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.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 21, 2014

QUESTIONS PRESENTED

Whether there are compelling reasons for this Court to review the Tenth Circuit's unanimous interlocutory opinion affirming the District Court's rulings:

(i) that none of the *Baker v. Carr*, 369 U.S. 186 (1962), political question factors requires dismissal of the Respondents' narrowly tailored Guarantee Clause challenge to Colorado's Taxpayer Bill of Rights; and

(ii) that the state legislator Respondents have alleged a concrete, institutional injury-in-fact sufficient to satisfy the requirements of legislative standing set forth in *Coleman v. Miller*, 307 U.S. 433 (1939), and later refined in *Raines v. Byrd*, 521 U.S. 811 (1997).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

No party to this proceeding is a corporation.

Petitioner is John Hickenlooper, Governor of Colorado, in his official capacity.

Respondents are Andy Kerr, Colorado State Representative; Norma V. Anderson; Jane M. Barnes; Elaine Gantz Berman, member, State Board of Education; Alexander E. Bracken; William K. Bregar; Bob Briggs, Westminster City Councilman; Bruce W. Broderius; Trudy B. Brown; John C. Buechner; Stephen A. Burkholder; Richard L. Byyny; Lois Court, Colorado State Representative; Theresa L. Crater; Robin Crossan, member, Steamboat Springs RE-2 Board of Education; Richard E. Ferdinandsen; Stephanie Garcia; Kristi Hargrove; Dickey Lee Hullinghorst, Colorado State Representative; Nancy Jackson, Arapahoe County Commissioner; William G. Kaufman; Claire Levy; Margaret Markert, Aurora City Councilwoman; Megan J. Masten; Michael Merrifield; Marcella Morrison; John P. Morse; Pat Noonan; Ben Pearlman; Wallace Pulliam; Paul Weissmann; and Joseph W. White.

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The March 7, 2014 panel opinion of the Court of Appeals for the Tenth Circuit, Pet. App. 1–53, is reported at 744 F.3d 1156. The Tenth Circuit's order denying the Governor's petition for rehearing en banc was filed July 22, 2014, Pet. App. 54–77, and is reported at 759 F.3d 1186.

The opinion of the United States District Court for the District of Colorado denying the Governor's motion to dismiss, Pet. App. 88–180, was issued July 30, 2012, and is reported at 880 F. Supp. 2d 1112. The September 21, 2012, order of the district court certifying this case for interlocutory appeal, Pet. App. 78–87, is not reported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's interlocutory order under 28 U.S.C. § 1292(b). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Guarantee Clause, Article IV, § 4 of the United States Constitution, states in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

Colorado Constitution article V, section 1, and article X, section 20 (TABOR), are reprinted at Pet. App. 208–213 and 214–223, respectively.

The pertinent section of the Colorado Enabling Act, 18 Stat. 474 (1875), is reprinted at Pet. App. 224–225.

INTRODUCTION

The Taxpayer Bill of Rights ("TABOR"), Colo. Const. art. X, § 20, is a provision of the Colorado Constitution that prohibits the state legislature and all local governments in the state from enacting any new tax or tax increase—whether on income, property, sales, or other basis. TABOR vests all such powers exclusively in the people to be exercised by plebiscite. Since the founding of the Republic, no state other than Colorado has totally deprived its legislature of the authority to tax.

In addition to removing the power to enact tax law, TABOR prohibits state and local governments from appropriating any revenues that exceed the prior year's spending, adjusted for inflation and population growth. Revenues exceeding this amount must be refunded. Together, these prohibitions on the power to tax and spend fundamentally disable state and local governments from meeting their fiscal responsibilities to the citizens of the state.

Thirty-three present and past state legislators,[1] school board members, educators, local government officials, and private citizens brought suit in this case to challenge the validity of TABOR under both the U.S. Constitution's Article IV, Section 4 (the "Guarantee Clause") and the Colorado Statehood Enabling Act of 1875, 18 Stat. 474 (the "Colorado Enabling Act").

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[1] Those Respondents who are current members of the Colorado General Assembly are referred to as the "Legislator-Respondents."

Adhering to Court and circuit precedent, on March 7, 2014, the Tenth Circuit Court of Appeals panel affirmed without dissent the District Court's order denying the Petitioner's motion to dismiss the case for lack of standing and justiciability. The Tenth Circuit denied the Petitioner's Petition for Rehearing En Banc on July 22, 2014. In seeking this Court's review, the Petitioner presents two questions for review, which are properly reframed, *supra*, to reflect the holding and rationale of the Tenth Circuit's opinion.

STATEMENT OF THE CASE

The Petitioner, describing this case as one of fundamental and national importance, attempts to fit the criteria for certiorari review. However, TABOR is *sui generis* with no impact whatsoever outside the state. Unlike other state constitutional provisions that restrict legislative taxing authority,[2] TABOR totally removes that power from the legislature in Colorado.

In Colorado, neither the legislature nor any local government entity may raise "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property tax, or extension of an expiring tax, or a tax policy change directly causing a new tax revenue gain to any district." That power may be exercised only by popular vote. Colo. Const. art. X, § 20(4)(a).

Any "new state real property tax or local district income tax" is banned entirely. *Id.* at § 20(8)(a). TABOR also prohibits the state legislature from spending an amount that exceeds prior fiscal year expenditures by more than "inflation plus the percentage change in state population in the prior calendar year." *Id.* at § 20(7)(a). Local government spending is similarly limited. *Id.* Revenues that exceed the prior year spending, so adjusted, must "be refunded [to taxpayers] in the next fiscal year." *Id.* at § 20(7)(d). Colorado is the *only* state in the history

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[2] The California, Michigan, Missouri, Nevada, and Oklahoma constitutional provisions cited by the Petitioner are easily distinguishable from TABOR; none of them totally eliminates the legislature's power to levy taxes as does TABOR. Pet. 6 n.4.

of the Republic to strip its state and local elected officials of the power to tax and so limit their ability to spend.

Contrary to the Petitioner's rhetoric, this case does not pose an attack on direct democracy or on the initiative power of Colorado voters. Pet. 2, 4–6. While TABOR happens to have been enacted by citizen initiative, the *process* of its enactment is not at issue. The issue is whether the *content* of this state law is constitutional—a legal question that is commonplace in the courts. If the Respondents succeed in their challenge to TABOR, the initiative power of Colorado voters, including their power to initiate tax legislation, will remain alive and well. The sole change will be that the legislature's essential fiscal powers will have been restored.

TABOR's enactment by initiative does not shield it from judicial scrutiny. Twice before, the Court has struck down unconstitutional measures enacted by citizen initiative in Colorado. *See Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (overturning an amendment to the state constitution that prohibited all state and local laws protecting individuals from discrimination based on sexual orientation); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736–37 (1964) (invalidating an amendment that put forward a plan for the apportionment of seats in the state legislature).

Like *Romer* and *Lucas*, this case challenges the constitutionality of a provision enacted by citizen initiative. It presents no threat to the power of the citizen initiative itself. *See Lucas*, 377 U.S. at 736–37 ("Manifestly, the fact that an apportionment plan

is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.").[3]

The Petitioner's portrayal of TABOR as a "focused form of direct democratic oversight" ignores that TABOR's wholesale removal of core legislative powers goes far beyond a benign "oversight" role and overlooks how limited this case really is. The Petitioner's logic would even preclude judicial review of a voter-enacted restriction eliminating the state legislature altogether.[4] *See* Pet. 5.

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[3] The Petitioner makes much of the fact that the Colorado Supreme Court has interpreted and applied TABOR without suggesting it is unconstitutional. Pet. 6-7. However, the constitutional claims bought in this case have never before been raised. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 778 (2005) (noting that, if possible, courts should "adhere to [the] wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law").

[4] At the hearing on the Petitioner's motion to dismiss before the District Court, counsel for the Petitioner maintained that a citizen initiative abolishing the state legislature could not be challenged under the Guarantee Clause:

> COURT: What if tomorrow a ballot [initiative] started to be circulated for the abolition of the Colorado legislature, and given how popular legislatures are these days, there was a ten percent turnout in the election on such a ballot [initiative] and it passed. Would you concede in that case that this Court would have jurisdiction to consider a Guarantee Clause challenge to the elimination of the Colorado legislature?
>
> COUNSEL: I pause because, again, the separation of powers doctrine would not allow

TABOR is as unique as this case is narrow. It is unlikely that the Tenth Circuit's opinion will reach beyond Colorado or even the circumstances of this case. As the Tenth Circuit accurately stated: "[T]he injury allegedly caused by TABOR is unique and unlikely to cause the federal courts to be flooded with legislators on the losing side of a vote." Pet. App. 23 n.9.

> this Court to decide a question that has been committed to Congress. So my answer to that would be no.

Resp. App. at 14-15 (relevant pages from the hearing transcript).

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari seeking interlocutory review should be denied for want of any "compelling reasons" for the Court to grant the Petition. *See* Sup. Ct. R. 10. The Tenth Circuit's opinion does not conflict with the Court's decisions concerning the political question doctrine or legislative standing. *See* Sup. Ct. R. 10(c). Nor are the circuits split on either issue. *See* Sup. Ct. R. 10(a).

Contrary to the Petitioner's assertions that the Tenth Circuit's opinion "radically and improperly" departs from this Court's precedent and that the Tenth Circuit split from "numerous circuits and state supreme courts," the opinion of the Court of Appeals exemplified a routine judicial analysis.

The interlocutory nature of the Petition makes it particularly appropriate for this Court to decline review.[5] The Petitioner seeks to compare this matter to other recent cases, such as *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), in which the Court granted certiorari prior to final judgment. However, *Hobby Lobby* and the other interlocutory cases cited in the Petition share a characteristic absent here. In *Hobby Lobby*, the petitioner was at

[5] Having come before the Tenth Circuit on appeal of the Petitioner's motion to dismiss for lack of standing and justiciability, the merits of the case have not yet been litigated and are not now before the Court. In eventually considering the merits, the District Court will have to address whether TABOR removes legislative powers essential to republican governance required by Article IV, section 4, and independently by the Colorado Enabling Act.

risk of a harm that might be, and later was found to be, unconstitutional (*i.e.*, having to pay health insurance coverage contrary to religious beliefs). *Id.* at 2764–66.

Here the reverse is true. There exists no imminent harm to the Petitioner's rights in allowing the case to proceed to trial. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) ("[T]he decisive consideration [in electing to take an intermediate appeal] is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order.") (Internal quotation marks omitted.)

I. The Petitioner has not presented compelling reasons for interlocutory review of the Tenth Circuit's holding that the political question doctrine does not bar the Respondents' Guarantee Clause claim.

In urging the Court to grant a petition for writ of certiorari, the Petitioner contends that there has been "growing debate and uncertainty" since *New York v. United States*, 505 U.S. 144 (1992). The Petitioner asserts that the Tenth Circuit's opinion directly conflicts with *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), and would open the floodgates to an "endless stream" of Guarantee Clause litigation. Pet. 12, 17–21. These claims are unfounded.

A. The Tenth Circuit's approach was consistent with this Court's political question jurisprudence.

The Petitioner asserts that the Tenth Circuit's opinion "overstep[s] its judicial authority," and stands in direct conflict with *Pacific States*. Pet. 13–14. The Petitioner appears so focused on *Pacific States* that he overlooks the Tenth Circuit's consideration of the full line of political question doctrine cases and the more contemporary and accommodating treatment of Guarantee Clause claims running from *Baker v. Carr*, 369 U.S. 186 (1962), to *New York*. While these cases do not directly treat such claims as justiciable, they do dispose of the notion that *Pacific States* bars all Guarantee Clause claims.

The Tenth Circuit carefully examined the political question doctrine and traced the doctrine's history from *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), through *Pacific States*, continuing through *Baker* and *Reynolds v. Sims*, 377 U.S. 533 (1964), and extending to *New York*. Pet. App. 31–38.

In evaluating this doctrinal history, the panel determined, as did the District Court, that *Pacific States* is distinguishable because the attack on Oregon's ballot initiative process in *Pacific States* was treated as questioning the legitimacy of the state government. Pet. App. 33 ("*Pacific States* involved a fact pattern similar to the one before us, but a much broader legal challenge. . . . Both *Luther* and *Pacific States* differ from those at bar . . . [because] both cases involved wholesale attacks on the validity of a state's government rather than, as before us, a

challenge to a single provision of a state constitution.").

Having examined the entire line of cases regarding Guarantee Clause justiciability, the panel concluded that the Court's precedent required it to undertake *Baker*'s six-factor examination applicable to all political question inquiries, including Guarantee Clause claims. The panel then presented a ten-page, factor-by-factor analysis under *Baker*, affirming the District Court's determination that the Respondents' Guarantee Clause claim is not barred by the political question doctrine. Pet. App. 38–49.[6]

The Petitioner strains to exploit Judge Gorsuch's statement regarding the second *Baker* factor (manageable judicial standards) in his dissent from the Tenth Circuit's order denying the Petitioner an *en banc* rehearing. Pet. 21–22. According to Judge

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[6] A number of federal cases have addressed Guarantee Clause claims and the proposition that all such claims run afoul of the political question doctrine and, therefore, are nonjusticiable. *See, e.g.*, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 950 (7th Cir. 2012); *Largess v. Supreme Judicial Ct.*, 373 F.3d 219, 226 (1st Cir. 2004); *Risser v. Thompson*, 930 F.2d 549, 552-53 (7th Cir. 1991); *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 757-58 (E.D. Va. 2011).

The *Largess* court ultimately found sufficient standards for interpreting the Guarantee Clause, and concluded that the plaintiffs' Guarantee Clause challenge lacked merit. *See id.* at 227–29.

While these cases may not have found violations of the Guarantee Clause on the facts presented, they nonetheless stand in contradiction to the Petitioner's sweeping contention that Guarantee Clause claims must always fail as nonjusticiable.

Gorsuch, no such standards applicable to Guarantee Clause claims exist. Pet. App. 71–73. To the contrary, this Court has recognized such standards.[7]

The Tenth Circuit, like the District Court, determined that, at the motion to dismiss stage, it was too early in the litigation to determine definitively whether such standards exist and acknowledged that resolving the issue of justiciability may turn on the resolution of the underlying claim, which could happen on summary judgment briefs or at trial. *See* Pet. App. 44–45; *see also Baker*, 369 U.S. at 217 ("Unless one of these [factors] is *inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.") (emphasis added).

B. Any questions left open by *New York* did not split the circuits and do not compel resolution here.

The Petitioner asserts that the Ninth and Eleventh Circuits, along with several state supreme courts, have split from the First, Second, Fifth, and Seventh Circuits as to whether Guarantee Clause

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[7] The model for a standards-based analysis of a Guarantee Clause claim is found in *Minor v. Happersett*, 88 U.S. 162 (1874). The issue there was, *inter alia*, whether the Guarantee Clause guaranteed the franchise for women. The *Happersett* Court found the relevant meaning for the Guarantee Clause in the historical context that state law afforded the Framers in 1787. *Id.* at 176. Since all but one state denied women the franchise, the Court concluded that the Guarantee Clause could not have been meant to guarantee the franchise for women. *Id.* at 176-78.

claims are categorically barred as non-justiciable, and that the Tenth Circuit's opinion entails a third approach and a further split. Pet. 17–19. This argument misreads the Court's precedent.

The Petitioner has invented the notion that the circuit opinions from the Ninth and Eleventh Circuits constitute a "*per se*" rule that all Guarantee Clause claims are non-justiciable political questions. Pet. 18 (describing "[t]he majority of post-*New York* federal circuit and state supreme court decisions . . . [as] continu[ing] to apply to *per se* bar to Guarantee Clause claims").[8] However, no circuit opinions characterize Guarantee Clause claims in those terms. Consistent with precedent, the Tenth Circuit reasoned out a principled holding that Guarantee Clause claims require analysis under *Baker*'s six factors.

Unlike true political question cases, the Respondents do not ask the courts to question a political decision of a *political branch*, much less a branch of the federal government, where the separation of powers concerns that underpin the political question doctrine are central. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012); *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997). Rather, this case challenges a state constitutional amendment's fundamental restructuring of Colorado government into a form not permitted by the Guarantee Clause.

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[8] Notably, the Petitioner then seems to hedge on this. Pet. App. 32 (explaining that "[t]here is some support for this position in . . . cases predating the modern articulation of the political question doctrine in *Baker*," but concluding that neither *Luther* not *Pacific States* precludes application of the six-factor *Baker* test in this case).

Federal courts routinely entertain such constitutional challenges to state law. *See, e.g.*, *Romer*, 517 U.S. at 635–36; *Lucas*, 377 U.S. at 736–37.

C. The Colorado Enabling Act provides an independent statutory basis for challenging TABOR, and is not subject to the political question doctrine.

The Petitioner attempts to dismiss, wholesale, the Respondents' claim brought under the Colorado Enabling Act as merely "derivative" of their Guarantee Clause claim. Pet. 7. This argument ignores the status of the Colorado Enabling Act as instrumental to statehood and overlooks the validity of the many other provisions of the Colorado Enabling Act. Pet. App. 224-25.

Having found ample basis to reject the Petitioner's effort to dismiss the Respondents' *constitutional* claims, both the Tenth Circuit and the District Court gave relatively little attention to the Respondents' independent *statutory* claims under the Colorado Enabling Act. Pet. App. 51-52, 167-71. However, this claim of a separate statutory violation presents a stand-alone basis to proceed on the merits.

Despite the Tenth's Circuit's explicit instruction, the Petitioner fails to recognize that "the [Colorado] Enabling Act claim is independently justiciable for reasons that do not apply to the Guarantee Clause claim." Pet. App. 52 (citing *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) ("This is

a statutory case. The Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. Never.")).

The District Court also rejected the Petitioner's argument that the political question doctrine has any bearing on the justiciability of the Respondents' Colorado Enabling Act claim: "[E]ven if Plaintiffs' Guarantee Clause claim were barred by the political question doctrine, the Court would nevertheless conclude that Plaintiffs' [Colorado] Enabling Act claim is not subject to dismissal." Pet. App. 168.

Although the Petitioner would have this Court collapse its justiciability analysis of the Colorado Enabling Act claim into that of the Guarantee Clause claim, the statutory nature of the Colorado Enabling Act requires an entirely different analysis. Interpretation of statutory language is well within the authority and the responsibility of the federal courts. This remains true even in politically charged cases. *See, e.g.*, *Zivotofsky*, 132 S. Ct. at 1424 (interpreting a statute about passport administration is a "familiar judicial exercise"); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (holding that the political question doctrine did not bar a federal statutory claim concerning whale harvesting quotas).

Federal courts have consistently held that the interpretation of state enabling acts involves the "familiar judicial exercise" of statutory construction. For example, in *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), the Tenth Circuit adjudicated the merits of a Colorado Enabling Act claim challenging an amendment to the

Colorado Constitution that altered the management of the public lands granted to the state through the Colorado Enabling Act. *Id.* at 625–27, 630; *see, e.g.*, *Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 (10th Cir. 1987) (adjudicating an enabling act claim involving rights and limitations pertaining to Indian trust lands); *Utah ex rel. Div. of State Lands v. Kleppe*, 586 F.2d 756, 759-61 (10th Cir. 1978) (enabling act case involving school lands), *rev'd on other grounds, sub nom. Andrus v. Utah*, 446 U.S. 500 (1980); *United States v. New Mexico*, 536 F.2d 1324, 1326-29 (10th Cir. 1976) (United States successfully sued to enforce an enabling act requirement that a grant of lands be used to provide a hospital for miners).

Thus, the Colorado Enabling Act provides separate and justiciable statutory grounds upon which the Respondents can pursue their case and one more reason the Petition should be denied.

II. The Petitioner has not presented compelling reasons for interlocutory review of the Tenth Circuit's holding that the Legislator-Respondents claim a concrete, institutional injury-in-fact that satisfies the requirements of legislative standing.

The Petitioner urges that the Tenth Circuit's opinion differs from decisions from other circuits as to both the political question doctrine and legislative standing. Pet. 17–19, 29–31. However, the Petitioner misunderstands the current uniform application of the law and invents circuit splits where none exist.

A. The Tenth Circuit's ruling on standing comports with *Coleman* and *Raines*.

The Tenth Circuit's holding on standing did not, as the Petitioner contends, run afoul of *Raines*, by making it the exception to *Coleman v. Miller*, 307 U.S. 433 (1939).[9] Pet. 26–29. Rather, it fit with *Coleman* in finding that the Legislator-Respondents have standing.

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[9] The Tenth Circuit's holding on legislative standing applied only to those Respondents who are current members of the state legislature. Neither the Tenth Circuit nor the District Court has determined whether any of the other Respondents have standing. *See* Pet. App. 142 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977) ("[Because] we have at least one individual plaintiff who has demonstrated standing . . . , we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.")).

Far from exceeding or extending the limits on legislative standing, the Tenth Circuit engaged in a disciplined exercise of routine judicial review, examining and applying *Raines* and *Coleman* to the legislative standing inquiry that was before it. Pet. App. 12–28; *see also* Pet. App. 104–42 (District Court's analysis).

Ultimately, the Tenth Circuit, like the District Court, determined that the allegations here "fall closer to the theory of vote nullification espoused in *Coleman* than to the theory of abstract dilution rejected in *Raines*," Pet. App. 16. The panel also relied on the fact that the Colorado General Assembly has neither a political remedy nor the power to undo TABOR, Pet. App. 17–19. The panel noted that this case—because it concerns a *state* government interest—does not present the *federal* "separation-of-powers concerns present in *Raines*." Pet. App. 21–22.

The Tenth Circuit declined the Petitioner's demand to read *Raines* as requiring legislators who seek standing to plead facts "substantially identical" to *Coleman*. Pet. App. 26 ("That both *Coleman* and *Raines* involved allegations concerning a single vote does not imply that only single-vote matters may give rise to an injury in fact."). The Petitioner's reading of *Raines* would relegate *Raines*' "discussion of various other elements militating against legislative standing"[10] to dicta—an unnecessary

[10] One such other element present in *Raines*, but missing here, was the ability of the Members of Congress to find their remedy by persuading their Article I branch colleagues to repeal the Line Item Veto. 521 U.S. at 824. No such remedy is available to the Legislator-Respondents here, as TABOR's constitutional

result the Tenth Circuit was careful to avoid. Pet. App. 26.

Contrary to the Petitioner's view, the Tenth Circuit's decision is nothing extraordinary given TABOR's uniqueness in the annals of American law. It not only is consistent with *Coleman*'s requirement that the alleged injury be to the "plain, direct and adequate interest in maintaining the effectiveness of [the legislators'] votes," *Coleman*, 407 U.S. at 438, but also satisfies the criterion in *Raines* that "[the legislators'] votes have been completely nullified," *Raines*, 521 U.S. at 823. The Tenth Circuit explained that this is so because "TABOR plainly bars the General Assembly from instituting a new tax through legislative action," Pet. App. 25, and any such vote "is advisory from the moment it is cast," Pet. App. 16. This makes clear that, unlike the alleged injury at issue in *Raines*, the Legislator-Respondents' injuries in this case are neither "wholly abstract" nor "widely dispersed." *See Raines*, 521 U.S. at 829.

As the District Court put it, the allegations here "are of such magnitude that the term 'dilution of institutional power' appears insufficient to describe the alleged injury TABOR has effected on Plaintiffs' core representative powers" and "detail anything but

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status permits no statutory remedy. Even if Respondents convinced every member of the General Assembly that TABOR must be repealed, they would still be unable to set aside this amendment to the state constitution. Pet. App. 17–18 ("TABOR denies the Colorado General Assembly the ability to vote on operative tax increases, and the legislator-plaintiffs cannot undo its provisions pursuant to the normal legislative process.") (Internal quotation marks omitted).

an *abstract* dilution of power." Pet. App. 120–21 (emphasis in original). When framed as a question of "lost political battles" versus "nullification of votes," Pet. App. 19 (internal quotation marks omitted), the Tenth Circuit was satisfied that the Respondents' allegations complain not of a "lack of success within the legislature," but rather that "TABOR has stripped the legislature of its rightful power," Pet. App. 20.

In sum, the Tenth Circuit followed *Coleman* and *Raines*. The Tenth Circuit's decisions on standing thus provide no basis for the Petition to be granted.

B. The Tenth Circuit's opinion does not expand legislative standing beyond *Raines* or conflict with other circuits.

Through a conventional analysis of the relevant case law, the Tenth Circuit was able to determine the issue of legislator standing without upsetting this Court's precedent and without creating a split among the federal circuits.[11] *See* Pet. App. 16–28 (noting that "[n]either *Coleman* nor *Raines* maps perfectly onto the alleged injury in this case" and then weighing the alleged injury here against the injuries alleged in *Coleman* and *Raines*, as well as against the injuries alleged in cases from the Second, Third,

[11] The Tenth Circuit's opinion created no circuit split concerning legislative standing. Its analysis did not create new categories, and instead carefully traced the commonalities and differences among the legislative standing cases that have been decided since *Raines,* and measured the injury alleged in this case against the established standards. See Pet. App. 16–28.

Sixth, Tenth, and D.C. Circuits, as well as *New York*).[12]

The Tenth Circuit's decision fit with *Coleman's* requirement that the alleged injury be to the "plain, direct and adequate interest in maintaining the effectiveness of [the legislators'] votes," *Coleman*, 407 U.S. at 438. It also satisfied *Raines*' mandate that "[the legislators'] votes have been completely nullified," *Raines*, 521 U.S. at 823. This is so because "TABOR plainly bars the General Assembly from instituting a new tax through legislative action," Pet.

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[12] In a footnote, the Petitioner suggests that the question of standing in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13-1314, warrants holding this Petition. Pet. 32 n.8. A determination that the entire Arizona state legislature has standing in that reapportionment case would not necessarily be dispositive of the standing of the Legislator-Respondents in this case because the District Court expressly stated that it would reconsider their standing—as well as whether judicially manageable standards exist—after additional facts are developed, perhaps at the summary judgment phase of the litigation. Pet. App. 152–53 n.33 ("Given that the case will proceed to the summary judgment stage, the Court notes that it may be able to resolve the case on the merits at that stage rather than having to address this difficult constitutional question.").

Likewise, a determination that the Arizona legislature lacks standing is inapposite here because both the Tenth Circuit and the District Court expressly declined to determine standing as to those Respondents who are not current members of the Colorado General Assembly. Pet. App. 11 (Tenth Circuit), 142 (District Court). Even if the Court were to reverse the Tenth Circuit as to the standing of the Legislator-Respondents, the standing of the remaining Respondents would still have to be addressed on remand. Accordingly, the pendency of the Arizona case does not warrant holding the Petition in this case.

App. 25, and because any such vote "is advisory from the moment it is cast," Pet. App. 16.

The Tenth Circuit was satisfied that the Legislator-Respondents complain not of a "lack of success within the legislature" but rather that "TABOR has stripped the legislature of its rightful power." Pet. App. 20. Again, the Tenth Circuit opinion followed precedent, created no circuit split, and provides no basis for the Petition to be granted.

C. Analysis of standing is inextricably intertwined with evidence to be adduced on the merits.

In a case like this, the issue of standing—and, by similar reasoning, justiciability—should properly be deferred for re-examination in light of evidence to be presented on the merits, when the injuries sustained by the Respondents can be fully established either through summary judgment or trial:

> [T]he circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim. If the plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry—which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated—might well be adjusted to the nature of the claimed injury.

Largess, 373 F.3d at 224–25.

In *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), the Tenth Circuit explained that "[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing." *Id.* at 1092. The Court "must assume the Respondents' claim has legal validity." *Id.* at 1093.

Reviewing its *Walker* decision in a subsequent standing case, *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), the Tenth Circuit explained why standing should be found when the standing inquiry is intertwined with the merits of a constitutional claim:

> [I]n *Walker*, the Plaintiffs' asserted injury and their claimed constitutional violation were one and the same. Accordingly, we refused to consider, at the threshold stage of determining standing, whether the First Amendment did or did not restrict supermajority requirements for certain initiative efforts. That question must be reserved for the merits analysis. . . . *Walker* mandates that we assume, during the evaluation of . . . standing, that the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law.

Id. at 1137 (internal citations omitted).

This is especially true in a Guarantee Clause case where the facts establishing standing are so intertwined with the facts that establish the merits under the Guarantee Clause. The First Circuit recognized this in *Largess*, itself a Guarantee Clause case. 373 F.3d at 224–25. Like *Largess*, this case may be seen as one in which the question of standing is "intertwined and inseparable from the merits of the underlying [constitutional] claim." *See id*.

The Tenth Circuit's reasoning in *Walker*, as explained in *Day*, and the First Circuit's standing analysis in *Largess*, are harmonious and apply to the circumstances here. The Petitioner readily admits that there is no accepted legal view of what constitutes a "Republican Form of Government." Pet. 20–23. If that is so, then the Respondents' injuries-in-fact cannot be fully understood at this stage and should await a decision on the merits as to whether TABOR violates the Guarantee Clause.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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November 21, 2014

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-01350-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; 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,

vs.

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

Defendant.

REPORTER'S TRANSCRIPT
(Defendant's Motion to Dismiss)

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Gwen Daniel, 901 19th Street, Room A259, Denver, Colorado, 80294, 303.571.4084

APPEARANCES

Proceedings before the HONORABLE WILLIAM J. MARTÍNEZ, Judge, United States District Court for the District of Colorado, commencing at 2:10 p.m., on the 15th day of February, 2012, in Courtroom A801, United States Courthouse, Denver, Colorado.

David Evans Skaggs, Lino S. Lipinsky de Orlov and Herbert Lawrence Fenster, Attorneys at Law, McKenna Long & Aldridge, LLP-Denver, 1400 Wewatta Street, #700, Denver, CO 80202-5556; Emily L. Droll, John A. Herrick and Michael F. Feeley, Attorneys at Law, Brownstein Hyatt Farber Schreck, LLP-Denver, 410 17th Street, #2200, Denver, CO 80202-4432, appearing for the Plaintiffs.

Megan Paris Rundlet and Bernard A. Buescher, Attorneys at Law, Colorado Attorney General's Office, 1525 Sherman Street, Denver, CO 80203, appearing for the Defendant.

Also Appearing: Melissa Hart, Associate Professor/*Amicus*.

* * * * *

PROCEEDINGS

(In open court at 2:10 p.m.)

THE COURT: I was told to expect a large crowd, and I am not disappointed.

The case that we are here for is Civil Action No. 11-cv-1350, Andy Kerr, et al., plaintiffs vs. John Hickenlooper, Governor, defendant.

I will take appearances of counsel.

MR. SKAGGS: Good afternoon, your Honor. David Skaggs, appearing for plaintiffs, with co-counsel Mr. Lino Lipinski, Ms. Emily Droll, Mr. John

Herrick, Mr. Mike Feeley, and Mr. Herb Fenster. And seated behind me is Melissa Hart with the *amicus*.

Thank you, your Honor.

THE COURT: Thank you. You are welcome.

MS. RUNDLET: Good afternoon, your Honor. Megan Rundlet from the Attorney General's office, representing Governor Hickenlooper. At the table with me is Bernie Buescher.

THE COURT: Welcome. Good afternoon.

The Court has set this matter for oral argument for 70 minutes on the Defendant's Motion to Dismiss, which is ECF No. 18. We will allocate the time as follows: The defendant as the movant will have the initial 30 minutes. My courtroom deputy, Ms. Hansen, will give you a five-minute warning when your 30 minutes are about to expire. The plaintiffs will have 30 minutes in response, with a similar five-minute warning. The defendant then will have a ten-minute rebuttal, with a two-minute warning.

I expect to ask more than a couple of questions, so we'll probably go beyond those 70 minutes.

Let's handle a procedural matter first. My review of the docket is that currently the Motion to Dismiss addresses the plaintiffs' substantive Complaint, which is ECF No. 12, which was filed on June 16th, 2011, the Motion to Dismiss being filed two months later, approximately, in August of 2011, that's ECF

No. 18. Since the Motion to Dismiss was filed, the plaintiffs sought and received leave to file a First Amended Substitute Complaint, ECF No. 36, which was filed in October of 2011.

So technically the Motion to Dismiss right now is not addressing the correct complaint. I want to correct that. Normally what I would have done in a case like this is deny the Motion to Dismiss as moot because it became moot by the filing of the Amended Complaint. But I don't want to exalt form over substance, so what I would like to do is get a stipulation from counsel -- because the First Amended Substitute Complaint, we've reviewed it, my law clerk and I, and it seems to be identical to the Substitute Complaint, with the exception of the removal of a single plaintiff. So we're really talking about the same substantive document.

What I would like to do is get a stipulation by counsel on the record that the motion that we're going to be hearing oral argument on this afternoon, the Motion to Dismiss, ECF No. 18, is addressing the First Amended Substitute Complaint, ECF 36.

MR. SKAGGS: Your Honor, we would so stipulate.

THE COURT: Thank you, Mr. Skaggs.

MS. RUNDLET: As would we, your Honor.

THE COURT: Thank you.

With that stipulation now we know what we are

addressing here.

Okay. Let's begin.

Ms. Rundlet.

DEFENDANT'S MOTION TO DISMISS

MS. RUNDLET: Good afternoon, your Honor.

I wanted to start first by asking the Court if it does indeed want me to start first, since although it is our Motion to Dismiss, it is the plaintiffs' burden to establish this Court's limited jurisdiction.

THE COURT: I do want you to start first. You have the burden on this motion.

MS. RUNDLET: Okay. Thank you, your Honor.

I would like to begin by addressing the three issues that you identified in your order on February 13th.

Specifically:

1. Whether the issue of the justiciability of this action under the political question doctrine is appropriate for resolution at the motion to dismiss stage. The answer to that question is absolutely, it is appropriate to considerate at this stage in the proceeding, because the concept of justiciability as embodied in the political question doctrine expresses the jurisdictional limitations of Article III standing.

Under the separation of powers provided by the Constitution and Supreme Court cases, a question of subject matter committed exclusively by the Constitution to the President or to Congress is said to be a political question and not capable of being decided by a federal court.

Since no justiciable controversy exists when parties seek adjudication of a political question, it is proper to dismiss a political question in a 12(b) motion.

In **Schlesinger**, the Supreme Court noted that the presence of a political question suffices to prevent the federal judiciary from being invoked.

Admittedly, there is no conclusion in the circuits over whether the appropriate type of dismissal is for failure to state a claim or for lack of subject matter jurisdiction. The Tenth Circuit noted this confusion in **Schroder vs. Bush**, which they dismissed for lack of subject matter jurisdiction, but the Court noted that ultimately the classification is immaterial.

Dismissal for subject matter is appropriate if the claims fall within the established category of political question.

THE COURT: Let me ask you this question. Is it the defendant's position that all Guarantee Clause cases are barred by the political question doctrine?

MS. RUNDLET: It is not our position that all Guarantee Clause claims are barred by the -- are barred --

THE COURT: By the political question doctrine.

MS. RUNDLET: -- by the political question doctrine.

THE COURT: So where do I draw the line?

MS. RUNDLET: It's difficult to draw the line, simply because the only reason that there is an idea that all political questions -- excuse me, that all Guarantee Clause claims are -- I am sorry, your Honor. Please forgive me.

What I would like to say is that all the Supreme Court cases hold that the Guarantee Clause is a political question. However, **New York vs. U.S.** is the one case in which Justice O'Connor suggested that there may be other claims that could be justiciable under the Guarantee Clause. However, in so noting, Justice O'Connor cited to **Pacific States** as an example of a case that does present a political question and is nonjusticiable.

THE COURT: Yeah, but the **Pacific States** case presents an issue that's not in front of me. All right?

MS. RUNDLET: The **Pacific States** case does present almost precisely the same issues that are before the Court.

THE COURT: That's not how I see it. The **Pacific States** case, a 1912 Supreme Court decision, found that the claims were barred by the political question doctrine in that case because in that case the entirety of the citizen initiative ballot process

that was at issue would be challenged. That is not how I read plaintiffs' First Substitute Amended Complaint. So tell me why **Pacific States** is the same case as this case.

MS. RUNDLET: Here plaintiffs in their Complaint make a broad category of claims that the initiative process violates the republican form of government because it is a component of direct democracy. And they argue first that direct democracy is not allowed under a republican form of government, but they later switch that position to focus specifically on TABOR. The plaintiffs can't have it both ways.

THE COURT: They are not having it both ways. See, I agree with you that the Complaint, at least in the beginning, has a lot of flowery verse, but then when it changes to prose, and you read the Complaint, it's clear that the plaintiffs are not challenging the citizen initiative ballot process of Colorado. They're not. The prayer for relief asks for much more limited relief from this Court, and it targets only this particular initiative.

If your argument is that this case is the same case as **Pacific States**, then whatever additional time you spend arguing that is not worthwhile, I would suggest, on your behalf, because I don't see it that way.

MS. RUNDLET: Your Honor, what they do not make clear, though, is what -- what their disagreement is with is the vote that the people have

under TABOR and the very fact that TABOR, the initiative itself, takes the power away from the legislature.

What if TABOR didn't have the vote provision? Would that be okay under plaintiffs' theory? Probably not. So they must be attacking the initiative process, because it's taking any power away from the legislature that makes it an issue.

You can't have some powers be given to the people to vote for the citizen initiative, then have some be kept by the legislature. That requires the Court to make a determination over and over whether or not it violates the republican form of government.

THE COURT: That is not the claim that I read in the Complaint. The claim is not -- I'll say it again, is not that the Colorado citizen initiative ballot process is somehow unconstitutional or violative of some other statutory restriction, it is that in this instance, through the ballot initiative, the Colorado Constitution was amended in such a way as to deprive the legislature of the core function, that core function being the ability to legislate tax-related laws. And that once you have a legislature that can do anything it chooses, except pass laws with respect to taxes, then you no longer have a republican form -- or republican, small case "r," republican form of government.

That's what I read is the claim. All right?

MS. RUNDLET: But even if you take **Pacific States** out of the equation and focus on the factors in

Baker, it still presents a political question. Because (1) under a republican form of government that issue has been committed to Congress and (2) there's no judicially manageable standards by which this Court can determine whether it violates the republican form of government to have the citizens vote to increase taxes. It still fails under the test for political question.

THE COURT: Well, there are six tests in **Baker.**

MS. RUNDLET: Well, there are six independent tests, but any test is sufficient to deprive the Court of jurisdiction to hear this case.

THE COURT: Is it the defendant's burden to show the applicability of one or more of the six tests or does defendant have the -- the plaintiff, rather, have the burden to show that none of them apply?

MS. RUNDLET: Your Honor, the burden is on the plaintiff to establish jurisdiction, and the Supreme Court addressed this in **Vieth vs. Jubelirer**, a 2004 case where they talked about whether or not there were judicially manageable standards to evaluate political gerrymandering. In that case the Court talked about this clumsy shifting of burden that had occurred in **Davis vs. Bandemer**, which **Vieth** overturned. There the Supreme Court said that it's for the plaintiffs to establish that it's been committed to the judiciary; that is, the plaintiffs to establish that judicially manageable standards exist, not for the defendants to establish that they do not exist. That's part of the

problem the Court identified in what occurred in **Davis vs. Bandemer.**

THE COURT: I agree plaintiffs have the burden to show that this Court has jurisdiction over this case, I absolutely agree with you there.

In terms of the applicability of the political question doctrine, is it defendant's initial burden of going forward to establish the applicability of the doctrine or does the plaintiff have the burden to show that the doctrine does not apply?

MS. RUNDLET: I read the Supreme Court decision in **Vieth** as stating that the plaintiffs have the burden to show that it's committed to the judiciary, that there are judicially manageable standards, and it is not the defendant's burden to show that there is not.

THE COURT: Okay.

MS. RUNDLET: So if we look under the **Baker** factors, throughout history this question of whether or not something violates the republican form of government has been committed to Congress. And plaintiffs have failed to show or identify any case that shows that it's been committed to the judiciary.

Likewise, with the judicially manageable standards, the plaintiffs have failed to establish any standards exist. It's not standards they come up with, it's standards that are judicially created.

Of course there could be no standards, because the Guarantee Clause claim has not been litigated in federal court. So no standards exist by which to measure the framework of whether there's a violation.

So even if the Court feels that **Pacific States** is inapplicable here, **the Baker** tests independently still show that a political question exists.

And what the plaintiffs would like to do by now narrowing their focus on TABOR is to put every initiative, beginning with TABOR, through an additional lens of whether or not it violates the republican form of government or not. And this invites the Court to look at other initiatives, and it invites other states to look at their initiatives as well, and this is not allowed.

THE COURT: Let me shift gears a little bit, ask you this question. Even if I were to agree that under **Baker** one or more of the six tests apply here and the political question doctrine barred the constitutional claim under the Guarantee Clause, as you've just articulated, what about what I think is functionally the equivalent claim, the statutory claim under the Enabling Act? **Baker** does not apply to that. I read **Baker** as a description of six tests under which a court will consider whether there are restrictions on its ability to pass on a particular constitutional question. All right? That's totally separate, in my mind, from the statutory claim under the Enabling Act.

One thing plaintiffs point out in their responsive brief, and the defendant did not respond to in his reply, is that for the Court to accept your argument with respect to the Enabling Act claim, the statutory claim, I would have to find and hold that I don't have jurisdiction under 28 U.S.C. 1331 over a federal statutory claim.

Can you address that, please.

MS. RUNDLET: Your Honor, in the plaintiffs' response they rely on **Branson School Trust** to establish standing. There's two problems:

1. The Enabling Act claim, in the defendant's view, is very much like **Pacific States**, where it asks the Court, again, to determine whether there's a violation of the republican form of government, and there are no standards for determining that. But the standing issue that they have is that there is no individual cause of action for them to assert under the Enabling Act.

THE COURT: Okay. Let me stop you. You are starting to go into standing, which is clearly a huge part of this case, but I don't want to get there yet. I am asking you about the Enabling Act claim. Do you agree that the political question doctrine does not apply to the statutory claim?

MS. RUNDLET: No, I disagree, your Honor.

THE COURT: What legal support do you have for that position?

MS. RUNDLET: Well, my legal support is **Pacific States**. That's the only case that's on point that has to do with evaluating the Enabling Act under the lens of whether it violates a republican form of government. So I do believe that it's attached to **Pacific States**. It is a political question.

Again, there's no judicially manageable standards by which the Court can determine whether or not the Enabling Act has been violated. The same exact arguments that would apply to the Guarantee Clause, apply equally to the Enabling Act.

THE COURT: Going back to the constitutional claim here, the Guarantee Clause claim, I think it was in the **Largess** case, which is the First Circuit case, the defendant there conceded that there hypothetically could be some violations of the Guarantee Clause that were so extreme that it would not present a typical case under the political question doctrine and the Court would have jurisdiction to consider such extreme cases.

So let me posit to you a hypothetical of what I think would be an extreme case, something that hasn't happened yet, but it might, given how liberal our voter initiative process is in terms of number of voters needed to put anything on the ballot.

What if tomorrow a ballot started to be circulated for the abolition of the Colorado legislature, and given how popular legislatures are these days, there was a ten percent turnout in the election on such a ballot and it passed. Would you concede in that case

that this Court would have jurisdiction to consider a Guarantee Clause challenge to the elimination of the Colorado legislature?

MS. RUNDLET: I pause because, again, the separation of powers doctrine would not allow this Court to decide a question that has been committed to Congress. So my answer to that would be no.

And when I think back to **Baker**, citing **Luther vs. Borden**, I think there is a reference the Supreme Court made about if there was a violation of the republican form of government, and Congress failed to act, it would not necessarily be correct for the Court to act if Congress failed to.

That leads me to think that, no, the Court would not be able to entertain that question, unless Congress first addressed whether or not that violates the republican form of government, or defines the contours of that for the Court then to interpret.

THE COURT: You are relying on the **Luther** case for that.

MS. RUNDLET: **Luther** and **Baker**. **Baker** cites to that provision of **Luther.**

THE COURT: What I find very instructive, even though they didn't decide the issue, the Supreme Court's decision in **New York vs. United States**. It is a very interesting opinion, and in it the Supreme Court goes back 150 years and reexamines **Luther**, and talks about how the Luther case, from the 1840s, there was the question of which was the appropriate

government for Rhode Island. There was two competing entire sets of governments. The Court in **Luther** just said: Well, only Congress can decide which is the legitimate government of Rhode Island in 1840.

Then the Supreme Court said in **New York vs. United States** that somehow that holding in the decades since -- centuries, century and a half since, has morphed, to use their word, or a variation of their word, has morphed into this attempt to engraft a per se rule that all Guarantee Clause cases at all times, in all situations, are barred by the political question doctrine.

So I go back to my hypothetical. Even if we were presented here in Colorado with such an extreme case of a voter initiative that eliminated the legislature as a whole, it's the Governor's position, the defendant's position, that this Court could not entertain a Guarantee Clause challenge to such an amendment to the state Constitution?

MS. RUNDLET: I can't say that for sure, to be honest. I don't know if the Court could or not. Based on the case law that's in front of us, the Court would not be able to. But when presented in that way it's difficult to think that it couldn't. Yet we're bound to follow the law, and the law says that the Court would not be able to hear that question.

Even when you are looking at **Luther vs. Borden**, you have two competing factions for the

State of Rhode Island, the Court refused to get involved.

THE COURT: All right. Let's turn to standing in the time that you have left. Why don't you address it from the defendant's perspective.

MS. RUNDLET: Your Honor, plaintiffs lack standing to bring these claims against the Governor. Speaking to the Enabling Act for a moment, they rely on **Branson School Trust**, but in **Branson School Trust** the language of the Enabling Act created a trust. And the school districts were third-party beneficiaries of that trust, so they had a specific injury that they could allege.

Here plaintiffs lack standing because their injury is not specific. They don't have a personal stake in it. It's a general grievance before the political process. It's an institutional injury.

Raines governs this case in terms of their trying to seek congressional standing -- excuse me, legislative standing. I don't think they can get around **Raines**. They have not been able to distinguish **Raines**. They didn't even bring it up in their opposition. In fact they try to rely on **Coleman vs. Miller**.

THE COURT: They raised it in a footnote. They address **Raines** in a footnote.

MS. RUNDLET: Very limited. They don't actually address the fact that it does govern their case. And it's not just a little case that they try to

diminish. It can't be. Legislative standing is difficult to establish. You must show that there's a personal stake in the injury, and they haven't done that here.

Likewise, the equal protection claim that they've alleged, they also lack standing. There's no voter dilution. There's no voter discrimination. The equal protection claim, divorced from the Guarantee Clause claims, and just left individually, that would fall under **Gordon vs. Lance**. In **Gordon vs. Lance**, West Virginia Constitution and statute allowed the political subdivisions to raise taxes and do bond indebtedness through a 60 percent majority referendum vote.

That's very similar to what we have here. In that case the Court found there was no equal protection violation. So their equal protection violation would fail as well.

THE COURT: Okay. You discussed legislator standing. What about citizen standing?

MS. RUNDLET: They haven't alleged a sufficient injury in fact, your Honor. It's a general grievance that's shared commonly. So, no, they don't have individual standing, nor do they have legislative standing.

THE COURT: What about something that the parties did not brief at all, I think, even though it's contained in paragraph 45 of the Complaint, the standing of educators to challenge the -- to have standing to assert the claim in this Court? What's your view on that?

MS. RUNDLET: The educators don't have standing for the same reasons that the individuals and the legislators do not have standing. The guarantee to a republican form of government contained in the Enabling Act is between the United States and the State of Colorado. The political subdivisions, the school boards, they do not have standing to allege an injury under that.

I think the First Circuit decision in **Largess** that you discussed earlier talked about whether or not there would be standing and didn't decide the issue in that case.

But here we don't have a trust that's created by the language that the schools would be able to assert a third-party beneficiary status. So they lack standing as well.

THE COURT: You raise in your reply brief the hypothetical of an individual who had entitlement to a particular governmental benefit that was deprived as a result of TABOR.

Let's say in this case one of the educators that are named here as a plaintiff could also allege that because of TABOR and the legislature's inability to raise sufficient funds for his or her school district that he or she lost her job as an educator or had to take a pay, compensation cut, in that situation would that individual still be bereft of standing in this case?

THE COURTROOM DEPUTY: You have five minutes.

MS. RUNDLET: Thank you.

Yes, they still would lack standing to bring this case, even if they had lost their job. You have to show an injury in fact, causation and redressability. There's no indication that the legislature would actually raise taxes, that it would have funneled that money to education, and that that teacher would have been able to keep their job.

THE COURT: That's on the causation prong. You were addressing before injury in fact. The loss of a governmental benefit you raised in your brief as an example by which there could be an injury in fact. So I gave you what I thought would be an example of an injury in fact.

So given that prong of the three-prong basis under Lujan for standing, what's your view on that?

MS. RUNDLET: If we can see that there's an injury there, that still does not get standing, because you do have to meet the other two prongs, which you would not be able to do in that case.

So even if we were to concede that an injury would occur, and an educator could bring that claim, they still would fail the other prongs on standing.

THE COURT: Well, they would have to show causation, that's the second prong, and that there would be redress through the relief they sought in the Complaint, which is the third **Lujan** prong.

MS. RUNDLET: Right.

THE COURT: Okay. How could I determine that they could or couldn't meet the factual components of prongs 2 and 3 on a motion to dismiss? Wouldn't that be a factual matter I could only decide on the merits after trial?

MS. RUNDLET: I am not sure the answer to that, your Honor.

THE COURT: All right. Would you concede that if the Complaint properly raised facts which could set forth causation and appropriate relief, that it would be inappropriate for me to dismiss the claim at this juncture?

MS. RUNDLET: Your Honor, our position is that it is appropriate to dismiss at this juncture. I don't think that they would be able to allege any additional facts that would establish causation or redressability.

THE COURT: All right. Why don't you wrap up as you were planning to. I think you are coming up close to your time limit.

MS. RUNDLET: Your Honor, our position is clear. We do think that **Pacific States** governs this case. I realize the Court disagrees. But if you still look at the tests that are set forth in **Baker**, these claims presented by plaintiffs present political questions. In addition, as our brief states, they lack standing to raise them.

Thank you.

THE COURT: Thank you, Ms. Rundlet.

Mr. Skaggs.

Plaintiffs' Response

MR. SKAGGS: Thank you, your Honor.

May it please the Court:

It is an honor and a privilege to argue this case. It's about first principles of our nation, it's about the essential place of representative institutions in our constitutional scheme.

We know the story of Ben Franklin as he was leaving the last session of the constitutional convention and was asked by a lady in the streets of Philadelphia: What kind of government have we got?

And Mr. Franklin answered: A republic, madam, if we can keep it.

Your Honor, this case is about keeping the republic.

I am here as a lawyer, but I can't forget 18 years of experience as a legislator, which really brought home to me the fundamental wisdom of the founders in setting up the republican form of government we enjoy as a nation. Sadly, that republican form of government here in Colorado has suffered great injury.

Contrary to the defendant's assertion, this is not a case that makes a frontal attack on the initiative process of the state Constitution; rather, it is a challenge to one constitutional amendment, the so-called Taxpayer Bill of Rights.

That amendment fundamentally restructured state government. It stripped the legislature of its plenary power to tax, and in the process it undermined its power to legislate and fulfill its other republican responsibilities.

We are told plaintiffs face some high hurdles. We've already talked about **Luther** and **Pacific Tel & Tel**. They may be in the way; however, we will show why that precedent simply doesn't tie in this case.

On the other hand, there are ample precedents for challenging an amendment to the state Constitution passed by initiative if it is unconstitutional. Twice before the United States Supreme Court has done so. In the cases of **Romer vs. Evans** with regard to Amendment 2 and **Lucas vs. Forty-Fourth General Assembly** with regard to a redistricting scheme adopted by initiative.

These cases demonstrate that a majority of voters may not use the initiative process to achieve an unconstitutional end. That is plaintiffs' position in this case.

Today we're concerned about the threshold issues raised by the defendant's motion - standing and justiciability. I'll address those in due course. But,

in sum, I think the plaintiffs are entitled to their day in court on the merits, your Honor. They have standing under applicable precedent. Their claims of constitutional and statutory violations are not barred by any doctrine of judicial forbearance.

Let me deal with standing, your Honor, which came up in your questioning with Ms. Rundlet.

As your hypothetical indicated, I think the question may first be posed in the reverse; that is, if the Court were to accept the defendant's standing argument, it would produce an untenable result. Neither these plaintiffs nor any Colorado citizens would be able to challenge the exercise of the initiative process that abolish the state's republican form of government.

We've perhaps grown too accustomed to TABOR. But what if, as the Court has suggested, the legislature itself had been abolished and the powers transfer -- perhaps the defendant would like that, but surely those citizens could be heard to raise a challenge.

These plaintiffs have standing to challenge the less dramatic but no less unconstitutional impact of TABOR on state government.

Let me first point out that the standing issue is, as the Court's questions have indicated, I think inextricably tied to the plaintiffs' claims, particularly those under the Enabling Act. The Enabling Act claim, under the Tenth Circuit's decision in **Branson vs. Romer**, really can do double duty here dealing

with standing as well as justiciability. In **Branson** the Tenth Circuit found standing of interest in citizens and entities to enforce provisions of the Colorado Enabling Act.

THE COURT: Mr. Skaggs, I am struggling here with the fact that **Branson** predates the **Lance** case and **Raines**. Neither of those two cases are very helpful for plaintiffs on standing. I would like you to address **Lance** and **Raines** insofar as the legislator standing is concerned, because I think plaintiffs did not meet the defendant's arguments respecting **Raines** head on. I don't believe plaintiffs discussed **Lance** at all. From my reading of those two cases, they are problematic cases for plaintiffs on standing.

MR. SKAGGS: Well, let me, if I may, your Honor, address the **Raines** matter first. I am somewhat familiar with that since I was one of the plaintiffs in that case. Didn't turn out well for me then. I hope it turns out better for me today.

I think that all of the Supreme Court cases on legislator standing deal in one way or another with some divestment or diminution of legislative power. They also all involve some fight between the Legislative Branch, or factions within the Legislative Branch, as was the case in Raines, or a disagreement with the Executive. That's not the case here. TABOR didn't just dilute the power of the General Assembly, it eliminated it.

The defendant certainly argues, understandably, that Raines controls. But in the Raines decision the

Court explained that its tough treatment of standing in that case was largely because the case involved an inner branch fight. At pages 819 and '20 the Court says, quote, "Our standing inquiry has been especially rigorous when reaching the merits of the dispute when it would force us to decide whether an action taken by one of the other two branches of the federal government was unconstitutional. In other words, Raines-type cases are predicated on a situation where the power sought to be vindicated in the Article III branch is exclusively within the Article I branch itself. By that reason a legislator loses a vote -- who loses a vote in his Article I environment cannot try to reclaim it with the help of Article III courts."

What was lost in our case, your Honor, is not a vote, but rather the fundamental power to vote in the first place on any matter having to do with taxation.

As importantly, **Raines** goes to some pains to distinguish but does not overrule the decision on legislator standing found in **Coleman vs. Miller.**

Coleman was, as your Honor knows, a case dealing with vote nullification. While that makes **Coleman** a closer case to ours, I think, the facts here are much more compelling.

Here, rather than a narrow or a single instance of vote nullification, there has been a complete elimination of Colorado's legislators' right to conduct a vote on taxes. Voting here isn't diluted, it's eliminated.

The **Raines** court noted several other factors that differentiate it from our case. In **Raines** the issue, as I say, was diminution, not for one time nullification of power that was the case in **Coleman**. And that point was really reinforced by Chief Justice Rehnquist in footnote No. 7 in **Raines.**

In that opinion at page 823 the Court analyzed the practical import of **Coleman** as turning on whether legislative action did or did not go into effect.

Here of course TABOR completely precludes legislative action, a circumstance that should make **Coleman's** reasoning apply *a fortiori*.

The **Raines** Court also gives weight to the fact that the legislator plaintiffs there had other recourse. They could always try to repeal the Line Item Veto Act.

Our legislator plaintiffs have no such recourse. **Lucas** pointed out that it is no recourse for plaintiffs to go back to the voters to try to get an amendment reversed to get the voters to change their minds. That simply is not a remedy for one whose constitutional rights have been infringed.

Finally, the **Raines** Court foreshadowed the successful challenge to the line item veto that followed the next year in **Clinton vs. New York**. It recognized that the challenge in **Raines** really wasn't going to be the last shot at the constitutionality of the Line Item Veto Act.

THE COURT: Why didn't you spell out the argument you just spent three minutes giving me now in your brief?

MR. SKAGGS: Well, an excellent question.

THE COURT: That was a much better place to have put it.

MR. SKAGGS: I wish that we had, your Honor. As with cases of this complexity, I think we've continued to think and analyze and review the applicable case law, and welcome the chance to have presented it to your Honor this afternoon.

THE COURT: In terms of the citizen standing issue, the **Lance** case has some pretty broad language, and I want to hear from you, from plaintiffs, how it is that the citizen plaintiffs in this case are bringing something other than the undifferentiated generalized complaint or grievance that the **Lance** Court said, and this defendant has pointed out, does not give standing to such citizen plaintiffs to bring the claim.

MR. SKAGGS: Your Honor, I think we would join the issue there by relying on **Largess**. The Supreme Court obviously had counseled that the **Flast** decision, **Flast vs. Cohen**, should receive a narrow construction. A few constitutional predictions are like the Establishment Clause. We think in fact the Guarantee Clause involves a similar situation. And if I may quote to the Court from the First Circuit's opinion in **Largess**, it cited **Flast** for the following proposition, and I quote:

"The circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim. If the plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry, which distinguished between concrete injuries and injuries that are merely abstract or undifferentiated, might well be adjusted to the nature of the claimed injury."

Of course there, your Honor, the Court went ahead to deal on the merits with the Guarantee Clause claim, including speaking to the question of manageable standards, examining what the republican form of government clause means and how it might apply to the facts of that case.

So I think our case is much more like **Largess** and really looks at the same kind of standing question that the Court dealt with in favor, if you will, of the plaintiffs in that case, and would be the same here for finding standing for our citizen plaintiffs.

Like **Largess**, we think -- and as the Court's questions to Ms. Rundlet pointed out, we may well have factual matters that will bear on this particular question that will be elicited on the merits, and the Court may wish to reserve final ruling on the motion to dismiss or allow the defendant leave to raise it again after we are heard on the merits.

THE COURT: Are there separate grounds for standing for the educator plaintiffs in your case?

MR. SKAGGS: To be honest, your Honor, we didn't try to explicate among our citizen plaintiffs different sorts of injury that they have suffered. I think it may well be developed in a hearing on the merits that educator plaintiffs have endured particular disadvantage because of the sequence of events flowing out of TABOR.

Ironically, or perhaps very relevantly, of course the defendant has raised the very question of whether TABOR has prevented the legislature from doing its job in funding education in its notice of appeal in the state court proceedings in **Labato.**

If I may, your Honor, proceed to questions of justiciability.

THE COURT: Yes, please.

MR. SKAGGS: As has already been noted in your dialogue with Ms. Rundlet, we believe that the Enabling Act claim that we have brought provides an independent basis for standing and justiciability. The Enabling Act imposes an independent statutory requirement for Colorado to have a republican form of government. I won't recite the provisions of the Enabling Act, they have been cited in our Complaint and brief. But it involves an irrevocable obligation on the people of Colorado and provides a standalone basis for the adjudication of plaintiffs' claims. In effect, we ask the Court to engage in pretty much a standard garden variety matter of statutory

interpretation and enforcement under 28 U.S. Code 1331.

Also pertinent to the questions that were raised earlier, your Honor, in **Japan Whaling**, 478 U.S. at 230, Justice White distinguished that case from cases implicating the political question doctrine, a statutory case, saying, and I quote, "As **Baker** plainly held, however, the courts have the authority to construe treaties and executive agreements. And it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."

Defendants claim that somehow incorporation of Article IV, Section 4 language in the Enabling Act automatically subjects it to political question doctrine challenge. And for the sake of brevity, your Honor, if I may refer to the political question doctrine hereafter as "PQD" just to save a little time.

THE COURT: You may.

MR. SKAGGS: As I will discuss in a few minutes, PQD ought not even to apply to our constitutional claim. In any case, defendant offers no authority for the proposition that the Enabling Act runs afoul of PQD because it happens to include a phrase that also shows up in Article IV, Section 4. The Enabling Act dealt with a whole range of requirements for statehood, not just that one provision.

The Tenth Circuit in **Branson vs. Romer** shows that an Enabling Act claim can be dealt with as standard statutory enforcement.

THE COURT: **Branson** was not a Guarantee Clause.

MR. SKAGGS: No, sir, it was not. It was a trust case, but I don't think there was anything about the trust case aspect of it that suggests that other provisions of the Enabling Act wouldn't be subject to standard statutory interpretation and enforcement.

Defendant is simply not correct in suggesting that **Pacific Tel & Tel** addressed any Enabling Act question. That's evident from the underlying Oregon Supreme Court decision, and it is evident from Chief Justice White's opinion itself.

Let me go on to the broader political question --

THE COURT: Before you do that, with respect to the PQD, I asked this question of Ms. Rundlet earlier, is it the defendant's burden to come forward and establish the doctrine applies in one or more of the six **Baker** tests or does the plaintiff have the burden of coming forward and establishing the doctrine does not apply in any of the six tests?

MR. SKAGGS: We would certainly prefer for it to be the burden of the defendant, your Honor. I have not researched that question, so I don't want to offer an opinion that is not properly informed.

THE COURT: All right. Go ahead.

MR. SKAGGS: In addressing PQD I think it's useful to start with a policy that underlies the doctrine. As the decisions have pointed out, it's

really all about separation of powers. The Court should refrain from encroaching on the jurisdiction and competency of a coordinate branch of government, whether the Executive or the legislature. That is, as Justice Brennan explained in **Baker vs. Carr**, PQD is a way of implementing separation of powers doctrine.

Justice Brennan made another helpful comment about cases where the specter of PQD is raised. He advised we should be aware of convenient but misleading, quote, "semantic cataloging," unquote. That is to say, not all or even most cases with political overtones involve political questions within the meaning of the PQD.

Certainly any case in which a court examines the constitutionality of a law has such overtones, because it necessarily questions the work of the legislature. Such cases do not implicate political question doctrine. This is just such a case.

I think it would help to differentiate between cases like ours which call on the Court to interpret the Constitution and decide what it means and the usual PQD case where a court is being asked to referee a dispute between the other political branches.

These cases share a common characteristic. They involve what might be called derivative or operational constitutional issues. For example, what are the practical boundaries of a provision such as the foreign affairs power, derived from the

Constitution, when it is being implemented in operation of the government? Is the President exercising his commander in chief power properly? Is Congress exercising its legislative authority properly?

Then, your Honor, there are cases like ours simply requiring a decision about what a provision of the Constitution means. They do not involve any conflict in any implementation of that provision by the Executive or the Legislative Branch.

These cases address a primary or similar question of constitutional interpretation: What's entailed in the right to the bear arms. What's the reach of the necessary and proper clause.

No separation of powers issue. No PQD issue.

Certainly this type of case often has an impact on Executive and Legislative decisions, because it determines their validity. But for purposes of PQD analysis, they are not viewed as intruding on exclusive constitutional prerogatives of a coordinate branch.

By comparison, let's examine our case. There is no coordinate branch to be concerned about. The functional equivalent here arguably might be the plurality of the citizenry of the state that voted for TABOR. But they are not a branch of government. We have no separation of powers issue. And we, therefore, do not have a PQD case.

Here we have a classic case for constitutional interpretation: What does the Guarantee Clause guarantee? What does it mean?

I am afraid, as earlier discussion indicates, that we may have to deal with the origins of Guarantee Clause jurisprudence in **Luther vs. Borden**. As we discussed already, at issue there was a determination after an insurrection in Rhode Island of which state government was to be treated as legitimate. The Court in **Luther** saw the manner and means by which the United States was obligated to enforce the Guarantee Clause in those very unique circumstances as a question to be left to the political branches.

The law professors' *amicus* brief helpfully argues that the broad rhetoric of **Luther** extends far beyond what the facts of the case would justify. They make the important point that there is simply no reason to embrace as black-letter law the proposition that **Luther** requires all Guarantee Clause cases to be treated as nonjusticiable.

And of course, as the Court indicated, Justice O'Connor's elaboration on Guarantee Clause jurisprudence in the **New York** case steps right up to, but then doesn't quite reach the conclusion in that case that such cases are justiciable, but certainly cites other cases preceding **Luther** in which Guarantee Clause claims were litigated, and cites more contemporary authority, including the work of one of our *amicus* professors, to indicate that the law here is evolving.

The extension of the **Luther** doctrine in **Pacific Tel & Tel** should be similarly limited to the facts in that case. There **Pac Tel & Tel** claimed that the mere addition of an initiative provision to the Oregon Constitution infected and rendered all state government illicit, including the tax provision that it was fighting. Given this challenge to the legitimacy of the state as a whole, **Pac Tel & Tel's** reliance on **Luther** actually makes a little bit of sense. But for our purposes it proves way too much.

We do not question the legitimacy of Colorado government. To the contrary, we seek to restore an essential component of it. What remains of state government in Colorado after TABOR is not illegitimate, it's just insufficient.

We have addressed in our brief the customary PQD analysis set out in **Baker vs. Carr**, the six tests. Our Professor *amicus* have done an excellent job of doing that as well, your Honor. So with the Court's leave, I don't need to, I hope, but I am happy to go through all six tests.

THE COURT: I would like you to address the second one.

MR. SKAGGS: I have a hard timekeeping them all straight.

THE COURT: As did I when I was preparing for this hearing.

MR. SKAGGS: The second test has to do with judicially manageable standards for resolving

whether TABOR in this case violates Colorado's duty to provide a republican form of government.

The question of whether TABOR violates the state's duty I think can be resolved through traditional judicial analysis. This is probably a question to be explored on the merits. But, for example, various portions of the Federalist papers, and other historical authority, will afford guidance to the Court.

The question of manageable standards, your Honor, is simply and typically subsumed in any case that decides the constitutionality of a state law.

Let me point out to the Court, if I may, and by way of concluding my remarks before answering any more of the Court's queries: State courts have been quite willing to interpret the Guarantee Clause. Our neighbors in Kansas and Oklahoma in the **VanSickle** and **Initiative 348** cases respectively address claimed violations of the Guarantee Clause. In **VanSickle** the claim had to do with the Executive's necessary powers under a republican form of government. In **Initiative 348** it was a question of the encroachment on the legislature, and the Oklahoma Court there recognized the fundamental nature of the legislature's taxing power.

THE COURTROOM DEPUTY: You have five minutes.

MR. SKAGGS: The Oregon Supreme Court also addressed that dimension of the Guarantee Clause before **Luther** in **Kadderly vs. Portland**. It made

short work there, by the way, of **Luther vs. Borden**. But went on to interpret the Guarantee Clause, noting that one of its functions is to prevent the people of the several states from abolishing a republican form of government. Citing Madison's writing of the Federalist papers. And concluded that the representative character of Oregon's government remained because the powers of the legislature had not been, quote, "materially curtailed," unquote. The material curtailment question there I think is also instructive as to the Court's question about manageable standards.

And of course Colorado's own Supreme Court addressed the Guarantee Clause in **Morrissey vs. State** in 1998. There Chief Justice Bullock found that an amendment to the state Constitution, quote, "usurped the exercise of representative legislative power," unquote, contrary to the Guarantee Clause.

Concededly there the Court ended up relying on an Article V argument rather than the Guarantee Clause, but it did say: We refer to Article IV, Section 4, to explain, quote, "the importance of the legislative role in our system of government," unquote.

Against this backdrop of state court rulings, it is ironic that a federal court, your Honor, is urged to refrain from taking a Guarantee Clause case under formulae and application of old PQD cases, invoking the broad language of those cases, but disregarding their factual limits.

Should federal courts go silent on the one provision of the United States Constitution that is intended to ensure that state governments meet minimum republican requirements? Surely we would not want the federal courts to leave enforcement of a federal requirement only to the state courts. What an old result that would be.

Plaintiffs therefore pray, your Honor, that you deny the motion to dismiss, allow their case to proceed on the merits, and prevent this, to assure Mr. Franklin that they are keeping a republic.

Thank you, your Honor.

THE COURT: Thank you, Mr. Skaggs.

Ms. Rundlet.

Defendant's Reply

MS. RUNDLET: Your Honor, I would like to address a few points made by the plaintiffs' counsel.

Plaintiffs' counsel distinguishes the **Branson** case and legislative standing cases based on the fact that this is an inner branch dispute between the legislature and the people.

But based on the amendment of the Constitution, the people are a part of the legislature and the representatives are the General Assembly. That is one of the reasons why this attack is on initiatives as a whole rather than just on TABOR. Because when you have people acting as a law-making body, they

are acting as the legislature, so you still do have a legislature, an Executive and a judiciary branch.

Plaintiffs' counsel argues that there was no Enabling Act claim in **Pacific States**. But that's incorrect if you read the actual decision. The Enabling Act was a claim that was decided in **Pacific States**, and it was dismissed, as was the equal protection claim.

As **Baker** explained, sometimes when the issues and the claims are too enmeshed in the Guarantee Clause in a republican form of government, they too become political questions. And that is what you have in this case. The Enabling Act is too enmeshed in the political question doctrine. It requires to Court to determine what a republican form of government is, and there are no judicially manageable or discoverable standards to make that determination.

Plaintiffs' counsel has not cited to you any case that suggests there are manageable standards. Whether or not state courts have been willing to look at this issue is irrelevant to the Court's jurisdiction. This is a court of limited jurisdiction and states are courts of general jurisdiction, they can decide whether to hear this case, but under the laws here, this Court cannot hear this case.

Plaintiffs have not met their burden of establishing the Court's jurisdiction.

Plaintiffs' counsel also refers to the *amicus* brief. The *amicus* professors are simply sharing the same

political views that plaintiffs have. But if you actually look at, for example, Professor Chemerinsky's Law Review article, the Guarantee Clause should be justiciable. But in 1994, and cited in our brief, you will see the very first page of his article tells you what the law is. The law is that the Guarantee Clause is a political question that is nonjusticiable. He then spends the rest of the article advocating reasons why he would like to see that change, but that doesn't change the fact that it is a nonjusticiable issue, and that can't be decided by the Court.

Plaintiffs have failed to offer sufficient reasons for overturning over a hundred years of Supreme Court precedent and finding that the Guarantee Clause claim in this case is justiciable.

This Court cannot decide plaintiffs' claims without violating the separation of powers doctrine, because clearly this issue has been committed to Congress and it is not for the courts to decide.

Thank you.

THE COURT: Thank you, Ms. Rundlet.

All right. The defendant's motion to dismiss, ECF No. 18, will be taken under advisement. A written order will issue.

Is there anything further from the plaintiffs?

MR. SKAGGS: No, your Honor. Thank you very much.

THE COURT: Thank you.

Anything further from the defendant?

MS. RUNDLET: No, your Honor. Thanks.

THE COURT: Thank you.

I compliment both counsel on an excellent presentation, and the time that you spent preparing for it is appreciated. Thank you very much.

(Proceedings concluded at 3:15 p.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 24th day of February, 2012.

s/Gwen Daniel