No. 14-460

In the Supreme Court of the United States

JOHN HICKENLOOPER, GOVERNOR OF COLORADO,
IN HIS OFFICIAL CAPACITY, PETITIONER

v.

ANDY KERR,
COLORADO STATE REPRESENTATIVE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR TEXAS, ARIZONA, IDAHO, INDIANA, OHIO AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

At its core, the plaintiffs' case challenges a longstanding method of governance (constitutional amendment via the ballot box) employed nationwide. In approximately twenty States, the people are authorized to place constitutional amendments on the ballot by signing an initiative petition. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2010 at 15 (2010) (Table 1.3, Constitutional Amendment Procedure: By Initiative). And in every State except one, proposed constitutional amendments adopted by the legislature may be ratified only through a vote by the people. *See id.* at 13–14 (Table 1.2, Constitutional Amendment Procedure: By the Legislature).

[1] Pursuant to Supreme Court Rule 37.2(a), counsel for amici curiae provided timely notice to all parties of the States' intent to file this brief.

This lawsuit, and the erroneous decision by the Tenth Circuit allowing state legislators' Guarantee Clause claims to proceed against Colorado Governor John Hickenlooper, threaten vital direct-democracy principles. Amici States join Governor Hickenlooper in urging the Court to grant certiorari review and preserve direct-democracy measures as valuable, and permissible, tools within the framework of a republican form of government.

SUMMARY OF ARGUMENT

The Constitution 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. The application of this clause to this case turns on two questions: What is guaranteed? And to whom?

The Tenth Circuit's decision that state legislators have standing to bring a Guarantee Clause challenge against the State, Pet. App. 11–29, and that such a challenge brought against a State is justiciable, Pet. App. 31–49, is founded upon its misunderstanding of, and incorrect answer to, both of these fundamental questions. The republican form of government contemplated by Article IV follows from the principle of popular sovereignty wherein the people have the ultimate say. This form of government, of course, permits direct-democracy methods of governance. And the rights extend to the States themselves and to the people. The rights of the people are protected by the federal political branches. And to the extent the Guarantee Clause affords a justiciable right, it is one that must be vindicated through a suit brought *by* the

State rather than *against* the State. This lawsuit is especially offensive to the Guarantee Clause because it is a suit against a State seeking to overturn a vote by the people of Colorado.

ARGUMENT

The petition presents two cert-worthy questions. Both are significant to the States, and amici States support Governor Hickenlooper's arguments on both questions. Rather than re-urge those arguments here, amici States offer their views on (1) the fundamental misunderstanding of the Guarantee Clause embodied in the decision below and (2) the significant consequences for the States and their citizens that could follow if the decision is allowed to stand.

I. THE TENTH CIRCUIT'S DECISION IS BASED UPON ITS MISUNDERSTANDING OF THE GUARANTEE CLAUSE

A. The Guarantee Clause Protects the People

The text of the Constitution does not define the "Republican Form of Government" that is guaranteed to the people, but the writings of the Framers, the Court's precedent, and state practices that continue to this day all demonstrate an understanding that the Guarantee Clause accommodates direct democracy as an appropriate mechanism whereby the people retain some authority over the method of governance.

The Federalist Papers provide significant evidence of this understanding. For example, Alexander Hamilton explained that the Guarantee Clause "could be no impediment to reforms of the State constitutions by a

majority of the people in a legal and peaceable mode. This right would remain undiminished." THE FEDERALIST NO. 21, at 140 (Alexander Hamiltion) (Clinton Rossiter ed., 1961). Likewise, a "fundamental principle of republican government [includes] the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness." THE FEDERALIST NO. 78, at 469 (Alexander Hamiltion) (Clinton Rossiter ed., 1961). James Madison, too, recognized that a republican form of government is one "which derives all its powers" from the people, THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961), and that the "genius of republican liberty . . . demand[s] . . . that all power should be derived from the people," THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). Properly understood, in a republican government a "majority of the people" remain "competent at all times . . . to alter or abolish its established government." THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

Early decisions of the Court also recognized that a republican government is "one constructed on [the] principle [] that the Supreme Power resides in the body of the people," *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793), and that "sovereignty resides in the great body of the people," *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 93 (1795). In *Luther v. Borden*, the Court explained that "according to the institutions of this country, the sovereignty in every State resides in the people of the State, and [] they may alter and change

their form of government at their own pleasure." 48 U.S. (7 How.) 1, 47 (1849). The Tenth Circuit's holding that legislators may sue their State to thwart a constitutional amendment duly adopted by the people is incompatible with the earliest precedents regarding the Guarantee Clause.

Finally, state constitutions contain numerous provisions that enable the people to carry out the principles embodied in the Guarantee Clause. From voter control over constitutional amendments in forty-nine States, to the initiative and referendum processes in nearly half the States, the people retain control over the structure of their state governments.

The Guarantee Clause thus helps preserve for the people the right of self-governance. The Tenth Circuit disregarded this fundamental principle in holding that state legislators may challenge in federal court the will of the voters.

B. The Guarantee Clause Protects the States

The Guarantee Clause requires the United States to guarantee to "every *State*" a "Republican Form of Government." U.S. CONST. art. IV, § 4 (emphasis added). The text thus makes clear that a constitutional obligation is placed upon the federal government and a constitutional benefit is extended to the States. Any injury resulting from the failure to maintain a republican form of government is thus experienced *by* the State itself.

This text has implications for both questions presented in this case. First, above and beyond the

confusion regarding the justiciability of Guarantee Clause claims brought *by a State* claiming an encroachment into the State's sovereign rights, *e.g. New York v. United States*, 505 U.S. 144, 184 (1992) (questioning the view that the "'[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts'") (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion)), the Tenth Circuit held that Guarantee Clause claims *against a State* are justiciable. The text of the Guarantee Clause cannot support an interpretation permitting claims to be asserted against a State; if a State's Guarantee Clause rights are to be vindicated in federal court, it is for the State to bring the claim seeking that vindication. Regardless whether the Court is content to allow some confusion to remain over the justiciability of Guarantee Clause claims brought *by* the States, it should not permit similar confusion over Guarantee Clause claims asserted *against* the States. If the Tenth Circuit's decision stands, it will only encourage legislators dissatisfied with the actions of their colleagues or constituents to file lawsuits, such as this one, seeking to win in court what they failed to obtain through the democratic process.

And second, the Tenth Circuit held that state legislators may experience legally cognizable injury as the result of an encroachment on the republican form of government. But where in the Guarantee Clause do state legislators find a right that they can vindicate through a lawsuit against the State? Not in the text of the Clause.

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The plaintiffs' view (adopted by the Tenth Circuit) that a few legislators may challenge in federal court decisions made by the people regarding how they will be governed demonstrates a complete misunderstanding of the purpose of the Guarantee Clause in particular and the proper role of government in general. And, at its core, the plaintiffs' view betrays the right of self-governance that is preserved for the people. This is antithetical to the founding principles embodied throughout the Constitution, including in the Guarantee Clause. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 760 (1994) (explaining that "[l]ike the Constitution's more explicit references to 'the People' in the Preamble, and the First, Ninth, and Tenth Amendments, Article IV's indirect reference to the people tapped into first principles of popular sovereignty and self-rule by the people"); *id.* at 762 (noting that the Guarantee Clause "reaffirms basic principles of popular sovereignty—of the right of the people to ordain and establish government, of their right to alter or abolish it, and of the centrality of popular majority rule, in these exercises of ultimate popular sovereignty"); *see also* Pet. App. 74–5 n. 2 (Gorsuch, J., dissenting from the denial of rehearing en banc) (citing Amar, 65 U. Colo. L. Rev. at 749–52, 761–73).

II. THE TENTH CIRCUIT'S DECISION WILL HAVE SIGNIFICANT CONSEQUENCES BEYOND COLORADO'S TAXPAYERS' BILL OF RIGHTS

The Tenth Circuit's holdings that Guarantee Clause claims against a State are justiciable and that state legislators have standing to bring those claims could affect numerous provisions of state law in nearly every State.

As noted above, state constitutional amendments require a direct-democracy component in forty-nine States; in many States, the citizens themselves can place constitutional amendments on the ballot. And in some States, the people have reserved the power to enact laws independent from the legislature. *E.g.*, COLO. CONST. art. V, § 1(1). These longstanding procedural protections are at risk if the Tenth Circuit's decision is allowed to stand as a model for other unhappy legislators across the country. Moreover, many substantive provisions would also be subject to attack. The voters have enshrined balanced-budget requirements in nearly every state constitution, *see* NATIONAL CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS at 11–13 (Oct. 2010), in order to ensure some level of fiscal discipline and protect the public fisc. In the words of the Tenth Circuit, limiting the ability to impose a tax "strips [legislators] of all power to conduct a 'legislative core function' that is not constitutionally committed to another legislative body." Pet. App. 25. Under the Tenth Circuit's view, the identical argument could be raised in the future by

legislators unhappy with the restriction against enacting a budget in deficit.

And what about constitutional provisions regarding veto powers,[2] super-majority requirements,[3] or term limits for legislators?[4] All of these pose limitations on an individual member's ability to legislate. States should not be forced to defend against challenges to these and other provisions under the Tenth Circuit's ruling, especially given the Tenth Circuit's refusal to require plaintiffs to offer a judicially manageable standard for their Guarantee Clause claim, Pet. App. 69 (Tymkovich, J., dissenting from the denial of rehearing en banc) (noting that instead of finding that judicially manageable standards exist for resolving the case, the panel "simply assures the reader that judicially manageable standards *might* emerge at a future stage of litigation"); *id.* at 70 (Tymkovich, J., dissenting from the denial of rehearing en banc) (recognizing that "the panel's failure to at least hint at what the relevant standards are for Guarantee Clause litigation deprives the litigants and district court

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[2] The line-item veto for appropriations is a tool made available to numerous governors. *E.g.*, ALASKA CONST. art. II, § 15; ARIZ. CONST. art. V, § 7; CAL. CONST. art. IV, § 10(e); LA. CONST. art. IV, § 5(G); MD. CONST. art. II, § 17(e); N.Y. CONST. art. IV, § 7; TEX. CONST. art. IV, § 14; VA. CONST. art. V, § 6(d).

[3] Some state constitutions require super-majorities in order for the legislature to raise taxes. *E.g.*, CAL. CONST. art. XIII A, § 3(a); OKLA. CONST. art. V, § 33(D).

[4] *E.g.*, ARIZ. CONST. art. IV, Part 2, § 21; CAL. CONST. art. IV, § 2(a)(4); MICH. CONST. art. IV, § 54; MO. CONST. art. III, § 8; MONT. CONST. art. IV, § 8.

of necessary guidance as to how these claims are to be adjudicated"); *id.* at 71–77 (Gorsuch, J., dissenting from the denial of rehearing en banc) (explaining that the plaintiffs have not yet even tried to articulate a standard for adjudicating their Guarantee Clause claim).

The Court should grant the petition and reverse to (1) preserve the Guarantee Clause rights of the people and the State of Colorado and (2) ensure that the Tenth Circuit's standardless justiciability holding does not serve as a model for future litigation against the States.

CONCLUSION

The Court should grant the certiorari petition.

Respectfully submitted.

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