Case No. 17-1192
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Senator, *et al.*, Plaintiffs–Appellants, v. JOHN HICKENLOOPER, in his official capacity as Governor of Colorado, Defendant–Appellee.	

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

Governor's Response Brief

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STATEMENT OF PRIOR OR RELATED APPEALS

Appellee-Defendant concurs with the statement of prior or related appeals set forth in Appellant-Plaintiffs' Opening Brief.

ISSUES PRESENTED ON APPEAL

I. Did the district court correctly dismiss this suit based on the doctrine of prudential standing after Plaintiffs forfeited argument on at least two prongs of that doctrine, each of which is independently sufficient to require dismissal?

II. In the alternative, must this case be dismissed because the Political Subdivision Plaintiffs fail to satisfy the doctrine of political subdivision standing?

INTRODUCTION

Plaintiffs seek to overturn the Taxpayer's Bill of Rights ("TABOR"), an amendment to Colorado's Constitution passed by ballot initiative in 1992. TABOR requires voter participation in enacting fiscal policies in Colorado, including tax increases. Plaintiffs allege that TABOR is incompatible with the concept of a "republican form of government" reflected in the United States Constitution and Colorado's Enabling Act. Six years into this case, after four amendments to the complaint and on their third stop in this Court, Plaintiffs have yet to establish that they have standing to maintain their claims.

Plaintiffs no longer contend that any of the individual legislators, educators, or citizens among their number has Article III standing. Their claims instead now depend entirely on a group of political subdivisions of the State of Colorado—eight school boards, a county commission, and a special district—that were recently added to the complaint following remand and that have allegedly been injured by TABOR.

The district court agreed that the Political Subdivision Plaintiffs' alleged injuries are sufficient to establish standing under Article III, but nevertheless concluded that the Political Subdivision Plaintiffs lacked prudential standing and, importantly for this appeal, that they had forfeited their opportunity to argue otherwise. Separately and in the alternative, the district court held that the nature of the Political Subdivision Plaintiffs' claimed injuries, when considered together with their status as political subdivisions of the State of Colorado, barred them from suing the Governor under the political-subdivision-standing doctrine. For the reasons below, this Court should fully and finally resolve this case by affirming the district court's order of dismissal. A

ruling in the Governor's favor on either prudential standing or the political subdivision doctrine is independently sufficient to affirm.

STATEMENT OF THE CASE AND FACTS

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; JA 1421.[1] Plaintiffs also claim that TABOR violates Colorado's Enabling Act, which incorporates the

[1] Plaintiffs' opening brief cites to the appendix with the abbreviation "JA." This brief will follow the same format.

same language.[2] That language has never, in the entire history of the United States, been successfully asserted as a basis for litigation beyond the motion-to-dismiss stage. *See, e.g., Phillips v. Snyder*, 836 F.3d 707, 716 (6th Cir. 2016) ("Traditionally, the Supreme Court has held that claims brought under the Guarantee Clause are nonjusticiable political questions.") (quotation omitted); *California v. United States,* 104 F.3d 1086, 1091 (9th Cir. 1997) (holding that "claims brought under the Guarantee Clause are nonjusticiable.").

In Plaintiffs' view, a state government is "republican" only if the citizens grant their elected representatives exclusive power over taxation and spending. Hoping to embed this vision of republican government in federal constitutional law, Plaintiffs have spent the last six years trying to find a party with standing to do so. A panel of this Court initially concluded that the legislator-plaintiffs had standing under Article III, *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014),

[2] Plaintiffs' two additional claims that TABOR violates the Supremacy Clause and impermissibly amends the Colorado Constitution are both derivative of the Guarantee Clause and Enabling Act claims, and thus rise and fall with them. JA 1448-50; *see also* JA 427-28 (noting that if TABOR violates the Guarantee Clause and Enabling Act, it also violates the Supremacy Clause).

but the Supreme Court vacated that judgment and remanded the case in light of its opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). *Hickenlooper v. Kerr*, 135 S. Ct. 2927 (2015). After reconsidering its opinion in light of *Arizona State Legislature*, this Court rejected the legislator-plaintiffs' claims of Article III standing and remanded the case to the district court for a determination as to "whether the non-legislator plaintiffs possess standing." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1218 (10th Cir. 2016).

Back in the district court, Plaintiffs amended their complaint for a fourth time, adding the Political Subdivision Plaintiffs upon which their standing arguments now hinge. JA 1419–52. The Governor again moved to dismiss, arguing that all Plaintiffs failed to satisfy either Article III or prudential standing requirements and that the Political Subdivision Plaintiffs, by virtue of their status as instrumentalities of their parent state, were independently barred from maintaining suit. JA 1453-1473. Consistent with the position taken in their opening brief in this Court, Plaintiffs' response essentially conceded the Governor's arguments with respect to all but the Political Subdivision Plaintiffs.

JA 1474–92. In its order granting the Governor's motion to dismiss, the district court noted that "plaintiffs make no effort to discuss, analyze, or even ruminate on how the elected officials, educators, and citizens have [Article III or prudential] standing." JA 1571.

Having given up on establishing standing for the original Plaintiffs, the response to the Governor's motion to dismiss focused instead on establishing the standing of the newly added Political Subdivision Plaintiffs. With respect to Article III standing, the district court concluded that, by claiming the political subdivisions had "incur[red] costs to present matters to voters that would have, without TABOR, been within the power of the political subdivisions to decide," the complaint adequately alleged that they had suffered an injury-in-fact. JA 1575.

This conclusion, however, was not dispositive. As the district court recognized, a plaintiff with Article III standing must still demonstrate prudential standing, "which embodies judicially self-imposed limits on the exercise of federal jurisdiction." JA 1570 (quoting *The Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011)). Moreover, due to their status as instrumentalities of the state, there are

additional limitations—independent of the doctrines of Article III and prudential standing—on the ability of political subdivisions to maintain suit against their parent state in federal court. *See City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). The district court concluded that the Fourth Amended Complaint failed to demonstrate both prudential and political subdivision standing.

The Political Subdivision Plaintiffs failed to satisfy prudential standing for two independent reasons. First, the response to the motion to dismiss did not address two of the three prongs of prudential standing. Thus, Plaintiffs forfeited any argument that they are (1) within the relevant zone of interests protected by the "republican form of government" language and (2) asserting something other than the sort of generalized grievance that is inappropriate for judicial review. JA 1585. Second, even putting aside the forfeiture issue, the district court concluded that the Political Subdivision Plaintiffs lacked prudential standing because: (1) they are not in the zone of the interests of the Guarantee Clause or Enabling Act; (2) their grievance is generalized "because it is a harm to which every citizen and political

subdivision in Colorado has allegedly been subjected," and (3) their claim "that TABOR has undermined a Constitution 'republican in form,' . . . is not their right to assert" because that right accrues to "the people of the State" as a whole, and not its political subdivisions. JA 1586.

A separate and independent basis for the district court's order of dismissal was the doctrine of political subdivision standing. The district court explained that the political subdivisions have no standing to assert their constitutional Guarantee Clause claim because "the Constitution did not contemplate the rights of political subdivisions as against their parent states." JA 1577. Rather, "courts have only allowed political-subdivision suits when Congress has enacted statutory law specifically providing rights to municipalities." *Id.* (quotation omitted). The district court concluded that, to satisfy the political subdivision standing doctrine, Plaintiffs were required to identify a statute granting political subdivisions a specific right to sue the State. Yet the Enabling Act—the only statutory basis for this lawsuit— was not "directed at protecting political subdivisions," JA 1578 (quoting *City of Hugo*, 656 F.3d at 1257). As a consequence, the Fourth Amended Complaint failed to allege that the Political Subdivision Plaintiffs were

"seeking to enforce a right granted to them in the Enabling Act." JA 1580. Without establishing this link, the political subdivisions could not demonstrate that they had standing to challenge TABOR.

SUMMARY OF THE ARGUMENT

The district court's order should be affirmed because the Political Subdivision Plaintiffs—the only group of Plaintiffs with any remaining chance of maintaining this lawsuit—cannot establish that they have prudential or political subdivision standing.[3] Plaintiffs' failure to satisfy the requirements of either doctrine is fatal to their claim.

The district court's prudential standing analysis, including its conclusion that Plaintiffs forfeited any arguments concerning the "zone of interests" and "generalized grievance" requirements, was straightforward and is alone dispositive of Plaintiffs' claims. As the district court concluded, this Court's discussion of prudential standing in *Kerr II* was limited to the legislator plaintiffs; its reasoning does not apply to political subdivisions. Because the question was not yet decided in this case, Plaintiffs were required to address it substantively

[3] For purposes of this appeal only, the Governor does not challenge the district court's conclusion that the Political Subdivision Plaintiffs have Article III standing.

in the district court in order to establish the newly-added political subdivisions' prudential standing. The district court correctly found that their failure to address at least two of the doctrine's three prongs, however, amounted to a forfeiture of any argument that they had prudential standing. For the same reason, Plaintiffs should be barred from raising new arguments in this Court that they chose not to assert below. Finally, even if Plaintiffs are permitted to raise new arguments in this Court, the district court's finding should be affirmed because Plaintiffs cannot satisfy the requirements for prudential standing on the merits, whether their arguments are taken at face value or evaluated under the plain error doctrine.

Nor can Plaintiffs overcome the limitations on political subdivision standing. The district court correctly held that this case is unlike a situation in which a school land trust, designed specifically to benefit local schools, gives rise to political subdivision standing on the part of a school district. *See Branson*, 161 F.3d at 628-30. To the contrary, here neither the Guarantee Clause nor the Enabling Act was created for the benefit of any particular political subdivision. Instead, the benefits of a "republican form of government" accrue to the State as a whole and all

of its people. As a result, Plaintiffs do not satisfy the narrow circumstances under which a political subdivision may sue its parent State.

STANDARD OF REVIEW

Generally, an order granting a motion to dismiss is subject to *de novo* review. *Tsosie v. United States,* 452 F.3d 1161, 1163 (10th Cir. 2006). Here, however, and as argued in detail below, Plaintiffs' forfeited arguments on prudential standing are subject only to plain error review. *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011). The remainder of the district court's order should be reviewed *de novo*.

ARGUMENT

Plaintiffs must show both prudential standing *and* political subdivision standing in order to achieve reversal of the district court's order. Because each strand is jurisdictional, this Court may consider them in any order in this appeal. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (noting that while "subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not

dictate a sequencing of jurisdictional issues"). The Governor addresses prudential standing before turning to the political subdivision question.

I. Plaintiffs do not have prudential standing.

Prudential standing encompasses three principles implicated here: "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 must satisfy each of these requirements in order to establish prudential standing. *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1137 (10th Cir. 2006). Because Plaintiffs can satisfy none of them, the district court's order should be affirmed.

A. As a preliminary matter, Plaintiffs were required to establish that the Political Subdivision Plaintiffs had prudential standing but expressly failed to do so.

Plaintiffs argued below that it was unnecessary for them to address prudential standing for two reasons. First, they claimed that "prudential standing is often unnecessary in Supremacy Clause

challenges." JA 1489. Second, they claimed that this Court resolved the prudential standing question for the purposes of this case in *Kerr II*. JA 1489–90. Plaintiffs' opening brief does not even discuss the first of these arguments, which is therefore waived. *Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("An issue or argument insufficiently raised in the opening brief is deemed waived."). As to the second, Plaintiffs summarily assert that the principles underlying the legislator-plaintiffs' prudential standing—an issue argued in previous phases of this case—apply in a similar fashion to the Political Subdivision Plaintiffs. They claim that by challenging the prudential standing of these newly added parties, "Defendant seeks to re-litigate previously rejected arguments." Op. Br. at 30. There is no merit to this assertion.

The district court correctly declined to construe *Kerr II* to include the Political Subdivision Plaintiffs, who were not even parties to this case when that decision was issued. The district court's order stated that "[a]s plaintiffs are more than fully aware, the [Tenth Circuit's] prior decision addressed the prudential standing of the legislator-plaintiffs only—the Court's bold heading to that effect should have

made the same fairly clear." JA 1573. Indeed, it would have been impossible for this Court to have addressed the prudential standing of the Political Subdivision Plaintiffs in *Kerr II* because those parties were added to the complaint *after* the Supreme Court remanded the case. *Compare* JA 142–43 (caption of substitute complaint) *with* JA 1371–72 (caption of third amended substitute complaint). The district court was therefore correct to reject Plaintiffs' suggestion that this Court's ruling as to the standing of the legislator-plaintiffs—a separate and unique set of parties to this litigation—was binding with respect to newly added, institutional Plaintiffs whose interests and powers diverge substantially from those of the individual legislators.

Because *Kerr II* did not settle the prudential standing question for parties who might be added to the suit in the future, Plaintiffs were required to establish prudential standing for the newly added political subdivision plaintiffs.

B. By failing to argue plain error with respect to the arguments they forfeited below, Plaintiffs have waived any opportunity to argue that they satisfy at least two dispositive elements of the prudential standing doctrine.

The Governor's motion to dismiss challenged Plaintiffs' prudential standing on all three relevant grounds, arguing that they were not within the zone of interests protected by the Enabling Act or Guarantee Clause, that they were asserting a generalized grievance, and that they were attempting to raise the rights of third parties. JA 1469–72. In response, Plaintiffs argued only that "TABOR removes state fiscal power from Colorado's representative institutions and relegates those powers to plebiscitary decision-making," and that "Plaintiffs seek to assert their own rights, not the rights of others, to restore that power." JA 1489. But Plaintiffs declined to address the remaining two prongs of prudential standing, relying—as noted above—on this Court's previous determination that the legislator Plaintiffs had prudential standing. *Id.*

The district court expressed surprise at this strategy, remarking that "[f]or some reason, plaintiffs appear to believe that the latter two tests [of prudential standing] are off the table, as they make no attempt

to address them," JA 1572, notwithstanding "defendant's clear assertion that plaintiffs lack standing on those grounds." JA 1573. The court went on to point out that "as the party with the burden to establish standing, plaintiffs must live and die by their decision not to address defendant's argument in this regard." JA 1573. The district court concluded that by failing to substantively address the issue, Plaintiffs forfeited any opportunity to demonstrate prudential standing. *Id.*

Plaintiffs' opening brief in this Court does not even mention forfeiture, much less offer any reason why the district court may have misconstrued their silence on the prudential standing issue. Their failure to address the forfeiture question amounts to a concession that the district court's conclusion on this point was correct, *see Avenue Capital Management II, L.P. v. Schaden*, 843 F.3d 876, 885-86 (10th Cir. 2016) (declining to address a newly presented argument on appeal where plain error arguments were not raised), and waives any argument to the contrary. *Becker*, 494 F.3d at 913 n.6.

Plaintiffs must satisfy all three prudential standing requirements. *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1450–51 (10th Cir. 1994). But by failing to argue plain error in their opening brief with respect to

the district court's prudential standing analysis, they have waived their opportunity to do so with respect to, at a minimum, the "generalized grievance" and "zone of interests" elements of the doctrine.[4] *Richison*, 634 F.3d at 1130-31 (stating that a failure to argue plain error in opening brief "marks the end of the road" for an argument that was not presented in the district court). Put another way, Plaintiffs' forfeiture on at least two of the prudential standing prongs in the district court, coupled with their waiver of any plain error argument with respect to the district court's analysis of those two prongs here, forecloses any opportunity for Plaintiffs to successfully argue that they have prudential standing. This fact, standing alone, is sufficient to affirm the district court's order dismissing the complaint.

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[4] As noted above, Plaintiffs' response to the Governor's motion to dismiss did offer a conclusory, two-sentence-long argument that they "seek to assert their own rights, not the rights of others." JA 1489. Even that, however, was arguably insufficient to preserve arguments on the subject of whether Plaintiffs seek to impermissibly raise the legal rights of third parties through this lawsuit. *See, e.g., U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.,* 582 F.3d 1131, 1142 (10th Cir. 2009) ("A party does not preserve an issue merely by advancing a related theory before the district court, or by presenting the issue to the district court in a vague and ambiguous manner.") (quotation omitted); *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1233-34 (10th Cir. 1997) (holding that a "fleeting contention" in the district court was insufficient to preserve issue for appeal).

C. The district court's conclusion that Plaintiffs lacked prudential standing was not error, and it certainly did not rise to the level of plain error.

Plaintiffs now offer several pages of new, never-before-asserted arguments on all three prongs of the prudential standing question. As argued above, those arguments have been waived and should not be considered here. But even if this Court were to conclude that waiver does not apply, the district court's conclusions may still only be reviewed for plain error because to the extent the Court entertains forfeited theories on appeal, it "will reverse a district court's judgment on the basis of a forfeited theory only if failing to do so would entrench a plainly erroneous result." *Richison*, 634 F.3d at 1128. Therefore, this Court should affirm the district court's ruling on prudential standing unless Plaintiffs can establish that it was plainly erroneous.

"To show plain error, a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* This is an "extraordinary, nearly insurmountable burden." *Employer's Reinsurance Corp. v. Mid–Continent Cas. Co.,* 358 F.3d 757, 769–770 (10th Cir. 2004). As

discussed in detail below, there was no error here at all. But even if the district court did err, its error was not "plain," nor did it "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings."

1. The district court's conclusion that the Political Subdivision Plaintiffs lack prudential standing was not error.

a. The Political Subdivision Plaintiffs are prohibited from asserting the legal rights of those protected by the republican guarantee—namely, the State and its people.

"The prudential standing doctrine encompasses various limitations, including the general prohibition on a litigant's raising another person's legal rights. The plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *The Wilderness Society*, 632 F.3d at 1168 (internal quotations and alterations omitted). The opening brief maintains that the Political Subdivision Plaintiffs "are asserting their own institutional legal rights and interests to exercise their historic, customary fiscal authority and to gain access to the State-legislated funds, all as contemplated by the Enabling Act and the United States Constitution." Op. Br. at 31.

But the constitutional 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) ("[T]he bare language of the Clause does not directly confer any rights on individuals vis-a-vis the states."). Likewise, the statutory guarantee of a republican form of government contained in the Enabling Act does not extend to political subdivisions, since "the State Constitution was formed *for the people of Colorado*. Not the State's political subdivisions." JA 1583 (emphasis in original). "[T]he right to a Constitution 'republican in form' is that of the people of Colorado, as they are the ones who allegedly created, maintained, and relinquished power to alter the same." JA 1584. Thus, while the political subdivision Plaintiffs may be asserting that TABOR impairs their own ability to raise revenue as they see fit, their legal theory depends entirely on constitutional and statutory provisions that do not provide them with any rights. In other words,

Plaintiffs are raising the legal rights of the State of Colorado and its People in a case seeking to secure benefits for themselves. Because Plaintiffs' standing may not rest on the alleged violation of another's rights, their claim to prudential standing fails.

b. The Political Subdivision Plaintiffs are prohibited from raising a generalized grievance about TABOR that applies to every citizen and political subdivision in the State.

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). When the asserted harm is a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Plaintiffs claim that TABOR deprives all Colorado citizens "of effective representative democracy." JA 1424, ¶ 10. The complaint 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." JA 1445, ¶ 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*, 422 U.S. at 499). The federal courts are the wrong forum for such a widespread dispute. *Valley Forge Christian College v. Americans United Separation of Church & State, Inc.,* 454 U.S. 464, 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).

Nor have Plaintiffs solved this problem by attempting to restrict their claim to the political subdivisions. Plaintiffs assert that "[b]ecause TABOR has deprived *all* of Colorado's legislative bodies—from the state legislature to boards of county commissioners to city councils to school boards to every form of special district—of the power to raise revenue, the Political Subdivision Plaintiffs have suffered concrete injury caused directly by TABOR, injury sufficient to establish standing." Op. Br. at

17. This only shows why their complaint asserts a generalized grievance.

Colorado has literally thousands of elected special districts, school boards, town and city councils, boards of county commissioners, and other similar local governing bodies, virtually all of which are affected by TABOR.[5] Plaintiffs claim that, in the district court, they "described their loss of access to state funds, the increased costs of ballot measures (which the Court actually found), as well as the inability to retain 'excess revenues.'" Op. Br. at 32. But as the district court held, it was not enough for Plaintiffs to generally assert "that TABOR has removed fiscal power form Colorado's representative institutions . . . because [that] is a harm to which every citizen and political subdivision in Colorado has allegedly been subjected." *Id.* Because Plaintiffs sought "relief that would no more benefit the political subdivisions than it would all citizens and political subdivisions," their grievance was generalized.

[5] According to the Colorado Department of Local Affairs, there are currently a total of 3,719 active local governments in Colorado. https://tinyurl.com/y93tqlwf (last visited Nov. 20, 2017).

c. The Political Subdivision Plaintiffs are not within the zone of interests of any provision of law invoked in the complaint.

The zone-of-interests analysis requires a court to determine whether a plaintiff's grievance "'arguably fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.'" *Bd. of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (quoting *Bennet v. Spear*, 520 U.S. 154, 163 (1997)). A "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 law. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. at 1388–89, 1390–91 (quotation omitted).

The Political Subdivision Plaintiffs do not belong to a class 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 enforceable rights under the Guarantee Clause or a State's Enabling Act to invalidate an exercise of direct democracy. The only

relevant decision concluded 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 the nonjusticiable theory that direct democracy violates republican government); *see also Arizona State Legislature*, 135 S. Ct. at 2660, n.3 ("The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter.").

2. Assuming *arguendo* that the district court's prudential standing analysis was incorrect, any error was not "plain."

"[A]n error that is plain is one that is clear and obvious. An error is clear and obvious when it is contrary to well-settled law." *United States v. Whitney*, 229 F.3d 1296, 1309 (10th Cir. 2000). Here, Plaintiffs fail to identify any "well-settled law" contravening the district court's analysis on any of the three prudential standing considerations. With respect to whether they are attempting to raise the legal rights of another, for example, Plaintiffs rely on the Colorado Supreme Court's acknowledgment that Colorado's school districts are the beneficiaries of

the trust created by the Enabling Act. *See Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886 (Colo. 2001). But this case is not about the "trust imposed by the Enabling Act." Op. Br. at 31. It is instead about whether TABOR violated the Guarantee Clause and the "guarantee" language in the Enabling Act by ensuring that Colorado voters would have a voice in matters of public revenue and debt. Accordingly, nothing in the district court's analysis of the nature of Plaintiffs' claims contravenes well-settled law.

The same is true for the "generalized grievance" and "zone of interests" prongs of the prudential standing doctrine. Plaintiffs identify no case holding that a harm shared by every political subdivision in the State does not amount to a generalized grievance. Nor do they cite to any authority clearly holding that a political subdivision is within the "zone of interest" protected by the Guarantee Clause or the "guarantee" language of the Enabling Act. At best, they argue that the district court's analysis is inconsistent with dicta from various cases entirely unrelated to the federal government's guarantee to the states. Because none of these cases is directly contrary to the district court's analysis, any error by the district court cannot have been "plain."

3. Any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Nor did any error by the district court seriously affect the fairness, integrity, or public reputation of judicial proceedings. After six years and five iterations of their complaint, Plaintiffs have had every opportunity to develop their arguments. Yet, as the district court repeatedly pointed out, their response to the motion to dismiss failed to develop those arguments at every turn. Indeed, the district court carefully analyzed Plaintiffs' complaint and dispositive briefing to determine if any allegations could be identified or arguments could be made to militate against dismissal. The fact that, despite this effort, the court was not able to successfully make Plaintiffs' own arguments for them demonstrates that the ruling of dismissal did not undermine the fairness or integrity of these proceedings. Because the district court did not commit plain error, its ruling must be affirmed.

II. Plaintiffs cannot demonstrate that they have political subdivision standing.

Even if Plaintiffs were able to show that the district court's conclusions on prudential standing were plain error, they still must show that the Political Subdivision Plaintiffs satisfy the doctrine of

political subdivision standing in order to prevail in this appeal. They cannot make that showing.

"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, Plaintiffs highlight the Tenth Circuit's acknowledgement 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."[6] *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; *see also* JA 1462 ("*City of Hugo* makes clear [that] a political subdivision must be seeking to enforce rights afforded it in a federal statute"). 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.

[6] Nor does the Supremacy Clause create an independent cause of action. *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383 (2015); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 898–904 (10th Cir. 2017).

For example, in *Branson*, the school district alleged that 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 that 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 Tribe* 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 plaintiff county was neither "the trustee nor the beneficiary of the hypothetical trust, nor the trust's settlor").

In contrast, the Political Subdivision Plaintiffs here cannot show that they are asserting rights granted to them in particular under either the Guarantee Clause or the Colorado Enabling Act. As the district court's order explained, in their response to the Governor's motion to dismiss they claimed that they were "seeking to enforce rights granted to them in the Enabling Act," and "cite[d] numerous paragraphs from the [Fourth Amended Complaint]; presumably to support this assertion." JA 1579. The district court reviewed each of these paragraphs, nearly 20 in all, noting that only two of them had any "mention of rights being granted in the Enabling Act to the political-

subdivision plaintiffs." JA 1579. The allegations in these paragraphs, however, "pertain[ed] to *public schools*" and not to "boards of county commissioners or special districts." JA 1580 (emphasis in original). Thus, there was no basis upon which to conclude that the newly added boards of county commissioners or special districts could establish political subdivision standing.[7] Therefore, the complaint was devoid of any allegations upon which these Political Subdivision Plaintiffs could establish political subdivision standing.

Plaintiffs analogize their claims to those in *Branson*—and attempt to distinguish those in *City of Hugo*—by pointing out that, as in this case, the *Branson* plaintiffs "were political subdivisions (school districts) seeking to enforce rights granted to them by Section 7 of the Enabling Act." Open. Br. at 28. The difficulty with this argument is that, unlike in *Branson,* the political subdivision Plaintiffs 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's

[7] And as to the two school districts for which Plaintiffs alleged specific facts, the district court correctly concluded that the rights asserted by Plaintiffs neither referenced a republican form of government, JA 1581, nor established the facts that afforded the *Branson* plaintiffs standing—an effect on the public land trust. JA 1582.

"Guarantee" language, arguing that it conveys a right that federal courts may enforce. As discussed above, however, the Guarantee Clause 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 mirrors this language. 18 Stat. 474, sec. 4 (1875) ("the constitution [of Colorado] shall be republican in form").

The fact that the "republican guarantee" appears in a federal statute (the Enabling Act) in addition to the Constitution neither alters its nature nor confers upon the political subdivisions any independent ability to enforce it. Unlike the 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 afforded to them—analogous to the trust monies in *Branson* or the Fair Housing Act protections in *Kaw Tribe*—that TABOR takes away from them. In short, the district court correctly found that Plaintiffs failed to allege that Colorado has taken

any actions that contravene a federal statutory enactment that affords them justiciable federal rights. Absent such an allegation, the reasoning in *City of Hugo* controls here, and the political subdivisions have no standing to challenge a state enactment such as TABOR in federal court.

CONCLUSION

The district court's decision dismissing the case for lack of prudential and political subdivision standing should be affirmed.

Respectfully submitted this 27th day of November, 2017.

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/ s / Glenn E. Roper
Dated November 27, 2017

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/ s / Glenn E. Roper
Dated November 27, 2017

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This is to certify that, on this 27th day of November, 2017, I have provided service of the foregoing **GOVERNOR'S RESPONSE BRIEF** through the federal ECF filing protocol and by e-mailing to the following attorneys:

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