Case No. 17-1192

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, et al., Plaintiffs-Appellants, v. JOHN HICKENLOOPER, GOVERNOR OF COLORADO, in his official capacity, Defendant-Appellee.	

On Appeal from
The United States District Court for the District of Colorado
No. 11-cv-01350-RM-NYW
Hon. Raymond P. Moore, United States District Judge

APPELLANTS' OPENING BRIEF

Oral Argument is Requested

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STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is requested.

PRIOR AND RELATED APPEALS

This case was the subject of a prior appeal. *Kerr v. Hickenlooper*, 744 F.3d 1156 ("*Kerr II*"), *reh'g denied*, 759 F.3d 1186 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015).

Following remand from the Supreme Court, this Court reversed its prior decision regarding legislator standing and remanded the case to the District Court for further proceedings limited to the question of standing. *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir. 2016) ("*Kerr III*").

STATEMENT OF JURISDICTION

I. District Court Jurisdiction

The District Court had federal question jurisdiction under 28 U.S.C. § 1331 because this case requires an interpretation of various provisions of federal law, including Article IV, Section 4, of the United States Constitution (the Guarantee Clause); Article VI, Section 2, of the United States Constitution (the Supremacy Clause); and certain federal statutes, including, the Colorado Territorial Act of 1861, ch. 59, 12 Stat. 176 (the "Territorial Act"), and the Colorado Statehood Enabling Act of 1875, ch. 139, 18 Stat. 474 (the "Enabling Act"). As a condition to admission to the Union, the Enabling Act prescribed minimum provisions of the

new Colorado Constitution, including the requirement for Colorado to enact an acceptable constitution and maintain a republican form of government, which, upon the Territory's presentation of required affirmations and documentation, was the basis for the President's declaration that the Colorado Territory had become a State.

The District Court also had jurisdiction under 28 U.S.C. § 1651, the All Writs Act, and 28 U.S.C. § 2201, the Declaratory Judgment Act, and had supplemental jurisdiction under 28 U.S.C. § 1367 to consider issues necessitating the interpretation of the Colorado Constitution.

II. Appellate Court Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1291 because the Plaintiffs appeal from the final judgment of the United States District Court for the District of Colorado entered on May 4, 2017. Joint Appendix ("JA") at 1564. The Plaintiffs filed their Notice of Appeal on June 2, 2017, within thirty days of entry of the final judgment. This appeal was therefore timely pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The sole issue presented in this appeal is whether the political subdivision Plaintiffs (collectively, the "Political Subdivision Plaintiffs") – the eight school boards, a county commission, and a special district board – have standing to bring

this case. The District Court found that the Political Subdivision Plaintiffs had Article III standing. *Kerr v. Hickenlooper*, No. 11-cv-01350, 2017 WL 1737703, at *6 (D. Colo. May 4, 2017) ("*Kerr IV*"). However, the District Court then denied standing based on an erroneous analysis of political subdivision standing and prudential standing. Accepting the District Court's determination that the Political Subdivision Plaintiffs meet the requirements for basic Article III standing, the only issues presented for review are whether the Political Subdivision Plaintiffs meet the requirements for political subdivision standing and prudential standing.

STATEMENT OF THE CASE

Colorado's Taxpayer Bill of Rights ("TABOR"), Colo. Const. art. X § 20, prohibits the state legislature and all political subdivisions in the state from enacting any new tax or tax increase – whether on income, property, sales, or any other basis – except by popular vote. TABOR therefore strips from the elected members of Colorado's legislative bodies the power to levy taxes, and instead vests all such power exclusively in the people, to be exercised only by plebiscite.

Because of TABOR, neither the Colorado legislature nor any political subdivision in the state may raise "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property tax, or extension of an expiring tax, or a tax policy change directly causing a new tax revenue gain to any district." *Id.* § 20(4)(a). Further, TABOR entirely bans any

"new state real property tax or local district income tax." *Id.* § 20(8)(a). Since the founding of this country, no other state has totally deprived its state and local governments of the power to tax. In Colorado, TABOR does just that.

In addition to removing the power to enact any new tax or tax increase, TABOR prohibits state and local governments in Colorado from appropriating any revenues that exceed the prior year's spending, adjusted for inflation and population growth. *Id*. § 20(7)(a). Revenues that exceed the prior year's spending, so adjusted ("excess revenues"), must "be refunded [to taxpayers] in the next fiscal year." *Id.* § 20(7)(d).

Taken together, TABOR's prohibitions on the power of elected representatives to tax and spend fundamentally disable Colorado's governments at all levels from exercising their constitutional duties and from meeting their fiscal responsibilities to the citizens. As a corollary to the requirement for plebiscites to increase taxes or to spend "excess revenues," all affected governmental jurisdictions must incur the costs associated with conducting the many special elections TABOR requires to raise or retain revenues.

To address that fundamental disability in governing, the Plaintiffs – county commissions, boards of education and of special districts, elected officials, educators, and citizens – brought suit to challenge the validity of TABOR under both the Guarantee Clause and the Enabling Act.

This case has been the subject of extended proceedings for more than six years – all limited to threshold questions of standing and justiciability. Having previously determined that the legislator-Plaintiffs in this case lack standing, *Kerr III*, 824 F.3d at 1216-17,[1] the Court now must determine whether the Political Subdivision Plaintiffs satisfy the requirements for standing.

In its May 4, 2017, Opinion and Order, the District Court held that the Political Subdivision Plaintiffs established Article III standing. *Kerr IV*, 2017 WL 1737703, at *6. However, the District Court also found that, even though they have Article III standing, the Political Subdivision Plaintiffs lack political subdivision standing and, even if they have political subdivision standing, they still lack prudential standing.[2]

The issue before this Court, then, is whether the Political Subdivision Plaintiffs have political subdivision standing, and, if so, whether they also have prudential standing, so that the case may proceed to the merits of whether TABOR violates the Guarantee Clause or the Enabling Act.

[1] Plaintiffs have preserved their right to further appeal the issue of legislator standing.

[2] It is not clear whether "political subdivision standing" is a recognized term of art. However, it will be treated as such for purposes of this brief, given the authorities that appear to turn on the distinction between the standing of political subdivisions to sue a parent state and the standing of other types of plaintiffs.

Under the Supremacy Clause, any provision of state law – including TABOR – in conflict with either the Guarantee Clause or the Enabling Act must yield to federal law and be invalidated. Both the Guarantee Clause and the Enabling Act require that Colorado maintain a "republican form of government," under which the elected members of a jurisdiction's legislative body fully exercise their fiscal powers, powers that are central to republican governance. Fourth Am. Compl. for Injunctive & Declaratory Relief ("Compl.") ¶¶ 4-9, 11-12, 14-17.[3]

The fundamental effect of TABOR has been to ossify the taxing system of the state and its political subdivisions and to severely compromise their spending powers, all in derogation of the core republican characteristics of a representative democracy. In the twenty-four years since it took effect, TABOR has prompted some sixteen attempted fiscal "fixes" in the form of ballot and other measures, temporary and partial, just at the state level. All but two have failed.[4]

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[3] Defendant has consistently mischaracterized TABOR as merely adding a technical, procedural step of a popular vote to accept or reject fiscal decisions made by a legislative body, entirely ignoring the plain fact that TABOR entirely strips the power to tax and spend from every legislative body in the state.

[4] Joshua Pens, *Restore the Republic*, 87 U. Colo. L. Rev. 621, 666 (2016), Table 1, Table 2. In addition to attempts to address TABOR's fiscal straight-jacket by initiated measures, the state and local governments have used fees and tax code revisions (short of new taxes or rate increases) to generate revenue or advance other policy objectives. *See* Summary of Litig. Affecting the Colo. Gen. Assembly as of Apr. 12, 2017, Office of Legis. Legal Servs., § II.k, at 54-62, https://leg.colorado.gov/publications/summary-litigation-affecting-colorado-general-assembly-april-12-2017.

Defendant persists in mischaracterizing Plaintiffs' cause of action and purpose in bringing this case. While Plaintiffs agree with Defendant that TABOR has caused enormous fiscal headaches for the state and its local governments,[5] this case, if successful, would not directly increase any state or local government funding. Rather, Plaintiffs seek only to restore the fundamental fiscal powers necessary for Colorado's state and local governments to fulfill their responsibilities as required by the Guarantee Clause and the Enabling Act. In what manner a jurisdiction chooses to exercise its power to tax and spend – once restored – is a matter for the jurisdiction's elected representatives to decide, consistent with the principles of republican governance.

In examining whether the Political Subdivision Plaintiffs have standing, it is helpful to understand that the requirement for a "republican form of government" applies not only on the state government but also to the state's local governments. Compl. ¶¶ 11, 30, 33-34, 40-42, 46, 49, 96, 108; *see infra* pp. 17-21. The Enabling Act, together with the Colorado Constitution enacted in compliance with the

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[5] The State of Colorado, through the Attorney General, has admitted in other litigation that the financial constraints caused by TABOR have left the state legislature unable to fulfill its constitutional obligations adequately to fund K-12 education. *See* Def.'s Mot. for Determination of Questions of Law Pursuant to C.R.C.P. 56(h) (the "Lobato Motion"), filed by the Colo. Att'y Gen., Feb. 25, 2011, in *Lobato v. State*, No. 05 CV 4794 (Dist. Ct. City & Cty. of Denver) at 6-7, *aff'd*, 216 P.3d 29 (Colo. App. 2008), *rev'd and remanded*, 218 P.3d 358 (Colo. 2009), *rev'g the decision of the Dist. Ct.*, 304 P.3d 1132 (Colo. 2013), JA at 1411-12.

requirements of the Enabling Act, created an integrated structure of government: a combination of counties, municipalities, school districts, metropolitan districts, and other special districts. These entities are interdependent on one another, just as they are dependent on traditional institutions of state government. *See infra* pp. 17-21. Because TABOR has deprived *all* of Colorado's legislative bodies – from the state legislature to boards of county commissioners to city councils to school boards to every form of special district – of the power to raise revenue, the Political Subdivision Plaintiffs have suffered concrete injury caused directly by TABOR, injury sufficient to establish standing.

Plaintiffs therefore respectfully request that this Court reverse the District Court's May 4, 2017 Opinion and Order.[6]

[6] In remanding this case to the District Court on June 3, 2016, this Court acknowledged its earlier decision finding for Plaintiffs on the Political Question Doctrine ("PQD"), which the parties had briefed in connection with the Defendant's initial dismissal motion. *Kerr III*, 824 F.3d at 1212. This Court stated that "[o]n remand, if the district court concludes the remaining plaintiffs lack standing, there will be no reason to consider the political question doctrine. [Citation omitted.] If, however, the district court holds that some other plaintiffs possess standing, the district court may then consider other justiciability hurdles." *Id*. at 1217. Nevertheless, in its original decision, this Court dealt extensively with the PQD, concluding, after extensive review of precedents, that the doctrine does not apply to this case. *Kerr II*, 744 F.3d at 1182-83. A determination now that the Political Subdivision Plaintiffs have standing does not affect this Court's prior determination regarding the PQD.

SUMMARY OF ARGUMENT

On appeal from the District Court's dismissal for lack of standing, Plaintiffs are to be accorded *de novo* review, in which the well-plead facts in their complaint are treated as true and construed in their favor. Under that standard, and as the District Court found, Plaintiffs have well-plead and substantiated injuries more than sufficient to establish Article III standing. These injuries have been and continue to be caused by the provisions of TABOR that deprive the Political Subdivision Plaintiffs of the essential taxing and spending powers to which they are entitled under the Guarantee Clause and the Enabling Act, and that cause the Political Subdivision Plaintiffs to incur the costs in money and time necessary to hold special elections required by TABOR.

Notwithstanding the Plaintiffs' Article III standing, the Defendant has argued that Plaintiffs lack "political subdivision standing" (*i.e.*, that they are not permitted to make a claim against their parent state) or prudential standing (*i.e.*, that they are asserting generalized grievances or injuries actually sustained by third parties or have injuries outside the "zone of interest" protected by the legal grounds for their claims). The District Court credited the arguments regarding prudential standing, but appears to have relied most heavily on a presumed lack of political subdivision standing. It is not entirely clear whether "political subdivision

standing" should be treated doctrinally as another subcategory of prudential standing. To be clear, Plaintiffs have addressed each separately.

The core question under the rubric of political subdivision standing is whether a political subdivision may be permitted to sue its parent state. Precedent on this question in this Circuit consists of two cases, *Branson v. Romer*, 161 F.3d 619 (10th Cir. 1998) (*Branson II)* and *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011), and the different criteria set out in those decisions.

Like this case, *Branson II* turned on the fact that the political subdivision there, a school district, sought to enforce against the state its *statutory* rights derived from the Enabling Act and enforceable by virtue of the Supremacy Clause. In *Hugo*, this Court focused on the fact that the city sought to enforce a *constitutional* claim against a state agency under the so-called "dormant commerce clause." *Hugo* also made the distinction that the school district's *statutory* claim in *Branson II* involved the structure of government, while the city's constitutional claim in *Hugo* was not statutory and could be characterized as a more conventional, commercial claim.

Plaintiffs here, of course, also make a constitutional Guarantee Clause claim. However, for purposes of standing to pursue their *statutory* claim under the Enabling Act, the Plaintiffs have met the criteria that were dispositive in *Branson*

II and implicitly affirmed by the distinctions this Court drew between *Hugo* and *Branson II.*

As to prudential standing, the Political Subdivision Plaintiffs' claims comport with the established criteria for "prudential standing." The injuries the Political Subdivision Plaintiffs suffered due to TABOR are concrete and particularized to them. While there are other Colorado governmental entities similarly injured, that fact does not imply that the injuries of the Political Subdivision Plaintiffs amount to "generalized grievances" under prudential standing jurisprudence. Similarly, the injuries suffered by the Political Subdivision Plaintiffs are clearly their own; they are not asserting the rights of others or third parties. Finally, under applicable precedent, the Political Subdivision Plaintiffs are due a presumption that their interests are within the "zone of interests" protected under the Enabling Act and Guarantee Clause. The zone of interests test is not a stringent one, and the "benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 569 U.S. 209, 225 (2012).

The District Court properly recognized the Political Subdivision Plaintiffs' Article III standing. Neither the doctrine of political subdivision standing nor the doctrine of prudential standing warrants denial of that Article III standing.

ARGUMENT

I. THIS COURT MUST REVIEW *DE NOVO* THE DISTRICT COURT'S RULING ON STANDING.

An appellate court's review of a District Court's ruling on standing is *de novo*. *Petrella v. Brownback*, 697 F.3d 1285, 1293 (10th Cir. 2012). When evaluating standing at the stage of a motion to dismiss, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Leverington v. City of Colo. Springs*, 643 F.3d 719, 723 (10th Cir. 2011).

The general rule of *de novo* review extends to consideration of a District Court's dismissal for lack of prudential standing. *Pantel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633, 637 (6th Cir. 2013).

II. THE POLITICAL SUBDIVISION PLAINTIFFS HAVE ARTICLE III STANDING, AS THE DISTRICT COURT PROPERLY CONCLUDED.

In its first decision in this action, *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112 (D. Colo. 2012) ("*Kerr I*"), the District Court noted that, under TABOR:

> A "district" (defined in TABOR as the State of Colorado or any local government in Colorado) "must have voter approval in advance for . . . any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a new tax revenue gain to any district." Colo. Const. art. X, § 20, cls. (2)(b), (4)(a).

Id. at 1118.

In its May 4, 2017 decision, the District Court focused on the ten Political Subdivision Plaintiffs, eight of which are school district boards of education. *Kerr IV*, 2017 WL 1737703, at *6. These political subdivisions are governing bodies contemplated by the Colorado Constitution. Compl. ¶¶ 31, 40. Because the Colorado Constitution itself originated pursuant to the terms of the Enabling Act, these political subdivisions are also derivative of the Enabling Act. *See infra* pp. 17-21. TABOR curtailed the taxing and spending powers of these political subdivisions just as it denied taxing and spending authority for the Colorado General Assembly. Colo. Const. art. X, § 20.

To establish Article III standing, a plaintiff must demonstrate that

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 852 F.3d 990, 996-97 (10th Cir. 2017) *(*quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 180-81 (2000)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The District Court, having noted this Court's earlier determination that the legislator-Plaintiffs lacked standing, then divided the remaining Plaintiffs into two

groups, "Elected Officials, Educators, and Citizens" and "Political Subdivisions." *Kerr IV*, 2017 WL 1737703, at *2-3. The latter group included both the local government and the school board Plaintiffs. The District Court thereupon found that the Political Subdivision Plaintiffs have Article III standing:

> The Court finds that the political-subdivision plaintiffs have Article III standing. Although the political-subdivision plaintiffs allege a host of injuries, the one that the Court finds determinative is the alleged injury the political-subdivision plaintiffs have suffered as a result of having to incur costs to present matters to voters that would have, without TABOR, been within the power of the political subdivisions to decide.

Id. at *6.

The court then went on to find that:

> [D]eclaring TABOR unconstitutional would redress the incurrence of election costs because, as alleged, the political subdivision plaintiffs would not incur those costs in a TABOR-free world. As such, all three parts of Article III's "irreducible minimum" have been achieved.

Id.

A. All the Political Subdivision Plaintiffs Have Properly Alleged an Injury in Fact.

The Political Subdivision Plaintiffs have established Article III standing because they have alleged injuries in fact that are "concrete," "particularized," and "actual." *Lujan*, 504 U.S. at 560. TABOR targeted not only the state legislature, but also all the state's political subdivisions, including school districts and their

governing boards. TABOR severely constrains the taxing and spending authority of each political subdivision, subject to relief only through the costly process of a ballot measure and plebiscite. If "the plaintiff is himself an object of the action (or foregone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury." *Id.* at 562.

Looking specifically to the injuries alleged, the Political Subdivision Plaintiffs first note that TABOR has forced them to pursue expensive and time-consuming ballot measures to meet funding needs and deprived them of any potential new tax revenues from the General Assembly. *See* Compl. ¶¶ 30-34, 41-46; Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss. apps. B-N, JA at 1500-39.[7] Financial costs constitute a concrete and actual injury. *See, e.g.*, *Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir. 2013) (holding that "the additional cost of . . . specialty license plates is a concrete, actual monetary injury").

The District Court found that these injuries met the *Lujan* standards. *Kerr IV*, 2017 WL 1737703, at *6. These findings of injury pertain to all the Political Subdivision Plaintiffs and are not limited to the non-education political subdivisions. (Contrary to the apparent finding of the District Court, TABOR

[7] In a facial challenge to jurisdiction under Rule 12(b)(1), a court may consider material referenced in the pleadings that is relevant to standing. *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002) ("A court has wide discretion to allow affidavits [and] other documents . . . to resolve disputed jurisdictional facts under Rule 12(b)(1).").

similarly affected the school board political subdivisions. The State of Colorado admitted this point when it sought to defend the TABOR-forced deprivations of state funds for those school systems.[8] Lobato Motion at 6-7.)

In addition, TABOR's spending limits inflict a second injury on the Political Subdivision Plaintiffs. To the extent they receive "excess revenue" under existing mill levies or taxes, they must either reduce their taxes and levies, or refund the "excess revenue." Compl. ¶¶ 26, 35, 43, 45 (citing Colo. Const. art. X, § 20(7)). As an alternative, the Political Subdivision Plaintiffs can incur the costs necessitated in going to the ballot for the voters' approval to retain such revenues. Whether a political subdivision loses "excess revenue" or incurs the cost of obtaining voter approval to retain it, it has suffered an Article III injury. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005).

Both types of injuries – the loss of "excess revenue" and the cost of getting approval to keep it – have affected the Political Subdivision Plaintiffs "in a personal and individualized way," meeting the particularity requirement. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016).

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[8] Defendant, and the State itself, through the Attorney General, has already admitted that TABOR constrains the funding required by the Education Clause of the State's Constitution and has, thereby, caused injury to Colorado school board plaintiffs. Compl. ¶ 36. *See also supra* note 5. Injuries to the Colorado system of public education are remarkably profound. The unchallenged findings of the trial court in *Lobato* were that the operating budgets of the state school system are deficient by $1.3 to $1.9 billion per year, in substantial part as a consequence of TABOR.

Under the Territorial Act, the Enabling Act, the Colorado Constitution, and other Colorado law, the burdens of adopting budgets and funding government programs are the responsibilities of representative institutions of the state, including its political subdivisions, and do not fall on every citizen of the State directly. Territorial Act §§ 4, 6, 7; Enabling Act §§ 3, 4; Colo. Const. art. XIV; Colo. Rev. Stat. § 30-11-103 (2017) (county governments); Colo. Rev. Stat. § 30-11-101 (2017) (special districts); *see also* Pens, *supra* note 4, at 639-40 n.4. Similarly, the constitutional and financial mandate to maintain a "thorough and uniform system of free public schools throughout the State," Colo. Const. art. IX, § 2, falls to the school boards themselves. Colo. Rev. Stat. § 22-54-101 (2017).

That TABOR might inflict different and possibly more diffuse injuries on other persons does not lessen the reality that the Political Subdivision Plaintiffs' TABOR-related injuries are particularized. *See United States v. SCRAP*, 412 U.S. 669, 688 (1973). Far from being "shared in substantially equal measure by all or a large class of citizens," *Warth*, 422 U.S. at 499, the financial and opportunity costs suffered due to TABOR can be claimed only by a discrete group: the political subdivisions of Colorado.

As great and damaging as are the injuries noted above, TABOR also carries an overarching constitutional insult to the state's political subdivisions. The requirement that Colorado maintain a "republican form of government" emanates

from the Enabling Act and was confirmed and included in the Colorado Constitution as the Enabling Act required.

The Enabling Act, like other federal enabling acts passed in the late nineteenth century, required that a state constitution be created "containing the clauses thus prescribed by Congress" in the enabling act for that state. *Ex parte Webb*, 225 U.S. 663, 680 (1912) (describing similar process by which Oklahoma became a state). Once a state constitution was found to be in "compliance with the ordained requirements" of the enabling act, "and the proclamation of the president so announcing, the state [would be] admitted on an equal footing with the original states." *Draper v. United States*, 164 U.S. 240, 242 (1896). In finding that the Colorado Constitution met the requirements of the Enabling Act, President Grant, necessarily found that the governance structures set forth in the Colorado Constitution satisfied the Enabling Act's "republican form of government" requirement.

The "republican form of government" requirement entrenched in the Colorado Constitution permeates the interdependent structure of taxing authority of the state and its political subdivisions. Specifically, the education clause of the Colorado Constitution "mandate[s] that the General Assembly 'provide for the establishment and maintenance of a thorough and uniform system of free public schools' through such measures as the creation of both statewide and local boards

of education." Tom I. Romero, *"Of Greater Value than the Gold of Our Mountains": The Right to Education in Colorado's Nineteenth-Century Constitution*, 83 U. Colo. L. Rev. 781, 786 (2012) (quoting Colo. Const. art. IX, § 2, citing Colo. Const. art. IX, §§ 1, 15).[9]

Sections 15 and 16 of the education clause of the Colorado Constitution gave control over education to the local school districts and boards of education. *See* Colo. Const. art. IX, §§ 15-16. With the adoption of these "local control provisions," Colorado became "only the second state, after Kansas, with an express constitutional local control requirement." Romero, 83 U. Colo. L. Rev. at 835 (citation omitted).

Indeed, "[b]y the time Colorado gained statehood in 1876, almost all states," like Colorado, "had provisions for the creation and state stewardship of a school fund (to be initially financed by federal land grants) while empowering the appropriate state or local government entities to levy taxes for schools." *Id.* at 800. The "varied local, state, and federal funding schemes found in federal acts and codified in state constitutions recognized the principle that every citizen is entitled

[9] Colorado's constitutional commitment to statewide public education, with the responsibility to implement that commitment assigned to local school districts, was already well-established by 1876. It appears not only in the final version of the Colorado Constitution, but also in two prior drafts proposed more than a decade prior to the Constitution's adoption. *Id.* at 821; *see also* Colo. Const. of 1876, art. IX, §§ 1-3; Colo. Const. of 1865, art. XIII, § 3; Colo. Const. of 1864, art. XIV, § 3.

to receive educational aid from the government." *Id.* (alterations, citation, and internal quotations omitted).

The Colorado Constitution's education clause reflects "an attempt to balance state and local control of the public schools." *Id.* at 794. "From the time [the education clause] was adopted, the general assembly, the state superintendent of public instruction, and local educational bureaucrats all struggled with questions about how schools would be financed and maintained . . . [.]" *Id.* at 841.

Not surprisingly, the first Colorado legislature after statehood continued to recognize the crucial role of the political subdivisions in revenue generation and spending, giving "authority to the school boards to determine," among other things, "the amount of additional revenue to be raised by special taxation if a district was willing to fund beyond its original appropriation." *Id.* at 837 (citing Act to Establish and Maintain a System of Free Schools, ch. 92, 1877 Colo. Gen. Laws 807, 825).

Colorado's political structure was created by the Colorado Constitution and adopted as part of the governance structure proclaimed in the President's grant of statehood. The Enabling Act even referred to the existence and responsibilities of the state's school districts. The political subdivisions were formed to function in an interdependent fashion with the State's legislature. Accordingly, the injury to the Political Subdivision Plaintiffs reaches to their participation in a taxing and

spending system in which they are purposefully interdependent with the legislature.

B. The Political Subdivision Plaintiffs Have Properly Alleged Causation and Redressability.

The Political Subdivision Plaintiffs also properly allege that their injuries are "fairly traceable" to TABOR. *Lujan*, 504 U.S. at 560. Prior to TABOR, the Political Subdivision Plaintiffs had the authority, within statutory limits, to increase revenue by taxation. *See* Compl. ¶¶ 35, 41, 44-45. TABOR has crippled these functions. *See id.* ¶¶ 34-37, 42, 46. Prior to TABOR, revenue increases would have been available from the combination of state (General Assembly) and local tax increases. Since TABOR, the Political Subdivision Plaintiffs have been forced to pursue ballot referenda and initiatives in order to obtain any increases. *Id*. ¶¶ 25, 28, 35, 43 (citing Colo. Const. art. X, § 20(4)(a) (requiring advance voter approval for the addition of new taxes, the increase of existing tax rates, or any other policy changes that result in increased revenues)). TABOR is also the sole legal barrier to the Political Subdivision Plaintiffs' ability to retain "excess revenue." *Id.* ¶ 26 (citing Colo. Const. art. X, § 20(7) (setting spending limits and mandating that "excess revenue" be refunded)).[10]

[10] As noted above, *supra* p. 7, Plaintiffs seek the restoration of the authority to tax and not an increase in taxes. *See also supra* notes 3 and 5. Plaintiffs simply request that this Court adopt the State's own conclusion in the Lobato Motion: TABOR is a cause of inadequate funding of the state's schools. *See supra* note 8.

Finally, it is "likely, as opposed to merely speculative, that the injur[ies] will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. "[If] the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question . . . that a judgment preventing or requiring the action will redress it." *Id.* at 561-62. The Political Subdivision Plaintiffs, like the other Plaintiffs, "seek a declaratory judgment that TABOR is null and void and an order prohibiting any state officer from enforcing TABOR's provisions." *Kerr II*, 744 F.3d at 1171. Such a judgment would allow the Political Subdivision Plaintiffs to vote directly for increased taxes or property mill levies and retain "excess revenues," thereby redressing their alleged injury. *See id*.

It is clear that the injuries about which the Political Subdivision Plaintiffs complain can be traced to TABOR. Accordingly, the Political Subdivision Plaintiffs meet the causation prong of Article III standing and, with it, have satisfied all requirement for Article III standing.[11]

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[11] During argument on the Defendant's first Motion to Dismiss in February, 2012, the District Court, in an apparent attempt to test the ultimate reach of the Defendant's logic and analysis of standing, posed the question whether *anyone* would have standing to bring a Guarantee Clause challenge even against a citizen-initiated amendment that abolished the Colorado legislature. Counsel for the Defendant seemed to conclude that no one would have standing even then. *See* tr. of argument on Def.'s Mot. to Dismiss, Feb. 15, 2012, at 14-17, JA at 279-82. While not speaking directly to the standing of the Political Subdivision Plaintiffs in the current posture of this case, the exchange nonetheless indicates the extent to

III. LIMITATIONS ON "POLITICAL SUBDIVISION STANDING" DO NOT BAR THE POLITICAL SUBDIVISION PLAINTIFFS' CLAIMS

The Political Subdivision Plaintiffs meet this Court's requirements regarding standing for political subdivisions. *See Branson II*, 161 F.3d at 628-29. In *Branson II*, this Court held that "a political subdivision has standing to bring a claim against its creating state when the substance of its claim relies on the Supremacy Clause and a *putatively* controlling federal law." *Id.* at 628 (emphasis added). In *Branson II*, this Court distinguished laws designed to protect *individual* rights, which do not entail standing for political subdivisions, from those protecting *structural* rights, which do. *Id.* at 628-29.

This emphasis on structural rights is critical in distinguishing this case from *Hugo*, on which the Defendant and the District Court relied so heavily to deny standing for the Political Subdivision Plaintiffs. *See Kerr IV*, 2017 WL 1737703, at *7-11. The plaintiffs in *Hugo* asserted an "individual" claim under the terminology of *Branson II*. *Hugo*, 656 F.3d at 1256. The *Hugo* Court drew a further distinction with *Branson II* in determining that, while a political subdivision could have standing to sue its parent state to enforce a *statutory* claim, as in *Branson II*, standing was not available for a political subdivision to pursue the dormant commerce clause *constitutional* claim alleged in *Hugo*. *Id.* at 1257.

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which the Defendant will assert the impossibility of any plaintiff having standing to challenge TABOR.

Hugo therefore did not detract from the strong Tenth Circuit precedent for standing based on the Enabling Act. *See Branson v. Romer*, 958 F. Supp. 1501, 1507, 1516 (D. Colo. 1997) ("*Branson I*"), *aff'd*, *Branson II*. In *Branson II*, this Court expressly endorsed the District Court's "very careful and thorough" decision in *Branson I*. *Branson I* offers crucial insight on standing under the Enabling Act. *See Branson II*, 161 F.3d at 627.

The *Branson I* court found that the plaintiffs had standing to enforce the terms of the Enabling Act on grounds closely paralleling those asserted here. *See Branson I*, 958 F. Supp. at 1509-11. The *Branson* plaintiffs claimed that a Colorado constitutional amendment violated the provision of the Enabling Act concerning the state lands trust. *See id.* at 1506. As in *Branson I*, the Political Subdivision Plaintiffs allege that TABOR violates the provision of the Enabling Act requiring a republican form of government, and that such violation is actionable against the state under the Supremacy Clause. *See* Compl. ¶¶ 100, 105, 110.

Here, as in the *Branson* litigation, the Political Subdivision Plaintiffs claim the protections afforded under a federal statute, the Enabling Act, which imposes the *structural* requirement that Colorado's government be "republican in form."[12]

[12] *Branson II* includes several statements pertinent to the standing of a political subdivision to bring a claim against its parent state. "[W]e conclude that a political subdivision has standing to bring a constitutional claim against its creating state

In *Federalist 10*, James Madison made clear that "republican" government was to be rooted in representative institutions, such as legislatures. The Federalist 10, at 62 (James Madison) (J. E. Cooke ed., 1961). The Supreme Court has settled any question whether a state government must include a legislative branch. "State legislatures are, historically, the fountainhead of representative government in this country . . . . With the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure." *Reynolds v. Sims*, 377 U.S. 533, 564-65 (1964).

In affirming *Branson I*, *Branson II* supports standing for the Political Subdivision Plaintiffs' challenge to TABOR. Under the Supremacy Clause, U.S. Const. art. VI, § 2, TABOR must yield to the superior provisions of the Guarantee Clause and the Enabling Act.

This Court has found that the Political Subdivision Plaintiffs – specifically, the school districts Plaintiffs – "have the power to bring their federal claims against

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when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law." *Branson II*, 161 F.3d at 628. The *Branson II* Court further explained, "[d]espite the sweeping breadth of Justice Cardozo's language, both *Williams [v. Mayor & City Council of Baltimore*, 289 U.S. 36 (1933),] and *Trenton [v. New Jersey*, 262 U.S. 182 (1923),] stand only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect *individual* rights, as opposed to collective or *structural* rights . . . ." *Id*. (citations omitted) (emphasis added).

the state under the Supremacy Clause and the Colorado Enabling Act." *Branson II*, 161 F.3d at 629. The Political Subdivision Plaintiffs seek to do just that. At the very least, the Enabling Act's requirement for a "republican form of government" in Colorado "putatively" controls the issue of Colorado's governmental form. *Branson II*, 161 F.3d at 628. Thus, the Political Subdivision Plaintiffs have standing to enforce their *structural* rights via the Supremacy Clause.[13]

Neither the District Court nor the Defendant has identified a case denying political subdivision standing to a plaintiff that asserts a statutory cause of action.[14]

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[13] The District Court erred in concluding that more is needed for a political subdivision to sue. It stretched the *Branson II* Court's *dicta* to impose two additional requirements for political subdivision standing: (1) substantial independence from the creating state, and (2) enforcement of a statute directed at protecting political subdivisions. *Kerr IV*, 2017 WL 1737703, at *8. Beyond granting inappropriate weight to dicta, such requirements represent a broad expansion of precedent that confuses the standing analysis. The proper place for determining whether a plaintiff has a cause of action under a particular statute is the "zone of interests" prong of prudential standing analysis, discussed *infra* at pp. 35-37. Shoehorning a more stringent requirement for direct statutory protection into the political subdivision analysis would render the Supreme Court's well-established zone of interests test superfluous.

[14] While Plaintiffs fall within the zone of interests of the Guarantee Clause and the Enabling Act, a strict zone of interests analysis may not even be required. In *Clinton v. New York*, 524 U.S. 417 (1998), the Supreme Court did not require that the plaintiffs' injuries arising from an exercise of the line item veto be linked to a violation of the Presentment Clause, on which basis the line item veto act was held unconstitutional. *Id.* at 428-33. That is, the injury complained of need not itself implicate the constitutional standard alleged to have been violated, *i.e.*, here, TABOR's violation of the requirements of republican governance in the Guarantee Clause and the Enabling Act. Instructive for this case, the *Clinton* Court was not concerned that the plaintiffs could claim no personal constitutional right to compel

The Political Subdivision Plaintiffs have such a federal *statutory* claim under the Enabling Act. As this Court concluded for the school board plaintiffs in *Branson II*: "[T]he school districts' status as political subdivisions does not disentitle them from bringing an action under the Supremacy Clause to enforce the terms of the Colorado Enabling Act merely because the defendants are sued in their official capacities representing the state that created those subdivisions." *Branson II*, 161 F.3d at 629. That same Enabling Act conditioned Colorado's admission into the Union upon its enactment of a constitution that was "republican in form." Compl. ¶ 19.[15]

Nothing in *Hugo* should detract from this analysis drawn from *Branson II*. Instead, several factors in this Court's opinion in *Hugo* distinguish it from its

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the President to adhere to the constitutional principles they sought to vindicate, and the Court said nothing about it. It sufficed that the President's vetoes hurt them directly. *See id.* at 431.

[15]As noted above, *supra* pp. 17-21, Colorado's Constitution established a republican form of government that was grounded in a structure that embodied a purposeful interdependence between the state and its political subdivisions. The Constitution expressly considered school boards and county governments. *See generally* Colo. Const. arts. IX, XIV. Among other provisions, county governments were granted home rule, Colo. Const. art. XIV, § 16, while schools were the beneficiaries of a "public school fund" that was intended to "forever remain inviolate and intact," and that was to be appropriated only to the schools of the state. *Id.* art. IX, § 3. The Enabling Act itself directly contemplated local government in the education sector, setting aside land for a common school in each township. *See* Enabling Act § 7. The historic existence of the Political Subdivision Plaintiffs is of a piece with Colorado's republican form of government and its origins.

ruling in *Branson II* and make *Hugo* inapplicable to this case. Most simply, the *Hugo*'s political subdivision doctrine does not apply where, as here, a political subunit seeks to enforce a federal *statutory* right over conflicting state law.

Hugo essentially involved a contract dispute over the obligation of the Oklahoma Water Resources Board to issue a permit needed to effect a transfer of water from the City of Hugo to the City of Irving, Texas. *Hugo*, 656 F.3d at 1253-54. The case concerned a "one-off" transaction that happened to involve a claim against a state agency, and that had nothing to do with the structure of state government.

In contrast, the *Branson II* plaintiffs were political subdivisions (school districts) seeking to enforce rights granted to them by Section 7 of the Enabling Act. *Branson II*, 161 F.3d at 629. The Political Subdivision Plaintiffs, unlike the plaintiff in *Hugo*, similarly seek to enforce a claim under the Enabling Act: the right to a republican form of government. Enabling Act § 4; Compl. ¶¶ 1, 10, 22, 30, 34, 47-51, 95, 96, 101, 105, 106, & 109-13. They do so through the Supremacy Clause, consistent with the Tenth Circuit's standing analysis in *Branson II*. "[T]he school districts' status as political subdivisions does not

disentitle them from bringing an action under the Supremacy Clause to enforce the terms of the Enabling Act. . . . ." *Branson II*, 161 F.3d at 629.[16]

The *Hugo* Court analyzed the holding from *Branson II* at length, and reaffirmed it. *Hugo*, 656 F.3d at 1257-58. The factors that were determinative in *Branson II*, and recognized as valid in *Hugo*, are present in this case. The Political Subdivision Plaintiffs, like the plaintiffs in *Branson II*, seek to enforce a federal *statute* under the Supremacy Clause against a conflicting state law. They seek to vindicate federal rights that are *structural* and collective, rather than *individual* or contractual. The federal statutory law at issue, the Enabling Act, relates to the structural relationship between the state and its subdivisions and citizens. For

[16] The political subdivision standing doctrine, as described in *Hugo* on facts unlike those underlying this case, removes "certain controversies between political subdivisions and their parent states" from the jurisdiction of the federal courts. *Hugo*, 656 F.3d at 1255. The claim in *Hugo* was essentially a claim for a breach of contract, *i.e.*, an obligation to issue a water permit by a state government board. The *Hugo* Court treated this alleged breach of contract as a violation of the dormant commerce clause, a "*substantive* provision of the Constitution." *Id.* at 1257 (emphasis added). That "substantive provision" factor was determinative in *Hugo*. *See id*. at 1257-58.

In contrast, the Political Subdivision Plaintiffs have standing because they seek to "enforce [a] federal statutory right, guaranteed by operation of the Supremacy Clause in the face of conflicting state law." *Id.* at 1257 (citing *Housing Auth. of Kaw Tribe of Indians v. City of Ponca City*, 952 F.2d 1183, 1188-89 (10th Cir.1991)). The Political Subdivision Plaintiffs here do not run afoul of the proscription in *Hugo* against invoking a "substantive provision of the Constitution." They do not seek only to "sue [their] parent state under a substantive provision of the Constitution." *Id*.

these reasons, *Hugo* did not affect the holding in *Branson II* that would recognize the Political Subdivision Plaintiffs' standing to litigate their challenge to TABOR.

IV. REQUIREMENTS OF PRUDENTIAL STANDING DO NOT BAR STANDING FOR THE POLITICAL SUBDIVISION PLAINTIFFS.

This Court previously held that principles of prudential standing did not bar the legislator-Plaintiffs' suit. *Kerr II*, 744 F.3d at 1172. None of the briefing to the District Court suggested why the Political Subdivision Plaintiffs should face screening for prudential standing different that articulated in *Kerr II*, or why the prudential standing interests of the Political Subdivision Plaintiffs are any less direct or significant than the interests of the legislator-Plaintiffs that this Court previously assessed. *Id.* Rather, Defendant seeks to re-litigate previously rejected arguments that Plaintiffs' claims are rooted in third-party interests, generalized interests, or interests falling outside any required zone of interests. This Court should extend its prior conclusion that these arguments are also without merit with respect to the Political Subdivision Plaintiffs.

A. The Political Subdivision Plaintiffs Are Not Raising the Legal Rights of Another.

The key principle of prudential standing is "the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth*, 422 U.S. at 499). "This rule assumes that the party

with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Id.* at 129.

In *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Supreme Court limited the application of the prudential standing doctrine in some respects, *see infra* p. 35, and expressly declined to address third party standing's "proper place in the standing firmament." *Id.* at 1387 n.3. The federal courts have continued to analyze third party standing as part of the prudential standing inquiry. *See, e.g., Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1118 n.9 (9th Cir. 2015) (collecting cases).

Here, the Political Subdivision Plaintiffs are asserting their own institutional legal rights and interests to exercise their historic, customary fiscal authority and to gain access to the State-legislated funds, all as contemplated by the Enabling Act and the United States Constitution. *See Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 887, 892, 894 (Colo. 2001) (beneficiaries of trust imposed by the Enabling Act are the public school districts and not the taxpayers at large). These interests belong specifically to the Political Subdivision Plaintiffs, and not to the taxpayers, the public at large, or to any other third party.

B. The Political Subdivision Plaintiffs Are Not Raising Generalized Grievances.

The bar to raising "generalized grievances" reflects courts' "reluctance to entertain" suits "claiming only harm to the plaintiff's and every citizen's interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lexmark*, 134 S. Ct. at 1387 n.3 (alterations, internal quotations, and citation omitted).

Here, the District Court incorrectly found that the Political Subdivision Plaintiffs raised what it characterized as a generalized grievance that "TABOR has removed fiscal power from Colorado's representative institutions," which the court considered "an extension of the republican in form argument." *Kerr IV*, 2017 WL 1737707, at *12. This characterization, however, ignores the actual injuries to the Political Subdivision Plaintiffs as alleged in their Complaint and as briefed to the District Court.

Specifically, the Political Subdivision Plaintiffs described their loss of access to state funds, the increased costs of ballot measures (which the Court actually found), as well as the inability to retain "excess revenues." *See* Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss at 6 ("[T]he political subdivision plaintiffs have been forced to depend on expensive and time-consuming ballot referenda to meet their budget responsibilities. . . . [T]he political subdivision Plaintiffs were required to reduce the mill levy or refund the 'excess' revenues or both."); *see also id.* apps.

B-N, JA at 1500-39 (detailing the specific expenses each of the Political Subdivision Plaintiffs incurred as a consequence of TABOR).

TABOR's effect on the Political Subdivisions Plaintiffs' ability to meet these particularized budget responsibilities cannot accurately be characterized as "generalized." The Political Subdivisions Plaintiffs' grievances are specific to their status as local governments and boards of education, and are not "shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 500.

While this category of injuries would apply to other political subdivisions across the state, that is not a prudential bar to standing. "[W]here a harm is concrete, though widely shared, the Court has found injury in fact." *FEC v Atkins*, 324 U.S. 11, 24 (1998); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury . . . .").

Additionally, strong prudential considerations favor a finding of standing here. The normal remedy for generalized grievances, *i.e.*, action by the legislative branch, is unavailable here because TABOR itself has disempowered the legislature. *Cf. Bd. of Cty. Comm'rs v. Geringer*, 297 F.3d 1109, 1113-15 (10th Cir. 2002) (holding that a Wyoming county did not have standing to sue when the state passed legislation that directed funds about which the county had

complained). Thus, "[d]enying prudential standing in this case would be particularly problematic." *Kerr II*, 744 F.3d at 1172.

C. The Political Subdivision Plaintiffs Fall Squarely Within the Colorado Enabling Act and the Guarantee Clause Zones of Interest.

This Court has previously declined to address "zone of interest" considerations in cases involving the Supremacy Clause, *see Wilderness Soc'y v. Kane Cty.*, 632 F.3d 1162, 1170-71 (10th Cir. 2011); *see also Kerr II*, 744 F.3d 1156.[17] Nonetheless, and to avoid any doubt, Plaintiffs address that issue.

The Supreme Court addressed the zone of interests test most recently in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), finding that "the City's claims of financial injury . . . specifically, lost tax revenue and extra municipal expenses – satisfy the 'cause-of-action' (or 'prudential standing') requirement." *Id.* at 1303 (internal quotations and citation omitted). The test involves "using traditional tools of statutory interpretation" to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." The test limits statutory causes of action to "plaintiffs whose interests fall within the zone of interests protected by the law invoked," and "whose injuries are proximately caused by violations of the statute" or constitutional guarantee in

[17] *See also* the discussion of *Clinton v. New York*, *supra* note 14, to the effect that the injury caused by an action occasioned by an unconstitutional statute need not be one directly protected by the constitutional provision that the statute violated.

question. *Lexmark*, 134 S. Ct. at 1388, 1390; *see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The zone of interests test is not a stringent one, and, when the test is applied, it is "not meant to be especially demanding," and the "benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 569 U.S. at 225; *see also Kerr II*, 744 F.3d 1156 (applying the "generalized grievance" rationale without considering the "zone of interests" rationale).

The Supreme Court has recently reaffirmed that the test is satisfied as long as "the [plaintiff's] claims of injury it suffered as a result of the statutory violations are, at the least, arguably within the zone of interests that the [statute] protects." *Bank of Am.*, 137 S. Ct. at 1303 (emphasis in original, internal quotations and citations omitted). Indeed, this Court recently noted that the zone of interests test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Am. Humanist Ass'n v. Douglas Cty. School Dist. Re-1*, 859 F.3d 1243, 1260 (10th Cir. 2017) (quoting *Lexmark*, 134 S. Ct. at 1389).

An examination of the meaning and purpose of the Enabling Act demonstrates that the Political Subdivision Plaintiffs' claims fall well within the interests protected by the statute. The Enabling Act predicated Colorado's

admission into the Union upon a Constitution that provided and maintained a "republican form of government." Enabling Act § 4. From its outset, and presumably inherent in its acceptance into the Union, the Colorado Constitution's guarantee of a republican government entailed an interdependent relationship between state government and local political subdivisions with the inherent authority to raise and spend revenue.

In particular, the Enabling Act directly contemplates local political subdivisions in the education sector setting aside land for each township to have a common school, Enabling Act § 7, and "impos[ing] a trust on the state of Colorado to manage the school lands given to Colorado for the benefit of Colorado's public schools," meaning the "public school districts," and "not for the benefit of the taxpayers at large." *Brotman*, 31 P.3d at 892, 894.

Under the standard stated in *Lexmark* and endorsed in *American Humanist Ass'n*, it would make no sense to suggest that the interests of the Political Subdivision Plaintiffs in exercising their historic fiscal authority are only "marginally related to or inconsistent" with the statute that expressly mandates the very form of government to which the Political Subdivision Plaintiffs owe their existence. Thus, the structural components of a "republican form of government" are more than "marginally" related to the statutory and constitutional purposes of the Enabling Act and the Guarantee Clause.

CONCLUSION

For the foregoing reasons, the Political Subdivision Plaintiffs have established standing to pursue their claims on the merits, and the District Court erred in dismissing the case for lack of standing. Accordingly, the case should be remanded to the District Court for further proceedings.

Appellants respectfully request oral argument on the singular and important issues presented.

Respectfully submitted this 27th day of September, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 8,945 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the foregoing **APPELLANTS' OPENING BRIEF** as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Sophos Endpoint Security and Control, Version number: 10.7, last update September 27, 2017, and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

This is to certify that, on this 27th day of September, 2017, I have provided service of the foregoing **APPELLANTS' OPENING BRIEF** through the federal ECF filing protocol to the following attorneys:

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ATTACHMENT:

COPY OF OPINION AND JUDGMENT TO BE REVIEWED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Case No. 11-cv-01350-RM-NYW

ANDY KERR, *et al.*,

Plaintiffs,

v.

JOHN HICKENLOOPER, Governor of Colorado in his official capacity,

Defendant.

OPINION AND ORDER

On June 3, 2016, the Tenth Circuit Court of Appeals vacated this Court's Order finding certain legislator-plaintiffs to have standing, concluded that the legislator-plaintiffs did not have standing, and remanded for this Court to determine whether any non-legislator plaintiffs have standing. (ECF No. 123.)

On December 6, 2016, plaintiffs filed a Fourth Amended Complaint ("FAC") against John Hickenlooper in his official capacity as the Governor of Colorado ("defendant"), seeking declaratory and injunctive relief with respect to the Taxpayer's Bill of Rights ("TABOR"), an amendment to the Colorado Constitution passed by voter initiative in 1992. (ECF No. 151.) Plaintiffs allege that TABOR violates: Article IV, Section 4 of the U.S. Constitution; the Enabling Act of 1875 ("the Enabling Act"), 18 Stat. 474; Article IV, Section 2 of the U.S. Constitution; and Article X, Section 2, and Article V, Sections 31 and 32 of the Colorado Constitution. (*Id.*)

On December 16, 2016, defendant filed a motion to dismiss the FAC ("the motion to dismiss"), pursuant to Fed.R.Civ.P. 12(b)(1) ("Rule 12(b)(1)"). (ECF No. 156.) Plaintiffs have responded in opposition to the motion to dismiss (ECF No. 160), and defendant has filed a reply (ECF No. 163). Subsequently, plaintiffs filed a motion requesting oral argument on the motion to dismiss (ECF No. 167), to which defendant has responded (ECF No. 169).

I. Legal Standards

Motions to dismiss for lack of subject matter jurisdiction take two principal forms: (1) a facial attack, or (2) a factual attack on the allegations in the complaint. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Here, defendant facially attacks the sufficiency of the allegations in the FAC. (*See* ECF No. 156 at 6-7.) As a result, the Court accepts the allegations in the FAC as true for purposes of its jurisdictional analysis. *Holt*, 46 F.3d at 1002. The party asserting jurisdiction has the burden of establishing it. *Port City Properties v. Union Pacific R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008).

II. Pertinent Factual Background

As an initial matter, the Court notes that this case has been thoroughly litigated up to this point and received various opinions from this Court and the Tenth Circuit Court of Appeals. Those opinions have set forth the alleged facts concerning the effect of TABOR on the revenue-raising power of state and local governments in Colorado. The Court, thus, does not find it necessary to repeat what has come before, given that the alleged effect of TABOR has not changed. (*See* ECF No. 147-1 at ¶¶ 12-46.) What has changed in this case since its visit to the Tenth Circuit is the pertinence of the non-legislator plaintiffs. As such, the Court will summarize the allegations pertaining to the identity of the plaintiffs, and the injuries they have allegedly suffered.

A. Political Subdivisions

Several of the plaintiffs are political subdivisions of the State of Colorado, such as county commissions, boards of education, and special districts. (ECF No. 151 at ¶ 47.) Specifically, these plaintiffs are: the Board of County Commissioners of Boulder County; the Boulder Valley School District RE-2 Board of Education; Cheyenne Wells RE-5 School District Board of Education; Colorado Springs District 11 Board of Education; the Denver County Public Schools Board of Education; Gunnison County Metropolitan Recreation District Board of Directors; Gunnison Watershed RE-1J Board of Education; Poudre School District Board of Education; the Pueblo City Schools Board of Education; the Pueblo County District 70 Board of Education. (*Id*. at ¶¶ 57-58, 66-67, 69, 72-73, 89-91.)

Plaintiffs allege that TABOR has injured these political subdivisions by impairing their fiscal powers and responsibilities, and undermining a Republican form of government. (*Id*. at ¶ 47.) More specifically, with respect to the plaintiff that is a board of county commissioners, it is alleged that TABOR has caused it to incur costs and expenses to present matters to voters affecting the exercise of the board's fiscal powers. (*Id*. at ¶ 43.) With respect to the special-district plaintiff, it is alleged that TABOR has impaired the special district's authority to fulfill its responsibilities and caused the incurrence of costs. (*Id*. at ¶ 45.) With respect to the school-district plaintiffs, it is alleged that TABOR has prevented adequate funding of public schools in the State. (*Id*. at ¶¶ 34-35.)

In addition, attached to plaintiffs' response to the motion to dismiss, are various resolutions or affidavits from the political-subdivision plaintiffs. (ECF No. 160-2 to ECF No. 160-14.) Given that this is a facial challenge to the allegations of the FAC, it is far from certain that documents attached to pleadings outside the FAC can be considered. *See Holt*, 46 F.3d at 1002-03 (explaining

that, for purposes of a *factual* attack, a court has wide discretion to consider documents outside the complaint, but not explicitly stating that such discretion applies to a *facial* challenge). Nonetheless, so the record is complete, the Court will summarize the documents.

Succinctly, and pertinently, the resolutions or affidavits state that TABOR has caused the respective political subdivisions to incur costs and expenses in presenting matters to voters for decision; matters, which, without TABOR, the political subdivisions would not have needed to present to voters. (*See, e.g.*, ECF No. 160-3 at 2-3.) All of the political subdivisions have submitted a resolution of their respective board (ECF Nos. 160-2 to 160-7; ECF No. 160-9; ECF No. 160-11; ECF Nos. 160-13 to 160-14), and some of the school districts have also submitted affidavits (ECF Nos. 160-8, 160-10, 160-12). Almost all of the resolutions or affidavits reference specific matters that have been presented to voters, such as mill levy overrides. (ECF No. 160-3 at 3; ECF No. 160-4 at 2; ECF No. 160-5 at 3; ECF No. 160-6 at 2; ECF No. 160-8 at 2-3; ECF No. 160-10 at 2; ECF No. 160-12 at 2; ECF No. 160-13 at 2-3; ECF No. 160-14 at 2).[1] Most of the resolutions or affidavits are signed on behalf of school districts (ECF No. 160-2 to ECF No. 160-12), but, one resolution is signed on behalf of a board of county commissioners (ECF No. 160-13), and one resolution is signed on behalf of a special district (ECF No. 160-14).

B. Elected Officials, Educators, and Citizens

Despite the Tenth Circuit's June 3, 2016 holding, plaintiffs leave in the FAC allegations pertaining to the injuries suffered by several plaintiffs due to their positions as legislators. (*See* ECF No. 151 at ¶¶ 48-49.) Those allegations are obviously irrelevant to the Court's current standing

[1] Only one resolution does not list specific matters that have been presented to voters. (ECF No. 160-2 at 2-3.)

analysis in light of the remand order. The Court notes the allegations, however, for completion purposes.

The plaintiffs listed as elected officials, educators, and/or citizens are: Andy Kerr, as an elected official, educator, and citizen; Norma V. Anderson, as a former elected official and citizen; Jane M. Barnes, as a former elected official and citizen; K.C. Becker, as an elected official and citizen; Elaine Gantz Berman, as a former elected official and citizen; Dr. Alexander E. Bracken, as a citizen; William K. Bregar, as a former elected official and citizen; Bob Briggs, as a former elected official and citizen; Bruce W. Broderius, as a former elected official and citizen; Trudy B. Brown, as a citizen; Stephen A. Burkholder, as a former elected official and citizen; Richard L. Byyny, as a citizen; Lois Court, as an elected official and citizen; Richard E. Ferdinandsen, as a former elected official and citizen; Stephanie Garcia, as a former elected official and citizen; Kristi Hargrove, as a citizen; Christopher J. Hansen, as an elected official and citizen; Leslie Herod, as a an elected official and citizen; Dickey Lee Hullinghorst, as a former elected official and citizen; Nancy Jackson, as a former elected official and citizen; William G. Kaufman, as a former elected official and citizen; Claire Levy, as a former elected official and citizen; Susan Lontine, as an elected official and citizen; Margaret Markert, as a former elected official and citizen; Megan J. Masten, as a citizen; Michael Merrifield, as an elected official and citizen; Marcella L. Morrison, as former elected official and citizen; John P. Morse, as a former elected official and citizen; Pat Noonan, as a former elected official and citizen; Ben Pearlman, as a former elected official and citizen; Wallace Pullman, as a citizen; Paul Weissmann, as an elected official and citizen; and Joseph W. White, as an educator and citizen. (*Id*. at ¶¶ 52-56, 59-65, 68, 70-71, 74-88, 92-94.)

Plaintiffs allege that citizens have protectable interests in a Republican form of government and in their elected representatives discharging "inherently legislative" functions such as taxation and appropriation. (*Id*. at ¶ 95.) Plaintiffs allege that TABOR has injured citizens by injuring their elected representatives' responsibilities and authority. (*Id*.) With respect to the educator-plaintiffs, it is alleged that TABOR has injured them by impairing their ability to properly educate students. (*Id*. at ¶ 50.)

Plaintiffs also allege that their injuries "will be further clarified upon development of facts to be adduced at trial and a judicial determination of the protections Plaintiffs enjoy under the Guarantee Clause." (*Id*. at ¶ 97.)

III. Discussion

As an initial matter, the Court considers the motion requesting oral argument (ECF No. 167). Having reviewed the motion to dismiss, plaintiffs' response and defendant's reply thereto, the motion requesting oral argument, and defendant's response thereto, the Court DENIES the motion requesting oral argument. The Court believes that the record and arguments are sufficiently developed and ready for resolution. So it is clear, to the extent arguments are made in the motion requesting oral argument, the Court has considered them in reaching its findings herein.

Turning to the motion to dismiss, as indicated *supra*, the Court believes that there are two essential groupings of plaintiffs in this case: the political-subdivision plaintiffs; and the plaintiffs who are elected officials, educators, and/or citizens. The Court will deal with the latter grouping first, and then the political-subdivision plaintiffs.[2]

[2] The Court notes that in its motion to dismiss, defendant places the plaintiffs into three groups: political subdivisions; citizens; and educators. (ECF No. 156 at 7.) The Court further notes that plaintiffs do not object to defendant's grouping or classification of the various plaintiffs. (*See generally* ECF No. 160.)

A. Elected Officials, Educators, and Citizens

As defendant points out in its reply, plaintiffs spend little to no time in their response addressing how the individual plaintiffs—the elected officials, educators, and citizens—have standing. As mentioned *supra*, the inclusion of allegations in the FAC with respect to how elected officials have been injured by TABOR may have simply been an oversight or a failure to press the "backspace" button enough times when plaintiffs re-drafted their Complaint because there is certainly no basis to find that the plaintiffs who were or are legislators have standing in light of the Tenth Circuit's remand order.

As for elected officials who are not members of the State General Assembly, plaintiffs make no attempt explain how they, but not their General Assembly brethren, have standing. The same is true of the educator plaintiffs and the citizen plaintiffs. The only mention of these plaintiffs, in an unspecific manner, is when the FAC alleges that "all Plaintiffs" have suffered concrete TABOR-related injuries. (*See* ECF No. 160 at 5.) Plaintiffs then proceed to ignore the forest for the political-subdivision tree by, *inter alia*, explaining that the political subdivisions have provided resolutions setting forth their injuries and discussing cases that involve political subdivisions. (*See id* at 6-9, 13-15.) That is all well and good for the political-subdivision plaintiffs (and will be addressed *infra*), but it does not help the individual plaintiffs to any great degree.

As the Tenth Circuit has explained, "[t]he Supreme Court's standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *The Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011) (ellipsis, quotation, and internal quotation omitted).

With respect to the individual plaintiffs, plaintiffs make no effort to discuss, analyze, or even ruminate on how the elected officials, educators, and citizens have standing under either strand. Simply asserting that all plaintiffs have suffered concrete TABOR-related injuries, falls far short of satisfying either strand. And the Court should not step in to perform the analysis for plaintiffs. The analysis for both strands is nuanced and cannot take place in an argument vacuum, not least because it is far from certain whether the individual plaintiffs could satisfy either strand.

Article III standing requires, "at an irreducible minimum," that a party show an actual or threatened injury as a result of defendant's allegedly illegal conduct, the injury can be traced to the challenged action, and is likely to be redressed by a favorable decision. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752 (1982). The Court should not have to wade into that analysis when plaintiffs have voluntarily decided to stay dry on the riverbank.[3]

Much is the same, if not worse, with respect to prudential standing. Although plaintiffs argue that prudential standing has been recently shorn of some of its components, plaintiffs do not dispute that those components remain part of the standing analysis, just under the Article III guise. (*See* ECF

[3] If the Court were to don waders, it might have been persuaded that the *citizen*-plaintiffs had alleged Article III's "irreducible minimum," but only if the Court had found that their alleged injury (which is essentially an interest in having a Republican form of government) was inextricably intertwined with the merits of their underlying claim. Arguably, that injury is inextricably intertwined, given that the Court cannot assess whether the citizen-plaintiffs' injury has actually occurred without determining whether TABOR has deprived the people of Colorado a Republican form of government. No such argument applies to the educator-plaintiffs, given that their alleged injury is being unable to properly educate their students. (*See* ECF No. 151 at ¶ 50.) That injury is not intertwined with the merits of any of the underlying claims. Moreover, as explained, plaintiffs have made no attempt to argue that, that injury satisfies Article III's "irreducible minimum." However, assuming for present purposes that plaintiffs' argument, regarding injuries being inextricably intertwined with facts, can be seen as covering the injury alleged by the citizen-plaintiffs (which is far from clear, given that plaintiffs make no such direct argument) (*see* ECF No. 160 at 9-11), the citizen-plaintiffs must still show that they have prudential standing, which the Court discusses *infra*.

No. 160 at 16.) Those components are: (1) "the general prohibition on a litigant's raising another person's legal rights"; (2) "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches"; and (3) "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, 134 S.Ct. 1377, 1386 (2014) (quotation and internal quotation omitted).

For some reason, plaintiffs appear to believe that the latter two tests are off the table, as they make no attempt to address them. (*See* ECF No. 160 at 16-17.) The mere fact that *Lexmark* may have removed the latter two tests from the prudential standing inquiry, does not mean that they are irrelevant, given that the Supreme Court specifically analyzed whether the plaintiff in that case was within the zone of the interests of the statute relied upon, and also noted that suits raising generalized grievances do not present constitutional cases or controversies. *See Lexmark*, 134 S.Ct. at 1387-88 & n.3. In addition, contrary to plaintiffs' contention, the Tenth Circuit has not held that "prudential standing review is often unnecessary in Supremacy Clause challenges." (*See* ECF No. 160 at 16.) Instead, the very case plaintiffs cite for this proposition demonstrates that prudential standing review is still very necessary, given that the Tenth Circuit concluded that the plaintiff lacked prudential standing in that case, and remanded for the case to be dismissed. *See Wilderness Soc'y*, 632 F.3d at 1170-72, 1174.[4]

[4] The Court notes that the Tenth Circuit's statement that the Supreme Court has yet to "weigh in" on whether the Supremacy Clause provides a cause of action, *Wilderness Soc'y*, 632 F.3d at 1169, is likely out-dated, given that, in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. ___, 135 S.Ct. 1378, 1383 (2015), the Supreme Court subsequently held that the Supremacy Clause is not a source of federal rights, "and certainly does not create a cause of action."

Furthermore, the Court rejects any suggestion that plaintiffs' prudential standing has been established by prior decisions in this case. As plaintiffs are more than fully aware, the Court's prior decision addressed the prudential standing of the legislator-plaintiffs only—the Court's bold heading to that effect should have made the same fairly clear. (*See* ECF No. 78 at 39.) If that did not, then the Court's subsequent declination to address whether any other plaintiffs had standing, should have done so. (*See id*. at 42.) Nor did the Tenth Circuit's original decision address anything other than the legislator-plaintiffs' prudential standing. (*See* ECF No. 115 at 27-29.)

In this light, plaintiffs' failure to address whether their injuries amount to generalized grievances or are within the zone of interests contemplated by the Enabling Act is perhaps indicative of their own belief as to the outcome of those inquiries. Again, though, the Court should not have to engage in a detailed inquiry of these issues, when plaintiffs have not done so in response to defendant's clear assertion that plaintiffs lack standing on those grounds. (*See* ECF No. 156 at 17-20.) As already stated, the Court is not plaintiffs' advocate, and, as the party with the burden to establish standing, plaintiffs must live and die by their decision not to address defendant's arguments in this regard.[5] *See Port City Properties*, 518 F.3d at 1189.

[5] The Court addresses the considerations of asserting another's rights and the Enabling Act's zone of interest in more detail *infra* with respect to the political-subdivision plaintiffs. If the Court were to engage in the hypothetical exercise of assessing the citizen-plaintiffs' standing in this regard, the analysis would appear to come to an end with the issue of asserting generalized grievances. As the Supreme Court has explained, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and law, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 601, 127 S.Ct. 2553 (2007). Here, the citizen-plaintiffs are asserting a harm to which every citizen in Colorado has allegedly been subjected, and seeking relief that would no more benefit them than it would all of those other citizens. (*See* ECF No. 151 at 32 & ¶ 95.) As such, despite not having the benefit of any argument from plaintiffs, it appears that the citizen-plaintiffs do not state an Article III case or controversy. *See Hein*, 551 U.S. at 601.

This still leaves the first test: whether plaintiffs seek to raise another person's legal rights. Plaintiffs' response to this inquiry is again demonstrative. For once, plaintiffs do address it; albeit with two meager sentences. Which effectively amount to the conclusory statement that plaintiffs seek to assert their own rights, rather than the rights of others. If all arguments could be won simply by restating the test and inserting a "do not," then the Court's job might be much easier. But, alas, that is not how things work. At best, plaintiffs' statement, that "TABOR removes state fiscal power from Colorado's representative institutions and relegates those powers to plebiscitary decision-making," can be construed as addressing whether the *political-subdivision* plaintiffs are asserting the rights of others. However, it does not come close to stating, let alone explaining, why the plaintiffs who are elected officials, educators, or citizens are asserting their own rights, rather than the rights of others, such as the political subdivisions.

In summary, plaintiffs have not attempted to meaningfully argue, and certainly not analyze, why the plaintiffs who are elected officials, educators, and/or citizens have either Article III standing or prudential standing. To repeat, it is plaintiffs burden to do so. Thus, their failure is determinative, and the Court finds that the plaintiffs identified in Section II.B. *supra* who are elected officials, educators, and/or citizens do not have Article III or prudential standing to pursue this case.

B. Political Subdivisions

To the heart of the parties' dispute: whether the political-subdivision plaintiffs have standing to pursue this action. As with the individual plaintiffs addressed *supra*, this inquiry involves tests of the political-subdivision plaintiffs' Article III and prudential standing. An additional wrinkle to the analysis, however, is whether the political-subdivision plaintiffs, as political subdivisions of the State of Colorado, have standing to bring this action. This has been called the concept of "political

subdivision standing." *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628-630 (10th Cir. 1998).

First, the Court addresses Article III standing. The Court finds that the political-subdivision plaintiffs have Article III standing. Although the political-subdivision plaintiffs allege a host of injuries, the one the Court finds determinative is the alleged injury the political-subdivision plaintiffs have suffered as a result of having to incur costs to present matters to voters that would have, without TABOR, been within the power of the political subdivisions to decide.[6] The incurrence of costs is a concrete monetary injury. *See Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir. 2013) (concluding that the additional cost of purchasing specialty license plates was a "concrete, actual monetary injury" for purposes of Article III standing). In addition, the FAC alleges that the elections resulting in the incurred costs are the result of TABOR requiring certain fiscal matters to be submitted to voters. (*See* ECF No. 151 at ¶¶ 35, 43, 45.) Finally, the Court finds that, unlike other of plaintiffs' alleged injuries, such as the inability to adequately educate children, declaring TABOR unconstitutional would redress the incurrence of election costs because, as alleged, the political-subdivision plaintiffs would not incur those costs in a TABOR-free world. As such, all three parts of Article III's "irreducible minimum" have been achieved.

Second, the Court addresses political-subdivision standing. As the parties present the issue, there are two relevant Tenth Circuit cases. The Court agrees. Those cases are *Branson* and *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011). The Court begins with *Branson*. In *Branson*, *inter*

[6] Although the resolutions and affidavits attached to the response to the motion to dismiss make more explicit that the political-subdivision plaintiffs have incurred costs in connection with presenting matters to voters, the FAC also makes that allegation with respect to each type of political-subdivision plaintiff. (*See* ECF No. 151 at ¶¶ 35, 43, 45.) Thus, whether or not the Court may consider the resolutions and affidavits attached to the response, the Court finds that the FAC alleges a sufficiently concrete injury with respect to the political-subdivision plaintiffs.

alia, the Tenth Circuit was faced with whether school-district plaintiffs had standing to pursue an action seeking to have a voter-approved amendment to the Colorado Constitution declared violative of the U.S. Constitution's Supremacy Clause. *Branson*, 161 F.3d at 625, 628. The Tenth Circuit answered in the affirmative. The Circuit began by explaining that, despite sweeping language in certain Supreme Court decisions, a political subdivision is not barred "from asserting the structural protections of the Supremacy Clause of Article IV in a suit against its creating state." *Id*. at 628-629. The Tenth Circuit also stated that prior Supreme Court cases "stand only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights." *Id*. at 628.

The Tenth Circuit then concluded that the school-district plaintiffs in that case were not disentitled from standing by virtue of being a political subdivision, in part, because they were "substantially independent" from the State of Colorado. *Id*. at 629. "Most important[]," though, the Tenth Circuit concluded that the school districts were "essentially the beneficiaries of the federal trust at issue here." *Id*. (quotation omitted). Addressing this latter aspect in more detail, the Tenth Circuit explained that the Colorado Enabling Act granted more than 4.6 million acres of school lands to Colorado for the support of "common schools," and school districts were the direct political descendants of "common schools." As a result, the Tenth Circuit concluded that the school districts' status as political subdivisions did not disentitle them from "bringing an action under the Supremacy Clause to enforce the terms of the Colorado Enabling Act …." *Id*.

The Tenth Circuit further explained that its conclusion was supported by case law from other circuits, citing a Fifth Circuit Court of Appeals case holding that a political subdivision could bring

a claim against its creating state when the claim was based upon a controlling federal law and the subdivision was a beneficiary of that law. *Id*. The Tenth Circuit also explained that its understanding of political-subdivision standing was "at work" in another of its decisions, *Housing Auth. of the Kaw Tribe of Indians v. City of Ponca City*, 952 F.2d 1183 (10th Cir. 1991), where the Circuit held, *inter alia*, that a local housing authority had standing to sue under the federal Fair Housing Act. *Id*. The Tenth Circuit explained that "[i]mplicit" in its *Kaw Tribe* decision was the "view that the Fair Housing Act, as a federal statute, trumps contradictory state law through the operation of the Supremacy Clause." *Id*. at 630.

Many years later, the Tenth Circuit decided *City of Hugo*. In that case, the Circuit addressed, *inter alia*, whether the City of Hugo, a political subdivision, had standing to sue its creating state under the dormant Commerce Clause. *City of Hugo*, 656 F.3d at 1254. The Circuit's analysis, naturally, discussed the decision in *Branson*. *Id*. at 1256-58. The Tenth Circuit explained that in *Branson*, as well as *Kaw Tribe*, "the source of substantive rights was a federal statute directed at protecting political subdivisions," which, the Circuit further explained, "informs" "the rights political subdivisions may vindicate in federal court against their parent states." *Id* at 1257. The Tenth Circuit also stated that courts have only allowed political-subdivision suits "when Congress has enacted statutory law specifically providing rights to municipalities." *Id*. The Tenth Circuit then concluded that, because the claims were based upon a substantive provision of the U.S. Constitution and the Supreme Court had made clear that the Constitution did not contemplate the rights of political subdivisions as against their parent states, the City of Hugo lacked standing under *Branson*. *Id*. at 1257-58.

The parties go to great lengths to explain the decisions in *Branson* and *City of Hugo*, and, where it suits them, distinguish the facts of those cases from those here. The Court finds both decisions pertinent. To begin, *factually*, the situation here is more similar to *Branson* than it is to *City of Hugo* in that the political-subdivision plaintiffs here are seeking to enforce a federal statute—the Colorado Enabling Act (perhaps coincidentally, the same one being enforced in *Branson*)—by way of the Supremacy Clause. To understand whether that factually similarity is determinative, it is necessary to more closely assess the Tenth Circuit's reasons for concluding that the school-district plaintiffs in *Branson* had standing, and the Circuit's further explanation of those principles in *City of Hugo*.

Put simply, the Court does not find the fact that the political-subdivision plaintiffs are seeking to enforce a federal statute via the Supremacy Clause alone to be determinative. If it were, then the Tenth Circuit's discussion in *Branson* of the school districts' independence and the school districts being the beneficiaries of a federal trust, would have been unnecessary. The Circuit could have simply stopped after identifying that the school districts sought to enforce a federal statute. What more is required therefore? *Branson*, as clarified in *City of Hugo*, provides the answer.

In *Branson*, it was (1) substantial independence from the creating State, which, for present purposes, the Court will assume the political-subdivision plaintiffs have, even though plaintiffs fail to make that argument, and (2), "[m]ost importantly," the plaintiffs being "essentially" the beneficiaries of a federal trust created by the Enabling Act. *Branson*, 161 F.3d at 629. With respect to the second factor, *City of Hugo* explains that the federal statute being enforced must be "directed at protecting political subdivisions." *City of Hugo*, 656 F.3d at 1257. As the Tenth Circuit further explained, this understanding of *Branson* comports with its facts, as those facts, as well as the facts

of other decisions upon which it relied, involved "whether a political subdivision could enforce against its parent state, via the Supremacy Clause, rights accorded it by a federal statute or statutory scheme." *Id*. at 1260.

At least for a fleeting moment, plaintiffs do not appear to disagree. Notably, in their response, plaintiffs assert that they are seeking to enforce rights granted to the political-subdivision plaintiffs in the Enabling Act. (ECF No. 160 at 14.) Whether that is the case will be discussed *infra*, but it is telling that plaintiffs acknowledge that which *City of Hugo* makes clear: a political subdivision must be seeking to enforce rights afforded it in a federal statute. Although plaintiffs may correctly assert that "determinative" in *City of Hugo* was the fact that the plaintiffs in that case sought to enforce a dormant Commerce Clause claim, *see City of Hugo*, 656 F.3d at 1257-58, that does not make the Tenth Circuit's explanation of *Branson* any less instructive for the purposes of this case; something which plaintiffs appear, at times, to acknowledge. (*See* ECF No. 160 at 14-15.)

With all this in mind, the Court turns to plaintiffs' assertion that the political-subdivision plaintiffs are seeking to enforce rights granted to them in the Enabling Act. (ECF No. 160 at 14.) Plaintiffs cite numerous paragraphs from the FAC; presumably to support this assertion. (*See id*. (citing ECF No. 160 at ¶¶ 10, 22, 30, 34, 47-51, 95, 96, 101, 105-106, 109-113)). Therefore, the Court will begin its analysis with those paragraphs. The first cite, to Paragraph One of the FAC, provides no support, as it simply states, with respect to the Enabling Act, that the same requires a Republican form of government. (*See* ECF No. 151 at ¶ 1.) There is no mention of rights being granted in the Enabling Act to the political-subdivision plaintiffs. (*See id*.) The same is true of Paragraphs Ten, Twenty-Two, Forty-Seven through Fifty-One, Ninety-Five,[7] Ninety-Six, One

[7] The Court also notes that Paragraphs Fifty and Ninety-Five pertain to educator and citizen-plaintiffs, and thus, have nothing to do with the political-subdivision plaintiffs. (*See* ECF No. 151 at ¶¶ 50, 95.)

Hundred and One, One Hundred and Five, One Hundred and Six, and One Hundred and Nine through One Hundred and Thirteen. (*See id* at ¶¶ 10, 22, 47-51, 95-96, 101, 105-106, 109-113.)

The only potentially relevant paragraphs are Paragraphs 30 and 34, which pertain to the funding of public schools. (*See id* at ¶¶ 30, 34.) Before analyzing those paragraphs, the Court makes some preliminary observations. First, given that the paragraphs pertain to *public schools*, they do not pertain to boards of county commissioners or special districts. Because the other paragraphs to which plaintiffs cite do not allege that the Enabling Act grants those entities rights, the Court finds that the FAC fails to allege that the plaintiffs who are the board of county commissioners (the Board of County Commissioners of Boulder County) or the special district (the Gunnison County Metropolitan Recreation District) are seeking to enforce a right granted to them in the Enabling Act, and thus, those plaintiffs do not have political-subdivision standing to pursue this action. *See Branson*, 161 F.3d at 629.

Second, although plaintiffs cite to numerous paragraphs in the FAC, they make no effort to explain to the Court how those paragraphs sufficiently allege that the political-subdivision plaintiffs are seeking to enforce rights granted to them in the Enabling Act. (*See* ECF No. 160 at 14.) As with much of the standing inquiry, therefore, the Court is left without meaningful argument from plaintiffs. This is particularly troubling given that it is plaintiffs' burden to establish their standing. In the specific context of the current inquiry it is equally troubling because whether a federal statute confers rights on a party is not necessarily straightforward, especially here where plaintiffs reference numerous provisions of the Enabling Act. (*See* ECF No. 151 at ¶ 30.) In their response, though, plaintiffs do not even identify the rights that the Enabling Act allegedly confers upon them. (ECF No. 160 at 14 (stating simply, "The political subdivision Plaintiffs here also seek to enforce the

rights granted to them in the Enabling Act.")). That one conclusory statement is the extent of plaintiffs' analysis. As a result, and perhaps understandably, in reply, defendant only directs its arguments toward the political-subdivision plaintiffs' alleged right to a Republican form of government. (*See* ECF No. 163 at 6-7.) Why plaintiffs should be able to proceed on the basis of one conclusory sentence is beyond the Court. Nonetheless, for the sake of completing the record, the Court addresses Paragraphs 30 and 34 of the FAC.

In Paragraph 30 plaintiffs reference specific provisions of the Enabling Act. Specifically, plaintiffs reference Sections 7, 10, and 14 of the Enabling Act. (ECF No. 151 at ¶ 30.) Section 10, however, relates to state universities. 18 Stat. 475 § 10. Because none of the plaintiffs are state universities, the Court finds Section 10 to be irrelevant to its analysis. This leaves Sections 7 and 14. As the Tenth Circuit explained in *Branson*, Sections 7 and 14 provide that certain plots of land in each township must be used to support "common schools," and, if the land is sold, the proceeds must constitute a permanent school fund, with the interest to be expended in support of "common schools." *Branson*, 161 F.3d at 625.

As an initial matter, Sections 7 and 14 have no relationship to plaintiffs' argument that the Enabling Act allegedly requires a Republican form of government. This alleged requirement of a Republican form of government is the sole basis upon which plaintiffs argue that the terms of the Enabling Act have been violated. (*See* ECF No. 160 at 8.) As discussed *supra*, the numerous paragraphs in the FAC to which plaintiffs' cite in their response (*id*. at 14), alleging that the Enabling Act requires a Republican form of government, do not allege that such a requirement is a right afforded to the political-subdivision plaintiffs. Neither do Sections 7 and 14 of the Enabling Act, given that they do not mention any requirement of a Republican form of government.

In this light, the Court is again skating on fresh ice because nowhere do plaintiffs assert in their response that Sections 7 and 14 afford the political-subdivision plaintiffs rights under the facts of this case. (*See generally* ECF No. 160.) Putting that aside, the Court finds that those provisions do not afford these political-subdivision plaintiffs rights in this case. The important thing to note is that, unlike the plaintiffs in *Branson* who were seeking to enjoin the implementation of an amendment to the Colorado Constitution that directly affected the administration of the public land trust established by Sections 7 and 14, the political-subdivision plaintiffs' claims here do not allege that TABOR has had *any* effect on the public land trust. Paragraph 34 of the FAC merely alleges that TABOR has prevented school districts from fulfilling their obligations to adequately fund public schools. (*See* ECF No. 151 at ¶ 34.) However, as the FAC then goes onto allege, TABOR's effect on the adequacy of school funding has been on the setting of property tax mill levies. (*See id*. at ¶ 35.) Moreover, given that TABOR is allegedly a means to curtail state and local governments' power to tax and raise revenue (*id*. at ¶ 24), the Court cannot discern how TABOR would have any effect on the public land trust. As such, unlike *Branson*, and the Supreme Court case to which it cites, there is no public trust "at issue here." *Branson*, 161 F.3d at 629 (citing *Lassen v. Arizona ex. rel. Arizona Highway Dep't*, 385 U.S. 458, 459 n.1, 87 S.Ct. 584 (1967)). Thus, although in certain cases Sections 7 and 14 of the Enabling Act may provide school districts with political-subdivision standing to sue their creating State, those provisions do not in this case.

What of plaintiffs' main argument then—that TABOR violates the express terms of the Enabling Act requiring a Republican form of government? (*See* ECF No. 160 at 8.) Of course, plaintiffs provide no actual analysis of the provision(s) of the Enabling Act that expressly require such a form of government or why those provision(s) afford the political-subdivision plaintiffs a

right to the same. (*See id*.) Instead, all plaintiffs cite is three paragraphs in the FAC; none of which either point to a specific provision of the Enabling Act or allege that the political-subdivision plaintiffs are afforded rights under the Act. (*See id*. (citing ECF No. 151 at ¶¶ 100, 105, 110)).

Like pushing a boulder up a hill, the Court presumes that plaintiffs rely upon Section 4 of the Enabling Act (*see* ECF No. 151 at ¶ 14), which provides, *inter alia*, that the constitution for the territory of Colorado "shall be republican in form." 18 Stat. 474 § 4. As already mentioned, plaintiffs make no attempt to explain how this provision provides the political-subdivision plaintiffs with a right to a Constitution "republican in form." In any event, the Court finds that, based on the present record, it does not. Unlike Sections 7 and 14 which specifically provide that the public land trusts were created to support "common schools," Section 4 does not expressly provide for whom the "republican in form" requirement is designed. However, review of Section 4, and also Section 5, indicate that the requirement is for the people of Colorado. Notably, in Section 4, it states that the State Constitution must be Republican in form. In Section 5, it states that, in the event a State Constitution is formed "for the people" of Colorado, the State Constitution shall be submitted to the people for ratification. 18 Stat. 475 § 5. In other words, the language of the Enabling Act reflects that the State Constitution was formed *for the people of Colorado*. Not the State's political subdivisions.

Absent any language to the contrary, which the Court does not find there to be, the inference the Court draws from this language is that the Colorado Constitution, including the requirement that it be Republican in form, is for the people of the State.[8] The allegations of the FAC appear to

[8] To be clear, this does not effect the Court's analysis *supra* with respect to the citizen-plaintiffs. First, the present analysis is one related to political-subdivision standing, it is not a component of assessing the standing of plaintiffs who are not political subdivisions. Second, even if the Enabling Act's requirement of a Constitution "republican in form" is meant to protect the people of Colorado, as discussed *supra*, the

support the Court's interpretation. Notably, in alleging that TABOR impermissibly amended the Colorado Constitution, plaintiffs allege that "the citizens of the State of Colorado" undertook to create and maintain a Republican form of government, and "the people of the State" relinquished the power to alter the Republican nature of their government. (ECF No. 151 at ¶¶ 111-112.) If anything, these allegations suggest that the right to a Constitution "republican in form" is that of the people of Colorado, as they are the ones who allegedly created, maintained, and relinquished the power to alter the same.

As a result, the Court finds that the school-district plaintiffs do not have political subdivision standing to pursue this action because they are not seeking to enforce any rights granted to them under the Enabling Act. *See City of Hugo*, 656 F.3d at 1260.

Third, the Court addresses plaintiffs' argument related to the standing inquiry being inextricably intertwined with the merits. As noted *supra*, arguably, this argument stretches to encompass the standing of the citizen-plaintiffs, assuming (because plaintiffs do not explain) that the pertinent inquiry here is whether TABOR undermines the requirement of a Constitution "republican in form." (*See* ECF No. 160 at 9-11.)[9] The Court does not believe that it stretches to the political-subdivision plaintiffs. As an initial matter, the Court has already found that the political-subdivision plaintiffs have alleged a sufficient injury for Article III standing purposes. Thus, it is not clear to what extent the inextricably intertwined analysis is necessary for the political-subdivision plaintiffs.

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citizen-plaintiffs still do not have standing due to their failure to present any arguments related to the prohibition on bringing generalized grievances.

[9] In light an assertion in the motion requesting oral argument, the Court notes that it did not believe plaintiffs' "inextricably intertwined" argument to be plaintiffs' "primary" argument on standing. (*See* ECF No. 167 at 3-4.)

Next, in light of the Court's analysis *supra* with respect to rights afforded by the Enabling Act, the political subdivision plaintiffs cannot be seeking to enforce a right to a Constitution "republican in form" because they have no such right. Thus, the presumed merits issue for the inextricably intertwined analysis—whether a Republican form of government has been undermined by TABOR—does not apply to the political-subdivision plaintiffs because that is not their injury to assert. Finally, even if the "republican in form" merits issue were applicable to the political-subdivision plaintiffs, the Court does not believe that their standing issue is inextricably intertwined with it. The standing issue for the political-subdivision plaintiffs is whether they are enforcing rights granted to them by the Enabling Act. This is a completely different inquiry to whether a Republican form of government has been undermined by TABOR. *See Day v. Bond*, 500 F.3d 1127, 1138 (10th Cir. 2007) (concluding that standing was not inextricably intertwined with the merits because the merits question was whether a state statute was preempted by federal law, while the standing question was whether the federal law created a private cause of action for the plaintiffs).

Fourth, the Court addresses prudential standing. To the extent that the pertinent plaintiffs have political-subdivision standing, the Court finds that they do not have prudential standing (however the components of that concept are characterized). As discussed *supra*, plaintiffs make no attempt to explain how they are not raising generalized grievances or that they are in the zone of interest of the Enabling Act. (*See generally* ECF No. 160 at 16-17.) Similarly, as already discussed, the Court rejects plaintiffs' apparent reasons for not reaching those issues. Thus, plaintiffs have forfeited those issues. To the extent they have not forfeited them, in light of the Court's finding *supra* that the Enabling Act's "republican in form" requirement is for the people of the State, the Court does not find the political-subdivision plaintiffs to be in the zone of interest of the Enabling Act, at least not the zone alleged in this case.

As for generalized grievances, it would of course help for plaintiffs to at least suggest the grievance being alleged by the political subdivisions. The closest plaintiffs get to this is asserting that TABOR has removed fiscal power from Colorado's representative institutions. (*See* ECF No. 160 at 16.) The Court presumes this is an extension of the "republican in form" argument. On that basis, the Court finds it to be a generalized grievance for the same reason noted *supra*—namely, because it is a harm to which every citizen and political subdivision in Colorado has allegedly been subjected, and seeks relief that would no more benefit the political subdivisions than it would all citizens and political subdivisions.

Similar reasoning applies to the remaining prudential consideration: the assertion of another's rights. Here, to the extent the political subdivision plaintiffs are seeking to assert that TABOR has undermined a Constitution "republican in form," that is not their right to assert. Section 4 of the Enabling Act, if anything, does not extend to, let alone mention, political subdivisions or even their political predecessors as in *Branson*. As construed *supra*, the requirement that a State Constitution be in a republican form is for the people of the State. Therefore, the Court finds that the political-subdivision plaintiffs are asserting the rights of another in alleging that TABOR violates the Enabling Act.

IV. Conclusion

For the reasons discussed herein, the Court finds that none of the named plaintiffs (be they political subdivisions, former or current elected officials, educators, citizens, or anything else) have standing to pursue this action. As a result, the Court GRANTS the motion to dismiss (ECF No. 156), and DISMISSES this action for lack of subject matter jurisdiction.

Plaintiffs' motion requesting oral argument (ECF No. 167) is DENIED.

The Clerk is instructed to enter Final Judgment in favor of defendant, and then CLOSE this case.

SO ORDERED.

DATED this 4th day of May, 2017.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge