Case No. 12-1445

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Representative, *et al.* Plaintiffs-Appellees, v. JOHN HICKENLOOPER, Governor of Colorado, in his official capacity, Defendant-Appellant.	

On Appeal from
The United States District Court For the District of Colorado
D.C. No. 11-cv-01350-WJM-BNB
Hon. William J. Martinez, United States District Judge

Governor's Opening Brief

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

CONSTITUTIONS

STATUTES

TABLE OF AUTHORITIES

Jurisdiction

Plaintiffs asserted federal-question jurisdiction, 28 U.S.C. § 1331, in the district court because they rely on federal law to challenge a provision of the Colorado Constitution. (App. Vol. 2 at 475.)[1] Jurisdiction in this Court is also based upon § 1331, as well as the interlocutory appeal statute, 28 U.S.C. § 1292(b).

Jurisdiction under § 1292 is proper. On July 30, 2012, the district court issued an order substantially denying the Governor's motion to dismiss. (App. Vol. 2 at 393–465.) The Governor requested that the district court certify its order for interlocutory appeal under § 1292(b), and the court granted the Governor's request on September 21, 2012. (App. Vol. 2 at 565–72.) Seven days later, on September 28 (within § 1292(b)'s ten-day time limit), the Governor petitioned this Court for permission to appeal the trial court's interlocutory order. (App. Vol. 2 at 573–84.) On November 6, 2012, the Court granted the Governor's

[1] Citations to "App." refer to the sequential pages of the two-volume appellant's appendix.

petition and accepted jurisdiction under § 1292(b). (App. Vol. 2 at 611–13.)

Introduction

Colorado's Constitution, like the constitutions of most other states, has long allowed its People to participate in lawmaking not only through elected officials but also directly, through initiatives and referenda. Colo. Const., art. V, § 1. This lawsuit is an attempt to invalidate one particular expression of that power: Colorado's Taxpayer's Bill of Rights, or TABOR, which ensures that voters have a voice in matters of public revenue and debt. *Id.*, art. X, § 20.

Plaintiffs assert that by requiring citizen voting on fiscal issues, the People of Colorado have violated the Guarantee Clause of the United States Constitution, which requires "the United States" to "guarantee to every State in this Union a Republican Form of Government." U.S. Const., art. IV, § 4. In Plaintiffs' view, a state government is "republican" only if the citizens grant their elected representatives exclusive power over taxation and spending. Plaintiffs

seek to embed this vision of republican government in federal constitutional law.

The virtues of direct and representative democracy are subjects for an interesting and perhaps useful public debate. But that debate cannot be resolved here. Plaintiffs do not have standing to invoke federal jurisdiction and, even if they did, their allegations fail to state legal claims entitling them to relief.

Moreover, for more than a century and a half, federal courts have held that Guarantee Clause claims are nonjusticiable political questions. A few court decisions have suggested that a set of extreme circumstances may someday present an opportunity for judicial enforcement of the Clause. But no federal court has ever invalidated a state law as anti-republican, despite legal challenges to many novel government arrangements—including those that vest directly in citizens the power to make law and to veto legislative enactments, as TABOR does.

Plaintiffs hope to sever TABOR from the general power of direct democracy that was embedded in Article V, Section § 1 of the Colorado Constitution over a century ago. Colorado's courts, however, have been

clear: "the initiative and referendum [are] fundamental rights of a republican form of government which the people have reserved unto themselves." *Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974). TABOR "does not give rise . . . to a new substantive voting right," *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994); it is simply an "example of the people exercising their initiative power to enact laws in the specific context of state and local government finance, spending, and taxation." *Zaner v. City of Brighton*, 917 P.2d 280, 284 (Colo. 1996). This Court should not lightly decide to contravene a policy decision made by the People of Colorado and upheld by their courts.

Issues

This appeal presents three issues:

(1) Do Plaintiffs' allegations grant them standing to challenge the structure of Colorado's government?

(2) Does the United States Constitution prohibit a state's citizens from ensuring that they have a direct voice in important matters of public policy, including taxation and spending?

(3) Should this Court depart from 150 years of federal jurisprudence holding that Guarantee Clause claims like Plaintiffs' are nonjusticiable?

Statement of the Case

Plaintiffs filed their original complaint on May 23, 2011. (App. Vol. 1 at 23.) They have since amended the complaint three times—both before and after the Governor filed his motion to dismiss. But because the legal claims and factual allegations have remained constant through the three iterations of the complaint (*compare* App. Vol. 1 at 37, 42–62, 165–87, 466–89), this brief will, for simplicity's sake, cite the most recent.

On August 15, 2011, the Governor moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). (App. Vol. 1 at 63–87.) The Governor asserted various grounds for dismissal, including that Plaintiffs' entire case—which rests on their particular theory of "Republican Form of Government"—is a nonjusticiable political question in the guise of a federal lawsuit. The Governor also argued that Plaintiffs lack standing under Article III and their allegations fail to state a legally cognizable claim for relief. (*See* App. Vol. 1 at 63–87, 194–224, 365–91.)

The district court held oral argument on the motion to dismiss in February 2012 and, shortly afterward, ordered the parties to submit supplemental briefs on the issue of Plaintiffs' standing. (App. Vol. 1 at 297–300.) On July 30, 2012, the district court issued an order dismissing one of Plaintiffs' claims—the claim that TABOR violates their Fourteenth Amendment right to equal protection—but allowing their other four claims to proceed. (App. Vol. 2 at 393–465.)

In the July 30 order, the court concluded that the five Plaintiffs who are current state legislators have standing under Article III. According to the court, taxing and spending are "core" legislative powers; TABOR dilutes those "core" powers and in so doing injures the Legislator-Plaintiffs in their official capacities; and Plaintiffs may therefore invoke federal jurisdiction to remedy this alleged "dilution of power." (App. Vol. 2 at 417.) The court also concluded that the complaint sets forth justiciable claims, not political questions. In so ruling, the court suggested that nothing would prevent the federal judiciary from answering "questions regarding how power is to be divided between the General Assembly and the Colorado electorate." (App. Vol. 2 at 444–45.)

The Governor moved the district court to certify the July 30 order for immediate appellate review under 28 U.S.C. § 1292(b). (App. Vol. 2 at 490–503.) In the meantime, the parties engaged in discovery negotiations. In a joint proposed scheduling order, the parties explained to the district court that the case could involve 160 lay witnesses (including numerous sitting state government officials) and 20 experts, some of whom would undoubtedly be asked to opine on a purely legal question: the proper interpretation of the phrase "Republican Form of Government." (App. Vol. 2 at 555–59.)

On September 21, 2012, the district court certified the July 30 order for interlocutory appeal under § 1292(b). (App. Vol. 2 at 565–72.) The court also stayed the proceedings, noting that an immediate appeal could "obviate the need for the lengthy and costly phases of discovery and trial." (App. Vol. 2 at 571.) This Court accepted the interlocutory appeal on November 6, 2012. (App. Vol. 2 at 611–13.)

Facts

A. Colorado's history of direct democracy and the TABOR Amendment.

The People of Colorado have been directly exercising legislative power for over a century. In 1910—at the height of the American Progressive and Populist movements—they "reserved to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly." Colo. Const. art. V, § 1. Many states across the country experimented with direct democracy in that era, and today twenty-seven states have constitutional provisions similar to Colorado's.[2] Some have since chosen, through the political process, to refine their systems of direct democracy.[3] Colorado is one of them.

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[2] *See* Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 Stan. L. Rev. 569, 573–74 (2001).

[3] *See* Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 Calif. L. Rev. 1191, 1216 (2005) ("In 2002, for instance, Oregon voters overwhelmingly passed Measure 26, the Initiative Integrity Act, which prohibits petitioners from paying signature gatherers on a per signature basis.").

Plaintiffs seek to invalidate one product of voter initiative in Colorado: Article X, Section 20 of the Colorado Constitution, an amendment the voters approved in 1992. TABOR itself, like the century-old amendment reserving direct legislative power to Colorado's citizens, adjusts the delegation of power the People have made to their legislature.

TABOR prohibits the Colorado General Assembly and any local government from increasing tax rates, imposing new taxes, or issuing new public debt without voter approval, and it provides specific procedures for obtaining that approval.[4] Colo. Const. art. X, § 20(3)–(4). As amended by the People in 2005, TABOR also caps public spending, limiting yearly spending fluctuations to the inflation rate, plus the change in the State's population, plus any fluctuations commensurate with "revenue changes approved by voters." *Id.* § 20(7)(a).

TABOR can be revoked or amended through the political process. *See* Colo. Const. art. XIX, § 1; *see also id.* art. X, § 20(1). Over the years, the People have approved various alterations to TABOR or tax and revenue increases under it. In 2005, for example, the People approved

[4] The full text of TABOR is set out in Addendum B to this brief.

the legislature's request to retain as much as $3.75 billion in excess tax revenue. *See* 2005 Colo. Sess. Laws 2323 (codified as amended at Colo. Rev. Stat. § 24-77-103.6 (2011)). And this past election year, voters across the State considered dozens of tax increases in TABOR elections. In Denver alone, voters approved over $100 million in new taxes, as well as a $466 million general-obligation bond, the largest in State history. *See* Jeremy P. Meyer, *Denver Voters Pass Three Tax Proposals*, THE DENVER POST, Nov. 6, 2012.[5]

B. Plaintiffs' lawsuit.

TABOR has been controversial since its inception, and some of its opponents have attempted to repeal or limit it through the political process.[6] The thirty-two[7] Plaintiffs here, however, chose instead to sue

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[5] *Available at* http://www.denverpost.com/breakingnews/ci_21941959.

[6] *See, e.g.*, 2011–2012 Proposed Initiative Measure #26, TABOR Repeal; *see also* John Ingold, *Panel on State Tax System Wants TABOR, Gallagher Amendments Gone*, THE DENVER POST, Oct. 3, 2011 (*available at* http://www.denverpost.com/news/ci_19033154).

[7] The lawsuit was originally filed by thirty-four plaintiffs. One plaintiff was withdrawn in the First Amended Complaint; another died in October 2012, and the parties agreed to remove his name from the caption.

Colorado's Governor in a bid to judicially invalidate Article X, Section 20.

Some of the Plaintiffs are public officials, including five sitting Colorado legislators. They assert that TABOR undermines their interest in a state legislature that can freely "tax and appropriate." (App. Vol. 2 at 474 ¶¶ 43, 44.) But they disclaim any official endorsement of this lawsuit and make clear that they have not been authorized to pursue this litigation in their official capacities.[8] Others claim some connection to public education (a few are teachers or university professors; some are parents of schoolchildren)—this group asserts a "specific interest" in increased spending on public education. (App. Vol. 2 at 474 ¶45.) Still others are simply concerned citizens who claim they have an "interest in assuring that their representatives can discharge the inherently legislative function of taxation and appropriation." (App. Vol. 2 at 474 ¶ 46.)

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[8] According to the complaint, the fact that some Plaintiffs are public officials "does not imply that the governmental bodies have themselves taken any official position regarding this litigation nor that these plaintiffs speak for those governmental bodies." (App. Vol. 2 at 470 ¶ 9.)

Plaintiffs assert five legal claims:

(1) TABOR violates Article IV, Section§ 4 of the United States Constitution, i.e., the Guarantee Clause (App. Vol. 2 at 483 ¶ 82);

(2) TABOR violates the Enabling Act—a federal law from 1875 that authorized Colorado citizens to "form for themselves . . . a state government," 18 Stat. 474—because the Act "require[s] that the state have a Republican Form of Government" (App. Vol. 2 at 483 ¶ 83);

(3) "[u]nder the Supremacy Clause . . . , TABOR must yield to the requirement[] . . . [of] a Republican Form of Government" (App. Vol. 2 at 483 ¶ 84);

(4) these "violations of the requirement for a Republican Form of Government" violate "Equal Protection" (App. Vol. 2 at 484 ¶ 85); and

(5) TABOR "undermines the fundamental nature of the state's Republican Form of Government," and Colorado citizens therefore lacked power to enact TABOR (App. Vol. 2 at 484–85 ¶¶ 87–92).

By their own terms, all of these claims are based on the Guarantee Clause and its requirement of a "Republican Form of Government"[9]:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

Plaintiffs allege that TABOR "is unconstitutional because it deprives the state and its citizens of effective representative democracy, contrary to a Republican Form of Government." (App. Vol. 2 at 470 ¶ 8.) According to Plaintiffs, "[a]n effective legislative branch must have the power to raise and appropriate funds" and TABOR has caused a "slow, inexorable slide into fiscal dysfunction." (App. Vol. 2 at 468 ¶ 3.) Their vision of a "republican" government is one in which the legislature has a free hand to pass tax increases.

Plaintiffs do not allege any actual injuries they have suffered as a result of TABOR—instead, they describe miscellaneous interests they

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[9] As the district court observed, Plaintiffs' Enabling Act claim is "virtually identical" to their Guarantee Clause claims. (App. Vol. 2 at 569.)

seek to vindicate through this lawsuit. Those interests include protecting their vision of "representative democracy" and a "Republican Form of Government" (App. Vol. 2 at 467 ¶ 1); preventing the States' alleged "fiscal dysfunction" (App. Vol. 2 at 468 ¶ 3); maintaining an "effective legislative branch" (App. Vol. 2 at 469 ¶ 7); "securing . . . the legislative core functions of taxation and appropriation" (App. Vol. 2 at 474 ¶ 43); "adequately funding core education responsibilities" (App. Vol. 2 at 474 ¶ 45); preventing the "arrogation of [legislative] power to popular vote of the people" (App. Vol. 2 at 481 ¶ 76); avoiding "a gradual, continuing reduction in the ability of the State to defray the necessary expenses of state government" (App. Vol. 2 at 481–82 ¶ 78); and ensuring that state legislators can increase taxes (App. Vol. 2 at 482 ¶ 80).

Summary of the Argument

Plaintiffs' disagreement with TABOR is undoubtedly sincere. The People of Colorado can disagree in good faith about how the State should make fiscal policy. And they can disagree about whether the General Assembly should have exclusive authority to raise taxes. This

is why TABOR's proponents and opponents should continue to publicly debate their respective views.

But for at least three reasons, the TABOR debate is not one that Plaintiffs can raise—let alone win—in federal court.

First, Plaintiffs have failed to allege facts that support their standing to sue. They allege no concrete, particularized injury to themselves; instead, they claim that Colorado's government, as a general matter, is incompatible with what they believe is "republican." This kind of generalized allegation about the unconstitutionality of state government, however, has never been sufficient to invoke federal jurisdiction.

Second, Plaintiffs fail to present a cognizable legal claim. No line of jurisprudence suggests that direct citizen voting on fiscal matters violates the U.S. Constitution. To the contrary, the Constitution provides states wide flexibility to experiment with novel government arrangements. And although Plaintiffs claim that taxation and spending are "core" legislative functions that the People cannot "arrogate," the Supreme Court has repeatedly held that it is the People—not government officials—who hold ultimate political power.

The People delegate power to their representatives, not the other way around.

Finally, Plaintiffs' legal theories demonstrate why the federal courts have long recognized that debates like this one are generally political and nonjusticiable. Plaintiffs wish to enlist this Court in fine-tuning the allocation of power between the People and their elected representatives. That task is for the People of Colorado, not the federal courts.

Argument

I. Plaintiffs lack Article III and prudential standing: they cannot transform their political objections to TABOR into a federal lawsuit.

The threshold question in this case is whether the Complaint presents facts sufficient to give the federal courts jurisdiction to grant Plaintiffs their requested remedy: a judicial decree restructuring the manner in which Colorado makes fiscal policy. The district court believed that it did have jurisdiction to do so, by virtue of the five Plaintiffs who are state-level legislators and who allege that TABOR has "arrogated" their power to raise taxes and spend public money. In

the district court's analysis, this "arrogation" of legislative power gives these five Plaintiffs standing to sue. (App. Vol. 2 at 419, 430.)

But Plaintiffs' status as state legislators—or, for that matter, as "educators" or concerned citizens—does not give the federal courts jurisdiction. Although Plaintiffs have amended their complaint three times over the past year and a half, none of them, in any capacity, has properly alleged the factual predicate that would entitle them to invoke the power of the federal judiciary.

A. Plaintiffs must establish each element of Article III and prudential standing to proceed with their claims.

The federal courts are not "free-wheeling enforcers of the Constitution and laws"; jurisdictional constraints give them a "properly limited" role in our "democratic society." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006). This is particularly relevant here. Plaintiffs seek to have "the contest between direct democracy and representative democracy" (App. Vol. 2 at 467 ¶ 1) decided by the "unelected, unrepresentative [federal] judiciary." *Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

This Court reviews the jurisdictional question of standing de novo. *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). Because the Governor has raised "a facial challenge to the plaintiff[s'] allegations concerning subject matter jurisdiction," the Court assumes the complaint's allegations are true and views them in a light most favorable to Plaintiffs. *Id.*

Article III standing has three elements, which Plaintiffs bear the burden of establishing: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable court decision. *Id.* at 1204. Asserting generally that the government must act in accordance with the United States Constitution does not meet these requirements. *See, e.g.*, *Allen*, 468 U.S. at 754.

Even if Plaintiffs can satisfy the three elements of Article III standing, they still must clear a prudential hurdle. They cannot enlist this court in deciding "generalized grievances" shared by every citizen of Colorado. *Common Cause of Penn. v. Pennsylvania*, 558 F.3d 249, 258–60 (3d Cir. 2009) (Ebel, J., sitting by designation). Broad complaints about a state's legislative process are inappropriate for judicial

mediation. *Id.* at 262 (allegations that "challenge the legislative process" amount merely to a "generalized, abstract grievance, shared by all . . . citizens").

B. The complaint fails to identify any concrete injury-in-fact caused by TABOR.

The anchor of a lawsuit is the injury the aggrieved party has suffered—the plaintiff's "*personal* stake in the outcome." *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008) (emphasis added). Without a "concrete and particularized" injury, a lawsuit lacks the "adverseness which sharpens the presentation of issues" and "upon which the court so largely depends for illumination." *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)).

At oral argument on the motion to dismiss, Plaintiffs conceded that they have not attempted to allege the particular injuries each of them has suffered: "To be honest, your Honor, we didn't try to explicate among our citizen plaintiffs different sorts of injury that they have suffered." (App. Vol. 2 at 330:11–15.) The complaint reflects this failure. It alleges no injury at all. For example, the complaint does not allege that the voters rejected a revenue measure passed by the General Assembly, which, if enacted, would have led to public spending directly

benefitting Plaintiffs. Indeed, the complaint does not allege that the voters rejected *any* revenue measure passed by the General Assembly.

Instead, Plaintiffs allege "interests" in, among other things, a "representative democracy," "the legislative core functions of taxation and appropriation," and "adequately funding core education responsibilities."[10] (App. Vol. 2 at 470 ¶ 8, 474 ¶ 43, 474 ¶ 45.)

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[10] These allegations paint an overly simplistic picture of how Colorado appropriates its public funds. That process is not conducted by the legislative branch alone, and it is certainly not the province of the small group of legislators who have chosen to join this suit. Before the General Assembly makes appropriations decisions, the Governor first evaluates the plans and projections of each state department and presents "a financial plan encompassing all sources of revenue and expenditure" to the legislative Joint Budget Committee. *See* Colo. Rev. Stat. § 24-37-301. Another executive entity, the Office of State Planning and Budgeting, assists in this process. Colo. Rev. Stat. §§ 24-37-102 and 302. Even after the General Assembly passes an appropriations bill, the executive's role in the process continues. The Governor has veto power over "any item or items of any bill making appropriations of money." Colo. Const. art. IV, § 12. And the legislature cannot "interfere with the executive's power to administer appropriated funds." *Anderson v. Lamm*, 579 P.2d 620, 623–24 (Colo. 1978). In asserting that they have suffered an injury to the "core" legislative function of appropriation, Plaintiffs overlook the critical responsibilities of the executive branch and ignore that the executive is also subject to the constraints of TABOR. Indeed, the executive's status as Defendant in this case underscores the impropriety of Plaintiffs' decision to proceed in this suit without the endorsement of the legislative branch whose interests they purport to represent.

In other words, Plaintiffs allege that Colorado's government ought to function differently and the voting public ought to endorse different fiscal policy choices. *Cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 473 (1982) ("Were the federal courts merely publicly funded forums for the ventilation of public grievances . . . the concept of 'standing' would be quite unnecessary."). Plaintiffs see no flaw in these loose allegations. They assume they can establish the foundational requirement of an injury-in-fact later, "in a hearing on the merits." (App. Vol. 2 at 330:15–16.)

There are two problems with Plaintiffs' approach. First, it ignores that Plaintiffs, not the Governor or the courts, bear the burden of asserting an injury-in-fact. *See, e.g.*, *Rector v. City & Cnty. of Denver*, 348 F.3d 935, 942 (10th Cir. 2003) ("[T]he party invoking federal jurisdiction bears the burden [of establishing standing]."). A defendant need not tilt at windmills; he is not required to imagine what injuries the complaint's allegations might encompass and argue against hypotheticals. If the complaint fails to allege a concrete, particularized injury-in-fact, it fails to provide a basis for federal jurisdiction. *Alvarado*

v. KOB-TV, LLC, 493 F.3d 1210, 1214 n.1 (10th Cir. 2007) ("Article III standing requires that a plaintiff *allege an injury-in-fact* . . . ." (emphasis added)).

Second, Plaintiffs ignore that standing must be satisfied at all stages of litigation, including the beginning. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154–55 (10th Cir. 2005) ("Standing is determined as of the time the action is brought."); *see also Alvarado*, 493 F.3d at 1214 (preventing two plaintiffs from appealing the dismissal of their claims because they failed to allege an injury-in-fact in the complaint). Plaintiffs have repeatedly argued that whether they have standing is "inextricably intertwined" with the merits of this case—that is, they claim that their standing depends on whether TABOR is anti-republican and therefore violates federal law. This, they believe, allows them to defer their obligation to establish an injury-in-fact. (App. Vol. 2 at 360.)

But a law's alleged illegality is not a substitute for an injury. "To prevail on the merits, Plaintiffs must prove that Defendants have acted in contravention of the law. *To reach the merits*, however, Plaintiffs must first identify a concrete injury . . . ." *Babbitt*, 137 F.3d at 1205

(emphasis added). "The only injury plaintiffs allege is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

C. The allegations in the complaint do not establish causation or redressability.

The complaint's failure to allege an injury-in-fact is not its only flaw, however: it also fails to allege causation or redressability. Plaintiffs have not asserted any facts to suggest that eliminating TABOR would arrest Colorado's "slow, inexorable slide into fiscal dysfunction" or cause the State to begin "adequately funding core education responsibilities." (App. Vol. 2 at 468 ¶ 3, 474 ¶ 43.) There is no reason to believe, based on the allegations in the complaint, that the General Assembly as a whole, in the absence of TABOR, would behave the way Plaintiffs would prefer. Plaintiffs' complaint is therefore "'conjectural or hypothetical' in that it depends on how legislators [and the People might] respond" if TABOR were judicially repealed. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006); *cf. Habecker v. Town of Estes Park*, 518 F.3d 1217, 1224–26 (10th Cir. 2008) (refusing

to make an "inferential leap regarding the motivations of individual voters" and finding a lack of causation).

Had Plaintiffs alleged that (1) the General Assembly passed measures that would have successfully resolved Colorado's alleged "fiscal dysfunction," and (2) the Governor signed them, but (3) the People rejected them at the polls, this causal chain might have sufficed to establish standing.[11] This Court cannot, however, rely on "speculative inferences . . . to connect [a plaintiff's] injury to the challenged action." *Habecker*, 518 F.3d at 1225. Here, Plaintiffs have failed even to speculate. They allege no injury, no causation, and no redressability. They have failed to bear their burden of establishing the three elements of Article III standing and their case must be dismissed.

D. Plaintiffs' status as state legislators does not excuse them from alleging a legally cognizable injury.

The district court ruled that it had standing based on the allegations of the Legislator-Plaintiffs—the five Plaintiffs who are

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[11] But even in those circumstances, Plaintiffs would still be required to demonstrate a *personal* stake in the particular legislation. *See Common Cause of Penn.*, 558 F.3d at 267 ("[Plaintiff] has failed to allege that the manner in which the General Assembly enacted Act 44 *actually and concretely* injured him *in particular*." (emphasis added)).

current members of the Colorado General Assembly.

(App. Vol. 2 at 397.) These Plaintiffs allege that their power to vote on taxing measures has been "arrogated" by the People of Colorado. (App. Vol. 2 at 481 ¶ 76.) This allegation, according to the district court, is sufficient to create standing. (App. Vol. 2 at 430, 434.)

Plaintiffs are not the only litigants who have attempted to enlist the federal judiciary in reforming representative government. Recently, a group of concerned citizens and federal legislators sought to invalidate the Cloture Rule, which requires a supermajority of the United States Senate to end a filibuster. *Common Cause v. Biden*, No. 12-cv-775, 2012 U.S. Dist. LEXIS 180358 (D.D.C. Dec. 21, 2012).[12]

The allegations in *Common Cause* are similar to those Plaintiffs have raised here: according to the *Common Cause* plaintiffs, the Cloture Rule displaces "majority rule" and violates principles of representative government, including "equal representation of each state in the

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[12] As here, court intervention would have been imprudent. The Senate recently enacted changes to the rules governing the filibuster, and some legislators continue to push for further reforms. *See* Alan Fram, *Senate OKs Modest Restrictions on Filibusters*, THE DENVER POST, Jan. 24, 2013 (*available at* http://www.denverpost.com/ci_22441288.)

Senate." *Id.* at *12–13. But neither the concerned citizens nor the legislators in that case had Article III standing. The citizens' allegation that two particular laws "would have passed but for the Cloture Rule" was "hypothetical, rather than concrete." *Id.* at *30–33 (emphasis omitted). And although the legislators—specifically, four House Members—"voted for two specific bills" that "should have been enacted," they again failed to allege an injury-in-fact. *Id.* at *43–45. While the Cloture Rule arguably prevented these bills from passing, the House Members' votes had not been "completely nullified." *Id.* at *42–45.

The Legislator-Plaintiffs in this case are even further from the mark—they fail to identify *any* "specific legislative act" they have been prevented from passing. *See Raines v. Byrd*, 521 U.S. 811, 823 (1997) (citing *Coleman v. Miller*, 307 U.S. 433, 446 (1939)). Beyond broadly asserting that TABOR deprives them of the "legislative core functions of taxation and appropriation" (App. Vol. 2 at 474 ¶ 43), the Legislator-Plaintiffs fail to allege that TABOR has caused them any particular, individualized injury. "Their claim is that [TABOR] causes a type of institutional injury (the diminution of legislative power), which

necessarily damages all Members of [the General Assembly] equally." *Raines*, 521 U.S. at 821.

This "wholly abstract and widely dispersed" "institutional injury" is particularly problematic because, as Plaintiffs admit in the complaint (App. Vol. 2 at 470 ¶ 9), none of them has authority from the General Assembly to challenge the constitutionality of TABOR—or to speak for the General Assembly as a whole. *See Raines*, 521 U.S. at 829 & n.10 (noting the "importance" of this fact and citing cases illustrating that individual legislators cannot represent their legislative bodies). In effect, they are suing as concerned citizens who would prefer, as a policy matter, that the state legislature be vested with additional power to pass tax legislation. That type of grievance is not an Article III case or controversy.

E. Plaintiffs' generalized grievances fall below the threshold of prudential standing.

Even if Plaintiffs can clear the hurdle of Article III standing, they still fail to present a case appropriate for consideration by a federal court. Prudential limitations on federal jurisdiction, which ensure that courts avoid deciding "abstract questions of wide public significance,"

bar plaintiffs from pursuing their claims. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

The complaint alleges that TABOR "deprives the state and its citizens"—that is, the *entire* state and *all* of its citizens—"of effective representative democracy." (App. Vol. 2 at 470 ¶ 8.) As the district court observed, "[t]his litigation [if it proceeds,] will quite literally affect every individual and corporate entity in the State of Colorado." (App. Vol. 2 at 570.) By Plaintiffs' own admission, then, the deprivation TABOR has allegedly inflicted is "shared in substantially equal measure" by everyone in Colorado. *See Citizens' Comm. v. U.S. Forest Serv.*, 297 F.3d 1012, 1026 (10th Cir. 2002) (quoting *Warth v. Seldon*, 422 U.S. 490, 499 (1975)). The federal courts are the wrong place to settle such a widespread dispute. *See Valley Forge*, 454 U.S. at 487 ("The federal courts were simply not constituted as ombudsmen of the general welfare.").

Plaintiffs made clear to the district court that they do not "challenge the ability of Colorado citizens to use the process of initiative (or referendum) to enact laws and amendments to the state constitution, and many other changes that might rebalance the three

branches of state government." (App. Vol. 1 at 139.) Instead of using this political process, however, Plaintiffs have shoehorned their ideological opposition to TABOR into a federal lawsuit. Their claims "fall below the prudential standing threshold" and must be dismissed. *Citizens' Comm.*, 297 F.3d at 1026.

II. The complaint does not state a claim for relief: the U.S. Constitution does not prohibit the People of Colorado from reserving the right to vote on particular matters, including fiscal matters.

TABOR is one of the many innovations state citizens have adopted through the centuries to make their governments more responsive to the electorate.[13] The federal courts have routinely refused to stand in the way of this process of innovation. The point of republican government, after all, is that the People govern themselves. *Pacific*

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[13] Plaintiffs try hard to characterize TABOR as unique. They argued below that TABOR amounts to "a radical new form of government" and "has no parallel in the corpus of initiated laws in the United States." (App. Vol. 1 at 110.) The connection between this hyperbole and the legal dispute here is foggy; the Guarantee Clause does not guarantee uniformity among the states or otherwise undo the basic, foundational premise of federalism. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

States Tel. & Tel. v. Oregon, 223 U.S. 118, 145 (1912) ("The ultimate power of sovereignty is in the people, and they . . . must have a right to change their constitution."). And the point of "Our Federalism," as Justice Black called it, is that the People of each state are governed by a system of their own choosing, without undue interference from the federal courts. *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

Colorado's government is hardly the sort of tyranny the United States committed to prevent under the Guarantee Clause. But even if Plaintiffs could establish that TABOR so radically transforms Colorado's government as to make it non-republican, they cannot show that a federal suit against the Governor is the proper vehicle to enforce the Guarantee Clause or the Enabling Act.

A. To survive a motion to dismiss, Plaintiffs must show that their allegations plausibly state a claim for relief.

If it reaches the merits of the case, this Court would review de novo the district court's ruling on the Governor's motion to dismiss.[14] *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). "[T]o withstand a motion to dismiss, a complaint must have enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In conducting this analysis, this Court must "disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Id.*

Here, the task under Rule 12(b)(6) is straightforward. Plaintiffs argue that a legal provision (TABOR) contradicts a legal standard (the

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[14] The Governor argued below that Plaintiffs have failed to state a claim upon which relief may be granted. (App. Vol. 1 at 63–66.) The district court agreed, but only with respect to Plaintiffs' equal protection claim. (App. Vol. 2 at 462.) The Governor maintains on appeal that this entire case—not just the Equal Protection claim—should be dismissed for failure to state a claim.

requirement of a "republican form of government"). This Court need only measure one against the other.

B. The boundaries of a "Republican Form of Government" are unclear but states have ample room to innovate with provisions like TABOR.

The merits of Plaintiffs' claims reside largely in uncharted waters. The Guarantee Clause itself provides little guidance.[15] It lacks "criteria by which a court could determine which form of government was republican": "No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated." *Baker v. Carr*, 369 U.S. 186, 222 & n.48 (1962) (quoting *Minor v. Happersett*, 88 U.S. 162, 175 (1875)).

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[15] Most commentators agree that the historical evidence does not offer a settled definition of "republican form of government." *See, e.g.*, Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 Stan. L. Rev 569, 575–76 (2001) ("[T]he Clause is subject to varying interpretations."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988) ("[E]ven today, the outer boundaries of the guarantee clause remain murky."); *cf.* Akhil Reed Amar, *Guaranteeing a Republican Form of Government: The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 752 (1994) ("The concept of Republican Government, Indeterminists would argue, is utterly vacuous.").

Not coincidentally, the federal courts have, for over 150 years, "consistently held that a challenge to state action based on the Guarantee Clause presents no justiciable question." *Id.* at 224; *see also Luther v. Borden*, 48 U.S. 1 (1849). Consequently, few court decisions explain the contours of a "Republican Form of Government." The Supreme Court has suggested that the "extreme limits" of the Clause might be an occasion for federal court intervention, without explaining what those "extreme limits" might be. *Baker*, 369 U.S. at 222 n.48; *see also New York v. United States*, 505 U.S. 144, 185–86 (1992) ("indulging the assumption" that a case under the Guarantee Clause might be justiciable). But whatever the boundaries of the Guarantee Clause, Colorado's government, including TABOR, falls within them.

In the American system, the basic unit of governmental power is the individual voter. *Pac. States*, 223 U.S. at 146. From there, a great deal of innovation is possible: voters may "delegate [their power] to representative instruments which they create." *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 672 (1976). Contrary to what Plaintiffs believe, nothing in the United States Constitution requires voters to exclusively delegate some set of pre-defined powers to the

various branches of government: "In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Id.*

For example, voters can—just as Colorado voters did when they enacted TABOR—subject a subset of legislative decisions to popular veto. *Id.* at 670–71; *see also James v. Valtierra*, 402 U.S. 137, 143 (1971) (upholding a state constitutional provision mandating voter approval of public housing projects and holding that "[t]his procedure for democratic decision-making" merely "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds"). According to the Supreme Court, a popular veto is not a "delegation" of power from the legislature to the People. Quite the opposite: "Under our constitutional assumptions, all power derives *from the people*, who can delegate it to representative instruments which they create." *Eastlake*, 426 U.S. at 672 (emphasis added). Here, Plaintiffs rely on the premise that the People cannot "arrogate" legislative power to themselves. (App. Vol. 1 at 143, App. Vol. 2 at 467 ¶ 1.) That premise—and hence Plaintiffs' entire case—is baseless.

The People can also grant power normally exercised by the legislature to other institutions. A state's governor can wield a version of the line-item veto, which may include the ability "to delete [from a particular bill] phrases, words (such as 'not')—even individual letters and digits." *Risser v. Thompson*, 930 F.2d 549, 553 (7th Cir. 1991). Although this power would enable the governor to "change the meaning of those provisions" and effectively make new laws, *id.*—or, as Plaintiffs would argue, enable the governor to "arrogate" legislative power (App. Vol. 1 at 143; App. Vol. 2 at 467 ¶ 1)—nothing in the United States Constitution precludes this arrangement. The Guarantee Clause is "flexible": the "states [can] 'choose to substitute other republican forms' for those existing when the Constitution was enacted." *Risser*, 930 F.2d at 550. The fact that the federal government could not adopt a similar arrangement is immaterial to whether the *states* may do so. *Cf. Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that the federal Line Item Veto Act violated the federal Presentment Clause).

The voters can also limit legislative discretion by mandating that legislators adhere to specific policy standards. *See Brown v. Sec'y of State of Fla.*, 668 F.3d 1271 (11th Cir. 2012). They may do so even in

the context of regulating elections for national office, which the United States Constitution delegates specifically to "the Legislature" of "each State." U.S. Const. art. I, § 4, cl. 1. This is because the Constitution's reference to "Legislature" is not "only to a state's legislative body." It refers to "the entire lawmaking function of the state"—including the "people's ability to flatly reject . . . legislation" and "the people's lawfully prescribed initiative power." *Brown*, 668 F.3d at 1278–79.

A "republican" government is even flexible enough to allow states to lodge legislative power in the judiciary. Long ago, in *Forsyth v. Hammond*, the Supreme Court upheld a state law that empowered the state's courts to set the territorial boundaries of municipal corporations, even though that power is "purely a legislative function." 166 U.S. 506, 519 (1897). "[T]here is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature." *Id.* A "Republican Form of Government," the Court held, is not so rigid that it requires a legislature to exercise what Plaintiffs here call "core" legislative functions. (App. Vol. 1 at 109.)

To the extent the federal courts have suggested where the "extreme limits" of a "Republican Form of Government" lie, *Baker*, 369 U.S. at 222 & n.48, those limits do not implicate Colorado's government. A republican government might not tolerate:

- "a monarchy," *Largess v. Supreme Judicial Ct.*, 373 F.3d 219, 225 (1st Cir. 2004);
- "a dictator," *Risser*, 930 F.2d at 553; or
- permanent martial law. *Luther*, 48 U.S. at 45; *see also Deer Park Indep. Sch. Dist. v. Harris Cnty. Appraisal Dist.*, 132 F.3d 1095, 1099–1100 (5th Cir. 1999).

Colorado's government is none of these. Nor does it implicate the Supreme Court's most recent Guarantee Clause guidance. *See New York*, 505 U.S. at 185 (a state as a whole must, in the face of federal action, "retain the ability to set [its] legislative agenda[ ]" and "state government officials [must] remain accountable to the local electorate").

Given the contours of a constitutionally "republican" government, the district court was wrong to assume it could make fine distinctions about "how power is to be divided between the General Assembly and the Colorado electorate." (App. Vol. 2 at 444–45.) "[N[othing in the Constitution prescribes the allocation of powers within state

governments." *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 950 (7th Cir. 2012) (citations omitted). "It matters not whether federal courts think [a particular form of government is] wise or desirable . . . . [State citizens] are largely free to structure their system of governance as they choose, and we respect their choice." *Perry v. Brown*, 671 F.3d 1052, 1073 (9th Cir. 2012), *cert. granted on other grounds*, 2012 U.S. LEXIS 9416 (Dec. 7, 2012). Plaintiffs have stated no legal claim on which a federal court could grant relief.

C. The Guarantee Clause is a promise from the federal government to the states; it cannot be enforced against the Governor.

This case has the wrong parties on both sides of the caption. The Guarantee Clause and the Enabling Act create rights and obligations between the United States and the State of Colorado. Neither of these laws suggests that individual members of the public may obtain judicial relief against Colorado or its Governor.

The First Circuit has observed that "the Guarantee Clause makes the guarantee of a republican form of government *to the states*; the bare language of the Clause does not directly confer any rights on individuals vis-à-vis the states." *Largess*, 373 F.3d at 224 n.5 (emphasis in original);

see also Helvering v. Herhardt, 304 U.S. 405, 414 (1938) ("[T]he states were in existence as such entities when the Constitution was adopted; [and] the Constitution Guaranteed *to them* a Republican form of government and undertook to *protect them* from invasion and domestic violence . . . ." (emphasis added)). Plaintiffs assume that they, and any other disgruntled Coloradan, are empowered to demand that the federal judiciary police the structure of Colorado's government through litigation. Nothing suggests that the Guarantee Clause or Enabling Act gives them that power.

Moreover, the guarantee of a "republican government" is made by the United States, not by any individual state government: "*The United States* shall guarantee to every State in this Union a Republican Form of Government . . . ." Neither the Guarantee Clause nor the Enabling Act imposes an obligation on Colorado or its Governor. *Cf. New York*, 505 U.S. 185–86 ("indulging in the presumption" that a *state* may be able to sue *the federal government* under the Guarantee Clause). One federal court has even said that it would be "impudent" for "the federal judiciary to allow the Clause to be used to challenge a state's own

lawmaking." *Schulz v. New York State Exec.*, 960 F. Supp. 568, 576 (N.D.N.Y. 1997).

Plaintiffs have not yet attempted to sue the United States or the federal executive branch. Perhaps they could do so in an "extreme" case. *Cf. Baker*, 369 U.S. at 222 n.48. A lawsuit of that kind would be as equally unprecedented as this one, but it would in the very least comport more closely with the text of the Guarantee Clause and Enabling Act than do the claims raised here.

III. Plaintiffs' case turns entirely on nonjusticiable political questions.

The district court believed it need not decide whether the political question doctrine bars Plaintiffs' claims. Instead, the court stated that it "may be able to resolve the case on the merits . . . rather than having to address this difficult constitutional question."
(App. Vol. 2 at 443 n.33.) And although it could not identify any "judicially discoverable and manageable standards for evaluating" Plaintiffs' claims, it believed it could resolve this case simply by "interpret[ing] the Constitution." (App. Vol. 2 at 449–50.)

The district court's preference for delaying an ultimate ruling in this case was well-intentioned but legally unsupported. Resolving the

issues presented here will not grow easier with time. As explained above, federal courts have been asked to interpret the meaning of "Republican Form of Government" for 150 years. In that time, they have only been able to sketch the faintest boundaries of its definition. And they have never used the phrase as a basis for invalidating a state law. Here, the only issues of substance are policy questions no federal court should answer.

A. The Court reviews de novo whether Plaintiffs' claims are political questions.

This Court reviews de novo "[w]hether the political question doctrine restricts [its] review of this matter." *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1030–31 (10th Cir. 2001). The inquiry is governed by the six-factor test of *Baker v. Carr*, which requires the Court to ask whether

(1) the text of the constitutional provision commits the controversy to another political branch;

(2) the Court lacks judicially discoverable and manageable standards for resolving the case;

(3) the resolution of the case hinges on the kind of policy determinations courts should avoid;

(4) a judicial decision would express a lack of respect to a coordinate branch of government;

(5) the Court should adhere to a political decision that has already been made; and

(6) a judicial ruling would risk the embarrassment of multifarious pronouncements on one question by various government departments.

Schroder v. Bush, 263 F.3d 1169, 1174 (10th Cir. 2001) (quoting *Baker*, 369 U.S. at 217). This inquiry must be conducted on a case-by-case basis, with specific reference to the facts alleged and the relief Plaintiffs have requested. *Id.*; *see also id.* at 1175.

B. No federal court has ever invalidated any law or government act for being non-republican.

Many litigants have attempted to convince federal courts to adopt their view of a "Republican Form of Government." Listing every case that has dismissed these claims for lack of justiciability would consume far too many words.[16] The converse, however, is easy. After exhaustive

[16] A few of the more recent cases include *Adar v. Smith*, 639 F.3d 146, 172 n.26 (5th Cir. 2011); *Van Allen v. Cuomo*, 621 F.3d 244, 249 n.5 (2d Cir. 2010); *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001); and *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 757 (E.D. Va. 2011).

research, counsel for the Governor has been unable to locate even a single federal case invalidating a law or other government action for being non-republican. Despite several rounds of briefing below, Plaintiffs have likewise failed to locate such a case. The best Plaintiffs could find are decisions assuming that legal claims based on the requirement of a "Republican Form of Government" *might* be justiciable, while also ruling that the claims failed to present examples of non-republican governments. *See, e.g.*, *New York*, 505 U.S. at 185–86; *Largess*, 373 F.3d at 225–26, 228–29.

Even when faced with an issue identical to the one presented here, the Supreme Court declined to intervene. In *Pacific States*, the petitioner argued, just as Plaintiffs do here, that a state's legislature must retain taxation authority in order to maintain a republican form of government. (*See* Addendum C at C-5.)[17] Oregon's voters had adopted a constitutional provision that, like TABOR, required voter approval for tax increases. (*Id.* at C-2–C-3 ("[N]o bill regulating taxation or exemption throughout the State shall become a law until *approved by*

[17] Excerpts from petitioner's briefs in *Pacific States* are attached as Addendum C.

the people of the State at a regular general election . . . ." (emphasis added)). The *Pacific States* petitioners asserted that "[i]t is a political axiom that the taxing power must be exercised by the legislative arm of the Government." (*Id*. at C–5.) This argument—strikingly similar to Plaintiffs' argument that the People cannot "arrogate" legislative taxing power—did not persuade the Supreme Court that Oregon had become non-republican or that petitioners' claims were justiciable.[18] *See Pac. States*, 223 U.S. at 151.

Plaintiffs have responded to this lack of precedent in two ways.

First, they have argued that because the Colorado Enabling Act contains language identical to that found in the Guarantee Clause, the Act has the power to transform what would be a political question into a justiciable controversy. (App. Vol. 1 at 122–26.) If that were true, the political question doctrine would be only a matter of form—not a matter of judicial power. *See Schroder*, 263 F.3d at 1175 ("Article III . . .

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[18] The Supreme Court's decision to leave the issue to the political process proved wise. The Oregon legislature later proposed an amendment to remove the provision requiring popular approval of tax increases, and the People adopted the amendment in a subsequent election. *See* Or. Const., art. IX, § 1a (Amendment proposed by S.J.R. 10, 1911, and adopted by the People Nov. 5, 1912).

preclud[es] the sort of judicial oversight of the political branches in which Appellants invite us to engage.").

In any event, there is no support for the argument. The mere fact that Plaintiffs have pleaded a statutory claim that is "virtually identical" (App. Vol. 2 at 569) to their constitutional claims does not alone create a justiciable controversy. *See Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009) ("We do not disagree with Appellants' assertion that we *could* resolve this case through . . . statutory construction; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task." (emphasis in original; citation omitted)); *see also Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951 (5th Cir. 2011) (dismissing claims brought under the Sherman and Clayton Acts as nonjusticiable without suggesting that justiciability concerns were obviated because the claims were statutory); *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (upholding the dismissal of claims based upon both the War Powers Clause of the Constitution and the statutory War Powers Resolution).

Second, Plaintiffs have asserted that the political question doctrine must be applied on a case-by-case basis and there can be no per se rule of nonjusticiability. (App. Vol. 1 at 133–35.) The Governor agrees; there is no need for a per se rule. But nor can Plaintiffs ignore that for 150 years, federal courts have routinely concluded that the phrase "Republican Form of Government" fails to provide "criteria by which a court could determine which form of government was republican." *Baker*, 369 U.S. at 222 n.48 (quoting *Minor*, 88 U.S. 175); *see also Luther*, 48 U.S. at 43. And if not decisive, it is at least *telling* that claims attacking direct citizen lawmaking have never led to the invalidation of any state law. *See, e.g.*, *Pac. States*, 223 U.S. at 146; *Brown*, 668 F.3d at 1278–79. Plaintiffs may wish the Supreme Court to "reconsider its Guarantee Clause jurisprudence," as at least one federal judge has urged the Court to do. *See Kidwell v. City of Union*, 462 F.3d 620, 635 n.5 (6th Cir. 2006) (Martin, J., dissenting). The Court has so far declined to do so, however, *see, e.g.*, *id.*, *cert. denied*, 2007 U.S. LEXIS 5197 (U.S. May 14, 2007),[19] and Plaintiffs' case must be decided under current law.

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[19] In the *Kidwell* petition for certiorari, the petitioner argued that the

C. Plaintiffs' claims would embroil the court in endless political questions inappropriate for judicial resolution.

"[T]his case presents textbook examples of political questions." *Schroder*, 263 F.3d at 1174. Every one of Plaintiffs' claims seeks a judicial determination that the People of Colorado, in enacting TABOR, so altered Colorado's government as to make it non-republican. (App. Vol. 2 at 483–85 ¶¶ 82–92.) As explained above, a court order of that kind would be entirely without precedent. It would also invite judicial scrutiny of questions that, for good reason, have consistently been left to the political process. Each of the *Baker* factors precludes judicial review of Plaintiffs' claims.

The first *Baker* test. As an initial matter, *Baker* reaffirmed that in most cases, "if any department of the United States [is] empowered by the Guaranty Clause to resolve [whether a state government is republican in form], it [is] not the judiciary." 369 U.S. at 220; *see also id.* at 222 n.48. The Clause itself says that the "United States" is the entity

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Supreme Court "has essentially read the Guarantee Clause out of the Constitution by holding that it is non-justiciable." 2007 U.S. S. Ct. Briefs LEXIS 986. This did not prompt the Court to hear the petitioner's claims.

that makes the guarantee, and the Supreme Court has interpreted this to mean the clause is committed to the political branches, except, perhaps, in "extreme" cases. *See id.* at 220–22 & n.48 (citing *Luther*, 48 U.S. at 45). The Enabling Act, meanwhile, is a command by Congress to the members of Colorado's founding constitutional convention. 18 Stat. 474, § 4. The Act's language does not suggest that a group of plaintiffs, dissatisfied with the way their fellow citizens have chosen to structure their government, can enforce the Act against their state's Governor in federal court. Plaintiffs' claims therefore fail the first *Baker* test.

The second *Baker* test. *Baker* also reaffirmed that "the Guaranty Clause is not a repository of judicially manageable standards" and is not "the source of a constitutional standard for invalidating state action." 369 U.S. at 223. Below, neither Plaintiffs nor the district court identified any judicial standards which might be used to measure the "republican-ness" of Colorado's government. Instead, both believed that the standards could be formulated later. (*See, e.g.*, App. Vol. 2 at 449.) But the political question doctrine applies at the outset of a case, before a court has become embroiled in a political fight. *See Schroder*, 263 F. 3d 1169 (relying on the plaintiffs' initial pleadings to guide the *Baker*

inquiry and affirming the dismissal of the complaint). Because Plaintiffs cannot satisfy the second *Baker* test at the outset of litigation, their case must be dismissed.

The third *Baker* test. And even if Plaintiffs could identify standards that a court might use to dispose of this case, those standards would not be "judicial." They would be pure "policy determinations," violating the third *Baker* test. *Baker*, 369 U.S. at 226.

For example, Plaintiffs have argued that taxation and appropriation are "core" legislative functions. (App. Vol. 1 at 109.) But Plaintiffs' fellow citizens may have different views about the legislature's most important responsibilities. They may believe that the power to enact civil rights laws is "core." Or they may prefer that the legislature be vested with exclusive power to make education, transportation, or energy policy.[20] Attempting to list each policymaking

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[20] The People have demonstrated a willingness to identify the policy issues they wish to leave to the legislature and those they wish to shape directly. They recently demonstrated that they prefer the General Assembly not have sole power to determine what conduct is criminal as a matter of state law. In the last twelve years, two initiated provisions of the Colorado Constitution have directly interfered with the legislature's power to criminalize the use of marijuana. *See* Colo. Const.

"function" of a legislature and to decide which ones are "core" is an inherently political task: it involves a subjective ordering of public priorities. Voters are better suited than courts to makes those distinctions; that is why, "[u]nder our constitutional assumptions, all power derives *from the people*, who can delegate it to representative instruments which they create." *Eastlake*, 426 U.S. at 672 (emphasis added).

Plaintiffs also argue that legislative power over "core" functions must not be "arrogated." (App. Vol. 2 at 467 ¶ 1, 474 ¶¶ 43, 45.) But what amounts to "arrogation"? Federal court decisions over the past century and a half indicate that the United States Constitution encourages innovation in state government structure. Judges can be vested with legislative power. *Forsyth*, 166 U.S. at 519. Governors can be empowered to make law. *Risser*, 930 F.2d at 550. The People may exercise the power of veto. *James*, 402 U.S. at 143; *Eastlake*, 426 U.S. at 670–71. These cases suggest that TABOR does not cross the boundary

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art. XVIII, § 14; *see also* Colo. Const. art. XXVIII, § 16 (enacted Nov. 6, 2012; certified by the Governor Dec. 10, 2012).

from innovation to arrogation, if that boundary exists.[21] If all political power derives from the People, a federal court cannot forbid them from reserving to themselves certain matters of public policy.

Yet in Plaintiffs' view, it is possible for a state to become too democratic. (*See* App. Vol. 2 at 467 ¶ 1 ("However attractive it might have seemed, [TABOR's] assertion of direct democracy is not permitted . . . .").) Courts have rejected that argument more than once in the last hundred years. "[I]t makes no difference whether federal courts think it a good idea" for states to permit direct citizen lawmaking. *Perry*, 671 F.3d at 1073 (citing *Pac. States*, 223 U.S. 118). Courts are not equipped to decide when the People have implemented "too much" democracy, and they should not be asked to.

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[21] Plaintiffs believe it is TABOR's direct democracy provisions that violate the Guarantee Clause. (App. Vol. 2 at 467 ¶ 1.) Their theory would therefore leave intact other strict limits on legislative taxation power, such as California's supermajority requirement. *See* Cal. Const. art. 13A, § 3 (requiring a tax increase to "be imposed by an act passed by not less than *two-thirds of all members elected to each of the two houses of the Legislature* . . . ." (emphasis added)). Plaintiffs ask this Court to draw an arbitrary political distinction between TABOR and efforts by the citizens of many other states to restrain government spending.

The remaining *Baker* tests. Plaintiffs' case also founders on the final three *Baker* tests, which require the Court to defer to political decisions already made by coordinate branches of government and to avoid opining on questions that might be answered differently by other government departments. The Supreme Court has repeatedly refused to entertain constitutional challenges to direct democracy. *See, e.g.*, *Ohio ex rel Davis v. Hildebrant*, 241 U.S. 565, 569–70 (1961) (rejecting the view that direct democracy is "a virus which destroys that [legislative] power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form"). Direct democracy has been a fixture of American state government throughout the nation's history, and TABOR is simply an extension of it. According to the Colorado Supreme Court, TABOR "does not give rise . . . to a new substantive voting right." *Bickel*, 885 P.2d at 226. "Since 1910 the citizens of Colorado have reserved to themselves 'the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly.'" *Id.* (citing Colo. Const. art. V, § 1). TABOR "is not a grant of new powers or rights to the people, but is more properly viewed as a

limitation on the power of the people's elected representatives." *Id.* Plaintiffs ask this Court to disrespect the political judgments that the People of Colorado made long ago.

Finally, even if Plaintiffs are correct that Colorado's government became non-republican in 1992 with the passage of TABOR, the question of remedy—another political question—would remain. Invalidating TABOR, according to Plaintiffs, would not fix the ultimate problem: Colorado suffers from "fiscal dysfunction" and cannot "adequately fund[its] core education responsibilities." (App. Vol. 2 at 468 ¶ 1, 474 ¶ 45.) To restore Plaintiffs' vision of a republican government, a court would be required to invalidate "not only . . . the particular [provision] which is before [the court], but . . . every other [law] passed in [the state] since the adoption" of TABOR. *Pacific States*, 223 U.S. at 141.

The federal courts are not equipped to answer these political questions. But Plaintiffs do have other means of vindicating the "interests" they identify in their complaint. "[T]here is a political remedy: amend the [Colorado] constitution." *Risser*, 930 F.2d at 555. Plaintiffs may think this remedy is too slow, and they may believe they

lack widespread voter support for their views. But those considerations, as the First Circuit observed, are "also the result of a republican form of government in action." *Largess*, 373 F.3d at 229.

It would be a gross and unnecessary expansion of judicial power for the federal courts to restructure Colorado's government at the request of thirty-two litigants. Plaintiffs must obtain the relief they seek through the political channels the People of their State—who, indeed, are some of the Plaintiffs' constituents—have created.

Conclusion

The federal judiciary should be wary—as it has always been—when litigants, "under the guise of a federal Guarantee Clause question," attempt to interfere "with the very form of government that the people of [a state] have chosen for themselves." *Largess*, 373 F.3d at 229.

Whether TABOR is a good idea or a bad one is an important question, and Plaintiffs should continue to debate and argue it. They should do so, however, in the proper political forum. The People of

Colorado chose to enact TABOR, and it is they, not a federal judge, who must repeal it.

The district court's July 30 order should be affirmed to the extent it dismissed Plaintiffs' equal protection claims. It should be reversed in all other respects and the case should be remanded for dismissal.

The Governor respectfully requests oral argument to address these important constitutional issues.

Respectfully submitted this 1st day of February, 2013.

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s/ Daniel D. Domenico

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This is to certify that on this 1st day of February, 2013, I have provided service of the Governor's Opening Brief through the federal ECF filing protocol and by e-mailing to the following attorneys and/or their law firms:

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