

DISTRICT COURT,
CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street, Denver, CO 80202

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

Plaintiffs,

v.

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

Defendants.

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**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS'
CROSS-MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION.

The defendants argue unpersuasively that the Governor's annual proclamation of a Colorado Day of Prayer does not constitute governmental endorsement of religion. The Governor claims to issue Day of Prayer Proclamations pretty much upon request -- so the proclamations allegedly should not count 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 purpose and effect of an official proclamation by the Governor, which he describes as a "public service" provided to constituents. The issuance of such official proclamations is an unabashed form of government endorsement, in part, precisely because of the intent to ingratiate.

The defendants concede that Colorado Day of Prayer Proclamations constitute government speech, but they ignore or misapprehend the meaning and context of that speech. The defendants' own submissions, however, establish that Day of Prayer Proclamations are issued after annual requests by the National Day of Prayer Task Force, an undisputedly evangelical organization that uses such government proclamations to give prestige and credibility to its proselytizing activities. That is exactly what the Colorado Constitution prohibits. Religious adherents must have faith in their own message, rather than trying to piggyback on the prestige and credibility of government speakers.

The defendants try to ascribe a meaning to the Governor's Day of Prayer Proclamations that is belied by their own evidence. They claim, for example, that proclamations are mere acknowledgements of the historical significance of religion. No evidence supports that claimed rationale for the Governor's actions, however, particularly given that the proclamations are issued upon request by the NDP Task Force, in order to facilitate its own religious organizing. The Governor, for his part, implies that he would not otherwise even issue Day of Prayer

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

Ceremonial deism helps the Governor no more than ubiquity. Ceremonial deism occurs when no religious connotation exists, which is not the case with the Colorado Day of Prayer. Massive displays of religious fervor are planned and implemented as a result of Day of Prayer proclamations, which are perceived and understood to be calls to pray.

In reality, Colorado Day of Prayer Proclamations are sought precisely because they give the appearance 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 play this facilitating role, however, and hence the court should enjoin future Day of Prayer Proclamations by the Governor.

II. RECENT PRECEDENT DIRECTLY ADDRESSES RELEVANT ISSUES.

The reasoning of the District Court for the Western District of Wisconsin is instructive on issues raised by the parties in the present case. In Freedom From Religion Foundation, Inc. v. Obama, 2010 U.S. Dist. LEXIS 37570 (W. D. Wis., April 15, 2010), the Court considered many of the same issues raised in this case, in a challenge to the federal National Day of Prayer. Judge Barbara Crabb concluded in the federal case that the National Day of Prayer constitutes a prohibited endorsement of religion by the President. The Court concluded that proclamations by the President of a National Day of Prayer were not "mere acknowledgements of religion" because the government effectively took sides on a matter that must be left to individual conscience. Id at 3. According to Judge Crabb, the lesson learned from history is that "when the government takes sides on questions of religious belief, a dangerous situation may be created. "

Id at 7. (A copy of the Court's opinion is attached to this Brief as Exhibit A for the convenience of the Court.)

Religious expression by government officials that may be inspirational and comforting to a believer may be exclusionary, or even threatening, to someone who does not share those beliefs, reasoned Judge Crabb. Id at 8. This is not simply a matter being "too sensitive" or wanting to suppress the religious expression of others. Rather, "it is a consequence of the unique danger that religious conduct by the government poses for creating 'in' groups and 'out' groups."

Id. Justice O'Connor, accordingly, has framed the problem concisely: "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); see also Santa Fe Independent School District v. Doe, 530 U.S. 290, 309-10 (2000) ("Sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are not inherent that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

Prayer proclamations violate the Establishment Clause under the endorsement test applied in FFRF v. Obama, even if they do not endorse any one religion. The Establishment Clause is not limited to discrimination among different sects. It guarantees religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." Allegheny, 492 U.S. at 590.

After giving recognition to the historical wisdom of the Establishment Clause, the Court in FFRF v. Obama proceeded to evaluate many of the same arguments made in this case as to why Day of Prayer Proclamations improperly endorse religion. Judge Crabb notes, for example, that "Establishment Clause values would be significantly eroded if the government could

promote any longstanding religious practice of the majority under the guise of 'acknowledgement.'" FFRF v. Obama, at 11. Judge Crabb also rejects the argument that Day of Prayer Proclamations "constitute mere ceremonial deism or that they are justified by 'history and ubiquity.'" She notes, in particular, that the Supreme Court has never held that religious conduct that would otherwise violate the Establishment Clause may be upheld for the sole reason that the practice has a long history. Id at 15.

Significantly, Judge Crabb did not uncritically accept the claim that annual Day of Prayer Proclamations embody a particular historical tradition. Id at 16. Certainly no tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular day, as it was not until 1952 that Congress established a legislatively-mandated National Day of Prayer. Id.

Judge Crabb also recognized that proclamations such as those commemorating Thanksgiving are distinguishable from annual Day of Prayer Proclamations, including because Thanksgiving Day proclamations and the like serve an obvious secular purpose that does not exist in the case of Day of Prayer Proclamations. Id. Finally, Judge Crabb recognized that even the claimed historical support for Prayer Day Proclamations does not point in one direction, including because such founding stalwarts as Thomas Jefferson and James Madison opposed such practices. Id.

In the end, the court in FFRF v. Obama concluded that government speech proclaiming a National Day of Prayer gives the improper appearance of government endorsement of religion. The very nature of having a "National Day in recognition of a particular act [prayer] connotes endorsement and encouragement." Id at 9. As Justice Kennedy has acknowledged, the National Day of Prayer "is a straightforward endorsement of the concept of turning to God in prayer." Allegheny, 492 U.S. at 672 (Kennedy, J., concurring in judgment in part and dissenting in part). In short, if official government speech proclaiming a Day of Prayer does not constitute

government support for the act of prayer, then no government speech can hardly be conceived that would be prohibited by the Establishment Clause.

Here, the appearance of endorsement also is unmistakable, and unlike private speech, government speech cannot constitutionally endorse or promote religion. The defendants' Motion for Summary Judgment, therefore, must be denied, and instead, the plaintiffs' Cross-Motion for Summary Judgment should be granted.

III. STATEMENT OF UNDISPUTED FACTS.

A. Stipulated Facts.

The Freedom From Religion Foundation ("FFRF") is a non-profit corporation headquartered in Wisconsin. FFRF is registered to do business in Colorado and is in good standing. Members of FFRF, including, the named plaintiffs, are residents of Colorado and are Colorado taxpayers. Bill Ritter, Jr., who is named as a defendant in his official capacity, is the Governor of the State of Colorado.

On April 2, 1952, the Committee on the Judiciary of the U.S. House of Representatives issued a Report to Accompany H.J. Res. 382 to create a National Day of Prayer. Public Law 324, a Joint Resolution, was approved on April 17, 1952. It provides: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation in churches, in groups, and as individuals." Public Law 324 was signed by President Harry Truman on April 17, 1952.

S. 1378, "An act to provide for setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated," was approved by the Senate on May 5, 1988, and signed into law by President Ronald Reagan on May 9, 1988. The NDP Task

Force, led by Shirley Dobson, writes to each state governor on an annual basis requesting a prayer proclamation, while referencing the NDP Task Force annual theme and supporting scriptural reference. Letters written by the NDP Task Force to governors requesting honorary proclamations are signed by Shirley Dobson, who reviews such letters before signing them.

Honorary proclamations recognizing the National Day of Prayer were issued by the Governor of Colorado for at least 2004-2009. The honorary proclamations issued by the Governor of Colorado from 2004-2008 each acknowledged the NDP Task Force annual theme and/or scriptural reference. The honorary proclamation issued by the Governor of Colorado in 2009 did not acknowledge the NDP Task Force annual theme or scriptural reference.

B. Colorado Day Of Prayer Proclamations.

The Governor of Colorado began issuing annual "Colorado Day of Prayer" Proclamations in 2004, upon the request of the National Day of Prayer Task Force, led by Shirley Dobson. (Bolton Aff., Exs. 2-6 and 8.) Each Colorado Day of Prayer Proclamation bears the Executive Seal of the State of Colorado and the signature of the Governor. (Bolton Aff., Exs. 2-7; Bannister Dep. at 13.¹) The Colorado Day of Prayer Proclamations are issued with the consent and authorization of the Office of the Governor. (Bannister Dep. at 14 and 18.)

The 2004 Colorado Day of Prayer Proclamation includes an annual theme and scriptural reference that Shirley Dobson requested the Governor to include:

"WHEREAS in 2004, the National Day of Prayer acknowledges Leviticus 25:10 with the theme "Let Freedom Ring"; . . .

¹ The Deposition transcript of Craig Bannister is attached as Exhibit 1 to the Affidavit of Richard Bolton.

The 2004 proclamation concludes with the following declaration:

NOW, THEREFORE, I, Bill Owens, Governor of the State of Colorado, do hereby proclaim May 6, 2004, as the COLORADO DAY OF PRAYER in the State of Colorado. (Bolton Aff., Ex. 2.)

The 2005 Colorado Day of Prayer Proclamation also includes a scriptural reference and annual theme requested by Mrs. Dobson:

WHEREAS, in 2005, the National Day of Prayer acknowledges Hebrews 4:16 - "Let us then approach the throne of grace with confidence, so that we may receive mercy and find grace to help us in our time of need" - with the theme "God shed his grace on thee"; . . .

The 2005 proclamation concluded with the following declaration:

Now, therefore, I, Bill Owens, Governor of the State of Colorado, do hereby proclaim May 5, 2005, as the COLORADO DAY OF PRAYER in the State of Colorado. (Bolton Aff., Ex. 3.)

The 2006 Colorado Day of Prayer Proclamation also includes an annual theme and scriptural reference requested by Mrs. Dobson:

WHEREAS, in 2006, the National Day of Prayer acknowledges I Samuel 2:30 - "Those who honor me, I will honor," and the theme "America, honor God"; . . .

The 2006 proclamation concludes with the following declaration:

Now, therefore, I, Bill Owens, Governor of the State of Colorado, do hereby proclaim May 4, 2006, as a DAY OF PRAYER in the State of Colorado. (Bolton Aff., Ex. 4.)

The 2007 Colorado Day of Prayer Proclamation includes the following scriptural reference and annual theme, as requested by Mrs. Dobson:

WHEREAS, in 2007, the National Day of Prayer acknowledges 2 Chronicles 7:14 - "If my people, who are called by my name, will humble themselves and pray and seek my face and turn from their wicked ways, then I will hear from heaven and forgive their sin and heal their land; . . .

The 2007 proclamation concludes as follows:

Therefore, I, Bill Ritter, Jr., Governor of the State of Colorado, do hereby proclaim May 3, 2007, COLORADO DAY OF PRAYER in the State of Colorado. (Bolton Aff., Ex. 5.)

The 2008 Colorado Day of Prayer Proclamation includes the following scriptural reference as requested by Mrs. Dobson:

WHEREAS, in 2008, the National Day of Prayer acknowledges Psalm 28:7 - "The Lord is my strength and shield, my heart trusts in Him, and I am helped;" . . .

The 2008 proclamation concludes with the following declaration:

Therefore, I, Bill Ritter, Jr., Governor of the State of Colorado, do hereby proclaim May 1, 2008, COLORADO DAY OF PRAYER in the State of Colorado. (Bolton Aff., Ex. 6.)

The 2009 Colorado Day of Prayer Proclamation, issued after the filing of the present lawsuit, did not include the NDP Task Force scriptural reference or annual theme, as requested by Mrs. Dobson, but still concluded:

Therefore, I, Bill Ritter, Jr., Governor of the State of Colorado, do hereby proclaim May 7, 2009, COLORADO DAY OF PRAYER in the State of Colorado. (Bolton Aff., Ex. 7.)

C. Colorado Day of Prayer Proclamations Have Been Issued In Response to Requests by Shirley Dobson.

Each of the Colorado Day of Prayer Proclamations issued by the Governor declares a day of prayer that corresponds to the National Day of Prayer, including in 2004 through 2009, as requested by Mrs. Dobson. (Bolton Aff., Exs. 2-6 and 8.) Each of the Colorado Day of Prayer Proclamations since 2004 has been issued in response to a request by the National Day of Prayer Task Force, by Shirley Dobson. Each request included a scriptural reference and annual theme, chosen by the National Day of Prayer Task Force, which Mrs. Dobson asked each governor to incorporate into their Day of Prayer Proclamations. (Bolton Aff., Exs. 2-8; Bannister Dep. at 34.)

D. Day Of Prayer Proclamations Serve A Purpose.

The Colorado Day of Prayer Proclamations are issued by the Governor's Office with no restrictions on their use. (Bannister Dep. at 17.) The National Day of Prayer Task Force 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 support. (Bannister Dep. at 91.)

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. (Bannister Dep. at 32; Bolton Aff., Ex. 8.) Officials in the Colorado Governor's Office assume that groups request proclamations in order to add support for their event from the Governor's Office. (Bannister Dep. at 15.)

The Governor's Office assumes that proclamations are used, at least by some requestors, to promote their activities. (Bannister Dep. at 15 and 17.) The National Day of Prayer Task Force, for one, uses proclamations as evidence of the Government's support for their activities. (Bannister Dep. at 32.) The Governor's Office is not surprised that people who request proclamations, such as the National Day of Prayer Task Force, use them to promote the Day of Prayer. (Bannister Dep. at 33.) Persons requesting proclamations are not told by the Governor's Office that they cannot circulate proclamations, nor are they told that they cannot tout proclamations as indicating the Governor's support. (Bannister Dep. at 33-34.)

E. Proclamations Are Crafted So As To Appear Applicable To Everyone.

Proclamations are intentionally drafted by the Governor's Office so as to appear to reflect general support for the requestor's activities, without specifically identifying the

requesting party. (Bannister Dep. at 40-41.) Proclamations are drafted to make them as general as possible, without specifically identifying the requesting organization. (Bannister Dep. at 40-41, 53-54 and 67.) Proclamations are drafted intentionally so as to not identify the requesting organizations, which would otherwise make the proclamation very specific to that organization. (Bannister Dep. at 53-54.)

In the case of Colorado Day of Prayer Proclamations, the National Day of Prayer Task Force is not specifically identified in the proclamation and the specified day is proclaimed generally as the Colorado Day of Prayer, without limitation to a specific organization's Day of Prayer. (Bannister Dep. at 54.) By not identifying the National Day of Prayer Task Force, proclamations appear to be applicable to as many people as possible without reference to a single group or a single individual. (Bannister Dep. at 54 and 67.)

F. Proclamations Are Discretionary With The Governor's Office.

In deciding to issue a proclamation, the Governor's Office first looks at the requesting group to determine if it is promoting a good cause. (Bannister Dep. at 35.) If the proclamation is for a good cause, and if it does not seem to be problematic and the Governor supports the cause, then the Governor's Office issues the proclamation. (Bannister Dep. at 35.) In the case of Colorado Day of Prayer Proclamations, although they all reference the National Day of Prayer as requested by Mrs. Dobson, the Colorado Governor is not required to issue such a proclamation. (Bannister Dep. at 48.) The State is proclaiming a Day of Prayer for all citizens.

G. Colorado Day Of Prayer Proclamations Incorporate Distinctly Christian Elements, Which Are Used By The NDP Task Force.

Each of the Colorado Day of Prayer Proclamations from 2004 through 2008 included a Biblical reference, as requested by Mrs. Dobson. (Bannister Dep. at 52.) The Colorado

Governor's Office understands that the scriptural references incorporated into the Colorado Day of Prayer Proclamations were requested by the National Day of Prayer Task Force.

(Bannister Dep. at 59.) The Governor's Office knows that the National Day of Prayer Task Force also apparently chooses an annual theme for each year's National Day of Prayer.

(Bannister Dep. at 64-65 and 70.)

The Governor's Office also understands that Mrs. Dobson, on behalf of the National Day of Prayer Task Force, wants proclamations issued by high government officials.

(Bannister Dep. at 70.) The Colorado Governor's Office also assumes that Mrs. Dobson probably uses the Day of Prayer Proclamations by state governors to lend support to her Day of Prayer. (Bannister Dep. at 70.)

The Governor's Office also understands that Mrs. Dobson wants the annual theme and supporting scripture selected by the NDP Task Force incorporated into official proclamations by state governors. (Bannister Dep. at 71.) The Colorado Day of Prayer Proclamations, although requested by the NDP Task Force, nonetheless are issued pursuant to the authority of the Office of the Governor. (Bannister Dep. at 82.)

The Governor's Office recognizes that the Colorado Day of Prayer Proclamations mean a great deal to the requesting group, in this case the NDP Task Force. (Bannister Dep. at 90.) The Colorado Governor's Office does not presently intend to discontinue the practice of issuing Colorado Day of Prayer Proclamations. (Bannister Dep. at 27.)

H. The Use Of Day Of Prayer Proclamations To Promote Religion Is No Secret.

In addition to issuing Colorado Day of Prayer Proclamations, Governor Ritter has actively participated in Day of Prayer activities held at the Capitol, as reported in the public news media. (Bolton Aff., Ex. 9.) In 2007, Governor Ritter spoke at National Day of Prayer

activities held at the Capitol; "There were cheers as Ritter read the official Proclamation," which stated that the National Day of Prayer was a day for Americans to gather to celebrate the rights endowed by their creator. (Bolton Aff., Ex. 9.) Governor Ritter's participation in the 2007 National Day of Prayer activities at the Capitol was planned and known in advance; the Colorado Day of Prayer organizers actually noted as early as April 12, 2007 that Governor Ritter would be part of their program; in fact Governor Ritter reportedly met with Day of Prayer organizers six weeks before the Day of Prayer and prayed with them. (Bolton Aff., Exs. 9 and 12.)

The purpose of the Colorado Day of Prayer is to encourage prayer, which has been candidly recognized by Colorado Day of Prayer organizers since at least 2005; in their application for use of the Capitol grounds in 2006, for example, the Day of Prayer was described as an annual holiday first established by an act of Congress "which encourages Americans to pray for our nation, its people, and its leaders." (Bolton Aff., Ex. 11.) The 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." (Bolton Aff., Ex. 13.)

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. (Bolton Aff., Exs. 95-97.) The Governor's encouragement of participation in Day of Prayer events puts the plaintiffs in the position of being outsiders. (Bolton Aff., Exs. 95-97.) The plaintiffs consider that the encouragement by government officials to believe in a God is inappropriate and non-believers should not be put in the position of having to resist overtures to pray. (Bolton Aff., Exs. 95-97.)

I. History Of 1952 National Day Of Prayer Legislation.

The Governor's Office began issuing Colorado Day of Prayer proclamations at the request of the NDP Task Force, which group organizes around the National Day of Prayer proclaimed by the President in order to promote Judeo-Christian prayer activities. (Bolton Aff., Ex. 2-8.)

The National Day of Prayer was a day originally set aside by Congress for prayer. (Bolton Aff., Ex. 111 at 63.)²

The impetus for an annual National Day of Prayer, by legislation, came from the Reverend Billy Graham, who suggested it in the midst of a crusade in the nation's Capitol in 1952. (Bolton Aff., Ex. 94 at 1 and Ex. 93 at 2.) The resolution mandating an annual National Day of Prayer was described as a measure against "the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it is placed." (Bolton Aff., Ex. 55 at 1 and Ex. 93 at 2.)

On April 2, 1952, the Committee on the Judiciary issued a Report to Accompany H.J. Res. 382 to create a National Day of Prayer, noting that the Purpose "is to direct the President to proclaim a National Day of Prayer each year." (Bolton Aff., Ex. 103.) The Report to Accompany H.J. Res. 382 to create a National Day of Prayer Statement claimed: "When the delegates to the Constitutional Convention encountered difficulties in the writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions." (Bolton Aff., Ex. 103.) The Statement encouraged the people of this country "to unite in a day of prayer each year, each in accordance with his own religious faith, thus reaffirming in a dramatic manner that deep

² The Deposition transcript of Shirley Dobson is attached to the Affidavit of Richard L. Bolton as Exhibit 111.

religious conviction which has prevailed throughout the history of the United States.”

(Bolton Aff., Ex. 103 at 1.)

As a matter of historical fact, the members of the Constitutional Convention did not pray at any session before adopting the entirely godless and secular U.S. Constitution, as noted by Constitutional Convention Secretary Benjamin Franklin. Franklin did suggest prayer on one occasion, but instead the Constitutional Convention adjourned for the day and never prayed at any time during the Constitutional Convention. (Pfeffer, Church, State & Freedom, at 121-122 (1967).)

Public Law 324, a Joint Resolution, was approved on April 17, 1952: “Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation in churches, in groups, and as individuals. (Bolton Aff., Ex. 104.)

Contemporaneous reporting of President Truman's signing of the Prayer Day Bill, in the New York Times on April 18, 1952, recognized that "the purpose of the resolution is to have the public assemble in churches, synagogues, and other places of worship to offer prayers for world peace." (Bolton Aff., Ex. 104 at 1.)

The National Day of Prayer legislation passed by Congress is an encouragement for the American people of all faiths to pray. (Bolton Aff., Ex. 111 at 14.) The National Day of Prayer is popularly described as being "designated by the United States Congress as a day when people are asked to come together and pray, especially for their country." (Bolton Aff., Ex. 93 at 1.)

J. Additional Legislation Was Enacted In 1988 To More Fully Facilitate Religious Organizing By Groups Like The NDP Task Force.

Prior to 1988, the President would call the nation to a day of prayer whenever he chose each year. (Bolton Aff., Ex. 57 at 1.) Eventually, however, the National Prayer Committee, and the first NDP Task Force Chairman, Mrs. Vonette Bright, directed efforts leading in 1988 to President Reagan signing legislation requiring that the first Thursday in May of each year be designated the National Day of Prayer. (Bolton Aff., Ex. 57 at 1.)

The National Prayer Committee provides collective leadership to the National Prayer Movement, and the NDP Task Force is a project of the National Prayer Committee, the purpose of which is to mobilize prayer. (Bolton Aff., Ex. 64 at 1 and Ex. 111 at 34.)

Mrs. Bright promoted legislation for a Day of Prayer on a specific day each year because she believed in the power of prayer; she believed that there should be a day in this Country in which the Nation is covered in prayer; and she wanted to facilitate all that prayer, if possible. (Bolton Aff., Ex. 111 at 31-32.) Mrs. Bright, cofounder with Dr. Bill Bright of Campus Crusade for Christ, told Shirley Dobson how the first Thursday in May amendment in 1988 came about: Mrs. Bright got up at 5 a.m. one day to phone some Congressmen about setting aside a [specific] day for the National Day of Prayer. A committee was formed and the first Thursday of May change came from that. (Bolton Aff., Ex. 111 at 43-44.)

The Campus Crusade for Christ website biography of Mrs. Bright publicly credits her with the achievement of introducing legislation that was approved by both houses of Congress to make the first Thursday of May a permanent date for The National Day of Prayer. (Bolton Aff., Ex. 106 at 3.)

Congressman Tony P. Hall, while introducing the 1988 National Day of Prayer bill on March 16, 1988, remarked that designating each first Thursday in May as the annual date on

which the National Day of Prayer is celebrated, would “help bring more certainty to the scheduling of events related to the National Day of Prayer, and permit more effective long-range planning.” (Bolton Aff., Ex. 107 at 2.)

“The annual observance would be so much easier to celebrate if its occurrence was not subject to the issuance of an annual proclamation. The event has a tradition of some consequence for increasing our nation’s awareness of the need for divine assistance,” said Rev. Msgr. Joseph F. Rebman, Chancellor, Diocese of Wilmington, Delaware, in urging passage of the bill. (Bolton Aff., Ex. 107 at 3.)

Pat Boone, Co-Chairman of the National Prayer Committee, complained that having a different day proclaimed each year “had offered little advance notice to adequately inform the grass roots constituencies. I believe a definite date will allow millions of citizens within our nation who have explicit faith in a Prayer-hearing God to be informed about this significant day in our country.” (Bolton Aff., Ex. 108 at 3.)

S.1378, “An act to provide for setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated,” was approved by the Senate on May 5, 1988, and signed into law by President Ronald Reagan on May 9, 1988. (Bolton Aff., Ex. 120.) After signing the 1988 law, President Reagan encouraged people of all faiths to participate in the National Day of Prayer. (Bolton Aff., Ex. 111, at 28-29.)

Groups like the NDP Task Force would have trouble mobilizing a National Day of Prayer if they did not know well in advance when it was going to take place. (Bolton Aff., Ex. 111 at 29-30.) The change in the law in 1988, to make predictable the Day of Prayer, on the first Thursday in May, facilitated efforts by the NDP Task Force to organize prayer observances. (Bolton Aff., Ex. 111 at 29.) Groups like the NDP Task Force have been

successful in mobilizing Christians to engage in prayer in part because it is beneficial to have a central event that people can gather around. (Bolton Aff., Ex. 111 at 85-86.)

K. Mrs. Dobson Is The Voice And Face Of The NDP Task Force.

When Mrs. Bright first asked Mrs. Dobson to become co-chair of the NDP Task Force in 1989, Mrs. Dobson told her she would pray about it and talk to her husband and get back to her. (Bolton Aff., Ex. 111, at 8-9.) Mrs. Dobson's husband, James Dobson, is the founder of the evangelical Christian group Focus on the Family. (Bolton Aff., Ex. 101 at 3.)

Shirley Dobson ultimately accepted Mrs. Bright's overture and became cochairman of the NDP Task Force in 1989, and she has been the chairman since 1991. (Bolton Aff., Ex. 111 at 4.) Mrs. Dobson is now the recognized voice and the face of the National Day of Prayer. (Bolton Aff., Ex. 111 at 42.)

Once Shirley Dobson became chair of the NDP Task Force, Focus on the Family provided startup money for the NDP Task Force: \$100,000 the first year; \$50,000 the second, \$25,000 the third. (Bolton Aff., Ex. 111 at 7-8.)

L. The NDP Task Force Uses The National Day Of Prayer To Mobilize Prayer Activities.

One of the principal goals of the NDP Task Force is to encourage prayer. (Bolton Aff., Ex. 111 at 4.)

The NDP Task Force promotes and encourages the role of prayer by mobilizing around the National Day of Prayer. (Bolton Aff., Ex. 111 at 10.) The National Day of Prayer is a rallying point, as a day for focusing on prayer, because it is declared as such by the President each year. (Bolton Aff., Ex. 111 at 62.) The National Day of Prayer is a rallying point for the NDP Task Force in focusing on prayer for the country. (Bolton Aff., Ex. 111 at 62.)

The National Day of Prayer is set aside by Congress, as a day when Americans pray for their country and for its leaders, and as a day that symbolizes the country, which is why the NDP Task Force chose to make the American flag a prominent part of its logo. (Bolton Aff., Ex. 111 at 47.) Mrs. Dobson understands the National Day of Prayer to be a special day set aside specifically for prayer. (Bolton Aff., Ex. 111 at 63.)

M. The NDP Task Force Is Exclusively Christian In Perspective.

The NDP Task Force was created by the National Prayer Committee for the express purpose of organizing and promoting prayer observances conforming to a Judeo-Christian system of values. (Bolton Aff., Ex. 51 at 1.)

The Judeo-Christian expression of the National Day of Prayer involves praying to the God of the Bible. (Bolton Aff., Ex. 111 at 67.) The NDP Task Force expression of the National Day of Prayer is based on the Bible, which says 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. (Bolton Aff., Ex. 111 at 69.)

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. (Bolton Aff., Ex. 111 at 106.) The NDP Task Force's annual theme, including in 2009, represents an effort to point Americans to the eternal source of encouragement and help, i.e., the God of the Bible. (Bolton Aff., Ex. 111 at 121-22.)

N. Presidential Proclamations Are Integral To Prayer Rallies.

The official proclamation issued by the President, of course, is an integral part of the yearly national observance. (Bolton Aff., Ex. 20 at 1.) The President's support for the National Day of Prayer serves a crucial role in calling Americans to prayer. (Bolton Aff., Ex. 21 at 1.) Because the President is the leader of the Country, and people look to the

President as the moral leader, and sometimes even the spiritual leader of the Nation, Mrs. Dobson likes to see the President encourage people of all faiths to pray. (Bolton Aff., Ex. 111 at 92.) The NDP Task Force provides draft proclamations for the President to consider. (Bolton Aff., Ex. 22 at 1-2.)

Mrs. Dobson likes for the President to encourage prayer, and she believes that Congress encourages prayer by designating a National Day of Prayer. (Bolton Aff., Ex. 111 at 82-83.) It is important to the NDP Task Force that the President sign a proclamation because he is the leader of the nation and many people look to the President as the moral and spiritual leader of the country, and since Congress has set aside the National Day of Prayer, and because the President is the leader of the American people, the NDP Task Force likes to see the President encourage people of all faiths to pray. (Bolton Aff., Ex. 111 at 92.)

Mrs. Dobson acknowledges that the intended audience for proclamations by the President is the people of the Nation, and in the case of proclamations by governors, the people of each state. (Bolton Aff., Ex. 111 at 134.)

O. Participation By Government Officials Is Critical To The NDP Task Force Efforts.

Mrs. Dobson understands the National Day of Prayer to be about calling Americans to come before Almighty God. (Bolton Aff., Ex. 111 at 106.) NDP proclamations by state governors also lend support to the National Day of Prayer. (Bolton Aff., Ex. 111 at 107.) Support by the nation's leaders is critical to the NDP Task Force's efforts. (Bolton Aff., Ex. 111 at 108-109.)

People look to their leaders to give them direction, so it is critical to the NDP Task Force that the leaders support the National Day of Prayer because they are role models. (Bolton Aff., Ex. 111 at 109.) The NDP Task Force, therefore, hopes that leaders of the

country will call the nation to prayer, including by issuing proclamations. (Bolton Aff., Ex. 111 at 110.)

P. Presidential Proclamations Promote Active Prayer.

Presidential proclamations advance the cause of prayer and inspire others to get involved. (Bolton Aff., Ex. 22 at 2.) The NDP Task Force solicits proclamations from the President, which are then read by some 40,000 Task Force coordinators at events around the country, and the presidential proclamations "underscore the need for corporate and personal intercession [that] will lend tremendous prestige and credibility to these gatherings." (Bolton Aff., Ex. 22 at 1.)

President George W. Bush in his NDP public comments lauded the Dobsons and the NDP Task Force and promoted the role of prayer at exclusive annual NDP prayer observances in the East Room of the White House. (Bolton Aff., Ex. 100 at 1-4.) Mrs. Dobson has attended ten White House prayer services for the National Day of Prayer and she has spoken at eight of these events. (Bolton Aff., Ex. 111 at 72 and 74.) Mrs. Dobson, as Chairman of the NDP Task Force, also has received personal "thank-you's" from President George W. Bush as a result of the Task Forces' NDP observances in Washington. (Bolton Aff., Ex. 47 at 1-2.) For its part, the NDP Task Force bound all the state National Day of Prayer proclamations by governors into a presentable package and presented it as a unique gift to President Bush on the National Day of Prayer. (Bolton Aff., Ex. 111 at 52).

Q. Governors Also Issue Proclamations In Conjunction With The National Day of Prayer.

The NDP Task Force, led by Mrs. Dobson, writes to each state governor every year requesting a prayer proclamation, while referencing the NDP Task Force annual theme and supporting scriptural reference. (Bolton Aff., Ex. 111 at 21, 23, 50, 585, 115 and 121.)

Letters written by the NDP Task Force to governors requesting proclamations are signed by Mrs. Dobson, who reviews such letters before signing them. (Bolton Aff., Ex. 111 at 23 and 148.)

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. (Bolton Aff., Ex. 111 at 28.)

The NDP Task Force considers it desirable that governors incorporate the NDP Task Force's annual theme and scriptural reference into their official proclamations. (Bolton Aff., Ex. 111 at 86.)

All state governors issued NDP Proclamations in 2009, including proclamations from the Governors of Arkansas, Florida, Iowa, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Nebraska, New Mexico, South Dakota, Texas, Utah, Virginia, Wisconsin and Wyoming, which all included references to the NDP Task Force annual theme and supporting scripture. (Bolton Aff., Ex. 19 at 1-17.)

All state governors also issued NDP Prayer Proclamations in 2008, including proclamations by the governors of Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, New Jersey, Utah, Virginia, Wisconsin and Wyoming, which proclamations included the NDP Task Force annual theme and supporting scripture. (Bolton Aff., Ex. 14 at 1-14.)

All state governors likewise issued NDP Prayer Proclamations in 2007, including proclamations by the governors of Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Nebraska, Utah, Virginia, Wisconsin and Wyoming, which included the NDP Task Force annual theme and supporting scripture. (Bolton Aff., Ex. 15 at 1-16.)

All state governors issued NDP Prayer Proclamations in 2006, including proclamations by the governors of Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Louisiana, Nebraska, Utah, Wisconsin and Wyoming which included the NDP Task Force annual theme and supporting scripture. (Bolton Aff., Ex. 16 at 11.)

All state governors issued NDP Prayer Proclamations in 2005, including proclamations by the governors of Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, North Carolina, Texas, Utah, Virginia and Wisconsin, which included the NDP Task Force annual theme and supporting scripture. (Bolton Aff., Ex. 17 at 1-17.)

All state governors issued NDP Prayer Proclamations in 2004, including proclamations by the governors of Arkansas, Colorado, Florida, Idaho, Illinois, Louisiana, Massachusetts, Missouri, Nebraska, New York, North Carolina, Texas, Virginia, Wisconsin and Wyoming, which included the NDP Task Force annual theme and supporting scripture. (Bolton Aff., Ex. 18 at 1-15.)

The NDP Task Force considers it especially vital to enlist the support and affirmation of national leaders, including proclamations by state governors. (Bolton Aff., Ex. 26 at 1.) The NDP Task Force considers it "critical" to garner the support of our nation's leaders for the NDP efforts, including by obtaining the written proclamations from governors. (Bolton Aff., Ex. 26 at 1.)

R. Recalcitrant Governors Are Pressured.

If governors do not issue proclamations, the NDP Task Force asks coordinators to set up an appointment at the governor's office and follow up, as well as inviting all governors to actively participate in the National Day of Prayer observance, most appropriately on the steps

of the Capitol Buildings to give visibility to the National Day of Prayer. (Bolton Aff., Exs. 24-27.)

In 2007, pressure was put on New York Governor Eliot Spitzer, to issue a NDP Proclamation. (Bolton Aff., Ex. 58 at 1-6.) James Dobson, head of Focus on the Family, and husband of Shirley Dobson, Chairman of the NDP Task Forces, was instrumental in publicly pressuring Governor Spitzer to issue a NDP proclamation. (Bolton Aff., Ex. 64 at 1, 3 and 5-6; Ex. 111 at 54-54.)

Minnesota Governor Jesse Ventura also was criticized in 1999 for refusing to issue a NDP proclamation. (Bolton Aff., Ex. 59 at 1.)

S. The National Day Of Prayer Task Force Succeeds Due To Official Participation By Government Officials.

The NDP Task Force considers it important that all fifty governors issue NDP Proclamations. (Bolton Aff., Ex. 60-61 at 1.) The State National Day of Prayer proclamations acknowledge the federal designation of the Day of Prayer by Congress and the President in their own proclamations. (Bolton Aff., Exs. 2-7 and 14-19.)

Millions of individuals participate in the NDP call to prayer by the NDP Task Force, supported by 30-40,000 NDP Task Force volunteers across the country. (Bolton Aff., Ex. 62.)

Mrs. Dobson is pleased when governors use the theme of the NDP Task Force because it was supposedly given to her by the Lord. (Bolton Aff., Ex. 111 at 58.) Support for the National Day of Prayer by governors helps further efforts to call the nation to prayer. (Bolton Aff., Ex. 30 at 1.)

The NDP Task Force also holds a prayer service in the Caucus Room of the Cannon Office Building each year on the National Day of Prayer as an observance, which is attended

by many federal officials and seeks their annual participation. (Bolton Aff., Exs. 32-35, 38, 40-45.) The Cannon Office Building observance by the NDP Task Force is symbolic of thousands of others that take place throughout the country, and overflow crowds each year fill the Cannon Caucus Room and adjoining hallways. (Bolton Aff., Ex. 32 at 5.) The Cannon Office Building is chosen in particular because it represents the seat of government and provides easy access to Congressmen. (Bolton Aff., Ex. 111 at 77.) God TV also now webcasts the Cannon Office Building NDP event. (Bolton Aff., Ex. 111 at 80.)

Representatives of all three branches of government are invited to attend the Cannon Office Building event. (Bolton Aff., Ex. 111 at 77-78.) The federal representatives attend a prayer service, and are invited to speak and often do speak; invited speakers have included members of the judiciary. (Bolton Aff., Ex. 111 at 78.) The NDP Task Force requests that federal officials speaking at the Task Force observance in Washington include a description of the significant role that prayer has played in their personal and professional lives. (Bolton Aff., Ex. 33 at 1-2.)

Participation in NDP Task Force observances of the National Day of Prayer by federal officials is viewed by Mrs. Dobson as "partnering in calling the nation to prayer." (Bolton Aff., Ex. 32 at 4.) The NDP Task Force values the participation of leaders and dignitaries in National Day of Prayer activities. (Bolton Aff., Exs. 23-46.)

Official statements from the President and governors constitute statements of support of the NDP Task Force observance. (Bolton Aff., Ex. 36 at 1.)

The NDP Task Force also has students gather around flagpoles on the National Day of Prayer, including little children. (Bolton Aff., Ex. 111 at 85-86.) The NDP Task Force even has a School Prayer Event Guide put together by a "prayer warrior." (Bolton Aff., Ex. 111 at 167.)

Regional coordinators also ask mayors, city council members or school board members to participate in the National Day of Prayer. (Bolton Aff., Ex. 111 at 24.)

The mission of the NDP Task Force is to encourage personal repentance and prayer, while mobilizing the Christian community. (Bolton Aff., Ex. 51 at 1.) Participation in NDP Task Force observances by public officials is noteworthy and the participants in such observances number in the millions. (Bolton Aff., Exs. 56 and 62.) The NDP Task Force organizes between 30,000 to 40,000 prayer gatherings across the Nation in conjunction with the National Day of Prayer. (Bolton Aff., Ex. 111 at 26.)

The NDP Task Force also seeks "generous contributions to extend its efforts to bring the name of Christ out from behind church walls and into the public front-lines in all fifty states." (Bolton Aff., Ex. 65 at 1.)

T. The NDP Task Force Promotes Active Christian Prayer.

The NDP Task Force promotes the National Day of Prayer as a means to encourage prayer, which involves establishing a relationship with God. (Bolton Aff., Exs. 52-54.)

The NDP Task Force represents a Judeo-Christian expression of the national observance, based on the belief that this country was birthed in prayer and in reverence for the God of the Bible. (Bolton Aff., Ex. 51 at 1.) According to Mrs. Dobson, the United States was founded on the Judeo-Christian system of values, and birthed in prayer, and founded on the God of the Bible. (Bolton Aff., Ex. 111 at 11.)

The NDP Task Force promotes only a Judeo-Christian expression of the National Day of Prayer. (Bolton Aff., Ex. 111 at 11-12, 14, 67.)

The NDP Task Force believes that for true Christians, prayer is communion with God, through which individuals actually experience a relationship with God. (Bolton Aff., Ex. 54 at 1.)

The NDP Task Force chooses an annual theme for each year's National Day of Prayer. (Bolton Aff., Ex. 111 at 56.) The NDP Task Force chooses an annual theme purportedly as a way to bring "unity to the Nation." (Bolton Aff., Ex. 111 at 61.)

The NDP Task Force desires that its annual theme and supporting scripture be incorporated into official proclamations by government officials. (Bolton Aff., Exs. 20-31.) Shirley Dobson supposedly goes before the Lord every year in prayer, and asks Him what is in His heart for our nation, and through prayer, God usually gives Mrs. Dobson a theme for that year. (Bolton Aff., Ex. 111 at 56-57.)

The Bible is the handbook of the NDP Task Force. (Bolton Aff., Ex. 111 at 64.) Prayer from the perspective of the NDP Task Force is related to the relationship with the God of the Bible. (Bolton Aff., Ex. 111 at 64.) The supporting scripture for each National Day of Prayer theme is exclusively chosen from the Bible, a source that is readily recognizable. (Bolton Aff., Ex. 111 at 57.)

U. The NDP Task Force Coordinates A Christian Celebration Of The National Day Of Prayer.

The National Day of Prayer stands as a memorial to our nation's supposed Christian heritage. (Bolton Aff., Exs. 40-41.) The NDP Task Force considers "foundational to our country the understanding that God is the Source of freedom," including the Christian God of the Bible. (Bolton Aff., Ex. 42 at 1.) A tremendous outpouring of prayer and repentance encompasses the nation at the time of the National Day of Prayer as hands join together to cry out to God and hearts are allegedly changed and hope restored. (Bolton Aff., Ex. 43 at 1.)

The NDP Task Force hopes that its annual theme and supporting scripture will draw Americans closer to God. (Bolton Aff., Ex. 44 at 1.)

The NDP Task Force promotes, publicizes and provides resources to "constituents" to help them celebrate the National Day of Prayer. (Bolton Aff., Ex. 111 at 16.) The NDP Task Force limits participation by coordinators and volunteers to persons holding a Judeo-Christian perspective. (Bolton Aff., Ex. 55 at 1.)

V. The National Day Of Prayer Is Highly Divisive.

The National Day of Prayer is highly divisive, amid concerns that it was created by and has been hijacked by fundamentalist Christians, including the NDP Task Force. (Bolton Aff., Exs. 66-92.) 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 National Day of Prayer is intended to promote and encourage religion. (Bolton Aff., Exs. 66-92.)

W. 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. (Bolton Aff., Ex. 101 at 3.) 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. (Bolton Aff., Ex. 101 at 3 and 66 at 4-5.)

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. (Bolton Aff., Ex. 101 at 3 and Ex. 66 at 5.) The NDP Task Force, in effect, is an exclusively Evangelical Christian non-profit organization recognizing only those NDP events which are organized by Evangelical groups. (Bolton Aff., Ex. 101 at 3.)

X. 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 by religious identification. (Bolton Aff., Ex. 105.) Nonbelievers today are reported to represent a significant part of the American population, constituting approximately 15 percent or thirty-four million Americans, in a recent American Religious Identification Survey. (Bolton Aff., Ex. 105.)

IV. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate when the material facts are undisputed and the moving party is entitled to judgment as a matter of law. AviComm, Inc. v. Colorado Public Utilities Commission, 955 P.2d 1023, 1029 (Colo. 1998). Here, both the plaintiffs and the defendants have now moved for summary judgment in their respective favor, and, in fact, the parties do not significantly disagree about the facts as much as they disagree about the legal significance of the facts. The parties' dispute about the legal significance of the undisputed facts, however, does not preclude summary judgment.

Whether Colorado Day of Prayer Proclamations issued by the Governor give the appearance of religious endorsement is the decisive legal question before the court. The defendants argue that proclamations of a Day of Prayer are per se incapable of giving the appearance of endorsement. The defendants, however, reason inconsistently in reaching this conclusion and they ignore most of the factual context in this case, or else they merely assume facts.

The defendants argue, for example, that Day of Prayer Proclamations have a long and ubiquitous history, to such an extent that they supposedly constitute no more than meaningless ceremonial deism. In fact, however, in Colorado, there is no evidence of a long

and ubiquitous history of Day of Prayer Proclamations. The issuance of such proclamations apparently only began in 2004, in response to requests by the National Day of Prayer Task Force, under the direction of Shirley Dobson. For her part, Mrs. Dobson obviously does not request governors and other public officials to issue Day of Prayer Proclamations as mere ceremonial deism. Proclamations are requested because they give credibility to the religious organizing efforts of the NDP Task Force. In short, official proclamations of a Day of Prayer by government officials, including the Colorado Governor, simply are not perceived as merely ceremonial, but rather they are sectarian, divisive and controversial.

The defendants also argue, albeit inconsistently, that Day of Prayer Proclamations constitute a carefully considered acknowledgement of the historical importance of religion. This hypothesis is not supported by evidence or logic, including because the defendants deny that the Governor issues Day of Prayer Proclamations with any thoughtful deliberation about the historical role of religion. The defendants instead emphasize that Day of Prayer Proclamations are issued as a sort of public service to the NDP Task Force. The resulting proclamations, however, do not even expressly make attribution to the NDP Task Force -- on the contrary, the proclamations are intentionally drafted for general applicability throughout the State, without identification of any sponsoring organization. The proclamations declare a Day of Prayer for the entire State of Colorado, but they also include a specific theme and scriptural reference that is exclusively, and identifiably, taken from the Bible. The resulting proclamations, in fact, are issued as official declarations of the Governor and they implicitly commend and exhort prayer.

The defendants largely ignore the undisputed facts relating to the motivations of the NDP Task Force for requesting Day of Prayer Proclamations; the inclusion of patently and exclusively Biblical references in the proclamations; the fact that the NDP Task Force

deliberately seeks out official prayer proclamations in order to give its own religious organizing the credibility and support of government officials; and the fact that official proclamations from government officials, including the Governor of Colorado, are perceived and understood to constitute government support and endorsement of religion. In deciding the parties' Cross-Motions for Summary Judgment, however, the court must consider the evidentiary submissions of the parties, including information that would be known by an objective observer. The Court must be careful, moreover, to not apply the applicable legal standard to merely assumed facts that are inconsistent with the evidentiary record. With that caveat in mind, the plaintiffs respectfully submit that they are entitled to summary judgment in their favor.

V. THE HISTORICAL CONTEXT OF DAYS OF PRAYER.

Every year since 1952, the President of the United States issues an official Prayer Proclamation and dedicates a National Day of Prayer. The President does this because Congress has legislatively mandated that he do so, but the President has not hesitated to issue such Prayer Proclamations, which extol the virtues of prayer and exhort all Americans to engage in prayer--solely for the sake of encouraging prayer itself.

More recently, the Governor of Colorado, and other state governors, have begun issuing Day of Prayer Proclamations without any legislative mandate, but instead to ingratiate themselves with the NDP Task Force and further its religious mission.

The posting of such proclamations on a courthouse door, or mailing them directly to citizens, or handing them out at public employment offices, would unquestionably run afoul of the Constitution, just as publicly disseminating them to all citizens merely compounds the offense. The government, cannot endorse, promote or prefer religion over non-religion, and prayer is quintessentially a religious activity.

National Day of Prayer Proclamations have 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 not only wrongly and unconscionably place the imprimatur of government upon belief in God. They place the stamp of approval upon religious belief, prayer and worship by the highest executive officer of the land. In fact, even the federal National Day of Prayer laws were entirely the brainchild of Protestant evangelicals. The first such law itself was promoted by Billy Graham during a crusade in Washington, D.C. in 1952.

The National Day of Prayer law was adopted almost immediately after its suggestion by Rev. Graham by a Congress which openly cited religious motives that are outside the purview of secular government, such as to "instill faith in an Almighty God," to exhort citizens "to unite in a day of prayer each year . . . reaffirming in a dramatic manner that deep religious conviction which has prevailed throughout the history of the United States." The law itself was enacted for the unconstitutional purpose of ordering the Executive Branch to urge the people of the United States to turn to God in prayer in churches, in groups and as individuals one day every year. The proviso in the 1952 law that the proclamation never be on a Sunday reveals additional intent to take religion out of its private realm of worship on Sundays in the private sphere, and draw attention to prayer through government action on weekdays. By ordering a presidential proclamation it was assured that the President's inappropriate and unconstitutional endorsement of prayer as part of his civil duties would be broadcast throughout the land.

Indeed, Presidents since 1952 have dramatically called on citizens not only to pray, but they have even had the temerity to tell Americans what to pray for, in proclamations that incessantly emphasize the supposed religious character of our government.

The 1988 Amendment which codified the first Thursday in May as the National Day of Prayer was likewise the brainchild of evangelists, namely the National Prayer Committee, whose National Day of Prayer Task Force ("NDP Task Force" hereafter) chair was Vonette Bright, cofounder of the enormously influential and wealthy Campus Crusade for Christ. The change in law was explicitly Mrs. Bright's idea. In addition to pressure by Protestant evangelicals, the National Prayer Committee lined up a rabbi and a priest to lobby for the change.

The stated purpose of changing the National Day of Prayer from a free-floating annual date to the first Thursday in May was to "help bring more certainty to the scheduling of events related to the National Day of Prayer, and permit more effective long-range planning." National Prayer Committee Chairman Pat Boone noted that the roving date "offered little advance notice to adequately inform the grass roots constituencies," but a "definite date will allow millions of citizens ... who have explicit faith in a Prayer-hearing God to be informed about this significant date in our country."

Since passage of the 1988 law, the NDP Task Force has become a publicity machine, pressuring public officials, including the President and all the state governors, to issue National Day of Prayer proclamations consistent with the NDP Task Force's "Judeo-Christian" perspective, so that the NDP Task Force can use the first Thursday in May to mobilize Christian-centered events, rallies, statements and activities at all 50 capitol and government buildings, as well as private churches, across the land.

The plaintiffs do not ask the court to determine that the citizens of Colorado may not pray in their personal lives or attend church to pray, or privately sponsor their own day of prayer. On the contrary, the plaintiffs support both the Free Exercise Clause as well as the Establishment Clause. The plaintiffs also are not seeking to restrain the Governor from exercising his free speech rights, such as by mentioning his or her religious views in public, or in a speech, or, for example, from concluding remarks with a phrase such as “God bless America.” The plaintiffs, however, do ask the court to declare unconstitutional the proclaiming of a Colorado Day of Prayer and the issuance of Prayer Proclamations that give official government sanction to the endorsement of religion by exhorting the citizens of Colorado to acknowledge and engage in the religious ritual of prayer.

The plaintiffs are not obligated to meekly avert their eyes and cover their ears when the government disseminates unconstitutional speech, which unlike private speech, may not endorse religion. The defendants imply that these individual plaintiffs should merely forego being informed, so as to avoid objectionable speech, but an informed Citizenry is a duty and it is a strength.

Forced or coercive exposure to religious endorsement is not the test of the Establishment Clause. Coercion is not the touchstone of the Establishment 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. On the contrary, this compounds the offense by emphasizing that religious believers are favored, while non-believers are political outsiders.

The defendants do not recognize their own deafness to the offence caused by extolling prayer, while declaring a statewide Day of Prayer. Many citizens, including the plaintiffs, do not believe in God -- or even believe that prayer or religion is a useful and

beneficent force in the affairs of men and nations. As Justice Black stated in Zorach v. Clauson, 343 U.S. 306, 318-19 (1952) (Black, J., dissenting):

It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the Constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere, zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim, and kill those they branded "heretics," "atheists," or "agnostics." The First Amendment was therefore to ensure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters whom they could not convert to their faith. Now, as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all non-believers can be maintained.

Thomas Jefferson also recognized that belief in the existence of God is not a prescription for virtue and comfort. In Jefferson's letter to his nephew, Peter Carr, written from Paris on August 10, 1787, Jefferson famously observed:

Question with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason than that of blindfolded fear. . . Do not be frightened from this inquiry by any fear of its consequences. If it ends in a belief that there is no God, you will find inducements to virtue in the comfort and pleasantness you feel in its exercise, and the love of others which it will procure you.

President Jefferson, a prime source on the meaning of the Establishment Clause, refused himself to issue such proclamations. President Jefferson wrote to Reverend Samuel Miller in 1808 explaining why he refused a request to issue a day of prayer:

I consider the government of the U.S. as interdicted by the constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises...Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government...But it is only proposed that I should *recommend*, not prescribe a day of fasting and 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. It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion. And does the change in the nature of

the penalty make the recommend the less *a law* of conduct for those to whom it is directed? Fasting & prayer are religious exercises. The enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it. (Thomas Jefferson: Writings, pgs. 1186-1187, Merrill D. Peterson, ed., New York: Library of America, 1994.)

The exhortations of an official Day of Prayer are not based on any supposed intrinsic utility of religion, just as they are not justified by the presumed numerical insignificance of non-believers. On the contrary, according to an authoritative religious identification survey, at least 15%, or 34 million adult Americans, are now non-religious. Less than 70% of Americans believe in a traditional theological concept of a personal God. The non-religious are the fastest-growing segment of the U.S. population, by religious identification, according to the American Religious Identification Singular Survey. While it may be true that many American are religious in their personal lives, moreover, “we do not count heads before enforcing the Establishment Clause.” McCreary County, Kentucky v. ACLU of Kentucky, 545 U.S. 844, 878 (O’Connor, J., concurring) (2005). In fact, being a member of the non-religious community is not a “self-inflicted injury,” as the defendants imply.

The defendants, in the end, incorrectly argue that the Supreme Court has already determined the constitutionality of Day of Prayer Proclamations; that is not true. The Supreme Court's prior references to Prayer Proclamations do not answer the question now before this court, which question cannot be determined in the abstract. The defendants also indulge and perpetuate historical inaccuracies in defending the officially proclaimed Days of Prayer, which are neither ubiquitous, nor without controversy and divisiveness.

The defendants misunderstand and distort the history of the Establishment Clause and the separation of church and state. The defendants also ignore the context and content of Prayer Day Proclamations and dedications, in which previous Presidents and Governors have

previously aligned with the National Day of Prayer Task Force, a messianic evangelical organization. The NDP Task Force purpose in soliciting government proclamations as in this case provides content and context which is relevant to the application of the reasonable observer test for determining improper endorsement.

The defendants incorrectly invite this court to rule as a matter of law that Prayer Day Proclamations inherently comply with the Colorado Constitution. No judicial authority supports the proposition that devotional governmental speech, such as Prayer Day Proclamations, is *per se* constitutional in all circumstances. Official dedications of a National Day of Prayer and Presidential Prayer Proclamations send a message to a reasonable observer that a preference for religion is being communicated -- that is exactly why the NDP Task Force solicits such proclamations. Government speech is tolerated under the Establishment Clause only where no religious endorsement occurs. Here, the purpose and effect of Prayer Day Proclamations are precisely the opposite; they intentionally encourage and promote active participation in religious practices, and implicitly exclude non-believing citizens.

It is axiomatic that a crucial difference exists between government and private speech that endorses religion: Government speech endorsing religion is forbidden by the Establishment Clause. The Board of Education of West Side Community Schools (District 66) v. Mergens, 496 U.S. 226, 250 (1990). The Supreme Court has consistently recognized this "crucial difference" between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion. Here, government speech is plainly at issue, even if available upon demand, which is ultimately the defendants' defense of last resort.

The foreseeable audience for a Day of Prayer Proclamation makes such proclamations distinguishable from practices like legislative prayer. The Supreme Court has already recognized in Allegheny County v. ACLU, 492 U.S. 573, 603 n. 52 (1989), that Presidential Prayer Proclamations stand on a different footing than "ceremonial deism" such as nonsectarian 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.

When the intended audience for government speech is not internal, legal responsibility may certainly include speech that is republished, such as by the media. The principle is already well recognized in the law that the author or originator of speech may be liable for republication or repetition by third persons if such repetition was foreseeable. Similarly, government speakers, like other speakers, may intend or foresee that their speech will be broadcast through intermediaries, including the print and TV media. That is the case here with the Governor's proclamations, which are used by the NDP Task Force like letters of reference. Such government speech is prohibited endorsement pure and simple.

VI. DAY OF PRAYER PRAYER PROCLAMATIONS GIVE THE APPEARANCE OF RELIGIOUS ENDORSEMENT.

A. The Endorsement Test is Fact Dependent.

Proclaiming a National Day of Prayer has been described by the Supreme Court, in Allegheny County, 492 U.S. at 603 n. 52, as "an exhortation from government to the people that they engage in religious conduct." In addition, Day of Prayer Proclamations in Colorado are ghost-written by the NDP Task Force, a patently evangelical organization dedicated to the promotion of Christianity through public prayer. As a result, the content and

context of Day of Prayer Proclamations give the appearance of endorsement, including specifically the Christian faith, in violation of the Colorado Constitution, which 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, 1315 (Colo. 1986).

The defendants initially invite the court to ignore the history of the over-arching National Day of Prayer legislation adopted in 1952, at the instigation of Billy Graham, as well as the 1988 Act requiring that the first Thursday in May be the fixed National Day of Prayer, in response to lobbying by conservative religious groups, particularly the nascent National Prayer Committee and the NDP Task Force. The 1988 Act, in particular, facilitated the mobilization of the religious viewpoint of the lobbyists behind the Act.

The defendants also ignore the undisputed historical fact that proclamations of a Day of Prayer are perceived as religious endorsement by the government, not just an acknowledgment of religion. Annual Proclamations by government officials, as a result, are critical to religious organizers, i.e., the NDP Task Force.

The defendants ignore virtually all of the facts relating to the context of Day of Prayer Proclamations, as well as the source of the content for such Proclamations, incorporated at the behest of the NDP Task Force. The defendants, nonetheless, argue that an "objective observer" of Day of Prayer Proclamations would not construe them as religious endorsements - - but presumably only if the "objective observer" is deemed not to be aware of the history and context of the Prayer Proclamations, including the role of the NDP Task Force.

The Supreme Court's endorsement test considers whether a reasonable observer aware of the history and context of a religious event would find the event to have the effect of favoring or disfavoring religion. The courts are to ask whether an objective, reasonable

observer, aware of the history and context in which the religious speech occurs, would fairly understand the speech to be a government endorsement of religion. O'Connor v. Washburn University, 416 F.3d 1216, 1227 (10th Cir. 2005); Sante Fe Independent School District v. Doe, 530 U.S. 290, 308 (2000). This standard presupposes a person of ordinary understanding and sensibility, familiar with the circumstances surrounding the government's speech and presumed to know more than most actual members of a given community. Id.; Green v. Haskell County Board of Commissioners, 568 F.3d 784, 799-800 (10th Cir. 2009).

The Establishment Clause is concerned with the message that the government may send to its citizenry about the significance of religion. See Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), cited in American Jewish Congress v. City of Chicago, 827 F.2d 120, 126 (7th Cir. 1987). Government messages of endorsement and preference impermissibly send a prohibited signal to non-adherents "that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." Lynch, 465 U.S. at 688. See also McCreary County, 545 U.S. at 860-61.

The test of endorsement under the Establishment Clause is analogous to the standard for determining whether a statement suggests a discriminatory preference to an ordinary reader or listener. The recognized standard for determining whether a statement evinces a prohibited preference is whether the statement "suggests a preference to the ordinary reader or listener." Fair Housing Congress v. Weber, 993 F.Supp 1286, 1290 (C.D. Cal. 1997). A violation occurs when a communication either implies an obvious preference or where the ordinary observer would infer a particular preference. Id. at 1291, citing Blomgren v. Ogle, 850 F.Supp. 1427, 1440 (E.D. Wash. 1993). The relevant standard applied in such cases is defined in terms of "the natural interpretation of the ordinary reader." Id., citing United

States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972). If a message suggests to an ordinary reader a proscribed preference, then the law is violated. Id. The ordinary reader "is neither the most suspicious, nor the most insensitive of our citizenry." Ragin v. New York Times Co., 923 F.2d 995, 1002 (2nd Cir. 1991).

In the present case, the defendants not only ignore the factual context of concerted action between the Governor and the NDP Task Force; they also ignore the fact that a reasonable observer is aware that prayer is a quintessential religious practice, and that admonitions to pray on a specified day inherently give the appearance of endorsement. Wallace v. Jaffree, 472 U.S. 38, 56 (1985). Promoting an intrinsically religious practice like prayer, therefore, will never satisfy the secular purpose requirement necessary for constitutionality. Jager v. Douglas County School District, 862 F.2d 824, 830 (11th Cir. 1989). In fact, these principles were upheld in Freedom From Religion Foundation v. Webb, 93-CV-6056 (District Court, City and County of Denver, Colorado, 1993), in which Judge McMullen enjoined Denver Mayor Wellington Webb from actively participating in a Day of Prayer Against Violence ceremony:

The challenged conduct here is Mayor Webb's press release and press conference endorsing the Day of Prayer. Since prayer is exclusively a religious act, the endorsement of a Day of Prayer would logically be interpreted by a reasonable person as an endorsement of religion. Because from all appearances, Mayor Webb was acting in his official capacity in issuing the press release and conducting the press conference endorsing the Day of Prayer, the Court concludes that a reasonable person would interpret his conduct as governmental endorsement of religion. As such, it violates the Establishment Clause.

The constitutionality of Day of Prayer Proclamations cannot be properly decided without considering the evidence of history and context. The defendants, however, are oblivious to the present day reality that the Day of Prayer has become exactly what the

Establishment Clause is intended to prevent: A battleground with the government deeply involved and impermissibly taking sides.

Here, the record includes overwhelming evidence of the joint action between the Governor's Office and the NDP Task Force as to the dedication and celebration of official Days of Prayer, including collaboration on the content of the official Prayer Proclamations. The defendants, however, ignore all of the factual detail about this relationship with the NDP Task Force, which relationship provides context that is relevant to whether a "reasonable observer" would find that Day of Prayer Proclamations give the appearance of official endorsement of religion.

Context and content matter in determining whether public officials have crossed the line between "benign ceremonial deism" and actions that give the appearance of official endorsement of religion. See Allegheny County, 492 U.S. at 598-600. The defendants, nonetheless, simply ignore the evidence as if it did not exist. This is not a proper approach for summary judgment. The court must instead consider the evidence and draw reasonable inferences, including inferences about the very reason that official proclamations are deemed so critical by the NDP Task Force.

B. The Supreme Court Has Not Approved Day of Prayer Proclamations.

The defendants incorrectly argue that Prayer Proclamations constitute nothing more than benign deism already approved by the Supreme Court. The facts tell a different story. Prayer Proclamations are not just "honorary;" they are hortatory.

The Report of the Senate Committee on the Judiciary relating to the National Day of Prayer belies the defendants' claim that the National Day of Prayer itself is simply the acknowledgment of a tradition. The claim that Congress intended the National Day of

Prayer Enactment for the secular purpose of acknowledging the role of faith in the Nation's history is simply not true. Instead, the Senate Report describes the intent of Congress for the people of this country to "reaffirm" the Nation's supposed deep religious conviction:

It would certainly be appropriate if, pursuant to this resolution and the proclamation it urges, that the people of this country were to unite in a day of prayer each year, each in accordance with his own religious faith, thus reaffirming in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States. (See Exhibit A attached to this Brief.)

The intent to "reaffirm in a dramatic manner" the supposed religious convictions of the nation does not reflect the claimed secular purpose of merely acknowledging the supposed role of religion in the nation's history. Instead the purpose of the National Day of Prayer was "to have the public assemble in churches, synagogues and other places of worship to offer prayers." The Passage of the Act, moreover, occurred only after weeks of crusading by Reverend Billy Graham.

Significantly, the Senate Report on the National Day of Prayer Legislation also exposes a very troublesome historical inaccuracy. The Senate Report states that "when the delegates to the Constitutional Convention encountered difficulties in the writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions." That statement is wrong, but it lies at the core of the defendants' attempt to justify the legislative enactment calling for a National Day of Prayer in 1952, more than 150 years after the signing of the United States Constitution. Leo Pfeffer, Church, State & Freedom (1967), describes the real facts at pages 121-122, in his scholarly examination of the Establishment Clause:

It is perhaps symbolic of the difference in the relationship of state and religion between the Continental Congress and the new government established by the Constitutional Convention of 1787, that whereas the Continental Congress instituted the practice of daily prayers immediately on first convening, the

Convention met for four months without any recitation of prayers. After the Convention had been in session for a month, the octogenarian Franklin, who in earlier years had been pretty much of a Deist, moved "that henceforth prayers imploring the assistance of heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service." The motion was received politely though not without embarrassment. According to the records of the Convention, "After several unsuccessful attempts for silently postponing the matter by adjourning, the adjournment was at length carried, without any vote on the motion."

More than symbolic, it is deeply significant that whereas there was scarcely a document or promulgation issued by the Continental Congress that did not contain an invocation to "God" or one of the numerous synonyms of the Deity, the Constitution emerging from the Convention contained no such invocation or reference. This omission was not inadvertent.

The different treatments of religion by the Continental Congress and the Constitutional Convention is significant in its implications about the supposed historical meaning of the Establishment Clause. Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (1986), notes this significance, as well as the historical confusion still being perpetuated:

The Constitutional Convention of 1787, which framed the Constitution of the United States, gave only slight attention to the subject of a Bill of Rights and even less to the subject of religion. In contrast to the Declaration of Independence and to many acts of the Continental Congress, the Constitution contains no references to God; the Convention did not even invoke divine guidance for its deliberations. Its finished product made no reference to religion except to prohibit a religious test as a qualification for federal office holders.

There are no other references to the subject of religion at the Constitutional Convention, except for Benjamin Franklin's speech at a critical juncture of the proceedings on the reason that prayers should open its sessions. President Ronald Reagan, who sometimes reinvents history, mistakenly declared that as a result of Franklin's motion, "From that day on they opened all the Constitutional meetings with a prayer." Practical considerations - an unwillingness to let the public think the Convention was in trouble, lack of money to pay a minister, and deference to Philadelphia's Quakers - resulted in the death of the Franklin motion. The Convention, he noted, "Except three or four persons, thought prayers unnecessary."

Id. at 63-64.

They may have prayed at the Continental Congress, but they did not pray at the Constitutional Convention. That is a distinction that makes a difference. The Articles of Confederation adopted by the Continental Congress do not provide a litmus for the interpretation of the Establishment Clause of the United States Constitution. The Articles of Confederation were ratified on March 1, 1771, but they lasted only seven years. They were seriously defective. The Articles were subsequently replaced by the Constitution on June 21, 1788, and that Constitution has lasted more than 200 years. Whereas the Articles of Confederation, moreover, hardly recognized the separation between church and state, the Constitution subsequently incorporated that separation, with continuing success.

In fact, the major architects of the Constitution vigorously opposed government meddling in religion, including the issuance of proclamations of prayer. Thomas Jefferson, for one, 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 own hands, where the Constitution has deposited it.'" Edwin S. Gaustad, Faith of Our Fathers: Religion in the New Nation, at p. 45 (1987).

Jefferson's own explanation for refusing to issue prayer proclamations, significantly, evidences that the divisiveness of such proclamations is of long standing. James Madison shared Jefferson's view regarding the issuance of prayer proclamations. Madison's views are particularly compelling because Madison is falsely cited as a proponent of the Constitutionality of dedicated days of prayer. He was not. Although Madison did stray from

his convictions during a time of war, he did not believe his actions were constitutional. Levy describes the circumstances:

In his "Detached Memoranda" Madison also stated that "religious proclamations by the Executive recommending Thanksgivings and fasts are shoots from the same root with the Legislative Acts reviewed." Madison made this remarkable judgment about so innocuous an act as a Presidential recommendation for a day of Thanksgiving, another extreme example of non-preference on a matter respecting religion. He regarded such recommendations as violating the First Amendment: "They seem" he wrote, "to imply and certainly nourish the erroneous idea of a national religion." As a President, however, Madison had proclaimed several days of fast and thanksgiving, but he found extenuating circumstances in the fact that he was Chief Executive during the time a war was fought on national soil.

Levy, The Establishment Clause: Religion and the First Amendment, at 99-100. See also Pfeffer, Church, State & Freedom, at 266-67:

Madison was unable to resist the demands to proclaim a day of thanksgiving, but after retiring from the Presidency he set forth five objections to the practice: (1) an executive proclamation can be only a recommendation, and an advisory government is a contradiction in terms; (2) in any event, it cannot act in Ecclesiastical matters; (3) a Presidential proclamation implies the erroneous idea of a national religion; (4) the tenancy of the practice is "to narrow the recommendation to the standard of the predominant sect," as is evidenced by Adams' calling for a Christian worship; and (5) "the liability of the practice to a subserviency to political views, to the scandal of religion as well as the increase of party animosities."

Even George Washington, often relied upon as authority for the constitutionality of Presidential Prayer Proclamations, involved a far different reality than depicted. In the first place, it would be:

... entirely erroneous to assume that the constitutionality of government proclamations of thanksgiving and prayer has always been accepted without question....when in the first Congress after the adoption of the Federal Constitution, a resolution was offered to request the President to "recommend to the people of the United States a day of Thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many signal favours of the Almighty God," objection was raised by another member of Congress that "it is a business with which Congress has nothing to do; it is a religious matter, and as such is proscribed to us." (Leo Pfeffer, Church, State and Freedom, pg. 265 (1967).

In the event, Washington's 1789 Day of Thanksgiving was never challenged, but significantly, Marbury had not even been decided so as to provide a basis for suit. President Washington, moreover, might well be distressed that his name and actions are now being invoked as justification for an Act of Congress establishing a National Day of Prayer more than 150 years later. According to Thomas Jefferson, President Washington was not a Christian, (Jefferson Memoirs, Vol IV, pg. 512), and he was poignantly sensitive to the divisiveness of religion. President Washington, in a letter to Sir Edward Newenham, on October 20, 1792, wrote:

Of all the animosities which have existed among mankind, those which are caused by difference of sentiment and religion appear to be the most inveterate and distressing, and ought most to be deprecated. I was in hopes that the enlightened and liberal policy which has marked the present age would at least have reconciled Christians of every denomination, so far that we should never again see their religious disputes carried to such a pitch as to endanger the peace of society.

As the largest property holder in the parish in which he lived in Virginia, President Washington was for a time a vestryman, a political office in Virginia. He occasionally attended the Protestant Episcopal church with his wife Martha, but did not take part in communion. The foremost myth maker about President Washington was Parson Mason L. Weems, whose Life of Washington (1800) promoted the cherry tree story and other disinformation, such as the claim that Washington prayed in the woods at Valley Forge in the hard Revolutionary War winter of 1777-78. This make-believe scene has been painted, and even appeared on stamps, and is repeated in several of the National Day of Prayer Proclamations, but the myth is not true, and in fact, Washington's diaries reveal that he seldom attended church and frequently walked and traveled on the Sabbath. Washington has been claimed by many religions, but he kept his private beliefs to himself. (The Religious Beliefs of Our Presidents, From Washington to FDR, Franklin Steiner, pgs. 14-41.)

Other historical inaccuracies also are resorted to in support of the National Day of Prayer, including reference to President Lincoln's Gettysburg Address, which supposedly included the words "under God." In fact, the original address, from which Lincoln read, includes no reference to a nation "under God," nor does Lincoln's later second draft. Only a later "commemorative" version of the Gettysburg Address by Lincoln, an unorthodox deist, added "under God."

Faulty history, in short, simply cannot be used to support the constitutionality of Prayer Day Proclamations; nor can misinterpretations of Supreme Court precedent. The United States Supreme Court has recognized in Allegheny v. American Civil Liberties Union, 492 U.S. at 603 n. 52, that official Prayer Proclamations stand on different footing than "ceremonial deism" such as 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.

Significantly, the Court's doubt about the constitutionality of Prayer Day Proclamations in County of Allegheny came after the Court's decision in Lynch v. Donnelly, 465 U.S. 668, 675 (1984), upon which the defendants rely. The Court concluded in Allegheny that Lynch teaches only that the government may celebrate holidays with religious significance if done in a way that does not endorse the religious doctrine or aspect of the holiday. Allegheny, 492 U.S. at 601.

The Supreme Court's concern about religious endorsement has found voice in subsequent recent decisions as well. For example, in McCreary County, 545 U.S. at 861, the Court noted 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." As a result, the Supreme Court has upheld Sunday closing statutes on secular grounds, after finding that the government had forsaken the religious purposes behind predecessor laws. Id.

The Supreme Court further noted in McCreary the difference 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." 545 U.S. at 877 n. 24.

Finally, the Supreme Court noted 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) (Justice 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, in short, has not determined that Prayer Day Proclamations are constitutional, even without the evidence of joint action with patently evangelical organizations, which marks this case. The defendants' argument to the contrary is wrong.

Nor has the constitutionality of Prayer Proclamations been decided ancillary to any judicial recognition of holidays like Thanksgiving and Christmas. Judicial acknowledgment of such holidays, in fact, has been limited to instances where the justification was based upon

the secular aspects of such holidays. By contrast, courts have not sanctioned government recognition of holidays where the justification was based upon "religious connotations." For example, in Ganulin v. United States, F. Supp. 2d 824, 834-35 (S.D. Oh.1999), the Court concluded that the United States did not violate the Establishment Clause by giving federal employees a paid vacation day on Christmas, but only because the government was not recognizing the religious significance of the holiday. According to the court, "the conclusion that Christmas has a secular purpose is supported by cases analyzing the constitutionality of school, office, and courthouse closings on other days traditionally celebrated as holy days by Christians," including Good Friday. Id., at 833.

In Granceier v. Middleton, 173 F.3d 568, 574 (6th Cir. 1999), the Court similarly summarized the law in regard to Good Friday closings, finally concluding that holiday closings are suspect "if the purpose for which they are instituted is religious." *See also* Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991); Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995); and Bridenbaugh v. O'Bannon, 185 F.3d 796 (7th Cir. 1999). Government recognition of various holidays with supposed religious connotations has been upheld only so long as the recognition is not based on the religious significance of the holiday. That distinction lies at the heart of the Supreme Court's Allegheny decision regarding the symbolism of government speech.

In short, the supposed historical support for the constitutionality of the National Day of Prayer is lacking -- and non-responsive to the necessary legal analysis to resolve the question. Professor Pfeffer cogently rebuts the reasoning that "appeals to the Almighty in the message of the Chief Executive might be objected to by a fastidious atheist or agnostic," noting:

This reasoning assumes that those who initiated or accepted the references to God in any particular document anticipated and were willing that the reference be taken as authority justifying the particular practice in question. There is rarely any evidence to support such an assumption; on the contrary, it is reasonable to assume that many of the original framers of the document would have opposed the reference had they anticipated the use to which it was later put. . . these references to God that are used to justify concrete practices are themselves assumed to be constitutional only because they have not been adjudged unconstitutional. . .

Finally, and most important, the question whether particular acts are constitutional must be determined by the Constitution, and that document does not contain any reference to God. This omission was not accidental or inadvertent, and was the basis of much opposition to the Constitution. Citing references to God in court oaths, legends on coins, Presidential Proclamations and the like would appear to be relying on secondary evidence, where the primary evidence does not sustain the convention thought to be proved. Put somewhat differently, when Justice Douglas in the Zorach case or Justice Stewart in Engle v. Vitale cited references to God and Presidential Proclamations in courtroom oaths to prove that the Constitution does not require “that in every and all respects there shall be a separation of church and state” nor prohibited released-time religious instruction or public school sponsored prayer recitations, the omission of reference to God in that Constitution might be cited with at least equal force and logic for the direct reverse of the proposition. (Pfeffer, Church, State and Freedom, pg. 239 (1967)).

C. Government Speech Must Be Evaluated By Content and Context.

Even with public displays of Nativity scenes, the content and context of the display must be considered in order to determine whether any particular display gives the appearance of endorsement of the religious aspects of the Christmas holiday season. Courts have not simply generalized that religious holiday displays are constitutionally acceptable. Public displays, instead, are carefully scrutinized for any appearance of governmental endorsement of the religious significance of the holiday. Hence, in Allegheny, the Supreme Court concluded that the display of a creche had an unconstitutional effect, but a menorah display was allowed because that display in its particular physical setting was deemed a visual symbol for a holiday with a secular dimension.

When employing the proper analytical approach, therefore, a court is charged with the responsibility of assessing the totality of the circumstances “to determine whether a reasonable person would believe that government speech amounts to an endorsement of religion.” Books v. City of Elkhart, 235 F.3d 292, 304 (7th Cir. 2000). The government’s use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government’s use of religious symbolism depends on its context. Id.

The appropriate emphasis has remained squarely on evaluating the totality of the circumstances when judging the constitutionality of government speech, including in the Supreme Court’s recent Ten Commandments decisions in McCreary and Van Orden v. Perry, 545 U.S. 677 (2005). In McCreary and Van Orden, the Supreme Court reached different conclusions as to the constitutionality of challenged Ten Commandments displays based upon the different circumstances and context of each display. Neither decision, however, leaves any doubt that if an objective observer could conclude from appearances and historic knowledge that the government was demonstrating a religious preference, then the Establishment Clause would be violated.

The concept of "ceremonial deism" also is dependent upon the conclusion that a reasonable observer would not view a religious display or 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). This determination, as noted, necessarily involves evaluation of context and content, including circumstances that may change with the passage of time as the actions and motivations of officials change.

Even practices such as legislative prayer are not constitutionally acceptable in all circumstances, as Justice Blackmun recognized 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." See also Hinrichs v. Bosma, 440 F.3d 393, 399 (7th Cir. 2006). Nor does one acquire a vested or protected right in violation of the Constitution. Marsh v. Chambers, 463 U.S. 783, 790 (1983).

Here, the defendants avoid the essential analysis. They incorrectly equate the legislative prayer in Marsh with Day of Prayer Proclamations which are solicited to help exhort participation in religious activity. They try to equate Thanksgiving and Memorial Day Proclamations marked by prayer with Proclamations extolling and exhorting prayer for its own sake. The two situations are different, and the facts of record in this case establish that the Day of Prayer is seen as an endorsement of religion, and one that is highly divisive. Finally, the defendants incorrectly claim that the Day of Prayer supposedly reflects an unbroken history of official acknowledgment of the role of religion in American life from at least 1789, never mind that Colorado Day of Prayer proclamations originated in 2004 -- at the behest of the NDP Task Force. In any event, the premise is not true, as some of the Presidential Proclamations even contradict this claim. For instance, the 1987 National Day of Prayer by Ronald Reagan acknowledged only intermittent Day of Prayer Proclamations before 1952:

In 1952 the Congress of the United States, resuming a tradition observed by the Continental Congress from 1776 to 1783 and followed intermittently thereafter, adopted a resolution calling on the President to set aside and proclaim a suitable day each year as a National Day of Prayer.

In 1983 President Reagan's National Day of Prayer Proclamation similarly noted:

Two hundred years ago in 1783, the Treaty of Paris officially ended the long, weary Revolutionary War during which a National Day of Prayer had been proclaimed every Spring for eight years. When peace came, the National Day of Prayer was forgotten.

Government speech, whether it involves legislative prayer, official Prayer Proclamations, government displays of Ten Commandments, or other religious symbols, must be evaluated in the particular circumstances of each case in order to determine whether the speech impermissibly endorses religion. In the present case, therefore, the question immediately before the court is whether the facts and circumstances relating to Colorado Day of Prayer Proclamations would lead a reasonable observer to find the appearance of endorsement.

D. The Role Of The NDP Task Force Is Part Of The Relevant Content And Context, But Ignored By The Defendants.

The relevant context in this case involves the Governor issuing Day of Prayer Proclamations in celebratory and festive circumstances, whereby citizens are encouraged to engage in prayer. The circumstances indicate a preference for religion, including especially Christianity, and the proclaimed Prayer Days involve controversial and divisive exhortations to pray.

Day of Prayer Proclamations also evidence joint action with evangelical Christian organizations, including the NDP Task Force. The Governor's Prayer Proclamations for 2004-2008 each expressly incorporated the preselected Biblical quote recommended by the NDP Task Force. A reasonable observer would know that these scriptural references were derived from the NDP Task Force, which selects a single theme to be used by the President and the governors of all 50 states. By agreeing to incorporate the NDP Task Force's annual theme, the Governor created the appearance of endorsement of the NDP Task Force. The alliance with the NDP Task Force creates the intended impression that the NDP Task Force

and government are working hand-in-glove in sponsoring the National Day of Prayer -- a situation that remains fully capable of repetition.

Nor has the government aligned with a "benign" nondenominational organization. The NDP Task Force is a virulently Christian organization; its organization and promotion of the National Day of Prayer and corresponding state Prayer Days are based on exclusively Judeo-Christian principles; and the NDP Task Force Prayer Day dedications are not passive acknowledgments of the historical significance of religion - - the NDP Task Force claims to publicize and preserve America's alleged Christian heritage, to encourage and emphasize prayer, and to glorify the Lord in word and deed.

Proper consideration of Day of Prayer Proclamations must also take into account the inherent nature of prayer. In Jaffree v. Wallace, 705 F.2d 1526, 1534-35 (11th Cir. 1983), the Court emphasized that prayer is the quintessential religious practice, such that no secular purpose generally can be inferred. See also North Carolina Civil Liberties Union v. Constangy, 947 F.2d 1145, 1150 (4th Cir. 1991) (an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the Lemon Test, citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)). Moreover, exhortations from government officials to engage in religious conduct, by proclaiming a Day of Prayer, are distinguishable from Thanksgiving and Memorial Day Proclamations, which holidays also have non-religious significance and which are celebrated by non-believers. County of Allegheny, 492 U.S. at 603 n. 52. Similarly, one court has found that prayer at Presidential Inaugurals does not have the sole purpose of encouraging prayer for its own sake. The National Day of Prayer, by contrast, involves "reaffirmation" by action and is blatantly exclusive of atheists and agnostics.

The circumstances of the present case, including the proclaiming of official Prayer Days, constitute calls to action. Day of Prayer Proclamations are issued in a context in which prayer is being promoted and extolled as a religious phenomenon. Prayer is being promoted as and for the sake of religion. There is no secular rationale for Day of Prayer celebrations marked by the Governor's Prayer Proclamations. The sole rationale is the encouragement of prayer by government, at least by expressed support. The NDP Task Force deliberately seeks official proclamations to aid and abet its religious mission. Mrs. Dobson knows what makes the ball roll, and so does any reasonable observer.

The history of Proclamations declaring a Colorado Day of Prayer establishes the facial problem with proclaiming a state-wide event, even as a public relations move. Proclamations declaring a Day of Prayer, in fact, eviscerate the prohibition on government speech endorsing religion. Such proclamations constitute government speech that unconstitutionally gives preferential support to a pro-prayer viewpoint in contrast to the views of non-believers. See Mercier v. LaCrosse, 305 F. Supp. 2d 999, 1011 (W.D. Wis. 2004). This viewpoint preference, on a matter proscribed by the Colorado Constitution, can and should be redressed by enjoining future Day of Prayer Proclamations by the Governor.

**VII. THE PLAINTIFFS ARE ENTITLED TO INJUNCTIVE
RELIEF PROHIBITING FUTURE
COLORADO DAY OF PRAYER PROCLAMATIONS.**

The defendants finally argue that even if past proclamations of a Colorado Day of Prayer are unconstitutional, the Court nonetheless should grant no prospective relief to the plaintiffs. Although there is no evidence that the Governor intends to discontinue issuing Day of Prayer Proclamations upon request, the defendants imply that it is speculative whether such future proclamations will be forthcoming. The defendants disingenuously make this argument, however, because the Governor has not disavowed the practice of

issuing Day of Prayer Proclamations, nor has he even announced a temporary moratorium. The defendants do not suggest that any reason exists to believe the Governor will discontinue issuing annual Day of Prayer Proclamations, as he did this year. The defendants' argument, in short, would have the practical effect of insulating in perpetuity a challenged practice that occurs every year.

This case fits comfortably within group of disputes "capable of repetition, yet evading review." See Davis v. Federal Elections Commission, 128 S. Ct. 2759, 2769 (2008). Where challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and a reasonable expectation exists that the same conduct will occur in the future, relief is available from the courts. That is clearly the case here -- beyond speculation.

Even if the Governor had unexpectedly chose to impose a moratorium on further Prayer Proclamations, that would not moot the plaintiffs' case or make it unduly speculative. Voluntary cessation of a challenged practice does not moot a pending action. A party cannot avoid judicial accountability by temporarily altering questionable behavior. See Pleasureland Museum, Inv. v. Beutter, 288 F.3d 988, 999 (7th Cir. 2002). The Supreme Court, accordingly, uses a very stringent standard for determining whether an issue has been rendered moot, even by a defendant's voluntary conduct: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968). The party asserting mootness, moreover, bears a heavy burden of persuading the court that there is no reasonable expectation that challenged conduct will re-occur in the future. Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 189 (2000).

Here, the defendants have not satisfied their "heavy burden." In fact, they point to no evidence that the Governor has implemented an institutional prohibition on future Day of Prayer Proclamations, which have continued through this year. In these circumstances, the defendants' claim that future relief is unwarranted on grounds of speculation is totally unsupported, even by so much as a purported declaration of a temporary moratorium. But a moratorium would not be a basis for the defendants to evade judicial relief any way, at least where a moratorium was not institutionally permanent. Cf. City of Los Angeles v. Lions, 461 U.S. 95, 97-98 (1983); White v. Lee, 227 F.3d 1214, 1243 (9th Cir. 2000).

Finally, the defendants misapprehend the protection for individual freedom of expression under Colorado Constitution Art. II, Sec. 10. Day of Prayer Proclamations, officially issued by the Governor's Office, constitute government speech, rather than private individual expression. That is why the government may impose restrictions on government speech that would not be allowable as restrictions on private speech; it is also why the government cannot engage in speech that endorses religion, while private individuals may. The defendants, in short, simply do not grasp the significance of the difference between government speech and private speech.

The plaintiffs have met the requirements for injunctive relief in this case, and therefore, it is proper for the Court to issue an injunction. The plaintiffs have established the merits of their claim, and continued harm will result unless an injunction is issued. The threatened continuation of the defendants' constitutional violation, moreover, outweighs any harm that an injunction may cause, which will not adversely affect the public interest. The Governor will engage in substantially the same type of conduct at issue in this case, and such conduct will continue to cause harm to the plaintiffs unless enjoined. Such an injunction will not adversely affect the public interest. On the contrary, an injunction against future Day of

Prayer Proclamations will serve the public interest by enforcing compliance by the defendants with the obligations of the Colorado Constitution.

CONCLUSION

For all of the above reasons, the court should deny the defendants' Motion for Summary Judgment and grant the plaintiffs' Cross-Motion for Summary Judgment.

Respectfully submitted,

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