IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil action No. 11-cv-01350-WJM-NYW

ANDY KERR, et. al.

Plaintiffs,

v.

JOHN HICKENLOOPER, GOVERNOR OF COLORADO, in his official capacity,

Defendant.

THE GOVERNOR'S MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Governor John Hickenlooper, by and through the Office of the Colorado Attorney General, pursuant to Fed.R.Civ.P. 12(b)(1), moves to dismiss Plaintiffs' Fourth Amended Complaint for Injunctive and Declaratory Relief, and in support thereof, states as follows:

INTRODUCTION

Plaintiffs seek to overturn the Taxpayers' Bill of Rights ("TABOR"), an amendment to Colorado's Constitution passed by voter initiative in 1992, on the grounds that it is incompatible with the "republican form of government" guaranteed by the United States Constitution.

As directed by the Tenth Circuit, before Plaintiffs' claims may proceed, this Court must first determine whether each Plaintiff has standing to assert Guarantee

Clause-based claims against the State. For the reasons detailed herein, no Plaintiff sufficiently demonstrates standing to bring these claims, and Plaintiffs' complaint should be dismissed.

PROCEDURAL HISTORY

Plaintiffs (then consisting of citizens, educators, and legislators) brought this lawsuit in May 2011. The Governor filed a motion to dismiss challenging Plaintiffs' standing and the justiciability of their claims. The Court denied the motion; it held the claims were justiciable and that the legislator plaintiffs had standing (and so declined to consider the other plaintiffs' standing). The Governor filed an interlocutory appeal, which the Tenth Circuit granted. A panel of the Tenth Circuit affirmed the district court's order. The Governor filed a petition for rehearing en banc that was denied, with four judges dissenting in three written opinions. The Governor then filed a petition for a writ of certiorari, which was granted. The Supreme Court remanded the case back to the Tenth Circuit for reconsideration of its decision in light of *Arizona State Legislature v. Arizona Independent Restricting Commission*, 135 S. Ct. 2652 (2015). On remand, the Tenth Circuit reversed itself and vacated its earlier opinion, finding that the non-legislator plaintiffs did not have standing. *Kerr v. Hickenlooper*, 824 F.3d 1207 (2016). The Tenth Circuit further remanded the case to this Court, directing it to consider whether the remaining plaintiffs have standing, and if so, whether Plaintiffs' claims are justiciable. *Id.* at 1217. Plaintiffs have now filed a Fourth Amended Complaint (ECF No. 148). Although their legal arguments are largely unchanged, they have

updated their list of participants, including adding as plaintiffs several political subdivisions of the State of Colorado.

FACTS

I. Direct Democracy in Colorado and the TABOR Amendment.

Plaintiffs cast this case as presenting for "resolution the contradiction between direct democracy and representative democracy." Compl. ¶ 1.[1] But direct democracy is not new to Colorado. The People of Colorado amended their constitution in 1912 to "reserve to themselves" the power of initiative and referendum—including the power to "approve or reject at the polls . . . any act of the general assembly." Colo. Const. art. V, § 1(1). This reservation of power affected not only the legislature, but the executive as well: laws passed by the people are outside the reach of the Governor's veto. *Id.* § 1(4).

In 1992, Colorado voters enacted TABOR, which requires the People to "accept or reject" any tax increase, increase in spending beyond certain limits, or new issuance of public debt. Colo. Const. art. X, § 20(3)-(4). TABOR's focused form of democratic oversight is an extension of the more general direct lawmaking power provided by article V of the Colorado Constitution. Under article V, the People may approve or reject any legislation, but this requires a particularized ballot petitioning process. TABOR simply removes that petition requirement and automatically places tax and spending measures on the ballot.

[1] All citations are to Plaintiffs' Fourth Amended Complaint.

TABOR applies to "Districts" which include both state and local governments, although it specifically excludes "Enterprises," which are government-owned businesses authorized to issue their own revenue bonds and receiving less than 10% of annual revenue in grants from all state and local governments combined.[2] Colo. Const. art. X, § 20(2)(b), -(d).

Like any provision of the Colorado Constitution, TABOR can be repealed or amended by a vote of the People. 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 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 § 24-77-103.6, C.R.S. (2011)). Local governments can also pass laws opting out of certain TABOR provisions. *See Mesa Cty. Bd. Cty. Comm'rs v. State,* 203 P.3d 519, 524 (Colo. 2009) (noting that 175 of 178 school districts opted out of certain revenue limits).

[2] The enterprise exception gives the General Assembly substantial authority to raise revenue and create new government programs. For example, in 2009, the General Assembly created the Colorado Bridge Enterprise (CBE) "to defray the cost of completing designated bridge projects..." *Tabor Found. v. Colo. Bridge Enter.*, 2014 COA 106, P27 (Colo. App. 2014) (citing § 43-4-805(2)(c), C.R.S.); *see also, e.g.*, § 23-5-101.7 (allowing CSU and other higher education institutions to obtain enterprise status); § 33-9-105 (Colorado Division and Commission of Parks and Wildlife); § 35-65-405 (Colorado State Fair Authority and Board of Commissioners); § 26-12-110 (state veterans centers); § 8-71-103 (Colorado's unemployment insurance program). Counties can also create enterprises exempt from TABOR. *Bd. of Comm'rs v. Fixed Base Operators*, 939 P.2d 464, 468 (Colo. App. 1997).

II. Plaintiffs' Fourth Amended Complaint.

Plaintiffs allege that TABOR "is unconstitutional and illegal because it deprives the State and its citizens of effective representative democracy, contrary to the requirements of the United States Constitution, of the Enabling Act, and of the Colorado Constitution, that it maintain a Republican Form of Government." Compl. ¶ 10. According to Plaintiffs, in order to be republican in form, Colorado must have "[a]n effective legislative branch [with] the power to raise and appropriate funds." *Id*. at ¶ 9. Plaintiffs complain that TABOR "removed from the General Assembly and subordinate political subdivisions the power to tax and raise revenue, and severely curtailed their respective powers to appropriate existing revenues." *Id*. at ¶ 24. When these legislative powers are curtailed, Plaintiffs allege that Colorado no longer exemplifies a republican form of government. *Id*. at ¶ 9.

Plaintiffs assert four legal claims:

(1) TABOR violates Article IV, § 4 of the United States Constitution, i.e., the Guarantee Clause (*Id*. at ¶ 108);

(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" (*Id*. at ¶ 109);

(3) "[u]nder the Supremacy Clause . . . , [TABOR] must yield to the requirement[] . . . [of] a Republican Form of Government" (*Id*. at ¶ 110); and

(4) TABOR is an impermissible amendment of the Colorado Constitution because it "undermines the fundamental nature of the State's Republican Form of Government," and Colorado citizens therefore lacked authority to enact TABOR (*Id*. at ¶¶ 111-16).

By Plaintiffs' own terms, each claim is based on the Guarantee Clause and its requirement of a "Republican Form of Government":

> 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. The United States carried out its obligation under the Guarantee Clause in the Colorado Enabling Act, 18 Stat. 474 (1875), which simply repeats the Constitution's "republican form of government" language and provides "[t]hat the constitution shall be republic in form." 18 Stat. 474, sec. 4 (1985); *see also* Compl. ¶¶ 14-15, 109. The claim asserting that TABOR impermissibly amends the Colorado Constitution similarly depends on whether TABOR violates the Republican Form of Government. Compl. ¶¶ 111-14.

STANDARD OF REVIEW

Defendant challenge Plaintiffs' standing under Rule 12(b)(1). *See Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004) (holding that a challenge to standing presents a jurisdictional issue). "Rule 12(b)(1) motions generally take one of two forms. The moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003) (quotation and citation omitted). Defendant's motion solely challenges the sufficiency of Plaintiffs' allegations to establish their standing as a

matter of law. Because this is a facial challenge, the Court must accept all facts pleaded in Plaintiffs' complaint as true and determine whether those facts establish jurisdiction. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Because the jurisdiction of federal courts is limited, however, there is a presumption against jurisdiction, and the party invoking federal jurisdiction bears the burden of establishing it. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE NO PLAINTIFF HAS STANDING.

In its most recent opinion, the Tenth Circuit held that the legislator-plaintiffs lacked Article III standing and remanded the case with instructions to consider the standing of the remaining plaintiffs. *Kerr*, 824 F.3d at 1217-18. Plaintiffs fall into three groups: political subdivisions (*see, e.g.*, Compl. ¶ 57); Colorado citizens (*see, e.g., id.* at ¶ 53); and educators (*see, e.g., id.* at ¶ 52). Some Plaintiffs belong to more than one group (*e.g.*, citizen and educator). None of the Plaintiffs, however, have standing to assert constitutional or statutory claims based on the Guarantee Clause.

Political Subdivisions. Eleven Plaintiffs are political subdivisions, *i.e.,* county commissions, boards of education, special districts, and the Treasurer of Boulder County. *Id.* at ¶¶ 57, 58, 66, 67, 69, 72, 73, 89, 90, 91, 93. They assert that "their fundamental fiscal powers and responsibilities have been impaired and their Republican Form of Government undermined." *Id.* at ¶ 47.

Citizens. Thirty-three Plaintiffs are "citizens," including the former legislator Plaintiffs (*id*. at ¶¶ 52-56, 59-65, 68, 70-71, 74-88, 92-94), who assert an "interest in ensuring that their representatives can discharge the inherently legislative function of taxation and appropriation, and an interest in ensuring that the State of Colorado has a Republican Form of Government." *Id*. at ¶ 95. They claim that since the passage of TABOR in 1992, the fiscal condition of the State has experienced "an inexorable and serious deterioration" (*id*. at ¶ 3) and that TABOR has and will continue to erode the ability of the State to pay the necessary expenses of government. *Id*. at ¶ 27. They further assert that they, as voters and taxpayers, are denied an "effective" legislature and "effective" local governments. *See, e.g., id.* at ¶¶ 9, 108-09.

Educators. Three individual Plaintiffs have a current[3] connection to public education, as teachers or as a member of the Board of Directors of Great Education Colorado. *Id.* at ¶¶ 52, 74, 94. They assert an interest in ensuring that the legislature may exercise its responsibility to tax for the purpose of adequately funding core education responsibilities and that TABOR has impaired their ability to properly educate students for whom they are responsible. *Id.* at ¶ 50.

[3] Additional plaintiffs allege former connections to education, such as the previous member of the Commission on Higher Education (Compl. ¶ 59) or the former Chancellor of the University of Colorado (*id*. at ¶ 65). These plaintiffs' prior connections to education do not confer any particular rights or responsibilities that would permit them to establish Article III standing. Their standing as individual citizens is addressed in § I.B.

A. The Political Subdivision Plaintiffs do not have standing.

"Under the doctrine of political subdivision standing, federal courts lack jurisdiction over certain controversies between political subdivisions and their parent states." *City of Hugo v. Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011). Controversies that do not qualify for federal jurisdiction include challenges like this one, in which a political subdivision attempts "to sue its parent state under a substantive provision of the constitution." *Id.* at 1256.

To be sure, there are some limited circumstances under which a political subdivision may assert claims against a state. In particular, the Tenth Circuit has acknowledged that while a political subdivision cannot "bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights," such a challenge may be based on "constitutional provisions designed to protect 'collective or structural rights' (i.e. the Supremacy Clause)." *Id.* at 1256 (quoting *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 2001)).

This case, of course, does involve a Supremacy Clause claim. But a political subdivision's mere invocation of the Supremacy Clause is not enough to establish standing because the Supremacy Clause itself is "not a source of any federal rights." *Chapman v. Hous. Welfare Rights Org.,* 441 U.S. 600, 613 (1979) (quotations omitted). Rather, it "operates to secure federal rights by according them priority whenever they come in conflict with state law." *Id.* "That is, a plaintiff alleging a Supremacy Clause claim is actually alleging a right under some *other* federal law,

which trumps a contrary state law by operation of the Supremacy Clause." *Hugo*, 656 F.3d at 1256. Thus, the Tenth Circuit has permitted political subdivisions to assert a Supremacy Clause claim *only* where the subdivision alleges that the state has contravened a controlling federal law that specifically provides rights to the political subdivisions. *Hugo*, 656 F.3d at 1257.

For example, in *Branson*, the school district alleged the Colorado Enabling Act entitled it to management of school trust lands and that a new state law conflicted with the federal statute. 161 F.3d at 625-26, 630. Because the Colorado Enabling Act was intended to provide rights to the school district itself, as a beneficiary of a land trust, *id*. at 629, 637, the political subdivision had standing to enforce the federal statutory right, guaranteed by operation of the Supremacy Clause in the face of conflicting state law. *Id*. at 630. Similarly, in *Housing Authority of Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1188 (10th Cir. 1991), the Tenth Circuit concluded a tribal housing authority established by Oklahoma law could bring a claim alleging that certain state conduct conflicted with the requirements of the Fair Housing Act. 952 F.2d at 1192-94. Although the housing authority was part of a political subdivision, it nonetheless had standing to sue because it fell within the group of aggrieved parties to whom the Fair Housing Act contemplated providing rights. *Id.* at 1194-95.

Key to the finding of standing in *Branson* and *Kaw* is that the political subdivisions were able to show that the federal statute at issue provided them with enforceable rights. As the Tenth Circuit put it in *Hugo*, "[*Branson*] merely held,

consistent with our prior decision in *Kaw Tribe*… that when Congress provides statutory rights to municipalities, municipalities can enforce those rights through the Supremacy Clause against their parent states." 656 F.3d at 1261, n.9; *cf. Bd. of Cnty. Comm'rs v. Geringer*, 297 F.3d 1108, 1113-14 (10th Cir. 2002) (dismissing for lack of political subdivision standing because unlike the school district in *Branson* the county was neither "the trustee nor the beneficiary of the hypothetical trust, nor the trust's settlor").

The educator plaintiffs attempt to analogize their claims to those in *Branson* by pointing out that sections 7, 10, and 14 of the Enabling Act specify the use of federal lands ceded to the state to the support of common schools (Compl. ¶ 30), and that the revenues from those lands are part of an integrated scheme for funding public education[.]" *Id.* at ¶ 30. They allege that these provisions of the Enabling Act together with article IX of Colorado's Constitution (providing a thorough and uniform system of free public schools) and the School Finance Act, §§ 22-54-101, *et seq*., C.R.S., require the State and school districts to share responsibility to fund the State's public school system. Compl. ¶¶ 30-34. Plaintiffs thus argue that the ability of the State's local districts to fulfill their share of the responsibility for funding the public depends on the General Assembly meeting its part of the shared responsibility. *Id.* at ¶33. This argument is unavailing because, unlike in *Branson,* the School Districts do not allege that they are beneficiaries of a trust created by the Enabling Act. *See Geringer*, 297 F.3d at 1113-14. They instead look to the Enabling Act—and specifically its "Guarantee" language—as the source of a substantive,

enforceable right that federal courts may enforce.

The Guarantee Clause, however, does not provide independent rights to the political subdivision plaintiffs. It instead provides that "[t]he United States shall guarantee to every *State* in this Union a Republican Form of Government...." U.S. Const. art. IV, § 4 (emphasis added). Colorado's Enabling Act largely mirrors this language. The fact that the guarantee that Colorado will remain republican in form appears in a statute in addition to the Constitution neither alters its nature nor confers upon the political subdivisions any independent ability to enforce it. Unlike plaintiffs in *Branson*, the political subdivisions here identify no provision of the Enabling Act that provides them with specifically enforceable federal rights. While they allege that TABOR constrains their ability to manage their fiscal affairs, they identify no specific benefit—like the trust monies in *Branson*, and Fair Housing Act protections in *Kaw Tribe*—that TABOR takes away from them. In short, the complaint does not allege that Colorado has taken any actions that contravene a federal statutory enactment that affords them justiciable federal rights. Absent such an allegation, Tenth Circuit precedent makes clear that the political subdivisions have no standing to challenge a state enactment such as TABOR in federal court.[4]

[4] Even if the political subdivision plaintiffs have standing under the political subdivision doctrine, they nonetheless fail to establish the elements for Article III or prudential standing discussed in the Section B, *infra*.

B. Plaintiffs cannot establish the necessary elements of Article III standing to proceed with their claims.

Article III standing has three elements, each of which Plaintiffs bear the burden to establish: (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. *United States v. Rodriguez-Aguirre,* 264 F.3d 1195, 1204 (10th Cir. 2001). To demonstrate standing, Plaintiffs must allege "facts essential to show jurisdiction." *Penteco Corp. Ltd. Partnership-1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991). "The elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Standing, moreover, is not dispensed in gross" – each plaintiff must have standing as to each claim. *Id.* at 551.

1. None of Plaintiffs' alleged injuries are concrete and particularized.

To meet the first element – an injury in fact – Plaintiffs must demonstrate an injury that is not abstract, but is concrete and particularized as well as actual or imminent. *Wyoming v. United States Dep't of Interior*, 674 F.3d 1220, 1230 (10th Cir. 2012). To survive a motion to dismiss under Rule 12(b)(1), it is not enough to state a constitutional error; a plaintiff must also sufficiently allege injury suffered as a consequence of that error. *Heath v. Bd. of County Comm'rs*, 92 Fed. Appx. 667, 672-673 (10th Cir. 2004) (citing *Valley Forge Christian Coll. v. Ams. United for*

Separation of Church and State, Inc., 454 U.S. 464 (1982)), Plaintiffs' broad allegations that they have the right to a Republican Form of Government fail to meet this standard.

Citizen Injuries: The Citizens claim "a specific, protectable interest in ensuring that their representatives can discharge the inherently legislative function of taxation and appropriation, and an interest in ensuring that the State of Colorado has a Republican Form of Government." *Id*. at ¶ 95. Additionally, the Citizens assert that they have been injured by TABOR's "effects in impairing the fiscal authority and responsibilities of State and local government, and the resulting impacts on the ability of State and local government to provide for the needs of the State and of the people of Colorado." *Id*. at ¶ 51.

Educator Injuries: Educator Plaintiffs similarly maintain that they "have a specific interest in ensuring that the legislature of the State can discharge its authority and responsibilities to tax for the purpose of adequately funding core education responsibilities of the State" and that TABOR impairs their ability to properly educate the students for whom they are responsible. *Id*. at ¶ 50.

Political Subdivision Injuries: The political subdivisions claim to have sustained injuries "in that their fundamental fiscal powers and responsibilities have been impaired and their Republican Form of Government undermined." *Id*. at ¶ 47. TABOR severely limits the power of political subdivisions "to appropriate existing revenues, and prohibits them from raising funds by any other means, including borrowing." *Id*. at ¶ 29.

None of these allegations describe concrete and particularized injuries-in-fact that Plaintiffs *themselves* have uniquely suffered. Each group of plaintiffs is "seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Lance v. Coffman*, 549 U.S. 437, 439 (2007). In other words, Plaintiffs allege that Colorado's government ought to function differently and the voting public ought to endorse different fiscal policy choices. That is insufficient to demonstrate standing under Article III. *Cf. Valley Forge Christian Coll.*, 454 U.S. at 471, 473 ("Were the federal courts merely publicly funded forums for the ventilation of public grievances . . . the concept of 'standing' would be quite unnecessary.").

Plaintiffs assume they can establish the foundational requirement of an injury-in-fact later, asserting that "the nature and extent" of their injuries "will be further clarified upon development of facts to be adduced at trial and a judicial determination of the protections Plaintiffs enjoy under the Guarantee Clause." Compl. ¶ 97. But this approach ignores that Plaintiffs bear the burden of asserting an injury-in-fact at the onset of the case. *See, e.g.*, *Rector v. City & Cty. of Denver*, 348 F.3d 935, 942 (10th Cir. 2003) ("[T]he party invoking federal jurisdiction bears the burden of establishing [standing]."). 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, L.L.C.*, 493 F.3d 1210, 1214 n.1. Accordingly, Plaintiffs' complaint should be dismissed based on the failure to demonstrate the first element of Article III standing.

2. Plaintiffs cannot establish that TABOR caused their alleged injuries or that any such injuries would be redressed by the relief they seek.

Plaintiffs' complaint likewise fails to establish the necessary second and third elements of Article III standing: causation and redressability. To demonstrate causation, Plaintiffs must show that their injury is "fairly traceable" to TABOR. *Lujan*, 504 U.S. at 560. Although Plaintiffs' complaint makes many conclusory allegations, the facts asserted do not demonstrate that TABOR is the cause of the alleged injuries. For example, the complaint does not allege that the voters rejected a revenue measure passed by the General Assembly, which would have led to public spending directly benefitting any of the plaintiffs. Indeed, the complaint does not allege that the voters rejected *any* revenue measure passed by the General Assembly. *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).

Plaintiffs similarly assert no facts suggesting that the elimination of TABOR would arrest the "inexorable and serious deterioration" of the State's fiscal condition, cause the State to begin "adequately funding core education responsibilities," or cause the educator plaintiffs to improve their ability to "properly educate the students for whom they are responsible." Compl. ¶¶ 3, 50. There is no reason to believe, based on the allegations in the complaint, that the General Assembly, in the absence of TABOR, would behave the way Plaintiffs prefer. The 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).

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*, 563 U.S. 125, 138 (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"). 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.

Because Plaintiffs cannot show that the harms they allege are caused by TABOR or that a ruling in their favor would redress those harms, they have failed to bear their burden of establishing the three elements of Article III standing.

C. Principles of prudential standing also bar Plaintiffs' claims.

Even if Plaintiffs could establish Article III standing, they still must clear a prudential hurdle. Prudential standing encompasses at least three broad principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citations omitted). Plaintiffs' complaint fails on all three counts.

Raising the Legal Rights of Another. Plaintiffs assert that "[t]he requirement to maintain a Republican Form of Government properly should extend to the subordinate levels of Colorado government, including its counties, school districts, and special districts. Otherwise, the obligations of republican governance could easily be subverted by the delegation of powers to such subordinate entities." Compl. ¶ 11. But the guarantee of a Republican Form of Government is a guarantee to the *states*. *See Texas v. White*, 74 U.S. 700 (1868). It "does not extend to systems of local governments for municipalities." *Phillips v. Snyder*, 2014 WL 6474344, *6 (E.D. Mich. Nov. 19, 2014) (quoting *Johnson v. Genesee*, 232 F. Supp. 567, 570 (E.D. Mich. 1964)); nor does it extend to individuals. *Largess v. Supreme Judicial Court*, 373 F.3d 219, 225 n.5 (1st Cir. 2004) ("the bare language of the Clause does not directly confer any rights on individuals vis-a-vis the states"). As a result, Plaintiffs' standing may not rest on their allegations of injury to entities other than the State.

Generalized Grievance. Prudential limitations on federal jurisdiction further ensure that courts avoid deciding "abstract questions of wide public significance." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

The complaint alleges that TABOR deprives all citizens of Colorado "of effective representative democracy." Compl. ¶ 10. It alleges that "[a]ll Plaintiffs in this case have rights . . . to a Republican Form of Government and therewith to legislative branches of state and local government with the powers to tax and appropriate revenues." Compl. ¶ 96. By Plaintiffs' own admission, then, the injury TABOR allegedly inflicts is "shared in substantially equal measure" by everyone in

Colorado. *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1026 (10th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). The federal courts are the wrong forum for such a widespread dispute. *Valley Forge,* 454 U.S. at 474–75, 487 ("The federal courts were simply not constituted as ombudsmen of the general welfare."). Complaints about a state's "legislative process" are "generalized, abstract grievance[s], shared by all … citizens," and therefore, are inappropriate for judicial resolution. *Common Cause v. Pa.*, 558 F.3d 249, 258–60, 262 (3d Cir. 2009).

Zone of Interests. The zone-of-interests analysis requires a court "to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark,* 134 S. Ct. at 1387. "[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked" and "whose injuries are proximately caused by violations of the statute." *Id.* at 1388-89, 1390-91 (quotation omitted).

None of the groups of Plaintiffs are within a class that Congress has authorized to sue under the Guarantee Clause of the United States Constitution and Colorado's Enabling Act. Plaintiffs are not the proper parties to enforce either provision. Indeed, no decision holds that a plaintiff has standing under the Guarantee Clause or a State's Enabling Act to invalidate an exercise of direct democracy. The only decision on that point concludes that the opposite is true. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118, 133, 139 (1912) (dismissing a

claim based on Oregon's Enabling Act because it depended on a nonjusticiable theory: that direct democracy violates republican government). For all these reasons, Plaintiffs cannot demonstrate prudential standing.

CONCLUSION

Plaintiffs can neither establish the elements of Article III standing nor meet the requirements of prudential standing. As a result, Plaintiffs' Fourth Amended Complaint should be dismissed at the outset. Should the Court find that any plaintiff has standing, the State anticipates challenging whether the remaining claims are justiciable and ultimately whether TABOR's provisions are compatible with the notion of a "republican form of government" mandated by the United States Constitution.

CYNTHIA H. COFFMAN
Attorney General

s/ Kathleen Spalding
KATHLEEN SPALDING
FREDERICK R. YARGER
GLENN ROPER
MATTHEW D. GROVE
MEGAN PARIS RUNDLET
STEPHANIE LINDQUIST SCOVILLE

Office of the Colo. Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203|
Telephone: (720) 508-6000
Attorneys for Defendant
John Hickenlooper
Governor of the State of Colorado

CERTIFICATE OF SERVICE

This is to certify that I have duly served **The Governor's Motion to Dismiss Plaintiffs' Fourth Amended Complaint for Injunctive and Declaratory Relief** upon all parties herein by serving through the Court's ECF Filing System and/or by E-mail transmission this 16th day of December, 2016 to the following:

Attorneys for Appellees:

David Evans Skaggs
david.skaggs@dentons.com

Herbert Fenster
hfenster@mckennalong.com

Lino S. Lipinsky de Orlov
Lino.lipinsky@dentons.com

Michael Lee Bender
mbender@perkinscoie.com

John Herrick
john.herrick@outlook.com

Michael F. Feeley
mfeeley@bhfs.com

Sarah Clark
sclark@bhsf.com

Carrie E. Johnson
cjohnson@bhfs.com

s/ Mary A. Brown