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 a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

In his dissent from the denial of rehearing en banc below, Judge Gorsuch said, "it's hard to look away . . . and conclude nothing of significance has happened here." App. 75. Although this case implicates every state constitutional provision that limits legislative power, Plaintiffs urge the Court to do just that: look away and conclude that the Tenth Circuit decision amounted to a "routine" application of precedent. *See* Br. in Opp. 11–13, 18–21.

The panel decision was anything but "routine." It directly decided important questions this Court left open in *New York v. United States* and *Raines v. Byrd*, questions that are now the subject of circuit splits. And the way in which the Tenth Circuit answered those questions fundamentally alters the relationship between the States and the federal judiciary.

Plaintiffs' chief argument against certiorari is that TABOR is unique, "with no impact whatsoever outside the state." Br. in Opp. 5. But the same cannot be said about the circuit conflicts regarding the parameters of Guarantee Clause litigation and the scope of legislative standing. By exacerbating those conflicts, the Tenth Circuit opened the door to a wide variety of challenges to state government structure long thought to be off-limits to federal litigation.[1]

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[1] *Compare Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997) (denying legislators standing to challenge a House rule requiring a three-fifths vote to approve income tax increases), *with, e.g.*, CAL. CONST. art. XIII A, § 3(a) (requiring a supermajority legislative vote for increased taxes); *see also Heimbach v. Chu*, 744 F.2d 11 (2d Cir. 1984) (rejecting a Guarantee Clause challenge to a procedure

One example is *Clinton v. City of New York*, where this Court invalidated the federal Line Item Veto Act. 524 U.S. 417 (1998). If the President cannot constitutionally alter bills before they become law, does the guarantee of a "republican form of government" prohibit States from giving their governors similar powers? The Seventh Circuit considered that question and, applying this Court's Guarantee Clause precedent, held the question to be nonjusticiable. *Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991). The Tenth Circuit panel considered the same precedent but arrived at a very different conclusion, becoming the first federal court to directly hold that Guarantee Clause claims may be heard on the merits.

Plaintiffs attempt to divert attention from the significance of this holding. Resorting to hyperbole, they claim that "TABOR's uniqueness in the annals of American law" makes this case unlikely to have ripple effects. *See* Br. in Opp. 5, 7, 20. But TABOR's form of voter oversight is not radical. It gives the electorate a limited veto power similar to that traditionally wielded by governors, requiring voter approval of two specific classes of legislation: increased taxes or public debt, and spending that exceeds inflation- and population-adjusted revenue levels. The constitutional provision in *Risser* was more unusual: it empowered a single person, the governor, to "delete phrases, words, and digits" in bills and thereby "change the meaning of those provisions" before they became law. 930 F.2d at 550.

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deeming absent state senators to have voted in favor of proposed legislation).

But the alleged "uniqueness" of TABOR, or any other state law, is beside the point. The question presented here is more universal and more fundamental: should federal courts play a role in policing the States' governmental structures? Either *Risser* was correct, and such challenges are nonjusticiable, or the Tenth Circuit was correct, and lower courts have the green light to begin determining what limits on legislative power violate republicanism. Either way, the outcome of this case will reach far beyond TABOR.

I. This Court should grant certiorari to answer the question left open in *New York v. United States*.

A. There is a genuine split in authority regarding whether the Guarantee Clause is justiciable.

Plaintiffs argue that *Baker* and *New York* "dispose[d] of the notion that *Pacific States* bars all Guarantee Clause claims." Br. in Opp. 11. If that were true, it is puzzling that *New York*, after examining *Pacific States* and other lines of precedent, would say that the Court "need not resolve this difficult question today." *New York v. United States*, 505 U.S. 144, 183–85 (1992); *see also Baker v. Carr*, 369 U.S. 186, 223 (1962) (citing *Pacific States* and eight other cases to show that "[t]he Court has . . . refused to resort to the Guaranty Clause . . . as the source of a constitutional standard for invalidating state action"). By its terms, *New York* did not "dispose" of any precedent—it did the opposite. It acknowledged an important legal issue but declined to clarify it. *Cf. Kidwell v. City of Union*, 462 F.3d 620, 635 n.5 (6th Cir. 2006) (Martin, J.,

dissenting) (urging the Court to "reconsider" its Guarantee Clause precedent and discard the *per se* rule of nonjusticiability).

For evidence that the law requires clarification, the Court need look no further than the proceedings below. One dissenting judge believes that *Pacific States* alone controls the outcome. App. 56 (Hartz, J., dissenting). Three other dissenters believe that the Guarantee Clause lacks judicially manageable standards and therefore does not provide a "principled basis for deciding the case." App. 71–72 (Gorsuch, J., dissenting); App. 69–70 (Tymkovich, J., joined by Holmes, J., dissenting). Meanwhile, four other judges (the district court judge and the three judges of the Tenth Circuit panel) believe that this case is justiciable but that judicially manageable standards will appear only as the litigation drags on. App. 45, 160.

And even those judges—who, according to Plaintiffs, simply applied established law—expressed serious concern about "how unsettled the law is in [this] area, and how courts have come out on both sides of the issue." App. 83; *see* App. 34 (finding this case justiciable while noting that this Court's decisions "suggest[ ] that Guarantee Clause litigation is categorically barred"). Indeed, it was the confusion in this Court's Guarantee Clause jurisprudence that prompted the district court to take the unusual step of certifying the case for interlocutory appeal.[2]

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[2] Plaintiffs are wrong that interlocutory appeals are worthy of certiorari only where a party might suffer "imminent harm" before trial. Br. in Opp 10. None of the cases cited at page 24 of the Petition were heard for that reason. For example, *Lawson v. FMR*

The sincere concerns expressed by the judges below belie Plaintiffs' assertion that Governor Hickenlooper "invented" the confusion that led to the current circuit split. Br. in Opp. 14. The split is deep and genuine. Some circuits, and most state courts, continue to hold after *New York* that Guarantee Clause claims are categorically nonjusticiable. Pet. 18; *see also Whitmore v. Fed. Election Comm'n*, 68 F.3d 1212, 1216 (9th Cir. 1995) (finding "no published precedent in any judicial decision" to support plaintiffs' Guarantee Clause claims and dismissing those claims as nonjusticiable and "frivolous").

Other courts go a step further, assuming as a theoretical matter that some Guarantee Clause claims are justiciable but holding that federal courts generally play no role in policing the States' republican forms. Pet. 18–19; *see, e.g.*, *Largess v. Supreme Judicial Ct.*, 373 F.3d 219, 225–29 (1st Cir. 2004). Contrary to Plaintiffs' characterization, *Largess* did not "f[ind] sufficient standards for interpreting the Guarantee Clause." Br. in Opp. 12 n.6. *Largess* instead applied *New York*, holding that absent extraordinary circumstances "our federal constitutional system

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LLC was an employee whistleblower case in which no "imminent harm" was implicated: the plaintiffs had already been fired and were suing for post-hoc statutory relief. 134 S. Ct. 1158, 1163–64 (2014). And there are other examples. *E.g.*, *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 408 (2009) (reviewing an interlocutory order denying a partial motion to dismiss on whether plaintiff could plead punitive damages). In any event, Plaintiffs do not argue that the interlocutory posture of this case affects the presentation of the issues. Nothing would prevent the Court, if it granted certiorari, from reaching the questions left open in *New York* and *Raines*.

simply does not permit a federal court to intervene in the arrangement of state government under the guise of a federal Guarantee Clause question." *Id*. at 229. In any event, even if *Largess* is, as Plaintiffs argue, a merits decision, that only further emphasizes the circuit split.[3]

The law's lack of clarity on this subject is not, as Plaintiffs argue, illusory or unimportant. A bedrock principle of federalism is that "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978); *see also New York*, 505 U.S. at 188 ("The Constitution . . . 'leaves to the several States a residuary and inviolable sovereignty' . . . ." (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)). Against this backdrop of "inviolable" state sovereignty, the Court has not yet suggested, much less held, that federal courts should wade into the thicket of determining the proper allocation of state governmental power.[4]

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[3] Plaintiffs argue that *Minor v. Happersett*, 88 U.S. 162 (1875), in reaching the merits of a Guarantee Clause claim, provides standards for decision in this case. Br. in Opp. 13 n.7. But they fail to suggest what those standards might be. *Id*. In any event, *Minor* was decided before this Court's Guarantee Clause precedent "metamorphosed" into the *per se* rule of nonjusticiability. *New York*, 505 U.S. at 184. *Minor* does not resolve the circuit split; to the contrary, *Minor* is one reason why the split exists.

[4] Plaintiffs concede that, on remand, the district court will have to determine what "legislative powers" are "essential to republican governance." Br. in Opp. 9 n.5. This inquiry is not "commonplace," *id*. at 6, and Plaintiffs cite no case in which a court has attempted to make such determinations.

Plaintiffs argue that their case must be justiciable, because contrary "logic" would "preclude judicial review" of a law "eliminating the state legislature." Br. in Opp. 7 & n.4. Yet that logic is precisely what this Court has endorsed. *See Luther v. Borden*, 48 U.S. 1, 39–40 (1849) (declining to review a law that displaced not just the legislature, but the entire state government); *see also Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion) (citing *Pacific States* for the principle that Guaranty Clause claims "involve[ ] no judicially enforceable rights"). The question presented here, then, is whether the rule of *Luther* and its progeny, including *Pacific States*, remains good law after *New York*.

If the Guarantee Clause places some justiciable limit on the structure of state government—or some justiciable limit on the United States' interference with that structure, *see New York*, 505 U.S. at 183–86—this Court should say so. And it should explain what those limits might be. Dozens of States allow at least some degree of direct voter oversight of state government. Pet. 6 nn.2–4; Br. for Texas, et al., as *Amici Curiae* 8–10. It is critically important for this Court to announce whether "what courts do," *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012), includes deciding when a state government ceases to be republican in form.

B. The Colorado Enabling Act does not obviate the difficult question left open in *New York*.

Plaintiffs argue that because their complaint includes a claim under the Colorado Enabling Act, this case requires only "the 'familiar judicial exercise' of

statutory construction." Br. in Opp. 16. Yet no decision of this Court holds, as Plaintiffs insist, that a statutory claim is necessarily justiciable. *Zivotofsky*, for example, said only that the "existence of a statutory right" is "*relevant*" to whether a case presents a political question. 132 S. Ct. at 1427 (emphasis added).

The inclusion of a statutory claim is therefore not *dispositive*—especially where the statute merely restates a constitutional provision long assumed to be nonjusticiable, as the Colorado Enabling Act does here. *Id*. at 1435 (Sotomayor, J., concurring in part and concurring in the judgment) (explaining that a statute "requir[ing] a court to resolve the very same issue we found nonjusticiable in *Nixon* [*v. United States*, 506 U.S. 224 (1993),]" would not create a justiciable cause of action); *see also Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 140 (1912) (dismissing a state enabling act claim as nonjusticiable); *Texas v. United States*, 106 F.3d 661, 666–67 (5th Cir. 1997) (dismissing claims under the Guarantee Clause and Texas Articles of Annexation).[5]

It would be remarkable if a statute alone could expand Article III's cases or controversies requirement; the Court has rejected that notion. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). This case thus also

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[5] The Enabling Act cases Plaintiffs cite are inapposite: they are all disputes over the management of public lands. Br. in Opp. 16–17. Litigation over public land is, of course, justiciable and always has been. *See, e.g.*, *Topaz Beryllium Co. v. United States*, 649 F.2d 775, 776 (10th Cir. 1981) (describing federal regulation of mining rights on public land since 1872). The fact that public-land disputes under the Colorado Enabling Act are litigated on the merits says nothing about the justiciability of a case like this one.

presents an ideal opportunity to clarify that a political question does not become justiciable merely because it is found in the text of a statute.

II. If considered in conjunction with *Arizona State Legislature*, this case will further clarify the circumstances in which state legislators have standing to vindicate institutional interests.

This Court has already recognized the importance of clarifying how *Raines v. Byrd* applies to state legislators. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314. Indeed, one of the questions *Raines* said it "need not decide" is whether the legislative standing inquiry changes when it is state legislators, rather than federal, who are attempting to sue. 521 U.S. at 824 n.8.

The circuits are now divided on this issue. On one side of the split, the circuits require state legislators to satisfy the *Raines* "specific legislative act" test. *See, e.g.*, *Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001); *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (D.C. Cir. 1999). The Tenth Circuit, in contrast, hews to a different rule, under which the three state legislators here have standing even though "[t]hey cannot point to a specific act that would have resulted in a tax increase" but for TABOR. App. 23–24. *Arizona State Legislature* implicates this same issue. There the district court held that because the Arizona Legislature "los[t] its authority to draw congressional districts," it suffered concrete injury, notwithstanding the *Raines* "specific legislative act" requirement. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1050 (D. Ariz. 2014).

But the circumstances here are different, and by granting certiorari and considering this case with *Arizona State Legislature*, the Court will have the opportunity to significantly clarify standing requirements for state legislators.[6] For example, the entire Arizona legislature, as an institution, is suing to protect its power to draw election districts. That fact alone may be sufficient to confer standing. *Cf. Raines*, 521 U.S. at 829 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress . . . ."). Here, in contrast, only three lawmakers are suing, and none of them has been authorized to represent either house of the state legislature. How *Raines* applies is therefore even less clear. *See id*. at 829, 824 n.8. Thus, unless the Court takes the unlikely step of declaring that state legislators *never* have standing to sue, this case will present the opportunity to resolve questions that will remain open even after a merits decision in *Arizona State Legislature*.

Plaintiffs contend that the Tenth Circuit's decision was unremarkable because "various other elements" mentioned in *Raines* support their standing. Br. in Opp. 19–20. Plaintiffs further contend that the Governor seeks to "relegate *Raines*' 'discussion of various other elements militating against legislative standing' to dicta." *Id*. But *Raines*'s discussion of those

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[6] As explained in the Petition, the Court can consider the justiciability of Guarantee Clause claims without addressing legislative standing. Pet. 31–32 & n.13. Thus, if the Court believes it unnecessary to consider legislative standing under the circumstances presented here, it should still grant certiorari to resolve the circuit split engendered by *New York*.

"elements" *was* dicta. The Court explicitly said that it "need not now decide" "[w]hether the case would be different if any of these circumstances were different." *Raines*, 521 U.S. at 829–30. Granting certiorari will allow the Court to explain whether any of those circumstances is dispositive—including circumstances different from those in *Arizona State Legislature*—and, if so, why.[7]

Finally, Plaintiffs argue that their "injuries-in-fact cannot be fully understood at this stage" and "should await a decision on the merits." Br. in Opp. 25. But no one disputes the meaning of TABOR or the limits it places on legislative power. The question is whether, assuming the injuries at issue are exactly as Plaintiffs describe them, the harm is sufficiently particularized to grant three legislators standing to sue. Several more years of litigation will do nothing to resolve whether the Tenth Circuit panel decision correctly interpreted and applied *Raines*.

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[7] For example, Plaintiffs emphasize the lack of a "statutory remedy." Br. in Opp. 19–20 n.10; *see Raines*, 521 U.S. at 829 (suggesting an "adequate remedy" was to "repeal the [Line Item Veto] Act"). But it is unclear whether the available political remedy—a constitutional amendment repealing TABOR—is the kind that *Raines* suggested might foreclose standing. *Cf. Largess*, 373 F.3d at 229 (explaining that the "most direct" remedy was amending the state constitution); *Risser*, 930 F.2d at 555 ("[T]here is a political remedy: amend the Wisconsin constitution. . . . There is no need to involve the federal courts in this affair and no legal basis for doing so.").

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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