IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-1350-RM-NYW

ANDY KERR, Colorado State representative, et al.
Plaintiffs,

v.

JOHN HICKENLOOPER, in his official capacity as GOVERNOR OF COLORADO,
Defendant.

GOVERNOR'S REPLY IN SUPPORT OF MOTION TO DISMISS

This case is nearly six years old. After extensive appellate proceedings, Plaintiffs are now on the fourth iteration of their complaint. Yet despite the resources that the Governor has diverted to address this lawsuit, Plaintiffs have yet to identify a set of plausible allegations upon which this Court could find that they have Article III standing. Because Plaintiffs are unable to establish that they have Article III standing, the Court should dismiss the complaint for lack of subject matter jurisdiction.

ARGUMENT

I. This Court should decline Plaintiffs' invitation to assume that they have standing.

Although, in its most recent opinion, the Tenth Circuit remanded the case "for determination of whether the non-legislator plaintiffs possess standing," *Kerr v. Hickenlooper*, 824 F.3d 1207, 1218 (10th Cir. 2016), Plaintiffs assert that this Court should simply table any concerns about standing for the moment because "the standing issue is intertwined and inseparable from the merits of the underlying

claim." Doc. 160 at 9, *quoting Largess v. Sup. Jud. Ct.*, 373 F.3d 219, 224 (1st Cir. 2004). That is, because Plaintiffs view their "asserted injury and their claimed constitutional violation [as] one and the same," they argue that this case presents the "rare instance" in which the Court cannot assess standing without also considering the merits. Doc. 160 at 10, *quoting Day v. Bond*, 500 F.3d 1127, 1137 (10th Cir. 2007).

The Tenth Circuit's instruction in this case was clear. The non-legislator Plaintiffs must demonstrate standing before this case may proceed further. If Plaintiffs can prove facts that satisfy the constitutionally required elements of standing, it is incumbent upon them to at least plausibly allege those facts now. *See Citizens Concerned for Separation of Church & State v. Denver*, 628 F.2d 1289, 1301 (10th Cir. 1980) ("A federal court must in every case, and at every stage of the proceeding, satisfy itself as to its own jurisdiction"). Plaintiffs need not independently prove their case at this stage, but "[i]f they fail to make the necessary allegations, they have no standing." *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation and brackets omitted).[1]

[1] Plaintiffs' assertion that this court should await trial to determine standing is contrary to Tenth Circuit law. In the Tenth Circuit, "[t]he jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case." *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). That uncommon situation arises, for example, if the government alleges that it is immune from suit because the facts do not bring the case within a statutory waiver of sovereign immunity. *Id.* Only in rare instances like that is a court permitted to delay determining its own jurisdiction. Here, Plaintiffs fail to identify how the elements of standing overlap with the merits such that standing cannot be decided now. Thus, this case presents the far more common situation: either the current complaint is sufficient to support

Despite the Tenth Circuit's clear instructions, Plaintiffs invoke the First Circuit's decision in *Largess*, which ultimately dismissed a Guarantee Clause claim but suggested that the standing analysis "might well be adjusted to the nature of the claimed injury." *Id.* This was the full extent of the standing analysis in *Largess*; it is hardly sufficient to allow this court to ignore Tenth Circuit case law or the Tenth Circuit's most recent instructions. But even if the First Circuit's reasoning was sound—that is, even if that court correctly excused the plaintiffs from alleging a concrete and particularized *injury* (the first prong of the standing analysis)—it still incorrectly elided the remaining two prongs of the Article III inquiry, causation and redressability. Here, Plaintiffs fail on all three prongs of the standing analysis. As the Governor argued in the motion to dismiss, Plaintiffs' allegations on these questions require untenable inferential leaps, and thus are inadequate to satisfy the irreducible constitutional minimum of Article III. [2]

II. None of the remaining plaintiffs have standing.

There are three distinct groups of Plaintiffs: political subdivisions, educators, and citizens. Plaintiffs appear to have abandoned any attempt to demonstrate that the educators and citizens have Article III standing, and instead concentrate

---

standing or it is not. Neither discovery nor a trial is needed for this court to make that decision, as the Tenth Circuit made clear when it ordered this court to resolve the question of standing before this case is allowed to proceed.

[2] Even if this Court were inclined to accept Plaintiffs' invitation and assume that they have Article III standing for now, other questions about justiciability remain unanswered. Those questions would need to be resolved in Plaintiffs' favor before this Court could consider the merits. Both justiciability and merits questions, however, should be decided on a motion to dismiss if this Court either declines to address standing at this juncture or determines that Plaintiffs have standing to proceed.

virtually their entire response on the political subdivisions. As a result, the Governor rests on the previous arguments made with respect to the citizen and educator Plaintiffs, *see* Doc. 156, and focuses here on whether the political subdivision plaintiffs have standing.

With respect to the political subdivisions, Plaintiffs assert (1) that the resolutions attached as Exhibits B-N to the response demonstrate that TABOR has "inflicted [injuries] on the political subdivision Plaintiffs' budgetary processes and ability to meet their republican responsibilities," Doc. 160 at 6; and (2) that because their claim is rooted in the Supremacy Clause, the normal bar on political subdivision standing does not apply under these circumstances. *Id.* at 8-9.

As to the first point, even if Plaintiffs were correct that Exhibits B-N demonstrate a concrete and particularized injury on the part of the political subdivision plaintiffs, and that the alleged injury would be redressed by a favorable outcome in this case, they would still be barred from maintaining this lawsuit by the political subdivision doctrine. As the motion to dismiss explained, federal courts lack subject matter jurisdiction over cases in which a political subdivision attempts "to sue its parent state under a substantive provision of the constitution." *City of Hugo v. Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011).

As to the second point, Plaintiffs are incorrect that the Supremacy Clause creates an exception to the political subdivision doctrine. Plaintiffs cite *Branson Sch. Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1511 (D. Colo. 1997) (*Branson I*), and the Tenth Circuit opinion affirming it, reported at 161 F.3d 619 (10th Cir. 1998)

(*Branson II*), for the proposition that, under the Supremacy Clause, a political subdivision may sue its parent state. *See* Doc. 160 at 8. In Plaintiffs' view, the *Branson* plaintiffs had standing "because" they alleged that "by implementing a state constitutional measure that contradicts the terms of the Enabling Act, the defendants have violated the United States Constitution." *Id.* (quoting *Branson I*, 958 F. Supp. at 1511).[3]

As the Tenth Circuit suggested more recently in *City of Hugo*, this reading of the *Branson* cases cannot be right. *See* 656 F.3d at 1257–59. To be sure, *Branson I* and *Branson II* both declined to categorically bar political subdivisions from suing their parent states in federal court. But the key to both cases, as well as the Tenth Circuit's subsequent decision in *City of Hugo*, is that political subdivisions must, in addition to satisfying Article III's requirements, overcome an additional hurdle in order to satisfy federal jurisdictional requirements: they must premise their claims on rights affirmatively, and explicitly, granted to them by Congress. In *Branson*, it was the revenue stream from the state lands trust created by the Enabling Act.

---

[3] Recent Supreme Court precedent undermines the Supremacy Clause analysis in both *Branson I* and *Branson II,* at least to the extent that those opinions concluded that a Supremacy Clause violation, standing on its own, provides either a private individual or a political subdivision with a right to sue. *See Branson I*, 958 F. Supp. at 1511 (holding that "it is irrelevant whether the Enabling Act itself creates a private right of action, as private parties are clearly permitted to maintain actions based on the Supremacy Clause"); *Branson II,* 161 F.3d at 630 (holding that "a political subdivision may sue its parent state when the suit alleges a violation of some controlling federal law"). In *Armstrong v. Exceptional Child Center*, the Supreme Court explicitly held that "the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action." 135 S. Ct. 1378, 1383 (2015) (internal citations and quotations omitted). Thus, the *Branson* opinions, read in light of the Supreme Court's recent guidance in *Armstrong*, do not support Plaintiffs' standing theory.

Branson I, 958 F. Supp. at 1508-11. In another Tenth Circuit case the federal statute, the Fair Housing Act, "expressly authorized" the political subdivision to sue its parent state. *Housing Authority of the Kaw Tribe v. Ponca City*, 952 F.2d 1183, 1188 (10th Cir. 1991). Here, in contrast, Plaintiffs point only to the Guarantee Clause and the Enabling Act, which simply repeats the language of the Guarantee Clause. Yet Plaintiffs do not dispute the Tenth Circuit's conclusion in *City of Hugo* that there is not "a single case in which the Supreme Court or a court of appeals has allowed a political subdivision to sue its parent state under a substantive provision of the Constitution." 656 F.3d at 1257. Instead, they argue that their lawsuit should not be dismissed because they, like the plaintiff in *Branson*, also assert a claim under a federal statute, the Enabling Act.

This argument is undercut by *City of Hugo* itself, which not only categorically barred political subdivisions from filing suit against their parent state under a "substantive provision of the constitution," but also acknowledged that political subdivisions could only maintain suit under a federal statute where the federal statute was "directed at protecting political subdivisions." *Id.* In contrast to *Branson*, Plaintiffs here identify nothing in the Enabling Act that is directed specifically at protecting school districts, special districts, counties, or any other type of administrative subunit authorized by state law. To the contrary, the language of the Enabling Act is clear: it is the State itself that is guaranteed a republican form of government. Neither the Act, nor for that matter the Guarantee Clause, affords any similar assurance to Colorado's political subdivisions. Absent

any demonstration that TABOR deprives them of a statutory right that is "directed at protecting" them, the Plaintiff political subdivisions cannot qualify for standing whether or not they independently satisfy the requirements of Article III.

III. Principles of prudential standing require dismissal.

Plaintiffs independently fail the prudential requirements of standing.[4] Rather than engaging on this issue, however, Plaintiffs assert that prudential standing requirements are of limited importance in Supremacy Clause challenges, and they conclude by suggesting that the prudential standing concerns raised in the motion to dismiss are now law of the case. Neither conclusory argument is correct.

First, citing *Wilderness Society v. Kane County*, 632 F.3d 1162, 1169-71 (10th Cir. 2011), Plaintiffs suggest that "prudential standing review is often unnecessary in Supremacy Clause challenges." Doc. 160 at 16. This is a misreading of the Tenth Circuit's opinion. While the court did not extensively analyze whether the plaintiffs fell within the "zone of interests" protected by the statute, it ultimately decided the case in the defendant's favor because the plaintiff "lack[ed] prudential standing." 632 F.3d at 1172. Nothing in the opinion suggests that prudential standing concerns—whether "zone of interests," "generalized grievances," or the rule against raising the legal rights of another—evaporate when the Supremacy Clause is invoked.

---

[4] With respect to prudential standing, Plaintiffs first argue that the Supreme Court recently held that the "zone of interest" and "generalized grievance" requirements are core requirements of Article III, rather than prudential considerations. Doc. 160 at 16, *citing Lexmark Int'l v. Static Control Components, Inc.*, 134 S. Ct 1377 (2014). Regardless of how these prudential standing requirements are classified, however, Plaintiffs fail to satisfy them.

Second, the Governor disagrees that prudential standing is now settled law of the case. *See* Doc. 160 at 16–17. The Court's prior order addressed prudential standing *only* with respect to the Legislator-Plaintiffs, and not the other remaining plaintiffs, which now include the political subdivisions. *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1139-41 (D. Colo. 2012) ("On these grounds, the Court concludes that prudential standing principles do not bar the Legislator-Plaintiffs at this stage of the proceedings."); *see also id.* at 1141 ("Because the Court holds that the Legislator-Plaintiffs have standing to pursue this action, the Court need not, and declines to, address whether any other Plaintiffs have standing."). Prudential standing remains an open question, and as explained in the motion to dismiss, Plaintiffs fail to satisfy its requirements.

CONCLUSION

Plaintiffs' complaint should be dismissed.

CYNTHIA H. COFFMAN
Attorney General

s/ Matthew D. Grove
FREDERICK R. YARGER
GLENN ROPER
KATHLEEN SPALDING
MATTHEW D. GROVE
MEGAN PARIS RUNDLET
STEPHANIE LINDQUIST SCOVILLE
Office of the Colo. Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203|
Telephone: (720) 508-6000
Attorneys for Defendant
John Hickenlooper
Governor of the State of Colorado

CERTIFICATE OF SERVICE

This is to certify that I have duly served **Reply in Support of Motion to Dismiss** upon all parties herein by serving through the Court's ECF Filing System and/or by E-mail transmission this 7th day of March, 2016 to the following:

Attorneys for Appellees:

David Evans Skaggs
david.skaggs@dentons.com

Herbert Fenster
hfenster@mckennalong.com

Lino S. Lipinsky de Orlov
Lino.lipinsky@dentons.com
Michael Lee Bender

mbender@perkinscoie.com

John Herrick

john.herrick@outlook.com

Michael F. Feeley
mfeeley@bhfs.com

Sarah Clark
sclark@bhsf.com

Carrie E. Johnson
cjohnson@bhfs.com

s/ Matthew D. Grove