IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, *et al.*	)	
	)	
Plaintiffs-Appellees,	)	
	)	No. 12-1445
v.	)	
	)	
JOHN HICKENLOOPER	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

On Appeal from the United States District Court for the District of Colorado
The Honorable William J. Martinez
Case No. 11-CV-01350-WJM

AMICUS CURIAE BRIEF OF THE CENTER ON BUDGET AND POLICY PRIORITIES

Respectfully submitted,

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Interest of *Amicus Curiae*[1]

The Center on Budget and Policy Priorities (CBPP) is one of the nation's premier policy organizations working at the federal and state levels on fiscal policy and public programs that affect low- and moderate-income families and individuals. The Center conducts research and analysis to help shape public debates over proposed budget and tax policies and to help ensure that policymakers consider the needs of low-income families and individuals in these debates. It also develops policy options to alleviate poverty. In addition, the Center examines the short- and long- term impacts of proposed policies on the health of the economy and the soundness of federal and state budgets. Among the issues it explores are whether federal and state governments are fiscally sound and have sufficient revenue to address critical priorities, both for low-income populations and for the nation as a whole.

CBPP understands that, although the merits of plaintiffs' claims are not currently before the Court, the question of whether the Guarantee Clause provides "judicially manageable standards" for resolving those claims is relevant to the

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[1] This filing is timely in accordance with Fed. R. App. P. Rule 29(e). The parties have consented to this filing. In accordance with Rule 29(c)(5), *amicus* state that no other counsel or party authored any portion of this brief and no counsel or party made monetary contributions intended to fund the preparation or submission of the brief.

justiciability question that the Court must resolve on this appeal. CBPP submits this brief to show that the historical record provides a firm basis for concluding that the Framers understood a "republican form of government" to be one in which a representative legislature must possess the essential, sovereign power to raise revenue. CBPP does not contend that the Guarantee Clause prohibits any and all efforts to set tax policy through direct democracy. Citizen initiatives that impose taxes, *see, e.g., Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912), or that repeal them do not violate the Guarantee Clause. The Colorado Taxpayer Bill of Rights, Colo. Const. art. X, § 20 (TABOR), is unconstitutional, however, because it completely divests the state legislature of a power central to a republican form of government.

ARGUMENT

The federal constitution 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. The Guarantee Clause was a response to Shays's Rebellion, a populist revolt against one state's tax and fiscal policies that had been largely (though not completely) quelled just months before the Philadelphia Convention commenced in May 1787. *See generally* William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 11, 27-42, 50 (1972) ("Wiecek"). The central focus of the Clause was

the risk of open revolt and the overthrow of a state government; its central commitment was to protect against insurrections and the risk that they could lead to the rule of a monarch or despot in any state. *Id.* at 42-50. In addition to these baseline requirements, however, the historical evidence demonstrates that the Guarantee Clause also requires that a state government have a representative legislature that possesses the essential sovereign power to tax. TABOR is unconstitutional because it violates this requirement of a republican form of government.

I. THE FRAMERS UNDERSTOOD THAT A REPUBLICAN FORM OF GOVERNMENT MUST HAVE A REPRESENTATIVE LEGISLATURE.

As used in the Guarantee Clause, the phrase "Republican form of Government" does not require a strictly representative form of democracy—*i.e.*, one that forbids any and all exercises of "pure" or "direct" democracy. The Guarantee Clause, however, does require that, at a minimum, a republican government include a representative legislature.

When the federal constitution was framed, every state constitution provided for a representative legislature.[2] No fewer than nine sections of the original

[2] Del. Const. of 1776, arts. II-V; Ga. Const. of 1777, art. II; Md. Const. of 1776, arts. I-II ; Mass. Const. of 1780, Part the Second, Ch. I; N.H. Const. of 1784, arts. II, IX, XXVII; N.J. Const. of 1776, arts. I-IV; N.Y. Const. of 1777, arts. II, IV,

Constitution depended on these state legislatures.[3] Indeed, one such provision entrusted the election of United States Senators to the state legislatures. *See* U.S. Const. art. I, § 3 (*amended by* amend. XVII).

The Framers, moreover, were plainly wary of pure or direct democracy. In Federalist No. 10, at 52 (James Madison) (Oxford Univ. Press ed., 2008),[4] Madison wrote that a pure democracy

> 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.

VII; N.C. Const. of 1776, arts. I-X; Pa. Const. of 1776, §§ I-II, IX; S.C. Const. of 1778, arts. II, XII-XIII; Va. Const. of 1776. Connecticut and Rhode Island did not have constitutions until 1818 and 1842, respectively. Though Vermont was not officially recognized as a state until 1791, it had a constitution that also included a provision for a representative legislature at the time the Federal Constitution was drafted. Vt. Const. of 1786, Ch. II, §§II, VII.

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

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

In addition, the Framers' descriptions of a "republican form of government" stressed its representative aspects. Madison explained that "[t]he elective mode of obtaining rulers is the characteristic policy of republican government," Federalist No. 57, at 282 (Madison). Alexander Hamilton concurred, saying "the true principle of a republic is, that the people should choose whom they please to govern them." 2 Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 253-57 (1827) ("Elliot"); *see also id.* at 252 (Hamilton) "[T]he general sense of the people will regulate the conduct of their representatives."). Thus, "[i]n republican government, the legislative authority necessarily predominates," Federalist No. 51, at 257 (Madison).

In Federalist No. 71, Hamilton stressed how the representative nature of a republican government served as a check on the "mischiefs" of pure democracy that Madison had decried in Federalist No. 10. Hamilton explained that

> The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, . . . which the people may receive from the arts of men, who flatter their prejudices to betray their interests. . . . *When . . . the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.*

Federalist No. 71, at 351-52 (Alexander Hamilton) (emphasis added).

Of course, the requirement that a republican form of government include a representative legislature does not foreclose the possibility that laws—including taxes—can be established (or repealed) by direct vote of the people. In Federalist No. 43, Madison recognized that states had the right to "choose to substitute other republican forms" of government. Federalist No. 43, at 217 (Madison). It appears that some of the ancient republics that the Framers used as models permitted the adoption of at least some laws through popular vote. *See infra* § II.C. And Congress, which shares responsibility for enforcement of the Guarantee Clause,[5] has admitted to the union states with constitutions that expressly authorized use of referenda to enact laws. *See* Br. of the Independence Inst. and the Cato Inst. at 8 (Feb. 8, 2013).

The question posed by TABOR, however, is not whether direct enactment by citizens of laws, including tax laws, violates the Guarantee Clause. It is, instead, whether the Clause permits a state to divest its representative legislature

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[5] *See* Wiecek, at 59-60 (noting that Article I grants Congress power "'to provide for calling forth the Militia to . . . suppress Insurrections'" and that "[h]ad the Convention meant to restrict power to act under the guarantee [clause] to any one branch of government, it would have relocated the clause in Articles I (Congress), II (President), or III (courts).").

entirely of the power to tax. As we explain next, there is considerable historical evidence that the Framers would not have viewed a government in which the representative legislature has no taxing authority to be "republican in form."

II. THE FRAMERS UNDERSTOOD THAT, IN A REPUBLICAN FORM OF GOVERNMENT, A REPRESENTATIVE LEGISLATURE MUST HAVE THE AUTHORITY TO TAX.

A. The Framers Understood That The Power To Tax Is Essential To The Existence Of Government.

The Framers were determined to establish governments that would endure, and they understood that the power to tax—and thereby fund the core instrumentalities of the state—is critical to the very existence and maintenance of government. Indeed, they were acutely aware of this: one of the central inadequacies of the Articles of Confederation was its notorious failure to empower the federal government to tax. *See*, *e.g.*, Sheldon D. Pollack, *The Failure of U.S. Tax Policy: Revenue and Politics* 33 (1996) ("'Under the Articles of Confederation, extractive capacity was severely limited, and neither legal authority nor bureaucratic machinery existed to enforce the demands of the Continental Congress for revenues.'") (quoting Dall W. Forsythe, Taxation and Political Change in the Young Nation, 1781-1833, at 14 (1977)); Sonia Mittal, Jack N. Rakove, and Barry R. Weingast, *The Constitutional Choices of 1787 and Their Consequences, in Founding Choices: American Economic Policy in the 1790s* at

41 (Douglas A. Irwin & Richard Sylla eds., 2011) (Under the Articles of Confederation, "[t]he national government lacked independent and reliable sources of revenue.").

Congress's inability, under the Articles of Confederation, to provide adequate funds for the army during the Revolutionary War is well known. *See* 5 Washington Irving, *Life of George Washington* 4 (Knickerbocker ed.1869) (noting that, during the war, "the finances of the country were in a lamentable state. There was no money in the treasury. The efforts of the former government to pay or fund its debts, had failed; there was a universal state of indebtedness, foreign and domestic, and public credit was prostrate."). In 1782, Hamilton and Madison focused on the dire need to raise revenue and to "galvanize the new country" and stem a budding popular movement to default on the debt. Ron Chernow, *Alexander Hamilton* 175 (2004)). They believed "Congress required a permanent, independent revenue source, free from reliance on the capricious whims of the states." *Id*. Hamilton stressed this proposition in a resolution to the Continental Congress: "*Resolved*, [t]hat it is the opinion of Congress that complete JUSTICE cannot be done to the creditors of the United States, nor restoration of PUBLIC CREDIT be effected, nor the future exigencies of the war provided for, but by the establishment of permanent and adequate funds to operate generally throughout the

United States, *to be collected by Congress*." 1 *The Works of Alexander Hamilton* 301 (Henry Cabot Lodge ed., Federal ed. 1904) (emphasis in original).[6]

The Framers ultimately resolved this problem by creating a representative legislature that could raise revenue for the general welfare. U.S. Const. art. I, § 8, cl. 1. The representative nature of Congress ensured the legitimacy of federal taxes. As Rufus King explained, "[i]t is a principle of th[e] Constitution, that representation and taxation should go hand in hand." 2 Elliot, *supra* at 36. Indeed, because the people could elect only members of the House (and not, at the time, senators), the Constitution required (and still requires) that all revenue-raising bills originate in the House. U.S. Const. art. I, § 7, cl. 1.

But unlike the scheme created by the Articles of Confederation, under which those subject to revenue demands (the states) could effectively nullify them (by ignoring them), the taxes of the new federal government could not be nullified (except, after *Marbury v. Madison*, by courts enforcing the limits of the Constitution). The Framers ensured "that the power of the general legislature . . .

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[6] As the first Secretary of the Treasury, Hamilton would later draft the blueprint for retiring the nation's (and the states') wartime debts and establishing the nation's creditworthiness. In his *Report on Public Credit*, Hamilton stressed that the nation's debts were the result of borrowing necessitated by the fact that "[t]he states had balked at taxing citizens during a revolt against onerous taxes." *See* Chernow, *supra* at 297.

extend[ed] to all the objects of taxation, that government should be able to command all the resources of the country." 2 Elliot, *supra* at 191(Elsworth). As Hamilton explained, the constitution conferred a "complete power" to tax, because revenue is "the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions." Federalist No. 30 at 143.

Indeed, at the time that the first Congress considered what became the Bill of Rights, a number of states had proposed an amendment that would have effectively allowed the states to override Congress's legislation on direct taxes, by requiring that Congress first determine that taxes from other sources were insufficient, and then requiring that it requisition needed funds from the states in proportion to their relative populations.[7] The first Congress (in which many

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[7] George Mason proposed the following amendment, versions of which appeared in proposals adopted by the ratifying conventions in Massachusetts, New York, New Hampshire, and South Carolina:

> That the Congress do not lay direct Taxes . . . but when the Monies arising from the Duties on Imports are insufficient for the public Exigencies; nor then until the Congress shall have first made a Requisition upon the States, to assess, levy and pay their respective Proportions of such requisitions according to the Enumeration or Census fixed in the Constitution, in such Way and Manner as the Legislature of the State shall

Framers, including Madison, served) declined to propose this amendment. Its members evidently recognized that stripping the federal legislature of effective ability to make and enforce tax laws would render it less than sovereign and deny it the ability to fulfill any of the other promises of the new national government.

Although the Framers understood that state governments could be republican without mirroring every feature of the new federal government, there are strong reasons to believe that they viewed the indefeasible taxing power that they had conferred on Congress to be indispensable to republican government generally. Their harsh war-time experiences taught them that no government could survive, much less function properly, without the power to raise revenue. Distrustful of direct democracy, the Framers recognized that the unpopularity of taxes had

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> judge best; and if any State shall neglect or refuse to pay its proportion pursuant to such Requisition, the Congress may assess and levy such States' proportion, together with Interest thereon, at the Rate of Six per Centum per Annum, from the Time of Payment prescribed in such requisition.

George Mason, *Amendments to the New Constitution of Government*, CONSTITUTION SOCIETY *available at* http://constitution.org/gmason/amd_gmas.htm Requisitions from the states that were "in every constitutional sense obligatory upon the States" and afforded them "no discretion beyond that of devising the ways and means of furnishing the sums demanded" were the same means of raising funds that had proven so inadequate under the Articles of Confederation. Federalist No. 30 (Hamilton) at 144.

jeopardized the revolution and was threatening to bankrupt their nascent nation. And they rejected an amendment that would have effectively nullified the federal taxing power by conditioning it on the acquiescence of state legislatures. Nothing in their experiences or actions suggests that the Framers would have viewed an indefeasible legislative taxing power to be any less essential to the republican governments guaranteed to the states. To the contrary, the Framers understood that taxing authority was just as vital to state government as it was to the new federal government.[8]

Indeed, as noted earlier, the Guarantee Clause was itself a response to Shays's Rebellion, which was a populist revolt that sought to nullify (through armed insurrection) one state's tax and fiscal policies. *See*, *e.g.*, David P. Szatmary, *Shays' Rebellion: The Making of an Agrarian Insurrection* 32-36 (1980) (discussing the role high taxes played in the rebellion); Chernow, *supra* at 225 (noting Hamilton's view that Shays' Rebellion "'was in great degree an offspring of'" the pressure created by Massachusetts' attempt to settle its debt through

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[8] In fact, this view was shared by opponents of the new constitution, who objected to Congress's taxing power on the grounds that, "[a]s there is no one article of taxation reserved to the state governments, the Congress may monopolize every source of revenue, and thus indirectly demolish the state governments, for without funds they could not exist." *The Anti-Federalist Papers: And The Constitutional Convention Debates* 243 (Ralph Ketcham ed. 2008).

onerous taxes on farmers) (citation omitted). To the Framers, therefore, total nullification of a state legislature's power to impose taxes—whether by revolt or by direct democracy—threatened the very existence of republican government. And that threat, in turn, created an unacceptable risk of chaos, and a concomitant risk that tyranny or a new monarchy could gain a beachhead in a state in the new nation. Because that is the very risk the Guarantee Clause sought to forestall, *see* Wiecek, *supra* at 39-43, there are strong reasons to conclude that the Clause's promise of a republican form of government ensures that each state's representative legislature possesses the essential power to tax.

B. Early State Constitutions All Vested The Power To Tax In The Legislature.

When they drafted the Guarantee Clause, the Framers also would have understood that all of the new state constitutions recognized that a legislative power to tax was essential to the republican state governments then in existence. These early state constitutions consistently vested the power to tax in the state legislature. Many did so by explicitly granting the legislature the exclusive power to tax (Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, South

Carolina[9]); some implicitly assigned the taxing power to the legislature (Georgia, North Carolina, Pennsylvania, the Vermont Republic[10]); and others granted the

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[9] Delaware: Del. Const. of 1776, art. VI ("All money-bills for the support of government shall originate in the house of assembly, and may be altered, amended, or rejected by the legislative council. All other bills and ordinances may take rise in the house of assembly or legislative council, and may be altered, amended, or rejected by either.").

Maryland: Md. Const. of 1776, art. XII ("no aid, charge, tax, fee, or fees, ought to be set, rated, or levied, under any presence, without consent of the Legislature."); *id.* at art. X ("the House of Delegates may originate all money bills.").

Massachusetts: Mass. Const. of 1780, art. IV ("[F]ull power and authority are hereby given and granted to the said general court [legislature] . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth.").

New Hampshire: N.H. Const. of 1784 art. XVIII ("All money bills shall originate in the house of representatives…").

New Jersey: N.J. Const. of 1776, art. VI (the power to "prepare or alter any money bill-which shall be the privilege of the Assembly.").

South Carolina: S.C. Const. of 1778, art. XVI ("all money bills for the support of government shall originate in the house of representatives, and shall not be altered or amended by the senate, but may be rejected by them, and that no money be drawn out of the public treasury but by the legislative authority of the State. All other bills and ordinances may take rise in the senate or house of representatives, and be altered, amended, or rejected by either.").

[10] Georgia: Ga. Const. of 1777, art. VII ("The house of assembly shall have power to make such laws and regulations as may be conducive to the good order and wellbeing of the State"); *id.* at Preamble (recognizing the undemocratic levying of taxes as one of the fundamental reasons to escape British rule); *id.* at art. LIV

legislature plenary powers (New York and Virginia[11]). Thus, in one form or another, every state constitution in eighteenth century America conferred the power to tax on a representative legislature.

Indeed, at the time of the framing, five state constitutions included language that prohibited takings, duties, or taxes "without the consent of the people or their

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("Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.").

North Carolina: N.C. Const. of 1776, art. XIX ("That the Governor, for the time beings shall have power to draw for and apply such sums of money as shall be voted by the general assembly, for the contingencies of government, and be accountable to them for the same.").

Pennsylvania: Pa. Const. of 1776, §41 ("NO public tax, custom or contribution shall be imposed upon, or paid by the people of this state, except by a law for that purpose: And before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be bur[d]ens.").

Vermont: Vt. Const. of 1786, § X ("[P]revious to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to the community, than the money would be if not collected.").

[11] New York: N.Y. Const. of 1777 , art. II ("[T]he supreme legislative power within this State shall be vested in" the assembly and senate).

Virginia: Va. Const. of 1776 ("All laws shall originate in the House of Delegates, to be approved of or rejected by the Senate, or to be- amended, with consent of the House of Delegates; except money-bills, which in no instance shall be altered by the Senate, but wholly approved or rejected.").

representatives" (or words to similar effect).[12] These provisions, which echo the Declaration of Independence and its emphasis on the primacy of the people under natural law,[13] underscored the fundamental principle that taxes cannot be imposed without representation; these provisions did not render the legislature's otherwise plenary taxing authority defeasible. Thus, the "consent of the people" provision in Massachusetts's Constitution was construed to require the state to "provide some representation in the legislature for . . . unincorporated plantations, on whom public taxes had been, or were to be levied, or to abandon the usage of taxing them." *In re Op. of Justices*, 3 Mass. 568, 569-70 (Mass. 1807). The framers of Massachusetts's Constitution recognized that the government "should possess . . . those powers which are essential to sovereignty," but they were "well aware, by the experience through which they had passed, that the power of imposing taxes, though inherent and necessary as a means of supporting and carrying on a government, was a difficult and delicate one, always regarded with jealousy by those on whom it is to be exercised." *City of Lowell v. Oliver*, 90 Mass. 247, 252

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[12] *See* Mass. Const. of 1780, art. XXIII; N.H. Const. of 1784, art. XII (N.H. Bill of Rights); N.C. Const. of 1776, art. XVI; Vt. Const. of 1786, Ch. I, § X; Va. Const. of 1776, §6 (Va. Bill of Rights)

[13] *See* The Declaration of Independence para. 2 (U.S. 1776) (stating that governments "deriv[e] their just powers from the consent of the governed," and criticizing Great Britain for imposing taxes "without our Consent.").

(Mass. 1864). They included the "consent of the people" provision to ensure "that there should be no doubt or dispute, either as to the existence of the power or as to those to whom the authority to use it was delegated." *Id.* Thus, "within the sphere of [taxing] prescribed by the constitution, the authority of the legislature is supreme." *Id.* at 255. *See also* Susan E. Marshall, *The New Hampshire State Constitution: A Reference Guide* 91 (2004) (explaining that same language in New Hampshire's constitution "states the principle of 'no taxation without representation.'"); *Op. of the Justices*, 725 A.2d 1082, 1086 (N.H. 1999) ("[B]oth case law and historical evidence lead us to conclude that [this language] does not reserve a right in the people of this State to consent by binding referendum to the establishment and levy of general taxes."); *Marshall v. N. Va. Transp. Auth.*, 657 S.E.2d 71, 79 (Va. 2008) ("[T]axes must be imposed only by a majority of the elected representatives of a legislative body, with the votes cast by the elected representatives being duly recorded.").

When the Framers wrote the Constitution, they accepted the state governments "precisely as they were," so it is "to be presumed" that the state governments were "republican in form." *Minor v. Happersett*, 88 U.S. 162, 176 (1874). Consequently, the early state constitutions are "unmistakable evidence of

what was republican in form, within the meaning of that term as employed in the Constitution." *Id.*

These early state constitutions reflect the Founding generation's understanding that a legislative taxing power is indispensable to republican government. Like those who drafted Massachusetts's Constitution, the federal Framers understood that the power to tax, while "a difficult and delicate one," was "essential to sovereignty," *City of Lowell*, 90 Mass. at 252; Federalist No. 30 at 143 (Hamilton) (same), and thus was essential to the political stability necessary to ward off "[t]he related specters of tumult, anarchy, military dictatorship, and monarchical government," Wiecek, *supra* at 11. Accordingly, there is considerable evidence that, having conferred plenary taxing authority on the federal legislature they created, and having ensured that this federal legislative taxing power could not be nullified, the Framers would have understood that the federal promise to ensure a republican form of government in each state would likewise prevent complete nullification of the legislature's power to tax.

C. Defendant And His *Amici* Have Not Shown That The Framers Knew And Approved Of Historic Republics In Which A Representative Legislature Was Divested Of All Taxing Authority.

Relying heavily on a law review article, *amici* supporting TABOR argue that the Framers frequently identified ancient governments involving direct democracy

as "republics." *See generally* Br. for *Amici* Independence Inst. and Cato Inst. (citing Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 820 *et seq.* (2002) ("Natelson")). Much of Natelson's article criticizes as historically inaccurate the broad argument that republicanism (as exemplified by Rome and earlier republics) excludes *all* direct citizen lawmaking. That is not an argument CBPP advances here.

Instead, as the historical evidence discussed above shows, the Framers believed that a republican form of government had to include a representative legislature (whether or not such bodies existed in all ancient republics), and that a representative legislature could not be entirely divested of the essential, sovereign authority to tax. CBPP submits that the historical evidence set forth by Natelson does not clearly demonstrate that the Framers believed that a government in which the legislative body completely lacks taxing power was "republican in form."

Natelson asserts that, as the Framers understood it, the sovereign power of the Roman Republic was exercised by "the whole body of citizens, acting without representation, through their popular assemblies," and not (as many modern historians believe) by the representative body of the Senate. Natelson, *supra* at

832 n.127, 839-40. Assuming this is correct,[14] Natelson's description is not evidence of a republic in which sovereign lawmaking power was vested in a representative legislature that completely lacked the sovereign power to tax. It is instead evidence that would support the extreme proposition that a state could abolish its representative legislature altogether and still have a republican form of government—a proposition, CBPP submits, that is refuted by the evidence of the Framers' contrary intent set forth above. *See* Part I.

Natelson also notes two brief statements in which Hamilton and Patrick Henry referred to two assemblies of the Roman Republic, the *comitia centuriata* and the *comitia tributa*. *See* Natelson *supra* at 839 n.187. Both men noted that, in the former, people voted by centuries, which afforded patrician interests greater sway, while in the latter, the people voted by tribes, in which "numbers prevailed." *See* Federalist No. 34 at 159 (Hamilton); 3 Elliot, *supra* at 174 (Henry). Neither statement addresses how taxes were established, much less establishes that, in a republican government, a representative legislature could be stripped entirely of any authority to set taxes.

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[14] CBPP notes that, in the decades following the adoption of the constitution, scholars stated that, in the Roman Republic, "taxes were fixed, not by the people, but solely by the Senate." George Bancroft, *Ancient Greece* 144-45 (2nd ed. 1862) (comparing Rome and Athens).

Natelson also discusses direct democratic lawmaking in republics such as Athens, Sparta, and Carthage. Natelson *supra* at 839. In Federalist No. 63, however, Madison stated that, "[i]n the most pure democracies of Greece, many of the *executive* functions were performed, not by the people themselves, but by officers elected by the people, and representing the people in their *executive* capacity." Federalist No. 63 at 312 (emphasis added). After discussing Athens, Sparta, and the "Cosmi of Crete," Madison concluded that "[t]he true distinction between these and the American governments, lies in the total exclusion of the people, in their collective capacity, from any share in the latter, and not in the total exclusion of the representatives of the people from the *administration* of the former [*i.e.*, the ancient republic governments]." *Id.* at 313 (emphasis added). Thus, in these republics, the Framers understood that pure democracy (which Madison elsewhere criticized in Federalist No. 10, *see supra* at 4) co-existed not with representative *lawmaking* bodies, but with representative *executive officials*. One again, therefore, these examples do not demonstrate that, in creating a new American republic, the Framers were relying on historical models in which a representative lawmaking body (*i.e.*, the legislature) could be stripped entirely of all authority to set taxes.

In short, the government's *amici* have not identified evidence that the Framers knew and approved of historic republics in which a representative legislative body was divested of all taxing authority. These *amici* have thus failed to show that the Framers would have understood a government in which a representative legislature is divested of all power to tax would still be "republican in form."

Conclusion

For the foregoing reasons, *amicus* respectfully ask this Court to affirm the district court's decision. Submitted this 17th day of April, 2013.

Respectfully submitted ,

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CORPORATE DISCLOSURE STATEMENT

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy, or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate *amici* are also required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 12-1445 Caption: *Kerr v. Hickenlooper*

Pursuant to Fed. R. App. P. 26.1, the Center on Budget and Policy Priorities, a 501(c)(3) nonprofit corporation (D.C.), who is an *amicus curiae*, makes the following disclosure:

1. Is party/*amicus* a publicly held corporation or other publicly held entity? NO

2. Does party/*amicus* have any parent corporations? NO

3. Is 10% or more of the stock of a parent/*amicus* owned by a publicly held corporation or other publicly held entity? NO

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation? NO

5. Is party a trade association? (*amici curiae* do not complete this question) N/A

6. Does this case arise out of a bankruptcy proceeding? NO

s/ Joseph R. Guerra

Dated: April 17, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,215 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: April 17, 2013

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) no privacy redactions were required in this brief pursuant to 10th Cir. R. 25.5; (2) the electronically filed version of the brief is an exact copy of the paper version to be filed with the clerk, apart from the substitution of digital signatures; and (3) prior to it being filed, the electronic version of the brief was scanned for viruses with McAfee VirusScan Enterprise v. 8.8 and found to be free from computer viruses.

Date: April 17, 2013

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CERTIFICATE OF SERVICE

The undersigned, attorney of record for *amicus*, hereby certifies that on April 17, 2013, an identical electronic copy of the foregoing amicus brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys. In addition, copies of the brief were sent via first class U.S. Mail, postage prepaid, on April 17, 2013 to:

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