IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-1350

ANDY KERR, et al., Plaintiffs,

v.

JOHN HICKENLOOPER, Defendant.

BRIEF OF THE INDEPENDENCE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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CORPORATE DISCLOSURE STATEMENT

Counsel certifies that the Independence Institute is a non-profit corporation, incorporated in Colorado. The Institute has no parent corporation, issues no stock, and there is no publicly held corporation that has an ownership interest of more than 10% in it.

EXPLANATION FOR SEPARATE BRIEF

This brief addresses an essential issue which has not addressed by Defendant. Regardless of whether Defendant is correct that the case is non-justiciable and that plaintiffs lack standing, granting the Motion to Dismiss is appropriate because Plaintiffs' claim is plainly wrong as a matter of law.

The instant brief explains what the Founders meant by the Republican Form of Government clause, and how democratic decision-making is clearly legitimate under that clause.

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STATEMENT OF AMICI INTERESTS

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts.

The Independence Institute has been involved in many constitutional and legal reform projects in Colorado, including providing the public with accurate information about the Taxpayer's Bill of Rights.

Counsel for the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Plaintiffs claim that the Colorado Taxpayer's Bill of Rights (TABOR), COLO. CONST., art. X, § 20, 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.

Defendant is incorrect to suggest that the substantive merits of the case

constitute a reasonable "subject for philosophic and academic debate," Brief in Support of Defendant's Motion to Dismiss, at 3, and a serious "question for political theorists, professors, and dinner-table debates." *Id.*, at 23. In fact, the Plaintiffs' substantive claim has absolutely no merit: The evidence on the subject from the standard (and all other probative) sources is so clear that, if the court finds that Plaintiffs' complaint does state a justiciable claim, 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 certain standard sources the Supreme Court uses for interpreting constitutional language.

Article IV, Section 4 of the United States Constitution 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.

This provision commonly is called the "Guarantee Clause."

The overriding purpose of the Guarantee Clause was to prevent any state from lapsing into monarchy or dictatorship.[1] In this case, however, Plaintiffs seek to use it for the opposite purpose: to restrict popular government.

Plaintiffs apparently view TABOR as inconsistent with the republican form because it was adopted by and employs institutions of *direct citizen lawmaking*—the generic term used in this brief for both initiative and referendum.[2] Specifically, (1) TABOR was adopted by citizen initiative and (2) it provides for mandatory referenda before certain tax and spending increases can become law.[3] Plaintiffs' Substitute Complaint, p. 1, para. 1. According to the plaintiffs, TABOR is

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[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 CONSTITUTION 283 (Edwin Meese, ed., 2005). Professor Amar of Yale University subsequently reached similar conclusions. AKHIL REED AMAR, AMERICA'S CONSTITUTION, A BIOGRAPHY 280 (2005) (hereinafter "AMAR").

[2] *Cf.* THE BATTLE OVER CITIZEN LAWMAKING (Dane Waters ed., 2001) (comprising a collection of essays on the subject).

[3] A citizen *initiative* permits voters to legislate entirely or wholly without the intervention of the legislature; a *referendum* gives the voters the opportunity to approve or disapprove legislative acts.

"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."

Claims that direct citizen lawmaking violates the Guarantee Clause are not new: Opponents of initiative and referendum have raised them regularly since the nineteenth century.[4] Some state courts have decided or otherwise opined on the merits, and in doing so have generally rejected Plaintiffs' position.[5] Federal courts have not addressed the merits because, as the Defendant points out, that the Supreme Court has ruled that Guarantee Clause claims are entrusted to Congress and therefore nonjusticiable in federal court. Defendant's Brief, pp. 5-14. For this reason, the Supreme Court has not authoritatively determined the full meaning of the phrase "republican form of government."

However, the Court has said in *Minor v. Happersett* that the acceptance of a state into the union is conclusive proof that it had a republican form of government at the time of acceptance.[6] Significantly, in 1907 Congress accepted Oklahoma into the Union, with Oklahoma's Constitution containing very strong provisions for initiative and referendum. OKLA. CONST., art. V, §§ 1-7; *see also* N.M. CONST., art. XIX, § 3 (1911 statehood constitution specifically contemplating the possibility of future enactment of laws by citizen initiative).

If one hypothesizes that *Minor* in itself is not sufficient to resolve the instant case, then to determine the meaning of a constitutional provision in the absence of binding precedent, the Supreme Court proceeds as courts generally do when interpreting any legal document: It examines the words and the contemporaneous facts and circumstances that cast light on the meaning the document held for the parties to it, who in the case of the Constitution were its ratifiers.

The sources of original constitutional meaning are copious.[7] Some kinds of sources, however, have been utilized repeatedly by the Supreme Court, and therefore enjoy particular persuasive authority. These sources 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 and Montesquieu, *see*, *e.g., Lynch v. Household Finance Corp*., 405 U.S. 538, 552 (1972) (*citing* ADAMS' DEFENCE

[4] Natelson at 842-43. *See also* AMAR at 276.

[5] Natelson at 810-13 (surveying case law).

[6] *Minor v. Happersett*, 88 U.S. 162, 176 (1875).

[7] Robert G. Natelson, *A Bibliography for Researching Original Understanding* (2011), at http://constitution.i2i.org/files/2011/01/Originalist-Bibliography.pdf.

OF THE CONSTITUTIONS[8] OF THE UNITED STATES); *Stern v. Marshall*, 131 S.Ct. 2594, 2608-09 (2011) (*citing* Montesquieu's THE SPIRIT OF THE LAWS);

- The records of the conventions that considered the Constitution—both the federal convention that framed it, *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, *see, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 96 (2002) (*citing* DEBATES ON THE FEDERAL CONSTITUTION [Jonathan Elliot ed., 1876]); and

- 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*, 130 S.Ct. 3020, 3037 (2010) (*citing* both THE FEDERALIST and the Anti-Federalist "Federal Farmer" essays).

As demonstrated below, those sources reveal no support for Plaintiffs' theory that the "republican form" excluded direct citizen lawmaking—and they strongly support the contrary position.

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.[9] These included extremely democratic republics, such as those ruling ancient Athens and Carthage,[10] as well as more aristocratic republics such as that of ancient Sparta. Even in Sparta, however, the voters enjoyed the final say over all pending legislation, not merely selected measures.[11] (By contrast, TABOR requires citizen approval only for a small percentage of the measures that a legislature might wish to enact in a typical year.)

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

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[8] The title of Adams' work uses the plural "Constitutions" because it addressed the then-existing state constitutions, rather than the federal constitution, which had not been written when the first volume of the work appeared.

[9] Natelson, 80 TEX. L. REV. at 834-35 (summarizing, as an example, the republics catalogued by John Adams).

[10] *Id.*

[11] *Id.*, at 835.

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 the Supreme Court relied on in *Heller, supra*), did not contain an entry for "republic," but it did define the adjective "republican." The full definition was "Placing the government in the people."[12] Another dictionary the Supreme Court has relied on, that of Samuel Johnson, defined "republican" the same way; and further described "republick" as "a commonwealth; state in which the power is lodged in more than one."[13]

The general approach of Sheridan and Johnson were 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."[14] John Ash's dictionary explained that a "republic" 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."[15] Similarly, Nicholas Bailey's dictionary described a republic as "a commonwealth, a free state."[16] Bailey's work contained no entry for the adjective "republican," but the noun "republican" was denoted as "a commonwealth's man, who thinks a commonwealth, without a monarch, to be the best form of government."[17] Frederick Barlow's definition of a "republic" was "a state in which the power is lodged in more than one. A commonwealth." Barlow's entry for the adjective "republican" was "belonging to a commonwealth; placing the government in the people."[18] Alexander Donaldson defined "republic" simply as "commonwealth," and "republican" as "placing the government in the people."[19]

Finally, Chambers' *Cyclopaedia* presented a more lengthy treatment. It stated that a "republic" was "a popular state or government; or a nation where the body, or only a part of the people, have the government in their own hands." It then itemized 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

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[12] THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (unpaginated).
[13] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786) (unpaginated).
[14] FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (1765) (unpaginated).
[15] 2 JOHN ASH, A NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (unpaginated).
[16] NICHOLAS BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed. 1783) (unpaginated).
[17] *Id.*
[18] 2 FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772-73) (unpaginated).
[19] ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763) (unpaginated).

Carthage."[20]

None of these Founding-Era definitions contained the least suggestion that a republic had to be purely representative. Indeed, these definitions of "republic" and "republican" 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 treatises. Among these are Baron Montesquieu's THE SPIRIT OF THE LAWS and JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES (1787). In the leading article on the subject of direct citizen lawmaking under the Guarantee Clause,[21] Professor Robert G. Natelson has collected and summarized the relevant treatments by Montesquieu and Adams. He summarizes the views of Montesquieu in this way (footnotes omitted):

> 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 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

[20] 4 EPHRAIM CHAMBERS, CYCLOPAEDIA OR AN UNIVERSAL DICTIONARY OF ARTS AND SCIENCES (1783) (unpaginated).

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

> 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.[22]

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.[23]

Adams also listed many other examples of republics that relied largely, or exclusively, on direct citizen lawmaking, including Athens, Sparta, Carthage, and various Swiss cantons.[24]

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 frequent references to earlier republics.[25]

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.[26] For example, at the drafting convention in Philadelphia, both George Mason and Alexander Hamilton referred to the ancient "Grecian republics." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 & 307 (Max Farrand ed., 1937).

The records contain more explicit statements as well. At the Pennsylvania ratifying convention, James Wilson distinguished "three simple species of

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[22] *Id.*, at 833-34.
[23] *Id.* at 834.
[24] *Id.* at 834-35.
[25] *See generally*, Natelson (listing scores of examples).
[26] *Natelson*, at 816-20 (see especially the footnotes). *See also id*. at 838.

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 DEBATES ON THE FEDERAL CONSTITUTION 433 (Jonathan Elliot ed., 1876) (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 *id.*, at 328 (italics added).

V. Commentary on the Constitution while it was still under debate, including *The Federalist*, also shows that citizen lawmaking was consistent with the Guarantee Clause.

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

> 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 writer, lacking even a pseudonym, spoke of the "Grecian republics." (This list is not exhaustive as to either Federalist or Anti-Federalist authors.)[27]

To be sure, several Founders expressed reservations about the *wisdom* of direct citizen lawmaking and suggested that a purely representative republic might yield superior results. Much of their concern arose from the fact that in prior republics,

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[27] *Natelson*, at 838. *See, e.g.,* THE FEDERALIST NO. 63 in ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST 325, 328-29 (George Carey & James McClennan eds. 2001) (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). Duer was a delegate to the Continental Congress, and a New York State legislator who served on the drafting committee for New York's state constitution.

citizens had voted in mass assemblies subject to sudden mob-like behavior[28]—conditions quite different from those of modern initiative and referendum, in which voting in disparate locations follows lengthy campaigns. But whatever their views on its wisdom, none of the Founders suggested that direct citizen lawmaking was inconsistent with the republican form. On the contrary, they repeatedly labeled governments with direct lawmaking as "republics."[29]

This was consistent with all prior experience: When the Constitution was written, the anomaly was *not* direct citizen lawmaking in a republic; rather, the anomaly was creation of a new federal government without it. (No one suggested that *state* governments were denied the right to employ direct citizen lawmaking.) In fact, purely representative forms were identified more with limited monarchy rather than with republics.[30] Accordingly, several of the Founders had to explain that a purely representative federal government would have sufficient popular control to qualify as republican. For example, in Federalist No. 63, 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.[31]

Even in Madison's time, moreover, some states employed direct citizen lawmaking. The most famous example, of course, was the town meeting, employed throughout New England. But there were other instances as well. Massachusetts ratified its Constitution of 1780 by referendum, and chose to adopt the Articles of Confederation in the same way.[32] Rhode Island conducted referenda on other subjects—including ratification of the U.S. Constitution.[33] Entry of those states into the Union was an admission that those existing states were republican under the Guarantee Clause. *Minor v. Happersett*, 88 U.S. 162, 176 (1875).

Finally, nothing prevents a state from altering its constitution to permit more direct citizen lawmaking than it employed 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

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[28] *See, e.g.* THE FEDERALIST, *supra*, No. 55 (James Madison), at 288 ("Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob").

[29] *See* sources in footnote 27.

[30] *Natelson*, at 855.

[31] THE FEDERALIST, *supra*, No. 63 (James Madison), at 328-29 (explaining that even the ancient republics had some representative institutions *in addition to* direct citizen lawmaking).

[32] EDWARD HARTWELL, REFERENDA IN MASSACHUSETTS AND BOSTON 7 (1910) (available on books.google.com); Robert K. Brink, *Timeline of the Massachusetts Constitution of 1780*, http://www.socialaw.com/article.htm?cid=15747 (Social Law Library).

[33] The Constitution was rejected in Rhode Island by referendum, but later approved by convention. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 30 (Merrill Jensen et al. eds., 1978) (setting forth ratification chronology).

> 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.[34]

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 FEDERALIST No. 10. Substitute Complaint, p. 3-5, para. 5. In that essay, the Plaintiffs contend, Madison distinguished between a "representative democracy" (which Plaintiffs assert is the only permissible kind of republic) and "direct democracy. *Id.* at p.3, para. 5.

However, Plaintiffs erroneously report Madison's distinction, and they misunderstand its meaning. As the actual extract, reproduced *id.*, para. 5, pp. 3-4, demonstrates, Madison did not distinguish between a republic and *direct* democracy but between a republic and *pure* democracy. That difference is important because, as Professor Natelson points out, the term "pure democracy" was a technical term referring not to republics with direct citizen lawmaking but to a theoretical form of government posited by Aristotle. In that theoretical form, there were no magistrates (governing officials) at all, and therefore no law; and day-to-day administration was conducted entirely by the mob.[35] Obviously, the state of Colorado, even with all the ills blamed on TABOR, continues to employ magistrates and the rule of law. Colorado certainly does not qualify as a "pure democracy" as Madison was using the term.

Madison's other writings in THE FEDERALIST show that he accepted direct citizen lawmaking as a common feature of republics. 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. Also, 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." Professor Natelson provides a thorough discussion of this subject.[36]

If Madison's view had been republics must exclude direct citizen lawmaking, his opinion certainly would have been a remarkable one—at odds, as Professor Amar observes, with the views universally prevailing at the time.[37] Fortunately, Plaintiffs misunderstand Madison; he, like other leading Founders, recognized that direct

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[34] THE FEDERALIST, *supra*, No. 43 (James Madison), at 225-26.
[35] *Natelson*, at 846-48.
[36] *Natelson*, at 844-50.
[37] AMAR, 276-77.

citizen lawmaking was a frequent, and permissible, part of republican government.

Conclusion

The Motion to Dismiss should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2011, an identical electronic copy of the foregoing amicus brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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