CASE NO. 12-1445

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Representative, *et al.*,	)
Plaintiffs-Respondents,	)
v.	)
JOHN HICKENLOOPER, Governor of Colorado, in his official capacity,	)
Defendant-Petitioner.	)

On Appeal from the United States District Court for the District of Colorado
Case No. 11-cv-01350-WJM-BNB
Honorable William J. Martinez, United States District Court Judge

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BRIEF OF COLORADO CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS AND COLORADO NONPROFIT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS AND AFFIRMANCE

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Statement of Amici Interests

Colorado Nonprofit Association is the collective voice of Colorado's nonprofit sector and a membership organization representing more than 1,350 nonprofits in the state. Colorado's nonprofits are an integral part of Colorado's economy and quality of life: There are now over 20,000 charitable nonprofits that employ 142,000 Coloradans and represent eight percent of Colorado's private workforce. Expenditures by Colorado nonprofits comprise seven percent of Colorado's gross domestic product.

TABOR limits public funding for nonprofit programs that serve basic human needs, including food, shelter, education, employment skills, healthcare and other human services. Demand for nonprofit services in Colorado has increased consistently in recent years, a trend exacerbated by TABOR's effect. TABOR's restrictions undermine the ability of nonprofits to meet current demands for services and adapt to future changes in economic conditions, population growth and the costs of delivering public services.

The Colorado Chapter of the American Academy of Pediatrics represents 600 Colorado pediatricians and is filing this amici brief for themselves and their patients, children and families who have been harmed significantly as a result of the substantial fiscal constraints TABOR has imposed. TABOR's state

funding cuts and caps have limited access to basic, needed medical care services to low-income children; restricted access to immunizations resulting in Colorado's low childhood vaccine coverage rates; and contributed to rising rates of childhood hunger and obesity. Following the passage of TABOR, Colorado had the most restrictive public health insurance program for children in the country.

Accordingly, amici curiae respectfully submit this brief and urge affirmance.[1]

Summary of Argument

The "political question doctrine" is a derivation of the constitutional separation of powers doctrine. In keeping with the separation of powers doctrine, Plaintiffs' Enabling Act claim is justiciable because the claim asks the court to perform its traditional judicial duty to preserve congressional intent by construing and enforcing its use of the "republican in form" language in Colorado's Enabling Act, Ch. 139, 18 Stat. 474 (1875). Interpretation of federal statutes comprises much of the Judiciary's daily work and the standards it uses to construe statutes are well developed and familiar. Accordingly, it is the federal district court's

[1] Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the amici curiae, its members or its counsel contributed money to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

responsibility to construe the federal Colorado Enabling Act, just as this Court has done in the past and as numerous federal courts have done without hesitation with other statehood enabling acts.

Argument

The District Court correctly concluded that Plaintiffs' Enabling Act claim was a justiciable statutory claim, regardless of whether the Guarantee Clause claim was held to be nonjusticiable under the political question doctrine. The Governor expends only a page and a half of his fifty-five page brief[2] making a half-hearted argument that judicial review of Plaintiffs' Enabling Act claim is improper, suggesting an awareness that his argument is unavailing in the face of firm grounds calling for judicial resolution.

Statutory interpretation of Colorado's Enabling Act will resolve a core, as yet undetermined, question that is presented by this case: What was Congress' intent concerning the manner in which the State of Colorado is entitled to govern itself? The federal courts have a duty to interpret and enforce the laws of Congress and the "political question doctrine" does not provide the Governor with a fig leaf to avoid the central statutory question in this litigation.

[2] Governor's Opening Brief at 44-45.

A. The Colorado Enabling Act Is a Federal Statehood Statute and Federal Courts, Including the Tenth Circuit, Have Not Hesitated to Interpret These Statutes.

In 1875, the Forty-third United States Congress passed Colorado's Enabling Act "[t]o enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States." Ch. 139, 18 Stat. 474 (1875).

The entire Enabling Act is comprised of 15 separate sections covering various topics. Section 4 sets forth the requirements for formation of the state's constitution. Among the requirements is the "republican in form" phrase at issue in Plaintiffs' Enabling Act claim. The phrase appears within a longer clause that authorizes the members of the state constitutional convention

> to form a constitution and State government for said Territory [of Colorado]; Provided, That the constitution shall be **republican in form**, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

Colorado Enabling Act, § 4, 18 Stat. 474 (emphasis added).

The "republican in form" phrase in section 4 of the Enabling Act parallels language from the Guarantee Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. The Governor and his *amici curiae* rely on this parallelism as the sole basis to dismiss Plaintiffs' Enabling Act claim, contending

that if the constitutional Guarantee Clause claim fails because interpretation of what constitutes a "republican form" presents a nonjusticiable political question, then the statutory Enabling Act claim necessarily fails too for the same reason. This analysis ignores the many U.S. Supreme Court and federal court decisions that have resolved cases by interpreting and enforcing enabling acts. *See* Plaintiffs' Brief in Opposition to Motion to Dismiss app. A, Aplt. App. at 149-52. (listing 118 federal cases involving claims under statehood enabling acts, noting none had been denied on the basis of an assertion of nonjusticiability or the political question doctrine). The Governor does not cite to any case in which a federal court declined to address an enabling act on grounds of nonjusticiability or the political question doctrine.

Notably, the Tenth Circuit interpreted provisions of Colorado's enabling statute in *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), to determine whether Congress intended to create a federal trust for Colorado's school lands, concluding that it did. *Id.* at 633. In particular, the Tenth Circuit examined whether an amendment to the Colorado Constitution that was passed by voter initiative in 1996 violated trust restrictions created by Congress in 1875 in the Colorado Enabling Act. The Tenth Circuit's judicial power to interpret congressional intent behind the terms of Colorado's Enabling Act was not questioned.

The numerous other federal cases interpreting enabling acts demonstrate that the courts have understood they are free to construe the terms of statehood statutes. Plaintiffs' Enabling Act claim here is likewise subject to judicial consideration and resolution.

B. Consistent with the Separation Of Powers Doctrine, Plaintiffs' Enabling Act Claim Obligates the Federal Court to Perform Its Traditional Duty of Interpreting a Federal Statute to Ensure Adherence to Congressional Legislative Intent.

Whether a claim is nonjusticiable because it asks a court to decide a political question "is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). Political questions are matters to be resolved by the political executive or congressional branches of government. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). However, the impact of the political question doctrine on the judiciary is considered to be "limited and precise," *Baker*, 369 U.S. at 215 n.43, and must be applied strictly to "political questions," and not to "political cases," *id*. at 217. The doctrine only "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling*, 478 U.S. at 230. The extremely narrow scope of the political question doctrine ensures that the courts will not "use it as a vehicle 'to decline the exercise of jurisdiction which is given.'" *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1236 (D.C. Cir. 2009)

(Edwards, J., concurring) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)), *rev'd, Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

Among the three branches of government, the judiciary not only has the statutory interpretation expertise, it has a responsibility to construe statutory claims properly before it. "It 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); *accord Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000) (duty to interpret statutes rests exclusively with the judiciary). The Plaintiffs' Enabling Act claim concerns what Congress intended by using the "republican in form" phrase and whether that congressional intent has been violated. It is within the Judiciary's power, and indeed is its duty, to ensure that Congress' "republican in form" intent is abided by. Moreover, in keeping with the separation of powers doctrine, which is the focus of the political question doctrine, allowing the Judiciary to interpret and enforce congressional intent honors, rather than invades, Congress' separate legislative power by ensuring adherence to congressional intent.

The Governor ignores key U.S. Supreme Court cases, upon which the District Court properly relied, that reinforce the Judiciary's obligation to resolve statutory claims. In *Japan Whaling*, wildlife conservation groups claimed that an executive agreement between Japanese and U.S. officials violated a federal statute

that required sanctions for violations of whale harvesting quotas. The Court determined that the action was justiciable and the political question doctrine did not apply because, despite the foreign relations implications, the case "present[ed] a purely legal question of statutory interpretation" and "interpreting congressional legislation is a recurring and accepted task for the federal courts." 478 U.S. at 230. The Court observed that even though Congress and the Executive play a "premier role" in the area of foreign relations, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id*.

Thus, *Japan Whaling* advanced the principle that the act of interpreting and applying a statute cannot itself constitute a political question. *See also Schiaffo v. Helstoski*, 492 F.2d 413, 419 (3d Cir. 1974) (court expressed "considerable doubt whether the political question doctrine" applied to cases involving interpretation and application of a statute, noting "[i]nterpreting statutes is a more common practice of the federal courts than interpreting the Constitution"); *Bredesen v. Rumsfeld*, 500 F. Supp. 2d 752, 762 (M.D. Tenn. 2007) ("[I]t is well-settled that the political question doctrine applies only to constitutional questions, not to questions of statutory violations." (citing *Japan Whaling*, 478 U.S. at 230)).

In the recent *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), decision, the plaintiff, born in Jerusalem, claimed that the State Department

violated a federal statute when it denied his request to have his passport indicate his birth place as Israel. The Court disagreed that the political question doctrine barred the action since resolution of the plaintiff's claim required the Judiciary to engage in the "familiar judicial exercise" of interpreting a statute and deciding whether the statute was constitutional. *Id*. at 1427. Indeed, the Court reminded that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Id*. (quoting *Cohens*, 19 U.S. (6 Wheat.) at 404).

The Governor's position seems to be that Congress' use of the word "republican" in the federal Enabling Act automatically transforms a straightforward statutory interpretation claim into a political question that only Congress can answer. Not so. The Enabling Act claim calls for an interpretation of what a prior Congress long ago intended by including the word "republican" in Colorado's statehood statute. Contrary to the Governor's suggestion, it cannot be presumed that the present-day Congress could interpret the intent of the Forty-third Congress in 1875—and it is not its place to try. Congress is not an interpretive body equipped to resolve statutory interpretation matters. Indeed, the Supreme Court has "often observed … that the 'views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (citation omitted); *accord In re Barnick*, 353 B.R. 233, 243 (Bankr. C.D. Ill. 2006) ("[A] Congress in 2005 is not

in a position to clarify what a 1984 Congress meant."). Accordingly, the Governor's weak attempt to squeeze a key statutory interpretation question that is ripe for judicial resolution under what is supposed to be an extremely narrow "political question" umbrella should be rejected.

C. Plaintiffs' Enabling Act Claim Does Not Require the Court to Decide a "Political Question."

The Governor cites three U.S. Court of Appeals cases[3] to persuade this Court that the Judiciary should "shirk" its statutory interpretation responsibility because, in his view, the "republican in form" phrase at issue in Plaintiffs' Enabling Act claim makes the claim part of a larger political question case. *But cf. Baker*, 369 U.S. at 217 (the doctrine "is one of 'political questions,' not one of 'political cases'"). The cases cited are of limited usefulness, however, since they

[3] *Lin v. United States*, 561 F.3d 502, 506, 508 (D.C. Cir. 2009) (concluded that claims by Taiwan residents asserting they were U.S. nationals were barred by the political question doctrine because the claims would require identification of Taiwan's sovereign, an issue on which the Executive Branch had "deliberately remained silent"); *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951, 956 (5th Cir. 2011) (concluded that ruling on the merits of antitrust claims alleging a conspiracy orchestrated by sovereign member nations of OPEC would "impermissibly interfere with the Executive Branch's longstanding policy of engaging with OPEC nations regarding the global supply of oil through diplomacy instead of private litigation," a policy that was not codified in a treaty the court was "merely asked to interpret"); *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (affirmed dismissal on political question grounds where district court found it lacked the resources and expertise to resolve a claimed War Powers Resolution violation concerning the President's alleged failure to report to Congress the U.S. military's presence in El Salvador despite indications of imminent involvement in hostilities).

all involve distinguishable foreign policy and war power matters[4] not at issue in Plaintiffs' domestic Enabling Act claim and, further, confidence in their precedential value is questionable given the recent 2012 guidance from the U.S. Supreme Court in *Zivotofsky*. *Cf. El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (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.").

It is noteworthy that the Governor cites to *Lin*, which the D.C. Circuit relied upon in part in *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009), to conclude that the political question doctrine barred judicial review. *See id*. at 1230, 1231, 1232. But the U.S. Supreme Court vacated the D.C. Circuit's decision, holding instead that the action was justiciable. 132 S. Ct. at 1426-27, 1431. The Supreme Court found that the D.C. Circuit had framed the issue too broadly: "Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under § 214(d) [of the Foreign Relations Authorization Act, Fiscal Year 2003], to choose to have Israel recorded on his passport as his place of birth."

[4] The U.S. Supreme Court has made clear that application of the political question doctrine is limited even in foreign relations cases: "[N]ot every matter touching on politics is a political question, and more specifically, . . . it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling*, 478 U.S. at 229-30 (citing and quoting *Baker*, 369 U.S. at 209, 211).

132 S. Ct. at 1427. "[T]he D.C. Circuit treated the two questions as one and the same." *Id*. "Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute . . . . This is what courts do." *Id.* at 1430.

Likewise, the Governor frames the issue posed by the Plaintiffs' Enabling Act claim too broadly: The claim does not ask the court to make a "policy choice[]" or "value determination[]"[5] about Colorado's form of government; it asks only that the court interpret congressional intent behind its use of the "republican in form" language and determine whether that intent has been violated. "[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Baker*, 369 U.S. at 209.[6]

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[5] *Japan Whaling*, 478 U.S. at 230.

[6]The Governor relies heavily on *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), in his attempt to persuade that Plaintiffs' Guarantee Clause and Enabling Act claims both involve a matter that belongs with a political branch — enforcement of a republican form of government. But even the *Pacific States* Court observed that if the questions raised had been more limited, "they would have been justiciable," *id.* at 150, and that its holding that a nonjusticiable political question existed was influenced by how broadly the issue was framed: "[T]he assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state." *Id*. In contrast, the question for resolution under Plaintiffs' Enabling Act claim is narrow: It simply seeks to engage the Judiciary's traditional power to interpret the intent of the Forty-third Congress in using the "republican in form" phrase and to ensure adherence to that intent.

In *Baker*, the U.S. Supreme Court articulated various indicia for recognizing when a case presents a political question that is best left to a nonjudicial branch of government for resolution:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

None of the *Baker* indicia applies to statutory interpretation of the congressional "republican in form" language used in the federal Colorado Enabling Act. "There is certainly no textually demonstrable constitutional commitment of issues involving statutory interpretation to a coordinate branch of government. . . . [I]t remains to the Courts to interpret . . . statutes." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1116 (D.D.C. 1976). There is no lack of judicially discoverable and manageable standards; the courts employ ordinary principles of statutory construction to resolve the issue of interpretation. *Id.*; *see also El–Shifa Pharm. Indus.,* 607 F.3d at 851 (Ginsburg, J., concurring) ("Under *Baker v. Carr* a statutory case generally does not present a non-justiciable political question

because 'the interpretation of legislation is a recurring and accepted task for the federal courts.'" (quoting *Japan Whaling*, 478 U.S. at 230)).

Moreover, interpretation of the Enabling Act does not require an initial policy determination by Congress; nor will disrespect of or embarrassment to the other branches of government occur: Insofar as a determination about "republican in form" might be deemed a political question, that political question was decided by the Congress when it incorporated the "republican in form" limitation on Colorado's statehood into the Enabling Act in accordance with its congressional power. *See Branson*, 161 F.3d at 635 ("Congress may indeed place limitations on a state through the admission process if these limitations 'are within the scope of the conceded powers of Congress.'" (citation omitted)). Now, the court is asked only to construe and enforce Congress' interpretation of the "republican in form" statehood limitation, not to formulate its own judgment about what constitutes a republican form of government. The "political overtones"[7] of the "republican in form" phrase at issue in Plaintiffs' Enabling Act claim do not preclude judicial interpretation of the phrase as used in the federal statute.[8]

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[7] *Japan Whaling*, 478 U.S. at 230.

[8] *Cf. Harjo*, 420 F. Supp. at 1117 ("[W]hile the question of what constitutes an Indian tribe is not ordinarily a matter for determination by the courts, the courts have always resolved questions of legislative intent even when the questions deal with Indians.").

Conclusion

The federal courts have routinely interpreted and enforced enabling acts. As in those cases, Plaintiffs have called upon the District Court to exercise its traditional judicial statutory interpretation responsibility to construe Colorado's Enabling Act. The interpretation and enforcement of this federal statute does not present a political question. Therefore, Plaintiffs' Enabling Act claim is justiciable and not subject to dismissal.

Respectfully submitted this 17th day of April, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 3,581 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman.

Date: April 17, 2013

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the foregoing *BRIEF OF COLORADO CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS AND COLORADO NONPROFIT ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENTS AND AFFIRMANCE* as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the most recent full version of Trend Micro Worry-Free Business Security, Program Version 7.0.1638, and according to the program, is free of viruses. The last virus scan was April 16, 2013. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of April, 2013, I have provided service of the foregoing *BRIEF OF COLORADO CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS AND COLORADO NONPROFIT ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENTS AND AFFIRMANCE* through the federal ECF filing protocol and by e-mailing to the following attorneys or their law firms:

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