

COLORADO SUPREME COURT

2 East 14<sup>th</sup> Avenue  
Denver, Colorado 80203

On Petition for Writ of Certiorari to the Colorado Court of Appeals, Opinion issued by Judge Ted C. Tow, III, (Judge Richman and Judge Grove concurring) Case No. 20CA1780:  
Freemont County District Court No. 18CV30069  
Honorable Lynette M. Wenner, Judge

Petitioner,  
THE STATE OF COLORADO, MARK EVERETT WARSEWA, AND LINDA JOSEPH  
v.  
Respondent,  
ROGER HILL

*Attorneys for Petitioner State of Colorado*  
PHILIP J. WEISER, Attorney General  
ERIC R. OLSON, Atty. Reg. No. 36414\*  
Solicitor General  
SCOTT STEINBRECHER, Atty. Reg. No. 36957\*  
Assistant Deputy Attorney General  
DANIEL E. STEUER, Atty. Reg. No. 35086\*  
Senior Assistant Attorney General  
OLIVIA PROBETTS, Atty. Reg. No. 56785\*  
Assistant Attorney General Fellow  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 10th Floor  
Denver, CO 80203  
Telephone: (720) 508-6000  
FAX: (720) 508-6043  
E-Mail:  
[eric.olson@coag.gov](mailto:eric.olson@coag.gov)  
[scott.steinbrecher@coag.gov](mailto:scott.steinbrecher@coag.gov)  
[daniel.steuer@coag.gov](mailto:daniel.steuer@coag.gov)  
[olivia.probetts@coag.gov](mailto:olivia.probetts@coag.gov)  
\*Counsel of Record

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Case Number: 2022 SC 119

**PETITION FOR CERTIORARI**

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 32 and 53, including all formatting requirements set forth in these rules. The brief complies with C.A.R. 53(a) in that it contains 3228 words and (1) an advisory listing of the issues presented for review; (2) a reference to the official or unofficial reports of the opinion of the court; (3) a concise statement of the grounds on which jurisdiction of the Supreme Court is invoked; (4) a concise statement of the case containing the matters material to consideration of the issues presented; (5) a direct and concise argument amplifying the reasons for the allowance of the writ; and (6) an appendix including a copy of the opinion delivered upon the rendering of the decision of the court of appeals.

*/s/ Eric Olson*

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Eric R. Olson

Attorney Reg. No. 36414\*

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## INTRODUCTION

Roger Hill asked a court to rule that the State, not Mark Warsewa and Linda Joseph, owned some land under the Arkansas River because, Hill claimed, the river was navigable when Colorado became a state. Therefore, he argued, the state of Colorado owned the riverbed, and he could use it as a member of the public. In addition, relying on the same theory, he sought a “declaration ... that [Warsewa and Joseph] have no right to exclude [him] from wading in the Arkansas river at the subject location.” First Am. Compl. ¶ 64.

The district court correctly found that Hill lacked standing to bring either claim and that Hill had failed to state a claim for which relief could be granted under Rule 12(b)(5). Although the court of appeals concluded that Hill lacked standing to quiet title in the name of the State, it still concluded that he had standing to seek a declaratory judgment that relied on the same theory.

This decision was wrong and, absent resolution by this Court, creates an unworkable process that threatens to upset long-settled

arrangements governing water and river access. Special and important reasons support granting review here because the court of appeals decided the standing question not in accord with applicable decisions of this Court and created an unworkable process that calls for the Court to exercise its power of supervision.

### **ISSUE PRESENTED FOR REVIEW**

Whether an individual has standing to seek a declaratory judgment that a river segment was navigable for title at statehood and belongs to the State.

### **OPINION BELOW**

The State seeks review of *Hill v. Warsewa*, 20CA1780 (Jan. 27, 2022).

### **JURISDICTION OF THE SUPREME COURT**

This Court has jurisdiction to grant certiorari review under C.A.R. 49. This Court granted the State's motion for an extension of time until April 11, 2022 to file this Petition.

## STATEMENT OF THE CASE

Upon admission to the Union, title to the bed of any navigable river passed to the State, while title to the beds of non-navigable rivers remained with the United States. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589–91 (2012). No river within the State of Colorado was declared navigable at statehood, so title to all riverbeds remained with the United States when Colorado became a State in 1876.

The United States has conveyed its title to non-navigable riverbeds to other owners through federal patents. Such a patent conveyed the land at issue, including a segment of the Arkansas riverbed, that now belongs to Warsewa and Joseph. CF, p. 133.

Roger Hill wants to fish on this segment of the river. After trying to fish without permission and being aggressively refused, he sued Warsewa and Joseph, claiming that a court could order that the riverbed belonged to the State and, as a member of the public, he had a right to use it.

Hill argues that he has standing to claim that Warsewa and Joseph's property belongs to the State because he is a member of the

public who, under his theory, could use the riverbed and because he faced aggressive efforts to remove him from the property. Hill filed suit against the landowners seeking an order “quieting title and decreeing that title to the disputed property is held exclusively by the state of Colorado in trust for the public.” First Am. Compl. ¶ 75. Hill also sought a declaratory judgment that the landowners “have no right to exclude Plaintiff Hill from wading in the Arkansas River at the subject location” because the “Arkansas River is navigable for title at this location” and thus the “bed of the Arkansas River at this location is therefore public land owned by the state of Colorado in trust for the public.” *Id.* ¶¶ 62–64.

This case has a complicated procedural history that does not bear on our request for certiorari. The proceedings directly below provide the relevant background. *See Hill v. Warsewa*, 2020CA1780 (Jan. 27, 2022), ¶¶ 6–10.

The state district court found that Hill lacked standing because he failed to show that he had a legally protected interest and failed to plead facts sufficient to support his claim for quiet title. CF, pp. 249–54.

Hill appealed the district court's decision to the court of appeals. CF, pp. 262–66. The division reached two separate conclusions.

First, the court held that Hill had no claim to title and therefore lacked a legally protected interest in that title. Thus, he lacked the standing necessary to quiet title in the name of the State. *Hill*, ¶ 21.

But the division then held that Hill had standing to seek a declaratory judgment that Warsewa and Joseph could not exclude Hill from the riverbed because title passed to the State at statehood. *Id.* ¶ 28.

According to the court of appeals, Hill alleged a particularized injury to a legally protected interest sufficient to confer standing for the declaratory judgment action since he, not the public, wanted to fish on Warsewa and Joseph's property and had been threatened by them. *Id.* ¶ 27.

## **PRESERVATION AND STANDARD OF REVIEW**

The court of appeals' decision granting Hill standing is reviewed *de novo*. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). Additionally,

this issue was preserved at both the district court level and the court of appeals.

## **REASONS FOR GRANTING REVIEW**

### **I. The Writ Should Be Granted Because the Opinion Will Upset Settled Practice and Expectations.**

The court of appeals' decision will cause significant disruption. It expands standing doctrine substantially, upends settled expectations and long-standing practices, and creates asymmetric incentives that reduce the likelihood of fair and accurate decisions.

#### **A. The court of appeals erred in its interpretation of the law.**

The court correctly determined that Hill lacked standing to quiet title in the State's name, *Hill*, ¶ 21, but then wrongfully found that Hill could seek a declaratory judgment reaching nearly the same result. *Id.* ¶ 28.

If the appellate decision remains, Hill has standing to require a court to determine whether this segment of the Arkansas River was navigable at statehood, and if so, to prohibit Warsewa and Joseph from

excluding Hill from the riverbed. Such a judgment in Hill’s favor would effectively grant the same relief as Hill sought in the quiet title claim.

The court of appeals’ holding wrongly expands standing by applying a broader approach for declaratory judgment actions than exists for the underlying claim. Plaintiffs cannot manufacture standing by adding a claim for a declaratory judgment when they lack standing to bring the underlying claim.

This limitation on standing helps ensure that courts do not “under the pretense of an actual case, assume powers vested in either the executive or the legislative branches of government.” *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977). The requirement of showing standing “distinguishes those particularly injured by government action ... from members of the general public, whose interests are more remote and who must address their grievances against the government through the political process.” *Reeves-Toney v. Sch. Dist. No. 1*, 2019 CO 40, ¶ 23. If the longstanding Colorado approach to determining ownership of riverbeds is to change, that process rightly belongs to the political process in the executive or legislative branches.

This concern has particular force when the lawsuit seeks to determine whether the state itself owns property. Having courts force such a determination without the state's consent bypasses the political process and would require the court to consider a series of challenging issues discussed below that courts are not particularly well situated to make.

**B. This lawsuit is part of a coordinated effort to disrupt settled agreements for the use of state rivers.**

Statements by Hill and his counsel make clear that this is not a one-off action by a private individual, but is rather a concerted effort to assert navigability across the State and disrupt settled agreements for the use of our state's rivers. Hill's attorneys have conceded that this suit is intended to create a procedure forcing courts to "determine navigability' for every river and stream in Colorado." Jason Blevins, *Colorado appeals court reviews river access, right-to-wade debate*, THE COLORADO SUN, (Feb. 14, 2022, 4:00 AM), <https://coloradosun.com/2022/02/14/colorado-appeals-court-river-right-to-wade/> (quoting Hill's

attorney). Hill himself has acknowledged that his case will have “staggering implications.” *Id.*

By empowering any member of the public to force a court to determine whether a river segment was navigable for title, this decision allows for strategic deployment of interest groups to sue individual landowners, who usually will not have the resources to fully defend the fact-intensive claim about whether a segment of a river was navigable 150 years ago. One of the many challenges a landowner might face is proving river conditions at the time of statehood. Post-statehood construction of significant water infrastructure to move water between river basins, along with increasing domestic and agricultural water use, means that water flow today does not necessarily correspond with historic water flow. The analysis of historic conditions throughout a river basin would likely be inconsistent if different landowners were required to respond to piecemeal claims that individual segments were navigable for title at statehood.

**C. The opinion threatens statewide collaborative efforts providing public fishing access.**

The court of appeals' opinion will undermine statewide collaborative efforts to ensure public access to streams and rivers while respecting private property rights. Through the efforts of the State of Colorado and its federal partners, public fishing access is plentiful on the Arkansas. From the river's headwaters to the City of Pueblo—a stretch of water that includes 102 miles of “Gold Medal” trout fishing—about 70% of land along the river is open to public fishing access. *See* Colo. Parks & Wildlife, Upper Ark. River Fish Survey and Mgmt. Date, p. 1, available at <https://bit.ly/2LUiIP4>. The Arkansas Headwaters Recreation Area—which covers 152 miles of the river—is collaboratively managed by Colorado Parks and Wildlife, the United States Bureau of Land Management, and the United States Forest Service. U.S. Dep't of Interior, Colo. Parks & Wildlife, and U.S. Forest Serv., Ark. Headwaters Recreation Area Final Mgmt. Plan & Env't'l Assessment, p. 1-13 (2019), available at <https://cpw.state.co.us/placestogo/parks/>

[ArkansasHeadwatersRecreationArea/Documents/Admin/Publications/ArkRivMgmtPlan.pdf](#).

Those state and federal partners have worked together to increase fishing access, delineate private land boundaries, and increase public education about public access to the river. One major purpose of those efforts is to reduce the potential for conflicts like this one. *E.g., id.*, pp. 1-22 (explaining that a goal of the recreation area is to “[k]eep impacts of recreation use and conflicts between recreationists, other land users and public and private landowners in a manner consistent with existing policies and laws”). The court of appeals’ opinion disrupts these efforts, giving individuals a tool to upset those long-settled and carefully balanced rights and dictate policy to both the state and federal governments.

**D. The opinion will upset almost 150 years of settled expectations for landowners.**

No river in Colorado has ever been declared navigable for title at statehood by a court. And historically, only states have sought such a declaration that a river was navigable at statehood, which Colorado has

never done. See *PPL Montana, LLC*, 565 U.S. 576; *United States v. Utah*, 283 U.S. 64 (1931); *Alaska v. United States*, Complaint, (No. 3:1-cv-00221-JMK) (Oct. 6, 2021), available at <https://gov.alaska.gov/wp-content/uploads/sites/2/Koyukuk-Complaint-as-filed.pdf> (Alaska seeking to quiet title in its own name to portions of the beds of the Koyukuk River, Bettles River, and Dietrich River). Since statehood, the settled expectation has been—absent a decision by a state to act otherwise—federal ownership of the riverbed, then private ownership—an expectation that Hill seeks to upset.

**E. The opinion will upset settled expectations for water rights holders.**

Current water rights holders have negotiated ditch and headgate easements under the belief that the riparian landowner had the sole authority to convey that easement. Hill’s success on the merits could leave owners of irrigation structures unable to continue diverting water and could have significant consequences for water rights across the state. Similarly, Hill’s success on the merits would impact owners of land under on-channel reservoirs. Property decisions were made

assuming that the land beneath the reservoir was properly conveyed. But if a river is declared navigable at statehood, those who acquired the land underneath that river might discover that they never acquired it since the riverbed was never private property. Such a decision could have monumental consequences for water rights in Colorado and could lead to significant litigation challenging existing property rights.

**F. The opinion encourages dangerous behavior.**

Finally, the court of appeals' reliance on the fact that Hill has standing because he suffered an injury to a legally protected interest as a result of trespassing would encourage others to trespass to acquire the necessary injury to confer standing and pursue suits against private landowners, particularly if they know another party has succeeded on a similar claim.

Each of these reasons, on their own, provide strong reasons supporting certiorari. But taken together, these reasons show the urgent need for this court to reverse the court of appeals' decision and reaffirm long-standing rules of standing that do not allow individuals to

force courts to resolve claims when the plaintiff possesses no legally protected interest.

## **II. The Writ Should Be Granted Because the Opinion Incorrectly Applies the Law of Standing for Generalized Grievances.**

A plaintiff cannot litigate generalized grievances held in common with the public. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000). A plaintiff must show a particularized injury to a legally protected interest to ensure “that courts do not decide abstract, generalized grievances.” *Town of Erie v. Town of Frederick*, 251 P.3d 500, 504 (Colo. App. 2010).

Taxpayer standing in Colorado stands as the exception to the rule that a generalized grievance does not provide standing. Under taxpayer standing, “a plaintiff must establish an injury relevant to her status as a taxpayer.” *Reeves-Toney*, ¶ 30. Because taxpayer standing serves as the lone exception to the generalized grievance rule, any other person suing, including Hill because he does not assert taxpayer standing, must show he or she has a legally protected interest that is not shared with the general public.

The court of appeals incorrectly concluded that Hill had asserted an injury to a legally protected interest particular to himself because only he had been threatened with violence when trespassing on Warsewa and Joseph's property. *Hill*, ¶ 27. While the threats of violence might lead to a tort claim against Warsewa and Joseph, those threats do not affect who may bring a claim to quiet title in the land. The relief that Hill seeks would be just as beneficial to any other member of the public who wished to fish or wade in the portion of the Arkansas River passing through Warsewa and Joseph's property, and the injury suffered by Hill is an injury that any other member of the public could be expected to suffer by wading in the river on the same property. Thus, Hill cannot transform a legally protected interest from generalized to particularized by trespassing when the injury remains the same as any other person would incur by trespassing. Ultimately, his injury, and any legal interest he may possess, remains one shared with the public. The Court should grant certiorari to make clear that when a plaintiff asserts a generalized grievance, that plaintiff cannot gain standing by incurring

an injury that any member of the public would incur in similar circumstances.

### **III. The Writ Should Be Granted Because the Opinion Creates Poor Public Policy.**

The court of appeals determined that Hill could not quiet title in the name of the State, *Hill*, ¶ 21, but the effect of the division's decision allows him to do just that. Hill's success on the merits requires a determination that a segment of the Arkansas River was navigable for title at statehood. Thus, any other person who could establish standing would use the judgment to claim the right to wade belonged to them too, ultimately reaching the same result as allowing Hill to quiet title in the first place.

Additionally, the Court of Appeals decision creates significant confusion by failing to address what a judgment in Hill's favor would mean for both the landowners and the State. Hill seeks only a judgment that Warsewa and Joseph cannot exclude him. But, as noted above, any such judgment requires a determination that the Arkansas River was navigable for title at statehood. Because the State is a party to this

litigation, other members of the public would likely claim the judgment binds the State as to everyone. This outcome is indistinguishable from a ruling that title passed to the State in 1876. This result contravenes the court of appeals' conclusion that Hill could not quiet title in the name of the State and undermines the title of any other person similarly situated to Warsewa and Joseph. The Court should grant certiorari to address this untenable outcome under which Hill is permitted, as a practical matter, to quiet title in the name of the State.

The court of appeals' opinion also rewards trespassing. The court of appeals determined that Hill suffered a particularized injury, because he had been personally threatened for trespassing on the landowners' property, and therefore has standing. *Hill*, ¶ 27. Had he not trespassed, and instead filed suit preemptively, he would have lacked standing and been unable to bring suit. Both lower courts and even Hill seem to agree that without the trespass Hill would lack standing. *See* CF, pp. 261 (The District Court concluding that “[w]hatever right plaintiff might possess in accessing the disputed riverbed he shares with all members of the public.”); *Hill*, ¶ 27 (noting

that whatever right of access Hill may possess is shared with the general public, but “there is no indication that all members of the public have been threatened with physical harm and prosecution for trespass [and t]hus, Hill’s claim is not a generalized or abstract claim, but a particularized one”); Opening Br., p. 26 (“Mr. Hill’s individualized, particularized, and concrete injury sets Mr. Hill apart from the public at large and makes this a real dispute between the parties ripe for judicial determination.”). Therefore, anyone who seeks to gain wading rights on another person’s property will be encouraged to violate property rights in a similar manner as Hill.

Finally, this Court has determined that the “primary purpose of a declaratory [judgment] . . . is to provide a ready and speedy remedy, in cases of actual controversy, for determining issues and adjudicating legal rights, duties, or status of the respective parties, *before* controversies with regard thereto lead to the repudiation of obligations, *the invasion of rights, and the commission of wrongs.*” *People ex rel. Inter-Church Temperance Movement of Colo. v. Baker*, 297 P.2d 273, 277 (Colo. 1956) (emphasis added). Thus, declaratory judgments are limited

to those cases when such a declaration would help resolve a legal issue before a wrong has to be committed. *See* Rule 57(k) (concluding that the Rule’s purpose is to “afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations”). Hill should therefore be unable to pursue a declaratory judgment as his standing to pursue the judgment relies on the fact that he has already committed a wrong.

### CONCLUSION

The State requests that this Court grant the Petition for Writ of Certiorari.

PHILIP J. WEISER  
Attorney General

*/s/ Eric Olson*

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ERIC R. OLSON, 36414\*

Solicitor General

SCOTT STEINBRECHER, 36957\*

Assistant Deputy Attorney General

DANIEL E. STEUER, 35086\*

Senior Assistant Attorney General

OLIVIA PROBETTS, 56785\*

Assistant Attorney General Fellow

\*Counsel of Record

*Attorneys for Petitioner State of  
Colorado*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITION FOR CERTIORARI** was served this 11<sup>th</sup> day of April 2022, by CCE e-filing procedures upon the following:

<b>Party</b>	<b>Type</b>	<b>Attorney</b>
Roger Hill	Respondent – Appellant	Alexander N. Hood <i>Towards Justice</i> Mark Squillace
Linda Joseph	Petitioner – Appellee	Kirk B. Holleyman <i>Kirk Holleyman PC</i>
Mark E. Warsewa	Petitioner – Appellee	Kirk B. Holleyman <i>Kirk Holleyman PC</i>

*/s/Nan B. Edwards*

Nan B. Edwards

Paralegal II

Colorado Department of Law