SUPREME COURT OF THE STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 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 ▲**
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ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

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

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

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I. INTRODUCTION.

The Petitioner, Governor John Hickenlooper ("Governor"), relies on an implausible fiction, while urging a repudiation of long-established Colorado precedent, in an effort to render the Preference Clause of the Colorado Constitution effectively unenforceable and without any substantive meaning. The Governor argues, contrary to reality, that annual proclamations of a Colorado Day of Prayer do not give government support to religion. The Governor also requests this Court to adopt a new rule of standing that would effectively preclude anyone from objecting to government dedications of an official Day of Prayer. In the end, however, legal and empirical reality compel a different result.

The Governor argues unpersuasively that annual proclamations of a Colorado Day of Prayer do not give the appearance of governmental endorsement of religion. The Governor claims to issue such proclamations pretty much upon request -- so the proclamations allegedly should not be construed as government speech endorsing religion. The Governor's public support of a private religious mission, however, does constitute prohibited government endorsement of religion; endorsement is the very purpose and effect of such official proclamations by the Governor. The issuance of such official proclamations is an unabashed act of government endorsement, in part, precisely because of the intent to curve favor.

The Governor concedes that Day of Prayer proclamations do constitute government speech, but he ignores or misapprehends the meaning and context of that speech. The Governor's own submissions, however, establish that Day of Prayer proclamations are issued after annual requests by the National Day of Prayer Task Force, an evangelical organization that uses such government proclamations to give prestige and credibility to its proselytizing activities. This "celebrity" endorsement of religion is exactly what the Colorado Constitution prohibits of elected officials. Religious zealots must place their faith in their own message, rather than trying to piggyback on the prestige and credibility of government endorsements.

The Governor ascribes a meaning to Day of Prayer proclamations that is belied by his own evidence. The Governor claims, for example, that proclamations are merely acknowledgements of the historical significance of religion - - perhaps just a "bulletin board" notice of "an independently organized and privately hosted event." No evidence actually supports these claimed rationales for the Governor's actions. The proclamations, instead, are issued upon request by the NDP Task Force, in order to facilitate religious organizing, but the proclamations do not disclose that the government dedicated Day of Prayer is a private affair. The Governor, for his part, implies that he would not otherwise even issue Day of Prayer

proclamations if not requested, further refuting the supposed history and ubiquity of Colorado Day of Prayer Proclamations.

Ceremonial deism helps the Governor no more than ubiquity. Ceremonial deism may be invoked as justification when no religious connotation attaches to an otherwise religious symbol, which is not the case with Day of Prayer proclamations. Massive displays of religious fervor are planned, organized, and celebrated as a result of Day of Prayer proclamations.

Day of Prayer proclamations are sought precisely because they give the apparent and real impression of religious endorsement. They are issued as official government documents bearing the Executive Seal of the State of Colorado and they have had the effect intended by the NDP Task Force: Day of Prayer Proclamations have helped the NDP Task Force market a major religious event in Colorado and elsewhere through the prestige and credibility of government officials. The government cannot constitutionally play this facilitating role, however, and hence the Supreme Court should enjoin future Day of Prayer Proclamations by the Governor.

II. STATEMENT OF THE CASE AND ADDITIONAL FACTS.

A. Court of Appeals Decision.

The Court of Appeals concluded that the Governor's annual proclamations of a Day of Prayer violate the Preference Clause of the Colorado Constitution. The Court initially explained that the concept of "religious liberty" is actually abridged when the government affirmatively sponsors religious practices such as prayer. (2012 COA 81, ¶ 5.) The Constitution, therefore, withdraws certain subjects "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." (2012 COA 81, ¶ 8.)

The Court of Appeals recognized that Day of Prayer proclamations are requested so that the Governor might "lend his support" to Day of Prayer celebrations. (2012 COA 81, ¶ 26.) In fact, the Court noted that former Governor Ritter actually spoke at the 2007 Day of Prayer celebration on the steps of the Colorado capital building, stating that "we should be prayerful in all things." (2012 COA 81, ¶ 27.)

The Court of Appeals analytically first addressed the question of standing. The Court acknowledged that taxpayer-citizens in Colorado benefit from a definition of standing that is broader than the federal test for standing. (2012 COA 81, ¶ 44.) The Court also recognized that under the Colorado test for standing, an injury-in-fact

can be satisfied by a complaint that the government is not conforming to the State Constitution. (2012 COA 81, ¶ 48.) The Court further recognized that a sufficient injury can be either tangible or intangible. (2012 COA 81 ¶45.)

The Court of Appeals concluded that the Plaintiffs satisfied applicable standing requirements with both types of injury, including the use of tax-payer revenue by the Governor's office in the process of approving and issuing Day of Prayer proclamations. The Court held that such expenditures did not have to involve a legislative earmark or line item expense in order to support standing. (2012 COA 81, ¶ 50.) The nexus between taxpayer and expenditure can be slight and does not require a discrete increase in a citizen's taxes for purposes of standing. (2012 COA 81, ¶50.)

The Court of Appeals additionally recognized that the Plaintiffs, non-believers and resident-taxpayers of Colorado, had direct exposure to the proclamations, thereby causing an injury-in-fact to their intangible interests. The Court also noted that Plaintiffs' claim under the Preference Clause "is based on a legally protected interest because it arises under the Colorado Constitution." (2012 COA 81, ¶ 54.)

The Court of Appeals concluded on the merits that Day of Prayer proclamations do violate the Preference Clause of the Colorado Constitution, including by providing active government endorsement of religion. The Court noted

that the term "endorsement" is closely related to the term "promotion." (2012 COA 81, ¶ 76.) In the circumstances of this case, moreover, the Court found that the purpose of Day of Prayer proclamations is avowedly religious. (2012 COA 81, ¶ 89.) Unlike holidays such as Thanksgiving and Christmas, which the government recognizes for their secular aspect, Day of Prayer proclamations have no other purpose than to promote religion. (2012 COA 81, ¶ 88.)

The Court of Appeals specifically recognized that the Governor's formal issuance of Day of Prayer proclamations gives the impression of government sponsorship of prayer. (2012 COA 81, ¶ 93.) The Court further noted that "prayer" is a distinctly religious exercise. (2012 COA 81, ¶ 95.) Finally, the Court noted that the proclamations at issue contain recognizable biblical verses and have a sole focus on prayer as a religious practice. (2012 COA 81, ¶ 97.)

The Court of Appeals distinguished Day of Prayer proclamations from ceremonial deism used to solemnize legislative meetings. The Court noted that acceptable ceremonial deism may include religious symbols or references, but only in a context not perceived as having religious significance. (2012 COA 81, ¶ 98.) That is not the case with Day of Prayer announcements.

The Court of Appeals also noted that Day of Prayer proclamations are different than holiday displays such as those put up for Christmas in which religious

symbols may be included in a larger context that includes surrounding secular symbols. (2012 COA 81, ¶ 102-107.) In the case of the Governor's declaration of an annual Day of Prayer, significance and impression of the proclamation are not part of a larger context. (2012 COA 81, ¶ 102) Instead, the proclamations are stand alone exhortations for citizens to recognize and engage in prayer. As a result, the Court concluded that the ostensible and predominant purpose of Day of Prayer proclamations is to advance religion. (2012 COA 81, ¶113.)

Finally, the Court of Appeals concluded that proclaiming a day on which citizens should engage in prayer is not analogous to invocations before legislative meetings. Day of Prayer proclamations, instead, encourage Colorado citizens to engage in prayer, which exhortations are distinguishable from legislative prayer. (2012 COA 81, ¶124.)

The Court of Appeals described numerous material differences between Day of Prayer proclamations and legislative invocations. In the first place, Colorado has no history dating back to the State's founding of declaring an annual Day of Prayer for that singular purpose. (2012 COA 81, ¶ 131.) The Court also recognized that Day of Prayer proclamations have a different effect than legislative prayer because they are not designed to "solemnize" an occasion that is otherwise secular in purpose. (2012 COA 81, ¶ 134.) Day of Prayer proclamations do not solemnize

anything and are issued to promote prayer for its own sake. (2012 COA 81, ¶ 134.) Day of Prayer proclamations also have a greater intended scope and audience than legislative prayer, which is ostensibly directed only at legislators rather than the public at large. (2012 COA 81, ¶ 134.)

In the final analysis, the Court of Appeals concluded that the Governor's annual day of prayer proclamations represent the active involvement of the government in promoting religious activity, which is one of the core problems that the Constitution was designed to prevent. (2012 COA 81, ¶ 140.) Day of Prayer proclamations are intended for the obvious purpose of promoting the religious exercise of prayer - - and for that end alone. In this respect, Day of Prayer proclamations do not constitute ceremonial deism, nor do they perform a solemnizing function that does not have recognized religious significance. The Court, accordingly, held that the Governor's annual day of prayer proclamations violate the Preference Clause of the Colorado Constitution.

B. Statement of Additional Facts.

1. Colorado Day of Prayer Proclamations are of Recent Vintage.

The Governor began issuing annual "Colorado Day of Prayer" Proclamations in 2004, in response to the request of the National Day of Prayer Task Force, led by

Shirley Dobson. (R. 484, 486, 488, 490, 492 & 496.) The proclamations have each acknowledged the NDP Task Force annual Christian theme and/or scriptural reference. (Id.)

Each Colorado Day of Prayer Proclamation bears the Executive Seal of the State of Colorado and the signature of the Governor. The Colorado Day of Prayer Proclamations are issued with the consent and authorization of the Office of the Governor. (R. 397, lines 6-17; 398, lines 2-5.)

2. Day of Prayer Proclamations Serve a Religious Purpose.

Colorado Day of Prayer Proclamations are issued by the Governor with no restrictions on their use. (R. 400, lines 8-11.) The National Day of Prayer Task Force, in particular, is not prohibited from using the official Colorado Day of Prayer Proclamations to support their organizing of prayer activities, including by indicating the Governor's endorsement and support. (R. 474, lines 12-18.) The NDP Task Force uses the proclamations of government officials to promote National Day of Prayer activities, including by utilizing the proclamations as evidence of government support. (R. 415, lines 7-14; R. 496-500.)

The Governor knows that groups request proclamations in order to add support for their event from the Governor's Office. (R. 398, lines 15-22.) The

Governor's Office also assumes that proclamations are used, at least by some requesters, to promote their activities. (R. 400, lines 12-17.)

The NDP Task Force, in fact, effectively uses proclamations as evidence of the Government's support for their activities. (R. 415, lines 7-14.) The Governor is not surprised that people who request proclamations, such as the NDP Task Force, use them to promote the Day of Prayer. (R. 416, lines 18-21.)

3. Proclamations Are Deliberately Crafted to Conceal Requester.

Proclamations are intentionally drafted by the Governor's Office to look like they reflect the government's general support for the requester's activities, without identifying the requesting party. (R. 423, line 18 to R. 424, line 14.)

In the case of Colorado Day of Prayer Proclamations, the NDP Task Force is not disclosed in the proclamations and the specified day is proclaimed categorically as the official Colorado Day of Prayer, without limitation or reference to a specific organization. (R. 436, line 24 to R. 437, line 25.)

By concealing the NDP Task Force, Day of Prayer proclamations are intended to be applicable to as many people as possible without reference to a single group or a single individual. (R. 437, lines 7-25 and R. 450, lines 6-16.)

4. Colorado Day of Prayer Proclamations Incorporate Distinctly Christian Elements.

Each of the Colorado Day of Prayer Proclamations includes a Biblical reference, as requested by the NPD Task Force. (R. 435, lines 18-22.)

The Governor understands that the scriptural references incorporated into the Day of Prayer Proclamations are requested by the NDP Task Force. (R. 442, lines 20-23.) The Governor also knows that the NDP Task Force chooses an annual theme for each year's National Day of Prayer. (R. 447, line 17 to R. 448, line 8, and R. 453, lines 20-24.) The Governor also understands that Mrs. Dobson, on behalf of the NDP Task Force, wants proclamations issued by high government officials. (R. 453, lines 15-19.)

The Governor also knows that the NDP Task Force uses the proclamations issued by the Governor to lend support to the Day of Prayer. (R. 453, lines 4-5.) The Governor also understands that the NDP Task Force wants the annual theme and supporting scriptural reference selected by the NDP Task Force to be included as part of the official proclamations. (R. 454, lines 2-14.)

The Colorado Day of Prayer Proclamations, although requested by the NDP Task Force, are issued pursuant to the authority of the Office of the Governor. (R. 465, lines 17-20.) The Governor recognizes that the Colorado Day of Prayer Proclamations mean a great deal to the requesting group, in this case the NDP Task Force. (R. 473, lines 21-23.)

5. The Use of Day of Prayer Proclamations to Promote Religion is No Secret, and They are Perceived to Support Religion.

The purpose of Day of Prayer proclamations is to encourage prayer, which has been candidly recognized by Colorado Day of Prayer organizers; in their application for use of the Capitol grounds in 2006, for example, they describe the Day of Prayer as an annual holiday "which encourages Americans to pray for our nation, its people, and its leaders." (R. 506.) The annual activities at the Colorado Capitol routinely include a program of worship and prayer "by church and community leaders, legislators, color guard, home-schoolers with worship band." (R. 511.)

To the Plaintiffs, the annual declarations of a Colorado Day of Prayer give the appearance of endorsing religion, while encouraging all persons to believe in God, and they thereby give the appearance that belief is preferable and that believers have special access to governmental leaders, including the Governor. (R. 964, 984 & 1004.) The Governor's encouragement of participation in Day of Prayer events makes the Plaintiffs outsiders. (R. 972, 996 & 1116.) The Plaintiffs consider encouragement by government officials to believe in God as being inappropriate, and non-believers should not be put in the position of having to resist overtures to pray. (R. 964, 984 & 1004.)

6. The NDP Task Force is Exclusively Christian in Perspective.

The NDP Task Force was created for the express purpose of organizing and promoting prayer observances conforming to a Judeo-Christian system of values. (R. 1249.) The Judeo-Christian expression of the National Day of Prayer involves praying to the God of the Bible. (R. 1146, p. 67, lines 10-14.)

The NDP Task Force expression of the National Day of Prayer is based on the Bible, which claims that God is the one and only, and his son, Jesus Christ, is the way to salvation, which is the belief of the Christian church. (R. 1146, p. 69, lines 6-10.) Mrs. Dobson understands the National Day of Prayer to involve proclaiming reliance on an Almighty God in calling Americans to come before Him on behalf of the Nation. (R. 1156, p. 106, lines 8-20.)

7. Endorsement by Government Officials, Including State Governors, is Critical to the NDP Task Force Efforts.

Support by government officials is critical to the NDP Task Force's missionary objective. (R. 1156, pp. 108-109.) People look to their leaders for direction, so it is deemed essential that the leaders support the National Day of Prayer because they are public role models. (R. 1156, p. 109, lines 4-8.)

The NDP Task Force, therefore, writes to each state governor every year requesting a prayer proclamation, while referencing the NDP Task Force annual theme and supporting scriptural reference. (R. 1134, 1135, 1142, 1144, 1157 &

1159.) The NDP Task Force requests state governors to designate the same day as the day set aside by the President for the National Day of Prayer. (R. 1136, p. 28, lines 11-21.)

The NDP Task Force considers it important that governors incorporate the NDP Task Force's annual theme and scriptural reference into their official proclamations. As a result, annual Day of Prayer proclamations by the Governor here in Colorado have regularly included the NDP Task Force Biblical theme and/or scriptural reference.

8. The NDP Task Force Promotes Active Christian Prayer.

The NDP Task Force promotes the Day of Prayer as a means to encourage prayer, which involves establishing a relationship with God. (R. 1254, 1256 & 1259.) The NDP Task Force represents a Judeo-Christian expression of the national observance, based on belief that this country was birthed in prayer and in reverence for the God of the Bible. (R. 1249.) The NDP Task Force promotes only a Judeo-Christian expression of the National Day of Prayer. (R. 1132, 1133 & 1146.)

The Bible is the handbook of the NDP Task Force. (R. 1145, p. 64, lines 18-22.) Prayer from the perspective from the NDP Task Force is related to the relationship with the God of the Bible. (R. 1145, p. 64, lines 4-16.)

The supporting scripture for each Day of Prayer theme is exclusively chosen from the Bible, a source that is readily recognizable. (R. 1143, p. 57, lines 7-12.) The NDP Task Force hopes that its annual theme and supporting scripture will draw Americans closer to God. (R.1226.)

9. The NDP Task Force is Particularly Exclusionary.

The NDP Task Force subscribes to the Lausanne Covenant, which was adopted by fundamentalists and other Evangelical Protestants from over 150 nations during the International Congress on World Evangelization at Lausanne, Switzerland in 1974. (R. 1092.) The Lausanne Covenant includes such beliefs as the inspiration and inerrancy of the Bible, the Trinity, the Second Coming of Jesus Christ, the Anti-Christ, etc. (R. 1092 & 1311-12.)

The adherence of the NDP Task Force to the Lausanne Covenant has the effect of excluding even traditional Jewish groups, or any other non-Christian organization or inter-faith groups. (R. 1092 & 1312.) The NDP Task Force is an exclusively evangelical Christian organization recognizing only those NDP events which are organized by evangelical groups. (R. 1092.)

10. The National Day of Prayer is Highly Divisive and Controversial.

The National Day of Prayer is highly divisive, amid concerns that it promotes only the exclusionary beliefs of fundamentalist Christians, including the NDP Task

Force. (R. 1308-1342 & 854-948.) The participation of public officials in NDP observances, including at public government buildings in Washington D.C., and State Capitol buildings throughout the nation, fuels the perception that the Day of Prayer is intended to promote and encourage religion. (R. 1308-1342 & 854-948.)

11. Nonreligious Persons Constitute a Significant Part of the Nation Excluded by the National Day of Prayer.

The number of nonreligious persons is the fastest-growing segment of the United States population. (R. 1103.) Nonreligious persons represent a significant part of the American population, constituting approximately 15 percent or thirty-four million Americans, in a recent American Religious Identification Survey. (R. 1103.)

III. STATEMENT REGARDING STANDARD OF REVIEW.

The Government correctly states the standard of review and preservation of issues for review.

IV. SUMMARY OF THE ARGUMENT.

The Court of Appeals correctly identified and applied the requirements in Colorado for taxpayer-citizen standing in cases involving alleged violations of the Colorado Constitution. Standing exists to challenge alleged violations of the self-executing Preference Clause of the Colorado Constitution. Taxpayer-citizens who are non-believers in Colorado have a legally protected and enforceable interest in having a government that does not promote or endorse religion. Exposure to

proclamations of a statewide Day of Prayer is anticipated, foreseeable, and unavoidable by these Colorado taxpayer-citizens, causing constitutionally significant injuries. The Governor, for his part, urges the Court to now adopt a restrictive rule of standing that is contrary to the well-established precedent and practice of this State.

Official Proclamations of a Colorado Day of Prayer are not merely ceremonial acknowledgements of religion. Although the Governor claims to issue such official proclamations without much thought, the proclamations constitute official government speech endorsing a blatantly evangelical event. That is the undisputed reason why the NDP Task Force requests official Day of Prayer proclamations, in order to benefit from the credibility and prestige of "celebrity" endorsements by high elected officials. The Governor, moreover, does not just report upcoming events as a public service announcement; the Governor declares an official statewide Day of Prayer with an annual Biblical theme and reference. Unlike legislative invocations, the Governor is not solemnizing a civil event; the Governor is declaring, endorsing and promoting a patently religious event as an official state-endorsed function.

V. ARGUMENT .

A. The Court Of Appeals Correctly Applied The Supreme Court's Recognized Taxpayer-Citizen Standing Principles.

1. Non-Believers Have Standing Under the Supreme Court's Precedents to Challenge Government Violations of the Self-Executing Provisions of the Religious Preference Clause of the Colorado Constitution.

Taxpayer-citizens of Colorado have standing to raise constitutional issues of "great public concern." This is particularly true where constitutional violations might otherwise go unaddressed, as in this case. "If a taxpayer and citizen of the community be denied the right to bring such an action under the circumstances presented by this record, then wrong must go unchallenged, and the citizen and taxpayer reduced to mere spectator without redress." Howard v. City of Boulder, 290 P.2nd 237, 238 (Colo.1955). This Court has not imposed a separate "nexus" requirement in such constitutional cases, as acknowledged in Hotaling v. Hickenlooper, 275 P.3rd 723, 727 n.4 (Colo.App. 2011).

Colorado has a long tradition of conferring standing on a wide class of plaintiffs. Ainscough v. Owens, 98 P.3d 851,853(Colo. 2004). "In addition to traditional legal controversies, our [Colorado] trial courts frequently decide general complaints challenging the legality of government activities and other cases involving intangible harm" *Id*. The injury required for standing in Colorado may be

tangible, such as physical damage or economic harm; "however, it may also be intangible, such as aesthetic issues or the deprivation of civil liberties. Deprivations of many legally created rights, although themselves intangible, are nonetheless injuries-in-fact." *Id*. "The test [for standing] in Colorado has traditionally been relatively easy to satisfy." *Id*.

Examples abound of the broad taxpayer-citizen standing allowed in Colorado Courts. In Colorado State Civil Service Employees Association v. Love, 448 P.2nd 624,627 (Colo. 1968), for example, this Court held that taxpayer citizens may sue to protect a matter of "great public concern" regarding the constitutionality of government actions. The Love decision did not involve any taxpayer nexus, but the Court instead acknowledged the fundamental "precept of constitutional law that a self-executing constitutional provision *ipso facto* affords the means of protecting the right given and of enforcing the duty imposed." *Id*. The Court cited its previous decision in Howard v. Boulder, for support, in which the Court concluded that "we can see no greater interest the taxpayer can have than his interest in the form of government under which he is required to live, or in any proposed change thereof." *Id*. In such circumstances, "the rights involved extend beyond the self-interest of individual litigants and are of great public concern." Colorado State Civil Service Employees Association, 448 P.2nd at 627 (A self-executing constitutional provision

is enforceable without ancillary legislation, and consequently obligatory. Crawford v. Denver, 398 P.2nd 627, 632-33 (Colo. 1965).)

Colorado's rule of standing is not anomalous. Courts in many states allow broad citizen standing. "Although some states adhere solely to the strict federal system of standing, many state courts have developed, standing doctrines that allow citizens or taxpayers to sue on behalf of the public interest in cases that involve issues of great constitutional importance." Beyond Taxpayers' Suits: Public Interest Standing In the States, 41 Conn. L. Rev. 639, 643-44 (2008). *See* also Gregory v. Shurtleff, 299 P.3d 1098, 1105-06 (UT 2013) ("Our public-interest standing doctrine is not unusual in state jurisprudence.").

Colorado courts, moreover, have consistently adhered to the principle that a self-executing constitutional provision affords the means of protecting the right and of enforcing the duty imposed. Ainscough, 90 P.3d at 857. In taxpayer-citizen cases the Court has consistently recognized that a generalized injury-in-fact is sufficient." A citizen has standing to pursue his or her interests in insuring that governmental units conform to the State Constitution." *Id*, quoting Nicholl v. E-470 Public Highway Authority, 896 P.2nd 859, 866 (Colo. 1995). See also Dodge v. Department of Social Services of the State of Colorado, 600 P.2nd 70, 71-72 (1979).

The Governor misapprehends Colorado law when arguing that taxpayer-citizen standing requires an unconstitutional line item or earmarked expenditure. No known Colorado decision has imposed such a requirement as a condition of standing. A plaintiff is not required in Colorado to show a specific earmarked government expenditure. An injury-in-fact is sufficient to confer standing even where no economic harm is implicated because "a citizen has standing to pursue his or her interests in insuring that governmental units conform to the State Constitution." Boulder Valley School District RE-2 v. Colorado State Board of Education 217 P.3rd 918, 924 (Colo. App. 2009). "As our precedent makes clear, an interest in seeing that governmental entities function within the boundaries of the State Constitution is sufficient to confer standing; when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision, such an averment satisfies the two-step standing analysis described above." *Id*. The intangible interest in having a government that does not prefer or support religion over non-religion is sufficient to confer such standing. Cf. Conrad v. City and County of Denver, 656 P.2nd 662, 668 (Colo.1983).

Taxpayer-citizen standing exists, in short, when the plaintiff's injury flows from a governmental violation of a specific constitutional provision. This principle is not limited to tax and spend challenges. Here, the Preference Clause is such a

constitutional provision that creates a protectable legal interest in the Plaintiffs, as both the District Court and Court of Appeals held.

The applicable test for standing in Colorado, in the final analysis, involves "a single inquiry as to whether a plaintiff-taxpayer has averred a violation of a specific constitutional provision." See Dodge, 600 P.2nd at 73. As this Court recently reaffirmed in Barber v. Ritter, 196 P. 3rd 238, 247 (Colo. 2008), "Colorado case law requires us to hold that when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision, such an averment satisfies the two-step standing analysis." The infringement of a constitutional guarantee injures the taxpayer citizen's interest in constitutional governance, which is a legally protected interest.

2. The Court of Appeals Correctly Applied Requirements for Taxpayer-Citizen Standing in Colorado.

The Court of Appeals correctly indentified and applied the requirements for taxpayer-citizen standing in Colorado. The Court's recognition of expenditures resulting from "work done on the clock," without resulting specific line-item expenses, properly supports the Plaintiffs' standing.

The Court of Appeals initially recognized that to have either taxpayer or general standing, a plaintiff must show that he or she has suffered (1) an injury-in-fact to (2) a legally protected interest. Wimberly v. Ettenberg 570 P.2nd 535, 538

(Colo. 1977). The Court also acknowledged that Colorado applies a relatively broad definition of standing. Ainscough 90 P.3d at 855.

As to the first Wimberly prong, injury-in-fact, the Court of Appeals noted that the injury may be tangible, "or the injury may be intangible such as a deprivation of a legally created right or the interest in ensuring that governmental units conform to the State Constitution." Barber v. Ritter, 196 P.3d 238, 246 (Colo. 2008). The second Wimberly prong, according to the Court, is also "satisfied when the plaintiff has a claim for relief under the Constitution, the common law, a statute or a rule or regulation." Ainscough 90 P.3d at 856. Again, the Court noted that the legally protected interest may be intangible, such as "an interest in having a government that acts within the boundaries of our state constitution." Ainscough, 90 P.3d at 856.

In the context of taxpayer-citizen standing, the Court of Appeals further explained that "when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision, such an averment satisfies the two-step [Wimberly] analysis. Boulder Valley School District RE-2, 217 P.3d at 924. Under the Wimberly test, the first prong can be satisfied by a complaint that the government is not conforming to the state Constitution, which also satisfies, according to the Court, the second prong of the Wimberly test because the claim arises from a legally protected interest under the Constitution.

The Court of Appeals then applied this Court's taxpayer-citizen standing requirements to the circumstances of the present case. As to the first Wimberly factor, the Court noted, in part, "that the taxpayers claim an intangible injury-in-fact to their interests as taxpayers in having a government that does not promote religion in a manner contrary to the Preference Clause. An alleged violation of the Constitution is an injury-in-fact sufficient for a plaintiff to have standing in Colorado." The Court also found that the Respondents in the present case "came into contact with the proclamations." Finally, the Court concluded that the Plaintiffs' claim "is based on a legally protected interest because it arises under the Colorado Constitution."

The Court of Appeals also correctly applied this Court's standing precedents in finding improper financial support in the process of issuing Day of Prayer proclamations. The Governor argues that such items as "overhead" and time spent "on the clock" should not be considered in determining tax-payer standing without a line item increase in government expenses. No decision by a Colorado appellate court supports this argument, however, which is patently inconsistent with Colorado's broad policy of public interest standing.

3. The Injuries Caused By Government Prayer Proclamations Are Not Generalized Grievances; The Interest Protected Is Fundamental And Enforceable.

The Plaintiffs' interest in a government that does not promote religion is not merely generalized injury suffered by all in equal measure. The interests of Colorado non-believers in a government that does not promote religion through official government speech is not insignificant or trivial - - and it is personal to them. The Preference Clause of the Colorado Constitution protects fundamental matters of conscience, which cannot be dismissed as simply a matter of generalized policy disagreement. A lesson hard learned from history is that when the government takes sides on questions of religion, a dangerous situation is created. That is the fundamental justification of the Preference Clause.

Religious expression by government officials may be inspirational and comforting to a believer, but exclusionary or even threatening to someone who does not share those beliefs. This is not simply a matter of being "too sensitive" or wanting to suppress the religious expression of others. It is a consequence of the unique danger that religious conduct by the government poses for creating "in" groups and "out" groups. "Government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to non-adherents that they are outsiders or less than full members of the political community." County of

Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring).

Proclamations of a Day of Prayer undisputedly make the Plaintiffs feel like political outsiders and they appear to the Plaintiffs as support and endorsement of religion. The Court of Appeals correctly concluded that this constitutes injury to a legally protected interest under the Colorado Constitution. These injuries, moreover, are the result of unavoidable and foreseeable exposure to declarations of a Day of Prayer, through extensive media coverage via the internet, print media and visual coverage. Prayer proclamations are intended to be broadcast and made known to the citizens of Colorado, including the Plaintiffs. These Plaintiffs are a foreseeable part of the expected audience for prayer proclamations, and they are differentially affected because they are non-believers.

The Plaintiffs, for their part, have not gone "roaming the country" in search of constitutional violations. The individual Plaintiffs live right here in Colorado and they are unavoidably exposed to the government's preference for religion. It is not the case, moreover, that being a taxpayer-citizen of Colorado is a self-inflicted injury, just as it is not a self-inflicted injury to be a non-believer.

The Plaintiffs are not obliged to meekly avert their eyes and cover their ears when the government proclaims religious preferences. The suggestion that these

individual Plaintiffs are obligated to forego being informed, such as comes from reading the newspaper or watching the news, is misguided. It is not the Plaintiffs' burden to avoid religious endorsement by the Governor. Being part of an informed citizenry is a duty and it is a strength of Colorado's political system -- it should not be deemed risky behavior.

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

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

B. The Preference Clause of the Colorado Constitution Prohibits the Appearance of Religious Endorsement.

1. Government Promotion of Religion Is Prohibited.

The Preference Clause of the Colorado Constitution is construed like the Establishment Clause of the First Amendment to the United States Constitution, Conrad v. City and County of Denver, 724 P.2d 1309, 1313 and 1315 (Colo. 1986), and just as governmental Nativity, Memorial Crosses, and Ten Commandment displays are prohibited under such analysis, so are annual dedications of a Day of Prayer issued in support of the NDP Task Force. The Governor's claim that exhortations to pray are merely historical acknowledgements of religion is implausible and far-fetched.

The test for determining whether a governmental act violates the Establishment Clause was first articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Supreme Court announced in Lemon a three part test for determining whether government action violates the Establishment Clause. Here, the first two prongs of the Lemon test are decisive because the principal or primary effect of the Governor's actions indisputably advances the NDP Task Force's patently religious agenda. The Governor's proclamations, moreover, are intended to promote religion, as the Court of Appeals correctly concluded.

The primary effect prong of Lemon turns upon whether governmental actions reasonably can be interpreted as governmental endorsement or disapproval of religion. See Colorado v. Freedom From Religion Foundation, 898 P.2d 1013, 1021 (Colo. 1995). If the Government's actions would be interpreted by a reasonable person either to endorse or to disapprove of either a particular religion or religion in general, those actions will run afoul of the First Amendment's prohibition. Freedom From Religion Foundation v. Colorado, 872 P.2d at 1261. The endorsement test is particularly appropriate in cases involving challenges to religious expression by the Government itself. See Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996).

The outcome in many cases involving government expression is distinguished by the difference between government speech and private speech. "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Board of Education of West Side Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.). In Santa Fe Independent School District v. Doe, 530 U.S. 290, 302 (2000), the Supreme Court reiterated that the Establishment Clause forbids government speech endorsing religion, and the Supreme Court continues to recognize the distinction between government speech endorsing religion -- and other

government speech. See Pleasant Grove v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 1131-32 (2009) (although the Free Speech Clause of the First Amendment does not apply to government speech, this "does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.").

"Endorsement" in this context is akin to "promotion." Utah Gospel Mission v. Salt Lake City, 425 F.3d 1249, 1260 (10th Cir. 2005), citing County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989). Symbolic benefit to religion is enough; "it need not be material and tangible advancement." Utah Gospel Mission, 425 F.3d at 1260, quoting Friedman v. Board of County Commissioners, 781 F.2d 777, 781 (10th Cir. 1985). Government actions which have the effect of communicating governmental endorsement or disapproval, "whether intentionally or unintentionally, . . . make religion relevant, in reality or public perception, to one's status in the political community." Green v. Haskell County Board of Commissioners, 568 F.3d 784, 799 (10th Cir. 2009).

Governmental expressions of adopted private speech are not insulated from constitutional accountability. In American Atheist, Inc. v. Duncan, 616 F.3d 1145, 1155 (10th Cir. 2010), the Court of Appeals rejected Utah's attempt to distance itself from the message conveyed by highway memorial crosses that included disclaimers.

The Court concluded that the State's attempt fell flat. "The Government's actions in this case -- allowing these memorial crosses to be displayed with the official UHP insignia primarily on public land -- cannot be overshadowed by its attempts to distance itself from the message conveyed by these displays." *Id*. The express imprimatur of the State was deemed highly significant in conveying a message of endorsement to a reasonable observer.

This present case is not one where the government has established a public forum for private speech. Official proclamations constitute actual government speech which gives the imprimatur of official support, and which can be proscribed under the Constitution. The fact that government speech is sought by private parties, moreover, does not foreclose the appearance of endorsement; it emphasizes the reality of endorsement, i.e., the Governor as promoter. Just as the Governor cannot promote a favorite church, so also helping to promote a distinctly evangelical event for the NDP Task Force is not a constitutionally permissible function of government.

Official proclamations by the Governor are not merely public announcements of upcoming private events. In the case of Day of Prayer proclamations, they declare that a particular date is designated by the Governor, to be recognized by the entire State of Colorado. They proclaim a statewide Day of Prayer with the implicit

support of the government. They intentionally do not limit their apparent scope to the requesting party.

The Governor claims incorrectly that prayer proclamations merely "acknowledge an independently organized and privately hosted event." The claim is flagrantly disingenuous. The Governor, in fact, proclaims a statewide Day of Prayer, with a Christian theme, but with no mention of this occasion being a privately hosted event. To all appearances, the Governor declares in his official capacity a Christian-themed Day of Prayer for the State of Colorado.

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

Official proclamations by the Governor invoke the prestige of the government, as candidly admitted by Shirley Dobson, the person requesting Day of Prayer proclamations for the NDP Task Force. Government endorsement of religion, however, is prohibited by the Colorado Constitution. That is what makes Day of Prayer Proclamations inappropriate, regardless of whether the government speaks on other subjects. The Colorado Constitution prohibits government speech

endorsing religion, which limitation does not apply to other government speech. The Governor misses the mark, therefore, by citing other proclamations that are not prohibited by the Colorado Constitution, although issued by the Governor. Government speech on secular topics does not thereby authorize government speech endorsing religion. Such a rule would entirely eviscerate the Preference Clause and render it nugatory.

Prayer, moreover, is the "quintessential" religious practice, such that no secular purpose generally can be inferred. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985). The Governor's reference to prayer in his proclamations, therefore, objectively has an unmistakable religious connotation and promoting such an intrinsically religious practice will never satisfy the secular purpose requirement necessary for constitutionality. Jagger v. Douglas County School District, 865 F.2d 824, 830 (11th Cir. 1989). *See* also North Carolina Civil Liberties Union v. Constagny, 947 F.2d 1145, 1150 (4th Cir. 1991) (an act so intrinsically religious as prayer cannot meet the secular purpose prong of Lemon). The religious connection is further made patently clear in this case by considering the background and context of the party requesting the Governor to issue such proclamations, *i.e.*, the NDP Task Force.

Statewide proclamations of a Day of Prayer are every bit as offensive to the Preference Clause as Christian nativity displays at Christmas time, erected to celebrate the birth of Jesus -- often at the request of private religious groups. Statewide proclamations also are as objectionable as roadside crosses put up by private parties with the official State insignia. See American Atheists, Inc. v. Duncan, 637 F.3d 1095 (10th Cir. 2010). Proclamations in aid of proselytization, similarily, constitute endorsements prohibited by the Preference Clause of the Colorado Constitution. No objective observer would fail to recognize the Governor's proclamations as an endorsement of religion.

2. The Background And Context Of The National Day Of Prayer Task Force Is Relevant To Judging The Appearance Of Endorsement By Official Statewide Day Of Prayer Proclamations.

Although the Governor claims that official proclamations by the Governor merely reflect the interests of the requesting party, the Governor also argues inconsistently that the background and context of the requesting party is irrelevant to judging the patently religious purpose of Day of Prayer proclamations. This is wishful thinking by the Governor.

The NDP Task Force requests that governors and other politicians issue Day of Prayer Proclamations in conjunction with the National Day of Prayer, which Colorado governors have ritually done since at least 2004. According to the

Governor, these proclamations are issued without much deliberation; the Governor casually lends his official insignia to the event while proclaiming a statewide Day of Prayer. This is not a compelling defense.

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

The Governor, therefore, baselessly dismisses as immaterial the factual circumstances of the Governor's Day of Prayer proclamations, including: All information about the NDP Task Force; the Task Force's purpose to utilize Day of Prayer Proclamations to promote prayer and religion; the Task Force's overtly Christian perspective; the coordination of statewide Day of Prayer Proclamations with the National Day of Prayer; the inclusion of annual Christian themes and

scriptural passages in state proclamations, as requested by the Task Force; the Task Force's avowed intent to use government proclamations to give credibility and prestige to its prayer mobilization efforts; the fact that all 50 state governors issue Day of Prayer Proclamations coordinated with the National Day of Prayer; and the fact that the National Day of Prayer itself was conceived and implemented to facilitate and promote religion. These undisputed facts are ignored by the Governor, who argues that the NDP Task Force is simply a private entity with its own agenda. In fact, however, that is the problem. The Task Force cannot constitutionally use a state vehicle to deliver its patently religious message.

Day of Prayer proclamations are not intended simply as "acknowledgments" of the historical significance of religion. The Governor issues Prayer Proclamations, to support a private party, i.e., the NDP Task Force. For the Governor to issue such government speech, proclaiming a statewide Day of Prayer, at the request of the Task Force, makes entirely relevant information about the party and activity that the Governor is supporting with his speech. The claim that Day of Prayer proclamations acknowledge religion without promotion belies the distinctly evangelical context of the NDP Task Force and the Colorado Day of Prayer promotion. Unlike Thanksgiving, Memorial Day and other proclamations that solemnize a secular

occasion, the Colorado Day of Prayer Proclamations promote religion for the sake of religion itself.

The Governor's position is not saved by his argument that the NDP Task Force may use Day of Prayer Proclamations at its will. When the Governor issues Day of Prayer Proclamations, he knows that the requesting party intends to use his official government speech to support its agenda. By analogy, the author of a letter of reference cannot subsequently deny his support by claiming that the letter was used by the subject to advance her own interests. Regardless how the letter of reference may be used, it constitutes the author's deliberate speech endorsing the subject. Similarly, Day of Prayer proclamations lend the government's credibility and prestige, and that support cannot plausibly be later denied.

Day of Prayer proclamations, in short, undeniably constitute government speech intended to promote religion. They simply do not have a secular purpose, as the Court of Appeals correctly held. The Governor himself tacitly denies that he issues such proclamations as a general acknowledgment of the historical role of religion, but instead he issues them as a service to the NDP Task Force. The Governor's claim that statewide prayer proclamations are mere acknowledgements of religion, therefore, is contradicted by all of the evidence. The Governor admits

that historicity is not his purpose when issuing these particular proclamations to the NDP Task Force; they have no nonreligious purpose.

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

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

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

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

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

The proclamations at issue in the present case are particularly noteworthy because they include annual themes and references that are uniquely and identifiably Biblical. These references are incorporated at the request of the NDP Task Force; the annual themes and scriptural references are selected by the NDP Task Force; and according to the Governor, Colorado Day of Prayer Proclamations reflect the interest of the requesting party, i.e., the NDP Task Force. The Governor's claim that these proclamations are just a ceremonial acknowledgment of religion, therefore, is simply not supported by the evidence. These proclamations would not pass constitutional muster under Marsh, even as legislative prayer, because they incorporate exclusively Christian themes and references.

The Court of Appeals correctly recognized that the comparison of prayer proclamations to legislative prayer is not compelling. In the case of legislative

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

The concept of "ceremonial deism," as with legislative prayer, is dependent upon the conclusion that a reasonable observer would not view government speech as having religious significance. "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate non-religious purposes." Elk Grove Unified School District v. Newdow, 542 U.S. 1, 37 (2004) (J. O'Connor, concurring).

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

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

To the extent that Marsh might ever be applied beyond the legislative prayer context, the decision actually reinforces the conclusion that Colorado Day of Prayer Proclamations are unconstitutional. The proclamations at issue do not have the supposed pedigree of antiquity, nor the non-religious connotation of ubiquitous practices. The Governor is disingenuously trying to piggyback on parentage that is not his own.

The Day of Prayer has never had a secular purpose, intent, or effect. The intent has always been to facilitate proselytizing, to place government endorsement behind prayer and religious belief, and more than that, to call upon citizens to pray and express belief in God. Day of Prayer Proclamations place the imprimatur of government upon belief in God, and they place a stamp of approval upon religious belief, prayer and worship by the highest executive officer of the land. In fact, the federal National Day of Prayer was entirely the brainchild of Protestant evangelicals, first promoted by Billy Graham during a crusade in Washington, D.C.

The Governor baselessly claims lineage for his own prayer proclamations based on the Country's founding. The history and motivation are different for these proclamations, which have a contemporary origin and motivation. Just as important, however, even the major architects of the United States Constitution vigorously

opposed government meddling in religion, such as by issuing proclamations of prayer. Thomas Jefferson, for one, vigorously opposed such proclamations. "In his view, Presidents should have nothing to do with Thanksgiving Proclamations or Days of Prayer or times of devotion. These were religious matters falling into the exclusive province of religious, not political, leaders; 'the right to issue such proclamations belong strictly to the former,' Jefferson declared, 'and this right can never be safer than in their hands, where the Constitution has deposited it.'" Edwin S. Gaustad, Faith of Our Fathers: Religion in the New Nation, at p. 45 (1987). Andrew Jackson also refused to issue resolutions of a national day of prayer and thanksgiving on grounds similar to Jefferson's rationale. Pfeffer, Church, State of Freedom, p. 267 (1967).

Prayer proclamations, in short are not merely benign deism, nor have they already been approved by the Supreme Court. As noted above, the Court has expressed grave doubt about the constitutionality of Prayer Day Proclamations, in County of Allegheny. The Court concluded that the government may only celebrate holidays with religious significance if done in a way that does not endorse the religious doctrine or aspect of the holiday. 492 U.S. at 601. .

The Supreme Court's concern about the appearance of religious endorsement by government speech has found voice in other recent decisions. For example, in

McCreary County, Kentucky v. ACLU of Kentucky, 545 U.S. 844, 861 (2005), the Court stated that "when the government designates Sunday closing laws, it advances religion only minimally because many working people would take the day off as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable." Id.

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

The Supreme Court concluded in McCreary that the framers of the Constitution intended the Establishment Clause to require government neutrality in religion, "including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead extended the prohibition to state support for religion in general." *Id* at 878. See also Lee v. Weisman, 505 U.S. 577, 503-506 (1992) (J. Souter, concurring)

("President Jefferson steadfastly refused to issue thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses.").

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

In the present case, the Governor's proclamations of a statewide Colorado Day of Prayer, in support of an explicitly evangelical organization and event, is the type of endorsement prohibited by Colorado's Preference Clause. The Governor's statewide proclamations are not just announcements of an upcoming evangelical event. The factual reality of the Governor's prayer proclamations, which include explicit Christian themes, distinguishes the proclamations at issue in this case from the supposed benign history of prayer proclamations by early Presidents and State governors. These proclamations constitute an unwarranted assistive device for a blatantly evangelical organization and event. The Court of Appeals correctly held that such assistance from the Governor is strictly prohibited.

VI. CONCLUSION.

The Supreme Court should affirm the decision of the Court of Appeals.

Dated this 7th day of November, 2013.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Answer Brief upon all parties herein by via ICCES this 7th day of November, 2013, addressed as follows:

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