SUPREME COURT
STATE OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, CO 80202

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case Nos.
10CA2559 & 08CV9799

JOHN HICKENLOOPER, in his official capacity as Governor of the State of Colorado, and THE STATE OF COLORADO,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC.; MIKE SMITH; DAVID HABECKER; TIMOTHY G. BAILEY; and JEFF BAYSINGER,

Respondents.



**▲COURT USE ONLY▲**

Case No. 12SC442

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# REPLY BRIEF IN SUPPORT OF THE GOVERNOR'S PETITION FOR WRIT OF CERTIORARI

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of C.A.R. 28 and 32, including all formatting requirements. Specifically, I certify that:

The brief complies with C.A.R. 53(d).

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Daniel D. Domenico

## INTRODUCTION

Plaintiffs oppose certiorari because they believe that the court of appeals reached the correct conclusion—in other words, they oppose certiorari because they prevailed below. But while the Governor disagrees with Plaintiffs on the merits, this case is about more than error correction. Indeed, Plaintiffs' Brief in Opposition, in repeatedly confusing this Court's precedent, is perhaps the best demonstration of why certiorari is warranted.

Granting certiorari here would not only allow the Court to clarify seemingly disparate strands of case law regarding a party's standing to sue; it would also permit the Court to define the scope and meaning of the Preference Clause, a provision that courts have applied only a handful of times throughout more than 135 years of Colorado statehood.

Moreover, this case will allow the Court to explain whether the remarkable holding by the court of appeals should stand. The Colorado Constitution, alone among the United States Constitution and those of the 50 states, now prohibits the Governor and other public officials from recognizing religious believers and beliefs—and requires the

government to single out religion and prayer as verboten topics of government conversation.

## ARGUMENT

### I. The opinion below expanded the doctrine of taxpayer standing beyond this Court's precedent and was based on factual assumptions that lack record support.

Under *Wimberly v. Ettenberg,* a prospective plaintiff must "suffer[] injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions" to have standing under the Colorado Constitution. 570 P.2d 535, 539 (1977). Although the language in post-*Wimberly* decisions has varied somewhat, the Court has consistently acknowledged that a prospective plaintiff may demonstrate an injury in fact in two different ways: (1) by showing that he has suffered an actual injury, either tangible or intangible, *see Ainscough v. Owens,* 90 P.3d 851, 856 (Colo. 2004); or (2) by demonstrating that his tax dollars have been spent in an unconstitutional manner. *Barber v. Ritter,* 196 P.3d 238, 247 (Colo. 2008). The first of these categories is known as "citizen" (or *Wimberly*) standing. *See Brotman v. E. Lake Creek Ranch, LLP,* 31 P.3d 886, 891 (Colo. 2001). The second category is

known as "taxpayer" standing. *Id.* at 892 (citing *Dodge v. Dep't of Soc. Servs.*, 600 P.2d 70, 71 (Colo. 1979)).

Plaintiffs' Brief in Opposition conflates these distinct concepts. Relying on selectively quoted dicta from *Ainscough, Barber,* and other decisions, Plaintiffs suggest that this Court's recent standing jurisprudence merged "taxpayer" and "citizen" standing into a single expansive doctrine. Under Plaintiffs' approach, all that a "plaintiff-taxpayer" must do is allege "that a government action violates a specific constitutional provision," *Brief in Opp.* at 6 (quoting *Barber,* 196 P.3d at 247), because "[t]he infringement of a constitutional guarantee injures the taxpayer citizen's interest in constitutional governance." *Brief in Opp.* at 6.

Plaintiffs have it wrong. Although this Court's dicta has on occasion been imprecise, the Court has never held that a potential plaintiff has standing simply because she has a generalized grievance—*i.e.,* because she disagrees with some government action. To the contrary, she must establish that the government action *injured* her, whether as a taxpayer or as an individual citizen.

Decisions such as *Ainscough* and *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995), do not say otherwise. In *Nicholl*, for example, the Court broadly stated that "[a] citizen has standing to pursue his or her interest in ensuring that governmental units conform to the state constitution." *Id.* at 866. Yet the Court also held that the plaintiff had demonstrated an injury in fact—the record showed that hundreds of millions of taxpayer dollars were at stake—and had standing under a specific provision of the Taxpayer's Bill of Rights (Amendment 1). *Id.* at 861, 866. And although *Ainscough* also contained broad language about the taxpayer standing doctrine, the case actually turned on *citizen* standing, because the Plaintiffs alleged a direct monetary injury as a result of the governor's challenged action. 90 P.3d at 857.

Here, the court of appeals *sua sponte* combed the record for evidence of government expenditures, and decided—without the benefit of the Governor's arguments—that *de minimis* (and unproven) spending on items such as postage, paper, and ink were sufficient to establish standing. *See Pet'n for Cert.* at 9–12. Leaving aside this problematic

procedure, Plaintiffs' Brief in Opposition reveals the confusion in this Court's standing jurisprudence, which has blurred the line drawn in *Wimberly* and *Dodge*. As Justice Eid emphasized in *Barber*, this Court's dicta should not be read to suggest that "taxpayers have standing not only to challenge expenditures of taxpayer funds, but to challenge *any* alleged unconstitutional action of the government." 196 P.3d at 257 (Eid, J. concurring). To do so would allow "'any and all members of the public' to challenge the propriety of any government action in court, contrary to *Wimberly*'s express admonition." *Id.* at 258 (quoting *Wimberly,* 570 P.2d at 538). Yet this is precisely what Plaintiffs urge here. And if the state is to adopt this new, expansive concept of standing, this Court should say so clearly, rather than allowing the opinion below to muddy the waters.

This case presents both citizen and taxpayer standing claims, and it also presents the novel question whether *de minimis* expenditures can form the basis of taxpayer standing. It therefore provides an ideal opportunity for this Court to untangle more than two decades of occasionally imprecise standing jurisprudence, providing guidance to

lower courts and explaining precisely what members of the public must prove before they may bring their grievances to court.

## II. In a question of first impression, the court of appeals misapplied this Court's Preference Clause jurisprudence and effectively barred the Governor from speaking on the topic of religion and prayer.

Colorado's lower courts would likewise benefit from an in-depth examination of the Preference Clause and the court of appeals' application of the endorsement and historical practice tests. And the benefit would not be limited to Colorado. Because this Court has, before now, interpreted the Preference Clause to be consistent with the federal Establishment Clause—and because on the merits this case presents a nationwide issue of first impression—granting certiorari would allow the Court to address a constitutional question that resonates far beyond Colorado's borders.

It is vitally important for the Court to explain the relationship between the religion clauses of the state and federal constitutions—especially in cases where they could be construed as working against each other. For example, in *Colorado Christian University v. Weaver*, the Tenth Circuit struck down a portion of a Colorado statute that

required state officials to discriminate against "pervasively sectarian" universities. 534 F.3d 1245 (10th Cir. 2008). The "pervasively sectarian" standard had been adopted by the Colorado General Assembly in an effort to comply with overly restrictive—and, in fact, "now-discarded"—judicial interpretations of the state and federal establishment clauses, *id.* at 1251–52, 1258, interpretations of the sort re-adopted by the court of appeals here. But although the trial court in *Weaver* believed that discrimination against "pervasively sectarian" institutions was necessary to comply with Colorado Constitution, the Tenth Circuit disagreed. *Id.* at 1267–68. Indeed, the trial court's reading of the *Colorado* Constitution violated the *United States* Constitution: states are not "free to discriminate in funding against religious institutions however they wish." *Id.* at 1256. To the contrary, under Supreme Court jurisprudence, a "State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* at 1255. As *Weaver* illustrates, state actors—including the General Assembly and the Governor—must thread the

needle between federal and state jurisprudence on the religion clauses. This Court must explain how the two interact.

Granting certiorari in this case would allow the Court to refine Colorado's approach to the endorsement test, a feature of both federal and state jurisprudence. *See Colo. v. Freedom From Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995); *Conrad v. City and Cnty. of Denver*, 656 P.2d 662 (Colo. 1982). The court of appeals' opinion, if it stands, would markedly alter the application of the endorsement test in Colorado. Not only did the opinion below adopt a meaning of "endorsement" that is inconsistent with applicable United States Supreme Court precedent, *see Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (plurality opinion); it also misapplied the "reasonable observer" test by failing to understand the context in which honorary proclamations are issued.

Government "religious proclamations" have been the subject of Supreme Court dicta on a number of occasions. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J. concurring) ("religious proclamations" are "rarely noticed, ignored without effort, conveyed

over an impersonal medium, and directed at no one in particular"); *Van Orden v. Perry,* 545 U.S. 677, 723 (2005) (Stevens, J. dissenting) ("[A]lthough Thanksgiving Day proclamations . . . undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed."). But the question presented here has never been considered on the merits by the Supreme Court or, for that matter, any appellate tribunal other than the Colorado Court of Appeals. For that reason alone, "special and important reasons" support certiorari in this case.

The court of appeals' rejection of the historical practice test outlined in *Marsh v. Chambers,* 463 U.S. 783 (1983), also deserves this Court's attention. The opinion below acknowledged the existence of *Marsh* but decided to apply it only in the alternative, for the express reason that this Court has never applied it in a Preference Clause case. *Slip Op.* at 38–39. Whether this Court applies the endorsement test, the historical practice test, or some other test, this case presents an

opportunity to clarify for lower courts the approach to follow in future Preference Clause litigation.

## CONCLUSION

The Governor respectfully requests that this Court grant his Petition for a Writ of Certiorari to the Colorado Court of Appeals.

Respectfully submitted on August 29, 2012.

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## CERTIFICATE OF SERVICE

This certifies that I have duly served this REPLY BRIEF IN SUPPORT OF THE GOVERNOR'S PETITION FOR WRIT OF CERTIORARI upon all parties via email this 29th day of August, 2012, addressed as follows:

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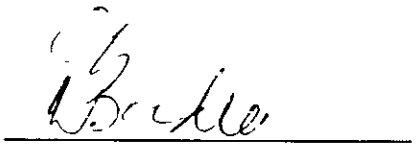

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