

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 No. 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.

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Case No. 12SC _____

**PETITION FOR WRIT OF CERTIORARI TO THE
COLORADO COURT OF APPEALS**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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Daniel D. Domenico

ISSUES

The Governor of the State of Colorado, like governors everywhere, regularly issues letters of recognition, signed photographs, and honorary proclamations to individuals or groups who request them. The Plaintiffs here object to six such proclamations recognizing the National Day of Prayer, an event observed by the federal government and by private organizations in all 50 states—and one that is rooted in more than two centuries of our nation’s history. Governors across the country regularly issue similar proclamations recognizing the Day of Prayer.

The court of appeals held that the Plaintiffs here have standing to challenge these honorary proclamations, and that the proclamations are unconstitutional endorsements of religion. The court’s decision is an imposition on the prerogatives of the Governor unique among the states, and raises two questions that warrant this Court’s review:

1. Whether the court of appeals erred by *sua sponte* determining that Plaintiffs had taxpayer standing based on *de minimis* governmental expenditures and despite the Plaintiffs’ failure to

plead or demonstrate the existence of taxpayer standing in the district court.

2. Whether the court of appeals erroneously concluded that the state constitution forbids the governor of Colorado from issuing certain honorary proclamations.

OPINION BELOW

The court of appeals opinion, captioned *Freedom From Religion Foundation, Inc. v. Hickenlooper*, __P.3d__ (Case No. 10CA1559, Colo. App. May 10, 2012), is attached hereto as an Appendix A. The district court's order on summary judgment is attached hereto as Appendix B.

JURISDICTION

The court of appeals issued its opinion on May 10, 2012. Neither party filed a petition for rehearing. This petition is timely filed pursuant to C.A.R. 52(a).

STATEMENT OF THE CASE

As does every governor, Colorado's governor issues hundreds of honorary proclamations each year. Honorary proclamation requests are submitted by an assortment of civic and cultural groups and involve

nearly every conceivable cause, from “Holocaust Awareness Week” to “Chili Appreciation Society International Day.” This case involves the issuance of honorary proclamations as requested by the National Day of Prayer Task Force (“NDP Task Force”), a private group that observes the National Day of Prayer – which is codified at 36 U.S.C. § 119 and observed annually on the first Thursday in May – in all fifty states. As part of its annual observation of the National Day of Prayer, the NDP Task Force requests honorary proclamations acknowledging the event from the President and the governors of each state. Executives of all political persuasions regularly issue the proclamations as requested by the NDP Task Force.

In this case Plaintiffs, the Freedom From Religion Foundation (“FFRF”) and several of its several Colorado members, filed suit against then-Governor Bill Ritter, complaining he had violated the Preference Clause of Colo. Const. art II, § 4, by issuing, upon request from the NDP Task Force, honorary proclamations acknowledging the NDP Task Force’s local observance of the National Day of Prayer. The facts in the trial court were largely undisputed, and the case was submitted on

summary judgment. The district court rejected the Governor's argument that the Plaintiffs lacked standing to sue, but nonetheless granted summary judgment in favor of the Governor after concluding that the challenged honorary proclamations did not amount to an unconstitutional endorsement of religion. See Appendix B at 10-13, citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Lynch v. Donnelly*, 465 U.S. 668 (1983); see also *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1021 (Colo. 1995) (applying *Lemon* test and Justice O'Connor's *Lynch* refinements to Preference Clause challenge).

Both parties appealed. The court of appeals affirmed the district court's conclusion that the Plaintiffs had standing, but rejected its reasoning for doing so. The court of appeals rejected the district court's conclusion that the Plaintiffs lacked "taxpayer" standing, but did have "citizen" standing. Instead, the court of appeals reviewed the record to determine only whether the Plaintiffs had "taxpayer" standing. Relying on a number of *de minimis* expenditures, including postage, ink, and hard drive storage space associated with the issuance of the challenged honorary proclamations, the court of appeals concluded that "although

the exact amount is not clear, the Governor spent state funds each year in order to issue the proclamation.” *See* Appendix A at 27. These expenditures, the court of appeals held, were sufficient to establish “a nexus between the taxpayers and the governmental action of issuing the Colorado Day of Prayer proclamations.” *Id.*

On the merits, the appellate opinion reversed the district court’s finding that the challenged honorary proclamations simply acknowledged a privately organized religious activity, rather than endorsing it. Applying the test outlined in *Lemon* and clarified in *Lynch*, the court of appeals rejected the district court’s conclusion that a reasonable observer would conclude that the challenged honorary proclamations were merely an acknowledgment of religious freedoms enshrined in the First Amendment and the Preference Clause and celebrated annually at a privately organized event. Instead, the court of appeals held that the challenged honorary proclamations: 1) did not have a secular purpose; and 2) constituted a governmental endorsement of religion. *Id.* at 55, 56-60. The opinion below accordingly concluded that the proclamations violated the Preference Clause because a

“reasonable observer would conclude that [they] send the message that those who pray are favored members of the Colorado’s political community, and that those who do not pray do not enjoy that favored status.” *Id.* at 60.

The court of appeals also rejected the Governor’s argument that, based in part on the long history of executive prayer proclamations in American life, the “historical practice” test articulated by the United States Supreme Court in *Marsh v. Chambers*, 463 U.S. 783 (1982), should apply. *Id.* at 39.

ARGUMENT

I. This Court should resolve whether the court of appeals was correct to expand both the substance and procedural burden of establishing taxpayer standing.

The court of appeals’ decision expands the concept and practice of establishing taxpayer standing beyond this Court’s precedents to such an extent that the concept would become meaningless if the decision is allowed to stand.

To establish standing, a plaintiff must demonstrate that he has:
1) suffered an injury-in-fact to a 2) legally protected interest. *Wimberly*

v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977). Under Colorado law, a Plaintiff may establish the existence of an injury-in-fact either as a “citizen”¹ or as a “taxpayer.” See *Brotman v. East Lake Creek Ranch, LLP*, 31 P.3d 886, 890-91 (Colo. 2001). An injury conferring citizen standing “may be tangible, such as physical damage or economic harm; however, it may also be intangible, such as aesthetic issues or the deprivation of civil liberties.” *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Either way, however, it cannot be “overly indirect and incidental” to the defendant’s action, and must present “a concrete adverseness which sharpens the presentation of issues that parties argue to the courts.” *Id.* (internal quotation omitted).

As interpreted by this Court, taxpayer standing applies to a narrower class of prospective plaintiffs – those who are able to demonstrate that their tax dollars have been spent in an unconstitutional manner. The injury-in-fact requirement for taxpayer standing “is satisfied when the plaintiff-taxpayer’s alleged injury

¹ The court of appeals’ opinion refers to citizen standing as “general” standing. See Appendix A at 20.

‘flow[s] from governmental violations of constitutional provisions that specifically protect the legal interests involved.’” *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008), quoting *Conrad v. City and County of Denver*, 656 P.2d 662, 668 (Colo. 1982). Thus, assuming the identification of a sufficient expenditure and a sufficient nexus between the plaintiff’s status as a taxpayer and the challenged governmental action, a plaintiff will qualify for taxpayer standing. See *Barber v. Ritter*, 196 P.3d at 246; see also *Hotaling v. Hickenlooper*, 275 P.3d 723 (Colo. App. 2011).

A. The court of appeals improperly concluded that the Plaintiffs had taxpayer standing, despite the fact that Plaintiffs asserted only citizen standing in the district court.

As the court of appeals noted, the district court “held that FFRF and the taxpayers had general [i.e., citizen] standing.” Appendix A at 20. The district court applied citizen standing principles after concluding that Plaintiffs did not qualify for taxpayer standing because “there has been no expenditure of public funds in this case.” Appendix B at 7. Despite this conclusion, the court of appeals did not review the

district court's conclusion that the Plaintiffs had citizen standing, and instead considered only whether "the taxpayers have taxpayer standing." *Id.* To do so, the court of appeals conducted an independent review of the record, concluding that several items and events reflected therein must have involved at least some minimal expenditure of taxpayer dollars. The court of appeals concluded that the expenditures it discovered were sufficient to establish an injury-in-fact to the individual Plaintiffs under principles of taxpayer standing.

While as a general matter an appellate court need not rely on the reasoning of the trial court in order to affirm the ruling below, *see, e.g., State Personnel Bd. v. Lloyd*, 752 P.2d 559, 568 (Colo. 1998), the court of appeals here erred by *sua sponte* raising and resolving an argument that the Plaintiffs never raised at all. In doing so, the court of appeals contravened another general rule: that "[a]rguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal." *Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721, n.5 (Colo. 1992).

To be sure, as evidenced by the district court's conclusion that the Plaintiffs had neither alleged nor proven any governmental expenditures related to the issuance of the challenged honorary proclamations, the general question of taxpayer standing was considered by the district court. But the court of appeals' analysis is contrary to this Court's holding that the burden of establishing subject matter jurisdiction is borne by the party asserting it. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 929 (Colo. 1993). Moreover, although this Court has never considered the question, other jurisdictions have consistently held that "arguments in favor of subject matter jurisdiction can be waived by inattention or deliberate choice." *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 120 (D.C. Cir. 2008).

By combing the record in search of expenditures to support its conclusion that the Plaintiffs had taxpayer standing, the court of appeals not only improperly shifted the burden of demonstrating standing, but also made inferences that find no support in the record. Its decision to do so *sua sponte* deprived the Governor of any

opportunity to respond. Although the opinion below speculated that the Governor's office spent money on items like postage, paper, and ink, the record offers no direct support for that conclusion, and the Plaintiffs waived their right to press that argument. In the absence of any actual evidence supporting the court of appeals' conclusions, this Court should grant *certiorari* to consider whether the court of appeals overstepped its bounds by finding taxpayer standing *sua sponte*.

B. The *de minimis* expenditures identified by the court of appeals are not sufficient to create taxpayer standing.

While this Court's cases may "reflect a more expansive view of standing under Colorado law than that expressed under federal law," *Grossman v. Dean*, 80 P.3d 952, 959 (Colo. App. 2003), they do not create unlimited standing. This Court has made clear that standing does not extend to "generalized grievances" against government action. Nor is it conveyed by "the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004), quoting *Brotman*, 31 P.3d at 890-91. The decision below exceeds these limits.

This Court has discussed standing doctrine on a number of occasions. *See, e.g., Barber* 196 P.3d 238; *Brotman*, 31 P.3d 886; *Nicholl v. E-470 Public Highway Authority*, 896 P.3d 859 (Colo. 1995); *Conrad*, 656 P.3d 662; *Dodge v. Dep't of Social Services*, 600 P.2d 70 (Colo. 1979). Although many of these cases noted the breadth of Colorado's taxpayer standing rule, this Court has never considered two key issues implicated by the opinion below: 1) whether the taxpayer must demonstrate a nexus between his status as a taxpayer and the challenged governmental action; and 2) whether, assuming a sufficient nexus is established, *de minimis* expenditures by the government will qualify as causing an injury in fact.

In *Hotaling*, a division of the court of appeals reviewed this Court's opinions in *Dodge*, *Conrad*, and *Nicholl* and concluded that Colorado law required a "connection...between the plaintiffs' status as taxpayers and the challenged government actions." 275 P.3d at *9. This conclusion is undoubtedly correct, but as the court of appeals' opinion in this case demonstrates, lower courts are still in need of guidance as to exactly what type of nexus is required.

This is particularly true when it comes to *de minimis* expenditures such as the ones identified by the court of appeals in this case. More than thirty years ago, *Conrad* held that storage and maintenance expenditures associated with the City and County of Denver’s nativity scene were sufficient to establish taxpayer standing under the Preference Clause. 656 P.2d at 667-68. Here, the court of appeals concluded that the minimal expenditures that it identified were analogous to those in *Conrad*, despite the fact that they were “at best indirect and very difficult to quantify.” Appendix A at 25, *quoting Conrad*, 656 P.2d at 668.

In reaching this conclusion, however, the court of appeals ignored several factors that raise serious questions about its interpretation of *Conrad*. First, in contrast to this case, *Conrad* addressed taxpayer standing on the municipal, rather than the state, level. Unlike taxpayer standing in the federal or state context, the United States Supreme Court has held that “[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate,

and the remedy by injunction to prevent their misuse is not inappropriate.” *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923).

Second, the *Conrad* opinion specifically noted that city “funds are appropriated for the display and storage of the nativity scene.” 656 P.2d at 667. Requiring specific appropriations is fully consistent with the United States Supreme Court’s approach to taxpayer standing under the Establishment Clause. *See Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 607 (plaintiffs lacked taxpayer standing to challenge “unspecified, lump-sum ‘Congressional budget appropriations’ for the general use of the Executive Branch”) (quotations omitted). Because this Court’s interpretation of the Preference Clause has long been consistent with the Supreme Court’s interpretation of the Establishment Clause, this Court should take the opportunity to consider the effect of more recent Establishment Clause jurisprudence on its contemporary understanding of the Colorado Constitution.

Third, and perhaps most importantly, the court of appeals assumed that *any* governmental expenditure, no matter how small, that furthers an allegedly unconstitutional governmental activity will

qualify as an injury-in-fact for taxpayer standing purposes. As noted previously, the record is devoid of evidence concerning the actual amounts associated with the expenditures identified by the court of appeals, but there can be no doubt that very little money was spent on preparing, printing, storing, and mailing the challenged honorary proclamations. This Court has never considered what types of expenditures will qualify for taxpayer standing, but other jurisdictions have consistently rejected the suggestion that *de minimis* expenditures will qualify. *See, e.g. Andrade v. Venable*, __S.W.3d__, 2012 Tex. LEXIS 423 at *10 (Tex., May 18, 2012) (“the expenditure cannot be *de minimis*—it must be significant”); *Droste v. Kerner*, 217 N.E.2d 73, 79 (Ill. 1966) (taxpayer lacked standing to challenge items of expense that are “too trifling to be reflected in [his] tax bills”) (quotation omitted).

To hold otherwise, as the court of appeals did in this case, would be to throw open the doors of Colorado’s state courts to *anyone* who disagreed with *any* governmental action. No matter how little time or energy a state employee or official’s action takes, some miniscule portion of his salary is earned during that period. If it is recorded with

or on state-provided office supplies, then it involves the use of additional state resources, and under the court of appeals' approach would qualify as a potentially challengeable expenditure of state funds. If Colorado is to radically lower the threshold requirements for taxpayer standing, it should be this Court that does so; in any event the Court should grant *certiorari* to clarify the issue.

II. The court of appeals interpreted the Preference Clause in a manner inconsistent with precedent set by this Court.

A. The opinion below interprets Colorado's Constitution as unique among the states and federal constitution in banning the Governor from acknowledging this particular event and is contrary to precedents of this Court and the U.S. Supreme Court.

As noted above, this Court has interpreted the Preference Clause of article II, § 4 of the Colorado Constitution in a manner consistent with federal Establishment Clause jurisprudence. *See State v. Freedom From Religion Foundation, Inc.*, 898 P.3d 1013, 1019 (Colo. 1995).

Accordingly, and consistent with the Establishment Clause, the Colorado Constitution forbids state government from “favor[ing] religion over non-religion.” *Id.*, citing *Allegheny County v. American*

Civil Liberties Union, 492 U.S. 573, 593 (1989). The court of appeals held that, by issuing honorary proclamations for a “Colorado Day of Prayer,” the Governor endorses religion, thereby favoring it over non-religion, and by doing so violates the Preference Clause. This is inconsistent with Establishment Clause jurisprudence, is unprecedented, and incorrect.

In the Establishment Clause context, “endorsement” does not merely mean “an expression or demonstration of approval or support.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (plurality opinion). To the contrary, the Supreme Court has “equated ‘endorsement’ with ‘promotion’ or ‘favoritism.’” *Id.* As the district court concluded in this case, the challenged honorary proclamations neither promote nor favor religion. The court of appeals disagreed with this conclusion, but in doing so failed to consider the challenged proclamations in the appropriate context, *i.e.* the hundreds of other honorary proclamations that the Governor’s office issues every year. By acknowledging various events, anniversaries, and civic accomplishments, the Governor is by no means “endorsing” or

“favoring” every one of the individuals recognized or the causes that the requesting groups support. Rather, honorary proclamations simply acknowledge the activities of individual and civic groups.

As Justice Souter noted, “religious proclamations” are “rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular[.]” *Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J. concurring). Even if noticed by individuals who disagree with them, they impose no obligations on the populace. As the Seventh Circuit stated in *Freedom From Religion Foundation, Inc. v. Obama*: “[A]lthough this proclamation speaks to all citizens, no one is obliged to pray, any more than a person would be obliged to hand over his money if the President asked all citizens to support the Red Cross and other charities. It is not just that there are no penalties for noncompliance; it is that disdaining the President’s proclamation is not a ‘wrong.’” 641 F.3d 803, 806 (7th Cir. 2011). The court of appeals’ conclusion to the contrary is inconsistent with both federal Establishment Clause jurisprudence and the interpretation of the

Preference Clause adopted by this Court. This Court should accordingly grant *certiorari*.

B. The Court should clarify that the historical practice test of *Marsh v. Chambers* is an appropriate analytical tool in Colorado.

In proceedings below, the Governor urged the reviewing courts to apply the “historical practice” test outlined by the United States Supreme Court in *Marsh v. Chambers*, 463 U.S. 783 (1983). The court of appeals, after noting that this Court had adopted only the tests articulated in *Lemon* and *Lynch*, nonetheless concluded in the alternative that there were “crucial” differences between the challenged proclamations and the legislative prayer in *Marsh* that rendered the historical practice test inapplicable.

In doing so, the court of appeals ignored the lengthy history of executive prayer proclamations in America. *Lynch*, for example, opined at length about the deep roots of the National Day of Prayer, pointing out that it is a tradition that began with George Washington in 1789, and has included nearly every President since that time. 465 U.S. at

674-75. The Governor’s issuance of similar – although substantially less exhortative – honorary proclamations, represents a continuation of a tradition dating back more than two centuries. Under the analysis adopted in *Marsh*, the challenged proclamations are entirely consistent with the Establishment Clause. The court of appeals acknowledged that First Amendment doctrine in this area is nuanced, with several strands of case law informing the analysis. But the court also recognized that “our Supreme Court is the final arbiter of the Colorado Constitution.” Ultimately, only this Court can finally determine whether Colorado law requires a different result than that reached in virtually every other jurisdiction to have considered the question. This Court should grant *certiorari* to consider whether the Preference Clause should be interpreted in a manner that permits application of the historical practice approach outlined in *Marsh*.

CONCLUSION

Based on the foregoing reasoning and authorities, Petitioners respectfully request that this Court grant their petition for a writ of *certiorari*.

Respectfully submitted this 21st day of June, 2012.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 21st day of June, 2012, addressed as follows:

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