SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 7, 2013 10:46 AM
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 10CA2559, 08CV9799	▲ COURT USE ONLY ▲
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.	Case Number: 12SC442
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MOTION TO LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

The American Humanist Association ("AHA"), through counsel, hereby move this Court pursuant to C.A.R. 29 for leave to file the amicus brief submitted herewith in support of the Plaintiffs in the above-captioned action. In support of this motion, AHA states as follows:

1. AHA is a national nonprofit organization that advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 175 local chapters and affiliates across America, including in Colorado. AHA currently has six chapters in Colorado and one affiliate group.

2. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity.

3. The mission of AHA's legal center is to defend the separation of church and state and the constitutional rights of humanists, atheists and other freethinkers. The legal center has been involved in numerous such cases in state and federal courts. We submit this brief to offer our legal expertise on separation of church and state issues to the Court.

4. AHA has an interest in this appeal because many of its members, especially those in Colorado, are subjected to the Defendant's unconstitutional

practice of issuing prayer proclamations, which have the purpose and effect of preferring and endorsing religion.

5. The Colorado Day of Prayer Proclamations (the "Prayer Proclamations"), which are stamped – literally and figuratively – with the Governor's approval, make humanists feel like outsiders and not full members of the Colorado political community. These Prayer Proclamations, unquestionably endorsed by the government, urge Colorado citizens to join in prayer. Humanists do not pray and are therefore necessarily excluded. AHA members are also forced to witness their own government preferring religion over non-religion, which sends a symbolic message to AHA's members that God-belief is favored and that humanism is disapproved.

6. AHA's legal center has extensive knowledge regarding three of the U.S. Supreme Court cases that have become a focal point of this appeal, namely, *Lemon, Marsh*, and *Hein*, as well as numerous lower federal court decisions interpreting those cases, and wish to offer their professional expertise on how those cases should be interpreted in the case *sub judice*.

7. AHA maintains that the Prayer Proclamations are unconstitutional and thus, seek affirmance of the lower court ruling. The prayers are motivated by a religious purpose and their clear effect is to advance, promote, endorse, and affiliate the government with religion. Not only do the prayers advance religion

over non-religion, but they also affiliate the government with Christianity specifically, through its close alliance with the National Day of Prayer Task Force, the purpose of which is to spread the Christian message through such prayer proclamations.

8. All parties to the action have been contacted as to the submission of the amicus brief and do not object.

9. The amicus curiae brief is conditionally filed with this motion.

Respectfully submitted,

November 7, 2013

s/ Katayoun A. Donnelly

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BRIEF OF AMICI CURIAE BY THE AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

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).

Choose one:

☑It contains 9,479 words.

❑It does not exceed 30 pages.

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

❑For the party raising the issue:

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

☑For the party responding to the issue:

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

☑I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Katayoun A. Donnelly

Signature of attorney or party

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF THE AHA

The American Humanist Association ("AHA") is a national nonprofit organization that advocates for the rights and viewpoints of humanists. Founded in 1941, its work is extended through more than 175 local chapters and affiliates across America, including in Colorado. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of AHA's legal center is to defend the constitutional mandate of separation of church and state. AHA has an interest in this appeal because its Colorado members are subjected to the Defendant's unconstitutional promotion of religion.

SUMMARY OF THE ARGUMENT

The Colorado Day of Prayer proclamations ("Prayer Proclamations") violate the Preference Clause of the Colorado Constitution because they have the purpose and effect of promoting religion. The *Lemon* test provides the analytical framework rather than the narrow exception to it created in *Marsh*. Finally, there is no "de minimis" exception to taxpayer standing in Colorado. Accordingly, this Court should affirm.

STATEMENT OF STANDARD OF REVIEW AND PRESERVATION

Amici have no issue with the Plaintiffs' statements regarding the standard of review and preservation of appeal.[1]

ARGUMENT

I. THIS CASE IS GOVERNED BY *LEMON*, NOT *MARSH*.

While not directly before the Court, the Defendant erroneously asserted that *Marsh v. Chambers*, 463 U.S. 783 (1983), which established an "exception" to the Establishment Clause (or at the very least, an "exception" to "the cumulative [Establishment Clause] criteria developed by the Court over many years," *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) discussed *infra*), governs the outcome of this case. (D. 23). This argument is without merit. First, the Colorado Supreme Court is not governed by any federal court decision when interpreting the State constitution. Second, this Court has already declined to adopt *Marsh*[2] and is free to do so again. Third, and more importantly, the narrow *Marsh* exception is inapplicable here, as it only applies to *legislative* prayers with a longstanding

[1] The Defendant's opening brief is herein cited as "D" followed by the page.

[2] The Court had the opportunity to adopt *Marsh* in *State v. Freedom from Religion Found*., 898 P.2d 1013 (Colo. 1995), but declined to do so. *Marsh* was only mentioned in a footnote by the dissent, who agreed, "the Supreme Court has not repudiated the use of the *Lemon* test." *Id.* at n.28 (Lhor, J., dissenting). The Court also declined to adopt *Marsh* in *Conrad v. Denver,* 724 P.2d 1309, 1314, n.6 (Colo. 1986).

history. Instead, this Court uses *Lemon* to determine whether state action violates the Preference Clause. *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 672 (Colo. 1982) (*Conrad I*).

A. *Marsh* is not binding on this Court.

This Court has a duty to independently interpret the Colorado Constitution and disregard federal precedent that affords less protection to Colorado citizens than required by state law. *People v. Huber*, 139 P.3d 628, 631 (Colo. 2006). *See also People v. District Court*, 834 P.2d 181, 192 (Colo. 1992) ("this court has departed from the holdings of federal courts . . . and held that certain provisions under our state constitution provide our citizens with a higher degree of protection."); *People v. Young*, 814 P.2d 834, 842-43 (Colo. 1991) ("We have recognized and exercised our independent role on a number of occasions"). Indeed, this Court has interpreted numerous provisions of the Colorado Constitution as providing "more protection for our citizens" than their federal counterparts. *Id.*[3]

[3] *See, e.g., Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 77, n.11 (Colo. 2008) ("Our state constitution provides more expansive protection of speech rights than provided by the First Amendment . . . and Supreme Court precedent."); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (Colorado has an "extensive history of affording broader protection under the Colorado Constitution for expressive rights."); *People v. Haley*, 41 P.3d 666, 672 (Colo. 2001) (the "Colorado law affords broader protections in some instances than the Fourth Amendment."); *Animas Valley Sand & Gravel v. Bd. of County Comm'rs*, 38 P.3d 59, 63 (Colo. 2001) ("This court has interpreted the 'damage' language in

Even the "existence of federal constitutional provisions essentially the same as those" in the "state constitution does not abrogate" the Court's "responsibility to engage in an independent analysis of state constitutional principles." *Young*, 814 P.2d at 842. Notably however, the Preference Clause language evidences a broader and more protective scope of separation of church and state than the Establishment Clause language. It is more textually analogous to "preference" clauses in other states' constitutions,[4] many of which have been interpreted as imposing a greater wall of separation than the Establishment Clause.[5]

Colorado's takings clause to provide broader rights than does the federal clause"); *People v. Mason*, 989 P.2d 757, 759 (Colo. 1999) ("We have afforded suspects in Colorado greater rights than are available under the federal Constitution."); *People v. Allen*, 868 P.2d 379, 381 (Colo. 1994) ("we have adopted a more protective standard for what constitutes the same offense [for Double Jeopardy]"); *People ex rel. Juhan v. Dist. Court,* 165 Colo. 253 (1968) (construing Colorado's Due Process Clause as more protective of liberty interests).

[4] States with "preference" clauses include Alabama, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming.

[5] *See, e.g.*, *Fox v. Los Angeles*, 22 Cal. 3d 792, 796 (Cal. 1978); *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991) ("The No Preference Clause, which California courts and the Ninth Circuit have interpreted as censuring so much as even the appearance of religious partiality, is a sweeping constitutional edict."); *Griswold Inn, Inc. v. State*, 183 Conn. 552, 559, n.3 (Conn. 1981) ("Article seventh's language even more than the federal provision condemns any law which gives 'preference' . . . The state provision is thus more comprehensive than the federal provision."); *Smith v. Pedigo,* 33 N.E. 777, 779 (Ind. 1893); *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 260-61 (Minn. App. 2003) ("The language of the

B. *Marsh* is inconsistent with Establishment Clause jurisprudence.

This Court has made clear that *Lemon* determines whether state action violates the Preference Clause.[6] This conclusion is quite sensible, given that the three *Lemon* prongs are merely a distillation of what the Establishment Clause prohibits. In laying the foundation for the *Lemon* test, the Supreme Court explained:

> [There are] three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Every analysis in this area must begin with consideration of the *cumulative criteria developed by the Court over many years.* Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz*, *supra*, at 674.

Minnesota Constitution regarding religion 'is of a distinctively stronger character than the federal counterpart'"); *St. Louis U. v. Masonic Temple Ass'n of St. Louis,* 220 S.W.3d 721, 729 (Mo. 2007) ("Missouri's establishment clause is more restrictive [on the government] than the federal provision."); *Ams. United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976) (same); *McDonald v. Sch. Bd. of Yankton Indep. Sch. Dist. No. 1 of Yankton*, 246 N.W.2d 93, 98 (S.D. 1976); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956) ("our own organic law is broader and more comprehensive . . . in that '*no preference shall ever be given*'"); *State ex rel. Reynolds v. Nusbaum,* 115 N.W.2d 761, 769-70 (Wis. 1962) (Wisconsin "'furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union.'")(citation omitted).

[6] *State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013, 1021 (Colo. 1995).

Lemon, 403 U.S. at 612-13 (emphasis added). *See also Conrad I*, 656 P.2d at 672. Because *Marsh* is an exception to *Lemon, infra,* it is essentially an exception to the Establishment Clause.

The vast majority of federal courts have described *Marsh* as an "exception" to *Lemon*. *See, e.g*., *Edwards v. Aguillard,* 482 U.S. 578, 583, n.4 (1987) ("The *Lemon* test has been applied in all cases since its adoption in 1971, ***except*** in *Marsh*"); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the "Supreme Court has not extended the *Marsh* ***exception***"); *Joyner v. Forsyth County*, 653 F.3d 341, 349 (4th Cir. 2011) ("'the ***exception*** created by *Marsh* is limited'") (citation omitted); *Doe v. Indian River Sch. Dist*., 653 F.3d 256, 259, 275 (3d Cir. 2011) (where the issue was "whether a school board may claim the ***exception*** established for legislative bodies in *Marsh*, or whether the traditional Establishment Clause principles . . . apply" the court concluded that "*Marsh's* legislative prayer ***exception*** does not apply"); *Card v. City of Everett,* 520 F.3d 1009, 1014 (9th Cir. 2008) ("*Marsh* . . . should be construed as carving out an ***exception*** to normal Establishment Clause jurisprudence.") (internal quotation omitted); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("the Supreme Court has never expanded the *Marsh* ***exception***"); *Coles by Coles v. Cleveland Bd. of Educ*., 171 F.3d 369, 376, 379 (6th Cir. 1999) ("the

unique and narrow ***exception*** articulated in *Marsh*"); *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 829, n.9 (11th Cir. 1989) ("*Marsh* created an ***exception*** to the *Lemon* test only for such historical practice."); *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) (referring to *Marsh* as an "**exception**" to *Lemon*); *Weisman v. Lee*, 908 F.2d 1090, 1094-96 (1st Cir. 1990) (Bownes, J., concurring) (twice referring to "the **exception** to [*Lemon*] delineated in *Marsh*."); *Doe v. Tangipahoa Parish Sch. Bd*., 631 F. Supp. 2d 823, 835 (E.D. La. 2009) (*Marsh* is "a narrow ***exception***"); *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1328 (N.D. Ga. 2006) (*Marsh* is an "**exception**"); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (same); *Wynne v. Town of Great Falls*, 2003 U.S. Dist. LEXIS 21009, *10 (D.S.C. 2003) (*Marsh* created an "***exception*** in Establishment Clause law"); *Metzl v. Leininger*, 850 F. Supp. 740, 744 (N.D. Ill. 1994) (referring to "*Marsh* court's narrow 'historical ***exception'*** to traditional Establishment Clause jurisprudence."); *Albright v. Board of Educ. of Granite School Dist*., 765 F. Supp. 682, 688 (D. Utah 1991) (*Marsh* is an "**exception**"); *Lundberg v. West Monona Community School Dist.,* 731 F. Supp. 331, 346 (N.D. Iowa 1989) (explaining that the plaintiffs sought to "escape the *Lemon* test by invoking the *Marsh* ***exception***" and concluding that "the *Marsh* ***exception*** is not controlling."); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 11, n.4 (D.D.C. 1988) ("[t]he Supreme Court has

applied the *Lemon* framework in all but one establishment clause case. The ***exception*** was *Marsh*."); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 142, n. 38 (N.D.N.Y 1988) (the "*Lemon* test has been applied by the Supreme Court in all cases subsequent to its formulation with one exception. In *Marsh* . . . the Court carved out a narrow ***exception*** to the prohibitions of the establishment clause"); *cf. Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("the Court is carving out an ***exception*** to the Establishment Clause.") (emphasis added in each). Some of the foregoing cases explicitly referred to *Marsh* as an exception to the *Establishment Clause*.[7]

Other courts discussing *Marsh* have highlighted its sui generis and one-of-a-kind nature, thereby affirming at the very least that *Marsh* is inconsistent with Establishment Clause jurisprudence. *See, e.g*., *McCreary County v. ACLU,* 545 U.S. 844, 860 n.10 (2005) (describing *Marsh* as a "special instance[]"); *Rubin v. City of Lancaster*, 710 F.3d 1087, 1091, n.4 (9th Cir. 2013) (since "*Marsh*, legislative prayer has enjoyed a 'sui generis status' in Establishment Clause jurisprudence."); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005) ("*Marsh*, in short, has made legislative prayer a field of

[7] *See, e.g*., *Indian River Sch. Dist*., 653 F.3d at 259, 275; *Card,* 520 F.3d at 1014; *Wynne*, 2003 U.S. Dist. LEXIS 21009, *10; *Metzl*, 850 F. Supp. at 744; *Blackwelder*, 689 F. Supp. at 142, n. 38.

Establishment Clause jurisprudence with its own set of boundaries and guidelines."); *Coles*, 171 F.3d at 381 ("*Marsh* is one-of-a-kind"); *Snyder v. Murray City Corp*., 159 F.3d 1227, 1232 (10th Cir. 1998) (en banc) ("the constitutionality of legislative prayers is a sui generis legal question"); *Jones v. Hamilton County*, 891 F. Supp. 2d 870, 885 (D. Tenn. 2012) (same); *Graham v. Central Community Sch. Dist.,* 608 F. Supp. 531, 535 (S.D. Iowa 1985) ("*Marsh* decision is a singular Establishment Clause decision.").

Marsh is not only inconsistent with decades of Establishment Clause jurisprudence preceding it, but also with jurisprudence following it. *See, e.g*., *Santa Fe v. Doe*, 530 U.S. 290, 313 (2000) (prayer in public school unconstitutional); *Lee v. Weisman*, 505 U.S. 577, 592 (1992)(same); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (same). *See also Wynne v. Town of Great Falls, S. Carolina*, 376 F.3d 292, 302 (4th Cir. 2004) ("in the more than twenty years since *Marsh*, the Court has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the *Marsh* approach to other situations.") (referring to *Lee* and *Allegheny*); *Jewish War Veterans*, 695 F. Supp. at 11, n.4 ("[t]he Court returned to the *Lemon* test in cases decided after *Marsh*.").

Consequently, lower courts have refused to apply *Marsh* to situations other than legislative prayer[8] (or to expand it in cases on that topic).[9]

Furthermore, the dicta cited by the Defendant (D. 36) regarding *Lemon* as a criticized test[10] must be seen for what it is: criticism of the Establishment Clause itself. It is no surprise that that the four justices who have criticized *Lemon* – Rehnquist, Scalia, Kennedy, and Thomas – are the same justices who wish to "gut" the core of the Establishment Clause. *See County of Allegheny v. ACLU*, 492 U.S. 573, 604 (1989) ("Justice Kennedy's reading of *Marsh* [joined by Rehnquist, White and Scalia, dissenting] would gut the core of the Establishment Clause"). *See also* Erwin Chemerinsky, *The Future of the Establishment Clause*, 28 HUM. RIGHTS 16, 17 (Spring, 2001) ("Rehnquist, Scalia, Kennedy, and Thomas . . . have

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[8] *See, e.g.*, *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1076 (2d Cir. 1997) (refusing to apply *Marsh* to compulsory A.A. program); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (refusing to apply *Marsh* to Good Friday holiday); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 828 (11th Cir. 1989) (*Marsh* "has no application to" school prayers); *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 453 (8th Cir. 1988) (declining to extend *Marsh* to hospital chaplaincy program).

[9] *Wynne*, 376 F.3d at 302 (declining to extend *Marsh* to permit sectarian legislative prayers, noting "we and our sister circuits have steadfastly refused to extend *Marsh*").

[10] *See, e.g.*, *Lamb's Chapel v. Center Moriches School Dist.,* 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (referring to *Lemon* as "some ghoul in a late-night horror movie").

expressed a desire for a new test that allows much more government aid to religion and much more of a religious presence in government. . . . Very little would violate the Establishment Clause under this approach."); Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause,* 89 Tex. L. Rev. 583, 632 (2011) ("Justice Thomas has been most explicit in his willingness to abandon the Establishment Clause."). These justices, and Scalia and Thomas in particular, have dissented in nearly every Establishment Clause case finding a practice unconstitutional. *See id.* at 631 ("Scalia has never joined a majority to strike down a government action on Establishment Clause grounds.").[11] Defying more than half a century of well-settled Establishment Clause law, Thomas has persistently argued that the Establishment Clause does not even apply to the states,[12] and Scalia has said that "the Establishment Clause permits [the] disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." *McCreary*, 545 U.S. at 893 (Scalia, J., dissenting, joined by C.J., Rehnquist, Thomas and Kennedy, J.J.). Yet the Supreme Court held in one of its first Establishment Clause cases, and many since, that the Establishment Clause "means

[11] *See also* Erwin Chemerinsky, *Why Separate Church and State?,* 85 OR. L. REV. 351, 352 (2006) (the conservative justices "seem ready and even eager to overrule decades of precedent with regard to the Establishment Clause.").
[12] *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc.,* 132 S. Ct. 12, 21 (2011) (Thomas, J., dissenting).

at least this: Neither a *state* nor the Federal Government can . . . pass laws which aid one religion, *aid all religions*, or prefer one religion over another." *Everson v. Bd. of Educ*., 330 U.S. 1, 15 (1947) (emphasis added). It is also firmly established that Establishment Clause protection "extends beyond intolerance among Christian sects – or even intolerance among 'religions' – to encompass intolerance of the disbeliever and the uncertain." *Wallace*, 472 U.S. at 52-54.[13] Clearly under Thomas and "Scalia's approach, little ever will violate the Establishment Clause." Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal,* 22 U. HAW. L. REV. 385, 388 (2000). Such an abandonment of the first freedom protected by the Bill of Rights would be a catastrophe for our secular democracy.

Despite the dicta, *Lemon* has proven to be a useful test and has not been overruled. In fact, the Supreme Court recently expressly refused to overrule *Lemon* over a strong dissent and over the insistence of the government, concluding that a Ten Commandments display was unconstitutional pursuant to *Lemon*. *McCreary*, 545 U.S. at 861.

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[13] *See also Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 216 (1963)("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government" can "pass laws or impose requirements which aid all religions as against non-believers.").

C. *Marsh* is premised on dangerous logic.

In addition to being inconsistent with the Establishment Clause, *Marsh* is also premised on dangerous logic. The analysis, or more accurately, lack thereof, in the short ten page opinion only goes as far as, "[t]he founders did it. Everyone since them has done it. No one is abusing it. Therefore it is constitutional." Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 338 (1993). The flaw in this logic is apparent when one considers other injustices in American history. This logic would uphold anti-miscegenation laws, *Loving v. Virginia*, 388 U.S. 1 (1967), racial segregation, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and even slavery, *Scott v. Sandford*, 60 U.S. 393 (1857). *Marsh*'s logic would permit women to be denied the right to vote, practice law,[14] serve on juries, and even frequent "wine rooms" pursuant to discriminatory local ordinances.[15] Indeed, women had almost no rights during the founders' era.[16]

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[14] *In re Thomas,* 16 Colo. 441, 442 (Colo. 1891) ("By ancient and universal usage women have been denied the right to practice [law]")

[15] *Adams v. Cronin*, 29 Colo. 488, 496-87 (Colo. 1902) ("That injury to public morality would ensue if women were permitted without restrictions to frequent wine rooms, there to be supplied with liquor, is so apparent to the average person, that argument to establish so plain a proposition is unnecessary." It "would be demoralizing to society.")

[16] *See Wells v. Caywood*, 3 Colo. 487, 491 (Colo. 1877).

Fortunately, the fact that such discriminatory practices existed in the past does not in any way legally justify them today. The Supreme Court has held that "'neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citation omitted). Racial segregation was struck down in *Brown* despite its longstanding history, 347 U.S. at 490, and "the total exclusion of women from juries," is "now unconstitutional even though [it] once coexisted with the Equal Protection Clause." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 n.15 (1994). This Court may look with pride upon its decision in 1891, rejecting precedents of the U.S. Supreme Court and other states upholding laws prohibiting women from practicing law, which were justified on the basis of "historical customs and usages, and the . . . women's legal status at the common law," ruling that women could practice in Colorado. *In re Thomas*, 16 Colo. at 442-43. In so doing, this Court declared:

> With all deference to those learned courts, we decline to imitate their example in the latter [r]egard. . . . *We shall likewise decline to give controlling weight to historic custom or usage in England, in the American colonies, and in the republic during its infancy.* Reasoning, predicated upon the latter ground, possesses the inherent weakness of ignoring to a greater or less extent the marvelous changes throughout the country during the last fifty years in the legal status of woman.

Id. (emphasis added).

Just as history cannot justify discriminatory laws, it cannot justify governmental practices that promote religion. *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). The Supreme Court later acknowledged the pernicious nature of the *Marsh*-historical justification, asserting that it could "gut the core of the Establishment Clause." *Id.* at 603-05. The Court reasoned:

> The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically . . . but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.

Id. In an earlier Establishment Clause case, the Court emphasized: "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz*, 397 U.S. at 678. *See also Comm. for Public Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 792-93 (1973) (same). *Cf. Lee*, 505 U.S. at 626 (Souter, J., concurring) ("[i]f the early Congress's political actions were determinative . . . we would have to gut our current First Amendment doctrine.").

In accord with these decisions, many courts have rejected history as a basis to uphold religious displays.[17] For instance, the Eleventh Circuit held that a judge's

[17] *See, e.g.*, *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) (despite claim that cross on seal "symbolizes 'the unique history and heritage of Edmond'" it violated Establishment Clause); *Harris v. Zion*, 927 F.2d 1401, 1414-15 (7th Cir. 1991) (same holding); *Friedman v. Board of County Commissioners*,

Ten Commandments monument was unconstitutional, reasoning:

> That there were some government acknowledgments of God at the time of this country's founding and indeed are some today, however, does not justify under the Establishment Clause a 5280-pound granite [religious] monument.

Glassroth v. Moore, 335 F.3d 1282, 1298 (11th Cir. 2003). The Seventh Circuit similarly rejected a town's argument that "the duration of its [crucifix] display reinforces its secular effect," declaring:

> We do not accept this sort of bootstrapping argument as a defense to an Establishment Clause violation, nor have we found any other case that adopted this reasoning.

Gonzales v. North Township of Lake County, 4 F.3d 1412, 1422 (7th Cir. 1993). It reiterated in *Pitts v. City of Kankakee*, 267 F.3d 592, 596 (7th Cir. 2001):

> In a predominantly Christian community, it may take a Buddhist, or a Moslem, or a Jew, or an atheist, to call to the authorities' attention a possible violation of the Establishment Clause. The rights of such citizens do not expire simply because a monument has been comfortably unchallenged for twenty years, or fifty years, or a hundred years.

The Ninth Circuit has held several cross displays unconstitutional under both the

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781 F.2d 777, 781-82 (10th Cir. 1985) (same); *ACLU v. Rabun County Chamber of Commerce, Inc.,* 698 F.2d 1098, 1111 (11th Cir. 1983) (cross violated Establishment Clause even though it had "'historical acceptance'"); *Washegesic v. Bloomingdale Pub. Sch*., 813 F. Supp. 559, 563, n.9 (W.D. Mich. 1993), *aff'd* 33 F.3d 679 (6th Cir. 1994) ("[t]his Court's analysis does not depend upon the length of time the picture [of Jesus] has hung on the school wall."); *Mendelson v. St. Cloud*, 719 F. Supp. 1065, 1070 (M.D. Fla. 1989).

Establishment Clause and California No Preference Clause despite having "historical significance."[18]

The longstanding nature of a religious practice, instead, exacerbates the constitutional injury because "religious outsiders [must] tolerate these practices . . . with the awareness that those who share their religious beliefs have endured these practices for generations." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2164 (1996). *See also Ellis*, 990 F.2d at 1525 ("The fact that the cross . . . stands as a prominent landmark and tourist attraction, does nothing to ameliorate a violation of [the No Preference Clause]. If anything, such facts underscore the formidable nature of the display and increase the likelihood of an impermissible appearance of religious preference.").

Finally, *Marsh*'s historical justification rests on *incorrect* history, or, at the very least, incomplete history. The Court in *Marsh* observed that James Madison, the father of the U.S. Constitution, "expressed doubts concerning the chaplaincy practice." *Marsh*, 463 U.S. at 791 n.12. "Doubt" is an understatement. Madison unequivocally stated:

> Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of

[18] *See, e.g.*, *Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011); *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 631-32 (9th Cir. 1996); *Ellis v. La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993).

> religious freedom? In strictness the answer on both points must be in the negative.[19]

D. The *Marsh* exception is inapplicable here.

Even if this Court were to adopt *Marsh*, the Prayer Proclamations are entirely outside its scope. The *Marsh* exception only applies to: (1) legislative prayer; (2) that is non-denominational; (3) not directed to the public; and (4) has an "unambiguous and unbroken history." 463 U.S. at 792. The Prayer Proclamations fail to meet a single element.

First, *Marsh* is narrowly confined to *legislative* prayers. No court has extended *Marsh* to executive or gubernatorial prayers, let alone any prayers that are not before a legislative body. *See Atheists of Fla., Inc.*, 713 F.3d at 590 (the "Supreme Court has not extended the *Marsh* exception to legislative bodies other than state legislatures"); *Graham*, 608 F. Supp. at 535 ("the holding of [*Marsh*] is clearly limited to the legislative setting."). *Cf. Allegheny*, 492 U.S. at 604 n.53 (opining that *Marsh* would not apply to a governor's proclamation). The Supreme Court has refused to apply *Marsh* to public school prayers. *Santa Fe*, 530 U.S. at 313; *Lee*, 505 U.S. at 592; *Wallace*, 472 U.S. 38. The courts have likewise refused to extend *Marsh* to prayers by the judicial branch, *North Carolina Civil Liberties*

[19] James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.,* in Madison's "Detached Memoranda" (Elizabeth Fleet ed.), in ser. 3, 3 Wm. & Mary Q. 534, 558 (1946) (hereafter, "Madison, Detached Memoranda").

Union Legal Foundation v. Constangy, 947 F.2d 1145, 1147- 49 (4th Cir. 1991),[20] and by military officials, *Mellen v. Bunting*, 327 F.3d 355, 368-69 (4th Cir. 2003), finding them unconstitutional under *Lemon*. *Id.* Finally, the courts have refused to extend *Marsh* to prayers before school boards, despite their "similar[ity] to a legislative body." *Indian River Sch.*, 653 F.3d at 259, 275-79; *Coles*, 171 F.3d at 381. Because the proclamations are not *legislative* prayers, *Marsh* is inapposite.

Although there is no need for further analysis since the first and most critical element is not met, the prayers fail the second element as well because *Marsh* does not protect "prayers that have the effect of affiliating the government with any one specific faith or belief." *Allegheny*, 492 U.S. at 603. *See also Wynne*, 376 F.3d at 300-01. All of the proclamations "were issued in response" to requests from an organization whose mission is to mobilize "the Christian community." *Freedom from Religion Found., Inc. v. Hickenlooper*, 2012 COA 81, P14-19 (Colo. Ct. App. 2012) ("*FFRF*"). They therefore affiliated the government with Christianity specifically.[21]

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[20] *See also ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 494-495 (6th Cir. 2004) (declining to apply *Marsh* in ruling a judge's Ten Commandments display violated Establishment Clause pursuant to *Lemon*); *Glassroth*, 335 F.3d at 1298 (same).

[21] Of course, this distinction would not matter outside of *Marsh. See McCreary*, 545 U.S. at 860; *Everson*, 330 U.S. at 18.

The third element is clearly not met because the Governor "encouraged Colorado's citizens to pray." *Id.* at P124. The prayers in *Marsh* were directed to the legislative body, not to the public. This distinction is important. The Supreme Court distinguished legislative prayers from "Day of Prayer" proclamations, noting: "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." *Allegheny*, 492 U.S. at 603 n.52. The Fourth Circuit made a similar observation in refusing to extend *Marsh* to judicial prayers, noting:

> legislative prayer is primarily directed at the legislators themselves, who have decided to have prayer. . . . [A] judge's prayer in the courtroom is not to fellow consenting judges but to the litigants and their attorneys.

Constangy, 947 F.2d at 1149. The Ninth Circuit likewise rested on this distinction in refusing to apply *Marsh* to a statute designating Good Friday a holiday, despite its longstanding history, noting that the prayers in *Marsh* "were largely confined to the *internal workings* of a state legislature. . . . In contrast, a public holiday can affect the *entire populace*." *Cammack*, 932 F.2d at 772 (emphasis added).

Finally, the Prayer Proclamations lack an "unambiguous and unbroken history." *Marsh*, 463 U.S. at 792. Unlike the 200 years of history supporting the prayers in *Marsh,* "the National Day of Prayer was established in 1952" while the

"first proclamation of a Colorado Day of Prayer was issued only [in 2004]." *FFRF*, 2012 COA at, P131-32. Additionally, whatever their opinions were on legislative prayers by chaplains, the founders did not approve of executive prayers. Thomas Jefferson explained in his famous letter to the Danbury Baptists that he would "not proclaim fastings & thanksgivings, as my predecessors did."[22] He also explained this in a letter to Rev. Samuel Miller: "But it is only proposed that I should recommend, not prescribe a day of fasting & prayer. That is, that I should indirectly assume to the U.S. an authority over religious exercises which the Constitution has directly precluded them from . . . [E]very one must act according to the dictates of his own reason, & mine tells me that civil powers alone have been given to the President of the US. and no authority to direct the religious exercises of his constituents."[23] Although Madison succumbed to political pressures by proclaiming days of Thanksgiving,[24] he wrote after his retirement the unconstitutional nature of doing so: "[r]eligious proclamations by the Executive

[22] Letter from Thomas Jefferson to Benjamin Rush (Apr. 21, 1803), in 8 The Writings of Thomas Jefferson, 1801-1806, at 129 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897).
[23] Letter from Thomas Jefferson to Rev. Samuel Miller (January 23, 1808), in 11 The Works of Thomas Jefferson 7-9 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1905).
[24] Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?,* 38 CAP. U. L. REV. 409, 453 (2009).

recommending thanksgivings & fasts . . . imply a religious agency, making no part of the trust delegated to political rulers."[25]

Disputed from the founding of the republic, such proclamations are not supported by an "unbroken history" either. George Washington made them only twice in his eight years of presidency.[26] His successor concluded that the people "dread" this sort of government-sponsored religious activity.[27] The third president, Thomas Jefferson, refused to issue any proclamations, and the fourth, Madison, determined that such proclamations are unconstitutional, *supra.* After that, the practice "ended for almost half a century, until revived by the sixteenth president during the Civil War."[28]

Accordingly, the Prayer Proclamations cannot escape the proscriptions of the Establishment Clause by resorting to *Marsh.*

II. THE PRAYER PROCLAMATIONS VIOLATE THE PREFERENCE CLAUSE PURSUANT TO *LEMON.*

That the legislative prayers upheld in *Marsh* would be unconstitutional under *Lemon* is incontrovertible. *Snyder*, 159 F.3d at 1232 ("the kind of legislative

[25] Madison, "Detached Memoranda," at 560, *supra*.
[26] Newdow, at 453, *supra* (citation omitted).
[27] Letter from John Adams to Benjamin Rush (June 12, 1812), in Old Family Letters, ser. A, 391, 392-93 (Alexander Biddle ed., Philadelphia, J. B. Lippincott Co. 1892).
[28] Newdow, at 454, *supra.*

prayers at issue in *Marsh* simply would not have survived the traditional Establishment Clause tests that the Court had relied on prior to *Marsh* and . . . since *Marsh*"); *Marsh,* 463 U.S. at 800-01 (Brennan, J., dissenting, with Marshall J., joining) ("if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."). As correctly pointed out by Justice Brennan, "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause." *Id.* at 796. The majority did not appear to dispute this contention. *See Simpson*, 404 F.3d at 281. Even prior to *Lemon*, it was settled law that the Establishment Clause prohibits the government from prescribing any "particular form of prayer." *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

A. The Prayer Proclamations fail the purpose prong.

The Prayer Proclamations clearly fail the first prong of *Lemon* as they "serve an exclusively religious purpose." *FFRF*, 2012 COA 81 at P135. State action fails the first prong where, as here, it has "a purpose to urge citizens to act in prescribed ways as a personal response to divine authority." *McCreary*, 545 U.S. at 877 n.24. The Court may infer a religious purpose in cases such as this where "the government action itself besp[eaks] the purpose" because it is "patently religious."

Id. at 862-63. Indeed, the courts have consistently ruled that governmental encouragement of prayer fails the purpose prong simply because of its inherently religious nature. *See Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (because "prayer is a primary religious activity in itself, its observance" has "a[n] obviously religious purpose").[29] Since the Prayer Proclamations are inherently religious, they fail on this ground alone.

The Defendant nonetheless insists that "there is an obvious secular purpose of acknowledging an independently organized and privately hosted event." (D. 38). However, the "event" is inherently religious and the Governor's support for it is public. As the lower court properly found, "the purpose of gubernatorial proclamations is to express the Governor's support for their content," which is a religious purpose, given their religious content. *FFRF*, 2012 COA at P90.

[29] *See also Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985) ("that prayer is the quintessential religious practice implies that no secular purpose" exists); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (same); *Constangy*, 947 F.2d at 1150 ("an act so intrinsically religious as prayer cannot meet . . . the secular purpose prong"); *Jager*, 862 F.2d at 831; *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980); *Graham*, 608 F. Supp. at 535 (prayer before graduation failed purpose prong "by the undeniable truth that prayer is inherently religious."). By way of analogy, religious displays have failed the purpose prong due solely to their patently religious nature. *See, e.g.*, *Gonzales*, 4 F.3d at 1421; *Rabun,* 698 F.2d at 1111; *Libin v. Greenwich*, 625 F. Supp. 393, 399 (D. Conn. 1985); *Mendelson*, 719 F. Supp. at 1069-70; *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380, 383 (S.D. Miss. 1987).

The Defendant further insists that its purpose is to acknowledge "the importance of the nation's religious heritage, and the constitutionally enshrined religious freedom of its citizens." (D. 40). Again, this is not a *secular* purpose, as it seeks to recognize a Judeo-Christian religious heritage by means of exhorting the public to pray. For instance, in *Ind. Civ. Liberties Union v. O'Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001), the court held that a Ten Commandments display failed the purpose prong, despite the government's assertion that "the monument is intended to honor our history by reminding society of its core values." The court reasoned: "'The code chosen, however, [is] a *religious code*'" and "[t]he Commandments are historical, secular 'core values' only to those who adhere to them. . . . [Thus,] the State's articulated purposes are not secular." *Id.* at 771-72 (emphasis added, citation omitted).[30]

The Defendant cites as proof of its "secular" purpose, a 2008 proclamation, which refers to Bible passages and prayer. (D. 39). Facially, this does not evidence a secular purpose, but even if it did, it is not sufficient for the State to merely articulate a secular goal. If it could "avoid the application of the first amendment in this manner," *Hall*, 630 F.2d at 1020-21, "any religious activity of whatever nature could be justified." *DeSpain v. DeKalb County Com. Sch. Dist.*, 384 F.2d 836, 839

[30] *Cf. Harris*, 927 F.2d at 1414-15 (cross on seal failed purpose prong reasoning, "the City may not honor its history by retaining the blatantly sectarian seal.").

(7th Cir. 1967) (religious poem recited in public school failed purpose prong even though it was intended to promote good manners and gratitude). See also *Karen B.*, 653 F.2d at 901 ("the state cannot employ a religious means to serve otherwise legitimate secular interests"); *Holloman*, 370 F.3d at 1286 ("a person attempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose").

In *Schempp*, for instance, the government argued that Bible reading in public schools served secular purposes including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U.S. at 222-23. Yet, without discrediting these ends, the Court held the practices furthered religious purposes, noting: "Even if its purpose is not strictly religious, it is sought to be accomplished through readings . . . from the Bible," i.e. through religious means. *Id.* The Fourth Circuit followed this rationale in *Hall*, ruling that a prayer displayed on a state map failed the purpose prong. 630 F.2d at 1020. The state contended that the prayer "promoted safety, which is a legitimate secular purpose." *Id.* While the court agreed that the "prayer may foster the state's legitimate concern for safety of

motorists," the state failed the purpose prong because it chose "a clearly religious means to promote its secular end." *Id.* at 1020-21.[31]

Finally, the Task Force's religious purpose is attributable to the State. *See Gonzales*, 4 F.3d at 1414. In *Gonzales*, a Catholic organization (the Knights of Columbus) erected a memorial crucifix on town property. A spokesperson stated before the dedication that "the purpose of erecting the crucifixes was to remind motorists of the importance of religion in everyday life." *Id.* The town however, claimed that the "crucifix was intended to act as a war memorial, not a religious icon." *Id.* at 1419. Concluding that the town lacked a secular purpose, the court imputed the Knights' purpose onto it, finding it sufficient that "the *Knights' goal* was to spread the Christian message." *Id.* at 1421 (emphasis added).[32] In this case, the Prayer Proclamations were issued in response to requests from the Task Force whose mission is to mobilize the "Christian community" through such proclamations. *FFRF*, 2012 COA at P14. The Court should therefore infer that this was the State's purpose as well.

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[31] *See also Holloman*, 370 F.3d at 1286 ("[t]he point of [the teacher's] daily [prayer] 'ritual' was to show that praying is a compassionate act; such an endorsement of an intrinsically religious activity" fails the purpose prong).

[32] *See also Books v. City of Elkhart*, 235 F.3d 292, 296, 303 (7th Cir. 2000) (Ten Commandments donated to city by fraternal organization failed purpose prong; "The participation of these influential members of several religious congregations makes it clear that the purpose for displaying the monument was . . . to urge the people of Elkhart to embrace the specific religious code").

B. The Prayer Proclamations fail the effect prong.

The lower court correctly ruled that the Prayer Proclamations unconstitutionally promote religion, *FFRF*, 2012 COA at P117-P119, and AHA sees no reason to elaborate on that court's extensive analysis. Suffice it to say that the "proclamations send the message that those who pray are favored members of Colorado's political community, and that those who do not pray," such as humanists, "do not enjoy that favored status." *Id.*

III. THERE IS NO "DE MINIMIS" EXCEPTION TO TAXPAYER STANDING.

A. Colorado's standing requirements are easily met.

Colorado imposes vastly different and significantly more permissive standing requirements than those imposed by Article III of the U.S. Constitution. In "contrast to federal courts," which are of limited jurisdiction, Colorado courts "are courts of general jurisdiction." *Lobato v. People*, 218 P.3d 358, 370 (Colo. 2009). Hence, "Colorado courts have broader jurisdiction than their federal counterparts[,]" *id.*, and standing in "Colorado has traditionally been relatively easy to satisfy." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Indeed, in Colorado and in several other states, courts may even "render advisory opinions." *Lobato*, 218 P.3d at 370.

Although federal courts prohibit taxpayer standing (except in Establishment Clause cases), the vast majority of "state courts routinely allow individual taxpayers to challenge official acts with trivial fiscal impacts." Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Difference!,* 46 WM. & MARY L. REV. 1273, 1275 (2005). *See* Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835, 858 (2012) ("taxpayer standing is [] relatively common"); Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1277 (2012) (observing that thirty-six states "clearly permit state taxpayer lawsuits," while only eight "prohibit state taxpayer actions," and in the remaining six states "it is unclear.").[33]

Of the thirty-six states that expressly allow taxpayer standing, some require the taxpayer to challenge "an expenditure made from a fund into which he or she actually paid." *Id.* at 1279 n.108. In contrast, Colorado, among other states, "permit state taxpayer actions challenging nonfiscal government conduct." *Id*. *See Carsten*

[33] Of the eight states that depart from the majority rule, only three "reject such lawsuits outright." Urquhart, *supra* at 1277-78. The remaining five "permit 'public importance' or 'public interest' lawsuits" which are effectively the same as "taxpayer actions." *Id.* Additionally, three of the states that fall into the "unclear" category still "permit local taxpayer lawsuits." *Id.* at 1279.

v. Psychology Examining Com., 27 Cal. 3d 793, 798 (Cal. 1980) ("unlike federal courts, most states permit such citizen-taxpayer suits even on nonfiscal issues."). *See, e.g*., *Barber v. Ritter*, 196 P.3d 238, 246-47 (Colo. 2008); *Jackson v. Metropolitan Denver Sewage Disposal Dist. No. 1*, 687 P.2d 494, 496 (Colo. Ct. App. 1984) ("courts have found sufficient standing, minus direct economic injury, when taxpayers allege an unconstitutional expenditure of public funds.") (citing *Conrad I,* 656 P.2d 662; *Dodge v. Department of Social Services*, 198 Colo. 379 (Colo. 1979)). *See also Smith v. W. Va. State Bd. of Educ.,* 295 S.E.2d 680, 683 (W. Va. 1982) ("where the right sought to be enforced is a public one . . . the proceeding can be brought by any citizen, taxpayer, or voter."); *Greater Harbor 2000 v. City of Seattle*, 937 P.2d 1082, 1090-91 (Wash. 1997) (noting the same); *State ex rel. Boyles v. Whatcom County Super. Ct.,* 694 P.2d 27, 28-29 (Wash. 1985) (taxpayer had standing to challenge governmental action assigning prisoners to religious program even though no public money was expended directly).

The Defendant suggests that without a "de minimis" exception, "any taxpayer who disagrees with any government action" could "seek redress in the courts." (D. 14). This is not true. Standing is only established if "the plaintiff has suffered injury in fact to a legally protected interest as contemplated by *statutory* or *constitutional* provisions." *Wimberly v. Ettenberg*, 194 Colo. 163, 168 (1977)

(emphasis added). Moreover, as shown above, numerous states including Colorado have long permitted taxpayers to challenge even *nonfiscal* action without issue. These courts recognize "the value of taxpayer suits generally outweighs any infringement on governmental processes." *Boyles*, 694 P.2d at 30. *See also* Susan L. Parsons, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints,* 59 TEMP. L.Q. 951, 973 (1986) ("some states permit [taxpayer] suits even where there is no pecuniary effect on the taxpayer. This trend reflects the fact that the evils associated with expanding taxpayers' suits have either not occurred or are outweighed by stronger policy considerations. The anticipated flood of litigation from taxpayers' suits has not occurred.") (footnotes omitted).

B. There is no "de minimis" exception to Establishment Clause taxpayer standing.

Even though a federal litigant generally cannot base standing on taxpayer status alone, the Supreme Court has carved out a unique exception for Establishment Clauses cases, premised on the notion that Establishment Clause infringements, no matter how small, harm society as a whole. *Flast v. Cohen,* 392 U.S. 83, 102-04 (1968).[34] As Madison argued in his famous Memorial and

[34] *See also* David J. Freedman, *Wielding the Ax of Neutrality: The Constitutional Status of Charitable Choice in the Wake of Mitchell v. Helms,* 35 U. RICH. L. REV. 313, 339 (2001) (The Establishment Clause "protects our society at large from the divisive and exclusionary 'antagonism of controversy over public support for

Remonstrance, disestablishment brings "moderation and harmony," while establishment of religion results in "torrents of blood."[35] In carving out the exception, the *Flast* Court recognized this harm, observing:

> The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.

Id. at 103-04 (footnotes omitted). *See also Lee*, 505 U.S. at 589-90; *Engel*, 370 U.S. at 431 ("[A] union of government and religion tends to destroy government and to degrade religion."). Of course, the Establishment Clause also protects the religious minority: "Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Id*. at 432.

Madison further dismissed the notion of a de minimis exception, stating forcefully that "the same authority which can force a citizen to contribute *three pence only* of his property for the support of any one establishment, may force him

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religious causes.'") (citation omitted); Caroline Mala Corbin, *Nonbelievers and Government Speech,* 97 IOWA L. REV. 347, 349 (2012) ("the Establishment Clause protects the stability of the civil society.")

[35] James Madison, Memorial and Remonstrance (1785) (stating that the bill establishing a provision for teachers of the Christian religion "will destroy that moderation and harmony.").

to conform to any other establishment in all cases whatsoever."[36] The Supreme Court adopted Madison's view, asserting in *Schempp*: "it is no defense to urge that the religious practices here may be relatively minor encroachments on the [Establishment Clause]. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." 374 U.S. at 225. This principle was at the forefront of *Everson*, where the Court recognized state taxpayer standing and declared, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16. The Court solidified this principle in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203 (1948), holding that taxpayers had standing to challenge a school's release-time program. The concurrence disagreed, contending, "any cost of this plan to the taxpayers is incalculable and negligible." *Id.* at 234 (Jackson, J., concurring). The majority did not dispute this but reiterated that "[n]o tax in any amount, large or small, can be levied to support any religious activities." *Id.* at 210.

Although the Court later held that state taxpayers must show a tangible "dollars and cents" injury for standing, *Doremus v. Bd. of Educ*., 342 U.S. 429, 434-35 (1952), it has never held that the amount must be sizable. In fact, since

[36] 2 Writings of James Madison 183, 186 (Hunt ed., 1901)(emphasis added).

Doremus, the Court has reaffirmed Madison's concerns. In *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347-49 (2006), the Court denied state taxpayers standing, reasoning, "[w]hatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to 'contribute three pence . . . for the support of any one [religious] establishment.'" (citing *Flast,* 392 U.S. at 103).

As these cases recognize, taxpayer standing is appropriate for Establishment Clause cases because *everyone* is harmed by state-sponsored religion and there is no need for a "de minimis" exception. Of course, the same must be true regarding the Preference Clause. In Colorado and other states, a taxpayer need not even challenge fiscal conduct. To create an exception to the general rule in a case involving the Preference Clause, which like the Establishment Clause, is designed to protect society as a whole, would be directly contrary to the public interest. Cf. *Flast*, 392 U.S. at 109 (Douglas, J., concurring) ("Taxpayers can be vigilant private attorneys general."). Indeed, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 686-688 (1973).

C. *Hein* is inapposite.

Despite the compelling justifications for a broad Establishment Clause exception to the general rule against federal taxpayer standing, *supra*, a recent plurality declined to apply *Flast* to executive branch expenditures. *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 593 (2007) (plurality). The Court distinguished *Flast* solely on the ground that the expenditures in *Hein* came "out of general Executive Branch appropriations" instead of from Congress. *Id.* Notably, both conservative and liberal justices disagreed with the plurality's distinction, with even the most conservative calling it an unprincipled distinction. *See id*. at 629 (Scalia & Thomas, JJ., concurring in the judgment) ("As the dissent correctly contends, . . . *Flast* is indistinguishable from this case for purposes of Article III"), *id.* at 633 (referring to the distinction as "meaningless and disingenuous"), *id.* at 637 (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting) ("I see no basis for this distinction in either logic or precedent."). *See also* Steven G. Gey, *The Procedural Annihilation of Structural Right*s, 61 HASTINGS L.J. 1, 29 (2009) ("*Hein* defies the logic of the *Flast* holding. As six of the nine Justices voting in *Hein* pointed out . . . the holding of *Hein* is essentially irrational.").

Unsurprisingly, numerous judges and scholars have criticized *Hein* as an arbitrary and unprincipled and harmful ruling.[37]

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[37] *See* Lauren S. Michaels, *Hein v. Freedom from Religion Foundation: Sitting This One Out - Denying Taxpayer Standing to Challenge Faith-Based Funding*, 43 HAR. CIV. RIGHTS-CIV. LIBS. L. REV. 213, 236-27 (2008) ("the plurality's argument [in *Hein*] that Congress can quickly step in if the Executive acts with egregious disregard for the Establishment Clause is absurd"); Judge Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows,* 44 U. CAL. DAVIS L. REV. 391, 400 n.36 (2010) (the Court's distinction of *Hein* from *Flast* was "far from persuasive"); Ira C. Lupu, Robert W. Tuttle, *Ball on A Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication,* 2008 B.Y.U. L. REV. 115, 167-68 (2008) ("*Hein* is an early step down a perilous path."); Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1083 (2009) (calling *Hein* "unprincipled and unsustainable"); Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 431 (2007) (calling *Hein* "fatuous"); Suzanna Sherry*, The Four Pillars of Constitutional Doctrine,* 32 CARDOZO L. REV. 969, 984 (2011) ("the decision in *Hein* represents a failure of human understanding."); Joy A. Trueworthy, *Hein v. Freedom from Religion Foundation, Inc.: The Remnants of Taxpayer Standing in the Era of the White House Office of Faith-Based and Community Initiatives*, 60 RUTGERS L. REV. 1073, 1074 (2008) ("The trouble with the Court's decision in *Hein* is not simply that the distinction between allowing taxpayer standing to sue one branch of the federal government but not another for the same injury is illogical."); Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After Massachusetts and Hein,* 20 REGENT U. L. REV. 175, 187 (2008) (calling *Hein* "irrational"); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona),* 99 GEO. L.J. 1, 11 (2010) (*Hein* drew "unpersuasive distinctions" and "[a] court that does not explain its distinctions from prior precedent has failed in its most basic of obligations."); William E. Thro, *AN ESSAY: THE ROBERTS COURT AT DAWN: CLARITY, HUMILITY, AND THE FUTURE OF EDUCATION LAW*, 2007 WL 3170288 (2007) (*Hein* is "fundamentally inconsistent" with *Flast*); *Note: Standing in the Mud: Hein v. Freedom from Religion Foundation, Inc.*, 42 AKRON L. REV. 1277, 1311 (2009); Eric J. Segall*, The Taxing Law of Taxpayer Standing,* 43 TULSA L. REV. 673 (2008) ("the *Hein* decision seems to make no sense.").

The Defendant urges this Court to adopt *Hein,* asserting that "[l]ike the Establishment Clause, the Preference Clause, by its plain language, applies only to actions taken by the legislature." (D. 16). However, *Hein* did not hold that the Establishment Clause only applies to Congress. Rather, it held that executive *spending* could not be challenged based on taxpayer status alone. There is no question that the Establishment Clause applies to all branches of government, despite its reference to "Congress." *Cohen v. City of Des Plaines*, 8 F.3d 484, 490 (7th Cir. 1993) ("every branch of government [is restrained] under the Establishment Clause."). The Supreme Court has adjudicated many Establishment Clause cases against state and local entities.[38] Federal courts have similarly applied the Establishment Clause to the judicial branch[39] and executive agencies and departments,[40] including the military,[41] state and federal prisons,[42] and police

[38] *See Santa Fe,* 530 U.S. at 308; *Lee*, 505 U.S. 577; *Wallace*, 472 U.S. at 49-50.
[39] *See Ashbrook*, 375 F.3d at 490 (judge's Ten Commandments display violated Establishment Clause); *Glassroth*, 335 F.3d at 1298; *Constangy*, 947 F.2d 1145 (judge's prayers violated Establishment Clause).
[40] *See Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991) (Establishment Clause applied to the extraterritorial actions of the Department of State in awarding grants to foreign religious schools).
[41] *Gillette v. United States*, 401 U.S. 437 (1971) (army); *Chaplaincy of Full Gospel Churches v. United States Navy,* 697 F.3d 1171 (D.C. Cir. 2012) (navy); *Anderson v. Laird,* 466 F.2d 283 (D.C. Cir. 1972) (federal military academies violated Establishment Clause); *Katcoff v. Alexander*, 599 F. Supp. 987 (E.D.N.Y. 1980) (taxpayers had standing to contest the constitutionality of the Army's chaplaincy

departments.[43] In *Allegheny*, the Court even indicated that gubernatorial prayer proclamations would violate the Establishment Clause. 492 U.S. at 605, n.53. Thus, the Defendant's argument is without merit.

Regardless, *Hein* is only relevant to federal jurisprudence as it limits an *exception* to the general rule against taxpayer standing. In Colorado, the general rule is to *allow* taxpayer standing. As such, there is simply no place for *Hein*.

CONCLUSION

In view of the above, AHA respectfully asks this Court to *affirm* the lower court ruling in favor of the Plaintiffs.

Respectfully submitted,

November 7, 2013

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program); *Jewish War Veterans*, 695 F. Supp. 3 (marine corps violated Establishment Clause by displaing cross on naval base).

[42] *See Hartmann v. Cal. Dep't of Corr. & Rehab*., 707 F.3d 1114 (9th Cir. 2013); *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007); *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005); *Warner*, 115 F.3d at 1074-75.

[43] *See Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523 (7th Cir. 2009) (sheriff violated Establishment Clause); *Venters v. City of Delphi,* 123 F.3d 956, 970 (7th Cir. 1997) (police department).

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certify that on November 7, 2013, a true and correct copy of the foregoing Motion for Leave to File Amicus Curiae and conditionally filed Amicus Curiae Brief was filed via the ICCES e-file system.

November 7, 2013

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