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
REPRESENTATIVE, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the ultimate source of governmental authority is the consent of the governed. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated on behalf of the parties as amicus curiae before this Court in several cases of constitutional significance addressing the Guarantee Clause and other structural provisions of the Constitution, including *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Bond v. United States*, 134 S. Ct. 2077 (2014); *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012); *Reisch v. Sisney*, 560 U.S. 925 (2010); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); and *Angle v. Guinn*, 541 U.S. 957 (2004).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Consent of Petitioner and of Respondents has been lodged with the Clerk. All parties waived any objections to late notice of the filing of this brief.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Colegrove v. Green*, Justice Frankfurter memorably expressed the Court's longstanding view that "violation of the great guaranty of a republican form of government in States cannot be challenged in the courts." 328 U.S. 549, 556 (1946) (plurality opinion). More recently, however, the Court has wisely called this overly dogmatic rule into question. *See New York v. United States*, 505 U.S. 144, 184 (1992). However, despite hinting in dicta at its readiness to address this "difficult question," the court has, up to this point, stopped short of holding Guarantee Clause claims justiciable. *Id.*

The Tenth Circuit Court of Appeals, on the other hand, has been less circumspect about disregarding Supreme Court precedent on this issue. Unfortunately, however, it has done so in precisely the kind of Guarantee Clause case that is most unsuited to judicial review, and where the old rule was most appropriate. Amicus submits that the Guarantee clause should be revived as a viable source of protection against restrictions on the sovereignty of the electorate. On the other hand, the Guarantee Clause does not provide judicially manageable standards for direct-democracy cases such as this, and the holding of *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), that such cases are not justiciable should not be disturbed.

Moreover, as Petitioner explains, the Tenth Circuit's grant of standing to the plaintiffs expands the doctrine of legislative standing in conflict with this Court's precedent. Pet. 25-29. This grant is particularly inappropriate in this case, because a

legislator in a republican system wields his voting power solely on behalf of the governed, and therefore suffers no cognizable injury if the governed instead choose to wield that power themselves.

REASONS TO GRANT REVIEW

I. THE TENTH CIRCUIT'S RULING IS CONTRARY TO CONTROLLING SUPREME COURT PRECEDENT WHICH IT FAILS TO DISTINGUISH, AND ALSO TO THE VERY SUPREME COURT HOLDING ON WHICH IT INSTEAD RELIES.

As Petitioner explains, the Tenth Circuit's decision is contrary to binding Supreme Court authority in *Pacific States* that the use of "direct democracy on a matter of state tax policy" is a non-justiciable political question. Pet. 14-15. Moreover, instead of following *Pacific States*, the court of appeals purported to apply the six-part test from *Baker v. Carr,* 369 U.S. 186 (1962), for determining the presence of a "political question." *See* Pet. App. 38-49. However, the court of appeals applied the *Baker* test in a manner inconsistent with this Court's holding in that case, thus further contradicting binding precedent.

In *Baker*, Justice Brennan acknowledged that "[t]he Court has since refused to resort to the Guaranty Clause . . . as the source of a constitutional standard for invalidating state action." 369 U.S. at 223. *Baker* does not "call into question *Pacific States* or any other decision under the Guarantee Clause." *See* Pet. App. 59 (Hartz, J., dissenting). Instead, it simply elucidates the reason behind the rule that

Guarantee Clause claims are in most cases not justiciable, namely the holding that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Baker*, 369 U.S. at 223. Justice Brennan therefore concludes that "any reliance on that clause would be futile." *Id.* at 227.

For Respondents, however, reliance on that clause was not futile. The Tenth Circuit insisted, contrary to this Court's holding in *Baker*, that the Guarantee Clause can in fact provide judicially manageable standards in direct democracy cases. *See* Pet. App. 44-46. However, despite "[t]hree years of litigation" and "no fewer than three rounds of pleading," respondents have been unable to articulate any general outline of such standards. Pet. App. 73 (Gorsuch, J., dissenting). It is unlikely that they will.

As outlined below, standards that are "principled, rational and based upon reasoned distinctions" can indeed be found for resolving certain kinds of Guarantee Clause issues, namely those implicating restrictions on the sovereignty of the electorate. However, such standards cannot be established for direct democracy cases, which implicate only whether the electorate chooses to exercise its sovereignty directly or indirectly.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO CLARIFY THAT GUARANTEE CLAUSE CLAIMS CONCERNING INTERFERENCE WITH THE STATE ELECTORATE'S ABILITY TO DIRECTLY OR INDIRECTLY CONTROL THE STATE GOVERNMENT ARE JUSTICIABLE.

To be sure, this Court has indicated a willingness to reconsider the "sweeping assertion" that all Guarantee Clause claims are non-justiciable political questions. *See New York*, 505 U.S. at 184. In *New York*, Justice O'Connor tentatively suggested that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *Id.* If so, whatever subclass of claims is justiciable must necessarily be more susceptible to judicially discoverable and manageable standards than other Guarantee Clause claims.

Disputes relating to what is generally agreed to be the core of the idea of a republican form of government are a good candidate for such a manageable sub-class of claims. The concept of a republican form of government is "a spacious one" and "many particular ideas can comfortably nestle under its big tent," but it is not without a "central pillar" or unifying principle. Akhil Reed Amar, *Guaranteeing a Republican Form of Government: The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 749 (1994). While this single feature uniting the disparate conceptions of the republican form of government has been variously expressed, it is perhaps best encapsulated in the formula that

governments "deriv[e] their just powers from the consent of the governed." *The Declaration of Independence* para. 2 (U.S. 1776); *see also* Amar, *supra*, at 749 (identifying "popular sovereignty" as "[t]he central pillar of Republican Government); Fred O. Smith, Jr, *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 Fordham L. Rev. 1941, 1949 (2012) (defining the Republican Principle as "the cardinal and indispensible [*sic*] axiom that the ultimate sovereignty in our constitutionally recognized polities rests in the hands of the governed, not persons who happen to govern").

In *New York*, the state of New York argued that federal legislation incorporating certain "carrots and sticks" designed to induce the states to participate in a federal nuclear waste disposal program violated the Guarantee Clause. 505 U.S. at 185-86. The Court declined to reach the question of whether the issue was justiciable, but nonetheless explained that such conditional exercises of congressional power, which offered the states a "legitimate choice rather than issuing an unavoidable command," allowed the states to "retain the ability to set their legislative agendas" and caused "state government officials [to] remain accountable to the local electorate" could not "reasonably be said to deny a State a republican form of Government." *Id.*

This reasoning is rooted in the core Republican Government principle of "consent of the governed" identified above. Actions wresting control of government (whether such control is direct or through elected representatives) from the electorate imperil the Republican Form of Government. They sever the link between the people and the state,

rendering the consent of the governed irrelevant. They thus clearly implicate the Republican Guarantee. Moreover, Justice O'Connor identifies a set of clearly articulable standards that courts can use to adjudicate such cases. The Court should thus grant certiorari in order to clarify that such cases are justiciable.

III. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO CLARIFY THAT, CONVERSELY, GUARANTEE CLAUSE CLAIMS CONCERNING ONLY TO WHAT EXTENT THE STATE ELECTORATE'S CONTROL OVER STATE GOVERNMENT IS DIRECT VERSUS INDIRECT ARE NOT JUSTICIABLE.

This case, and disputes about the proper limits of the extent of direct democracy generally, are not amenable to judicially discoverable and manageable standards and are thus not justiciable. *See Baker* 369 U.S. at 217.

The historical question as to precisely how much direct democracy the framers understood to be compatible with a "republican form of government" is somewhat uncertain. Some scholars have claimed that "the weight of the evidence" supports the idea that the framers used the phrase Republican Form of Government to rule out not only aristocracies and monarchies, but also "[d]emocrac[ies]." Smith, *supra*, at 1955-56. Typically, such scholars rely heavily on Federalist Number 10, which explains that "[t]he two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country,

over which the latter may be extended." The Federalist No. 10 (James Madison).

But more and stronger evidence supports the contention that, in guaranteeing a Republican Form of Government, the framers did not seek to exclude such "democracies." The guarantee of a Republican Form of Government "does not . . . prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require ordinary lawmaking via these direct populist mechanisms." Amar, *supra*, at 749 (footnote omitted); *see also* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 825, 818-19, 835 & n.155 (2002) (marshalling evidence that one framer contemplated even "monarchical republics," and that the framers frequently described the generally direct democracies of ancient Greece and of the Swiss cantons as "republics").

Even Federalist 10, upon which the "ban on direct democracy" proponents heavily rest, does not suggest that the direct exercise of sovereign authority by the people is barred by the Guarantee Clause. First, Madison was there defending a representative government *at the national level* as a logistical necessity for governing an extended territory such as the United States. Second, Madison's statements in Federalist 10 cannot be taken out of context. The fundamental theme of the Federalist Papers, and founding era discourse more generally, was the linkage between Republicanism and majority rule, not whether such rule was direct or indirect. Amar, *supra*, at 757. Moreover, at a conceptual level, it is clear that whether democracy is direct or representative does not impact whether

the electorate remains in control of government. Whether the people elect representatives to vote for them on all matters, or reserve some types of decisions to popular vote, they nonetheless remain sovereign and their government thus remains faithful to the Republican Principle.

In addition, the "sharp dichotomy in the Guarantee Clause between republican and non-republican forms of government" would necessitate arbitrary "judicial line drawing" should questions about how much direct democracy is too much be deemed justiciable, as the Tenth Circuit held below. *See* Pet. App. 70 (Tymkovich, J., dissenting). Modern state governments are not dichotomous, but instead exist on a continuum, combining elements of direct and indirect democracy in various ways and to varying extents.

Twenty-three states allow the legislature to put a statute to popular vote, and all states but Delaware require popular consent in order to pass a state constitutional amendment (Delaware is one of the twenty-three states which allow the legislature to put a statute to popular vote, so no state is without some form of direct democracy). Initiative & Referendum Inst. at the Univ. of Southern Cal., Table 1.2: *States with Legislative Referendum (LR) for Statutes and Constitutional Amendments*, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Legislative%20Referendum%20States.pdf (last visited Nov. 20, 2014).

Almost half the states allow for initiatives—measures placed on the ballot as a result of petition by citizens—with twenty-one of them allowing citizens to propose ordinary statutes and eighteen

allowing citizens to propose even constitutional amendments. Initiative & Referendum Inst., *supra*, *What are ballot propositions, initiatives, and referendums?*, http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm (last visited Nov. 20, 2014). Further distinctions can be made between states that provide for a one-step initiative process, and those requiring a two-step process. *Id.* In short, a sophisticated and diverse machinery has been created in the several states to allow for various degrees of direct democracy—that is direct control by the sovereign people of the governmental affairs. A binary analysis of "Republican' or "Non-Republican" forms of government is unlikely to be helpful in determining a place on the line that would, if crossed, undermine the core principle that republicanism is the embodiment of the consent of the governed.

The sheer variety of gradations of the Republican Form found in the several states recalls Justice Brandeis's famous observation that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As more recently articulated, the Court "ha[s] long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (citation omitted).

In short, there is no "principled" or "rational way" for a court to determine whether, at some point on

that continuum, a system of government approved by the people incorporates too much direct democracy and ceases to be republican. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.). Moreover, even if a court were to determine that such a point exists, it could not by way of "reasoned distinctions" identify precisely where such point lies. *Id*. The Court should thus hold that such claims are non-justiciable.

That the Colorado version of the Republican Form of Government is perhaps further towards the direct democracy-end of the spectrum than the versions prevalent in some other states does not alter the analysis. Indeed, Colorado state judicial opinions are the most favorable in the nation to direct democracy precisely because the Colorado courts have held that initiatives and referenda are "fundamental to republican government." Natelson, *supra*, at 811; *see, e.g.*, *In re Interrogatories Propounded by the Senate concerning House Bill 1078*, 536 P.2d 308, 313 (Colo. 1975) ("[W]hen the people speak through the amendment of their constitution and assign one branch or the other some duties which are not normally considered to be that of the branch assigned, then because of our devotion to the republican scheme of government, we are compelled to accept their decision."); *Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974) ("We view recall, as well as the initiative and referendum, as fundamental rights of a republican form of government which the people have reserved unto themselves.").

Colorado thus has its own distinct version of a Republican form of Government. It is distinct from the federal version, and from the versions in effect in

each of the other forty-nine states, as are each of those systems from each other. However, the people of Colorado have given up none of their sovereignty and they continue to control the government of their state—indeed, if anything, they have only increased their level of control! On these facts, no justiciable claim under the Guarantee Clause can be made, whether by elected representatives or by citizens dissatisfied by the outcome of the democratic process, to challenge the will of the majority of the Coloradoans.

IV. REVIEW IS NECESSARY TO CLARIFY THAT EVEN A WHOLE LEGISLATURE SUFFERS (AND CERTAINLY INDIVIDUAL LEGISLATORS SUFFER) NO COGNIZABLE INJURY WHEN THE ELECTORATE CHOOSES TO EXERCISE DIRECTLY POWERS PREVIOUSLY DELEGATED TO THE LEGISLATURE.

As demonstrated by Petitioner, the Tenth Circuit's grant of standing to the plaintiffs expands the doctrine of legislative standing in conflict with this Court's precedent. Pet. 25-29. Additionally, amicus would like to point out that the ruling also warrants review, in that it improperly extends legislative standing to cases when the purported injury to the legislature is done by the electorate.

The Tenth Circuit maintains that the "legislator-plaintiffs' injury is their *disempowerment* rather than the failure of any specific tax increase." Pet. App. 24 (emphasis added). However, under a republican system, where the people remain sovereign, legislators hold their power solely "as trustee for [their] constituents, not as a prerogative of personal power." *Raines v. Byrd*, 521 U.S. 811,

821 (1997). Thus, in a situation where the legislator's constituents choose to take power from the legislator, and where his loss in power is offset by their gain, the constituents have suffered no loss. If legislators are trustees for their constituents, the power has simply been transferred from its legal owner back to its beneficial owner, a transaction with no real economic substance.

The Tenth Circuit protests that if an elected official cannot sue because the "legislative prerogatives" which he seeks to assert "properly belong to his constituents," then the concept of legislative standing is practically eviscerated. Pet. App. 27. The court notes that in *Coleman v. Miller* (distinguished by petitioner at Pet. 29), the only case in which this Court has recognized legislative standing, the injury to the legislators was suffered in their representative capacity, and this court nonetheless found them to have standing. *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

Coleman, however, is readily distinguishable. The injury done to the legislators' voting power in that case was done by another official, the lieutenant governor, not by the electorate at whose pleasure the legislators served. Amicus acknowledges that legislative standing is appropriate when a sufficient number of legislators who have the capacity to act under the terms of their constitutional authority are blocked from their action by a third party, such as the lieutenant governor in *Coleman*. 307 U.S. 433 at 438; *see also Angle v. Legislature of Nev.*, 274 F. Supp. 2d 1152 (D. Nev. 2003) (per curiam) (implicitly accepting legislative standing by one third plus one of the state's legislators to challenge a violation of the state constitution's two-thirds vote requirement),

aff'd sub nom. Amodei v. Nev. State Senate, 99 F. App'x 90 (9th Cir. 2004).

But that assertion of standing is dramatically different than the one presented by legislators here. Certiorari is therefore warranted to clarify the line between the valid claim of standing rightly recognized by this Court in *Coleman* and the invalid assertion of standing rejected by this Court in *Raines*.

CONCLUSION

For the foregoing reasons, and those in the petition for a writ of certiorari, certiorari should be granted.

Respectfully submitted,

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