SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Court of Appeals, State of Colorado, The Honorable Jerry N. Jones, Arthur P. Roy, and Alan Loeb, Judges, Case Number 10CA0364 District Court, City and County of Denver, Colorado, The Honorable Larry J. Naves, District Court Judge, Case Number 08CV9453	
Plaintiff-Petitioner: Mark Hotaling Defendants-Respondents: John Hickenlooper, in his official capacity as Governor of the State of Colorado; Christopher E. Urbina, in his official capacity as Executive Director of the Colorado Department of Public Health and Environment; Planned Parenthood of the Rocky Mountains Services Corporation, a Colorado nonprofit corporation; and Boulder Valley Women's Health Center, Inc., a Colorado nonprofit corporation	▲ COURT USE ONLY ▲
ATTORNEY FOR PETITIONER Barry K. Arrington, #16,486 ARRINGTON LAW FIRM 7340 East Caley Avenue, Suite 360 Centennial, Colorado 80111 Phone Number: (303) 205-7870 FAX Number: (303) 463-0410 E-mail: barry@arringtonpc.com	Case Number: _____
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I. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err when it held that a plaintiff-taxpayer who alleged that a government action violated a specific provision of the Colorado Constitution lacked standing to challenge that violation?

II. DECISION BELOW

A copy of the Court of Appeals' June 23, 2011 decision is attached hereto.

III. JURISDICTION STATEMENT

The Court of Appeals announced its decision on June 23, 2011. No petition for rehearing was filed. This Court has jurisdiction over this matter pursuant to C.A.R. 52.

IV. STATEMENT OF THE CASE

The Colorado Constitution flatly prohibits the State and its subdivisions from using "public funds" to pay for abortions, either directly or indirectly. Colorado Constitution, Article V, Section 50. Planned Parenthood of the Rocky Mountains Services Corporation ("Planned Parenthood") and Boulder Valley Women's Health Center, Inc. ("Boulder Valley") provide abortion services. In his complaint Mark Hotaling ("Plaintiff" or "Hotaling") alleged that the Colorado Department of Public Health and Environment (the "Department") was using public funds to

subsidize the abortion services provided by Planned Parenthood and Boulder Valley in violation of Article V, Section 50.

In *Barber v. Ritte*r, 196 P.3d 238 (Colo.2008), this Court held that a plaintiff has standing merely by alleging that a governmental action violates the state constitution, even though this appears to collapse the two-part test standing test into a single inquiry:

> Because the issues presented by Petitioners in this case concern the enforcement of [an amendment to the Colorado Constitution], the legally protected interest requirement of the *Wimberley* test is satisfied. Concerning the injury-in-fact requirement of the *Wimberley* test, we hold . . . that Petitioners suffered an injury-in-fact because they seek review of what they claim is an unlawful government expenditure which is contrary to our state government. **We acknowledge that this reasoning may appear to collapse the *Wimberley* two-part test into a single inquiry as to whether the plaintiff-taxpayer has averred a violation of a specific constitutional provision**. **However, Colorado case law requires us to hold that when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision such as Amendment 1, such an averment satisfies the two-step standing analysis**.

Id., 196 P.2d at 246-47 (internal citations and quotations omitted; emphasis added).

It would seem under this analysis that Hotaling established his standing to bring this action by alleging the Department was using public funds to subsidize Planned Parenthood's and Boulder Valley's abortion operations in violation of a specific provision of the state constitution.

Not so, say the defendants. They argue that because the public funds being paid to Planned Parenthood and Boulder Valley were received from the federal government, they are exempt from the restrictions of the Colorado Constitution (or at least no one may challenge the expenditure, which amounts to the same thing). Indeed, the defendants go even further. They argue, essentially, that the state may fund an unlimited number of abortions in flagrant violation of the letter and spirit of the Colorado Constitution, and as long as the funds used were received from the federal government, no one has standing to challenge the unlawful expenditures. State Officials' Court of Appeals Answer Brief, pp. 34-35. Defendants' argument obviously conflicts with this Court's holding in *Barber*, and for that reason they urged the Court of Appeals not to engage in a "hyper-literal" interpretation of *Barber*. *Id*., pg. 47.

The Court of Appeals agreed with the defendants. The Court of Appeals specifically acknowledged that in *Barber* this Court held that "when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision ..., such an averment satisfies the two-step standing analysis . . ." Slip op., pp. 9-10. The Court of Appeals concluded, however, that notwithstanding the broad language this Court employed, it did not mean what it literally said. Instead, the Court of Appeals held that Hotaling

failed to meet that standing test because he had not been indirectly "harmed" as a Colorado taxpayer. *Id.*

V. ARGUMENT

A. The Court of Appeals Failed to Follow *Barber*.

One of the primary considerations guiding this Court's discretion in granting review on a writ of certiorari is whether "the Court of Appeals . . . had decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court." C.A.R. 49. In this case the Court of Appeals as much as admitted that if it were to follow this Court's literal holding in *Barber*, Hotaling would have established standing. Slip op., pp 9-10. Thus, the issue presented by this case is whether this Court meant what it literally said in *Barber*. Hotaling respectfully urges the Court to grant his petition in order to reaffirm its recent holding in *Barber*.

B. Facts Relevant to This Petition.

In 1984 the voters of the State of Colorado approved an amendment to the Colorado Constitution prohibiting the use of public funds either directly or indirectly to pay for induced abortions. Complaint (ID 17899051), pg. 2. This amendment is set forth as Article V, Section 50 of the Colorado Constitution, which states:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise

> reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.

Planned Parenthood provides abortion services. Complaint (ID 17899051), pg. 2. Boulder Valley also provides abortion services. *Id*., pg. 3. Hotaling alleges the Department has used public funds to subsidize Planned Parenthood's and Boulder Valley's abortion operations. *Id*., pp. 2-3.

C. Colorado Provides For Very Broad Taxpayer Standing.

Plaintiffs in Colorado "benefit from a relatively broad definition of standing that has traditionally been relatively easy to satisfy." *Reyher v. State Farm Mut. Auto. Ins. Co*., 230 P.3d 1244, 1250 (Colo.App. 2009). To establish standing under Colorado law, a plaintiff must satisfy a two-part test requiring (1) that the plaintiff suffered injury in fact, and (2) that the injury was to a legally protected interest as contemplated by statutory or constitutional provisions. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008), *quoting*, *Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 538 (1977).

D. Alleging a Violation of the State Constitution Satisfies the Standing Test.

In *Barber* this Court plainly held that when a plaintiff alleges a violation of a specific provision of the state constitution, the two-step standing test is satisfied, even though this appears to collapse the test into a single inquiry:

> We acknowledge that this reasoning may appear to collapse the *Wimberley* two-part test into a single inquiry as to whether the plaintiff-taxpayer has averred a violation of a specific constitutional provision. However, Colorado case law requires us to hold that when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision such as Amendment 1, such an averment satisfies the two-step standing analysis.

Barber, 196 P.2d at 246-47 (internal citations and quotations omitted).

E. The Barber Court Was Mindful of the Implications of its Holding.

The Court of Appeals seems to believe that "in context" this Court did not really mean what it literally said in *Barber*. This is plainly not the case, because the concurring justices in *Barber* specifically pointed out that they did not agree with the broad standing analysis of the majority. Concurring in the result reached by the majority – but disagreeing with its standing analysis – Justice Eid wrote:

> Petitioners claim in this case that monies in special cash funds were transferred into the general fund in violation of Amendment 1. Yet it is undisputed that not a single petitioner actually paid into the special cash funds that they allege were

> improperly depleted. Because the only injury alleged in the suit is the improper depletion of the special cash funds, petitioners cannot satisfy the injury-in-fact requirement of the standing inquiry. The majority's ruling-which permits petitioners to pursue their claim under Amendment 1, albeit rejecting it on the merits-stretches the concept of standing so far that, **after today, virtually *any* taxpayer can bring *any* claim alleging that a government entity has acted in an unconstitutional manner**. Such generalized grievances about government operations do not constitute a controversy to be decided by the judiciary, but rather should be directed to the General Assembly or the executive branch. I therefore concur only in the result reached by the majority.

Id., 196 P.2d at 254 (Eid, J. concurring) (bold emphasis added; italicized emphasis in original).

In summary, in *Barber* both the majority and the concurrence understood and plainly asserted that the Court's holding meant that by alleging that a government action has violated a specific constitutional provision, a taxpayer plaintiff has satisfied the two-step standing analysis. The only difference was that the majority specifically intended this result and the concurrence disagreed with it. Accordingly, it is difficult to credit an argument that the broad taxpayer standing language this Court used in *Barber* was somehow inadvertent, and that, "in context" this Court did not mean what it wrote.

F. In Constitutional Cases Plaintiffs Need Not Establish Economic Injury.

Where constitutional issues are concerned this Court has categorically rejected the "economic interest" approach to standing. In *Dodge v. Dept. of Soc. Servs.*, 198 Colo. 379, 600 P.2d 70 (1977) this Court stated:

> Plainly, there is no direct economic injury in fact here. *Wimberly, supra*. **However, injury in fact may be found in the absence of direct economic injury**. . .
>
> In *Howard v. City of Boulder*, 132 Colo. 401, 290 P.2d 237 (1955), a taxpayer brought an action challenging the constitutional validity of a proposed amendment to the Boulder city charter. **Although the proposal had no adverse economic effect on the plaintiff, we found that he had standing because of his interest that the form of government under which he lived be in accord with the state constitution.**
>
> More recently, in *Colorado State Civil Service Employees Association v. Love*, 167 Colo. 436, 448 P.2d 624 (1968), state employees challenged the constitutional validity of the Administrative Reorganization Act of 1968. We found that the **plaintiffs there had standing because of their interest in ensuring that the organization of government conforms to the constitution of this state**. In that case, we stated:
>
> > 'The rights involved extend beyond self-interest of individual litigants and are of 'great public concern.' Petitioners state a justiciable controversy, because they claim violation of the Civil Service Amendment (to the state constitution) . . . .'

Id., 600 P.2d at 381 (emphasis added).

In summary, therefore a taxpayer plaintiff has standing when he alleges that a government action violates a specific constitutional provision,

even if the plaintiff has not incurred any economic harm from the governmental action. Nevertheless, the Court of Appeals held that a taxpayer must show at least some indirect economic injury by virtue of an expenditure of funds "to which the taxpayer contributed." Slip op., pg. 9. Moreover, in an analysis that is difficult to understand, the Court of Appeals stated that *Barber* actually supports this conclusion, because the plaintiff in that case was indirectly harmed when funds were transferred into the state general fund (to which the plaintiff contributed) from the special cash funds (to which the plaintiff did not contribute). *Id*.

But the Court of Appeals' analysis is directly opposite of this Court's holding in *Barber*, as the concurrence in *Barber* specifically pointed out. Justice Eid understood that the petitioner in *Barber* suffered no economic injury of any kind and in fact **benefitted** from the challenged expenditure when she wrote: "Moreover, as general taxpayers, petitioners *actually benefited* from the alleged improper transfers because, under petitioners' theory of the case, taxpayers to the general fund actually paid less in taxes because the general fund was being subsidized by the infusion of special cash funds." *Barber*, 196 P.2d at 254 (Eid, J. concurring) (emphasis in original).

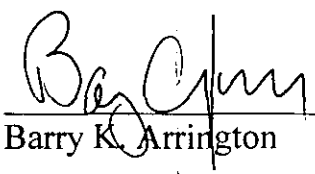
VI. CONCLUSION

The Court of Appeals admits it deviated from this Court's holding in *Barber*, because it believes, in context, this Court did not mean what it literally wrote. Yet, for the reasons discussed above, there is no reason to believe the language this Court used in *Barber* was in any way inadvertent and every reason to believe that this Court meant exactly what it said. Moreover, the Court of Appeals insists that a taxpayer plaintiff in a constitutional case must show an indirect economic injury. This is contrary to this Court's plain holdings in any number of cases. Indeed, in *Barber* the plaintiffs arguably benefitted from the illegal expenditure.

In summary, therefore, the Court of Appeals' almost certainly "decided a question of substance in a way . . . not in accord with applicable decisions of the Supreme Court." Therefore, Hotaling respectfully requests the Court to grant his petition and review and reverse the Court of Appeals' holding.

CERTIFICATION REGARDING WORD LIMIT

Undersigned counsel certifies that this principal brief contains 2610 words.



Barry K. Arrington