No. 14-460

IN THE

Supreme Court of the United States

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

Petitioner,

v.

ANDY KERR, COLORADO STATE REP., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, INDEPENDENCE INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether voter initiatives that limit taxing and spending constitute a threat to the republican form of state government under the Constitution's Guarantee Clause.

2. Whether those who oppose successful voter initiatives can challenge them in federal court without articulating how exactly they violate the Guarantee Clause.

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INTEREST OF *AMICI CURIAE*[1]

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Independence Institute is a public policy research organization founded in 1984 on the eternal truths of the Declaration of Independence. The Institute has participated in many constitutional cases in federal and state courts including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); and the Affordable Care Act cases. The Institute's *amicus* briefs in *Heller* and *McDonald* (under the name of lead *amicus*, the International Law Enforcement Educators & Trainers Association, ILEETA) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*). The research of Institute Senior Fellow Rob Natelson was cited in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014)

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Parties consented given seven days' notice. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

(Justice Scalia); *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2104) (Justice Alito); *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) (Justice Thomas); and *Arizona v. Inter Tribal Council of Arizona*, 133 S.Ct. 2247 (2013) (Justice Thomas).

Reason Foundation is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by issuing research reports and publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

The Individual Rights Foundation was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation in cases involving fundamental constitutional issues. IRF opposes attempts to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

This case is important to *amici* because it involves an attack on popular sovereignty, which is an ideal central to the Constitution.

SUMMARY OF REASONS TO GRANT THE PETITION

The Court should grant the petition and dispense with respondents' claims because they are plainly both non-justiciable and without merit. Without the Court's guidance, the decision below will stand as a green light for litigants hoping to challenge any of the many state constitutional provisions that limit the legislative omnipotence of state lawmakers.

Respondents claim that the Colorado Taxpayer's Bill of Rights, Colo. Const. art. X, § 20 ("TABOR"), is inconsistent with the Guarantee Clause of the U.S. Constitution. While a claim under the Guarantee Clause may in other situations be justiciable, this is clearly not such a case. This case is not justiciable because (1) the respondents' substituted complaint reveals that the respondents cannot—or will not—enunciate sufficiently manageable judicial standards for review, (2) respondents' requested relief would destabilize dozens of state constitutions in violation of the stability standard for justiciability, and (3) Congress has already authoritatively decided the issues raised by the respondents.

Even apart from justiciability, the Court should grant the petition and rule that the respondents' claims must be dismissed because they are without merit as a matter of law. Respondents' theory that popular restrictions on state legislatures are unconstitutional rests squarely on the long-discredited canard that initiatives and referenda violate the Guarantee Clause.

As a matter of history and law, there is no basis for the assertion that limiting a legislature's fiscal powers violates the republican form. The U.S. Constitution itself contains important fiscal restrictions on Congress, while state constitutional restrictions on legislative power—by popular vote and otherwise—are widespread and long-standing.

Finally, the standard sources used by the U.S. Supreme Court to deduce constitutional meaning show, beyond any doubt, that direct citizen voting on fiscal measures and other laws was a permitted—and even prevalent—feature of "republican" government as the term was understood by those who wrote and adopted the U.S. Constitution. Even if respondents' complaint stated a justiciable claim, the motion to dismiss should still have been granted.

REASONS FOR GRANTING THE PETITION

I. THIS CASE OFFERS AN OPPORTUNITY TO RESOLVE IMPORTANT QUESTIONS ABOUT THE GUARANTEE CLAUSE WHILE AVOIDING THE ISSUE OF WHETHER GUARANTEE CLAUSE CLAIMS ARE *PER SE* NON-JUSTICIABLE

Article IV, Section 4 of the U.S. Constitution, commonly known as the "Guarantee Clause," provides as follows:

> 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.

The overriding purpose of the Guarantee Clause was to prevent any state from lapsing into—or remaining in—monarchy or dictatorship. [2] Here, however, the respondents seek to use the clause for the opposite purpose: to constrain popular government. While this is far from the first time litigants have attempted to use the Guarantee Clause to attack a state constitutional provision allowing for direct citizen participation in lawmaking, the decision below is extraordinary in that it permits a clearly non-justiciable and non-meritorious claim to be heard. By refusing to dismiss the respondents' claims, the Tenth Circuit's decision will subject the constitutions of the dozens of states that use initiatives and referenda to similarly shoddy Guarantee Clause claims. It also creates a split with every other circuit court of appeals—one that this Court need not let develop further.

The Court can avoid this flood of litigation by granting the petition and providing guidance to the lower courts on why claims like the respondents' do not belong before the courts.

Alternatively, the Court could simply look past justiciability to the merits and conclude, as *amici* point out *infra*, that the respondents' claims are factually in conflict with any realistic standards that could be used to decipher the Guarantee Clause. This approach would mirror that of this Court in

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[2] Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 825 (2002). See also THE HERITAGE GUIDE TO THE CONSTITUTION 283 (David F. Forte et al. eds., 2005). Prof. Amar subsequently reached similar conclusions. Akhil Reed Amar, AMERICA'S CONSTITUTION, A BIOGRAPHY 280 (2005).

New York v. United States, where the Court "indulg[ed] the assumption" that the claims at issue were justiciable, yet held the challenged provisions did not "pose any realistic risk of altering the form or the method of functioning" of the state's republican government. *Amici* contend that the respondents' claims plainly present no such risk when viewed in historical context, and can be dispensed with via a narrow and informative ruling.

Either approach will permit the Court to avoid exposing the states to an increase of similarly flawed Guarantee Clause claims—and the Court can do this without implicating the broader question of whether Guarantee Clause claims are per se justiciable. As the petitioner points out, since *New York*, there has been some question in the appeals courts whether the *per se* ban on justiciability of Guarantee Clause claims remains in full force. Cert. Pet. 17 (citing *New York*, 505 U.S. at 184). The flaws in the respondents' claims render such an analysis unnecessary.

II. THIS CASE'S CLAIMS ARE NON-JUSTICIABLE UNDER *BAKER V. CARR* BECAUSE RESPONDENTS HAVE FAILED TO PRESENT JUDICIALLY MANAGEABLE STANDARDS FOR REVIEW AND RULING IN THEIR FAVOR WOULD DESTABILIZE STATE CONSTITUTIONS

For the respondents' case to be justiciable, there must be "judicially discoverable and manageable standards for resolving" their claim. *Baker v. Carr*, 369 U.S. 186, 217 (1962). However, the respondents themselves have difficulty enunciating any coherent

standard. Their substituted complaint does allege that to be "republican," a state must have a "fully effective legislature" (Substituted Complaint, Civil Action No. 1:11-cv-01350-WJM-BNB, Docket #12 at pp. 17-18, ¶ 83), but it never defines that phrase. On the contrary, the precise grounds on which they claim TABOR renders the Colorado legislature less than "fully effective" varies by the paragraph. In some paragraphs, the respondents claim TABOR's alleged shortcoming is the electoral restriction on the legislative power to tax. *See*, *e.g., id.* at p. 4, ¶¶ 6 & 7; p. 15, ¶ 75 (second sentence); pp. 17-18, ¶ 83. Elsewhere, the respondents claim the alleged defect lies in TABOR's spending rules. *Id.* at pp. 16-17, ¶ 79. Still elsewhere, the respondents claim a "fully effective legislature" must have power to "tax and appropriate" (*i.e.*, tax and spend). *Id.* at p. 9, ¶ 44 and p. 12, ¶ 61. In yet other paragraphs, the substituted complaint argues that a republican legislature must have power to "raise and appropriate" (*i.e.*, tax, borrow, and spend). *Id.* at p.3, ¶ 3; p.4, ¶ 7; p.13, ¶ 65; and p.15, ¶ 72.

Clearly, the respondents do not offer "judicially discoverable and manageable standards for resolving" the issues they present. Indeed, as Judge Neil Gorsuch pointed out in his dissent from the Tenth Circuit's denial of rehearing en banc, over three years of litigation, the respondents "haven't even tried" to present such standards. *Hickenlooper v. Kerr*, 759 F.3d 1186, 1194 (10th Cir. 2014) (Gorsuch, J., dissental).

The substituted complaint's prayer for relief presents further problems. It requests invalidation of TABOR in its entirety: "a DECLARATION that the

TABOR AMENDMENT is facially unconstitutional and unconstitutional as applied" and "that the TABOR AMENDMENT is null and void." Substituted Complaint, Prayers for Relief, p. 20, ¶¶ 1 & 2. This relief could be justified only if the taxing, spending, and borrowing limits imposed by TABOR are all invalid—that is, if to be republican, a "fully effective" legislature must be fiscally omnipotent.

This is a strange claim indeed. The U.S. Constitution itself includes many significant restrictions on legislative fiscal power. Congress is forbidden to impose taxes on exports. U.S. Const., art. I, § 9, cl. 5. Direct taxes must be apportioned among the states. *Id*., art. I, § 3, cl. 3 & art. I, § 9, cl. 4. Indirect taxes must be uniform. *Id*., art. I, § 8, cl. 1 & art. I, § 9, cl. 6. Spending is limited to "general Welfare" purposes. *Id*.; *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Appropriations are restricted in various ways. *Id*., art. I, § 8, cl. 12 (limiting the length of military appropriations); *id*, art. I, § 9, cl. 7 (other appropriations rules); *id*., art. I, § 7, cl. 1 (revenue bills must begin in the House).

Moreover, TABOR-like restrictions on taxes, spending, and/or debt are extremely common in state constitutions. *See generally* Robert G. Natelson & Zakary Kessler, The Attack on Colorado's TABOR and the Threat to Other States, Independence Institute Issue Paper 1-2013 (2013) (listing numerous provisions from many states)[3]. In fact, TABOR's requirements of approval of certain fiscal

[3] Available at http://liberty.i2i.org/2013/01/09/attack-colorado-tabor-threat-other-states.

measures by referendum or super-majorities are no more restrictive—and in many cases less restrictive—than per se restrictions on legislative fiscal authority in many state constitutions. *See generally* Natelson & Kessler, especially at 4. Thus, to uphold the respondents' stunning claim, it would be necessary for a court to "entertain the fantasy that more than half the states (27 in all) lack a republican government." *Hickenlooper*, 759 F.3d at 1195 (Gorsuch, J., dissental). Even if the respondents' claim is construed as extending only to restrictions imposed by initiatives and referenda, it still would be inconsistent with two centuries of American state constitution-making.[4] And it would blow holes in more than half of the states' constitutions. *See generally* Natelson & Kessler at 4.

Such a claim violates this Court's justiciability standard based on the need for stability as reflected in *Baker*, 369 U.S. at 217 (a case is not justiciable where there is "an unusual need for unquestioning adherence to a political decision already made").

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[4] A citizen *initiative* occurs when voters adopt a law or state constitutional amendment with no participation—in some states, limited participation—by the legislature. A *referendum* is voter review of a measure, such as a law or constitutional amendment, already passed by the legislature. Depending on the measure and the state, a referendum may be required by the state constitution or may occur by legislative referral or by citizen petition. For example, TABOR was written into the Colorado constitution by initiative. It is similar to constitutional provisions in many other states in requiring that certain extraordinary financial measures be subject to referendum.

III. THIS CASE IS ALSO NON-JUSTICIABLE BECAUSE CONGRESS, UNDER THE RULE IN *LUTHER V. BORDEN* AND *MINOR V. HAPPERSETT*, HAS REJECTED THE CLAIM THAT INITIATIVES AND REFERENDA ARE INCONSISTENT WITH THE REPUBLICAN FORM

In *Luther v. Borden*, 48 U.S. 1 (1849), the U.S. Supreme Court ruled that Congress's acceptance of a state into the union is conclusive proof that it had a republican form of government at the time of acceptance. The Court held:

> Under [the Guarantee Clause] 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 the State before it can determine whether it is republican or not. And 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. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

Id. at 42

The Court reaffirmed that rule in *Minor v. Happersett*, 88 U.S. 162, 176 (1875). Since that time, at least two states have been admitted to the Union

with initial constitutions reserving to the voters wide power over public policy—including fiscal policy.

In 1907, Congress admitted Oklahoma with a state constitution containing very strong provisions for initiative and referendum, Okla. Const., art. V, §§ 1-7, and providing for a mandatory referendum before the legislature could incur debt. Id. art. X, §25. Similarly, in 1912, Congress admitted New Mexico with a constitution that specifically contemplated enactment of laws, including fiscal measures, by citizen initiative. N.M. Const., art. XIX, § 3.

Under the rule of *Minor*, Congress has decided authoritatively that popular restrictions on the legislature's fiscal powers are consistent with the republican form. Re-examining that question would re-open the congressional decision that states like Oklahoma and New Mexico qualified for admission to the Union. The issue is thus non-justiciable. *See Baker*, 369 U.S. at 217 (a case is not justiciable where there is "an unusual need for unquestioning adherence to a political decision already made").

IV. REGARDLESS OF JUSTICIABILITY, THE COURT SHOULD DISPENSE WITH RESPONDENTS' CLAIMS BECAUSE, UNDER ANY REASONABLE STANDARD OF REVIEW, THEY FAIL TO ALLEGE A PLAUSIBLE THREAT TO THE REPUBLICAN FORM OF GOVERNMENT

A. In the Absence of Controlling Precedent, the Phrase "Republican Form of Government" Is Defined by the Standard

Sources this Court Uses for Interpreting Constitutional Text

Claims that initiatives and referenda violate the Guarantee Clause are not new: Their opponents have raised them regularly since the 19th century. Natelson, *supra* note 2, at 842-43 (2002). See also Amar, *supra* note 2, at 276. Some state courts have decided or otherwise opined on the merits, and in doing so, generally rejected respondents' position. Natelson, *supra* note 2, at 810-13 (surveying case law). Federal courts have not addressed the merits because, as the petitioner has pointed out, the Supreme Court has ruled that Guarantee Clause claims are entrusted to Congress and therefore non-justiciable in federal court. For this reason, the Supreme Court has not authoritatively determined the full meaning of "republican form of government." *Cf. Minor v. Happersett*, 88 U.S. 162, 176 (not fully construing the Guarantee Clause, but holding that acceptance of the original states into the Union showed that the Founders understood them to have republican forms of government).

To determine the meaning of a constitutional provision in the absence of binding precedent, this Court proceeds as courts generally do when interpreting any legal document: It examines the words and the contemporaneous facts and circumstances that cast light on the meaning the document held for the parties to it. For the Constitution, the relevant parties are the ratifiers. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (defining "keep and bear arms"); *Boumediene v. Bush*, 553 U.S. 723 (2008) (defining scope of habeas corpus); and *Crawford v. Washington*, 541

U.S. 36 (2004) (using materials from before and during the Founding Era to determine the scope of the Confrontation Clause).

The sources of original constitutional meaning are copious. *See*, *e.g.*, Robert G. Natelson, A Bibliography for Researching Original Understanding (2013), at http://constitution.i2i.org/files/2013/11/Originalist-Bibliography-2013-1113.pdf. Some sources, however, have been used repeatedly by this Court, and therefore enjoy particular persuasive authority. These sources include:

- Founding Era dictionaries. *See, e.g., Heller*, 554 U.S. at 581 (2008) (citing SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., 1773)) and at 584 (citing THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1796)); *McDonald v. City of Chicago*, 561 U.S. 742, 814 n.2 (2010) (citing PERRY'S ROYAL STANDARD ENGLISH DICTIONARY (1788));
- Eighteenth-century political treatises relied on by the Founders, in particular those by eminent authors, such as John Adams. *E.g.*, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (citing Adams's A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES)) and Baron Montesquieu; *Stern v. Marshall*, 131 S.Ct. 2594, 2608-09 (2011) (citing Montesquieu's THE SPIRIT OF THE LAWS);
- The records of the conventions that considered the Constitution; both the federal convention that framed it (*e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (citing MAX

FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787)), and the state conventions that ratified it (*e.g.*, *Crawford*, *supra*, 541 U.S. at 48 (citing debate at the Massachusetts ratifying convention); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 96-97 (2002) (citing remarks of James Wilson at the Pennsylvania ratifying convention)); and

- Contemporaneous publications discussing the Constitution during the ratification process, including *The Federalist*. *See, e.g., McDonald,* 130 S.Ct. at 3037 (2010) (citing both *The Federalist* and the Anti-Federalist "Federal Farmer" essays); *Crawford*, 541 U.S. at 49 (citing the "Federal Farmer").

As demonstrated below, those sources reveal no support for respondents' theory that the "republican form" excluded direct citizen voting on revenue measures or other laws. Indeed, they strongly support the contrary position.

B. Eighteenth-Century Dictionaries Define "Republic" and "Republican" in a Way Fully Consistent with Citizen Votes on Laws and Taxes

If, during the Founding, it were widely understood that direct citizen voting on laws and taxes was inconsistent with republicanism—that a republic must be wholly or primarily representative in form—that understanding should be reflected in contemporaneous definitions of the terms "republic" and "republican." Accordingly, using the authoritative Gale database *Eighteenth Century*

Collections Online, http://gdc.gale.com/products/eighteenth-century-collections-online, *amici* reviewed all available 18th-century dictionaries that defined the noun "republic," the adjective "republican," or both. In all, *amici* collected nine Founding-Era dictionaries, several of which, as noted earlier, have been cited by this Court. When more than one edition was available, *amici* used the one published closest to, but not after, the 13th state (Rhode Island) ratified the Constitution on May 29, 1790.

The results of this exhaustive search are instructive. Thomas Sheridan's dictionary—on which this Court relied in *Heller*, 554 U.S. at 584—did not contain an entry for "republic," but it did define the adjective "republican" as: "Placing the government in the people."[5] Another dictionary this Court has relied on, that of Samuel Johnson, defined "republican" the same way; and further described "republick" as "a commonwealth; state in which the power is lodged in more than one."[6]

All other lexicographers of the period echoed the general approach of Sheridan and Johnson:

Francis Allen defined "republic" as "a state in which the power is lodged in more than one" and "republican" as "belonging to a commonwealth."[7]

John Ash likened "republic" to a "commonwealth; a state or government in which the supreme power is

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[5] THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (unpaginated).

[6] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786) (unpaginated).

[7] FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (1765) (unpaginated).

lodged in more than one." Ash defined "republican" as "[b]elonging to a republic, having the supreme power lodged in more than one."[8]

Nicholas Bailey's dictionary similarly described a republic as "a commonwealth, a free state."[9] Bailey's work had no entry for "republican," but the noun "republican" was denoted as "a commonwealth's man, who thinks a commonwealth, without a monarch, to be the best form of government."[10]

Frederick Barlow's definition of "republic" was "a state in which the power is lodged in more than one. A commonwealth." Barlow's entry for the adjective "republican" was "belonging to a commonwealth; placing the government in the people."[11]

Alexander Donaldson defined "republic" simply as "commonwealth," and "republican" as "placing the government in the people."[12]

In addition, the first American edition of *Perry's Royal Standard English Dictionary* (relied on in *McDonald*), defined "republic" as "a commonwealth without a king" and the adjective "republican" as "placing the government in the people."[13]

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[8] 2 JOHN ASH, A NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (unpaginated).

[9] NICHOLAS BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed. 1783) (unpaginated).

[10] *Id.*

[11] 2 FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772-73) (unpaginated).

[12] ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763) (unpaginated).

[13] PERRY'S ROYAL STANDARD ENGLISH DICTIONARY (1788) (unpaginated).

Finally, Chambers's *Cyclopaedia* presented a more lengthy treatment. It stated that a "republic" was "a popular state or government; or a nation where the body, or only a part of the people, have the government in their own hands." It then itemized two species of republics: "When the body of the people is possessed of the supreme power, this is called a Democracy. When the supreme power is lodged in the hands of a part of the people, it is then an Aristocracy." Chambers added that "The celebrated republics of antiquity are those of Athens, Sparta, Rome, and Carthage."[14]

Not one of these 16 definitions from nine different dictionaries contained the least suggestion that a republic had to be purely representative. Indeed, these Founding-Era definitions of "republic" and "republican" did not require representative institutions of any kind. They required only that the government be a popular one, or at least not a monarchy. Their authors clearly saw direct democracy not as the antithesis of a republic—as respondents assert—but as a *kind* of republic, or at least an overlapping concept.

As explained below, this finding is consistent with a significant historical fact: When the Constitution was ratified, most republics relied heavily on direct democracy, including for revenue measures; indeed, the purely representative republic had been a rarity.

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[14] 4 EPHRAIM CHAMBERS, CYCLOPAEDIA OR AN UNIVERSAL DICTIONARY OF ARTS AND SCIENCES (1783) (unpaginated).

C. Leading 18th-Century Political Works Make Clear That Direct Citizen Voting on Laws and Taxes Is "Republican"

When the Constitution was adopted, most of the prior and contemporaneous republics conspicuously featured institutions of direct democracy whereby citizens voted on revenue measures and other laws. Natelson, *supra* note 2, at 834-35 (summarizing the republics catalogued by John Adams). These had included extremely democratic republics—such as those ruling Athens and Carthage—and more aristocratic republics, such as that of Sparta. Even in Sparta, however, the voters enjoyed the final say over all pending legislation, not merely selected measures. *Id*. at 835. (By contrast, TABOR permits a citizen control only of certain fiscal measures.)

In inferring constitutional meaning, this Court has often relied on important 18th-century political treatises. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (quoting Montesquieu via *The Federalist*). Those treatises reflect the historical fact that direct democracy was often a dominant institution in republican government.

Among the most important of those treatises were Baron Montesquieu's *The Spirit of the Laws* and John Adams's *A Defence of the Constitutions of the United States*. In the leading article on the subject of initiatives and referenda under the Guarantee Clause, Prof. Natelson collected and summarized the relevant treatments by Montesquieu and Adams. He summarized the views of Montesquieu in this way:

> Montesquieu distinguished three kinds of government: monarchies, despotisms, and

> republics. Both monarchies and despotisms were characterized by the rule of one person. What distinguished them was that monarchy honored the rule of law, while despotism did not. Republics were governments in which the whole people, or a part thereof, held the supreme power. Republics governed by merely a part of the people were aristocracies. Republics governed by the people as a whole were democracies.
>
> Like Madison, Montesquieu preferred purely representative government to citizen lawmaking. However, most of the states that he identified as republics authorized their citizens to make or approve all or most laws. He discussed their institutions. He opined that, in ancient times, legislative representation was unknown outside of confederate republics. "The Republics of Greece and Italy were cities that had each their own form of government, and convened their subjects within their walls." Indeed, on repeated occasions, Montesquieu specifically identified Athens—the exemplar of citizen lawmaking—as a republic. Montesquieu described the constitution of the Roman Republic [which featured direct citizen lawmaking] in great detail because "[i]t is impossible to be tired of so agreeable a subject as ancient Rome." He also classified Sparta and Carthage as well-run republics, even though they utilized direct citizen lawmaking.

Natelson, *supra* note 2 at 833-34 (notes omitted).

Adams's treatment of direct citizen lawmaking was similar. Prof. Natelson writes:

> Adams was a strong supporter of the mixed constitution. . . But far from arguing that republics had to be wholly representative, he specifically cited multiple examples of republics with direct citizen lawmaking. His most important example was the Roman Republic, during the discussion of which he reproduced in his volume Polybius's essay on the Roman constitution.

Id. at 834.

Adams also listed many other examples of republics that relied largely, or exclusively, on direct citizen voting on fiscal measures and other laws, including Athens, Sparta, Carthage, and various Swiss cantons. *Id*. at 834-35.

D. Constitutional Convention Records Show That Direct Citizen Voting on Fiscal Matters and Other Laws Is "Republican"

The Founders were well-grounded in history and political science, and particularly in the Greco-Roman classics. *See generally*, Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* (1994). The records of the conventions that drafted and ratified the Constitution, therefore, contain frequent references to earlier republics. *See generally* Natelson, *supra* note 2 (listing scores of examples).

The convention records do not contain a single suggestion, however, that citizen lawmaking was inconsistent with republicanism. On the contrary,

delegates frequently described as "republics" governments that relied on popular assemblies for adoption of their laws. *Id.* at 816-20 (see especially the footnotes). For example, at the drafting convention in Philadelphia, both George Mason and Alexander Hamilton referred to the ancient "Grecian republics." 1 Records of the Federal Convention of 1787, at 112 & 307 (Max Farrand ed., 1937).

The records contain more explicit statements as well. At the Pennsylvania ratifying convention, James Wilson distinguished "three simple species of government": monarchy, aristocracy, and "a republic or democracy, where the people at large retain the supreme power, and act either collectively or by representation." 2 Debates on the Federal Constitution 433 (Jonathan Elliot ed., 1876). Similarly, Charles Pinckney, a leading delegate at the federal Convention, distinguished three kinds of government during the South Carolina ratification convention: despotism, aristocracy, and "[a] republic, where the people at large, either collectively or by representation, form the legislature." 4 *id.* at 328.

E. Commentary During the Ratification Process, Including *The Federalist*, Also Shows That Citizen Lawmaking Was Consistent with the Guarantee Clause

Commentary during the ratification debates also gave the republican label to governments that featured extensive direct democracy. As Prof. Natelson points out:

> In *Federalist Number* 6, Hamilton stated that "Sparta, Athens, Rome, and Carthage were all republics. . . ." In Federalist Number 63,

> Madison listed five republics: Sparta, Carthage, Rome, Athens, and Crete. In his Anti-Federalist writings, "Brutus"—probably Roberts Yates, a conventions delegate from New York—stated that "the various Greek polities" and Rome were republics. Anti-Federalist author "Agrippa" (John Winthrop of Massachusetts) identified Carthage, Rome, and the ancient Greek states as republics. The Anti-Federalist "Federalist Farmer" spoke of the "republics of Greece" and Anti-Federalist "A Farmer" and "An Old Whig" discussed the Roman Republic. An anonymous Anti-Federalist writer, lacking even a pseudonym, spoke of the "Grecian Republics." (This is not exhaustive as to either Federalist or Anti-Federalist authors.)

Natelson, *supra* note 2, at 838 (notes omitted).[15]

To be sure, several Founders expressed reservations about the *wisdom* of direct citizen lawmaking and suggested that a purely representative republic might yield superior results. Much of their concern arose from the fact that in some ancient republics, citizens had voted in mass

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[15] The relevant parts of *The Federalist* are Nos. 6 (Hamilton) and 63 (Madison). *See* ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST PAPERS: THE GIDEON EDITION 23 & 328-29 (George Carey & James McClennan eds. 2001) (discussing the "republics" of Athens, Sparta, and Carthage). *See also* William Duer, N.Y. DAILY PACKET, Nov. 16, 1787 (referring to ancient Athens as a republic).

assemblies subject to sudden mob-like behavior[16]—conditions quite different from those of modern initiative and referendum, in which voting in disparate locations follows lengthy campaigns. But whatever the Founders' views on its *wisdom*, none of the Founders suggested that direct citizen lawmaking was inconsistent with the republican *form*. On the contrary, they repeatedly labeled governments with direct lawmaking as "republics."

This understanding was consistent with all prior experience: When the Constitution was written, the anomaly was *not* direct citizen voting on laws, but rather the creation of a new federal government without it. In fact, purely representative forms were identified more with monarchy than with republics. Natelson, *supra* note 2, at 855. Accordingly, several Founders had to explain that a purely representative federal government would have sufficient popular control to qualify as republican. For example, James Madison, while fully acknowledging that ancient governments with direct citizen voting on laws were republics, sought to show that those earlier governments had also featured some representative institutions—not instead of direct citizen lawmaking, but in addition to it. *The Federalist* No. 63, at 328-29.

Even in Madison's time, moreover, some states employed direct citizen lawmaking. The most famous example, of course, was the town meeting, employed throughout New England. But there were other methods too. Massachusetts ratified its 1780 state

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[16] *See e.g., The Federalist* No. 55 (Madison) at 288 ("Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob").

constitution by referendum. Robert K. Brink, *Timeline of the Massachusetts Constitution of 1780*, Social Law Library Research Portal, available at http://www.socialaw.com/article.htm?cid=15747. Rhode Island conducted referenda on other subjects, including ratification of the U.S. Constitution. [17] Entry of those states into the Union entailed recognition that they had republican forms of government. *Minor*, 88 U.S. at 176.

Finally, nothing prevents a state from altering its constitution to permit more direct citizen lawmaking than it employed when it entered the union. As Madison stated in *Federalist* No. 43:

> As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter.

The Federalist No 43, at 225-26.

F. *Federalist* No. 10 Does Not Prove that Direct Citizen Lawmaking Is Inconsistent with the Republican Form

The sole Founding-Era citation offered by the respondents to support their argument is *Federalist* No. 10. Substituted Complaint at 3-5, ¶ 5. The respondents contend that Madison distinguished

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[17] The Constitution was rejected in Rhode Island by referendum, but later approved by convention. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 30 (Merrill Jensen et al. eds., 1978).

here between a "representative democracy"—which they assert is the only permissible kind of republic—and "direct democracy." *Id*. at 3 ¶ 5. The respondents erroneously report Madison's distinction, however, and they misunderstand its meaning.

As the actual extract demonstrates, Madison did not distinguish between a republic and direct democracy but instead between a republic and *pure* democracy. That difference is important because, as Prof. Natelson points out, the term "pure democracy" (also called "perfect democracy") was a technical term referring not to direct citizen lawmaking, but to a theoretical form of government posited by Aristotle. In that theoretical form, there were no magistrates, and therefore no law; day-to-day administration was conducted entirely by the mob. Natelson, *supra* note 2 at 846-48.[18] Obviously, the state of Colorado—even with all the alleged ills blamed on TABOR—continues to employ magistrates and the rule of law. Colorado certainly does not qualify as a "pure democracy" as used by Madison or anyone else.

Madison's other writings in *The Federalist* show that he accepted direct citizen lawmaking as a common feature of republics. As noted earlier, in *Federalist* No. 63 (which respondents fail to mention),

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[18] *See also* ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT (1698) (Thomas G. West ed., 1996), one of the Founders' favorite books of political science. Sidney referred to "perfect democracy" as a system in which a "small number of men, living within the precincts of one city, have . . . cast into a common stock, the right which they had of governing themselves and children, and by common consent joining into one body, exercised such power over every single person as seemed beneficial." *Id*. at 31.

Madison labeled as "republics" several prior governments where citizens enjoyed far more direct citizen lawmaking than permitted in Colorado. And in *Federalist* No. 39 (which respondents also fail to mention), Madison provides clarifying language in which he clearly implies that republics may feature direct citizen lawmaking: "[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." *The Federalist* No. 39, at 194.

If Madison's view had been that republics must exclude direct citizen lawmaking, his opinion certainly would have been remarkable—at odds with the views universally prevailing at the time. *See* Amar, *supra* note 2, at 276-77. In short, respondents misunderstand Madison; he, like other Founders, recognized that citizen lawmaking was a permissible, and frequent, part of republican government.

Dissenting from the Tenth Circuit's denial of rehearing, Judge Gorsuch noted that the respondents' failure to invoke any manageable standards for reviewing their claims strongly suggests that either there aren't any or "what standards the Guarantee Clause may contain won't prove favorable to them." *Hickenlooper*, 759 F.3d at 1194 (Gorsuch, J., dissental). *Amici* believe that the historical context provided in our brief suggests the latter. This Court thus has the opportunity to make a narrow ruling on the merits and finally put to bed the erroneous notion that citizens of a republic cannot directly participate in lawmaking.

CONCLUSION

For the foregoing reasons, the Court should grant the cert. petition.

Respectfully submitted,

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November 20, 2014