

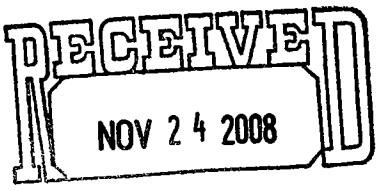
<p>SUPREME COURT, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203</p>	
<p>District Court, Denver, Colorado, Case No 05CV4794 Court of Appeals, Colorado, Case No 06CA733</p>	
<p>Petitioners: Anthony Lobato, as an individual and as parent and natural guardian of Taylor Lobato, et al. v. Respondents: The State of Colorado, et al.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>AMICI CURIAE BRIEF OF THE COLORADO LAWYERS COMMITTEE AND THE COLORADO CENTER ON LAW AND POLICY IN SUPPORT OF PETITIONERS</p>	

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STATEMENT OF INTEREST AND ISSUE PRESENTED

The Colorado Lawyers Committee (the “CLC”) is a non-partisan not-for-profit public service organization that engages in and supports charitable activities in the public interest, facilitates legal representation to individuals and organizations for charitable purposes, and provides research and education facilities and services to law students and the public. CLC projects aim to advance social interests and protect individuals most in need of assistance.

The Colorado Center on Law and Policy (the “Center”) is a non-profit organization that, in response to significant restrictions imposed by Congress on the activities of federally funded legal services programs, has promoted economic security for all Coloradoans, especially lower-income individuals and families. The Center’s programs focus on self-sufficiency, welfare, health care, and fiscal policy. The Colorado Fiscal Policy Institute, a project of the Center, conducts research and analysis on state and local tax and budget policies that affect low- and moderate-income families in the state.

While *amici curiae* support the arguments made by Petitioners to this Court, they will address only the following issue in *Lobato v. State*, No. 08SC185:

Whether the Court of Appeals overextended the political question doctrine by holding that Petitioners’ challenge to Colorado’s school finance system is nonjusticiable because the proposed remedies would intrude upon the General Assembly’s exclusive

authority to appropriate funds and establish a system of public education?

Amici curiae believe it critical to highlight how the Court of Appeals' application of the political question doctrine would drastically and improperly reduce the range of justiciable state constitutional claims.

SUMMARY OF THE ARGUMENT

Incorrectly applying *Baker v. Carr*, 369 U.S. 186 (1962), the Court of Appeals held that Petitioners' school funding challenge presented a nonjusticiable political question. The Court reached this conclusion in part because of two erroneous conclusions: (1) the requested relief would intrude upon the General Assembly's authority over appropriations by requiring a legislative allocation of funds to remedy the constitutional violation, and (2) the Education Clause of the Colorado Constitution, Article IX, Section 2, assigns to the General Assembly unaccountable discretion to establish and maintain a system of public education.

The Court should reject the extreme aspects of the Court of Appeals' reasoning. While the General Assembly has the authority and responsibility to set policy for funding and compliance with constitutional mandates for schools, that authority is not unfettered and is limited by the checks and balances of our three-branch governmental system. The Court of Appeals' approach would mistakenly preclude judicial review of any state constitutional claim for which the proposed

remedy would necessitate an expenditure of state funds, and would preclude judicial review of most any state constitutional claim challenging the discharge of any legislative—or, by extension, executive—duty. If upheld, either aspect of the Court of Appeals’ reasoning would yield an unprecedented expansion of the political question doctrine and severely undermine the power of courts to interpret and enforce the Colorado Constitution.

ARGUMENT

I. THE COURT OF APPEALS’ POLITICAL QUESTION ANALYSIS WOULD IMPROPERLY RENDER AN UNPRECEDENTED RANGE OF STATE CONSTITUTIONAL CLAIMS NONJUSTICIABLE

The political question doctrine plays an important, but exceedingly limited, role in constitutional interpretation. Other than the Court of Appeals’ decision in *Lobato v. State*, no reported Colorado case has ever invoked the doctrine to squarely hold a specific clause of the Colorado Constitution nonjusticiable. Similarly, over the course of more than two hundred years of adjudication, the U.S. Supreme Court has invoked the doctrine as justification for declining to interpret the Federal Constitution only in the rarest of circumstances.¹ This

¹ See *Nixon v. United States*, 506 U.S. 224 (1993) (holding that whether a former federal judge’s impeachment proceedings violated the Impeachment Clause was a political question); *Colegrove v. Green*, 328 U.S. 549 (1946) (holding that whether the apportionment of congressional districts in a state complies with Article I, Sections 2 and 4 is a political question); *Coleman v. Miller*, 307 U.S. 433

(Footnote continues on next page.)

historically limited usage reflects the bedrock principle that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The reasoning of the Court of Appeals would drastically depart from the longstanding principle of *Marbury*. It would expand the political question doctrine far beyond its limited scope and render a substantial portion—perhaps even a majority—of claims under the Colorado Constitution nonjusticiable. The effect would be to undermine the enforcement of constitutional provisions concerning everything from limits on legislative and executive power to the protection of individual rights.

A. The Court of Appeals’ Analysis Wrongly Precludes Judicial Review Of Any Constitutional Claim For Which The Remedy Would Necessitate A Legislative Appropriation Of State Funds.

The Court of Appeals held that Petitioners’ claims were nonjusticiable, in

(Footnote continued from previous page.)

(1939) (holding that whether a state’s ratification of the Child Labor Amendment was invalid because too much time had elapsed since Congress’s initial proposal of the Amendment was a political question); *Luther v. Borden*, 48 U.S. 1 (1849) (holding that whether the charter government of Rhode Island violated the Guarantee Clause was a political question); *see also Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality) (holding that whether legislative districts were gerrymandered in violation of the Equal Protection Clause was a political question); *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality) (holding that whether the President properly abrogated a mutual defense treaty with Taiwan was a political question).

part on the ground that deciding the merits would “present a substantial risk of judicial intrusion” into the General Assembly’s power over appropriations.

Lobato v. State, 2008 Colo. App. LEXIS 69, at *28 (Jan. 24, 2008) (internal quotation marks omitted). According to the court, the risk of intrusion exists because the financial cost of implementing the judicial remedies would require the General Assembly to reduce funding in areas other than education to avoid violating the government spending limits imposed by the Taxpayers’ Bill of Rights (“TABOR”). *Id.* at 29.

The Court should reject this reasoning because Petitioners’ remedies do not intrude upon the General Assembly’s appropriations authority. The proposed declaratory judgment sought to establish that the Education Clause mandates the provision of quality education and that the current school finance system fails to provide adequate funding to meet that mandate. The proposed injunction would require the General Assembly to establish a new system of finance. None of this relief would require the General Assembly to increase funding for public schools by a specific dollar amount, or under a particular financing structure, or for a specific area of education. Rather, the remedies would leave to the General Assembly the freedom to decide how to use its appropriations power to implement

the Education Clause within the limits declared by the Court.² The difference is important because it means that any new finance system would follow the judicial remedies subject to further legislative action; although a court order would operate as the impetus for the system's creation, the General Assembly would independently develop its specific character. Courts and commentators alike have recognized that a separation of powers problem does not arise in this context. *See, e.g., Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 483-84 (Conn. 2002) (concluding that a claim seeking a declaration of the unconstitutionality of the state's system for financing public schools was justiciable because the declaratory judgment "would leave the formulation of the appropriate remedy to the legislative branch"); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. L. Rev. 661, 708-12, 718-21 (1978) (explaining that courts can avoid infringing upon executive and legislative

² Even the proposed injunction leaves ample room for the General Assembly to exercise its constitutional prerogatives. Although the proposed injunction requires additional funding for public schools, it does not specify the particular manner in which the General Assembly must implement its constitutional duty. Moreover, even if this Court deems the injunction request to be nonjusticiable because the injunction would directly mandate a legislative action, the Court of Appeals still erred by treating the injunctive and declaratory remedies as indistinguishable. Because the declaratory judgment does not direct *any* legislative action, it is even less intrusive than the injunction and even less likely to raise a separation of powers problem. Thus, the request for the declaratory judgment should be justiciable even if the injunction request is not.

prerogatives by fashioning declaratory and injunctive relief that leaves room for the other branches to determine the specific manner of implementation).

Further, the reasoning of the Court of Appeals would render an unprecedented range of state constitutional claims nonjusticiable. The breadth of a finding that any judicial ruling touching on funding impermissibly intrudes upon the General Assembly's appropriations authority deprives the citizens of Colorado of the ability to obtain judicial review of almost any legislative action. Few statutes have no fiscal impact. Thus, the range of potentially affected constitutional provisions is virtually without limit, including everything from Article II, Section 10, which establishes the individual right to freedom of speech, to Article VII, Section 11, which requires the General Assembly to pass laws ensuring the integrity of state elections.

The number and variety of cases that the Court of Appeals' analysis would render nonjusticiable cannot be overstated. Imagine, for example, that an indigent criminal defendant challenges his conviction on the ground that he never received assistance of counsel during trial. He argues that the state's failure to provide counsel violated Article II, Section 16 of the Colorado Constitution and seeks a declaratory judgment that the state has a duty to provide him and other like defendants with an attorney. Under the reasoning of the Court of Appeals, a

Colorado court would be unable to adjudicate the claim because the declaratory judgment would intrude upon the General Assembly's authority by requiring an undoubtedly substantial allocation of state funding for public defense. *Cf. People v. Anderson*, 842 P.2d 621, 622 & n.4 (Colo. 1992) (explaining that the Colorado Constitution provides a right to counsel in criminal proceedings).

Similarly, imagine that a class of state prisoners seeks a declaratory judgment establishing that the conditions of their confinement violate the prohibition against cruel and unusual punishment in Article II, Section 20 of the Colorado Constitution. Under the reasoning of the Court of Appeals, a court would also be unable to adjudicate this claim because the requested judgment would require the General Assembly to increase the amount of money allocated to prisons to improve living conditions for inmates. *Cf. People v. Young*, 814 P.2d 834, 842-43 (Colo. 1991) (explaining that the Colorado Constitution prohibits "cruel and unusual punishment" and that this prohibition can in some cases provide greater protection than the Eighth Amendment of the U.S. Constitution).

Finally, imagine any case claiming that the state's failure to provide notice and a hearing in connection with the deprivation of liberty or property violates procedural due process. The Court of Appeals' analysis would render all of these cases nonjusticiable insofar as they involve proposed remedies that require the

General Assembly to reallocate TABOR-limited funds to afford greater procedural protections. The Court of Appeals' analysis would thus eviscerate the holding of *People v. Lamb*, 732 P.2d 1216, 1220-21 (Colo. 1987) (holding that the state securities commissioner is required to provide notice of and an opportunity to suppress the issuance of administrative subpoenas for the discovery of bank records).

In short, under the Court of Appeals' analysis the courts could not "say what the law is" because a wide variety of constitutional provisions would be beyond judicial review. *Marbury*, 5 U.S. (1 Cranch) at 177.

In addition to barring the enforcement of many state constitutional rights, the Court of Appeals' reasoning is inconsistent with this Court's prior adjudication of cases that implicate the General Assembly's appropriations power. *See Barber v. Ritter*, 2008 WL 4767999 (Colo. 2008) (adjudicating whether the General Assembly's transfer of money from various special funds to the state's General Fund violates TABOR); *Indus. Claim Appeals Office v. Romero*, 912 P.2d 62 (Colo. 1996) (adjudicating whether a statute limiting workers' compensation disability benefits to state and other employees under age 65 violates equal protection); *Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113 (Colo. 1994) (adjudicating whether a workers' compensation statute violates the state

constitutional right to access to courts by limiting appellate review to certiorari); *Dempsey v. Romer*, 825 P.2d 44 (Colo. 1992) (adjudicating a claim that a statute setting maximum monthly salary levels for state employees violates the constitution); *Colo. Gen. Assembly v. Lamm*, 738 P.2d 1156 (Colo. 1987) (interpreting whether the General Assembly has constitutional authority to direct the state expenditure of federal block-grant monies); *Lujan v. Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (addressing whether the Education Clause contains a guarantee of equality of education among districts); *City of Colo. Springs v. State*, 626 P.2d 1122 (Colo. 1980) (adjudicating the constitutionality of the Pension Reform Act's requirement that cities—rather than the state—pay previously accrued, unfunded pension liabilities).

Like *Lobato*, all of these cases involved claims that required the General Assembly to alter its appropriation of state funds. In some cases, this Court entertained a direct challenge to the manner in which the appropriations power itself was utilized. *See Barber*, 2008 WL 4767999; *Lamm*, 738 P.2d 1156. In other cases, the Court adjudicated claims that, if successful, would have required the General Assembly to reallocate funds to correct deficiencies in government compensation or services. *See Dempsey*, 825 P.2d 44; *Lujan*, 649 P.2d 1005. Still others actually entered relief that required a greater expenditure of state funds.

See Romero, 912 P.2d 62; *Allison*, 884 P.2d 1113; *City of Colo. Springs*, 626 P.2d 1122. The circumstances and issues presented in these cases are diverse. Yet the fact of their adjudication alone establishes that a constitutional claim can permissibly have a collateral, or even direct, impact on the budget without unconstitutionally intruding upon legislative prerogatives.

Other state courts have made this point expressly. In *Department of Health and Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (2001), for example, the Supreme Court of Alaska upheld an injunction against the enforcement of a state Medicaid regulation that unconstitutionally denied funding for medically necessary abortions. The state argued that the case was nonjusticiable because the injunction “effected an appropriation of funds in violation of the separation of powers,” but the court “emphatically” disagreed. *Id.* at 913-14. The court explained that the state’s argument “would remove all constitutional restraints from legislative exercise of the spending power,” and that “the mere fact that the legislature’s appropriations power underlies Medicaid funding cannot insulate the program from constitutional review.” *Id.* at 913-15. The Supreme Court of Massachusetts reached the same conclusion on an identical claim. *See Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 395 (1981).

Finally, although the Court of Appeals did not address the point, it is

important to emphasize that the analysis does not change merely because the right to education is not a fundamental right in Colorado. *See Lujan*, 649 P.2d at 1016-17.³ Colorado courts have adjudicated constitutional claims involving non-fundamental rights or non-suspect classes even when the proposed remedy will likely affect appropriations. *See, e.g., Romero*, 912 P.2d 62 (adjudicating an age-discrimination claim notwithstanding the likely budgetary effect of the proposed remedy); *Dempsey*, 825 P.2d 44 (adjudicating a claim of an allegedly unconstitutional salary cap for state employees). Indeed, after declaring that

³ The Court may wish to revisit *Lujan*'s holding that education is not a fundamental right. Since the decision in *Lujan* in 1982, a substantial number of other state courts have ruled that the right to education is fundamental. *See Campbell County Sch. Dist. v. State*, 181 P.3d 43 (Wyo. 2008); *In re Arons*, 756 A.2d 867 (Del. 2000); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Bingham v. State*, 692 A.2d 384 (Vt. 1997); *Bismarck Pub. Sch. Dist. No. 1 v. State ex rel. N.D. Legislative Assembly*, 511 N.W.2d 247 (N.D. 1994); *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Ala. Coal. for Equity, Inc. v. Hunt*, 1993 WL 204083 (Ala. Cir. Ct. 1993); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Stout v. Grand Prairie Indep. Sch. Dist.*, 733 S.W.2d 290 (Tex. Ct. App. 1987); *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237 (Miss. 1985).

Even more telling, the U.S. Supreme Court has also moved in this direction. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), originally concluded that education is not a fundamental right, but the Court has since explained that the question of whether the right to a “minimally adequate education” is fundamental has not been “definitively settled.” *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

education is not a fundamental right, *Lujan* itself proceeded to evaluate whether inequality in local school financing survives rational-basis review. *See* 649 P.2d at 1023. If the nature of the right to education had been determinative of justiciability, the Court would have terminated its analysis immediately upon deeming the right non-fundamental.

B. The Court of Appeals’ Analysis Lacks A Basis In The Text Of The Education Clause And Precludes Judicial Review Of Any Constitutional Claim Involving A Legislative Or Executive Duty.

The Court of Appeals also held Petitioners’ claims nonjusticiable because the Colorado Constitution “specifically directs the General Assembly to establish and maintain the system of free public education.” 2008 Colo. App. LEXIS 69, at *19. The basis for this holding was the Court of Appeals’ conclusion that the General Assembly’s constitutional duty to establish and maintain public schools creates an exclusive legislative prerogative to determine whether the duty has been adequately carried out.

This Court should reject the Court of Appeals’ reasoning, in part because it lacks textual basis. The Education Clause provides in relevant part that the General Assembly “shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state.” This language makes clear that the General Assembly possesses a duty to establish and

maintain public schools. However, it does not logically follow that the General Assembly also possesses exclusive authority to determine whether the duty has been discharged. Nor does any part of the Education Clause expressly provide the General Assembly with such unreviewable authority. To the contrary, the Clause's requirements that the school system be "thorough and uniform" and provide "free" schools "throughout" the state establish express limits on the General Assembly's authority to decide the quality of the public school system. The requirement of "maintenance" of a system of schools also sets limits on legislative action. The inclusion of these limits makes sense only if they are enforceable. The Court of Appeals' reasoning reads these express limits out of the Education Clause, and instead instills the General Assembly with *carte blanche* authority to establish, and perhaps even not maintain, any school system it chooses without the prospect of judicial review.

Further, if the General Assembly possesses both the duty to enact laws under the Education Clause as well as the exclusive authority to determine whether it has discharged its duty, then any claim that challenges the manner in which the General Assembly has discharged any of its other constitutional duties would also be nonjusticiable for the same reason. A wide variety of constitutional provisions would mistakenly become judicially unenforceable as a result. *See,*

e.g., Colo. Const., Art. VII, § 11 (“The general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise.”); Art. VII, § 12 (“The general assembly shall, by general law, designate the courts and judges by whom the several classes of election contests . . . shall be tried, and regulate the manner of trial, and all matters incident thereto”); Art. XVIII, § 6 (“The general assembly shall enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state”). Without judicial review, the General Assembly would face no constitutional check to ensure its execution of these duties.

Lacking any unique justification for judicial deference specifically in areas of legislative authority, the Court of Appeals’ reasoning would also warrant withholding judicial review on any claim challenging the discharge of an executive duty. Affected executive duties would also be numerous. *See, e.g.*, Colo. Const., Art. IV, § 19 (“It shall be the duty of all [executive officers] to collect in advance all fees prescribed by law for services rendered by them severally, and pay the same into the state treasury.”). This Court should reject the reasoning of the Court of Appeals to avoid such an unprecedented and dangerous result.

CONCLUSION

The Court of Appeals' reasoning lacks any textual or precedential basis and would severely undermine the power of courts to interpret and enforce the Colorado Constitution. The Court should, therefore, reject that reasoning.

Dated: November 24, 2008

Respectfully submitted,



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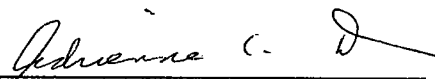
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of November, 2008, a true and correct copy of the foregoing **AMICI CURIAE BRIEF OF THE COLORADO LAWYERS COMMITTEE AND THE COLORADO CENTER ON LAW AND POLICY IN SUPPORT OF PETITIONERS** was placed in the U.S. Mail, postage prepaid, addressed to the following:

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