SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 13, 2013 6:25 PM
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 10CA2559, 08CV9799 JOHN HICKENLOOPER, in his official capacity as Governor of the State of Colorado; and THE STATE OF COLORADO, Petitioners, v. FREEDOM FROM RELIGION FOUNDATION, INC.; MIKE SMITH; DAVID HABECKER; TIMOTHY G. BAILEY; and JEFF BAYSINGER, Respondents.	▲ **COURT USE ONLY** ▲ Case No. 12SC442
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OPENING BRIEF	

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/s/ Michael Francisco

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

Petitioner Governor John Hickenlooper and the State of Colorado hereby submit their Opening Brief.

The Governor of the State of Colorado, like governors everywhere, regularly issues letters of recognition, signed photographs, and honorary proclamations to individuals or groups who request them. The Plaintiffs here object to six such proclamations that were requested by a citizen group that celebrates the National Day of Prayer, an event that is fixed by federal statute and that is rooted in more than two centuries of our nation's history.

Even though honorary proclamations acknowledging the National Day of Prayer have long been issued annually by the President and by the governors of all 50 states, and despite the lack of a cognizable injury for the Plaintiffs, the court of appeals held that the Governor violated the Colorado Constitution by issuing the proclamations. It went on to remand the case so an injunction barring the Governor and his successors from issuing similar honorary proclamations in the future could be issued.

This Court granted certiorari to consider whether the Plaintiffs had standing to raise their claims and, assuming that they did, whether the Governor's actions violated the Preference Clause.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred by *sua sponte* determining that Plaintiffs had taxpayer standing based on *de minimis* governmental expenditures and despite the Plaintiffs' failure to plead or demonstrate the existence of taxpayer standing in the district court.

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

STATEMENT OF THE CASE AND FACTS

The Governor of the State of Colorado issues hundreds of honorary proclamations each year. An assortment of civic and cultural groups request honorary proclamations for nearly every conceivable cause, from "Holocaust Awareness Week" to "Chili Appreciation Society International Day."[1] *CD*, p.129, 470. This case involves the issuance of

[1] Instructions for requesting an honorary proclamation may be found at http://www.colorado.gov/govhdir/requests/proclamation.html.

honorary proclamations requested by the National Day of Prayer Task Force, a private group that observes the National Day of Prayer on the first Thursday in May. *See* 36 U.S.C. § 119; *CD*, pp.775 - 816 (examples of proclamations). Every year the NDP Task Force requests honorary proclamations from the President and the governors of all 50 states. Executives of all political persuasions regularly issue the proclamations.

In this case Plaintiffs, the Freedom From Religion Foundation ("FFRF") and several of its Colorado members, filed suit against then-Governor Bill Ritter, complaining he had violated the Preference Clause of Colorado Constitution by issuing honorary proclamations requested by the NDP Task Force.

Plaintiffs conceded that issuance of the proclamations involved no "expenditure of tax monies" aside from overhead costs such as the Governor's salary. *CD,* p.247. Plaintiffs likewise admitted that none of them had ever attended any National Day of Prayer event in Colorado, and that their only exposure to the proclomations was "through extensive media coverage, including on the internet, print media and visual coverage." *CD,* p.166 (Interrogatory 5); p.167 (Interrogatory 7).

Despite their lack of contact with the proclamations, Plaintiffs contended they were injured because issuance of the proclamations "gives the appearance that believers are political insiders, with special access to government leaders, while non-believers are political outsiders without such access." *CD,* p.174-75.

The parties filed competing motions for summary judgment. The district court found that the Plaintiffs had standing to sue, but nonetheless granted summary judgment in favor of the Governor after concluding that the challenged honorary proclamations did not amount to an unconstitutional endorsement of religion. *CD*, pp.1564-77. Both parties appealed.

The court of appeals affirmed the district court's conclusion that the Plaintiffs had standing, but on different grounds, and reversed on the merits, finding the proclamations violated the Preference Clause. Unlike the district court, which had concluded that the Plaintiffs lacked "taxpayer" standing but had "citizen" standing, the court of appeals reviewed the record to determine only whether the Plaintiffs had "taxpayer" standing. Relying on several items of government overhead,

which the panel characterized as "expenditures" that it had "uncovered" during its own review of the record, *id.* ¶59, the court of appeals concluded that "although the exact amount is not clear, the Governor spent state funds each year in order to issue the proclamation" and this was sufficient to establish a nexus for taxpayer standing. *Id.* ¶¶47-56.

On the merits, the court of appeals held that the challenged honorary proclamations: 1) did not have a secular purpose; and 2) constituted a governmental endorsement of religion. *Id.* ¶¶86-120. The court of appeals also declined to follow the "historical practice" test articulated by the United States Supreme Court in *Marsh v. Chambers,* 463 U.S. 783 (1982). *Id.* ¶¶141. It nonetheless went on to consider and reject the application of *Marsh*'s "historical practice" test. *Id.* ¶¶121-141.

After concluding that the honorary proclamations violated the Preference Clause the court of appeals remanded the case for "additional proceedings to determine whether it should issue a permanent injunction to enjoin the Governor and his successors from issuing proclamations that are predominantly religious and have the

effect of government endorsement of religion as preferred over nonreligion." *Id.* ¶142.

SUMMARY OF THE ARGUMENT

As this case demonstrates, Colorado's twin doctrines of "taxpayer" and "citizen" standing have become hopelessly confused both by litigants and lower courts. Under the court of appeals' analysis, standing to sue extends to any Colorado resident who is dissatisfied with any government action, without regard to identifiable government expenditure. Because virtually anything can be characterized as using government resources (particularly if a few kilobytes of hard drive space suffices), the opinion below casts aside the core of the "case and controversy" requirement—that a plaintiff must demonstrate that he has suffered an injury-in-fact to a legally protected interest.

This Court should reverse and hold that the Plaintiffs do not have "taxpayer" standing based on the "expenditures"—in reality, overhead costs—identified by court of appeals. While doing so, this Court should also clarify Colorado's standing doctrine and realign it with federal

standing doctrine. If this Court determines that the Plaintiffs had standing, this Court should reverse the court of appeals' decision on the merits.

The religious provision of the Colorado Constitution in Article II, § 4 has long been applied by this Court to be consistent with the First Amendment of the U.S. Constitution. This court has thrice considered whether particular government practices violate the Preference Clause of Article II, § 4. This Court approved of the practice of reading the Bible in public schools, *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (1927),[2] the presence of a crèche on the steps of the Denver City and County Building, *Conrad v. City and County of Denver*, 656 P.2d 662 (Colo. 1982) ("*Conrad I*"), *Conrad v. City and County of Denver*, 724 P.2d 1309 (Colo. 1986) ("*Conrad II*") and the presence of a Ten Commandments monument in Lincoln Park. *State v. Freedom From Religion Foundation*, 898 P.3d 1013 (Colo. 1995) ("*State v.*

[2] In 1927 *Vollmar* permitted Bible readings in public schools. Decades later the United States Supreme Court held such a practice violated the Establishment Clause. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). As a result, *Vollmar* was overruled in part by this Court. *Conrad I,* 656 P.2d at 670 n.6. (Colo. 1982).

FFRF"). In all three cases the government action was permitted, consistent with persuasive federal case law under the Establishment Clause. This case should be no different.

At issue here are honorary proclamations acknowledging the "Colorado Day of Prayer." These proclamations are far more ephemeral and benign than the governmental conduct previously reviewed and approved under the Preference Clause.

In the most recent pronouncement on the meaning of the Preference Clause this Court described the spirit of neutrality that underlies the religion provision of the Colorado Constitution:

> The Constitution does not require complete separation of church and state: It affirmatively mandates accommodation, not merely tolerance, of all religious, and forbids hostility towards any. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. (citations and quotation marks omitted)

State v. FFRF, 898 P.2d at 1020 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)). Contrary to this guidance, the Court of Appeals did not accommodate or tolerate religion. Instead, it singled out religion for hostile treatment, in effect, by allowing the Governor to issue honorary

proclamations for any group on any subject, so long as the proclamation does not reference religion. The Colorado Constitution requires no such result.

Consistent with the principles of neutrality and accommodation this Court should reverse and allow the Governors of Colorado to issue prayer proclamations, just as Presidents of the United States have always done and just as Governors of the other 49 states have long done. There is no reason for Colorado to be the outlier jurisdiction.

ARGUMENT

I. Standard of review.

A district court's grant of summary judgment is reviewed *de novo*. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 298 (Colo. 2003).

II. Plaintiffs do not have standing.

This Court has long held that to establish standing, a plaintiff must demonstrate that he has: 1) suffered an injury-in-fact to, 2) a legally protected interest. *Wimberly v. Ettenberg,* 570 P.2d 535, 539 (Colo. 1977). Here, the court of appeals collapsed this two-part test into

a single inquiry, holding that an injury-in-fact can be demonstrated "by a generalized complaint that the government is not conforming to the state constitution," and that such a complaint "necessarily satisfies the second prong of the *Wimberly* test because the claim arises out of a legally protected interest under the constitution." 2012 COA 81, ¶48, *citing Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Ed.,* 217 P.3d 918, 924 (Colo. App. 2009). Somewhat inconsistently, the court of appeals went on to hold that there must be a "nexus between the plaintiff's status as a taxpayer and the challenged governmental action," 2012 COA 81, ¶ 49, but found that the mere operation of a government office—including use of ink, paper, stamps, and staff time—was sufficient to cause a "tangible injury" to the Plaintiffs as taxpayers. *Id.* ¶52.

It is true that, under Colorado law, "parties to lawsuits benefit from a relatively broad definition of standing." *Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2004). But even Colorado's standing doctrine is not unlimited. Contrary to the opinion below, it does not extend to "generalized grievances" against government action. *City of Greenwood*

Village v. Petitioners for the Proposed City of Centennial, 3 P.3d 427, 437 (Colo. 2000). Nor is it conveyed by "the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action." *Ainscough,* 90 P.3d at 855, *quoting Brotman v. East Lake Creek Ranch, LLP,* 31 P.3d 886, 890-91 (Colo. 2001).

A. The court of appeals misunderstood the doctrines of taxpayer and citizen standing.

There are two general categories of standing potentially applicable to the Plaintiffs in this case: "taxpayer" standing and "citizen" (also sometimes called "general") standing. Although this Court has not always clearly distinguished between them, *see, e.g.*, *Ainscough,* 90 P.3d at 856-57, most cases do recognize a marked distinction between the two categories. In *Brotman,* for example, this Court conducted separate analyses of the Plaintiffs' standing as an adjacent landowner (i.e., as a "citizen") under *Wimberly,* and also as a taxpayer under *Dodge v. Dep't of Social Servs,* 600 P.2d 70 (Colo. 1979). Here, the district court found that the Plaintiffs had citizen standing but not taxpayer standing. Affirming on different grounds, the court of appeals held that the

Plaintiffs had taxpayer standing but did not consider whether they had citizen standing. These doctrines should not be conflated.

Citizen standing: "Citizen" standing arises when a plaintiff has suffered a concrete and particularized injury to a legally protected interest. *Romer v. Bd. of County Comm'rs,* 956 P.2d 566, 573 (Colo. 1998).[3] Although "relatively broad," *Ainscough,* 90 P.2d at 855, Colorado's citizen standing requirements nonetheless track the approach outlined by the United States Supreme Court. Injury-in-fact requires "a 'concrete adverseness which sharpens the presentation of issues' that parties argue to the courts." *Greenwood Village,* 3 P.3d at

[3] Although *Romer* explicitly held that a "concrete and particularized" injury is a necessary antecedent to standing under Colorado law, a footnote in *Greenwood Village* suggested that Colorado's "standing doctrine does not require these refinements." 3 P.3d at 437 n.8. In the same opinion the Court stated prudential limitations prohibit consideration of "an abstract, generalized grievance." *Id.* at 437. This has caused confusion in the lower courts, *see Boulder Valley,* 217 P.3d at 923 ("a plaintiff need not show that his or her injury is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"), and conflicts with *Romer*'s acknowledgment that a concrete and particularized injury is necessary. The Court should clarify these two seemingly conflicting lines of reasoning by providing standing guidance consistent with its prior holdings: prudential standing requires a concrete and particularized injury that is actual or imminent, not conjectural or hypothetical.

437, (*quoting Baker v. Carr,* 369 U.S. 186 (1962)). An injury that is "indirect and incidental" will not confer standing. *Brotman,* 31 P.3d at 891.

Taxpayer standing: This Court has held that "a taxpayer has standing to seek to enjoin an unlawful expenditure of public funds." *Dodge,* 600 P.2d at 71. An individual asserting taxpayer standing under Colorado law need not demonstrate a particularized injury; rather, the injury for taxpayer standing is presumed to flow from the unconstitutional allocation of taxpayer dollars. In *Barber v. Ritter,* 196 P.3d 238, 247 (Colo. 2008), a 4-3 majority of 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." Thus, in Colorado taxpayers generally have standing to challenge allegedly unconstitutional expenditures of government funds. *Id.* at 245-46.

This approach diverges sharply from federal standing doctrine, which does not extend to plaintiffs who wish to challenge discretionary executive branch expenditures. *See Hein v. Freedom From Religion*

Found., 551 U.S. 587 (2007). There are limits to Colorado's more lenient approach, however. There must still be "some nexus between the plaintiff's status as a taxpayer and the challenged government action." *Hotaling v. Hickenlooper,* 275 P.3d 723, 727 (Colo. App. 2011); *see also Barber,* 196 P.3d at 246 (injury-in-fact must not be overly indirect or incidental). In other words, for taxpayer standing "the injury-in-fact requirement is satisfied when the plaintiff-taxpayer's alleged injury 'flow[s] from governmental violations of constitutional provisions that specifically protect the legal interests involved.' " *Barber,* 196 P.3d at 247*, quoting Conrad I,* 656 P.2d at 668.

B. Taxpayer standing requires more than government overhead to establish an injury-in-fact.

It is undeniable that Colorado courts have traditionally conferred broad taxpayer standing on plaintiffs. *See Conrad I*, 656 P.2d at 669. But taxpayer standing still has limits. It must, otherwise it would subsume citizen standing and simply allow any taxpayer who disagrees with any government action to seek redress in the courts. *See Barber,* 196 P.3d at 257 (Eid., J., specially concurring).

1. *This Court should follow the Supreme Court's approach in Hein: discretionary expenditures by the executive branch do not support taxpayer standing.*

Given that "similar considerations underlie both Colorado and federal standing law," and that this Court "frequently consult[s] federal cases for persuasive authority" on questions of standing, *Greenwood Village,* 3 P.3d at 436 n.7, the clarification about taxpayer standing in the federal courts in recent years—and particularly the Supreme Court's limitation of taxpayer standing under the Establishment Clause—should portend a similar movement under state law. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332 (2006) (state taxpayers do not have sufficient interest in monies expended by the state to qualify for general taxpayer standing); *Hein*, 551 U.S. at 587 (plaintiff had no standing under Establishment Clause to challenge executive branch expenditure of funds that had been generally appropriated by Congress).

The Supreme Court's approach to standing under the Establishment Clause in *Hein* is particularly relevant here, since

Supreme Court precedent formed the basis for this Court's analysis of standing under the Preference Clause in the only case to have considered the question. *See Conrad I,* 656 P.2d at 669 (court's conclusion that plaintiff had standing derived in part from *Flast v. Cohen,* 392 U.S. 83, 88 (1968), which, prior to *Hein,* had allowed "federal taxpayer standing to enforce Establishment Clause rights in certain circumstances analogous to the plaintiffs' assertion of state constitutional rights in the present case").

Like the Establishment Clause, the Preference Clause, by its plain language, applies only to actions taken by the legislature: "Nor shall any preference be given by law to any religious denomination or mode of worship." Colo. Const., art. II, § 4. *Hein* made clear that the Establishment Clause, with its similar language ("Congress shall make no law respecting an establishment of religion"), simply does not confer taxpayer standing on individuals seeking to enjoin *executive* action.

The court of appeals' opinion here underscores the problems with a contrary holding. After concluding that the challenged proclamations violated the Preference Clause, the court remanded the case so

plaintiffs could seek to enjoin "the Governor and his successors from issuing proclamations that are predominantly religious and have the effect of government endorsement of religion as preferred over nonreligion." 2012 COA 81, ¶143. But this action would have the district court impose a prior restraint on the speech of the current Governor and anyone who may hold the office in the future. This not only raises grave First Amendment concerns—there is "a heavy presumption against the constitutional validity of any prior restraint" on speech, because they are "the most serious and least tolerable infringement on First Amendment rights," *In re Matter of Attorney E.,* 78 P.3d 300, 309 (Colo. 2003)—but also impinges on the separation of powers guaranteed by Colo. Const. art. III.

In light of the parallels between the federal and state constitutional provisions, as well as Colorado's historical reliance on the Supreme Court's interpretations of the Establishment Clause, this Court should adopt *Hein*'s approach. *Hein* acknowledged that taxpayer standing does not work to expand the Establishment Clause beyond its

plain language. Similar reasoning should apply to the Preference Clause, which prohibits only legislative—not executive—action.

2. *Taxpayer standing cannot be based on* de minimis *expenditures or costs for overhead.*

Even if *Hein* does not control, however, the court of appeals still erred when it concluded that taxpayer standing can be based on the presumed expenditure of money by the Governor's office to keep the lights on.

The district court found that "there has been no expenditure of public funds in this case." *CD,* p.1570. It thus correctly held there was no taxpayer standing since a taxpayer "must at least show some use of taxes generally" to have standing. *Id., citing Dodge,* 600 P.2d at 71. The court of appeals—based on its own independent review of the record—reversed this ruling after identifying "expenditures," such as ink, hard drive storage space, and staff time, that were neither alleged nor proven below. 2012 COA 81, ¶52. However, there was no showing that a single taxpayer dollar would have been saved if the challenged proclamations

were never issued. Nonetheless, the court of appeals held that these items of overhead were sufficient to confer taxpayer standing. *Id.*

The court of appeals' approach eviscerates any limit to taxpayer standing. One can always point to "staff time." Irrespective of whether the cost can actually be calculated with any amount of precision, every government action would include at least *something* like staff time, overhead, or supplies (any of which would support standing according to the court below). While the court of appeals admitted that "the exact amount is not clear," it nonetheless was satisfied that "the Governor spent state funds each year in order to issue the proclamation," and that "[s]uch a nexus, though slight, is sufficient for standing in Colorado." *Id.* ¶56. Yet neither the Plaintiffs nor the court below identified any appropriated amount of money linked to the proclamations.

This was error. However broad taxpayer standing may be in Colorado, it cannot encompass speculative, indirect, and undifferentiated costs that the government incurs on a daily basis in order to continue its operations. To hold otherwise would be to

completely undercut the fundamental requirement that a plaintiff's asserted injury be concrete and particularized. *Romer,* 956 P.2d at 573. A holding that taxpayer may base standing on the government's cost of doing business would obliterate even a pretense of needing an actual injury—thus leading to the precise consequence that the concurring Justices warned against in *Barber*, 196 P.3d at 256-57 (Eid, J., specially concurring).

The court of appeals erred when it determined that a nexus existed when the expenditures identified were comprised of no more than overhead or *de minimis* costs. This Court should hold that taxpayer standing in Colorado requires a greater showing. At a minimum, taxpayer standing should require a specific expenditure that forms the nexus to the plaintiff's tax burden. Absent such a showing, a complaint alleging taxpayer standing dissolves into nothing more than what this case presented: a generalized grievance that the government has done something that the plaintiff finds disagreeable. Such a case has nothing to do with a taxpayer as someone who pays taxes. The broad language in *dicta* of *Dodge,* 60 P.2d at 70, could be seen as

supporting this approach. The Court now has the opportunity to shore up *Wimberly*'s "express admonition" that, in cases that do not involve changes in the structure of government itself,[4] taxpayer standing may not be indiscriminately extended to "any and all members of the public." *Barber,* 196 P.3d at 258, *quoting Wimberly,* 570 P.2d at 538.

C. Citizen standing requires more than plaintiffs being offended to establish an injury-in-fact.

The court of appeals did not address citizen standing, but the same concerns with taxpayer standing apply with equal force to citizen standing. The district court found that Plaintiffs had citizen standing based on their claim that "the honorary proclamations of a Colorado Day of Prayer make them 'feel like political outsiders because they do not believe in the supposed power of prayer' [and] because they 'give the appearance of support and endorsement of religion.' " *CD,* p.1570. The

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[4] Challenges concerning changes in governmental structure are allowed without a specific showing of expenditures because "the form of government under which [a citizen and taxpayer] is required to live" is a matter of "great public concern." *Howard v. City of Boulder,* 290 P.2d 237, 238 (Colo. 1955); *see also Colorado State Civil Serv. Employees Ass'n v. Love,* 448 P.2d 624 (Colo. 1968). This exception does not apply here.

district court concluded that this was "enough of an injury for standing under Colorado's law." *CD,* p.1580.

It is not exceptionally difficult to establish citizen standing in Colorado's state courts, but airing a "generalized grievance," rather than raising an actual injury to a legally protected interest, will not do. *Greenwood Village,* 3 P.3d at 437. The Plaintiffs are certainly entitled to take offense at the Governor's issuance of honorary proclamations acknowledging a Colorado Day of Prayer, but their mere disagreement with the Governor's policies does not confer standing. *See Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 223 n.13 (1974) (no standing arises from "the abstract injury in nonobservance of the Constitution asserted by … citizens").

Simply put, the Plaintiffs were required to show more than that they decided to sue the state after searching for and finding that the challenged honorary proclamations had been issued. To hold otherwise would be to abandon Colorado's already-lenient standing jurisprudence, and allow virtually anyone who disagreed with virtually any government policy or action to present it to the courts for resolution. For

these reasons, this Court should hold that the Plaintiffs failed to demonstrate any injury-in-fact sufficient for citizen standing.

III. The honorary proclamations are Constitutional.

The court of appeals held the challenged proclamations (and ill-defined future proclamations)[5] violate the Colorado Constitution. This was wrong under the plain text of the Constitution, under the best analogous federal precedent, *Marsh v. Chambers*, and under the court of appeals' preferred precedent, *Lemon v. Kurtzman*.

A. Honorary proclamations are constitutional under the plain text of the Preference Clause.

This Court interprets the text of the Colorado Constitution by applying the plain meaning of the text whenever possible. *Mesa County*

[5] By remanding the case for consideration of an injunction to prohibit current and future governors from "issuing proclamations that are predominantly religious and have the effect of government endorsement of as preferred over nonreligion," 2012 COA 81 ¶ 143, the opinion endorsed the imposition of a prior restraint of speech on the Governor and his successors and foreshadowed an unprecedented level of judicial interference with the Governor's office.

Bd. of County Comm'rs v. State, 203 P.3d 519, 530 (Colo. 2009). Article II, § 4 of the Colorado Constitution provides, in part:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; … *Nor shall any preference be given by law to any religious denomination or mode of worship*. (Emphasis added.)

The court of appeals found that certain proclamations issued by the Governor violated the final clause of the section, commonly known as the Preference Clause. While this Court has looked to federal case law when interpreting the Preference Clause, it has noted that this persuasive authority "will not necessarily be dispositive" and that the clause "ultimately requires analysis of the text and purpose of that section." *Conrad I*, 656 P.2d at 667 (citing *Americans United for Separation of Church and State Fund v. State,* 648 P.2d 1072, 1082 (Colo. 1982)). The text and purpose of the Preference Clause easily permit the Governor to issue the honorary proclamations at issue here.

The text of the Preference Clause prohibits a [1] "preference" that is [2] "given by law" to a [3] "religious denomination or mode of worship." The plain meaning of these terms belies the Court of Appeals'

holding. First, by its very nature, an honorary proclamation does nothing "by law" and involves only a discretionary executive action. The proclamations bear none of the hallmarks of a "law"—they are not considered by or passed by the General Assembly and are not enforceable in court, for example. The honorary proclamations fall well short of being "by law" as stated in the Preference Clause.

Second, the challenged proclamations are not a "preference." They do not give any advantage to one group over another group. *See* BLACK'S LAW DICTIONARY 1197 (7th ed. 1999) (*preference* "the act of favoring one person or thing over another;") As the court below acknowledged, the Governor's office issues honorary proclamations hundreds of times a year to virtually any group that applies. The same neutral criteria are used by the Governor's office when determining whether to issue the non-binding proclamations. CD, p157-159. That a religious group requested one of the hundreds of proclamations issued each year does not show a "preference" being given to religious groups, or this religious group in particular. As the Governor's website makes clear, "Proclamations are non-binding documents signed by the Governor of

Colorado in recognition of special events or significant issues … Proclamations neither indicate nor imply Governor Hickenlooper's support of any given issue, project or event."[6] The challenged proclamations do not show any "preference" to a group to the exclusion of another group.

This interpretation of "preference" is consistent with the only other use of "preference" in the original Colorado Constitution. Article XV, § 6 prohibits public carriers from giving any "preference" to individuals in "furnishing cars of motive power." Since a mere decade after the constitution was adopted, Colorado courts have interpreted this lesser-known preference clause to allow a wide range of differential treatment, including different charges for transportation, so long as the discrimination is not "undue or unjust." *See Bayles v. Kansas Pac Ry*, 22 P. 341, 344 (Colo. 1889); *accord Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U.S. 667, 685 (1884) (interpreting Art. XV, § 6). Understanding the word "preference" to allow differential treatment, as

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[6] *Available at* http://www.colorado.gov/govhdir/requests/proclamation.html (visited 9/12/13)

this court does in Article XV, § 6, is consistent with interpreting the religious Preference Clause in Article II, § 4 as allowing honorary proclamations.

Third, consistent with the unique text, the "purpose" of the Preference Clause is "aimed to prevent an established church." *Vollmar*, 255 P. at 615. An honorary proclamation that merely recognizes facts about our state's religious history, and acknowledges that various citizens may engage in prayer, does not create an established church. For that matter, even a formal prayer proclamation calling for prayer, or legislative or gubernatorial prayer, does not establish a church. The seminal work on what constituted an established church identifies six categories of laws that contribute to an established church,[7] none of which are implicated by an honorary proclamation. These

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[7] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003) ("the laws constituting the establishment … can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.")

proclamations fall well short of creating or even contributing to an established church.

B. Honorary proclamations are constitutional under *Marsh v. Chambers*.

The honorary proclamations not only comply with the unique text and purpose of Colorado's Preference Clause, they also satisfy the United States Supreme Court's most applicable precedent under the Establishment Clause. Because prayer proclamations have been part of Colorado's history since before the adoption of the Colorado Constitution in 1879, this Court should uphold the practice as consistent with the Preference Clause. This is consistent with the U.S. Supreme Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983) where it used a "historical practices" method of interpreting the religion clauses of the First Amendment.

In *Marsh* the Supreme Court upheld the Nebraska Legislature's practice of opening its sessions with a prayer offered by a chaplain paid out of public funds. The Supreme Court based its decision on legislative prayer dating back to the founding of the republic:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

Id. at 786. The Court reasoned the founders must not have intended the First Amendment to prohibit the historical practice of legislative prayer that was common at the time the First Amendment was adopted. *See id.* at 790.

1. Marsh v. Chambers *provides the best framework to interpret the Preference Clause.*

Given the nature of the challenged state action, *Marsh* is particularly apt. When this Court has interpreted the Preference Clause by following U.S Supreme Court Establishment Clause cases it has done so when facts of the federal case were similar to the Colorado case. Thus, this Court looked to the well-known *Lemon* line of cases when the state challenge involved the public display of a crèche, just as holiday displays had been challenged in federal court. *Conrad I*, 656 P.2d at 672-76 (following *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Conrad II*,

724 P.2d at 1314 (following *Lynch v. Donnelly*, 465 U.S. 668 (1984). Likewise this Court again looked to the *Lemon* line of cases when the state challenge involved display of the Ten Commandments, just as Ten Commandments displays had been challenged in federal court. *State v. FFRF*, 898 P.2d at 1019-27 (following *Allegheny County v. ACLU*, 492 U.S. 573 (1989)).[8]

This Court should follow the federal case with the closest factual context, which in this case is *Marsh*. Like *Marsh*, this case involves a historical practice with deep roots that can be traced to the time the constitution was adopted. Legislative prayer as in *Marsh*, and prayer proclamations as in this case, should be analyzed under the historical practices methodology that gives meaning to the intent of the Preference Clause.

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[8] This Court has followed the same method with other clauses in Article II, § 4. *See Zavilla v. Masse*, 147 P.2d 823, 825 (Colo. 1944) (following *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)); *Young Life v. Div. of Employment and Training*, 650 P.2d 515, 519-20, 526 (Colo. 1982) (following *Larson v. Valente*, 456 U.S. 228 (1982) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

2. *Honorary prayer proclamations are a historical practice in Colorado.*

Similar to legislative prayer, executive branch proclamations regarding prayer constitute a historical practice dated to the time of the First Amendment's adoption and, more importantly, to the time of the Colorado Constitution's adoption in 1879. The founders of the Colorado Constitution were undoubtedly aware of both prayer proclamations and the similar practice of legislative prayer. This Court has previously noted the prevalence of public prayer at the time the Colorado Constitution was adopted. *See Vollmar* 255 P. at 615. If the Constitution permits public prayer at the hands of the government, then it must also permit proclamations of prayer by citizens.

The court of appeals acknowledged that Colorado Governors "have declared days of Thanksgiving and have encouraged others to prayer" but it failed to appreciate the historical significance of this practice. 2012 COA 81, ¶133. In fact, immediately after the Constitution was adopted, Colorado's governors engaged in public proclamations about

prayer that are substantially more religious in nature than the proclamations in this case.

For example, Colorado's first Governor, John Routt, issued proclamations of "Thanksgiving and Prayer" in 1876, 1877 and 1878.[9] These proclamations affirmatively requested that citizens engage in prayer ("earnestly recommend" 1878 "earnestly request" 1879), unlike the passive honorary proclamations at issue here.

Likewise, at the time when the Preference Clause was adopted, President Ulysses S. Grant issued a proclamation to commemorate the centennial year of the birth of the United States and invited citizens "to mark its recurrence [the centennial] by some public religious and devout thanksgiving to Almighty God for the blessings which have been bestowed upon us as a nation" on the upcoming Fourth of July.[10]

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[9] This and several other sample proclamations collected from the State Archives are attached to the Amicus Br. Of National Day of Prayer Task Force. This Court may take judicial notice of those documents under C.R.E. 201. *People v. Stanley*, 170 P.3d 782, 793 (Colo. App. 2007).

[10] *See* Ulysses S. Grant: "Proclamation 229 - Recommending Religious Services on July 4, 1876," June 26, 1876. *Available at* http://www.presidency.ucsb.edu/ws/?pid=70539.

Consistent with the evidence of prayer proclamations in Colorado and nationally at the time the Preference Clause was adopted, the United States Supreme Court opined at length in *Lynch* about the deep historic roots of the National Day of Prayer and how it reflects a tradition going back to George Washington in 1789. *See* 465 U.S. at 674-75. This too supports the historical record in favor of prayer proclamations.

The historical practice of prayer proclamations was well established when the Preference Clause was adopted. The drafters of Colorado's Preference Clause, therefore, could not have intended the constitution to prohibit these accepted practices. For this same reason the U.S. Supreme Court examined legislative prayer in *Marsh* by looking to the historical practices dating back to the time of the First Amendment. *Marsh*, 463 U.S. at 791 ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also how they thought the Clause applied to the practice authorized by the First Congress – their actions reveal their intent.")

3. *The Court of Appeals erred by not following* Marsh v. Chambers.

The court of appeals declined to follow *Marsh* and argued there were "crucial" differences between the challenged proclamations in this case and the legislative payer in *Marsh*, while admitting the case was "somewhat analogous." 2012 COA 81,¶ 123. The court of appeals distinguished *Marsh* by repeatedly characterizing the honorary proclamations as 'calling for prayer' or 'encouraging' citizens to pray. This was unsupported. In each instance, the honorary proclamations simply acknowledge that citizens will be praying or have the right to pray; they do not call for or encourage citizens to pray.

The court of appeals also erred by refusing to consider Colorado's history of prayer proclamations as relevant. It makes no sense to cast aside as irrelevant the openly exhortative content of the historic prayer proclamations in Colorado while then declaring unconstitutional the more mild content of the modern honorary proclamations. If a Governor can personally encourage citizens to pray, then merely acknowledging citizens' right to pray must likewise be constitutional.

From Plymouth colony Governor William Bradford's Thanksgiving proclamation in 1623 to President George Washington in 1789 to Colorado's First Governor John Routt in 1876 and Governor Hickenlooper in recent years, proclamations about prayer have been a regular and accepted practice in Colorado. These historical practices comply with the Preference Clause. This Court should decline Plaintiffs' invitation to be the first state in the nation to declare these common proclamations to be inconsistent with religious liberty.

C. Honorary proclamations acknowledging religion are constitutional under *Lemon v. Kurtzman*.

The proclamations are constitutional under *Lemon*, contrary to the holding below. The U.S. Supreme Court's approach to Establishment Clause jurisprudence has been notoriously tangled.[11] While the Governor contends the framework of *Marsh* should be applied

[11] The U.S. Supreme Court has recently granted certiorari in *Town of Greece v. Galloway*, 681 F.3d 20 (2d Cir. 2012) (No. 12-696) where the issue presented involves the application of the Establishment Clause to legislative prayer. It is possible the resulting opinion will clarify federal Establishment Clause precedent.

in this case, the Court of Appeals applied the framework of *Lemon*. Even under this framework, however, the proclamations must be upheld.

Even 40 years after *Lemon* was decided, the Justices themselves remain divided over the scope and meaning of the Establishment Clause as well as the proper legal framework to apply to any particular case. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) ("When we wish to strike down a practice [that the *Lemon* test] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts.' ") (citations omitted) (*quoting Hunt v. McNair,* 412 U.S. 734, 741 (1973)). Although it has been heavily criticized (and in some cases simply ignored),[12] the *Lemon* test has been variously applied by the Court. *E.g. Wallace v. Jaffree,* 472 U.S. 38, 63 (1985) (Powell, J.,

[12] *See* Michael Stokes Paulsen, *Symposium: Religion and the Public Schools after* Lee v. Weisman: Lemon *is Dead*, 43 Case W. Res. 795, 800 (1993) ("For many years, *Lemon* had been the subject of sharp criticism from legal commentators and even sharper criticism from members of the Court.") (collecting criticism)

concurring). The *Lemon* test requires a government act to: "1) have a secular purpose, 2) neither advance nor inhibit religion as its primary effect, and 3) not foster excessive entanglement with religion." *Van Osdol v. Vogt,* 908 P.2d 1122, 1131 (Colo. 1996). Challenged government actions must satisfy all three prongs of the test. *Id.*

1. *Prong 1: The honorary proclamations have a secular purpose.*

The first prong of the *Lemon* test asks "whether government action has 'a secular legislative purpose' " *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005) (quoting *Lemon*, 403 U.S. at 612). The purpose prong has been "seldom dispositive." *Id.* The central concern of this test is maintaining government neutrality between religions or between religion and nonreligion. *See Wallace*, 472 U.S. at 53. Thus, governmental acts with a "predominant purpose of advancing religion" will not satisfy the purpose test. *McCreary County*, 545 U.S. at 860.

The Supreme Court recently discussed application of the purpose prong and emphasized the objective nature of the inquiry. *Id.* at 863 ("In each case, the government's action was held unconstitutional only

because openly available data supported a commonsense conclusion that a religious objective permeated the government's action.").

The Governor's honorary proclamations satisfy the purpose prong because there is an obvious secular purpose of acknowledging an independently organized and privately hosted event. This is true for all honorary proclamations, not just the challenged proclamations. As the district court noted, the Governor's office does not "examine the purposes of the National Day of Prayer Task Force before issuing its proclamation, and is not making a determination of what activities are 'religious.' " *CD,* p.1576.

The text of the 2008 honorary proclamation, quoted in its entirety below, evidences the Governor's objectively secular purpose in issuing the honorary proclamation:

> WHEREAS, the authors of the Declaration of Independence recognized "That all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness;" and
>
> WHEREAS, the National Day of Prayer,

> established in 1952, and defined by President Ronald Reagan as the first Thursday in May, provides Americans with the chance to congregate in celebration of these endowed rights; and
>
> WHEREAS, each citizen has the freedom to gather, the freedom to worship, and the freedom to pray, whether in public or private; and
>
> WHEREAS, in 2008, the National Day of Prayer acknowledges Psalm 28:7 – "The Lord is my strength and shield, my heart trusts in Him, and I am helped;" and
>
> WHEREAS, on May 1, 2008, individuals across this state and nation will unite in prayer for our country, our state, our leaders, and our people;
>
> Therefore, I, Bill Ritter, Jr., Governor of the State of Colorado, do hereby proclaim May 1, 2008, Colorado Day of Prayer in the State of Colorado.

CD, p17. The first three clauses of the honorary proclamation outline the purpose and history of the National Day of Prayer statute: to "provide[ ] Americans with the chance to congregate in celebration" of their religious freedom. The fourth and fifth clauses acknowledge the occurrence of the National Day of Prayer, and make reference to the theme chosen by the private organization that requested the

proclamation and organized an event on that date. The fifth clause notes that on May 1, 2008, "individuals … will unite in prayer." This is certainly not an admonition or exhortation to pray from the Governor. In fact, the acknowledgement is simply the unremarkable observation that, based on over fifty years of U.S. history, it is safe to predict that a significant number of citizens will indeed gather and "unite in prayer" on the day designated by federal state as the National Day of Prayer.

Viewed as a whole, this honorary proclamation's secular purpose is apparent. As with all honorary proclamations, it is neither an endorsement of the event being acknowledged nor an exhortation to participate. *See supra* n.5. It is an acknowledgment of the importance of the nation's religious heritage, and the constitutionally enshrined religious freedom of its citizens. *See CD* p.1574 ("This Court finds Defendants merely intend to acknowledge the events of the National Day of Prayer Task Force, and a reasonable observer would not conclude otherwise.") The Court of Appeals took a different tack and glossed the proclamations as having the purpose of expressing

government sponsorship of prayer because an "implicit, if not explicit, call to prayer is the focus of each proclamation." 2012 COA 81, ¶95.

The District Court was correct; the purpose of the honorary proclamations was not religious or predominately religious. The court of appeals wrongly characterized the proclamations as saying something they do not. The court of appeals also wrongly ignored persuasive judicial authority addressing the nature of proclamations that acknowledge religion. *See Lee v. Weisman*, 505 U.S. 577, 630 (1992) (religious proclamations are "rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular[.]") (Souter, J., concurring); *Freedom from Religion Found. v. Obama*, 641 F.3d 803, 806-08 (7th Cir. 2011) (reviewing National Day of Prayer Proclamations). A proclamation about prayer serves a typical secular governmental purpose.

In any event, the honorary proclamation's purpose is certainly not *predominately* to advance religion. That the honorary proclamations may confer an incidental benefit on religious activity does not convert them into an impermissible religious statement or exhortation. *See*

State v. FFRF, 898 P.2d at 1020 ("We have adopted the view that a government act which has both a religious and secular message need not, in all instances, fall as a casualty of constitutional scrutiny."); *see also Van Orden v. Perry,* 545 U.S. 677, 684 n.3 (2005) (rejecting "the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion," and noting that "[e]ven the dissenters do not claim that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion").

2. *Prong 2: The honorary proclamations do not endorse religion over nonreligion.*

Lemon's second prong considers whether the "principal or primary effect" of a governmental action "advances [or] inhibits religion." *Lemon,* 403 U.S. at 612-13. This comports with the Establishment Clause requirement that the government take a neutral stance with respect to religion. *See Wallace,* 472 U.S. at 53 ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all").

When this Court has applied the second prong of *Lemon* it has previously looked to Justice O'Connor's "endorsement test" from her *Lynch* concurrence. The "endorsement test" calls for considering whether the government's "actions reasonably can be interpreted as governmental endorsement or disapproval of religion." *State v. FFRF,* 898 P.2d at 1021, *citing Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

The endorsement test is a contextual inquiry that requires consideration of "(1) what message the government intended to convey; and (2) what message the government's actions actually conveyed to a reasonable person." *State v. FFRF,* 898 P.2d at 1021, *citing Lynch,* 465 U.S. at 690 (O'Connor, J., concurring). "Endorsement" does not merely mean "an expression or demonstration of approval or support;" to the contrary, the Supreme Court has "equated 'endorsement' with 'promotion' or 'favoritism.' " *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 763 (1995) (plurality opinion). The court of appeals wrongly concluded that the proclamations violated the endorsement test.

a. Honorary proclamations in general do not convey any government endorsement.

The court of appeals surmised that the honorary proclamations convey a message that religion is favored or preferred for a host of factors, including the reference to bible verses, presence of the governor's signature, and that the reasonable observer would conclude the proclamations established government approval of religion. Not so. The court of appeals fundamentally misunderstood the nature of honorary proclamations. Honorary proclamations- regardless of their subject- neither "endorse" anything nor require any citizen action in response. *CD,* p1599; *cf. FFRF v. Obama,* 641 F.3d at 807 (by issuing prayer proclamation, "[t]he President has made a request; he has not issued a command"); *and Zwerling v. Reagan,* 576 F.Supp.2d 1373 (C.D. Cal. 1983) (President Reagan's proclamation of the "Year of the Bible," and accompanying congressional resolution, did not violate the Establishment Clause).

Honorary proclamations simply acknowledge events, like anniversaries or annual gatherings, or recognize individual

accomplishments. The undisputed evidence below demonstrated that endorsement is *not* the purpose of an honorary proclamation, and it would not be construed as such by a reasonable observer. *CD,* p. 414-15 (31:24-32:6). A reasonable observer would realize that the Governor's office issues hundreds of honorary proclamations each year, some of which acknowledge rival groups and causes. The reasonable observer would realize that, whether he is proclaiming "Chili Appreciation Society International Day," or a "Colorado Day of Prayer," the Governor is not promoting or favoring the cause, but instead is simply acknowledging some private group's own celebration of it. The court of appeals truncated the context of the honorary proclamations by refusing to allow the reasonable observer to be aware of any other honorary proclamations issued by the Governor, contrary to the trial court's findings on this point.

Because honorary proclamations do not constitute governmental endorsement of the subjects and events that they recognize or acknowledge, Plaintiffs' claim fails at the threshold. Nonetheless, even assuming *arguendo* that a reasonable observer could construe honorary

proclamations as endorsements, the content and context of the particular honorary proclamations at issue fully comport with the Preference Clause.

b. The honorary proclamations in this case do not have content endorsing religion.

The challenged honorary proclamations cannot be reasonably read as an exhortation to pray or to participate in privately organized National Day of Prayer events. To be sure, like every other honorary proclamation, they simply acknowledge the event, its purpose, and its theme, and use the language suggested by the event's organizers to do so. This reasoning finds support in the Supreme Court's approach to various other proclamations that also mention prayer or have religious implications. American Presidents have issued proclamations with religious content on holidays such as Memorial Day and Thanksgiving for generations. The Supreme Court noted (and implicitly approved) this practice in *Lynch:* "Executive orders and other official announcements of Presidents and of the Congress have proclaimed both

Christmas and Thanksgiving National Holidays in religious terms." 465 U.S. at 686.[13]

Even the Justices most inclined to find Establishment Clause violations have conceded that these actions are benign. As Justice Stevens stated in *Van Orden*: "although Thanksgiving Day proclamations … undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which separation of church and state is aimed." 545 U.S. at 723 (Stevens, J., dissenting). Justice Stevens' tolerant approach is consistent with treating the challenged proclamations as being similar to government actions referred to as "ceremonial deism." That category include things where the "history, character, and context" of a governmental action renders it permissible to "acknowledge or refer to the divine without offending the Constitution." *Newdow,* 542 U.S. at 37 (O'Connor, J., concurring in the judgment).

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[13] The court of appeals wrongly conflated the holiday of Thanksgiving, which is widely celebrated by nonreligious citizens, with the historical practice of Thanksgiving prayer *proclamations*, which are functionally similar to the challenged proclamations.

Thus, the Supreme Court has favorably commented on "such things as the national motto ('In God We Trust'), religious references in patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of th[e Supreme] Court opens each of its sessions ('God save the United States and this honorable Court')." *Id.* Like these statements, prayer proclamations have the history, character, and context making the government acknowledgement of religion fully constitutional.

c. The honorary proclamations in this case have a broad, secular context.

The endorsement test has been used most commonly in monument cases, where "context" can be derived from the prominence of the display, its timing, and its surroundings, among other factors. *See, e.g.*, *State v. FFRF,* 898 P.2d at 1025-26; *Allegheny County,* 492 U.S. at 597. The notion of "context" is less geographic for honorary proclamations; however, the Supreme Court has emphasized that reasonable observer is objective and the reviewing court should take into account "the text, legislative history, and implementation of the statute, or comparable

official act" from the perspective of a detached third party observer. *McCreary County,* 545 U.S. at 862 (internal quotation omitted).

As Justice O'Connor described it: "the [endorsement] test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape." *Elk Grove Unified Sch. Dist.,* 542 U.S. at 35 (2004) (O'Connor, J., concurring in the judgment). In addition, the "reasonable observer" must in fact be truly objective. "[A]dopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement." *Id.* Plaintiffs in this case seek to exercise a heckler's veto by objecting to a proclamation they did not even come in contact with apart from their desire to file this lawsuit. *See* CD p.1568-69.

Departing from the Supreme Court's guidance, the court of appeals concluded the honorary proclamations must be considered in a vacuum, apart from the undisputed context of hundreds of diverse

proclamations being issued by the governor in any given year. This artificial limit on the context of the challenged proclamations was error.

The endorsement test's contextual analysis looks to the circumstances surrounding the government act. In this case, those circumstances include the governor's office practice of *frequently* issuing honorary proclamations to a wide array of groups. These are not formal proclamations, which the Governor or President may issue only a handful of times each year; these are honorary proclamations issued more often than school groups tour the Capitol.

The circumstances surrounding the issuance of the proclamations plainly demonstrates that a reasonable third-party observer would be aware of the ubiquity and lengthy history of prayer proclamations in American life, as well as the particular circumstances under which the challenged proclamations are requested and issued in Colorado.

Once the challenged proclamations are properly reviewed for content and context the court must conclude they cannot "reasonably … be interpreted as governmental endorsement … of religion." *State v. FFRF,* 898 P.2d at 1021. Their content is neutral towards religion, and

the evidence of the circumstances surrounding their issuance is devoid of any suggestion of the state endorsing or giving special favor to the proclamations' proponents. Accordingly, the challenged honorary proclamations satisfy the second prong of the *Lemon* test.

3. *Prong 3: The honorary proclamations do not foster excessive entanglement.*

No court below has found a violation of the third prong of the *Lemon* test. *Lemon's* "excessive entanglement" prong requires consideration of the "character and purpose of the institution involved, the nature of the regulation's intrusion into religious administration, and the resulting relationship between the government and the religious authority." *Vogt,* 908 P.2d at 1132. This prong is typically relevant only in cases where the government becomes involved in the workings of religious institutions, either financially or through oversight of an organization's internal workings. *See, e.g., Catholic Health Initiatives Colorado v. City of Pueblo, Dept. of Finance,* 207 P.3d 812 (Colo. 2009) (addressing permissible scope of charitable tax exemption); *Vogt,* 908 P.2d 1122.

As this court has held, where "the challenged action does not involve any direct subsidy to a school or religious institution," there is no need to conduct an entanglement analysis. *Conrad II*, 724 P.2d at 1316. The district court found there was no evidence that the challenged honorary proclamations cause any entanglement with religion. *CD*, p 1576. The honorary proclamations satisfy the third prong of *Lemon*.

CONCLUSION

Based on the foregoing reasons and authority the Governor respectfully requests that this Court reverse the court of appeals.

Respectfully submitted this 13th day of September, 2013

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within OPENING BRIEF upon all parties in the manner indicated this 13th day of September, 2013, addressed as follows:

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