IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, *et al.*	)	
	)	
Plaintiffs-Appellees,	)	
	)	No. 12-1445
v.	)	
	)	
JOHN HICKENLOOPER	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

On Appeal from the United States District Court for the District of Colorado
The Honorable William J. Martinez
Case No. 11-CV-01350-WJM

AMICI CURIAE BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS; TABOR FOUNDATION; OKLAHOMA COUNCIL FOR PUBLIC AFFAIRS; HOWARD JARVIES TAXPAYERS FOUNDATION; FREEDOM CENTER OF MISSOURI; 1851 CENTER FOR CONSTITUTIONAL LAW; FREEDOM FOUNDATION; and GOLDWATER INSTITUTE

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Interest of *Amici Curiae*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a non-profit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a non-profit, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The NFIB Legal Center files here because this case will impact small business taxpayers in Colorado, and may have far-reaching implications in other states.

TABOR Foundation is an advocacy organization that was created with the express goal of defending the voter enacted Colorado Taxpayer Bill of Rights. The mission of the TABOR Foundation is to develop and distribute educational materials, documenting compliance with the Taxpayer's Bill of Rights, and to provide a clearinghouse for information and analysis about the effectiveness,

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[1] This filing is timely in accordance with Fed. R. App. P. Rule 29(e); Defendant filed its amended principal brief on February 5, 2013, therein triggering the seven-day window, allowing amicus filings through February 12, 2013. Plaintiffs' counsel has consented to this filing. In accordance with Rule 29(c)(5), the *amici* state that—other than *amici*—no counsel or party authored any portion of this brief and no counsel or party made monetary contributions intended to fund the brief's preparation or submission.

structure and importance of TABOR and other tax-limitation measures. Accordingly, TABOR Foundation has a great interest in the resolution of this case.

Oklahoma Council for Public Affairs (OCPA) promotes the principles of free enterprise, limited government, and individual initiative in Oklahoma. Consistent with our purpose and mission, OCPA endorses any states' efforts to educate individuals about policies, which have the force and effect of law, that could have the effect of limiting these ideals.

The Howard Jarvis Taxpayers Foundation (HJTF) is a taxpayer advocacy group in California. HJTF has consistently advocated for fiscal discipline and restraints on government's fiscal powers. HJTF files here specifically because the Foundation is concerned this case may open the door to challenges to voter initiatives in California, and specifically challenges to California's constitutional taxing and spending restraints.

The Freedom Center of Missouri (FCMo) is a non-profit, non-partisan organization dedicated to research and constitutional litigation in five key areas: freedom of expression, economic liberty, property rights, religious liberties, and limited government. FCMo files here out of concern that this case may create persuasive authority that could be invoked in challenge to constitutional fiscal restraints in Missouri.

The 1851 Center for Constitutional Law is an advocate for advancement of the human condition through protection of constitutional liberties in Ohio. The Center files here out of concern that this case may encourage challenges to Ohio's constitutional fiscal restraints.

The Freedom Foundation is a non-profit public interest group dedicated to advancing individual liberty, free enterprise, and the principles of limited, accountable government in Washington state. The Freedom Foundation files here because in framing their state constitution the people of Washington expressly reserved to themselves powers of initiative and referendum superior to the state legislature, and they have repeatedly exercised those powers to limit the legislature's ability to impose unwanted taxes. The Plaintiff's theory in this case, if accepted, would bolster ideologically-motivated litigants in their efforts to undercut this fundamental principle of Washington government.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom and individual responsibility through litigation, research, papers, editorials, policy briefings and forums. The Institute was a chief proponent of Arizona's Private Property Rights Protection Act ("PPRPA"), which was approved by voters in 2006 and guarantees every Arizonan the right to compensation for laws and regulations that restrict the use of their property.

Goldwater Institute is concerned that Plaintiffs' theory in this case—if endorsed by this Court—may be invoked in a challenge to the PPRPA.

Summary of Argument

If endorsed here, Plaintiffs' theory of the Guarantee Clause would open Pandora's Box. Not only would it call into question similar restrictions on legislative powers to tax, spend and borrow in other states, but it would create authority to challenge any restriction on legislative powers. This would open a torrent of litigation throughout the country. As such, this Court should approach Plaintiffs' theory with great trepidation.

But, there is no need to step into this unbounded political thicket because Plaintiffs have raised non-justiciable claims, and because Plaintiffs' theory may be perfunctorily dismissed as contravening the purpose of the very constitutional clause they invoke. The Guarantee Clause demands only that the people be ensured the right to self-rule—a right that the People of Colorado exercised in enacting the Colorado Taxpayer Bill of Rights (TABOR). Colo. Const. art. X, § 20. Accordingly, this very action to invalidate TABOR undermines the purpose of the Guarantee Clause because it would upset the will of Colorado's voters and would therein interfere with their right to self-governance.

Finally, *amici* take issue with Plaintiffs' suggestion that TABOR has crippled Colorado's finances. Fiscal challenges are not unique to Colorado, especially in light of our continuing tepid economic climate. But, more fundamentally, Colorado's finances are immaterial to the political question doctrine or the merits question at hand.

For these reasons, *amici* respectfully urge this Court to reverse the district court's decision.

I. Plaintiffs' Theory Would Create Authority to Invalidate Any Constitutional Restriction on a State Legislature's Fiscal Powers

Though Plaintiffs seek to paint this case as a narrow challenge to TABOR, their theory—even if so narrowly cast—would have dramatic and far reaching implications. They argue here that TABOR is unconstitutional on the view that the Guarantee Clause, U.S. Const., art. IV, § 4, denies the voters of Colorado the right to impose restraints on their legislature's powers to tax, spend and borrow money. Specifically, they contend that such restraints are anti-republican because they inhibit the legislature's ability to effectuate its preferred policies. (App. Vol. 2 at 468 ¶ 3).

As we expand upon in Sections II and III, this theory would call into question all state constitutional provisions inhibiting legislative powers. Moreover, if endorsed here, it would create authority to directly challenge all fiscal restraints on state government. This would open a flood of litigation throughout the country.

Indeed, most states impose fiscal restraints on their legislature. Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1267 (2012) (referring to state constitutional fiscal restraints as "ubiquitous"). For example, "[v]irtually all states have some form of a balanced budget requirement."[2] Similarly, most states allow the Governor to veto budget proposals, therein constraining the legislature's ability to spend. BUDGET PROCESS IN THE STATES, 29. Voters have also adopted limitations on their legislature's fiscal powers in at least 15 states through initiative. BERT WAISANEN, NAT'L CONFERENCE OF STATE LEGIS., STATE TAXING AND EXPENDITURE LIMITS (2010).[3] All of these restraints would be subject to challenge under Plaintiffs' theory because such restraints inhibit the legislature's capacity to advance its preferred policies.

A. Taxing Limitations

In particular, *amici* are concerned that ideologically motivated litigants would invoke this decision to challenge constitutional provisions in numerous

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[2] NAT'L ASS'N OF STATE BUDGET OFFICERS, BUDGET PROCESS IN THE STATES, 29 (2008), *available at* http://www.nasbo.org/sites/default/files/BP_2008.pdf.

[3] *Available at* http://www.ncsl.org/issues-research/budget/state-tax-and-expenditure-limits-2010.aspx#typesoflimts.

states that require supermajority votes for new taxes, and or explicit voter approval. For example, Oklahoma's Constitution requires a supermajority of legislators to approve new taxes. Okla. Const. art. V, § 33(D). In the alternative, the legislature may seek approval from Oklahoma voters through the initiative process. *Id.* at § 33(C). Likewise, South Dakota's Constitution prohibits new taxes, and increases in tax rates, except upon voter approval, or a supermajority vote in both houses. S.D. Const. art. XI, § 13. Similarly, Nevada's Constitution prohibits its legislature from raising taxes unless either (1) the measure is approved by two-thirds of legislators in both houses, or (2) the measure is approved by a majority in both houses and by a majority of voters through the initiative process. Nev. Const. art. IV, § 18(2)-(3); *see also* Cal. Const. art. XIII A, § 3 (requiring a supermajority legislative vote for new or increased taxes).

Additionally, Missouri's Constitution—like TABOR—requires that all tax increases, and proposed new taxes or fees, must be approved by voters. Mo. Const. art. X, § 16. Kentucky's Constitution provides that its citizens must be allowed the right to vote on any change in classification of property for tax purposes. Ky. Const. § 171. And California's Constitution prohibits local government from raising taxes, except upon an affirmative vote from the citizens. Cal. Const. art. XIII C, § 2 (requiring a supermajority approval for "special taxes").

Other states take a similar approach to TABOR by restricting the legislature's power to exact revenue in excess of a fixed formula. For example, with only limited exceptions allowing for adjustments based on growth in average personal incomes, Michigan's Constitution requires that all increases in revenue and tax rates must be approved by a majority of voters. Mich. Const. art. 9, §§ 25-32. Florida restricts its legislature's taxing powers as well—allowing for only limited adjustments based on growth in the average Floridian's personal income. Fla. Const. art. VII, § 1(e). The only exception allows for tax hikes when approved by a supermajority of legislators in both houses. All of these taxing restraints could be challenged under Plaintiffs' theory.

B. Spending and Borrowing Limitations

Amici are further concerned that litigants would invoke this decision in challenges to constitutional limitations that restrict spending levels. For example, Alaska's Constitution severely limits the legislature's ability to raise spending levels in excess of the rate of growth in "population and inflation." Alaska Const. art. IX, §16; *see also* N.C. Const. art. V, § 3 (prohibiting enactment of unbalanced budgets that would require the state to borrow money). Likewise, Plaintiffs' theory would call into question all debt limits that hamper a state legislature's ability to fund its preferred projects. *See, e.g.*, Cal. Const. art. XVI, § 1.

Several states impose a fixed cap on general obligation state debt. For example, Arizona's Constitution prohibits its legislature from incurring a debt totaling more than $350,000. Ariz. Const. art. IX § 5; *see also* Mo. Const. art. III, § 37 (prohibiting general obligation debt in excess of $1,000,000, except with voter approval); Ohio Cont. art. VIII, § 1 (capping general obligation shortfall debt to a maximum of $750,000). Additionally, several states prohibit legislatures from incurring debt beyond a level fixed by a set formula, which is often tied to revenue rates. For example, Louisiana's Constitution prohibits its legislatures from incurring any debt that would require service payments in excess of six percent of all general funds in a given fiscal year. La. Const. art. VII, § 6(F). Likewise, the Ohio legislature is prohibited from issuing public debt in an amount that would require service payments in excess of "five percent of the total estimated revenues of the state for the General Revenue Fund and from net state lottery proceeds." Ohio Const. art. VIII, § 17; *see also* S.C. Const. art. X. § 13(6)(c) (capping debt service rate at 5 percent of revenues); Wyo. Const. art. XVI, §§ 1-2.

Other states have adopted debt limitations similar to TABOR, in requiring that voters must approve certain proposals to incur public debt. For example, in Florida, the legislature may not finance or refinance capital projects without approval from voters. Fla. Const. art. VII, § 11(a). Likewise, Louisiana requires voter approval before public debt may be issued, except if the proposal would fund

endeavors specifically authorized in the state Constitution. La. Const. art. VII, § 6(D).

Similarly, Montana's Constitution prohibits the legislature from incurring debt without voter approval or a supermajority vote in both houses. Mont. Const. art. VIII, § 8; S.C. Const. art. X. § 13(5) (same). And some states impose even more stringent debt limitations. For example, Indiana's Constitution prohibits its legislature from incurring general obligation debt, except in very limited circumstances. Ind. Const. art. X, § 5; *see also* Neb. Const. art. VIII, § 1 (allowing for the issuance of public debt only for specific purposes and in specific amounts). Also, in Michigan, the legislature cannot incur debt without approval by supermajorities in both houses, and only then upon voter approval. Mich. Const. art. IX, § 15. Plaintiffs' theory would render all such fiscal restraints unconstitutional.

II. Plaintiffs' Theory of the Guarantee Clause Has No Logical Bounds

A. Supreme Court Precedent Would Squarely Preclude a Challenge to Colorado's Direct Voter Initiative Process

Plaintiffs make no attempt to hide the true nature of this suit in their complaint. The opening line states that "[t]his case presents for resolution the contest between direct democracy and representative democracy." (App. Vol. 1 at 043 ¶ 1). Indeed, this is a challenge to the right of Coloradans to limit the powers of their legislature through the direct voter initiative process. But, the Supreme

Court holds that such challenges are precluded by the political question doctrine in *Pacific States Tel. v. Oregon*, 223 U.S. 118, 145 (1912). This Court must follow suit.

Nothing in *Baker v. Carr* calls into question this point of law. 369 U.S. 186 (1962). In fact, *Baker* assumed that Guarantee Clause claims are categorically beyond the purview of judicial review. *Id.* at 223. Though Justice O'Connor suggested—in *dicta*—that some Guarantee Clause claims might be subject to judicial review, the Supreme Court has since reasserted the non-justiciability of all claims invoking this clause. *See New York v. United States*, 505 U.S. 144, 185–86 (1992); *but see Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (citing *Pacific States* for the proposition that "claims arising under the Guaranty Clause" are entrusted to the political branches).

B. Plaintiffs Offer No Judicially Manageable Standards for Narrowly Cabining their Theory of the Guarantee Clause

Recognizing that *Pacific States* squarely precludes a Guarantee Clause challenge to Colorado's entire ballot initiative process, the Plaintiffs seek to recast their claim as a more narrow challenge to TABOR. *See* (App. Vol. 1 at 136) (acknowledging that initiative and referendum are "well-accepted institutions"). Still even this alternative theory would require the court to make prohibited

political judgments. Moreover, Plaintiffs' theory would potentially invalidate all state constitutional restraints on legislative powers.[4]

1. There Are No Judicially Manageable Standards for Discerning What an Appropriate Stream of Revenue is

Some questions are non-justiciable by their very nature. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803). Thus, a reviewing court must look to the nature of the question presented to determine justiciability. *Baker*, 369 U.S. at 211-12. *Baker* offered six considerations relevant to this determination; however, the Supreme Court has emphasized the importance of the second consideration—whether there is "a lack of judicially discoverable and manageable standards . . . ."[5] *Id.* at 217. In *Vieth*, the Court held that a question is non-justiciable if a reviewing court finds a lack of judicially manageable standards. 541 U.S. at 277-28.

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[4] It is important to note that—if the political questions doctrine precludes Plaintiffs' Guarantee Clause challenge to TABOR—it must necessarily preclude their Enabling Act claim as well. In this case, Plaintiffs maintain that TABOR's restrictions violate Colorado's Enabling Act—18 Stat. 474—because the Enabling Act incorporates the Guarantee Clause's requirement that the state must maintain a "republican form of government." Accordingly, the Enabling Act claim falls with the Guarantee Clause claim because one derives from the other.

[5] *Amici* principally address the second consideration here; however, it should be noted that the fifth consideration requires the court to ask whether there is "an unusual need for unquestioning adherence to a political decision already made . . . ." *Baker*, 369 U.S. at 217. *Amici* submit that there are compelling reasons to weigh this consideration strongly against Plaintiffs' claims in light of a century of Congressional acquiescence to state initiative and referenda practices—and the substantial bodies of law they have created.

This makes sense because "law pronounced by the court must be principled, rational, and based on reasoned distinctions." *Id.* And in the absence of judicially manageable standards governing the resolution of an issue, a court is faced with a quintessential political question because its resolution demands an arbitrary proclamation of law, or an initial policy decision—i.e. an exercise of political judgment. Either way, the court would be making positive law, rather than interpreting existing law.

Here Plaintiffs contend that the people of Colorado violated the Guarantee Clause in enacting restrictions on their legislature's powers to tax and spend. But, their theory dissolves into a series of political issues if we break-down its assumptions. To begin with, Plaintiffs assume that the Guarantee Clause entails an *unwritten mandate* to preserve some unfettered stream of public revenue. And that assumption—in turn—rests on the notion that a republican government requires some guaranteed stream of tax revenues in order to discharge certain vaguely articulated public duties.

But, how can a court determine what an appropriate stream of revenue is without setting policy? Moreover, if that determination rests on the idea that a "republican government" must fund certain programs, how can a court determine what programs are required without exercising political judgment? And, if we are to accept Plaintiffs' assumptions, how can a court determine at what level these

endeavors should be funded, or how funding should be allocated? Indeed, these present policy questions beyond the purview of the courts. *See Baker*, 369 U.S. at 223 ("[T]he Guaranty Clause is not a repository of judicially manageable standards…"); *see also Vieth*, 541 U.S. at 285 (dismissing a proposed standard for judicial resolution because it would "all but evaporate" into a series of unmanageable policy questions if applied by courts).

2. There Are No Judicially Manageable Standards for Otherwise Cabining Plaintiffs' Theory of the Guarantee Clause

If this is not a challenge to Colorado's direct voter initiative process, then Plaintiffs' theory must hold either that the Guarantee Clause is violated (a) when citizens go *too far* in restricting the legislature's fiscal powers, or (b) categorically whenever citizens enact any constitutional restriction that inhibits specific legislative powers. But, there are no judicially manageable standards for determining how far the citizens could go in imposing fiscal restrictions without crossing some hypothetical amorphous line. And the Court could not readily draw such a line without setting fiscal policy, which would require the court to address the sort of sticky questions noted in the previous section.[6] Yet there are no

[6] *See* Lawrence H. Tribe, et. al., Wash. Legal Found., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (2010), *available* at http://www.wlf.org/publishing/publication_detail.asp?id=2132 (last visited Feb. 4, 2013) (invoking this same logic).

judicially manageable standards for saying that the Guarantee Clause categorically prohibits interference with any specific legislative powers either.

Plaintiffs apparently proceed under the later theory, as they allege only that a constitutional problem arises when the citizens use the initiative process to *revoke* specific legislative powers. *See* Plaintiffs' Brief in Opp. to Motion to Dismiss, P-28 (recognizing citizens are permitted to make certain "modifications" to the legislature's powers through the initiative process). But, here again their theory of the Guarantee Clause boils down to a quintessential political question because there are no judicially manageable standards governing the question of what legislative powers are *non-revocable*. A Court seeking to answer that question would step into the realm of political philosophy.

The only standard Plaintiffs offer would render all state constitutional restrictions on legislative powers void under the Guarantee Clause. Indeed, they argue that a violation occurred here because the citizens of Colorado interfered with the legislature's ability to effectuate its preferred policies. But that would be true of any constitutional restraint, initiative or referendum.[7]

[7] For this reason, the case should properly be construed as a challenge to Colorado's direct initiative system.

III. Plaintiffs Ask This Court to Step into an Invariable Political Thicket, With Unbounded Consequences for the People of the Fifty States

If accepted, Plaintiffs' theory of the Guarantee Clause would trigger an avalanche of litigation across the country. Their theory holds that the people may not impose restrictions on their legislature's powers if it would interfere with the legislature's ability to effectuate its goals. (App. Vol. 2 at 468 ¶ 3).This would call into question all voter enacted initiatives and referenda, or any constitutional restriction abridging a state's legislative powers.

A. Invalidation of TABOR Would Invite Challenge to State Initiatives and Referenda in 27 States

1. Plaintiffs' Theory Threatens the Continued Viability of All Voter Initiatives and Referenda

At least 27 states allow citizens to adopt constitutional amendments through direct voter initiatives. Amleto Cattarin, *Hands Off My Taxes! A Comparative Analysis of Direct Democracy and Taxation*, 9 J. L. SOCIETY 136, 173 n. 90 (2008). The citizens of these states—exercising their right of self-governance—have enacted initiatives and referenda on a wide array of issues, all of which impinge upon the prerogative of their state legislatures. Initiatives commonly (1) impose obligations on government[8]; (2) restructure government[9]; (3) limit state

[8] If it is anti-republican to impair a state legislature's capacity to effectuate its preferred policies, then numerous initiatives imposing obligations and directives on government would be subject to challenge. *See e.g.*, Co. Prop. No. 7

interference with local government[10]; (4) impede state action[11]; (5) establish public policy that would otherwise be the prerogative of the legislature[12]; (6) constrain the

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(1962)(requiring reapportionment of legislative districts); Cal. Prop. No. 20 (1972) (establishing the California Coastal Commission).

[9] Citizens of numerous states have interfered with their legislature's ability to operate by enacting initiatives that restructure or create political subdivisions, administrative agencies and judicial branches, all of which impact the administration and operation of law within the state. *See e.g.*, Cal. Prop. No. 19 (1914) (consolidation of city and county); Or. Measure No. 13 (1930) (creating water and utility districts). More fundamentally, citizens have exerted control over the functions and priorities of their legislature by enacting campaign finance reforms, setting terms and conditions on elected offices, and, in some cases, dramatically transforming the legislature by reducing the number of seats or representative houses. *See e.g.*, Okla. Prop. No. 77 (1914) (making unicameral legislature); Okla. Prop. No. 281 (1940) (establishing qualifications for state office); Okla. Prop. No. 632 (1990)(changing term limits); Nev. Prop. No. 10 (1996) (campaign contribution limits).

[10] The voters of several states have adopted initiatives with the explicit purpose of taking away their state legislature's powers, expressing a preference for home rule by local authorities. *See e.g.*, Or. Measure No. 15 (1910) (giving cities and towns exclusive power to regulate liquor); Co. Prop. No. 8 (1912) (granting home rule to cities and towns); Ohio Issue No. 2 (1933) (granting counties home rule).

[11] For example, voters in several states have elected to restrict the use or disposal of radioactive materials, which may well interfere with their legislature's ability to pursue its preferred energy policies. *See e.g.*, Idaho Prop. No. 2 (1982) (concerning the use of nuclear power); Mont. Prop. No. 1 80 (1978) (requiring voter regulation of nuclear facilities). Likewise, voters in some states have forbidden their state from constructing dams or other projects in environmentally sensitive areas. *See e.g.*, Cal. Prop. No. 7 (1924) (inhibiting the construction of dams); Wash. Measure Initiative No. 1-43 (1972) (inhibiting development along the Washington coast).

legislature's power to tax, spend and borrow[13]; and (7) prohibit or place conditions on the exercise of the legislature's police powers.[14]

In many instances, voter initiatives expressly restrain a state legislature's exercise of police powers. All such initiatives would be subject to challenge if a republican form of government requires unfettered legislative powers. Indeed, a

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[12] Voters have established public policy on many issues. *See e.g.*, Or. Measure No. 6 (1912) (eight hour work day on public works); Ohio Issue No. 2 (1918)(prohibiting manufacture and sale of alcohol); Or. Measure No. 25 (1910) (fish and game regulation); Wash. Measure Initiative No. 1-208 (1960) (authorizing joint tenancies); Wash. Measure Initiative No. 1-316 (1975) (making death penalty mandatory for some offenses); Co. Prop. No. 3 (1984) (ban on state funded abortion); Cal. Prop. No. 184 (1994) (stricter sentencing requirements for repeat offenders); Mont. Prop. No. 1-151 (2006) (setting minimum wage); Cal. Prop. 37 (2012) (requiring labeling for certain genetically modified foods). All of these initiatives interfere with the prerogatives of the state legislature, especially where the voters have ossified these policies in their state constitution.

[13] See e.g., Okla. Prop. No. 74 (1914) (reducing maximum levy of state taxes); Co. Prop. No. 8 (1972) (prohibiting state from levying taxes and appropriating funds for Olympics); Idaho Prop. No. 1 (1978) (restricting property valuation or tax changes); Nev. Prop. No. 8 (1980) (exempting household goods from taxation); Mont. Prop. No. 1 105 (1986) (limiting property tax rates to 1986 levels); Az. Prop. 203 (1996) (allocating lottery revenues for health programs); Or. Measure No. 47 (1996) (reduces and limits property taxes; limits revenue available for schools and other local services); Wash. Measure Initiative No. 1-722 (2000) (declaring null and void tax and fee increased adopted without voter approval by state and local government).

[14] *See* Initiative and Referendum Institute, http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Feb. 4, 2013) (detailing initiatives in each state).

legislature cannot fully effectuate its preferred agenda if its hands are tied by voter enacted restraints, or if its preferred policies are frustrated by referenda.

As such, invalidation of TABOR would invite challenges to voter initiatives permitting otherwise prohibited activities. Litigants could rely on Plaintiffs' theory in a challenge to Montana's 1918 initiative authorizing chiropractors to practice their trade, or Ohio's 1949 initiative permitting manufacture and sale of colored oleomargarine. *See* Mont. Prop. No. 1 112 (1918); Ohio Issue No. 1 (1949). They could also challenge Oregon's 1952 initiative repealing regulations governing the sale of milk, Colorado's 1958 initiative authorizing bingo games, or California's 1972 initiative restricting the state's prerogative to effectuate its preferred policies, concerning the transportation of public school students. *See* Or. Measure No. 8 (1954); Co. Prop. No. 4 (1958); Cal. Prop. No. 21 (1972). Ideologically motivated litigants could also target more recent initiatives, like Nebraska's 1988 initiative limiting its legislature's power to regulate firearms; Massachusetts' 1994 restrictions on the implementation of rent control ordinances; California's 1996 initiative allowing for the distribution and use of medicinal marijuana; or Utah's 2000 initiative forbidding the state from requiring innocent parties to forfeit personal property used in connection with drug offenses. *See* Neb. Prop. No. 403 (1988); Mass. Question No. 9 (1994); Cal. Prop. No. 215 (1996); Utah Prop. B (2000).

Amici are particularly concerned that Plaintiffs' theory would also be invoked to challenge voter enacted initiatives intended to protect private property rights. For example, Arizona's Private Property Rights Protection Act (PPRPA) was enacted by popular vote, and imposes a condition on the exercise of police powers in Arizona. Az. Prop. 207 (2006). Under the PPRPA, state and local government must compensate landowners for lost property values when new regulations interfere with a landowner's reasonable use and enjoyment of his or her land. *Sedona Grand, LLC v. City of Sedona*, 270 P.3d 864, 865 (Ariz. App. 2012). Likewise, Virginians recently voted to adopt a constitutional amendment significantly limiting the use of sovereign eminent domain powers.[15] See A. Barton Hinkle, Opponents Made Best Case for Takings Amendment, RICHMOND TIMES-DISPATCH, Nov. 7, 2012. These private property protections would be vulnerable to challenge if the Plaintiffs should succeed in creating authority for their theory of the Guarantee Clause.[16]

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[15] Both of the Arizona PPRPA and Virginia's recently enacted amendment provide greater protections for property rights than are currently recognized under the federal constitution.

[16] This may even call into question the propriety of state court decisions recognizing greater protections for individuals rights than recognized under the federal constitution. For example, the Ohio Supreme Court held in *City of Norwood v. Horney*, that Ohio's Takings Clause provides greater protections against the exercise eminent domain for the purpose of economic development. 853 N.E.2d 1115, 1136–42 (2006).

2. Opening Initiatives and Referenda to Challenge Would Upset Entire Bodies of State Law

Citizens of 27 states have enacted more than 800 initiatives in the Twentieth Century alone.[17] These states have developed extensive bodies of law around voter-enacted initiatives in the past century, all of which would be drawn into question—or severely undermined—if Plaintiffs' theory of republicanism is invoked to cut down the initiative process or the reforms it has effected. This would result in unbounded litigation.

For example, voters enacted the California Coastal Act in 1972, which created the California Coastal Commission to manage coastal resources. *See Marine Forests Soc. v. California Coastal Com'n*, 113 P.3d 1062, 1098 (Cal., 2005). Washington voters adopted a similar measure in that same year, requiring each coastal city and county to adopt measures to protect the environment and control development. *See State, Dept. of Ecology v. City of Spokane Valley*, 275 P.3d 367, 368-369 (Wash.App. Div. 3, 2012). Should these initiatives be struck down under Plaintiffs' theory of the Guarantee Clause, every decision of these governing bodies would also be subject to challenge, including state and county zoning ordinances all along the California and Washington coasts, all of which are currently predicated on these existing voter enacted regimes.

[17] *See* Initiative and Referendum Institute, *supra* n. 14.

B. Potentially Any State Constitutional Constraint May be Subject to Challenge

Should Plaintiffs prevail here, the resulting torrent of litigation would not necessarily be limited to direct voter initiatives, referenda and constitutional restrictions on a state legislature's ability to tax, spend and borrow. Indeed, Plaintiffs' radical theory of the Guarantee Clause holds that a republican form of government requires a legislature to be free to pursue its preferred agenda. Under that view, any constitutional restriction—whether voted on by the people or not—would be *anti-republican*. This would call into question all state constitutional constraints on legislative power. Accordingly, this theory must be rejected not only because of its far-reaching implications, but because is antithetical to the very concept of constitutional governance. *Duncan v. McCall*, 139 U.S. 449 (1891) ("[W]hile the people are [] the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds on their own power…").

On that note, Plaintiffs' theory of republicanism is entirely incongruent with that expressed by the founding generation in ratification of the United States Constitution. It cannot be that it is somehow anti-republican to restrain the powers of government if the federal constitution was itself consistent with republican ideals. *See Baker*, 369 U.S. at 222 (*citing Duncan* favorably and noting that

constitutional restrictions do not violate the Guarantee Clause). After all, the United States Constitution was intended to structure and control government.

To be sure, Congress' power to tax—which Plaintiffs presume to be an inalienable right of a "republican" legislature—is limited by the federal constitution. *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2599 (2012) (recognizing that taxing power is "not without limits"); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922) (holding taxing power could not impose penalties to regulate conduct); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895) (holding—before enactment of the Sixteenth Amendment—that the Constitution prohibited direct income taxes). Moreover, the doctrine of federalism limits Congressional authority to specifically enumerated powers. *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (acknowledging that Congress cannot regulate non-commercial activities that have no impact on a larger economic regulatory scheme). And the Bill of Rights further limits Congress' ability to enact legislation. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 272 (1978). [18] Accordingly, if those restrictions on congressional powers were consistent with republican ideals, then there is nothing inherently anti-republican about restricting a state government's powers.

[18] The constitutional restrictions in the Bill of Rights also apply, with few exceptions, against the states through incorporation into the Fourteenth Amendment, therein limiting the powers of state legislatures. *Wise v. Bravo*, 666 F.2d 1328, 1332 (10th Cir. 1981).

IV. The Guarantee Clause Concerns the Form of Government, Not Public Policy

A. Without Textual or Historical Grounding, Plaintiffs Seek to Inject Their Own Politically-Charged Concept of What Government Should Be Into the Guarantee Clause

The text of the Guarantee Clause provides only that "[t]he United States shall guarantee to every State in the Union a Republican Form of Government, and shall protect them against invasion . . . ." U.S. Const. art. IV, § 4. This tells us only that the Constitution imposed a duty on the federal government to prevent the states from adopting certain forms of government. But, it is necessary to look to the historical record—the Federalist Papers, the ratification debates, contemporary dictionaries, and other indicia of original meaning—to understand what the framers meant.

In review of these sources, scholars from all persuasions recognize that the guarantee of a republican government prevents any state from establishing a dictatorship or a monarchy. *See* AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, 276-280, (2005) ("Repeatedly, Federalists explained the central meaning of republican government . . . . by defining republics not in contradistinction to democracies but rather in opposition to monarchies and aristocracies."); *see also* Robert Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 814 (2002). Moreover, the predominant understanding of republican

government was associated with the idea that the people must be allowed the right to self-govern. *See* AMAR, *supra* at 278. But, the historical record is void of any suggestion that republicanism inhibits the right of the people to impose restraints on their legislature. To the contrary, a fundamental tenant of republicanism was understood as preserving "the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness." *Id.*

Plaintiffs assert that TABOR conflicts with a republican form of government because it limits the legislature's fiscal powers and inhibits its performance of essential government functions. Though they are entitled to their philosophical view of the proper role of government, there is no basis for injecting the Guarantee Clause with modern notions that government must necessarily engage in any public endeavor requiring constant revenue. If anything, the guarantee of a republican government ensures the right of the people to choose what function their government will serve.

B. The Guarantee Clause Imposes No Duty on the State to Provide Any Public Service that Would Require an Unfettered Stream of Revenue

The Guarantee Clause concerns the structure of government power, not the duties of government. As *Baker* put it, "[n]o particular government is designated as republican, [and] neither is the exact form to be guaranteed, in any manner especially designated." Baker, 369 U.S. at 222, n. 48. As such, the requirement that

states maintain a republican government is entirely indifferent to questions of public policy—like whether a state should provide a specific public service or program.[19]

To be sure, the historical record is void of any suggestion that republicanism implicates specific policy choices at all.[20] Instead, republicanism embodied an ideal that the people should be free to choose what sort of policies their government should pursue.[21] Indeed, if the people are free to govern themselves, they can choose to limit the role of government in their lives. Accordingly, there is no reason to assume that a republican government requires the state legislature to retain unfettered tax and spend powers.

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[19] Perhaps state constitutional principles may speak to this issue; however, that has no bearing on the requirements of the Guarantee Clause.

[20] The original ratifying states provided very few if any public services or programs. Given that the original states were republican at that time, it does not make sense to assume that a republican government requires the sort of expansive public programs that Plaintiffs seem to advocate.

[21] It is important to note that this view of republicanism was tempered by the founding generation's predominant views on natural law and natural rights, which they incorporated into the Constitution and Bill of Rights to restrain the powers of the federal government. Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review on Kermit Roosevelt's the Myth of Judicial Activism*, 23 J.L. & POL. 1, 3 (2007).

V. Federal Invalidation of TABOR Would Upset the Sovereignty of the People of Colorado, Therein Contravening the Purpose of the Guarantee Clause

A. A Republican Form of Government Vests Ultimate Sovereignty in the Citizens of the State, Not the Legislative Apparatus *Per Se*

In our constitutional system, ultimate sovereignty rests with the people, not in their instruments of government. *See Chisolm v. Georgia*, 2 U.S. 419 (2 Dall.), 471 (1793) ("[T]he sovereignty of the nation is in the people of each state . . . . [A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country . . . ."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people by whom and for whom all government exists and acts."). This view of popular sovereignty was of fundamental importance to the young American Republic, which had just fought a war of independence to assert the people's right of self-governance.

To preserve the right of self-government, the founding generation was careful in crafting the federal constitution so as to prevent a centralized government from growing too powerful and despotic. John G. Schmidt, Jr., *The Tenth Amendment: A 'New' Limitation on Congressional Commerce Power*, 45 RUTGERS L. REV. 417, 417 (1993). And the Guarantee Clause represented the founding generation's commitment to these republican ideals as well, for it guaranteed the right of self-governance to the people of each state in the union.

AMAR, *supra*, at 279-80. Moreover, the dual requirements that the federal government guarantee a republican form of government and protect the states against invasion was also meant to serve as a prophylactic measure to guard against invading foreign powers, or any domestic anti-republican regime that might threaten other states or the American Republic as a whole. *Id.*

B. The Citizens of Colorado Have Exercised Their Right to Self-Governance in Amending Their Constitution Through Popular Vote

Here the Court has been asked to invalidate a voter-enacted amendment to the Colorado Constitution, which gives Coloradans greater say over their own governance. The enactment of TABOR was therefore an exercise in free government. And *amici* contend that the Guarantee Clause reserves the right of the people of any state to enact such constitutional amendments to restrict their government's powers. *Pacific States*, 223 U.S. at 145. [22] Invalidation of TABOR would in itself be anti-republican and would frustrate the purpose of the Guarantee Clause.[23]

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[22] The Colorado Supreme Court goes even further, holding that voter initiatives are fundamental to republican government. *See Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974).

[23] The historical record and the great weight of scholarship only support this conclusion. But, the Plaintiffs would be correct in noting that the text offers no apparent standard for definitively assessing an assertion that any particular action violates the Guarantee Clause.

VI. Plaintiffs' Concerns Over Colorado's Fiscal Health are a Red Herring

Plaintiffs contend that TABOR violates the Guarantee Clause because it has crippled Colorado's budget, despite the fact that the Clause does not speak to state finances.[24] Even if this characterization of Colorado's fiscal health were accurate and clearly attributable to TABOR, Plaintiffs' claims should be dismissed for the reasons set forth already. After all, the meaning and application of the Guarantee Clause cannot depend upon the vitality of our economy, much less Plaintiffs' politically expedient concerns. *See Korematsu v. U.S.*, 323 U.S. 214, 245 (1944) (J. Jackson dissenting) (arguing the Constitution should not be "distorted" for expedient concerns); *see also Canning v. N.L.R.B.*, 2013 WL 276024, 21 (D.C. Cir. 2013) (opining that courts should not depart from the Constitution "in favor of our own concept of efficiency, convenience, or facilitation of the functions of government").

The real issue here is that Coloradans enacted TABOR in order to restrain their government's appetite for spending, and Plaintiffs do not want to make

[24] This characterization of Colorado's budgetary health is wrong. *See* The Colorado Outlook: Economic and Fiscal Review, Governor's Office of State Planning and Budgeting (Dec. 20, 2012) *available* at http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251843184456&ssbinary=true (last visited Feb. 5, 2013) (noting that "[a]ll []major tax revenue categories continue to come in higher than expected," and forecasting that "General Fund revenue will be $864.6 million above FY 2012-13 spending and reserve levels").

politically difficult choices as to how finite revenues will be appropriated. Yet difficult choices are nothing unique to Colorado. Christopher Thornberg, *With few promising signs on the horizon for state budgets, lawmakers face another year full of difficult decisions*, National Conference of State Legislatures, (Jan. 2013).[25] State and local governments all across the country are struggling to enact balanced budgets with limited revenues. While the recession has exacerbated the problem, economic strain does not give license to untether constitutional restraints.[26] If expedient concerns could justify invalidation of constitutional amendments, then all constitutional restraints would be illusory.

[25] *Available* at http://www.ncsl.org/issues-research/budget/state-budgets-struggling-to-grow.aspx (last visited Feb. 4, 2013).

[26] Nonetheless, Colorado remains among the highest ranked states in terms of its economic outlook according to the American Legislative Exchange Council. Rich States, Poor States: ALEC-LAFFER, State Economic Competitive Index, 9 (2012) available at http://www.alec.org/publications/rich-states-poor-states/ (last visited Feb. 4, 2013).

Conclusion

For the foregoing reasons, *amici* respectfully ask this Court to reverse the district court.

Respectfully submitted this 12th day of February, 2013.

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FED. R. APP. P. 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(B) and (C) and Fed. R. App., P. 29(d), I certify that this brief is proportionally spaced and contains 6,928 words. I relied on Microsoft Word 2010 to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: */s/Richard A. Westfall*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amici Curiae Brief was served via ECF on all parties of record.

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