

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 16, 2013 12:49 PM
Certiorari to the Court of Appeals, 2010CA2559 District Court, City and County of Denver, 2008CV9799	
Petitioner:  John Hickenlooper, in his official capacity as Governor of the State of Colorado,  v.  Respondents:  Freedom From Religion Foundation, Inc.; Mike Smith; David Habecker; Timothy G. Bailey; and Jeff Baysinger.	
<b>Order</b>	

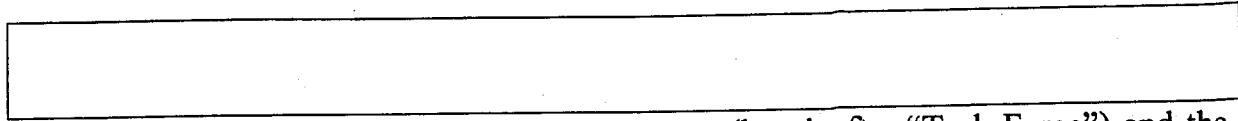
GRANTED.

Amicus brief received on September 13, 2013 is accepted for filing.

Issue Date: 9/16/2013

BY THE COURT

<p>Supreme Court, State of Colorado  101 West Colfax Avenue, Suite 800  Denver, CO 80202</p>	<p>FILED IN THE  SUPREME COURT</p> <p>SEP 13 2013</p> <p>OF THE STATE OF COLORADO  Christopher T. Ryan, Clerk</p> <p>^Court Use Only^</p> <p>Case Number: 12SC442</p>
<p>Court of Appeals No. 10CA2559  District Court for the City and County of Denver  Honorable R. Michael Mullins, Judge  Case No. 2008CV9799</p>	
<p>John Hickenlooper, in his official capacity as  Governor of the State of Colorado, and The State  of Colorado,</p> <p>Petitioners,</p> <p>v.</p> <p>Freedom From Religion Foundation, Inc; Mike  Smith; David Habecker; Timothy G Bailey; and  Jeff Baysinger,</p> <p>Respondents.</p>	
<p><b>Attorneys For Amici Curiae</b></p> <p>Michael J. Norton, No. 6430  ALLIANCE DEFENDING FREEDOM  7951 E. Maplewood Ave., Suite 100  Greenwood Village, CO 80111  Tel: (720) 689-2410  Fax: (303) 694-0703  <a href="mailto:mjnorton@alliancedefendingfreedom.org">mjnorton@alliancedefendingfreedom.org</a></p>	
<p align="center"><b>MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN  SUPPORT OF PETITIONER</b></p>	



The National Day of Prayer Task Force (hereinafter "Task Force") and the Colorado Elected Officials and Individuals named in the attached amicus curiae brief conditionally filed herewith (hereinafter "Colorado Elected Officials"), through counsel, hereby move this honorable Court, pursuant to C.A.R. 29, for leave to file an amicus curiae brief in support of Petitioners John Hickenlooper, in his official capacity as Governor of the State of Colorado, and the State of Colorado. In support of this motion, the Task Force and Colorado Elected Officials state:

1. The Task Force is a not-for-profit organization based in Colorado Springs, Colorado and is dedicated to protecting and promoting the United States' tradition, dating to before the time of America's Founders and before the date upon which Colorado became a State in 1876, of publicly requesting help and guidance from Almighty God.

2. In addition, the Task Force is dedicated to, among other things, seeking to protect religious freedoms guaranteed by the First Amendment to the United States Constitution and its counterpart in the Colorado constitution, of being able to gather in prayer, to worship, and to speak freely; to maintain America's religious heritage, including that religious history and tradition within

the State of Colorado; to encourage and emphasize prayer by our citizens, regardless of current national or international issues and political positions; and, in so doing, to respect all people regardless of their denomination or creed.

3. The Task Force has an interest in this appeal because Governors of the State of Colorado and other elected officials have, for decades, issued proclamations about prayer and this case specifically challenges certain honorary proclamations issued, principally at the request of the Task Force, in the last few years by the Governor of Colorado.

4. The Colorado Elected Officials are Colorado State Senators and Representatives, County Commissioners, and Former Elected Representatives who seek to protect these same rich historical traditions in the State of Colorado; to advance Colorado's religious self-understanding; and to support the right of the Governor of the State of Colorado and other Colorado elected officials to recognize Colorado's historical tradition of prayer in such proclamations and other documents in the future.

5. These Colorado Elected Officials come from both political parties and are from across the State of Colorado. They all support the few recent prayer proclamations that have been issued by the Governor of the State of Colorado and

support the continuation of this historic, traditional way of honoring certain citizens of the State of Colorado.

6. The Colorado Elected Officials have an interest in this case because they are leaders in their communities and officials of the State of Colorado who wish to see the continued acknowledgement by the State of Colorado of such proclamations regarding prayer and the protection of Colorado's religious history and tradition.

7. The Task Force and Colorado Elected Officials provide a unique perspective on the present case because of the specific issue involved and the Task Force's experience in similar cases in other courts.

8. The Task Force and Colorado Elected Officials have done considerable research through the Colorado State Archives, including the executive records of Colorado's governors. Many of those historic documents which support Colorado's religious history and tradition are attached as exhibits to this amicus curiae brief in support of Petitioners John Hickenlooper, in his official capacity as Governor of the State of Colorado, and the State of Colorado. These exhibits date from Colorado's territorial days, at the time of statehood, and to the present day.

9. The court of appeals erred in this case when it held that the gubernatorial prayer proclamations are not constitutional as they do not satisfy *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (popularly referred to as the *Lemon* test).

10. The court of appeals erred when it concluded that the gubernatorial prayer proclamations did not satisfy *Marsh v. Chambers*, 463 U.S. 783 (1983). The court of appeals based this analysis on a faulty understanding of the history of prayer proclamations within the State of Colorado.

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12. In 1876, 1877, and 1878 Colorado's first governor John Routt issued three consecutive prayer proclamations. This brief points out that this trend has continued throughout Colorado's history to the present day. In addition, minutes from early Colorado legislative sessions that demonstrate the continuance of this historic tradition and this practice occurred. These minutes are available at the

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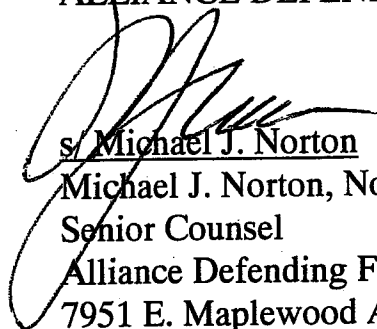
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15. All sides have been contacted concerning the filing of this brief and do not object.

16. The amicus curiae brief, with attachments of various prayer proclamations found at the Colorado State Archives, is conditionally filed with this motion.

Respectfully submitted this 13<sup>th</sup> day of September, 2013.

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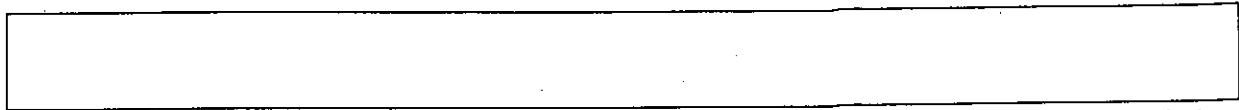
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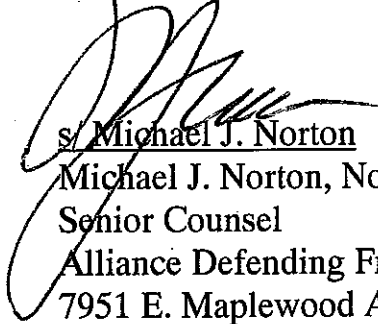
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<p><b>Attorneys For Amici Curiae</b> Kevin Theriot, Esq. Joel Oster, Esq. ALLIANCE DEFENDING FREEDOM 15192 Rosewood Leawood, Kansas 66224 Tel: (913) 685-8000 Fax: (913) 685-8001 <a href="mailto:joster@alliancedefendingfreedom.org">joster@alliancedefendingfreedom.org</a></p> <p>Michael J. Norton, No. 6430 Senior Counsel ALLIANCE DEFENDING FREEDOM 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 Tel: (720) 689-2410 Fax: (303) 694-0703 <a href="mailto:mjnorton@alliancedefendingfreedom.org">mjnorton@alliancedefendingfreedom.org</a></p>	<p>^Court Use Only^  Case Number: 12SC442</p>
<p><b>A BRIEF FOR AMICI CURIAE BY THE NATIONAL DAY OF PRAYER TASK FORCE AND COLORADO ELECTED OFFICIALS AND INDIVIDUALS IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW</b></p>	

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

Specifically, the undersigned certifies that:  
The brief complies with C.A.R. 28(g).

Choose one:

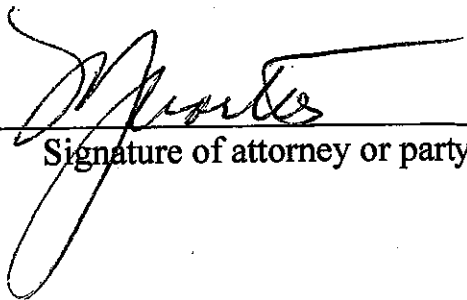
It contains \_\_\_\_\_ words.  
 It does not exceed 30 pages.

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

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

For the party responding to the issue:

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

  
\_\_\_\_\_  
Signature of attorney or party

***AMICI CURIAE* COLORADO ELECTED OFFICIALS  
AND INDIVIDUALS**

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Representative Kathleen Conti (CO-38)

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Representative Justin Everett (CO-22)

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Representative Stephen Humphrey (CO-48)

Former Senator Mike Kopp (CO-22)

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Representative Dan Nordberg (CO-14)

Commissioner Roger Partridge (Douglas County, District II)

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**Representative Jerry Sonnenberg (CO-65)**

**Representative Amy Stephens (CO-19)**

**Representative Spencer Swalm (CO-37)**

**Representative Libby Szabo (CO-27)**

**Senator Nancy Todd (CO-28)**

**Representative Jared Wright (CO-54)**

**Councilman Rick Dindinger (Centennial)**

**Representative Carole Murray (CO-45)**

**Representative Polly Lawrence (CO-39)**

**Representative Bob Rankin (CO-57)**

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## INTRODUCTION<sup>1</sup>

The Colorado Supreme Court should reverse the appeal court's ruling because honorary prayer proclamations are constitutional as indicated by the tests from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Marsh v. Chambers*, 463 U.S. 783 (1983).

The court of appeals incorrectly held that the prayer proclamations do not satisfy either the *Lemon* test or *Marsh*. Gubernatorial prayer proclamations satisfy *Marsh* because the founders<sup>2</sup> of the Colorado Constitution did not intend to prohibit government acknowledgement of our religious heritage through such practices as legislative prayer and prayer proclamations. In *Marsh*, the Supreme Court upheld the practice of the Nebraska legislature of paying a Christian chaplain to give a prayer for legislative sessions. In upholding this practice, the Court looked to the intent of the Founders. As evidence of this intent, the Court pointed to the fact that at the time the Constitution was drafted, it was a common practice for legislative sessions to be opened with prayer. In addition, this practice continued after the Constitution was ratified. So these two elements – that the

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<sup>1</sup> All parties have consented to filing of this amicus brief.

<sup>2</sup> This brief refers to both the “founders” of the Colorado Constitution, and the “Founders” of the U.S. Constitution.

practice was going on at that time and that it continued – were evidence of legislative intent.

Here, the court of appeals erred when it held that the gubernatorial proclamations did not satisfy *Marsh* because the court could not point to a long, unbroken history of prayer proclamations. This conclusion is historically inaccurate. Prayer proclamations were issued at the time of the founding of the Colorado Constitution and have continued to this day. Furthermore, Colorado has a long history of acknowledging our religious heritage with official prayers before legislative sessions and prayer proclamations. All of this is evidence that the framers of the Colorado Constitution did not intend to prohibit any and all acknowledgment of religion by the state, including honorary gubernatorial prayer proclamations.

### **INTERESTS OF *AMICI CURIAE***

The National Day of Prayer Task Force (hereinafter “NDP Task Force”) is a not-for-profit organization dedicated to protecting and promoting the United States’ tradition, dating back to the Founders, of publicly requesting help and guidance from God. The NDP Task Force is dedicated to, among other things, seeking to protect the freedoms of being able to gather in prayer, worship, and speak freely; to maintain America’s religious heritage, including the history and

traditions within Colorado; to encourage and emphasize prayer, regardless of current issues and political bent; and to respect all people regardless of their denomination or creed.

The NDP Task Force has an interest in this appeal because the NDP Task Force has requested honorary proclamations from the governor of Colorado – one of which is the subject of this lawsuit. The NDP Task Force is located in Colorado Springs, Colorado, and has an interest in the history and traditions within this state. Even though not a named party in this suit, the NDP Task Force can provide a unique perspective on the present case because of the specific issues involved and experience in similar cases in federal courts.

The Colorado Elected Officials and Individuals are Colorado State Senators and Representatives, County Commissioners, and Former Elected Representatives who seek to protect Colorado's rich historical traditions; to renew Colorado's religious self-understanding; and encourage the promulgation of prayer at all times. The Colorado Elected Officials and Individuals have an interest in this case as leaders of their communities and officials of the state who wish to see the continued acknowledgement by the state of prayer and Colorado's religious history.

The Colorado Elected Officials and Individuals respectfully asks that the court grant leave for filing this *amicus curiae* brief in support of Defendant Governor Hickenlooper and the State of Colorado (hereinafter "Defendant").

### **STATEMENT OF STANDARD OF REVIEW AND PRESERVATION**

This party has no issue with the statements made by the Defendants in regards to standard of review or preservation for appeal.

### **ARGUMENT**

#### **I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT HONORARY PRAYER PROCLAMATIONS DO NOT SATISFY *MARSH*.**

In *Marsh v. Chambers*,<sup>3</sup> 463 U.S. 783, 786 (1983) the Supreme Court held that opening sessions of the Nebraska State Legislature with prayer by a paid chaplain did not violate the Establishment Clause. The Court reasoned that the long and unbroken history of legislative prayer in both the states and Congress dating back to the Founders indicated that the Founders would not have seen this as a violation of the Establishment Clause. *Id.* at 790-791. The historical evidence

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<sup>3</sup> *Marsh* is applicable to a state constitutional analysis as the Colorado courts "derive[] guidance in interpreting the Preference Clause by looking at the Establishment Clause of the United States Constitution and the body of federal law that has construed it." *Conrad v. City and County of Denver*, 724 P.2d 1309, 1313 (Colo. 1986). See also *State v. Freedom from Religion Foundation, Inc.* 898 P.2d 1013, 1026-1027 (Colo. 1995) (applying *Lemon* in upholding a Ten Commandments monument against a claim that the monument violated the Colorado Constitution).

showed “not only ... what the draftsmen intended the Establishment Clause to mean, but also ... how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.” *Id* at 790.

Specifically, the Court was concerned with the *intent* of the Founders, with the long and unbroken history merely being a signal that one should not “cast aside” a historical practice lightly. *Id.* Thus in the present case, the court of appeals erred when it relied solely on distinctions between the Colorado prayer proclamations and the prayers of *Marsh*. While the continuation of the practice gives evidence of the founders’ intent, whether the practice has an unbroken history is not the ultimate issue. The ultimate issue is the intent of the founders. (R. 34061265, Page 14).

Therefore, the question is whether the framers of the Colorado Constitution intended to ban any and all government acknowledgments of religion. To ascertain this intent, *Marsh* invites us to look at the practices of the founders that ratified the Colorado Constitution and whether such practices continued, because “their actions reveal their intent.” 463 U.S. at 790.

When we look at the prevailing practices of that day (1876) and the practices since then, it is clear that the Colorado founders did not intend to ban every single government acknowledgment of religion. Rather, official statements

acknowledging religion, including prayer proclamations and legislative prayers, were a consistent occurrence within Colorado at that time, and have continued to this day.

**A. History of Government Acknowledging Religion Within Colorado**

Gubernatorial prayer proclamations predate statehood in Colorado.<sup>4</sup> For example, in 1865, in response to Abraham Lincoln's death, Territorial Governor John Evans issued a proclamation asking the people of Colorado that "they pray Almighty God to sanctify this bereavement to the good of the nation." (Exhibit 1)<sup>5</sup> (Colorado State Archives ("Col. St. Arch.")).

Territorial Governor Alexander Cummings gave this proclamation for Thanksgiving in 1865, listing several things for the people of Colorado to give thanks and prayer for:

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<sup>4</sup> Most of these quoted proclamations are stored in the Colorado State Archives, located at 1313 Sherman, Room 1B20, Denver, CO 80203. The rest were found through a search of the Colorado Historical Society's database. Searching for proclamations located in the Archives involved looking through an index of sorts and trying to find the specific examples provided in this brief. Earlier records were scarcer but more specific (e.g. "Thanksgiving Proclamation") while later records were more numerous and generalized (e.g. "proclamation"). We were not able to go through all state executive records since 1876 to find every proclamation that pertains to prayer. However, the records that we did have time to pull and review show that Colorado has an extensive history of gubernatorial prayer proclamations that predate statehood, occurred at the time of statehood, and has continued to this day. This is consistent with the "unambiguous and unbroken" history referenced in *Marsh* and clearly demonstrates the founders' intent.

<sup>5</sup> All exhibits are filed as separate documents unless otherwise indicated.

And while this rendering thanksgiving, let us earnestly supplicate Him, that in all our future history, we may, as a people, be characterized by that Righteousness which exalts a nation, and that we be wisely directed, so that we may not hesitate to render equal and expert justice...

(Exhibit 2) (Col. St. Arch.).

Similarly in an 1866 proclamation, Gov. Cummings called Coloradans to prayer:

And while thus expressing our gratitude let us invoke Divine aid that the wonted harmony of the nation may be fully restored and that the rights of every human being claiming the protection of the flag may be permanently secured.

(Exhibit 3) (Col. St. Arch.).

In 1869, Territorial Governor Edward McCook gave a proclamation of prayer and thanksgivings, stating:

...and I hereby earnestly recommend to all the people of this Territory that upon that day in the churches and of the family after, we each and all, with a full sense of our dependence upon Him who is the giver of every good and perfect gift unite in thanking God for His goodwill towards us during the year [...] and humbly ask for the continuance of His favors...

(See Exhibit 4) (Col. St. Arch.).

These prayer and thanksgiving proclamations did not stop once Colorado became a state. For example, when the President issued a proclamation for a day

of "Thanksgiving to Almighty God" in 1876, John Routt, Colorado's first governor, issued this proclamation:

Now therefore, I, John L. Routt, Governor of the State of Colorado, in accordance with the said proclamation, do recommend to the citizens of this commonwealth, to abstain on that day from their usual avocations and observe it as a day of thanksgiving.

(Exhibit 5) (Col. St. Arch.).

Similarly in 1877, Governor Routt gave this proclamation in response to the President's proclamation for national "Thanksgiving and Prayer":

Now, therefore, I, John L. Routt, Governor of Colorado, in accordance with the said proclamation, do earnestly recommend that the people of this state observe the day, so set apart, as a day of Thanksgiving to Almighty God for the rich and manifest blessings conferred upon this Commonwealth.

(Exhibit 6) (Col. St. Arch.).

Likewise in 1878, Gov. Routt gave another proclamation in response to the President's proclamation of a day of "National Thanksgiving and Prayer":

Now, therefore, I, John L. Routt, Governor of the State of Colorado, in accordance with the said proclamation of the President, do hereby earnestly request the citizens of this commonwealth to abstain from their usual avocations on the day so set apart, and unite in observing it as one of official thanksgiving and prayer to Almighty God for peace, prosperity, and all the blessings conferred upon us.

(Exhibit 7) (Col. St. Arch.).

Colorado's second governor, Frederick Pitkin, gave a proclamation recommending thanksgiving and prayer to God in 1881:

I do therefore designate Thursday the 24<sup>th</sup> day of November, 1881 to be observed by the people of Colorado as a day of Thanksgiving praise and prayer...

(Exhibit 8) (Col. St. Arch.).

In 1892, Gov. John Routt gave this proclamation for thanking Almighty

God:

The people of Colorado have special reason for the expression of profound gratitude to Almighty God. His gifts during the year now drawing to a close have been abundant. In this, the anniversary year of the discovery of our country, we have been blessed with peace, unusual prosperity and contentment. Let us earnestly invoke for the future His benediction; and let it be the purpose of the part of all to make brighter the homes of those who may need our assistance and sympathy.

Therefore, In conformity with the proclamation of the President, designating Thursday, November 24<sup>th</sup>, as a day of Thanksgiving, I John L. Routt, Governor of the State of Colorado, do urge that our people forego for that day their usual pursuits, and observe it with reverent thanksgiving.

(Exhibit 9) (Col. St. Arch.).

In 1905, Governor Jesse McDonald issued this proclamation:

The people of the State of Colorado have much for which to thank Almighty God. During the past year we have been prospered in all material things. Our lot has been one of peace. Our citizens have been profitably employed. Our farms and mines have yielded full store. Our people are apparently contented and happy. We enjoy liberty of

speech and freedom of action, and have the greatest possible opportunities of developing within us the highest and truest type of citizenship. But in periods of great prosperity, we are apt to be forgetful of our dependence upon a Higher Power, and conclude that we have achieved our own greatness without guidance or help from above. It is, therefore, most becoming that, as a Nation and a State, we should return thanks for the bounteous blessings we have received at His hand.

Now, Therefore, I, Jesse F. McDonald, Governor of the State of Colorado, pursuant to the power and authority vested in me by law, and in accordance with the proclamation of the President of the United States, designating Thursday November 30, 1905, as a day of Thanksgiving do call upon the people of this State to turn to the Lord in prayer and thanksgiving for His mercies, and for a continuation of our present happy condition in the future; and do earnestly request that, in our homes and houses of worship, we humble ourselves before Him, with gratitude and love in our hearts, and endeavor to cultivate within us the Christ-like spirit.

(Exhibit 10) (Col. St. Arch.).

Governor Julius Gunter issued a proclamation in 1918 for Colorado citizens to “observe Memorial Day, May 30, with religious solemnity and fervent prayer....” *Colorado News Notes*, Akron Weekly Pioneer Press, Friday, May 24, 1918, page 1 (Exhibit 11) (Colorado Historical Society (“Col. Hist. Soc.”)).

Similarly in 1921, Governor Oliver Shoup gave a proclamation asking “that our prayers be offered up that the cause of freedom [...] continue forever as the heritage of generations to come.” Annotated Press, *Proclamation For Memorial*

*Day Is Made By Governor*, The Fort Collins Courier, Thursday May 19, 1921, page 3. (Exhibit 12) (Col. Hist. Soc.).

Governor William Adams issued a proclamation in 1932 asking Colorado citizens to "pray for strength to meet the serious problems of the coming year."  
(Exhibit 13) (Col. St. Arch.).

In 1944, Governor John C. Vivian gave a proclamation in recognition of Thanksgiving, stating:

In conformity with the hallowed custom of the American people and in grateful acknowledgment of the profound blessings of Almighty God, it seems propitious that we should join in calling our people to a due and solemn observance of November 23<sup>rd</sup> as a day of Thanksgiving and prayer.

(Exhibit 14) (Col. St. Arch.).

In 1955, the Lieutenant and Acting Governor Stephen L. R. McNichols gave this proclamation:

Whereas, many of our most serious local, national and world problems can be solved only by a return to the spiritual concepts found in religion; and

Whereas, that Book of all Books, the Bible, is replete with the lessons of life and freedom under God; and

Whereas, all of us need to turn more and more to spiritual guidance for happiness and good living and for the solution of our problems in this great and perplexing age,

Now, therefore, I, Stephen L. R. McNichols, Lieutenant and Acting Governor of the State of Colorado, do hereby proclaim the week of October 17 to 23, 1955, as

**National Bible Week**

In the State of Colorado and urge all our citizens to observe 15<sup>th</sup> Annual National Bible Week, with proper consideration in the home and in public places to the end that we may have the benefits of a great spiritual revival. Such revival is needed for encouragement of freedom and a peaceful and prosperous world.

(Exhibit 15) (Col. St. Arch.).

Lt. Gov. McNichols also gave this proclamation that same year:

Whereas: November is the month in which all Americans traditionally set aside one day to offer thanks to the Almighty for personal blessings and for this nation in which our rights and liberties are safeguarded; and

Whereas: The freedoms of this nation are safeguarded as the gift of God Himself, no matter by which creed we worship Him, and we stand before the world as a people united in a way dedicated to the faith of our Creator; and

Whereas: To reaffirm that faith, the non-sectarian program known as Religion In American Life has designated the month of November as a period of special emphasis on the value of religion in personal, community and national life:

Therefore: I, Stephen L.R. McNichols, acting and Lieutenant Governor of the State of Colorado, do hereby proclaim November 1955 as

**Religion in American Life Month**

In the State of Colorado, and I urge that all families actively participate by attending regularly the church or synagogue of their choice.

(Exhibit 16) (Col. St. Arch.).

After Steve McNichols became governor, he issued a proclamation in 1961 for "World of Prayer Day," noting that "History gives an eloquent and persuasive proof that an appeal to God, through prayer, can lead to the rule of truth, justice, and peace in the hearts of men and nations." (Exhibit 17) (Col. St. Arch.).

In 1964, Governor John A. Love issued a proclamation in honor of "Worship with Your Children Month," and asked "citizens to participate by family prayer and church attendance..." (Exhibit 18) (Col. St. Arch.).

More recently, in 1994 Governor Roy Romer gave an honorary proclamation for prayer, noting that our nation had official prayer dating back to 1775 and that Colorado citizens may wish to join in prayer for the Colorado Day of Prayer. (Exhibit 19). Similar declarations have been issued since then. (Exhibits 20-33).<sup>6</sup>

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<sup>6</sup> In addition, the Colorado Historical Society has a large collection of historical newspapers that are searchable online in PDF format. See <http://www.coloradohistoricnewspapers.org/Default/welcome.asp?skin=Colorado&QS=Skin=Colorado&e>. A quick search of that database uncovered several newspaper articles concerning various prayer proclamations or references to prayer proclamations that have been issued throughout Colorado's history. See *A Proclamation*, The Daily Colorado Republican and Rocky Mountain Herald (Denver), Sept. 24, 1861 (at 2) (Exhibit 38); *A Proclamation*, The Daily Colorado

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Republican and Rocky Mountain Herald (Denver), Nov. 19, 1861 (at 2) (Exhibit 39); *A Proclamation by the Governor*, The Colorado Daily Chieftain (Pueblo), Nov. 25, 1873 (at 2) (Exhibit 40); *A Proclamation by the Governor*, The Colorado Daily Chieftain (Pueblo), Nov. 26, 1873 (at 2) (Exhibit 41); *Ammons' Proclamation*, Akron Weekly Pioneer Press, Nov. 21, 1913 (at 1) (Exhibit 42); *Cause for Thanks*, The Aspen Weekly Times, Nov. 11, 1893, (at 4) (Exhibit 43); *Colorado Briefs*, The Castle Rock Journal, Nov. 5, 1897 (at 1) (Exhibit 44); *Cyclone of Religion*, The Aspen Daily Times, Jan. 31, 1896, (at 1) (Exhibit 45, mayoral proclamation); *Give Thanks Nov. 26*, The Aspen Daily Times, Nov. 15, 1896 (at 1) (Exhibit 46); *Give Thanks Nov. 26*, The Aspen Weekly Times, Nov. 21, 1896 (at 1) (Exhibit 47); *Governor's Proclamation*, The Colorado Daily Chieftain (Pueblo), Nov. 19, 1876 (at 2) (Exhibit 48); *Governor's Proclamation*, The Colorado Daily Chieftain (Pueblo), Nov. 21, 1876 (at 2) (Exhibit 49); *Governor's Proclamation*, The Colorado Daily Chieftain (Pueblo), Nov. 22, 1876 (at 2) (Exhibit 50); *Governor's Proclamation*, The Colorado Springs Gazette and El Paso County News, Nov. 17, 1877 (at 2) (Exhibit 51); *Governor's Proclamation*, The Colorado Weekly Chieftain (Pueblo), Nov. 21, 1878 (at 2) (Exhibit 52); *History*, The Colorado Miner (Georgetown), Nov. 29, 1879 (at 1) (Exhibit 53); *Mayor's Proclamatio[n]*, The Eagle Valley Enterprise, Aug. 10, 1923 (at 1) (Exhibit 54); (No Title), The Buena Vista Democrat, Nov. 22, 1883 (at 1) (Exhibit 55); *Pray for Education*, The Brandon Bell, Oct. 10, 1913 (at 3) (Exhibit 56); *Prayers for Education*, Akron Weekly Pioneer Press, Oct. 10, 1913 (at 1) (Exhibit 57); *Proclamation*, The Colorado Miner (Georgetown), Nov. 25, 1876 (at 2) (Exhibit 58); *Proclamation*, The Record-Journal (Castle Rock), Nov. 10, 1939 (at 1) (Exhibit 59; mayoral proclamation); *Proclamation by Governor Routt*, The Colorado Miner (Georgetown), Nov. 17, 1877 (at 1) (Exhibit 60); *Proclamation by Governor Routt*, The Colorado Miner (Georgetown), Nov. 24, 1877 (at 1) (Exhibit 61); *Thanksgiving Day*, The Aspen Daily Times, Nov. 24, 1907 (at 1) (Exhibit 62); *Thanksgiving Day*, The Castle Rock Journal, Nov. 14, 1902 (at 1) (Exhibit 63); *Thanksgiving Decree*, Akron Weekly Pioneer Press, Dec. 1, 1916 (at 1) (Exhibit 64); *Thanksgiving Proclamation*, The Aspen Daily Times, Nov. 11, 1885 (at 1) (Exhibit 65); *Thanksgiving Proclamation*, The Aspen Daily Times, Nov. 22, 1890

These proclamations demonstrate the history of Colorado's governors offering prayer proclamations that pre-date 2004, contrary to the district court's understanding. (R. 34061265, Page 14). Furthermore, the district court noted that older proclamations were often not kept. (R. 34061265, Page 3). So even if there were not any recorded proclamations before 2004 (which there clearly are), it would only mean that there is no record of them, not that none existed.

In addition, there is an abundance of evidence that the state regularly opens legislative sessions with prayer. In *Marsh*, the Supreme Court noted that Colorado, along with many other states, opened up its legislative sessions with prayer and

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(at 2) (Exhibit 66; mayoral proclamation); *Thanksgiving Proclamation*, The Aspen Daily Times, Nov. 12, 1898 (at 1) (Exhibit 67); *Thanksgiving Proclamation*, The Aspen Daily Times, Nov. 13, 1904 (at 2) (Exhibit 68); *Thanksgiving Proclamation*, The Aspen Times, Nov. 19, 1881 (at 3) (Exhibit 69); *Thanksgiving Proclamation*, The Aspen Times, Nov. 24, 1883 (at 1) (Exhibit 70); *Thanksgiving Proclamation*, The Aspen Weekly Times, Nov. 14, 1885 (at 2) (Exhibit 71); *Thanksgiving Proclamation*, The Castle Rock Journal, Nov. 8, 1907 (at 7) (Exhibit 72); *Thanksgiving Proclamation*, Colorado Republican (Buena Vista), Nov. 7, 1907 (at 5) (Exhibit 73); *Thanksgiving Proclamation*, The Colorado Transcript (Golden), Nov. 20, 1878 (at 1) (Exhibit 74); *Thanksgiving Proclamation*, The Colorado Transcript (Golden), Nov. 17, 1886 (at 2) (Exhibit 75); *Thanksgiving Proclamation*, The Daily Chronicle (Aspen), Nov. 22, 1890 (at 4) (Exhibit 76, mayoral proclamation); *The Governor's Proclamation*, The Buena Vista Democrat, Nov. 17, 1886 (at 1) (Exhibit 77); *To Observe Thanksgiving*, Akron Pioneer Press, Nov. 14, 1902 (at 1) (Exhibit 78); *Why Colorado Should Rejoice*, Carbonate Chronicle (Leadville), Nov. 22, 1920 (at 2) (Exhibit 79).

accordingly held such practice to be constitutional. *See* 463 U.S. at 789, n.11. In fact, these prayers have been going at least since 1879, three years into Colorado's statehood, as the earliest available record shows. (Exhibits 34-37).

That the Colorado legislature, a governmental body, has a history of *directly praying to God* is a strong indication that Colorado's founders intended a gubernatorial proclamation *asking people to pray* to be constitutional. And surely, they would not have intended an honorary prayer proclamation program which is akin to a bulletin board and that merely acknowledges that many people pray to God within the state, to be a violation of the Preference Clause.

Finally, when comparing the text of the U.S. Constitution's preamble and the text of the Colorado Constitution's preamble, there is strong indication that the founders of Colorado would have seen public prayer proclamations as constitutional. The Preamble for the Colorado Constitution declares: "We, the people of Colorado, with profound reverence for the *Supreme Ruler of the Universe...*do ordain and establish this constitution for the 'State of Colorado'." (emphasis added). Col. Const., available at <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp>. The Colorado Constitution itself contains a reference to God. In contrast, the U.S. Constitution's preamble makes no explicit or direct reference to God. U. S. Const.

pmbL., available at

<http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp>.

Despite the “lack” of a direct or explicit reference to God in the preamble, the Founders of the U.S. Constitution regularly issued prayer proclamations. It would be very inconsistent for the founders of Colorado to make references to God in the preamble and yet have a more stringent view of the Preference Clause than the U.S. Supreme Court has of the Establishment Clause. If anything, it would seem Colorado has a more expansive view of the Preference Clause and, at a minimum, that it does not prohibit government acknowledgment of Colorado’s religious heritage.

In addition, the Colorado Enabling Act passed by Congress states that Colorado’s Constitution cannot be “repugnant to the Constitution of the United States and the principles of the Declaration of Independence” and “that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship.” 18 Stat. 474, available at:

<http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp>. It

would be entirely consistent with the Colorado founders’ intent to have as broad of an understanding of the Preference Clause as the U.S. Supreme Court does of the

Establishment Clause. To paraphrase Chief Justice Burger's conclusion in *Marsh* about the Establishment Clause, it would be incongruous to interpret the Preference clause as imposing more stringent limits than the draftsmen put into the Preamble. 463 U.S. at 790-91.

Given these facts, this Court should find that public prayer proclamations are consistent with the intent of Colorado's founders as evidenced by the many prayer proclamations at the time the Colorado Constitution was ratified – a practice that has continued to this day.

**B. Official Prayer Proclamations Are a Part of United States History.**

Like opening Congressional sessions with prayer in *Marsh*, there is a long and illustrious history of public prayer proclamations made by America's leaders. For example, the Seventh Circuit noted in its decision upholding the constitutionality of the National Day of Prayer statute in *Freedom From Religion Foundation v. Obama*, No. 10–1973, 641 F.3d 803, 804–05 (7th Cir. 2011), that all presidents except for Jefferson issued prayer proclamations. Specifically, the court quoted a prayer proclamation by George Washington made in 1789:

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His

kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquility, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.

*Id.* at 808. This is just a taste of the many proclamations our nation's presidents have made.<sup>7</sup> These proclamations, while made by United States presidents, are also a part of Colorado history, both as a state and a territory.

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<sup>7</sup> See also Woolley and Peters, *The American Presidency Project*, July 7, 2010, at <http://www.presidency.ucsb.edu/index.php> (Chronicling the following presidential prayer proclamations: George Washington (Oct. 3, 1789 & Jan. 1, 1795); John Adams (March 23, 1798 & March 6, 1799); James Madison (July 9, 1812; July 23, 1813 & Nov. 16, 1814); John Tyler (April 13, 1841); Abraham Lincoln (Aug. 12, 1861; March 30, 1863; July 15, 1863; July 7, 1864 & Oct. 20, 1864); Andrew Johnson (April 29, 1865 & Oct. 12, 1868); Ulysses S. Grant (Oct. 5, 1869; Oct. 14, 1873; Oct. 27, 1875; June 26, 1876 & Oct. 26, 1876); Rutherford B. Hayes (Oct. 29, 1877; Oct. 30, 1878; Nov. 3, 1879 & Nov. 1, 1880); Chester A. Arthur (Nov. 4, 1881 & Oct. 25, 1882); Grover Cleveland (Nov. 2, 1885; Nov. 1, 1886; Oct. 25, 1887 & Nov. 1, 1888); Benjamin Harrison (April 4, 1889; Nov. 1, 1889 & Nov. 8, 1890); Grover Cleveland (Nov. 1, 1894; Nov. 4, 1895 & Nov. 4, 1896); William McKinley (Oct. 29, 1897 & Oct. 25, 1899); Theodore Roosevelt (Sept. 14, 1901; Nov. 2, 1905; Oct. 22, 1906; Oct. 26, 1907 & Oct. 31, 1908); William Howard Taft (Nov. 5, 1910; Oct. 30, 1911 & Nov. 7, 1912); Woodrow Wilson (Oct. 2, 1913; Oct. 28, 1914; Oct. 20, 1915; Nov. 17, 1916; Nov. 7, 1917; May 11, 1918; Nov. 16, 1918; Nov. 5, 1918 & Nov. 12, 1920); Warren G. Harding (Oct. 31, 1921); Calvin Coolidge (Oct. 26, 1925; Oct. 30, 1926; Oct. 26, 1927 & Oct. 23, 1928); Herbert Hoover (Nov. 5, 1929 & Nov. 3, 1932); Franklin D. Roosevelt (Nov. 19,

Supreme Court Justice John Paul Stevens even recognized that governmental officials have historically given proclamations for prayer in his dissent in *Van*

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1938; Aug. 7, 1940; Nov. 27, 1941 & Nov. 26, 1942); Harry S. Truman (April 13, 1945; May 8, 1945; Aug. 16, 1945; Aug. 2, 1946; Nov. 10, 1947; May 28, 1948; May 26, 1949; Nov. 10, 1949; May 22, 1950; Oct. 26, 1951; June 17, 1952 & Nov. 8, 1952); Dwight D. Eisenhower (Nov. 7, 1953; Nov. 6, 1954; Oct. 11, 1955; Nov. 12, 1956; Nov. 8, 1957 & Oct. 31, 1958); John F. Kennedy (April 24, 1961; Sept. 28, 1961; Oct. 28, 1961; May 18, 1962; Oct. 11, 1962; April 26, 1963; Oct. 8, 1963 & Nov. 5, 1963); Lyndon B. Johnson (April 23, 1964; Sept. 22, 1964; May 15, 1965; Nov. 6, 1965; May 26, 1966; May 22, 1967 & May 13, 1968); Richard Nixon (July 16, 1969; Nov. 17, 1972; Jan. 26, 1973 & Nov. 16, 1973); Gerald Ford (Dec. 5, 1974; May 22, 1975; June 12, 1975; Jan. 21, 1976; March 16, 1976 & May 19, 1976); Jimmy Carter (April 25, 1977; Oct. 13, 1977; May 19, 1978; Sept. 1, 1978; March 29, 1979; Sept. 19, 1979; May 1, 1980; Sept. 22, 1980 & Nov. 13, 1980); Ronald Reagan (March 19, 1981; April 24, 1981; Nov. 12, 1981; Feb. 12, 1982; April 16, 1982; Sept. 27, 1982; Dec. 10, 1982; Jan. 27, 1983; April 4, 1983; Sept. 15, 1983; Dec. 14, 1983; April 13, 1984; Oct. 19, 1984; Jan. 29, 1985; April 26, 1985; Nov. 15, 1985; Jan. 13, 1986; May 22, 1986; Oct. 13, 1986; Dec. 22, 1986; May 21, 1987; July 28, 1987; Feb. 3, 1988; May 20, 1988 & Aug. 4, 1988); George H. W. Bush (Jan. 29, 1989; March 17, 1989; May 22, 1989; Nov. 17, 1989; March 6, 1990; May 24, 1990; Nov. 2, 1990; Nov. 14, 1990; Feb. 1, 1991; March 7, 1991; April 25, 1991; May 14, 1991; Nov. 25, 1991; Dec. 16, 1991; March 5, 1992 & May 21, 1992); Bill Clinton (April 30, 1993; May 28, 1993; April 12, 1994; May 30, 1994; March 14, 1995; May 18, 1995; Nov. 9, 1995; April 2, 1996; April 5, 1996; May 24, 1996; Nov. 11, 1996; April 18, 1997; May 22, 1997; Nov. 21, 1997; April 29, 1998; May 22, 1998; Nov. 17, 1998; May 5, 1999; May 26, 1999; Nov. 20, 1999; May 4, 2000; May 26, 2000 & Nov. 17, 2000); George W. Bush (Jan. 20, 2001; April 27, 2001; May 25, 2001; Sept. 13, 2001; Nov. 16, 2001; April 26, 2002; May 21, 2002; Aug. 31, 2002; Nov. 21, 2002; April 30, 2003; May 22, 2003; Sept. 4, 2003; Nov. 21, 2003; April 30, 2004; May 26, 2004; Sept. 10, 2004; May 3, 2005; May 20, 2005; Sept. 8, 2005; Sept. 9, 2005; May 3, 2006; May 16, 2006; Sept. 5, 2006; Nov. 16, 2005; April 20, 2007; May 15, 2007; Sept. 4, 2007; April 21, 2008 & May 22, 2008); and Barack Obama (May 7, 2009; May 22, 2009; Sept. 3, 2009; April 30, 2010; April 29, 2011; May 1, 2012 & May 1, 2013)).

*Orden v. Perry*, 545 U.S. 677 (2005). “Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents.... In this sense, although Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed.” 545 U.S. at 723. Similarly, Justice O’Connor, the creator of the Endorsement test, agreed that government acknowledgments of religion that date to the adoption of the Establishment Clause cannot properly be held to violate it. *See Wallace v. Jaffree*, 472 U.S. 38, 79-80 (1985) (O’Connor, J., concurring).

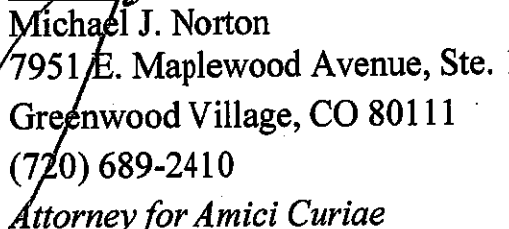
Given these numerous cited examples of presidential prayer proclamations and the Supreme Court’s own recognition of them, this court should find that American Founders did not see prayer proclamations by governmental officials as a violation of the Establishment Clause and thus Colorado’s founders did not consider them a violation of the Preference Clause either. These proclamations were part of the cultural landscape in which the Colorado Constitution was drafted and ratified. It is incongruous to think that the Colorado founders intended to ban any and all government acknowledgments of religion considering the statewide and nationwide practice of legislative prayers and prayer proclamations.

## CONCLUSION

Honorary prayer proclamations do not violate the Preference Clause of the Colorado Constitution. They pass both the *Lemon v. Kurtzman* and *Marsh v. Chambers* tests. The NDP Task Force respectfully asks that this court reverse the decision of the court of appeals.

Dated this 13th day of September, 2013.

ALLIANCE DEFENDING FREEDOM



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**CERTIFICATE OF SERVICE**

I hereby certify that on September 13, 2013, I caused a true and correct copy of the foregoing Motion for Leave to File Amicus Curiae and conditionally filed Amicus Curiae Brief and Exhibits 1-79 to said brief to be served by placing same in the U.S. Mail, postage prepaid, addressed to:

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