EFILED Document
CO Court of Appeals
10CA2559
Filing Date: Aug 18 2011 11:22AM MDT
Transaction ID: 39353985

COURT OF APPEALS
STATE OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, CO 80202

City and County of Denver County
Honorable R. Michael Mullins, Judge
Case No. 08CV9799

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

Appellants/Cross-Appellees,

v.

JOHN HICKENLOPER, in his official capacity as Governor of the State of Colorado, and THE STATE OF COLORADO.

Appellees/Cross-Appellants.

▲ **COURT USE ONLY** ▲

Case No. 10CA2559

JOHN W. SUTHERS, Attorney General
DANIEL D. DOMENICO, Solicitor General* #32038
GEOFFREY N. BLUE, Deputy Attorney General* #32684
MAURICE KNAIZER, Deputy Attorney General* #5264
MATTHEW D. GROVE, Assistant Attorney General* #34269
1525 Sherman Street, 7th Floor
Denver, CO 80203
Phone: (303) 866-5380 Fax: (303) 866-5671
Email: matthew.grove@state.co.us
*Counsel of Record

OPENING-ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

Choose one:

It contains **7,750** words.

It does not exceed 30 pages.

~~The brief does not comply with CAR 28(g) because it exceeds the word and/or page limit. A motion to accept the over length brief has been filed contemporaneously with the brief.~~

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

For the party raising the issue:

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

For the party responding to the issue:

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

Or

~~The opponent did not address standard of review and/or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal~~.

s/ *Matthew D. Grove*

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

Appellees/Cross-Appellants Governor John Hickenlooper and the State of Colorado hereby submit their Opening-Answer brief in the above-captioned matter.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) *On cross-appeal:* Whether the district court correctly determined that the Plaintiffs had standing to pursue their claim.
2) *On appeal*: Whether the district court correctly determined that the Governor did not violate Colo. Const. art. II, § 4, by issuing honorary proclamations acknowledging private celebrations of the National Day of Prayer.

STATEMENT OF THE CASE

In 2008, Plaintiffs filed suit against the State of Colorado and its Governor challenging the Governor's issuance of honorary proclamations recognizing a "Colorado Day of Prayer." Plaintiffs claimed that the challenged honorary proclamations violated Colo. Const. art. II, § 4, known as the Preference Clause. Plaintiffs' Complaint sought a declaration that previously issued honorary

proclamations of a "Colorado Day of Prayer" violated art. II, §4, and also requested that the district court enjoin the Governor and his successors from issuing further Day of Prayer proclamations. *CD,* pp. 1569-70.

Both parties moved for summary judgment. After rejecting the State's argument that the Plaintiffs lacked standing to sue, the district court ruled that the challenged proclamations did not violate the Preference Clause, and consequently granted summary judgment on the merits in favor of the State. *CD,* pp. 1564-77. These proceedings followed.

STATEMENT OF THE FACTS

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 Governor's office accepts requests for signed photographs, letters of congratulation or recognition, and honorary proclamations. *CD,* p.157, ¶ 4. The Governor'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." *CD,* p129, 470.

Process for Approval and Issuance of Honorary Proclamations

Colorado's Governor is rarely, if ever, involved in the issuance of honorary proclamations. *CD,* p159 at ¶ 14. Instead, honorary proclamation requests are typically routed through the Press/ Communications Office. *CD,* p157 at ¶ 5. The proponent is required to propose language for the honorary proclamation as part of its request. *CD,* p158 at ¶ 8. Upon receipt, the Governor's communications staff reviews the language being proposed. *Id.* If the communications staff determines that it is not problematic, it simply issues the proclamation as requested. *Id.* at ¶ 9. Many groups file annual honorary proclamation requests; 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 communications staff use the previous year's digitally saved copy as a template for creating the new proclamation. *CD,* p159 at ¶ 18.

The Governor's office does on rare occasions decline to issue requested honorary proclamations based on the proposed content. *CD,* p158 at ¶ 11. On one occasion, an individual sought an honorary proclamation that he was of good moral character. *Id.* After some research, communications staff determined that the individual had been charged and was awaiting trial for murder in New York City. *Id.* As a result, communications staff 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 are not publicized or distributed publicly by the Governor's office. Instead, they are printed out by communications staff, signed by the Governor's "auto-pen" device, and mailed directly to, or made available for pickup by, the requesting party.

Honorary Proclamations for a "Colorado Day of Prayer"

Like Governor Owens before him, Governor Ritter's administration issued honorary proclamations for a "Colorado Day of Prayer" upon request during each year of his administration.[1] *CD,* p160 at ¶ 20. Although Colorado's governors have issued Thanksgiving and other proclamations of this type for many years, the honorary proclamations challenged in this case are prompted by annual requests submitted by the National Day of Prayer ("NDP") Task Force, a private

[1] Although there is no post-2010 information in the appellate record, Plaintiffs' Opening Brief indicates that the Hickenlooper continued the tradition by issuing an honorary proclamation of a "Colorado Day of Prayer" in 2011. Open. Br. 6.

evangelical organization that has taken it upon itself to promote the National Day of Prayer, which, per federal statute, occurs annually on the first Thursday of May. *Id*., *see* 36 U.S.C. § 119.[2]

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. *CD,* p161 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. CD,* p224-225

---

[2] As discussed in more detail, *infra,* the Freedom From Religion Foundation recently raised an Establishment Clause challenge to 36 U.S.C. § 119, and presidential proclamations issued pursuant to that statute, in federal district court in Wisconsin. The district court first dismissed the challenge to the issuance of presidential proclamations on standing grounds, *Freedom From Religion Foundation v. Obama,* 691 F.Supp.2d 890, 910-914 (W.D. Wisc. 2010) ("*Obama I").* In a subsequent opinion, the court declared 36 U.S.C. § 119 unconstitutional. *Freedom From Religion Foundation v. Obama,* 705 F.Supp.2d 1039 (W.D. Wisc. 2010) ("*Obama II*"). The Seventh Circuit Court of Appeals reversed that ruling, finding that the Plaintiffs lacked Article III standing to challenge the both the statute and presidential proclamations issued in accordance with the statute. *Freedom From Religion Foundation v. Obama,* 641 F.3d 803 (7th Cir. 2011) ("*Obama III*").

(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.*

Plaintiffs' claimed injuries

As the district court found, the individual Plaintiffs do not contend that the issuance of the challenged honorary proclamations "prevented them from exercising their right to non-belief, or exerted any coercion in this regard." *CD,* p1568 (Order on Summary Judgment). The individual Plaintiffs have never attended the privately organized National Day of Prayer event. *CD,* p1569. They do not assert that were encouraged to do so, or that they suffered any adverse consequences as a result of their failure to attend. *CD,* p1569. No money is specifically budgeted for the issuance of honorary proclamations; in any event, the cost is plainly *de minimis*. *CD,* p1569, 1570.

Plaintiffs nonetheless argued below that the issuance of honorary proclamations injures them by making them "feel like political outsiders because they do not believe in the supposed power of prayer," and

because the honorary proclamations "give the appearance of support and endorsement of religion," allegedly in violation of the Preference Clause. *CD,* p1596-97. Plaintiffs reiterate these arguments on appeal, asserting that the challenged honorary proclamations "put[] the Plaintiffs in the position of being outsiders." Open. Br. 19. They consider the alleged "encouragement by government officials to believe in God as being inappropriate, and non-believers should not be put in the position of having to resist overtures to pray." *Id.*

Additional facts

The Defendants maintain that, notwithstanding the Plaintiffs' extensive discussion of the history of and purported motivations behind the National Day of Prayer legislation, the foregoing facts are all that is relevant to the disposition of this appeal. In short, because the challenged proclamations are not required by, or issued pursuant to, 36 U.S.C. § 119, the existence of the federal statute should have no bearing or impact on the outcome of this case.

STANDARD OF REVIEW

The Defendants generally agree with Plaintiffs' recitation of the standard of review. Whether a plaintiff has standing to sue is reviewed *de novo*. *Barber v. Ritter,* 196 P.2d 238, 245 (Colo. 2008).

A district court's grant of summary judgment is reviewed *de novo*. *McIntire v. Trammel Crow, Inc.,* 172 P.3d 977, 979 (Colo. App. 2007). Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Siepierski v. Catholic Health Initiative Mountain Region,* 37 P.3d 537, 539 (Colo. App. 2001).

SUMMARY OF THE ARGUMENT

Opening Brief: The district court erroneously found that the Plaintiffs had demonstrated an injury-in-fact to a legally protected interest sufficient to establish their standing to sue. Accordingly, its ruling in favor of the Defendants should be affirmed, but on different grounds, because the district court lacked subject matter jurisdiction over the Plaintiffs' complaint.

Answer Brief: On the merits, the district court correctly determined that the challenged honorary proclamations do not violate the Preference Clause of art. II, § 4. The Court accurately applied the endorsement test to conclude that the challenged honorary proclamations do not violate the Colorado Constitution. However, given the lengthy history of prayer proclamations by government officials, the historical practice test outlined by *Marsh v. Chambers,* 463 U.S. 783 (1983), may represent a more suitable approach. In any event, irrespective of the test that is applied the district court's ruling should be affirmed.

OPENING BRIEF

I. The district court erroneously ruled that the Plaintiffs had standing to sue.

"A court does not have jurisdiction over a case unless a plaintiff has standing to bring it." *Hotaling v. Hickenlooper,* __P.3d__ No. 10CA0364 (Colo. App. June 23, 2011) at 4. To establish standing, a plaintiff must demonstrate that he has: 1) suffered an injury-in-fact to a 2) legally protected interest. *Wimberly v. Ettenberg,* 570 P.2d 535, 539

(Colo. 1977). Under Colorado law, "parties to lawsuits benefit from a relatively broad definition of standing." *Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2004). Even Colorado's standing is not unlimited, however; it does not extend to "generalized grievances" against government action. Nor is it conveyed by "the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action." *Id., quoting Brotman v. East Lake Creek Ranch, LLP,* 31 P.3d 886, 890-91 (Colo. 2001).

II. General rules of standing.

There are two general categories of standing potentially applicable to the Plaintiffs' claims in this case: "taxpayer" standing and "citizen" standing. Although our supreme court has not always clearly distinguished between them, *see, e.g. Ainscough,* 90 P.3d at 856-57, most cases do recognize a marked distinction between the two. In *Brotman,* for example, the supreme court conducted separate analyses of the Plaintiffs' standing as an adjacent landowner (i.e., as a "citizen") under *Wimberly,* and also as a taxpayer under *Dodge v. Dep't of Social Servs,* 600 P.2d 70 (Colo. 1979). Colorado's standing rules are fairly

lenient for both categories, but taxpayer standing is undeniably broader.

Taxpayer standing: "[W]hen a *plaintiff-taxpayer* alleges that a government action violates a specific constitutional provision ..., such an averment satisfies the two-step standing analysis." *Hotaling, supra* at 6, *quoting Barber,* 196 P.3d at 247 (emphasis added). Thus, taxpayers generally have standing to challenge allegedly unconstitutional expenditures of government funds. *Barber,* 196 P.3d at 245-46. However, there must still be "some nexus between the plaintiff's status as a taxpayer and the challenged government action." *Hotaling, supra* at 10; *see also Barber,* 196 P.3d at 246 (injury-in-fact must not be overly indirect or incidental). In other words, for taxpayer standing "the injury-in-fact requirement is satisfied when the plaintiff-taxpayer's alleged injury 'flow[s] from governmental violations of constitutional provisions that specifically protect the legal interests involved.'" *Barber,* 196 P.3d at 247*, quoting Conrad v. City and County of Denver,* 656 P.2d 662, 668 (Colo. 1982).

Citizen standing: Although the *Wimberly* test applies to both taxpayer and citizen standing, what constitutes an "injury-in-fact" varies depending on the type of standing asserted. As noted above, our supreme court has conferred very broad standing on plaintiffs alleging an unconstitutional expenditure of government funds. *See Barber*. But for plaintiffs who do not complain that their tax dollars are being misused, the test is somewhat more stringent. Although still "relatively broad," *Ainscough,* 90 P.2d at 855, Colorado's citizen standing requirements nonetheless track the approach outlined by the United States Supreme Court. Injury-in-fact requires "a 'concrete adverseness which sharpens the presentation of issues' that parties argue to the courts." *Greenwood Village v. Petitioners for Proposed City of Centennial,* 3 P.3d 427, 437 (Colo. 2000), *quoting Baker v. Carr,* 369 U.S. 186, 204 (1962). An injury that is "indirect and incidental" will not confer standing. *Brotman,* 31 P.3d at 891.

III. The district court erroneously concluded that the Plaintiffs' alleged psychic injury was sufficient to confer citizen standing.

Only one reported Colorado case – *Conrad* – addresses questions of standing under Colo. Const. art. II, § 4.[3] Unlike the Plaintiffs here, however, the *Conrad* plaintiffs qualified for taxpayer standing primarily because they alleged an unconstitutional expenditure of city funds. 656 P.2d at 668-69. Plaintiffs made no such allegation of improper expenditures here, and the district court rightly therefore rejected the claim of taxpayer standing.

The district court erred, however, when it conferred standing on Plaintiffs based on their claim "that the honorary proclamations of a

---

[3] Questions of standing are not addressed at all in the only other pertinent reported case to have considered an alleged violation of the preference clause. *State v. Freedom from Religion Found., Inc.,* 898 P.2d 1013 (Colo. 1995). That case involved a permanent monument, not an ephemeral honorary proclamation, and so is plainly distinguishable on the facts. Moreover, the fact that the court reached a conclusion in that case without considering questions of standing has no bearing on the question whether the Plaintiffs have standing here. *See Romer v. Bd. of County Comm'rs,* 956 P.2d 566, 570 n.4 (Colo. 1998) (where court was not called upon to address the issue of standing in prior case, the precedential value of opinion in that case should not be read or assumed to resolve the question of standing).

Colorado Day of Prayer make them 'feel like political outsiders because they do not believe in the supposed power of prayer' [and] because they 'give the appearance of support and endorsement of religion.'" *CD,* p1570. Based on Justice O'Connor's refinement of the *Lemon* test in *Lynch v. Donnelly,* 465 U.S. 668, 688 (1984), the district court concluded that this was "enough of an injury for standing under Colorado's law." *CD,* p1580.

To be sure, the district court's interpretation of *Lynch* was generally accurate: psychic injuries have on occasion given rise to "offended observer" standing in Establishment Clause cases. *See, e.g, American Atheists, Inc. v. Davenport,* 637 F.3d 1095, 1113-14 (10th Cir. 2010) (en banc) (finding standing to challenge Utah State Patrol's erection of roadside memorial crosses where plaintiffs had "direct personal and unwelcome contact" with the crosses); *Vazquez v. Los Angeles County,* 487 F.3d 1236, 1249-51 (9th Cir. 2007) (plaintiff had standing to challenge revision of county seal on Establishment Clause grounds where he alleged frequent regular contact with the revised seal). Although *Conrad*'s holding was focused on primarily on taxpayer

standing, the supreme court's opinion implied that the offense suffered by the plaintiffs when personally observing the crèche – as well as religious services occurring in front of it – would have conferred standing on similar grounds under the Preference Clause. 656 P.2d at 666-67.

But even if psychic injury can give rise to standing, it does not follow that "offended observer" arises from the mere fact that a plaintiff is upset by a government's policy, actions, or statements. To be sufficient to confer standing, an alleged psychic injury cannot be based on a plaintiff's mere knowledge that the government has done something that offends him. Rather, the general rule under the Establishment Clause is that standing will not arise unless the injury is caused by "direct contact" with the allegedly unconstitutional action or object. *See, e.g. Suhre v. Haywood County,* 131 F.3d 1083, 1090 (4th Cir. 1997). Thus, in *Sch. Dist. of Abingdon v. Schempp,* 203, 206-08 (1963), the plaintiffs had standing to sue because they were "exposed" every morning to a "religious ceremony" of consisting of Scripture readings and prayers. However, in *Valley Forge Christian College v. Americans*

United for Separation of Church and State, 454 U.S. 464 (1982), the Supreme Court found dispositive the plaintiffs' lack of direct contact with the challenged land transfer. As the majority put it: "the psychological consequence presumably produced by observation of conduct with which one disagrees…is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86.

Direct contact with a fixed physical object is easy to come by; as a result "offended observer" standing is successfully invoked on a regular basis in monument cases. However, in cases where a plaintiff attempts to challenge more ephemeral governmental actions or policies, direct contact is much more difficult to establish. *Valley Forge* dismissed the idea that reading a "news release" describing an offending governmental action can ever be enough to establish the type of injury required. 454 U.S. at 469. Other cases have taken a similarly dim view of the assertion that an injury-in-fact may flow from mere knowledge of government activity that has no direct impact on the complainant. *See, e.g., Caldwell v. Caldwell,* 545 F.3d 1126, 1133-34 (9th Cir. 2008)

(mother of student who viewed school web page containing information on religion and evolution lacked standing to challenge "the University of California's treatment of religious and anti-religious views on evolution"); *see also Elk Grove Unified School District v. Newdow,* 542 U.S. 1 (2004) (plaintiff lacked standing to challenge inclusion of "under God" in Pledge of Allegiance where he was not required to say the Pledge himself and lacked parental rights with respect to the pupil who was present when the Pledge was recited).

This is the approach that the federal district court followed in *Obama I.* That case was postured nearly identically this one, with the Freedom from Religion Foundation and several individually named plaintiffs challenging, in addition to the federal statute, the President's issuance of prayer proclamations. *Obama I,* 691 F.Supp.2d at 910-11. In rejecting the plaintiffs' claim that the issuance of the proclamations caused an injury-in-fact, the federal district court noted that "[t]hese plaintiffs may be aware through media reports, complaints from foundation members, or other sources that Presidents have issued statements regarding prayer, but that is not enough in the context of

this claim." *Id.* at 910. Relying on the Supreme Court's requirement of direct contact as outlined in *Valley Forge,* the court held that plaintiffs "may not challenge prayer proclamations by 'roaming the country' in search for them." *Id., quoting Valley Forge,* 454 U.S. at 487 (alterations omitted).

The individual plaintiffs in this case alleged precisely the same injury as the one found insufficient in *Obama I.* The proclamations were not mailed to them or posted by the Governor for the world to see. Plaintiffs did not attend any of the Colorado Day of Prayer celebrations or personally observe (and take offense at) the honorary proclamations being publicly read. Instead, the Plaintiffs went looking for the honorary proclamations, and found them "through extensive media coverage, including on the internet, print media and visual coverage." *CD,* p167. They were not injured by the Governor's issuance of the proclamations; rather, any injury that they allegedly suffered was the self-inflicted result of their search for something to be offended by. The nature of the proclamations themselves makes this conclusion all the more evident. 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). The honorary proclamations challenged in this case are no different. They are not publicized by the Governor's office and they do not have the force and effect of law. Moreover, as the district court found, rather than requiring or even requesting participation from the public at large, the challenged honorary proclamations simply acknowledge that an event will occur. *CD,* p1573. In that sense, they are even less likely to cause injury than the Presidential proclamations challenged in the Wisconsin case, which, as the Seventh Circuit noted, contained a general invitation to pray. *Obama III,* 641 F.3d at 806. Even an invitation would not be enough for standing, though. "[A]lthough this proclamation speaks to all citizens, no one is obliged to pray, any more than a person would be obliged to hand over his money if the President asked all citizens to support the Red Cross and other charities. It is not just that there are no penalties for noncompliance; it is that disdaining the President's proclamation is not a 'wrong.'" *Id.*

It is not exceptionally difficult to establish citizen standing in Colorado's state courts, but airing a "generalized grievance," rather than raising an actual injury to a legally protected interest, will not do. *Greenwood Village,* 3 P.3d at 437. The Plaintiffs are certainly entitled to take offense at the Governor's issuance of honorary proclamations acknowledging a Colorado Day of Prayer, but their mere disagreement with the Governor's policies is not enough to confer standing to challenge their constitutionality in court. *See Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 223 n.13 (1974) (no standing arises from "the abstract injury in nonobservance of the Constitution asserted by…citizens"). Simply put, the Plaintiffs were required to show more than that they decided to sue the state after reading in the newspaper that the challenged honorary proclamations had been issued. To hold otherwise, as the district court did, would be to abandon Colorado's already-lenient standing jurisprudence, and allow virtually anyone who disagreed with virtually any government policy or action to present it to the courts for resolution. For these reasons, the district court's ruling should be affirmed, but on the alternate ground that the

Plaintiffs – because they did not demonstrate an injury-in-fact – lacked standing to challenge the honorary proclamations at issue.

ANSWER BRIEF

Our supreme court's construction of the Preference Clause mirrors federal Establishment Clause jurisprudence. *See State v. Freedom From Religion Foundation, Inc.,* 898 P.3d 1013, 1019 (Colo. 1995). 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' substantive 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.

I. 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. Even 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,* 597 F.3d 1007, 1017 (9th Cir. 2010). (applying three independent tests to evaluate plaintiffs' claim). This brief follows the same approach.

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 v. Jaffree,* 472 U.S. 38, 63 (1985) (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. Like all honorary proclamations, honorary proclamations acknowledging a "Colorado Day of Prayer" 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).

The Governor's honorary proclamations have the obvious secular purpose of acknowledging an independently organized and privately hosted event. This is true for all honorary proclamations. As the district court noted, the Governor's office does not "examine the purposes of the National Day of Prayer Task Force before issuing its proclamation, and is not making a determination of what activities are 'religious.'" *CD,* p1576.

The text of the 2008 honorary proclamation, quoted in its entirety below, demonstrates its secular 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, and 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 endorse religion over non-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 refinement of *Lemon* in her *Lynch* concurrence. This refinement, commonly known as the "endorsement test," directs the 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).

The endorsement test is a contextual inquiry that requires consideration of "(1) what message the government intended to convey; and (2) what message the government's actions actually conveyed to a reasonable person." *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). On appeal, Plaintiffs focus primarily on the endorsement prong of the *Lemon* test, arguing that a "reasonable observer," aware of the context in which the challenged honorary proclamations have been issued, would conclude that the Governor issued them as a means of endorsing religion over non-religion.

2. Honorary proclamations – irrespective of their subject matter – do not "endorse"

anything, and therefore cannot be reasonably be construed as communicating promotion or favoritism.

Plaintiffs assert that "endorsement is the purpose and effect of an official proclamation by the Governor." Open. Br. 30. Building on this claim, they argue that any honorary proclamation that mentions prayer can only be construed as endorsing it.

This position betrays Plaintiffs' fundamental misunderstanding of the nature of honorary proclamations, and is key to why the district court's order should be affirmed. Honorary proclamations – regardless of their subject – neither "endorse" anything nor require any citizen action in response. *CD,* p1599; *cf. Obama III,* 641 F.3d at 807 (by issuing prayer proclamation, "[t]he President has made a request; he has not issued a command"); *and Zwerling v. Reagan,* 576 F.Supp.2d 1373 (C.D. Cal. 1983) (President Reagan's proclamation of the "Year of the Bible," and accompanying congressional resolution, did not violate Establishment Clause). Instead, they simply acknowledge events, like anniversaries or annual gatherings, or recognize individual

accomplishments. Although Plaintiffs assert otherwise, the undisputed evidence below demonstrated that endorsement is *not* the purpose of an honorary proclamation, and would not be construed as such by a reasonable observer. *CD,* p414-15 (31:24-32:6). To the contrary, a reasonable observer would realize that the Governor's office issues hundreds of honorary proclamations each year, some of which acknowledge rival groups and causes. The reasonable observer would realize that, whether he is proclaiming "Chili Appreciation Society International Day," or a "Colorado Day of Prayer," the Governor is not promoting or favoring the cause, but instead is simply acknowledging some private group's own celebration of it.

Because honorary proclamations do not constitute governmental endorsement of the subjects and events that they recognize or acknowledge, Plaintiffs' claim fails at the threshold. Nonetheless, as argued below, even assuming *arguendo* that a reasonable observer could theoretically construe honorary proclamations as endorsements under some circumstances, the content of the particular honorary

proclamations at issue, and the context in which they are issued, raise no concerns under the Preference Clause.

3. Even assuming that honorary proclamations could be considered endorsements in some contexts, no such concerns cast doubt on the constitutionality of the honorary proclamations challenged in this case.

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,* 542 U.S. at 35 (2004) (O'Connor, J., concurring in the judgment). In addition, the "reasonable observer" must in fact be truly objective. "[A]dopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement." *Id.*

As they did below, Plaintiffs assert that the challenged honorary proclamations must be considered in the context of the history of the National Day of Prayer statute. Indeed, a substantial portion of the Opening Brief is devoted to outlining the history of, and motivations behind, the federal government's adoption of 36 U.S.C. § 119. The district court correctly rejected this approach, noting that although "Plaintiffs… refuse to quit the argument about the National Day of Prayer…[it] is simply not at issue here." *CD,* p1600.

Plaintiffs' arguments notwithstanding, an objective analysis of the challenged 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 alleged below 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; Open. Br. 43. This "alliance," the Plaintiffs claimed, "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, as the district court found, the NDP Task Force follows the same process for requesting their honorary proclamations as everyone else. *CD,* p1596. At best, Plaintiffs' case was based on conjecture and innuendo. Indeed, as the district court correctly found,

the Governor does not even directly participate in the honorary proclamation process, much less collaborate with or do NDP Task Force's bidding. *CD,* p1591. The district court therefore correctly rejected Plaintiffs' claims that the Governor and the NDP Task Force have some sort of collaborative agreement intended to foster state sponsorship of religion. *CD,* p1599, 1601. 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,[4] 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

---

[4] 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 have been 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. As the district court concluded, the Plaintiffs offered no evidence in support of this theory. *CD,* p1601.

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.

a. 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).

As the district court found, there was no evidence that the challenged honorary proclamations cause any entanglement with religion. *Order,* p13. As previously discussed, the Plaintiffs offered no evidence to support any collaboration or alliance between the Governor's office 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.

II. The Historical Practice Test

Although the challenged honorary proclamations 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.[5] The Governor's issuance of similar – although substantially

[5] 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,*

less exhortative – 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.

The district court declined to apply the historical practice test in this case because there was "no evidence that the honorary proclamations for the Colorado Day of Prayer date to before 2004." *CD,* p1602. Although the district court accurately described the evidence, it

---

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 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).

missed the larger and more important point. The question is not whether Colorado's Governor has a lengthy history of issuing prayer proclamations. Given Colorado's relatively brief history as an organized territory and state, a history of gubernatorial proclamations dating back to the early days of nationhood would be impossible to demonstrate in any event. Rather, the pertinent question is whether prayer proclamations in general – as issued by Presidents, Governors, and other chief executives around the country – have an historical pedigree substantial enough to make them "part of the fabric of society." *Marsh,* 463 U.S. at 792. Given the lengthy history of prayer proclamations discussed above, the answer to that question is fairly obvious. The Governor's proclamations of a "Colorado Day of Prayer" are constitutional not only because they do not "endorse" religion, but also because they stem from a tradition that began with George Washington and has continued virtually unbroken for more than 225 years.

CONCLUSION

Based on the foregoing reasoning and authorities, Defendants respectfully request that the district court's order granting summary judgment in their favor be affirmed.

JOHN W. SUTHERS
Attorney General

/s/ Matthew D. Grove
MATTHEW D. GROVE, *
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for Defendants
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within OPENING-ANSWER BRIEF upon all parties herein, and the district court, by LexisNexis File and Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 18th day of August, 2011, addressed as follows:

rbolton@boardmanlawfirm.com
Plaintiffs' Counsel:
Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
Box 927
Madison, WI 53701-0927

dbonifazi@i-blaw.com
Plaintiffs' Counsel:
Daniele W. Bonifazi
John H. Inderwish
6377 S. Revere Parkway #400
Centennial, CO 80111

/s/Matthew D. Grove

AG ALPHA: GRLZX
AG File: P:\SS\SSGROVMD\PUBLIC OFFICIALS\GOVERNOR\FREEDOM FROM RELIGION\COURT OF APPEALS\OPENING-ANSWER BRIEF.2 LSS-COPY.DOCX