

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Ave., 3rd Floor
Denver, CO 80203

District Court, Denver County, State of Colorado
The Honorable R. Michael Mullins, Judge
Civil Action No. 08-CV-9799

Plaintiffs/Appellants:

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

v.

Defendants/Appellees:

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

▲ COURT USE ONLY ▲

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Div.

APPELLANTS' OPENING 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).

Chose one:

- It contains 9,499 words.
- It does not exceed 30 pages.

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

For the party raising the issue:

It contains under a separate heading (1) 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 responding party to the issue:

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

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TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF COMPLIANCE.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
I. STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
II. STATEMENT OF THE CASE/FACTUAL BACKGROUND.....	1
A. District Court Decision.....	1
B. Statement of Additional Facts.....	6
1. Colorado Day of Prayer Proclamations.....	6
2. Day of Prayer Proclamations Serve a Purpose.....	8
3. Proclamations Crafted to Conceal Requester.....	9
4. Proclamations are Discretionary with the Governor.....	10
5. Colorado Day of Prayer Proclamations Incorporate Distinctly Christian Elements, Which are Used by the NDP Task Force.....	11
6. The Use of Day of Prayer Proclamations to Promote Religion is No Secret, and They are Perceived to Support Religion.....	12
7. History of 1952 NDP Legislation.....	13
8. Additional Legislation was Enacted in 1988 to More Fully Facilitate Religious Organizing by Groups Like the NDP Task Force.....	14
9. Mrs. Dobson is the Voice and Face of the NDP Task Force.....	16
10. The NDP Task Force Uses the NDP To Mobilize Prayer Activities.....	17
11. The NDP Task Force is Exclusively Christian in Perspective.....	17

12.	Presidential Proclamations are Integral to Prayer Rallies.....	18
13.	Participation by Government Officials, Including State Governors, is Critical to the NDP Task Force Efforts.....	18
14.	The NDP Task Force Succeeds in its Mission Due in Part to Official Participation by Government Officials.....	19
15.	The NDP Task Force Promotes Active Christian Prayer.....	20
16.	The NDP Task Force is Particularly Exclusionary.....	21
17.	The NDP is Highly Divisive and Controversial.....	21
18.	Nonreligious Persons Constitute a Significant Part of the National Excluded by the NDP.....	22
III.	STANDARD OF REVIEW.....	22
IV.	SUMMARY OF ARGUMENT.....	23
V.	ARGUMENT.....	26
A.	The Preference Clause Prohibits the Appearance of Religious Endorsement.....	26
B.	The Context of Day of Prayer Proclamations is Significant.....	31
C.	Day of Prayer Proclamations Give the Appearance of Religious Endorsement.....	36
1.	The Endorsement Test is Fact Dependent.....	36
2.	Government Speech Must be Evaluated by Content and Context.....	40
3.	The Role of the NDP Task Force is an Unmistakable Part of the Relevant Content and Context, But Ignored by the Defendants.....	42
VI.	CONCLUSION.....	45
	CERTIFICATE OF MAILING.....	46

TABLE OF AUTHORITIES

	<u>Page</u>
<u>American Atheists, Inc. v. Duncan</u> , 616 F.3d 1145, 1155 (10th Cir. 2010).....	29
<u>American Jewish Congress v. City of Chicago</u> , 827 F.2d 120, 126 (7th Cir. 1987).....	38
<u>Board of Education of West Side Community Schools (Dist. 66) v. Mergens</u> , 496 U.S. 226, 250 (1990).....	28
<u>Books v. City of Elkhart</u> , 235 F.3d 292, 304 (7th Cir. 2000).....	41
<u>Capitol Square Review & Advisory Board v. Pinette</u> , 515 U.S. 753, 765-66 (1995).....	28
<u>Colorado v. Freedom From Religion Foundation</u> , 898 P.2d 1013, 1021 (Colo. 1995).....	27
<u>Conrad v. City and County of Denver</u> , 724 P.2d 1309, 1313 and 1315 (Colo. 1986).....	26, 37
<u>County of Allegheny v. ACLU</u> , 492 U.S. 573, 593 (1989).....	28, 36, 40
<u>Elk Grove Unified School District v. Newdow</u> , 542 U.S. 1, 37 (2004).....	42
<u>Freedom From Religion Foundation, Inc. v. Colorado</u> , 872 P.2d 1256, 1265 (Colo. App. 1993).....	23, 27
<u>Friedman v. Board of County Commissioners</u> , 781 F.2d 777, 781 (10th Cir. 1985).....	28
<u>Gaylor v. United States</u> , 74 F.3d 214, 217 (10th Cir. 1996).....	27
<u>Green v. Haskell County Board of Commissioners</u> , 568 F.3d 784, 799 (10th Cir. 2009).....	29
<u>Jager v. Douglas County School District</u> , 862 F.2d 824, 830 (11th Cir. 1989).....	39
<u>Lemon v. Kurtzman</u> , 403 U.S. 602, 612-13 (1971).....	27
<u>Lewis v. Matthews</u> , 941 P.2d 266, 271 (Colo. 1997).....	22
<u>Lynch v. Donnelly</u> , 665 U.S. 668, 693-694 (1984).....	23, 38, 39
<u>McCreary County, Kentucky v. ACLU of Kentucky</u> , 545 U.S. 844, 878 (2005).....	35, 39, 41
<u>Mercier v. LaCrosse</u> , 305 F. Supp. 2d 999, 1011 (W.D. Wis. 2004).....	44

<u>O'Connor v. Washburn University</u> , 416 F.3d 1216, 1227 (10th Cir. 2005).....	38
<u>Pleasant Grove v. Summum</u> , 555 U.S. 460, 129 S. Ct. 1125, 1131-32 (2009).....	28
<u>Santa Fe Independent School District v. Doe</u> , 530 U.S. 290, 302 (2000).....	28, 38
<u>Shelter Mutual Insurance Company v. Mid-Century Insurance Company</u> , 246 P.3d 651, 657 (Colo. 2011).....	22
<u>Utah Gospel Mission v. Salt Lake City</u> , 425 F.3d 1249, 1260 (10th Cir. 2005).....	28
<u>Van Orden v. Perry</u> , 545 U.S. 677 (2005).....	41
<u>Wallace v. Jaffree</u> , 472 U.S. 38, 56 (1985).....	39

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

Whether annual proclamations of a Colorado Day of Prayer by the Governor of Colorado give the appearance of religious endorsement.

II. STATEMENT OF THE CASE/FACTUAL BACKGROUND.

A. District Court Decision.

The Plaintiffs claim that official proclamations by the Governor of Colorado, declaring a Colorado Day of Prayer, give the appearance of religious endorsement in violation of the Preference Clause in Article II, Section 4 of the Colorado Constitution.

The District Court granted summary judgment in favor of the Defendants. (R. 34061265, Page 14.) The Court concluded that annual Day of Prayer Proclamations do not violate any provision of the Colorado Constitution, including the no preference provision of Article II, Section 4. The Court reasoned that no objective observer would perceive the Governor's official proclamations as an endorsement of religion.

In a summary of undisputed facts, the District Court recognized that the Governor of Colorado has issued proclamations recognizing the National Day of Prayer (“NDP”) at least from 2004 through 2010. (R. 34061265, Page 2.) Although

these proclamations do not have the force and effect of law, they are official documents issued by the Governor's Office. (R. 34061265, Page 2.)

The Court further recognized that the initiative for these proclamations comes from the NDP Task Force, led by Shirley Dobson, who requests each state governor to issue an annual proclamation, which includes the NDP Task Force annual theme and supporting scriptural reference. (R. 34061265, Page 2.) The proclamations issued by the Governor of Colorado from 2004 through 2008, moreover, did each acknowledge the NDP Task Force annual theme and/or scriptural reference. (R. 34061265, Page 2.) The proclamations issued in 2009 and 2010, after commencement of suit, did not acknowledge the NDP Task Force theme or scriptural reference. (R. 34061265, Page 5.)

All of the Colorado Day of Prayer Proclamations from 2004 to 2010 have proclaimed the Colorado Day of Prayer to coincide with the federal NDP. (R. 34061265, Page 2.) The NDP Act specifies the first Thursday in May as the day on which the NDP is celebrated. (R. 34061265.) According to the District Court, having a predictable date for the NDP assists private organizers of the Day of Prayer to inform grass roots constituencies and to engage in long-range planning. (R. 34061265.) As a result, the Colorado Day of Prayer Committee has historically

reserved the west steps at the Capitol for the first Thursday in May to celebrate the Day of Prayer. (R. 34061265, Page 2.)

The Governor of Colorado issues proclamations after considering requests from the public. (R. 34061265, Page 2.) The District Court found that these requests are reviewed by the Governor's Office, and if the content of a requested proclamation is not problematic, or if it is similar to a proclamation approved and issued in a prior year, then the Governor's staff will process and issue the proclamation. (R. 34061265, Page 2.) If the content of a requested proclamation seems to be problematic, then the proposed proclamation is submitted to the Governor's Director of Communications, who either approves or rejects the request, sometimes after consultation with legal counsel. (R. 34061265, Page 2.)

The Governor's Office is not required to issue any proclamation, and some requests are occasionally rejected, although this is rare. (R. 34061265, Page 3.) Some requested proclamations, moreover, are edited for content to avoid controversial language and statements. (R. 34061265, Page 3.) Proclamations are also drafted to make them as general as possible, thereby concealing the requesting organization. (R. 34061265, Page 3.)

Approved proclamations receive the Governor's automated signature. Each proclamation also bears the Executive Seal of the State of Colorado in addition to the

signature of the Governor. (R. 34061265, Page 3.) Official proclamations are mailed directly to the requesting individual or group. The Governor does not restrict the uses to which the proclamations may thereafter be put. (R. 34061265, Page 3.)

The purpose of the organizers of the Colorado Day of Prayer, including the NDP Task Force, is to encourage prayer. (R. 34061265, Page 5.) The corresponding activities at the Colorado Capitol, planned by private organizers, routinely include a program of worship and prayer. (R. 34061265, Page 5.) Members of the NDP Task Force believe that state proclamations issued by governors convey the Governors' support for the NDP, according to the District Court. (R. 34061265, Page 5.)

The District Court, nonetheless, concluded that proclamations issued by the Governor of Colorado are not intended to convey a message of support, but instead merely give open access to the Governor's Office to all groups that ask for proclamations for various causes. (R. 34061265, Page 11.) The Court also stated that Colorado Day of Prayer Proclamations are intended as acknowledgements of the NDP by the Governor's Office. (R. 34061265, Page 11.)

Whether the NDP conveys a message of religious endorsement is irrelevant, according to the District Court, because the State of Colorado has nothing to do with the existence of that holiday, but is merely acknowledging it in official proclamations. (R. 34061265, Page 12.) The Court further concluded that Colorado

Day of Prayer Proclamations do not force citizens of Colorado to recognize the Colorado Day of Prayer or to pray themselves, and there is nothing controversial about a restatement of rights protected by the First Amendment of the United States Constitution. (R. 34061265, Page 12.)

The purpose of the NDP Task Force, however, in requesting proclamations from government officials is relevant, reasoned the District Court. (R. 34061265, Page 12.) That purpose is to encourage people to pray. (R. 34061265, Page 12.) The Court, nonetheless, tried to distinguish proclamations from donated monuments, which may indicate government endorsement. (R. 34061265, Page 12.) According to the Court, proclamations are not visible to the whole world on a continuous basis. (R. 34061265, Page 12-76.) Furthermore, the Court concluded that the purpose of proclamations is to acknowledge events requested by private groups rather than to endorse such events. (R. 34061265, Page 13.) As a result, the purpose of the requesting party, here the NDP Task Force, should not be ascribed to the Governor's resulting proclamation. (R. 34061265, Page 13.)

Finally, the District Court summarized that the primary message of Colorado Day of Prayer Proclamations is simply that the Governor's Office acknowledges the right of an individual to pray and worship, the NDP, and the events held by the NDP Task Force at the Capitol. (R. 34061265, Page 13.) Such proclamations do not

encourage anyone to pray, nor would an objective observer perceive such proclamations as an attempt to influence that issue, said the Court. (R. 34061265, Page 13.)

B. Statement of Additional Facts.

1. Colorado Day of Prayer Proclamations.

The Governor of Colorado began issuing annual "Colorado Day of Prayer" Proclamations in 2004, in response to the request of the NDP Task Force, led by Shirley Dobson. (R. 31538041, Exhibit 2, 3, 4, 5, 6 & 8.) The proclamations issued by the Governor of Colorado from 2004-2008 each acknowledged the NDP Task Force annual theme and/or scriptural reference, as does the 2011 proclamation. (Id.)

Each Colorado Day of Prayer Proclamation bears the Executive Seal of the State of Colorado and the signature of the Governor. The Colorado Day of Prayer Proclamations are issued with the consent and authorization of the Office of the Governor. (R. 31538041, Exhibit 1, Page 14, lines 6-17; Page 15, lines 2-5.)

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

"WHEREAS in 2004, the National Day of Prayer acknowledges Leviticus 25:10 with the theme "Let Freedom Ring"; . . . (R. 31538041, Exhibit 2.)

The 2004 proclamation concludes with the following declaration, as do all the proclamations:

NOW, THEREFORE, I, Bill Owens, Governor of the State of Colorado, do hereby proclaim May 6, 2004, as the COLORADO DAY OF PRAYER in the State of Colorado. (R. 31538041, Exhibit 2.)

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

WHEREAS, in 2005, the National Day of Prayer acknowledges Hebrews 4:16 - "Let us then approach the throne of grace with confidence, so that we may receive mercy and find grace to help us in our time of need" - with the theme "God shed his grace on thee"; . . . (R. 31538041, Exhibit 3.)

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

WHEREAS, in 2006, the National Day of Prayer acknowledges I Samuel 2:30 - "Those who honor me, I will honor," and the theme "America, honor God"; . . . (R. 31538041, Exhibit 4.)

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

WHEREAS, in 2007, the National Day of Prayer acknowledges 2 Chronicles 7:14 - "If my people, who are called by my name, will humble themselves and pray and seek my face and turn from their wicked ways, then I will hear from heaven and forgive their sin and heal their land; . . . (R. 31538041, Exhibit 5.)

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

WHEREAS, in 2008, the National Day of Prayer acknowledges Psalm 28:7 - "The Lord is my strength and shield, my heart trusts in Him, and I am helped;"
... (R. 31538041, Exhibit 6.)

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

Therefore, I, Bill Ritter, Jr., Governor of the State of Colorado, do hereby proclaim May 7, 2009, COLORADO DAY OF PRAYER in the State of Colorado. (R. 31538041, Exhibit 7.)

The 2011 Colorado Day of Prayer Proclamation includes the following annual theme of the NDP Task Force:

WHEREAS, the 2011 National Day of Prayer theme is "A Mighty Fortress is Our God . . ." (www.coloradondp.org)

2. Day of Prayer Proclamations Serve a Purpose.

Colorado Day of Prayer Proclamations are issued by the Governor's Office with no restrictions on their use. (R. 31538041, Exhibit 1, Page 17, lines 8-11.) The NDP Task Force, in particular, is not prohibited from using the official Colorado Day of Prayer Proclamations to support its organizing of prayer activities, including by indicating the Governor's support. (R. 31538041, Exhibit 1, Page 91, lines 12-18.)

The NDP Task Force uses the proclamations of government officials to promote NDP activities, including by utilizing the proclamations as evidence of government support. (R. 31538041, Exhibit 1, Page 32, lines 7-14; R. 31538041, Exhibit 8.)

Officials in the Colorado Governor's Office assume that groups request proclamations in order to add support for their event from the Governor's Office. (R. 31538041, Exhibit 1, Page 15, lines 15-22.) The Governor's Office also assumes that proclamations are used, at least by some requesters, to promote their activities. (R. 31538041, Exhibit 1, Page 17, lines 12-17.)

The NDP Task Force, in fact, uses proclamations as evidence of the Government's support for their activities. (R. 31538041, Exhibit 1, Page 32, lines 7-14.) The Governor's Office is not surprised that people who request proclamations, such as the NDP Task Force, use them to promote the Day of Prayer. (R. 31538041, Exhibit 1, Page 33, lines 18-21.)

Persons requesting proclamations are not told by the Governor's Office that they cannot circulate proclamations, nor are they told that they cannot tout proclamations as indicating the Governor's support. (R. 31538041, Exhibit 1, Page 33, line 22 to R. 31538041, Exhibit 1, Page 34, line 4.)

3. Proclamations Crafted to Conceal Requester.

Proclamations are intentionally drafted by the Governor's Office to look like they reflect general support for the requester's activities, without specifically identifying the requesting party. (R. 31538041, Exhibit 1, Page 40, line 18 to R. 31538041, Exhibit 1, Page 41, line 14.)

In the case of Colorado Day of Prayer Proclamations, the NDP Task Force is not specifically identified in the proclamations and the specified day is proclaimed generally as the Colorado Day of Prayer, without limitation to a specific organization's Day of Prayer. (R. 31538041, Exhibit 1, Page 53, line 24 to R. 31538041, Exhibit 1, Page 54, line 25.)

By not identifying the NDP Task Force, Day of Prayer proclamations appear to be applicable to as many people as possible without reference to a single group or individual. (R. 31538041, Exhibit 1, Page 54, lines 7-25 and R. 31538041, Exhibit 1, Page 67, lines 6-16.)

4. Proclamations are Discretionary with the Governor.

In deciding to issue a proclamation, the Governor's Office first looks at the requesting group to determine if the group is promoting a good cause. (R. 31538041, Exhibit 1, Page 35, lines 6-11.) If the proclamation is for a good cause, it does not seem to be problematic and the Governor supports the cause, then the Governor's Office issues the proclamation. (R. 31538041, Exhibit 1, Page 35, lines 19-24.)

In the case of Colorado Day of Prayer Proclamations, although they all reference the NDP, as requested by Mrs. Dobson, the Colorado Governor is not required to issue such a proclamation. (R. 31538041, Exhibit 1, Page 48, lines 14-17.)

5. Colorado Day of Prayer Proclamations Incorporate Distinctly Christian Elements, Which are Used by the NDP Task Force.

Each of the Colorado Day of Prayer Proclamations from 2004 through 2008 included a biblical reference, as requested by Mrs. Dobson as well as the 2011 proclamation. (R. 31538041, Exhibit 1, Page 52, lines 18-22.)

The Colorado Governor's Office understands that the scriptural references incorporated into the Colorado Day of Prayer Proclamations are requested by the NDP Task Force. (R. 31538041, Exhibit 1, Page 59, lines 20-23.) The Governor's Office knows that the NDP Task Force also chooses an annual theme for each year's NDP. (R. 31538041, Exhibit 1, Page 64, line 17 to R. 31538041, Exhibit 1, Page 65, line 8, and R. 31538041, Exhibit 1, Page 70, lines 20-24.) The Governor's Office also understands that Mrs. Dobson, on behalf of the NDP Task Force, wants proclamations issued by high government officials. (R. 31538041, Exhibit 1, Page 70, lines 15-19.)

The Colorado Governor's Office also assumes that Mrs. Dobson probably uses the Day of Prayer Proclamations by the Governor to lend support to her Day of Prayer. (R. 31538041, Exhibit 1, Page 70, lines 4-5.) The Governor's Office also understands that Mrs. Dobson wants the annual theme and supporting scripture reference selected by the NDP Task Force included as part of the official proclamations by state governors. (R. 31538041, Exhibit 1, Page 71, lines 2-14.)

The Colorado Day of Prayer Proclamations, although requested by the NDP Task Force, are issued pursuant to the authority of the Office of the Governor. (R. 31538041, Exhibit 1, Page 82, lines 17-20.) The Governor's Office recognizes that the Colorado Day of Prayer Proclamations mean a great deal to the requesting group, in this case the NDP Task Force. (R. 31538041, Exhibit 1, Page 90, lines 21-23.)

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

The purpose of the Colorado Day of Prayer is to encourage prayer, which has been candidly recognized by Colorado Day of Prayer organizers since at least 2005. In their application for use of the Capitol grounds in 2006, for example, they describe the Day of Prayer as an annual holiday first established by an act of Congress "which encourages Americans to pray for our nation, its people, and its leaders." (R. 31538041, Exhibit 11.) The annual activities at the Colorado Capitol routinely

include a program of worship and prayer "by church and community leaders, legislators, color guard, home-schoolers with worship band." (R. 31538041, Exhibit 13.)

To the Plaintiffs, the annual declarations of a Colorado Day of Prayer give the appearance of endorsing religion, while encouraging all persons to believe in God, and they thereby give the appearance that belief is preferable and that believers have special access to governmental leaders, including the Governor. (R. 31541758, Exhibit 95, Page 4, Exhibit 96, Page 4 & Exhibit 97, Page 4.) The Governor's encouragement of participation in Day of Prayer events puts the Plaintiffs in the position of being outsiders. (R. 31541758, Exhibit 95, Page 12, Exhibit 96, Page 12 & Exhibit 97, Page 12.) The Plaintiffs consider the encouragement by government officials to believe in God as being inappropriate, and non-believers should not be put in the position of having to resist overtures to pray. (R. 31541758, Exhibit 95, Page 4, Exhibit 96, Page 4 & Exhibit 97, Page 4.)

7. History of 1952 NDP Legislation.

The Governor's Office began issuing Colorado Day of Prayer proclamations at the request of the NDP Task Force, which group organizes around the NDP proclaimed by the President in order to promote Judeo-Christian prayer activities. (R. 31542267, Exhibit 111, Page 17, p. 63, lines 7-12.)

The NDP was a day originally set aside by Congress for prayer. (R. 31542267, Exhibit 111, Page 17, p. 63, lines 7-12.) The law requires that the President shall set aside and proclaim a suitable day each year, other than a Sunday, as a NDP, on which the people of the United States may turn to God in prayer and meditation in churches, in groups, and as individuals.

The impetus for an annual NDP, by legislation, came from the Reverend Billy Graham, who suggested it in the midst of a crusade in the nation's Capitol in 1952. (R. 31541758, Exhibit 94 & R. 31541758, Exhibit 93, Page 2.) The resolution mandating an annual NDP was described as a measure against "the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it is placed." (R. 31595093, Exhibit 55 & R. 31541758, Exhibit 93, Page 2.) Contemporaneous reporting of President Truman's signing of the Prayer Day Bill, in the New York Times on April 18, 1952, recognized that "the purpose of the resolution is to have the public assemble in churches, synagogues, and other places of worship to offer prayers for world peace." (R. 31542267, Exhibit 104.)

8. Additional Legislation was Enacted in 1988 to More Fully Facilitate Religious Organizing by Groups Like the NDP Task Force.

Prior to 1988, the President would call the nation to a day of prayer whenever he chose each year. (R. 31595093, Exhibit 57.) The law was amended in 1988, however, so as to designate the first Thursday in May as the date on which the NDP is celebrated each year.

The National Prayer Committee, and the first NDP Task Force Chairman, Mrs. Vonette Bright, directed efforts in 1988 leading to President Reagan signing legislation requiring that the first Thursday in May of each year be designated as the NDP. (R. 31595093, Exhibit 57.)

Congressman Tony P. Hall, while introducing the 1988 NDP bill on March 16, 1988, remarked that designating each first Thursday in May as the annual date on which the NDP is celebrated, would “help bring more certainty to the scheduling of events related to the NDP, and permit more effective long-range planning.” (R. 31542267, Exhibit 107, Page 3.) “The annual observance would be so much easier to celebrate if its occurrence was not subject to the issuance of an annual proclamation. The event has a tradition of some consequence for increasing our nation’s awareness of the need for divine assistance,” said Rev. Msgr. Joseph F. Rebman, Chancellor, Diocese of Wilmington, Delaware, in urging passage of the bill. (R. 31542267, Exhibit 107, Page 3.)

Pat Boone, Co-Chairman of the National Prayer Committee, complained that having a different day proclaimed each year “had offered little advance notice to adequately inform the grass roots constituencies. I believe a definite date will allow millions of citizens within our nation who have explicit faith in a Prayer-hearing God to be informed about this significant day in our country.” (R. 31542267, Exhibit 108, Page 2.)

Groups like the NDP Task Force would have trouble mobilizing a NDP if they did not know well in advance when it was going to take place. (R. 31542267, Exhibit 111, Page 8-9.) The change in the law in 1988, to make the Day of Prayer predictable, on the first Thursday in May, facilitated efforts by the NDP Task Force to organize prayer observances. (R. 31542267, Exhibit 111, Page 8, p. 29, lines 19-22.)

Groups like the NDP Task Force have been successful in mobilizing Christians to engage in prayer in part because it is beneficial to have a central event that people can gather around. (R. 31542267, Exhibit 111, Page 22-23.)

9. Mrs. Dobson is the Voice and Face of the NDP Task Force.

Shirley Dobson became co-chairman of the NDP Task Force in 1989, and has been the chairman since 1991. (R. 31542267, Exhibit 111, Page 2, p. 4, lines 6-11.) Shirley Dobson’s husband, James Dobson, is the founder of Focus on the Family.

(R. 31542267, Exhibit 101, Page 3.) Mrs. Dobson is now the recognized voice and face of the NDP. (R. 31542267, Exhibit 111, Page 12, p. 42, lines 5-6.)

10. The NDP Task Force Uses the NDP to Mobilize Prayer Activities.

One of the goals of the NDP Task Force is to encourage prayer. (R. 31542267, Exhibit 111, Page 2, p. 4, lines 17-19.) The NDP Task Force promotes and encourages the role of prayer by mobilizing around the NDP. (R. 31542267, Exhibit 111, Page 4, p. 10, lines 19-22.) The NDP is a rallying point, as a day for focusing on prayer, because it is declared as such by the President each year. (R. 31542267, Exhibit 111, Page 17, p. 62, lines 15-20.)

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

The NDP Task Force was created by the National Prayer Committee for the express purpose of organizing and promoting prayer observances conforming to a Judeo-Christian system of values. (R. 31594605, Exhibit 51.) The Judeo-Christian expression of the NDP involves praying to the God of the Bible. (R. 31542267, Exhibit 111, Page 18, p. 67, lines 10-14.)

The NDP Task Force expression of the NDP is based on the Bible, which claims that God is the one and only, and his son, Jesus Christ, is the way to salvation, which is the belief of the Christian church. (R. 31542267, Exhibit 111, Page 18, p.

69, lines 6-10.) Mrs. Dobson understands that the NDP involves proclaiming reliance on an Almighty God in calling Americans to come before Him on behalf of the Nation. (R. 31542267, Exhibit 111, Page 28, p. 106, lines 8-20.)

12. Presidential Proclamations are Integral to Prayer Rallies.

The official proclamation issued by the President is an integral part of the yearly national observance of the Day of Prayer. (R. 31539481, Exhibit 20.) The President's support for the NDP serves a crucial role in calling Americans to prayer. (R. 31539481, Exhibit 20, Page 2.)

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

Proclamations by state Governors also lend support to the NDP. (R. 31542267, Exhibit 111, Page 28, p. 107, lines 5-10.) Support by the nation's leaders is critical to the NDP Task Force's efforts. (R. 31542267, Exhibit 111, Page 28, p. 108-109.) People look to their leaders to give them direction, so it is critical that the leaders support the NDP because they are public role models. (R. 31542267, Exhibit 111, Page 28, p. 109, lines 4-8.)

The NDP Task Force, therefore, writes to each state Governor every year requesting a prayer proclamation, while referencing the NDP Task Force annual theme and supporting scriptural reference. (R. 31542267, Exhibit 111, Page 6, 7, 14, 16, 29 & 31.) The NDP Task Force requests state Governors to designate the same

day as the day set aside by the President for the NDP. (R. 31542267, Exhibit 111, Page 8, p. 28, lines 11-21.)

The NDP Task Force considers it desirable that Governors incorporate the NDP Task Force's annual theme and scriptural reference into their official proclamations. As a result, annual Day of Prayer Proclamations by the Colorado Governor for 2004-2008, as well as 2011, included the NDP Task Force annual theme and/or scriptural reference.

14. The NDP Task Force Succeeds in its Mission Due in Part to Official Participation by Government Officials.

The NDP Task Force considers it important that all fifty Governors issue NDP Proclamations. (R. 31595093, Exhibit 60 & 61.) The Day of Prayer proclamations by state Governors acknowledge the federal designation of the Day of Prayer by Congress and the President in their own proclamations.

Millions of individuals participate in the NDP call to prayer by the NDP Task Force, supported by 30,000-40,000 NDP Task Force volunteers across the country. (R. 31595093, Exhibit 62.)

Support for the NDP by Governors helps further efforts to call the nation to prayer. (R. 31594605, Exhibit 30.) The mission of the NDP Task Force is to encourage personal repentance and prayer, while mobilizing the Christian community. (R. 31594605, Exhibit 51.) Participation in NDP Task Force

observances by public officials is noteworthy and the participants in such observances number in the millions. (R. 31595093, Exhibit 56 & 62.)

15. The NDP Task Force Promotes Active Christian Prayer.

The NDP Task Force promotes the NDP as a means to encourage prayer, which involves establishing a relationship with God. (R. 31595093, Exhibit 52, 53 & 54.)

The NDP Task Force represents a Judeo-Christian expression of the national observance, based on the belief that this country was birthed in prayer and in reverence for the God of the Bible. (R. 31594605, Exhibit 51.) The NDP Task Force promotes only a Judeo-Christian expression of the NDP. (R. 31542267, Exhibit 111, Page 4, 5 & 18.)

The Bible, therefore, is the handbook of the NDP Task Force. (R. 31542267, Exhibit 111, Page 17, p. 64, lines 18-22.) Prayer from the perspective of the NDP Task Force is related to the relationship with the God of the Bible. (R. 31542267, Exhibit 111, Page 17, p. 64, lines 4-16.)

The supporting scripture for each NDP theme is exclusively chosen from the Bible, a source that is readily recognizable. (R. 31542267, Exhibit 111, Page 15, p. 57, lines 7-12.) The NDP Task Force hopes that its annual theme and supporting scripture will draw Americans closer to God. (R. 31594605, Exhibit 44.)

The NDP Task Force limits participation by coordinators and volunteers to persons holding a Judeo-Christian perspective. (R. 31595093, Exhibit 55.)

16. The NDP Task Force is Particularly Exclusionary.

The NDP Task Force subscribes to the Lausanne Covenant, which was adopted by fundamentalists and other Evangelical Protestants from over 150 nations during the International Congress on World Evangelization at Lausanne, Switzerland in 1974. (R. 31542267, Exhibit 101, Page 3.) The Lausanne Covenant includes such beliefs as the inspiration and inerrancy of the Bible, the Trinity, the Second Coming of Jesus Christ, the Anti-Christ, etc. (R. 31542267, Exhibit 101, Page 3 & R. 31595093, Exhibit 66, Page 4-5.)

The adherence of the NDP Task Force to the Lausanne Covenant has the effect of excluding even traditional Jewish groups, or any other non-Christian organization or inter-faith groups. (R. 31542267, Exhibit 101, Page 3 & R. 31595093, Exhibit 66, Page 5.) The NDP Task Force, in effect, is an exclusively Evangelical Christian non-profit organization recognizing only those NDP events which are organized by Evangelical groups. (R. 31542267, Exhibit 101, Page 3.)

17. The NDP is Highly Divisive and Controversial.

The NDP is highly divisive, amid concerns that it has been hijacked by fundamentalist Christians, including the NDP Task Force. (R. 31595093, Exhibit 66-

72 & R. 31541758, Exhibit 73-92.) The participation of public officials in NDP observances, including at public government buildings in Washington D.C., and State Capitol buildings throughout the nation, fuels the perception that the NDP is intended to promote and encourage religion. (R. 31595093, Exhibit 66-72 & R. 31541758, Exhibit 73-92.)

18. Nonreligious Persons Constitute a Significant Part of the Nation Excluded by the NDP.

The number of nonreligious persons is the fastest-growing segment of the United States population. (R. 31542267, Exhibit 105.) Non-believers today are reported to represent a significant part of the American population, constituting approximately 15% or 34 million Americans, in a recent American Religious Identification Survey. (R. 31542267, Exhibit 105.)

III. STANDARD OF REVIEW.

The Court of Appeals reviews a grant of summary judgment *de novo*. Shelter Mutual Insurance Company v. Mid-Century Insurance Company, 246 P.3d 651, 657 (Colo. 2011). Summary judgment is only proper where no genuine issue of material fact is in dispute, entitling the moving party to summary judgment as a matter of law. Id.

Findings of constitutional fact are particularly subject to *de novo* review. Lewis v. Matthews, 941 P.2d 266, 271 (Colo. 1997). The critical determinations in

such cases invariably involve mixed questions of law and fact, which require an independent appellate review of the entire record. Id. Furthermore, where the underlying historical facts are not disputed, but the legal conclusions to be drawn from those facts are contested, the Court of Appeals independently reviews the record. Id.

In cases involving alleged government endorsement of religion, the critical issue of support is deemed a question of law that is reviewed *de novo*. In Freedom From Religion Foundation, Inc. v. Colorado, 872 P.2d 1256, 1265 (Colo. App. 1993), the Court of Appeals discussed the fact/law determinations of a Trial Court in governmental endorsement cases, quoting Justice O'Connor's concurrence in Lynch v. Donnelly, 665 U.S. 668, 693-694 (1984) (O'Connor, J., concurring). The Court concluded that a government display conveyed an essentially religious message that would appear to the reasonable observer to be endorsed and approved by the state, thereby violating the prohibition against the establishment of religion set forth in both the First Amendment and the Colorado State Constitution.

IV. SUMMARY OF ARGUMENT.

The District Court erred in concluding that official proclamations of a Colorado Day of Prayer do not give the appearance of religious endorsement in violation of the Preference Clause of the Colorado Constitution. The Court did not

take account of the factual context in which Day of Prayer Proclamations are issued and ignored the obvious inferences from the evidence. The Court, on the contrary, was studiously oblivious to the most logical inferences that follow as the natural consequence of the Governor's proclamations, viewed in the context of all the evidence. The Court assigned an inappropriately narrow scope to the reasonable inferences from the evidence, including the Court's conclusion that a reasonable observer would not perceive official proclamations of a Day of Prayer, upon request by a proselytizing religious organization, as support for the requested Day of Prayer.

The natural first step for the Court of Appeals in reviewing this case is to determine whether the message conveyed by official proclamations of the Governor of Colorado constitute government speech, as opposed to private speech or expression. Here, official proclamations by the Governor clearly constitute government speech, which is precisely why the requesting entity, the NDP Task Force, desires such proclamations. The Task Force receives support and credibility for its organizing efforts from such proclamations.

A crucial difference exists between government speech endorsing religion, which is prohibited under the Constitution, and private speech, which is not subject to such constraints. In the present case, the District Court treated the Governor's

proclamations as if they were private speech, and therefore, the Court erroneously refused to ascribe an appearance of endorsement to the government as speaker.

The District Court also ignored the religious connotation of the NDP, with which the state proclamations help to coordinate local celebrations. The Court reasoned that the perception of the NDP is irrelevant because the Colorado Day of Prayer merely acknowledges the federal designation. The Court's attempt to dissociate such acknowledgement from its subject, however, is unpersuasive. The NDP Task Force, in fact, requests proclamations from Governors precisely and deliberately as a means of adding credibility and prestige to NDP celebrations.

The District Court also erroneously seemed to feel that endorsement requires coercion. The Court observed that no one is forced to pray or participate in Day of Prayer activities, so no improper endorsement supposedly results. The Preference Clause of the Colorado Constitution, however, is interpreted consistent with the Establishment Clause of the First Amendment, which does not require coercion. The Preference Clause is violated, just like the Establishment Clause, by government speech that gives the appearance of support for religion, regardless of whether coercion is applied by the speaker.

Finally, the District Court erred by seemingly imposing a "permanency" requirement on government speech that unconstitutionally endorses religion. The

Court stated that proclamations do not have the public visibility or permanence of donated monuments, and therefore, the Governor can express religious sentiments without violating the Constitution. Governmental endorsement of religion, however, is not just prohibited on permanent donated monuments and displays; government speech endorsing religion is prohibited in all of its manifestations, including seasonal or temporal government speech or expression, such as holiday displays.

The District Court, in the end, erroneously concluded that official proclamations by the Governor, at the request of an organization to promote its proselytizing activities, do not give the appearance of endorsement. The intended purpose, and the realized effect, of official proclamations is to express government support for various entities and their activities. The Governor's proclamations in respect to the Day of Prayer, therefore, constitute prohibited government speech endorsing religion.

V. ARGUMENT.

A. The Preference Clause Prohibits the Appearance of Religious Endorsement.

The Preference Clause of the Colorado Constitution, Article II, Section 4, is construed like the Establishment Clause of the First Amendment to the United States Constitution. Conrad v. City and County of Denver, 724 P.2d 1309, 1313 and 1315 (Colo. 1986).

The test for determining if a governmental act violates the Establishment Clause was first articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Supreme Court announced in Lemon a three part test for determining if government action violates the Establishment Clause. Here, the second prong of the Lemon test is at issue, i.e., whether the principal or primary effect of governmental action advances or inhibits religion.

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

What distinguishes the outcome in many cases involving government expression is the constitutional difference between government speech and private

speech. See Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 765-66 (1995). "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id., quoting Board of Education of West Side Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.). In Santa Fe Independent School District v. Doe, 530 U.S. 290, 302 (2000), the Supreme Court reiterated that the Establishment Clause forbids government speech endorsing religion, and the Supreme Court continues to recognize the distinction between government speech endorsing religion -- and other government speech. See Pleasant Grove v. Sumnum, 555 U.S. 460, 129 S. Ct. 1125, 1131-32 (2009) (although the Free Speech Clause of the First Amendment does not apply to government speech, this "does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.").

"Endorsement" in this context is akin to "promotion." Utah Gospel Mission v. Salt Lake City, 425 F.3d 1249, 1260 (10th Cir. 2005), citing County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989). Symbolic benefit to religion is enough; "it need not be material and tangible advancement." Utah Gospel Mission, 425 F.3d at 1260, quoting Friedman v. Board of County Commissioners, 781 F.2d 777, 781 (10th Cir.

1985). Government actions which have the effect of communicating governmental endorsement or disapproval, "whether intentionally or unintentionally, . . . make religion relevant, in reality or public perception, to one's status in the political community." Green v. Haskell County Board of Commissioners, 568 F.3d 784, 799 (10th Cir. 2009).

Governmental expressions of adopted private speech, moreover, are not insulated from constitutional accountability. In American Atheists, Inc. v. Duncan, 616 F.3d 1145, 1155 (10th Cir. 2010), the Court of Appeals rejected Utah's attempt to distance itself from the message conveyed by highway memorial crosses that included disclaimers. The Court concluded that the State's attempt fell flat. "The Government's actions in this case -- allowing these memorial crosses to be displayed with the official UHP insignia primarily on public land -- cannot be overshadowed by its attempts to distance itself from the message conveyed by these displays." Id. The express imprimatur of a state entity was deemed highly relevant in conveying a message of endorsement to a reasonable observer.

In this case, the Defendants claim that the Governor's annual proclamations of a Colorado Day of Prayer do not constitute governmental endorsement of religion. The Governor claims to issue Day of Prayer Proclamations pretty much upon request -- so the proclamations allegedly should not count as government speech endorsing

religion. The Governor's public support of a private religious mission, however, does constitute prohibited government endorsement of religion; endorsement is the purpose and effect of an official proclamation by the Governor, which he has described as a "public service" provided to constituents. The issuance of such official proclamations is an unabashed form of government endorsement, all the more so because of the intent to ingratiate.

The Defendants do not deny that Colorado Day of Prayer Proclamations constitute government speech, but they ignore or misapprehend the meaning and context of such speech. The Defendants' own submissions establish that Day of Prayer Proclamations are issued after annual requests by the NDP Task Force, an undisputedly evangelistic organization that uses such government proclamations to give prestige and credibility to its proselytizing activities. That is exactly what the Colorado Constitution prohibits. Religious adherents should place their faith in their own message, rather than piggybacking on the prestige and credibility of government speakers.

The Defendants ascribe a meaning to the Governor's Day of Prayer Proclamations that is belied by their own evidence. They claim, for example, that proclamations are mere acknowledgements of the historical significance of religion, but no evidence supports that this is even the supposed rationale for the Governor's

actions in this case. The proclamations at issue, instead, are promulgated upon request from the NDP Task Force, in order to facilitate its own religious organizing. The Governor, for his part, has implied that he would not otherwise issue Day of Prayer proclamations if not requested, further refuting the history and ubiquity of Colorado Day of Prayer Proclamations as a motivating rationale.

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

In reality, Colorado Day of Prayer Proclamations are sought precisely because they give the appearance of religious endorsement. They are issued as official government documents bearing the Executive Seal of the State of Colorado and they have had the effect intended by the NDP Task Force: Day of Prayer Proclamations have helped the NDP Task Force market a major religious event in Colorado and elsewhere through the prestige and credibility of government officials. The government cannot play this facilitating role under the Constitution.

B. The Context of Day of Prayer Proclamations is Significant.

The President of the United States currently issues an official Prayer Proclamation and dedicates a NDP every year. The President does this because Congress has legislatively mandated that he do so. Such Prayer Proclamations by the President extol the virtues of prayer and exhort all Americans to engage in prayer--solely for the sake of encouraging prayer itself.

More recently, the Governor of Colorado, and other state Governors, have begun issuing Day of Prayer Proclamations without any legislative mandate, but instead to ingratiate themselves with the NDP Task Force and other religious adherents. Supporting religion is good politics.

NDP Proclamations have never had a secular purpose, intent, or effect. The intent has always been to facilitate proselytizing, to place government endorsement behind prayer and religious belief, and more than that, to call upon citizens to pray and express belief in God. Day of Prayer Proclamations not only wrongly places the imprimatur of government upon belief in God. They place the stamp of approval upon religious belief, prayer and worship by the highest executive officer of the land. In fact, the federal NDP laws were entirely the brainchild of Protestant evangelicals. The first such law was promoted by Billy Graham during a crusade in Washington, D.C. in 1952.

The NDP law was adopted after instigation from Rev. Graham by a Congress which openly cited religious motives that were outside the purview of secular government, such as to "instill faith in an Almighty God," to exhort citizens "to unite in a day of prayer each year . . . reaffirming in a dramatic manner that deep religious conviction which has prevailed throughout the history of the United States." The law itself was enacted for the unconstitutional purpose of ordering the Executive Branch to urge the people of the United States to turn to God in prayer, in churches, in groups, and as individuals one day every year. By ordering a presidential proclamation, Congress assured that the President's inappropriate and unconstitutional endorsement of prayer as part of his civil duties would be broadcast throughout the land.

The 1988 Amendment which codified the first Thursday in May as the NDP was likewise the brainchild of evangelists. The stated purpose of changing the NDP from a free-floating annual date to the first Thursday in May was to "help bring more certainty to the scheduling of events related to the NDP, and permit more effective long-range planning." National Prayer Committee Chairman Pat Boone noted that the roving date "offered little advance notice to adequately inform the grass roots constituencies," but a "definite date will allow millions of citizens ... who have

explicit faith in a Prayer-hearing God to be informed about this significant date in our country.”

Since passage of the 1988 law, the NDP Task Force has become a publicity machine, pressuring public officials, including the President and all the state Governors, to issue NDP proclamations consistent with the NDP Task Force's "Judeo-Christian" perspective, so that the NDP Task Force can use the first Thursday in May to mobilize Christian-centered events, rallies, statements and activities at all 50 capitols and government buildings, as well as private churches, across the land. In fact, official proclamations, including by the Governor of Colorado, include the Biblical themes and references that the NDP Task Force asks to be incorporated as general statements.

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

The right to be free from government endorsement of religion is a matter of conscience. That is why forced or coercive exposure to religious endorsement is not the test under the Constitution. Coercion is not the touchstone of the Establishment

Clause, nor of the Preference Clause of the Colorado Constitution, which prohibits governmental endorsement of religion over non-religion -- even if done secretly. The expectation that non-believers should merely ignore or avoid objectionable governmental speech does not prevent the offense. On the contrary, this compounds the offense by emphasizing that religious believers are favored, while non-believers are political outsiders.

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

The Defendants misunderstand and distort the history of the Establishment Clause and the separation of church and state. The Defendants also ignore the actual

context and content of Prayer Day Proclamations and dedications. The NDP Task Force, a messianic evangelical organization, solicits government proclamations as in this case, and provides Christian content for such proclamations, which the Governor officially adopts, all the while without even identifying the self-serving source.

Official dedications of a Colorado Day of Prayer and official Prayer Proclamations send an unmistakable message to reasonable observers that a preference for religion is being communicated -- that is exactly why the NDP Task Force solicits such proclamations. Government speech is tolerated under the Establishment Clause only where no religious endorsement occurs. Here, the purpose and effect of Prayer Day Proclamations are precisely the opposite; they intentionally encourage and promote active participation in religious practices, and implicitly exclude non-believing citizens.

C. Day of Prayer Proclamations Give the Appearance of Religious Endorsement.

1. The Endorsement Test is Fact Dependent.

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

prayer. As a result, the content and context of Day of Prayer Proclamations gives the appearance of endorsement, including specifically the Christian faith, in violation of the Colorado Constitution, which is construed like the Establishment Clause of the First Amendment to the United States Constitution. Conrad, 724 P.2d at 1319.

The Defendants first urged the District Court to ignore the history of the NDP legislation adopted in 1952, at the instigation of Billy Graham, as well as the 1988 Act requiring that the first Thursday in May be the fixed NDP, in response to lobbying by conservative religious groups, particularly the National Prayer Committee and the NDP Task Force. The 1988 Act, in particular, facilitated the mobilization of the religious viewpoint of the lobbyists behind the Act.

The Defendants also advocated that a blind eye be turned toward the undisputed historical fact that proclamations of a Day of Prayer are perceived as, and they are sought as, religious endorsement by the government, not just an acknowledgment of religion. Annual proclamations by government officials are understood as being critical to religious organizers, including the NDP Task Force.

The District Court, for its part, ignored virtually all of the facts relating to the context of Day of Prayer Proclamations, as well as the source of the content for such Proclamations, incorporated at the behest of the NDP Task Force. The Court concluded that an "objective observer" of Day of Prayer Proclamations would not

construe them as religious endorsements - - but only by assuming that Day of Prayer Proclamations are not supportive of the organizing efforts of the NDP Task Force and intended to influence behavior. These assumptions are not reasonable and they are historically unsupported by the record.

The Supreme Court's endorsement test considers whether a reasonable observer aware of the history and context of a religious event would find the event to have the effect of favoring or disfavoring religion. The Courts are to ask whether an objective, reasonable observer, aware of the history and context in which the religious speech occurs, would fairly understand the speech to be a government endorsement of religion. O'Connor v. Washburn University, 416 F.3d 1216, 1227 (10th Cir. 2005); Sante Fe Independent School District v. Doe, 530 U.S. at 308.

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

political community." Lynch, 465 U.S. at 688. See also McCreary County, 545 U.S. at 860-61.

In the present case, the Defendants not only ignore the factual context of coordinated action between the Governor and the NDP Task Force; they also ignore the fact that a reasonable observer is aware that prayer is a quintessential religious practice, and that encouragement to pray on a specified day inherently gives the appearance of endorsement. Wallace v. Jaffree, 472 U.S. 38, 56 (1985). Promoting an intrinsically religious practice like prayer will never satisfy the secular purpose requirement necessary for constitutionality. Jager v. Douglas County School District, 862 F.2d 824, 830 (11th Cir. 1989). The District Court in the present case, therefore, relied on an attempted distinction that lacks meaning or logical force when concluding that Day of Prayer Proclamations lend no support to the underlying mission of the requesting organization.

The constitutionality of Day of Prayer Proclamations cannot be properly decided without considering the evidence of history and context. The District Court, however, was oblivious to the present day reality that the Day of Prayer has become exactly what the Preference Clause is intended to prevent: A battleground with the government deeply involved.

Here, the record includes overwhelming evidence of the joint action between the Governor's Office and the NDP Task Force as to the dedication and celebration of official Days of Prayer, including coordination of the content of the official Prayer Proclamations. The District Court, however, ignores all of the factual detail about this relationship with the NDP Task Force, which relationship provides context that is relevant to whether a "reasonable observer" would find that Day of Prayer Proclamations give the appearance of official endorsement of religion. The Court recited the facts, but gave them no meaning or significance.

2. Government Speech Must be Evaluated by Content and Context.

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

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

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

The concept of "ceremonial deism" also is dependent upon the conclusion that a reasonable observer would not view a religious display or government speech as

having religious significance. "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate non-religious purposes." Elk Grove Unified School District v. Newdow, 542 U.S. 1, 37 (2004) (J. O'Connor, concurring). This determination, as noted, necessarily involves evaluation of context and content, including circumstances that may change with the passage of time as the actions and motivations of officials change.

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

3. The Role of the NDP Task Force is an Unmistakable Part of the Relevant Content and Context, But Ignored by the Defendants.

The relevant context in this case involves the Governor issuing Day of Prayer Proclamations in celebratory and festive circumstances, whereby citizens are encouraged to engage in prayer. The circumstances indicate a preference for

religion, including Christianity, and the proclaimed Prayer Days involve controversial and divisive encouragement to pray.

Day of Prayer Proclamations also evidence joint action with evangelical Christian organizations, including the NDP Task Force. The Governor's Prayer Proclamations for 2004-2008, and 2011, each expressly incorporated the pre-selected Biblical quote recommended by the NDP Task Force. The Proclamations, therefore, give the appearance that the official theme of the Day of Prayer is Christian in content and origination. A reasonable observer would know that these scriptural references were derived from the NDP Task Force, which selects a single theme to be used by the President and Governors of all 50 states. By agreeing to incorporate the NDP Task Force's annual theme, the Governor creates the appearance of endorsement of the NDP Task Force. The alliance with the NDP Task Force creates the intended impression that the NDP Task Force and government are working cooperatively in promoting the NDP -- a situation that remains fully capable of repetition.

Nor has the government aligned with a "benign" nondenominational organization. The NDP Task Force is a patently Christian organization; its organization and promotion of the NDP and corresponding state Prayer Days are based on exclusively Judeo-Christian principles; and the NDP Task Force Prayer

Day dedications are not passive acknowledgments of the historical significance of religion - - the NDP Task Force claims to publicize and preserve America's alleged Christian heritage, to encourage and emphasize prayer, and to glorify the Lord in word and deed.

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

Declaring a Colorado Day of Prayer as a state-wide event, even as a public relations move to ingratiate with the citizens, is unconstitutional when spoken by the government. Proclamations declaring a Day of Prayer eviscerate the prohibition on government speech endorsing religion. Such proclamations constitute government speech that unconstitutionally gives support to a pro-prayer viewpoint in contrast to the views of non-believers. See Mercier v. LaCrosse, 305 F. Supp. 2d 999, 1011

(W.D. Wis. 2004). This viewpoint preference is proscribed by the Colorado Constitution, contrary to the District Court's decision.

VI. CONCLUSION.

The Court of Appeals should reverse the District Court's Judgment dismissing Plaintiffs' Complaint.

Dated this _____ day of June, 2011.

INDERWISH & BONIFAZI, P.C.

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CERTIFICATE OF MAILING

I hereby certify that on June 10, 2011, a true and correct copy of the foregoing Appellants' Opening Brief was filed and served electronically via *LexisNexis*, address to:

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*In accordance with C.R.C.P. 121 § 1-26(7) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.