UNITED DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AMERICAN TRADITION INSTITUTE, *et al.*, Plaintiffs, v. THE STATE OF COLORADO, *et al.*, Defendants.	Case No. 11-CV-00859

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

COME NOW Plaintiffs, by and through their undersigned counsel, and hereby submit their Response to Defendants' Motion to Dismiss (Defs.' Mot. to Dismiss, ECF No. 28).

INTRODUCTION

The Plaintiffs, the American Tradition Institute ("ATI") and the American Tradition Partnership ("ATP") brought this case on behalf of their members, including the named individual Plaintiff, Rod Lueck, (jointly, the Plaintiffs), seeking declaratory and injunctive relief and an award of damages under 42 U.S.C. §1983. The Plaintiffs allege that the Colorado Renewable Energy Standard ("RES"), codified at Colo. Res. Stat. § 40-2-124, violates the Commerce Clause (Article I, Section 8) of the United States Constitution (Pls.' Am. Compl. ¶¶ 1, 2, ECF No. 12). The Defendants now seek to defend the RES, not on the basis of its merits, but rather by attacking the Plaintiffs' ability to bring the case. As demonstrated below, this tact must fail, and the Plaintiffs' case must proceed.

THE PARTIES

The Plaintiffs incorporate Paragraphs 3-12 of their Amended Complaint and Paragraphs 3-4 of the Stipulated Motion to Substitute Party as though fully set forth herein (Pls.' Am. Compl. ¶¶ 3-12; Stipulated Mot. to Substitute Party ¶¶ 3-4, ECF No. 15).

STANDARD OF REVIEW

Defendants move to dismiss the Plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(1) and (6). Under 12(b)(1), a court may dismiss a claim if the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Failure to establish standing deprives a federal court of subject matter jurisdiction. *Shultz v. Thorne*, 415 F.3d 1128, 1132 (10th Cir. 2005). Under this rule, the court "must accept as true all material allegation of the complaint and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Under Fed. R. Civ. P. 12(b)(6), the court's role is "not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003). All well-pleaded facts in the complaint are assumed to be true and are viewed in the light most favorable to the plaintiff. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990).

ARGUMENT

I. Plaintiffs Have Standing to Bring This Case

The Supreme Court's "standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, ... and prudential standing which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004)(internal quotation marks omitted). The

Defendants challenge both strands of the Plaintiffs' standing; however, as demonstrated below, both strands hold strong.

A. Plaintiffs Establish Art. III Standing

To have Article III standing, "[t]he plaintiff must show that the conduct of which he[, she, or it] complains has caused him[, her, or it] to suffer an 'injury in fact' that a favorable judgment will redress." *Newdow,* 542 U.S. at 12. This standard has been anatomomized into three elements. A plaintiff must allege: (1) a concrete and particularized, actual or imminent injury, (2) which is fairly traceable to defendant's conduct, and (3) which a favorable court decision will redress. *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993). Plaintiffs have established each element of Article III standing.

First, Plaintiffs have suffered an injury in fact. An injury in fact must be "a palpable and distinct harm" that, even if "widely shared", "must affect the plaintiff in a personal and individual way." *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 138 (3d Cir. 2009) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n. 1 (1992)). Here, Plaintiff Lueck has alleged that he has suffered injury in the form of "higher energy rates, through higher electricity costs, less reliable electricity service, greater emissions of pollutants regulated under the federal Clean Air Act and higher emissions of greenhouse gases" (Pls.' Am. Compl. ¶ 5). The first injury alleged – higher energy rates, through higher electricity costs – is sufficient to establish injury in fact.[1] This injury is both palpable and distinct, and although it is widely shared by other Colorado rate payers, it affects Plaintiff Lueck in a personal and individual way. Thus, Plaintiff Lueck has established the first element of standing.

[1] The Plaintiffs need not address the other injuries alleged in the Amended Complaint because the economic injury of higher energy rates is sufficient to establish standing. This is in no way is intended to indicate that the Plaintiffs' additional injuries are insufficient to establish standing.

Next, the traceability prong "focuses on who inflicted [the] harm." *Toll Bros.*, 555 F.3d at 142. While "[t]he plaintiff must establish that the defendant's challenged actions, not the actions of some third party, caused the plaintiff's injury[,] … [t]his causal connection need not be as close as the proximate causation needed to succeed on the merits of a tort claim," and "an indirect causal relationship will suffice." *Id.* Here, Plaintiff Lueck's injury is readily traced to the RES. The RES allows utility companies to charge the rate payer two percent (2%) above the cost of electricity generated from non-renewable sources (Am. Compl. ¶129). This extra charge is listed on consumers' bills as the Renewable Energy Standard Adjustment (RESA) (*Id.*). The consumers' monthly statement explains that the RESA represents "2% of an electric bill and funds the renewable energy program as required by [the RES]." (*Id.* ¶ 130). Accordingly, the injurious energy rate imposed through the RESA is clearly traceable to the RES. Thus, Plaintiff Lueck has established the second element of Article III standing.

The final element, redressability, "does not demand mathematical certainty," but does requires "a 'substantial likelihood' that the injury in fact can be remedied by a judicial decision." *Id.* at 143 (*quoting Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000)). Here, Plaintiff Lueck's injury could be remedied by a judicial decision of this court. If the court were to determine the RES were unconstitutional, its enforcement would be suspended and the RES could no longer be used to extract injurious energy rates from the Plaintiff. Consequently, Plaintiff Lueck's injury is redressable by a judicial decision, and he has established the third, and final, element of Article III standing. Having established each element, Plaintiff Lueck has proven Article III standing.

This conclusion is reinforced by comparison to the case *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), where upon strikingly similar facts, the Tenth Circuit upheld the

plaintiff's Article III standing. In *Foremaster*, the plaintiff, was a citizen who challenged the legality of an electrical subsidy used to fund the exterior lighting of a Mormon Temple. *Id*. at 1486. The plaintiff alleged that he suffered economic injury because the subsidy caused him to pay higher rates for electricity. *Id*. at 1487. The Tenth Circuit found that this was a "distinct and palpable" economic injury because, as a power purchaser of municipal electricity, the plaintiff was less well-off and paid higher rates because of the subsidy. *Id*.

The court further found that the second two elements of Article III standing, traceability and redressability, were also established. *Id*. at 1488. The court reasoned that the economic injury was fairly traceable to the subsidy, because without it, the plaintiff would not have had to pay additional fees, and if the subsidy were ended, the plaintiff would be relieved of the economic injury. *Id*. The court concluded that the plaintiff "suffered economic harm from the subsidy to the Temple and [therefore] had standing to challenge it." *Id*.

For the purposes of Article III standing, the present case is indistinguishable from *Foremaster*. Like the *Foremaster* plaintiff, Plaintiff Lueck asserts economic injury in the form of higher electricity rates (Pls.' Am. Compl. ¶ 129). This economic injury is fairly traceable to the RES because without the RES, Lueck would not have to pay the higher rate. Moreover, as explained above, the utility companies' bill explicitly attributes the RESA to the RES (Pls.' Am. Compl. ¶ 130). Finally, if the RES were withdrawn, Plaintiff Lueck would be relieved of his economic injury because the RESA would have to be dropped from the monthly bill. Thus, the same outcome must be reached under this case as under *Foremaster*: the plaintiff suffered economic harm due to the challenged energy subsidy, and therefore, has standing to challenge it.[2]

[2] The Defendants attempt to distinguish *Foremaster* by pointing to irrelevant and erroneous factual distinctions. First, the Defendants assert that the alleged injury in *Foremaster* was "localized among a limited group of

B. ATI and ATP Have Organizational Standing

An organization may establish standing when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested require[] the participation of individual members in the lawsuit." *Hung v. Washington State Apple Advertizing Comm'n*, 432 U.S. 333, 343 (1977). ATI and ATP meet each of these requirements, and consequently, have standing to participate as Plaintiffs in this suit.

As resolved above, Plaintiff Lueck, a member of both ATI and ATP, has standing to sue in his own right (Pls.' Am. Compl. ¶¶ 1, 5). Additionally, and unchallenged by Defendants, the interests sough to be protected are germane to ATI's and ATP's purposes, and the individual members of these organizations need not personally participate in the lawsuit (*see* Pls.' Am. Compl. ¶¶ 3-4).[3] Thus, ATI and ATP have met all organizational standing requirements, and accordingly, have standing to participate in the suit as Plaintiffs.

C. Plaintiffs Not Barred by Prudential Standing

The prudential standing doctrine encompasses various situations in which a federal court may choose not to exercise jurisdiction even though a party has established Article III standing. *Warth*, 422 U.S. at 498; *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000).

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individuals" (Defs.' Mot. to Dismiss 13 fn. 5). However, the size of the customer base is never in mentioned in *Foremaster*, much less relied upon as an operative fact. Second, the Defendants assert that the "causal relationship between ending the subsidy and the effect on rates was very direct" whereas the alleged effect on rates in this case is very complex (Defs.' Mot. to Dismiss 14 fn. 6). Contradicting this assertion the statement quoted above explaining the purpose of the RESA appearing on every utility bill (Amended Complaint ¶ 130). Taken at its word, the RESA's 2% rate hike is used directly to fund the RES (*Id.*). In short, the Defendants are attempting to distinguish a case, that for all relevant purposes, is indistinguishable.

[3] Defendants assert that ATI and ATP may not rely on their general mission in order to bolster their standing to bring these claims (Defs.' Mot. to Dismiss 18). Insofar as ATI and ATP rely on their "general mission," it is to support the second prong of the organizational standing inquiry, not to bolster the organizations standing independent of Plaintiff Lueck. Consequently, Defendants' argument is immaterial.

The Defendants urge this court to hide behind the prudential standing doctrine in order to avoid hearing the Plaintiffs' case (Defs.' Mot. to Dismiss ¶¶ 7, 9, 12-13, 15). To accomplish this, the Defendants offer three prudential standing rules: (1) the plaintiff must assert his, her, or its own rights rather than asserting the legal rights of others; (2) the court should decline to hear "generalized grievances" based on abstract injuries; and (3) the plaintiff's claims must fall within the "zone of interest" to be protected by the constitutional guarantee in question (*Id*.). *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 474-75 (1982). None of these rules is appropriately relied upon in the present case.

1. The Plaintiffs Properly Assert Their Own Rights

The first rule is that plaintiffs must assert his, her, or its own rights, not the rights of a third-party. *Id*. The Defendants argue that the Plaintiffs improperly assert the legal rights and interest of third-parties in contravention of the Supreme Court precedent *Warth v. Seldin*, 422 U.S. 490 (1975) (Defs' Mot. to Dismiss ¶ 15). However, the Plaintiffs here are easily distinguished from the plaintiffs denied standing in *Warth.*

In *Warth*, taxpayers who potentially suffered increased taxes resulting from defendant's zoning practices were barred by the third-party prudential standing rule because they were asserting the rights or legal interest of third-parties in order to obtain relief from injury to themselves. *Warth*, 422 U.S. at 509. The Court anchored its holding on the facts that the *Warth* taxpayers were not themselves subject to the allegedly unconstitutional practice, and they did not have any relationship with the third parties whose rights were allegedly violated. *Id*. at 510. Here, neither is the case. The Plaintiffs are directly subject to the unconstitutional law as evidenced by the monthly RESA paid by Plaintiff Lueck to fund the RES (Pls.' Am. Compl. ¶¶

129-130). Moreover, Plaintiffs have a direct and concrete relationship with the utility companies, as it is from these companies that Plaintiff Luecks receives his monthly utility bill.

What is more, the *Warth* Court explained that "persons to whom Congress has granted a right of action, either expressly or by clear implication may have standing to seek relief on the basis of the legal rights and interest of others, and indeed, may invoke the general public interest in support of their claim." *Id*. at 501. Here, as explained above, the Plaintiffs do not need to assert the rights of others in order to be entitled to seek relief; however, this does not mean that they are precluded from invoking the full spectrum of constitutional violations of the RES in support of their claims for relief.

The only other case cited by the Defendants in support of their argument is simply off-the-mark. In *RMA*, pursuant to a writ of execution, the plaintiff auctioned its rights to the award from a lawsuit at a public sale to the defendants. When the plaintiff then tried to appeal the underlying lawsuit, the court denied the plaintiff standing relying upon the third-party prudential standing rule. *RMA*, 576 F.3d at 1073. Thus, the plaintiff was only denied standing on a prudential basis because it *sold* its rights to the lawsuit to the defendant. *Id*. Far from the situation in *RMA* (and assuming constitutional rights could be sold), the Plaintiffs in this case have not auctioned-off their constitutional rights to the highest bidder, and are not now attempting to assert those rights despite the fact that they no longer possess them. Instead they are asserting a violation of their own inalienable constitutional rights. Consequently, applying this prudential standing rule in the same manner as the court in *RMA* would be fatuous.

2. Plaintiffs' Claims Not a Generalized Grievance

The second prudential standing rule is that "the party who invokes the power [of the judiciary] must be able to show not only that the statute is invalid, but that he[, she, or it] has

sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he[, she, or it] suffers in some indefinite way in common with people generally." *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 478 (1982) (*citing Frothingham v. Mellon*, 262 U.S. 447, 448 (1923). "In short," the court must find that the plaintiff's grievance is "a direct dollars-and-cents injury" not just a "clash of interests" that may nevertheless be "real and … strong." *Id.* (internal quotation marks omitted).

Here, the Plaintiffs' injury literally comes down to dollars-and-cents (*See* Pls.' Am. Compl. ¶¶ 129-30). Just because this injury is shared by other Colorado electric utility consumers does not mean that the Plaintiff suffers in a generalized, indefinite way. To the contrary, the Plaintiff has sustained, and continues to sustain, a definite and particular dollars-and-cents injury every month when he pays his electricity bill.

3. Plaintiffs' Claims Within Zone of Interest of Dormant Commerce Clause

The final prudential standing rule requires the plaintiff's interests to arguably fall within the "zone of interests" intended to be protected by the constitutional provision upon which the claim is based. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Although the zone of interests "test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit[,] [t]he test is not meant to be especially demanding." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Here, the zone of interest determination is made in the context of the Commerce Clause of the United States' Constitution. U.S. Const. art. I, § 8.[4] The Commerce Clause provides that "Congress shall have Power ... to regulate Commerce ... among the several States." *Id*. The

[4] The Plaintiffs would like to remind the court of its environmental concerns with regard to the RES as an additional basis to uphold the court's prudential standing (Pls.' Am. Compl. ¶¶ 107-18).

Supreme Court has explained that the Commerce Clause was not only designed to protect the states, but was also "intended to benefit those [individuals] who ... are engaged in interstate commerce. The [c]onstitutional protection against burdens on commerce is for [their] benefit." *Dennis v. Higgins*, 498 U.S. 439, 448-49 (1991)(internal quotation marks omitted). Thus, the Commerce Clause "has been interpreted to contain an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652 (1981)(internal quotation marks omitted). This implied limitation is often referred to as the "dormant" Commerce Clause.

The Defendants' remaining prudential standing argument is that the Plaintiffs' claims fall outside of the zone of interest of the dormant Commerce Clause. However, quite the opposite is true; this suit falls squarely in the zone of interest of the dormant Commerce Clause.

All that is necessary to overcome the "not especially demanding" zone of interest test is that the plaintiff's interests be "marginally related to," and not "inconsistent" with, the interests intended to be protected by the dormant Commerce Clause. *Clarke*, 479 U.S. at 399; *see also Camp*, 397 U.S. at 153. Here, Plaintiff Lueck's injuries arise through his engagement in interstate commerce, the very activity entitled to protection under the dormant Commerce Clause.[5] *Dennis*, 498 U.S. at 448-49. The electricity Plaintiff Lueck purchases is drawn from an interstate grid (Pls.' Am. Compl. ¶¶ 53-59). As more fully described in Plaintiffs' Amended Complaint, this means that the electricity could have been generated in any one of the multitude

[5] The Defendants attempt to draw a distinction between consumer choice and consumer protection, arguing that consumer protection is outside of the dormant Commerce Clause's zone of interest (Defs.' Mot. to Dismiss 10). This argument is a non-starter because the Supreme Court has explicitly recognized consumer protection as a goal of the dormant Commerce Clause. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (under the Commerce Clause, "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 286 (1997) ("Consumers who suffer this sort of injury [*i.e.* higher prices] from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III.").

of states connected to the grid (*Id.*). Consequently, every time Plaintiff Lueck purchases electricity – or for that matter, turns on the lights – he engages in interstate commerce entitled to protection by the dormant Commerce Clause.[6] Thus, the Plaintiffs interests fall squarely within the zone of interest of the dormant Commerce Clause.

Furthermore, alleged economically protectionist, energy-related laws routinely provide fodder for dormant Commerce Clause challenges. Limiting our review to facially-discriminatory, energy-related laws, a plethora of cases immediately surface. *See e.g. General Motors Corp. v. Tracy*, 519 U.S. 278 , 286-87 (1997) (holding an in-state consumer challenging a law imposing a tax on natural gas had standing to raise a dormant Commerce Clause challenge because they suffered injury in the form of higher natural gas prices).[7] Even within this limited scope of review, it is evident that alleged economically protectionists, energy-related laws, such as the RES, are the bread and butter of dormant Commerce Clause jurisprudence.

In sum, the court should not surrender its jurisdiction over this case due to the prudential standing doctrine.

II. The Eleventh Amendment Does Not Bar the Plaintiffs' Claims

Under the Eleventh Amendment, states are generally immune from suits brought in federal court by their own citizens, or by citizens of other states. *See* U.S. Const. amend. XI; *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 827 (10th Cir. 2007). However, the

[6] Whether or not the Colorado RES violates the Commerce Clause must be resolved at trial and is not a matter to be resolved at this stage of litigation. *Warth*, 422 U.S., 500 (1975) ("[s]tanding in no way depends on the merits of the plaintiff's contention that the particular conduct is illegal").

[7] *See also New Hampshire v. New England Power*, 455 U.S. 331 (1982) (striking down a law prohibiting hydroelectric plants from selling power out-of-state before offering it for sale in-state because it effectively hoarded the resources for state's economic advantage); *Oklahoma v. Wyoming*, 502 U.S. 437 (1992), (invalidating a law requiring in-state plants to burn a mixture of coal containing at least ten percent in-state-mined coal); *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995) (abolishing a law making the use of in-state coal a more attractive option compared with out-of-state coal); *New Energy Co. of Indiana* , 486 U.S. 269 (1988) (holding a law that extended a tax credit to users of ethanol from Ohio or from other states granting reciprocal tax advantages to violate the Commerce Clause).

Supreme Court has outlined "certain limits ... implicit in the constitutional principle of state sovereign immunity." *Alden v. Maine*, 527 U.S. 706, 755 (1999).

One such limit is known as the *Ex Parte Young* exception. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). Under *Ex Parte Young*, the Eleventh Amendment does not bar suits against a state officer in his or her official capacity when the plaintiff is seeking prospective relief. *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). The Supreme Court has explained that in determining whether the *Ex Parte Young* exception applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002). Under the *Ex Parte Young* exception, nearly all of the Plaintiffs' claims are permitted by the Eleventh Amendment.

A. The Defendants Named in Their Official Capacity are Not Immune from Suit Seeking Prospective Relief

The *Ex Parte Young* exception applies when: (1) the defendant is an official and is being sued in that capacity, (2) the complaint alleges an ongoing violation of federal law, and (3) the plaintiffs seek relief properly characterized as prospective. *Verizon* 535 U.S. at 645 (2002) *Edelman*, 415 U.S. at 667-68; *Ex Parte Young*, 209 U.S. 159-60. Here, each element of the *Ex Parte Young* exception is met.

First, Defendants Hickenlooper, Kelley, Epel, Tarpey, Baker, and Dean are officials of the State of Colorado and are being sued in that capacity (Amended Complaint Case Caption, ¶¶ 7-12; Stipulated Mot. to Substitute Party ¶¶ 3-4). Second, the complaint alleges an ongoing violation of the Commerce Clause of the United States' Constitution (Amended Complaint ¶¶ 2, 6, 18, 60-78, 146, 148, 157-59, 164-65, 170, 175, 180, 185). Finally, the Plaintiffs have properly characterized their relief as prospective. Properly characterized prospective relief includes

declaratory relief that the law is unconstitutional and/or an injunction prohibiting the defendant from enforcing the unconstitutional law. *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008). Here, Plaintiffs' Claims for Relief One through Twelve seek prospective relief (Pls.' Am. Compl. ¶¶ 156-88). Thus, Plaintiffs' claims for prospective relief against Hickenlooper, Kelley, Epel, Tarpey, Baker, and Dean in their official capacities are permitted by the Eleventh Amendment.

The Defendants argue that the Plaintiffs erroneously rely on the *Ex Parte Young* exception in naming Defendants Hickenlooper and Kelley (Defs.' Mot. to Dismiss 20). The Defendants are wrong. As explained in *Ex Parte Young*, the exception is applicable so long as the defendant officer has "some connection with the enforcement of the act." *Ex Parte Young*, 209 U.S. at 157. Based on other Tenth Circuit application of this caveat, Defendants Hickenlooper and Kelley have sufficient connection with the enforcement of the RES to remain Defendants in their official capacity for prospective relief. *See e.g. Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 758 (10th Cir. 2010) (holding that state Attorney General was not afforded sovereign immunity because he had duty to enforce the law and demonstrated a willingness to exercise that duty); *Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007) (finding that the *Ex Parte Young* exception was satisfied because the Commissioner "may have [had] interests as a state officer" and "enjoy[ed] unique authorities and responsibilities" in his position); *Wagnon*, 476 F.3d at 828 ("Defendants, although not specifically empowered to ensure compliance with the statute at issue, clearly have assisted or currently assist in giving effect to the law.").

With respect to Defendant Hickenlooper, he has sufficient connection with the RES because he has a duty to enforce it, and has demonstrated a willingness to exercise that duty.

Edmondson, 594 F.3d at 758. It is Defendant Hickenlooper's duty to enforce the laws of Colorado, including the RES, and specifically to implement H.B. 10-1001, the law requiring that the RES to be increased to thirty percent (30%) by 2020. Colo. Const. art. IV, § 2; Colo. Rev. Stat. § 40-2-124; H.B. 10-1001, 67th Gen. Assemb., Reg. Sess. (Co. 2010) (enacted). In carrying out this task, the Governor is obliged to: (1) appoint members of the Renewable Energy Authority, and a committee to study the desirability of credentialing of solar installers; (2) form and administer a Governor's Energy Office; (3) direct funding for the Clean Technology Discovery Evaluation Grant Program; and (4) identify renewable resource generation development areas on land owned by the state. Colo. Res. Stat. §§ 24-33-114, 38.5-101, 38.5-104, 47.5-101, 48.5-111. Defendant Hickenlooper has demonstrated his willingness to exercise these duties by identifying the "support [of] new clean energy and the 30% Renewable Energy Standard" as one of his key energy priorities.[8]

Likewise, Defendant Kelley has sufficient connection with the RES because she is the Executive Director of the Department of Regulatory Agencies ("DORA"), a division of which is the Public Utilities Commission ("PUC"). DORA and the PUC are tasked with enforcement of the Rules Regulating Public Utilities, which include the rules implementing the RES. 4 Code Colo. Regs. 723-3 §3650 *et seq.* (2011). ("[t]he purpose of these rules is to establish a process to implement the renewable energy standard for qualifying retail utilities in Colorado, pursuant to § 40-2-124, C.R.S."). Thus, Defendant Kelley specifically empowered to ensure compliance with the statute at issue, has interest the RES as a state officer, and enjoys unique authority and responsibilities in her position. *Finstuen*, 496 F.3d, 1151; *Wagnon*, 476 F.3d at 828.

[8] Governor John Hickenlooper, *Solutions for a Stronger Colorado*, 25 (2011), *available at* http://www.hickenlooperforcolorado.com/tools/assets/files/Issues-2.pdf.

In sum, the named Defendants Hickenlooper and Kelley are not afforded immunity under the Eleventh Amendment.

B. The Plaintiffs Concede the State of Colorado is Immune From Suit

The Plaintiffs concede that the State of Colorado is immune from suit under the Eleventh Amendment, and are therefore prepared to relinquish the State of Colorado as a named Defendant.

III. Defendants Subject to Suit For Damages Under 42 U.S.C. § 1983 in Their Individual Capacity.

Suits for violations of the Commerce Clause may be brought under 42 U.S.C. § 1983. *Dennis,* 498 U.S. at 451. Individual employees of state government may be sued in their individual capacities for damages. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("[p]ersonal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, '[o]n the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.'") (*quoting Kentucky v. Graham*, 473 U.S. 159, 167 (1985)). Here, the Plaintiffs properly name Defendants Hickenlooper, Kelley, Tarpey, Baker, and Dean in their *individual* capacity for violation of the Commerce Clause (Amended Complaint case caption, ¶¶ 7-8, 10-12, 190). Thus, the individually named Defendants are subject to suit for damages under §1983.

The Plaintiffs are prepared to relinquish Defendant Epel in his individual capacity for damages as he was substituted into this case after commencement of suit.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the court deny the Defendants' Motion to Dismiss.

Respectfully submitted this 16th day of August, 2011.

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