DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: FREEDOM FROM RELIGION FOUNDATION, INC., MIKE SMITH, DAVID HABECKER, TIMOTHY G. BAILEY and JEFF BAYSINGER, **v.** **Defendants:** BILL RITTER, JR., in his official capacity as GOVERNOR OF THE STATE OF COLORADO, and THE STATE OF COLORADO.	▲ COURT USE ONLY ▲
	Case Number: 08CV9799 Courtroom: 19 Room 275
ORDER ON SUMMARY JUDGMENT	

This matter comes before the Court on Defendants' Motion for Summary Judgment, filed May 11, 2010, and on Plaintiffs' Cross-Motion for Summary Judgment, filed June 7, 2010. This Court, being fully advised, finds that there are no genuine issues of material fact, and hereby sets forth the relevant facts, conclusions of law, and order.

UNDISPUTED FACTS

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

S. 1378, "An act to provide for setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated," was approved by the Senate on May 5, 1988, and signed into law by President Ronald Reagan on May 9, 1988. Having a set date for the National Day of Prayer each year assists private organizers for the Day of Prayer to inform grass roots constituencies and to engage in long-range planning.

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

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

Honorary proclamations recognizing the National Day of Prayer were issued by the Governor of Colorado at least from 2004 through 2010. Honorary proclamations do not have the force and effect of law, but are official documents issued by the Governor's Office.

The Colorado Day of Prayer committee has historically reserved the West Steps at the Capitol for the first Thursday in May for its celebration of the Day of Prayer prior to the issuance of the honorary proclamations of the Colorado Day of Prayer by the Governor's Office. (Bolton Aff., Ex. 6 and 13). The honorary proclamations issued by the Governor of Colorado from 2004 through 2008 each acknowledged the NDP Task Force annual theme and/or scriptural reference. The honorary proclamations issued by the Governor of Colorado in 2009 and 2010 did not acknowledge the NDP Task Force annual theme or scriptural reference.

All of the "Colorado Day of Prayer" honorary proclamations from 2004 to 2010 have proclaimed as the Day of Prayer the same day designated by federal law for the National Day of Prayer. (Bolton Aff., Exs. 2-7.) The honorary proclamations issued by the Governor for the "Colorado Day of Prayer" from 2004 until 2010 acknowledged the federal designation of the Day of Prayer by Congress and the President, as well as the history of the National Day of Prayer. (Ex. A, Bannister Aff. at ¶ 27).

Process for Obtaining Honorary Proclamations

The Governor of Colorado issues various honorary proclamations, photographs, and letters of recognition or congratulation upon request from the public. (Ex. A, Bannister Aff. at ¶ 4). Typically, the Governor himself does not act on, review, or respond to such requests for honorary proclamations, letters, or photographs; instead, his staff has been delegated this responsibility. (Ex. A, Bannister Aff. at ¶ 5, 13).

The Governor's Office receives several hundred requests for honorary proclamations every year, and nearly every requested proclamation is issued. (Ex. A, Bannister Aff. at ¶ 7). If the content of the requested honorary proclamation does not seem to be problematic, or if it is similar to an honorary proclamation approved and issued in a prior year, the Governor's Press/Communications staff will process and issue it without further review. (Ex. A, Bannister Aff. at ¶ 9). If the content of the requested honorary proclamation seems to be problematic, the

Governor's Press/Communications staff submits it to the Director of Communications, who either approves or rejects the request, sometimes after consultation with legal counsel. (Ex. A, Bannister Aff. at ¶ 10).

The Governor's Office is not required to issue any honorary proclamation. Requested honorary proclamations are occasionally rejected, although this is rare. In one instance, an individual submitted an online honorary proclamation request, the suggested language of which attested to the requesting individual's good moral character, which was rejected. (Ex. A, Bannister Aff. at ¶ 11).

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

Some requested honorary proclamations are edited for content to avoid controversial language and statements. (Ex. A, Bannister Aff. at ¶ 13). Proclamations are drafted to make them as general as possible, without specifically identifying the requesting organization. (Ex. 1, Bannister Dep. 40:1-25 – 41:1-14).

Once accepted by the Press/Communications staff, honorary proclamations typically receive the Governor's signature by a device called an "auto-pen." (Ex. A, Bannister Aff. at ¶ 14). Each honorary proclamation bears the Executive Seal of the State of Colorado in addition to the signature of the Governor. After an honorary proclamation has been approved and signed, it is mailed directly to the individual or group who requested it. Alternatively, the requesting individual or a representative of the requesting group may elect to pick the honorary proclamation up in person from the Governor's Office at the State Capitol. (Ex. A, Bannister Aff. at ¶ 15).

The Governor does not restrict the uses to which honorary proclamations may be put. (Ex. 1, Bannister Dep., 17:8-11; 33:22-25 – 31:1-15; 91:12-18). In most instances, the Governor's Office does not publish or promote honorary proclamations or issue them with a press release. (Ex. A, Bannister Aff. at ¶ 16). Copies of honorary proclamations that have been approved and issued may be requested by members of the general public. (Ex. A, Bannister Aff. at ¶ 17).

No hard copies of previously-issued honorary proclamations are kept on file, though the Press/Communications staff does save digital copies on a staff member's office computer. When annual requests are received, office staff retrieves the old file from the previous year, updates it with new dates and other specifics, and then saves the new file in place of the previous one. Thus, honorary proclamations requested annually are only available until next year's proclamation has been drafted. (Ex. A, Bannister Aff. at ¶ 18). Computer files from the Owens administration were archived at the end of Governor Owens' term. (Ex. A, Bannister Aff. at ¶ 19). Because honorary proclamations that are requested annually are only available until the next year's proclamation has been drafted, such annual honorary proclamations may only be available for the last year of Owens' term. (Ex. A, Bannister Aff. at ¶ 19).

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

Honorary Proclamations for the Colorado Day of Prayer

Each of the "Colorado Day of Prayer" Honorary Proclamations includes the following paragraphs:

> 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, on [date], 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 [date], COLORADO DAY OF PRAYER in the State of Colorado.

(Bolton Aff., Exs. 2-7).

In 2007 and 2008, the Governor's Office received honorary proclamation requests for a "Colorado Day of Prayer," which included a specific annual theme and scriptural reference. The theme and scriptural reference were included in the 2007 and 2008 honorary proclamations. (Ex. A, Bannister Aff. at ¶ 20, Bolton Aff. Exs. 5 and 6). The 2007 Colorado Day of Prayer Proclamation includes the following scriptural reference and annual theme, as requested by the NDP Task Force:

> 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"; . . .

(Bolton Aff., Ex. 5).

The 2008 Colorado Day of Prayer Proclamation includes the following scriptural reference and annual theme, as requested by the NDP Task Force:

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

(Bolton Aff., Ex. 6).

In 2009 and 2010, the Governor's Office received honorary proclamation requests for a "Colorado Day of Prayer," which included a specific annual theme and scriptural reference. The 2009 and 2010 honorary proclamations for the "Colorado Day of Prayer" did not include the language regarding the theme and scriptural reference. (Ex. A, Bannister Aff. at ¶ 21).

The 2007 and 2008 honorary proclamation requests for a "Colorado Day of Prayer" were handled by Press/Communications staff and were not submitted either to Governor Ritter or to the director of communications for approval. (Ex. A, Bannister Aff. at ¶ 23). The 2007, 2008, and 2009 honorary proclamations for a "Colorado Day of Prayer" were signed by the "auto-pen" device and mailed to the requesting party without any involvement by the Governor. (Ex. A, Bannister Aff. at ¶ 24). The Governor's Office did not issue a press release for the "Colorado Day of Prayer" proclamations in 2007, 2008, or 2009. (Ex. A, Bannister Aff. at ¶ 25).

The Governor appeared at a public National Day of Prayer celebration held at the Capitol by the NDP Task Force, where the Governor spoke and read the 2007 Proclamation to an assembled audience. This appearance was reported by the media. (Bolton Aff., Ex. 9). The Governor's participation in the 2007 National Day of Prayer activities at the Capitol was planned and known in advance; the Colorado Day of Prayer organizers noted as early as April 12, 2007 that Governor Ritter would be part of their program. Reportedly, Governor Ritter also met with Day of Prayer organizers six weeks before the Day of Prayer and prayed with them. (Stipulated) The Day of Prayer events held on the west steps of the State Capitol building are initiated, organized, and sponsored by private citizens. (Ex. C, Lambert Aff.)

The purpose of the private organizers of the Colorado Day of Prayer, including the NDP Task Force, is to encourage prayer. (Stipulated.) The activities at the Colorado Capitol planned by private organizers routinely include a program of worship and prayer. (Stipulated.) Members of the NDP Task Force believe that state honorary proclamations issued by governors lend the governors' "support" to the National Day of Prayer. (Bolton Aff., Exs. 28-31).

<u>Effect of the Honorary Proclamations on Plaintiffs</u>

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

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

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

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

STANDARD OF REVIEW

"Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Churchey v. Adolph Coors Co.,* 759 P.2d 1336, 1339-40 (Colo. 1988). The moving party has the initial burden to show that there is no genuine issue of material fact. *See Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708, 712 (Colo. 1987). However, once the moving party has met its initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *See Ginter v. Palmer,* 196 Colo. 203, 206, 585 P.2d 583, 585 (1978).

The nonmoving party 'must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts.' *Tapley v. Golden Big O Tires*, 676 P.2d 676, 678 (Colo. 1983). All doubts as to whether an issue of fact exists must be resolved against the moving party. *See Dominguez v. Babcock,* 727 P.2d 362, 365 (Colo. 1986). Even if it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. *See Abrahamsen v. Mountain States Tel. & Tel. Co.,* 177 Colo. 422, 428, 494 P.2d 1287, 1290 (1972).

Moreover, because neither party has disputed the competence or admissibility of the evidentiary materials offered in support of and in opposition to the summary judgment motion, we may consider all of this record evidence in our analysis. *Cf.* C.R.C.P. 56(e)." *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997). In this case, there are no genuine issues of material fact. In considering all of the evidence offered, we conclude that Defendants are entitled to judgment as a matter of law.

CONCLUSIONS OF LAW

Plaintiffs in this case seek a declaration that "Prayer Proclamations by Governor Ritter designating a Day of Prayer and the attendant celebrations and commemorations are a violation

of Article II, Section 4 of the Colorado Constitution;" an injunction over "future designations of Day of Prayer celebrations by Governor Ritter;" and an injunction over "further Day of Prayer Proclamations" by Governor Ritter and his successors. For the following reasons, these demands must be denied and summary judgment granted to the Defendants.

Standing

Standing is a jurisdictional issue that can be raised at any time during judicial proceedings – including in the Defendants' Reply in Support of Summary Judgment and Response in Opposition of Summary Judgment, as was done here. *See Anson v. Trujillo,* 56 P.3d 114, 117 (Colo.App. 2002) (citations omitted). To establish standing under Colorado law, a plaintiff must show (1) that he suffered injury in fact, and (2) that the injury was to a legally protected interest. *Barber v. Ritter,* 196 P.3d 238, 245 (Colo.,2008) (citations omitted). "In determining whether standing has been established, all averments of material fact in a complaint must be accepted as true." *State Bd. for Community Colleges and Occupational Educ. v. Olson,* 687 P.2d 429, (Colo. 1984) (citation omitted).

This Court rejects Defendants' invitation to rewrite Colorado standing law to make it identical to Federal standing law. Standing law in Colorado is broad. *See Boulder Valley School Dist. RE-2 v. Colorado State Bd. of Educ.*, 217 P.3d 918, 924 (Colo.App. 2009). Federal standing law is narrower. *See Hein v. Freedom From Religion Foundation, Inc.***,** 551 U.S. 587, 593 (2007). Our Supreme Court does glean its Preference Clause jurisprudence from the United States Supreme Court's Establishment Clause jurisprudence, but considering the thorough and long history Colorado has for its own standing jurisprudence. Colorado's standing law prevails in matters regarding the Colorado Constitution.

Defendants have structured their argument concerning standing around taxpayer standing, and Plaintiffs have followed suit. It is true that Plaintiffs have alleged that they are Colorado taxpayers, but it is also true that there has been no expenditure of public funds in this case. While a taxpayer need not show economic harm to himself, he must at least show some use of taxes generally. S*ee Dodge v. Department of Social Services*, 600 P.2d 70, 71 (Colo. 1979) ("This court has held on several occasions that a taxpayer has standing to seek to enjoin an unlawful expenditure of public funds."). Thus, taxpayer standing is irrelevant, and we will examine standing under the ordinary two step analysis.

"To constitute an injury-in-fact, the alleged injury may be tangible, such as physical damage or economic harm, or intangible, such as aesthetic harm or the deprivation of civil liberties. *Ainscough v. Owens,* 90 P.3d 851, 856 (Colo. 2004) (collecting cases). However, an injury that is 'overly "indirect and incidental" to the defendant's action' will not convey standing. *Id.* (quoting *Wimberly v. Ettenberg,* 570 P.2d 535, 538)." *Barber v. Ritter*, 196 P.3d 238, 245-246 (Colo. 2008). Here, the Plaintiffs have alleged that the honorary proclamations of a Colorado Day of Prayer make them "feel like political outsiders because they do not believe in the supposed power of prayer" because they "give the appearance of support and endorsement of religion." Justice O'Connor of the United States Supreme Court has identified one of the harms of a violation of the Establishment Clause to be that of making nonadherents of an endorsed faith feel like political outsiders. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). The Establishment Clause is analogous to the Preference Clause portion of our Religious Freedom section of the

Colorado Constitution, and thus this opinion is highly relevant. *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1019 (Colo. 1995). Being made to feel like political outsiders is enough of an injury for standing under Colorado's law. It comes directly from the allegation that the Plaintiffs are being deprived of their civil liberties. Thus, the Plaintiffs have satisfied the first prong of the standing requirement.

"Whether the plaintiff's alleged injury was to a legally protected interest 'is a question of whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation.' *Ainscough v. Owens,* 90 P.3d 851, 856 (Colo. 2004)." *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008). Plaintiffs are alleging a violation of the Colorado Constitution. This alleged violation is claimed to have caused their injury of "feeling like political outsiders." They have thus satisfied the second prong of the standing requirement. Taking all of the allegations in the complaint as true, as we must, we conclude that the Plaintiffs have standing to bring this case.

<u>Article II, Section 4 of the Colorado Constitution</u>

Article II, Section 4 of the Colorado Constitution states:

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

("Religious Freedom clause")

Plaintiffs have alleged that "[t]he actions of Governor Ritter in issuing Prayer Proclamations, including those that expressly incorporate references to the NDP Task Force's selected biblical precepts, constitute the endorsement of religion by Governor Ritter and the State of Colorado in violation of the Colorado Constitution's Religious Freedom clause" and that "[d]esignations of an official Day of Prayer by Governor Ritter encourage public celebration of prayer and create a hostile environment for non-believers, including the plaintiffs, who are made to feel as if they are political outsiders." (Complaint, ¶¶ 39 and 47).

Thus, it appears that the Plaintiffs in this case are pointing to two clauses within the Religious Freedom clause: (1) "no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion," and (2) "[n]or shall any preference be given by law to any religious denomination or mode of worship." Whether Governor Ritter's Prayer Proclamations are an endorsement of religion is a question of law.

1. *Denial of Civil or Political Rights, Privileges or Capacity on Account of Religion*

Under the Colorado Constitution, "no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion." This portion of the Religion Clause has received precious little attention in our state courts, and there is no interpretation of the clause by any of our courts of appeal. However, we take it at face value that, for a violation of this clause to have occurred, there must first be a denial of a right, privilege, or capacity due to the religion of the plaintiffs.

Plaintiffs here have alleged that they are "made to feel as if they are political outsiders" because of the Colorado Day of Prayer Proclamations. This is enough to permit the Plaintiffs standing in this case. However, without evidence showing what precise rights, privileges or capacity have been violated (other than a blanket statement that the Religion Clause has been violated), this Court cannot find a violation of this clause of the Religion Clause of the Colorado Constitution.

Plaintiffs have pointed to no instances in which they have been denied any right or privilege by the State of Colorado based upon their religion. They have not even presented evidence of any instances in which they were questioned by private citizens for failing to be Christians. There is no "right" or "privilege" provided to Colorado citizens to "feel" any particular way, and so allegations that Plaintiffs are made to feel a certain way are of little use to the Plaintiffs without language in the Proclamations that conveys the message that "any person is excluded from our political community based on religious beliefs or the lack of such beliefs." *State v. Freedom From Religion Foundation, Inc.,* 898 P.2d 1013, 1026 (Colo. 1995). There is no such language here excluding those who will not pray – only language that each citizen has the "freedom" to worship and pray, and that some individual persons will in fact pray. These are simple facts; both our state constitution and the federal constitution preserve those rights.

There is also no evidence that the NDP Task Force has a "direct line" to the Governor's Office. To the contrary, the NDP Task Force is required to use the same procedure as any other person or group requesting an honorary proclamation. The Plaintiffs have not presented any evidence of rejection of their own proposed honorary proclamation in favor of non-belief. Thus, there is no violation of this portion of the Religion Clause.

2. *Preference Clause Analysis*

The Preference Clause to the Colorado Constitution states: "Nor shall any preference be given by law to any religious denomination or mode of worship." The Colorado Supreme Court has instructed that "[i]n interpreting our Preference Clause we have looked to the Establishment Clause of the First Amendment to the United States Constitution and the body of federal cases that have construed it." *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1019 (Colo. 1995).

The United States Supreme Court has used several different tests under the Establishment Clause, and has in fact stated that in this sensitive area of the law, it hesitates to adopt a single test. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). There are at least three readily identifiable

tests. First, there is the coercion test, then the *Lemon* test, and finally, the historical practice test. Some courts have identified a fourth test, the "endorsement" test, but this is essentially simply a refinement of the *Lemon* test. *Wallace v. Jaffree***,** 472 U.S. 38, 69 (1985) (concurring opinion).

a. Coercion Test

The coercion test is a threshold test; at a minimum, the government may not "coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' Lynch at 678." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Thus, before even reaching the other tests, we must concern ourselves with whether the violation at issue here requires the Plaintiffs to support or participate in religion, or whether a state religion is established by the honorary proclamations of a Colorado Day of Prayer.

The answer is simple. Plaintiffs have repeatedly denied any coercion to participate in events or to pray. No state religion has been founded, either – the proclamation merely asserts individual "freedoms" to do religious things, asserts that individuals will in fact exercise those freedoms, and relates back to nationally significant documents and events which include a Biblical theme. The proclamations do not have the force and effect of law, and even if they did, the language does not support the foundation for a state religion, but only an acknowledgment of the rights of the citizenry as recognized as far back as the Declaration of Independence.

b. Lemon *Test*

The seminal case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) sets out the most often relied upon test of the federal judiciary on the Establishment Clause; it also represents "[*t*]*he* test for determining whether a governmental act violates the Establishment Clause" as recognized and followed in Colorado. *See State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1021 (Colo. 1995) (emphasis added). In *Lemon*, the issue was whether a State could give financial assistance to nonpublic, mostly religious schools without running afoul of the Establishment Clause. The Court stated, "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)." *Lemon* at 612-613.

In *Lemon*, the supervision of religious activities required by the statutes caused excessive entanglement, and the statutes were struck down. *Id*. at 615. This three part test has been extended beyond application to just statutes and legislative action. *See Lynch v. Donnelly*, 465 U.S. 668, 679 (1983) (". . . we have often found it useful to inquire whether the challenged law *or conduct* has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion").

The Colorado Supreme Court has also recognized that the United States Supreme Court "embraced Justice O'Connor's refinement of the second prong of the tripartite *Lemon* test" as

defined in *Lynch v. Donnelly*, 465 U.S. 668 (1983), and has accepted that refinement. *State v. Freedom From Religion Foundation, Inc.,* 898 P.2d 1013, 1021 (Colo. 1995). Justice O'Connor's refinement 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." *Id*. Both the intended and actual message must be secular. *Id*. "[A]ny religious meaning of legal consequence must ultimately flow from the character of the state action as perceived by an objective observer, but does not turn on whether the message, though secular, also has religious value." *Id*. at 1026.

So first, the Colorado Day of Prayer Proclamations must have a secular purpose. In determining the true purpose, the court takes the perspective of a reasonable observer. *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 862 (2005). The Defendants have characterized their purpose as acknowledging the National Day of Prayer, the National Day of Prayer Task Force's events, and the right to freedom of religion. When acknowledgment of religion is the stated purpose, the courts must carefully scrutinize the government to ensure that this is the actual purpose, lest "acknowledgment" become an easy way of violating the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 694 (1983) (concurring opinion).

Defendants assert that they regularly issue such proclamations in order to acknowledge events and occasions occurring in Colorado and abroad. They do not intend to convey a message of support, but instead intend to give open access to the Governor's Office to all groups that ask for proclamations for various causes. For example, the Governor's Office issues proclamations for groups supportive of both the Turks and the Armenians, who have a history of conflict, without intending to convey support for either group. They remove controversial language from both of those requested proclamations, just as they have recently removed the Bible verses included in the requested proclamations from the National Day of Prayer Task Force in order to avoid controversy such as this lawsuit.

The Plaintiffs have not offered any evidence that the Defendants' acknowledgment is pretextual and is in reality an endorsement of religion. This Court finds Defendants merely intend to acknowledge the events of the National Day of Prayer Task Force, and a reasonable observer would not conclude otherwise.

Second, the Colorado Day of Prayer Proclamations must have the principal or primary effect that neither advances nor inhibits religion. This requires consideration of what message the government intended to convey, and the message that the government's actions actually conveyed to a reasonable person, as perceived by an objective observer. Plaintiffs assert that the very language of the proclamations indicate support for prayer; in particular, Plaintiffs allege that the statement that "individuals across this state and nation will unite in prayer" is an exhortation to pray and not a statement of fact.

As discussed, the intended message is that of acknowledgment of the National Day of Prayer by the Governor's Office. This does not end the inquiry because if the message actually conveyed is primarily religious, intent alone does not save the honorary proclamations. We must examine the message from the vantage of a reasonable observer. *State v. Freedom From Religion Foundation, Inc.,* 898 P.2d 1013, 1026 (Colo. 1995).

The objective observer has access to all of the contextual information involved in the alleged violation, including the text, legislative history, and implementation of the statute or comparable official act. *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U. 844, 862 (2005). In this case, that means that the objective observer knows that there is a federally recognized holiday for the National Day of Prayer, has read the proclamations, knows that they were requested by a group who is primarily directed toward furthering its own religious goals, and knows that the Governor's Office issues many honorary proclamations on request, even when they contradict each other. The constitutionality of the National Day of Prayer is irrelevant to this context because the State of Colorado has nothing to do with the existence of that holiday, other than its acknowledgment of it through these honorary proclamations.

Plaintiffs nevertheless refuse to quit the argument about the National Day of Prayer in this suit, which is a federal holiday which is simply not at issue here. The Colorado Day of Prayer Proclamation does not declare a State holiday, though it does acknowledge the National Day of Prayer. This State does not have the authority to declare the National Day of Prayer unconstitutional, despite Plaintiffs' focus on the potential illegality and background of that holiday. Defendants have presented evidence that it is normal procedure for the Governor's Office to recognize days through honorary proclamation for almost any purpose that is not controversial. "Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1983) (concurring opinion), but also *see County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 601 (1989) (" . . . but under the First Amendment it may not observe [a public holiday] as a Christian holy day by suggesting that people praise God . . ."). There is no exhortation here for the citizens of Colorado to also recognize the Colorado Day of Prayer or to pray themselves. Furthermore, there is nothing controversial about a restatement of a right protected by the First Amendment of the United State Constitution, despite Plaintiffs' assertions to the contrary, and so this proclamation is not out of the ordinary for that reason either.

Plaintiffs are able to point to a recent Federal District Court decision which ruled that the National Day of Prayer statute was unconstitutional. *See Freedom From Religion Foundation, Inc. v. Obama*, --- F.Supp.2d ---, 2010 WL 1499451 (W.D. Wis. 2010). The decision is stayed pending appeal, but even if it was the final decision, the opinion does little to help the Plaintiffs here. In that opinion, the Court distinguished the prayer statute, which it found unconstitutional, from other cases upholding the constitutionality of prayer proclamations. The Court outlined the three ways in which prayer proclamations are different from the National Day of Prayer statute. *Id*. at 24. First, proclamations take notice of particular events rather than exhorting prayer. *Id*. Second, an executive's statements of his own beliefs about prayer are less likely to be viewed as an official endorsement by the government. *Id*. Third, proclamations are not an attempt to help religious groups organize. *Id*.

The purpose of the National Day of Prayer Task Force is, of course, relevant. *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1024 (Colo. 1995). That purpose is, ostensibly, to encourage people to pray. However, unlike the facts in *State v. Freedom From Religion Foundation, Inc.,* where the purpose of the donor of a monument was ascribed to the donee, this case does not involve a single gift to the Governor's office, where the purpose of the gift is readily apparent or easily obtainable. Honorary proclamations do not share the same ceremony and importance as monuments, and are not publicized by the state the way monuments

are, visible to the whole world on a continuous basis. The Governor's Office gets and grants hundreds of requests for honorary proclamations each year. Its consideration of each does not and cannot conceivably go into the purpose of the requesting parties other than what is contained in the request itself. To require more will burden the process to a point that it would be prohibitive. Generally, because the purpose of honorary proclamations is to acknowledge events as requested by private groups and individuals and is not an endorsement of their purposes, the purpose of the National Day of Prayers Task Force in requesting the proclamations cannot be ascribed directly to the Defendants.

The primary message that the proclamations sends, as perceived by the objective observer, is that the Governor's Office acknowledges the right of an individual to pray and worship, the National Day of Prayer, and the events held by the National Day of Prayer Task Force at the capitol. It does not insist or encourage anyone to pray or not pray. That issue is left up to the individual. The proclamations do not attempt to influence that issue.

Finally, the Proclamations must not foster an excessive government entanglement with religion. "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon* at 615. Obviously, the benefited institutions here are the National Day of Prayer Task Force and all individuals and groups who participate in the events. The purpose of the National Day of Prayer Task Force is to encourage people to pray; the purpose of those who pray is various, but it is primarily a religious act. The aid provided is an official acknowledgement of these religious activities by the Governor of the State of Colorado. The key, however, is in the relationship that results from the aid to these purposes.

Here, there is almost no relationship between the National Day of Prayer Task Force and the Governor's Office. The State 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." In fact, if it was inquiring into the purposes of the requesters for proclamations and weeding out only the religious ones, this could be characterized either as entanglement or outright hostility toward religion, which is also forbidden. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1983), *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect."). The National Day of Prayer Task Force uses the same procedures as anyone else to get an honorary proclamation by the Governor's Office. There is no excessive entanglement present in this case.

Plaintiffs argue that the Proclamations excessively entangle government and religion because it facilitates the Colorado Day of Prayer festivities. In light of the fact that most festivities are planned well in advance of the Proclamation's issuance, this argument is not credible. Announcing that people will in fact gather to celebrate a public holiday does not necessarily involve the State in any way in the planning of religious activities.

c. Historical Practice Test

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court chose not to apply the Lemon test because of the long history of the practice at issue in that case (legislative prayer). In coming to this conclusion, the Court said that "[t]he opening of sessions

of legislative public bodies with prayer is deeply embedded in the history and tradition of this country. . . . It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood." *Id*. at 786, 788-789. Even though the Court finds that honorary proclamations at issue here do not violate the *Lemon* test, it is prudent to discuss the reasons that the honorary proclamations would not be saved by the test defined by *Marsh* even if they did violate the test in *Lemon*.

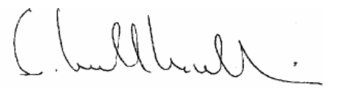
In *Marsh*, the Court found the length of the national practice *and* the length of the state practice to be important factors. *Id*. at 788-89. Here, there is no evidence that the honorary proclamations for the Colorado Day of Prayer date to before 2004. Needless to say, a practice lasting six years is not sufficient to make it historical. There is some dispute as to the history of national prayer proclamations, but because *Marsh* requires the state practice to also be of significant length, those disputes are best left for another case and are immaterial here.

ORDER

IT IS THEREFORE ORDERED that, in accordance with the foregoing, Defendants' Motion for Summary Judgment is hereby GRANTED, and Plaintiffs' Cross-Motion for Summary Judgment is DENIED. Summary Judgment is hereby entered in favor of Defendants BILL RITTER, JR., in his official capacity as GOVERNOR OF THE STATE OF COLORADO, and THE STATE OF COLORADO and against Plaintiffs FREEDOM FROM RELIGION FOUNDATION, INC., MIKE SMITH, DAVID HABECKER, TIMOTHY G. BAILEY and JEFF BAYSINGER on all of Plaintiffs' claims.

Dated this 28th day of October, 2010

BY THE COURT



R. MICHAEL MULLINS,
District Court Judge