Docket No. 12-1445

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Representative, *et al.*,
Plaintiffs and Respondents,

vs.

JOHN HICKENLOOPER, Governor of Colorado, in his Official Capacity,
Defendant and Petitioner.

Appeal From The United States District Court for the District of Colorado
The Honorable William J. Martinez, U.S. District Judge
Case No. 11-cv-01350-WJM-BNB

BRIEF OF CONSTITUTIONAL LAW SCHOLARS ERWIN CHEMERINSKY, HANS LINDE, WILLIAM MARSHALL, GENE NICHOL, AND WILLIAM WIECEK AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-RESPONDENTS AND URGING DISMISSAL OF THIS APPEAL

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are professors and scholars of constitutional law who have devoted substantial professional time to studying the structures of the state and federal governments established under the United States Constitution. As legal scholars, they offer an arms'-length perspective on the issue of the judicial role presented by the Motion to Dismiss.

Erwin Chemerinsky is the Dean and Distinguished Professor of Law, University of California, Irvine School of Law. He is the author of casebooks and treatises on both Constitutional Law and Federal Jurisdiction and of numerous articles on the Guarantee Clause and other provisions of the U.S. Constitution.

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Amici's interest in this dispute is in the proper resolution of the threshold justiciability question. The consequences of a determination of nonjusticiability are significant; such a determination risks diminishing the accountability of the States or of coordinate branches of the federal government for ensuring adherence to our Constitution. Because the district court correctly declined to dismiss this case on

grounds that the claims presented pose a nonjusticiable "political question," *amici* respectfully urge dismissal of this appeal and remand to the district court for consideration of the merits of plaintiffs-respondents' claims.[1]

SUMMARY OF ARGUMENT

The "political question doctrine" does not bar this court from evaluating the constitutional claims presented by the plaintiffs in this dispute. The Substituted Complaint presents the court with the legal question whether a particular set of provisions added to the Colorado Constitution creates a government structure that is at odds with the obligation of the State of Colorado to maintain a republican form of government. This court has the authority to consider the constitutionality of these provisions under Article IV, section 4, of the Constitution (the "Guarantee Clause") as well as to consider the other claims raised by the plaintiffs.

Similar claims to those presented here have been considered and answered by numerous state and federal courts. The few U.S. Supreme Court opinions that have considered claims under the Guarantee Clause arose in quite different

[1] Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than counsel for amici curiae contributed money to fund preparing or submitting this brief.

contexts and do not bar this court from considering the claims presented here. Further, the tests for assessing "political questions" articulated by the Court in *Baker v. Carr*, 369 U.S. 186 (1962) do not stand in the way of federal court consideration of plaintiffs-respondents' claims. The district court correctly concluded that it could and should proceed to analyze and decide the serious legal and factual questions raised by this suit.

ARGUMENT

The question presented by this case is whether a particular set of provisions that have been added to the Colorado Constitution are inconsistent with the state's obligation to maintain a republican form of government. This is not a dispute about which competing set of persons should be recognized as the legitimate representatives of the state by the federal government. That was the question presented in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). Nor is it about the legitimacy of a state constitution that includes a process for citizens to initiate laws, which was the question in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). The question in this case is much narrower: is a state government in which the representative legislature is deprived of independent authority to tax and spend still the republican form of government mandated by the Colorado Enabling Act and the U.S. Constitution?

The tests developed by the Supreme Court in *Baker v. Carr* do not counsel against judicial review of the claims presented in this case. The *Baker* tests are focused on separating questions appropriately left to political resolution from those reasonably susceptible to judicial resolution. The question whether a provision of the Colorado Constitution goes beyond the bounds of what a "republican form of government" can permit is precisely the type of question of constitutional analysis that courts regularly address.

A. Claims Under the Guarantee Clause Are Not *Per Se* Nonjusticiable

As the Supreme Court observed in *New York v. United States*, 505 U.S. 144 (1992), the justiciability of Guarantee Clause claims is not the settled question that some courts have assumed it to be. Some courts have permitted the "limited holding" in *Luther v. Borden*, *supra*, to "metamorphose[] into the sweeping assertion that" the Guarantee Clause is generally nonjusticiable. *Id.* at 184. In fact, however, this broad assertion is inconsistent with Supreme Court precedent spanning centuries. Prior to and even after *Luther*, the Court decided a number of cases under the Clause. *See, e.g.*, *Kies v. Lowery*, 199 U.S. 233, 239-40 (1905); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874). More recently, the Court has suggested that the question of justiciability depends not simply on the fact that a claim is brought under the Guarantee Clause, but instead on the particular issue

raised by the claim. *See New York*, 505 U.S. at 184; *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (noting that "*some* questions raised under the Guaranty Clause are nonjusticiable," where they meet specified criteria (emphasis added)).

The question presented in this dispute is quite different from those that have confronted the Supreme Court in Guarantee Clause challenges. The differences are, as discussed below, central to understanding why the plaintiffs' claims are within the federal courts' authority to adjudicate.

1. *The Legal Question Presented by a State's Obligation to Maintain a Republican Form of Government is Distinct From the Political Question of How the Federal Government Should Guarantee Republican Government*

The Supreme Court has quite correctly criticized the tendency of lower courts to permit the narrow holding in *Luther v. Borden* to morph into a broad statement about the justiciability of Guarantee Clause claims.[2] *See New York*, 505 U.S. at 184. The question presented in *Luther* was not what constitutes an unconstitutional departure from a "republican form of government." The question was in what manner and by what means the United States is obligated to guarantee

[2] *See, e.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator*, 65 U. COLO. L. REV. 749, 753 (1994) ("the hoary case said to establish the general nonjusticiability of the Clause, Luther v. Borden, in fact establishes no such thing").

such government. These are two entirely distinct questions. The case at bar does not present a question about the obligation of the United States to guarantee Coloradans a republican form of government. Instead, it raises only the question whether the removal of taxing authority from the legislature is inconsistent with the requirement that the state of Colorado maintain a republican form of government.[3]

Luther v. Borden was a unique case. It presented the question "which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one." 48 U.S. at 1. The political choice between competing claimants was in fact pending in Congress at the time. The Court concluded that it was appropriate for Congress, not the Courts, to determine which of these two competing state governments would be recognized by the national government. As Professor Akhil Reed Amar has explained it, "the real question in *Luther* was akin to the international question

[3] The Governor's Opening Brief asserts that the State of Colorado has no duty under the Guarantee Clause. *See* Governor's Opening Brief at 38-40. This is incorrect. As the Supreme Court stated well over a century ago, "[t]he guaranty [of a republican form of government] necessarily implies a duty on the part of the States themselves to provide such a government." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874).

of 'recognition'—a question committed to the federal political branches under our Constitution." Amar, *supra,* at 776.

The fundamental distinction in these republican form of government disputes is that between the nature of the states' legal obligation (which courts can adjudicate) and the nature of the action that the political branches should take against a defaulting state (not a matter for judicial resolution).[4] In the present case, the question is not how Congress or the President should act to restore essential fiscal powers of Colorado's elected representatives. The issue is how a legal standard applies to a concrete situation. No one suggests that the state's institutions cannot be trusted to accept the eventual judicial answer, any more than the answer to other debatable constitutional issues such as, for instance, the effect of the "dormant commerce clause" on a state's public policies.

[4] This distinction is sometimes ignored as a result of ambiguity resulting from the 1787 Convention's combining two distinct parts of John Randolph's 11th Virginia Resolution into a single sentence. *See* James Madison, *Debates on the Adoption of the Federal Constitution*, *in* ELLIOT'S DEBATES 333 (Jonathan Elliot ed., 1845)(1901); Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 951-52 (2001).

2. *The Decision in* Pacific States *Does Not Foreclose Federal Court Consideration of the Legal Questions Presented in this Dispute*

The question whether certain provisions of law constitute an unconstitutional departure from a "republican form of government" is one that is well within the reach of judicial authority. Throughout this case, in his briefs to the District Court, his 1292(b) petition, and in his Opening Brief, the Governor accords undue weight and authority to *Pacific States Telephone & Telegraph* as holding otherwise.

Pacific States Telephone & Telegraph involved a challenge to a tax on telephone and telegraph companies that was passed through Oregon's constitutionally prescribed initiative process. Pacific States asserted that the entire initiative process contained within the Oregon Constitution violated the federal Constitution. The Oregon Supreme Court rejected a wholesale attack on the initiative process by simply citing its earlier opinion in *Kadderly v. City of Portland*, 74 P. 710 (Or. 1903), which had sustained Oregon's system in principle because it left the state's elected representatives free to amend or repeal whatever measure the initiative process had enacted. 74 P. at 720. The United States Supreme Court dismissed the telephone company's appeal as being beyond its own jurisdiction.

Two aspects of Chief Justice White's long opinion deserve mention. First, the opinion painted a scene of devastating consequences if a state were held to have departed in any respect from a republican form of government: it would no longer be a legitimate state and all its laws and other governmental acts would be invalid. The opinion did not consider that only the offending detail would need to be invalidated, leaving the state free to enact a valid alternative of its own choice. The Court thus understood Pacific States' argument as a "contention that the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as a result of the provisions of [the Guarantee Clause]."[5] 223 U.S. at 137. This broad challenge to the legitimacy of the state's "framework and political character," *id.* at 150-51, is very different from a challenge to a single, unique provision of a state's constitution. The Substituted Complaint in the instant case does not argue that Colorado's entire Constitution violates the federal Constitution, that the structure or framework of Colorado's government is entirely invalid, or that the initiative process itself is invalid. Instead it challenges only one part of the state Constitution

[5] Other courts have recognized the broad reach of the challenge presented in *Pacific States.* See, *e.g., Vansickle v. Shanahan*, 511 P.2d 223 (Kansas 1973) ("In short, the holding in *Pacific* was that courts will not consider the merits of a lawsuit where the aggrieved party is challenging the state government as a political entity.")

as inconsistent with the state's obligations under the U.S. Constitution. The case is thus fundamentally different from *Pacific States*.[6]

A second essential point about *Pacific States* is that the opinion did not hold, or even suggest, that the states were permitted to ignore the obligation to maintain a republican form of government. Nor did it suggest that state courts were precluded or excused from deciding whether some state institution or action has departed from republican government. That obligation of state courts follows from each state's federal obligation to maintain such a government, *see Minor v. Happerset*, 88 U.S. (21 Wall.) 162 (1874), and from the Constitution's explicit command that the "judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S.Const. art. VI, sec. 2. A substantial number of state courts since Oregon's, including the Colorado Supreme Court, have dealt on the merits with arguments that a state governmental institution or process was incompatible with republican governance. *See, e.g., Van Sickle v. Shanahan*, 511 P.2d 223, 231-35 (Kan.1973); *In re*

[6] The Defendant-Appellant cites one sentence in Pacific States' brief to the Court to argue that the issue presented in *Pacific States* was same narrow question presented here. Governor's Opening Brief at 43-44. That single sentence, however, doesn't change the breadth of the questions actually presented to, and addressed by the Court. Those questions were broad challenges to the initiative process itself and, as the Court understood them, to "the state as a state." 223 U.S. at 150.

Initiative Petition No. 348, 820 P.2d 772, 779-81 (Okla. 1991); *Morrissey v. State*, 951 P.2d 911, 915-17 (Colo. 1998); *State v. Lehtola*, 198 N.W.2d 354, 356 (Wis. 1972).

Indeed, although Guarantee Clause challenges are rare, other federal courts have also considered the legitimacy of state laws and government structures challenged under the Clause. *See, e.g.*, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 950 (7th Cir. 2012); *Brown v. Sec'y of State of Fla.* 668 F.3d 1271, 1277-78 (11th Cir. 2012); *Largess v. Supreme Judicial Court for the State of Massachusetts*, 373 F.3d 219, 226-27 (2004); *Corr v. Metro. Washington Airports Auth.*, 1:11-CV-389 AJT/TRJ, 2011 WL 2680471 (E.D. Va. July 7, 2011); *Soling v. New York*, 804 F.Supp. 532, 537 (S.D.N.Y.1992). The Defendant-Appellant seeks to make much of the fact that these challenges have failed on the merits. *See* Governor's Opening Brief at 42-46. That fact is simply beside the point. What is significant about these cases is that the courts correctly understood that the questions with which they were presented were justiciable.

This case does not require the federal courts to define every contour of a republican form of government. It asks for a determination only whether there are some legal arrangements—in particular the elimination of legislative authority to

tax—that are beyond those contours. As the many cases cited here demonstrate, the court would not be striking an uncharted path in addressing the Guarantee Clause question. The District Court correctly concluded that it could proceed to address the merits of the questions presented by the Substituted Complaint.

B. The Tests Established in *Baker v. Carr* for Application of the Political Question Doctrine Do Not Foreclose Judicial Review of This Dispute

In *Baker v. Carr* the Supreme Court established a six-part test for evaluating whether a particular claim raises a non-justiciable political question. The Court explained that judges should not decide cases that involve:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker, 369 U.S. at 217.

The claims presented by the Substituted Complaint do not include any of the elements listed in *Baker*, and thus do not present a nonjusticiable political question.

1. *The Guarantee Clause's Text Does Not Commit Resolution of the Issue to Congress*

The text of the Guarantee Clause does not commit the resolution of whether a state is violating its obligation to provide a republican form of government to Congress. No one disputes that the guarantee of republican government is a national political responsibility, and Congress may choose the means to carry it out. But also no one can reasonably dispute that the Constitution directly obligates the states themselves to maintain republican governments.[7] As the Supreme Court stated well over a century ago, "[t]he guaranty [of a republican form of government] necessarily implies a duty on the part of the States themselves to provide such a government." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874). *See also* Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. Rev. 1735, 1760 (1998). Further, a state's obligation in this regard appears as a contract between the state and the United States when Congress passes an Enabling Act in accordance with Article IV, section 3 of the Constitution. A properly drawn judicial declaration that a state's government falls short in some respect of its obligation to provide a republican form of government invades no congressional power.

[7] The Defendant-Appellant's contrary assertion, Governor's Opening Brief at 38-40, simply ignores the relevant law.

2. There are judicially manageable standards for resolving whether TABOR violates Colorado's duty to provide a republican form of government

Although *amici* believe that comment on the merits presented by this suit is premature at this stage of the litigation, there is little doubt that the question of whether TABOR violates the state's duty to provide a "republican form of government" can be resolved through traditional judicial analysis. The briefs submitted by the State and their *amici*, for example, present arguments about how to interpret the language of the Guarantee Clause. *See* Governor's Opening Brief at 33-38; Brief of the Independence Institute and Cato Institute at 19-37. The Response brief provides a set of counterarguments on the same question. See Response to Governor's Opening Brief at 12-19. Both sides support their arguments with historical evidence and judicial precedent. These arguments are precisely the type that courts regularly consider in interpreting the Constitution. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1430 (2012) ("Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical arguments put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do.").

3. This dispute can be resolved without judicial policy-making

Without question, TABOR presents a politically divisive issue and resolution of its constitutionality will also be divisive. The fact that a lawsuit raises politically contentious questions does not mean that its resolution requires judicial policy-making. As the Supreme Court recently noted, "courts cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky*, 132 S.Ct. at 1428 (*quoting INS v. Chadha*, 462 U.S. 919, 943 (1983)). See also *Baker*, 369 U.S. at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."); *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 229 (1986) (noting that "not every matter touching on politics is a political question").

This case may well be one that the federal courts would prefer not to hear, as few issues are more contentious in Colorado politics than TABOR. But "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 132 S.Ct. at 1427 (*quoting Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). Resolving the question of TABOR's constitutionality will not require judicial policy-making any more than resolution of any other constitutional question.

4. This dispute can be resolved without the court expressing lack of respect for a coordinate branch of government

Whether or not the voters of Colorado are correctly defined as a "coordinate branch of government," resolution of this question does not require the federal court to express any lack of respect for a coordinate branch of government. Courts consider the validity of legislative enactments on a near-daily basis without showing a lack of respect for the legislature. Similarly, courts can and do evaluate the constitutionality of measures passed by the initiative process without expressing a lack of respect for the voters. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating an amendment to the Colorado Constitution that had been added by initiative because the amendment violated the U.S. Constitution). Our system of government, with its checks and balances, presupposes that courts will sometimes invalidate actions taken by coordinate decisionmakers. A finding of invalidity is not an expression of disrespect, but an exercise of the function granted to the judiciary in our coordinate system.

5. This dispute presents no need for unquestioning adherence to a political decision already made

The only "political decision" at issue in this case is TABOR itself, and there is certainly no need for "unquestioning adherence" to a law that is unconstitutional, whether that law is passed by popular vote or by a vote of elected representatives.

The Independence Institute and the Cato Institute assert that a ruling on TABOR "would blow holes in nearly every state constitution." Brief for *Amici* Independence Institute and Cato Institute at 7. This assertion is not correct. The Substituted Complaint does not challenge the initiative process, nor does it challenge the presence of fiscal limitations in state constitutions. It is the content of TABOR specifically, not the process by which it was passed or the general issue of fiscal limitations passed by initiative that is the subject of this challenge. Given TABOR's uniqueness, nothing about a judicial ruling in this case will call into question other referenda or initiatives, either in Colorado or elsewhere.

6. *This dispute presents no risk of "multifarious pronouncements by various departments on one question"*

There have been no pronouncements by any other government department on the constitutional question presented by this dispute. This case is quite different from the various disputes considered in *Baker v. Carr*. The *Baker* Court focused on disputes involving foreign relations, the dates of duration of hostilities and the status of Indian tribes. 369 U.S. at 210-215. In these contexts, responsibility has clearly been vested in either the executive or the legislative branch and judicial pronouncements on the issues might well conflict with decisions made by one of

the other branches. The separation of powers concerns implicated in these contexts are not at issue in this case.

CONCLUSION

The district court correctly concluded that the political question doctrine presents no bar to consideration of the claims presented in this dispute. For the reasons set forth above, this Court should dismiss this interlocutory appeal and remand the case to the District Court for further proceedings on the merits.

Dated: April 17, 2013

Respectfully Submitted,

s/Melissa Hart

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CERTIFICATION 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 4071 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 Office Word 2007 in 14 point Times New Roman.

Date: April 17, 2013

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CERTIFICATION OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the foregoing *Amicus Brief*, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Microsoft Security Essentials version 1.147.1983.0, last updated on 4/16/2013 at 6:11 pm, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

Date: April 17, 2013

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of April, 2013, I have provided service of the foregoing BRIEF OF CONSTITUTIONAL LAW SCHOLARS ERWIN CHEMERINSKY, HANS LINDE, WILLIAM MARSHALL, GENE NICHOL, AND WILLIAM WIECEK AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-RESPONDENTS AND URGING DISMISSAL OF THIS APPEAL.

Participants in the case who are registered CM/ECF users will be served by the court's CM/ECF system. In addition, the *Amicus Brief* has been served by e-mailing or mailing first class to the following attorneys or their law firms:

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