COURT OF APPEALS STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
City and County of Denver County Honorable R. Michael Mullins, Judge Case No. 08CV9799	
FREEDOM FROM RELIGION FOUNDATION, INC.; MIKE SMITH, DAVID HABECKER; TIMOTHY G. BAILEY, and JEFF BAYSINGER, Appellants/Cross-Appellees, v. JOHN HICKENLOPER, in his official capacity as Governor of the State of Colorado, and THE STATE OF COLORADO. Appellees/Cross-Appellants.	▲ **COURT USE ONLY** ▲ Case No. 10CA2559
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REPLY BRIEF

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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:

The brief complies with C.A.R. 28(g).

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It contains **1,922** words.

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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s/ *Matthew D. Grove*

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Plaintiffs' answer brief reveals a troubling misunderstanding of the critical differences between taxpayer standing and citizen standing in Colorado. As the district court found, this is not a taxpayer standing case because it involves no material governmental expenditures. *CD,* p1579 (No. 34061625) (*Order on Summary Judgment*). Plaintiffs nonetheless persist in contending that Colorado's broad taxpayer standing rules should apply to their complaint, even going so far as to assert that "[u]nder Colorado law, the Plaintiffs are not required to show specific government expenditures." *Answer-Reply Br.* at 4. This remarkable claim is not only offered up without any supporting citation, but is also patently wrong. With one minor (but inapplicable) exception under Colorado law, an allegation that a taxpayer's money is being unconstitutionally expended is a foundational – not to mention tautological – requirement of taxpayer standing. *See, e.g. Dodge v. Dept. of Soc. Servs.,* 600 P.2d 70, 72 (Colo. 1979) (taxpayers had standing to challenge expenditure of public funds for abortions); *Nicholl v. E-470 Pub. Highway Authority,* 896 P.2d 859, 866 (Colo. 1995)

("taxpayers have standing to enjoin an unlawful expenditure of public funds"); *Barber v. Ritter,* 196 P.3d 238, 246 (Colo. 2008) (same).

The exception mentioned above – which was applied in two cases cited by the Plaintiffs – permits a taxpayer to challenge legislation that purports to alter the form of government prescribed by the Colorado Constitution without also alleging an unconstitutional expenditure. *See Hotaling v. Hickenlooper,* 2011 WL 2474302 at *3, n.4 (Colo. App. June 23, 2011) (acknowledging existence of additional narrow category of taxpayer standing). In *Howard v. City of Boulder,* 290 P.2d 237 (Colo. 1955), for example, a taxpayer challenged an initiated amendment to the city charter that would have changed the city council from an at-large body to one that was elected by district. The trial court "dismiss[ed] the action on the ground that the plaintiff had no capacity to sue[.]" *Id.* at 239. The supreme court reversed. Although the word "standing" was not used, the court relied on the concepts of modern standing jurisprudence throughout the opinion. Relying on these concepts, the court held that the plaintiff had capacity to sue because there is "no greater interest a taxpayer can have than his interest in the

form of government under which he is required to live, or in any proposed change thereof." *Id.* at 238 (emphasis added).

Colorado State Civil Serv. Employees Assn. v. Love, 448 P.2d 624 (Colo. 1968), likewise involved a taxpayer's argument that a legislative act was inconsistent with the form of government mandated by the Colorado Constitution. Citing *Howard,* the supreme court found that the plaintiffs, as taxpayers, had standing to challenge the Administrative Reorganization Act of 1968 because it "involve[d] reorganization of our state government." *Love,* 448 P.2d at 627. As Justice Eid recently noted, "taken together, *Howard* and *Love* stand for the proposition that a citizen has standing to challenge 'the form of government under which he is required to live.'" *Barber v. Ritter,* 196 P.3d 238, 257 (Colo. 2008) (Eid, J., concurring in the judgment).

Here, Plaintiffs take *Howard* and *Love* to mean something entirely different: that any Colorado taxpayer has standing to bring a claim that a governmental unit has violated a self-executing constitutional provision. But whether or not a constitutional provision is self-executing speaks only to its general justiciability, not to the more

case-specific questions of standing, ripeness, and mootness. The distinction between these concepts was highlighted in *Developmental Pathways v. Ritter,* 178 P.3d 524 (Colo. 2008), where the supreme court held that Amendment 41 was self-executing but simultaneously determined that the plaintiffs had failed to present an issue that was ripe for review.

Because justiciability and standing are not the same thing, it is not enough to simply assert, as Plaintiffs have done here, that a party may pursue a lawsuit simply because he asserts a claim that is grounded in a self-executing constitutional provision. To the contrary, Plaintiffs must also prove that they have suffered an actual injury as a result of the Defendants' alleged violation of that provision. *See Wimberly v. Ettenberg,* 570 P.2d 535, 539 (Colo. 1977). As noted above, in *taxpayer standing* cases, the supreme court has held that such an injury may flow from either the adoption of an unconstitutional form of

government or unconstitutional usage of tax dollars.[1] *See Barber v. Ritter, supra.* But in cases that involve neither demonstrable government expenditures nor legislative alterations to the state's constitutionally mandated form of government, it is not enough to simply allege that the government has done something that violates the constitution. In other words, in cases that rely on citizen standing (i.e., *Wimberly* standing), a Plaintiff must show an *actual* injury-in-fact to a legally protected interest. While the Plaintiffs in this case have arguably established the existence of a legally protected interest under Article II, § 4 of the Colorado Constitution, the undisputed facts below demonstrated that the Plaintiffs have failed to establish that they

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[1] Note that our supreme court has conferred taxpayer standing even where the unconstitutional use of tax dollars has not led to "direct economic harm." *See Nicholl v. E-470 Pub. Highway Auth.,* 896 P.2d 859, 866 (Colo. 1995). In other words, in taxpayer standing cases, our supreme court has rejected the federal approach that equates state taxpayers with federal taxpayers for the purpose of assessing whether a plaintiff is harmed by allegedly unconstitutional expenditures. *See, e.g. Colorado Taxpayers Union, Inc. v. Romer,* 963 F.2d 1394, 1402 (10th Cir. 1992) (no Article III taxpayer for state taxpayer who cannot show "that a distinct and palpable injury resulted from the allegedly illegal appropriation or expenditure").

suffered an injury-in-fact as a consequence of the issuance of the challenged honorary proclamations.

The answer brief's expostulation of Plaintiffs' alleged injuries only serves to hammer home the fact that Plaintiffs filed this lawsuit not because they were actually injured in any way, but merely because they were unhappy with the Governor's policies. Citing *Conrad,* the Plaintiffs contend that "the intangible interest in having a government that does not prefer or support religion over non-religion is sufficient to confer standing." *Answer-Reply Br.* at 5. If anything, a citizen's "intangible interest" in having the government conform to the constitution satisfies only the "legally protected interest" prong of the standing test. Irrespective of its label, having an "intangible" or "legally protected" interest only gets a plaintiff halfway. In order to establish standing, a plaintiff must also demonstrate that he has been *injured* by an invasion of that interest. In *Conrad,* that injury was established by the fact that municipal tax dollars were spent on storing and maintaining the display. 656 P.2d at 668-69. Here, however, the Plaintiffs have never alleged, much less proven, any connection between

their tax dollars and the issuance of the challenged honorary proclamations.

The question that this Court must answer, then, is whether the self-inflicted psychic injuries alleged by the plaintiffs amount to a cognizable injury-in-fact under the Colorado Constitution. This question has never been answered in Colorado under the analysis for citizen standing outlined in *Wimberly*. As explained in the State's opening brief, however, other jurisdictions addressing the issue have unanimously rejected the proposition that mere disagreement with the government's conduct can arise to the level of injury-in-fact. For example:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs *as a consequence* of the alleged constitutional error, other than the psychological consequences presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. That concrete adverseness which sharpens the

> presentation of issues is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 487 (1982) (emphasis in original) (internal quotations and citations omitted).

Plaintiffs nevertheless argue that feeling like "political outsiders" as a consequence of the challenged honorary proclamations is a sufficient injury to establish their standing to sue. But it is well settled that "an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing." *Newdow v. Lefevre,* 598 F.3d 638, 643 (9th Cir. 2010), *quoting Allen v. Wright,* 468 U.S. 737, 755-56 (1984); *see also Freedom From Religion, Inc. v. Perry,* 2011 WL 3269339 (S.D. Tex. Sept. 28, 2011) (allegation that Texas governor's promotion of a prayer rally made plaintiffs "feel like political outsiders" was not an injury sufficient to establish standing). Although psychic injuries can, and sometimes do, cause injury-in-fact, courts across the country are virtually unanimous in their rejection of the idea that "a perceived

slight, or feeling of exclusion" is an injury sufficiently tangible to confer standing to sue. *Freedom From Religion Foundation v. Obama,* 641 F.3d 803, 806 (7th Cir. 2011) ("*Obama III*").

Nor is it availing for Plaintiffs to argue that they must have standing simply because if they do not, then no one will. *Answer-Reply Br.* pp. 8-9. First, this unsupported assertion is obviously incorrect. The fact that they were unable to demonstrate an injury-in-fact does not mean that it would be impossible for someone else to do so. As the State has previously pointed out, the Plaintiffs would be much more likely to establish standing if they were able to demonstrate that suffered an injury due to coming in "direct contact" with the challenged honorary proclamations. *See, e.g., See, e.g, American Atheists, Inc. v. Davenport,* 637 F.3d 1095, 1113-14 (10th Cir. 2010) (en banc). Moreover, nothing in the Colorado Constitution suggests that any and every action taken by the government must somehow be challengeable in the state's courts. To the contrary, in accord with every other American jurisdiction, Colorado has minimum requirements for standing and justiciability. Plaintiffs' failure to satisfy the minimal

requirements to establish standing in Colorado does not mean that those requirements should be ignored. But if the basic limitations on standing "were not imposed, any person could seek judicial review of a controversy, merely by a claim of any subjective injury to an intangible interest. The Colorado Constitution requires more." *Conrad,* 656 P.2d at 679 (Erickson, J., dissenting).

American courts are virtually universal in holding that "offense at a public official's support of religion" is not enough to demonstrate standing. *Perry, supra* at *5, *citing Obama III,* 641 F.3d at 807-08. In the case of first impression presented here, this Court should reach the same conclusion. To hold otherwise would be to throw open the courthouse doors to anyone who wished to question "the wisdom and soundness of Executive action," *Hein v. Freedom From Religion Foundation,* 551 U.S. 587, 611 (2008), irrespective of whether they have suffered an injury that creates "a 'concrete adverseness which sharpens the presentation of issues' that parties argue to the courts." *Greenwood Village v. Petitioners for Proposed City of Centennial,* 3 P.3d 427, 437 (Colo. 2000), *quoting Baker v. Carr,* 369 U.S. 186, 204 (1962).

CONCLUSION

Based on the reasoning and authorities herein and in the opening-answer brief, this Court should affirm the district court's ruling, but on the alternate ground that the Plaintiffs lacked standing to proceed with their lawsuit.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY BRIEF** upon all parties herein, and the district court, by LexisNexis File and Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 21st day of November, 2011, addressed as follows:

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