COURT OF APPEALS, STATE OF COLORADO
101 West Colfax Ave., Suite 800
Denver, CO 80202

District Court, Denver County, State of Colorado
The Honorable R. Michael Mullins, Judge
Civil Action No. 08-CV-9799

Appellants/Cross-Appellees:

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

v.

Appellees/Cross-Appellants:

BILL RITTER, JR., in his official capacity as GOVERNOR OF THE STATE OF COLORADO, and
THE STATE OF COLORADO.

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Case Number: 10CA2559

APPELLANTS' ANSWER-REPLY BRIEF

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:

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

Chose one:

√ It contains 5806 words.

__ It does not exceed 18 pages.

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

__ For the party raising the issue:
It contains under a separate heading (1) 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.

√ For the responding party to the issue:
It contains, under a separate heading, a statement 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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A. Answer Brief

Standing exists to challenge alleged violations of the self-executing Preference Clause of the Colorado Constitution. Non-believers in Colorado have a legally protected and enforceable interest in having a government that does not promote or endorse religion. The fundamental interest protected by the Preference Clause cannot be dismissed or trivialized by characterizing the Plaintiffs' injury as "psychic sensitivity." The Plaintiffs' interest is constitutionally protected and it is not a self-inflicted injury. Exposure to Proclamations of a state-wide Day of Prayer is anticipated and unavoidable by these Colorado taxpayer citizens, causing constitutionally significant injuries.

B. Reply Brief

The Governor's official Proclamations of a Colorado Day of Prayer are not merely acknowledgements of the historical significance of religion. (R. at 31538041, Exhibit 1, Page 52, Lines 18-22) Although the Governor claims to issue such official proclamations on demand, and without much thought, the Proclamations constitute government endorsements of a blatantly evangelical event. That is the undisputed reason why the National Day of Prayer Task Force requests official Day of Prayer Proclamations. (R. at 31542267, Exhibit 111, Page 28, p. 107, Lines 5-10) The Governor, moreover, does not just report up-coming

events as an announcement service. The Governor declares an official state-wide Day of Prayer with an annual Christian theme. (R. at 31538041, Exhibit 1, Page 52, Lines 18-22) Unlike legislative invocations, the Governor is not solemnizing anything; the Governor is promoting a patently religious event.

II. ANSWER BRIEF

A. Standard Of Review

The Plaintiffs agree that the issue raised by the Defendants is subject to *de novo* review.

B. Taxpayer Citizens Have Standing To Challenge Government Endorsements Of Religion Under The Self-Executing Preference Clause Of The Colorado Constitution

Taxpayer citizens of Colorado have standing to raise constitutional issues of "great public concern." This is particularly true where constitutional violations might otherwise go unredressed, as in this case. "If a taxpayer and citizen of the community be denied the right to bring such an action under the circumstances presented by this record, then wrong must go unchallenged, and the citizen and taxpayer reduced to mere spectator without redress." Howard v. City of Boulder, 290 P.2d 237, 238 (Colo. 1955). The Colorado Supreme Court has not imposed a separate "nexus" requirement in such constitutional cases, as acknowledged in Hotaling v. Hickenlooper, 2011 Colo. App. LEXIS 1048 at 11 n. 4 (Colo. App., June 23, 2011), relied upon by the Defendants.

Colorado has a long tradition of conferring standing on a wide class of Plaintiffs. Ainscough v. Owens, 98 P.3d 851, 853 (Colo. 2004). "In addition to traditional legal controversies, our [Colorado] trial courts frequently decide general complaints challenging the legality of government activities and other cases involving intangible harm." Id. The injury required for standing in Colorado 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. Deprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact." Id. "The test [for standing] in Colorado has traditionally been relatively easy to satisfy." Id.

Examples abound of the broad taxpayer standing allowed in Colorado courts. In Colorado State Civil Service Employees Association v. Love, 448 P.2d 624, 627 (Colo. 1968), for example, the Colorado Supreme Court held that taxpayer citizens may sue to protect a matter of "great public concern" regarding the constitutionality of government actions. The Love decision did not involve any taxpayer nexus, but the Court instead acknowledged the fundamental "precept of constitutional law that a self-executing constitutional provision *ipso facto* affords the means of protecting the right given and of enforcing the duty imposed." Id. In Howard v. Boulder, 290 P.2d 237, 238 (1955), the Court concluded that "we can see 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. In such circumstances, "the rights involved extend beyond self-interest of individual litigants and are of great public concern." Colorado State Civil Service Employees Association, 448 P.2d at 627. (A self-executing constitutional provision is enforceable without ancillary legislation, and consequently obligatory. Crawford v. Denver, 398 P.2d 627, 632-33 (Colo. 1965).)

The Colorado Supreme Court has consistently adhered to the principle that a self-executing constitutional provision affords the means of protecting the right and of enforcing the duty imposed. Ainscough, 98 P.3d at 857. In taxpayer standing cases, the Court has recognized that a generalized injury-in-fact is sufficient -- "even where no direct economic harm is implicated, a citizen has standing to pursue his or her interest in insuring that governmental units conform to the state constitution." Id, quoting Nicholl v. E-470 Public Highway Authority, 896 P.2d 859, 866 (Colo. 1995). See also Dodge v. Department of Social Services of the State of Colorado, 600 P.2d 70, 71-72 (1979).

The Defendants misapprehend Colorado law when suggesting that taxpayer standing requires an unconstitutional expenditure. Under Colorado law, the Plaintiffs are not required to show specific government expenditures. An injury-in-fact is sufficient to confer standing even where no direct economic harm is implicated because "a citizen has standing to pursue his or her interests in ensuring

that governmental units conform to the state constitution." Boulder Valley School District RE-2 v. Colorado State Board of Education, 217 P.3d 918, 924 (Colo. App. 2009). "As our precedent makes clear, an interest in seeing that governmental entities function within the boundaries of the state constitution is sufficient to confer standing; when a Plaintiff-taxpayer alleges that a government action violates a specific constitutional provision, such an averment satisfies the two-step standing analysis described above." Id. The intangible interest in having a government that does not prefer or support religion over non-religion is sufficient to confer standing. Cf. Conrad v. City and County of Denver, 656 P.2d 662, 668 (Colo. 1983).

Standing exists when the Plaintiff's injury flows from a governmental violation of a specific constitutional provision. This principle is not limited to tax and spend challenges. The Preference Clause is such a constitutional provision that creates a protectable legal interest in these taxpayer citizens. By contrast, cases like Hotaling and Brotman v. East Lake Creek Ranch, 31 P.3d 886 (Colo. 2001), involved claims substantively relating to property in which the Plaintiffs had no legally protectable interest.

The applicable test for standing in Colorado ultimately involves "a single inquiry as to whether a Plaintiff-taxpayer has averred a violation of a specific constitutional provision." See Dodge, 600 P.2d at 73. As the Colorado Supreme

Court recently reaffirmed in Barber v. Ritter, 196 P.3d 238, 247 (Colo. 2008), "Colorado case law requires us to hold that when a Plaintiff-taxpayer alleges that a government action violates a specific constitutional provision . . . such an averment satisfies the two-step standing analysis." The infringement of a constitutional guarantee injures the taxpayer citizen's interest in constitutional governance, which is a legally protected interest.

The Plaintiffs have standing based on their allegations that proclamations declaring a Colorado Day of Prayer endorse religion in violation of the Preference Clause, which creates a legally protectable interest in these Plaintiffs. (R. at 31541758, Exhibit 95, Page 4) The proclamations give the appearance of support and endorsement of religion, while making the Plaintiffs feel like political outsiders because they do not believe in the supposed power of prayer. (R. at 31541758, Exhibit 95, Page 12) The Defendants' misapprehension of Colorado law does not diminish the actual breadth and scope of Colorado's standing rules as applicable to the present case. The Defendants' arguments to the contrary ultimately reduce to their mistaken belief that the interest protected by the Preference Clause is "ephemeral" and not important enough to warrant judicial enforcement.

C. The Injuries Caused By Government Prayer Proclamations Are Not Self-Inflicted; The Interest Protected Is Fundamental And Enforceable

The Defendants disdainfully claim that the Plaintiffs' interest in a government that does not promote religion is merely a self-inflicted "psychic" injury. The interests of Colorado taxpayer citizens in a government that does not promote religion through official government speech, however, is not insignificant or trivial. The Preference Clause of the Colorado Constitution protects fundamental matters of conscience, which cannot be dismissed as simply matters of psychic sensitivity. A lesson hard learned from history is that when the government takes sides on questions of religion, a dangerous situation may be created.

Religious expression by government officials may be inspirational and comforting to a believer but exclusionary or even threatening to someone who does not share those beliefs. This is not simply a matter of being "too sensitive" or wanting to suppress the religious expression of others. It is a consequence of the unique danger that religious conduct by the government poses for creating "in" groups and "out" groups. "Government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to non-adherents that they are outsiders or less than full members of the political community." County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring).

The District Court correctly found that Proclamations of a Colorado Day of Prayer make the Plaintiffs feel like political outsiders and appear to the Plaintiffs as support and endorsement of religion. The Court also correctly concluded that this constitutes injury to a legally protected interest under the Colorado Constitution. These injuries, moreover, are the result of unavoidable and foreseeable exposure to declarations of a Day of Prayer, through extensive media coverage via the internet, print media and visual coverage. Prayer proclamations are intended to be broadcast and made known to the citizens of Colorado, including the Plaintiffs. (R. at 31538041, Exhibit 1, Page 32, Lines 7-14, and Exhibit 8)

The Defendants falsely accuse the Plaintiffs of "roaming the country" looking for constitutional violations. The Plaintiffs live in Colorado and are unavoidably exposed to the government's preference for religion. It is not the case, moreover, that being a taxpayer citizen of Colorado is a self-inflicted injury, just as it is not a self-inflicted injury to be a non-believer.

The Defendants, nonetheless, claim that exposure to Prayer Proclamations is not coercive and that no one is forced to engage in prayer. The Defendants contend that no one has "unwanted and unwelcome" exposure to explicitly Christian Prayer Proclamations by the Governor just because they are publicly broadcast throughout the state. The Defendants imply that the Plaintiffs must close

their eyes and cover their ears, and they must endure the official promotions of their government which cause sincere distress and feelings of exclusion.

No one would have standing to challenge the issuance of Prayer Proclamations, according to the Defendants' reasoning. The Defendants, in fact, claim that no one can or should be allowed to challenge the issuance of Prayer Proclamations by the Governor because proclamations are supposedly "ephemeral," i.e., repeated, but short-lived. The Defendants' argument, however, misperceives the nature of Prayer Proclamations. The Plaintiffs are a foreseeable part of the audience for such speech, which is broader than the intended audience for a local nativity scene on government property, for instance. These Plaintiffs are a foreseeable part of the expected audience, and they are differentially affected because they are non-believers.

The Plaintiffs are not obligated to meekly avert their eyes and cover their ears when the government proclaims religious preferences. The Defendants suggest that these individual Plaintiffs are obligated to forego being informed, such as comes from reading the newspaper or watching the news. It is not the Plaintiffs' burden, however, to avoid objectionable speech by the Governor. Being part of an informed citizenry is a duty and it is a strength of Colorado's political system -- it should not be deemed risky behavior that is to be avoided.

The Preference Clause of the Colorado Constitution does not only proscribe forced or coercive exposure to religious endorsement. Coercion is not the touchstone of the Preference Clause, which prohibits governmental endorsement of religion over non-religion--even if done secretly. The expectation that nonbelievers should merely ignore or avoid objectionable governmental speech does not prevent the offense. This compounds the offense by emphasizing that religious believers are favored, while non-believers are political outsiders who should stay in the shadows.

In the end, the Defendants unpersuasively argue that the Plaintiffs must "walk by" unwelcome Prayer Proclamations, such as may occur with a nativity scene at a county courthouse. The Defendants unconvincingly reason that exposure to government speech must have a pedestrian or walk-by attribute, which allegedly is missing with respect to Day of Prayer Proclamations. Without "pedestrian" exposure to government speech endorsing religion, the Defendants conclude that the Plaintiffs are merely experiencing psychic injury common to the general public.

The Defendants misunderstand the contact with government speech necessary to support standing. Their interpretation of unwelcome exposure to government speech would effectively disqualify anybody from objecting, unless speech is physically placed in front of an individual by a government official, in

hard copy form, preferably as a monument. This test may work for parochial government speech with a limited intended audience, but government speech intended to reach a broader audience would no longer be objectionable by anyone. The Preference Clause then would only prohibit government speech endorsing religion at the most local level, while insulating proclamations to the entire State that endorse religion. Even proclamations of an official state religion would not be redressible under the Defendants' reasoning.

The complaint in Valley Forge v. ACLU, 454 U.S. 464 (1982), relied on by the Defendants, significantly did not involve government speech at all, unlike Day of Prayer Proclamations which constitute quintessential speech. That makes a difference because Prayer Proclamations are foreseeably intended to be made known to all the citizens of Colorado. A Day of Prayer Proclamation, without an intended audience, would not be a proclamation at all. Unlike Valley Forge, and unlike cases involving local religious displays, therefore, the present case deals with official government speech which the government knows will be broadcast and made known to the citizenry at large.

The Plaintiffs are not merely complaining about a generalized grievance that they share with all citizens of Colorado. If only that were the case! In fact, the Plaintiffs are non-believers, and they do not suffer the ignominy of their Governor promoting and exhorting prayer in common with evangelicals. The Plaintiffs'

injury is distinct and palpable, and they are not without redress under the Colorado Constitution.

III. REPLY BRIEF

A. Day Of Prayer Proclamations Constitute Government Speech That Gives The Appearance Of Religious Endorsement

The Defendants' argument on the merits can be fairly summarized as follows: Official proclamations of a Colorado Day of Prayer should not be taken seriously because the Governor is essentially pandering to constituents and everyone knows it.

The Defendants' argument is legally unpersuasive because official proclamations constitute official government speech appearing to endorse the subject of the proclamations, regardless of the Governor's underlying political motivation. The Defendants' argument is logically and factually flawed because official proclamations are sought precisely because they lend the Governor's credibility and prestige to the subject of the proclamation. (R. at 31538041, Exhibit 1, Page 32, Lines 7-14) Proclamations are sought for the appearance of the Governor's support, in this case by a religious organization seeking to mobilize support for prayer and religion. (Id.) That is undisputedly why the NDP Task Force solicits such official proclamations.

The Defendants argue implausibly that official proclamations do not give the appearance of endorsement because they are issued without much thought. The

reality of endorsement, however, is not dependent upon the thoughtfulness of the government speaker. Endorsement turns on the words and images actually conveyed. Here, official proclamations of a Colorado Day of Prayer, issued by the Governor in his official capacity, and in response to the requests of a patently evangelical organization, do give the appearance of endorsement.

This is not a case where the government has established a public forum for private speech. Official proclamations constitute actual government speech, albeit requested by private parties to give the imprimatur of official support. The fact that government speech is sought by private parties does not foreclose the appearance of endorsement; it emphasizes the reality of endorsement, i.e., the Governor as promoter. Just as the Governor cannot promote a favorite church, so also helping to promote a distinctively evangelical event for the NDP Task Force, is not a constitutionally permissible function of government.

Official proclamations by the Governor are not merely public announcements or bulletins of up-coming private events. In the case of Day of Prayer Proclamations, they declare that a particular date is designated by the Governor, to be recognized by the entire State of Colorado. (R. at 31538041, Exhibit 7) They proclaim a state-wide Day of Prayer with the implicit support of the government. They intentionally do not limit their apparent scope to the

requesting party. (R. at 31538041, Exhibit 1, Page 53, Line 24 to Page 54, Line 25)

The Defendants claim incorrectly that Prayer Proclamations merely "acknowledge an independently organized and privately hosted event." (R. at 39353985, Page 25.) The Governor proclaims a state-wide Day of Prayer, with a Christian theme, but with no mention of this occasion being a privately hosted event. To all appearances, the Governor declares in his official capacity a Christian-themed Day of Prayer. In fact, the 2011 Proclamation by Governor Hickenlooper continues to include the NDP Task Force Christian scriptural reference as the "official" theme of the state-wide event.

By contrast, the Governor obviously would not issue a proclamation of racial invective, in order to prevent giving his official sanction, credibility and prestige to despicable or deplorable subject matter, even if a private party requested such a proclamation. The Governor would not issue such a proclamation because of the unavoidable appearance of endorsement.

Official proclamations by the Governor invoke the prestige of the government, as candidly admitted by Shirley Dobson, the person requesting Day of Prayer proclamations for the NDP Task Force. (R. at 31542267, Exhibit 111, Page 28 and Page 107, Lines 5-10) Government endorsement of religion, however, is prohibited by the Colorado Constitution. That is what makes Day of Prayer

Proclamations inappropriate, regardless of whether the government speaks on other subjects. The Colorado Constitution prohibits government speech endorsing religion, which limitation does not apply to other government speech. The Defendants miss the mark, therefore, by citing other proclamations that are not prohibited by the Colorado Constitution, although issued by the Governor. Government speech on other topics does not thereby authorize government speech endorsing religion.

Prayer is a "quintessential" defining aspect of religion, as the NDP Task Force emphasizes. The Governor's reference to prayer in his proclamations, therefore, objectively does have an unmistakable religious connotation. The religious connection is made patently clear by considering the background and context of the party requesting the Governor to issue such proclamations.

State-wide proclamations of a Day of Prayer are every bit as offensive to the Preference Clause as Christian nativity displays at Christmas time, erected to celebrate the birth of Jesus -- often at the request of private religious groups. Statewide proclamations also are as objectionable as roadside crosses put up by private parties with the official State insignia. See American Atheists, Inc. v. Duncan, 637 F.3d 1095 (10th Cir. 2010). Proclamations in aid of proselytization, in short, constitute endorsement prohibited by the Preference Clause of the Colorado Constitution.

B. The Background And Context Of The National Day Of Prayer Task Force Is Relevant To Judging The Appearance Of Endorsement By Official State-Wide Day Of Prayer Proclamations

Although the Defendants claim that official proclamations by the Governor merely reflect the interests of the requesting party, the Defendants also argue inconsistently that the background and context of the requesting party is irrelevant to judging the appearance of endorsement.

The NDP Task Force requests that governors and other politicians issue Day of Prayer Proclamations in conjunction with the National Day of Prayer, which Colorado governors have ritually done since 2004. According to the Defendants, these proclamations are issued without much deliberation; the Governor casually lends his official insignia to the event while proclaiming a state-wide Day of Prayer.

Instead of making the background and circumstances of the requesting party irrelevant, on-demand proclamations make information about the requesting party highly relevant when assessing the appearance of endorsement by an objective observer. Just as a proclamation supporting a discriminatory KKK event would inevitably be evaluated with reference to the Klan, so also proclamations declaring a Colorado Day of Prayer cannot be disassociated from the NDP Task Force. The government's own speech is issued in the form of official proclamations -- and government speech endorsing religion is constitutionally prohibited -- so the

background and circumstances of the beneficiary of the proclamation is highly material to determining the appearance of endorsement.

The Defendants baselessly dismiss as immaterial the factual circumstances of the Governor's Prayer Proclamations, including: All information about the NDP Task Force; the Task Force's purpose to utilize Day of Prayer Proclamations to promote prayer and religion (R. at 31542267, Exhibit 111, Page 4, p. 10, Lines 19-22); the Task Force's overtly Christian perspective (R. at 31594605, Exhibit 51); the coordination of state-wide Day of Prayer Proclamations with the National Day of Prayer (R. at 31542267, Exhibit 111, Page 8, p. 28, Lines 11-21); the inclusion of annual Christian themes and scriptural passages in state proclamations, as requested by the Task Force; the Task Force's avowed intent to use government proclamations to give credibility and prestige to its prayer mobilization efforts; the fact that all 50 state governors issue Day of Prayer Proclamations coordinated with the National Day of Prayer; and the fact that the National Day of Prayer itself was conceived and implemented to facilitate and promote religion. (R. at 31542267, Exhibit 111, Page 17, p.63, lines 7-12) These undisputed facts are ignored by the Defendants, who argue that the federal National Day of Prayer legislation is not at issue in the present case and that the NDP Task Force is simply a private entity with its own agenda. In fact, however, that is the problem. The Task Force cannot constitutionally use a state vehicle to deliver its message.

Day of Prayer Proclamations are not intended simply as "acknowledgments" of the historical significance of religion, which the Defendants tacitly admit. The Governor issues Prayer Proclamations on demand, to support a private party, i.e., the NDP Task Force. For the Defendants to issue such government speech, proclaiming a state-wide Day of Prayer, at the request of the Task Force, makes entirely relevant information about the party and activity that the Governor is supporting with his speech. The claim that Day of Prayer proclamations acknowledge religion without promotion belies the distinctly evangelical context of the NDP Task Force and the Colorado Day of Prayer promotion. Unlike Thanksgiving, Memorial Day and other proclamations that solemnize a secular occasion, the Colorado Day of Prayer Proclamations promote religion for the requestor's own sake.

The Defendants' position is not saved by their argument that the NDP Task Force may use Day of Prayer Proclamations as it will. When the Governor issues Day of Prayer Proclamations, he knows that the requesting party intends to use his official government speech to support its agenda, which is relevant to the appearance of endorsement. (R. at 31538041, Exhibit 1, Page 71, Lines 2-14) By analogy, the author of a letter of reference cannot subsequently deny his support by claiming that the letter was used by the subject to advance her own interests. Regardless how the letter of reference may be used, it constitutes the author's

speech endorsing the subject. Similarly, Day of Prayer Proclamations lend the government's credibility and prestige, and that support cannot plausibly be later denied.

Colorado Day of Prayer Proclamations undeniably constitute government speech when evaluated for the appearance of endorsement. The Governor himself denies that he issues such Day of Prayer Proclamations as a general acknowledgment of the historical role of religion, but instead issues them as a service to the NDP Task Force. The background and circumstances of the Task Force, therefore, are obviously material to determining whether such proclamations give the appearance of endorsement to a reasonable observer. The Governor's claim that state-wide Prayer Proclamations are mere acknowledgements of religion is contradicted by the evidence. The Governor admits that is not his purpose when issuing these particular proclamations to the NDP Task Force.

C. Colorado Day Of Prayer Proclamations Are Not Ceremonial Acknowledgements Of Beliefs Widely Held

Despite arguing that Day of Prayer Proclamations are issued on demand to the NDP Task Force, the Defendants still claim that such proclamations are like the legislative prayer considered in Marsh v. Chambers, 463 U.S. 783, 792 (1983). This is irreconcilable with the Defendants' own explanation of the Governor's Day of Prayer Proclamations as an on-demand public service provided to the NDP Task Force.

The District Court correctly found that these Day of Prayer Proclamations do not have a long and ubiquitous history in Colorado. The issuance of such Proclamations apparently only began in 2004, in response to requests by the NDP Task Force, under the direction of Shirley Dobson. (R. at 31538041, Exhibit 2) For her part, Mrs. Dobson undisputedly does not request governors and other public officials to issue Day of Prayer Proclamations as mere ceremonial deism. Special interest proclamations by government officials, including the Colorado Governor, are not perceived as merely ceremonial, but rather they are sectarian, divisive and controversial. They do not have the "historical pedigree," as a matter of fact, that the Defendants baldly assert.

The United States Supreme Court previously recognized in Allegheny County v. ACLU, 492 U.S. 573, 603 n. 52 (1989), that Prayer Proclamations stand on a different footing than "ceremonial deism," such as non-sectarian legislative prayer. The Supreme Court stated:

> It is worth noting that just because Marsh sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct.

The proclamations at issue in the present case are particularly noteworthy because they include annual themes and scriptural references that are uniquely and exclusively Christian. (R. at 31542267, Exhibit 111, Page 15, p.57, Lines 7-12)

These references in Colorado Proclamations are incorporated at the request of the NDP Task Force; the annual themes and scriptural references are selected by the NDP Task Force; and according to the Defendants, the Colorado Day of Prayer Proclamations reflect the interest of the requesting party, i.e., the NDP Task Force. For the Defendants to claim on this state of facts that the proclamations are just a ceremonial acknowledgment of religion is not credible. These proclamations would not pass constitutional muster under Marsh, even as legislative prayer, because they incorporate exclusively Christian themes and references. See Joyner v. Forsyth County, 2011 U.S. App. LEXIS 15670 (4th Cir., July 29, 2011) (invalidating Christian invocations before legislative meetings).

The comparison of Prayer Proclamations to legislative prayer is itself not compelling. In the case of legislative prayer at issue in Marsh, the Supreme Court concluded that such prayer had no religious significance and was merely a means of solemnizing the beginning of legislative sessions. By contrast, a state-wide Day of Prayer is intended to promote the Day of Prayer itself; it is not solemnizing something else with ceremonial deism. With Day of Prayer Proclamations, the purpose is to designate a specific day as a state-wide event for the purpose of celebrating and engaging in prayer.

The concept of "ceremonial deism," as with legislative prayer, is dependent upon the conclusion that a reasonable observer would not view government speech

as having religious significance. "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate non-religious purposes." Elk Grove Unified School District v. Newdow, 542 U.S. 1, 37 (2004) (J. O'Connor, concurring). That is not the case in this matter.

Day of Prayer Proclamations are not "ceremonial acknowledgments" of religion. The Proclamations represent government speech designating a particular day to assist an overtly Christian proselytizing organization in its missionary pursuits. The proclamations are issued upon request, but they designate an official state-wide "Colorado Day of Prayer," while incorporating recognizably Christian scriptural references as themes. Considering these facts, the Governor violates the Preference Clause by issuing special interest proclamations promoting religion.

D. Special Interest Prayer Proclamations Do Not Have The Historical Pedigree Of Judicial Approval

To the extent that Marsh might ever be applied beyond the legislative prayer context, the decision actually reinforces the conclusion that Colorado Day of Prayer Proclamations are unconstitutional. The Proclamations at issue do not have the supposed pedigree of antiquity, or the non-religious connotation of ubiquitous practices. The Defendants are disingenuously trying to piggyback on parentage that is not their own.

The National Day of Prayer itself has never had a secular purpose, intent, or effect. The intent has always been to facilitate proselytizing, to place government

endorsement behind prayer and religious belief, and more than that, to call upon citizens to pray and express belief in God. Day of Prayer Proclamations place the imprimatur of government upon belief in God, and they place a stamp of approval upon religious belief, prayer and worship by the highest executive officer of the land. In fact, the federal National Day of Prayer laws undeniably were entirely the brainchild of Protestant evangelicals, first promoted by Billy Graham during a crusade in Washington, D.C. (R. at 31541758, Exhibit 94 and R. at 31541758, Exhibit 93, p. 2)

The Governor baselessly claims lineage for his own prayer proclamations back to the Country's founding. The history and motivation is different in this case. Just as important, however, even the major architects of the United States Constitution vigorously opposed government meddling in religion, such as by issuing proclamations of prayer. Thomas Jefferson, for one, vigorously opposed such proclamations. "In his view, Presidents should have nothing to do with Thanksgiving Proclamations or Days of Prayer or times of devotion. These were religious matters falling into the exclusive province of religious, not political, leaders; 'the right to issue such proclamations belong strictly to the former,' Jefferson declared, 'and this right can never be safer than in their hands, where the Constitution has deposited it.'" Edwin S. Gaustad, Faith of Our Fathers: Religion in the New Nation, at P. 45 (1987).

Jefferson's refusal to issue prayer proclamations evidences the long-standing divisiveness of such proclamations. James Madison, moreover, contrary to Defendants' claim, shared Jefferson's view regarding the issuance of prayer proclamations. Madison's views are significant because he is falsely cited as a proponent of the constitutionality of dedicated days of prayer. He was not. Although Madison strayed from his convictions during a time of war, he did not believe his actions were constitutional. Historian Leonard W. Levy describes the actual facts:

> In his "Detached Memoranda" Madison stated that "religious proclamations by the Executive recommending thanksgivings and fasts are shoots from the same root with the Legislative Acts reviewed . . ." He regarded such recommendations as violating the First Amendment: "They seem" he wrote, "to imply and certainly nourish the erroneous idea of a national religion."

Levy, the Establishment Clause: Religion and the First Amendment, at 99-100 (1986).

The Defendants incorrectly argue, therefore, that prayer proclamations constitute nothing more than benign deism that already has been approved by the Supreme Court. As noted above, the Court has expressed doubt about the constitutionality of Prayer Day Proclamations, in County of Allegheny. The Court concluded that the government may only celebrate holidays with religious significance if done in a way that does not endorse the religious doctrine or aspect of the holiday. 492 U.S. at 601.

The Supreme Court's concern about the appearance of religious endorsement by government speech has found voice in other recent decisions. For example, in McCreary County, Kentucky v. ACLU of Kentucky, 545 U.S. 844, 861 (2005), the Court stated that "when the government designates Sunday closing laws, it advances religion only minimally because many working people would take the day off as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable." Id.

The Supreme Court further stated in McCreary that a difference exists between passive symbols and insistent calls for religious action. "Creches placed with holiday symbols and prayers by legislators do not insistently call for religious action on the part of citizens; the history of posting the [Ten] Commandments [however] expressed a purpose to urge citizens to act in prescribed ways as a personal response to divine authority." Id at 877 n. 24.

The Supreme Court concluded in McCreary that the framers of the Constitution intended the Establishment Clause to require government neutrality in religion, "including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead extended the prohibition to state support for religion in general." Id at 878.

See also Lee v. Weisman, 505 U.S. 577, 503-506 (1992) (J. Souter, concurring) ("President Jefferson steadfastly refused to issue thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses.").

The United States Supreme Court has not determined that Prayer Day Proclamations are constitutional -- and even practices such as legislative prayer are not constitutionally acceptable in all circumstances. Justice Blackmun recognized the limits of Marsh in County of Allegheny, 492 U.S. at 604 n. 53, stating that "not even the unique history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief."

In the present case, the Governor's Proclamations of a state-wide Colorado Day of Prayer, in support of an explicitly evangelical organization and event, is the type of endorsement prohibited by Colorado's Preference Clause. The Governor's state-wide proclamations are not just a "bulletin board" announcement of an up-coming evangelical event. The factual reality of the Governor's Prayer Proclamations, which include explicit Christian themes, distinguishes the proclamations at issue in this case from the supposed benign history of Prayer Proclamations by early Presidents. These Proclamations constitute an assistive device for a blatantly evangelical organization and event.

IV. CONCLUSION

State-wide Day of Prayer Proclamations issued by the Governor in aid of the NDP Task Force's evangelical mission violate the Preference Clause of the Colorado Constitution. Government speech endorsing religion is prohibited even when requested by a private religious organization. The Governor is responsible under the Constitution for his speech, which is being used in this case to confer the prestige and credibility of his office on the evangelical Christian views promoted by the NDP Task Force.

Dated this 14th day of November, 2011.

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CERTIFICATE OF MAILING

I hereby certify that on November 14, 2011, a true and correct copy of the foregoing Appellants'/Cross-Appellees' Answer/Reply Brief was filed and served electronically via *Lexis Nexis*, address to:

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*In accordance with C.R.C.P. 121 § 1-26(7) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.