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AUDIOTAPED ORAL ARGUMENTS HELD  
BEFORE THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT  
September 23, 2013

Re: Kerr v. Hickenlooper  
Case No. 12-1445

APPEARANCES:

For the Plaintiffs-Appellees:

David E. Skaggs, Esq.  
Michael F. Feeley, Esq.  
Herbert L. Fenster, Esq.

For Defendant-Appellant:

Daniel D. Domenico, Esq., Solicitor General

1                   CHIEF JUDGE BRISCOE: Our first case for  
2 argument this morning is Kerr v. Hickenlooper, Case  
3 No. 12-1445. We're ready to hear from the  
4 Appellants. And I understand each side has 25  
5 minutes.

6                   MR. DOMENICO: May it please the Court, I'm  
7 Dan Domenico, Solicitor General, appearing on behalf  
8 of Governor John Hickenlooper.

9                   Each of the 50 states draws a different set  
10 of lines dividing the power of government between  
11 the people and those who represent them.

12                   The lines drawn in Colorado certainly  
13 aren't always easy on our legislature.

14                   Article 5 of our Constitution reserves to  
15 the people the power to amend, reject, approve,  
16 superseded, otherwise undo anything that our  
17 legislature might choose to do.

18                   Our Constitution, famously, is among the  
19 easiest in the country to amend. It limits  
20 legislative discretion and authority in countless  
21 ways on countless topics ranging from whether or not  
22 we can accept the Olympics to defining felonies to  
23 banning the detonation of nuclear bombs.

24                   JUDGE LUCERO: Could the population in  
25 Colorado by amendment abolish the legislature?

1           MR. DOMENICO: Your Honor, they have the  
2 power to do it. I think that Article 5 says that  
3 the legislature is acting on behalf of the people.  
4 So the delegation is from the people to the  
5 legislature.

6           More to the point though, for purposes of  
7 this Court, at this point until the Supreme Court  
8 reverses Pacific States, in particular, the Supreme  
9 Court has told us that it's not the province of the  
10 federal courts to decide when a state may have  
11 crossed the line from republican . . .

12           CHIEF JUDGE BRISCOE: But isn't Pacific  
13 States a lot different than our case in that there  
14 they were doing away with the whole procedure of  
15 initiative?

16           MR. DOMENICO: Your Honor, I don't think  
17 Pacific States is distinguishable in any relevant  
18 way. Pacific States had a number of claims. The  
19 Court lists the six claims.

20           There was one very broad claim that the  
21 initiative process, period, was unconstitutional.

22           There was also a narrower claim that the  
23 particular action taken, a tax measure, was  
24 unconstitutional. And there was also an Enabling  
25 Act claim just like there is here.

1           The Court could have, I assume, written an  
2 opinion that said, well, what we're going to do here  
3 is empower the courts to draw fine distinctions and  
4 say well, this particular tax measure is okay under  
5 the Guarantee Clause, but we'll leave it to future  
6 courts to decide when the state may have gone too  
7 far.

8           But the Pacific State's court didn't do  
9 that. It very clearly in the very first paragraph  
10 of the opinion says we're answering two questions  
11 here.

12           Is it the province of the federal courts to  
13 decide when a state may have lost its Republican  
14 Form? And is it the province of the federal courts  
15 to enforce the Guarantee Clause?

16           The answer to both of those questions was  
17 no. Unless the answer becomes yes to those  
18 questions, that is binding in this case.

19           JUDGE LUCERO: But that's not the question  
20 before us, correct? The question before us is  
21 standing.

22           MR. DOMENICO: Well, certainly before you  
23 get to justiciability, you have to address the  
24 jurisdictional question of standing. So, I mean,  
25 the both of them, the answer is yes.

1           JUDGE LUCERO:  So the answer to my question  
2  is --

3           MR. DOMENICO:  The answer is the initial  
4  question certainly is standing and I'm happy to  
5  discuss standing.

6           CHIEF JUDGE BRISCOE:  Are you conceding it?

7           MR. DOMENICO:  Absolutely not, no.  We  
8  absolutely don't conceded that any of the plaintiffs  
9  have standing.  The district court relied on one  
10 particular theory, legislator plaintiff standing.

11          JUDGE LUCERO:  Let me ask you this.  If, by  
12 a constitutional amendment, the people of Colorado  
13 stripped the legislature of the power to raise  
14 taxes, period, that's out of their jurisdictional  
15 purview.  Would the legislature have standing to  
16 challenge that issue before the federal courts under  
17 the enabling clause?

18          MR. DOMENICO:  I don't think so.  There's  
19 no precedent for that, your Honor.  I mean, state  
20 constitutions, the federal constitution, what they  
21 do, their nature is to strip legislatures of the  
22 authority to do something.

23          So, for example, this past year Colorado  
24 stripped the legislature of the authority to ban,  
25 prohibit marijuana possession and use.

1 I know of no precedent that suggests that a  
2 legislator who feels that they should have that  
3 authority back would have standing under Coleman or  
4 Raines. Raines is very clear that legislator  
5 standing is a very --

6 CHIEF JUDGE BRISCOE: But isn't the  
7 stripping of power here much more broad in that  
8 there is no authority to appropriate?

9 MR. DOMENICO: No, it's actually not much  
10 more broad. Judge Lucero's example, where if the  
11 state had simply said, no authority to raise taxes  
12 at all, would be equally broad just on a different  
13 topic. The legislature has no authority now in  
14 Colorado over marijuana prohibition.

15 What TABOR does is it requires the  
16 legislature -- it leaves in place a significant role  
17 for the legislature in taxation policy. Before  
18 TABOR, without TABOR in order to raise taxes --

19 JUDGE LUCERO: So you wouldn't concede that  
20 the complete stripping, 100 percent stripping of the  
21 power of the fisc, that is the tax-raising power of  
22 the fisc would not -- you don't even concede that  
23 that would give the legislature or some portion  
24 thereof standing?

25 MR. DOMENICO: Raines is very clear on the

1 narrow scope of legislator standing. Three things  
2 have to happen under Raines for legislators in their  
3 official role asserting a diminution in power to  
4 have a standing.

5 One, they have to vote for a specific bill.  
6 Two, they have to have a sufficient number of votes  
7 to pass that bill. And three, it has to then have  
8 been nullified.

9 I suppose it would be possible if after --

10 JUDGE LUCERO: Is Raines applicable to this  
11 situation? I mean, I understand the law generally  
12 is, but I mean, are the facts analogous in any way?

13 MR. DOMENICO: I think they're quite  
14 analogous. The exact same types of arguments were  
15 made by the plaintiffs in Raines.

16 They argued that what had happened with the  
17 line item veto was that their entire relationship  
18 between the legislative and executive branch had  
19 been changed. I think the lower court had held that  
20 they had become immediately subservient to the  
21 President.

22 Ultimately, of course, in Clinton v. City  
23 of New York, the Supreme Court agreed on the merits.

24 JUDGE LUCERO: But that was a federal case,  
25 correct? I mean, it was federal.

1 MR. DOMENICO: Sure.

2 JUDGE LUCERO: In this case it isn't. It's  
3 a state case in which members of the legislature are  
4 asserting that they have standing to raise the --  
5 I'm not speaking to the merits.

6 MR. DOMENICO: Sure.

7 JUDGE LUCERO: That's not in our bailiwick.  
8 But here the assertion is that at least the federal  
9 court should hear their case.

10 MR. DOMENICO: Absolutely. And that's  
11 exactly the same argument that the plaintiffs made  
12 in Raines.

13 JUDGE LUCERO: But Raines didn't involve  
14 the enablement clause.

15 CHIEF JUDGE BRISCOE: Raines didn't  
16 overturn Coleman.

17 MR. DOMENICO: No, it didn't, but it made  
18 very clear that it applies only in limited  
19 circumstances that don't apply here.

20 CHIEF JUDGE BRISCOE: When your vote is  
21 nullified.

22 MR. DOMENICO: When you allege a specific  
23 bill was voted on that the plaintiffs --

24 CHIEF JUDGE BRISCOE: It doesn't say that  
25 when it talks about Coleman.



1           MR. DOMENICO: Well, your Honor, I urge you  
2 to look at page 824. It says the reason the  
3 plaintiffs in Raines fail is that, one, they didn't  
4 allege that they voted for a specific bill, two,  
5 that they had sufficient votes to pass it, and  
6 three, it was then nullified.

7           This is precisely the situation the  
8 plaintiffs were in --

9           JUDGE SEYMOUR: Nor can they allege the act  
10 will nullify their votes in the future in the same  
11 way that the votes of Coleman legislatures had been  
12 nullified. So what's the difference --

13          MR. DOMENICO: That's right.

14          CHIEF JUDGE BRISCOE: What's the difference  
15 between TABOR nullifying the votes of the  
16 legislature on tax issues and Coleman?

17          MR. DOMENICO: The difference is the  
18 legislature had proposed -- in Coleman, of course,  
19 it was a little bit different because it was a -- it  
20 was ratification of a constitutional amendment.

21          But essentially what happened in Coleman  
22 was, the legislature had a majority of votes to  
23 enact -- to adopt, ratify the amendment. And it was  
24 undone.

25          Here we would be in that situation if the

1 plaintiffs could point to a particular -- if the  
2 plaintiffs could point to an instance of the  
3 legislature passing or even maybe alleging that they  
4 right now have a majority to pass.

5 CHIEF JUDGE BRISCOE: Why do they have to  
6 do that when they're not talking about particular  
7 tax? They're talking about their power to act.

8 MR. DOMENICO: That's exactly what Raines  
9 said. That's what the complaint was in Raines.  
10 We're talking about our power to act.

11 CHIEF JUDGE BRISCOE: The circumstances  
12 were totally different.

13 MR. DOMENICO: They weren't in any relevant  
14 way. I mean, Raines is very clear. Coleman is  
15 limited to an actual vote on an actual measure that  
16 is undone, nullified.

17 What TABOR does again is it essentially  
18 gives the people a veto over tax measures just like  
19 the line item details --

20 JUDGE LUCERO: Is that correct? Does it  
21 give the people a veto or does it require an  
22 affirmative act on the part of the people?

23 MR. DOMENICO: Well, before TABOR, without  
24 TABOR, what was required to pass a tax increase was  
25 these plaintiffs would have to convince a majority

1 of their colleagues in both houses to support it and  
2 then it would be subject to approval or disapproval  
3 of the Governor.

4 Here, you have essentially the same thing.  
5 The legislature still -- both houses have to pass it  
6 and then the approval or disapproval is there. It's  
7 just the people have to approve or disapprove.

8 So essentially it is. The mechanism is  
9 slightly different. Article 5 uses essentially --  
10 CHIEF JUDGE BRISCOE: Which is a much  
11 greater burden, isn't it? I mean, doesn't TABOR  
12 just basically handcuff the legislature?

13 MR. DOMENICO: I don't think so, your  
14 Honor. The legislature has proposed alterations in  
15 2005 to parts of TABOR. The people have voted for  
16 it. TABOR applies to local governments. They have  
17 a very strong record of both --

18 CHIEF JUDGE BRISCOE: So the legislature  
19 should just keep nibbling away at TABOR? That's the  
20 answer here? They can fix their own problem?

21 MR. DOMENICO: Well, that's what the courts  
22 have said in Risser, in Largess. That is exactly  
23 right, that just because it's a little bit harder  
24 doesn't make us unrepugnant. And again --

25 JUDGE LUCERO: Let me posit this question

1 for you because I'm trying to test first principles  
2 of standing as to your position on it.

3 MR. DOMENICO: Sure.

4 JUDGE LUCERO: Let us assume that the  
5 people adopt an amendment essentially making  
6 Hickenlooper a dictator. Is there standing when a  
7 structural change has been made in government which  
8 the legislature contends conflicts with its enabling  
9 clause -- with the enabling clause.

10 MR. DOMENICO: Under Raines until --

11 JUDGE LUCERO: Just answer that question  
12 first, because I'm trying to find out when you think  
13 there's standing.

14 MR. DOMENICO: As soon as Governor  
15 Hickenlooper started dictating, then there would be  
16 standing. That's the difference between Raines and  
17 Clinton v. City of New York.

18 As soon as the President used this  
19 structural power that was alleged to be  
20 unconstitutional, then it created standing. But  
21 until he actually uses that power in a way that  
22 causes a concrete injury, simply alleging diminution  
23 in and power isn't effective. So for legislators --

24 JUDGE LUCERO: So you concede that at some  
25 point there is that?

1 MR. DOMENICO: Sure, absolutely.

2 JUDGE LUCERO: That's a bit of a relief  
3 because I couldn't figure out when you thought there  
4 might be standing.

5 MR. DOMENICO: When the allegedly  
6 unconstitutional power is used to nullify something  
7 the legislature has done, then you go from Raines to  
8 Coleman.

9 CHIEF JUDGE BRISCOE: And that's what you  
10 would require is a nullification as opposed to  
11 absolute prohibition from the outset, because isn't  
12 that what TABOR does? You can't go there,  
13 Legislature. This is the line and you cannot cross  
14 it.

15 MR. DOMENICO: Again, that's Judge Lucero's  
16 hypothetical. What it says is, in order to pass a  
17 tax increase, you have to get approval from the  
18 voters.

19 Now, if you want to challenge that power  
20 under Raines, just like if you want to pass in  
21 Raines an appropriations bill, in that case they had  
22 structurally changed -- the allegation was,  
23 ultimately that the Supreme Court agreed with --  
24 that they had structurally changed in an  
25 unconstitutional manner the relationship between the

1 legislature and the President.

2 Here that is exactly the same argument and  
3 the Supreme Court said, that's not enough. You have  
4 to actually point to a specific measure that would  
5 have gone into effect, but that this allegedly  
6 unconstitutional power in real life affected.

7 CHIEF JUDGE BRISCOE: So if there is a  
8 proposed bill in the Colorado Legislature that would  
9 want to raise funding for education, you just have  
10 to float that balloon even though you know it's not  
11 going to go anywhere under TABOR. Is that what you  
12 have to do?

13 MR. DOMENICO: Well, you don't know that  
14 it's not going to go anywhere. It's not that you  
15 have to try to violate (inaudible).

16 CHIEF JUDGE BRISCOE: Well, doesn't TABOR  
17 tell you that, that it's not going to go anywhere?

18 MR. DOMENICO: No, it just tells you that  
19 you have to get approval of the voters in order to  
20 have it go anywhere. And so, until they've actually  
21 tested that and the power has been used to nullify  
22 something they did, then --

23 CHIEF JUDGE BRISCOE: So this lawsuit is  
24 premature then?

25 MR. DOMENICO: That's exactly right, your

1 Honor. Unless they were to point to something that  
2 TABOR actually impacted and they specifically  
3 disclaim any effort to do that.

4 Page 44 of the brief says, whether or how  
5 these powers, if the federal courts were to  
6 rearrange them, whether or how they would be used  
7 any differently is not the issue. They simply want  
8 restoration of what they view as constitutional  
9 government. That is simply a Lance v. Coffman  
10 desire, abstract desire to have the law followed.  
11 It's not a concrete injury.

12 Page 37 makes the same point when they try  
13 to point to their concrete injury as simply the  
14 deprivation of what they view as constitutional  
15 government. That is inadequate to assert a case or  
16 controversy under Article III.

17 So not only did none of the legislators --  
18 for essentially the same reasons, none of the  
19 plaintiffs have standing. Until this power that  
20 they're complaining about is actually used to impact  
21 things, then there is no standing.

22 We are in the situation of Raines v. Byrd.  
23 Certainly, if this power came into effect -- I mean,  
24 a couple of years ago the legislature considered or  
25 at least a few legislators considered passing a tax

1 increase, precisely what the hypothetical you  
2 suggested, considered passing a tax increase.

3 Had that passed through the legislature and  
4 then been voted down, nullified, then I think you  
5 would be in the Coleman situation and you'd  
6 probably, depending on the details, would also be in  
7 the Clinton v. New York situation where someone on  
8 the potential receiving end might have had a claim.

9 So that certainly it's not that nobody will  
10 ever have standing under TABOR, but it --

11 JUDGE LUCERO: So you're saying that the  
12 legislature, through this mechanism, could  
13 manufacture standing?

14 MR. DOMENICO: Sure. If what they want to  
15 do is raise revenue, they can try -- I don't think  
16 it's manufacture in the sort of sense of do  
17 something artificial. What they have to do is what  
18 the --

19 JUDGE LUCERO: I'm not proposing anything  
20 artificial. I'm just listening to what you're  
21 telling me.

22 MR. DOMENICO: Sure. What Raines teaches  
23 is that if you're concerned about a shift in power  
24 like this that diminishes legislative power, what  
25 you have to do is see if it actually -- wait until



1 it's actually used to diminish your power. So you'd  
2 go from Raines to Clinton v. City of New York or  
3 from Raines to Coleman.

4 JUDGE LUCERO: You're saying the  
5 legislature basically could not be a bunch of  
6 law-abiding folks and test the law -- challenge the  
7 law as unconstitutional. They've got to act like a  
8 bunch of outlaws. That is to say, contrary to the  
9 law, before they can get the courts to hear it.

10 MR. DOMENICO: No, that's not right, Judge  
11 Lucero.

12 JUDGE LUCERO: Where am I off the beat?

13 MR. DOMENICO: Sure. Think about again the  
14 comparison between Raines and then Clinton v. City  
15 of New York. The legislature wasn't required by  
16 Raines to essentially ignore the law. They were  
17 required to pass their bill and then if the  
18 President used this allegedly unconstitutional  
19 power, then it would actually cause a concrete  
20 injury.

21 CHIEF JUDGE BRISCOE: Here under TABOR they  
22 can never pass the bill. The language of TABOR, any  
23 new tax, and on and on, must have prior voter  
24 approval.

25 MR. DOMENICO: Maybe there's just confusion

1 about how it works. The way a tax increase would  
2 work --

3 CHIEF JUDGE BRISCOE: Apparently the  
4 legislators feel that it works in that fashion.  
5 Before they can do anything on the issue of  
6 taxation, they have to have prior voter approval.  
7 Is that right?

8 MR. DOMENICO: That is not how it works.

9 CHIEF JUDGE BRISCOE: Okay.

10 MR. DOMENICO: Before it can go into  
11 effect, there has to be prior voter approval. The  
12 way a TABOR tax increase would work is the  
13 legislature would pass a tax increase and then it  
14 would be put to a vote of the people after they pass  
15 it. And I apologize, that is how it would work. So  
16 it would work just like an appropriations bill under  
17 Raines.

18 The legislature passes the bill, and this  
19 is what happened in 2005, on kind of tweaking the  
20 revenue issues. The legislature passes an effort to  
21 raise taxes and then it goes to a vote of the  
22 people.

23 So what they have to do is not ignore the  
24 law. They have to comply with the law. And then if  
25 the people use that vote to nullify what the

1 legislature did, then I think you're out of Raines  
2 and you're into Coleman.

3 CHIEF JUDGE BRISCOE: I guess what we're  
4 dancing on is whether it's prior voter approval or  
5 just voter approval someday.

6 MR. DOMENICO: Exactly. And what prior  
7 means, the way it's been interrupted and the way  
8 it's been applied is prior to going into effect.

9 So the legislature can pass a measure and  
10 then it would be voted on by the people. So there's  
11 two ways now in Colorado to raise taxes. One is  
12 that process. The legislature votes, suggests a tax  
13 increase to the people, and then the people have a  
14 vote.

15 The other is essentially an initiative  
16 process where the initiative takes place, the  
17 initiative process, and then a vote. So both sort  
18 of the initial process is either an initiative or  
19 essentially a referendum under TABOR and then the  
20 vote and it's prior to going into effect.

21 So it's not true that the legislature has  
22 no role under TABOR. It's just that there has to be  
23 a vote of the people before --

24 CHIEF JUDGE BRISCOE: Would you admit they  
25 have a diminished role? It's not like it is in most

1 states. They have the power of the fisc and they  
2 pass bills saying, we are going to increase funding  
3 to higher education?

4 MR. DOMENICO: It's different. It's  
5 certainly different than in other states.

6 CHIEF JUDGE BRISCOE: And so their powers  
7 are limited?

8 MR. DOMENICO: Their powers are subject to  
9 a different check than they were before. If I can  
10 reserve the balance of my time?

11 CHIEF JUDGE BRISCOE: Sure. Thank you.

12 MR. SKAGGS: May it please the Court, Chief  
13 Judge Briscoe, David Skaggs appearing on behalf of  
14 the plaintiffs and with me at counsel table is  
15 Michael Feeley and Herbert Fenster.

16 CHIEF JUDGE BRISCOE: Good morning.

17 MR. SKAGGS: Good morning. Legislators,  
18 elected officials, citizens of Colorado have brought  
19 this action to vindicate and enforce the promise of  
20 the United States Constitution and the Enabling Act  
21 that the government of Colorado be and be maintained  
22 as a republican form of government.

23 The Colorado Taxpayer Bill of Rights by  
24 removing essential powers from the Colorado General  
25 Assembly violates that guarantee of a republican

1 form of government.

2 CHIEF JUDGE BRISCOE: How do you respond to  
3 his -- is it true that TABOR works the way he says  
4 it works, the legislature proposes a tax and then  
5 the people vote on it?

6 MR. SKAGGS: It may work that way, your  
7 Honor. That is, the legislature may refer a matter  
8 to the people but basically TABOR establishes a  
9 plebiscitary democracy in Colorado with regard to a  
10 whole range of issues that it covers, taxation,  
11 certain spending limits, requirements for refunds.

12 So the legislature's plenary powers that  
13 existed before and which we believe are absolutely  
14 requisite to a republican form of government have  
15 been deprived by TABOR.

16 JUDGE LUCERO: One thing that I failed to  
17 glean from the very, very good batch of briefs that  
18 we had before us was whether the Colorado  
19 Constitution was before Congress at the time of the  
20 passage of the Enabling Act or whether it was  
21 adopted after the Act.

22 MR. SKAGGS: Well, it was adopted after the  
23 Act and in compliance with the Act's requirement  
24 that Colorado have a Republican form of government.  
25 So the recitation in the Enabling Act --

1           JUDGE LUCERO: So the Congress has never  
2 actually officially passed in any way or reviewed in  
3 any the Colorado Constitution for constitutional  
4 purposes?

5           MR. SKAGGS: Well, the original  
6 constitution of the state had to be certified as in  
7 compliance with the Enabling Act, I believe, by the  
8 U.S. Secretary of State and that certification  
9 approved by the President of the United States at  
10 the time. So that was the review process.

11          JUDGE LUCERO: Who determines whether the  
12 certification should be granted?

13          MR. SKAGGS: I don't know, your Honor. I  
14 am pleased to address in sequence, I think the  
15 issues first that have been brought up already with  
16 counsel for the state, the question of standing.  
17 Under both the Enabling Act, which is a separate  
18 question and very distinguishable from the question  
19 of standing under our constitutional claim and  
20 likewise, should we get there, the justiciability  
21 issue both under the Enabling Act and under our  
22 constitutional claim.

23                I think this Court's holding in the Branson  
24 v. Romer case makes clear that we have standing  
25 under the Enabling Act.

1           In the Branson case, as the Court will  
2 recall, the challenge was to a change in the  
3 Colorado Constitution that allegedly violated the  
4 mandate for the use of the trust lands in Colorado  
5 for the benefit of education.

6           Here we have a violation of the Enabling  
7 Act alleged that would run contrary to the  
8 requirement for a republican form of government.

9           In Branson this Court stepped through all  
10 of the Lujan criteria for standing and concluded  
11 that, in effect, that there the district court's  
12 analysis of standing would hold.

13           In particular, that because of the Enabling  
14 Act violation they had and we have a supremacy  
15 clause violation as well and the Court there  
16 determined that there was essentially a private  
17 cause of action, analogy that was apt to establish  
18 standing for the plaintiffs in Branson.

19           In the constitutional claim in which  
20 perhaps Raines is implicated, I would call the  
21 Court's attention to this Court's holding and  
22 Initiative and Referendum v. Walker from 2006, an en  
23 banc decision in which this Court determined that  
24 there was standing by the plaintiffs in that case  
25 anticipating what was described as the chilling

1 effect of restrictions on their ability to pursue  
2 certain initiatives in, I believe, it was Utah.

3 And the Court there determined that for  
4 purposes of standing the validity of their  
5 constitutional claim, there a First Amendment claim,  
6 had to be assumed and that therefore, assuming that  
7 there was a constitutional violation that the  
8 plaintiffs there had standing under their  
9 constitutional claim.

10 The holding in Walker was reinforced by  
11 this Court the next year in Day v. Bond which says  
12 that Walker demands that we assume during the  
13 evaluation of standing that plaintiff will prevail  
14 on his merits' argument. That the constitutional  
15 violation alleged results in Article III standing,  
16 injury with sufficient concreteness and  
17 particularity.

18 Let me address because it took up a good  
19 deal of time in my colleague's conversation with the  
20 Court, the question of legislator standing, which is  
21 not the only basis, but it was the basis that the  
22 district court used.

23 In our view, Raines is simply inapplicable  
24 to the circumstances of this case. I happen to be a  
25 plaintiff in Raines in a former life and I'm



1 painfully familiar with the holding there.

2 CHIEF JUDGE BRISCOE: So this is your  
3 second coming?

4 MR. SKAGGS: God willing. But what was not  
5 yet discussed about Raines, which is absolutely  
6 critical is that that was a separation of powers  
7 issue. It was a conflict between different parts of  
8 the first branch of government that was asking the  
9 third branch of government to intercede with the  
10 second branch of government.

11 JUDGE LUCERO: Which is why I asked whether  
12 it's even relevant to our --

13 MR. SKAGGS: A classic separation of  
14 powers, political question, set of circumstances and  
15 importantly, along with the other things that were  
16 said by the opinion in Raines, which is not entirely  
17 a clear holding, that the legislators there -- I was  
18 one of them -- still had recourse to their  
19 colleagues to persuade them of the error of their  
20 ways. That's not here.

21 No legislator can go to the rest of the  
22 General Assembly under the circumstances of this  
23 case and say, let's get our taxing power back. It's  
24 gone.

25 CHIEF JUDGE BRISCOE: Well, what about the

1 discussion that we had with opposing counsel where  
2 he's saying, you know, you all can do what you need  
3 to do and whatever you want to do, you can go ahead  
4 and pass the revenue increase, trial balloon, if you  
5 will, and put it up to the vote of the people.

6 MR. SKAGGS: Your Honor, I don't think  
7 there's any requirement for standing purposes or  
8 otherwise for the General Assembly to go through a  
9 charade in order to establish the grounds for this  
10 case any more than --

11 CHIEF JUDGE BRISCOE: I mean, I'm sort of  
12 caught up on what I thought the facts were, as far  
13 as what TABOR requires.

14 MR. SKAGGS: TABOR gives alternative paths  
15 to a goal that it permits, which is voter approval  
16 of tax measures. That measure can get to them for  
17 approval either by referral from the General  
18 Assembly, which has no legal effect by itself, or by  
19 an initiative of the people, but ultimately this is  
20 a plebiscitary system for purposes of the policy  
21 issues that TABOR covers.

22 JUDGE LUCERO: Well, is it your position  
23 that the people of Colorado could not adopt a direct  
24 democracy as a state form of government and still be  
25 a republic?

1           MR. SKAGGS: Your Honor, they cannot do  
2 that. The Guarantee Clause and the Enabling Act  
3 both require a republican form of government and I  
4 think manifest from the writings of the framers of  
5 the Constitution in the historical context of their  
6 day that they contemplated state governments that  
7 were representative democracies in which the  
8 legislatures played a central role and had to have  
9 the power to tax.

10           Hamilton is clear. Without the power to  
11 tax, there is no effective government.

12           JUDGE LUCERO: And the power to -- and  
13 we're told by one of the briefs, the power to elect  
14 the United States senators at the time. And that  
15 certainly couldn't be done by plebiscite.

16           MR. SKAGGS: Your Honor, you know the early  
17 days of the republic are replete with various  
18 expressions both in the Constitution and in the  
19 Federalist Papers and in the commentaries of the  
20 time of the founders' mistrust of direct democracy.

21           This is offensive to our contemporary ears  
22 and population, but that was the system that was  
23 established and they thought for very good reason.

24           CHIEF JUDGE BRISCOE: Does that mean you  
25 can't have any initiative system?

1           MR. SKAGGS: Your Honor, no. And this case  
2 is very narrowly drawn to deal only with TABOR and  
3 its complete removal of a core power from the  
4 Colorado Legislature.

5           We do not challenge the initiative power  
6 generally except when it goes to something that is  
7 structurally central to the maintenance of  
8 republican form of government.

9           The Governor's briefs and many of their  
10 amici would have the Court stand on the precipice of  
11 a slippery slope, that if somehow our case goes  
12 forward, Western civilization will crumble because  
13 all initiatives will be called into question, not  
14 the case.

15           On standing I would submit that our case is  
16 Coleman on steroids, you know. That was a single  
17 vote nullification.

18           As your Honor has already pointed out in  
19 questioning, we're out of business on a whole range  
20 of core policy issues. It's not one vote  
21 nullification. It's putting all sorts of things  
22 completely off limits. I would also --

23           CHIEF JUDGE BRISCOE: Or is it sort of off  
24 limits? I mean, again, you can pass a bill, I  
25 guess, because it's not actually a law. You pass

1 something and it would go to the people for vote.

2 So are you out of business?

3 MR. SKAGGS: The legislature itself is  
4 deprived of the power to fund the necessary business  
5 of state government.

6 CHIEF JUDGE BRISCOE: And that's what you  
7 want. You want to begin and end and have the whole  
8 thing.

9 MR. SKAGGS: And without challenging,  
10 however, your Honor, the residual ability of the  
11 voters if they want to challenge an enactment of the  
12 legislature, they are still empowered to do that  
13 under the Constitution. It's just that they don't  
14 have a prior approval of a legislative power in this  
15 realm.

16 JUDGE LUCERO: But that's somewhat  
17 analogous to the present limitations on the power of  
18 the legislature. For example, the Constitution  
19 requires that the budget be balanced from year to  
20 year, that you not have deficit spending.

21 So the legislature is already under some  
22 limitations, constitutional limitations that  
23 certainly meet the criteria for the establishment of  
24 a republican form of government.

25 MR. SKAGGS: That is correct, your Honor,

1 as it is also subject to a gubernatorial veto if it  
2 does pass a tax bill. So it's not as if the  
3 legislature becomes all powerful under the  
4 restoration of republican government that we  
5 advocate.

6 And there are other constraints that we do  
7 not challenge that are not compromising the core  
8 quality of republican governance.

9 What is the issue here is the essential  
10 devolution of fundamental powers of republican  
11 governance to plebiscitary democracy, something that  
12 was abhorrent to the founders and that's why they  
13 wrote the Constitution the way they did.

14 Obviously, these are issues to be  
15 elaborated on, on the merits if this Court  
16 determines to remand for further proceedings.

17 JUDGE LUCERO: We are told by some of the  
18 members of the legislature that they do not join in  
19 this request, that they feel that the legislature  
20 has that power already or is not qualified in an  
21 impermissible manner. What say you to that?

22 MR. SKAGGS: I will let them speak for  
23 themselves, your Honor. I don't know that it's  
24 pertinent to the disagreement that they may have  
25 with the plaintiffs in this case that --

1           JUDGE LUCERO: But does that make it a  
2 political question?

3           MR. SKAGGS: It does not, your Honor, not  
4 in the sense that a political question is a matter  
5 for this Court's determination of justiciability.

6           I think Justice Brennan's admonition in  
7 Baker v. Carr that not all cases that raise  
8 political issues are political question cases.

9           The definition of political question is  
10 drawn much more narrowly in Baker v. Carr and for  
11 starters is completely irrelevant to our statutory  
12 claim in which Judge Cavanaugh in the El-Shifa  
13 Pharmaceutical case made the point very clear.

14           The Supreme Court has never found a  
15 political question doctrine in a statutory  
16 interpretation matter. So on our Enabling Act claim  
17 I think we're on solid ground there.

18           Again, on legislator standing called the  
19 Court's attention to the case of Michel v. Anderson  
20 in the D.C. circuit and other cases cited in our  
21 brief which have held legislator standing under  
22 circumstances where clearly, as we have here,  
23 legislators were individually and concretely harmed.

24           I also want to stress the standing of our  
25 educator plaintiffs and this was well briefed, I

1 think, by the amicus brief submitted on behalf of  
2 the Association of School Boards and School  
3 Executives.

4 CHIEF JUDGE BRISCOE: Did Lobato, the  
5 second Lobato Supreme Court opinion, undermine that  
6 argument?

7 MR. SKAGGS: To the contrary, your Honor.  
8 I think it reinforces our standing because it makes  
9 clear, one, that there is a very real controversy  
10 alive in this state as to the adequacy of school  
11 funding. The Lobato Supreme Court decision merely  
12 determined that some constitutional minimums were  
13 met.

14 What it didn't address was the ability of  
15 our educator plaintiffs and others to seek redress  
16 from the General Assembly to do more than the  
17 minimum under the state education clause to be able  
18 to get adequate funding.

19 And under the Colorado Constitution, school  
20 boards share a constitutional responsibility with  
21 the General Assembly to assure adequate funding for  
22 the K-12, the P-12 educational system.

23 And again, with TABOR standing in the way,  
24 as was admitted by the defendant in the Lobato  
25 proceedings, we can't do better by way of education



1 funding because TABOR is in the way.

2 With it in the way, our educator plaintiffs  
3 again would be forced to go through essentially the  
4 empty gesture of approaching their representatives  
5 and the General Assembly to say, can't we do better  
6 by education funding? And the only answer to that  
7 from the legislators is, sorry, TABOR makes it  
8 impossible for us adequately to fund the schools.

9 JUDGE LUCERO: How could, on some  
10 hypothetical situation, the public play a role other  
11 than through the election of its legislature in  
12 limiting taxation?

13 MR. SKAGGS: Well, we are not in --

14 JUDGE LUCERO: Obviously, they can vote the  
15 jerks out of office.

16 MR. SKAGGS: Which I think is the central  
17 check on legislative power and one that has served  
18 the nation well for a long time.

19 Under the initiative and referendum  
20 provisions of the Colorado Constitution, a group of  
21 citizens can petition for a particular tax change.  
22 That's how Amendment 64 dealing with the marijuana  
23 situation arose.

24 And we will now have on the ballot for  
25 voter approval a tax to deal with the implementation

1 of Amendment 64. So that mechanism is there.

2 Likewise, absent the adoption of a safety  
3 clause by legislation passed and enacted by the  
4 General Assembly and signed by the Governor, the  
5 people have the right to challenge a statute enacted  
6 by the legislature through the initiative process as  
7 well.

8 So we are not wanting for checks and  
9 balances with authority in the people of the state.  
10 The question is, how far can you go? And in our  
11 opinion TABOR steps over the boundaries of  
12 republican governance.

13 If the Court please, I wanted to speak  
14 briefly on the question of justiciability and in  
15 particular the hang up that we seem to have with  
16 Baker v. Carr tests, which we can run through them.

17 I would really say that our amicus brief  
18 from the constitutional law professors does a very  
19 nice job of explaining, one, why they don't apply,  
20 but even if they do, they are met.

21 But one of the things that does come up in  
22 the Baker/Carr opinion is at least a suggestion that  
23 the federal courts pay some deference to coordinate  
24 branches of government. That's really inapplicable  
25 here unless one looks to the suggestion in Rizzo v.

1 Goode that there should be some sensitivity to state  
2 pronouncements.

3 So the Colorado Supreme Court happens to  
4 have made a pronouncement in the case of Morrissey  
5 v. State. And it remarks that the framework of our  
6 republican form of government -- I'm quoting --  
7 created by the Guarantee Clause, it is the Guarantee  
8 Clause that assures the role of elected  
9 representatives in our system.

10 Supreme power rests with the citizens  
11 entitled to vote and is exercised by representatives  
12 elected by them, unquote.

13 There are several other cases cited in our  
14 brief that show that the federal courts, including  
15 the United States Supreme Court have entertained  
16 Guarantee Clause claims and found them justiciable.

17 It doesn't mean they've agreed with the  
18 claim and found a violation but they have certainly  
19 been justiciable. White v. Texas, Minor v.  
20 Happersett, several other cases as well that are  
21 cited in our brief.

22 JUDGE SEYMOUR: What do you do with Pacific  
23 States and Luther that basically say the  
24 determination of what is a republican form of  
25 government is for Congress?

1           MR. SKAGGS: Your Honor, the text of the  
2           Guarantee Clause itself, of course, speaks to the  
3           United States as the guarantor, as the enforcer, if  
4           you will, of the Guarantee Clause.

5           If the framers had wished to assign this  
6           textually as one of the Baker/Carr tests suggests  
7           textually to one or another branch of government, it  
8           could have said so.

9           We ended up with a kind of per se rule that  
10          emerged from Luther v. Borden and then was  
11          unfortunately ratified in Pacific States that all  
12          Guarantee Clause questions are, per se, political  
13          questions.

14          Justice O'Connor's opinion in U.S. v. New  
15          York, I think, makes clear that that per se doctrine  
16          is in very fragile shape under current thinking.

17          But more particularly in Luther v. Borden,  
18          indeed, it was appropriate for the Court to defer to  
19          Congress because the question there was, what's the  
20          legitimated government of Rhode Island?

21          There were competing claims to be the state  
22          government there and I think the Court didn't  
23          express it in this way at the time, but it was  
24          analogous to the recognition of a foreign  
25          government. That's a political question

1 appropriately left to the political branch.

2 JUDGE LUCERO: Well, it seems to me that  
3 certainly at the time of the admission of a state to  
4 the Union that it's certainly in Congress's purview  
5 to make a determination that the republican form of  
6 government is guaranteed to the people of that  
7 state.

8 But is there any constitutional mechanism  
9 by which Congress as a branch can continue to  
10 exercise a supervisory or an oversight function to  
11 make the kind of determinations that are implicit in  
12 Judge Seymour's question or is that necessarily left  
13 (inaudible) Article III?

14 MR. SKAGGS: Your Honor, this is an Article  
15 III question. As with any question about what did  
16 Congress intend when it passed the law? So that the  
17 43rd Congress, I believe it was, in passing the  
18 Enabling Act in 1875 used these words that Colorado  
19 must have a republican form of government.

20 Subsequent Congresses generally don't get  
21 in the business of explaining what prior Congresses  
22 meant. We rely on the courts. And as in the  
23 Zivotofsky case the traditional business of federal  
24 courts to determine what the law means, both the  
25 U.S. Constitution and the federal statutes.

1           If I may, Judge Seymour, I don't want to  
2     leave Pacific States unaffected by my comments.  
3     There, I think the critical issue as it was framed  
4     was whether or not by adopting initiative and  
5     referendum in Oregon and the progressive era, the  
6     entire state government had been infected and the  
7     challenge in Pacific States was to the state as a  
8     state.

9           And in that framing of it, it made some  
10    sense for the Court there to rely on Luther because  
11    it had that quality of a challenge to the legitimacy  
12    of state government.

13           That's not our case. We are not  
14    challenging the initiative process. We are not  
15    challenging how TABOR was enacted. We're  
16    challenging what TABOR does, how it has restructured  
17    the government of Colorado.

18           Should we get to the point, and I hope we  
19    do where your colleagues below are required to  
20    determine that meaning, I think they are manageable  
21    standards helpfully put forward by the brilliant  
22    people that framed the Constitution.

23           Madison made it very clear that state  
24    governments with legislatures and of manifesting  
25    representative government were critical elements

1 that were contemplated by the Guarantee Clause.

2 Just as Hamilton made it very clear coming  
3 out of the dysfunctionality of the Articles of  
4 Confederation that the power to tax was absolutely  
5 essential. And a government without the power to  
6 tax essentially was not legitimate.

7 This case is about restoring Colorado's  
8 birthright and enforcing its responsibility to  
9 maintain that republican form of government.

10 In Reynolds v. Simms the Supreme Court  
11 noted that state legislatures historically have been  
12 the fountainhead of representative democracy in this  
13 country.

14 A legislature with the requisite powers to  
15 maintain its republican nature is essential to our  
16 compliance with the Constitution and the Enabling  
17 Act and we must not let that fountainhead be turned  
18 into a figurehead.

19 Last week we celebrated Constitution Day,  
20 the founding of the Republic. And as Ben Franklin  
21 said, a Republic if we can keep it. I pray this  
22 Court will permit us to go forward in that cause.  
23 Thank you.

24 CHIEF JUDGE BRISCOE: Thank you, counsel.

25 MR. DOMENICO: Judge Seymour, you asked a

1 question that may be frustrating but is absolutely  
2 necessary which is, what to do about Pacific States?  
3 Pacific States is still good law. Pacific  
4 States was reinforced in Baker, not undermined.  
5 Counsel is absolutely right that New York v. U.S. is  
6 the case where Justice O'Connor suggested some  
7 question about the wisdom of a per se rule, but  
8 absolutely left it in place.

9 This Court's decision, I think, in Hanson  
10 v. Wyatt shows about as far as the federal courts  
11 can go under New York on this question. And what  
12 the Court said in Hanson was that courts may have  
13 some discretion to essentially skip the  
14 justiciability question and dismiss a case on the  
15 merits.

16 But what it didn't say was what the  
17 plaintiffs need it to say here, which is that  
18 Pacific States is overruled.

19 And so, perhaps this will be the case where  
20 the plaintiffs can convince the Supreme Court on a  
21 cert petition to reverse Pacific States, but it's  
22 still good law.

23 And while the Supreme Court certainly could  
24 have written a decision that counsel, that the  
25 plaintiffs, that the law professors think it should



1 have written, what it actually wrote was a very  
2 clear broad opinion. And this makes sense given the  
3 historical context.

4 CHIEF JUDGE BRISCOE: Don't we have to  
5 always read opinions in the context in which they  
6 were written?

7 MR. DOMENICO: Absolutely. And the context  
8 --

9 CHIEF JUDGE BRISCOE: Isn't that a  
10 distinguishing factor here?

11 MR. DOMENICO: The distinguishing factor --  
12 I don't think there's anything in Pacific States to  
13 distinguish the holding, the clear holding which was  
14 that the province that is not the province of the  
15 federal courts to try to redraw these lines.

16 And at the time the Pacific States came up  
17 in the middle of this progressive movement adding  
18 all these limitations of all types to state  
19 constitutions imposing, implementing direct  
20 democracy.

21 And what the Pacific States' court was  
22 doing was pulling the federal courts out of that.  
23 This case is an attempt to pull them back in. But  
24 until the Supreme Court says that it's willing to do  
25 that, Pacific States still controls.

1           A couple of other points before I run out  
2 of time. One, the Walker case makes a very  
3 important point that counsel referenced.

4           Number one, it says that it could imagine  
5 few tasks less appropriate to federal courts than  
6 deciding which state constitutional limits affect an  
7 important governmental interest and which don't.

8           That is precisely what the plaintiffs are  
9 asking this Court to do here, say taxation -- again,  
10 it's important. It's not taxation as a whole.

11           TABOR doesn't say, no taxes in Colorado.  
12 At most it says, we're going to stop -- we're going  
13 to add a new check on increasing taxes. We pay  
14 plenty of taxes in Colorado. It's not that we're a  
15 voluntary state.

16           So it's additional taxes that are affected  
17 at most by TABOR.

18           Counsel, I think, has acknowledged that the  
19 way TABOR actually works is, as I described, but  
20 it's not a flat prohibition on the legislature  
21 participating in taxation decisions at all. It's  
22 just that it works through referendum rather than  
23 simply the legislature being able to impose taxes on  
24 itself.

25           Counsel also pointed to a Michel v.

1     Anderson case a couple of times.  It's prominent in  
2     the briefs.  That is a case that the Raines court  
3     specifically mentioned and then proceeded to  
4     overrule.  So I don't think it's a good fount for  
5     standing here.

6             Finally, I'll just make one point about the  
7     Enabling Act.  First, it's simply not true that the  
8     Supreme Court has never held an act of Congress to  
9     present a political question.

10            Pacific States itself has exactly the same  
11    kind of claim based on Oregon's Enabling Act that we  
12    have here and the Court recognized that it raised  
13    all the same problems.

14            And so, if I may just close, this case  
15    raises interesting issues, but not any that can be  
16    resolved by the federal courts.

17            CHIEF JUDGE BRISCOE:  Thank you, counsel.  
18    Thank you all for your attendance this morning and  
19    participation.

20            (The oral arguments were concluded.)

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