IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-1350-WJM-BNB

ANDY KERR, et al
Plaintiffs,
v.

JOHN HICKENLOOPER, GOVERNOR OF COLORADO, in his official capacity,
Defendant.

UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS BRIEF

Professors Erwin Chemerinsky, Gene Nichol and William Wiecek hereby seek leave to file the attached *amicus* brief. *Amici*'s counsel has consulted with counsel for the parties and they do not oppose the filing of this motion.

These constitutional scholars offer an arms'-length perspective on the issue of the judicial role presented by the Motion to Dismiss in this litigation. They provide sources and analysis not offered by either party in the briefing thus far filed with the court. This analysis would be helpful to the court in evaluating whether the political question doctrine bars judicial consideration of the claims presented here.

Dated: February 1, 2012

Respectfully Submitted,

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BRIEF OF CONSTITUTIONAL LAW SCHOLARS ERWIN CHEMERINSKY, GENE NICHOL, AND WILLIAM WIECEK AS *AMICI CURIAE*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are professors 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.[1]

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.

Gene R. Nichol is the Boyd Tinsley Distinguished Professor of Law and Director of the Center on Poverty, Work & Opportunity at the University of North Carolina School of Law. Professor Nichol was the Dean of the University of Colorado Law School from 1988 to 1995. He is a co-author of Cases and Materials on Federal Courts (2d ed. 2011) and has written extensively on standing and other doctrines of justiciability.

William M. Wiecek is the Chester A. Congdon Chair in Public Law and Legislation with joint appointment in History Department of the Maxwell School at Syracuse University. He is an expert in legal and constitutional history. Professor

[1] *Amici* do not represent and are not being compensated in any way by any party in this case.

Wiecek has written extensively on republicanism, the United States Supreme Court and the Guarantee Clause. Among his other work, Professor Wiecek's scholarship includes *The Guarantee Clause of the U.S. Constitution* (1972).

Amici's interest in this dispute is not in the resolution of the underlying question of the constitutionality of the challenged provisions of the Colorado Constitution.[2] Instead, *amici* seek to clarify whether this court is precluded from the normal exercise of its judicial responsibility on grounds that the asserted incompatibility poses a "political 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. As constitutional scholars, *amici* are interested in ensuring that the assessment of justiciability is analytically sound and careful.

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

[2] Indeed, any comment on that issue would be premature at this stage of the litigation.

these provisions under the United States Constitution's 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 Article IV, section 4, of the Constitution (the "Guarantee Clause") arose in quite different cases and do not bar this court from considering the claims presented here. Further, the tests describing "political questions" articulated by the Court in *Baker v. Carr*, 369 U.S. 186 (1962) do not stand in the way of this court's consideration of plaintiffs' claims. The court 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.[3] 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 constitution that includes a process for citizens to initiate laws,

[3] The "Taxpayer's Bill of Rights" amends the Colorado Constitution in part by providing that any new tax or tax increase must be approved by a popular vote. See Colorado Const., Art. X, Section 20.

which was the question in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). The question in this case is narrower: is a state government in which the representative legislature is deprived of authority to raise revenue still the republican government mandated by the Colorado Enabling Act and the U.S. Constitution?

The State invites this court to walk away from this case by citing *Pacific States Tel. & Tel., supra,* as enshrining a broad proposition that any claim of departure from republican governance invariably is a non-justiciable political question. *See, e.g.,* Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss at 14. While that approach might be easy, it would also be wrong. That century-old opinion badly overstated its rationale, and it has since been superseded by the Supreme Court's statement in *Baker v. Carr, supra*, of more nuanced tests for issues left to decision by the federal political branches. There is no *per se* bar to judicial review of Guarantee Clause claims.

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 a settled question. 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 challenges to the republican form of government. The differences are, as discussed below, central to understanding why the plaintiffs' claims are within this court's 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.[4] *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 such government. These are two entirely distinct questions. In contrast, 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.[5]

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

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[4] *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").

[5] The defendant suggests that the State of Colorado has no duty under the Guarantee Clause. *See*, Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss at 19, n. 10. 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).

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 Amar has explained it, "the real question in *Luther* was akin to the international question 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 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 (the federal guarantee). 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). It is a distinction that must not be ignored in resolving a dispute such as the one presented here.

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–though

that is exactly what the defendants seem to suggest as the only available forum for resolving this dispute about the meaning of the constitutional standard. 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.

2. *The Decision in* Pacific States *Does Not Foreclose this Court's 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. The Motion to Dismiss incorrectly treats *Pacific States Telephone & Telegraph* as holding otherwise.

In that case, the people of the state of Oregon passed, by initiative, a tax on telephone and telegraph companies. Pacific States challenged the new law, claiming that the 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]."[6] 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 as inconsistent with the state's obligations under the U.S. Constitution.

[6] 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.")

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's 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 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 commented on the legitimacy of state laws and government structures challenged under the Clause. *See, e.g., 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).

If the Substituted Complaint in the instant case presented a challenge to Colorado's citizen initiative process itself, the suit would look very much like *Pacific States*. Perhaps in recognition of this fact, the Motion to Dismiss treats the complaint as an overall attack on a target described as "direct democracy." Motion to Dismiss Plaintiffs' Substitute Complaint, p. 2. While the plaintiffs might have been more careful in their word choices, it is clear from the remainder of the Substituted Complaint, as well as the Opposition Motion, that the challenge here is not to the initiative process, or to direct democracy more generally. Instead, the present issue is whether a representative legislature with no power to raise revenue is legitimately part of a republican form of government. Maintaining this distinction—between the requirement of preserving effective representative institutions and the legitimacy of submitting proposed laws to voters—is essential to resolving the Motion to Dismiss.

This case does not require the court to define every contour of a republican form of government. It asks the court to consider 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. This court should 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 6-part test for evaluating whether a particular claim raised a non-justiciable political question. The Court explained that judges should not decide cases that involved:

> "[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 all states themselves to maintain republican governments. 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.

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 brief submitted by the Independence Institute in support of the Motion to Dismiss, for example, presents arguments about how to interpret the language of the Guarantee

Clause. *See* Brief of the Independence Institute as *Amicus Curiae* in Support of Defendant's Motion to Dismiss in Kerr et al v. Hickenlooper, No. 11-cv-1350. These arguments are precisely the type that courts regularly consider in interpreting the Constitution.

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

Without question, TABOR presents a politically divisive issue and resolution of its constitutionality will be divisive. The fact that a lawsuit raises politically divisive questions does not mean that its resolution requires judicial policy-making. As the Supreme Court noted in *Baker*, "[t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." 369 U.S. at 217.

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

Whether this court considers the voters of Colorado as a "coordinate branch of government" or not, resolution of this question does not require the 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. 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 State has asserted that a ruling on TABOR "would call into question all laws passed by referendum or initiative in Colorado and the 25 other states that provide for the process." Reply at 23. This assertion is not correct. The Substituted Complaint does not challenge the initiative process; it challenge the results of one voter-initiated measure. It is the content of TABOR, not the process by which it was passed, 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 the case at bar.

CONCLUSION

This court has the authority to consider the claims presented in this dispute and it should exercise that authority.

Dated: February 1, 2012

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