

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>Plaintiffs:</p> <p>FREEDOM FROM RELIGION FOUNDATION, INC., MIKE SMITH, DAVID HABECKER, TIMOTHY G. BAILEY and JEFF BAYSINGER</p> <p>v.</p> <p>Defendants:</p> <p>BILL RITTER, JR., in his official capacity as Governor of the State of Colorado, and THE STATE OF COLORADO.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</p>	

Defendants Bill Ritter, Jr., in his official capacity as Governor of the State of Colorado, and the State of Colorado, submit the following Memorandum of Law in support of their motion for summary judgment.

INTRODUCTION

Institutional acknowledgment of the role that religion plays in American life dates back to the Founders – a tradition that has lasted more than two centuries. This lawsuit demands that this Court overturn that tradition by: 1) declaring that the Colorado Constitution prohibits the governor from recognizing the right to pray, and 2) “enjoining Governor Ritter and his successors from issuing future Day of Prayer proclamations.” *Complaint* at 7. Because such a result is required by neither Colo. Const. art. II, § 4, nor the Establishment Clause of the First Amendment, this Court should grant summary judgment in favor of the Defendants.

STIPULATED FACTS

1. 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.
2. Members of FFRF, including the named Plaintiffs, are residents of Colorado and are Colorado taxpayers.
3. Bill Ritter Jr., who is named as a defendant in his official capacity, is the Governor of the State of Colorado.

4. 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.

5. 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.”

6. Public Law 324 was signed by President Harry Truman on April 17, 1952.

7. 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.

8. 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.

9. Letters written by the NDP Task Force to governors requesting honorary proclamations are signed by Shirley Dobson, who reviews such letters before signing them.

10. Honorary proclamations recognizing the National Day of Prayer were issued by the Governor of Colorado for at least 2004-2009.

11. The honorary proclamations issued by the Governor of Colorado from 2004-2008 each acknowledged the NDP Task Force annual theme and/or scriptural reference.

12. The honorary proclamation issued by the Governor of Colorado in 2009 did not acknowledge the NDP Task Force annual theme or scriptural reference.

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

Process for Submission and Issuance of Honorary Proclamations

1. As a public service, the Governor of the State of Colorado issues various honorary proclamations, photos, and letters of congratulation or recognition upon request. (Ex. A, Bannister Aff. at ¶ 4).

2. The Governor is typically not involved in acting on, reviewing, or responding to requests for honorary proclamations, letters, or photo requests. Instead, the Governor's communications staff is responsible for reviewing and responding to requests for honorary proclamations and letters as they are submitted by members of the general public. (*Id.* at ¶¶ 5, 13).

3. Honorary proclamation requests may be submitted via facsimile, by mail, or through the Governor's website, at www.colorado.gov/governor. (*Id.* at ¶ 6).

4. The Governor's office receives several hundred honorary proclamation requests every year. Nearly every proclamation that is requested is issued. (*Id.* at ¶ 7).

5. Honorary proclamation requests must be accompanied by draft language for the honorary proclamation. When a request is submitted, a member of the Governor's Press/Communications staff reviews it for content. (*Id.* at ¶ 8).

6. If the content of the requested honorary proclamation does not seem to be problematic, or if it is similar to an honorary proclamation approved and issued in a prior year, the governor's Press/Communications staff will typically process and issue it without further review. (*Id.* at ¶ 9).

7. If the content of the requested honorary proclamation appears problematic, the Governor's Press/Communications staff submits it to the Director of Communications. The Director of Communications approves or rejects it, sometimes after consultation with legal counsel. (*Id.* at ¶ 10).

8. Requested honorary proclamations are occasionally rejected, although this is rare. For example, in one instance, an individual submitted an online honorary proclamation request, the suggested language of which attested to the requesting individual's good moral character. After researching the issue, the Governor's Press/Communications staff determined that the individual in question had been charged and was awaiting trial for murder in New York City. The Governor's staff did not issue this honorary proclamation. (*Id.* at ¶ 11).

9. Occasionally, the Governor's staff determines that a letter of congratulations or recognition is more appropriate than an honorary proclamation, and will thus send such a letter instead of issuing an honorary proclamation. (*Id.* at ¶ 12).

10. Some requested honorary proclamations are edited for content. For example, the Armenian National Committee of America annually submits an honorary proclamation request for Armenian Genocide Awareness Day. As submitted, this honorary proclamation

typically contains controversial language and statements. The Governor's Press/Communications staff edits the suggested language for content before approving and issuing the honorary proclamation. (*Id.* at ¶ 13).

11. Most honorary proclamations are not personally reviewed, approved, or signed by the Governor himself. Once accepted by Press/Communications Staff, honorary proclamations typically receive the Governor's signature by a device called an "auto-pen." (*Id.* at ¶ 14).

12. After an honorary proclamation has been approved and signed, it is mailed directly to the individual or group who requested it. Alternatively, the requesting individual or a representative of the requesting group may elect to pick the honorary proclamation up in person from the Governor's office at the State Capitol. (*Id.* at ¶ 15).

13. In most instances, an honorary proclamation approved by the Governor's office is not published, promoted or accompanied by a press release. (*Id.* at ¶ 16).

14. Copies of honorary proclamations that have been approved and issued may be requested by members of the general public. (*Id.* at ¶ 17).

15. No hard copies of previously-issued honorary proclamations are kept on file. To save time for anticipated future requests or in case a copy is requested by a member of the general public, Press/Communications staff does save digital copies of honorary proclamations on a staff member's office computer. That file is used as a template for future requests. Specifically, when the new annual request is received, office staff retrieves the old file from the previous year, updates it with new dates and other specifics, and then saves the

new file in place of the previous one. Thus, copies of an honorary proclamation that is requested on an annual basis are only available until the next year's proclamation has been drafted. (*Id.* at ¶ 18).

16. Hard copies of issued proclamations are not sent to the state archives. (*Id.* at ¶ 19).

17. Computer files from the Owens administration were archived at the end of Governor Owens' term. Those archived computer files should contain records of honorary proclamations issued during the Owens administration, although older honorary proclamations may have been written over. (*Id.* at ¶ 19).

Day of Prayer Proclamations

18. In 2007 and 2008, the Governor's office received honorary proclamation requests for a "Colorado Day of Prayer." These requests have been made on an annual basis throughout the Owens and Ritter administrations. Because the suggested language for the proclamations was similar to that which had been used in prior years, the requests were accepted and the proclamations issued. (*Id.* at ¶ 20).

19. As is the case with nearly every honorary proclamation request, regardless of its subject, the 2007 and 2008 honorary proclamations issued for a "Colorado Day of Prayer" followed the language suggested by their proponents. (*Id.* at ¶ 21).

19. In 2009, the Governor's office issued an Honorary Proclamation for a "Colorado Day of Prayer." However, the Honorary Proclamation issued in 2009 did not

follow the thematic suggestions contained in that year's form letter from the NDP Task Force requesting the Honorary Proclamation. (*Id.* at ¶ 22).

20. In order to have its annual requests for honorary proclamations considered, the NDP Task Force is required to follow the procedures for requesting honorary proclamations outlined on the Governor's website. These procedures apply to all groups or individuals who wish to request an honorary proclamation, letter of recognition or congratulations, or photograph from the Governor. (*Id.* at ¶ 26).

21. The 2007 and 2008 honorary proclamation requests for a "Colorado Day of Prayer" were not submitted either to Governor Ritter or to the director of communications for approval. (*Id.* at ¶ 23).

22. The 2007, 2008, and 2009 honorary proclamations for a "Colorado Day of Prayer" were signed by the "auto-pen" device and mailed to the requesting party without any involvement by the Governor. (*Id.* at ¶ 24).

23. The Governor's office did not issue a press release or otherwise publicize the "Colorado Day of Prayer" proclamations in 2007, 2008, or 2009. (*Id.* at ¶ 25).

24. The honorary proclamations issued by the Governor of Colorado from 2004-2008 acknowledged the federal designation of the Day of Prayer by Congress and the President, as well as the history and ubiquity of the National Day of Prayer. (*Id.* at ¶ 27).

25. The Plaintiffs use the term "dedication," "dedicated," and "dedicating," in the Complaint (at ¶¶ 1, 13, 52, and 53, respectively), referring to the 2007 and 2008 Colorado Day of Prayer events and to all Honorary Proclamations recognizing a Colorado Day of

Prayer from 2004-2009. (Ex. B, *Plaintiff FFRF's Responses to Defendants' First Set of Interrogatories and First Request for Production of Documents, Interrogatory Responses 1 and 2.*) The Defendants have not used these terms in connection with the honorary proclamations.

26. The individual Plaintiffs do not claim that Governor Ritter or the State of Colorado has prevented them from exercising their right to non-belief, or exerted any coercion in this regard. (Ex. B, *Interrogatory Response 3.*)

27. The Plaintiffs have not produced any evidence to support the allegation in the Complaint that each honorary proclamation affected each plaintiff's political status in the State of Colorado. To the contrary, they have made only the following bald assertions, which lack any evidentiary support.

- a. "[A]nnual declarations of a "Colorado Day of Prayer" give the appearance of elevating and endorsing religion as a solution to social problems, while encouraging all persons to believe in God," and
- b. The honorary proclamations at issue "giv[e] the appearance that belief is preferable and that believers have special access to government leaders, including the Governor."

(Ex. B, *Interrogatory Response 4.*)

28. The individual Plaintiffs have not attended or participated in any Day of Prayer event in Colorado; nor have they been prevented from attending or participating in or acting at such event in any way they wished. (Ex. B, *Interrogatory Response 5.*)

29. The Day of Prayer events held on the west steps of the State Capitol building are initiated, organized, and sponsored by private citizens. (Ex. C, *Affidavit of Rita Lambert*).

30. The Plaintiffs do not contend that the Governor or any other State official affected or took any other action with regard to the individual Plaintiffs' failure to attend any Day of Prayer event in Colorado. (Ex. B, *Interrogatory Response 6.*)

31. Plaintiffs have produced no evidence that they have been adversely affected by the issuance of honorary proclamations declaring a "Colorado Day of Prayer."

32. The Plaintiffs have produced no evidence demonstrating any affiliation, either formal or informal, between the NDP Task Force and the Governor or his staff.

33. The Plaintiffs did not learn about or become exposed or subjected to the honorary proclamations by way of coercion, but instead became aware of them via media coverage. (Ex. B, *Interrogatory Response 7.*)

34. There is no item in the State budget or any expenditure of tax monies relating to the issuance of the honorary proclamations complained of, except to the extent that the Governor's attendance at a Day of Prayer event involved the use of paid State personnel, i.e. the Governor and his security. (Ex. B, *Interrogatory Response 8.*)

35. The allegation that the Governor is aligned or associated with Reign Down USA is based on an internet report that Governor Ritter proclaimed April 26, 2008, to be a Day of Prayer in Colorado, in conjunction with an event sponsored by Reign Down USA. (Ex. B, *Interrogatory Response 9.*)

36. The allegation that the language in the honorary proclamations at issue constitutes “exhortations to pray” is based on the Plaintiffs’ declared belief that all of the language in the honorary proclamations encourages all citizens to actively pray. Specifically, the Plaintiffs allege that the language that “Americans will unite in prayer for our Nation, our State, our leaders and our people” is an exhortation to pray. (Ex. B, *Interrogatory Response 10.*)

37. The allegation that the Governor made “related pronouncements endorsing prayer” is based solely on his alleged attendance at privately organized and sponsored Day of Prayer events at the Capitol in 2007 and 2008 and a prayer luncheon event in 2008. (Ex. B, *Interrogatory Response 11.*)

38. The allegation that there were approximately 70 events held in Colorado in May 2009 is based on an article in the Rocky Mountain News dated May 4, 2007; in any event, none of the individual Plaintiffs attended such events and were not coerced to do so. (Ex. B, *Interrogatory Response 12.*)

39. The allegation concerning contacts between the governor and the NDP Task Force is based solely on the fact that Shirley Dobson, as chair of the NDP task force, writes to each governor, including the Governor of Colorado, requesting the issuance of a Day of Prayer proclamation; that such honorary proclamations have been issued since 2004; and that the 2004-2008 honorary proclamations included the annual theme and/or biblical reference suggested by the NDP Task Force. (Ex. B, *Interrogatory Response 13.*)

40. The 2009 honorary proclamation did not include the NDP Task Force annual theme and/or biblical reference. (Ex. B, *Interrogatory Responses 13 and 14.*)

41. The governors of all 50 states issued honorary proclamations or otherwise acknowledged (e.g., by letter) days of prayer in 2007, 2008, and 2009. Many of these proclamations, letters, or similar acknowledgments made reference to the theme and/or supporting scripture suggested by the NDP Task Force in its annual form letter.

(*Background Statement of NDP History and NDP Task Force Involvement*, Ex. D, ¶¶ 110-112).

42. The Plaintiffs' evidence supporting the allegation that the governor has "embraced" the NDP Task Force and/or Focus on the Family is as follows:

- a. The governor included the NDP Task Force annual theme and/or supporting scriptural reference in the 2004-2008 proclamations as requested by Shirley Dobson's form letter. (Ex. C, *Interrogatory Response 17*);
- b. The governor spoke briefly at an event hosted by the NDP task force on the National Day of Prayer in 2007. (Ex. C, *Interrogatory Response 21*).

43. The Plaintiffs' evidence supporting the allegation that the governor has worked, or is currently working, "hand-in-glove" with the NDP Task Force and/or Focus on the Family is that the honorary proclamations issued in 2004-2008 incorporated the NDP Task Force annual theme and/or supporting scriptural reference as suggested in the form letters submitted by Shirley Dobson. (Ex. C, *Interrogatory Response 18.*)

44. The Plaintiffs' evidence supporting the allegation that the governor or his predecessor has a "collaborative" relationship with the NDP Task Force and/or Focus on the Family is that the honorary proclamations issued in 2004-2008 incorporated the NDP Task Force annual theme and/or supporting scriptural reference suggested in the form letters submitted by Shirley Dobson. (Ex. C, *Interrogatory Response 19.*)

45. The Plaintiffs' evidence supporting the allegation that the governor endorses the religious principles of the NDP Task Force and/or Focus on the Family is that the honorary proclamations issued in 2004-2008 included the NDP Task Force annual theme and/or supporting scriptural reference as suggested in the form letters submitted by Shirley Dobson. (Ex. C, *Interrogatory Response 20.*)

46. The Plaintiffs' evidence supporting the allegation that the governor endorses religion in violation of the Colorado Constitution is that: 1) since 2004, he or his predecessor has issued an annual honorary proclamation declaring a Day of Prayer at the request of the National Day of Prayer Task Force; 2) in 2007, he spoke briefly at a public event organized by the NDP Task Force and held on the Capitol steps; and 3) he has allegedly attended Colorado Prayer luncheons, including in 2008. (Ex. C, *Interrogatory Response 21.*)

47. The Plaintiffs' evidence supporting the allegation that the governor supports "an indelible bond between church and state" is that the honorary proclamations issued between 2004 and 2008 included annual themes and scriptural references suggested by the NDP Task Force. (Ex. C, *Interrogatory Response 22.*)

48. The Plaintiffs' evidence supporting the allegation that the governor endorses public celebrations of religion by public officials, as distinguished from freedom of religion, is that:

- a. the governor or his predecessor has issued honorary proclamations declaring a Day of Prayer since 2004;
- b. the 2004-2008 honorary proclamations included an annual theme and scriptural reference chosen by the NDP Task Force;
- c. the Plaintiffs allege that issuance of such proclamations constitutes a celebration of religion by public officials;
- d. the governor made brief remarks at a privately-organized (but open to the public) event held on the Capitol steps in 2007; and he has allegedly attended Colorado Prayer luncheons, including in 2008.

(Ex. C, *Interrogatory Response 23.*)

49. The Plaintiffs' evidence supporting the allegation that the words or phrases in the honorary proclamations convey to non-religious Americans that they are expected to believe in God is that: 1) the issuance of an annual Colorado Day of Prayer honorary proclamation gives the appearance that the government views religion as the solution to social problems, therefore allegedly elevating religion to the status of generally accepted dogma in which all citizens are encouraged to believe, including belief in a God; and 2) the Plaintiffs are non-believers who perceive the proclamations to be an encouragement for them

to believe in a God, which they allege violates their freedom of conscience. (Ex. C, *Interrogatory Response 24.*)

50. The Plaintiffs' evidence supporting the allegation that the governor prefers religion over non-religion for all Colorado citizens is that an honorary proclamation recognizing the annual "Colorado Day of Prayer" allegedly gives this appearance, including elevating religion to the status of a preferred solution to problems and by encouraging all citizens to believe in a God. (Ex. C, *Interrogatory Response 25.*)

51. The Plaintiffs' evidence supporting the allegation that believers are made political insiders while non-believers remain political outsiders, and how this alleged belief specifically affects the lives of Plaintiffs and other Colorado citizens is as follows:

- a. issuance of an annual "Colorado Day of Prayer" proclamation allegedly gives this appearance, because no proclamations extolling the role of reason are allegedly issued;
- b. inclusion of the annual theme and/or scriptural reference chosen by the NDP Task Force in the 2004-2008 proclamations allegedly gives the appearance that believers have access to government leaders;
- c. while the Plaintiffs do not allege they have been coerced into becoming believers, they allege that the proclamations give the appearance to the Plaintiffs and others that religion is preferred and expected, and that the Plaintiffs' non-belief is disfavored and discouraged;

- d. the Plaintiffs allege that they are put in a position of having to justify their non-belief (although they have provided no evidence on this point).

(Ex. C, *Interrogatory Response 26.*)

52. The Plaintiffs' evidence supporting the allegation that honorary proclamations become known to all citizens is that honorary proclamations are allegedly intended to become known to all citizens of the State, and proclamations are allegedly broadcast through extensive media coverage on the internet, in print media, and by broadcast media. (Ex. C, *Interrogatory Response 27.*)

53. The Plaintiffs' evidence supporting the allegation that the honorary proclamations create a hostile environment for the Plaintiffs is as follows:

- a. the governor's honorary proclamation of a "Colorado Day of Prayer" allegedly gives the appearance that he encourages religion as a preferred solution to problems and that all citizens should believe in God;
- b. the issuance of the honorary proclamations allegedly causes the Plaintiffs to have to defend their non-belief (a point on which the Plaintiffs have offered no evidence);
- c. the Plaintiffs believe that issuance of the honorary proclamations violates their freedom of conscience, which is magnified by alleged annual media hoopla, which they allege the governor promotes; and
- d. the Plaintiffs believe they are made to feel like stigmatized outsiders, who must defend or justify their non-belief.

(Ex. C, *Interrogatory Response 28.*)

54. The Plaintiffs' evidence supporting the allegation that the Plaintiffs and other FFR members in Colorado are subjected or exposed to unwanted honorary proclamations or commands to pray is that the proclamations are allegedly intended to be broadcast publicly and become known to all citizens via the media. (Ex. C, *Interrogatory Response 29.*)

55. The Plaintiffs' evidence supporting the allegation that the government, including the State of Colorado and the governor, have induced celebrations of religion in the public realm is as follows:

- a. millions of Americans in thousands of events across the country have allegedly participated in public Day of Prayer events because of the Day of Prayer proclamations by various government officials;
- b. Governor Ritter allegedly attended public Day of Prayer events in 2007 and 2008;
- c. Plaintiffs allege that the honorary proclamations go beyond simply acknowledging independently organized events and hosted events, and instead allege that the honorary proclamations explicitly endorse such events and the message that they convey, and also encourage public participation in them.

(Ex. C, *Interrogatory Response 30.*)

56. The Plaintiffs' evidence supporting the allegation that the governor's actions constitute a culture of officially-sanctioned religiosity is that: 1) the governor has issued honorary proclamations acknowledging a "Colorado Day of Prayer," which allegedly

encourage all citizens to believe in God; 2) thus precipitating massive Day of Prayer events. (Ex. C, *Interrogatory Response 31.*)

57. The Plaintiffs' evidence supporting the allegation that Colorado's governor has "dedicated" a Day of Prayer is that since 2004 he or his predecessor has issued an honorary proclamation acknowledging a "Colorado Day of Prayer" on the day designated by federal law for the National Day of Prayer, and at the request of the NDP task force. (Ex. C, *Interrogatory Response 32.*)

58. The Plaintiffs' evidence supporting the allegation that the governor or his predecessor officially supports and advocates religion through the medium of prayer for all Colorado citizens is that he has issued annual honorary proclamations acknowledging a "Colorado Day of Prayer," which proclamations allegedly include the endorsement of religion as practiced through prayer; and that the 2004-2008 proclamations included an annual theme and/or scriptural reference chosen by the NDP Task Force headed by Shirley Dobson. (Ex. C, *Interrogatory Response 33.*)

59. The Plaintiffs' evidence supporting the allegation that the interests and behavior of Plaintiffs and other FFRF members in Colorado are injured or affected by actions of the governor is that the Plaintiffs perceive that their freedom of personal conscience is violated and that the government apparently prefers religion and allegedly stigmatizes Plaintiffs who must defend or justify their non-belief. (Ex. C, *Interrogatory Response 34.*)

60. The Plaintiffs' evidence supporting the allegation that the governor has officially admonished anyone to pray is that he has issued annual honorary proclamations

acknowledging a “Colorado Day of Prayer,” which allegedly encourage all citizens to pray and believe in God. (Ex. C, *Interrogatory Response 35.*)

61. The Plaintiffs’ evidence supporting the allegation that the text of the honorary proclamations endorses religion per se, as distinguished from religious freedom, is that the governor has issued honorary proclamations acknowledging a “Colorado Day of Prayer.” (Ex. C, *Interrogatory Response 23.*)

SUMMARY OF THE ARGUMENT

Article II, section 4 of the Colorado Constitution, like the U.S. Constitution’s Establishment Clause, prohibits governmental *endorsement* of religion, but it does not forbid governmental officials from *acknowledging* America’s religious heritage. Honorary proclamations recognizing the “Colorado Day of Prayer” do not express a preference for religion over non-religion, do not deny non-believers any rights or privileges on account of their non-belief, and do not coerce anyone to participate in privately organized and privately managed National Day of Prayer events. To the contrary, as with all honorary proclamations, the Governor’s honorary proclamations of a “Colorado Day of Prayer” have simply acknowledged the existence of the event and the fundamental rights – in this case, the right to religious freedom – associated with it. This is a far cry from governmental endorsement of religion or coercion to participate in Day of Prayer events, and is accordingly in no way violative of the Colorado Constitution.

ARGUMENT

I. Standard of Review.

Summary judgment must be “granted when there is a clear showing that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law.” *AviComm, Inc. v. Colorado Public Utils. Comm’n*, 955 P.2d 1023, 1029 (Colo. 1998). The nonmoving party is entitled to all favorable inferences that may be drawn from uncontested facts. Any doubt as to whether a triable issue of fact exists will be resolved against the moving party. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 298 (Colo. 2003). In the case at bar, there are no genuine issues of material fact. Defendants are entitled to judgment as a matter of law.

II. Factual background.

The Office of the Colorado Governor, like the administration of virtually every state, has a long-standing practice of acknowledging the activities and accomplishments of individuals and civic groups. In keeping with this tradition, the Ritter administration accepts requests for signed photographs, letters of congratulation or recognition, and honorary proclamations. *Affidavit of Craig Bannister*, Ex. A, at ¶ 4. Governor Ritter’s office receives thousands of such requests every year, submitted by mail, facsimile, or through its website. *Id.* at ¶ 7. Most requests are for letters or photographs, but several hundred of the requests each year are for honorary proclamations. *Id.* Honorary proclamation requests are submitted by an assortment of civic and cultural groups, and involve nearly every conceivable cause, from “Holocaust Awareness Week” to “Chili Appreciation Society International Day.”

Process for Approval and Issuance of Honorary Proclamations

Governor Ritter is rarely, if ever, involved in the issuance of honorary proclamations. *Id.* at ¶ 14. Instead, throughout the Ritter administration, honorary proclamation requests have been routed to Press/Communications Officer Craig Bannister. *Id.* at ¶ 5. The proponent is required to propose language for the honorary proclamation as part of its request. *Id.* at ¶ 8. Upon receipt, Mr. Bannister and his staff review the language being proposed. *Id.* If Mr. Bannister determines that it is not problematic, he is authorized to issue the proclamation as requested. *Id.* at ¶ 9. Many honorary proclamations are requested every year, and if a request is similar to an honorary proclamation issued in the past it is subject only to limited review. *Id.* In fact, annually-requested honorary proclamations are usually so similar from year to year that Mr. Bannister uses the previous year's digitally saved copy as a template for creating the new proclamation. *Id.* at ¶ 18.

The Governor's office does on rare occasions decline to issue requested honorary proclamations based on the proposed content. *Id.* at ¶ 11. For example, Mr. Bannister once received a request from an individual seeking an honorary proclamation that he was of good moral character. *Id.* After some research, he determined that the individual had been charged and was awaiting trial for murder in New York City. *Id.* As a result, Mr. Bannister made the decision to reject the proposed honorary proclamation. *Id.* Editing is much more common than rejection. *Id.* at ¶ 13. For example, every year the Armenian National Committee of America submits an honorary proclamation request for Armenian Genocide Awareness Day. *Id.* The language suggested by the proponents typically contains

controversial language and statements concerning the history of conflict between Armenia and Turkey. *Id.* This potentially divisive language is edited out before the proclamation is issued. *Id.*

Honorary Proclamations for a “Colorado Day of Prayer”

Like Governor Owens before him, Governor Ritter has issued honorary proclamations for a “Colorado Day of Prayer” during each year of his administration. *Id.* at ¶ 20. These proclamations have been prompted by annual requests submitted by the National Day of Prayer (“NDP”) Task Force, a private evangelical organization that has taken it upon itself to promote the National Day of Prayer. *Id.* at ¶ 20. The Governor’s process for granting the NDP Task Force’s request to acknowledge the “Colorado Day of Prayer” is exactly the same as it is for any other honorary proclamation. *Id.* at ¶ 26. Historically, the NDP Task Force has submitted its honorary proclamation requests by mail early in the calendar year. The honorary proclamations are requested by a form letter sent to every state governor by Shirley Dobson, Chairman of the NDP Task Force. *See, e.g.* Ex. E (photocopy of form letter). Mrs. Dobson’s letters typically discuss the history of the National Day of Prayer, describe the annual theme adopted by the NDP Task Force, and ask that the recipient governor issue a proclamation acknowledging the event. *See id.*

Throughout the Ritter administration, Mrs. Dobson’s letter has been routed to Mr. Bannister, the Press/Communications Officer in charge of responding to requests for photos, letters, and honorary proclamations. Ex. A, ¶ 20. In 2007 and 2008, Mr. Bannister brought up the previous year’s proclamation on his computer, changed the dates, and redrafted the

language to reflect the NDP Task Force’s suggestions. *Id.* Mr. Bannister then printed the honorary proclamation, placed a seal on it, had it signed by the “auto-pen device,” and mailed it to the address indicated in the requesting letter. *Id.* at ¶ 24. Governor Ritter never saw the proclamation before it was issued. *Id.* at ¶ 23, 24.

III. The governor’s honorary proclamations of a “Colorado Day of Prayer” did not violate the Preference Clause of the Colorado Constitution.

The Plaintiffs first seek a declaration from this Court that “Prayer Proclamations by Governor Ritter designating a Day of Prayer and the attendant celebrations and commemorations are a violation of Article II, Section 4 of the Colorado Constitution.”

Article II, § 4 of the Colorado Constitution states as follows:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Colo. Const. art II, § 4.

Although the Plaintiffs rely exclusively on an alleged violation of art. II, § 4 as their basis for relief, the Complaint does not clearly identify the specific portions allegedly violated by the honorary proclamations at issue. A review of the substantive allegations of the Complaint, however, suggests that it may implicate three clauses of art. II, § 4:

- “no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion”;
- “No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent”; and
- “Nor shall any preference be given by law to any religious denomination or mode of worship.”

The discovery process has shed additional light on the Plaintiffs’ claims. None of the individual Plaintiffs allege – indeed, all of them explicitly disclaim – that they have ever been required or coerced to attend any events associated with the National Day of Prayer. *See* Statement of Undisputed Material Facts, *supra*, ¶¶ 26, 28, 30.

Nor have the Plaintiffs produced any evidence to show that they have been denied any civil or political rights, privileges, or capacities by virtue of the honorary proclamations. Indeed, the Plaintiffs’ sole “evidence” on this point is their unsubstantiated claim that issuing the honorary proclamations “giv[es] the appearance that belief is preferable [to non-belief] and that believers have special access to government leaders, including the Governor.” *Id.*, ¶ 25. This unsupported assertion is wholly refuted by the actual evidence in this case. Requests that the Governor acknowledge a “Colorado Day of Prayer” are treated in the same manner as every other request for an honorary proclamation. The very fact that the rules for requesting an honorary proclamation apply to everyone, including the NDP Task Force, refutes the Plaintiffs’ suggestion that the proponents of the National Day of Prayer have “special access to government leaders.” Similarly, and as is discussed in detail *infra*, the Plaintiffs’ claim that the honorary proclamations “give[] the appearance that belief is

preferable” is belied by the fact that, on their face, the challenged honorary proclamations are merely acknowledgments – and not endorsements – of religion and religious activities.

The only other basis for Plaintiffs’ claim for relief is the last sentence of art. II, § 4, known as the “Preference Clause.” *See State v. Freedom From Religion Foundation, Inc.*, 898 P.3d 1013, 1019 (Colo. 1995) (“*FFRF*”). Our supreme court’s construction of the Preference Clause mirrors federal Establishment Clause jurisprudence. *See id.* (“In interpreting our Preference Clause we have looked to the Establishment Clause...and the body of federal cases that have construed it”). Accordingly, and consistent with the Establishment Clause, the Colorado Constitution forbids state government from “favor[ing] religion over non-religion.” *Id.*, citing *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 593 (1989).

At bottom, Plaintiffs’ claim rests on the sole proposition that, by issuing honorary proclamations for a “Colorado Day of Prayer,” the Governor endorses religion, thereby favoring it over non-religion, and by doing so violates the Preference Clause. To the contrary, however, each of the multiple tests applied by the Supreme Court in Establishment Clause cases leads to the same result: the Governor’s acknowledgment of a “Colorado Day of Prayer” does not violate the Preference Clause.

A. The Supreme Court has previously indicated that the statute establishing National Day of Prayer is constitutional.

The National Day of Prayer statute, adopted by Congress in 1952 and most recently amended in 1988, provides as follows:

The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.

36 U.S.C. § 119 (2009). The Supreme Court has never ruled on the constitutionality of this statute or the proclamations it requires the president to issue. The Court has, however, on several occasions suggested that both the statute and the President's annual proclamations would withstand a constitutional challenge.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court considered whether a municipality's inclusion of a crèche in an outdoor Christmas display violated the Establishment Clause. In upholding the display's constitutionality on historical grounds, the Court noted the "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage," including the employment of Congressional chaplains, *Id.* at 672, 676, and the National Day of Prayer statute:

Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h. Our Presidents have repeatedly issued such Proclamations. Presidential Proclamations and messages have also issued to commemorate Jewish Heritage Week...and the Jewish High Holy Days[.] One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs.... Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions"

and “respect[ed] the religious nature of our people.” [*Zorach v. Clausen*, 343 U.S. 306, 314 (1952)].

Lynch, 465 U.S. at 677-78 (emphasis added) (internal citations omitted).

Lynch's approval of the National Day of Prayer statute has not been seriously questioned by the Court in the 25 years that have passed since the opinion was issued. Justice O'Connor's concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), for example, drew a clear distinction between proclamations and school prayer. Presidential proclamations “are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination.” *Id.* at 81. “[G]iven their long history,” Justice O'Connor noted, “Presidential Proclamations [declaring days of prayer] would probably withstand Establishment Clause scrutiny.” *Id.* at 81 n.6.

The Justices have substantively discussed the National Day of Prayer only one other time, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (evaluating the constitutionality of two holiday displays that contained religious symbols). Justice Kennedy, dissenting in part and objecting to the majority's approach, favorably commented on, among other things, the longstanding practice of presidential Thanksgiving proclamations, the national motto's reference to God, and the National Day of Prayer statute. *Id.* at 672 (Kennedy, J. concurring in part and dissenting in part). Although Justice Blackmun, writing for the majority, declined to address the issue, *id.* at 603 n.5, appellate courts around the country have continued to acknowledge the deep

historical roots, as well as the constitutionality, of the Day of Prayer statute in the wake of *County of Allegheny*. See, e.g., *DeBoer v. Village of Oak Park*, 267 F.3d 558, 569-70 (7th Cir. 2001); *Allen v. Consolidated City of Jacksonville, Florida*, 719 F.Supp. 1532 (M.D. Florida 1989).

Given the lengthy history of presidential prayer proclamations, the Supreme Court's implicit acknowledgement of the constitutionality of the National Day of Prayer statute is unremarkable. "As Justice Holmes once observed, '[if] a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" *Wallace v. Jaffree*, 472 U.S. at 79-80 (O'Connor, J., concurring), quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). Prayer proclamations extend back to 1789, when George Washington proclaimed a day of "prayers and supplications to the Great Lord and Ruler of Nations[.]" *Lynch*, 465 U.S. at 675 n.2. Nearly every subsequent president has followed this tradition, with day of prayer proclamations becoming virtually ubiquitous along the way.

Moreover, if the National Day of Prayer statute is constitutional, then Governor Ritter's issuance of honorary proclamations acknowledging the event is *a fortiori* also constitutional. In contrast to the National Day of Prayer statute, which by its terms *requires* the President to declare a Day of Prayer, an honorary proclamation has no actual (or, for that matter, theoretical) force or effect. It is a purely ceremonial recognition of the longstanding history and fundamental rights acknowledged by Congress when it passed the National Day of Prayer Statute into law. If the Plaintiffs are unable to demonstrate that 36 U.S.C. § 119

violates the Establishment Clause, then they cannot prevail on their claim that issuance of honorary proclamations in accord with that statute runs afoul of the Colorado Constitution. *But see Freedom From Religion Foundation v. Obama*, 2010 WL 1499451 (W.D. Wisc. 4/15/2010) (discussed in detail *infra*).

Accordingly, the Defendants are entitled to summary judgment because the National Day of Prayer statute is itself constitutional. If this Court agrees, then there is no need to reach any of the various Establishment Clause tests discussed and applied below.

B. The honorary proclamations at issue pass all of the various tests developed in the Supreme Court’s Establishment Clause jurisprudence.

The Supreme Court’s approach to Establishment Clause jurisprudence is less than straightforward. Nearly 40 years after the seminal case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Justices remain divided not only as to the scope and meaning of the Establishment Clause, but also as to the proper legal framework to apply to the facts in each particular case. *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. District*, 508 U.S. 384, 398-399 (1993) (Scalia, J., concurring) (“When we wish to strike down a practice [that the *Lemon* test] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs ‘no more than helpful signposts.’”) (citations omitted) (*quoting Hunt v. McNair*, 412 U.S. 734, 741 (1973)). In the midst of this uncertainty, courts commonly apply several potential tests in every case. *See, e.g. Newdow v. Rio Linda Union School District*, ___F.3d___, 2010 WL 816986 (9th Cir.,

March 11, 2010) at *5 (applying three independent tests to evaluate plaintiffs' claim) The Defendants take the same approach here.

1. The *Lemon* Test

Lemon involved a First Amendment challenge to state statutes providing for public assistance to parochial schools. Although it has been heavily criticized (and in some cases simply ignored), the *Lemon* test remains “the only coherent test” of the Establishment Clause ever adopted by a majority of the Court. *Wallace*, 472 U.S. at 63 (Powell, J., concurring). The *Lemon* test requires a government act to: “1) have a secular purpose, 2) neither advance nor inhibit religion as its primary effect, and 3) not foster excessive entanglement with religion.” *Van Osdol v. Vogt*, 908 P.2d 1122, 1131 (Colo. 1996).

a. The Governor’s honorary proclamations have a secular purpose.

The first prong of the *Lemon* test asks “whether government’s actual purpose is to endorse or disapprove of religion.” *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (*quoting Lynch*, 465 U.S. at 690) (O’Connor, J., concurring). “[T]he secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 863 (2005).

Governor Ritter’s honorary proclamations have the obvious secular purpose of acknowledging an independently organized and privately hosted event. The text of the 2008 honorary proclamation, quoted in its entirety below, demonstrates this purpose quite clearly.

WHEREAS, the authors of the Declaration of Independence recognized “That all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that

among these are Life, Liberty and the pursuit of Happiness;”
and

WHEREAS, the National Day of Prayer, established in 1952,
and defined by President Ronald Reagan as the first Thursday
in May, provides Americans with the chance to congregate in
celebration of these endowed rights; and

WHEREAS, each citizen has the freedom to gather, the freedom
to worship, and the freedom to pray, whether in public or
private; and

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

WHEREAS, on May 1, 2008, individuals across this state and
nation will unite in prayer for our country, our state, our leaders,
and our people;

Therefore, I, Bill Ritter, Jr., Governor of the State of Colorado,
do hereby proclaim May 1, 2008, Colorado Day of Prayer in the
State of Colorado.

The first three clauses of the honorary proclamation outline the purpose and history of the National Day of Prayer statute: to “provide[] Americans with the chance to congregate in celebration” of their religious freedom. The fourth and fifth clauses acknowledge the occurrence of the National Day of Prayer, and make reference to the theme chosen by the private organization that requested the proclamation and organized an event on that date. The fifth clause notes that on May 1, 2008, “individuals...will unite in prayer.” This is certainly not an admonition or exhortation to pray on that date. To the contrary, it is simply the unremarkable observation that, based on over fifty years of U.S. history, it is safe to predict that significant numbers of citizens will indeed gather and “unite in prayer” on the National Day of Prayer.

Viewed as a whole, this honorary proclamation’s secular purpose is clear. As with all honorary proclamations, it is neither an endorsement of the event being acknowledged nor an exhortation to participate. It is an acknowledgment of the importance of the nation’s religious heritage, and the constitutionally enshrined religious freedom of its citizens. In any event, the honorary proclamation’s purpose is certainly not *exclusively* religious; moreover, the fact that it may confer an incidental benefit on religious activity does not convert the honorary proclamation to an impermissible religious statement or exhortation. *See FFRF*, 898 P.2d at 1020 (“We have adopted the view that a government act which has both a religious and secular message need not, in all instances, fall as a casualty of constitutional scrutiny”); *see also Van Orden v. Perry*, 545 U.S. 677, 684 n.3 (2005) (rejecting “the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion,” and noting that “[e]ven the dissenters do not claim that the First Amendment’s Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion”).

b. The Governor’s honorary proclamations do not have the primary effect of advancing or inhibiting religion.

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

purposes of applying *Lemon*'s second prong under Colo. Const., art II, § 4, our supreme court has adopted Justice O'Connor's "endorsement test," which requires a reviewing court to consider whether the government's "actions reasonably can be interpreted as governmental endorsement or disapproval of religion." *FFRF*, 898 P.2d at 1021, *citing Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). This is a contextual inquiry that requires consideration of "(1) what message the government intended to convey; and (2) what message the government's actions actually conveyed to a reasonable person." *FFRF*, 898 P.2d at 1021, *citing Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). "Endorsement" does not merely mean "an expression or demonstration of approval or support;" to the contrary, the Supreme Court has "equated 'endorsement' with 'promotion' or 'favoritism.'" *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (plurality opinion).

The endorsement test has been used most commonly in monument cases, where "context" can be derived from the prominence of the display, its timing, and its surroundings, among other factors. *See, e.g. FFRF*, 898 P.2d at 1025-26; *Allegheny County*, 492 U.S. at 597. The notion of "context" is less distinct for honorary proclamations; however, the Supreme Court has at least made clear that the "objective observer" standard applies, pursuant to which the reviewing court takes into account "the text, legislative history, and implementation of the statute, or comparable official act" from the perspective of a detached third-party observer. *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 862 (2005) (internal quotation omitted). As the architect of the endorsement test described it: "the [endorsement] test does not evaluate a practice in isolation from its origins

and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape.” *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring in the judgment). In addition, the “reasonable observer” must in fact be truly objective. “[A]dopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a ‘heckler’s veto’ sufficed to show that its message was one of endorsement.” *Id.*

An objective analysis of the honorary proclamations themselves and the circumstances surrounding their issuance plainly demonstrates that a reasonable third-party observer, aware of the ubiquity and lengthy history of prayer proclamations in American life, as well as the particular circumstances under which the challenged proclamations are requested and issued, would not conclude that they promote or favor religion over non-religion. First, as discussed in detail *supra*, the challenged honorary proclamations cannot be reasonably read as an exhortation to pray or participate in privately organized observances of the National Day of Prayer. To be sure, like every other honorary proclamation, they simply acknowledge the event, its purpose, and its theme, and use the language suggested by the event’s organizers to do so.

This reasoning finds support in the Supreme Court’s approach to various other proclamations that also mention prayer or have religious implications. American Presidents have issued proclamations on holidays such as Memorial Day and Thanksgiving for generations. The Court noted (and implicitly approved) this practice in *Lynch*: “Executive

orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms.” 465 U.S. at 686. Even the Justices most inclined to find Establishment Clause violations have conceded that these actions are benign. As Justice Stevens stated in *Van Orden*: “although Thanksgiving Day proclamations...undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which separation of church and state is aimed.” 545 U.S. at 723 (Stevens, J., dissenting). Justice Stevens’ tolerant approach reflects the fact that the challenged proclamations likely fall into the category of “ceremonial deism,” which applies to a narrow subset of cases in which the “history, character, and context” of a governmental action renders it permissible to “acknowledge or refer to the divine without offending the Constitution.” *Newdow*, 542 U.S. at 37 (O’Connor, J., concurring in the judgment). Ceremonial deism most commonly “encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of th[e Supreme] Court opens each of its sessions (‘God save the United States and this honorable Court’).” *Id.* Given the history, character, and context of executive prayer proclamations, the term could easily include proclamations such as those challenged here.

Second, the endorsement test’s contextual analysis requires an inquiry into the circumstances surrounding the government act. The Plaintiffs have alleged that the honorary proclamations at issue are a “joint action between Governor Ritter and the NDP Task Force,” and that the Governor has “embraced” and formed an “alliance with the NDP Task Force.”

Complaint, ¶¶ 26, 27, 28. This “alliance,” the Plaintiffs claim, “creates the intended impression that the NDP Task Force and the State of Colorado are working hand-in-glove in sponsoring the Colorado Day of Prayer and the National Day of Prayer.” *Complaint* ¶ 28. However, the evidence plainly demonstrates that the NDP Task Force follows the same process for requesting their honorary proclamations as everyone else. At best, Plaintiffs’ case is based on conjecture and innuendo. Contrary to Plaintiffs’ suggestions of a conspiracy, the undisputed evidence shows that Governor Ritter does not even directly participate in the honorary proclamation process, much less collaborate with or do NDP Task Force’s bidding.

Given this evidence, the Plaintiffs’ allegations about a “hand-in-glove” collaboration between Governor Ritter and the NDP Task Force are simply baseless. No reasonable observer could infer that the administration and the NDP Task Force had formed an alliance in order to promote or favor religion over non-religion,¹ because there is no evidence that such an alliance exists.

A review of the content and context of the challenged honorary proclamations demonstrates that they cannot “reasonably...be interpreted as governmental endorsement...of religion.” *FFRF*, 898 P.2d at 1021. Their content is neutral towards religion, and the

¹ Even if such a conspiracy existed – and it does not – it would not be enough to show that Governor Ritter worked “hand-in-glove” with the NDP Task Force to issue the honorary proclamations, because the proclamations themselves are entirely benign. To succeed on their theory, Plaintiffs would be required to show that the alleged alliance between the administration and the NDP Task Force would appear, to a reasonable observer, to have been created with the purpose of endorsing religion over non-religion.

evidence of the circumstances surrounding their issuance is devoid of any suggestion of collaboration between state officials and the proclamations' proponents. Accordingly, the challenged honorary proclamations satisfy the second prong of the *Lemon* test.

c. The challenged honorary proclamations do not foster excessive entanglement with religion.

Lemon's "excessive entanglement" prong requires consideration of "the character and purpose of the institution involved, the nature of the regulation's intrusion into religious administration, and the resulting relationship between the government and the religious authority." *Vogt*, 908 P.2d at 1132. This prong is typically relevant only in cases where the government becomes involved in the workings of religious institutions, either financially or through oversight of an organization's internal workings. *See, e.g., Catholic Health Initiatives Colorado v. City of Pueblo, Dept. of Finance*, 207 P.3d 812 (Colo. 2009) (addressing permissible scope of charitable tax exemption); *Vogt*, 908 P.2d 1122 (holding that judicial review of church's hiring decision as to minister would result in excessive entanglement of government and church). In fact, our supreme court has held that, where "the challenged action does not involve any direct subsidy to a school or religious institution," there is no need to conduct an entanglement analysis. *Conrad v. City and County of Denver*, 724 P.2d 1309, 1316 (Colo. 1986).

Nonetheless, assuming *arguendo* that an entanglement analysis is necessary, there is no evidence that the challenged honorary proclamations cause any entanglement with religion. As previously discussed, the Plaintiffs offer no evidence to support any

collaboration or alliance between the Ritter administration and the NDP Task Force. The State provides no funding for the NDP Task Force or the National Day of Prayer.

Accordingly, the Governor's issuance of honorary proclamations creates no entanglement with religion whatsoever, much less "excessive" entanglement.

2. The Historical Practice Test

Although the challenged honorary proclamations easily pass muster under the *Lemon* test, *Lemon* may not represent the best approach to evaluating their constitutionality. Instead, the most appropriate fit may be the "historical practice" test developed in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh* involved a challenge by a Nebraska state legislator to the Nebraska Legislature's practice of opening its sessions with a prayer offered by a chaplain paid out of public funds. Although the courts below had applied *Lemon* to find a violation of the Establishment Clause, the Supreme Court reversed, upholding the practice without applying *Lemon* at all.

Marsh based its decision on the fact that legislative prayer dates back to the founding of the republic. As Chief Justice Burger, writing for the Court, put it: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786. The opinion reasoned that more than 200 years of legislative prayer have made it "part of the fabric of society," and that

it is accordingly “a tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.* at 792.

Because the historical practice test developed in *Marsh* can be applied only to a narrow set of cases, it has never displaced *Lemon*. *See, e.g. Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (declining to apply the historical practice test to questions concerning religion in public schools, “since free public education was virtually nonexistent at the time the Constitution was adopted”). In circumstances like those presented here, however, where the validity of longstanding practices are at issue, the approach adopted in *Marsh* has substantial relevance. *Lynch* opined at length about the deep roots of the National Day of Prayer, pointing out that it is a tradition that began with George Washington in 1789, and has included nearly every President since that time. 465 U.S. at 674-75. That the Founders themselves (excluding Jefferson) issued prayer proclamations without hesitation speaks volumes.² Governor Ritter’s issuance of similar – although substantially less exhortative –

² Jefferson’s opinions on the subject, while of course relevant, are somewhat less influential than the opinions of those who were actually involved in debating and drafting the First Amendment. Jefferson was in France during the constitutional debates and during the congressional debates on the Bill of Rights, acting as the United States’ minister plenipotentiary to the French court. *See Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J. dissenting). Madison, the principal author of the Bill of Rights, is often cited as “regretting” his decision to issue prayer proclamations during the War of 1812. *See, e.g., McCreary County*, 545 U.S. at 879 n.25. This characterization, however, paints an incomplete picture of Madison’s thoughts on the issue. Madison’s subsequent writings reveal that while he was uncomfortable with issuing proclamations *requiring* people to pray, he had no concerns about proclamations that were “absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms. In this sense, I presume you reserve to the Govt. a right to appoint particular days for religious

honorary proclamations, represents a continuation of a tradition dating back more than two centuries. Under the analysis adopted in *Marsh*, the challenged proclamations are entirely consistent with the Establishment Clause.

3. The Coercion Test

Justice Kennedy's separate opinion in *Allegheny County* gave life to yet another approach to Establishment Clause cases: the coercion test. 492 U.S. at 655-79 (Kennedy, J., concurring in part and dissenting in part). The coercion test takes an arguably more tolerant approach than *Lemon*, questioning "whether the government is coercing individuals by requiring support of or adherence to a particular religious belief or practice before being allowed benefits to which they are otherwise entitled." *Vogt*, 908 P.2d at 1131 n.15.

Plaintiffs have denied that they have been coerced into participating in the activities that the challenged honorary proclamations recognize. *Statement of Undisputed Facts* ¶ 24.

Moreover, in any event, as our supreme court has recognized, the coercion test has been "confined...to cases in which government creation of a state-sponsored and state-directed religious exercise in a public setting was seen as 'an attempt to employ the machinery of the state to enforce a religious orthodoxy.'" *Vogt*, 908 P.2d at 1131 n. 15, quoting *Weisman*, 505 U.S. at 592. No such circumstances exist here, and the coercion test would not apply even if the Plaintiffs had asserted any coercion.

worship throughout the State, without any penal sanction enforcing the worship." See *Letter from James Madison to Edward Livingston* (July 10, 1822), reprinted in 5 Philip B. Kurland & Ralph Lerner, *The Founders' Constitution* 105 (1987).

C. The Plaintiffs are not entitled to relief on their claims.

Honorary proclamations do not fit neatly into any one category of Establishment Clause jurisprudence (even assuming such categories exist). They are clearly government speech, but unlike a stone monument they are ephemeral. *Cf. Pleasant Grove City, Utah v. Sumnum*, 129 S.Ct. 1125 (2009). In Colorado, they bear the governor’s seal and signature, but unlike legislation they have no force or effect. *See Freedom From Religion Foundation v. Obama*, 2010 WL 1499451 (W.D. Wisc. 4/15/2010). These unique characteristics alleviate many of the concerns commonly associated with governmental acknowledgment of religion. As Justice Souter has put it: “religious proclamations” are “rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular[.]” *Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J. concurring). They are thus distinguishable from school prayer, compulsory religious instruction, and the like.

The recently-issued district court opinion in *Freedom From Religion Foundation v. Obama* only serves to highlight the distinctions between the National Day of Prayer statute, 36 U.S.C. § 119, and a tradition of governmental speech that predates it by more than 150 years. To be clear, the Defendants disagree with most aspects of the district court’s holding. Irrespective of its fate on appeal, however, it cannot be disputed that *Obama* has no direct bearing on this case. Not only was it issued by a court whose opinions are not binding in Colorado, but it also explicitly declined to reach the substantive issue raised by the Plaintiffs in this case. *Obama*, 2010 WL 1499451 at *24 (“Although plaintiffs sought a declaration that all presidential ‘prayer proclamations’ violate the establishment clause, I dismissed this

claim because plaintiffs failed to show they had standing to raise it.”) Moreover, to the extent that *Obama* has any persuasive effect, its analysis works in favor of applying the *Marsh v. Chambers* approach discussed above.

If the Justices universally agree on anything, it is that “[t]he wall that separates the church from the State does not prohibit the government from acknowledging the religious beliefs and practices of the American people[.]” *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting). Any truly objective observer would agree that that is all the challenged honorary proclamations do. Like proclamations issued for countless other events that have either secular or religious roots, the Governor’s recognition of the National Day of Prayer simply acknowledges the religious beliefs and practices of those who choose to participate in it. While the Plaintiffs are certainly entitled to disagree with the beliefs and practices of the proclamations’ proponents, they may not exercise a heckler’s veto to prevent the Governor from acknowledging them.

Given the lengthy history of prayer proclamations and the fact that the Founders – including even the drafters of the Establishment Clause itself – issued them without hesitation, the historical practice test adopted in *Marsh* would seem to be the most appropriate means by which to analyze them here. Although the Supreme Court has, on previous occasions, declined to expand the holding in *Marsh*, it has never had occasion to directly address the constitutionality of “religious proclamations.” *Lee, supra*, at 630 (Souter, J. concurring). Nonetheless, the Court’s extensive *dicta* on the subject suggest a consensus among the Justices concerning the history, ubiquity, and benignity of

proclamations such as those challenged here. As such, the Defendants are entitled to summary judgment because the challenged honorary proclamations do not violate the Colorado Constitution.

IV. The Plaintiffs are not entitled to injunctive relief.

In addition to seeking declaratory judgment in their favor, Plaintiffs also demand that “the Court enjoin future designations of Day of Prayer celebrations by Governor Ritter and enjoining [sic] Governor Ritter and his successors from issuing further Day of Prayer Proclamations.” *Complaint* at 7. Irrespective of the outcome of this Court’s Establishment Clause analysis, however, injunctive relief is inappropriate.

First, if this Court agrees that Governor Ritter’s 2007 and 2008 “Day of Prayer” honorary proclamations pass constitutional muster, there would be no violation of the Establishment Clause, and therefore nothing to enjoin.

Second, although this Court could conceivably declare that one or more of the challenged honorary proclamations violated the Colorado Constitution, it is impossible to reach the same conclusion – or order prospective relief – regarding potential future proclamations. Whether or not the challenged honorary proclamations were constitutional depends not on whether they were issued in the first place, but rather whether the language that they used violated the Preference Clause. Even if this Court were to disapprove of the language contained in prior honorary proclamations, it has no way of predicting whether future proclamations will use language inconsistent with the Preference Clause. Indeed, it seems likely that the Governor would studiously avoid using language ultimately determined

to be unconstitutional. The inherent variability of future proclamations therefore makes them a particularly inappropriate target for injunctive relief.

As noted above, the court in *Freedom From Religion Foundation v. Obama* recently reached an identical conclusion with respect to the plaintiffs' demand for injunctive relief against the President. See *Freedom From Religion Foundation v. Obama*, 2010 WL 698133 (W.D. Wisc. March 1, 2010), The *Obama* court relied in part on the holding in *Newdow v. Bush*, 391 F.Supp.2d 95, 108 (Dist. D.C. 2005), in which a district judge declined to issue an injunction against President Bush's planned inaugural prayer, in part because he found he could not "rule on the constitutionality of prayers yet unspoken at future inaugurations of Presidents who will make their own assessments and choices with respect to the inclusion of prayer." *Id.* As the *Obama* court held: "It is one thing to issue a narrowly circumscribed injunction regarding a single, ministerial act; it is quite another for a court to issue a broad ruling that dictates the particular language the President may use in any context." *Obama, supra*, at *20; see also *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002) ("courts generally do not consider cases involving uncertain or contingent future matters").

That honorary proclamations are an unfit target for injunctive relief is especially true in light of the Colorado Constitution's strong prohibitions on prior restraint. As our supreme court has noted, Colo. Const. art II, § 10 provides "greater protection for individual freedom of expression than the Federal Constitution." *Curious Theatre Co. v. Colorado Dept. of Public Health and Environment*, 220 P.3d 544, 551 (Colo. 2009). Thus, "the state constitution...affirmatively guarantees the freedom of every person 'to speak, write, or

publish whatsoever he will on any subject,' without prior approval or restraint, subject only to being held accountable for any abuse of that liberty." *Id.* The Plaintiffs are therefore not entitled to injunctive relief, and this Court should grant summary judgment in favor of the Defendants.

CONCLUSION

Based on the foregoing reasoning and authorities, the Defendants respectfully request that this Court grant summary judgment in their favor on all claims and requests for relief contained in Plaintiffs' Complaint.

Respectfully submitted this 7th day of May, 2010

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT upon all parties herein by LexisNexis File and Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 7th day of May, 2010, addressed as follows:

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