CASE NO. 12-1445

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

On Appeal from the United States District Court for the District of Colorado
Case No. 11-cv-01350-WJM-BNB
Honorable William J. Martínez, United States District Court Judge

RESPONSE TO GOVERNOR'S OPENING BRIEF

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Plaintiffs request oral argument.

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There are no other prior or related appeals.

STATEMENT OF ISSUES

1. Did the District Court correctly determine that Plaintiffs have standing to pursue their constitutional and statutory claims that the TABOR Amendment violates the guarantee of a Republican Form of Government by depriving the Colorado legislature of powers fundamental to republican governance, especially the power to raise revenue?

2. Are Plaintiffs entitled to a trial on the merits to establish that TABOR's transfer of the Colorado General Assembly's revenue-raising power to the electorate, and its limits on other core legislative powers, violate the guarantee of a Republican Form of Government enshrined in the United States Constitution and in the Colorado Statehood Enabling Act of 1875, 18 Stat. 474 ("Enabling Act")?[1]

3. Did the District Court correctly determine that Plaintiffs' constitutional and statutory claims are justiciable?

[1] The text of the Enabling Act appears immediately preceding the text of the Colorado Constitution in the Colorado Revised Statutes and is reproduced in Addendum A to this brief.

STATEMENT OF THE CASE

Plaintiffs, a group of legislators, other office-holders, educators, and citizens, filed this action on May 23, 2011, to challenge, under the United States Constitution, the Colorado Constitution, and the Enabling Act, TABOR's radical restructuring of Colorado government and, most critically, the removal of the legislature's authority to raise revenue. Aplt. App. at 165-87. On August 15, 2011, Defendant moved to dismiss Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(6). *Id.* at 63-87. Defendant asserted that Plaintiffs' claims were nonjusticiable and that they lacked standing to bring the case. *Id.* at 67-80.

After hearing oral argument and ordering supplemental briefing, on July 30, 2012, the District Court denied the Governor's Motion to Dismiss ("Governor's Motion"), except as to Plaintiffs' Equal Protection claim. *Id.* at 464-65. The District Court concluded that all Plaintiffs have standing, based on the standing of those Plaintiffs who are members of the Colorado General Assembly. *Id.* at 393-465. The Court found, because TABOR deprived the General Assembly of the power to tax and arrogated that power to the voters, that the legislator-Plaintiffs suffered a concrete injury-in-fact and that the case did not present separation-of-power concerns. *Id.* at 413-26, 430.

Moreover, the District Court determined that the legislator-Plaintiffs have no adequate legislative remedy, because the voters – not the General Assembly – had

enacted TABOR. *Id.* at 426-28. The Court further noted that the legislator-Plaintiffs had established causation and redressability. *Id.* at 430-31.

In addition, the District Court concluded that Plaintiffs had stated justiciable claims. *Id.* at 394-95. The Court determined that the Political Question Doctrine ("PQD") does not preclude the litigation of Plaintiffs' constitutional claims, because the PQD is not a blanket bar to all claims arising under the Guarantee Clause of the United States Constitution. *Id.* at 435-55.

The District Court also held that the PQD did not bar Plaintiffs' statutory claim, *id.* at 455-58, noting that adjudication of cases arising under federal statutes is a "familiar judicial exercise," even in politically charged cases. *Id.* at 457. Based upon the foregoing analysis, the Court concluded that Plaintiffs' impermissible amendment and Supremacy Clause claims also survived dismissal. *Id.* at 462-64.

Defendant moved the District Court to certify the case for review pursuant to 28 U.S.C. § 1292(b). *Id.* at 490-502. The District Court certified the case for review. *Id.* at 565-72. Defendant then petitioned this Court to review the District Court's ruling, i*d.* at 573-83, and this Court granted the petition. *Id.* at 611-13.

STATEMENT OF FACTS

Enactment of TABOR marked the first time in the history of the Republic that any state has taken the radical step of completely depriving its legislature of the core function of raising revenue, and shifting that function to the voters. By placing TABOR in the Colorado Constitution in 1992, the Colorado electorate launched an unprecedented experiment with direct democracy.

While the voters of several states, including Colorado, had previously adopted constitutional and statutory changes at the ballot box, TABOR remains *sui generis* in stripping fundamental powers from a state legislature. This case is narrowly focused on TABOR's impact on Colorado government; Plaintiffs do not challenge the right of initiative.

Under TABOR, "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a new tax revenue gain to any district" for the State of Colorado and any local government in the state can be enacted only by plebiscite. Colo. Const. art. X, § 20, cls. (2)(b), (4)(a). No elected body is empowered to modify a single comma of TABOR. *See* Colo. Const. art. XIX, § 2, cl. (1). Because the Constitution also limits any amendment to a "single subject," it is impossible simply to repeal or significantly to amend TABOR by a single initiative or referendum. Colo. Const. art. V, § 1(5.5).

The voters' enactment of TABOR by initiative does not protect it from judicial scrutiny, however. At least twice before, federal courts have struck down constitutional amendments approved by Colorado voters that violated the United States Constitution. *See Romer v. Evans*, 517 U.S. 620, 623, 635 (1996); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964).

Plaintiffs are thirty-two Colorado citizens – five current members of the Colorado General Assembly, nine former members of the General Assembly, current and former county commissioners, mayors, city councilpersons, members of boards of education, public university presidents and professors, public school teachers, and parents. They contend that Colorado's twenty-year experiment with TABOR has caused "fiscal dysfunction;" deprives the legislator-Plaintiffs of their right, as elected representatives of the people of Colorado, to enact revenue-raising measures; and denies all Plaintiffs their right to the Republican Form of Government guaranteed by the Constitution and the Enabling Act. Aplt. App. at 44.

In their First Amended Substituted Complaint for Injunctive and Declaratory Relief ("Complaint"), Aplt. App. at 165-87, Plaintiffs asserted claims arising under the Guarantee Clause of the United States Constitution; the Enabling Act; the Supremacy Clause of the United States Constitution; the Equal Protection Clause

of the Fourteenth Amendment to the United States Constitution; and the impermissible amendment of the Colorado Constitution. *Id.*

Plaintiffs seek a trial at which they can present evidence that TABOR removed such core powers from the Colorado General Assembly that the state and its citizens have been denied the Republican Form of Government required by both the United States Constitution and the Enabling Act.

SUMMARY OF THE ARGUMENT

Although a full explication of the meaning of the Guarantee Clause and its guarantee of a Republican Form of Government await a trial on the merits, a preliminary understanding of these constitutional provisions is important to evaluating Defendant's arguments against justiciability. The expressed views of the Framers of the Constitution, understood in the historical context of the day, establish that state legislatures with the power to tax were assumed to be essential elements of the Republican Form of Government guaranteed for states under the Guarantee Clause. In removing that power, as well as other important powers, from the Colorado legislature, TABOR undermined the Republican Form of Government that Colorado must maintain.

The cases holding Guarantee Clause claims to be nonjusticiability are now quite dated and were never the only authorities pertinent to this case. Regardless, those cases have been superseded by contemporary cases treating Guarantee Clause claims as justiciable.

Consistent with that trend, the applicability of the PQD to such cases has been subject to judicial question for some time. The District Court gave exhaustive consideration to Defendant's assertions that this case was not justiciable under the PQD, found them wanting, and ruled that the case could proceed on the

merits. The District Court also found no basis to question the justiciability of Plaintiffs' claims under the Enabling Act.

The District Court's ruling on justiciability was therefore correct and should withstand this Court's scrutiny.

Given that the legislator-Plaintiffs' well-founded claims raise legitimate and justiciable issues of violations of the Guarantee Clause and the Enabling Act, the District Court also determined – after exhaustive analysis – that these Plaintiffs had Article III standing to pursue their claims and that prudential standing jurisprudence was no bar.

As the District Court found, the standing of the legislator-Plaintiffs is supported by the Supreme Court's decision about legislator standing in *Coleman v. Miller*, 307 U.S. 433 (1939), which applies *a fortiori* to the facts here – TABOR's wholesale deprivation of core legislative powers. If the Complaint leaves any doubt for standing purposes about the injuries suffered by the legislator-Plaintiffs and the other Plaintiffs, an assessment of their standing falls well within the mode of analysis of this Court when the question of standing is "inextricably intertwined" with the merits of constitutional claims. As with its treatment of justiciability, the District Court's careful and thorough analysis of the issue of standing is unassailable.

Having established proper standing to pursue their substantial and justiciable claims of constitutional and statutory violations, Plaintiffs should have their day in court on the merits.

ARGUMENT

I. STANDARD OF REVIEW

In the District Court, Defendant sought dismissal on two procedural bases: (1) Federal Rule of Civil Procedure 12(b)(1), alleging lack of subject matter jurisdiction; and (2) Federal Rule of Civil Procedure 12(b)(6), alleging failure to state a claim. Aplt. App. at 64.

In its Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, the District Court noted:

> There is some dispute between the parties regarding which of these two rules applies to each of Defendant's purported bases for dismissal. . . . However, the parties agree that, no matter which of the two rules applies to each purported basis for dismissal, for every purported basis for dismissal the Court should accept the Operative Complaint's allegations as true.

Id. at 402-03.

Motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may take two forms: a facial attack or one that considers facts outside the pleadings. A facial attack questions the sufficiency of the complaint. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). A factual attack may go beyond allegations in the complaint and challenge the facts upon which subject matter jurisdiction depends. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995).

This matter involves a Rule 12(b)(1) *facial* attack. Aplt. App. at 64-87. The Governor's Motion did not go beyond allegations in the Complaint, *id*. at 165-87, and did not attack facts set forth in the Complaint. The District Court, concluding that the legislator Plaintiffs had standing (while not addressing standing for the non-legislator Plaintiffs), did not consider evidence outside the Complaint. *See id*. at 405-34.

The *Holt* court announced the Rule 12(b)(1) standard to be applied in this Circuit. *Holt* confirmed that Rule 12(b)(1) cases require *de novo* review, which Plaintiffs agree is applicable to this appeal, notwithstanding that the District Court found standing and upheld most of Plaintiffs' claims. *Holt* , 46 F.3d at 1003.

In a review of a facial challenge, a plaintiff retains safeguards similar to those provided in opposing a Rule 12(b)(6) motion. The court will accept the allegations of the Complaint as true, will construe the allegations in favor of the plaintiff, and will not look beyond the face of the complaint to determine jurisdiction. *United States v. Rodriguez-Aguierre*, 264 F.3d 1195, 1203 (10th Cir. 2001); *2* James Wm. Moore *et al.*, Moore's Federal Practice ¶12.30 (3d ed. 2013).

For Rule 12(b)(6) purposes, the Court must accept the Complaint's factual allegations as true, drawing all reasonable inferences in Plaintiffs' favor. *See Dill v. City of Edmund*, 155 F.3d 1193, 1203-04 (10th Cir. 1998). A motion to dismiss for failure to state a claim is to be judged in accordance with the "plausibility

standard" announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). The issue is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Thus, whether considered as a Rule 12(b)(1) facial attack on subject matter jurisdiction or a Rule 12(b)(6) attack for failure to state a claim, the posture on appeal is, as a practical matter, the same. This Court conducts its review *de novo*, taking the allegations in the Complaint as true and according the benefit of the doubt to the plausibility of Plaintiffs' claims.

II. GIVING MEANING TO THE GUARANTEE CLAUSE

Left unexamined for eighty years, these few decisions have supported a myth that government by plebiscite can never be unrepublican.[2]

A. Defining a Republican Form of Government

The essential requirements for a Republican Form of Government under the Guarantee Clause, U.S. Const. art. IV, § 4, are properly to be determined at a trial on the merits. However, Defendant and several *amici curiae* base their arguments regarding nonjusticiability under the PQD on either an alleged absence of standards for adjudicating this issue or on a simplistic definition of Republican Form of Government that would exclude Plaintiffs' claims. Both arguments are mistaken.

It is important to avoid the fundamental error, made by some *amici* supporting Defendant, of conflating the meaning of a "Republican Form of Government" required by the Guarantee Clause with simplistic eighteenth century definitions of a "republic." *See Amici Curiae* Br. of Nat'l Fed'n of Indep. Bus., *et al*., at 24-25; Br. for *Amici* Independence Inst., *et al.* at 3, 10-27.[3] Such an

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[2] Hans A. Linde, *Who is Responsible for Republican Government?*, 65 Colo. L. Rev. 709, 711 (1994).

[3] The Br. for *Amici* Independence Inst., *et al.* at 26 chides Plaintiffs for "fail[ing] to mention" Federalist 63. We should have. There Madison explains why the system of representative democracy embodied in the new Constitution was superior to the representative elements in some ancient "republics":

erroneous premise can easily lead to the erroneous conclusion that, like a "republic," a Republican Form of Government requires only sovereignty in the people and excludes only a monarchy or tyranny. Governor's Opening Brief 29-30 ("Gov. Br."). A Republican Form of Government is certainly *at least* that. But – as the writings of the Framers explain – much more is required.

Madison made clear in Federalist 10 that the Framers were almost as wary of pure or direct democracy as they were of monarchy and tyranny. The Federalist ("The Federalist") No. 10, at 61-62 (James Madison) (J. E. Cooke ed., 1961).[4] He explained that the new nation was to have a "Republican Form of Government" (not being simply a "republic"). *Id.* at 62-64. It was to have *representative* institutions that would *reflect* popular sentiments, but would also moderate and refine those sentiments – institutions that would be democratic but *not* pure democracies. *Id.*

> . . . it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked . . . . The true distinction between these and the American governments, lies *in the total exclusion of the people, in their collective capacity*, from any share in the *latter*, and not in the *total exclusion of the representatives* of the people from the administration of the *former*. The distinction . . . must be admitted to leave . . . superiority in favor of the United States.

The Federalist No. 63, at 428 (Madison).

[4] All subsequent citations are to this edition of The Federalist.

B. State Legislatures Are Fundamental to States' Republican Form of Government

The Guarantee Clause's requirement that the states have a "Republican Form of Government" envisioned the same grounding in *representative* institutions for state government as in the new national government. Fourteen sections of the United States Constitution[5] depend on state legislatures (*e.g.*, state legislatures elected Senators – another intermediation of popular will – until adoption of the 17th Amendment in 1913).

The Framers saw state legislatures as central to the implementation of a Republican Form of Government for the states. As the Supreme Court observed in *Reynolds v. Sims*, 377 U.S. 533 (1964): "State legislatures are, historically, the fountainhead of representative government in this country. . . . With . . . the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure." *Id.* at 564-65.

The meaning of the Guarantee Clause is further informed by Federalist 39, 43, 51, 57 and 71, in which Madison and Hamilton elaborate on what the

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[5] *See* U.S. Const. art. I, § 2; art. I, § 3 (*amended by* amend. XVII); art. I, § 4; art. I, § 8, cl. 16; art. IV, § 3; art. IV, § 4; art. V (two provisions); art. VI; amend. XIV, § 2; amend. XIV, § 3; amend. XVIII, § 3; amend. XX, § 6; amend. XXII, § 2.

Given these provisions, it is incomprehensible that the Governor's counsel at oral argument could not agree with the District Court's hypothetical that a state initiative that abolished the legislature would present a legitimate Guarantee Clause claim. Aplt. App. at 315-16.

"republican form" is all about. It must, Madison notes, include two parts: power derived "directly or indirectly from the people *and administered . . . by persons holding office* . . . for a limited period." The Federalist No. 39, at 251 (Madison) (emphasis added).

In Federalist 43, Madison looks to the then-existing forms of state government and, in defense of a need for the guarantee, observed presciently: "who can say what experiments may be produced by the caprice of particular states . . . ." The Federalist No. 43, at 292 (Madison). He suggests that the Guarantee Clause provides some insurance as to state compliance because "a right implies a remedy." *Id*. at 291.

Madison continues in Federalist 51: "In republican government, the legislative authority necessarily predominates." The Federalist No. 51, at 350 (Madison). And in Federalist 57: "The elective mode of obtaining rulers is the characteristic policy of republican government." The Federalist No. 57, at 384 (Madison).

Finally, Hamilton sounds a call much like that in Edmund Burke's Speech to the Electors of Bristol:[6]

> *The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust*

[6] Edmund Burke, *Speech to the Electors of Bristol 3 Nov. 1774, in* The Works of the Right Honourable Edmund Burke (Henry G. Bohn ed., 1854-56).

> *the management of their affairs*; *but it does not require an unqualified complaisance to every sudden breeze of passion*, . . . which the people may receive from the arts of men, who flatter their prejudices to betray their interests. . . . [T]he people commonly INTEND the PUBLIC GOOD. This often applies to their very errors. . . . *When . . . the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.*

The Federalist No. 71, at 482-83 (Alexander Hamilton) (emphasis added).

C. The Legislative Power to Tax Is Fundamental

The question also arises as to how the Framers viewed the power of government to raise funds necessary to fulfill its responsibilities. The central role of money and taxation to any functional constitution is made clear by Hamilton:

> The conclusion is, that there must be interwoven, in the frame of the government, a general power of taxation . . . .
>
> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as *an indispensable ingredient in every constitution.*

The Federalist No. 30, at 188 (Hamilton) (emphasis added).

Hamilton's explanation occurred against the backdrop of the fiscally dysfunctional Articles of Confederation, under which the Congress of the United States had to depend on the states to pay its assessments.[7]

[7] In 1787 all state legislatures had the power to raise revenue to pay assessments levied by Congress under the Article of Confederation. The Framers therefore

> Congress, by the articles which compose that compact . . . are authorized to . . . call for any sums of money necessary . . . to the service of the United States; and their requisitions . . . are in every constitutional sense obligatory upon the States. *These have no right to question the propriety of the demand; no discretion beyond that of devising the ways and means of furnishing the sums demanded. . . .*
>
> What remedy can there be for this situation, . . . but that of permitting the national government to *raise its own revenues by the ordinary methods of taxation authorized in every well-ordered constitution of civil government?*

Id. at 189 (emphasis added).[8]

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would have seen the taxing power as inherent in state legislatures. Contrariwise, they would not have contemplated – much less countenanced – that the taxing power should be exercised *exclusively* though plebiscitary democracy. *See* Charles A. Beard & Birl E. Schultz, Documents on the State-wide Initiative, Referendum, & Recall (1912):

> . . . one may reasonably infer that they [the Framers] would have looked upon such a scheme with a feeling akin to horror. . . . [N]o one has any warrant for assuming that the founders . . . would have shown the slightest countenance to a system of initiative and referendum applied to either state or national affairs. . . . Democracy, in the sense of simple direct majority rule, was undoubtedly more odious to . . . most . . . than was slavery.

Id. at 28-29.

[8] Justifying the need for a national taxing power, Hamilton also poses questions that are prescient to Colorado under TABOR:

> How is it possible that a government half supplied and always necessitous, can fulfill the purposes of its institution, can . . . support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit . . .? How can its administration be any thing else than a succession of expedients . . .? How will it be able to avoid a frequent sacrifice of its engagements to immediate

The Articles of Confederation recognized that all the original thirteen state legislatures had the power to raise revenue in order to pay Congressional assessments.[9] Articles of Confederation of 1781, art. VIII. This crucial state power would have informed the Framers' understanding of the Republican Form of

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> necessity? How can it undertake or execute any . . . plans of public good?

Id. at 191.

[9] All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, *which shall be supplied by the several States* in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

> The *taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States* within the time agreed upon by the United States in Congress assembled.

Articles of Confederation of 1781, art. VIII (emphasis added).

For the provisions of the state constitutions and charters in effect at the time of ratification and pertinent to their taxing powers, *see* Conn. Char. of 1662, ¶¶ 6, 8; Del. Const. of 1776, art. 6; Ga. Const. of 1777 was silent, *but see* Ga. Const. of 1789, art. I; Md. Const. of 1776, §§ XII, XIII, IX; Mass. Const. of 1780, art. IV, XXIII; N.H. Const. of 1784, part I, art. XXVIII, part II, art. V; N.J. Const. of 1776, art. I, VI; N.Y. Const. of 1777, art. II; N.C. Const. of 1776, art. XVI; Pa. Const. of 1776, Plan or Frame of Gov't, § 41; Charter of R.I. & Prov. Plantations of 1663, ¶ 5; S.C. Const. of 1778, art. II, XVI; Va. Const. of 1776, Bill of Rights § 6.

government that states then had and in the future would be required to maintain.[10] U.S. Constitution, art. IV, § 4; *see* The Federalist No. 43, at 291-92 (Madison).

The foregoing is concededly material for the merits. It does, however, show that, in the term "Republican Form of Government," the Framers had much more in mind than merely a "republic" based on popular sovereignty and the absence of monarchy or tyranny. It suggests the rich historical material available to interpret the Guarantee Clause to require that the government of each state include a legislature with the power to raise revenue.[11]

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[10] This is consistent with the District Court's preliminary conclusion that the power to tax is, as alleged, a "core" legislative power, Aplt. App. at 417, a conclusion with which the Governor takes such umbrage. Gov. Br. 6, 15.

[11] One example is *Rice v. Foster*, 4 Del. (4 Harr.) 479 (1847), in which the requirement for a Republican Form of Government served to set a limit on direct democracy. At issue was a statute granting Delaware counties "local option" regarding the sale of alcoholic beverages. In invalidating this delegation of legislative responsibility to popular vote, the court speaks to the merits in this case:

> The framers . . . were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. . . .

Id. at 485-86.

Citing Madison on the perils of direct democracy, the opinion continues:

> To guard against these dangers . . . our republican government was instituted . . . . The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by

III. JUSTICIABILITY OF THE GUARANTEE CLAUSE AND POLITICAL QUESTION DOCTRINE JURISPRUDENCE

A. Some Misleading Propositions in Defendant's Brief

Defendant relies on several straw men and legal fictions. He claims that Plaintiffs insist the legislature should have the *exclusive* power to tax and that the people have *no* role. Gov. Br. 2, 4, 14-15. To the contrary, Plaintiffs seek only the restoration of the legislature's fiscal powers, which would still *co-exist* with the initiative power over such matters. Defendant claims that Plaintiffs have a simple political remedy available through repeal of TABOR. Gov. Br. 9, 29, 53**.**

> separate, co-ordinate branches of government in whom those powers are vested by the constitution.

Id. at 487.

The court then reaches what is also the ultimate issue in this case:

> And although the people have the power . . . to alter the constitution; under no circumstances can they . . . establish a democracy, or any other than a republican form of government.

Id. at 488.

And it offers a homily about the value of legislative deliberation:

> The making of laws is the highest act of sovereignty . . . and, therefore, the legislative power may be truly said to be the supreme power of a State. Its exercise requires superior intellectual faculties, improved by study and experience; although it seems to be a common notion with many pretended advocates of popular rights . . . that every man is instinctively fitted to be a member of the legislature.

Id. at 489.

However, following TABOR's adoption in 1992, the Colorado Constitution was amended in 1994 to limit future amendments to only a "single subject." Colo. Const. art. V, § 1(5.5). This requirement has been held to preclude an initiative to repeal TABOR because TABOR deals with more than one subject. *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 447 (Colo. 2002); *In re Proposed Initiative 1996-4*, 916 P.2d 528, 533-34 (Colo. 1996). Colorado has thus put itself in a constitutional box with no exit, placing TABOR off-limits to any normal political remedy.

Defendant ignores the narrow focus of Plaintiffs' constitutional and statutory claims, which address only TABOR's unique restructuring of state government. Like the hoary "slippery slope" metaphor, Defendant's innuendo stokes anxiety that Plaintiffs' success in this case would lead to an upheaval of state governments and laws around the country. *See* Gov. Br. 6, 37, 47, 51, 53. This line of argument insults the competency of the Court to make distinctions and to draw appropriate legal boundaries around the reach and implication of its holdings.

B. Justiciability in General

Plaintiffs are indebted to Defendant for calling attention to authorities that support the justiciability of Guarantee Clause claims and demonstrate how state law when the Constitution was enacted bears on its proper interpretation. In *Minor v. Happersett*, 88 U.S. 162, 165 (1875), the issue was, *inter alia*, whether the

franchise for women was covered by the Guarantee Clause's guarantee. Most interesting is how the *Happersett* Court addressed adjudication of the Guarantee Clause:

> All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.
>
> The guaranty is of a Republican Form of Government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

Id. at 176.

The Court then looked to the fact that, in 1787, all but one state excluded women from the franchise and concluded that the Guarantee Clause could not have been meant to guarantee the franchise for women. *Id.* at 176-78. Here, thirty-six years after *Luther v. Borden*, 48 U.S. 1 (1849) (the case regularly cited by Defendant as *precluding* justiciability, Gov. Br. 33, 37, 46; Aplt. App. at 315-17), the Court adjudicated the validity of state law against the requirements of the Guarantee Clause, but saw no need to cite *Luther* or even to concern itself with the PQD.

C. Political Question Doctrine in Retreat: *Baker v. Carr, New York v. United States, et al.*

The District Court was careful and thorough in dispensing with the question whether this case is barred by the PQD. Aplt. App. at 436-58. It rejected

Defendant's mechanical reliance on *Luther* and *Pacific States Telephone & Telegraph v. Oregon*, 223 U.S. 118 (1912). Aplt. App. at 451-53. Instead, it examined the more contemporary and accommodating treatment of Guarantee Clause claims, running from *Baker v. Carr*, 369 U.S. 186 (1962), to *New York v. United States*, 505 U.S. 144 (1968). *See* Aplt. App. at 437-42. While these cases do not directly treat such claims as justiciable, they do dispose of the notion that *Luther* and *Pacific States* preclude justiciability.

The District Court then drew on this Court's opinion in *Hanson v. Wyatt*, 552 F.3d 1148 (10th Cir. 2008):

> the Tenth Circuit briefly identified [*Colgrove v. Green*, 328 U.S. 549 (1946)'s] holding that Guarantee Clause claims cannot be raised in court, and then stated, "[t]he *New York* court, however, was not so sure about that. It decided not to resolve the matter on justiciability grounds. Rather, it *assumed justiciability* and rejected the claim on the merits."

Aplt. App. at 442-43 (quoting *Hanson*, 552 F.3d at 1163) (emphasis in original).[12]

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[12] Other federal cases have adjudicated Guarantee Clause claims and so rejected the proposition that *any* such claims run afoul of the PQD and therefore are nonjusticiable. *See e.g.*, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 950 (7th Cir. 2012); *Brown v. Sec'y of State of Fla.* 668 F.3d 1271, 1277-78 (11th Cir. 2012); *Largess v. Supreme Judicial Ct.*, 373 F.3d 219, 226 (1st Cir. 2004)*; Risser v. Thompson*, 930 F.2d 549, 552-53 (7th Cir. 1991); *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 757-58 (E.D. Va. 2011).

While these cases – cited by the Governor – may not have found violations of the Guarantee Clause on the facts presented, they nonetheless stand in contradiction to the Governor's sweeping contention that Guarantee Clause claims must always fail as nonjusticiable. The Governor's counsel conceded as much in oral argument.

Defendant makes a valiant effort to re-examine this case against the PQD tests set out in *Baker*, invoking this Court's decision in *Schroder v. Bush*, 263 F.3d 1169 (10th Cir. 2001). *Schroder* actually was a classic PQD case, involving a challenge to various acts of the *political* branches of the *federal* government. In contrast, this case does not ask the court to question a political decision of a political branch, much less a branch of the federal government, where the separation of powers underpinning of the PQD is vital. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012); *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

Fortunately, the District Court has already analyzed the *Baker* tests with great rigor, concluding that none applies. Aplt. App. at 445-555. There is no need to disturb that conclusion. It largely parallels the *Baker* analysis in Plaintiffs' Brief in Opposition to the Motion to Dismiss, Aplt. App. at 137-41, which we need not repeat here.

While correctly reciting the six tests the *Baker* Court used to assess the PQD issue, *see Baker*, 369 U.S. at 217, Defendant pays no attention to the admonition in *Baker* that immediately followed: "The cases we have reviewed show the necessity for *discriminating inquiry into the precise facts and posture of the*

Aplt. App. at 307. Therefore, this Court should allow the District Court to examine the Plaintiffs' claims on the merits. The cited cases also serve to refute the Governor's apparent contention, Gov. Br. 38-40, that the federal courts are not a proper forum for Guarantee Clause enforcement or that a state may not be required to fulfill its Guarantee Clause responsibilities.

particular case, and the impossibility of resolution by any semantic cataloguing." *Id.* (emphasis added).

After reviewing many of the cases in which claims of Guarantee Clause violations were rejected *because they embedded political questions,* the *Baker* Court stated, ". . . we emphasize that it is the involvement in the Guarantee Clause claims of elements thought to define 'political questions,' and no other feature, which could render them nonjusticiable. Specifically, we have said that *such claims are not held nonjusticiable because they touch on matters of state government organization.*" *Id.* at 228-29 (emphasis added).

A few years after *Baker,* the Supreme Court again discussed Guarantee Clause justiciability. In *New York v. United States,* 505 U.S. 144 (1992), it rejected the notion that the PQD precludes all redress of Guarantee Clause claims and limited prior decisions, including *Luther* and *Pacific States,* on which Defendant relies so heavily:

> The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther v. Borden* . . . . Over the following century, this limited holding metamorphosed into the sweeping assertion that "[v]iolation of the great guaranty of a Republican Form of Government in States cannot be challenged in the courts." . . . [quoting *Colgrove*, 328 U.S. at 556].
>
> In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. . . .

> More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. *See Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable"). Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.

Id. at 184-85.

D. State Courts and Guarantee Clause Justiciability

It is pertinent that *state* courts have often seen fit to fulfill their responsibility to interpret the federal constitution and to adjudicate claims that some state action violated the Guarantee Clause requirement for maintaining a Republican Form of Government.[13] If *federal* courts decline to consider Guarantee Clause claims, we

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[13] *See, e.g.*, *VanSickle v. Shanahan*, 511 P.2d 223, 235-44 (Kan. 1973); *Harris v. Shanahan*, 387 P.2d 771, 789 (Kan. 1963); *In re Initiative Petition No. 348, State Question No. 640*, 820 P.2d 772, 779-81 (Okla. 1992); *Kadderly v. City of Portland*, 74 P. 710, 719-20 (Or. 1903); *State v. Lehota*, 98 N.W.2d 354, 356 (Wis. 1972); *In re Advisory Opinion to Governor*, 612 A.2d 1, 16-19 (R.I. 1992).

Generally, the state supreme courts have had little difficulty sorting through political questions and reaching questions of foundational importance in the maintenance of republican governance. The Colorado Supreme Court in *Morrissey v. State*, 951 P.2d 911 (Colo. 1998), overturned a state constitutional amendment, stating on this point:

> The framework of our republican form of government is created by the Guarantee Clause . . . . It is the Guarantee Clause that assures the role of elected representatives in our system. A republican form of government is one in which the "supreme power rests in all citizens entitled to vote *and is exercised by representatives elected, directly or indirectly, by them and responsible to them."* Webster's New World Dictionary 1207 (2d College ed. 1986). The power delegated to the elected representatives is the hallmark of a republic.

face an anomalous and awkward situation. That is, a *federal* constitutional obligation designed to guarantee a minimal republican form of *state* governance and check against the "experiments . . . produced by the caprice of particular states," The Federalist No. 43 at 292 (Madison), is placed off limits to the *federal* courts and is to be enforced only by courts of the very *states* foreseen as susceptible to "caprice." *See* Hans A. Linde, *State Courts & Republican Governance*, 41 Santa Clara L. Rev. 951, 958 (2001).

E. Focus of this Case: TABOR, Not Initiatives

Defendant attempts to have it both ways, first in arguing against justiciability (and so against reaching the merits), and then in arguing for his own views of the merits. Citing cases that validate various state policies enacted through discrete exercises of the initiative power or requiring voter approval,[14] Defendant essentially argues for a kind of cumulative, inferential conclusion from the purportedly[15] relevant cases that all policies approved by initiative must be valid, including TABOR.

Id. at 916-17 (emphasis added).

[14] *See* Gov. Br. 33-36, citing, *e.g.*, *City of Eastlake v. Forest City Enters.*, 426 U.S. 668 (1976); *James v. Valtierra*, 402 U.S. 137 (1971); *Brown*, 668 F.3d 1271; *Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991).

[15] Two cases cited by the Governor do not even address Guarantee Clause claims. *See* Gov. Br. 42, n.16. *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011), does not rule on a Guarantee Clause claim. *Id.* at 172, n.6. *Van Allen v. Cuomo*, 621 F.3d 244

This is a sophistical attempt to ignore the question raised by this case. That question has nothing to do with *how* TABOR was enacted; it rather asks the court to examine the *what* of TABOR, *i.e.*, whether TABOR has relegated *exclusively* to plebiscite one or more core legislative powers essential for Colorado state government to remain republican in form.[16]

Plaintiffs will be happy to address the merits in due course and are, as explained above, confident there is ample material by which the District Court can determine the requirements for a Republican Form of Government that may be applicable in the circumstances presented by this case. *See supra* pp. 12-19.

(2d Cir. 2010), is an equal protection and First Amendment case; the court there declined to address a Guarantee Clause claim as inadequately raised on appeal. *Id.* at 249 n.5.

[16] *See* Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. Colo. L. Rev. 709 (1994). Judge Linde there is critical of "the use of initiatives to force communities to choose sides between dominant majorities and identifiable minorities in a way that elected representatives seek to avoid." *Id.* He argues that "the Guarantee Clause precludes misuse of initiatives . . . to force a plebiscite on measures of popular passion or self-interest, the two dangers which were meant to be controlled by the deliberative processes of representative government." *Id.* at 710. Plaintiffs suggest that plebiscites on taxes qualify as susceptible both to "popular passion" and "self-interest."

IV. JUSTICIABILITY AND THE ENABLING ACT CLAIM

A. Enabling Act Is Separate Basis for Relief

Defendant lastly attempts to take Plaintiffs' free-standing statutory claim of an Enabling Act violation and bury it under a mistaken parsing of Guarantee Clause jurisprudence. The pretext is that both use the term "Republican Form of Government." Employing this dubious theory, Defendant offers only a cursory argument for dismissal of Plaintiffs' Enabling Act claim.

Plaintiffs' statutory claim is that TABOR violates the requirements that Congress established in authorizing Colorado to join the Union. Defendant devotes but two paragraphs of his fifty-five page brief to this separate basis for Plaintiffs' case. *See* Gov. Br. 44-45.

Plaintiffs' Enabling Act and Guarantee Clause claims present discrete grounds for invalidating TABOR. Defendant tries to merge the two, but the Enabling Act is not, as Defendant suggests, some superfluous bit of law with no independent legal significance.

No real authority is given for Defendant's assertion that a statutory claim may be dismissed solely because the statute contains language also found in an allegedly nonjusticiable Constitutional provision. Defendant ignores the federal courts' fundamental duty to adjudicate statutory claims. Interpretation and

enforcement of federal statutes is a "familiar judicial exercise." *See Zivotofsky*, 132 S. Ct. at 1427.

It matters greatly that the Enabling Act contains its own requirement for Colorado's republican government. Plaintiffs are unaware of any decision, from any United States court, holding a statutory claim nonjusticiable *because of the words Congress employed in drafting the statute.* This Court should not rule on that basis to invoke the PQD and refuse to adjudicate a statutory claim.

The Enabling Act is "the paramount law of this state and all constitutional provisions of our fundamental state document must be consistent with it. In the event of a conflict, the constitution must yield to the Enabling Act." *W. Colo. Power Co. v. Pub. Utilities Comm'n*, 411 P.2d 785, 804 (Colo. 1966). The Enabling Act required, *inter alia*, that Colorado adopt the Constitution of the United States and a state constitution that "shall be republican in form." Enabling Act; *see also Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009).

B. Governor Relies on Inapposite Cases

Defendant's contention that Plaintiffs' Enabling Act claim is nonjusticiable rests on a trio of inapposite cases. None held that the wording of a statute kept it from the reach of judicial review. Rather, all three were improper efforts to modify United States foreign policy under the guise of a lawsuit, *i.e.*, standard occasions to invoke the PQD to decline adjudication.

In *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009), appellants were residents of Taiwan who asked the court to decide a foreign policy issue concerning Taiwan's sovereignty, *id.* at 503-04, so as to entitle them as non-citizen nationals to obtain United States passports. *Id.* at 505. The Court declined to consider *Lin* on the merits, not because of any statutory language, but because the appellants' claims required a determination of a foreign policy issue in the executive branch's domain. *Id.* "[T]he political question doctrine forbids us from commencing that analysis. We do not dictate to the Executive . . . [regarding] determinations of U.S. sovereignty." *Id.* at 507. The PQD determination in *Lin* does not support Defendant's argument, as the court there did not refuse to consider a statutory claim based on the text of the statute.

Similarly, in *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011), the court declined to review the merits of plaintiffs' political attack on OPEC made under the guise of an antitrust case. *Id.* at 942-43. The court's ruling against justiciability rested not on wording in the antitrust statutes, but on the court's refusal to supplant the Executive Branch's responsibility to make "critical foreign policy decisions." *Id.* at 951. The ruling in *Spectrum Stores* had nothing to do with the text of the antitrust legislation purportedly underlying the appellants' claims.

Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983), also does not support Defendant's attack on Plaintiffs' Enabling Act claim. *Crockett*, like *Lin* and *Spectrum Stores*, was a thinly-disguised attempt to use the judicial branch to change United States foreign policy. *Id.* Members of Congress sought to challenge the Reagan Administration's policy of military assistance to El Salvador. *Id.* at 1356. Appellants' claim arising under the War Powers Resolution failed because "Congress had taken no action which would suggest that it viewed our involvement in El Salvador as subject to the [Resolution.]" *Id.* at 1356-57. The court dismissed Appellants' claim under the Foreign Assistance Act of 1961 because the matter concerned a dispute among groups of legislators. *Id.* at 1357. The court's decision in *Crockett* simply recognized that the question of military support to El Salvador was a political question beyond the reach of judicial review.

In contrast, this case does not challenge the authority of a political branch of the federal government, a factor central to the PQD analyses in *Lin*, *Crockett*, and *Spectrum Stores*. Rather, this case involves a radical change in the very structure of Colorado government that runs afoul of both the Guarantee Clause and the Enabling Act.

C. Obligation to Enforce Federal Statute

Defendant ignores controlling case law holding that a federal court cannot shirk its duty to interpret and to enforce a federal statute. *See Zivotofsky*, 132 S.

Ct. at 1425. Only last year, the Supreme Court held that the courts are empowered to decide a claim arising under a statute that required the birthplace of a U.S. citizen born in Jerusalem to be recorded as "Israel" in his passport. *Id.*

The Supreme Court rejected the argument that the case presented a nonjusticiable political question. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Id.* at 1427 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). *Zivotofsky* concerned a *bona fide* statutory claim and not an attempt to force a change in foreign policy from the bench: "Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine *whether he may vindicate his statutory right*, under § 214(d), to choose to have Israel recorded on his passport as his place of birth." *Id.* (emphasis added).

> The existence of a statutory right . . . is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches . . . . Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation . . . is correct, and whether the statute is constitutional. *This is a familiar judicial exercise*.

Id. (emphasis added).

This case involves the very same "familiar judicial exercise" of interpreting a federal statute. As in *Zivotofsky*, Plaintiffs have pleaded an independent statutory claim. As in *Zivotofsky*, Defendant invokes a theory of nonjusticiability to avoid a

decision on the merits. Unlike the three foreign policy cases on which Defendant rests his argument, the Court in this case cannot avoid adjudicating Plaintiffs' statutory claim.

D. Enabling Act Claims Are Historically Justiciable

Nothing inherent in state enabling acts precludes the courts from adjudicating claims arising under them. The judiciary has long held that the interpretation of state enabling acts involves the "familiar judicial exercise" of statutory construction.

In *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), this Court adjudicated the merits of a claim challenging, under the Enabling Act, an amendment to the Colorado Constitution that altered the management of the public lands granted to the state through the Enabling Act. *See id.* at 625-27, 630; *see also Indian Country, U.S.A., Inc. v. State of Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987) (adjudicating enabling act claim involving rights and limitations pertaining to Indian trust lands); *Utah ex rel. Div. of State Lands v. Kleppe*, 586 F.2d 756 (10th Cir. 1978) (enabling act case involving school lands,) *rev'd on other grounds, sub nom. Andrus v. Utah*, 446 U.S. 500 (1980); *United States v. New Mexico*, 536 F.2d 1324 (10th Cir. 1976) (United States successfully sued to enforce the requirement of the New Mexico enabling act that a grant of lands be used to provide a hospital for miners).

The cases in which federal courts have adjudicated enabling act claims are too numerous to cite here. One hundred ten such decisions, involving a variety of issues, are cited in Appendix A to Plaintiffs' Brief in Opposition to Motion to Dismiss. Aplt. App. at 149-52. These cases make clear that Plaintiffs' Enabling Act claim presents a question of statutory interpretation and enforcement that this Court has the authority and the duty to decide. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

V. PLAINTIFFS HAVE STANDING

A. Article III Standing Under the Constitution and the Enabling Act

This Court's standing jurisprudence applies two parallel strands of analysis: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction. *See,* e.*g*., *The Wilderness Soc'y v. Kane County, Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011) (internal citations omitted). The District Court has categorized the threshold issue in this case as one of Article III standing: "no principle is more fundamental to the federal judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases and controversies." Aplt. App. at 407.

To establish Article III standing, a plaintiff must show that: (1) it has suffered an "injury in fact" that is (a) both concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely (as opposed to merely speculative) that the injury will be redressed by a favorable decision. *S. Utah Wilderness Alliance v. Palm*, 707 F.3d 1143, 1153 (10th Cir. 2013) (quoting *Lujan v. Defenders of Wildlife, Inc.*, 504 U.S. 83, 87 (1968)); *see also Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008); *Schaffer*, 240 F.3d at 882.

1. Legislator-Plaintiffs Have Standing

Defendant's argument against standing rests entirely on the "concrete and particularized" requirement of *Lujan*. *See* Gov. Br. 19 (citing *Protocols, LLC*, 549 F.3d at 1298). Defendant contends that Plaintiffs failed to allege any injuries at all, *id.*, and that Plaintiffs' injuries are mere "loose allegations" insufficient to meet the standard for establishing standing. Gov. Br. 21.

Defendant overlooks the central harm alleged by Plaintiffs: By eliminating the General Assembly's power to tax and relegating that power exclusively to plebiscite, TABOR inflicts an ongoing injury-in-fact, depriving them of the Republican Form of Government guaranteed under both the U.S. Constitution and the Enabling Act. Aplt. App. at 182. TABOR imposed similar limitations on all political subdivisions of the State. For those Plaintiffs who hold public office, TABOR directly undermines their ability to fulfill their official responsibilities. *Id.* at 173.[17]

Defendant contends that Plaintiffs' injury argument is weakened because Plaintiffs lack authority from the General Assembly to bring this action. Gov. Br. 27. The Court may take notice that the Colorado General Assembly, through Senate Joint Resolution 13-016 (March 14, 2013), has authorized the General

[17] As the District Court recognized, success in establishing standing for one Plaintiff results in standing for all Plaintiffs. Aplt. App. at 434.

Assembly to enter this action as *amicus curiae* in support of Plaintiffs' position regarding legislator standing, and that the General Assembly's Committee on Legal Services has acted to employ counsel to represent it.[18]

a. Legislator-Plaintiffs Suffered Article III Injury

The District Court noted several cases in which legislators sought redress for limits imposed on their inherent authority, cases that undercut Defendant's argument that the legislator-Plaintiffs lack standing. Aplt. App. at 418 (citing *Miller v. Moore*, 169 F.3d 1119, 1122-23 (8th Cir. 1999) (finding standing for

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[18] Resolved . . . .

> That it is in the best interests of the General Assembly and the state of Colorado that the General Assembly participate as an amicus curiae in any lawsuit in which the General Assembly is not a party but individual members are plaintiffs on the limited issue of standing of those legislator-plaintiffs when standing is based upon advancing an institutional interest of the General Assembly; and
>
> That the Committee on Legal Services, in furtherance of its authority under section 2-3-1001, Colorado Revised Statutes, is authorized and directed to retain legal counsel to represent the General Assembly through participation as an amicus curiae in any pending or future lawsuit in which the General Assembly is not a party on the limited issue of standing of the legislator-plaintiffs if the Committee determines that standing is based upon advancing any institutional interest of the General Assembly.

Colo. SJC 13-16 (March 14, 2013), found at: http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont/AE5A0857CA39AEBD87257B13005E5BF3?Open&file=SJR016_enr.pdf. The action of the Committee on Legal Services was taken on March 19, 2013, and is memorialized in the Minutes of the Committee on Legal Services found at: http://tornado.state.co.us/gov_dir/leg_dir/olls/PDF/cols20130319.pdf.

Nebraska state legislators to challenge an initiative designed to punish those who did not support congressional term limits); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 89 (D.D.C. 1998) (finding standing for the U.S. House of Representatives to challenge the Census Bureau's use of statistical sampling because "the House's composition will be affected by the manner in which the Bureau conducts the Census.")).

In *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), the District of Columbia Circuit found standing for Members of the House of Representatives whose voting power had been diluted through a rule allowing delegates from U.S. territories to vote in committee proceedings. *Id.* at 626-27.

The *Michel* court said that even the plaintiffs' *constituents* had standing because their representatives' votes had been diluted, even though citizens in all states shared the same injury. *See id.* at 626. It rejected the argument that the plaintiffs complained of a harm that was "suffered by every American voter who resides in any state" and thus presented only a generalized, abstract grievance. It found instead that each person suffered a distinct and concrete – if widely shared – harm. *Id*. "That an injury is widespread . . . does not mean that it cannot form the basis for a case in federal court so long as each person can be said to have suffered a distinct and concrete harm." *Id.* The court further observed, "[t]hat all voters in the states suffer this injury, along with the appellants, does not make it an

"abstract" one. *Id.* *Michel*'s ruling applies with even greater force to the legislator-Plaintiffs here because TABOR does not merely dilute their votes; it prohibits them.

Plaintiffs agree with the District Court that *Coleman* is controlling regarding the standing of the legislator-Plaintiffs. In *Coleman*, the Kansas State Senate tied in voting to ratify an amendment to the United States Constitution. *Id.* at 435-36. The twenty Senators who voted against the amendment claimed their votes had been nullified when the Lieutenant Governor cast the deciding vote in favor of the amendment. *Id.* at 438. They sued to challenge the validity of the tie-breaker vote. *Id.* at 436. The Court found the Senators had standing because they had a "plain, direct, and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438.

Like the state legislators in *Coleman*, the legislator-Plaintiffs here have suffered a direct attack on their power to legislate. As the District Court recognized, the harm alleged in *Coleman* pales in comparison to the harm alleged here. *Coleman* concerned only a single vote in the Kansas State Senate, while TABOR totally eliminates the power of the General Assembly to enact revenue measures. Aplt. App. at 417.[19]

[19] Plaintiffs agree with the District Court that *Raines v. Byrd*, 521 U.S. 811 (1997), does not taint the legislator-Plaintiffs' standing to challenge TABOR. *Raines* was a "premature" suit involving the line-item veto. In holding that the plaintiffs could

The reasoning in *Coleman* applies here *a fortiori*, as the legislator-Plaintiffs have been injured by TABOR's prohibition of legislative action in this core policy area. *See* Colo. Const. art. X, § 2. What has been "lost" in the instant case is not *a* vote, but any ability to carry out the fundamental responsibility of a legislature to raise revenue needed to meet the needs of the state.

b. TABOR Caused Legislator-Plaintiffs' Injury

The causal connection requirement for standing under *Lujan* is satisfied by the direct and intended effects of TABOR on Colorado government. TABOR directly prohibits the General Assembly from legislating on matters involving new taxes or tax increases and, through its spending limitations, also limits the legislature and subordinate political subdivisions in funding government. TABOR achieves this deprivation of legislative power through five requirements. *See* Anna-Liisa Mullis, *Dismantling the Trojan Horse*, 82 U. Colo. L. Rev. 259, 267-71 (2011).

First, TABOR requires prior voter approval of any tax increase, directly displacing the legislature's power to tax. Colo. Const. art. X, § 20(4)(a). Second,

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not proceed with their case, the *Raines* court noted that the challenged transfer of power from the legislative branch to the executive branch had not yet been exercised and would occur only when the President actually used his new veto power. *Id.* at 829-30. In contrast, the impact of TABOR on the General Assembly's core budget and taxing powers is both complete and permanent. The District Court found that the injury alleged here is far more concrete than the injury alleged in *Raines*. Aplt. App. at 417.

TABOR limits the amount state and local governments can collect and keep by requiring a refund of all revenue in excess of the TABOR limit.[20] Colo. Const. art. X, § 20(7). Third, TABOR directly limits the amount of revenue state and municipal governments can spend. *Id*. Fourth, it prevents the weakening of other limits on government spending by subjecting to plebiscite any changes to prior limits. Colo. Const. art. X, § 20(1). Finally, TABOR flatly and permanently prohibits any new taxes in three areas: transfer taxes on real property, state real property taxes, and local income taxes. Colo. Const. art. X, § 20(8)(a); s*ee also* Colo. Mun. League, *TABOR: A Guide to the Taxpayer's Bill of Rights*, chs. 3-4 (revised 2011) (containing a detailed explanation of TABOR's spending and revenue collection limitations).

Shortly after TABOR's passage, the Colorado Supreme Court explained the effect of TABOR on the General Assembly's power to both collect and spend revenue:

> [N]ot only does [TABOR] attempt to limit the amount that the state spends, it also attempts to limit the amount that the state does not

[20] The TABOR limit is a formula that originally limited the growth of the government's revenue collection over a previous year to the combined factor of inflation plus population growth. *See* Colo. Const. art. X, § 20(7). The formula was modified by Referendum C in 2005 to, *inter alia*, remove the so-called ratchet effect of resetting each year's base to the previous year's revenue. Referendum C effectively reset the revenue baseline to the amount received in fiscal year 2007. *See Referendum C*, The Bell Policy Center, http://bellpolicy.org/content/referendum-c (last checked April 8, 2013.)

> spend, but collects, and keeps in reserve. If state revenues increase in a given year, then even if the state does not spend the additional money, it may violate the spending limits of [TABOR] by putting that money in reserve. In order to assure that it complies with [TABOR], it is therefore necessary that the General Assembly provide not only for its expenditures, but also for its collection of revenues. If for any reason its collection of revenues should increase beyond the limits set by [TABOR], then the state would be required by [TABOR] to refund the surplus to the taxpayers.

Submission of Interrogatories in Senate Bill 93-74, 852 P.2d 1, 12 (Colo. 1993).

The direct effect of TABOR's restrictive revenue and spending requirements is to deprive the legislature of power to make decisions regarding: taxes (which are left to the exclusive direction of the voters); spending over the TABOR limit; and accumulating reserves. This stripping of legislative power denies to Plaintiffs their right to a representative government that is at the core of the Republican Form of Government. *See supra* pp. 12-19.

c. Invalidating TABOR Would Redress Plaintiffs' Injury

The relief sought in this case – the invalidation of TABOR – would redress Plaintiffs' injury. TABOR's encumbrances on taxing and spending powers would be gone, and representative institutions – the legislature and subordinate political subdivisions – would again have the power to determine public needs and raise the revenues to cover their costs. The requirements in subsection 20(4) of TABOR for elections to enact taxes would be enjoined, as would the spending limits in subsection 20(7). *See* Colo. Const. art. X, § 20.

Defendant argues that Plaintiffs' claims are conjectural or hypothetical because Plaintiffs have not shown that the legislature or local governments would use their restored powers if TABOR were invalidated. Once again, Defendant mischaracterizes Plaintiffs' case.

Repeal of TABOR would automatically reinvest the legislature with the power to "provide by law for an annual tax sufficient" to "defray the estimated expenses of the state government for each fiscal year," as required by Article X, Section 2, of the Colorado Constitution. Plaintiffs simply seek the restoration of republican governance – their right to representative government itself – through the return of appropriate *powers* to the legislature. Whether or how those powers might be used is not the issue.

d. No Separation of Powers Concerns

The Supreme Court, as recently as *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), has framed the Article III standing principle through the prism of separation-of-powers analysis:

> The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches [citing, among other cases, *Raines v. Byrd*, 521 U.S. 811, 818 (1997)]. In keeping with the purpose of this doctrine, our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the two other branches of the Federal Government was unconstitutional.

Clapper, 133 S. Ct. at 1147.

This Court followed this "especially rigorous" standing analysis in *Schaffer v. Clinton*, 240 F.3d 878, 882-83 (10th Cir. 2001). There, a valid separation-of-powers concern – a dispute between branches of the federal government – did exist. "[A]lthough the standing question is often dressed in the dazzling robe of legal jargon, its essence is simple – what kind of injuries are courts empowered to remedy and what kind are they powerless to address." *Id*. at 883.

No separation-of-powers concerns are present here. The gravamen of this case is a voter-enacted constitutional amendment and the resulting havoc imposed on government in Colorado. The state legislator-Plaintiffs have suffered concrete, particularized injuries and have presented a substantial claim that neither implicates separation of powers concerns nor warrants the "especially rigorous" standing enquiry sought by Defendant.

In *Raines*, the Supreme Court explained that its "standing inquiry" is "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." 521 U.S. at 819-20.[21] As the District Court

[21] The separation of powers aspect of the standing analysis in *Raines* and other cases is well examined in Una Lee, *Reinterpreting Raines: Legislator Standing to Enforce Congressional Subpoenas*, 98 Geo. L.J. 1165, 1169-74 (2010); *see also Kucinich v. Bush*, 236 F. Supp. 2d 1, 6-8 (D.D.C. 2002).

concluded, and as discussed *infra* pp. 46-47, such separation of powers concerns are not present in this case. Aplt. App. at 423.

Raines-type cases are predicated on a situation where the "power" sought to be vindicated in court is exclusively housed in the Article I branch. By that reasoning, legislators who lose a vote in their Article I institution cannot try to undo it by enlisting the aid of Article III courts.

The *Raines* Court importantly distinguished the diminution of legislative power there being challenged from the nullification of legislative power at issue in *Coleman*.[22] It is pertinent that the legislator-Plaintiffs here are, as in *Coleman*, *state* officials. *See also Risser*, 930 F.2d at 551 (standing for state senators' challenge to the line item veto provision of state constitution as a violation of the Guarantee Clause); *cf. Coleman*, 307 U.S. at 436 with Complaint, ¶¶ 10, 13, 22, 28, 31, 36, 43, 44, Aplt. App. at 169-73

This case involves no issue of *federal* separation of powers, which was central to the decision in *Raines*. Indeed, this case involves no dispute that implicates any branches of either state or federal government. *See* Aplt. App. at 423. The District Court therefore correctly concluded that this case presents no

[22] *Raines* distinguished, but did *not* overrule, the standing for state legislator plaintiffs found in *Coleman, see Raines*, 521 U.S. at 823, a point underscored by the Court. *See id.* at 824 n.7.

separation of powers concerns warranting the more rigorous *Raines* standing analysis. Aplt. App. at 422-26.

Defendant's reliance on *Common Cause v. Biden*, No. 12 cv-775, 2012 U.S. Dist. LEXIS 180358, at *25-26 (D.D.C. Dec. 21, 2012) reflects a failure to appreciate this critical distinction. See Gov. Br. 25 (citing *Common Cause*). In *Common Cause*, members of the House of Representatives challenged the Cloture Rule of the Senate as unconstitutional. The District Court rightly relied on *Raines* in finding no standing for the federal legislators, but indicated in *dicta* that *Coleman* is still controlling for state legislator challenges. *Id.* at *42-43. Unlike this case, *Common Cause* involved a classic separation of powers issue, asking the court to settle a dispute between the two Article I bodies. *Id.*

2. Educator-Plaintiffs Have Article III Standing

The educator-Plaintiffs, made up of teachers and elected state and local school board members, can show concrete and particularized injury stemming from TABOR that a favorable decision would remedy. As will be more fully addressed in the *amicus* brief of the Colorado Association of School Executives and the Colorado Association of School Boards, the Colorado General Assembly is charged under the Colorado Constitution with providing a "thorough and uniform

system of free public schools throughout the state," Colo. Const. art. IX, § 2.[23] In addition, the Colorado Constitution requires this system of education to be controlled locally by elected school boards. Colo. Const. art. IX, § 15. What constitutes a "thorough and uniform" system of education will soon be addressed by the Colorado Supreme Court in *Lobato v. State,* No. 2012SA25.

No matter the outcome of *Lobato,* local school boards have the ongoing constitutional responsibility to obtain the funds needed for their schools. By its terms, TABOR precludes local school boards from obtaining from the General Assembly its consideration of funding to meet the shared responsibility of the state and its local school districts to provide a "thorough and uniform" public school system. *See* Complaint ¶¶ 45, 72, 76-77, 80-81, Aplt. App. at 173, 179-81.

This presents a concrete, individual injury to school board members, not in the lack of funding, but in foreclosing the ability to request funding through their representatives. The State has argued in *Lobato* that TABOR overrides Article IX and, as a result, Colorado lacks funding to provide a uniform state-wide public school system due to the constraints of TABOR.[24] The invalidation of TABOR

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[23] An obligation to fund public education was also recognized in the provisions of the Enabling Act that set aside lands for the state to use "for the support of common schools." Enabling Act, §§ 7, 14.

[24] *See* Defendant's Motion for Determination of Questions of Law Pursuant to C.R.C.P 56(h) at 6, *Lobato v. Colorado*, No. 05 CV 4794 (Colo. Dist. Ct. Feb. 25, 2011), *available at*

would allow school districts to petition the General Assembly for the required funds to meet their Article IX constitutional obligation.

3. All Plaintiffs Have Standing Under the Analysis in Flast *and* Largess

Defendant's contention that Plaintiffs lack standing also runs afoul of *Flast v. Cohen*, 392 U.S. 83 (1968). Although *Flast* has been narrowly construed,[25] it shows that a plaintiff may have standing to challenge a constitutional violation that affects no one individual differently from the public at large. *See Flast*, 392 U.S. at 105-06 (recognizing standing to challenge a violation of the Establishment Clause).

Largess v. Supreme Judicial Ct., 373 F.3d 219 (1st Cir. 2004), illustrates the parallel between the Establishment Clause rationale in *Flast* and the Guarantee Clause at issue here:

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http://www.coloradoattorneygeneral.gov/sites/default/files/2011%2002-25%20DEFS%27%20MOTION%20FOR%20DETERMINATION%20OF%20QUESTIONS%20OF%20LAW.pdf; Respondent's Answer Brief at 61, *Lobato v. Colorado*, No. 08SC185, (Colo. Jan. 16, 2009), *available at* https://www.coloradoattorneygeneral.gov/sites/default/files/01-16%20Lobato%20Answer%20Brief%20%28final%29.pdf; Appellant's Opening Brief at 45-46, *Lobato v. Colorado*, No. 08SC185 (Colo. Jul. 18, 2012), *available at*: http://www.ednewscolorado.org/wp-content/uploads/2012/07/States-Lobato-Opening-Brief-7-18-12.pdf.

[25] *See Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 602 (2007) (noting that *Flast* "carved out a narrow exception to the general constitutional prohibition against taxpayer standing").

> First, the defendants argue that the Plaintiffs lack standing because . . . they share an undifferentiated harm with other voters. . . . But . . . [i]f the Plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry – which distinguishes between concrete injuries and injures that are merely abstract and undifferentiated – might well be adjusted to the nature of the claimed injury.

Id. at 224-25 (citing *Flast*, 392 U.S. at 105-06).

By citing *Flast* on the standing issue in a Guarantee Clause case, the *Largess* court credited a rationale for conferring standing in Guarantee Clause cases and avoiding an inflexible standing inquiry. *Id.* While the legislator-Plaintiffs in this case have clearly incurred particularized injuries in fact, standing to seek the protection of the Guarantee Clause should be afforded to the other Plaintiffs even if their harm is also suffered by others. Both the Guarantee and Establishment Clauses guarantee constitutional rights that should be enforced. In addressing the Guarantee Clause in Federalist 43, Madison advised that "a right implies a remedy." *See* The Federalist No. 43 at 291(Madison).

B. Prudential Standing No Bar

Defendant argues that, even if Plaintiffs can satisfy the requirements of Article III standing, their claims are barred by the prudential standing doctrine. Gov. Br. 27-29. While this case does involve questions of importance to "the *entire* state and *all* of its citizens," Gov. Br. 28, Plaintiffs' claims do not raise "generalized grievances" (in the sense intended in prudential standing

jurisprudence) that are best left to the political branches. Indeed, those branches are disempowered from acting by TABOR itself. The specific harms to Plaintiffs' legal rights and interests as legislators, local officials, educators, and citizens satisfy any prudential standing concerns.

Prudential standing encompasses "several judicially self-imposed limits on the exercise of federal jurisdiction" that may bar an action even where a plaintiff satisfies Article III's standing requirements. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Supreme Court has described these prudential standing limits as encompassing three different principles.

First, a 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." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975); *see also Allen*, 468 U.S. at 751 (described as a "general prohibition on a litigant's raising another person's legal rights"). Second, "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*, 422 U.S. at 499 (emphasis added); *see also Allen*, 468 U.S. at 751 (regarding generalized grievances "more appropriately addressed in the representative branches"). Third, "the interest sought to be protected [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); *see also Allen*, 468 U.S. at 751.

The *Warth* Court stressed that these prudential standing limitations are intended to prevent courts from adjudicating "abstract questions of wide public significance" that other branches of government are better able to address. *Warth*, 422 U.S. at 500.

Defendant does not specify which prudential standing rationale should bar Plaintiffs' claims, but appears to argue that the claims impermissibly involve "generalized grievances" shared by all or a large class of Colorado's citizens. Gov. Br. 27-29. However, the authorities cited by Defendant do not stand for the proposition that prudential standing limitations reach *all* "generalized grievances," just those devoid of other justifications for standing.[26]

Defendant recites allegations from the Complaint that TABOR deprives Colorado citizens of effective representative democracy and refers to the District Court's comment that this litigation "will quite literally affect every individual and

[26] Defendant's simplistic recitation of the "generalized grievances" concept is reminiscent of the comment in *Baker*, 369 U.S. at 217, that just because there may be a political dimension to a case does not mean a nonjusticiable "political question" is involved. "The cases we have reviewed show the necessity for *discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." Id.* (emphasis added).

corporate entity in the State of Colorado." *Id.* at 28 (quoting Aplt. App. at 570).[27] Plaintiffs' claims are not, however, mere "generalized grievances" or "abstract questions" more appropriately addressed by the representative branches. Although the effects of this case may be far-reaching, the *grievances* alleged by Plaintiffs are specific to them. That the injuries suffered because of TABOR may be widely shared is simply incidental to the direct legal insult TABOR inflicts on each Plaintiff.

Plaintiffs' claims are therefore not limited by the prudential standing principle related to widely shared harm. *Cf. Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1026 (10th Cir. 2002) (finding that an environmental group's allegations that the U.S. Forest Service failed to inform "the general public" of a land exchange during an environmental analysis did not violate prudential standing limitations).

Defendant did not expressly raise the prudential standing limitation related to the rights of third parties, which in any event does not apply here. TABOR focuses on removing state fiscal power from Colorado's representative institutions and relegating those powers to plebiscitary decision-making. Plaintiffs seek to assert their own rights, not the rights of others, to restore that power.

[27] The District Court considered and firmly rejected Defendant's attempt to invoke "prudential standing" considerations. *See* Aplt. App. at 431-34.

As to the final prudential standing rationale, the interests which Plaintiffs seek to protect fall well within the apparent zones of interest intended to be protected by the Guarantee Clause, the Enabling Act, and the Supremacy Clause.[28] As the District Court noted, there is "little to no case law authority indicating who falls within the zone of interests intended to be protected by the Guarantee Clause and Enabling Act." Aplt. App. at 433 (citing *Largess*, 373 F.3d at 1170). This "zone of interests" limitation is "not meant to be especially demanding," and the "benefit of any doubt goes to the plaintiff." *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). Further, this Court has noted that prudential standing review is typically unnecessary in Supremacy Clause challenges. *See The Wilderness Soc'y* , 632 F.3d at 1170-71 (rejecting, on facts presented, the "zone of interest" rationale, but applying the "third party"-rights rationale).

C. The Facts Establishing Standing Are Intertwined with the Facts on the Merits.

This Court has stated that "[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be

[28] Again, this issue is one that may be "inextricably intertwined" with factors to be developed on the merits, an issue not properly raised in Defendant's facial attack on standing. *See infra* pp. 54-56.

dismissed for want of standing." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006) (en banc). The Court "must assume the Plaintiffs' claim has legal validity." *Id.* at 1093.

This is especially true in a Guarantee Clause case where the facts establishing standing are so intertwined with the facts that establish the merits under the Guarantee Clause. The First Circuit recognized this in *Largess*, 373 F.3d at 224-25, a Guarantee Clause case that provides authority for this case to proceed on the merits.[29] Like *Largess*, this case may be seen as one in which the question of standing is "intertwined and inseparable from the merits of the underlying [constitutional] claim." *Id.*

The *Largess* court acknowledged that Guarantee Clause cases such as this are unique and, therefore, the standing inquiry must be adjusted to take account of that intertwining and inseparability. "If the Plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry – which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated – might well be adjusted to the nature of the claimed injury." *Id.* at 225.

[29] *See supra* p.49-50.

The First Circuit's analysis in *Largess* reflects the standing jurisprudence in this Circuit's First Amendment cases.[30] In *Walker*, wildlife groups claimed that a state constitutional amendment requiring a supermajority to pass a certain category of initiative violated the groups' First Amendment right of free speech and had "a chilling effect on [the Plaintiffs'] speech in support of wildlife initiatives in Utah." 450 F.3d at 1085, 1088. This Court accepted plaintiffs' claim that the supermajority requirement deterred them from pursuing initiatives and found that this chilling effect was a cognizable injury-in-fact sufficient to establish standing. *Id*. at 1090. Here, Plaintiffs claim a comparable injury on account of the denial of their rights under the Guarantee Clause and the Enabling Act.

Reviewing the *Walker* decision in a subsequent standing case, *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), this Court explained why standing should be found when the standing inquiry is intertwined with the merits of a constitutional claim:

> In *Walker*, the Plaintiffs' asserted injury and their claimed constitutional violation were one and the same. Accordingly, we refused to consider, at the threshold stage of determining standing, whether the First Amendment did or did not restrict supermajority requirements for certain initiative efforts. *Id*. at 1093. That question must be reserved for the merits analysis. *See id.* at 1098-1105. . . . *Walker* mandates that we assume, during the evaluation of . . .

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[30] *See Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1247 (10th Cir. 2009); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098-1105 (10th Cir. 2006) (en banc).

> standing, that the plaintiff will prevail on his merits argument – that is, that the defendant has violated the law. *See id.* ("For purposes of standing, we must assume the [p]laintiffs' claim has legal validity.").

Id. at 1137.

This Court's reasoning in *Walker*, as explained in *Day*, and the First Circuit's standing analysis in *Largess*, are harmonious and apply to the facts here. *Walker* and *Largess* found that the merits of the respective plaintiffs' constitutional claims were inextricably intertwined with the alleged standing injury. *Walker*, 450 F.3d at 1093; *Largess*, 373 F.3d at 224. Likewise, the standing of those Plaintiffs who are neither office-holders nor educators here may depend on a merits-based determination of whether rights conferred under the Guarantee Clause were violated.

Defendant readily admits that there is no accepted legal view of what constitutes a "Republican Form of Government." Gov. Br. 32, n.15. If that is so, then Plaintiffs' injury-in-fact cannot be assessed at this stage of the litigation and should await a decision on the merits regarding a violation of the Guarantee Clause. The standing claims of all Plaintiffs should be treated as inextricably intertwined with the merits of their Guarantee Clause claims, and this Court may properly apply a *Walker*/*Largess* analysis to find standing sufficient for the case to reach the merits.

D. Plaintiffs Have Standing Under the Colorado Enabling Act

Plaintiffs also claim violation of a federal statute, the Enabling Act. Curiously, Defendant does not address Plaintiffs' standing based on the Enabling Act.

There is strong Tenth Circuit precedent for citizen standing based on the Enabling Act. *See Branson v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997) ("*Branson I*"), *aff'd*, 161 F.3d 619 (10th Cir. 1998) ("*Branson II*"). The *Branson* plaintiffs claimed that the language of a Colorado constitutional amendment violated the express terms of the Enabling Act relating to the state lands trust. *Id.* at 1506. The District Court found that the plaintiffs had standing to enforce the terms of the Enabling Act on grounds similar to those asserted here. *Id.* at 1509-11.

In *Branson II*, this Court affirmed the *Branson I* decision on standing under the Enabling Act. The court in *Branson I* had found that plaintiffs had standing because "[t]he genesis of plaintiffs' case is that by implementing a state constitutional measure that contradicts the terms of the Enabling Act, the defendants have violated the United States Constitution. . . . [and] private parties are clearly permitted to maintain actions based on the Supremacy Clause." *Id.* at 1511.

As in *Branson I*, Plaintiffs allege that TABOR violates the express terms of the Enabling Act relating to the guarantee of a Republican Form of Government. *See* Complaint, ¶ 83, Aplt. App. at 182. The reasoning in *Branson I* is also clearly pertinent to Plaintiffs' Supremacy Clause argument. *See* Complaint, ¶ 84, Aplt. App. at 182.

By affirming *Branson I*, *Branson II* provides additional precedent for Plaintiffs' standing to challenge to TABOR. Under the Supremacy Clause, U.S. Const. art. VI, § 2, it is axiomatic that TABOR must yield to the superior provisions of the Guarantee Clause and the Enabling Act.

CONCLUSION

Plaintiffs have standing to pursue their justiciable claims that TABOR violates the Guarantee Clause, the Enabling Act, and the Supremacy Clause. Therefore, this Court should dismiss this appeal and remand the case to the District Court for further proceedings on the merits.

Plaintiffs respectfully request oral argument on the singular and important issues presented.

Respectfully submitted this 10th day of April, 2013.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 13,607 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the foregoing **Response to Governor's Opening Brief** as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee Agent Version number: 4.6.0.3122, Last Update 4/10/2013 10:20:06 AM, Scan engine version (32-bit): 5400.1158, DAT version: 7040.0000, DAT Created on: 4/9/2013, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

This is to certify that on this 10th day of April, 2013, I have provided service of the foregoing Response to Governor's Opening Brief through the federal ECF filing protocol and by e-mailing to the following attorneys or their law firms:

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ADDENDUM A

Colorado Enabling Act of 1875, 18 Stat. 474

March 3, 1875. **CHAP. 139.**—An act to enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States.

Territory of Colorado made a State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of the Territory of Colorado included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves, out of said Territory, a State government, with the name of the State of Colorado; which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever, as hereinafter provided.

Boundaries.

SEC. 2. That the said State of Colorado shall consist of all the territory included within the following boundaries, to wit: Commencing on the thirty-seventh parallel of north latitude where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north, on said meridian, to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; thence south on said meridian, to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel of north latitude, to the place of beginning.

Who may vote at first election.

SEC. 3. That all persons qualified by law to vote for representatives to the general assembly of said Territory, at the date of the passage of this act, shall be qualified to be elected, and they are hereby authorized to vote for and choose representatives to form a convention under such rules and regulations as the governor of said Territory, the chief justice, and the United States attorney thereof may prescribe; and also to vote upon the acceptance or rejection of such constitution as may be formed by said convention, under such rules and

Apportionment of

representatives.

Time of first election, &c.

regulations as said convention may prescribe; and the aforesaid representatives to form the aforesaid convention shall be apportioned among the several counties in said Territory in proportion to the vote polled in each of said counties at the last general election as near as may be; and said apportionment shall be made for said Territory by the governor, United States district attorney, and chief justice thereof, or any two of them; and the governor of said Territory shall, by proclamation, order an election of the representatives aforesaid to be held throughout the Territory at such time as shall be fixed by the governor, chief justice and the United States attorney, or any two of them, which proclamation shall be issued within ninety days next after the first day of September, eighteen hundred and seventy-five, and at least thirty days prior to the time of said election; and such election shall be conducted in the same manner as is prescribed by the laws of said Territory regulating elections therein for members of the house of representatives; and the number of members to said convention shall be the same as now constitutes both branches of the legislature of the aforesaid Territory.

Meeting of convention to form State constitution.

No distinction on account of race, color &c.

Religious toleration.

Unappropriated public lands.

Taxes.

SEC. 4. That the members of the convention thus elected shall meet at the capital of said Territory, on a day to be fixed by said governor, chief justice, and United States attorney, not more than sixty days subsequent to the day of election, which time of meeting shall be contained in the aforesaid proclamation mentioned in the third section of this act, and, after organization, shall declare, on behalf of the people of said Territory, that they adopt the Constitution of the United States; whereupon the said convention shall be, and is hereby, authorized to form a constitution and State government for said Territory: *Provided*, That the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence: *And provided further*, That said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State, first, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said State shall

ever be molested, in person or property, on account of his or her mode of religious worship; secondly, that the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said State shall never be taxed higher than the lands belonging to residents thereof, and that no taxes shall be imposed by the State on lands or property therein belonging to, or which may hereafter be purchased by the United States.

Constitution to be submitted to popular vote.

SEC. 5. That in case the constitution and State government shall be formed for the people of said Territory of Colorado, in compliance with the provisions of this act, said convention forming the same shall provide, by ordinance, for submitting said constitution to the people of said State for their ratification or rejection, at an election, to be held at such time, in the month of July, eighteen hundred and seventy-six, and at such places and under such regulations as may be prescribed by said convention, at which election the lawful voters of said new State shall vote directly for or against the proposed constitution; and the returns of said election shall be made to the acting governor of the Territory, who, with the chief justice and United States attorney of said Territory, or any two of them, shall canvass the same; and if a majority of legal votes shall be cast for said constitution in said proposed State, the said acting governor shall certify the same to the President of the United States, together with a copy of said constitution and ordinances; whereupon it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the original States, without any further action whatever on the part of Congress.

Voting and returns.

Representative in Congress.

SEC. 6. That until the next general census said State shall be entitled to one Representative in the House of Representatives of the United States, which Representative, together with the governor and State and other officers provided for in said constitution, shall be elected on a day subsequent to the adoption of the constitution, and to be fixed

by said constitutional convention; and until said State officers are elected and qualified under the provisions of the constitution, the territorial officers shall continue to discharge the duties of their respective offices.

School lands.

SEC. 7. That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said State for the support of common schools.

Land for public buildings.

SEC. 8. That, provided the State of Colorado shall be admitted into the Union in accordance with the foregoing provisions of this act, fifty entire sections of the unappropriated public lands within said State, to be selected and located by direction of the legislature thereof, and with the approval of the President, on or before the first day of January, eighteen hundred and seventy-eight, shall be, and are hereby, granted, in legal subdivisions of not less than one quarter-section, to said State for the purpose of creating public buildings at the capital of said State for legislative and judicial purposes, in such manner as the legislature shall prescribe.

Penitentiary.

SEC. 9. That fifty other entire sections of land as aforesaid, to be selected and located and with the approval as aforesaid, in legal subdivisions as aforesaid, shall be, and they are hereby, granted to said State for the purpose of erecting a suitable building for a penitentiary or State prison in the manner aforesaid.

State university.

SEC. 10. That seventy-two other sections of land shall be set apart and reserved for the use and support of a State university, to be selected and approved in manner as aforesaid, and to be appropriated and applied as the legislature of said State may prescribe for the purpose named and for no other purpose.

Salt-springs.

SEC. 11. That all salt-springs within said State, not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to said State for its use, the said land to be selected by the governor of said State within two years after the admission of the State, and when so selected to be used and disposed of on such terms, conditions, and regulations as the legislature shall direct: *Provided*, That no salt-spring or lands the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State.

Proviso.

Five per cent of sales of public lands for internal improvements.

SEC. 12. That five per centum of the proceeds of the sales of agricultural public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expense incident to the same, shall be paid to the said State for the purpose of making such internal improvements within said State as the legislature thereof may direct: *Provided*, That this section shall not apply to any lands disposed of under the homestead-laws of the United States, or to any lands now or hereafter reserved for public or other uses.

Proviso.

Unexpended balances of appropriations.

SEC. 13. That any balance of the appropriations for the legislative expenses of said Territory of Colorado remaining unexpended shall be applied to and used for defraying the expenses of said convention, and for the payment of the members thereof, under the same rules and regulations and rates as are now provided by law for the payment of the territorial legislature.

School-fund.

SEC. 14. That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school-fund, the interest of which to be expended in the support of common schools.

Mineral lands.

SEC. 15. That all mineral-lands shall be excepted from the operation and grants of this act.

Approved, March 3, 1875.

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