NO. 12-1445

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

TENTH CIRCUIT

ANDY KERR, Colorado State Representative, *et al.*,

Plaintiffs-Appellees,

v.

JOHN HICKENLOOPER, Governor of Colorado, in his official capacity,

Defendant-Appellant.

On Appeal from
The United States District Court for the District of Colorado
The Honorable William J. Martínez

BRIEF OF D'ARCY W. STRAUB, MEMBER OF THE COLORADO BAR, AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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INTEREST OF THE *AMICUS CURIAE*

This cause of action to invalidate The Taxpayers Bill of Rights ("TABOR"), Colo. Const. art. X, § 20, requires the Court to determine the legal implications of a republican form of government as referenced in the Guarantee Clause and the Colorado Enabling Act. The Plaintiffs-Appellees Andy Kerr and other concerned public officials and citizens ("Plaintiffs") primarily attempt to cast a republican form of government in terms of the power to tax, and they suggest Colorado's government is anti-republican in form because the power to tax is limited under TABOR. In The Federalist No. 10, James Madison defines a republican government as one that enacts law through elected representatives, and Madison additionally contrasts a republican government to a direct democracy that allows citizens to enact laws through a popular vote. *See* The Federalist No. 10, at 58 (James Madison) (R. Scigliano ed., 2000).

D'Arcy Straub[1] ("Straub") is a member of the Colorado Bar. Straub offers this brief pursuant to the Colorado Rules of Professional Conduct that encourage

[1] All parties gave their written consent for Straub to file this brief, and Straub extends a sincere thank you to the parties.

No counsel for a party authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the *amicus curiae* contributed money to fund preparing or submitting it.

pro bono efforts by attorneys. As an attorney and citizen of Colorado, Straub feels direct democracy represents a largely unrecognized threat to the state of Colorado and many of its citizens. Although the average citizen probably believes that nothing could be more fair than the electorate directly voting on a public policy issue, the Founding Fathers recognized the perils of this unchecked power.

While Plaintiffs attempt to attack TABOR without challenging direct democracy, this lawsuit provides the Tenth Circuit a crucial opportunity to provide judicial review of an ill-conceived form of self-governance. In contrast to the briefs submitted in this case that are perhaps driven by the substantive issue of taxation under TABOR, this brief addresses the important procedural issue of enacting laws within a government of checks and balances, and how direct democracy subverts this process. The procedural issue of *how* laws are enacted is just as important as the substantive issue of *what* laws are enacted. After all, it is the *how* that primarily distinguishes desirable forms of government from undesirable forms of government.

The position advanced by Straub is consistent with the legal conclusion of Defendant-Appellant Hickenlooper ("Defendant") who argues Plaintiffs' claim for relief presents a nonjusticiable political question. But Straub only partially supports the Defendant, as Straub does not support Defendant's defense of direct

democracy. Straub generally supports Plaintiffs' efforts to invalidate TABOR, as the electorate cannot possess an unchecked power to tax within a republican form of government.

SUMMARY OF THE ARGUMENT

The Guarantee Clause and Colorado Enabling Act require Colorado's government to be republican in form. The unchecked power of direct democracy, which supports citizen-initiated state constitutional amendments ("citizen initiatives"), functions as an anti-republican form of government that threatens government stability and individual liberties.

At Colorado's admission into the Union, the New States Clause at Article IV, Section 3, Clause 1 of the United States Constitution provided Congress the power to supervise the provisions of a state constitution through an enabling act. The Guarantee Clause at Article IV, Section 4 of the United States Constitution maintains this supervisory power over a state constitution and allows Congress to either ratify or reject citizen initiatives. This congressional power to ratify or reject simultaneously places a check on the power of the electorate and eliminates the anti-republican form of government encompassed by direct democracy.

This case presents a nonjusticiable political question where two of the factors in *Baker v. Carr*, 369 U.S. 186 (1962) are satisfied. Although

nonjusticiable, the present case allows this Court to address the unchecked power of direct democracy and hold that Congress satisfies the Guarantee Clause by either ratifying or rejecting citizen initiatives.

ARGUMENT

I. The Legal Issue of a Republican Form of Government

A. The Federalist No. 10 – The Characteristics of a Republican Form of Government and a "Democracy"

The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. Additionally, the Colorado Enabling Act requires "that the [Colorado] constitution shall be republican in form." Colorado Enabling Act, § 4, 18 Stat. 474 (1875). Madison in The Federalist No. 10 provides context for interpreting the meaning of a republican form of government:

> From this view of the subject, it may be concluded, that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and ***there is nothing to check the inducements to sacrifice the weaker party***, or an obnoxious individual. Hence it is, that such ***democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property***; and have in general been as short

> in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.
>
> A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure, and the efficacy which it must derive from the Union.
>
> The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The Federalist No. 10, at 58 (James Madison) (emphasis added).

Madison does not provide specific characteristics of a republican government other than to suggest it must entail the "delegation of the government" to a relatively small number of elected representatives. *See id.* Madison's only other characterization of a republican government is gained through the contrast between a republic and a democracy, which serves to suggest what a republican government cannot be. A republican government cannot support citizens "administer[ing] the government in person." *See id.* When the citizens of

Colorado personally vote on a constitutional amendment that forecloses the involvement of elected representatives, they are "administer[ing] the government in person" through an unchecked power, thus creating a government anti-republican in form.[2] *See id.* Under such circumstances, the citizens of Colorado are practicing a democracy as characterized by Madison.

B. The Turbulence and Dangers of the Unchecked Power in a "Democracy"

The Founding Fathers recognized the perils of direct democracy,[3] and Madison keenly advised in The Federalist No. 10 that "democracies have been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as violent in their deaths." *Id*.

Sources of "turbulence" are readily identifiable where citizens have an unchecked power to amend their state constitution through the citizen initiative. For example, the possibility exists that amendments may lead to taxation

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[2] Citizen-initiated statutes that can be amended or repealed by the Colorado General Assembly and constitutional amendments that the Colorado General Assembly refers to the voters are consistent with a government republican in form. In each case, a check on the electorate's power exists as elected representatives are involved or can be involved in the process of governance.

[3] The "democracy" Madison refers to in The Federalist No. 10 is more commonly known today as direct democracy.

provisions in the state constitution that make it difficult or impossible for the state to comply with its constitution or manage its budget. Indeed, Governor Hickenlooper noted in his 2013 State of the State Address that "TABOR, the Gallagher Amendment and Amendment 23[4] shouldn't be viewed in isolation. They create a fiscal knot that can't be untied one strand at a time." Hickenlooper State of the State Address, *available at* http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251638211880.

Examples of citizen initiatives that contradict federal law also exist, but they are not relevant to TABOR and need not be presented to further establish the "turbulence" created by direct democracy.

TABOR is a citizen-initiated tax policy that only begins to suggest the dangers of placing tax policy in the hands of the citizenry. Madison warned about people voting for their own financial interest in The Federalist No. 10:

> The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. ***Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.***

[4] Amendment 23 is a citizen initiative affecting school funding. *See* Colo. Const. art. IX, § 17. The Gallagher Amendment is a referred constitutional amendment affecting property taxes. *See* Colo. Const. art. X, §§ 3, 15.

The Federalist No. 10, at 56-57 (James Madison) (emphasis added).

A simple explanation for the support of TABOR is the unsurprising notion that people do not like to pay taxes. But if the electorate believes that limiting one's taxes through a popular vote is a good idea, then the possibility exists that the electorate will one day realize that an even better tax policy is to lower the taxes of the majority while raising the taxes of an identifiable and vulnerable minority group, most obviously the top-income earners. The towering endgame of direct democracy – the redistribution of wealth by the majority – was evident to Madison who recognized that "democracies . . . have ever been found incompatible with personal security, or the rights of property." *Id.* at 58. Under the current understanding of law that provides an unchecked power to the Colorado electorate, the liberty to accumulate wealth in Colorado is a tenuously based liberty that exists only at the will of the citizenry.

Proposition 30, which the California electorate passed in the November 2012 general election, increased the marginal tax rate of California's wealthiest citizens (i.e., those citizens with a taxable income of at least $250,000). *See* Cal. Const. art. XIII, § 36(f)(2)(A). Proposition 30 provides a mere glimpse into the future of direct democracy, where a majority of the electorate realizes that each "shilling" they tax the wealthiest citizens is a "shilling saved to their own

pockets." *See* The Federalist No. 10, at 57 (James Madison).

The exact definition of a republican government is debatable with many scholarly opinions, thereby making it difficult to legally assess whether a government is republican in form. Accordingly, perhaps the best indication of a government being anti-republican in form is to analyze how the government functions and identify any of the perils discussed in The Federalist No. 10. Such perils are easily identifiable under Colorado's current form of governance. The danger of the electorate's unchecked power of the initiative – much like the unchecked power of a monarchy – currently makes Colorado's government anti-republican in form.

C. Congressional Relationship to the Colorado Constitution

1. Congressional Requirement for a Government Republican in Form

Under the New States Clause of the federal Constitution, "[n]ew states may be admitted by the Congress into this Union." U.S. Const. art. IV, § 3, cl. 1. Acting under the power granted to it by the Constitution, Congress passed the Colorado Enabling Act. 18 Stat. 474 (1875). Through the Colorado Enabling Act, Congress established criteria that the Colorado Constitution must satisfy, including the requirement "that the [Colorado] constitution shall be republican in

form." *Id.* § 4. After the citizens of Colorado complied with the Enabling Act, Colorado entered the Union as a state upon the proclamation of President Ulysses S. Grant on August 1, 1876.

2. Congressional Power Over Colorado's Constitution

Colorado's admission to the Union by means of an enabling act raises this subtle point: Congress has a supervisory power over the provisions of a state constitution. Whatever powers the Tenth Amendment bestows upon the People and the states, *see* U.S. Const. amend X, gaining statehood to the Union illustrates that the right or power to implement a state constitution free from federal oversight is not one of them. A limited supervisory power for Congress to control the provisions of a state constitution resides within Article IV, Section 3, Clause 1 of the United States Constitution.

D. Harmonizing the Citizen Initiative with the Guarantee Clause

1. Inherent Power of Congress to Ratify or Reject Citizen Initiatives

Under the New States Clause of the federal Constitution, Congress may admit new states into the Union. U.S. Const. art. IV, § 3, cl. 1. In the section immediately following the New States Clause, the Guarantee Clause provides

"[t]he United States shall guarantee to every state in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. The proximity of the New States Clause to the Guarantee Clause is significant – once Congress admits states to the Union, the federal government has a continuing duty to ensure the welfare of the states, including maintaining the republican form of government of a state.

Madison addresses the "guarantee" and the federal duty to prevent states from adopting anti-republican forms of government in the Federalist No. 43:

> In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. . . . It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provisions for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that ***if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to guaranty of a republican form of government, which supposes a preexisting government of the form which is to be guaranteed***. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange

> republican for anti-republican Constitutions, a restriction which, it is presumed, will hardly be considered a grievance.

The Federalist No. 43, at 277-79 (James Madison) (emphasis added).

The Federalist No. 10 and the lack of the initiative in the federal Constitution suggests the Founding Fathers would disfavor state constitutions that act as instruments of direct democracy. Indeed, the Founding Fathers' aversion to the electorate controlling policy through a popular vote is seemingly evident through the initial provisions of the United States Constitution that required the election of senators by state legislatures, *see* U.S. Const. art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII, § 3, and the election of the president through the electoral college. *See* U.S. Const. art. II, § 1, cl. 3, *repealed by* U.S. Const. amend. XII. The simplistic nature of the electorate's unchecked power of direct democracy in Colorado stands is stark contrast to the sophisticated system of checks and balances the Founding Fathers established in the United States Constitution.

Any state constitution that operates to incorporate a "democracy" is an "anti-republican" form of government. *See* The Federalist No. 10, at 58; The Federalist No. 43, at 278-79. Under the Guarantee Clause and as explained in The Federalist No. 43, the federal government is obligated to protect states from anti-

republican forms of government, but "the authority extends no further than to *guaranty* of a republican form of government." *Id.* at 278. An electorate amending a state constitution that forecloses the participation of elected state representatives requires federal intervention under the Guarantee Clause.

The federal constitutional remedy for curing the anti-republican form of government created by citizen initiatives is for Congress to either ratify or reject these amendments once approved by an electorate. Under the New States Clause, Congress possesses a limited power to dictate the provisions of a state constitution through an enabling act, but an absolute power to subsequently accept or reject any proposed state constitution. *See Coyle v. Smith*, 221 U.S. 559, 568 (1911). The Supreme Court stated in *Coyle*:

> The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion. From this alone, it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval.

Id. No state ever possessed the power to force Congress to accept the provisions of a state constitution at its admission into the Union.

Upon an electorate approving a constitutional amendment through a citizen initiative, the Guarantee Clause requires Congress to exercise the same

supervisory authority over a state constitution that it originally employed upon the admission of the state into the Union. When Congress – an elected body of representatives – either ratifies or rejects a citizen initiative, the anti-republican form of direct democracy vanishes, thus bringing the initiative process back within the boundaries of a government republican in form.

The above application of law is consistent with the circumstances that attended Oklahoma's admission into the Union in 1907. Upon admission into the Union, the Oklahoma Constitution contained provisions that supported the citizen initiative as a means for enacting law. *See* Okla. Const. art. V, § 1. Additionally, the Supreme Court has indicated that the admission of a state into the Union makes it "to be presumed" that the state possesses a republican form of government. *See Minor v. Happersett*, 88 U.S. 162, 175-176 (1875). Thus, the argument can be made that because Oklahoma was accepted into the Union with a constitution that supports the initiative, and the acceptance of a state into the Union signifies that its government is republican in form, then the People's unchecked power of the citizen initiative is a legitimate component of a republican form of government.

But such a line of reasoning is flawed. When Oklahoma was admitted into the Union with a state constitution that supported the initiative, the admission did

nothing to eliminate the supervisory power of Congress to subsequently oversee the provisions of Oklahoma's constitution. When the citizens of Oklahoma now wish to amend their constitution through a citizen initiative, Congress still maintains a supervisory power over the state constitution through the Guarantee Clause that allows either the ratification or rejection of the citizen initiative.

The congressional ratification or rejection of a state constitutional amendment is an act under the Guarantee Clause that extends no further than is necessary to ensure a state government remains republican in form. While a state and its citizens may complain about federal interference in enacting law under the pretext of state sovereignty, the solution is simple – initiate laws as state statutes. In any event, congressional ratification or rejection of citizen initiatives forecloses a form of self-governance that Madison and the Founding Fathers wisely recognized as ill-conceived and dangerous.

2. Supreme Court Precedent Supporting a Congressional Power to Ratify or Reject – Luther and Pacific States

Luther v. Borden, 48 U.S. 1 (1849) and *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) – two of the Supreme Court cases central to the Guarantee Clause question – provide support for Congress to ratify and reject citizen initiatives. In *Luther*, the question at trial required the court to determine

whether the charter government or the government of a competing faction comprised the legitimate government of Rhode Island. The Supreme Court held that the nature of the case prevented adjudication because it required the determination of a political question. "[I]t rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." *Luther*, 48 U.S. at 48.

Implicit in the holding of *Luther* is that Congress possesses the power to ratify and reject a state constitution – how else could Congress otherwise recognize one government of Rhode Island and reject the other? Similarly, after the passage of a citizen initiative, two competing constitutions that represent two different states now exist, the one prior to the election and the one subsequent to the election. Just as in *Luther*, Congress possesses the power through a simple vote of elected representatives to settle the political question as to which competing state constitution represents the legitimate state.

The passage of a citizen initiative does not seem to interrupt the existence of a state via the death of one government and the birth of another. In today's world, the emergence of a new government is frequently marked with the conspicuous

impact of warfare. However, the United States Constitution takes an expansive view on the definition of a state, which signifies the emergence of a new state and government when a state constitution is amended:

> In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.

Texas v.White, 74 U.S. 700, 721 (1869). Accordingly, when the "written constitution" of a government changes, a new state emerges under the United States Constitution that Congress has the authority to admit into the Union under the New States Clause. Ratifying a citizen initiative represents the constitutional admission of a new state into the Union, while rejecting a citizen initiative leaves the state with the same standing in the Union that it possessed prior to the passage of the citizen initiative.

Pacific States addressed whether the Guarantee Clause prohibited the citizen initiative as a legislative instrument of the electorate. The Supreme Court concluded that the legal challenge to the initiative process was an attack "on the State as a State" and presented a political question to be determined by Congress.

See Pac. States, 223 U.S. at 150-51. In dismissing the case as one containing an issue within the purview of Congress, the implicit result is that Congress decides such political issues as a matter of course by voting, such as through the ratification of one constitution and the rejection of another.

II. The Nonjusticiable Political Question Presented

A. The Presence of a Textually Demonstrable Constitutional Commitment to Congress

A nonjusticiable political question exists in a case upon the finding of "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Plaintiffs request an Article III Court to invalidate TABOR, but the request is essentially one of choosing between two different states defined by two different state constitutions. Indeed, as Plaintiffs characterize the situation, the choice is between two very different states – one republican in form and one anti-republican in form.

Under the authority of the New States Clause, "[n]ew States may be admitted by the Congress into this Union." U.S. Const. art. IV, § 3, cl. 1. The New States Clause presents a textual commitment to Congress, which involves the supervisory power to oversee the provisions of a state constitution, as illustrated by the Colorado Enabling Act. By ratifying or rejecting the competing

constitutions of Colorado that either include or exclude TABOR, Congress is acting under the power specifically granted to it – and not an Article III Court – under the New States Clause. Additionally, the vote to ratify or reject competing constitutions by the congressional body of elected representatives simultaneously fulfills the obligation under the Guarantee Clause for the "United States [to] guarantee to every State in the Union a Republican Form of Government." U.S. Const. art. IV, § 4.

The situation presented in this case is the same type of situation presented in *Luther*, and the first *Baker* factor of a "textual commitment" supports the holding in *Luther* that Congress should address this political question, not an Article III Court.

B. The Presence of an Initial Policy Determination That Is Best Made by Congress

A nonjusticiable political question exists in a case upon the finding of "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). In the present case that involves the determination of a government republican in form, the selection between a TABOR and non-TABOR state constitution by some branch in the federal government involves the policy decision about how to treat

other similarly passed citizen initiatives. If an Article III Court holds that a single citizen initiative is invalid because Congress has not ratified it, the effects on Colorado and other states are significant because the remaining citizen initiatives are similarly invalid.

Only Congress can establish through legislation a flexible process to remedy its past failures in appropriately exercising its supervisory power over state constitutions. In advancing the position that Congress has the authority to supervise the citizen initiative process, one commentator suggested Congress could prohibit the electorate from enacting law that pertains to certain subject matter. *See* Catherine Enberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 Stan. L. Rev. 569, 592-95 (2001). Similarly, Congress can enact legislation that requires a state to amend its constitution according to various criteria – which serves to allow or prohibit certain subject matter – before Congress ratifies the constitution pursuant to its supervisory powers under the New States Clause and Guarantee Clause. An Article III Court cannot exercise this policy-making authority that Congress possesses to remedy the past failings involving direct democracy.

III. The Vital Issue Presented – Checking the Power of Direct Democracy

A. The Holding Requested – Congress Must Ratify or Reject Citizen-Initiated State Constitutional Amendments to Fulfill the Guarantee Clause

Plaintiffs' argument involving a republican form of government has provided this Court an opportunity to address direct democracy. The Supreme Court in *Pacific States* held the related issues of direct democracy and a republican form of government involve a nonjusticiable political question, but the Supreme Court failed to provide any meaningful guidance to resolve the issue. The unchecked power of the citizen initiative should now be evident as inconsistent with a republican form of government. Accordingly, this Court should hold that while this cause of action includes a nonjusticiable political question that must be dismissed on remand, Congress has a duty to ratify or reject citizen initiatives in order for the United States to comply with the Guarantee Clause and ensure the maintenance of a state government republican in form.

B. Madison's Relationship to Einstein and $E=mc^2$

$E=mc^2$ – with one equation, Einstein reduced complex subject matter to one simple equation. As an attorney and MIT Ph.D., Straub has often mused at the differences between the sciences and the law. In the sciences, complexity is

frequently reduced to clarity and the simplicity of a scientific law or equation. In the law, complexity seems to beget shades of gray and even more complexity.

The genius of James Madison is this – like Einstein, he reduced the essence of a complex subject down to one simple statement. "[D]emocracies . . . have ever been found incompatible with personal security, or the rights of property. . . ." The Federalist No. 10, at 58 (James Madison). Once this statement and its implications are fully understood, no debate remains as to whether direct democracy is consistent with a government republican in form.

CONCLUSION

This case presents a nonjusticiable political question that requires reversal with regard to the issue of a nonjusticiable political question. The Court should also address the unchecked power of direct democracy and additionally hold that Congress satisfies the Guarantee Clause by either ratifying or rejecting citizen-initiated state constitutional amendments.

Respectfully submitted this 8th day of February, 2013.

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CERTIFICATE OF PRIVACY REDACTIONS AND ECF COMPLIANCE

I hereby certify that:

(1) the brief did not require any privacy redactions;

(2) the copy of the brief, as submitted as a PDF file via the CM/ECF system, is an exact copy of the written brief filed with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit; and

(3) the PDF file of this brief submitted through the court's CM/ECF system was scanned for viruses using AVG Anti-Virus Free Edition 2013 on February 8, 2013, and the program indicates the PDF file is free of viruses.

Date: February 8, 2013

s/ D'Arcy W. Straub

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I hereby certify that:

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Date: February 8, 2013

s/ D'Arcy W. Straub

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I served a copy of the foregoing *amicus curiae* brief via the court's CM/ECF system and e-mail to the following parties:

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