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 Reply Brief

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I. The Answer Brief and *amicus* briefs highlight that this suit is an attempt to have the federal judiciary take sides in a political debate.

TABOR eviscerates [the Legislator-Plaintiffs'] ability to enact or raise taxes. . . . TABOR also nullifies the legislator-plaintiffs' ability to serve their constituents	*TABOR [is] an important feature of constitutional government Colorado, which helps to ensure that the General Assembly governs responsibly and adheres to its duty to protect the rights of all Coloradans.*
—*Amicus Curiae* Br. of the Colo. General Assembly at 6, 20.	—*Amicus Curiae* Br. of Various Senators and Representatives and the Colo. Union of Taxpayers at 1.

Is TABOR good for the People of Colorado and the state's financial health? Or does it excessively undermine elected officials' ability to tax and spend money to benefit the public? These are good questions that deserve public attention. They are not, however, grist for a federal lawsuit.

"Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). A review of the parties and *amici* that

have appeared in this case makes it clear: this lawsuit is an effort to draw the federal courts into the perpetual debate between those favoring limited government and those who believe in greater government spending. Only by choosing sides in that debate could the courts resolve the merits of this lawsuit. "Judicial experience and common sense," however, dictate that this debate be settled—to the extent it can be settled—using the political process.

A. The actual issue to be decided in this case is a political question.

In dozens of pages of briefing, the parties and *amici* have vigorously debated whether the political question doctrine applies to this dispute. Plaintiffs believe the doctrine has been "in retreat" since *Baker v. Carr*. (Answer Br. at 22.) The Governor, on the other hand, believes that whether or not the phrase "Republican Form of Government" *should* provide a basis for invalidating an exercise of direct democracy, precedent holds that it doesn't. *See Perry v. Brown*, 671 F.3d 1052, 1073 (9th Cir. 2012) ("[I]t makes no difference whether federal courts think it a good idea that California allows its constitution to be amended by a majority vote . . . . The People of California are largely free to structure their system of governance as they choose, and

we respect their choice." (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912))). The Supreme Court is free to revisit the issue in the future, but this Court is bound by current law until then. *Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991) ("The clause guaranteeing to each state a republican form of government has been held not to be justiciable . . . and although this result has been powerfully criticized, . . . it is too well entrenched to be overturned at our level of the judiciary."); *see also United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cnty.*, No. 12-2047-cv, 2013 U.S. App. LEXIS 6965, at *32 (2d Cir. Apr. 5, 2013) ("As its final constitutional salvo, the County argues that the instant interpretation of the consent decree violates the Constitution's Guaranty Clause. U.S. Const. art IV, § 4. As this and other courts have repeatedly noted, such determinations are nonjusticiable political questions.").

But perhaps this cacophony of legal argument has distracted from the real question: What must be decided here?

To Plaintiffs, "a full explication of the . . . guarantee of a Republican Form of Government [must] await a trial on the merits." (Answer Br. at 6.) That is, for Plaintiffs, the purpose of this case and the

reason for trial are to present testimony and evidence in an effort to explain the meaning of the Guarantee Clause. But that is not what trials are for.[1] Certainly, this Court or the district court would have to define the legal standards that govern this case[2]—were it a *case* and not a political dispute. But the standards for decision are separate from what must actually be decided. *See Baker*, 369 U.S. at 217 (holding that the existence of judicial standards is one factor to consider in determining whether a dispute is a political question). Here, Plaintiffs ask a federal court to decide a question very different from what a Constitutional provision "means" in some broad sense. Plaintiffs ask

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[1] Relevant legal standards are usually established apart from the fact-finding that occurs at trial. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254–55 (1986) ("It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall . . . .").

[2] The definition would be hard to come by. *Baker v. Carr*, 369 U.S. 186, 223 (1962) (noting that a long line of case law holds that "the Guaranty Clause is not a repository of judicially manageable standards"). As explained below in Part II, even Plaintiffs themselves have failed to identify the legal standards that would govern their particular claims.

this court to decide whether TABOR gives too much power to Colorado's voters.

For good reason, federal courts routinely refuse to intervene in matters concerning the allocation of state governmental power. Our "system of federal courts . . . subsist[s] side by side with 50 state judicial, legislative, and executive branches." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). "[T]he principles of federalism" therefore "play [ ] an important part in governing the relationship between federal courts and state governments." *Id.* at 380.[3] This does not mean that *all* Guarantee

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[3] To demonstrate that their claims are justiciable, Plaintiffs cite a few state court cases applying the Guarantee Clause. (Answer Br. at 26.) State courts, of course, cannot bind federal courts on federal questions, especially ones that implicate the power to render a judicial decision. *See, e.g.*, *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (dismissing a case for lack of standing although a state court reached the merits). In any event, most of the state court cases Plaintiffs cite have nothing to do with the balance of power between voters and their legislature. And those that do simply reaffirm *federal* law: that Plaintiffs have failed to present a claim for relief. *See In re Initiative Petition No. 348*, 820 P.2d 772, 781 (Okla. 1991) ("[A] basic right of the people is the liberty to direct how much or how little government may spend. . . . [T]he issue of taxation has from the very beginning of this country been a topic of paramount concern."); *Van Sickle v. Shanahan*, 511 P.2d 223, 242 (Kan. 1973) ("The purpose of [the Guarantee Clause] is to protect the people of the several states against aristocratic and

(footnote continued on next page . . .)

Clause claims are nonjusticiable. *Baker*, 369 U.S. at 222 n.48 (noting that the "extreme limits" of the Clause might justify federal court intervention). It simply means that a lawsuit premised on the idea that Colorado has become too democratic is not one that the federal courts should entertain. There is no judicially manageable, let alone principled, way for a court to declare that mandatory direct democracy is permissible in some subject areas, but not in the allegedly "core" areas of taxation and spending.

Plaintiffs nonetheless believe there must be a judicial remedy because there is no "normal political remedy" for the supposed ills of TABOR. (Answer Br. at 21.) They claim that the state has "put itself in a constitutional box with no exit" because single subject requirements for initiated measures prohibit repealing TABOR in its entirety. (*Id.*)

Plaintiffs have not tested this theory. They have never tried to repeal TABOR wholesale—or at least they have not alleged they have tried to do so. Consequently, we do not know whether this particular remedy is available. There are good arguments that a measure

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monarchal innovations . . . . But it does not forbid them from amending or changing their Constitution in any way they may see fit . . . .").

repealing TABOR *would* comply with Colorado's single subject requirement. *See Court v. Pool (In re Initiative 1996-4)*, 916 P.2d 528, 535–537 & n.4 (Colo. 1996) ("The threshold question, which is not addressed by the majority, is whether the single-subject requirement applies to a repeal. I would hold it does not. . . . [Application of the single-subject rule would] limit[ ] the electorate's ability to repeal by initiative and could lead to absurd results.") (Mullarkey, J., concurring in the result).[4]

Even if their argument were true, it would mean only that Plaintiffs and their supporters—and the *amicus* briefs show that Plaintiffs have no shortage of powerful political supporters—might have to use the initiative and referendum process more than once. This is hardly the sort of predicament that calls for unprecedented federal judicial intervention in state governance.

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[4] In another case Plaintiffs cite, the Colorado Supreme Court held that a ballot measure attempting to *prevent* the wholesale repeal of TABOR violated the single-subject rule. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 # 43*, 46 P.3d 438, 447 (2002). Like *Court v. Pool*, however, that case failed to determine whether TABOR itself could be repealed by a single initiated measure.

The United States Constitution does not guarantee Plaintiffs an easy or perfect political solution. *See Largess v. Supreme Judicial Court*, 373 F.3d 219, 229 (1st Cir. 2004) ("The amendment process enshrined in the Massachusetts Constitution is purposely designed to be slow; that choice is itself a result of the state's republican form of government."). Even if the single-subject rule would preclude a wholesale repeal of TABOR, Plaintiffs could excise TABOR's voter-approval sections by initiative. Or they could mount a political campaign to raise taxes in compliance with TABOR—Colorado's recent history suggests that the voters are in fact willing to follow that course. *See, e.g.*, Referendum C, ch. 355, 2005 Colo. Sess. Laws 2323 (codified as amended at C.R.S. § 24-77-103.6 (2011)). Indeed, the impressive array of *amicus curiae* that support Plaintiffs' position—many of whom advocate for increases in public spending[5]—demonstrate that the

[5] *See* Br. of Colo. Chapter of the Am. Academy of Pediatrics and Colo. Nonprofit Assoc. as *Amici Curiae*; Br. of *Amicus Curiae* The Bell Policy Center and the Colo. Fiscal Institute; Br. of *Amicus Curiae* Colo. Parent Teacher Assoc.; Br. of *Amici Curiae* Colo. Assoc. of Sch. Bds. and Sch. Execs.

federal courts ought not fight Plaintiffs' political battles for them. Litigation is a poor substitute for democracy.

B. The "irreducible minimum" of Article III standing cannot be manipulated by the political process.

In March—nearly two years after this case was filed and after an intervening election—the Colorado General Assembly passed a Joint Resolution authorizing the funding and filing of *amicus* briefs in cases like this one, but only on the "limited issue" of whether individual members of the General Assembly have Article III standing. S. Joint Res. 16, 69th Gen. Assembly, 1st Regular Sess. (Colo. 2013). The Resolution did not give the General Assembly authority to intervene as a *party* in this kind of litigation, nor did it authorize the Legislator-Plaintiffs here to represent the Colorado General Assembly as a whole. It merely authorized the General Assembly to submit friend-of-the-court briefs advocating its "institutional interests."[6]

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[6] Some of the legislators who voted in favor of the Joint Resolution filed an *amicus* brief arguing that Plaintiffs in this case *lack* standing and *failed* to state a justiciable claim. (*See Amicus Curiae* Br. of Various Senators and Representatives and the Colo. Union of Taxpayers (including Senators Baumgardner, Cadman, Grantham, Harvey,

(footnote continued on next page . . .)

There is another institutional interest at stake here, however—the institutional interest of the federal judiciary, with its "properly limited . . . role . . . in a democratic society.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The federal courts, and the jurisdictional requirements of Article III, are not subject to manipulation by "resolutions" or *amicus* briefs by state legislators. The "irreducible constitutional minimum of standing" is "immutable" and cannot "be modified or abrogated by Congress." *Warth*, 422 U.S. at 501. If all it took to establish jurisdiction under Article III was a legislative resolution, the entire doctrine of standing would have been a waste of time and judicial effort.

Lambert, Lundberg, Marble, Renfroe, and Scheffel and Representatives Holbert, Joshi, McNulty, Nordberg, Priola, Sonnenberg, Swalm, and Wright, all of whom voted in favor of SJR 13-016).) This demonstrates that the General Assembly as a whole does not agree on whether a subgroup of legislators can invalidate TABOR through litigation. The brief also serves as a reminder that the Resolution did not grant Plaintiffs the authority to represent the General Assembly itself. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997) ("[A]ppellees have not been authorized to represent their respective Houses of Congress in this action . . . ."). Certainly, the tension between this *amicus* brief and the Joint Resolution underscores that this litigation is nothing more than a political debate dressed up like a lawsuit.

Plaintiffs do not satisfy the "irreducible minimum" of Article III standing, and nothing in the brief submitted by their colleagues can fix the flaws in their complaint. They have suffered no legally cognizable injury that was caused by TABOR and can be redressed by this Court.

No Injury. Plaintiffs cite a number of cases where legislators suffered concrete, particularized injuries. (Answer Br. at 38–41.) In *Miller v. Moore*, for example, the Eighth Circuit found standing where a state senatorial candidate was threatened with "a pejorative ballot label" that "would seriously jeopardize his chances of reelection and threaten his political career and livelihood," merely because he refused to state publicly that he supported term limits. 169 F.3d 1119, 1122 (8th Cir. 1999). In *House of Representatives v. Department of Commerce*, the court emphasized that it did not endorse "general legislative standing." 11 F. Supp. 2d 76, 90 (D.D.C. 1998). But because the case implicated the House's "statutory right to receive information" from the Census Bureau, it was the "extremely rare case" in which legislators had suffered an injury "that satisfies Article III's rigorous demands." *Id.* In *Michel v. Anderson*, the court adjudicated a challenge to a House rule that allowed delegates from various non-voting U.S. territories to

exercise votes as part of a particular House committee. 14 F.3d 623, 624–25 (D.C. Cir. 1994). Finally, in *Coleman v. Miller*, the Supreme Court accepted jurisdiction where a specific vote on a particular piece of legislation was "completely nullified." *See Raines v. Byrd*, 521 U.S. 811, 823 (1997) ("*Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if . . . their votes have been completely nullified." (discussing *Coleman v. Miller*, 307 U.S. 433 (1939))).

Plaintiffs imply that these cases, despite their narrow circumstances, establish a broad rule of legislative standing whenever elected officials suffer an "attack on their power to legislate." (Answer Br. at 38–41.) None of those cases says such a thing, however, and none undermines the most recent guidance from the Supreme Court: that a lawsuit premised "on a loss of political power" or a "diminution of legislative power" does not meet the case-or-controversy requirement of Article III. *Raines*, 521 U.S. at 821.

No causation or redressability. In arguing that TABOR has caused their injuries and that a favorable court decision would provide

redress, Plaintiffs merely explain what TABOR does and what legal effect a repeal of TABOR would have. (Answer Br. at 41–44.) Plaintiffs assert that they "simply seek the restoration of republican governance." (*Id.* at 44.) This confuses the legal question of what a "republican government" is with the practical question of what Plaintiffs seek to accomplish through this lawsuit. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

If greater public spending is Plaintiffs' goal, the allegations in the complaint fall short of what Article III demands. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1444 (2011) (in a case based on a law's allegedly detrimental effect on a state budget, holding that "[e]ach of the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt"). Here, the Court would have to infer that in the absence of TABOR, the legislature would pass, and the Governor would sign, specific tax and spending increases that would remedy some particularized injury that Plaintiffs have suffered. The complaint is devoid of any allegations to that effect, and Plaintiffs have never

suggested that any such facts exist. This dearth of support for Plaintiffs' claims highlights the distinction between this lawsuit and cases like *Coleman*.

The allegations of educational injury are legally insufficient. Plaintiffs assert that the "thorough and uniform" clause of the Colorado Constitution provides a separate basis for Article III standing. (Answer Br. at 48.) There are at least three problems with this argument.

First, Plaintiffs have not even attempted to state a claim under Colorado's "thorough and uniform" clause; it therefore cannot provide a basis for jurisdiction. *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007) ("Each plaintiff must have standing to seek each form of relief in each claim.").

Second, Plaintiffs disclaim that their purported educational injury is based on "the lack of funding" for public education in Colorado. Instead, they assert that TABOR "foreclos[es] the ability to *request* funding through their representatives." (Answer Br. at 48 (emphasis added).) But no provision of the Colorado Constitution—and certainly nothing in the "thorough and uniform clause"—states that anyone has a

right to "request funding through their representatives." Plaintiffs cannot base Article III standing on a right that does not exist.

Finally, Plaintiffs cite no authority for the proposition that the Guarantee Clause empowers a federal court to examine two state constitutional provisions and pick a favorite. Any purported conflict between TABOR and the "thorough and uniform" clause must be decided under state law by the Colorado Supreme Court. And, as Plaintiffs acknowledge, that court is now considering a case providing just that opportunity. (Answer Br. at 48 (citing *Lobato v. State*, No 2012 SA 25 (Colo.).)

***Flast* does not apply.** As a last resort, Plaintiffs invoke *Flast v. Cohen*, 392 U.S. 83 (1968), to suggest that "all Plaintiffs have standing." (Answer Br. at 49.) But Plaintiffs have not stated a claim under the Establishment Clause, nor have they claimed that any federal funds were somehow misspent. *Flast* is therefore irrelevant. *See Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 593 (2007).

This Court has warned against expansion of taxpayer standing, especially in cases involving "state self-determination":

> We can discern few areas so sacrosanct as protection of state self-determination. . . . This case proves the continuing

> importance of judicial vigilance over these time-tested doctrines [of standing]. Absent such vigilance, we would seriously undermine the constitutional commitment to federalism.

Colo. Taxpayers Union, Inc. v. Romer, 963 F.2d 1394, 1403 (10th Cir. 1998).[7] "Judicial vigilance" and the courts' "constitutional commitment to federalism" are especially important here, where Plaintiffs ask a federal court to insert itself between a state's voters and their government.[8]

C. The Enabling Act cannot transmute this policy debate into a federal lawsuit.

Plaintiffs assert that the Enabling Act cures any jurisdictional or justiciability-related defects of this dispute. Their arguments, however, ignore substance and focus solely on form.

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[7] Plaintiffs' reliance on *Largess v. Supreme Judicial Court* is also misplaced. *Largess* may have "cit[ed] *Flast* on the standing issue" and "credited a rationale" for expanding the concept of standing. (Answer Br. at 50.) Any rationale for expanding *Flast*, however, was rejected by the Supreme Court several years after the First Circuit decided *Largess*. *Hein*, 551 U.S. at 609 ("[I]n the four decades since its creation, the *Flast* exception has largely been confined to its facts."); *id.* at 615 ("We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.").

[8] Plaintiffs also fail to satisfy prudential standing. (Op. Br. at 27–29.) Nothing in the Answer Brief undermines this conclusion. (*See* Answer Br. at 50–54.)

With respect to justiciability, Plaintiffs cite a few cases from this Court holding that individuals who are injured by the mismanagement of public lands held in trust can bring claims under the Enabling Act. (Answer Br. at 34.) No one disputes that trust beneficiaries may sue to ensure proper management of trust assets, or that Enabling Acts can in some circumstances create justiciable cases.[9] But this sheds no light on whether Plaintiffs may sue to have the federal courts restructure Colorado's government. Plaintiffs point to "[o]ne hundred ten . . . decisions" that they claim support standing under the Enabling Act. What they neglect to mention is that *none of those decisions* hold that a plaintiff has standing under the Act to invalidate an exercise of direct democracy. The only decision on that point—a decision by the United States Supreme Court—concludes that the opposite is true. *Pac. States*,

[9] There is nothing remarkable about the decisions Plaintiffs cite; trust beneficiaries are frequent litigants. *Compare Stell v. Boulder Cnty Dept. of Soc. Servs.*, 92 P.3d 910, 914 (Colo. 2004) ("We hold that this case is not moot and that it is ripe for adjudication because . . . the beneficiary of a disability trust[ ] has the ability to object to the interpretation of a statute that creates inevitable personal liability for his trustee."), *with Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) ("[T]he plaintiffs, as beneficiaries of what we hold to be a federal trust over the school lands, have a legally cognizable interest in the undivided loyalty of the school lands trustees.").

223 U.S. at 139 (dismissing a claim based on Oregon's Enabling Act because it depended on a nonjusticiable theory: that direct democracy violates republican government).

On standing, meanwhile, Plaintiffs' argument under the Enabling Act is circular. They assert that the Act gives them standing because "TABOR must yield" to the United States Constitution under the Supremacy Clause. (Answer Br. at 59.) In other words, they assert that they have standing because they will prevail on the merits. But whether a state law violates the Supremacy Clause does not answer the question of whether a litigant has properly alleged an injury-in-fact that satisfies causation and redressability. *See, e.g.*, *Taubman Realty Group Ltd. P'ship v. Mineta*, 320 F.3d 475, 481 & n.3 (4th Cir. 2003) (dismissing Supremacy Clause claims against various federal defendants for lack of standing, but holding that claims against state defendants survived because an "inevitable devaluation of [certain commercial property]," was (1) "an injury in fact" (2) that was "fairly traceable to the Supremacy Clause violation" and (3) "a favorable decision . . . would redress [the] alleged injury in fact").

II. Colorado's government does not violate the United States Constitution.

The merits of this case, as Plaintiffs have presented it, reduce to this: Do the People serve their legislature, or does the legislature serve its People? Although Plaintiffs contend that they need not answer that question until a "trial on the merits," their position is plain. In their view, the Guarantee Clause is designed not to protect the rights of the People but to ensure that the People do not meddle in the legislative process. No legal principle supports this view.

Because Plaintiffs' claims are not based on any viable legal theory, they must be dismissed.

A. It would be unfair and a waste of judicial resources to defer answering purely legal questions until a "trial on the merits."

Although this case has been pending for nearly two years, although the parties and numerous *amici* have submitted thousands of words of legal argument, and although the Governor has repeatedly contended that Plaintiffs' claims are groundless, Plaintiffs prefer to wait until later to "address the merits." (Answer. Br. at 28.) They prefer—in fact they are "happy"—to delay consideration of the substance of their claims until after remand, discovery, and trial. (*Id.* at

12, 28.) They still, however, have not identified any facts that need adjudicating, and they have only hinted at what legal standards TABOR might have violated. (*Id.* at 12–19.) But no one here disputes what the issue is: whether TABOR, a legal text, violates the requirements of a "Republican Form of Government," a legal standard (albeit one Plaintiffs refuse to define). Plaintiffs accuse the Governor of "insult[ing] the competency of the Court." (*Id.* at 21.) Yet it is they who coyly decline to explain how the law supports their interpretation of the Constitution.

This is not a poker game. The rules of civil procedure prohibit Plaintiffs from holding their cards close to their vest, hiding their legal theories until a "trial on the merits." (*Id.* at 12.) "The legal sufficiency of a complaint is a *question of law* . . . ." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (emphasis added). Plaintiffs can't just wait and see—they are *required* to present "some viable legal theory" now. *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Circuit 2008) (internal citations omitted). The Governor is entitled to know "the actual grounds of the claim against [him]" and Plaintiffs have no right to "gin[ ] up the costly machinery associated with our civil discovery regime on the basis

of 'a largely groundless claim.'" *Id.* at 1287 (internal citations omitted). Plaintiffs' failure to explain the legal basis for their lawsuit leaves the Court no choice but to dismiss it.

B. Plaintiffs cite no legal authority to support their claims—they instead argue that voter incompetence requires purely representative government to be enshrined in the Constitution.

In arguing that their theory of the Constitution permits them to proceed to trial, Plaintiffs do not rely on any *law*. Instead, they rely on what they call "rich historical material"—hand-selected political commentary that they believe might be relevant to this dispute. (*See, e.g.*, Answer Br. at 19.) But if Plaintiffs cannot support their claims with legal authority—or if they cannot at least explain how a fair reading of historical evidence compels the Court to invalidate TABOR as a matter of constitutional law—they have not stated a claim for relief.

Plaintiffs, citing *The Federalist*, warn against "the perils of direct democracy." They posit that "the Framers were almost as wary of pure or direct democracy as they were of monarchy and tyranny" and that

"plebiscites on taxes" are "susceptible both to 'popular passion' and 'self-interest.'" (Answer Br. at 19 n.11, 28 n. 16.)[10] Meanwhile, they ignore evidence directly contrary to their own parsing of the historical record. (*See, e.g.*, Br. for *Amici* Independence Institute and Cato Institute at 24 (explaining that Massachusetts ratified its constitution by referendum)). More importantly, they ignore the law. *See, e.g.*, *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2827 (2010) (Sotomayor, J., concurring) ("It is . . . up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action.").

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[10] While Plaintiffs suggest that direct democracy is vulnerable to the corrupting influence of voter "self-interest," an *amicus* brief supporting Plaintiffs unintentionally highlights how self-interest plays out in a representative democracy. The brief bemoans TABOR's impact on *amici's* "ability to lobby the state legislature for school funding." (Br. of Amici Curiae Colo. Assoc. of Sch. Bds. and Sch. Execs. at 14.) But every public body in this country is subject to the potentially corrupting influence of lobbyists. Many laws, both state and federal, are designed to curtail the harmful effects of money and influence on elected officials. *See, e.g.*, *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005) ("Both the Supreme Court and this court have upheld lobbyist-disclosure statutes based on the government's 'compelling' interest in requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption.").

Undeterred by the lack of precedent, Plaintiffs cite a book from 1912 on the history of American direct democracy. Quoting that source, Plaintiffs suggest that "Democracy, in the sense of simple direct majority rule, was undoubtedly more odious to . . . most [of our founding fathers] . . . *than was slavery*." (Answer Br. at 17 n.7 (quoting Charles A. Beard & Birl E. Schultz, *Documents on the State-wide Initiative*, Referendum, & Recall (1912)) (emphasis added).)

It is remarkable and, perhaps, revealing that Plaintiffs have been forced to compare direct democracy to slavery[11] in order to justify their unprecedented claims. More revealing, however, is what Plaintiffs choose *not* to quote. That same book explains, "the initiative and referendum amendment does not abolish or destroy the republican form of government or substitute another in its place. The representative character of the government still remains. The people have simply

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[11] Were the analogy sound, it would still undermine Plaintiffs' legal position. The abominable practice of slavery was permitted by many state governments—all of which existed under the Guarantee Clause—until the Civil War and the Thirteenth Amendment forcibly abolished it. *Cf. Minor v. Happersett*, 88 U.S. 162 (1875) (explaining that women's suffrage cannot be a baseline requirement of "republican" government because when Congress readmitted the Southern States to the Union under the Guarantee Clause, many states did not allow women to vote).

reserved to themselves a larger share of legislative power." Beard & Schultz, *supra* at 30.[12] This view—that direct democracy is of debatable political merit but of undeniable constitutional validity—is reflected in the law that governs this case. *See, e.g.*, *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 672 (1976) ("Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create."); *see also* Op. Br. at 32–38.

What is unremarkable, given the posture of this litigation, is Plaintiffs' suggested remedy to the alleged "legal insult" of TABOR.

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[12] Plaintiffs neglect to point out another passage from that book, which explains how "legislative omnipotence" in early America "did not last long, . . . because, in far too many cases, 'the representatives of the people' betrayed their trust." Beard & Schultz, *supra* at 4. These "omnipotent" legislatures "created new offices at will and elected the incumbents if they pleased; they granted charters to public and private corporations; and they laid taxes and incurred debts at their pleasure." *Id.* at 3. Indeed, although state constitutions were at first "brief documents," they soon grew to encompass many limitations on legislative power. *Id.* at 3–8. This included limitations on the ability to tax and spend: "Legislatures cannot be given a free hand in laying taxes, incurring debts, and making appropriations. This nearly all of our states have learned by bitter experience; and they have now written in their constitutions limitations on the extent of the taxing power and on the amount of debt which may be incurred." *Id.* at 6.

(Answer Br. at 53.) They assert, citing James Madison, that only "representative institutions" can properly "refine [popular] sentiments." (*Id*. at 13.) And they quote Alexander Hamilton to suggest that while voters often suffer fits of "temporary delusion," elected officials are characterized by "cool and sedate reflection." (*Id*. at 16.)

If these statements were the full story of the Guarantee Clause, then *any* exercise of direct democracy would be incompatible with "republican" government. The Supreme Court has said otherwise. *See Pac. States*, 223 U.S. 118.

In any event, TABOR is perfectly compatible with the sentiments Plaintiffs express. TABOR does not reduce "deliberation and circumspection"; if anything it *strengthens* the deliberative "check" on "excesses in the majority." *See The Federalist* No. 70 (Alexander Hamilton). Under TABOR, not only must the General Assembly debate the wisdom of a tax increase and agree that one is necessary, but they must convince the electorate itself that higher taxes are a good idea.[13]

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[13] Of course, the People can change tax policy independent from the legislature. But Plaintiffs do not challenge the broader power of initiative that has been a part of Colorado's government for over a

(footnote continued on next page . . .)

The *only* legal authority Plaintiffs cite for the proposition that the "Republican Form of Government serve[s] to set a limit on direct democracy" is a case from 1847—and it is not a case from the United States Supreme Court or even a federal court. It is instead a case from Delaware that, according to Plaintiffs, "offers a homily about the value of legislative deliberation." (Answer. Br. at 20 n.11.) This "homily" asserts that not every citizen has the "superior intellectual faculties" befitting "a member of the legislature." (*Id.* (quoting *Rice v. Foster*, 4 Del. 479 (1847).)

Whether or not *Rice* was correct under Delaware law as it existed in 1847, the case is contrary to every decision by the United States Supreme Court on the constitutionality of direct democracy, and it is contrary to the reasoning that underlies those precedents. In *Rice*, the Delaware court describes popular elections as "demoralizing in their effects" and asserts that they "are among the worst evils that can befall a republican government." *Rice*, 4 Del. at 498. Whatever the merits of this view as a matter of political philosophy, the Supreme Court has

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century. (Answer Br. at 1 ("Plaintiffs do not challenge the right of initiative.").)

flatly rejected it as a matter of constitutional law. *See, e.g.*, *Ohio ex rel Davis v. Hildebrant*, 241 U.S. 565, 569–70 (1961) (explaining that the power of referendum is not "a virus which destroys that [legislative] power, which in effect annihilates representative government"). This Court is obliged to do the same.

C. TABOR, like many other constitutional provisions, is simply a constraint on the power of government officials.

Plaintiffs believe that it is their "*right*, as elected representatives of the people of Colorado, to enact revenue-raising measures." (Answer Br. at 4 (emphasis added).) In other words, public officials have a right to govern that is unconstrained by the People who elected them.[14]

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[14] For its part, the General Assembly, as *amicus curiae*, asserts that its "taxation and appropriation powers—including the power to determine *all* questions of timing, method, nature, purpose, extent, and priority with respect to the imposition of taxes or the appropriation of funds—are plenary." (*Amicus Curiae* Br. of the Colo. General Assembly at 3–4 (emphasis added).) This is simply untrue. *See, e.g.*, Colo. Const., Art. X § 3 (carefully explaining, in over 1,700 words, how property taxes may be assessed and what property must be exempt from taxation).

The General Assembly appears not to understand what "plenary" means. It does not mean immutably unlimited. As the Colorado Supreme Court has explained, "The power of the general assembly over appropriations is plenary,[ ] *subject only to constitutional limitations*." *Colo. General Assembly v. Lamm*, 738 P.2d 1156, 1169 (Colo 1987)

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This proposition is bewildering. Constitutions delineate the relationship between governmental powers and the rights of the governed; that is their nature. One of the primary functions of a constitution is to *restrain* state power and protect individual rights. The preamble to the United States Constitution says that the country was formed by "We, the people" to "secure the blessings of liberty to *ourselves and our posterity*"—not to "our elected representatives." The Colorado Constitution, whose preamble contains identical language, reflects the same sentiment. In Article II, Section 2, the document gives the *People* the "sole and exclusive right of governing themselves." And the document contains too many provisions limiting legislative power—even in the allegedly "core" area of taxation and spending—to list here.[15]

(emphasis added) (footnote omitted). TABOR is just one of the numerous provisions in the Colorado Constitution that restrain the legislature's "plenary" power over taxation and appropriation.

[15] *See, e.g.*, Colo. Const., Art. II, §§ 11 (prohibiting ex post facto laws), 19 (right to bail); Art. IV, § 12 (giving the Governor the power of line-item veto over appropriations bills); Art. V, §§ 25 (prohibiting special legislation), 32 (requiring a general appropriation bill that "embrace[s] nothing but appropriations"); Art. X, §§ 3 (requiring uniform taxation), 16 (prohibiting appropriations that "exceed the total tax then provided

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But Plaintiffs attempt to comfort the Court by asserting that their claims are "narrow" and "address only TABOR's unique restructuring of state government." (Answer Br. at 21.) Only because TABOR invades "core legislative powers," they promise, does it transgress the boundaries of a republican government. (*Id.* at 3, 5, 28, 41 n.19.)

There is no legal support for the notion that some powers of state legislatures are "core," while others may be altered by the People. Plaintiffs again resort to selective readings of *The Federalist*, and they even cite the Articles of Confederation to support their idiosyncratic view of "republican" government. (Answer Br. at 16–19.) But as the District of Colorado has observed—albeit in a different context—Plaintiffs' interpretation of the Constitution would invite "standardless" judicial oversight of government:

> The argument has surfaced from time to time within our constitutional jurisprudence that certain types of core functions exist within the legislative power that cannot be delegated. There is scant authority for this proposition . . . . [A]doption of a 'core functions' analysis would be effectively standardless. . . . [T]he line would necessarily have to be

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by law"); Art. XI, § 3 (limiting the circumstances under which the state may incur public debt).

> drawn on the basis of the court's own perceptions of the relative importance of various legislative functions.

United States v. Smith, 686 F. Supp. 847, 860 (D. Colo. 1988) (citations and quotation omitted).[16]

Nor is there any support for Plaintiffs' argument that TABOR is "unique." TABOR does not abolish the legislature or threaten representative democracy; it simply imposes procedural requirements on legislation involving taxation and spending. Many states have similar requirements. Indeed, in seeking to prove how "unique" TABOR is, one of the *amicus* briefs filed in support of Plaintiffs actually demonstrates that TABOR is akin to many other state laws. (Br. of *Amicus Curiae* Colo. Parent Teacher Assoc. at 12–18.) Those laws include "spending limits without legislative override"; "significant limitations on spending growth," where the legislature is allowed "to exceed those limits" only "with a declaration of emergency and/or a

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[16] *See also United States v. Alves,* 688 F. Supp. 70, 78 (D. Mass. 1988); *United States v. Myers*, 687 F. Supp. 1403, 1409 (N.D. Cal. 1988); *Synar v. United States*, 626 F. Supp. 1374, 1385 (D.D.C. 1986) ("[I]f there were any nondelegable 'core functions,' there is no reason to believe that appropriations functions would be among them."), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

supermajority vote"; and requirements that excess taxes "be invested and saved for future fiscal years." (*Id.* at 14–18.) As other *amici curiae* point out, several states even require voter approval of new taxes, both statewide and at the local level. (*Amici Curiae* Br. of Nat'l Federation of Indep. Bus., *et al.* at 6–10.) Set in the proper context, TABOR is not "radical." (Answer Br. at 1.) Like voters in other states, Colorado's voters have simply implemented a "modest shift of power," leading to neither "a denial of republican government or even a reduction in the amount of democracy." *Risser*, 930 F.2d at 553.

Plaintiffs complain that "plebiscites" meddle with the "moderat[ing]" and "refin[ing]" influence of politicians, who—allegedly through "study and experience"—have developed "superior intellectual faculties." (Answer Br. at 13, 20 n.19.) This view is, to say the least, debatable. But not in federal court. As the First Circuit has held, "simply labeling their dissatisfaction as a Guarantee Clause claim" does not mean Plaintiffs have stated a claim on which a federal court can—or should—grant relief. *Largess*, 373 F.3d at 225 n.7.

Conclusion

The claims at issue here must be evaluated in light of "judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. When a few Plaintiffs, against the great weight of legal authority, attempt to drag into federal court a political battle about taxes and public spending, the prudent solution is to leave the matter to the democratic process. The Governor does not doubt the sincerity of Plaintiffs' convictions, and he does not doubt that they have legitimate arguments about the wisdom of TABOR. He simply believes that those debates are ones for the People of Colorado, not the federal judiciary.

Respectfully submitted this 13th day of May, 2013.

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