IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

ANDY KERR, COLORADO STATE REPRESENTATIVE;
NORMA V. ANDERSON;
JANE M. BARNES, MEMBER JEFFERSON COUNTY BOARD OF EDUCATION;
ELAINE GANTZ BERMAN, MEMBER STATE BOARD OF EDUCATION;
ALEXANDER E. BRACKEN;
WILLIAM K. BREGAR, MEMBER PUEBLO DISTRICT 70 BOARD OF EDUCATION;
BOB BRIGGS, WESTMINSTER CITY COUNCILMAN;
BRUCE W. BRODERIUS, MEMBER WELD COUNTY DISTRICT 6 BOARD OF EDUCATION;
TRUDY B. BROWN;
JOHN C. BUECHNER, PH.D., LAFAYETTE CITY COUNCILMAN;
STEPHEN A. BURKHOLDER;
RICHARD L. BYYNY, M.D.;
LOIS COURT, COLORADO STATE REPRESENTATIVE;
THERESA L. CRATER;
ROBIN CROSSAN, MEMBER STEAMBOAT SPRINGS RE-2 BOARD OF EDUCATION;
RICHARD E. FERDINANDSEN;
STEPHANIE GARCIA, MEMBER PUEBLO CITY BOARD OF EDUCATION;
KRISTI HARGROVE;
DICKEY LEE HULLINGHORST, COLORADO STATE REPRESENTATIVE;
NANCY JACKSON, ARAPAHOE COUNTY COMMISSIONER;
WILLIAM G. KAUFMAN;
CLAIRE LEVY, COLORADO STATE REPRESENTATIVE;
MARGARET (MOLLY) MARKERT, AURORA CITY COUNCILWOMAN;
MEGAN J. MASTEN;
MONISHA MERCHANT, MEMBER UNIVERSITY OF COLORADO BOARD OF REGENTS;
MICHAEL MERRIFIELD;
MARCELLA (MARCY) L. MORRISON;
JOHN P. MORSE, COLORADO STATE SENATOR;
PAT NOONAN;
BEN PEARLMAN, BOULDER COUNTY COMMISSIONER;
WALLACE PULLIAM;
FRANK WEDDIG, ARAPAHOE COUNTY COMMISSIONER;
PAUL WEISSMANN; and
JOSEPH W. WHITE;
Plaintiffs,

v.

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

Defendant.

BRIEF OF AMICUS CURIAE INDEPENDENCE INSTITUTE

INTRODUCTION

Aside from questions of justiciability, the Plaintiffs' claim that the Colorado Taxpayer Bill of Rights (TABOR) is inconsistent with the Guarantee Clause of the United States Constitution is erroneous as a matter of law. It is erroneous as a matter of law because there is no factual or legal basis for such a claim. Amicus therefore urges the Court to grant the Defendant's motion to dismiss.

Amicus has filed this brief because, although it agrees with Defendant that Plaintiffs' claim is nonjusticiable under controlling precedents, it wishes to correct Defendant's implication that the topic at issue is a reasonable "subject for philosophic and academic debate," Brief in Support of Defendant's Motion to Dismiss, at 3, or that it is a serious "question for political theorists, professors, and dinner-table debates." *Id.*, at 23. In fact, the evidence on the subject from the standard (and all other probative) sources is so clear that, even if Plaintiffs' complaint does present a justiciable case, the motion to dismiss still should be granted.

ARGUMENT

I. In the absence of controlling Supreme Court precedent, the phrase "republican form of government" is defined by other sources the Supreme Court relies on for interpreting constitutional language.

Article IV, Section 4 of the United States Constitution, the "Guarantee Clause," provides as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Even though this provision was adopted primarily to prevent any state from becoming a monarchy or dictatorship,[1] Plaintiffs seek to use it to curb popular government. They

[1]Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 825 (2002) (hereinafter Natelson). *See also* The Heritage Guide to the Constititution 283 (2005). Professor Amar of Yale University subsequently reached similar conclusions. *See* Akhil Reed

apparently view TABOR as inconsistent with the republican form because (1) it was adopted by citizen initiative, and (2) it provides for mandatory referenda before certain tax and spending increases can become law.[2] Plaintiffs' Substitute Complaint, p. 1, para. 1. According to the plaintiffs, TABOR is "unrepublican" because it prevents the legislature from being "fully effective," *id.* at p. 17, para. 83; p. 18, para. 84,— by which Plaintiffs apparently mean "omnipotent."

The United States Supreme Court has not ruled on the issue because, as the Defendant points out, that Court has long held that Guarantee Clause claims are entrusted to Congress and therefore nonjusticiable. Defendant's Brief, pp. 5-14. In the absence of binding precedent, the Supreme Court when interpreting the Constitution does what courts generally do when interpreting a legal document: examine the words and the contemporaneous facts and circumstances that cast light on the meaning that those words held for the ratifiers.

The sources of contemporaneous constitutional meaning are copious. However, some of these sources have been utilized by the Supreme Court repeatedly, and so must be seen as having special legal authority. These include but are not limited to—

* Founding Era dictionaries, *see, e.g., District of Columbia v. Heller,* 554 U.S. 570, 581 (2008) (citing Samuel Johnson's Dictionary of the English Language) and *id.* at 584 (citing Thomas Sheridan's A Complete Dictionary of the English Language);

* eighteenth-century political treatises relied on by the Founders, in particular those by authors such as John Adams, *see e.g., Lynch v. Household Finance Corp*., 405 U.S. 538, 552 (1972) (citing Adams' Defence of the Constitutions of the United States) and Baron Montesquieu, *see, e.g., Stern v. Marshall*, ___ U.S. ___, 131 S.Ct. 2594, 2608-09 (2011) (citing Montesquieu's Spirit of the Laws);

* the records of the convention that considered the Constitution, including the convention that framed it, especially the collection by Max Farrand, *see, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (citing Max Farrand, Records of the Federal Convention of 1787) and the state conventions that ratified it, especially as reported in Elliot's Debates, *see, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 96 (citing Debates on the Federal Constitution [Jonathan Elliot ed., 1876]); and

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Amar, America's Constitution, A Biography 280 (2005) (hereinafter Amar).

[2]A citizen initiative permits voters to legislate entirely or wholly without the intervention of the legislature; a referendum gives the voters a veto on legislative acts.

* contemporaneous publications discussing the Constitution while its ratification was still pending, including but not limited to *The Federalist*. *See, e.g., McDonald v. City of Chicago*, ___ U.S. ___, 130 S.Ct. 3020, 3037 (2010) (citing both *The Federalist* and the Anti-Federalist "Federal Farmer").

A thorough review of those sources reveals no support for Plaintiffs' theory that the "republican form" excluded direct citizen lawmaking. Quite the contrary.

II. Eighteenth Century dictionaries define "republic" and "republican" in a way fully consistent with direct citizen lawmaking

Most of the prior and existing republics known to the Founders conspicuously featured institutions of direct citizen lawmaking.[3] These included extremely democratic republics, such as Athens and Carthage,[4] as well as more aristocratic republics such as that in ancient Sparta. Even in Sparta, however, the voters enjoyed a veto over all proposed legislation, not merely selected measures.[5] (By contrast, TABOR permits a citizen veto only on a small category of measures.)

Thus, if during the Founding it were widely understood that direct citizen lawmaking was inconsistent with republicanism, that understanding should be reflected in contemporaneous sources.

Using the Gale database *Eighteenth Century Collections Online*, Amicus examined all available eighteenth-century dictionaries that defined either the noun "republic," the adjective "republican," or both. When more than one edition of a dictionary was available, Amicus selected the one published closest to, but not after, the thirteenth state (Rhode Island) ratified the Constitution in 1790.

The results are instructive. Thomas Sheridan's dictionary (which, as stated earlier, the Supreme Court has relied on), did not contain an entry for "republic," but it did define the adjective "republican." The full definition was "Placing the government

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[3] Natelson, at 834-35 (summarizing, as an example, the republics catalogued by John Adams).

[4] Id.

[5] *Id.* at 835.

in the people."[6] Another dictionary the Supreme Court has relied on, that of Samuel Johnson, defined "republican" the same way. It also described "republick" as "a commonwealth; state in which the power is lodged in more than one."[7]

The general approach of Sheridan and Johnson are echoed by all other lexicographers of the period. Francis Allen defined "republic" as "a state in which the power is lodged in more than one" and "republican" as "belonging to a commonwealth."[8] John Ash's dictionary entry for "republic" stated that it was "A commonwealth; a state or government in which the supreme power is lodged in more than one." Ash defined "republican" as "Belonging to a republic, having the supreme power lodged in more than one."[9] Similarly, Nicholas Bailey's dictionary described a republic as "a commonwealth, a free state."[10] Bailey's work contained no entry for the adjective "republican," but the noun "republican" was portrayed as "a commonwealth's man, who thinks a commonwealth, without a monarch, to be the best form of government."[11] Frederick Barlow's definition of a "republic" was "a state in which the power is lodged in more than one. A commonwealth." His entry for the adjective "republican" was "belonging to a commonwealth; placing the government in the people."[12] Alexander Donaldson explained "republic" simply as "commonwealth," and defined "republican" as "placing the government in the people."[13]

Finally, Chambers' *Cyclopaedia* had a more lengthy treatment. It stated that a "republic" was "a popular state or government; or a nation where the body, or only a

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[6]Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789) (unpaginated).

[7]2 Samuel Johnson, A Dictionary of the English Language (8th ed. 1786) (unpaginated).

[8]Francis Allen, A Complete English Dictionary (1765) (unpaginated).

[9]2 John Ash, A New and Complete Dictionary of the English Language (1775) (unpaginated).

[10]Nicholas Bailey, An Universal Etymological English Dictionary (25th ed. 1783) (unpaginated).

[11]*Id.*

[12]2 Frederick Barlow, The Complete English Dictionary (1772-73) (unpaginated).

[13]Alexander Donaldson, An Universal Dictionary of the English Language (1763) (unpaginated).

part of the people, have the government in their own hands." It then proceed to itemize two species of republics: "When the body of the people is possessed of the supreme power, this is called a DEMOCRACY. When the supreme power is lodged in the hands of a part of the people, it is then an ARISTOCRACY." Chambers added that "The celebrated *republics* of antiquity are those of Athens, Sparta, Rome, and Carthage."[14]

None of these Founding-Era definitions—nor any other Amicus has come across—contained the least suggestion that a republic had to be purely representative. Indeed, they did not require representative institutions of any kind. They required only that the government be a popular one, or at least not a monarchy. Their authors clearly saw democracy not as the antithesis of a republic (as Plaintiffs claim), but as a kind of republic, or at least an overlapping concept.

III. Leading eighteenth century political works make clear that direct citizen lawmaking is "republican."

In inferring constitutional meaning, the Supreme Court also relies on important eighteenth-century political writers, particularly Baron Montesquieu's *The Spirit of the Laws* and John Adams' *Defence of the Constitutions (*sic*) of the United States*. In the leading article on the subject,[15] Professor Robert G. Natelson has collected and summarized both writers' treatments of republican government. He summarizes the treatment by Montesquieu in this way (footnotes excluded):

> Montesquieu distinguished three kinds of government: monarchies, despotisms, and republics. Both monarchies and despotisms were characterized by the rule of one person. What distinguished them was that monarchy honored the rule of law, while despotism did not. Republics were governments in which the whole people, or a part thereof, held the supreme power. Republics governed by merely a part of the people were aristocracies. Republics governed by the people as a whole were democracies.
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> Like Madison, Montesquieu preferred purely representative government to citizen lawmaking. However, most of the states that he identified as

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[14] 4 E. Chambers, Cyclopaedia or An Universal Dictionary of Arts and Sciences (1783) (unpaginated).

[15] Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 825 (2002) (hereinafter Natelson).

> republics authorized their citizens to make or approve all or most laws. He discussed their institutions. He opined that, in ancient times, legislative representation was unknown outside of confederate republics. "The Republics of Greece and Italy were cities that had each their own form of government, and convened their subjects within their walls." Indeed, on repeated occasions, Montesquieu specifically identified Athens—the exemplar of citizen lawmaking—as a republic. Montesquieu described the constitution of the Roman Republic [which featured direct citizen lawmaking] in great detail because "[i]t is impossible to be tired of so agreeable a subject as ancient Rome." He also classified Sparta and Carthage as well-run republics, even though they utilized direct citizen lawmaking.[16]

Adams' treatment of direct citizen lawmaking was similar. Professor Natelson writes:

> Adams was a strong supporter of the mixed constitution. . . But far from arguing that republics had to be wholly representative, he specifically cited multiple examples of republics with direct citizen lawmaking. His most important example was the Roman Republic, during the discussion of which he reproduced in his volume Polybius's essay on the Roman constitution.[17]

Adams also listed many other examples of republics that relied largely, or exclusively, on direct citizen lawmaking, including Athens, Sparta, Carthage, and various cantons of Switzerland.[18]

IV. The records of the conventions that produced the Constitution show that direct citizen lawmaking is "republican."

Leading American Founders were well-grounded in history and political science, and particularly in the Greco-Roman classics. *See generally* Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* (1994). The records of the conventions that drafted and ratified the Constitution, therefore, contain

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[16] *Id.*, at 833-34.

[17] *Id.* at 834.

[18] *Id.* at 834-35.

frequent references to earlier republics.[19]

The convention records do not contain a single suggestion that direct citizen lawmaking was inconsistent with republicanism. On the contrary, delegates frequently referred to governments as "republics" that had relied on popular assemblies for adoption of all their laws.[20] For example, at the drafting convention in Philadelphia, both George Mason and Alexander Hamilton referred to the ancient "Grecian republics." 1 Max Farrand, *supra*, at 112 & 307.

The records contain more explicit statements as well. At the Pennsylvania ratifying convention, James Wilson distinguished "three simple species of government," monarchy, aristocracy, and "a republic or democracy, where the people at large retain the supreme power, and act *either collectively or by representation*." 2 Elliot Debates, at 433 (italics added). Similarly, Charles Pinckney, who had been a leading delegate at the federal Convention, distinguished three kinds of government during the South Carolina ratification convention: despotism, aristocracy, and "[a] republic, where the people at large, *either collectively or by representation*, form the legislature." 4 Elliot's Debates, at 328 (italics added).

V. Commentary on the Constitution while it was still under debate, including but not limited to *The Federalist*, also shows that citizen lawmaking was consistent with the Guarantee Clause.

Commentary produced during the dispute over the Constitution's ratification also gave the republican label to governments understood to feature direct citizen lawmaking. As Professor Natelson points out (footnotes deleted):

> In *Federalist Number 6*, Hamilton stated that "Sparta, Athens, Rome, and Carthage were all republics. . . ." In *Federalist Number 63*, Madison listed five republics: Sparta, Carthage, Rome, Athens, and Crete. In his Anti-Federalist writings, "Brutus"— probably Robert Yates, a convention delegate from New York—stated that "the various Greek polities" and Rome were republics. Anti-Federalist author "Agrippa" (John Winthrop of Massachusetts) identified Carthage, Rome, and the ancient Greek states as republics. The Anti-Federalist "Federal Farmer" spoke of the "republics of Greece," and Anti-Federalists "A Farmer" and "An Old Whig" discussed the Roman Republic. An anonymous Anti-Federalist

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[19] *See generally*, Natelson (listing scores of examples).

[20] Natelson, at 816-20 (see especially the footnotes). *See also id*. at 838.

writer, lacking even a pseudonym, spoke of the "Grecian republics." (This list is not exhaustive as to either Federalist or Anti- Federalist authors.)[21]

To be sure, several of the Founders expressed reservations about the wisdom of direct citizen lawmaking and suggested that a directly representative republic might yield superior results. But this was because the technology of the time allowed only for citizen voting in mass assemblies subject to sudden mob-like behavior. Needless to say, measures such as TABOR provide for voting in disparate locations, and only after a significant time for campaigning and persuasion.

More importantly, however, none of the Founders suggested that even voting in mass assemblies rendered a government unrepublican. Rather, as noted above they repeatedly referred to governments that had such features as "republics."

This was consistent with prior experience: When the Constitution was written, the anomaly was not direct citizen lawmaking in a republic. The anomaly was creation of a new federal government without it. (No one suggested that *state* governments were denied the right to include direct citizen lawmaking in their constitutions.) Because purely representative forms were identified more with limited monarchy rather than with republics,[22] several of the Founders had to explain that a purely representative federal government would have sufficient popular control to qualify as republican. Thus, in Number 63 of *The Federalist*, James Madison, *while fully acknowledging that earlier governments with direct citizen lawmaking were republics*, sought to show that they had *also* featured some representative institutions—not instead of direct citizen lawmaking, but in addition to it.

What discouraged direct citizen lawmaking in the United States was not the perception that it was unrepublican. What discouraged it was the sheer size of the country (and of most of the states) without the technological tools that exist today—tools that ensure that all citizens may witness and participate in pre-vote deliberation.[23] Nevertheless, the direct citizen lawmaking did exist in some states. For

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[21]Natelson, at 838.*See, e.g., The Federalist No.* 63 (discussing the "republics" of Athens, Sparta, and Carthage). For another example, see William Duer, N.Y. Daily Packet, Nov. 16, 1787 (referring to ancient Athens as a republic).

[22]Natelson, at 855.

[23]Madison acknowledged the influence of territorial extent near the end of The Federalist No. 63.

example, Massachusetts ratified the Constitution of 1780 by referendum.[24] Rhode Island conducted referenda on other subjects—including ratification of the Constitution.[25] Entry of those states into the union under the Guarantee Clause was an admission that those existing states were republican. *Minor v. Happersett*, 88 U.S. 162, 176 (1875).

None of this, of course, prevents a state from altering its constitution to permit more direct citizen lawmaking than it enjoyed when it entered the union. As Madison stated in *Federalist No.* 43:

> 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.

VI. Madison's *Federalist No.* 10 is does not mean that direct citizen lawmaking is inconsistent with the republican form.

The sole Founding-Era citation offered by Plaintiffs to support their argument is Madison's essay reproduced as No. 10 in *The Federalist*. Substitute Complaint, p. 3-5, para. 5. In that essay, the Plaintiffs contends, Madison distinguish between a representative democracy (republic) and "direct democracy. *Id.* at p.3, para. 5. Theirs is a common misconception, which both Professor Natelson and Professor Akhil Reed Amar have corrected. Natelson, at 838; Amar at 276-271. (The misunderstanding apparently arose in the nineteenth century. Natelson at 842-43.)

As the extract in the Substitute Complaint place shows, however, Madison does not distinguish between a republic and *direct* democracy but between a republic and *pure* democracy. Substitute Complaint, p. 3-4, para. 5.

The difference is important. As Professor Natelson, points out, Madison was a devotee of Aristotle, and was referring not to governments with some citizen lawmaking but to a theoretical form of pure (or "ultimate") democracy posited by that Aristotle: a form with no magistrates and complete mob rule. Obviously, the state of

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[24]Robert K/ Brink, Timeline of the Massachusetts Constitution of 1780, http://www.socialaw.com/article.htm?cid=15747.

[25]The Constitution was rejected by referendum, but later approved by convention. 1 The Documentary History of the Ratification of the Constitution 30 (Merrill Jensen et al. eds., 1978) (setting forth ratification chronology).

Colorado, even with all the ills blamed on TABOR, continues to have magistrates and the rule of law. Colorado certainly does not qualify as a "pure democracy" as Madison was using the term.

Besides Madison's known affinity for Aristotle, there are many other reasons for believing this is the correct interpretation. First, Plaintiffs' interpretation would put Madison's view of republicanism at odds with that of everyone else in his generation. Amar, 276-77. Second, in *Federalist No*. 63 (which Plaintiffs fail to mention), Madison labeled as "republics" several prior governments where citizens enjoyed far more direct citizen lawmaking than permitted in Colorado. Third, in *Federalist No.* 39 (which Plaintiffs also fail to mention), Madison provides clarifying language in which he is clearly implies that republics may feature direct citizen lawmaking: "[W]e may define a republic to be, *or at least may bestow that name on,* a government which derives all its powers *directly or indirectly* from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." A fuller discussion of this point appears at Natelson, pp. 844-50.

Even if Madison were saying what the Plaintiffs claim he was, he would be contradicting the prevailing meaning of "republican form" when that phrase was inserted into the Constitution. Madison was not, however, saying what the Plaintiffs claim he was.

CONCLUSION

If the Court determines this case to be justiciable, the motion to dismiss should be granted on the basis that the TABOR provision in the Colorado Constitution is consistent with the Guarantee Clause as a matter of law.

Signatures

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