No. _____

In the Supreme Court of the United States

JOHN HICKENLOOPER, GOVERNOR OF COLORADO,
IN HIS OFFICIAL CAPACITY,
Petitioner,

v.

ANDY KERR, COLORADO STATE REPRESENTATIVE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1992, the People of Colorado enacted the Taxpayers' Bill of Rights (TABOR), which amended the state constitution to allow voters to approve or reject any tax increases. In 2011, a group of plaintiffs, including a small minority of state legislators, brought a federal suit claiming that TABOR causes Colorado's government to no longer be republican in form, an alleged violation of the Guarantee Clause, Article IV, Section 4 of the United States Constitution. The court of appeals held that the political question doctrine does not bar federal courts from resolving this kind of dispute and that the Legislator-Plaintiffs have standing to redress the alleged diminution of their legislative power.

The questions presented are as follows:

1. Whether, after this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), Plaintiffs' claims that Colorado's government is not republican in form remain non-justiciable political questions.

2. Whether a minority of legislators have standing to challenge a law that allegedly dilutes their power to legislate on a particular subject.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

No party to this proceeding is a corporation.

Petitioner is John Hickenlooper, Governor of Colorado, in his official capacity.

Respondents are Andy Kerr, Colorado State Representative; Norma V. Anderson; Jane M. Barnes; Elaine Gantz Berman, member, State Board of Education; Alexander E. Bracken; William K. Bregar; Bob Briggs, Westminster City Councilman; Bruce W. Broderius; Trudy B. Brown; John C. Buechner; Stephen A. Burkholder; Richard L. Byyny; Lois Court, Colorado State Representative; Theresa L. Crater; Robin Crossan, member, Steamboat Springs RE-2 Board of Education; Richard E. Ferdinandsen; Stephanie Garcia; Kristi Hargrove; Dickey Lee Hullinghorst, Colorado State Representative; Nancy Jackson, Arapahoe County Commissioner; William G. Kaufman; Claire Levy; Margaret Markert, Aurora City Councilwoman; Megan J. Masten; Michael Merrifield; Marcella Morrison; John P. Morse; Pat Noonan; Ben Pearlman; Wallace Pulliam; Paul Weissmann; and Joseph W. White.[1]

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[1] Various Plaintiffs were, at the time this suit was filed, representatives of local governments or members of state or local boards of education. Some have since left office. Titles are indicated above only for those Plaintiffs who are current officeholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

RULE

OTHER AUTHORITIES

OPINIONS BELOW

The March 7, 2014 panel opinion of the Court of Appeals for the Tenth Circuit, App. 1–53, is reported at 744 F.3d 1156. The Tenth Circuit's order denying the Governor's petition for rehearing en banc—with Judges Hartz, Tymkovich, Holmes, and Gorsuch dissenting in three separate opinions, App. 54–77—was filed July 22, 2014, and is reported at 759 F.3d 1186.

The opinion of the United States District Court for the District of Colorado denying the Governor's motion to dismiss, App. 88–180, was issued July 30, 2012, and is reported at 880 F. Supp. 2d 1112. The September 21, 2012, order of the district court certifying this case for interlocutory appeal, App. 78–87, is not reported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's interlocutory order under 28 U.S.C. § 1292(b). The court of appeals filed its opinion on March 7, 2014, and it denied, on July 22, 2014, petitioner's timely petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Guarantee Clause, Article IV, § 4 of the United States Constitution, states in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

Colorado Constitution article V, section 1, and article X, section 20 (TABOR), are reprinted at App. 208–213 and 214–223, respectively.

The pertinent section of the Colorado Enabling Act, 18 Stat. 474 (1875), is reprinted at App. 224–225.

INTRODUCTION

Like more than half the states, Colorado has deviated from purely representative democracy and, for over a century, has enabled its citizens to engage in direct democratic lawmaking. The Colorado Constitution "reserve[s] to [the people] themselves the power [to enact laws] independent of the general assembly" and "to approve or reject at the polls any act . . . of the general assembly." Colo. Const. art. V, § 1(1). Using this general lawmaking power, the People of Colorado have reserved to themselves a more specific one: the right to approve or reject any tax increase before it goes into effect. *Id*. art. X, § 20(4). This provision, known as the Taxpayers' Bill of Rights or TABOR, has been controversial since its enactment.

Having been unable to overturn TABOR at the ballot box or in state court, a group of opponents brought this suit, asking the federal courts to invalidate it. According to Plaintiffs, raising taxes is a "core governmental function," and legislators' decisions on that topic cannot be subjected to "plebiscite." Under this view, TABOR deprives Colorado citizens of a republican form of government.

Courts throughout American history would have dismissed this case as non-justiciable. As Judge Gorsuch explained below in his dissent from the denial of rehearing en banc, more than a century of Supreme

Court precedent prohibits the federal judiciary from wading into the political questions raised by the Guarantee Clause. App. 72–73.

Nonetheless, in response to dicta in *New York v. United States*, 505 U.S. 144 (1992), some courts have begun to depart from this established practice. Expressing uncertainty about the continuing validity of the *per se* rule of non-justiciability for Guarantee Clause claims, these courts—which include the First, Second, Fifth, and Seventh Circuits—dismiss these claims on alternative grounds. Now, however, the Tenth Circuit has rejected both the *per se* rule (currently followed by the Eleventh and Ninth Circuits) and the alternative approaches of the other circuits. Instead, the Tenth Circuit has adopted its own novel approach to the Guarantee Clause. If that approach stands, Colorado will be the first state in the country to be required to prove, to a federal judge's satisfaction, that it is adequately republican.

Even putting aside the political question doctrine, most courts also would have dismissed this case for lack of standing under Article III. Respondents' claims rest on the alleged injuries of just three of the State's 100 legislators, who argue that TABOR deprives the Colorado legislature of its "rightful" lawmaking power. Here, too, the court of appeals adopted an expansive view of the federal courts' power over state government structure, creating confusion and inconsistency in the law of legislative standing. Under *Raines v. Byrd*, 521 U.S. 811 (1997)—the seminal case that rejected a challenge to the federal Line Item Veto Act—legislators are generally prohibited from enlisting the federal judiciary to vindicate the sort of "abstract dilution of

institutional legislative power" alleged here. But the Tenth Circuit's new multi-factor test sidelines *Raines*, giving federal courts far greater power to adjudicate disputes between state legislators and their own governors and voters—issues traditionally, and properly, reserved for the political process.

This case thus involves two intertwined legal doctrines, each residing at the heart of our system of federalism and divided power. The People of Colorado have chosen to maintain a direct voice in the state's tax policy and overall level of appropriations. Plaintiffs here challenge that choice and ask the federal courts to undo it. Whether the federal judiciary can interfere in this sort of intra-state governance dispute is of fundamental importance.

This case has already produced five written opinions joined by eight different federal judges (including seven judges and four opinions in the court of appeals). Each of these opinions adopts its own unique approach, which only serves to highlight that the legal issues presented in this case require additional clarity. *See Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868, 902 (2009) (Scalia, J., dissenting) ("The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." (citing Sup. Ct. R. 10)). The Court's opinion in *New York* raised, but did not answer, the "difficult question" whether to overrule the longstanding *per se* rule of non-justiciability for Guarantee Clause claims. 505 U.S. at 185. In *Raines*, meanwhile, the Court cited various facts that distinguished an earlier legislative standing case, *Coleman v. Miller*, 307 U.S. 433 (1939), but stated that it "need not now decide" whether those

particular facts should be considered determinative. *Raines*, 521 U.S. at 829–30. The Tenth Circuit's opinion shows that the time has come to answer the important questions left open in *New York* and *Raines*.

STATEMENT

Direct Democracy in Colorado. The People of Colorado amended their constitution in 1912 to provide for direct democratic lawmaking. Colo. Const. art. V, § 1(1). Over the ensuing century, this power has been used to override the judgment of the state's legislature on a number of topics, ranging from the mundane to the groundbreaking. *See, e.g.*, *id*. at art. XVIII, § 12b (banning the use of snares to trap wild game); art. XI, § 10 (prohibiting the state from appropriating funds for the 1976 Winter Olympic Games); art XVIII, § 16 (making Colorado the first state in the nation to legalize recreational marijuana).

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

This kind of popular control over state government is widespread. Twenty-seven states have some form of direct popular lawmaking.[2] Nearly all limit legislators' fiscal authority through, for example, balanced budget or public debt limitations.[3] Other state constitutions include supermajority requirements for tax legislation or, as does Colorado's, they require voter approval of tax increases.[4]

Plaintiffs' Guarantee Clause Claim. In its two decades, TABOR has been the subject of constant criticism and litigation. *See* Richard B. Collins, Article: *The Colorado Constitution in the New Century*, 78 U. Colo. L. Rev. 1265, 1301–23 (2007) (discussing the various legal challenges involving TABOR). The Colorado Supreme Court has interpreted and applied

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[2] *See* Univ. of S. Cal. Initiative and Referendum Institute, http://tinyurl.com/afnscc (noting that twenty-seven states are referendum states and twenty-four allow for citizen initiative).

[3] *See* Nat'l Conf. of State Legislatures Fiscal Brief: State Balanced Budget Provisions (Oct. 2010), http://tinyurl.com/m78pg66 (collecting provisions).

[4] *See, e.g.*, Cal. Const. art. XIIIA, § 3(a) (requiring a supermajority legislative vote for increased taxes); Mich. Const. art. 9, § 26 (establishing "a limit on the total amount of taxes which may be imposed by the legislature" and requiring voter approval to change that limit); Mo. Const. art. X, § 16 ("Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution."); Nev. Const. art. IV, § 18(2) (requiring two-thirds majority of each house to increase public revenue in any form); Okla. Const. art. V, § 33(D) (requiring voter approval for any revenue bill that does not pass by a three-quarters majority in each house).

TABOR at least 18 times—but has never suggested the provision makes Colorado insufficiently republican in form. *Cf. Bickel v. City of Boulder*, 885 P.2d 215, 226 (1994) (noting that TABOR is "a perfect example of the people exercising their initiative power to enact laws in the specific context of state and local government finance, spending, and taxation").

But while Colorado voters have been willing to loosen some of TABOR's more restrictive provisions, *see* COLO. REV. STAT. § 24-77-103.6 (2014) (authorizing the state to retain and spend state revenue in excess of TABOR's limits from 2005 through 2010), Plaintiffs here have not been satisfied with the results of the political process. They filed this lawsuit in 2011, declaring that it "presents for resolution the contest between direct democracy and representative democracy." App. 182. The complaint argues that TABOR amounts to an "arrogation" of legislative power by the People of Colorado. *Id*. And because the Guarantee Clause describes a "republican" form of government rather than a "democratic" one, Respondents assert that TABOR is a state governmental innovation forbidden by the federal constitution. App. 183–86, 202. Respondents also raised a derivative claim under the Colorado Enabling Act, 18 Stat. 474 (1875), which simply repeats the Constitution's "republican form of government" language. App. 202.

Respondents are thirty-three individuals, each a citizen of the State of Colorado who asserts an "interest in assuring that their representatives can discharge the inherently legislative function of taxation and appropriation." App. 192. These citizens allege

miscellaneous "injuries" that are not specific to any particular person and are not described in any concrete terms. These alleged injuries include preserving a more pure form of "representative democracy," App. 182–83; preventing "fiscal dysfunction," App. 183; maintaining an "effective legislative branch," App. 183–84; "securing . . . the legislative core functions of taxation and appropriation," App. 191; "adequately funding core education responsibilities," App. 191–92; and ensuring that the legislators can increase taxes, App. 186, 192.

Also included in the list of Plaintiffs are three state legislators. As the court of appeals recognized, these Legislator-Plaintiffs cannot point to any particular legislative act, such as a tax increase, that would have gone into effect but for TABOR. App. 23–24. Instead, they "contend they have been injured because they are denied the authority to legislate with respect to tax and spending increases." *Id.* at 23. That is, they allege an injury to their interest in securing to themselves, and the legislature as a whole, the so-called "core functions of taxation and appropriation." *Id*. at 191.

District Court Proceedings. The Governor moved to dismiss the complaint, arguing that Respondents' complaint presents a non-justiciable political question and that no Plaintiff, including any of the Legislator-Plaintiffs, has standing to sue. The district court denied the motion.

On the issue of justiciability, the district court held that the political question doctrine would not prevent a federal judge from determining, as a matter of federal constitutional law, "how power is to be divided between the General Assembly and the Colorado electorate." App. 155. In arriving at this conclusion, the district

court acknowledged this Court's 150-year-old line of precedent that "consistently h[olds] that a challenge to state action based on the Guaranty Clause presents no justiciable question." App. 150 (quoting *Baker v. Carr*, 369 U.S. 186, 224 (1962)). But relying on dicta from this Court's opinion in *New York v. United States* and on dicta from two Tenth Circuit cases, the district court held that there no longer is a *per se* non-justiciability rule in Guarantee Clause cases. It further concluded that *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912)—which held that the Guarantee Clause cannot be used to challenge a state's exercise of direct democracy—is inapposite. App. 154–55. Finally, the court applied the factors from *Baker v. Carr* and concluded that this case is justiciable. App. 156–67.

The district court also held that the handful of Respondents who are current state legislators have standing to sue under Article III. The court acknowledged that Respondents here allege only an "institutional legislative injury." App. 137. Nonetheless, the court held that the state legislators suffered a sufficiently concrete injury because TABOR "dilutes" the "core" legislative powers of taxing and spending. App. 120–23, 138. The district court declined to reach the question of standing for the non-legislator plaintiffs. App. 142.

The Tenth Circuit Panel Decision. The district court certified its order for immediate interlocutory appeal under 28 U.S.C. § 1292(b), recognizing that "[t]he ultimate resolution of this litigation will quite literally affect every individual and corporate entity in the State of Colorado." App. 84. The district court also

sua sponte issued a stay of the case, because appellate review "may obviate the need for the lengthy and costly phases of discovery and trial." App. 86 (citing the broad and excessive discovery, on all levels of government, which Plaintiffs have requested). The Tenth Circuit accepted the interlocutory appeal and affirmed.

Like the district court, the Tenth Circuit panel held that Respondents' claims are justiciable. The court acknowledged that "[t]here can . . . be little doubt that [this Court's decisions] include language suggesting that Guarantee Clause litigation is categorically barred by the political question doctrine." App. 34. But the panel expressly rejected the *per se* rule, reasoning that *Baker* and *New York* have "suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." App. 38 (quoting *New York*, 505 U.S. at 185). The panel also held that Respondents' derivative claim under the Colorado Enabling Act is "independently justiciable" because statutes are "never" subject to political question analysis. App. 52–53 (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring)).

Separately, the panel endorsed the district court's expansive view of legislative standing. App. 28. According to the panel, an "abstract dilution of institutional legislative power" is generally insufficient under *Raines* to create standing when there has been no specific vote on a legislative act. But, in at least some cases, no specific vote is needed, and institutional injuries alone may provide a basis for federal jurisdiction. App. 16–17, 23–28. The court of appeals rejected the "especially rigorous" understanding of

Raines adopted in other circuits, which limits legislative standing to a narrow set of circumstances. App. 22 (quoting *Tachiona v. United States*, 386 F.3d 205, 213 (2d Cir. 2004)). Instead, the panel held that *Raines* need not apply to a handful of state legislators if they allege that a state law has interfered with one of their allegedly "core function[s]." App. 25. TABOR's voter-approval requirements allegedly "stripped the legislature of its rightful power" over this "core" function and thus created a cognizable injury-in-fact. App. 20, 25, 28.

The Governor's Petition for Rehearing. The Governor petitioned for rehearing en banc. On a 6–4 vote, over three separate written dissents, the court denied the petition. App. 55. In the view of the dissenters, the panel opinion both shrinks the scope of the political question doctrine and expands the doctrine of legislative standing.

All four dissenting judges would have dismissed the case as a non-justiciable political question. Judge Hartz was "at a loss" to distinguish this case from *Pacific States*. App. 56. In Judge Hartz's view, the plaintiffs in *Pacific States*—like Respondents here—claimed that "the Guarantee clause was violated by the transfer of legislative power from the legislature to the electorate." App. 56. And because "the Supreme Court has never questioned the holding of nonjusticiability in *Pacific States*," the panel decision improperly broke new jurisprudential ground. App. 59.

Judge Gorsuch, meanwhile, focused on "the failure of the plaintiffs, the district court, or the panel to identify any standard for decision." App. 75. To Judge Gorsuch, Plaintiffs face a formidable task under *Pacific*

States, because there "the Supreme Court . . . dismissed for lack of judicially manageable standards a case challenging a state constitutional provision that allowed citizens to overturn by direct vote *any* state legislative enactment (not just enactments raising taxes)." App. 72 (emphasis in original). To Judge Gorsuch, it would be improper to require the Governor to join "a multi-year scavenger hunt up and down the federal court system looking for some judicially manageable standard that might permit us to entertain the case." App. 76.

Judges Tymkovich and Holmes agreed with that analysis. App. 70. But they separately objected to the panel's expansion of the legislative standing doctrine. They explained that "[t]he panel's view of *Raines* makes any state constitutional provision that limits a legislature's authority over a policy area vulnerable to legislative standing on a Guarantee Clause claim." App. 64. In the view of Judges Tymkovich and Holmes, "[a]n abstract reduction of authority to raise taxes is an institutional injury based on the dilution of political power," and, under *Raines*, "[t]his cannot serve as a basis for legislative standing." App. 66.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit decision highlights the growing debate and uncertainty, since this Court's opinions in *New York* and *Raines*, about the proper extent of federal judges' power to intervene in disputes between a state's people and their elected officials. That uncertainty has been percolating for years, but the Tenth Circuit's radical departure from other federal and state courts highlights the need for definitive resolution from this Court. Without this Court's

intervention, Guarantee Clause claims will proliferate in the Tenth Circuit (at least) and place federal courts in the untenable position of overseeing state government structure without any judicially manageable standards to guide them. This Court's guidance, on matters of the utmost importance in our constitutional system, is needed, particularly given the split among the circuits.

I. The petition should be granted to review the Tenth Circuit's holding that Plaintiffs' claims under the Guarantee Clause are justiciable.

Whether the federal courts have a role in policing state government structure under the Guarantee Clause is not a new question. Since at least *Luther v. Borden*, 48 U.S. 1 (1849), the Court has recognized that if the courts have any role at all, it must be sharply limited. Indeed, over the years, *Luther* has become a "general rule of nonjusticiability" for Guarantee Clause claims. *New York*, 505 U.S. at 184.

The Tenth Circuit was correct in noting that *New York* questioned whether to maintain that *per se* rule. But the panel overstepped its judicial authority when it leapt beyond the holding of *New York* to do away with the *per se* rule entirely. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). And the panel erred even more grievously in taking a further leap: holding that the particular claims presented here are in fact justiciable,

and Colorado can be forced to prove, after discovery and possibly a trial, that its government is adequately republican in form. That decision conflicts with this Court's own precedent, as well as the decisions of numerous circuits and many state courts.

The lower courts' current confusion regarding the Guarantee Clause—which the decision below both highlights and exacerbates—proves that "the day has come" for this Court to resolve the difficult question left open by *New York*: whether some Guarantee Clause claims are in fact justiciable. *See Kidwell v. City of Union*, 462 F.3d 620, 635 n.5 (6th Cir. 2006) (Martin, J., dissenting).[5] This case presents the ideal opportunity to resolve that question.

A. The Tenth Circuit's decision conflicts with *Pacific States*.

A century ago this Court first faced a Guarantee Clause challenge to the use of direct democracy on a matter of state tax policy. In *Pacific States*, the Court rejected that challenge, declaring that the question whether courts are empowered "to determine when a

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[5] There has been no shortage of academics urging the Court itself to take the leap the Tenth Circuit took. *See, e.g.,* Symposium, Ira C. Rothgerber, Jr. Conference on Constitutional Law: *Guaranteeing a Republican Form of Government*, 65 U. Colo. L. Rev. 709 (1994) (setting forth arguments by Professors Amar, Chemerinsky, Merritt, and Weinberg that Guarantee Clause claims should be justiciable); Laurence H. Tribe, American Constitutional Law 398 (2d ed. 1988); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 70–78 (1988); John H. Ely, Democracy and Distrust: A Theory of Judicial Review 118, n.*, 122–23 (1980).

State has ceased to be republican in form and to enforce the [G]uarantee [Clause] . . . . is not novel, as that question has long since been determined by this court . . . to be political in character, and therefore not cognizable by the judicial power." *Pac. States*, 223 U.S. at 133.

The panel below attempted to distinguish *Pacific States* by arguing that it involved a challenge to the entire Oregon initiative system, while this case is a focused attack on TABOR. App. 33. This misstates *Pacific States*. There, the Court faced a variety of challenges to a democratically adopted tax, including both a broad challenge and several narrower ones. But all the challenges were based on the same theory presented here: that direct democracy is in conflict with constitutionally required republicanism. 223 U.S. at 136–37. *Pacific States* recognized that *any* such claim, no matter how broad or narrow, is an attack on the state's system of governing itself. The Court thus analyzed, and rejected, all the claims identically. *Id*. at 136–51.[6]

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[6] *Pacific States* also rejected the plaintiff's derivative claim that the initiative power "violates the provisions of the act of Congress admitting Oregon to the Union." 223 U.S. at 139. This disproves the panel's mistaken view below that statutory claims, even those that merely parrot the language of the Guarantee Clause, are *always* justiciable. App 52–53. As the *Pacific States* Court recognized, a statutory claim that is entirely duplicative of a Guarantee Clause claim, as here, offers nothing of substance to make it justiciable. *See* 223 U.S. at 140 (noting that "every reason urged to support [the plaintiff's claims] is solely based on § 4 of Art. IV"). To the extent the decision below was based on Respondents' Enabling Act claim in addition to their Guarantee Clause claim, that decision should still be reviewed here.

After *Pacific States*, the rule that federal courts are not the proper forum for deciding whether states are adequately republican only became more settled. *See*, *e.g.*, *Kiernan v. Portland*, 223 U.S. 151 (1912); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916). Today, even scholars who take an expansive view of federal jurisdiction over state government structure—and who disapprove of the *per se* rule against justiciability of Guarantee Clause claims—recognize the validity of the *per se* rule. As Dean Chemerinsky noted, "It is a well-settled principle that cases brought under [the Guarantee Clause] must be dismissed as posing a nonjusticiable political question." Erwin Chemerinsky, *Cases Under The Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 849 (1994). This is true, he said, because "countless Supreme Court decisions . . . summarily dismissed various challenges to various aspects of state governance." *Id.*; *see also id.* at 849 & nn.1–2 (citing, e.g., *Ohio ex rel. Bryant v. Akron Metro. Park Dist*, 281 U.S. 74, 79–80 (1930)). Indeed, as recently as 2004, a plurality of this Court cited Guarantee Clause claims, and specifically *Pacific States*, as examples of non-justiciable questions that are "entrusted to one of the political branches or involve[ ] no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion).

Despite this broad and longstanding consensus, *New York* created significant confusion and a split of authority among the courts of appeals. In dicta, the Court rejected the plaintiffs' proposition that a law requiring states to dispose of radioactive waste within their borders violated the Guarantee Clause. Justice O'Connor's opinion for the Court questioned how *Luther* had "metamorphosed into the sweeping

assertion that 'violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.'" *New York*, 505 U.S. at 184 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion)). Justice O'Connor cited commentators who "suggested that courts should address the merits of such claims, at least in some circumstances." *Id*. at 185. But whether to undo the *per se* rule was a "difficult question," one the Court did not answer in *New York*. *Id*. Instead, the Court avoided the question, "indulging the assumption" that the claims at issue were justiciable and holding that the challenged federal statutes "d[id] not pose any realistic risk of altering the form or the method of functioning of New York's government." *Id*. at 186.

B. The Tenth Circuit split from numerous circuits and state supreme courts by explicitly holding that Guarantee Clause claims are justiciable.

By questioning, but not resolving, whether Guarantee Clause claims should always be dismissed as political questions, the *New York* dicta created significant confusion, leading to what is now a three-way split among circuit and state courts.[7] Within that split of authority, the Tenth Circuit stands alone in

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[7] *See* David A. Carrillo and Stephen M. Duvernay, *The Guarantee Clause and California's Republican Form of Government,* 62 UCLA L. Rev. Disc. 104, 107 (2014) ("Ultimately, *New York* raised more questions than it answered. . . . But while professors and pundits heavily debated these issues over the last twenty years, lower courts provided little intervening guidance on Guarantee Clause claims, and *New York* remains the Supreme Court's last word on the subject.").

directly holding that at least some Guarantee Clause claims are in fact justiciable.

The majority of post-*New York* federal circuit and state supreme court decisions follow this Court's older precedents and continue to apply a *per se* bar to Guarantee Clause claims. This is the approach taken in the Eleventh and Ninth Circuits and by the highest courts of Minnesota, Oregon, South Carolina, and Washington. *See, e.g.*, *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001) ("A challenge based on the Guarantee Clause . . . is a non-justiciable political question. We therefore deny Murtishaw's Guarantee Clause claim."); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) ("[W]hether the level of illegal immigration is an 'invasion' of Florida and whether this level violates the guarantee of a republican form of government present nonjusticiable political questions."); *see also Clayton v. Kiffmeyer*, 688 N.W.2d 117, 126 (Minn. 2004); *State of Ore. ex rel. Huddleston v. Sawyer*, 932 P.2d 1145, 1157–62 (Or. 1997); *Campbell v. Hilton Head*, 580 S.E.2d 137, 140 n.7 (S.C. 2003); *State v. Davis*, 943 P.2d 283, 285–86 (Wash. 1997). These courts recognize correctly that while *New York* may have suggested that "the time is clearly approaching [when] the Court may be quite willing to reject" the *per se* rule, Chemerinsky, 65 U. Colo. L. Rev. at 851, the Court has not done so yet.

Other courts take a middle course. Following the example set by *New York*, these courts entertain the possibility of someday adjudicating an extreme case that poses a "realistic risk of altering the form or the method of functioning" of state government. But as in *New York*, these courts avoid the "difficult question" of

justiciability and dismiss the case on alternative grounds—namely, that the sort of extreme case contemplated by *New York* is not before them. *See, e.g., United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 712 F.3d 761, 774–75 (2d Cir. 2013) ("[E]ven if we determined the question here was justiciable, the County has not presented any evidence that it has been deprived of a republican form of government. The residents of the County remain able to 'choose their own officers' and 'pass their own laws' . . . ."); *Largess v. Supreme Judicial Ct.*, 373 F.3d 219, 229 (1st Cir. 2004) (holding that judicial recognition of same-sex marriage "does not plausibly constitute a threat to a republican form of government"); *see also Deer Park Indep. Sch. Dist. v. Harris Cnty. Appraisal Dist.*, 132 F.3d 1095, 1099–1100 (5th Cir. 1998); *Risser v. Thompson*, 930 F.2d 549, 552–53 (7th Cir. 1991). Neither applying nor rejecting the *per se* rule, these courts decline to take the significant step of holding that Guarantee Clause claims are, in fact, justiciable. And not one of them has required a state government to prove to a federal judge's satisfaction that it is sufficiently republican.

In parting ways with these other approaches, the Tenth Circuit has taken at least two leaps beyond current law. First, it not only questioned the *per se* rule but affirmatively rejected it—something no other court has done. Second, it went on to hold that claims such as Respondents' (*i.e.*, that "plebiscite" is unconstitutional when applied to "legislative core functions") are actually justiciable under the *Baker* test. App. 49. In taking these steps the Tenth Circuit now stands alone in subjecting states to a trial on the merits over their use of direct democracy.

C. The Tenth Circuit's decision would inject the federal courts into countless novel disputes about the proper structure of state governments, without judicial standards.

If Guarantee Clause claims are now justiciable, there is no shortage of creative lawyers and academics standing ready to embroil states and federal courts in an endless stream of litigation on questions that, before now, would have been resolved through the political process. For example, the Guarantee Clause could be used to challenge any limit imposed on legislative power (such as balanced budget amendments and supermajority requirements) or any delegation of legislative power to non-representative institutions or bodies (such as the redistricting commission challenged in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13-1314). States would be forced to defend, and courts to resolve, whether the concept of a republican government includes any variety of positive individual rights, such as the right to a free public education, the right to choose one's occupation, and the right to own property.[8] As academic commentators have suggested over and over,

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[8] *See* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513 (1962).

the scope of Guarantee Clause litigation is nearly unlimited.[9]

The Tenth Circuit's ruling here will also require federal courts to determine which legislative powers are "core functions" and which are something less. This Court, however, has long recognized the peril in asking federal courts to draw such lines. *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 498 (2003) (rejecting a test that asked whether a suit interfered with a state's "core sovereign responsibilities"); *Garcia v. San Antonio Metro Transit Auth*, 469 U.S. 528, 546–47 (1985) (rejecting as "unsound in principle and unworkable in practice" a rule that turned on whether a state function was "integral" or "traditional"); *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions.").

As Judge Gorsuch emphasized, the Tenth Circuit compounded these problems by flatly refusing to provide the Governor and the State of Colorado (not to mention the district court judge) with judicial standards to govern this case. "[T]he parties have exhausted no fewer than three rounds of pleadings in the district court and an interlocutory appeal . . . . At every stage Governor Hickenlooper has challenged the plaintiffs to identify judicially manageable standards of decision . . . . Yet even today the plaintiffs profess no

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[9] *See, e.g.*, Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 Fordham L. Rev. 1941 (2012); Chemerinsky, 65 U. Colo. L. Rev. at 868–69.

more than 'confiden[ce]' that if their case is allowed to proceed still further the district court will someday be able to find some standard for decision." App. 73 (Gorsuch, J., dissenting). This lack of guidance to the lower court, and to other courts that will be forced to address similar claims in the future, highlights the uncharted territory the Tenth Circuit has entered and is an additional reason to grant review.[10]

Even if the Tenth Circuit was correct that the *per se* rule should no longer be employed, the Court should grant the petition to provide guidance about what should replace it. There is no reason that the only options need be the *per se* rule or the standardless expedition the Tenth Circuit has endorsed. This Court could reaffirm that claims asking courts to resolve "the contest between direct democracy and representative democracy" are non-justiciable. *See Pacific States*, 223 U.S. 118. It could also reserve the option of justiciability for the "extreme" circumstances suggested in *Baker*. 369 U.S. at 222 n.48; *see also New York*, 505 U.S. at 185–86. Or it could draw the line at claims asking the federal courts to determine which legislative powers are sufficiently "core" such that they cannot be subject to popular oversight.

Finally, the Tenth Circuit refused to acknowledge another boundary line separating potentially viable

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[10] The panel cited this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), for the proposition that a lack of standards on novel constitutional questions is no bar to jurisdiction. App. 43–44. That is a dubious description of *Heller*, and Judge Gorsuch was right that *Vieth*—which, after reviewing existing case law, found a lack of judicial standards to govern gerrymandering claims—is the far better analogy. *See* App 74 n.1.

Guarantee Clause claims from those that should never get off the ground. In *New York* it was a state challenging the actions of the federal government. That claim at least was consistent with the text of the Guarantee Clause: the guarantee of a "republican form of government" is made *by* the United States *to* the several states. The Tenth Circuit, however, opened the Clause to challenges *against* states brought by any frustrated citizen. In that setting, there are improper parties on both sides of the caption, and the federal government's "guarantee" to the states is simply not implicated.

Thus, the scope of potentially justiciable Guarantee Clause cases contemplated by *New York* is infinitely smaller than the universe of now-viable cases under the Tenth Circuit's approach. Even if the Court believes the panel was correct to jettison the *per se* rule, it should grant the petition to give guidance to the lower courts about the otherwise potentially boundless reach of the Guarantee Clause.

D. These issues are of fundamental importance.

The questions raised by the Tenth Circuit's decision sit at the confluence of two foundational principles: federalism and the separation of powers. As the Court recognized in *New York*, these questions implicate "perhaps our oldest question of constitutional law . . .: discerning the proper division of authority between the Federal Government and the States." 505 U.S. at 149. This division of power "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1146 (2013) (discussing

standing). Yet these foundational issues have profoundly divided the judges of the Tenth Circuit, as well as the lower courts more generally.

This Court will often review a case, like this one, at an interlocutory stage when doing so will clarify important legal principles or advance significant litigation. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354; *Am. Broadcasting Cos., Inc. v. Aereo, Inc.*, No. 13-461; *Fifth Third Bancorp v. Dudenhoeffer*, No. 12-751; *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317; *Limelight Networks, Inc. v. Akamai Techs., Inc.*, No. 12-786; *Michigan v. Bay Mills Indian Cmty.*, No. 12-515; *Lawson v. FMR LLC*, No. 12-3. The need for immediate review here is particularly strong given the lack of standards for the lower courts to apply as Respondents' Guarantee Clause claim moves forward. The failure of the courts below to dismiss this case means a lengthy, expensive, and uncertain discovery process for Colorado's Governor, without any judicial standards to govern that process or a later trial.

If this case were to proceed, it would be the first of its kind to be litigated on the merits—but it is unlikely to be the last. Warns Judge Gorsuch: "[T]o hold for plaintiffs in this case would require a court to entertain the fantasy that more than half the states (27 in all) lack a republican government." App. 74–75. And it is not just the states that would feel the effects. The implications for the federal judiciary are significant too. This suit has drawn the courts into the center of a decades-old, politicized debate about the size of government and the power to tax. If this case proceeds, an unelected *federal* district court will be asked to determine what *state* policy constitutes "fiscal

dysfunction," whether TABOR causes it, and whether raising taxes will cure it.

II. The Court should also review the Tenth Circuit's expansion of the legislative standing doctrine.

As it did with the Guarantee Clause, the Tenth Circuit adopted an interpretation of this Court's legislative standing cases that creates confusion among the lower courts and, if left in place, would expand the reach of the federal courts into intra-state governance disputes. The result is an approach to federal jurisdiction that reaches far beyond what this Court, and any other circuit, has so far countenanced.

The injuries alleged in the complaint are a mix of conclusory assertions, legal conclusions, and generalized grievances. Indeed, most are asserted in the form of "interests," not injuries—interests such as "representative democracy," "the legislative core functions of taxation and appropriation," and "adequately funding core education responsibilities." App. 105–06, 119. Respondents' complaint begins by declaring that this case "presents for resolution the contest between direct democracy and representative democracy." App. 182. But because the power Respondents object to—the power to reject via popular vote a tax increase passed by the legislature—has never actually been exercised in Colorado, and because the Legislator-Plaintiffs have failed to base their alleged injuries on any legislative vote that TABOR has actually undone, Respondents have struggled to establish their standing to bring this case. The district court offered Respondents an opportunity to produce additional briefing on standing, and in the end both

lower courts found standing based solely on the allegations brought by members of Colorado's legislature.[11] Those allegations cannot support standing under this Court's precedents and would not support standing in other circuits.

A. The Tenth Circuit radically and improperly expanded the doctrine of legislative standing in direct conflict with this Court's precedents.

This Court has countenanced legislator standing only once. *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, the Court faced a unique situation: a state legislature's vote to ratify a constitutional amendment ended in a tie—resulting in the amendment not being ratified. The state's lieutenant governor, however, cast a tie-breaking vote and thus reversed the legislative outcome. 307 U.S. at 436. All the senators who had voted to block ratification (as well as some other legislators who objected to the lieutenant governor's participation in the vote) sued, challenging the lieutenant governor's power to break the tie. The Court held that they had standing to do so under the narrow circumstances presented. *Id.* at 438.

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[11] The lower courts did not address the non-legislator plaintiffs' standing. But the Complaint—along with the briefing and arguments in the record from the district court's hearing on standing—is more than adequate to show that no other plaintiff has a cognizable injury in fact. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 473 (1982) ("Were the federal courts merely publicly funded forums for the ventilation of public grievances . . . the concept of 'standing' would be quite unnecessary.").

The Court revisited this issue in *Raines* when a handful of House members challenged the federal Line Item Veto Act. 521 U.S. at 814. Unlike *Coleman*, the circumstances in *Raines* had much in common with this case. The plaintiffs challenged the Line Item Veto Act in the abstract and did not point to any particular piece of legislation the Act had affected; the size of the group of legislator-plaintiffs was insufficient to actually enact any legislation; and the plaintiffs' challenge was premature in that the line-item veto power had not been employed by the President. *Id*. at 824–30.

Raines noted that in *Coleman*, the Court "repeatedly emphasized that if the[ ] legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity." 521 U.S. at 822. The Court thus declared it to be "obvious" that *Coleman* "stands . . . *at most* . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a *specific legislative act* have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id*. at 823 (footnote omitted, emphasis added). Those circumstances being absent, the *Raines* Court held that the legislator-plaintiffs could not challenge the Line Item Veto.[12]

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[12] Once the challenged line-item veto power *was* employed, a legitimate injury was in fact caused, and the Line Item Veto Act was struck down in *Clinton v. City of New York*, 524 U.S. 417 (1998). Thus, an expansive version of legislative standing was unnecessary to resolve the important constitutional questions presented in *Raines*. So too here: if TABOR's powers are ever invoked by the People of Colorado to block a legislatively-approved

This suit satisfies none of the *Raines* requirements: there are now only three legislators suing, and they cannot point to a single vote they made that was "deprived of all validity" by TABOR. Yet the panel rejected this Court's straightforward test. *See* App. 65 (Tymkovich and Holmes, J.J., dissenting). Instead, the panel held that the Plaintiff-Legislators have an injury based on "their *disempowerment* rather than the failure of any specific tax increase." App. 24 (emphasis added). That is, TABOR has allegedly "stripped the legislature of its rightful power" and turned their decisions on tax matters from legally binding into merely "advisory." App. 16, 20.

The court of appeals recognized that Respondents' challenge to TABOR does not fit within the confines of *Coleman*. Instead, the panel transformed *Raines* into an exception to *Coleman*. And it held that the exception does not apply here for a variety of reasons, including:

- the General Assembly had filed an amicus brief (even though it did not actually join the case as a party and even though a group of other legislators filed an opposing amicus brief supporting the *Governor's* position);
- the challenge here is to a constitutional rather than statutory limit on legislative power; and
- Plaintiffs here are state legislators rather than federal.

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tax increase, and a majority of legislators choose to sue, an injury in fact is likely and the issue would be ripe.

App. 21–22. The court declared that it would be "bizarre" to allow standing on the basis of a single nullified vote but not on a more general limit on legislative power, and it would be "futile" to require a showing of a legislative act that was actually nullified. App. 26.

Raines rejected precisely this type of analysis. The alleged injury in this case is shared by every member of both houses of the Colorado legislature, and it exists only in the abstract, not in connection with any specific vote that has been undone. It therefore amounts to an "abstract dilution of institutional legislative power" that is inadequate to create a case or controversy. *Raines,* 521 U.S. at 826. Such arguments about "effectiveness" or "meaning" of legislators' votes "pull[] *Coleman* too far from its moorings." 521 U.S. at 825.

B. The expansion of legislative standing beyond the confines of *Raines* conflicts with the decisions of other courts of appeals.

By drastically shrinking the *Raines* rule and making it merely an exception to *Coleman*—rather than vice versa—the Tenth Circuit created a second split, this time with two other federal circuits. The D.C. Circuit, for one, has held exactly the opposite. *See Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (describing "the very narrow possible *Coleman* exception to *Raines*"). The *Coleman* exception, as the D.C. Circuit noted, is the result of the very "unusual situation" presented by a ratification vote on a constitutional amendment—once voted upon, literally nothing, absent judicial review, can be done to rescind a vote on an amendment. *See Campbell*, 203 F.3d at

22–23. In more typical cases of legislative dilution of power, the D.C. Circuit requires dismissal under *Raines*. *See Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (D.C. Cir. 1999) ("[T]here is not the slightest suggestion here that these particular legislators had the votes to enact a particular measure, that they cast those votes or that the federal statute or the federal defendants did something to nullify their votes.").

The Sixth Circuit similarly declines to treat *Raines* as a mere exception to *Coleman*. In *Baird v. Norton*, 266 F.3d 408 (6th Cir. 2001), that court confronted a concurrent resolution procedure that undoubtedly had a serious effect on legislative power: concurrent resolutions could be passed by a "vote margin [that] would have been insufficient to enact legislation." *Id*. at 410. But "although [the plaintiff's] institutional power was diluted," "she ha[d] not suffered an injury that satisfie[d] the stringent requirements for legislative standing set out in *Raines*." *Id*. at 412. The legislator failed to identify a specific legislative act that "her vote alone" could have defeated. *Id*.

The Tenth Circuit distinguished *Babbitt* and similar cases by asserting that "the extent and type of disempowerment" in this case is different because TABOR "strips [the legislature] of all power to conduct a 'legislative core function.'" App. 24–25. This reasoning causes even more mischief by importing the novel "core powers" concept into not only Guarantee Clause jurisprudence, but into standing questions as well.

Raines led the federal courts away from such a dangerous course when it rejected legislative standing

based only on institution-wide disempowerment. 521 U.S. at 825–26. But the Tenth Circuit took what *Raines* had called a "drastic" step the Court was unwilling to take, *see id.*: allowing any frustrated legislator, or small group of them, to ask federal courts to throw out constitutional limits on their power. *See* App. 60–66 (Tymkovich, J., and Holmes, J., dissenting). This Court should grant certiorari to decide whether taking that drastic step was the right course.

C. The Tenth Circuit's expansion of legislative standing implicates the fundamental questions of separation of powers and federalism.

Whether state legislators are permitted to lure federal courts into disputes like this one is an important question, as the Court recently recognized in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13-1314. As important as that case is, however, the implications here are even more significant.

The Tenth Circuit based its jurisdiction on the alleged injuries of just three of Colorado's 100 legislators. App. 11–12, 28. This is a significant step beyond the situation the Court faces in *Arizona State Legislature*, where the *entire* legislature, acting as an institution with one voice, filed a suit to protect its power to draw election districts.

Whatever the outcome in that case, decisive action by this Court will still be needed. Here, the Tenth Circuit extended legislative standing far beyond the facts of *Arizona State Legislature*, allowing a tiny minority of the Colorado General Assembly to sue the

Governor, who is standing in as a surrogate for the voters who enacted TABOR.[13]

Below, Judges Tymkovich and Holmes warned against the combined effects of the panel's decision that Guarantee Clause claims are justiciable and its extension of legislative standing:

> The net result of the panel's decision ratifying standing is that *just about any policy provision codified in the state* [and federal] *constitution would be subject to legislative standing and attack on the theory of vote dilution* [under the Guarantee Clause].

App. 60 (emphasis in original). No other court has recognized such an expansive role for federal courts' oversight of a state government's division of political power.

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[13] Even if the Court believes the standing issue in this case may be resolved by a decision in *Arizona State Legislature*, the Court should grant this petition to address whether Plaintiffs' Guarantee Clause claims are non-justiciable political questions. This Court, in a unanimous opinion, recently confirmed "that a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted). A holding that a claim is a non-justiciable political question is, of course, a threshold ground for denying review. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). Given the importance of the Guarantee Clause issue, we believe the preferable course is to address it first. At a minimum, however, this petition should be held until *Arizona State Legislature* is resolved.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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OCTOBER 2014

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 12-1445

[Filed March 7, 2014]

ANDY KERR, Colorado State Representative; NORMA V. ANDERSON; JANE M. BARNES, member Jefferson County Board of Education; ELAINE GANTZ BERMAN, member State Board of Education; ALEXANDER E. BRACKEN; WILLIAM K. BREGAR, member Pueblo District 70 Board of Education; BOB BRIGGS, Westminster City Councilman; BRUCE W. BRODERIUS, member Weld County District 6 Board of Education; TRUDY B. BROWN; JOHN C. BUECHNER, Ph.D., Lafayette City Councilman; STEPHEN A. BURKHOLDER; RICHARD L. BYYNY, M.D.; LOIS COURT, Colorado State Representative; THERESA L. CRATER; ROBIN CROSSAN, member Steamboat Springs RE-2 Board of Education; RICHARD E. FERDINANDSEN; STEPHANIE GARCIA, member Pueblo City Board of Education; KRISTI

HARGROVE; DICKEY LEE HULLINGHORST, Colorado State Representative; NANCY JACKSON, Arapahoe County Commissioner; WILLIAM G. KAUFMAN; CLAIRE LEVY, Colorado State Representative; MARGARET (MOLLY) MARKERT, Aurora City Councilwoman; MEGAN J. MASTEN; MICHAEL MERRIFIELD; MARCELLA (MARCIE) L. MORRISON; JOHN P. MORSE, Colorado State Senator; PAT NOONAN; BEN PEARLMAN, Boulder County Commissioner; WALLACE PULLIAM; PAUL WEISSMANN; JOSEPH W. WHITE,

Plaintiffs - Appellees,

v.

JOHN HICKENLOOPER, Governor of Colorado, in his official capacity,

Defendant - Appellant.

D'ARCY W. STRAUB; INDEPENDENCE INSTITUTE; CATO INSTITUTE; SEN. KEVIN LUNDBERG; REP. JERRY SONNENBERG; REP. JUSTIN EVERETT; REP. SPENCER SWALM; REP. JANAK JOSHI; REP. PERRY BUCK; SEN. TED HARVEY; SEN. KENT LAMBERT; SEN. MARK

SCHEFFEL; SEN. KEVIN)
GRANTHAM; SEN VICKI MARBLE;)
SEN. RANDY BAUMGARDNER; REP.)
DAN NORDBERG; REP. FRANK)
MCNULTY; REP. JARED WRIGHT;)
REP. CHRIS HOLBERT; REP. KEVIN)
PRIOLA; SEN. SCOTT RENFROE;)
SEN. BILL CADMAN; COLORADO)
UNION OF TAXPAYERS)
FOUNDATION; NATIONAL)
FEDERATION OF INDEPENDENT)
BUSINESS; TABOR FOUNDATION;)
OKLAHOMA COUNCIL FOR PUBLIC)
AFFAIRS; HOWARD JARVIES)
TAXPAYERS FOUNDATION;)
FREEDOM CENTER OF MISSOURI;)
FREEDOM FOUNDATION;)
GOLDWATER INSTITUTE; 1851)
CENTER FOR CONSTITUTIONAL)
LAW; COLORADO CHAPTER OF THE)
AMERICAN ACADEMY OF)
PEDIATRICS AND COLORADO)
NONPROFIT ASSOCIATION;)
COLORADO GENERAL ASSEMBLY;)
BELL POLICY CENTER; COLORADO)
FISCAL INSTITUTE; THE CENTER)
ON BUDGET AND POLICY)
PRIORITIES; COLORADO PARENT)
TEACHER ASSOCIATION; ERWIN)
CHEMERINSKY; HANS LINDE;)
WILLIAM MARSHALL; GENE)
NICHOL; WILLIAM WIECEK;)
COLORADO ASSOCIATION OF)
SCHOOL BOARDS; COLORADO)

ASSOCIATION OF SCHOOL EXECUTIVES,

Amici Curiae.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:11-CV-01350-WJM-BNB)

Daniel D. Domenico, Solicitor General (John W. Suthers, Attorney General, Frederick R. Yarger, Assistant Solicitor General, Bernie Buescher, Deputy Attorney General, Megan Paris Rundlet, Assistant Attorney General, with him on the briefs), Office of the Attorney General for the State of Colorado, Denver, Colorado, for the Defendant-Appellant.

David E. Skaggs (Lino S. Lipinsky de Orlov, Herbert Lawrence Fenster, McKenna Long & Aldridge LLP; Michael F. Feeley, John A. Herrick, Geoffrey M. Williamson, and Carrie E. Johnson, Brownstein Hyatt Farber Schreck LLP, with him on the briefs), Denver, Colorado for the Plaintiffs-Appellees.

Richard A. Westfall, Hale Westfall, LLP, Denver, Colorado and Karen R. Harned and Luke A. Wake, NFIB Small Business Legal Center, Washington, DC, filed an amicus curiae brief for National Federal of Independent Business, Tabor Foundation, Oklahoma Council for Public Affairs, Howard Jarvies Taxpayers Foundation, Freedom Center of Missouri, 1851 Center for Constitutional Law, Freedom Foundation, and Goldwater Institute on behalf of Defendant-Appellant.

David B. Kopel, Independence Institute, Denver, Colorado, and Ilya Shapiro, Cato Institute, Washington, DC, filed an amicus curiae brief for Independence Institute and Cato Institute on behalf of Defendant-Appellant.

James M. Manley, Mountain States Legal Foundation, Lakewood, Colorado, filed an amicus curiae brief for Sen. Kevin Lundberg, Rep. Jerry Sonnenberg, Rep. Justin Everett, Rep. Spencer Swalm, Rep. Janak Joshi, Rep. Perry Buck, Sen. Ted Harvey, Sen. Kent Lambert, Sen. Mark Scheffel, Sen. Kevin Grantham, Sen. Vicki Marble, Sen. Randy Baumgardner, Rep. Dan Nordberg, Rep. Frank McNulty, Rep. Jared Wright, Rep. Chris Holbert, Rep. Kevin Priola, Sen. Scott Renfroe, Sen. Bill Cadman, and Colorado Union of Taxpayers Foundation on behalf of Defendant-Appellant.

D'Arcy W. Straub, Littleton, Colorado, filed an amicus curiae brief for D'arcy W. Straub, on behalf of Defendant-Appellant.

Andrew M. Low, Emily L. Droll, and John M. Bowlin, Davis Graham & Stubbs LLP, Denver, Colorado, filed an amicus curiae brief for Colorado Association of School Boards and Colorado Association of School Executives on behalf of Plaintiffs-Appellees.

Melissa Hart, University of Colorado Law School, Boulder, Colorado, filed an amicus curiae brief for Erwin Chemerinsky, Hans Linde, William Marshall, Gene Nichol, and William Wiecek on behalf of Plaintiffs-Appellees.

Joseph R. Guerra and Kathleen Mueller, Sidley Austin LLP, Washington, DC, filed an amicus curiae brief for

The Center on Budget and Policy Priorities on behalf of Plaintiffs- Appellees.

Stephen G. Masciocchi, Holland & Hart, Denver, Colorado, and Maureen Reidy Witt, Holland & Hart, Greenwood Village, Colorado, filed an amicus curiae brief for The Colorado General Assembly on behalf of Plaintiffs-Appellees.

Matthew J. Douglas, Holly E. Sterrett, Paul W. Rodney, and Nathaniel J. Hake, Arnold & Porter LLP, Denver, Colorado, filed an amicus curiae brief for the Bell Policy Center and the Colorado Fiscal Institute on behalf of Plaintiffs-Appellees.

Catherine C. Engberg, Shute, Mihaly & Weinberger LLP, San Franscisco, California, filed an amicus curiae brief for Colorado Parent Teacher Association on behalf of Plaintiffs-Appellees.

Harold A. Haddon and Laura G. Kastetter, Haddon, Morgan and Foreman, P.C., Denver, Colorado, filed an amicus curiae brief for Colorado Chapter of the American Academy of Pediatrics and Colorado Nonprofit Association on behalf of Plaintiffs-Appellees.

Before **BRISCOE**, Chief Judge, **SEYMOUR** and **LUCERO**, Circuit Judges.

LUCERO, Circuit Judge.

Article IV, § 4 of the Constitution of the United States of America guarantees to the State of Colorado a "Republican Form of Government." It provides: "The United States shall guarantee to every State in this

Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, § 4. This right to a republican form of government is further assured and mandated by the enabling act of Congress, Colorado Enabling Act, ch. 139, § 4, 18 Stat. 474, 474 (1875), under which the State was admitted to the Union in 1876.

Various groups, and in particular, several Colorado state legislators, brought an action in the U.S. District Court for the District of Colorado. They claim that the so-called Taxpayer's Bill of Rights, TABOR, violates the Guarantee Clause of the federal Constitution, is in direct conflict with provisions of the Enabling Act, and impermissibly amends the Colorado Constitution.

In order to avoid Eleventh Amendment sovereignty issues, the Governor of Colorado, John Hickenlooper, was designated as the named defendant. Governor Hickenlooper filed his Answer to the plaintiffs' Complaint, and promptly followed with a motion to dismiss, alleging that plaintiffs lacked Article III standing and prudential standing, and that their claims were barred by the political question doctrine. This motion was denied by the district court, and the Governor brings this appeal to us, asserting error and asking us to dismiss the proceedings on the same bases that he presented to the district court.

The merits of the case are not before us. We express no view on the substantive issues and intend none. We consider solely standing and the political question doctrine: whether these plaintiffs have suffered a

particularized injury not widely shared by the general populace that entitles them to have their case heard by the federal courts, and whether the question presented is purely political in nature and should not be reached by the courts. We conclude that these plaintiffs may bring their claims and that the political question doctrine does not bar our consideration. Exercising jurisdiction under 28 U.S.C. § 1292(b), we affirm the district court's ruling and remand for further proceedings.

I

Article X, § 20 of the Colorado Constitution—better known as the Taxpayer's Bill of Rights or TABOR—was adopted by voter initiative in 1992.[1] TABOR limits the revenue-raising power of the state and local governments by requiring "voter approval in advance for . . . 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." Colo. Const. art. X, § 20, cl. 4(a). TABOR also limits state year-to-year spending increases to "inflation plus the percentage change in state population in the prior calendar year," id. cl. 7(a), requires that revenue exceeding this limit "be refunded in the next fiscal year unless voters approve a revenue change," id. cl. 7(d), and bans any "new state real property tax or local district income tax," id. cl. 8(a). Like all provisions in Colorado's Constitution, TABOR

[1] Like the district court, we take judicial notice of the provisions of the Colorado Constitution at issue in this case. See Fed. R. Evid. 201(b).

may be revoked or amended only with voter approval. Id. art. XIX, § 2 ("[A]mendments shall be submitted to the registered electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of this constitution."); id. § 1 (requiring voter approval to call constitutional convention).

More than thirty citizens of Colorado—including educators, parents of school-age children, and current and former state legislators—brought this suit against Colorado Governor John Hickenlooper in May 2011. The Second Amended Substitute Complaint for Injunctive and Declaratory Relief (the "complaint")[2] alleges that TABOR "undermines the fundamental nature of the state's Republican Form of Government" in violation of the Guarantee Clause, U.S. Const. art. IV, § 4. The complaint further alleges that TABOR violates the Colorado Enabling Act, the Supremacy Clause, and the Equal Protection Clause of the

[2] The complaint in this case has gone through several iterations. Plaintiffs originally intended to sue the state of Colorado, but following preliminary discussions with attorneys in the Office of the Colorado Attorney General, both sides agreed that Governor Hickenlooper should be named as the defendant in order to avoid possible Eleventh Amendment issues. Thus, on June 16, 2011, plaintiffs filed what they styled a "Substituted Complaint for Injunctive and Declaratory Relief." The district court later granted several motions to amend. Plaintiffs' Second Amended Substitute Complaint for Injunctive and Declaratory Relief is the operative complaint in this action. All references and citations to the complaint herein refer to that document. See S. Utah Wilderness Alliance v. Palma, 707 F.3d 1143, 1152 (10th Cir. 2013) ("Where . . . the original complaint has been super[s]eded by an amended complaint, we examine the amended complaint in assessing a plaintiff's claims . . . ." (quotation omitted)).

Fourteenth Amendment, and that it constitutes an impermissible amendment to the state constitution under state constitutional law principles.

Governor Hickenlooper moved to dismiss the complaint. He argued that plaintiffs lacked standing and that the political question doctrine required dismissal of all claims. The Governor also argued that the plaintiffs failed to state a claim on which relief could be granted as to their equal protection and impermissible amendment claims. The district court concluded that the plaintiffs who were current state legislators possessed standing and declined to assess the standing of the remaining plaintiffs. It ruled that the political question doctrine did not bar the lawsuit, thereby allowing plaintiffs to proceed on their Guarantee Clause and Enabling Act challenges to TABOR. The district court dismissed the equal protection challenge for failure to state a claim but refused to dismiss the impermissible amendment claim, exercising supplemental jurisdiction under 28 U.S.C. § 1367(a).

Governor Hickenlooper then asked the district court to certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court granted his request for certification and stayed the proceedings. A previous panel of this court granted permission to appeal. See 28 U.S.C. § 1292(b) ("The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order [certified for interlocutory appeal].").

II

We review de novo the district court's rulings on standing. Petrella v. Brownback, 697 F.3d 1285, 1292 (10th Cir. 2012). The plaintiffs bear the burden of establishing each element of standing. Id. In determining whether plaintiffs have met their burden, we assume the allegations contained in the complaint are true and view them in the light most favorable to the plaintiffs. S. Utah Wilderness Alliance, 707 F.3d at 1152. To establish Article III standing, a plaintiff must show: (1) that it has suffered a concrete and particular injury in fact that is either actual or imminent; (2) the injury is fairly traceable to the alleged actions of the defendant; and (3) the injury will likely be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

The district court determined that the plaintiffs who are current state legislators (the "legislator-plaintiffs") have standing and thus declined to assess the standing of any of the other named plaintiffs. See Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977) (allowing suit to proceed based on "one individual plaintiff who has demonstrated standing" without considering standing of remaining plaintiffs); see also Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."). We similarly limit our review to the standing of the legislator-plaintiffs.

A

Our analysis of standing begins with injury-in-fact. The legislator-plaintiffs claim that TABOR deprives

them of their ability to perform the "legislative core functions of taxation and appropriation." They say that TABOR prevents them from doing their jobs. Several cases have held, in other contexts, that an inhibition on a person's ability to perform work constitutes an injury-in-fact. See Singleton v. Wulff, 428 U.S. 106, 112-13 (1976) (allowing physicians who perform abortions to challenge law restricting Medicaid reimbursement); Ezell v. City of Chicago, 651 F.3d 684, 696 (7th Cir. 2011) (concluding "supplier of firing-range facilities" possessed standing to challenge city's ban on such facilities); Sammon v. N.J. Bd. of Med. Exam'rs, 66 F.3d 639, 642 (3d Cir. 1995) (aspiring midwives had standing to challenge statutory scheme that made "it more difficult for [them] to practice their chosen profession"); see also Pierce v. Soc'y of Sisters, 268 U.S. 510, 532, 535-36 (1925) (overturning state law mandating public education characterized by plaintiffs as conflicting "with right of schools and teachers . . . to engage in a useful business or profession"). However, standing in these cases was based in part on the harm, either financial or penal, that plaintiffs would suffer as a result of legislation inhibiting their ability to work. TABOR does not inflict either type of injury upon Colorado legislators. See Colo. Const. art. V, § 6 (fixing salary of members of the General Assembly); id. § 16 (providing legislative immunity to members).

Nonetheless, the Supreme Court has held that members of a state legislature may have standing to sue in order to vindicate the "plain, direct and adequate interest in maintaining the effectiveness of their votes." Coleman v. Miller, 307 U.S. 433, 438 (1939). We therefore consider the legislator-plaintiffs' claimed injury under the Supreme Court's legislative standing

framework, first articulated in Coleman and later refined by Raines v. Byrd, 521 U.S. 811 (1997).

Coleman involved a challenge by state legislators to Kansas' ratification of a proposed federal constitutional amendment. 307 U.S. at 435. Twenty senators voted in favor of the proposed amendment, and twenty voted against. Id. at 436. The Lieutenant Governor, presiding over the state Senate, broke the tie in favor of ratification, and the state House of Representatives later approved the amendment. Id. Twenty-one senators, including the twenty who had opposed the amendment, sought a writ of mandamus in state court. Id. After the state court denied mandamus relief, the Supreme Court granted certiorari. Id. at 437.

The Court held that the legislators had standing to sue:

> [P]laintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege.

Id. at 438. It reasoned perforce from two cases in which ordinary voters were permitted to challenge state

ratifications of federal constitutional amendments. Id. at 438-39 (citing Leser v. Garnett, 258 U.S. 130 (1922) (entertaining citizen challenge to registration of female voters) and Hawke v. Smith, 253 U.S. 221 (1920) (entertaining citizen challenge to Ohio constitutional amendment requiring voter approval of federal constitutional amendments)).

In Raines, the Supreme Court declined to extend Coleman. Raines dealt with a challenge to the Line Item Veto Act ("LIVA") brought by six Members of Congress who had voted against it. 521 U.S. at 814. Holding that its "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 other two branches of the Federal Government was unconstitutional," id. at 819-20, it distinguished an earlier suit in which a legislator had successfully asserted standing to challenge his exclusion from Congress. Id. at 820-21 (citing Powell v. McCormack, 395 U.S. 486 (1969)). Plaintiffs in Raines were not "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," 521 U.S. at 821, and they failed to allege deprivation of something to which they were "personally . . . entitled." Id. (emphasis omitted).

Raines also distinguished Coleman, concluding that

> Coleman stands []at most . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

521 U.S. at 823 (footnote omitted). It ultimately ruled that the Raines plaintiffs lacked standing. "[T]heir votes [against LIVA] were given full effect," the Court stated; "[t]hey simply lost that vote." Id. at 824 (footnote omitted). The Supreme Court characterized the Raines plaintiffs' alleged injury as "the abstract dilution of institutional legislative power." Id. at 826.

It emphasized that the plaintiffs in that case used the word "effectiveness" (describing their vote for appropriations bills) in a way that "pulls Coleman too far from its moorings" and "stretches the word far beyond the sense in which the Coleman opinion used it." Raines, 521 U.S. at 825-26.

> The argument goes as follows. Before [LIVA], Members of Congress could be sure that when they voted for, and Congress passed, an appropriations bill that included funds for Project X, one of two things would happen: (i) the bill would become law and all of the projects listed in the bill would go into effect, or (ii) the bill would not become law and none of the projects listed in the bill would go into effect. Either way, a vote for the appropriations bill meant a vote for a package of projects that were inextricably linked. After [LIVA], however, a vote for an appropriations bill that includes Project X means something different. Now, in addition to the two possibilities listed above, there is a third option: the bill will become law and then the President will "cancel" Project X.

Id. at 825 (footnote omitted). LIVA could not possibly "nullify [plaintiffs'] votes in the future in the same way that the votes of the Coleman legislators had been

nullified" because "a majority of Senators and Congressman can vote to repeal [LIVA], or to exempt a given appropriations bill (or a given provision in an appropriations bill) from [LIVA]." Id. at 824.

Neither Coleman nor Raines maps perfectly onto the alleged injury in this case. Unlike those in Raines, the allegations before us go well beyond mere "abstract dilution." Plaintiffs claim that they have been deprived of their power over taxation and revenue. Under TABOR, the state "must have voter approval in advance for . . . any new tax, tax rate increase, . . . or a tax policy change directly causing a net tax revenue gain to any district," with narrow exceptions.[3] Colo. Const. art. X, § 20, cl. 4(a). With respect to taxing and revenue, which the plaintiffs describe as "legislative core functions," the General Assembly allegedly operates not as a legislature but as an advisory body, empowered only to recommend changes in the law to the electorate.

These allegations fall closer to the theory of vote nullification espoused in Coleman than to the abstract dilution theory rejected in Raines. Under TABOR, a vote for a tax increase is completely ineffective because the end result of a successful legislative vote in favor of

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[3] The exceptions permit "emergency taxes" when two-thirds of the legislature "declares the emergency and imposes the tax by separate recorded roll call votes," Colo. Const. art. X, § 20, cl. 6, and permit the suspension of the prior approval requirement "[w]hen annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments," id. cl. 1. None of the parties suggests these exceptions alter our analysis.

a tax increase is not a change in the law.[4] A vote that is advisory from the moment it is cast, regardless of how other legislators vote, is "ineffective" in a way no vote envisioned by LIVA could be.

Moreover, the case at bar does not share other characteristics highlighted by the Raines Court. Unlike LIVA, TABOR was not passed by, and cannot be repealed by, the Colorado General Assembly. See Raines, 521 U.S. at 824; Colo. Const. art. XIX (requiring voters to approve constitutional amendments or the calling of a constitutional convention). In Schaffer v. Clinton, 240 F.3d 878 (10th Cir. 2001), we concluded that a Congressman lacked standing to challenge a Congressional pay increase, noting that "as in Raines, there has been no nullification of Congressman Schaffer's ability to vote." Id. at 885-86. His pay was increased "simply because he lost [a] vote," and to the extent he found the pay increase objectionable, the Congressman was free "to press for a change in the law setting Representatives' salaries or for Congress to amend the COLA provisions pursuant to the normal legislative process." Id. at 886 (quotation omitted). In sharp contrast, TABOR denies the Colorado General Assembly the "ability to vote" on operative tax increases, and the legislator-plaintiffs

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[4] The governor may veto the result of a successful legislative vote in Colorado, but the result of a veto is not analogous to what TABOR requires. Colo. Const. art. IV, § 11. When the governor vetoes a bill, it does not become law but is returned to the legislature, which may override the veto by a two-thirds vote. Id. Votes subject to a veto are not advisory from the moment that they are cast in the same way as votes requiring "voter approval in advance," id. art. X, § 20, cl. 4, before a law is enacted.

cannot undo its provisions "pursuant to the normal legislative process." Id. at 885-86.

Several other courts have relied on this key distinction between Coleman and Raines. In Russell v. DeJongh, 491 F.3d 130 (3d Cir. 2007), the Third Circuit considered whether a member of the Legislature of the Virgin Islands possessed standing to assert a claim that the governor had improperly appointed justices to the Supreme Court of the Virgin Islands. Id. at 131. Claiming that the expiration of a statutory ninety-day deadline extinguished the governor's authority to submit nominations, and that the governor's decision to ignore the deadline nullified his vote in favor of the law creating the deadline, the plaintiff sought a declaration that the nominations were void. Id. at 133-34. The court explained that "legislators have a legally protected interest in their right to vote on legislation and other matters committed to the legislature, which is sometimes phrased as an interest in 'maintaining the effectiveness of their votes.'" Id. at 134 (quoting Coleman, 307 U.S. at 438). However, "[n]ot every affront to a legislator's interest in the effectiveness of his vote . . . is an injury in fact sufficient to confer standing." Id. Although courts have "h[e]ld uniformly that an official's mere disobedience or flawed execution of a law for which a legislator voted . . . is not an injury in fact," the Russell court noted that "distortion of the process by which a bill becomes law by nullifying a legislator's vote or depriving a legislator of an opportunity to vote . . . is an injury in fact." Id. at 135 (quotation omitted). It rejected the plaintiff's reliance on Coleman and another case, Silver v. Pataki, 755 N.E.2d 842 (N.Y. 2001) (per curiam), because "the challenged actions in those cases left the plaintiffs with

no effective remedies in the political process." Russell, 491 F.3d at 135 (footnote omitted). In announcing that Russell was not a "vote nullification" case, the Third Circuit explained that "[t]he consequence of the Governor's late submission of the nominations was . . . not to circumvent the Legislature, but to place the decision whether to confirm the nominees directly in their hands." Id. at 136. In the case at bar, the power to tax and spend is not directly in the hands of the Colorado legislature.

The New York Court of Appeals drew a similar line in Silver, which dealt with a challenge by the Speaker of the New York Assembly to the Governor's line item veto authority on non-appropriation bills.[5] 755 N.E.2d at 845. Considering both state and federal cases on legislative standing, the court distinguished between alleged injuries related to "lost political battles" and those concerning "nullification of votes."[6] Id. at 847. The Court characterized Coleman as involving vote nullification, and Raines as a "lost vote" case. Id. It concluded that the plaintiff possessed standing in part because he was "not seeking to obtain a result in a courtroom which he failed to gain in the halls of the Legislature." Id. at 848 (quotation omitted). In

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[5] The New York State Constitution provides for line-item vetoes with respect to bills that "contain several items of appropriation of money." N.Y. Const. art. IV, § 7.

[6] Although we recognize the Court of Appeals of New York is not bound by Article III, the Silver decision applies the injury-in-fact test in terms essentially identical to the federal requirement. Id. at 847, 848 (requiring an "injury in fact" that is "concrete and particularized" (quotations omitted)). We cite Silver for its persuasive interpretation of Coleman and Raines.

contrast, the court explained that the Raines plaintiffs "lost their political battles when legislation was validly enacted over their opposition." Id. We are not confronted with claimants who complain of nothing more than a lack of success within the legislature; plaintiffs' complaint alleges that TABOR has stripped the legislature of its rightful power.

Baird v. Norton, 266 F.3d 408 (6th Cir. 2001), illustrates the difference between legislators who allege unconstitutional state action and legislators who merely seek to reverse the results of a lost vote. In Baird, two state legislators who were on the losing side of a concurrent resolution approving gaming compacts complained that the approval was improper. Id. at 409-10. Unlike the action in Coleman, the court observed, the suit was not joined by a sufficient number of legislators to defeat the concurrent resolution and thus the plaintiffs lacked standing. Id. at 412. The rule from Raines applied because the plaintiffs were not arguing "that the compacts themselves [were] unconstitutional" but instead alleged that "the compacts would have been defeated[] had the constitutionally required procedures been followed." Id. at 413. Baird therefore stands for the proposition that legislators seeking standing arising from a lost vote must demonstrate that they would have won had proper procedures been followed. Allegations before us go beyond those in Baird; the plaintiff-legislators in this case challenge a provision that, they allege, deprives them of the ability to cast meaningful votes at all.

Other circuits, the D.C. Circuit in particular, have interpreted Raines in a similar manner. In Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), the court held

that a number of congressmen lacked standing to challenge U.S. participation in the NATO campaign in Yugoslavia. Id. at 19. It wrote that Supreme Court precedent cannot be read to suggest "that the President 'nullifies' a congressional vote and thus legislators have standing whenever the government does something Congress voted against." Id. at 22. The majority concluded that Judge Randolph, who concurred in the judgment and wrote separately, did "not give sufficient attention to Raines' focus on the political self-help available to congressmen. . . . [T]he [Raines] Court denied them standing as congressmen because they possessed political tools with which to remedy their purported injury." Id. at 24; see also Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999) (concluding House members lacked standing to challenge the President's implementation of a program through executive order, in part because "[i]t is uncontested that the Congress could terminate the [program] were a sufficient number in each House so inclined"); Kucinich v. Obama, 821 F. Supp. 2d 110, 120 (D.D.C. 2011) (successful use of vote nullification theory "necessitates the absence of a legislative remedy"). We agree with these cases that Raines rested in large measure on the plaintiffs' ability to correct the alleged injury through ordinary legislation, an ability the legislator-plaintiffs in this case lack. A legislator who complains of nothing more than dissatisfaction with the actions, or inaction, of his colleagues does not state an injury to a judicially cognizable interest.

Furthermore, because the present suit deals with the relationship between a state legislature and its citizenry, we are not presented with the separation-of-powers concerns that were present in Raines. See 521

U.S. at 819-20 ("[O]ur 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 other two branches of the Federal Government was unconstitutional."). The Raines decision has been characterized as "standing informed—and indeed virtually controlled—by political-question concerns." 13B Charles Alan Wright et al., Federal Practice & Procedure, § 3531.11.2, at 135 (3d ed. 2008). In Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004), the Second Circuit similarly concluded that Raines was "distinguishable in crucial respects" because it did not "involve[] a constitutional challenge to an action taken by one of the other two branches of the Federal Government—a fact that the Court believed merited an 'especially rigorous' standing inquiry." Id. at 213 (quoting Raines, 521 U.S. at 819-20); see also Chenoweth, 181 F.3d at 116 (stating that Raines may "require [the court] to merge [its] separation of powers and standing analyses").

Notably, the Colorado General Assembly, through its Committee on Legal Services, has chosen to participate as an amicus curiae in favor of legislative standing in this appeal.[7] The General Assembly's participation further distinguishes this case from Raines, in which the Court "attach[ed] some importance to the fact that appellees ha[d] not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose[d] their suit." 521 U.S. at 829.

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[7] The General Assembly's amicus brief does not imply "authorization" of the legislator-plaintiffs.

The legislator-plaintiffs' allegations in the case before us differ in some respects from those at issue in Coleman. Nevertheless, we must reject Governor Hickenlooper's argument that plaintiffs' failure to identify a "specific legislative act" that TABOR has precluded is fatal to their claim. See Raines, 521 U.S. at 823. He argues that the legislator-plaintiffs must refer a tax increase to the voters, and have that measure rejected, before they bring suit.[8] This argument misunderstands the alleged injury. Legislator-plaintiffs contend they have been injured because they are denied the authority to legislate with respect to tax and spending increases.[9] They cannot

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[8] Both parties have provided supplemental authority to this court noting that Colorado voters recently approved "Proposition AA," which imposes a new tax on marijuana and was referred for a referendum, but rejected "Amendment 66," a citizen initiative that would have raised taxes to fund certain public school reforms. However, "standing is determined at the time the action is brought, and we generally look to when the complaint was first filed, not to subsequent events." Mink v. Suthers, 482 F.3d 1244, 1253-54 (10th Cir. 2007) (citation omitted). We accordingly do not consider these November 2013 events.

[9] We recognize that legislatures may permissibly be deprived of authority to legislate in certain arenas. The First Amendment, to take an obvious example, says that "Congress shall make no law" in a variety of fields. U.S. Const. amend. I. We distinguish the sorts of substantive prohibitions found in the Bill of Rights and elsewhere—"Congress shall make no law" means "there shall be no federal law"—from TABOR's alleged transformation of the state legislature from a body that makes laws to a body that recommends to the public laws increasing taxes or spending. So construed, the injury allegedly caused by TABOR is unique and unlikely to cause the federal courts to be flooded with legislators on the losing side of a vote. We are aware of a few Supreme Court

point to a specific act that would have resulted in a tax increase because any revenue-raising bill passed by both houses of the General Assembly and signed by the governor, instead of becoming law, would merely be placed on the ballot at the next election. In other words, the legislator-plaintiffs' injury is their disempowerment rather than the failure of any specific tax increase.

The extent and type of disempowerment distinguishes the case before us from Alaska Legislative Council v. Babbitt, 181 F.3d 1333 (D.C. Cir. 1999). In that case, the D.C. Circuit concluded that members of the Alaska State Legislature and a legislative committee lacked standing to challenge a federal statute that established a priority for subsistence hunting and fishing on federal lands in the state. Id. at 1335-36. Plaintiffs' theory that the federal statute "render[ed] the Alaska Legislature unable to control hunting and fishing on federal lands within the State" was rejected because "there is not the slightest suggestion here that these particular legislators had the votes to enact a particular measure, that they cast those votes or that the federal statute or the federal defendants did something to nullify their votes." Id. at 1338. The court expressed skepticism that the federal

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cases involving requirements of municipal referenda before a decision made by a city council could go into effect. See City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 670 (1976) (changes in land use required 55% citizen approval in referendum); James v. Valtierra, 402 U.S. 137, 139, 142 (1971) (construction of low-cost housing could not occur without voter referendum, noting other referenda requirements in California Constitution). In neither case was standing a contested issue, nor did any plaintiff rest a claim on the Guarantee Clause.

statute undermined state prerogatives, noting that federal regulations promulgated pursuant to the challenged statute expressly incorporated state game and fishing rules. Id. Much like the plaintiffs in Raines, the Alaska legislators therefore retained some legislative control and were not without a legislative remedy.

This led the D.C. Circuit to conclude that the "supposed injury is nothing more than an abstract dilution of institutional legislative power to regulate and manage fish and wildlife resources, and we are not sure it amounts to even this much." Id. (quotation omitted). The state legislators in Alaska Legislative Council complained only that they lost some control over federal lands, a power the Constitution expressly grants to Congress. See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). By contrast, the state legislators before us have alleged that TABOR strips them of all power to conduct a "legislative core function" that is not constitutionally committed to another legislative body.

In light of the actual injury alleged, Governor Hickenlooper's "specific legislative act" argument does not carry the day. TABOR plainly bars the General Assembly from instituting a new tax through legislative action. Our standing jurisprudence does not demand that plaintiffs engage in an obviously futile gesture. In United States v. Hardman, 297 F.3d 1116 (10th Cir. 2002) (en banc), we considered a challenge to 16 U.S.C. §§ 703 and 668(a), which prohibit possession of certain eagle feathers absent a permit. Hardman,

297 F.3d at 1122-23. Only members of federally recognized tribes were eligible for such permits. Id. at 1121. We rejected the government's argument that the non-member claimants in the case lacked standing because they had not applied for permits, noting that "the application itself requires certification of membership." Id. "Because it would have been futile for these individuals to apply for permits, we find that they have standing to challenge the statutory and regulatory scheme." Id. A similar principle applies here: The legislator-plaintiffs were not required to pass a law purporting to independently increase taxes in violation of TABOR before filing this action.

That both Coleman and Raines involved allegations concerning a single vote does not imply that only single-vote matters may give rise to an injury in fact. If plaintiffs seek legislative standing based on the nullification of a particular vote, Raines requires that they identify "a specific legislative act . . . [that] goes into effect (or does not go into effect)" as a result. 521 U.S. at 823; see also Baird, 266 F.3d at 412. But we do not read Raines to require legislators seeking standing to plead facts substantially identical to Coleman's. Were that the case, the discussion of various other elements militating against legislative standing in Raines would be dicta. See 521 U.S. at 819-20, 825-26. And it would be a bizarre result if the nullification of a single vote supported legislative standing, but the nullification of a legislator's authority to cast a large number of votes did not.

We recognize that the legislator-plaintiffs' alleged injury shares certain characteristics with that asserted in Raines. Just as the legislator-plaintiffs in this case,

the Raines plaintiffs did not assert a claim that they were "personally entitled" to cast an effective vote on revenue-raising measures in the sense that the authority at issue "runs . . . with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power." Id. at 821. But the same was true in Coleman, which the court declined to overrule despite a clear opportunity to do so. See id. at 825-26. If an elected official cannot sue on his own behalf to assert legislative prerogatives on the theory that his power properly belongs to his constituents, legislative standing would cease to exist outside the narrow category of particularly unfair treatment exemplified by Powell. This factor alone thus cannot be sufficient to defeat standing.

Some legislative standing cases have relied in part on the fact that a claimed injury impacted all members of a legislature in denying standing to a sub-group of legislators. In Schaffer, for example, the injuries alleged "necessarily damage[d] all Members of Congress equally." 240 F.3d at 885 (quoting Raines, 521 U.S. at 821) (alterations omitted). And in Kucinich, the court held that a group of House members lacked standing to challenge alleged violations of the War Powers resolution partially on the basis that the claimed injury "impacts the whole of Congress—not solely the ten plaintiffs[] before the Court." 821 F. Supp. 2d at 117-18. But both of these cases also rested in part on the "lost vote" rationale, the availability of internal legislative remedies, or separation-of-powers concerns, none of which are present in this case. See Schaffer, 240 F.3d at 886 (plaintiffs received objectionable pay raise because they lost a vote, and

could cure any injury "pursuant to the normal legislative process"); Kucinich, 821 F. Supp. 2d at 120 (plaintiffs "overlook the important role political remedies have in the standing analysis" by arguing their votes were nullified while "acknowledging that they retain legislative remedies").

In sum, the case under review differs from both Coleman and Raines—and the cases interpreting those decisions—in important respects. We ultimately agree with the district court that the legislator-plaintiffs have sufficiently alleged an injury to the "plain, direct and adequate interest in maintaining the effectiveness of their votes," Coleman, 407 U.S. at 438, rather than relying only on an "abstract dilution of institutional legislative power," Raines, 521 U.S. at 826. On remand, the plaintiffs will be required to prove their allegations. But at this stage, assuming the truth of all well-pled allegations contained in the complaint, we conclude that the legislator-plaintiffs have satisfied Coleman's requirements for legislative standing. We therefore hold that plaintiffs have suffered an injury in fact, and thus proceed to a brief discussion of causation and redressability.

B

To satisfy causation for standing purposes, plaintiffs must demonstrate that their injury is "fairly traceable to the challenged action of the defendant." Defenders of Wildlife, 504 U.S. at 560 (quotation and alterations omitted). And an injury is redressable if a court concludes it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561 (quotations omitted).

The Governor suggests that we construe the alleged injury as broadly as possible for purposes of analyzing causation. He selects two phrases from the operative complaint, arguing that plaintiffs' alleged injuries are a claimed slide into fiscal dysfunction and inadequate education funding. Neither injury, he suggests, is caused by TABOR or redressable by a decision invalidating it. As explained supra, however, the legislator-plaintiffs' alleged injury is not a lack of revenue flowing into state coffers but the elimination of their authority to make laws raising taxes or increasing spending. This injury is directly attributable to TABOR's requirement that any tax increase be approved by Colorado voters. Plaintiffs seek a declaratory judgment that TABOR is null and void and an order prohibiting any state officer from enforcing TABOR's provisions. Such a judgment would allow the legislator-plaintiffs to vote directly for increased taxes, thereby redressing their alleged injury.[10]

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[10] To the extent that Governor Hickenlooper argues that the plaintiffs' Guarantee Clause claim is not redressable because it cannot be enforced against him, this assertion is contradicted by the Supreme Court's decision in Minor v. Happersett, 88 U.S. 162 (1875). There, the Court held that the Guarantee Clause "necessarily implies a duty on the part of the States themselves to provide such a government." Id. at 175. As Colorado's chief executive, Governor Hickenlooper bears responsibility for enforcing that guarantee on the state's behalf. See Developmental Pathways v. Ritter, 178 P.3d 524, 529-30 (Colo. 2008) (governor is generally proper defendant in suit challenging state constitutional amendment).

C

In addition to the Article III requirements for standing, we also consider prudential standing considerations. See Sac & Fox Nation of Mo. v. Pierce, 213 F.3d 566, 573 (10th Cir. 2000) (listing prudential standing principles). Governor Hickenlooper suggests that plaintiffs assert only a "generalized grievance shared in substantially equal measure by all or a large class of citizens." Warth v. Seldin, 422 U.S. 490, 499 (1975) (quotation omitted). We disagree. The Governor's argument again rests on the premise that the legislator-plaintiffs' claimed injury is nothing more than a decrease in the amount of tax revenue collected by the state. Such an alleged injury would constitute a generalized grievance. Courts should generally decline to hear cases based on nothing more than a plaintiff's disagreement with budgetary policies. See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 476-78 (1982).

We do not doubt that TABOR has a substantial effect on the state of Colorado and its citizens. But the injury the legislator-plaintiffs seek to redress, as explained in Parts II.A & B, supra, is particular to their positions as state legislators and is not "shared in substantially equal measure by all or a large class of citizens." Warth, 422 U.S. at 499. Only the one hundred members of the Colorado General Assembly can claim the disempowerment injury alleged here. Denying prudential standing in this case would be particularly problematic given our instruction that parties harmed by "generalized grievances should normally be directed to the legislative, as opposed to judicial, branches of government." Bd. of Cnty. Comm'rs v. Geringer, 297

F.3d 1108, 1112 (10th Cir. 2002). As we have discussed, the legislator-plaintiffs cannot obtain a remedy through the legislative process.

Moreover, the Supreme Court has stressed that its prudential standing limitation on widely dispersed injuries "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the common concern for obedience to law." FEC v. Akins, 524 U.S. 11, 23 (1998) (quotation omitted). "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found injury in fact." Id. at 24 (quotation omitted); see also Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449-50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury . . . ."). As discussed in Part II.A, supra, we conclude that the legislator-plaintiffs have alleged a concrete injury.

Because neither the Article III standing requirements nor the asserted doctrine of prudential standing bars the legislator-plaintiffs' suit, we affirm the district court's rulings on legislative standing.

III

We turn to another justiciability hurdle, the political question doctrine. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the

Executive Branch." Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986). Applicability of the political question doctrine is a question of law that we review de novo. Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1031-32 (10th Cir. 2001).

A

As a threshold matter, we must decide if the political question doctrine categorically precludes Guarantee Clause challenges against state constitutional amendments adopted by popular vote. There is some support for this position in Supreme Court cases predating the modern articulation of the political question doctrine in Baker v. Carr, 369 U.S. 186 (1962). But we conclude that neither Luther v. Borden, 48 U.S. (7 How.) 1 (1849), nor Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912), precludes merits consideration in this case.

In Luther, the Supreme Court was asked to resolve a dispute that would have required it to determine which of two putative governments legitimately controlled Rhode Island at the time. On the basis that the issue "ha[d] been already decided by the courts of Rhode Island," the Court held that "[u]pon such a question the courts of the United States are bound to follow the decisions of the State tribunals." 48 U.S. at 40. The Court also discussed the Guarantee Clause, labeling the issue of which government was valid as "political in its nature," vested not in the judiciary but in Congress. Id. at 42. "Under [the Guarantee Clause] it rests with Congress to decide what government is the established one in a State." Id.

Pacific States involved a fact pattern similar to the one before us, but a much broader legal challenge. Shortly after Oregon amended its state constitution to permit lawmaking by initiative and referendum, the people enacted "a law taxing certain classes of corporations." Pac. States, 223 U.S. at 135. A corporation affected by the new tax challenged its legitimacy, alleging that "by the adoption of the initiative and referendum, the State violates the right to a republican form of government." Id. at 140 (quotation omitted). "In other words," said the Court, "the propositions [of error in the complaint] each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon." Id. at 141. Construing the plaintiff's complaint as an attempt to overturn "not only . . . the particular statute which is before us, but . . . every other statute passed in Oregon since the adoption of the initiative and referendum," id., the Justices held "the issues presented, in their very essence, [to be] . . . political and governmental, and embraced within the scope of powers conferred upon Congress," id. at 151.

Both the Luther and Pacific States claims differ from those at bar. Importantly, both cases involved wholesale attacks on the validity of a state's government rather than, as before us, a challenge to a single provision of a state constitution. See Pac. States, 223 U.S. at 150 (the "essentially political nature" of the question presented "is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on

the State as a State");[11] Luther, 48 U.S. at 47 (whether the people of a state "abolish[ed] an old government, and establish[ed] a new one in its place, is a question to be settled by the political power"). There can nevertheless be little doubt that these cases include language suggesting that Guarantee Clause litigation is categorically barred by the political question doctrine. In Luther, the Court stated that "Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." 48 U.S. at 42. And when the Pacific States Court faced the question of "whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form, and to enforce the guaranty of the Constitution on that subject," it declared that the issue

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[11] Contrary to the Governor's position, Pacific States did not involve an issue "identical to the one presented here." We are confronted with an allegation that one provision of the Colorado Constitution brings it below a constitutionally mandated threshold. Governor Hickenlooper directs us to the plaintiff's brief in Pacific States in support of his argument that the issues presented in the two cases are identical. According to that brief, the people of Oregon passed in 1910 an amendment similar in relevant respects to TABOR that required voter approval via referendum before certain taxes could be enacted. We note that the amendment was passed after the Oregon Supreme Court rendered the decision reviewed by the Pacific States Court, see Oregon v. Pac. States Tel. & Tel. Co., 99 P. 427 (Or. 1909), and it is therefore unclear whether that amendment was formally before the Court in Pacific States. In any event, the Court's opinion in Pacific States does not mention Oregon's prior approval amendment, which was repealed by the people in November 1912. We are unpersuaded that an argument briefed by one party but never addressed by the Court requires us to read Pacific States more narrowly than its framing of the issues suggests.

was "political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress." 223 U.S. at 133.

Had those been the Supreme Court's final words on the justiciability of the Guarantee Clause, a categorical approach might be proper. However, the Court in Baker highlighted the proposition that its prior political question cases turned on a number of "attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness" and that much confusion had resulted "from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." 369 U.S. at 210-11. After reviewing its prior cases applying the political question doctrine, the Court explained that "several formulations which vary slightly according to the settings in which the questions arise may describe a political question." Id. at 217.

Baker then announced six factors that render a case non-justiciable under the political question doctrine:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

> potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." Id. (emphasis added).

Given the clarity of this holding, we must agree with the plaintiffs that the six tests identified in Baker are the exclusive bases for dismissing a case under the political question doctrine. Furthermore, the Baker Court explicitly rejected a categorical Guarantee Clause bar. Immediately after announcing the six political question factors, the Court addressed the argument that the case under its consideration "shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government." Baker, 369 U.S. at 217-18. It determined that the prior cases in which the Court had considered "Guaranty Clause claims involve those elements which define a 'political question,'" referencing the aforementioned six factors, "and for that reason and no other, they are nonjusticiable." Id. at 218 (emphasis added). "[N]onjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization." Id.

The Baker opinion includes a lengthy discussion of Luther, ultimately concluding that the decision rested on four of the six previously identified factors:

> the commitment to the other branches of the decision as to which is the lawful state

> government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.

Id. at 222. A reading of Luther under which "the political question barrier was . . . absolute" was rejected, with the Court continuing that in some circumstances a court could determine "the limits of the meaning of 'republican form,' and thus the factor of lack of criteria might fall away." Id. at 222 n.48. Even then, however, "there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented." Id. In recognizing Luther as standing solely for the proposition that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government," it clarified that it had consistently declined to resort to the clause as a "standard for invalidating state action." Id. at 223.

More recently, the Supreme Court has continued to decline interpretation of its political question doctrine precedent as categorically barring Guarantee Clause litigation. In New York v. United States, 505 U.S. 144 (1992), the Court expressed displeasure that Luther's "limited holding metamorphosed into the sweeping assertion that violation of the great guaranty of a republican form of government in States cannot be challenged in the courts." Id. at 184 (quotation omitted). The Supreme Court stressed that it has

"addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable." Id. (citing Att'y Gen. of Mich. ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905); Forsyth v. Hammond, 166 U.S. 506, 519 (1897); In re Duncan, 139 U.S. 449, 461-62 (1891); Minor, 88 U.S. at 175-76). And although the Court did not address the issue directly, it noted that modern decisions have "suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," id. at 185, quoting the statement in Reynolds v. Sims, 377 U.S. 533, 582 (1964) that "[s]ome questions raised under the Guarantee Clause are nonjusticiable."

Relying on the Court's directive in Baker that "there should be no dismissal for non-justiciability on the ground of a political question's presence" absent one of the specifically identified factors, 369 U.S. at 217, we reject the proposition that Luther and Pacific States brand all Guarantee Clause claims as per se non-justiciable.

B

We must yet apply the six-factor test announced in Baker. For the convenience of the reader, we restate the Baker factors, inserting in brackets an Arabic number before each of the six tests, and proceed to a discussion of those factors.

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding

> without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

1

Initially, we consider whether the Guarantee Clause manifests "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Id. The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, § 4.

The text of the Guarantee Clause does not mention any branch of the federal government. It commits the "United States"—which would normally be read as including the Article III courts—to the preservation of republican government in the states. The Guarantee Clause is found not in Article I or Article II, where we would expect to find it if its provisions were textually committed to another branch, but in Article IV. Moreover, two other provisions of Article IV specifically

empower Congress to act, but the Guarantee Clause does not. See id. § 1 ("[T]he Congress may by general Laws prescribe the Manner in which [public] Acts, Records, and Proceedings shall be proved, and the Effect thereof."); id. § 3 ("New states may be admitted by Congress into this Union . . . Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). The omission of any mention of Congress from the Guarantee Clause, despite Congress' prominence elsewhere in Article IV, indicates there is no "textually demonstrable commitment"—certainly not an inextricable one—barring our review or district court consideration of this case. Baker's refusal to bar Guarantee Clause claims on an "absolute" basis would be rendered a nullity if the clause itself contained a textual commitment to the coordinate political branches. 369 U.S. at 222 & n.48.

As part of its discussion of Luther, the Baker opinion stated that "Chief Justice Taney . . . found further textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the judiciary." 369 U.S. at 220. Note that the "issue" referenced was not whether a state government had fallen below a minimum constitutional threshold, but "what government is the established one in a State." Id. (quoting Luther, 48 U.S. at 42). The quoted passage explains that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper

constitutional authority." Id. (quoting Luther, 48 U.S. at 42).

Inexorably, the Baker Court concluded that Congress was the appropriate authority for determining "which is the lawful state government." 369 U.S. at 222. This conclusion follows logically from the Constitution's text, which makes Congress the arbiter of congressional elections. See U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."). Yet, possibility of congressional action does not preclude a judicial determination regarding whether an admittedly established state government has later adopted an impermissibly un-republican state constitutional provision. The Pacific States opinion does not identify any textual commitment of authority, but it too dealt with a claim that "assail[ed] . . . the rightful existence of the State." 223 U.S. at 141-42; see also id. at 151 (plaintiffs "demand of the State that it establish its right to exist as a State").[12] We must read Luther's statement regarding recognition of congressional delegates, 48 U.S. at 42, in that context: When choosing between slates of representatives from two competing governments, congressional admission of one slate over the other would seem to imply

[12] Similarly, in Hanson v. Flower Mound, 679 F.2d 497 (5th Cir. 1982) (per curiam), the court summarily rejected a pro se litigant's claim that "the government of the Town of Flower Mound is a nullity" based on a violation of the Guarantee Clause. Id. at 499, 502. Assuming the Clause applied to municipalities, the Court concluded that "the question whether a government is a nullity because its form violates the Clause is a nonjusticiable political question." Id. at 502 (citing Luther, 48 U.S. at 42).

recognition of one putative government as the proper (and republican) representatives of the citizenry. And given the textually demonstrable commitment to Congress the role of determining the "Elections, Returns and Qualifications of its own Members," U.S. Const. art. I, § 5, cl. 1, we would not hesitate to conclude that the first Baker test would forbid the judiciary from choosing between two putative state governments. That is not this case, however; the legislator-plaintiffs do not challenge the representative legitimacy of Colorado's current government or the authority of its congressional delegation to serve in Washington. Looking to the "particular fact setting presented," as Baker directed, 369 U.S. at 222 n.28, we discern no textual commitment of the narrow issue raised by the plaintiffs to a coordinate political branch.

2

We are similarly unpersuaded that a "lack of judicially discoverable and manageable standards," id. at 217, precludes judicial review of this lawsuit. As construed by Baker, the Luther decision rested in part on the lack of criteria for determining which government was legitimately republican. See 369 U.S. at 222. We reiterate that this holding rests on the impossibility of applying judicial standards to choose between two governments that each claim to be valid, rather than any extraordinary vagueness in the text of the Guarantee Clause itself. The Luther Court asked "by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it," and answered: The Court lacks "the right to determine what political

privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision." 48 U.S. at 41. That is not this case.

There is sparse judicial precedent interpreting the Guarantee Clause to aid our analysis. Even Guarantee Clause cases in which the Supreme Court declined to invoke the political question doctrine do not provide much meaningful guidance in this case. See Kies, 199 U.S. at 239 ("If the legislature of the State has the power to create and alter school districts and divide and apportion the property of such districts . . . the action of the legislature is compatible with a republican form of government . . . ."); Minor, 88 U.S. at 175-76 (depriving women of the franchise did not violate Guarantee Clause because none of the original thirteen states nor any state admitted to that point "save perhaps New Jersey" allowed women to vote). "Judicially manageable standards" must include—but cannot be limited to—precedent. We must not "hold[] a case nonjusticiable under the second Baker test without first undertaking an exhaustive search for applicable standards." Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005).

Before the Supreme Court's decision in District of Columbia v. Heller, 554 U.S. 570 (2008), there was similarly sparse judicial interpretation of the Second Amendment at both the state and federal levels. Precedent that did exist included a Supreme Court case that had long been understood as foreclosing the suggestion that the Second Amendment protects an individual right. See United States v. Miller, 307 U.S. 174, 178 (1939). Outside the judiciary, historians and law professors studied the meaning of the Amendment,

relying on sources typically used to aid constitutional interpretation: dictionaries, ratification history, contemporary treatises, and the like. Meanwhile, states and localities had developed various provisions regulating firearms. Such legislative enactments became relevant because courts, including the Heller Court, were willing to consider the rarity of state enactments in determining whether they are constitutionally permissible. 554 U.S. at 629 ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."). There is no evidence that the Court in Heller even considered the possibility that the sources available to it could be insufficient for developing judicially discoverable and manageable standards.

As it was with the Second Amendment, so it is with the Guarantee Clause. We are directed, by both parties and by various amici, to sources that courts have relied on for centuries to aid them in constitutional interpretation. Briefing directs us to several of the Federalist Papers, founding-era dictionaries, records of the Constitutional Convention, and other papers of the founders. We have the authority to take judicial notice of other state constitutional provisions regulating the legislature's power to tax and spend. See Fed. R. Evid. 201(b). At this stage of the litigation, we must strike a delicate balance between acknowledging that repositories of judicially manageable standards exist and allowing further record development in the district court before the merits of the case are adjudicated. See Largess v. Supreme Judicial Court for the State of Mass., 373 F.3d 219, 225 (1st Cir. 2004) (per curiam) ("[R]esolving the issue of justiciability in the Guarantee Clause context may also turn on the resolution of the

merits of the underlying claim."). Without reaching or considering the merits, we note the ready availability of sources providing judicially manageable guidance on the meaning of the Guarantee Clause. We are unwilling to allow dicta suggesting that the Guarantee Clause is per se nonjusticiable to become a self-fulfilling prophecy; in order to develop judicially manageable standards, courts must be permitted to reach the stage of litigation where such standards are developed.

Our holding comports with the holdings of other circuits that have applied the second prong of Baker. We are not asked to second-guess military decisions, see Aktepe v. United States, 105 F.3d 1400, 1404 (11th Cir. 1997) ("[C]ourts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life."), nor must we consider sensitive foreign policy issues, see Schneider v. Kissinger, 412 F.3d 190, 196 (D.C. Cir. 2005) (declining to determine whether "it was proper for an Executive Branch official . . . to support covert actions against" a foreign official (quotation omitted)).

In Wang v. Masaitis, 416 F.3d 992 (9th Cir. 2005), the Ninth Circuit applied the Baker factors to a case that would have required it to "decide whether, under the Treaty Clause of the Constitution, the United States may enter into a 'treaty' with a non-sovereign entity." Id. at 993. It discussed "Baker's distinction between discerning a nation's sovereignty (a political question) and interpreting the impact of that status on the law (a judicial one)." Id. at 995. Considering the second and third Baker factors together, the Ninth

Circuit held: "'Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue.'" Id. at 996 (quoting Goldwater v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring)). The same is true in this case. We cannot identify any feature of the Guarantee Clause that makes it unamenable to "normal principles of interpretation."

Under Fed. R. Civ. P. 8(a)(2), a plaintiff must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." The Governor notes that we relied on the plaintiffs' initial pleadings to apply the Baker test in Schroeder v. Bush, 263 F.3d 1169 (10th Cir. 2001). But we did not hold that plaintiffs must incorporate into their complaint every legal source relevant to the applicable standard. Our review of the record and briefing in this case satisfies us that judicially discoverable and manageable standards for Guarantee Clause litigation exist. An attempt to define those standards thoroughly would necessarily implicate adjudication on the merits not appropriate for interlocutory appeal.

3

With respect to the third Baker test, we conclude that resolving this case will not require the making of a "policy determination of a kind clearly for nonjudicial discretion." Baker, 369 U.S. at 217. TABOR is a hotly contested issue in Colorado that has had a wide-ranging influence on the state's fiscal policy. But the interpretation of constitutional text—even vague constitutional text—is central to the judicial role. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the

judiciary to say what the law is."). We "cannot avoid [our] responsibility merely because the issues have political implications." Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1428 (2012) (quotation omitted).

We agree with the district court that this lawsuit is distinguishable from others in which courts have invoked the "policy determination" prong in Baker. See, e.g., Schroeder, 263 F.3d at 1175 ("Courts are ill-equipped to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency."); Ad Hoc Comm. on Judicial Admin. v. Massachusetts, 488 F.2d 1241, 1245 (1st Cir. 1973) (concluding that "the financing and, to an important extent, the organization of the judicial branches" requires a policy determination);[13] Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) ("[D]ecisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy, and military strategy inappropriate to judicial inquiry."). Plaintiffs do not ask the court to balance delicate policy matters similar to market conditions,

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[13] Ad Hoc Committee also includes the following language: "[I]t would be both unprecedented and unseemly for a federal judge to attempt a reordering of state priorities." 488 F.2d at 1245-46. We note that "priorities," as used in that case, refers directly to budget priorities. Plaintiffs alleged that the state's inadequate judicial financing violated their constitutional rights and requested as a remedy the "enlargement and restructuring of the entire state court system." Id. at 1243. The plaintiffs in this case seek no similar relief and do not ask the federal courts to become involved in the minutiae of Colorado's budget.

budgeting priorities, or foreign policy concerns. Instead, they seek a ruling as to whether state government under TABOR is republican in form.

If adjudicating this case required us or the district court to determine the wisdom of allocating certain traditionally legislative powers to the people, the third Baker factor would dictate dismissal. But deciding whether a state's form of government meets a constitutionally mandated threshold does not require any sort of "policy determination" as courts applying the Baker tests have understood that phrase. The case before us requires that we determine the meaning of a piece of constitutional text and then decide whether a state constitutional provision contravenes the federal command. See Goldwater, 444 U.S. at 999 ("Resolution of the question . . . requires us to apply normal principles of interpretation to the constitutional provisions at issue.").

4

We dispense briefly with the remaining three Baker factors: "[4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. These factors are best understood as promoting separation-of-powers principles in cases featuring prior action on an issue by a coordinate branch. See Goldwater, 444 U.S. at 1000 (Powell, J., concurring) ("[T]he political-question doctrine rests in part on

prudential concerns calling for mutual respect among the three branches of Government.").

We are aware of no action taken by either Congress or the executive with respect to this litigation specifically or TABOR generally. Both the people and courts of Colorado have made pronouncements on TABOR. However, the possibility that federal judicial decisions will conflict with a state referendum or a state court decision does not implicate the political question doctrine. Such conflicts are an ordinary part of the judicial process. See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (striking down Colorado's popularly enacted Amendment 2 as unconstitutional); Gallegos v. Colorado, 370 U.S. 49 (1962) (reversing decision of Colorado Supreme Court). TABOR's ratification by the people of Colorado was a "political decision," Baker, 369 U.S. at 217, but it was not a decision of the sort that we must adhere to unquestioningly. See Gross v. German Found. Indus. Initiative, 456 F.3d 363, 390 (3d Cir. 2006) ("As Baker makes clear, the fifth factor contemplates cases of an 'emergency[] nature' that require 'finality in the political determination,' such as the cessation of armed conflict." (quoting Baker, 369 U.S. at 213-14 (alteration in Gross))).'

We thus affirm the district court's conclusion that the specific Guarantee Clause claim asserted in this case is not barred by the political question doctrine.

IV

Governor Hickenlooper argues that the operative complaint fails to state a claim upon which relief can be granted because Colorado's government remains republican in form after the passage of TABOR. The

Governor did not assert this traditional Fed. R. Civ. P. 12(b)(6) argument to the district court with respect to the Guarantee Clause claim; he sought dismissal of that claim only on standing, prudential standing, and political question grounds. And the district court order over which we exercise interlocutory review decided only the questions properly presented. Although we may exercise our discretion in certain circumstances to reach issues "fairly included" in an order subject to interlocutory review, we "may not reach beyond the certified order." Rural Water Dist. No. 4 v. City of Eudora, 720 F.3d 1269, 1278 (10th Cir. 2013) (citations omitted); see also Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 205 (1996) ("The court of appeals may not reach beyond the certified order . . . ."); Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1219-20 (11th Cir. 2001) (declining to consider statute of limitations claim on interlocutory appeal because of insufficient development of claim at district court level); 16 Charles Alan Wright et al., Federal Practice & Procedure, § 3929, at 456-57 (3d ed. 2012) ("[T]he court of appeals will not consider matters not yet ruled upon by the district court."). Because the order at issue in this limited interlocutory appeal does not include a decision as to whether the Guarantee Clause claim asserted by plaintiffs plausibly states a basis for relief under Fed. R. Civ. P. 12(b)(6), we cannot address that question. We stress that our decision on plaintiffs' Guarantee Clause claim is quite limited, leaving all issues other than standing, prudential standing, and the political question doctrine to the district court.

V

Plaintiffs also allege that TABOR violates § 4 of the Colorado Enabling Act, which requires "[t]hat the constitution [of Colorado] shall be republican in form." Colorado Enabling Act, ch. 139, § 4, 18 Stat. 474, 474 (1875). The district court concluded that even if the Guarantee Clause claim were found non-justiciable on political question grounds, plaintiffs could proceed with their statutory Enabling Act claim. The Governor raises the same standing and political question challenges to the Enabling Act claim as to the Guarantee Clause claim. We do not need to conduct a separate Article III standing inquiry for the Enabling Act claim because the injury, causation, and redressability analyses are identical regardless of whether the claim for relief is statutory or constitutional. See Parts II.A & B, supra. Similarly, our prudential standing analysis above applies with equal force to the Enabling Act claim—we have already decided that the legislator-plaintiffs' particular claim does not constitute a generalized grievance. See Part II.C, supra.

We agree with the district court that the political question analysis is not identical for statutory and constitutional claims. In Japan Whaling, the Supreme Court held that "it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." 478 U.S. at 230. To be sure, the mere fact that a claim is statutory does not automatically obviate political question concerns. See Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 943 (5th Cir. 2011) (declining to adjudicate "challenge [to] the structure of OPEC and

its relation to the worldwide production of petroleum"); Lin v. United States, 561 F.3d 502, 504 (D.C. Cir. 2009) (invoking political question doctrine where issue would have required determining "who exercises sovereignty over Taiwan"); Crockett v. Reagan, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (per curiam) (political question doctrine barred challenge to U.S. military presence in Ecuador notwithstanding statutory War Powers Resolution). In each of these cases, the court could not address the question presented without rendering a decision on a question of foreign policy, thereby risking either "expressing lack of the respect due coordinate branches of government" or "potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217. Neither danger is present in the case before us.

The Supreme Court's recent decision in Zivotofsky elucidates the difference between the judiciary "being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination" of foreign policy, 132 S. Ct. at 1427, and "enforc[ing] a specific statutory right," id. In the instant case, we are asked to decide "if [plaintiffs'] interpretation of the [Colorado Enabling Act] is correct." Id. And at this stage of litigation, we must determine only if federal courts are empowered to make that decision. We hold that they are, and that the Enabling Act claim is independently justiciable for reasons that do not apply to the Guarantee Clause claim. See El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) ("This is a statutory case. The Supreme Court has never applied the political

question doctrine in a case involving alleged statutory violations. Never.").

VI

We emphasize once again that this interlocutory appeal allows us to consider only whether the legislator-plaintiffs have established Article III standing and whether prudential standing jurisprudence or the political question doctrine precludes consideration of their Guarantee Clause and Enabling Act claims. Our answer to those questions completes our role at this stage of the proceedings.

We **AFFIRM** the standing and political question rulings of the district court and **REMAND** for further proceedings.

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 12-1445
(D.C. No. 1:11-CV-01350-WJM-BNB)

[Filed July 22, 2014]

ANDY KERR, Colorado State Representative, et al.,	)
Plaintiffs - Appellees,	)
v.	)
JOHN HICKENLOOPER, Governor of Colorado, in his official capacity,	)
Defendant - Appellant.	)
----------	)
DARCY W. STRAUB, et al.,	)
Amici Curiae.	)

ORDER

Before **BRISCOE**, Chief Judge, **KELLY**, **LUCERO**, **HARTZ**, **TYMKOVICH**, **GORSUCH**, **HOLMES**,

BACHARACH, **PHILLIPS**, and **MCHUGH**, Circuit Judges.*

This matter is before the court on the appellant's *Petition for Rehearing En Banc*. We also have a response. The implicit request for panel rehearing contained in appellant's petition is denied by the original hearing panel. The entire petition, as well as the response, was also circulated to all of the judges of the court who are in regular active service. A poll was called, and a majority of the court voted to deny the en banc request. *See* Fed. R. App. P. 35(a). Judges Hartz, Tymkovich, Gorsuch and Holmes voted to allow en banc reconsideration.

Entered for the Court

/s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

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* The Honorable Scott Matheson is recused in this matter and did not participate in the en banc proceedings.

HARTZ, Circuit Judge, dissenting from the denial of rehearing *en banc*:

I respectfully dissent from the denial of en banc review. We are bound by Supreme Court precedent to hold that the Guarantee Clause claim is nonjusticiable as a political question.

The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, §4. The claim in this case is that TABOR, an amendment to the Colorado constitution adopted by voter initiative, violates the Guarantee Clause by requiring advance voter approval of new taxes. A quite similar claim was raised in the United States Supreme Court in *Pacific States Telephone & Telegraph Company v. Oregon*, 223 U.S. 118 (1912). Oregon had amended its constitution to allow the enactment of legislation through an initiative or referendum. One statute so enacted imposed a tax on Pacific States. The company defended against collection of the tax on the ground that the initiative process violated the Guarantee Clause. The Supreme Court held that the claim based on the Guarantee Clause was a political question and "not, therefore, within the reach of judicial power." *Id.* at 151. The provisions in the Oregon and Colorado constitutions are obviously not identical. But I am at a loss to find a principled basis on which to hold that the challenge in *Pacific States* was a political question while the challenge here is not. In both, the gist of the claim has been that the Guarantee Clause was violated by the transfer of legislative power from the legislature to the electorate.

The panel opinion attempts to distinguish *Pacific States* on the ground that it raised "a much broader legal challenge" than does this case. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1173 (10th Cir. 2014). To support that characterization, the panel opinion quotes from a passage in the Supreme Court's opinion. The passage follows the Court's discussion of the assignments of error raised by Pacific States in its brief to the Court. The Court stated that those assignments were "reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of [the Guarantee Clause]." *Pac. States Tel. & Tel. Co.*, 223 U.S. at 137. After quoting the six propositions in Pacific States' brief, the Court wrote:

> *In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon.* This being so, the contention, if held to be sound, would necessarily affect the validity, *not only* of *the particular statute which is before us, but* of *every other statute passed in Oregon since the adoption of the initiative and referendum*. And indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well-founded, that there is, at one and the same time, one and the same

> government, which is republican in form, and not of that character.

Id. at 141 (emphasis added to language that is quoted by panel opinion).

This passage set forth the Court's view of the implications of Pacific State's argument, not what was actually stated in its brief. Nowhere did the brief argue, or even suggest, that everything done by any branch of the Oregon state government was illegitimate after approval of the constitutional provision allowing initiatives and referenda. The brief simply argued, as one would expect, that the tax was improper because the initiative process—under which the tax was enacted—was unlawful under the Guarantee Clause. Nor did the Supreme Court "[c]onstru[e] the . . . complaint as an attempt to overturn 'not only . . . the particular statute which is before us, but . . . every other statute passed in Oregon since the adoption of the initiative and referendum.'" *Kerr*, 744 F.3d at 1173 (quoting *Pacific States*, 223 U.S. at 140). Rather, it said only that if Pacific States' arguments in its brief (not the complaint) were sound, then all other legislation (even if not adopted by initiative or referendum) would also fall. In other words, the Court was saying that either Oregon had a republican form of government or it did not; if Pacific States was correct in saying that the initiative process violated the Guarantee Clause, then the whole state government came tumbling down because it was not republican in form. The Court rejected, albeit *sub silentio*, the possibility that the Court could just invalidate the one feature of the Oregon

government—the initiative process—that was incompatible with a republican form of government.

One can challenge the cogency of the reasoning in *Pacific States*. Professor Tribe wrote: "Chief Justice White's decisive assumption was, to say the least, dubious: if a court found that a particular feature of state government rendered the government unrepublican, why could not the court simply declare that feature invalid?" 1 Laurence H. Tribe, American Constitutional Law § 3-13, at 369 (3d ed. 2000). But we cannot ignore Supreme Court precedent just because we think it poorly reasoned. And the Supreme Court has never questioned the holding of nonjusticiability in *Pacific States*. At most, in *New York v. United States*, 505 U.S. 144 (1992), it indicated that there may be some questions under the Clause that are justiciable. *See id.* at 184–86. Neither *New York* nor any other Supreme Court opinion since *Pacific States*, however, has cast doubt on the validity of the nonjusticiability holding of that opinion. Even *Baker v. Carr*, 369 U.S. 186 (1962), which formulated a new framework for assessing whether a claim raises a nonjusticiable political question, *see id.* at 208–37, did not call into question *Pacific States* or any other decision under the Guarantee Clause. Indeed, commenting on the possibility that the appellants might have raised a claim under the Clause, the Court said, "Of course, as we have seen, any reliance on that clause would be futile." *Id.* at 227.

Because I think it clear that Supreme Court precedent holds that the Guarantee Clause claim in this case is nonjusticiable, I vote for en banc review to correct the panel's error.

TYMKOVICH, Circuit Judge, joined by **HOLMES**, Circuit Judge, dissenting from denial of Rehearing Petition, *En Banc*

I would hear this case en banc. The panel's decision mistakenly extends the doctrine of legislative standing, as articulated in *Raines v. Byrd*, 521 U.S. 811 (1997), and contradicts Supreme Court precedent as to the non-justiciability of the Guarantee Clause, U.S. Const. art. IV, § 4. Because the issues presented in this case are of exceptional importance to the separation of powers that undergirds our constitutional structure, I would grant Governor Hickenlooper's petition.

Colorado's Taxpayers Bill of Rights (TABOR), Colo. Const. art. X, § 20, is a state constitutional provision that requires a vote of the people before new taxes can be imposed or tax rates can be increased. The legislator-plaintiffs argue that they are injured by this constitutional provision because TABOR dilutes their core legislative prerogative to increase taxes and that this injury confers Article III standing.

But many state constitutional provisions cause the same type of injury. The net result of the panel's decision ratifying standing is that *just about any policy provision codified in the state constitution would be subject to legislative standing and attack on the theory of vote dilution*.

Thus, consider the effect of this view of legislative standing:

- According to the panel's logic, state legislators would have standing to challenge the state constitution's protection of the recreational use of marijuana, Colo. Const., art. XVIII, § 16, on the

theory that the provision infringes on the legislative core function of codifying the criminal law.

- Legislators would also have standing to challenge the mandatory school funding provision of the state constitution, Colo. Const., art. IX, § 17, because it deprives them of their right to cast effective votes on appropriations and education policy.

- Legislators are required to divvy up funds from casino gambling to specific recreational and environmental uses under the Great Outdoors Colorado Amendment, Colo. Const., art. XXVII, § 1. They could argue this requirement injures their ability to spend the money on other pressing social issues.

- And on and on and on throughout the Colorado Constitution (and the constitutions of other Tenth Circuit states).

The panel's view of legislative standing reaches well beyond Supreme Court precedent. And by remanding for further proceedings under the Guarantee Clause, the decision squarely conflicts with longstanding Supreme Court precedent that holds such inquiries are beyond the scope of federal-court review.

Legislative Standing

Article III standing requires the plaintiff to have a suffered an "injury in fact," a causal connection between the injury and the challenged conduct, and that the injury be redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Consistent with Article III's strict standing requirements, it is rare for legislators to have standing

to challenge a law or action that results in a loss of the legislature's political power. That is because institutional injuries of this kind are shared by all members of the legislature, so plaintiffs suing in their legislative capacities usually cannot establish a "concrete and particularized" injury for standing purposes. *Id.* at 560.

In this light, the Supreme Court has held that the "abstract dilution of institutional legislative power" is not a judicially cognizable injury for purposes of individual legislators' standing. *Raines*, 521 U.S. at 826. *Raines* reserves a narrow exception to the rule against legislative standing—those actions that result in "vote nullification." *Id.* (citing *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (holding that legislator-plaintiffs' votes were nullified if their votes against ratification of a constitutional amendment were "overridden")).

The legislator-plaintiffs in this case have alleged that TABOR violates the United States Constitution's Guarantee Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. They argue that the Guarantee Clause requires state constitutions to preserve state legislators' ability to perform "legislative core functions," which the plaintiffs contend include taxation and appropriation. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1165 (10th Cir. 2014). TABOR, because it requires successful legislative votes in favor of tax increases or new taxes to be approved by citizen referendum before being implemented, has allegedly resulted in injury to them as lawmakers. In this way, TABOR reduces the

legislators' authority to cast fully effective votes in favor of tax increases.

In *Raines*, the Supreme Court held that plaintiffs, members of Congress, did not have standing to challenge the Line Item Veto Act, rejecting an argument that the Act denied them the "meaning" and "effectiveness" of their votes on appropriations bills. 521 U.S. at 825–26. The plaintiffs alleged the Act deprived them of their "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 821–22 (relying on *Coleman*, 307 U.S. at 438). Rejecting a broad approach, the Court held that legislative standing exists only where plaintiffs' votes have been "completely nullified" or "deprived of all validity." *Id.* at 822–23. The Court concluded that the line item veto caused abstract dilution of Congress's power, rather than vote nullification, and thus the plaintiffs' alleged injury was not judicially cognizable. *Id.* at 826.

The panel sees a distinction between this case and *Raines*—the lack of legislative remedies available to the plaintiffs under TABOR. The lack of legislative remedies is, of course, relevant to determining whether the plaintiffs have suffered complete nullification of their votes. But all of the cases cited by the panel stand for the proposition that legislator-plaintiffs do not suffer complete nullification of their votes where legislative remedies remain available. *See, e.g.*, *Schaffer v. Clinton*, 240 F.3d 878, 885–86 (10th Cir. 2001). The inverse is not necessarily true—the lack of legislative remedies is necessary, but not sufficient, to show vote nullification. The dispositive question is

whether the injury caused by TABOR constitutes vote nullification as understood in *Raines*. It does not.

The plaintiffs' theory of the case is that their votes are ineffective in light of the requirements of the Guarantee Clause because the "end result of a successful legislative vote in favor of a tax increase is not a change in the law." *Kerr*, 744 F.3d at 1165. Put another way, the right to an "effective" vote for standing purposes is the right to have a successful vote given its *full* effect under the relevant constitutional provision, not just *some* legal effect.

But, in *Raines*, the Court rejected a similar argument. According to the *Raines* plaintiffs, the legislation rendered their future votes ineffective in light of the requirements of the Presentment Clause because all approved appropriations were no longer inextricably linked for the President's signature or veto. *See Raines*, 521 U.S. at 825. The Court described this change in effectiveness as "abstract dilution of institutional legislative power" rather than "vote nullification." *Id.* at 826. The Court further noted that "[i]n the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process." *Id.* at 824. The Court thus rejected the idea that the failure to give a successful vote its full effect under the Presentment Clause was a judicially cognizable injury to the plaintiffs as lawmakers—the claim was, rather, "based on a loss of political power." *Id.* at 821.

The panel's view of *Raines* makes any state constitutional provision that limits a legislature's authority over a policy area vulnerable to legislative standing on a Guarantee Clause claim. But TABOR

and the other constitutional provisions described above do not completely nullify the plaintiffs' votes nor deprive their votes of all validity. As to TABOR, a new tax or tax increase that passes the General Assembly and is signed by the governor is referred to the statewide ballot for a voter referendum and may indeed become law. A successful vote still has substantial legal effect. Although the legal effect of a successful vote is less than it might have been without TABOR, *Raines* makes clear that abstract institutional injuries of this kind cannot confer legislative standing.

Further, even if it were plausible that votes for tax increases were not given legal effect, the resulting injury falls far short of the type of institutional injury at issue in *Coleman*. In *Raines*, the Supreme Court noted that *Coleman* allows for legislative standing when there has been "complete nullification" of a vote for a "specific legislative Act." *Id.* at 823. In this case, the legislator-plaintiffs have not voted in favor of a successful tax measure that was subsequently denied in a referendum. The panel attempts to explain away the "specific legislative Act" requirement by asserting it would be absurd if legislators could bring a claim for nullification of a specific vote but not for "nullification of a legislator's authority to cast a large number of votes." *Kerr*, 744 F.3d at 1170. But *Raines* stands for that precise proposition: legislative standing is limited to claims of nullifications of specific, otherwise valid votes. The withdrawal of authority to cast a large number of votes with a particular degree of effectiveness is another way of alleging that the legislature has suffered an abstract institutional injury. Without the complete nullification of an actual vote, there is no concrete injury under *Raines*.

Even if the legislator-plaintiffs are correct on the merits of their argument—that TABOR's reduction of legislative authority violates the Guarantee Clause—the federal courts can only hear claims made by plaintiffs who have suffered a judicially cognizable injury. An abstract reduction of authority to raise taxes is an institutional injury based on the dilution of political power. This cannot serve as a basis for legislative standing.

Political Question Doctrine

I also see no basis for the panel's conclusion that the Supreme Court has retreated from considering Guarantee Clause challenges to be non-justiciable under the political question doctrine. And, in particular, as I explain further below, the Court has held that Guarantee Clause challenges to statewide direct democracy provisions, like TABOR, are non-justiciable.

Federal courts lack authority to hear cases that involve a "political question." The Supreme Court has held that a case "involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

The Supreme Court has long maintained that Guarantee Clause claims are generally non-justiciable under the political question doctrine. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 183 (1980) ("We

do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable."), *abrogated on other grounds by Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Baker v. Carr*, 369 U.S. 186, 218 (1962).

The panel's conclusion that Guarantee Clause claims are not generally barred by the political question doctrine derives from an erroneous reading of *Baker v. Carr*. *Baker* involved an equal-protection challenge to Tennessee's apportionment statute. Tennessee argued that apportionment cases, regardless of how the litigants characterized the case, can implicate no constitutional provision except the Guarantee Clause and that such claims present non-justiciable political questions. *Baker*, 369 U.S. at 209. In explaining that equal protection challenges to apportionment statutes were justiciable, the Supreme Court clarified that previous Guarantee Clause claims were considered non-justiciable not because they "touch[ed] upon matters of state governmental organization," but because such claims involve at least one of the six factors that make up the political question doctrine. *Id.* at 218. The panel reads this clarification as a rejection of the general rule that Guarantee Clause claims are non-justiciable. But nowhere in *Baker* does the Supreme Court retreat from previous cases holding that Guarantee Clause claims are non-justiciable—the Court simply explained *why* Guarantee Clause claims have always been found non-justiciable. Indeed, the Court's explanation of the non-justiciability of Guarantee Clause claims strongly suggests the Court held that such claims *always* involve political questions. *Id.* ("We shall discover that Guaranty Clause claims involve those elements which

define a 'political question,' and for that reason and no other, they are nonjusticiable.").

In addition to recognizing this general rule, the Supreme Court has already held that challenges to state-level direct democracy provisions under the Guarantee Clause are non-justiciable. In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), the Supreme Court held that a Guarantee Clause challenge to a tax increase enacted through Oregon's initiative and referendum process was non-justiciable because the Constitution confers only on Congress the power to determine whether a state government is republican in form. *Id.* at 150–51 (holding it is "the [federal] legislative duty to determine the political questions involved in deciding whether a state government republican in form exists").

The panel distinguishes *Pacific States* by arguing the lawsuit in that case was a "wholesale attack[] on the validity of a state's government rather than . . . a challenge to a single provision of a state constitution." *Kerr*, 744 F.3d at 1173 (citing *Pacific States*, 223 U.S. at 150 ("[T]he assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state.")). The panel maintains that, in contrast to *Pacific States*, the issue in this case is only whether "one provision of the Colorado Constitution brings it below a constitutionally mandated threshold." *Id.* at 1173 n.11.

I do not think this is a meaningful distinction. The Guarantee Clause presents a dichotomy: either a state government is republican in form (and thus a "valid" government) or it is not. The plaintiffs in this case have alleged that TABOR is inconsistent with the Guarantee

Clause. In other words, TABOR renders the Colorado government non-republican in form.

In *Pacific States*, the Supreme Court explained the petitioners' claim called into question the validity of not only the particular tax statute adopted by referendum, but "every other statute passed in Oregon since the adoption of the initiative and referendum" because they were passed by a government not republican in form. 223 U.S. at 141. This description may have been somewhat hyperbolic, considering the wide discretion courts have to fashion the appropriate remedy, but its logic is equally applicable to the claim in this case. Ultimately, the essence of the claims in *Pacific States* and in the case before us—that a state constitution's direct democracy provision renders the state government non-republican in form—is the same. The Court squarely held that this question is textually committed to Congress. *Id.* at 150–51.

Moreover, the panel's opinion does not expressly find that there are "judicially discoverable and manageable standards" for resolving the case; it simply assures the reader that judicially manageable standards *might* emerge at a future stage of litigation. The panel gives no support for its conclusion besides a comparison to *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the Supreme Court was able to determine the meaning and scope of the Second Amendment based on a detailed historical inquiry. The panel is confident that the parties will be able to produce materials that will allow for a similar inquiry into the meaning of the Guarantee Clause.

But the requirement that there be "judicially discoverable and manageable standards" is driven by

more than concerns about the difficulty of a historical inquiry. Instead, this *Baker* factor requires a court to determine whether it can decide a legal issue in a way that is "principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). The majority gives us nothing besides a mere assurance that the Guarantee Clause contains standards allowing for a principled and rational application that remain to be found. But the panel's failure to at least hint at what the relevant standards are for Guarantee Clause litigation deprives the litigants and district court of necessary guidance as to how these claims are to be adjudicated.

The sharp dichotomy in the Guarantee Clause between republican and non-republican forms of government is all the more reason for concern in this case. The judicial line-drawing that will be required to determine whether a direct democracy provision renders a state government non-republican in form leads me to doubt that a court can decide this case in a way that is "principled, rational, and based upon reasoned distinctions."

* * *

Because the panel's opinion is inconsistent with Supreme Court precedent on legislative standing and the non-justiciability of the Guarantee Clause, I would have granted the Governor's petition for rehearing en banc.

GORSUCH, Circuit Judge, dissenting from the denial of rehearing *en banc*.

Everyone knows that before a federal court may decide a dispute "judicially manageable standards" must exist for doing so. Federal judges aren't free to intervene in any old dispute and rule any way they wish. Legislatures may act in ways that are "inconsistent, illogical, and ad hoc." *Vieth v. Jubelirer*, 541 U.S. 276, 278 (2004) (plurality opinion). But the "judicial Power" extended by Article III, §1 to the federal courts imposes on us the duty to act "in the manner traditional for English and American courts." *Id.* And "[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*" — or, put differently, federal courts must be able to proceed in a "principled, rational, and . . . reasoned" fashion. *Id.* Unless judicially manageable standards for decision exist, we have no business intervening. *Id.*; *see also Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

Where are the judicially manageable standards for deciding this case? The burden of showing such standards exist usually presents a plaintiff with little trouble. Most cases in federal court — whether arising under congressional legislation or the common law or sounding in equity — come with ample principles and precedents for us to apply in a reasoned way, even if those principles and precedents don't always dictate a single right answer. But in our case the plaintiffs make a rather novel claim: they contend that Colorado's government is not a republican one — and so violates the Guarantee Clause — because tax increases proposed by the legislature must also be approved by

the public. Where are the legal principles for deciding a claim like *that*?

The plaintiffs don't say. They don't suggest, for example, that the Clause requires all decisions about legislation to be made by elected representatives rather than the public. Neither do they contend that the Clause is offended only when all legislative decisions are made by direct democracy. If the Constitution could be said to contain one or the other of these rules — either forbidding any experiment with direct democracy or forbidding only the total loss of a representative legislature — we might have a principled basis for deciding the case. The former rule of decision might require judgment for the plaintiffs; the latter, for the defendants. But the plaintiffs in our case disclaim either such standard. They seem to acknowledge that *some* direct democracy is consistent with republican government, insisting only and instead that the kind *here* runs afoul of the Constitution.

And this is where we run into trouble. To date, the plaintiffs have declined to advance *any* test for determining when a state constitutional provision requiring direct democracy on one subject (here, taxes) does or doesn't offend the Clause. No doubt, the task the plaintiffs face is a formidable one: they enter a field in which the Supreme Court has already dismissed for lack of judicially manageable standards a case challenging a state constitutional provision that allowed citizens to overturn by direct vote *any* state legislative enactment (not just enactments raising taxes). *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). The plaintiffs enter a field, too, where the Supreme Court has more recently chosen to derive

a multi-part justiciability test from its preexisting Guarantee Clause jurisprudence — in the process expressly reaffirming the idea that the Clause lacks judicially manageable standards for cases like ours. *See Baker v. Carr*, 369 U.S. 186, 223 (1962) (noting that the Court has "refused to resort to the Guaranty Clause . . . as the source of a constitutional standard for invalidating state action" in many cases, including one involving the "claim that initiative and referendum negated republican government").

But even if the plaintiffs could somehow surmount these precedential problems and colorably contend that judicially manageable standards exist for deciding their case, they haven't even *tried*. Three years of litigation have slipped by. During that time the parties have exhausted no fewer than three rounds of pleadings in the district court and an interlocutory appeal in this one. At every stage Governor Hickenlooper has challenged the plaintiffs to identify judicially manageable standards of decision that might empower an Article III court to decide their case. Yet even today the plaintiffs profess no more than "confiden[ce]" that if their case is allowed to proceed still further the district court will someday be able to find some standard for decision. Appellees' Br. 28. For their part, the district court and the panel have allowed the case to proceed on this same sanguine hope — all while following the plaintiffs' lead and conspicuously declining to identify any principled standard for

decision. *See* Panel Op. 39-42; App. at 449 (district court opinion).[1]

In one sense, this shortcoming may be unimportant. On remand, after all, the district court remains very likely to dismiss this case — eventually — either for lack of manageable standards or on the merits. The plaintiffs' failure for so long to identify any legal standards for deciding their own case pretty strongly suggests there aren't any — or that what standards the Guarantee Clause may contain won't prove favorable to them. Indeed, this hypothesis is fully borne out by the scholarly literature on the Clause's text and original meaning. Much of which suggests that the Clause may rule out a state monarchy, a smaller amount of which suggests the Clause may rule out a complete direct democracy, but none of which credibly suggests a limited dose of direct democracy of the sort at issue here is constitutionally problematic.[2] Indeed, to hold for

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[1] In expressing confidence that judicially manageable standards might yet pop up, the panel opinion leaned primarily on the argument that because manageable standards were found in the Second Amendment to decide *District of Columbia v. Heller*, 554 U.S. 570 (2008), manageable standards are sure to be found in the Guarantee Clause to decide this case. *See* Panel Op. 40-41. But that, of course, commits the logical fallacy of overgeneralization. Just because one clause of the Constitution contains manageable standards to decide one case doesn't mean another clause contains manageable standards for deciding another case. *See, e.g.*, *Vieth*, 541 U.S. at 281; *id.* at 313 (dismissing political gerrymandering challenge because plaintiffs failed to carry their burden of showing judicially manageable standards existed for deciding it).

[2] *See, e.g.*, Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 811 n.19 (2002); G. Edward White, *Reading*

plaintiffs in this case would require a court to entertain the fantasy that more than half the states (27 in all) lack a republican government. *See* Appellant's Br. 8.

Even so, it's hard to look away — to ignore the failure of the plaintiffs, the district court, or the panel to identify any standard for decision — and conclude nothing of significance has happened here. The Supreme Court has plainly instructed that "[w]hen a court is given no standard by which to adjudicate a dispute . . . resolution of the suit is beyond the judicial role envisioned by Article III." *Zivotofsky*, 132 S. Ct. at 1432. Yet three years into this case and many challenges later and still no one has ventured any standard for deciding this dispute. It would seem time — past time — to say the plaintiffs have not carried their burden of establishing that this case lies within our power to decide under Article III. After all, this isn't some prosaic question of fact that can be resolved by deposing a legislator-plaintiff or sending an interrogatory to the Governor: no amount of fact discovery can remedy the plaintiffs' shortcomings in this case. We face an Article III issue and a question of law, one the plaintiffs bear the burden of answering but one they have not borne.

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the Guarantee Clause, 65 U. Colo. L. Rev. 787, 803-06 (1994); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 749-52, 761-73 (1994); Jonathan Toren, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & Liberty 371, 374-92, 392-99 (2007); Brief for Amici Independence Institute and Cato Institute 12-26.

As things stand, the panel opinion assigns the litigants and the district court to a kind of litigation limbo — the promise of many more years wrestling with this case all without a wisp of an idea what rule of law might govern its disposition. That seems no small wrong to impose on any litigant in any case, but it is perhaps an especially unseemly wrong to impose on the state's highest elected official in a case calling into question a state constitutional amendment. Federalism and comity appear to count for little when we condemn a state, its governor, and its constitution to a multi-year scavenger hunt up and down the federal court system looking for some judicially manageable standard that might permit us to entertain the case in the first place.

The situation we confront in this case is more than a little reminiscent of the one the Supreme Court faced in *Vieth*, where the plaintiffs sought to challenge a political gerrymander as unconstitutional. There, 18 years of experimenting by various courts failed to yield any sure standards for litigating those sorts of cases. Here, we encounter an arguably longer history of failed efforts to develop standards for litigating Guarantee Clause cases involving individual citizen initiatives — one extending into the nineteenth century. There, the plaintiffs sought to identify and defend as workable their own set of legal standards at the motion to dismiss stage, but the Court found those efforts unavailing and affirmed the dismissal of the complaint. Here, the plaintiffs haven't even *attempted* to identify workable legal standards for adjudicating their case despite many opportunities over many years. If the law's promise of treating like cases alike is to mean something, this case should be put to bed now as

Vieth's was then, rather than being destined to drag on forlornly to the same inevitable end. I respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 11-cv-01350-WJM-BNB

[Filed September 21, 2012]

ANDY KERR, Colorado State Representative, NORMA V. ANDERSON, JANE M. BARNES, ELAINE GANTZ BERMAN, Member State Board of Education, ALEXANDER E. BRACKEN, WILLIAM K. BREGAR, Member Pueblo District 70 Board of Education, BOB BRIGGS, Westminster City Councilman, BRUCE W. BRODERIUS, TRUDY B. BROWN, JOHN C. BUECHNER, Ph.D., STEPHEN A. BURKHOLDER, RICHARD L. BYYNY, M.D., LOIS COURT, Colorado State Representative, THERESA L. CRATER, ROBIN CROSSAN, Member Steamboat Springs RE-2 Board of Education, RICHARD E. FERDINANDSEN, STEPHANIE GARCIA, Member Pueblo City Board of Education, KRISTI HARGROVE, DICKEY LEE HULLINGHORST, Colorado State Representative, NANCY JACKSON, Arapahoe County Commissioner,	)

WILLIAM G. KAUFMAN, CLAIRE LEVY, Colorado State Representative, MARGARET (MOLLY) MARKERT, Aurora City Councilwoman, MEGAN J. MASTEN, MICHAEL MERRIFIELD, MARCELLA (MARCY) L. MORRISON, JOHN P. MORSE, Colorado State Senator, PAT NOONAN, BEN PEARLMAN, WALLACE PULLIAM, FRANK WEDDIG, PAUL WEISSMANN, and JOSEPH W. WHITE,

Plaintiffs,

v.

JOHN HICKENLOOPER, Governor of Colorado, in his official capacity,

Defendant.

ORDER CERTIFYING INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

On July 30, 2012, this Court issued an Order granting in part and denying in part Defendant's Motion to Dismiss, holding, *inter alia*, that the Legislator-Plaintiffs in this action have standing to pursue their claims, that the political question doctrine does not bar Plaintiffs' claims, and that only Plaintiffs' Equal Protection Claim is subject to dismissal. (ECF No. 78.)

This matter is before the Court on Defendant's Motion for Certification of the Court's July 30, 2012 Order for Interlocutory Appeal Under 28 U.S.C. § 1292(b) ("Motion for Certification"). (ECF No. 85.) Plaintiffs have filed a Response to the Motion for Certification (ECF No. 89), and Defendant has filed a Reply (ECF No. 90). The Motion for Certification is ripe for adjudication. Having carefully considered the arguments presented, the Court GRANTS the Motion for Certification.

I. ANALYSIS

As both parties implicitly concede, the Court's July 30, 2012 Order is not a "final decision" appealable under 28 U.S.C. § 1291. However, under certain circumstances, a district court may certify for appeal an otherwise unappealable interlocutory order. 28 U.S.C. § 1292(b) provides,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the

> district judge or the Court of Appeals or a judge thereof shall so order.

Thus, there are three primary questions a district court must resolve in determining whether to certify an interlocutory order for appeal: (1) whether the order involves a controlling question of law; (2) whether there is a substantial ground for difference of opinion regarding the question; and (3) whether an immediate appeal from the order may materially advance the ultimate termination of the litigation. An interlocutory order can be certified for appeal if it involves at least one such controlling question of law, but the scope of review on appeal will be all issues raised in the order. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

It is within a district court's discretion to certify an order for appeal under section 1292(b). *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995).

A. Controlling Question of Law

In determining whether the Court's July 30, 2012 Order involves a "controlling question of law" within the meaning of section 1292(b), the Court must first determine whether the Order involves a "question of law," and if so, whether that question of law is "controlling."

The Court concludes that the July 30, 2012 Order involves at least two "questions of law" under section 1292(b). First, the issue of whether the political question doctrine can bar a claim brought under the Enabling Act – a statutory claim – is a pure question of law. And second, the issue of whether the political question doctrine bars Plaintiffs' claims generally is

also a "question of law" within the meaning of section 1292(b). As to this second issue, although consideration of this question would require the Tenth Circuit to apply law to fact, the factual setting is straightforward, with the complaint's allegations accepted as true for purposes of Defendants' operative motion to dismiss, and the language of TABOR subject to judicial notice. However, the law to apply to those facts – in particular whether a Guarantee Clause claim presents a non-justiciable political question – is highly unsettled. Given this record, the second issue is also a "question of law" under section 1292(b). *See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 624-27 (7th Cir. 2010) (permitting appeal to be taken from interlocutory order where it would require appellate court to apply unsettled area of law to complaint's allegations); 19 James W. Moore, Moore's Federal Practice § 203.31[2] (3d ed. 2012).

Further, these two questions of law, when considered together, are manifestly "controlling." Specifically, if a higher court were to hold on appeal that the political question doctrine bars Plaintiffs' claims, including the Enabling Act claim, that would conclusively resolve the litigation in favor of Defendant. *See Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) ("A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so."); *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) ("Although the resolution of an issue need not necessarily terminate an action in order to be

'controlling,' it is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action.").

The Court concludes that its July 30, 2012 Order involves "controlling question[s] of law" under section 1292(b).

B. Substantial Ground for Difference of Opinion

There is also a "substantial ground for difference of opinion" regarding those controlling questions of law. As to whether the political question doctrine can bar an Enabling Act claim, the Court held in its July 30, 2012 Order that it had jurisdiction to hear the Enabling Act claim – a statutory claim – even if the political question doctrine barred Plaintiffs' Guarantee Clause claim. (ECF No. 78, at 63-66.) However, Defendant had tenably argued that the political question doctrine should apply equally to Plaintiffs' Guarantee Clause claim and their Enabling Act claim because both claims present the virtually identical question of whether TABOR violates Colorado's obligation to maintain a republican form of government.

As to whether the political question doctrine bars Plaintiffs' Guarantee Clause claim, the Court emphasized in its July 30, 2012 Order how unsettled the law is in that area, and how courts have come out on both sides of the issue. (*Id.* at 45-53.) So on that issue, also, there is clearly a substantial ground for difference of opinion.

Further, the importance of the issues presented in this action cannot be reasonably disputed. *See* 16 Charles Alan Wright, et al., Federal Practice & Procedure § 3930 (2d ed. 2012) ("The level of

uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case. If proceedings that threaten to endure for several years depend on an initial question of jurisdiction . . . or the like, certification may be justified at a relatively low threshold of doubt.") As far as the Court is aware, TABOR is the only state law of its kind anywhere in the country. Accepting the operative Complaint's allegations as true, TABOR fundamentally restructured Colorado's government and the way in which it functions, and in the process allegedly violated the U.S. and Colorado Constitutions, and a federal statute. The ultimate resolution of this litigation will quite literally affect every individual and corporate entity in the State of Colorado. Faced with a case of this magnitude and importance, as well as the unsettled law governing the jurisdictional questions presented, in the Court's view the interests of justice militate in favor of certifying the June 30, 2012 Order for interlocutory review at this time.

C. Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation

"The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." *Id.* As explained above, if a higher court were to hold on appeal that the political question doctrine bars Plaintiffs' claims, including the Enabling Act claim, that decision would materially advance the ultimate termination of the litigation in favor of Defendant. Thus, this final prerequisite for a

district court to allow an appeal of an interlocutory order is also met here.

D. Timing of Certification

Section 1292(b) provides that, if a district judge is of the opinion that an interlocutory order is properly appealable, "he shall so state in writing in such order." However, the Tenth Circuit has made clear that a district judge may instead issue a supplemental order certifying a previously issued order for appeal. *See Hous. Fearless Corp. v. Teter*, 313 F.2d 91, 92 (10th Cir. 1962) ("[T]he trial court had the power to supplement the original order to include the § 1292(b) statement."); *see also Shire LLC v. Sandoz Inc.*, No. 07-cv-00197, 2008 WL 5120728, at *1 (D. Colo. Dec. 5, 2008) ("Where no section 1292(b) certification is included in the original order, the district court may supplement that order to include an appropriate certification.") (citing *Teter*, 313 F.2d at 92).

The Court hereby supplements and amends its July 30, 2012 Order with this Order, including a finding that the July 30, 2012 Order involves controlling questions of law as to which there are substantial grounds for differences of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation. With this supplemental Order, the July 30, 2012 Order is now appealable. *See Teter*, 313 F.2d at 92 ("When [the trial court supplemented the original order to include the § 1292(b) statement], the order became appealable and the appeal time ran from the entry of the supplemental order.").

E. Stay

Section 1292(b) provides that an interlocutory appeal does not stay proceedings in the district court "unless the district judge or the Court of Appeals or a judge thereof shall so order." The district court has discretion to determine whether to stay proceedings pending disposition of an interlocutory appeal. *See United States ex rel. Drake v. NSI, Inc.*, 736 F. Supp. 2d 489, 503 (D. Conn. 2010) ("When issuing a certificate of appealability, the court also has the discretion to stay the proceedings . . . ."); *Mills v. Everest Reinsurance Co.*, 771 F. Supp. 2d 270, 273 (S.D.N.Y. 2009) (same).

Although Defendant has not explicitly requested a stay, he argues that an interlocutory appeal is warranted in part because it may obviate the need for the lengthy and costly phases of discovery and trial. (ECF No. 85, at 12-13.) For the reasons discussed at length *supra*, the Court finds it appropriate to stay proceedings in this Court pending resolution of any appeal from the July 30, 2012 Order.

II. CONCLUSION

In accordance with the foregoing, the Court hereby ORDERS as follows:

(1) Defendant's Motion for Certification of the Court's July 30, 2012 Order for Interlocutory Appeal Under 28 U.S.C. § 1292(b) (ECF No. 85) is GRANTED;

(2) This Order of the Court SUPPLEMENTS and AMENDS the Court's July 30, 2012 Order Granting in Part and Denying in Part Defendant's Motion to Dismiss (ECF No. 78);

(3) The Court FINDS that its July 30, 2012 Order involves controlling questions of law as to which there are substantial grounds for differences of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation;

(4) The Court's July 30, 2012 Order, as supplemented by this Order, is CERTIFIED for interlocutory appeal under 28 U.S.C. § 1292(b); and

(5) In the event a party to this action files a timely appeal of the July 30, 2012 Order, as supplemented by this Order, the Court STAYS all proceedings in this action until such time as the appeal is fully and finally resolved and the action is remanded to this Court.

Dated this 21st day of September, 2012.

BY THE COURT:

/s/William J. Martínez
William J. Martínez
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 11-cv-01350-WJM-BNB

[Filed July 30, 2012]

ANDY KERR, Colorado State Representative, NORMA V. ANDERSON, JANE M. BARNES, Member Jefferson County Board of Education, ELAINE GANTZ BERMAN, Member State Board of Education, ALEXANDER E. BRACKEN, WILLIAM K. BREGAR, Member Pueblo District 70 Board of Education, BOB BRIGGS, Westminster City Councilman, BRUCE W. BRODERIUS, Member Weld County District 6 Board of Education, TRUDY B. BROWN, JOHN C. BUECHNER, Ph.D., Lafayette City Councilman, STEPHEN A. BURKHOLDER, RICHARD L. BYYNY, M.D., LOIS COURT, Colorado State Representative, THERESA L. CRATER, ROBIN CROSSAN, Member Steamboat Springs RE-2 Board of Education, RICHARD E. FERDINANDSEN, STEPHANIE GARCIA, Member Pueblo City Board of Education, KRISTI HARGROVE, DICKEY LEE

HULLINGHORST, Colorado State Representative, NANCY JACKSON, Arapahoe County Commissioner, WILLIAM G. KAUFMAN, CLAIRE LEVY, Colorado State Representative, MARGARET (MOLLY) MARKERT, Aurora City Councilwoman, MEGAN J. MASTEN, MICHAEL MERRIFIELD, MARCELLA (MARCY) L. MORRISON, JOHN P. MORSE, Colorado State Senato, PAT NOONAN, BEN PEARLMAN, Boulder County Commissioner, WALLACE PULLIAM, FRANK WEDDIG, Arapahoe County Commissioner, PAUL WEISSMANN, and JOSEPH W. WHITE,

Plaintiffs,

v.

JOHN HICKENLOOPER, Governor of Colorado, in his official capacity,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

This action challenges the constitutionality and legality of the Taxpayer's Bill of Rights ("TABOR"), an amendment to the Colorado Constitution passed by voter initiative in 1992. Among other provisions,

TABOR prohibits the Colorado General Assembly from increasing tax rates or imposing new taxes without voter approval. Plaintiffs allege that, by taking away the General Assembly's power to tax, TABOR violates Colorado's constitutional and statutory obligations to maintain a republican form of government.

This matter is before the Court on Defendant's Motion to Dismiss. (ECF No. 18.) In the Motion, Defendant argues that Plaintiffs lack standing to bring this action, that Plaintiffs' claims present non-justiciable political questions, and that Plaintiffs' Equal Protection claim and "Impermissible Amendment claim"[1] are independently subject to dismissal. (*Id.*) On February 15, 2012, the Court held oral argument on the Motion, and thereafter requested supplemental briefing from the parties on various issues related to standing. (*See* ECF No. 57, 68). The Motion to Dismiss is fully briefed and now ripe for adjudication. (*See* ECF No. 18, 30, 51, 72, 73; *see also* ECF No. 21-1, 61.)

Having carefully analyzed the issues presented, the Court GRANTS IN PART and DENIES IN PART the Motion to Dismiss. The Court holds that the Plaintiffs who are current members of the Colorado General Assembly have standing to bring this action, and therefore the action is not subject to dismissal for lack of standing.[2] The Court also holds that Plaintiffs' claims are not barred by the political question doctrine.

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[1] The Court explains the nature of Plaintiffs' "Impermissible Amendment claim" below.

[2] As explained below, because of this determination, the Court need not consider the standing of the remaining Plaintiffs.

Further, the Court holds that Plaintiffs have failed to state an Equal Protection claim, but that their "Impermissible Amendment claim" is not subject to dismissal. Therefore, the Court will allow this action to proceed past the pleading stage on all claims except for the Equal Protection claim.

I. BACKGROUND

A. TABOR

TABOR is codified in Article X,[3] Section 20 of the Colorado Constitution. TABOR provides,[4] among other things, that:

- A "district" (defined in TABOR as the State of Colorado or any local government in Colorado) "must have voter approval in advance for . . . 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

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[3] Article X is the Article entitled "Revenue."

[4] The Court properly takes judicial notice of TABOR's provisions. *See* Fed. R. Evid. 201(b) (providing that judicial notice may be taken of a fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) (stating that, in evaluating a motion to dismiss, a court may take judicial notice of facts that are a matter of public record).

a new tax revenue gain to any district." Colo. Const. art. X, § 20, cls. (2)(b), (4)(a).[5]

- A district "must [also] have voter approval in advance for . . . creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years." *Id.* art. X, § 20, cl. (4)(b).[6]

- "The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year . . . . The maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual local growth . . . . The maximum annual percentage change in each district's property tax revenue equals inflation in the prior calendar year plus annual local growth . . . . If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year

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[5] Clause (4)(a) exempts from this limitation "emergency taxes" as defined in clause (6), and also exempts the scenario (described in clause (1)) where "annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments."

[6] Clause (4)(b) exempts from this limitation "refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans."

unless voters approve a revenue change as an offset." *Id.* art. X, § 20, cl. (7)(a)-(d).[7]

- "New or increased transfer tax rates on real property are prohibited. No new state real property tax or local district income tax shall be imposed. . . . Any income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge." *Id.* art. X, § 20, cl. (8)(a).

Given that TABOR is part of the Colorado Constitution, it cannot be revoked or amended without voter approval. *See* Colo. Const. art. XIX, § 2, cl. (1) (provision of Colorado Constitution explaining how amendments to Constitution are adopted, and stating that proposed constitutional amendments "shall be submitted to the registered electors of the state for their approval or rejection [during a general election], and such as are approved by a majority of those voting thereon shall become part of this constitution"); *id.* art. XIX, § 1 (constitutional provision explaining how a constitutional convention is called, providing that voter approval must be obtained to hold the convention, and providing that voter approval is required for the adoption of any revisions, alterations, or amendments to the Constitution resulting from the convention); *see*

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[7] In 2005, Colorado voters approved Referendum C, which, *inter alia*, allowed the state to retain and spend all excess revenue collected above the TABOR limit for five years (from fiscal year 2005-06 through fiscal year 2009-10), and allowed the state, beginning in fiscal year 2010-11, to retain and spend excess revenue up to a new "excess state revenues" cap. *See* Colo. Rev. Stat. § 24-77-103.6.

also id. art. X, § 20, cl. (1) (provision of TABOR stating that "[o]ther limits on district revenue, spending, and debt may be weakened only by future voter approval").

B. The Operative Complaint

For purposes of Defendant's Motion to Dismiss, the Court properly accepts as true the allegations in Plaintiffs' First Amended Substitute Complaint for Injunctive and Declaratory Relief (the "Operative Complaint"). (*See* "Legal Standards" section below.)

1. Plaintiffs

This action is brought by 33 Plaintiffs. (*Id.* ¶¶ 10-42.) Five Plaintiffs are current members of the Colorado General Assembly, four of whom are members of the Colorado House of Representatives and one of whom is a member of the Colorado Senate (the "Legislator-Plaintiffs"). (*Id.* ¶¶ 10, 22, 28, 31, 36.)[8] Nine Plaintiffs are former members of the Colorado General Assembly. (*Id.* ¶¶ 11, 16, 19, 30, 32, 34, 35, 40, 41.) Other Plaintiffs include current or former county commissioners, mayors, city councilpersons, members of boards of education, public university presidents and professors, public school teachers, and parents of school-age children. (*See generally id.* ¶¶ 10-42.) All Plaintiffs are Colorado citizens. (*Id.*)

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[8] The Plaintiffs who are current members of the Colorado House of Representatives are Lois Court, Dickey Lee Hullinghorst, Andy Kerr, and Claire Levy. Plaintiff John P. Morse is a current member of the Colorado Senate. (*Id.*) *See also* www.leg.state.co.us (last visited June 20, 2012); Fed. R. Evid. 201(b); *Grynberg*, 390 F.3d at 1278 n.1.

2. General Allegations

Plaintiffs' Operative Complaint states, "The purpose of this case is to seek a ruling that [TABOR] is unconstitutional because it deprives the state and its citizens of effective representative democracy, contrary to a Republican Form of Government as required under both the United States and Colorado Constitutions." (ECF No. 36, ¶ 8.) Plaintiffs explain their position that "[a]n effective legislative branch must have the power to raise and appropriate funds. When the power to tax is denied, the legislature cannot function effectively to fulfill its obligations in a representative democracy and a Republican Form of Government." (*Id.* ¶ 7.) They allege that TABOR has caused a "slow, inexorable slide into fiscal dysfunction [in Colorado]" (*id.* ¶ 3), and specifically allege that TABOR has constrained the state government's ability to comply with its constitutional obligation to adequately fund public education (*id.* ¶ 81). After reviewing some of TABOR's provisions (*id.* ¶¶ 75-77, 79), the Complaint states,

> The totality of these TABOR provisions removes entirely from the Colorado General Assembly any authority to change state law concerning taxation to replace or increase revenue, and prohibits the General Assembly from raising funds by any other means, including borrowing. Moreover, the interactions of the provisions of TABOR may actually force existing taxes to be decreased without any action of the General Assembly.

(*Id.* ¶ 80.)

3. Claims

Plaintiffs bring five claims for relief in the Operative Complaint:

(1) The "Guarantee Clause claim," alleging that TABOR violates Article IV, Section 4 of the United States Constitution (the "Guarantee Clause"). (*Id.* ¶ 82.) The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. Plaintiffs' Guarantee Clause claim alleges that, "[b]y removing the taxing power of the General Assembly, the TABOR amendment renders the Colorado General Assembly unable to fulfill its legislative obligations under a Republican Form of Government and violates the guarantee of Article IV, Section 4 . . . ." (ECF No. 36, ¶ 82.)

(2) The "Enabling Act claim," alleging that TABOR violates the Enabling Act of 1875 (the "Enabling Act"), the U.S. statute granting statehood to Colorado. (*Id.* ¶ 83.) The Enabling Act, *inter alia*, authorized the formation of "a constitution and State Government [for Colorado] . . . . *Provided*, That the constitution shall be republican in form . . . and not repugnant to the Constitution of the United States . . . ." 18 Stat. 474 (1875). Plaintiffs' Enabling Act claim alleges that "the TABOR amendment violates the Enabling Act" because "[t]he Enabling Act's requirement for a Republican Form of Government entail[s] having and maintaining a fully effective legislature." (ECF No. 36, ¶ 83.)

(3) The "Supremacy Clause claim," alleging that TABOR violates Article VI of the United States Constitution (the "Supremacy Clause"). (*Id.* ¶ 84.) The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Plaintiffs' Supremacy Clause claim alleges that TABOR is in "irresolvable conflict" with the Guarantee Clause and Enabling Act, and therefore "must yield to the requirements of the 'Guarantee Clause' and of the Enabling Act that Colorado maintain a Republican Form of Government." (ECF No. 36, ¶ 84.)

(4) The "Equal Protection claim," alleging that TABOR violates the Equal Protection Clause of the Fourteenth Amendment of United States Constitution. (*Id.* ¶ 85.) The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiffs' Equal Protection claim alleges that, because TABOR violates the requirement of a Republican Form of Government, TABOR "den[ies] to Plaintiffs and others similarly situated the Equal Protection of the Laws . . . ." (ECF No. 36, ¶ 85.)[9]

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[9] Despite the fact that paragraph 86 of the Operative Complaint is ambiguous regarding whether Plaintiffs are attempting to assert a claim under the Fourteenth Amendment separate and apart

(5) The "Impermissible Amendment claim," alleging, *inter alia*, that TABOR impermissibly amended the Colorado Constitution in violation of constitutionally superior provisions of the Colorado Constitution, specifically Article II, Section 2; Article V, Sections 31 and 32; and Article X, Section 2 of the Colorado Constitution. (*Id.* ¶¶ 87-92.)[10, 11]

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from their Equal Protection claim, the Court holds that the Operative Complaint as a whole is properly interpreted as bringing a claim under the Fourteenth Amendment based only on the alleged violation of the Equal Protection Clause. (*See id.* ¶¶ 47, 51, 58.)

[10] To the extent that the Impermissible Amendment claim can be construed as also alleging violations of the Guarantee Clause and the Enabling Act, such allegations are already encompassed within the Guarantee Clause claim and the Enabling Act claim.

[11] Those sections of the Colorado Constitution provide:

- "The people of [Colorado] have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States." Colo. Const., art. II, § 2.
- "All bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments, as in the case of other bills." *Id.* art. V, § 31.
- "The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, state institutions, interest on

4. Relief Sought

Through this action, Plaintiffs seek an order rendering TABOR "null and void" and "prohibiting any [Colorado] state officer from taking any action whatsoever to effect the requirements and purposes of [TABOR]." (*Id.* at 20-21.)

C. Procedural History

Plaintiffs filed this action on May 23, 2011. (ECF No. 1.) On June 15, 2011, Plaintiffs filed an unopposed motion to amend the original Complaint in order to, *inter alia*, replace the State of Colorado as the named defendant with the Governor of Colorado, John Hickenlooper, in his official capacity. (ECF No. 9.) The Court granted the request (ECF No. 11), and Plaintiffs' Substituted Complaint for Injunctive and Declaratory Relief ("Substitute Complaint") was entered on June 16, 2011 (ECF No. 12).

On October 17, 2011, Plaintiffs again filed an unopposed motion to amend their complaint. (ECF No. 31.) The only differences between the proposed First Amendment Substitute Complaint for Injunctive and Declaratory Relief and the Substitute Complaint were the removal of one of the 34 Plaintiffs, the addition of a new position for another Plaintiff, and a slight re-

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the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject." *Id.* art. V, § 32.

- "The general assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year." *Id.* art. X, § 2.

ordering of paragraphs. (*Compare* ECF No. 12, *with* ECF No. 36.) The Court again granted the request (ECF No. 35), and the First Amended Substitute Complaint for Injunctive and Declaratory Relief (the "Operative Complaint") was entered on October 18, 2011 (ECF No. 36).

On August 15, 2011, Defendant filed the Motion to Dismiss currently at issue. (ECF No. 18.) On October 11, 2011, Plaintiffs filed their Brief in Opposition to the Motion to Dismiss. (ECF No. 30.) On November 18, 2011, Defendant filed a Reply to Plaintiffs' Opposition. (ECF No. 51.) The Court has also allowed the filing of two *amicus* briefs, one filed by the Independence Institute (ECF No. 21-1),[12] and one filed by Professors Erwin Chemerinsky, Gene Nichol, and William Wiecek (ECF No. 61).[13]

On February 15, 2012, the Court held oral argument on Defendant's Motion to Dismiss. (ECF No. 68.) At the oral argument, the parties formally stipulated that the Motion to Dismiss is properly construed as moving to dismiss the Operative

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[12] The *amicus* brief filed by the Independence Institute only addresses the merits issue of what constitutes a republican form of government. (ECF No. 21-1.) The Independence Institute argues that, even if this case is justiciable, it should be dismissed on the merits. (*Id.*)

[13] The *amicus* brief filed by the three Professors (the "*amici* Professors") only addresses the political question doctrine. (ECF No. 61.) The *amici* Professors argue that this action does not present non-justiciable political questions. (*Id.*)

Complaint.[14] Based on this stipulation and the Court's authority to do so, the Court construes Defendant's Motion to Dismiss as moving to dismiss the Operative Complaint in this action. *See Medinger v. City of Ashland*, No. 1:11-CV-00470, 2012 WL 1849667, at *1 (D. Or. May 17, 2012) (construing motion to dismiss as applying to later-filed amended complaint).

Because the parties in their briefing on the Motion to Dismiss and at oral argument disproportionately focused on the political question doctrine's applicability *vel non* to this action, the Court on February 17, 2012 ordered further briefing from the parties on issues related to Plaintiffs' standing to bring this action. (ECF No. 70.) On March 16, 2012, both sides filed supplemental briefs addressing the standing issues identified by the Court. (ECF No. 72, 73.)

Defendant's Motion to Dismiss is now ripe for adjudication.

II. LEGAL STANDARDS

A. Motion to Dismiss and Parties' Positions

Defendant's Motion to Dismiss is brought pursuant to Federal Rules of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim). There is some dispute between the parties regarding which of these two rules applies to

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[14] As a technical matter, the Motion to Dismiss was filed in response to the Substitute Complaint, not the Operative Complaint. However, the Substitute Complaint and Operative Complaint are virtually identical, so from a practical perspective the Motion to Dismiss is properly construed as moving to dismiss the Operative Complaint.

each of Defendant's purported bases for dismissal. (*See* ECF No. 18, at 3-4; ECF No. 30, at 5-7; ECF No. 51, at 2.) *See also, e.g.*, *Schroder v. Bush*, 263 F.3d 1169, 1171 n.1 (10th Cir. 2001) (discussing Rules 12(b)(1) and 12(b)(6), and stating, "Deeply rooted ambiguity in the nature and justification of the political question doctrine has prevented clear classification of the appropriate type of dismissal in political question cases."). 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. (*See* ECF No. 18, at 3-4; ECF No. 30, at 5-6; ECF No. 51, at 2.)

B. Federal Rule of Civil Procedure 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a claim for lack of subject-matter jurisdiction. Rule 12(b)(1) challenges are generally presented in one of two forms: "[t]he moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (citation and quotation marks omitted). Where, as here, the defendant's motion to dismiss presents a facial attack on the existence of subject-matter jurisdiction, "the district court must accept the allegations in the complaint as true . . . and construe the complaint in favor of [the plaintiffs]." *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001); *see also Warth v. Seldin*, 422

U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, . . . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). However, "[t]he burden of establishing subject matter jurisdiction is on the party asserting jurisdiction." *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008).

C. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." In evaluating such a motion, a court must "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). In ruling on such a motion, the dispositive inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quotation marks omitted).

III. ANALYSIS

The Court begins its analysis by evaluating Plaintiffs' standing to bring this action, and then proceeds to discuss whether the political question doctrine bars this action, in addition to the other

arguments raised in Defendant's Motion to Dismiss. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974).[15]

A. Standing

1. Operative Complaint's Allegations Regarding Standing

The Operative Complaint contains the following allegations regarding various Plaintiffs' purported standing to bring this action:

- "Several plaintiffs . . . hold[] public office in certain state and local governmental bodies. The offices held by these plaintiffs are relevant to their standing in the case." (ECF No. 36, ¶ 9.)
- "In [Andy Kerr's] individual capacity as a citizen of the State of Colorado and in his capacity as a State Representative, he has standing to challenge the

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[15] In *Schlesinger*, the Court stated,

> [T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines . . . . Each of these doctrines poses a distinct and separate limitation, so that either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party. The more sensitive and complex task of determining whether a particular issue presents a political question causes courts . . . to turn intially, although not invariably, to the question of standing to sue.

418 U.S. at 215 (citations omitted).

constitutionality of the TABOR amendment." (*Id.* ¶ 10.)

- "Certain plaintiffs in this case are past or sitting elected representatives in the General Assembly of the State of Colorado. As such, they have a direct and specific interest in securing to themselves, and to their constituents and to the state, the legislative core functions of taxation and appropriation. Other plaintiffs in this case include officers of counties, districts and municipalities which are dependent, under the state constitution, on the power of the legislature and their own powers to tax and appropriate." (*Id.* ¶ 43.)

- "Certain plaintiffs in this case are past or sitting elected officials of counties, cities, and school districts in the State of Colorado, jurisdictions whose abilities to tax are eliminated by TABOR." (*Id.* ¶ 44.)

- "Certain plaintiffs in this case are or have been educators employed by the State of Colorado or by various school districts. In addition to their interests as citizens of the state, they also have a specific interest in assuring that the legislature of the state can discharge its responsibilities to tax for the purpose of adequately funding core education responsibilities of the state as provided in Article IX, Section 2 of the Colorado Constitution." (*Id.* ¶ 45.)

- "Certain plaintiffs in this case are citizens of the State of Colorado, having a specific, protectable interest in assuring that their representatives can discharge the inherently legislative function of

taxation and appropriation and an interest in assuring that the State of Colorado has a Republican Form of Government, as required by the United States Constitution." (*Id.* ¶ 46.)

2. Summary of Parties' Arguments Regarding Standing

In terms of the Legislator-Plaintiffs, Defendant argues that those Plaintiffs do not have standing to assert their claim that TABOR has caused a diminution of their political power, analogizing this case to *Raines v. Byrd*, 521 U.S. 811 (1997), and distinguishing *Coleman v. Miller*, 307 U.S. 433 (1939). (ECF No. 51, at 5-7.) Plaintiffs, on the other hand, argue that the Legislator-Plaintiff have standing because "TABOR directly impacts their ability to fulfill their official responsibilities." (ECF No. 30, at 8.) The Legislator-Plaintiffs argue that their claim is akin to the claim at issue in *Coleman*, and distinguishable from that in *Raines*. (*Id.* at 8-9 & n.5.) The Court requested further briefing from the parties' regarding *Raines*'s applicability *vel non* to this action (ECF No. 70, at 3), which the parties have provided (ECF No. 72, at 4-8; ECF No. 73, at 13-16).

In terms of citizen standing, Defendant argues that Plaintiffs as citizens of Colorado do not have standing because their claim is "a generally available grievance about government – claiming only harm to [their] and every citizen's interest in proper application of the Constitution and laws . . . ." (ECF No. 18, at 15-16 (quoting *Lance v. Coffman*, 549 U.S. 437, 439 (2007)).) In response, Plaintiffs liken their claim of citizen standing to *Flast v. Cohen*, 392 U.S. 83 (1968), in which taxpayers bringing an Establishment Clause challenge

were found to have standing. (ECF 30, at 10-11.) Defendant argues that *Flast*, a narrow exception to the general rule that taxpayers do not have standing, is inapplicable. (ECF No. 51, at 8-11.) The Court requested further briefing from the parties' regarding *Lance*'s applicability to this action (ECF No. 70, at 3), which the parties have provided (ECF No. 72, at 9-14; ECF No. 73, at 10-13).

The parties' original briefing on the Motion to Dismiss focused only on legislative standing and citizen standing. Given the allegation in the Operative Complaint regarding the standing of educators (ECF No. 36, ¶ 45), the Court asked Plaintiffs to clarify whether they were alleging standing based on injury to educators, and asked the parties to brief whether standing would exist on that basis (ECF No. 70, at 3). In the supplemental briefing, Plaintiffs clarified that they do seek standing on that basis, and both sides provided argument on that issue. (ECF No. 72, at 14-17; ECF No. 73, at 16-19.)

The parties also disagree as to whether TABOR caused the injuries alleged, and whether a ruling in Plaintiffs' favor would redress those alleged injuries. (ECF No. 18, at 17-18; ECF No. 30, at 12-14; ECF No. 51, at 11-13.)

3. General Rules of Constitutional Standing

Article III of the United States Constitution limits the jurisdiction of federal courts to "[c]ases" and "[c]ontrover[ies]." U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or

controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The gist of the question of standing" is whether the plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Standing "is perhaps the most important of the[] doctrines" limiting the federal judicial power. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

"[T]he irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered a "concrete and particularized" injury that is "actual or imminent" (*i.e.*, an "injury in fact"), (2) there must be "a causal connection between the injury and the conduct complained of," and (3) it must be "likely . . . that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (quotation marks omitted); *see also Allen*, 468 U.S. at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.")

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

> At the pleading stage, general factual allegations of injury resulting from the

> defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Id. (citations, quotation marks, and brackets omitted).

Also,

> [w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Id. at 561-62.

4. Legislative Standing – "Injury in Fact"

The Court first addresses the issue of whether the Legislator-Plaintiffs have standing to bring this action.

a. Governing Case Law

(1) U.S. Supreme Court Cases

The United States Supreme Court has infrequently addressed the issue of legislative standing. One of the few cases in which it did so is *Coleman v. Miller*, 307 U.S. 433 (1939). There, twenty Kansas State Senators, among others, brought suit after a vote in the Kansas State Senate deadlocked at 20-20 (which ordinarily would mean the measure would not pass), but the State's Lieutenant Governor cast a deciding vote passing the measure. *Id.* at 435-36. The Court found standing based on the complete nullification of the effectiveness of those Senators' votes, explaining, "[the plaintiffs'] votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. The Court in *Coleman* ultimately ruled against the plaintiffs on the merits, affirming the Kansas Supreme Court's denial of mandamus. *See id.* at 437-56.

The Supreme Court more recently took up the issue of legislative standing in *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, six members of the United States Congress challenged the constitutionality of the Line Item Veto Act (the "Act"), which had been passed by Congress and signed into law by the President in 1996. *Id.* at 814. The six plaintiffs had voted against passage of the Act. *Id.* The Court held that the plaintiffs lacked constitutional standing to bring the action because, among other reasons discussed in more detail below,

the alleged injury constituted only an abstract dilution of institutional legislative power. *Id.* at 818, 825-26, 830.[16]

The Supreme Court in *Raines* began its analysis by laying out fundamental rules of standing, *id.* at 818-20, and emphasized that "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 other two branches of the Federal Government was unconstitutional," *id.* at 820. Later in the decision, the Court again emphasized the importance of separation-of-powers concerns in the standing analysis, evaluating in depth instances during the nation's history when Members of Congress or the Executive declined to entangle the Judiciary in confrontations between Congress and the Executive branch. *Id.* at 826-28.

The *Raines* Court then proceeded to analyze *Coleman* and another prior Supreme Court case in which a legislator was found to have standing, *Powell*

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[16] Notably, the Act specifically authorized Members of Congress to bring a legal action challenging the constitutionality of the Act. *See id.* at 815-16. As the Court in *Raines* pointed out, however, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 820 n.3. Rather, "Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality [only serves to] eliminate[] any prudential standing limitations." *Id.*; *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who would otherwise be barred by prudential standing rules."). *Raines*, therefore, dealt only with the issue of whether the plaintiffs there met the minimum constitutional requirements for standing.

v. McCormack, 395 U.S. 486 (1969). In *Powell*, the Supreme Court held that the exclusion of a member of Congress from the House of Representatives (with a consequent loss of salary) presented a live "case or controversy." 395 U.S. at 512-14 & n.35. *Raines* distinguished *Powell* on two grounds. First, the Court stated that, unlike in *Powell*, the plaintiffs in *Raines* "ha[d] not been singled out for specially unfavorable treatment . . . . [Instead t]heir claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." 521 U.S. at 821. Second, the Court stated that, unlike in *Powell*, the *Raines* plaintiffs' "claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete." *Id.* The Court in *Raines* emphasized that the plaintiffs were suing in their official capacities rather than based on some private injury. *Id.*

Raines then turned to *Coleman*, identifying *Coleman* as "[t]he one case in which we have upheld standing for legislators (albeit *state* legislators) claiming an institutional injury." *Id.* (emphasis in original). After evaluating *Coleman*, the Court in *Raines* stated,

> [O]ur holding in *Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

521 U.S. at 823 (citation omitted). The Court then proceeded to explain why *Coleman* provided "little meaningful precedent" for the situation presented in *Raines*:

> [The *Raines* plaintiffs] have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote. Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified. In the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process.

Id. at 824. The Court ultimately stated, "There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step." *Id.* at 826.

In conclusion, the Court in *Raines* stated:

> In sum, appellees have alleged no injury to themselves as individuals (contra, *Powell*), the institutional injury they allege is wholly abstract and widely dispersed (contra, *Coleman*), and

> their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.
>
> We therefore hold that these individual members of Congress do not have a sufficient "personal stake" in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.

Id. at 829-30 (some citations omitted).

(2) Tenth Circuit Case

In *Schaffer v. Clinton*, 240 F.3d 878 (10th Cir. 2001), the Tenth Circuit discussed *Raines* and legislative standing. In *Schaffer*, Bob Schaffer, a member of the U.S. House of Representatives, brought suit challenging a statute authorizing cost of living adjustments ("COLAs") for Members of Congress, claiming that the statute violated the Twenty-Seventh

Amendment to the Constitution.[17] Although the statute granted Congressman Shaffer a pay *increase*, he brought suit claiming that the unconstitutional salary increase was "personally offensive and professionally harmful to him, as well as damaging to his political position and his credibility among his constituency." *Id.* at 883 (quotation marks and brackets omitted). Although that case presented an alleged injury quite different than the one alleged here, the Tenth Circuit's discussion of *Raines* is notable:

> Like the plaintiffs in *Raines*, Congressman Schaffer has not alleged a sufficiently personal injury to establish standing because he has not been singled out for specially unfavorable treatment as opposed to other Members of the House of Representatives. Instead the COLAs, which apply to every Representative, necessarily damage all Members of Congress equally. Congressman Schaffer's allegations of harm to his political position and his credibility among his constituency are even more abstract than the assertion of a dilution of institutional legislative power the Court found wanting in *Raines*. Finally, as in *Raines*, there has been no nullification of Congressman Schaffer's ability to vote on the COLAs; if he received a COLA . . ., that is simply because he lost that vote. The [COLA] has no effect on either Congressman Schaffer's ability to press for a change in the law

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[17] The Twenty-Seventh Amendment provides, "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. amend. XXVII.

> setting Representatives' salaries or for Congress to amend the COLA provisions pursuant to the normal legislative process.

Id. at 885-86 (citations, quotation marks, brackets, and ellipses omitted).

b. Analysis of Whether the Legislator-Plaintiffs Have Alleged a Cognizable Injury in Fact

Raines identifies numerous issues to consider in determining whether legislators in a particular case have standing: whether the alleged injury is concrete or abstract; whether the legislators allege an institutional injury in their official capacities that is common to all members of the legislative body; whether the legislators have been authorized to bring suit on behalf of the legislative body; whether separation-of-powers concerns are present; whether the legislators have an adequate internal remedy within the legislative body; and whether declining standing to the legislators would foreclose any constitutional challenge to the disputed measure. *See* 521 U.S. at 829. *Raines* also specifically stated, "Whether the case would be different if any of these circumstances were different [than those present in *Raines*] we need not now decide." *Id.* at 829-30. The Court will analyze these important standing considerations in turn.

(1) Concreteness of Injury

Standing jurisprudence makes clear that the concreteness (versus abstractness) of an injury is one of the more important, if not *the* critical issue, governing the standing question. *See Lujan*, 504 U.S. at 560; *Schlesinger*, 418 U.S. at 222 ("To permit a

complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'"); *Okpalobi v. Foster*, 190 F.3d 337, 352 (5th Cir. 1999) (stating that "the fundamental goal of the standing inquiry" is to "ensur[e] that litigants have a concrete stake in the outcome of the proceedings such that the issue will be framed properly").

In *Raines*, the Court did not engage in any extended discussion of why the injuries alleged by the plaintiffs there were too abstract to confer standing. The Court's entire discussion regarding the nature of the injuries alleged was made during the process of distinguishing *Coleman*:

> [A]ppellees rely heavily on our statement in *Coleman* that the Kansas senators had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." Appellees claim that this statement applies to them because their votes on future appropriations bills (assuming a majority of Congress does not decide to exempt those bills from the Act) will be less "effective" than before, and that the "meaning" and "integrity" of their vote has changed. . . . Even taking appellees at their word about the change in the "meaning" and "effectiveness" of their vote for appropriations bills which are subject to the

> Act, we think their argument pulls *Coleman* too far from its moorings. Appellees' use of the word "effectiveness" to link their argument to Coleman stretches the word far beyond the sense in which the Coleman opinion used it. There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here.

Raines, 521 U.S. at 824-26. *Raines* based its holding, in part, on the ultimate conclusion that "institutional injury [that plaintiffs] allege is wholly abstract and widely dispersed (contra, *Coleman*) . . . ." *Id.* at 829.[18]

In the Court's view, it is significant that *Raines* did not overrule *Coleman*, but instead reaffirmed that the "level of vote nullification" at issue in *Coleman* was

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[18] The Court's emphasis on the "widely dispersed" nature of the injury appears to be tied to the fact that it is an institutional injury. Notably, though, in the Supreme Court's jurisprudence, this idea of a widely dispersed injury not being cognizable appears to have only been consistently applied in the context of citizen or taxpayer suits. *See, e.g.*, *Warth*, 422 U.S. at 499 ("[W]hen 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."). Importantly, the Supreme Court in *Akins* stated, "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" 524 U.S. at 24. Given that a sufficiently concrete injury can confer standing even if shared by all or a vast majority of Americans, this Court would be hard-pressed to deny standing if a sufficiently concrete injury existed, just because it was "widely shared" by 100 Colorado General Assembly members.

sufficient to confer standing. *Coleman* involved a vote on *one measure* in which legislators' votes were "nullified." This action, on the other hand, challenges a state constitutional provision in effect for nearly twenty years, under which members of the Colorado General Assembly have not had the power to increase tax rates or approve new taxes without voter approval.[19] In the Operative Complaint, Plaintiffs allege:

- "An effective legislative branch must have the power to raise and appropriate funds. When the power to tax is denied, the legislature cannot function effectively to fulfill its obligations in a representative democracy and a Republican Form of Government." (*Id.* ¶ 7.)
- "[T]axation and appropriation" are "legislative core functions." (*Id.* ¶ 43.)
- "[TABOR] removes entirely from the Colorado General Assembly any authority to change state law concerning taxation to replace or increase existing revenue, and prohibits the General Assembly from raising funds by any other means, including borrowing. Moreover, the interaction of the provisions of TABOR may actually force existing taxes to be decreased without any action of the General Assembly." (*Id.* ¶ 80.)

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[19] Notably, in *Raines*, the plaintiffs brought suit *the day after* the Line Item Veto Act was passed, *see* 521 U.S. at 814, and so did not even wait until the President had exercised his new powers under the Act.

- "A fully effective legislature is an essential component of a Republican Form of Government, as guaranteed to each state by [the Guarantee Clause]. By removing the taxing power of the General Assembly, the TABOR amendment renders the Colorado General Assembly unable to fulfill its legislative obligations under [the Guarantee Clause]." (*Id.* ¶ 83.)

- "The TABOR amendment has made the General Assembly ineffective by removing an essential function, namely the power to tax. In so doing, the TABOR amendment violates the Enabling Act." (*Id.* ¶ 84.)

At this early stage of the proceedings, the Court *must* accept as true that the Legislator-Plaintiffs have suffered a concrete injury. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."); *see also Am. Tradition Inst. v. State of Colorado*, --- F. Supp. 2d ---, 2012 WL 2899064, at *6-*7 (D. Colo. July 17, 2012) (emphasizing importance of the stage of proceedings in denying motion to dismiss complaint based on claim that the plaintiffs lacked standing).

As alleged, this injury is of a greater magnitude than the single instance of vote nullification in *Coleman*, and is far more concrete than the alleged injury in *Raines*. The injury alleged here is a concrete injury involving the removal of a "core" legislative power of the General Assembly. The allegations of the Operative Complaint are of such a magnitude that the

term "dilution of institutional power" appears insufficient to describe the alleged injury TABOR has effected on Plaintiffs' core representative powers. More importantly, the allegations of the Operative Complaint detail anything but an *abstract* dilution of power. As a consequence, the concreteness of the injury alleged here weighs in favor of finding standing.[20]

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[20] The cases cited by Defendant are distinguishable. In *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333 (D.C. Cir. 1999), the court applied *Raines* and denied standing to state legislators challenging a federal statute that took away the power of the Alaska Legislature to control hunting and fishing on federal lands within Alaska. At this early stage of these proceedings, this Court can without hesitation distinguish the relatively narrow removal of the power over hunting and fishing on the portions of land in Alaska owned by the federal government, as being of less civic import than the alleged wholesale removal of the Colorado legislature's "core functions" of taxation and appropriation.

Defendant also unpersuasively likens this case to *Daughtrey v. Carter*, 584 F.2d 1050 (D.C. Cir. 1978). There, two legislators brought suit challenging the Executive Department's alleged failure to enforce a law that the legislature had passed. The Court denied standing on the ground that "[t]he failure or refusal of the executive branch to execute accomplished legislation does not affect the legal status of such legislation; nor does it invade, usurp, or infringe upon a Congressman's power to make law. [citation omitted] Once a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public." *Id.* at 1057. Here, however, the claim is that the power to legislate itself has been taken away.

Also, as previously mentioned, in *Schaffer*, a member of the House of Representatives alleged injuries based on a law being "personally offensive and professionally harmful to him, as well as damaging to his political position and his credibility among his constituency." 240 F.3d at 883. The Tenth Circuit denied standing, in part, on the conclusion that those asserted harms were "even more abstract" than those at issue in *Raines*. *Id.* at 885. Here,

With respect to the *nature* of the injury alleged by the Legislator-Plaintiffs and its effect on standing, *Lujan* is telling. There, the Supreme Court specifically emphasized:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Lujan, 504 U.S. at 561-62. Other courts have applied this holding from *Lujan* in finding standing for legislators or legislative bodies. *See Miller v. Moore*, 169 F.3d 1119, 1122-23 (8th Cir. 1999) (finding standing where Nebraska voters passed ballot initiative intended to punish legislators who did not support and actively pursue the passage of 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) (holding that House of Representatives had standing to challenge the Census Bureau's plan to use statistical sampling in the Census "because the House's composition will be affected by the manner in which the Bureau conducts the Census," and citing this holding from *Lujan*).

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however, the alleged harm is significantly more concrete than that in *Raines*.

Here, the allegations of the Operative Complaint indicate that TABOR was specifically designed to take away from the General Assembly "the power to tax and [to] arrogat[e] that power to [the voters] themselves." (ECF No. 36, ¶ 1.) The Legislator-Plaintiffs, along with other members of the Colorado General Assembly, were the targeted objects of TABOR's design. *See Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994) ("[TABOR's] requirement of electoral approval is not a *grant* of new powers or rights to the people, but is more properly viewed as a *limitation* on the power of the people's elected representatives.") (emphasis in original). That makes this case different than *Raines*, where the challenged action was the passage of a statute where the plaintiffs, although on the losing side of the vote, were not the targets of the action being challenged.

Thus, the concreteness and nature of the injury alleged here is distinguishable from the abstract injury alleged in *Raines*. Moreover, the Court finds that the injury alleged here is of greater magnitude than the single instance of vote nullification in *Coleman*. Both of these considerations weigh in favor of finding that the Legislator-Plaintiffs have standing in this action.[21]

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[21] It would be overly formalistic to deny standing on the ground that the Colorado General Assembly has never unsuccessfully attempted to circumvent TABOR by, for example, passing a tax bill and attempting to coax the Governor's office to sign the bill into law without first submitting the bill to the voters for approval, but ultimately being prevented from doing so by the Colorado Attorney General.

(2) Institutional Injury, Suing in an Official Capacity, and Authorization to Represent the Legislative Body

Raines repeatedly emphasized the importance of the fact that the plaintiffs there alleged an institutional injury in their official capacities, and not any personal injury differentiable from the injury suffered by all Members of Congress. *See, e.g.*, 521 U.S. at 821 (in distinguishing *Powell*, the Court stated, "[A]ppellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally."). The *Raines* Court also attached "some importance" to the fact that the plaintiffs there had not been authorized to represent the legislative bodies in which they served. *Id.* at 829. These concepts are obviously inter-related because an institutional legislative injury might be more appropriately raised by the legislative institution itself, or by legislators authorized to represent the legislative institution.

As in *Raines*, the Legislator-Plaintiffs here clearly base their claim of standing on an institutional injury: TABOR's removal of the Colorado General Assembly's power to increase tax rates or impose new taxes without voter approval. The Legislator-Plaintiffs also clearly bring their claims in their official capacities as state legislators. (ECF No. 36, ¶¶ 9-10 ("The offices held by [the Legislator-Plaintiffs] are relevant to their standing in the case. . . . [They bring this action] in

[their] capacity as [] State Representative[s].") The Legislator-Plaintiffs also concede that they have not been authorized to bring this action on behalf of the General Assembly. (*Id.* ¶ 9 ("[Plaintiffs do] not imply that the governmental bodies have themselves taken any official position regarding this litigation nor that these plaintiffs speak for those governmental bodies regarding this litigation.").

The law remains unclear regarding the situations in which an institutional legislative injury (where the plaintiffs legislators are not authorized to represent the legislative body) confers standing on legislators, and when it does not. Notably, in *Coleman*, the plaintiffs alleged an injury suffered in their official capacities, of an institutional nature, and they had not been authorized to bring suit on behalf of the Kansas Senate. The Supreme Court in *Raines* could have overruled *Coleman* and laid down a *per se* rule that legislators alleging an institutional injury, where the legislators have not been authorized to bring suit on behalf of the legislative body, never have standing to pursue such claims. Instead, *Raines*'s treatment of *Coleman* was significantly more limited. After analyzing ways in which *Coleman* was distinguishable (including the presence or lack of an adequate internal legislative remedy), the Court in *Raines* expressed concern about pulling *Coleman* "too far from its moorings," and emphasized how significantly different the concreteness and magnitude of the injuries were. *Raines*, 521 U.S. at 825-26 ("There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."). Also, although the *Raines* Court held that *Coleman* stands "at most"

for the proposition that legislators have standing where their votes have been completely nullified (because their votes would have been successful but for the challenged action), that does not mean legislative standing can *only* be found to exist if the circumstances in *Coleman* are present. By analyzing *Coleman* in these ways, the Court in *Raines* provided less guidance to future lower courts, including this Court, regarding when an institutional legislative injury does or does not confer standing.

Given *Raines*'s discussion of *Powell*, however, and much of the case law interpreting *Raines*,[22] the institutional injury alleged by the Legislator-Plaintiffs here, and the fact that they have not been authorized to bring suit on behalf of the Colorado General Assembly, draws some skepticism from this Court regarding whether the injury alleged can provide a legitimate basis for standing. But because *Raines* did not provide clearer guidance, and because of the concreteness of the injury alleged here, the Court finds it appropriate to also evaluate the other factors identified in *Raines* to determine whether they weigh in favor or against finding legislative standing in the circumstances presented here. *See Raines*, 521 U.S. at 829-30 ("Whether the case would be different if any of

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[22] As Defendant points out, however, numerous lower courts since *Raines*, in denying legislative standing, have placed great weight on the fact that what was being alleged was an institutional injury common to all members of the legislative body and/or one involving a mere loss of political power. *See, e.g.*, *Schaffer*, 240 F.3d at 885; *Alaska Legislative Council*, 181 F.3d at 1336-38; *Chenoweth v. Clinton*, 181 F.3d 112, 115-16 (D.C. Cir. 1999); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 116-18 (D.D.C. 2011).

these circumstances were different we need not now decide.").

(3) Separation-of-Powers and Federalism Concerns

In *Raines*, the Court's emphasis on separation-of-powers concerns was significant. Overlaying the entirety of the decision was the Court's initial statement that

> 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 other two branches of the Federal Government was unconstitutional. The law of Article III standing is built on a single basic idea – the idea of separation of powers. In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency.

Id. at 819-20 (citations and quotation marks omitted). Also, later in the decision, the Court engaged in a detailed analysis of different times in the nation's history when Members of Congress or the Executive declined to entangle the Judiciary in confrontations between Congress and the Executive Branch. *Id.* at 826-28. This historical discussion underscores the importance of separation of powers in the *Raines* Court's analysis. Further, it is notable that the *Raines* Court's initial statement regarding *Coleman* emphasized that *Coleman* was brought by state

legislators, not federal legislators, further reiterating the importance of federal separation-of-powers concerns in the Court's analysis. *Id.* at 821 ("The one case in which we have upheld standing for legislators (albeit *state* legislators) claiming an institutional injury is *Coleman* . . . .) (emphasis in original).

Indeed, the vast majority of case law addressing legislative standing involve cases in which the federal Judiciary is asked to resolve a dispute between the federal Executive and Legislative Branches.[23] Here, however, this Court is not being asked "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 819-20. Instead, like in *Coleman*, this Court is being asked to resolve a dispute involving a state legislature.[24]

It is significant, too, that this Court is also not being asked to resolve a dispute between separate branches

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[23] Not surprisingly, for this reason most of these cases come out of the D.C. Circuit.

[24] *See also Harrington v. Bush*, 553 F.2d 190, 204 n.67 (D.C. Cir. 1977) ("The major distinguishing factor between *Coleman* and the present case lies in the fact that the plaintiffs in *Coleman* were state legislators. A separation of powers issue arises as soon as the *Coleman* holding is extended to United States legislators. If a federal court decides a case brought by a United States legislator, it risks interfering with the proper affairs of a coequal branch."). *But see Alaska Legislative Council*, 181 F.3d at 1337-39 (applying *Raines* to deny standing to state legislators challenging a federal statute that took away the power of the Alaska Legislature to control hunting and fishing on federal lands within Alaska).

of Colorado government.[25] Articles IV, V, and VI of the Colorado Constitution create three "distinct departments" of the Colorado government, the Executive Department, the Legislative Department, and the Judicial Department, respectively. *See* Colo. Const. arts. III, IV, V, VI. This action involves a solely *intra*-branch dispute involving *only* the Colorado Legislative Department: Article V of the Colorado Constitution – the Article creating the Legislative Department – not only creates the Colorado General Assembly, it also reserves to the Colorado electorate the initiative and referendum power as a legislative power. *See* Colo. Const. art. V, § 1, cls. (1)-(3). This dispute, therefore, is between two components of the same Legislative Department.

The fact that this action does not present any separation-of-powers concerns, either between separate branches of the federal government or separate branches of the Colorado government, does not end this Court's inquiry into whether an equivalent concern warrants declining to hear this case: federalism.[26] *See*

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[25] *See Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 578 n.5 (8th Cir. 1998) ("Justice Souter [in his concurring opinion in *Raines*] cautioned against courts embroiling themselves in a political interbranch controversy between the United States Congress and the President. [citation omitted] Federal courts should exercise this same caution when, as in this case, there exists a political interbranch controversy between state legislators and a state executive branch concerning implementation of a bill.").

[26] *Raines* declined to address appellants' alternative arguments that *Coleman* should be distinguished because "the separation-of-powers concerns present in such suit were not present in *Coleman*,

13B Wright & Miller, Federal Practice & Procedure § 3531.11.3 (3d ed. 2012) ("State legislator standing raises issues similar to the issues of congressional plaintiff standing, although the separation-of-powers concerns are much diminished and largely replaced by concerns of federalism.").

> [Federalism involves] the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments . . . .

Younger v. Harris, 401 U.S. 37, 44 (1971). Where, however, it is state action which allegedly violates the U.S. Constitution, federalism concerns are reduced. *See Valdivia v. Scharzenegger*, 599 F.3d 984, 991 n.6 (9th Cir. 2010) ("[P]rinciples of federalism do not permit a state to violate what this court has already deemed to

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and since any federalism concerns were eliminated by the Kansas Supreme Court's decision to take jurisdiction over the case." *Raines*, 521 U.S. at 824 n.8.

be a constitutionally-protected right."); *Mackin v. City of Boston*, 969 F.2d 1273, 1275-76 (1st Cir. 1992) ("[F]ederal courts, in mulling whether to relax or abandon their supervision over the operation of local governmental units, should take federalism concerns into account, ever mindful that the legal justification for displacement of local authority is a violation of the Constitution by the local authorities.") (quotation marks and ellipses omitted).

In this regard, the Court finds it significant that TABOR was passed nearly twenty years ago.[27] In *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964), the Supreme Court emphasized that a federal court might properly wait a short period to allow a state's electorate to remedy an unconstitutional measure passed by ballot initiative, but that otherwise the federal court must act to remedy the constitutional violation:

> Courts sit to adjudicate controversies involving alleged denials of constitutional rights. While a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum, individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy . . . . [C]onstitutional rights

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[27] TABOR has only been modified since by Referendum C, which in no way affected the limitation on the General Assembly's power to increase tax rates or impose new taxes without voter approval.

> can hardly be infringed simply because a majority of the people choose that it be. . . . [T]he fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted . . . .

Id. at 736-37 (1964).[28]

At this stage of the proceedings, this Court must assume the validity of Plaintiffs' allegations that TABOR is unconstitutional, and their allegations regarding the importance of the constitutional rights at issue. *See Lujan*, 504 U.S. at 561. Given these accepted allegations, the fact that TABOR has been in effect for nearly twenty years counsels against the Court "staying its hand," and in favor of allowing the case to proceed without further delay.

With there being no separation-of-powers concerns in this case (unlike in *Raines*), and with federalism concerns diminished by the length of time TABOR has caused the alleged harms at issue (with those allegations being accepted as true at this stage of the

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[28] *See also Kean v. Clark*, 56 F. Supp. 2d 719, 727 (S.D. Miss. 1999) ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. . . . [Further,] it is irrelevant that a statutory restriction is based upon a constitutional provision enacted by petition. The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation.") (citations, quotation marks, brackets, and ellipses omitted).

proceedings), the Court finds that these considerations weigh in favor of finding legislative standing here.

(4) Whether Legislators Have an Adequate Internal Remedy

TABOR was passed by the Colorado electorate by ballot initiative, without any involvement of the Colorado General Assembly. (ECF No. 36, ¶ 1.) Also, significantly, TABOR is an amendment to the Colorado Constitution that can only be revoked or amended by a majority of Colorado voters. *See* Colo. Const. art. XIX, §§ 1, 2. The only power members of the Colorado General Assembly have to undo TABOR is to *propose* to Colorado voters that they pass a constitutional amendment or authorize a constitutional convention. *See id.* In order for the legislature to submit a proposed constitutional amendment to the Colorado electorate, an affirmative vote by two-thirds of each House of the General Assembly is required. *See id.* This leaves the Legislator-Plaintiffs in this case with little available remedy in the political process to undo TABOR, and no means by which to effect any change to the current TABOR regime by way of any of the legislature's remaining powers or prerogatives.

That distinction makes this case remarkably different from *Raines*. Indeed, in *Raines* the presence of an internal legislative remedy was one of the primary bases upon which the Court distinguished *Coleman*. *See* 521 U.S. at 824. The removal of the Colorado General Assembly's power to independently pass any tax legislation, without any recourse available to that Assembly, places this case in stark contradistinction to the facts in *Raines*, in which

various internal remedies were available to the plaintiffs.

Courts since the *Raines* decision have continued to emphasize the importance of the existence of a legislative remedy in legislative standing analysis. For example, in *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011), the court denied standing to legislators who sought to challenge the President's authorization of military action in Libya without congressional approval. Analyzing *Raines* and *Coleman*, the court concluded that for legislative standing to exist,

> plaintiff legislators must be without legislative recourse before they may turn to the courts to seek their desired remedy. . . . [The plaintiffs] have not demonstrated that they are without a legislative remedy. . . . By contending that their votes were nullified, despite seemingly acknowledging that they retain legislative remedies, the plaintiffs' arguments overlook the important role political remedies have in the standing analysis. In the end, the availability of effective political remedies goes to the very heart of the standing analysis . . . .

Kucinich, 821 F. Supp. 2d at 119-20.[29] Also, in *Russell*

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[29] Defendant cites *Kucinich* in support of the argument that the Legislator-Plaintiffs do not have standing here. (ECF No. 73, at 13, 15-16.) Indeed, the *Kucinich* decision also placed great weight on the fact that what was alleged there was an institutional injury and that the legislator plaintiffs had not been authorized to bring suit on behalf of their respective legislative bodies. 821 F. Supp. 2d at 116-18. However, the fact that in *Kucinich* an internal legislative remedy existed – and the fact that *Kucinich* placed so

v. Dejongh, 491 F.3d 130 (3d Cir. 2007), a Senator of the Virgin Islands challenged the Governor's appointment of Supreme Court justices on the ground that the Governor was untimely in submitting the nominations to the legislature for approval. The court distinguished cases in which there were no internal legislative remedies, stating, "the Legislature was free to confirm, reject, or defer voting on the Governor's nominees. The consequence of the Governor's late submission of the nominations was thus not to circumvent the Legislature, but to place the decision whether to confirm the nominees directly in their hands." *Id.* at 136. The Third Circuit in *DeJongh* also stated, "[C]ourts have drawn a distinction . . . between a public official's mere disobedience of a law for which a legislator voted – which is not an injury in fact – and an official's distortion of the process by which a bill becomes law by nullifying a legislator's vote or depriving a legislator of an opportunity to vote – which is an injury in fact." *Id.* at 135-36 (quotation marks omitted).

The importance of the presence of a potential internal legislative remedy makes sense, because this consideration is directly tied to federal separation-of-powers concerns. *See, e.g.*, *Leach v. Resolution Trust Corp.*, 860 F. Supp. 868, 875 (D.D.C. 1994) (stating that courts should be "reluctant to meddle in the internal affairs of the legislative branch" due to separation-of-powers concerns). If a legislator has an adequate

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much importance on this fact – makes *Kucinich* distinguishable on that basis. Also, like in *Raines*, separation-of-powers concerns existed in *Kucinich*, but do not exist here, further distancing *Kucinich* from the issues presented by the instant dispute.

internal remedy, he should not be challenging a decision of the legislature in an Article III court. Instead, he should work within his own legislature to enact a remedy. Those concepts are entirely inapplicable here. The fact that Colorado voters enacted TABOR in 1992, with members of the Colorado General Assembly having no effective recourse to legislatively prevent its passage or undo its effects, weighs heavily in favor of finding legislative standing in this case.

(5) Whether a Finding of No Standing Would Foreclose TABOR from Constitutional Challenge

Without discussing the issue during most of the decision, the Supreme Court at the end of the *Raines* decision also "note[d]" that its decision to deny legislative standing would not "foreclose[] the [Line Item Veto] Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)." 521 U.S. at 829. The weight of Supreme Court jurisprudence on this point, however, makes clear that this issue is irrelevant: standing cannot be found merely because there is no other plaintiff who would have standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) ("'[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.' This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit.") (quoting *Schlesinger*,

418 U.S. at 227); *United States v. Richardson*, 418 U.S. 166, 179 (1974) ("It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."); *see also State of Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998). Given this precedent, the Court declines to place any weight on the possibility that if the Legislator-Plaintiffs were denied standing, there might be no other plaintiff who would have standing to bring an action in federal court challenging TABOR.

c. Conclusion on Injury in Fact

This action involves an alleged institutional legislative injury asserted by legislators suing in their official capacities, but who have not been authorized to bring this action on behalf of their respective legislative bodies. These factors are of considerable significance in determining whether the Legislator-Plaintiffs have standing to pursue this action.

It is there, however, that the similarity between this case and *Raines* ends. Unlike in *Raines*, this action involves a concrete, though dispersed, injury. Also, unlike *Raines*, there are no separation-of-powers concerns present in this case, concerns that lie at the heart of standing analysis. Moreover, given the circumstances of this dispute, federalism concerns do not weigh against hearing this case. And finally, unlike in *Raines*, the Legislator-Plaintiffs here are without meaningful legislative recourse. All of these factors, especially when considered together, weigh in favor of

finding that the Legislator-Plaintiffs have standing to pursue this action.

The Court therefore concludes that the Legislator-Plaintiffs have, at this early stage of the proceedings, advanced sufficient allegations of a cognizable injury in fact sufficient to confer Article III standing.

5. Legislative Standing – Causation and Redressability

Having determined that the Legislator-Plaintiffs have sufficiently alleged injury in fact, the Court has little trouble concluding that the remaining causation and redressability elements for legislative standing are also met at the pleading stage. *Lujan*, 504 U.S. at 561. Plaintiffs have sufficiently alleged that the passage of TABOR and resulting amendment of the Colorado Constitution directly and proximately caused the harm of which Plaintiffs complain: the removal of the Colorado General Assembly's power to raise tax rates or impose new taxes without separate voter approval. (ECF No. 36, ¶¶ 1, 6-8.) *See also* Colo. Const. art. X, § 20, cls. (2)(b), (4)(a). Thus, as Plaintiffs also allege, it would appear to easily follow that the invalidation of TABOR would remove the requirement that a tax rate increase or new tax passed by the General Assembly obtain separate voter approval prior to becoming law. *See Sierra Club v. Young Life Campaign, Inc.*, 176 F. Supp. 2d 1070, 1084-85 (D. Colo. 2001) (accepting general allegations of causation and redressability at the pleading stage); *Am. Tradition Inst.*, --- F. Supp. 2d ---, 2012 WL 2899064, at *7 (same).

The Court therefore concludes that, at this stage of the litigation, the Legislator-Plaintiffs have constitutional standing.

6. Prudential Standing of Legislator-Plaintiffs

Neither in the Motion to Dismiss nor in the Reply brief does Defendant specifically argue that the Court should dismiss this action based on prudential standing principles. Defendant's Supplemental Brief, however, contains a brief section arguing that dismissal is warranted based on the prudential standing principle that federal courts should refrain from resolving "abstract questions of wide public significance." (ECF No. 73, at 23-24.)

"Beyond the constitutional requirements [for standing], the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian Coll.*, 454 U.S. at 474; *see also Allen*, 468 U.S. at 751 (describing prudential standing principles as "judicially self-imposed limits on the exercise of federal jurisdiction"). First, "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. Second, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* And 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." *See*

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). *See also Allen*, 468 U.S. at 751 (summarizing all three prudential standing principles).

The prudential standing principle that federal courts should refrain from resolving "abstract questions of wide public significance" – the basis on which Defendant tardily seeks dismissal – might arguably be applicable to Plaintiffs' claim that they have standing as citizens of Colorado. However, the Court declines to reach the issue of whether Plaintiffs as citizens have standing in that capacity. (*See infra*.) In terms of the Legislator-Plaintiffs (five of whom have brought this action and where there are a total of 100 members of the Colorado General Assembly), the Court declines to dismiss this action based on the prudential standing principle barring adjudication of "abstract questions of wide public significance." Accepting the Operative Complaint's allegations as true, TABOR was an action targeted at the 100-member General Assembly. The injury alleged by the Legislator-Plaintiffs is not a "generalized grievance shared in substantially equal measure by *all or a large class of citizens*." *Warth*, 422 U.S. at 499 (emphasis added); *see also Akins*, 524 U.S. at 23 ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where *large numbers of Americans* suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.") (emphasis added). The prudential standing principle barring adjudication of "generalized grievances" or "abstract questions of wide public significance" does not apply to the Legislator-Plaintiffs' claims.

Likewise, no other prudential standing principle bars this action, and Defendant has not asserted as much. First, the principle prohibiting a litigant from raising another person's legal rights does not apply. The Operative Complaint's allegations, accepted as true, indicate that TABOR was directly targeted at taking away the power of members of the General Assembly to independently enact tax legislation. *See Lujan*, 504 U.S. at 561-62 ("[If] the plaintiff is himself an object of the action (or forgone action) at issue . . ., there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."). And second, the zone of interests test does not bar this action, at least at this early stage of the proceedings. In terms of that test, the Court has found 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. *See Largess v. Supreme Judicial Court for the State of Mass.*, 373 F.3d 219, 228 n.9 (1st Cir. 2004) (citing authorities discussing question of whether the Guarantee Clause confers judicially cognizable rights on individuals as well as states). As to the Supremacy Clause, the Tenth Circuit recently declined to decide who falls within the zone of interests test, but pointed to case law from other Circuits in which courts held that consideration of prudential standing is unnecessary in Supremacy Clause challenges. *See Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1170 (10th Cir. 2011) (citing cases). Given the lack of precedent, the Court will err on the side of finding that the zone-of-interests test is met here. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (stating that the zone of interests prudential

standing test "is not meant to be especially demanding" and that "we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of the doubt goes to the plaintiff") (quotation marks omitted).

On these grounds, the Court concludes that prudential standing principles do not bar the Legislator-Plaintiffs at this stage of the proceedings.

7. Standing of Other Plaintiffs

Because the Court holds that the Legislator-Plaintiffs have standing to pursue this action, the Court need not, and declines to, address whether any other Plaintiffs have standing. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977) ("[Because] we have at least one individual plaintiff who has demonstrated standing . . ., we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."); *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's."); *cf. Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009) ("Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so.").[30]

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[30] *See also U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 729 (1990); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).

B. The Political Question Doctrine

Defendants also argue that the political question doctrine bars all of Plaintiffs' claims brought in the Operative Complaint.

1. General Rules Regarding the Political Question Doctrine

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (stating that the political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government"); *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). The basis for the doctrine is that "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Japan Whaling*, 478 U.S. at 230 (quotation marks omitted). It is a "judicially created" doctrine (not an express constitutional or statutory provision), *In re Nazi Era Cases Against German Defendants Litig.*, 196 F. App'x 93, 97 (3d Cir. 2006), having its roots in case law dating back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

The six widely recognized tests for determining whether a particular case presents a non-justiciable

political question come from *Baker v. Carr*, 369 U.S. 186 (1962). There, the Court stated,

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found **[1]** a textually demonstrable constitutional commitment of the issue to a coordinate political department; or **[2]** a lack of judicially discoverable and manageable standards for resolving it; or **[3]** the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or **[4]** the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or **[5]** an unusual need for unquestioning adherence to a political decision already made; or **[6]** the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217 (bolded numbering added by this Court). The *Baker* Court continued,

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject

> as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.

Id. *Baker* further emphasized, "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.*; *see also id.* at 210-11 ("Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether [the political question doctrine applies] is itself a delicate exercise in constitutional interpretation . . . ."); *id.* at 210 ("the attributes of the [political question] doctrine . . . in various settings, diverge, combine, appear, and disappear in seeming disorderliness").

2. The Guarantee Clause Claim and the Political Question Doctrine

a. Summary of Parties' Arguments Regarding the Political Question Doctrine's Applicability to Plaintiffs' Guarantee Clause Claim

The parties' arguments, particularly those of Defendant, regarding the applicability *vel non* of the political question doctrine to this action focus on Plaintiffs' First Claim for Relief in the Operative Complaint, the Guarantee Clause Claim. Plaintiffs' Guarantee Clause claim alleges that, "[b]y removing the taxing power of the General Assembly, the TABOR amendment renders the Colorado General Assembly unable to fulfill its legislative obligations under a Republican Form of Government and violates the

guarantee of Article IV, Section 4 . . . .” (ECF No. 36, ¶ 82.)

In moving to dismiss Plaintiffs’ Guarantee Clause claim, Defendant argues that this case is directly on point with *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118 (1912), a U.S. Supreme Court case holding that a Guarantee Clause challenge to Oregon’s ballot initiative system was barred by the political question doctrine. Defendant also argues that all of the six tests identified in *Baker v. Carr* for whether a case presents a non-justiciable political question are met here.

In response, Plaintiffs (and the *amici* Professors) argue that *Pacific States* is distinguishable, because that case involved a challenge to Oregon’s entire ballot initiative process, while this case presents a far narrower challenge to only one particular measure passed by Colorado voters pursuant to their power of initiative. Plaintiffs (and *amici* Professors) also argue that none of the six *Baker* tests are met here.

b. The History of the Application of the Political Question Doctrine to Guarantee Clause Claims, and Whether Such Claims Are *Per Se* Non-Justiciable

The United States Supreme Court’s most recent pronouncement regarding the applicability of the political question doctrine to Guarantee Clause claims came in 1992 in *New York v. United States*, 505 U.S. 144 (1992). There, the Court reviewed the history of court decisions and other sources addressing the issue of whether Guarantee Clause claims are barred by the political question doctrine. *Id.* at 184-85. The Court

first pointed out a substantial line of cases, beginning with *Luther v. Borden*, 48 U.S. 1 (1849), that "metamorphosed into the sweeping asssertion" that Guarantee Clause claims are *per se* non-justiciable. *New* York, 505 U.S. at 184.[31] The Court then pointed out other cases (decided between 1875 and 1905) in which courts "addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable." *Id.* at 184-85. Further, the Court indicated that more recent authority "suggest[s] that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *Id.* at 185 (citing, *inter alia*, *Reynolds v. Sims*, 377 U.S. 533 (1964)). Ultimately, the Court did not resolve the question, stating, "We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, [it ultimately lacks merit]." *Id.*

This Court proceeds to conduct its own, albeit non-exhaustive, historical analysis of the case law on the topic. In *Luther v. Borden*, 48 U.S. 1 (1849) ("*Luther*"), the Supreme Court was asked to decide whether the charter government of Rhode Island, or a competing faction, was the legitimate government of Rhode Island. The Court ultimately held that the case could not be heard in the courts because "it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in

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[31] Also citing *Pacific States*, 223 U.S. 118; *Colegrove v. Green*, 328 U.S. 549 (1946); *Baker*, 369 U.S. 186; and *City of Rome v. United States*, 446 U.S. 156 (1980).

the State before it can determine whether it is republican or not." *Id.* at 42. The *Luther* Court also pointed out that the President had already recognized the charter government by agreeing to assist it with military force if the need should arise, and that courts in Rhode Island had also recognized the charter government's authority. *Id.* at 40, 43-44. The *Luther* Court further emphasized, among other things, that there were no judicially manageable standards to resolve the dispute, and that the Court was being asked to make a political decision. *Id.* at 41.

New York emphasized that the "limited" holding in *Luther* – that it rests with Congress to decide what government is the established one in a state – subsequently began "metamorphos[izing] into the sweeping assertion" that Guarantee Clause claims are *per se* non-justiciable. *New York*, 505 U.S. at 184; *see also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 753 (1994) ("[T]he hoary case said to establish the general nonjusticiability of the [Guarantee] Clause, *Luther v. Borden*, in fact establishes no such thing . . . .").

The next significant U.S. Supreme Court decision in this area is *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118 (1912) ("*Pacific States*"). This is the case focused on most heavily by the parties, with Defendant arguing that the case is on point, and Plaintiffs arguing that it is distinguishable. In that case, Pacific States Telephone & Telegraph Co. challenged a corporate tax passed by voter initiative. Through the framing of the issues, the U.S. Supreme

Court was asked to decide whether Oregon's entire voter initiative system violated the Guarantee Clause. The Court in *Pacific States* analyzed the *Luther* opinion and concluded that "[i]t was long ago settled that the enforcement of th[e] guaranty [of a republican form of government] belonged to the political department." *Id.* at 149. Applying *Luther*, the Court continued,

> [The] essentially political nature [of the attack on the statute here] is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power . . . but to demand of the state that it establish its right to exist as a state, republican in form.

Id. at 150-51. Based on this rationale, the Court held that the challenge to Oregon's ballot initiative system presented a non-justiciable political question. *Id.* at 151.

In *Colegrove v. Green*, 328 U.S. 549 (1946) ("*Colgrove*"), the Supreme Court was asked to intervene in a dispute regarding the apportionment of legislative districts within Illinois. The Court held that the issue was political and non-justiciable. "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to

secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." *Id.* at 556. Citing to *Pacific States*, the Court in *Colegrove* again enunciated the broad rule called into question in *New York*: "Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts." *Id.*

The next case discussing the justiciability of Guarantee Clause claims is the foundational case for the political question doctrine, *Baker v. Carr*, 369 U.S. 186 (1962) ("*Baker*").[32] There, the Court laid out the six (now widely recognized) tests for whether a case presents a non-justiciable political question. *Id.* at 217. The Court also repeatedly emphasized that the facts of each case must be scrutinized in determining justiciability. *See id.* ("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."). After reviewing other subject areas, the Court addressed Guarantee Clause cases, discussing *Luther* and its progeny, and stating that "the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question . . . ." *Id.* at 224; *see generally id.* at 218-26. There is language in *Baker* indicating the Court's belief, based on precedent, that Guarantee Clause claims are *per se* non-justiciable. *See id.* at 226-27 ("[T]he appellants might conceivably have added a claim under the Guarantee Clause. Of course, as we have seen, any reliance on that clause would be

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[32] Notably, *Baker* held to be justiciable the same type of claim – legislative apportionment – that was at issue in *Colegrove*.

futile."). However, there is other language to the contrary. *See id.* at 222 n. 48 ("Even though the [*Luther*] Court wrote of unrestrained legislative and executive authority under this Guaranty, thus making its enforcement a political question, the Court plainly implied that the political question barrier was no[t] absolute . . . ."). Further, it is important to note that *Baker* involved an equal protection claim, not a Guarantee Clause claim, so the Court's discussion of Guarantee Clause cases, albeit detailed, is clearly *dicta*. Nevertheless, *Baker* is much more widely recognized for setting forth the six governing tests for determining whether a particular claim presents a non-justiciable political question.

Between the *Baker* decision in 1962 and the 1992 *New York* decision, the Supreme Court did not address in detail the justiciability of Guarantee Clause cases. Two years after the *Baker* decision, the Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), cited *Baker* and stated, "*some* questions raised under the Guaranty Clause are nonjusticiable, where [they are] 'political' in nature and where there is a clear absence of judicially manageable standards." *Id.* at 582 (emphasis added). This is the case cited by the *New York* Court for the proposition that "[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. at 185.

That brings this Court back to the Supreme Court's most recent pronouncement of the issue in *New York*, in which the Supreme Court called into question the cases adopting a *per se* rule that Guarantee Clause claims are not justiciable. In addition to looking at

controlling precedent from the U.S. Supreme Court, this Court also looks for binding precedent from the Tenth Circuit. Significantly, two recent Tenth Circuit decisions have discussed the fact that *New York* called into question the idea that Guarantee Clause claims are *per se* non-justiciable. In *Kelley v. United States*, 69 F.3d 1503 (10th Cir. 1995), the Tenth Circuit described the *New York* decision, pointing out that "there has been some belief that violations of the Guarantee Clause cannot be challenged in the courts," but also pointing out that "it has [been] suggested, in more recent opinions, that this belief may be incorrect." *Id.* at 1510. Like *New York*, the Court in *Kelley* did not resolve the issue: "Assuming, without deciding, that plaintiffs' claim is justiciable, there appears to be no merit to it." *Id.* at 1511. Then, in *Hanson v. Wyatt*, 552 F.3d 1148 (10th Cir. 2008), the Tenth Circuit briefly identified *Colegrove*'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." *Id.* at 1163 (emphasis in original).[33]

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[33] It is notable that many courts, like *New York*, *Kelley*, and *Hanson*, have resolved cases on the merits rather than having to resolve the difficult question of whether any Guarantee Clause claims are justiciable, and if some are, which types of claims. *See, e.g.*, *City of New York v. United States*, 179 F.3d 29, 37 (2d Cir. 1999) (citing *New York*, and stating, "Even assuming the justiciability of this [Guarantee Clause] claim, [it lacks merit]."); *United States v. Vazquez*, 145 F.3d 74, 83 (2d Cir. 1998) (same); *Adams v. Clinton*, 90 F. Supp. 2d 27, 34 (D.D.C. 2000) (same); *see also State of Michigan v. United States*, 40 F.3d 817, 837 (6th Cir.

c. Discussion of Whether a *Per Se* Rule Would Be Properly Applied, and Whether *Pacific States* Controls, in this Action

New York, *Kelley*, and *Hanson* provide little to no guidance to this Court regarding whether the political question doctrine bars the particular Guarantee Clause claim being raised in this action, a claim based on unique allegations involving TABOR and its effects. However, given this recent U.S. Supreme Court and Tenth Circuit case law seriously calling into question the propriety of applying a *per se rule of non-justiciability* in Guarantee Clause cases, the Court determines that it cannot summarily conclude that Plaintiffs' Guarantee Clause claim is *per se* non-justiciable. *See Trimble v. Gordon*, 430 U.S. 762, 776

1994) (Guy, J., dissenting) ("I hesitate to reach the substantive question of the Guarantee Clause's effect on federal taxation. . . . The district court did not reach plaintiffs' main arguments, for it concluded that this was a nonjusticiable issue. . . . Just as the Supreme Court has declined to answer this difficult question, *see New York* . . ., I would decline here. I would leave it to the Supreme Court in the first instance to enter this constitutional thicket.").

Indeed, if possible, courts should "adhere to [the] wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law." *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 778 (2005). This consideration, alone, would not warrant allowing this case to proceed past the pleading stage into the burdensome discovery process. However, independent of this consideration, the Court concludes below that it is not appropriate to dismiss this action as non-justiciable at this early stage of the proceedings. Given that the case will proceed to the summary judgment stage, the Court notes that it may be able to resolve the case on the merits at that stage, rather than having to address this difficult constitutional question.

n.17 (1977) ("To the extent that our analysis in this case differs from [a previous case] the more recent analysis controls."); *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1102 (10th Cir. 2005) ("We . . . think it prudent to follow the Court's most recent pronouncement on the issue.").

The Court concludes that *Pacific States* is not controlling here. The way the issues were framed in *Pacific States* led the Court there to consider whether the entire voter initiative system in Oregon violated the Guarantee Clause. Similarly, Defendant in this case tries to characterize Plaintiffs' Guarantee Clause claim as challenging the entire initiative process in Colorado. (*See, e.g.*, ECF No. 18, at 2 ("[W]hile [Plaintiffs'] policy preferences lead them to focus their ire on one particular instance of direct democratic participation in Colorado, the Taxpayers' Bill of Rights, their arguments ultimately would require the Court to hold unconstitutional all forms of direct citizen lawmaking."). So framed, Defendant has little trouble arguing that *Pacific States* controls. Indeed, the Court would agree that it would be appropriate to apply *Pacific States* in an action brought under the Guarantee Clause challenging Article V, Section 1, Clause 2 of the Colorado Constitution, the clause reserving in Colorado voters the power of the initiative process.

This action, however, seeks not the invalidation of Colorado's ballot initiative system. Plaintiffs, in fact, seek only to invalidate *one particular measure* passed via the Colorado voter initiative process: TABOR. (*See* ECF No. 36, at 20-21 (prayer for relief seeking invalidation of the "TABOR AMENDMENT").) Invalidating Article X, Section 20 of the Colorado

Constitution will in no way affect Colorado voters' power of initiative codified in Article V, Section 1 of that Constitution. The Court cannot conclude that a challenge to the effects of TABOR itself should be equated with a challenge to the entire voter initiative process, at least at this stage of the proceedings, merely because both involve questions regarding how power is to be divided between the General Assembly and the Colorado electorate. While *Pacific States* has language that one can argue should be similarly applied to the power struggle involved here, the Court declines to read *Pacific States* that broadly.

Given that the Court declines to adopt a *per se* rule of non-justiciability in Guarantee Clause cases, and given that *Pacific States* is not controlling, the Court finds it appropriate to apply the widely-recognized *Baker* tests to determine whether Plaintiffs' Guarantee Clause claim is barred by the political question doctrine. *See Baker*, 369 U.S. at 217 ("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.").[34]

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[34] Indeed, both Plaintiffs and Defendant, and the *amici* Professors, conduct a thorough review of the *Baker* tests. (*See* ECF No. 18, 7-11; ECF No. 30, at 29-33; ECF No. 51, at 18-24; ECF No. 61, at 12-16.) At the very least this suggests Defendant's agreement that, if there is no *per se* rule of non-justiciability in political question cases, and if *Pacific States* does not govern, then the *Baker* tests should be applied.

d. The *Baker* Tests

(1) "A textually demonstrable constitutional commitment of the issue to a coordinate political department"[35]

Addressing the first *Baker* test of whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," Defendant argues that there is a textually demonstrable commitment of Guarantee Clause disputes to a coordinate political department, namely, Congress. (ECF No. 51, at 18-19.) Defendant purports to support that argument by citing to *Luther* and *Pacific States*, arguing that "[t]he Supreme Court has long been clear that the question of what constitutes a republican form of government is committed to Congress." (*Id.* at 19.) But "textually demonstrable" means demonstrable from the text of the constitution itself, not from case law interpreting the constitutional text. *See Nixon v. United States*, 506 U.S. 224, 228 (1993) ("[C]ourts must, in the first instance, interpret the text in question and determine whether and to

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[35] Some recent Supreme Court decisions have only identified the first two *Baker* tests in describing the test for whether the political question doctrine applies in a particular case, suggesting the importance of the first two tests. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) ("[A] controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.") (quotation marks and ellipses omitted); *Clinton v. Jones*, 520 U.S. 681, 700 n.34 (1997) (same); *Nixon v. United States*, 506 U.S. 224, 228 (1993) (same).

what extent the issue is textually committed [to a coordinate branch of government].") (emphasis added); *Powell*, 395 U.S. at 519-20 ("In order to determine whether there has been a textual commitment to a coordinate department of the Government, we must interpret the Constitution."). The language in case law precedent, even from the U.S. Supreme Court, does not make the commitment of an issue to a coordinate branch of government "textually demonstrable."

Although Defendant also baldly argues that "[t]he text of the Guarantee Clause . . . definitively commit[s] this question to Congress," that assertion is not correct. Again, the Guarantee Clause provides, "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." The implication in the Guarantee Clause that the "United States" will enforce this guarantee of a republican form of government in no way specifies whether enforcement will lie in the Legislative, Executive, or Judicial Department of the U.S. government. *See Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005) (stating that there was no textually demonstrable commitment to a coordinate political branch because "the text [in question] is silent" regarding any such commitment); *cf. Nixon*, 506 U.S. at 229-36 (holding that constitutional clause providing that "[t]he Senate shall have the sole Power to try all Impeachments" constituted a textually demonstrable commitment of that issue to the Senate). Also, importantly, the Guarantee Clause is included within Article IV of the Constitution, the Article entitled "The States." Thus, it does not fall under Article I (specifying Congress's powers), Article II (specifying the Executive's powers), or Article III (specifying the Judiciary's powers).

Plainly, there is no textually demonstrable commitment of this issue to Congress or to the Executive Department. Thus, this *Baker* test is not met and does not indicate the political question doctrine's applicability to this case.

(2) "A lack of judicially discoverable and manageable standards for resolving [the issue]"

The second *Baker* test, asking whether there are judicially discoverable and manageable standards for resolving a plaintiff's claim, gives this Court some pause.

As previously discussed, the U.S. Supreme Court has focused on the justiciability of Guarantee Clause challenges, providing little guidance to lower courts regarding actual standards for resolving Guarantee Clause claims on the merits. Also, in *Largess v. Supreme Judicial Court for the State of Mass.*, 373 F.3d 219 (1st Cir. 2004), the First Circuit pointed out that "scholars have interpreted . . . the Guarantee Clause in numerous, often conflicting, ways." *Id.* at 226 (citing various law review articles). The *Largess* Court also noted that "John Adams himself, twenty years after ratification of the Constitution, confessed that he 'never understood' what the Guarantee Clause meant and that he 'believ[ed] no man ever did or ever will.'" *Id.* at 226-27 (citing letter written by Adams in 1807). However, the *Largess* Court ultimately found sufficient standards for interpreting the Guarantee Clause, concluding that the plaintiffs' Guarantee Clause challenge in that case lacked merit. *See id.* at 227-29. Notably, the Independence Institute's *amicus* brief argues the merits of Plaintiffs' Guarantee Clause

claim, indicating its belief that there are sufficiently clear standards for dismissing Plaintiffs' Guarantee Clause claim on the merits. (ECF No. 21-1.) *See also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (stating that the judicially manageable standards for determining the constitutionality of the statute in question were evidenced by the detailed legal arguments made by both sides on the issue).

However, the foregoing discussion of this *Baker* test reflects the fact that the discussion is premature at this stage of the litigation. Resolving the issue of whether there are judicially discoverable and manageable standards for determining the merits of Plaintiffs' Guarantee Clause claim would *necessarily* require this Court to begin to wade into the merits of this dispute. Indeed, in *Largess*, the court stated, "[R]esolving the issue of justiciability in the Guarantee Clause context may also turn on the resolution of the merits of the underlying claim." 373 F.3d at 225. For obvious reasons, the Court declines to address the merits of Plaintiffs' Guarantee Clause claim based merely on the pleadings filed in this action. *See Shakman v. Democratic Org. of Cook Cnty.*, 435 F.2d 267, 271 (7th Cir. 1970) ("We do not view [the aforementioned] difficulties . . . as demonstrating 'a lack of judicially discoverable and manageable standards for resolving' the case or as requiring, at the pleading stage, a decision that plaintiffs' claim is not justiciable."); *Holtzman v. Richardson*, 361 F. Supp. 544, 551 (E.D.N.Y. 1973) (declining to evaluate whether there were judicially discoverable and manageable standards

for resolving a dispute because "the issue arises on a motion to dismiss the complaint on its face").[36]

At this early stage of the proceedings, the Court cannot resolve the issue of whether there will be judicially discoverable and manageable standards for evaluating Plaintiffs' Guarantee Clause claim. At the very least, the Court is comfortable at this early stage in concluding that this *Baker* test is not "inextricable from" this case. *See Baker*, 369 U.S. at 217 ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.").

(3) "The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"

The third *Baker* test asks whether it is possible for a court to resolve a plaintiff's claim "without [making] an initial policy determination of a kind clearly for nonjudicial discretion."

As to this test, Defendant's argument focuses entirely on Plaintiffs' motives in bringing this action – that Plaintiffs only brought this particular action

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[36] *See generally United Steelworkers of Am. v. Or. Steel Mills, Inc.*, 322 F.3d 1222, 1229 (10th Cir. 2003) ("Defendants . . . outline what must be proven to ultimately succeed on the merits, and not what is required at the pleading stage."); *Enriques v. Noffsinger Mfg. Co., Inc.*, 412 F. Supp. 2d 1180, 1183 (D. Colo. 2006) ("[Defendant's] argument, while perhaps appropriate at the merits stage with the benefit of discovery, is insufficient to dismiss the claim at the pleading stage, where a plaintiff's well-pleaded allegations must be accepted as true.").

because of their own values and judgments that TABOR is bad public policy. (ECF No. 18, at 8-9; ECF No. 51, at 20-21.) However, notwithstanding Plaintiffs' personal motivations for bringing this particular action, this *Baker* test concerns whether *the Court itself* will be required to make a policy determination in resolving the claims. The question of whether TABOR violates Colorado's obligation to maintain a republican form of government is a question requiring interpretation of the Guarantee Clause. A court's interpretation of the Constitution does not constitute a policy determination, but instead a legal determination that courts are well-positioned to resolve. *See Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *Powell*, 395 U.S. at 548 (in finding the political question doctrine inapplicable, the Court stated that resolving the claim at issue "would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law . . . .").

That makes this case entirely distinguishable from the types of cases involving non-justiciable policy determinations soundly committed to the political branches of government. *See, e.g.*, *Schroder v. Bush*, 263 F.3d 1169, 1774 (10th Cir. 2001) ("Appellants' request that courts maintain market conditions, oversee trade agreements, and control currency . . . would require courts to make [non-justiciable] policy determinations . . . ."); *Ad Hoc Comm. on Judicial Admin. v. Commonwealth of Massachusetts*, 488 F.2d 1241, 1245 (1st Cir. 1973) (finding non-justiciable a policy determination regarding the financing of the judicial branches, an issue that has "been left to the

people, through their legislature"); *Orlando v. Laird*, 443 F.2d 1039, 1044 (2d Cir. 1971) (in action challenging war in Vietnam, court stated, "[D]ecisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry.").

The Court thus finds that the third *Baker* test does not apply to the case at bar.

(4) "The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"

The fourth *Baker* test requires the Court to consider whether it is possible to undertake resolution of this action "without expressing lack of the respect due coordinate branches of government."

As to this test, Defendant first argues that the Court's consideration of Plaintiffs' Guarantee Clause claim would express a lack of respect due to the U.S. Congress. (ECF No. 18, at 9; ECF No. 51, at 22-23.) In support of that argument, Defendant cites cases in which courts have held that questions arising under the Guarantee Clause are to be decided by Congress, not the federal Judiciary. (*Id.*) However, the Court has already determined that, at this early stage of the proceedings, it is not appropriate to apply those cases' *per se* rules of non-justiciability. Thus, there is still a question whether Plaintiffs' Guarantee Clause claim can be decided by the Court, or whether the decision

should be deferred to Congress. Further, the Court again finds it of some import that TABOR has been in effect for nearly twenty years, and the Court is not aware of Congress ever having taken a position on TABOR's constitutionality. While silence could indicate approval, the Court cannot so presume. *See Hanson v. Wyatt*, 552 F.3d 1148, 1164 (10th Cir. 2008) ("It may be worth noting that neither *New York*'s treatment of the Guarantee Clause issue in that case nor our resolution of [this case] is likely to raise any concern in the political branches about the courts' violating their turf.").

Defendant also argues that this Court should defer to decisions of the Colorado Supreme Court which have addressed TABOR: *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996) ("*Zaner*"), and *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994) ("*Bickel*"). (ECF No. 51, at 22; *see also* ECF No. 18, at 11.) If the Colorado Supreme Court had addressed a Guarantee Clause challenge to TABOR, this Court would now likely defer to that Court's interpretation of the U.S. Constitution. *See Trans Shuttle, Inc. v. Pub. Utils. Comm'n*, 24 F. App'x 856, 859 (10th Cir. 2001) ("One of the fundamental policies underlying the *Younger* doctrine is the recognition that state courts are fully competent to decide federal constitutional questions."). However, in neither *Zaner* nor *Bickel* did the Colorado Supreme Court consider whether TABOR violated the U.S. Constitution's Guarantee Clause, whether TABOR violated the requirement that Colorado maintain a republican form of government, or even more generally whether TABOR is constitutional under either the U.S. Constitution or Colorado Constitution. Instead, *Bickel* merely stated (a passage repeated by *Zaner*) that

TABOR "is a perfect example of the people exercising their initiative power to enact laws in the specific context of state and local government finance, spending and taxation." *Bickel*, 885 P.2d at 226; *Zaner*, 917 P.2d at 284. These cases' statements that TABOR is a "perfect example" of the Colorado electorate's exercise of its initiative power does not speak to the issue of whether that particular exercise of the initiative power in 1992 resulted in a violation of the Guarantee Clause, the issue presented in this case.

And finally, Defendant suggests that this Court must defer to the will of the Colorado electorate itself in enacting TABOR. As a foundational matter, the political question doctrine's applicability in a particular case is lessened or eradicated when the action challenges an act of a state. *See Baker*, 369 U.S. at 210 ("[I]n the Guaranty Clause cases and in the other 'political question' cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"); *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 701-02 (9th Cir. 1992) ("[T]he political question doctrine arises primarily from concerns about the separation of powers within the federal government. . . . Accordingly, the doctrine has at best limited applicability to actions challenging state statutes as violative of the federal Constitution."). Also, as the Court's previous discussion of *Lucas* indicates, the Court cannot defer to the will of a state's electorate when it passes an allegedly unconstitutional ballot initiative, particularly when that law has been in effect for nearly twenty years. *See also Romer v. Evans*, 517 U.S. 620 (1996) (invalidating amendment to Colorado

Constitution passed by ballot initiative prohibiting all legislative, executive, or judicial action designed to protect homosexuals).

Although the fourth *Baker* test presents more difficult and sensitive issues, the Court finds that the test is not met here.

(5) "An unusual need for unquestioning adherence to a political decision already made"

Regarding the issue of whether this case presents "an unusual need for unquestioning adherence to a political decision already made," Defendant argues that "[t]wenty-six states now use some form of direct democracy, and countless laws and constitutional provisions have been instituted through these mechanisms. . . . Plaintiffs' argument, if accepted, would call into question all of these provisions, and all of the countless laws enacted under them." (ECF No. 18, at 10; *see also* ECF No. 51, at 23-24.)

The Court has already addressed and rejected Defendant's argument that this action is properly interpreted as a frontal attack on Colorado's entire ballot initiative process. Thus, Defendant's more incredible argument that this action should be construed as an attack on the ballot initiative systems in place in twenty-six states in this country is similarly and even more appropriately rejected. Thus, Defendant's concern regarding the continuing validity of laws enacted via ballot initiative (other than TABOR, of course) is also unfounded. And significantly, in terms of Plaintiffs' actual challenge to TABOR itself, it warrants mentioning that laws are not enacted

pursuant to TABOR. Instead, TABOR merely acts to limit the power of the General Assembly to legislate in certain areas ("core" areas according to Plaintiffs). *See Bickel*, 885 P. 2d at 226 ("[TABOR's] requirement of electoral approval is not a *grant* of new powers or rights to the people, but is more properly viewed as a *limitation* on the power of the people's elected representatives."). Thus, the invalidation of TABOR would not undo any other enacted law. Further, as already explained, the Colorado Supreme Court's decisions in *Zaner* and *Bickel* did not address the question of whether TABOR violates Colorado's obligation to maintain a republican form of government, and therefore a judgment resolving that issue would not violate those "decision[s] already made."

The Court therefore concludes that the fifth *Baker* test is not met here.

(6) "The potentiality of embarrassment from multifarious pronouncements by various departments on one question"

As for the sixth and final *Baker* test, Defendant again repeats the mantra that this action challenges the entire ballot initiative process, a process repeatedly upheld by state and federal decision-makers. (*See* ECF No. 18, at 10 ("[A] court pronouncement in favor of Plaintiff would be in conflict with the views of various state and federal departments on . . . whether direct democracy is incompatible with a republican form of government. . . . Congress . . . has never questioned the practice of state direct democracy . . . . State courts and legislators have likewise upheld and relied upon

citizen-initiated or approved laws.").) Defendant also again cites *Zaner* and *Bickel* for the proposition that TABOR has already been upheld. (*Id.* at 11; ECF No. 51, at 24.) For the aforementioned reasons, those arguments are rejected. The sixth *Baker* test is also not met in this case.

e. Conclusion

In summary, there is no basis to conclude, at this stage of the proceedings, that any of the six *Baker* tests are "inextricable from the case at bar." 369 U.S. at 217. Thus, the Court concludes it is not appropriate to dismiss Plaintiffs' Guarantee Clause claim at this stage as non-justiciable under the political question doctrine.

3. The Enabling Act Claim and the Political Question Doctrine

Defendant's Motion to Dismiss includes little argument as to why the Enabling Act in particular should be dismissed, saying only in a footnote that "[t]he rationale applied by the Supreme Court to Guarantee Clause claims therefore applies with equal force to Plaintiffs' claims brought under the Colorado Enabling Act," and citing the fact that *Pacific States* included an Enabling Act claim. (ECF No. 18, at 6 n.4.)[37] Defendant repeats the same argument in the

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[37] *Pacific States* did include an Enabling Act claim. *See* 223 U.S. at 139 (listing as an assignment of error, "The provision in the Oregon Constitution for direct legislation violates the provisions of the act of Congress admitting Oregon to the Union"). The Court in *Pacific States* held that the Guarantee Clause claim and the Enabling Act claim, among others, were to be resolved on the same basis: "the propositions each and all proceed alone upon the theory

Reply brief. (ECF No. 51, at 25-26.) However, as explained above, *Pacific States* is not controlling and does not bar this Court's consideration of Plaintiffs' Guarantee Clause claim. Because the Court holds Plaintiffs' Guarantee Clause claim to be justiciable at this early stage of the proceedings, Plaintiffs' Enabling Act claim is likewise not subject to dismissal.

Further, even if Plaintiffs' Guarantee Clause claim were barred by the political question doctrine, the Court would nevertheless conclude that Plaintiffs' Enabling Act claim is not subject to dismissal. *Pacific States* includes a brief discussion as to why it was appropriate to treat all of the claims in that case similarly. Indeed, both Plaintiffs' Guarantee Clause claim and their Enabling Act claim are based on the requirement that Colorado maintain a republican form of government. *See* U.S. Const. art. IV, § 4; 18 Stat. 474 (1875).

However, the fact that Plaintiffs' Enabling Act claim is a statutory claim leads the Court to conclude that it would have jurisdiction to hear that claim *even if* the Guarantee Clause claim were held to be non-justiciable under the political question doctrine. In *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986), wildlife conservation groups brought an action challenging an executive agreement between Japanese and U.S. officials that allegedly violated a U.S. statute requiring sanctions for violations of whale harvesting quotas. On appeal, petitioners argued that the action was barred by the political question doctrine because

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that the adoption of the initiative and referendum destroyed all government republican in form in Oregon." *Id.* at 141.

federal courts lack the power to call into question Executive Department decisions, such as the executive agreement at issue. *Id.* at 229. The Court disagreed:

> [I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that [whether the statute was violated] presents a purely legal question of statutory interpretation. The Court must first . . . apply[] no more than the traditional rules of statutory construction, and then apply[] this analysis to the particular set of facts presented below. We are cognizant of the interplay between [the statute] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy . . . .

Id. at 230.

Earlier this year, the Supreme Court again reiterated the rule that federal courts have jurisdiction to interpret federal statutes, even in politically charged cases. In *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), the plaintiff, who was born in Jerusalem, challenged a decision by State Department officials to deny his request that his passport indicate his place of birth as Israel, in apparent direct violation of a federal statute. The Secretary of State argued that

the case presented a nonjusticiable political question. The Court disagreed:

> 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 with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Id. at 1427.

For the Court's purposes here, a fellow U.S. District Judge has stated the rule clearly. In *Bredesen v. Rumsfeld*, 500 F. Supp. 2d 752 (M.D. Tenn. 2007), the Court stated that "it is well-settled that the political question doctrine applies only to constitutional questions, not to questions of statutory violations." *Id.* at 762 (citing *Japan Whaling*). In *Bredesen*, the Court ultimately found that the plaintiff's constitutional claims (but not the statutory claims) were barred by the political question doctrine. *Id.* at 762-63.[38]

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[38] *See also Schiaffo v. Helstoski*, 492 F.2d 413, 419 (3d Cir. 1974) ("[S]ince Congress has seen fit to enact a statute granting the franking privilege, we have considerable doubt whether the political question doctrine is applicable at all. We have found no case regarding the application of a statute concerned solely with domestic affairs and passed by Congress in which the political

Thus, it is not surprising that numerous courts have evaluated the merits of Enabling Act claims. *See Branson Sch. Dist. v. Romer*, 161 F.3d 619 (10th Cir. 1998) (evaluating whether an amendment to the Colorado Constitution passed by voter initiative violated the Colorado Enabling Act); (ECF No. 30, at 41-44 (listing 117 other cases in which courts have taken up the issue of whether a provision in an Enabling Act has been violated).).

Given the sufficiently clear and recent case law authority (some of it binding U.S. Supreme Court authority from the past three decades) that this Court has jurisdiction to hear the Enabling Act claim, it would be error to dismiss this case based only on the fact that *Pacific States* also involved an Enabling Act claim. The Court therefore concludes that it has jurisdiction to hear Plaintiffs' Enabling Act claim under 28 U.S.C. § 1331, and as a consequence Plaintiffs' Enabling Act claim is not subject to dismissal.

To summarize, the Court concludes that, at this stage of the litigation, Plaintiffs' Guarantee Clause and Enabling Act claims are justiciable and not barred by the political question doctrine.

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question doctrine has precluded Supreme Court review."); *El-Shifa Pharm. Indus. Co. v. U.S.*, 607 F.3d 836, 851 (D.C. Cir. 2010) (Ginsburg, J., concurring) ("Under *Baker v. Carr* a statutory case generally does not present a non-justiciable political question because the interpretation of legislation is a recurring and accepted task for the federal courts.") (quotation marks omitted). *But see Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of the U.S. Trade Representative*, 540 F.3d 940, 945 (9th Cir. 2008) ("[I]t is a political question arising out of a statute that provides us with no meaningful standards to apply.").

C. Equal Protection Claim

Defendant separately moves to dismiss Plaintiffs' Equal Protection claim for failure to state a claim upon which relief can be granted. (ECF No. 18, at 19-21.)[39] Defendant argues that the claim must fail because Plaintiffs have not alleged that they are members of a constitutionally protected class or that they are being treated differently than other similarly situated people in Colorado. (*Id.* at 19.) Defendant also points out that Colorado cannot extend its jurisdiction outside its borders so as to treat Colorado citizens differently than citizens in other states. (*Id.* at 20.)

In response, Plaintiffs argue that their Equal Protection claim should not be dismissed because their claim is analogous to the Equal Protection claims found viable in the legislative apportionment cases of *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964). (ECF No. 30, at 33-36.) Plaintiffs argue that, as in the legislative apportionment cases, this action involves a majority's efforts to impose an unconstitutional law on a minority. (*Id.*)[40]

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[39] Defendant also briefly argues that Plaintiffs "cannot use [the Equal Protection claim] to turn their otherwise non-justiciable question into a justiciable one." (ECF No. 18, at 19.) Because the Court has held that Plaintiffs have standing and that the political question doctrine does not bar this action, Plaintiffs' Equal Protection claim is not subject to dismissal on the ground of non-justiciability.

[40] Specifically, Plaintiffs make clear that their Equal Protection claim is based on the premise that a voting majority has taken

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see also Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike.") (quotation marks omitted); *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998). "In order to assert a viable Equal Protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Barney*, 143 F.3d at 1312; *see also Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011) (same); *Campbell v. Buckley*, 203 F.3d 738, 747 (10th Cir. 2000) (same).

Plaintiffs' Equal Protection claim is properly dismissed because Plaintiffs have not plead or otherwise shown that TABOR has treated any of the Plaintiffs differently from others who are similarly

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away the minority's right to a republican form of government. (*See* ECF No. 36, ¶ 85 ("The aforesaid violations of the requirement for a Republican Form of Government deny to Plaintiffs and others similarly situated the Equal Protection of the Laws . . . ."); ECF No. 30, at 33 ("[The Equal Protection Clause prohibits] a majority's efforts to impose an unconstitutional law on a state's entire population."); *id.* at 35 ("[Plaintiffs' Equal Protection claim] concerns a minority's attempt to vindicate rights lost through the will of the majority."); *id.* at 35-36 ("The Equal Protection Clause [bars] a majority's attempt . . . to place in its own hands the critical functioning of the state legislature.").)

situated to them. All Colorado voters had an equally weighted vote on TABOR in 1992. All Colorado voters would have an equal vote on any attempt to pass a ballot initiative invalidating TABOR. TABOR increases all Colorado voters' power equally by, *inter alia*, giving them the power to approve or reject any proposed new tax or tax rate increase. TABOR decreases Colorado General Assembly members' power equally by, *inter alia*, taking away their power to approve new taxes or tax rate increases without voter approval.[41] Plaintiffs have not plead or shown how TABOR treats similarly situated people in Colorado differently.[42]

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[41] Although Plaintiffs have not made the argument, it would not be appropriate to treat a Colorado voter as similarly situated to a member of the General Assembly for purposes of equal protection analysis. *See Campbell*, 203 F.3d at 748 ("Citizens who propose legislation through the initiative process and members of the general assembly who pass bills are not similarly situated classes. . . . The legislative process and the initiative process are so fundamentally different that we cannot read the Equal Protection Clause of the federal Constitution to require the state to afford the same title setting treatment to these two processes.").

[42] In the Court's view, it would also not be appropriate in evaluating Plaintiffs' Equal Protection claim to consider how TABOR treats Colorado citizens differently than the citizens of other states. U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person *within its jurisdiction* the equal protection of the laws.") (emphasis added); *see also Fetzer v. McDonough*, No. 4:07cv464–WS, 2009 WL 3163147, at *7 (N.D. Fla. Sept. 29, 2009) ("Plaintiff's argument that inmates in other states are provided Kosher food does not show that *these Defendants*, who are responsible for inmates incarcerated *in Florida*, have treated other inmates in Florida differently than Plaintiff. These Defendants are not responsible for the conditions of confinement for other prisoners incarcerated in other states . . . .") (emphasis in original).

The legislative apportionment cases cited by Plaintiffs are inapposite. Of those cases, *Reynolds* provides the clearest explanation for why the legislative apportionment at issue there violated the Equal Protection Clause. In *Reynolds*, the plaintiffs raised an Equal Protection claim challenging the apportionment of legislative districts in Alabama that gave voters in certain districts greater weighted votes than voters in other districts. 377 U.S. at 537-46. The Court struck down the apportionment as violative of the Equal Protection Clause, stating,

> [T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. . . . Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment. . . . Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id. at 565-68. In the legislative apportionment cases, the allegation was that similarly situated people – voters from different districts – were being treated differently. That is not the case here. Here, TABOR affects all voters equally. TABOR does not give any voter more or less voting power than any other voter.

And even if TABOR does violate Plaintiffs' constitutional rights as citizens to have a government republican in form, TABOR has the same effect on *every* Colorado citizen's constitutional right to a republican form of government.[43]

The Court therefore concludes that Plaintiffs' Equal Protection claim is properly dismissed. Because Plaintiffs have not requested leave to amend this Claim, nor made any suggestion how this fundamental defect in their Equal Protection claim might be cured, the dismissal will be with prejudice. *See Curley v. Perry*, 246 F.3d 1278, 1282 (10th Cir. 2001).

D. Impermissible Amendment Claim

Defendant's primary argument in moving to dismiss Plaintiffs' Impermissible Amendment claim is that the claim presents a non-justiciable political question. (ECF No. 18, at 21-22; ECF No. 51, at 27-28.) For the reasons discussed above, the political question doctrine does not bar this action or any claims brought herein, including the Impermissible Amendment claim.

Defendant also argues that the Impermissible Amendment claim fails to state a claim upon which relief can be granted. (ECF No. 18, at 22.) In support of that contention, Defendant argues that the Colorado

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[43] Plaintiffs attempt to generalize the holdings of the voter apportionment cases to stand for the propositions that the Equal Protection Clause does not allow a voting majority to "remake a state legislature," to "compromise the fundamental operations" of the legislature, and to "manipulate their legislatures to promote the interests of particular groups." (ECF No. 30, at 33-34.) Such a reading of the voter apportionment cases is overly broad and unsupported.

Supreme Court considers the initiative and referendum process to be a fundamental right of voters, and also argues that the Colorado Supreme Court has never questioned TABOR's general structure. (*Id.*) Regarding the first argument, as this Court has already stated, this action challenging TABOR is not properly interpreted as an attack on the entire initiative and referendum process in Colorado. Nonetheless, it is also indisputable that just because Colorado voters have the right to the initiative process does not mean they can pass any ballot initiative they choose, no matter how violative of state or federal constitutional rights. *See Romer*, 517 U.S. 620. As to the second argument, Defendant attempts to read far too much into the fact that the Colorado Supreme Court to date has never questioned TABOR's general structure. Particularly in light of the fact that a direct challenge to TABOR's constitutional legitimacy has never previously been mounted, Defendant's contention that the Colorado Supreme Court has at least implicitly found TABOR to pass constitutional muster is without merit.

The Court therefore also finds that Plaintiffs' Impermissible Amendment claim is not subject to dismissal for failure to state a claim. The Court properly exercises supplemental jurisdiction over this claim pursuant to 28 U.S.C. § 1367(a). (*See* ECF No. 36, ¶ 53.)

E. Supremacy Clause Claim

Defendant does not separately move to dismiss Plaintiffs' Supremacy Clause claim. In fact, the only time the Supremacy Clause claim is even mentioned in Defendant's Motion to Dismiss (ECF No. 18) or in his Reply brief (ECF No. 51) is in a footnote pointing out

that *Pacific States* also involved a claim brought under the Supremacy Clause. (ECF No. 18, at 13 n.7.) Plaintiffs' Supremacy Clause claim is based on the allegation that "TABOR must yield to the requirements of the 'Guarantee Clause' and of the Enabling Act that Colorado maintain a Republican Form of Government." (ECF No. 36, ¶ 84.) The Supremacy Clause claim is derivative of the Guarantee Clause claim and Enabling Act claim; if TABOR violates the Guarantee Clause and/or the Enabling Act, then it would appear that it also violates the Supremacy Clause. Because the Court has held that Plaintiffs' Guarantee Clause claim and Enabling Act claim are not subject to dismissal at this stage of the proceedings, Defendant's Motion to Dismiss Plaintiffs' Supremacy Clause claim will also be denied.

F. Unopposed Motion to Amend Complaint

On March 28, 2012, Plaintiffs filed an Unopposed Motion for Leave to File Second Amended Substitute Complaint for Injunctive and Declaratory Relief ("Unopposed Motion"). (ECF No. 74) In the Unopposed Motion, Plaintiffs explain that they only seek to amend the Operative Complaint in order to update the current elective status of six particular plaintiffs. (*Id.*) This Court's review of the Operative Complaint and the proposed Second Amended Substitute Complaint for Injunctive and Declaratory Relief confirms that those were the only changes made to the Operative Complaint. (*Compare* ECF No. 36, *with* ECF No. 74-1.) The Court therefore finds good cause to grant the Unopposed Motion.

IV. CONCLUSION

In accordance with the foregoing, the Court hereby ORDERS as follows:

(1) Defendant's Motion to Dismiss Plaintiffs' Substitute Complaint (ECF No. 18), properly construed as moving to dismiss Plaintiffs' First Amended Substitute Complaint for Injunctive and Declaratory Relief, is GRANTED IN PART and DENIED IN PART;

(2) Defendant's Motion to Dismiss is GRANTED as to Plaintiffs' Equal Protection claim. Plaintiffs' Equal Protection claim is hereby DISMISSED WITH PREJUDICE;

(3) Defendant's Motion to Dismiss is DENIED as to Plaintiffs' other four claims for relief. Those four claims will be allowed to proceed past the pleading stage in this action;

(4) Plaintiffs' Unopposed Motion for Leave to File Second Amended Substitute Complaint for Injunctive and Declaratory Relief (ECF No. 74) is GRANTED;

(5) The Clerk of Court shall FILE as a separate docket entry the Second Amended Substitute Complaint for Injunctive and Declaratory Relief, currently filed as an attachment at ECF No. 74. The Second Amended Substitute Complaint for Injunctive and Declaratory Relief will hereinafter be the operative complaint in this action; and

(6) The Court's Order staying disclosures and discovery in this action (ECF No. 29) is VACATED and said stay is hereby LIFTED.

Dated this 30th day of July, 2012.

BY THE COURT:

/s/William J. Martínez
William J. Martínez
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-01350-WJM-BNB

[Filed July 30, 2012]

ANDY KERR, COLORADO STATE REPRESENTATIVE; NORMA V. ANDERSON; JANE M. BARNES; ELAINE GANTZ BERMAN, MEMBER STATE BOARD OF EDUCATION; ALEXANDER E. BRACKEN; WILLIAM K. BREGAR, MEMBER PUEBLO DISTRICT 70 BOARD OF EDUCATION; BOB BRIGGS, WESTMINSTER CITY COUNCILMAN; BRUCE W. BRODERIUS; TRUDY B. BROWN JOHN C. BUECHNER, PH.D.; STEPHEN A. BURKHOLDER; RICHARD L. BYYNY, M.D.; LOIS COURT, COLORADO STATE REPRESENTATIVE; THERESA L. CRATER; ROBIN CROSSAN, MEMBER STEAMBOAT SPRINGS RE-2 BOARD OF EDUCATION; RICHARD E. FERDINANDSEN; STEPHANIE GARCIA, MEMBER PUEBLO CITY BOARD OF EDUCATION; KRISTI HARGROVE; DICKEY LEE HULLINGHORST, COLORADO STATE REPRESENTATIVE; NANCY JACKSON, ARAPAHOE COUNTY COMMISSIONER; WILLIAM G. KAUFMAN; CLAIRE LEVY, COLORADO STATE REPRESENTATIVE;

MARGARET (MOLLY) MARKERT, AURORA CITY COUNCILWOMAN; MEGAN J. MASTEN; MICHAEL MERRIFIELD; MARCELLA (MARCY) L. MORRISON; JOHN P. MORSE, COLORADO STATE SENATOR; PAT NOONAN; BEN PEARLMAN; WALLACE PULLIAM; FRANK WEDDIG; PAUL WEISSMANN; and JOSEPH W. WHITE,

Plaintiffs,

v.

JOHN HICKENLOOPER, GOVERNOR OF COLORADO, IN HIS OFFICIAL CAPACITY,

Defendant.

SECOND AMENDED SUBSTITUTE COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. OPENING STATEMENT

1. This case presents for resolution the contest between direct democracy and representative democracy. In 1992, Colorado voters adopted by initiative the Taxpayers Bill of Rights ("TABOR", removing from their own legislature the power to tax and arrogating that power to themselves. However attractive it might have seemed, this assertion of direct democracy is not permitted under the United States

Constitution, which requires all states to have a Republican Form of Government embodied in a representative democracy.

2. At our nation's birth, some three million citizens acted through their representatives at a constitutional convention to commit the nation to a government of representative democracy, a Republic, and rejected direct democracy. Today, the Constitution carries the same commitment in a nation of over three hundred million people. Frustration with the work of legislatures, whether federal or state, may indicate a need for representative institutions to be more effective, but that frustration does not justify or permit resorting to direct democracy.

3. Since the passage of TABOR in 1992, the State of Colorado has experienced a slow, inexorable slide into fiscal dysfunction. Deterioration of the state's funding base has been slowed by many attempts to patch, cover over, or bypass the straightjacket of TABOR. However, events have demonstrated that a legislature unable to raise and appropriate funds cannot meet its primary constitutional obligations or provide services that are essential for a state.

4. The framers of the federal Constitution prescribed a Republican Form of Government for the nation at large and, in Article IV, Section 4, of the United State Constitution, guaranteed a Republican Form of Government to each state. The federal statutes creating the Territory of Colorado and then enabling creation of the State of Colorado required that the state have a Republican Form of Government. The state cannot properly or constitutionally govern itself without adhering to the requirements of a Republican

Form of Government, which entails having an effective legislative branch.

5. In prescribing a Republican Form of Government for the states, the framers of the federal Constitution intended that each state have a government with power exercised through a representative democracy. James Madison explained in *Federalist 10* the difference between a direct and a representative democracy and the reasons that a representative democracy was essential to the Republic to be established by ratification of the Constitution:

> From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized

> and assimilated in their possessions, their opinions, and their passions.
>
> A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.
>
> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.
>
> The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

6. The Colorado Constitution as adopted at the Constitutional Convention in 1876 and continuing until

the passage of TABOR fully complied with the federal constitutional requirement for a Republican Form of Government, in part by providing in Article X, Section 2, the requisite powers for the General Assembly to tax to provide for state expenses.

7. An effective legislative branch must have the power to raise and appropriate funds. When the power to tax is denied, the legislature cannot function effectively to fulfill its obligations in a representative democracy and a Republican Form of Government.

8. The purpose of this case is to seek a ruling that the TABOR amendment to the Constitution of the State of Colorado is unconstitutional because it deprives the state and its citizens of effective representative democracy, contrary to a Republican Form of Government as required under both the United States and Colorado Constitutions.

II. PARTIES

9. Several plaintiffs are described in the caption and in the following paragraphs as holding public office in certain state and local governmental bodies. The offices held by these plaintiffs are relevant to their standing in the case. The listing of offices does not imply that the governmental bodies have themselves taken any official position regarding this litigation nor that these plaintiffs speak for those governmental bodies regarding this litigation.

10. Plaintiff Andy KERR is a Member of the House of Representatives of the Colorado General Assembly, representing District 26, and a social studies teacher in the Jefferson County schools. In his individual capacity as a citizen of the State of Colorado

and in his capacity as a State Representative, he has standing to challenge the constitutionality of the TABOR Amendment.

11. Plaintiff Norma V. ANDERSON is a former member of and Majority Leader of the Colorado State House of Representatives and the Colorado State Senate, a former director of the Regional Transportation District and a citizen of the State of Colorado.

12. Plaintiff Jane M. BARNES is a former member of the Jefferson County Board of Education, past president of the Colorado Association of School Boards and a citizen of the State of Colorado.

13. Plaintiff Elaine Gantz BERMAN is a member of the Colorado State Board of Education, a former member of the Denver Public Schools Board of Education and a citizen of the State of Colorado.

14. Plaintiff Dr. Alexander E. BRACKEN is a former member of the Colorado Commission on Higher Education, was the Nineteenth President of the University of Colorado and is a citizen of the State of Colorado.

15. Plaintiff William K. BREGAR is a member of the Pueblo District 70 Board of Education, past President of the Colorado Association of School Boards, and a citizen of the State of Colorado.

16. Plaintiff Bob BRIGGS is a Councilman of the City of Westminster and a former member of the Colorado State House of Representatives, the Adams County Commission, former director of the Regional

Transportation District, and a citizen of the State of Colorado.

17. Plaintiff Bruce W. BRODERIUS is a former member of Weld County District 60 Board of Education, Professor of Education Emeritus and former Dean of Education at the University of Northern Colorado and is a citizen of the State of Colorado.

18. Plaintiff Trudy B. BROWN is a citizen of the State of Colorado.

19. Plaintiff Dr. John C. BUECHNER is a former Councilman in the City of Lafayette and was the Eighteenth President of the University of Colorado. He is Professor Emeritus of the University of Colorado, former Chancellor of the Denver Campus of the University, former member of the Colorado State House of Representatives, former Mayor and Councilman of the City of Boulder, and is a citizen of the State of Colorado.

20. Plaintiff Stephen A. BURKHOLDER is former Mayor and Councilman of the City of Lakewood and a citizen of the State of Colorado.

21. Plaintiff Richard L. BYYNY, M. D., is Director of the Center for Health Policy at the University of Colorado Hospital, former Chancellor of the Boulder Campus of the University and a citizen of the State of Colorado.

22. Plaintiff Lois COURT is a member of the Colorado State House of Representatives representing House District 6 and a citizen of the State of Colorado.

23. Plaintiff Theresa L. CRATER is a professor at Metro State College of Denver and a citizen of the State of Colorado.

24. Plaintiff Robin CROSSAN is the former president and a current member of the Steamboat Springs School District RE-2 Board of Education and a citizen of the State of Colorado.

25. Plaintiff Richard E. FERDINANDSEN is a former Jefferson County Commissioner and a citizen of the State of Colorado.

26. Plaintiff Stephanie GARCIA is President of the Pueblo City Board of Education and a citizen of the State of Colorado.

27. Plaintiff Kristi HARGROVE is a parent of school-age children, a member of the Board of Directors of Colorado PTA and a citizen of the State of Colorado.

28. Plaintiff Dickey Lee HULLINGHORST is a member of the Colorado State House of Representatives, representing House District 10, and a citizen of the State of Colorado.

29. Plaintiff Nancy JACKSON is an Arapahoe County Commissioner and a citizen of the State of Colorado.

30. Plaintiff William G. KAUFMAN is a member of the Colorado Transportation Commission, a former member of the Colorado State House of Representatives, and a citizen of the State of Colorado.

31. Plaintiff Claire LEVY is a member of the Colorado State House of Representatives, representing House District 13 and a citizen of the State of Colorado.

32. Plaintiff Margaret (Molly) MARKERT is a Councilwoman of the City of Aurora, a former member of the Colorado State House of Representatives and a citizen of the State of Colorado.

33. Plaintiff Megan J. MASTEN is the parent of two school children and a citizen of the State of Colorado.

34. Plaintiff Michael MERRIFIELD is a former member of the Colorado State House of Representatives and a citizen of the State of Colorado.

35. Plaintiff Marcella (Marcy) L. MORRISON is a former member of the Colorado State House of Representatives, the El Paso County Commission, the Manitou Springs Board of Education and is a citizen of the State of Colorado.

36. Plaintiff John P. MORSE is Majority Leader of the Colorado State Senate, representing Senate District 11, and a citizen of the State of Colorado.

37. Plaintiff Pat NOONAN is a former Arapahoe County Commissioner and a citizen of the State of Colorado.

38. Plaintiff Ben PEARLMAN is a former Boulder County Commissioner and a citizen of the State of Colorado.

39. Plaintiff Wallace PULLIAM is a former director of the Regional Transportation District and a citizen of the State of Colorado.

40. Plaintiff Frank WEDDIG is a former Arapahoe County Commissioner, a former member of both the Colorado State Senate and the Colorado State

House of Representatives, a former member of the Aurora City Council and a citizen of the State of Colorado.

41. Plaintiff Paul WEISSMANN is a former member of both the Colorado State Senate and the Colorado House of Representatives and a citizen of the State of Colorado.

42. Plaintiff Joseph W. WHITE is a teacher at ThunderRidge High School and a citizen of the State of Colorado.

43. Certain plaintiffs in this case are past or sitting elected representatives in the General Assembly of the State of Colorado. As such, they have a direct and specific interest in securing to themselves, and to their constituents and to the state, the legislative core functions of taxation and appropriation. Other plaintiffs in this case include officers of counties, districts and municipalities which are dependent, under the state constitution, on the power of the legislature and their own powers to tax and appropriate.

44. Certain plaintiffs in this case are past or sitting elected officials of counties, cities, and school districts in the State of Colorado, jurisdictions whose abilities to tax are eliminated by TABOR.

45. Certain plaintiffs in this case are or have been educators employed by the State of Colorado or by various school districts. In addition to their interests as citizens of the state, they also have a specific interest in assuring that the legislature of the state can discharge its responsibilities to tax for the purpose of adequately funding core education responsibilities of

the state as provided in Article IX, Section 2 of the Colorado Constitution.

46. Certain plaintiffs in this case are citizens of the State of Colorado, having a specific, protectable interest in assuring that their representatives can discharge the inherently legislative function of taxation and appropriation and an interest in assuring that the State of Colorado has a Republican Form of Government, as required by the United States Constitution.

47. All plaintiffs in this case are citizens of the State of Colorado and have rights protectable under the Fourteenth Amendment to the United States Constitution to the equal protection of the laws, including the right to a Republican Form of Government and therewith to a legislative branch with the power to tax.

48. Defendant John HICKENLOOPER is Governor and chief executive officer of the State of Colorado with authority to administer and execute the provisions of the Constitution and laws of the State of Colorado and is named in his official capacity.

III. JURISDICTION AND VENUE

49. Jurisdiction of this case is grounded in 28 U.S.C. § 1331, Federal Question, as this case requires the Court to interpret the provisions of Article IV, Section 4, of the United States Constitution, the "Guarantee Clause," which requires a Republican Form of Government.

50. Jurisdiction of this case is grounded in 28 U. S. C. § 1331, Federal Question, as this case requires

the Court to interpret the provisions of Article VI, Section 2, of the United States Constitution, the "Supremacy Clause."

51. Jurisdiction of this case is also grounded in 28 U.S.C. § 1331, Federal Question, as this case requires the Court to interpret the rights of the Plaintiffs under the "Equal Protection" provisions of the Fourteenth Amendment to the United States Constitution.

52. Jurisdiction under 28 U.S.C. § 1331 also lies because this case requires the Court to interpret federal statutes, to wit, The Colorado Territorial Act, 12 Stat. 176 (1861), and the Colorado Enabling Act, 18 Stat. 474 (1875), "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" (hereafter, the "Enabling Act"), under which Congress granted the People of Colorado the authority to form a state subject to requirements that are at issue in this case.

53. Jurisdiction of this case is also grounded in 28 U.S.C. § 1367, as this Court has Supplemental Jurisdiction over such matters as may involve the interpretation of the Constitution of the State of Colorado.

54. Jurisdiction for relief in this case is also grounded in 28 U.S.C. § 1651, the All Writs Act, and 28 U.S.C. § 2201, the Declaratory Judgment Act.

55. The Courts of the United States have jurisdiction to determine a state's compliance with Article IV, Section 4, of the Constitution of the United

States, i.e., whether its government is a Republican Form of Government, and to nullify and declare void laws or state constitutional provisions that compromise republican governance.

56. The Courts of the United States have jurisdiction to determine whether TABOR violates the requirement that Colorado have a Republican Form of Government prescribed by Article IV, Section 4, of the Constitution of the United States, the "Guarantee Clause," and the Enabling Act, and that such conflict compels invalidation of TABOR under the Supremacy Clause.

57. The Courts of the United States have jurisdiction to determine whether a state is complying with federal statutes and, particularly, the statute (the Enabling Act) under the terms of which Congress authorized the creation of the State of Colorado and its admission to the Union.

58. The Courts of the United States have jurisdiction to determine whether the citizens of the State of Colorado are being denied the equal protection of the laws because Colorado now fails to provide a Republican Form of Government.

59. Venue of this case is proper in this Court under the provisions of 31 U.S.C. § 1391(b) as all of the Plaintiffs and the Defendant are residents of the State of Colorado.

IV. BACKGROUND OF THIS CIVIL ACTION

60. Article IV, Section 4, of the Constitution of the United States provides that:

> "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

This "Guarantee Clause" encompasses the assurance that each state shall, as in the case of the government of the United States itself, have legislative, executive, and judicial branches and that the legislative branch, as in the case of the United States itself, shall be empowered to tax and appropriate.

61. On February 28, 1861, in accordance with Article IV, Section 3, of the United States Constitution, Congress enacted The Colorado Territorial Act, 12 Stat. 176, providing for the organization of and a temporary government for the Territory of Colorado. That statute specified in Section 4 the establishment of a bicameral "legislative council" and in Section 6 that the power of the legislative council "extend to all rightful subjects of legislation consistent with the Constitution of the United States."

62. On March 3, 1875, pursuant to Article IV, Section 3 of the United States Constitution, Congress enacted the Colorado Enabling Act. 18 Stat. 474 (1875). Under the terms of the Enabling Act, the Territory of Colorado was to be admitted to the Union as a state after meeting certain requirements. Among them was the requirement that the territory convene a Constitutional Convention that would, *inter alia*, adopt on behalf of the people, the Constitution of the United

States and draft a state Constitution that "shall be republican in form." 8 Stat. 474, Sections 4.

63. In compliance with the provisions of the Enabling Act, the Constitutional Convention of the Territory of Colorado met, adopted the Constitution of the United States, and prepared a Constitution then fully compliant with the Enabling Act. That Constitution of the proposed State of Colorado did provide for a Republican Form of Government and, in Article V, Section 1, expressly provided that "[t]he legislative power shall be vested in the General Assembly, which shall consist of a Senate and House of Representatives, both to be elected by the People."

64. Article V of the Constitution of the proposed State of Colorado provided in Sections 31 and 32 for the General Assembly of the State of Colorado to have and execute the exclusive powers to raise and appropriate revenue, powers similar to those of the legislative branch in the Constitution of the United States, and in Section 33 that no monies shall be paid out of the State Treasury "except upon appropriations made by law."

65. Article X, Section 2, of the Colorado Constitution provides: "The general assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of state government for each fiscal year." This provision was essential to and an integral part of the several provisions of the Colorado Constitution that constituted the state's Republican Form of Government.

66. Combined with revenues from federal common lands ceded to the state under Section 7 of the

Enabling Act, Article X, Section 2, was integral to the scheme for funding public education in the state.

67. On August 1, 1876, President Ulysses S. Grant, pursuant to the Enabling Act, proclaimed the Territory of Colorado to be the State of Colorado, recognizing that the Constitution of the proposed State of Colorado had been duly drawn and ratified by the People of Colorado, and that compliance with the Enabling Act had been certified by the Territorial Governor, the Chief Justice, and the Territorial United States Attorney.

68. The certifications of compliance with the Enabling Act and the Proclamation of Statehood by the President could occur only if and because the Colorado Constitution provided for a Republican Form of Government, including a legislature with powers sufficient to fulfill its responsibilities under a Republican Form of Government, including, without limitation, plenary and exclusive powers to raise and appropriate revenues and to provide for taxes to defray the expenses of state government.

69. For the succeeding 116 years, the State of Colorado and its Constitution complied with the requirements of the Territory Act, the Enabling Act, and Article IV, Section 4, of the United States Constitution, in that the State maintained a General Assembly able to meet its constitutional obligations under a Republican Form of Government, including the powers to raise and appropriate revenues.

70. In 1910, the General Assembly proposed and the people adopted an amendment to the Colorado Constitution, with the short title, "Providing for the

initiative and referendum." It revised Article V, Section 1(1) of the State Constitution. That section originally stated that "[t]he legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people." The amendment added the following language: "but the people reserve to themselves the power *to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the general assembly* and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly." Laws 1910 Ex. Sess., p 11; emphasis added. (Subsequent subsections added and amended in 1980 and 1994 elaborate on the initiative and referendum processes.)

71. Notwithstanding its sweeping terms, this initiative and referendum provision could not lawfully compromise or subtract from the undertakings of the State of Colorado required under the Enabling Act and by the "Guarantee Clause" to have and maintain a Republican Form of Government, necessarily including a legislative branch with the requisite powers to be effective. Section 2 of Article II of the Colorado Constitution then and now expressly recognizes this limitation, stating that the plenary power reserved to the people "to alter or abolish their constitution and form of government" is itself constrained in that "any such change be not repugnant to the constitution of the United States."

72. By Article IX of the original Colorado Constitution, the proposed State of Colorado undertook to provide its children with a universal system of free

public education. Specifically, Section 2 of Article IX provided that "[t]he General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the State, wherein all residents of the State between the ages of six and twenty-one years may be educated gratuitously."

73. On November 3, 1992, the People of the State of Colorado voted to amend the Colorado Constitution by adding Section 20, "The Taxpayer's Bill of Rights" ("TABOR") as an amendment to Article X ("Revenue") of the Constitution. This amendment became effective by Proclamation of the Governor of Colorado on January 14, 1993.

74. The TABOR amendment removed from the General Assembly and subordinate political subdivisions the power to tax and raise revenue. Under the TABOR amendment, the power to tax was to be vested exclusively in the People of Colorado and could be exercised only through a tightly constrained popular voting process.

75. Paragraph 3 of TABOR, "Election Provisions," and its subparagraphs specify and limit what the People of Colorado may be told in proposals for ballot measures to increase taxes or otherwise to change the means and methods by which taxes would be imposed. The limitations of this Paragraph 3 deprived the People of the State of Colorado of access to full and complete facts upon which they might base their votes.

76. Paragraph 4 of TABOR, "Required Elections," and its subparagraphs vested in the People of Colorado, to be exercised only by popular vote, all of the powers

to lay new taxes, to increase tax rates, to change in any manner existing tax structures and in all other respects to raise and collect funds for the operation of the State. By its incorporation of various terms and definitions, paragraph 4 similarly applied this arrogation of power to popular vote of the people to all other political subdivisions of the State, removing the separate taxing ability of Counties, Municipalities, and School Districts, subject to a vote of the people in such subdivisions to suspend the effect of this provision on Counties, Municipalities, and School Districts.

77. Paragraph 7 of TABOR, "Spending Limits" and its subparagraphs established a cap on the total amount that the state may spend in any given fiscal year, a cap adjusted annually for the combination of "inflation" plus the "percentage change in state population," but otherwise inviolable and not subject to any findings, determinations, or circumstances that might be found by the State General Assembly or by Counties, Municipalities or School Districts. To the extent that revenues from tax sources exceed the cap, any excess must be refunded to the People of the State of Colorado or of the affected jurisdiction.

78. At the General Election in 2005, the voters approved Referendum C, which, *inter alia*, adjusted the spending limit provisions of TABOR by removing the requirement to reset the spending cap each year to the level of the prior year's General Fund spending. However, a spending limitation remains, adjusted only for inflation and population increases, and causes a gradual, continuing reduction in the ability of the State to defray the necessary expenses of state government. This occurs because the annual adjustment only for

inflation and population fails to account for the effects that increases in productivity have on wage levels and standards of living, and the impact that in turn has on the cost of personal services that comprise the major portion of the state budget.

79. Paragraph 8 of TABOR, "Revenue limits" and its subparagraphs prohibit the imposition of new or increased property taxes, prohibit any new local district income tax, and prohibit any new income tax change that is progressive.

80. The totality of these TABOR provisions removes entirely from the Colorado General Assembly any authority to change state law concerning taxation to replace or increase revenue, and prohibits the General Assembly from raising funds by any other means, including borrowing. Moreover, the interaction of the provisions of TABOR may actually force existing taxes to be decreased without any action of the General Assembly.

81. The State, through its Attorney General, has admitted that, because of TABOR, the State can no longer fulfill another critical constitutional obligation, namely the requirement that it educate its children, declaring that "[a]ny funding required by the Education Clause is constrained by TABOR." (See *Def.'s Mot. for Determination of Questions of Law Pursuant to C. R. C. P. 56(h),* filed by the Attorney General of Colorado, February 25, 2011, in *Lobato, et al. v. State of Colorado, et al.,* District Court, City & County of Denver, Colorado, 05 CV 4794, at p. 6.)

V. COUNT I - VIOLATION OF ARTICLE IV, SECTION 4 OF THE UNITED STATES CONSTITUTION

82. A fully effective legislature is an essential component of a Republican Form of Government, as guaranteed to each state by Article IV, Section 4, of the Constitution of the United States. By removing the taxing power of the General Assembly, the TABOR amendment renders the Colorado General Assembly unable to fulfill its legislative obligations under a Republican Form of Government and violates the guarantee of Article IV, Section 4, of the United States Constitution.

VI. COUNT II - VIOLATION OF THE ENABLING ACT

83. The Enabling Act of 1875, a statute of the United States, set forth the conditions for Colorado statehood, including the requirement that the state have a Republican Form of Government. The Enabling Act's requirement for a Republican Form of Government entailed having and maintaining a fully effective legislature. This requirement has not been amended by any subsequent federal law. The TABOR amendment has made the General Assembly ineffective by removing an essential function, namely the power to tax. In so doing, the TABOR amendment violates the Enabling Act.

VII. COUNT III - VIOLATION OF ARTICLE VI, SECTION 2, OF THE UNITED STATES CONSTITUTION

84. TABOR is in irresolvable conflict with the "Guarantee Clause" of the United States Constitution

and with the undertakings of the State of Colorado as required by the Enabling Act. Under the Supremacy Clause of Article VI, Section 2, of the United States Constitution, TABOR must yield to the requirements of the "Guarantee Clause" and of the Enabling Act that Colorado maintain a Republican Form of Government.

VIII. COUNT IV – VIOLATION OF AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

85. The aforesaid violations of the requirement for a Republican Form of Government deny to Plaintiffs and others similarly situated the Equal Protection of the Laws as guaranteed by Amendment XIV of the Constitution of the United States.

86. Plaintiffs are also denied their rights under the Colorado Constitution to the protections of a Republican Form of Government that were guaranteed to them under the Enabling Act and in the Colorado Constitution as originally drawn.

IX. COUNT V – IMPERMISSIBLE AMENDMENT OF COLORADO CONSTITUTION

87. As a condition for Colorado to become a State and be accepted into the Union under the Enabling Act, the citizens of the State of Colorado undertook to create and maintain irrevocably a Republican Form of Government.

88. Thus, the expectant citizens of the future State of Colorado, for themselves and for all citizens of Colorado to come, obligated themselves irrevocably to form and to maintain a state government republican in form. That obligation necessarily inheres in the

Colorado Constitution without further elaboration and entails having a legislative branch able to fulfill its responsibilities under a Republican Form of Government. Section 2 of Article II of the Colorado Constitution expressly recognizes that the people of the state relinquish the power to alter the republican nature of their government.

89. By accepting the obligations under its Enabling Act and in its Constitution to establish and maintain a Republican Form of Government, the State of Colorado and its citizens irrevocably undertook for themselves and their successors to have and maintain a Constitution embodying a Republican Form of Government. An essential component of a Republican Form of Government is a legislature with sufficient plenary authority to be effectively republican both in form and in actual authority, necessarily including the power to impose taxes and raise revenues necessary to defray the expenses of state government.

90. Any amendment to the Colorado Constitution must therefore be read as subordinate to the original and perpetual obligation of the state to maintain a Republican Form of Government. The citizens of the State of Colorado were and are constitutionally disempowered to amend the state Constitution to derogate or remove power and authority from the legislative branch such that the fundamental nature of the state's Republican Form of Government is compromised or undermined.

91. The TABOR amendment, in depriving the General Assembly of the power to tax, compromises and undermines the fundamental nature of the state's Republican Form of Government. In passing the

TABOR amendment, a one-time voting majority of the citizens of the State of Colorado violated the superior obligation inherent in the Colorado Constitution to maintain, and the right of all the people to enjoy, a Republican Form of Government. Therefore, as a matter of state constitutional law, TABOR exceeded the powers retained by the citizens of the State and is unconstitutional and void under the Constitution of the State of Colorado.

92. The TABOR amendment, in depriving the General Assembly of the power to tax, nullifies the inherent and necessary powers of General Assembly under Article X, Section 2, and Article V, Sections 31 and 32, of the Colorado Constitution, and so violates both those superior provisions of the Colorado Constitution and the guarantee of a Republican Form of Government under Article IV, Section 4, of the United States Constitution.

X. PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. For a DECLARATION that the TABOR AMENDMENT is facially unconstitutional and unconstitutional as applied;

2. For a DECLARATION that the TABOR AMENDMENT is null and void;

3. For a DECLARATION that the Plaintiffs's rights to and responsibilities under a Republican Form of Government in accordance with Article IV, Section 4, of the United States Constitution have been violated;

4. For a DECLARATION that the TABOR AMENDMENT violates the Colorado Territorial and Enabling Acts;

5. For an ORDER prohibiting any state officer from taking any action whatsoever to effect the requirements and purposes of the TABOR amendment; and

6. For such other and further relief as the Court may find justified.

DATED: March 28, 2012

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX F

Colorado Constitution

Article V- Legislative Department

Section 1. General assembly – initiative and referendum.

(1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.

(2) The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state at least three months before the general election at which they are to be voted upon.

(3) The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions, against any act or item, section, or part of any act of the general assembly, either by a petition signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of the secretary of state at the previous general election or by the general assembly. Referendum petitions, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section, or part of any act shall not delay the remainder of the act from becoming operative.

(4) The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the power to enact any measure.

(5) The original draft of the text of proposed initiated constitutional amendments and initiated laws shall be submitted to the legislative research and drafting offices of the general assembly for review and comment. No later than two weeks after submission of the original draft, unless withdrawn by the proponents, the legislative research and drafting offices of the general assembly shall render their comments to the proponents of the proposed measure at a meeting open to the public, which shall be held only after full and timely notice to the public. Such meeting shall be held prior to the fixing of a ballot title. Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure or to establish deadlines for the submission of the original draft of the text of any proposed measure.

(5.5) No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls. In such circumstance, however, the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the

fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5) shall not operate to alter or extend any filing deadline applicable to the measure.

(6) The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

(7) The secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance with this section. In submitting the same and in all matters pertaining to the form of all petitions, the secretary of state and all other officers shall be guided by the general laws.

(7.3) Before any election at which the voters of the entire state will vote on any initiated or referred constitutional amendment or legislation, the nonpartisan research staff of the general assembly

shall cause to be published the text and title of every such measure. Such publication shall be made at least one time in at least one legal publication of general circulation in each county of the state and shall be made at least fifteen days prior to the final date of voter registration for the election. The form and manner of publication shall be as prescribed by law and shall ensure a reasonable opportunity for the voters statewide to become informed about the text and title of each measure.

(7.5) (a) Before any election at which the voters of the entire state will vote on any initiated or referred constitutional amendment or legislation, the nonpartisan research staff of the general assembly shall prepare and make available to the public the following information in the form of a ballot information booklet:

(I) The text and title of each measure to be voted on;

(II) A fair and impartial analysis of each measure, which shall include a summary and the major arguments both for and against the measure, and which may include any other information that would assist understanding the purpose and effect of the measure. Any person may file written comments for consideration by the research staff during the preparation of such analysis.

(b) At least thirty days before the election, the research staff shall cause the ballot information booklet to be distributed to active registered voters statewide.

(c) If any measure to be voted on by the voters of the entire state includes matters arising under section 20 of article X of this constitution, the ballot information

booklet shall include the information and the titled notice required by section 20 (3) (b) of article X, and the mailing of such information pursuant to section 20 (3) (b) of article X is not required.

(d) The general assembly shall provide sufficient appropriations for the preparation and distribution of the ballot information booklet pursuant to this subsection (7.5) at no charge to recipients.

(8) The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado".

(9) The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen percent to propose any measure by the initiative in any city, town, or municipality.

(10) This section of the constitution shall be in all respects self-executing; except that the form of the initiative or referendum petition may be prescribed pursuant to law.

Article X- Revenue

Section 20. The Taxpayer's Bill of Rights.

(1) **General provisions.** This section takes effect December 31, 1992 or as stated. Its preferred interpretation shall reasonably restrain most the growth of government. All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions. Other limits on district revenue, spending, and debt may be weakened only by future voter approval. Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous. Revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct. Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return. When annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments, (4)(a) and (7) shall be suspended to provide for the deficiency.

(2) **Term definitions.** Within this section:

(a) "Ballot issue" means a non-recall petition or referred measure in an election.

(b) "District" means the state or any local government, excluding enterprises.

(c) "Emergency" excludes economic conditions, revenue shortfalls, or district salary or fringe benefit increases.

(d) "Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.

(e) "Fiscal year spending" means all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfer or expenditures, damage awards, or property sales.

(f) "Inflation" means the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

(g) "Local growth" for a non-school district means a net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to,

minus deletions from, taxable real property. For a school district, it means the percentage change in its student enrollment.

(3) Election provisions.

(a) Ballot issues shall be decided in a state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years. Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues and voters may approve a delay of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period.

(b) At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "All Registered Voters" at each address of one or more active registered electors. The districts may coordinate the mailing required by this paragraph (b) with the distribution of the ballot information booklet required by section 1 (7. 5) of article V of this constitution in order to save mailing costs. Titles shall have this order of preference: **"NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED**

MEASURE." Except for district voter-approved additions, notices shall include only:

(i) The election date, hours, ballot title, text, and local election office address and telephone number.

(ii) For proposed district tax or bonded debt increases, the estimated or actual total of district fiscal year spending for the current year and each of the past four years, and the overall percentage and dollar change.

(iii) For the first full fiscal years of each proposed district tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase.

(iv) For proposed district bonded debt, its principal amount and maximum annual and total district repayment cost, and the principal balance of total current district bonded debt and its maximum annual and remaining total district repayment cost.

(v) Two summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary

shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments. The provisions of this subparagraph (v) do not apply to a statewide ballot issue, which is subject to the provisions of section 1 (7.5) of article V of this constitution.

(c) Except by later voter approval, if a tax increase or fiscal year spending exceeds any estimate in (b)(iii) for the same fiscal year, the tax increase is thereafter reduced up to 100% in proportion to the combined dollar excess, and the combined excess revenue refunded in the next fiscal year. District bonded debt shall not issue on terms that could exceed its share of its maximum repayment costs in (b)(iv). Ballot titles for tax or bonded debt increases shall begin, **"SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY ... ?" or "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost), ... ?**

(4) **Required elections.** Starting November 4, 1992, districts must have voter approval in advance for:

(a) Unless (1) or (6) applies, 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 net tax revenue gain to any district.

(b) Except for refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans, creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.

(5) **Emergency reserves.** To use for declared emergencies only, each district shall reserve for 1993 1% or more, for 1994 2% or more, and for all later years 3% or more of its fiscal year spending excluding bonded debt service. Unused reserves apply to the next year' s reserve.

(6) **Emergency taxes.** This subsection grants no new taxing power. Emergency property taxes are prohibited. Emergency tax revenue is excluded for purposes of (3)(c) and (7), even if later ratified by voters. Emergency taxes shall also meet all of the following conditions:

(a) A 2/3 majority of the members of each house of the general assembly or of a local district board declares the emergency and imposes the tax by separate recorded roll call votes.

(b) Emergency tax revenue shall be spent only after emergency reserves are depleted, and shall be refunded within 180 days after the emergency ends if not spent on the emergency.

(c) A tax not approved on the next election date 60 days or more after the declaration shall end with that election month.

(7) Spending limits.

(a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991. Population shall be determined by annual federal census estimates and such number shall be adjusted every decade to match the federal census.

(b) The maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual local growth, adjusted for revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(c) The maximum annual percentage change in each district's property tax revenue equals inflation in the prior calendar year plus annual local growth, adjusted for property tax revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(d) If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset. Initial district bases are current fiscal year spending and 1991 property tax collected in 1992. Qualification or disqualification as an enterprise shall change district bases and future year limits. Future creation of district bonded debt shall increase, and retiring or refinancing district bonded debt shall lower, fiscal year spending and property tax revenue by the annual debt service so funded. Debt service changes, reductions, (1) and (3)(c) refunds, and voter-approved revenue changes are dollar amounts that are exceptions to, and not part of, any district base. Voter-approved revenue changes do not require a tax rate change.

(8) Revenue limits.

(a) New or increased transfer tax rates on real property are prohibited. No new state real property tax or local district income

tax shall be imposed. Neither an income tax rate increase nor a new state definition of taxable income shall apply before the next tax year. Any income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge.

(b) Each district may enact cumulative uniform exemptions and credits to reduce or end business personal property taxes.

(c) Regardless of reassessment frequency, valuation notices shall be mailed annually and may be appealed annually, with no presumption in favor of any pending valuation. Past or future sales by a lender or government shall also be considered as comparable market sales and their sales prices kept as public records. Actual value shall be stated on all property tax bills and valuation notices and, for residential real property, determined solely by the market approach to appraisal.

(9) State mandates. Except for public education through grade 12 or as required of a local district by federal law, a local district may reduce or end its subsidy to any program delegated to it by the general assembly for administration. For current programs, the state may require 90 days notice and that the

adjustment occur in a maximum of three equal annual installments.

APPENDIX G

Colorado Enabling Act, 18 Stat. 474 (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.

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.

* * *

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.