Case No. 12-710

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Andy Kerr, Colorado State Representative, *et al.* Plaintiffs-Appellees, v. John Hickenlooper, Governor of Colorado, in his official capacity, Defendant-Appellant.	

On Petition for Permission to Appeal from
The United States District Court For the District of Colorado
D.C. No. 11-cv-01350-WJM-BNB
Hon. William J. Martinez, United States District Judge

Reply Brief in Support of the Governor's Petition for Appeal

Defendant-Appellant John Hickenlooper, Governor of Colorado, by and through undersigned counsel, hereby files his Reply Brief in Support of the Governor's Petition for Appeal.

Nothing in Plaintiffs' Answer undermines the district court's recognition that (1) this case "involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) an appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Indeed, Plaintiffs' Answer demonstrates why this Court

should intervene now: without an immediate appeal, Plaintiffs will be granted a license to cast about for facts to prove legal claims that, based on current case law, lack any discernible contours.

In the Answer, Plaintiffs assert that this case does not turn on questions of law; in their view, only a "fully-developed record" generated through a massive discovery campaign will allow them to prove their allegations. Answer at 9. Yet Plaintiffs, making oblique references to "the facts that will be adduced during discovery," *id.*, fail to actually identify any fact that must be developed before this Court can adjudicate the Governor's motion to dismiss. At this stage, all of Plaintiffs' allegations are accepted as true. *See Jordan-Arapahoe, LLP v. Bd. of Cnty. Comm'rs*, 633 F.3d 1022, 1025 (10th Cir. 2011). As the district court observed, "the factual setting is straightforward, with the complaint's allegations accepted as true for purposes of Defendant's operative motion to dismiss." Pet'n for Appeal, Ex. B. at 4. On appeal, this Court need do only what it does routinely: measure Plaintiffs' allegations against controlling legal standards.

Plaintiffs also maintain that they should prevail on the merits and on matters of justiciability. *See* Answer at 11–17. But the question now is not who should win. The question is whether the legal issues here provide a "substantial ground for difference of opinion." § 1292(b). While Plaintiffs

correctly point out that some courts, including this one, have "assumed" that a justiciable case may someday arise under the Guarantee Clause, *see Kelley v. U.S. ex rel. Dep't of Justice*, 69 F.3d 1503, 1511 (10th Cir. 1996), that merely proves the point: whether the Guarantee Clause is justiciable, and under what circumstances, is debatable. Federal courts have for the last hundred years labored under the assumption that if voters have a direct voice in structuring their governments, the Guarantee Clause "simply does not permit a federal court to intervene in the arrangement of state government." *Largess v. Sup. Jud. Ct.*, 373 F.3d 219, 229 (1st Cir. 2004). If this assumption is wrong, the Tenth Circuit should say so now, "materially advancing the ultimate termination of the litigation." § 1292(b). A prompt decision will, in the least, explain what legal standards govern this case before Plaintiffs embark on a massive, unguided discovery campaign.

Respectfully submitted this 19th day of October, 2012.

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CERTIFICATE OF SERVICE

This is to certify that on this 19th day of October, 2012, I have provided service of the Reply Brief in Support of the Governor's Petition for Appeal through the federal ECF filing protocol and by e-mailing to the following attorneys and/or their law firms:

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