SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Court of Appeals, State of Colorado No. 10CA2559 District Court for the City and County of Denver The Honorable R. Michael Mullins, Judge No. 08CV9799	
Petitioner: JOHN HICKENLOOPER, in his official capacity as Governor of the State of Colorado; and THE STATE OF COLORADO, v. **Respondents:** FREEDOM FROM RELIGION FOUNDATION, INC., MIKE SMITH, DAVID HABECKER, TIMOTHY G. BAILEY, and JEFF BAYSINGER.	**▲ COURT USE ONLY ▲** Case No. 12SC442
ATTORNEYS FOR *AMICI CURIAE*: Alan K. Chen, #11PB0032* Justin Pidot, D.C Bar Reg. #979074 University of Denver Sturm College of Law 2255 E. Evans Avenue, Room 455E Denver, Colorado 80208 (303) 871-6283 achen@law.du.edu Mark Silverstein, #26979 Sara Rich, #36904 ACLU Foundation of Colorado 303 Seventeenth Avenue Suite 350 PO Box 18986 Denver CO 80218-0986 (303) 777-5482 msilverstein@aclu-co.org *Admitted pursuant to COLO. R. CIV. P. 223.	

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION (ACLU), THE ACLU OF COLORADO, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

CERTIFICATE OF COMPLIANCE

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

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

Choose one:

☒It contains 7,249 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 opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

As amici curiae, we are neither the party raising the issue nor the party responding to the issue.

ATTORNEY FOR *AMICI CURIAE*

Alan K. Chen, #11PB0032
University of Denver
Sturm College of Law
2255 E. Evans Avenue, Room 455E
Denver, Colorado 80208
(303) 871-6283
achen@law.du.edu

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INTEREST OF *AMICI*

The American Civil Liberties Union, the American Civil Liberties Union of Colorado, and Americans United for Separation of Church and State ("Amici") submit this brief urging this Court to affirm the Court of Appeals decision holding that the plaintiffs have standing to challenge the Colorado Day of Prayer Proclamations and that those Proclamations violate the Colorado Constitution's Preference Clause.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, including members in Colorado, dedicated to the defending the principles of liberty and equality embodied in the United States Constitution and the constitutions of the states. The ACLU of Colorado, with over eight thousand members, is one of the ACLU's statewide affiliates. Freedom of religion has been a central concern of the ACLU since the organization's founding in 1920, and it has appeared on numerous occasions before the Supreme Court, the federal courts of appeals, and state supreme courts in a variety of Establishment Clause and state constitutional religion clause cases. The ACLU has repeatedly advocated and litigated to preserve the religious liberty protections embodied in the U.S. and state constitutions, including the right to be free from government conduct that gives

preference to some religious beliefs and practices over others or promotes religion over non-religion.

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization committed to preserving religious liberty and the separation of church and state. Americans United represents more than 120,000 members, supporters, and activists across the country, many of whom reside in Colorado. Since its founding in 1947, Americans United has regularly served as a party, as counsel, or as an amicus curiae in scores of church-state cases before federal and state courts nationwide, including a number of cases before this Court. It often represents taxpayers and other citizens who object to unconstitutional state promotion of religion.

Amici file here both to preserve the rights of taxpayers to bring constitutional challenges in state courts and to protect the substantive rights guaranteed by the Colorado Constitution's religion clauses.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[1]

Amici submit this brief in support of Respondents Freedom From Religion Foundation, and its individual members, Mike Smith, David Habecker, Timothy G. Bailey, and Jeff Baysinger. We urge this Court to uphold the decision of the Colorado Court of Appeals, which concluded that the respondents had standing to bring this case and that the proclamations of a Colorado Day of Prayer over the course of several years by different governors violated the Preference Clause of the Colorado Constitution.[2]

This Court should reject the Governor's proposals for substantially narrowing taxpayer standing in Colorado. Colorado has a long history of allowing taxpayers to seek redress in state courts when government officials are alleged to have acted unconstitutionally. The Court should decline the Governor's invitation to dilute Colorado's standing requirements and to instead follow federal taxpayer-standing law. Federal law in this area is based on restrictive language in the U.S. Constitution that does not appear in the Colorado Constitution. The standard proposed by the Governor has no basis in Colorado law and would close the

[1] Because the factual and procedural background of this case will be discussed in greater detail by the parties, Amici include only a summary of their argument.

[2] Amici do not include a separate statement of the standard of review because they are not the party raising such issues on appeal. COLO. APP. R. 28(k).

courthouse doors to Colorado citizens seeking to vindicate their rights, while paving the way for state officials to violate the Colorado Constitution with impunity.

Similarly, in adjudicating the merits of this case, this Court should reject the Governor's suggestion that it construe the Preference Clause of the Colorado Constitution as a perfect mirror of the Establishment Clause of the First Amendment to the U.S. Constitution. The Governor's proposed approach would run afoul of a fundamental and widely accepted element of state sovereignty—state constitutions exist independently of the federal constitution and should be interpreted as such. Independent state constitutional interpretation is particularly warranted where, as here, the state constitution has a wide range of different textual provisions restricting the state's promotion of religion, those provisions are more specific and detailed than the First Amendment, and the status of the relevant federal constitutional doctrine is in flux. This Court has observed that the Preference Clause has independent meaning in previous cases, and has recognized that many other provisions of the Colorado Constitution provide greater protection than the U.S. Constitution.

In exercising its independent judgment, this Court should hold that the Preference Clause forbids the Governor from proclaiming a Colorado Day of

Prayer. The Preference Clause provides: "Nor shall any preference be given by law to any religious denomination or mode of worship." The Governors' proclamations give preference to one particular "mode of worship"—prayer. In addition, the content of the proclamations reveals an official preference for some religious faiths over others, as the proclamations include quotes from the Bible and promote themes that reflect particular religious views.

ARGUMENT

I. COLORADO TAXPAYERS HAVE STANDING TO CHALLENGE UNCONSTITUTIONAL ACTIONS OF GOVERNMENT OFFICIALS.

A. Colorado's Law Has Long Given Taxpayers Broad Rights to Challenge Unconstitutional Government Conduct.

Colorado has a long history of allowing taxpayers to seek redress in state court when government officials are alleged to have acted unconstitutionally. *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 n.4 (Colo. 2003) (identifying historic cases); *Dodge v. Dep't of Soc. Servs.*, 600 P.2d 70, 71 (Colo. 1979) (same).

Two considerations underlie Colorado's broad standing doctrine. First, by eschewing formalistic standing requirements, Colorado has ensured that courts are able to hear claims that government officials are violating the state constitution

and, as a result, has given force to the well-recognized maxim that every Coloradan has a strong "interest in living under a constitutional government." *See Salazar*, 79 P.3d at 1229 n.4; *see also Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995) (explaining that taxpayers can bring suit "even where no direct economic harm is implicated, [because] a citizen has standing to pursue his or her interest in ensuring that government units conform to the state constitution"); *accord State ex rel. Boyles v. Whatcom Cnty. Superior Court*, 694 P.2d 27, 30 (Wash. 1985) ("The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when the state's citizens contest the legality of official acts of their government.").

As a general matter, Colorado standing law requires that a plaintiff show "(1) that [he] 'suffered injury in fact,' and (2) that the injury was to a 'legally protected interest as contemplated by statutory or constitutional provisions.'" *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008) (citations omitted). But this Court has rejected a formalistic application of that standard where the plaintiff's claim alleges unconstitutional state action. In *Barber*, for example, the plaintiffs claimed that the state had unconstitutionally transferred money from "special cash funds to the General Fund." *Id.* at 245. Although none of the plaintiffs had paid taxes into those "special cash funds," and therefore the government action had not

cost a penny of the plaintiffs' taxes, the Court held that the plaintiffs had standing based on their claim that "a government action violates a specific constitutional provision." *Id.* at 247.

Acknowledging that in cases involving constitutional claims the standing analysis "may appear to collapse the . . . two-part test into a single inquiry as to whether the plaintiff-taxpayer has averred a violation of a specific constitutional provision," the Court nevertheless made clear that such an allegation satisfies both parts of the two-step analysis. *Id.*; *see also* Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1281 & n.122 (2012) (describing *Barber* as representative of a set of state cases "that allow taxpayers to challenge virtually any government conduct, regardless of how it affects state taxpayer dollars.").

Notably, the *Barber* Court did not require a showing that the plaintiffs, or even taxpayers generally, had suffered any particular quantum of economic harm. The Court did not, for instance, examine whether the challenged cash transfer involved a significant amount of tax funds or a *de minimis* one. Had the Court taken such a formalistic approach to taxpayer standing, as the Governor demands

here, Gov. Br. at 18-21, it would have been prevented from hearing the key issue in the case—whether the government was violating the state constitution.

The second consideration animating Colorado's broad taxpayer standing doctrine—one particularly relevant to this case—is the time-tested understanding that the judicial branch can be "the most appropriate forum" for a minority to seek redress for civil rights violations, especially when such violations involve unpopular beliefs. *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 668 n.5 (Colo. 1982) (*Conrad I*). The courts often must enforce constitutional protections of unpopular or minority views because the other branches of government, by design, respond to majority interests. Tying standing to the amount of tax money used to take the challenged unconstitutional actions would effectively sanction all forms of "oppression that a sectarian majority may visit upon citizens with unpopular beliefs" by using the machinery of the State, so long as the cost to taxpayers was *de minimis*. *See id.*

Thus, in *Conrad I*, the Court held that citizens challenging Denver's display of a nativity scene had standing to bring a challenge under the Preference Clause notwithstanding the district court's finding that "plaintiffs had not proved that their taxes were used to construct or maintain the nativity scene." *Id*. at 667. Although the plaintiffs' "economic interest in having their tax dollars spent in a

constitutional manner" was "at best indirect and very difficult to quantify" with respect to the challenged display, the Court held that they satisfied Colorado's standing requirements because, like the respondents in this case, they had alleged an injury to an interest protected by Article II, § 4 of the Colorado Constitution—namely, their "interest in a government that does not prefer or support the Christian religion over all others, including their own." *Id*. at 668.

In sum, Colorado courts have correctly concluded that there is nothing to be gained by a formalistic application of standing requirements in taxpayer cases, and there is little or no downside to Colorado's current approach. Colorado officials ordinarily make a good-faith effort to act within the confines of the law and, as a result, taxpayer suits have been rare. A search of the Westlaw database of Colorado state court decisions using the query "taxpayer /3 standing" returns only 35 results. While there may be a handful of cases involving taxpayer standing that are not captured by this search, this result indicates that Colorado's sensibly permissive standing doctrine has kept the courthouse doors open to citizens with constitutional complaints without creating a mad rush of litigation.

B. The Court Should Reject the Governor's Proposal to Drastically Narrow Colorado's Standing Doctrine.

Unable to contest plaintiffs' right to sue under existing standing doctrine, the Governor urges this Court to simply change the law by severely restricting the

types of cases that Colorado courts may hear. The Governor suggests: (1) that the Court adopt much narrower federal standing law, Gov. Br. at 15-18, or, in the alternative, (2) apply an unnecessary and formalistic "nexus" requirement, Gov. Br. at 18-23. This Court should reject both proposals.

1. This Court Should Not Adopt Federal Standing Law.

Adopting federal rules pertaining to taxpayer standing would effect a drastic change in Colorado's standing law. Specifically, by demanding that the Court eliminate taxpayer standing for "discretionary expenditures by the executive branch," Gov. Br. at 15, the Governor is effectively seeking *carte blanche* to violate the state constitution, provided that his unlawful conduct is financed by his discretionary fund. Under the Governor's proposed rule, his office could use discretionary funds to give a direct grant of taxpayer money to a church or issue a proclamation that "Colorado is a Christian state and Muslims should move away," and Coloradans would have no judicial recourse.

The Governor claims that this change is necessary to make Colorado law "consistent" with federal law. Gov. Br. at 15. But this Court has repeatedly declined to apply the narrow doctrine of standing articulated by federal courts. *See, e.g.*, *City of Greenwood Vill. v. Pets. for Proposed City of Centennial*, 3 P.3d 427, 437 n.8 (Colo. 2000) (recognizing that the injury requirement for state-court

plaintiffs is not as stringent as under federal standing law). And uniformity with federal law for consistency's sake alone is a slim reed on which to rest the wholesale reworking of Colorado's time-tested standing doctrine, especially where it would effectively deny Coloradans their right to correct grievous wrongs and live under a constitutional government. Government officials need no sphere within which to act illegally or unconstitutionally with impunity, and Colorado courts have efficiently and responsibly carried out their duty and exercised their power to keep Colorado's government within constitutional limits.

2. This Court Should Not Adopt a Stringent and Formalistic "Nexus" Requirement.

The Governor urges this Court to require Colorado plaintiffs bringing constitutional claims to demonstrate a specific "nexus" between their tax dollars and the specific government action that is challenged. In other words, the Governor would require plaintiffs to identify a specific, discrete expenditure of taxpayer dollars in support of the alleged unconstitutional conduct before they could establish standing. As discussed above, Colorado law does not impose such a stringent requirement, and the Court should not adopt one here.

Requiring that plaintiffs isolate specific expenditures made in support of unconstitutional activities would wholly insulate certain governmental actions

from judicial review, even when those actions tread on fundamental rights enumerated in the Colorado Constitution. Under the Governor's theory, Colorado's courts would have no power to protect those invoking the Colorado Constitution simply because the Governor assigned the unconstitutional tasks to a salaried employee, rather than hiring a contractor to carry out the unconstitutional activities, or used the office copying machine in service of the violative conduct rather than sending the materials out to a third-party printer.

To be sure, there may be circumstances in which this Court could sensibly require a minimal connection between the paid taxes and the challenged governmental action, but such a requirement serves only to identify *who* is the most appropriate plaintiff to challenge the government's illegal conduct. A person paying taxes in Littleton might not have taxpayer standing to challenge an action by the mayor of Denver. In that circumstance, the plaintiff would pay no taxes to fund the municipality engaging in the illegal action, and, therefore, the plaintiff's status as taxpayer would be irrelevant to the lawsuit.

The court of appeals case that the Governor relies on to support a more stringent nexus requirement, *Hotaling v. Hickenlooper*, 275 P.3d 723, 726-27 (Colo. App. 2011), can be understood as requiring only this sort of minimal connection. *See* Gov. Br. at 14. In *Hotaling*, a plaintiff challenged dispersion of

federal grant money, and the court found that the "award of federal funds . . . has not and will not have any effect, even incidental or indirect, on [the Plaintiff] as a Colorado taxpayer." 275 P.3d at 727. In other words, the *Hotaling* court found that *no* state tax dollars were involved in the challenged government action, a circumstance far different than the one at issue here. *Id.*

In any event, the Court need not decide the precise lower bounds of taxpayer standing today because any reasonable requirement is already met by the plaintiffs. Here, it is undisputed that the Governor's Office is financed by money from the general treasury, into which the individual plaintiffs pay taxes. These taxes fund the Governor's activities, including the issuance of the proclamations challenged in this lawsuit, and any associated costs. The use of government employees, equipment, and supplies to carry out an unconstitutional directive does not involve only "overhead" costs, Gov. Br. at 18-20, but create real opportunity costs because those resources are being diverted from another, legitimate government function. There is no need or justification for this Court to impose a stringent, formalistic barrier to constitutional challenges that would insulate unconstitutional state government action from judicial review.

II. THE PREFERENCE CLAUSE OF THE COLORADO CONSTITUTION PROVIDES BROADER PROTECTION FOR RELIGIOUS LIBERTY THAN THE U.S. CONSTITUTION'S ESTABLISHMENT CLAUSE.

It is a talisman of federalism that states may, where their courts deem it appropriate, construe their own constitutions independently of the U.S. Supreme Court's interpretation of the federal Constitution. A generation ago, Justice William Brennan, himself a former state supreme court justice, laid out the compelling case for independent state constitutional interpretation, noting that states' ability to guarantee rights more protective than those available under federal law was "an important and highly significant development for our constitutional jurisprudence and for our concept of federalism." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

The highest courts in many states, including Colorado, have embraced this aspect of sovereignty in forging state constitutional developments that are based not (or at least not solely) on the U.S. Supreme Court's understanding of the federal Constitution, but on the unique history of their states, the often different language adopted by states' constitutional framers, and the varying considerations of constitutional policy that these courts deem important to advance in their jurisdictions. Indeed, this Court has described this process as a "*responsibility*

[that] springs from the inherently separate and independent functions of the states in a system of federalism." *People v. Young*, 814 P.2d 834, 842 (Colo. 1991) (plurality opinion) (emphasis added), *superseded on other grounds by statute*, Colo. Rev. Stat. § 16-12-102 (1) (1993), *as recognized in People v. Vance*, 933 P.2d 576 (Colo. 1997). In so doing, Colorado courts and the courts of other states have carried on a tradition of taking an independent stance in protecting individual rights under state constitutional law.

The argument for independent state constitutional interpretation relating to religious liberty provisions is particularly strong. First, state courts are historically no stranger to deciding important questions involving religious freedom. Indeed, until the mid-twentieth century, when the First Amendment's religion clauses were found to be incorporated through the Fourteenth Amendment to extend to the states, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (Establishment Clause), disputes over state and local government infringement of religious freedom were exclusively within the province of state courts.

Second, states have established a wide range of distinctive approaches to protecting religious liberty under their own constitutions. For instance, states have adopted a variety of different constitutional texts to ensure religious freedom,

many of which mandate a greater degree of separation between church and state than is required under current federal constitutional law. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post*-Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275, 321 n.215 (1993); James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2146 (2013); Linda S. Wendtland, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 631 (1985) (noting the "more restrictive stance some states have taken on church-state separation"); Brian L. White, Comment, *Potential Federal and State Constitutional Barriers to the Success of School Vouchers*, 49 U. KAN. L. REV. 889, 934 (2001) ("Many state constitutions . . . read their state religion and equal protection clauses as more restrictive than their federal counterparts."); *see also* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES §4.01, at 4-3 (4th ed. 2006).

Some of the differences among state constitutions may be based on the unique histories of religion in each state (consider Mormonism in Utah, for example), while some may be attributable to particularly acute concerns about the intersection between church and state. Another example of the states' variant

approaches to government and religion are the inclusion in many state constitutions of "no aid" clauses, provisions that expressly prohibit the use of public funds to support religious institutions. FRIESEN, *supra*, §4.01, at 4-4 to 4-5. That state constitutions choose to define religious liberty rights in many different ways strongly supports the claim that interpretations of state religion clauses need not reflexively follow the U.S. Supreme Court's understanding of the federal Religion Clauses.

A. Independent State Constitutional Interpretation is Particularly Warranted With Respect to the Colorado Constitution's Preference Clause.

The present case provides an occasion for this Court to clarify that the Preference Clause has meaning independent of the First Amendment. Several factors weigh heavily in favor of such an independent interpretation. First, the Colorado Constitution expresses a particular concern for religious liberty and preserving the separation of church and state, as evidenced by the fact that the Constitution contains multiple provisions protecting these individual freedoms. Second, the Colorado Constitution includes provisions that have unique and specific language that goes beyond the general religious freedom protections of the U.S. Constitution. Third, the law pertaining to the federal Constitution's Religion Clauses is in flux, and those Clauses might be interpreted to provide less protection

for religious liberty than the drafters of the Colorado Constitution intended to guarantee under state law.

1. The Colorado Constitution Should Be Independently Interpreted Because It Includes Several Religious Liberty Provisions That Are More Specific than the Establishment Clause.

One compelling argument for independent interpretation of Colorado's religion clauses is that the Colorado Constitution protects religious liberty in numerous and specific ways. The First Amendment's Religion Clauses are notably brief and general, but the framers of the Colorado Constitution chose to map out state constitutional protection of religious liberty with a range of different substantive rights. For example, while the Establishment Clause simply and economically states that "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I, Section 4 of Article II of the Colorado Constitution imposes two separate substantive restrictions on state support of religion. First, it states that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." COLO. CONST. art. II, § 4. Second, the Preference Clause (or more accurately, the *no*-preference clause) adds, "[n]or shall any preference be given by law to any religious denomination or mode of worship." *Id*. Moreover, Colorado is one of

the states that has adopted a "no aid" clause, adding yet a third component to regulating state support of religion and suggesting that the framers of the Colorado Constitution intended to more precisely police the boundaries of church and state than the federal Constitution and some other state constitutions do. *See* COLO. CONST. art. V, § 34; COLO. CONST. art. IX, § 7. Finally, two other Colorado constitutional clauses place additional restrictions on state promotion of religion. *See* COLO. CONST. art. IX, § 8 (prohibiting public educational institutions from discriminating based on religion in admissions or employment, requiring students or teachers to attend religious services, and teaching sectarian doctrines); COLO. CONST. art. XII, § 13 (prohibiting religious discrimination in state employment).

A similar observation can be made about the Colorado constitutional provisions that limit state interference with religious exercise. The remainder of Article II, Section 4 includes three other clauses relating to the protection of the free exercise of religion that are substantially different from, and far more detailed than, the First Amendment's Free Exercise Clause. First, in language clearly more detailed than what the Free Exercise Clause provides, the Colorado Constitution specifies that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed." COLO. CONST. art. II, § 4. Second, the state constitution goes further and states that "no

person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion." *Id*. And, finally, Colorado's constitution indicates that "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." *Id*.

The breadth of the measures that the Colorado Constitution includes to protect religion from state interference suggests that the state constitutional framers cared a great deal about religious liberty. The state constitution should be construed with this goal in mind.

Not only are the Colorado Constitution's religious liberty provisions wide ranging, but also they are more specific than the First Amendment. *See Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1081 (Colo. 1982) [hereinafter *Americans United*] (observing that Article II, § 4 of the Colorado Constitution is "considerably more specific than the Establishment Clause"). Most relevant to the present case, the more specific language banning government preference of religious denominations or modes of worship appears to go beyond a more limited concept of anti-establishment, though the principles certainly overlap. This is consistent with the choice of many states that have included detailed religious liberty provisions in their constitutions. *See* FRIESEN,

supra, § 4.01, at 4-2 (observing that the religion clauses in most states' constitutions are "more detailed and more specific than the brief and general language of the first amendment"); *see also id.* at 4-7 ("[s]tate clauses limiting government establishment, aid or sponsorship of religion are . . . often quite strict and detailed").

This Court's adoption of an independent interpretation of the Preference Clause would further be consistent with its own precedent, as well as a body of supporting authority from other jurisdictions. First, in several decisions, this Court has expressed its understanding that the Preference Clause, while embodying many of the same values and purposes as the federal Establishment Clause, is an independent source of law. While Colorado courts may look to federal Establishment Clause cases for limited guidance in interpreting the Preference Clause, they must examine the latter's "text and purpose" in ascertaining its meaning and applying it to particular disputes, as this Court stated in *Americans United*. 648 P.2d at 1082. Similarly, in *Conrad I*, a Preference Clause challenge to a government-sponsored holiday display that included a nativity scene placed in front of the main city government building, this Court stated that "determination of the First Amendment [i.e., Establishment Clause] challenge will not necessarily be dispositive of the state constitutional question." 656 P.2d at 667. Indeed, that case

made clear that a government preference could survive an Establishment Clause challenge, yet still violate the Preference Clause, which "flatly prohibits any preferential treatment." *Id*. at 672; *see also id*. at 671 ("the specific 'text and purpose' of our state constitutional provision must be considered in [the interpretation] process"). In a subsequent decision in the same case after remand, this Court made its position even clearer, noting that "under certain circumstances we could find a violation of the Preference Clause where, under the same or similar factual circumstances, the United States Supreme Court had declined to find a violation of the Establishment Clause." *Conrad v. City & Cnty. of Denver* (*Conrad II*), 724 P.2d 1309, 1316 (Colo. 1986).

Consistent with these arguments for independent interpretation is the practice in other states. The courts in many jurisdictions have expressly read their state constitution's religion clauses to provide more protection than the Establishment Clause. *See, e.g.*, *Fox v. City of L.A.*, 587 P.2d 663, 665 (Cal. 1978) (holding that under California's no-preference clause, "[p]reference . . . is forbidden even when there is no discrimination," but "[t]he current interpretation of the United States Constitution may not be that comprehensive"); *Fiscal Court v. Brady*, 885 S.W.2d 681, 686 (Ky. 1994) (Kentucky no-preference and no-aid clauses "restrict direct aid from state or local government to sectarian schools

much more specifically and significantly than . . . the 'establishment of religion' clause in the First Amendment"); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 450, 454 (Ind. 2001) (Indiana no-preference clause allowed a church to proceed on a claim that would not have been viable under the federal First Amendment); *see also Snyder v. Murray City Corp.*, 73 P.3d 325, 332 (Utah 2003) (relying on Utah Constitution's broad language to hold that a city violated a resident's rights by prohibiting him from presenting a mock prayer that criticized opening prayers at meetings of government bodies after a federal court rejected similar claims under the U.S. Constitution); *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141, 161 (Kan. Ct. App. 2011) ("the Kansas Constitution . . . provides even greater protection of the free exercise of . . . religious beliefs than the First Amendment to the United States Constitution"); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107 (Tenn. 1975) (Tennessee Constitution "contains a substantially stronger guaranty of religious freedoms" than the federal Constitution); *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974) ("the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution.").

2. The Colorado Constitution Should be Independently Interpreted Because Federal Establishment Clause Law Is in a State of Flux.

Notwithstanding past statements about the principle of independent interpretation of the Preference Clause, this Court typically has looked to the Supreme Court's understanding of the Establishment Clause for guidance in the specific context of applying the Preference Clause, rather than articulating its own analytical framework for what constitutes an unconstitutional preference to a religious denomination or mode of worship. Thus, this Court has referenced the Supreme Court's test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that a government policy or practice violates the Establishment Clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion. *Id*. at 612-13.[3]

[3] The State's claim that this Court should look to the Supreme Court's idiosyncratic decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), rather than *Lemon*, is simply a non-starter. As the Court of Appeals below properly held, *Marsh* is limited on its own terms by the fact that it involved prayer directed at members of the Nebraska legislature, who chose to be at the state capitol, not a state exhortation for private citizens to pray, and by the unique circumstances surrounding the longstanding tradition of prayer to open sessions of Congress. *Freedom from Religion Found., Inc. v. Hickenlooper*, No. 10CA2559, 2012 WL 1638718, at *23-27 (Colo. App. May 10, 2012).

While Amici firmly believe that the Colorado Day of Prayer Proclamations at issue in this case do violate the *Lemon* test, we contend that *Lemon* should not be the principal guiding rule for construing the Preference Clause. This Court has suggested that one circumstance justifying an independent and more expansive interpretation of state constitutional law is when the U.S. Supreme Court's own case law interpreting a comparable federal constitutional provision is unclear or erratic. In *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991), a case interpreting the Colorado Constitution's free speech protections more broadly than the First Amendment, the Court explained:

> The United States Supreme Court's First Amendment jurisprudence on the scope of free speech in the face of private power has had a rather tortuous history, with speech in nominally private spaces at first accorded protection, *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), then eclipsed in *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), and finally suffering a rejection in *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976). Respondent urges us to follow the twists and turns of this federal road to the end and deny petitioners' claims. We decline.

Id. at 58.

In the case of the Establishment Clause, courts and commentators have suggested that the U.S. Supreme Court's jurisprudence has been similarly difficult to understand and not entirely clear. *See, e.g., Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1117 (10th Cir. 2010); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW

1720 (4th ed. 2013) (noting confusion despite the fact that *Lemon* has not been overruled and has been invoked in recent cases). Indeed, the Governor himself asserts that this area of law is the subject of turmoil and confusion. In his brief, the Governor argues that "[e]ven 40 years after *Lemon* was decided, the Justices themselves remain divided over the scope and meaning of the Establishment Clause as well as the proper legal framework to apply to any particular case." Gov. Br. at 36. To the extent that the U.S. Supreme Court's attempts to define the contours of federal anti-establishment principles continue to develop, this Court has a prime opportunity to set its own course and define a state constitutional test for determining when the government violates the Preference Clause.

Moreover, if federal jurisprudence is in flux, courts may interpret the Establishment Clause to provide less protection for religious liberty than the framers of the Colorado Constitution's Preference Clause intended. Again, as this Court expressed in *Americans United*, the Preference Clause must be interpreted in light of its own text and purposes. 648 P.2d at 1082.

The importance of independent interpretation of the Colorado Constitution's religious liberty provisions is by no means limited to the Preference Clause. If this Court were to hold that the state constitution's religious liberty provisions provide no more protection than that available under the First Amendment, this would also

mean that the U.S. Supreme Court's interpretation of the federal Free Exercise Clause would determine the meaning of Colorado's religious exercise provisions. Thus, cases such as *Emp't Division v. Smith*, 494 U.S. 872, 884-85 (1990)—which held that laws of general applicability that burden free exercise of religion are not subject to heightened scrutiny—would also be the rule under the Colorado Constitution. In other words, the failure to exercise the power of independent constitutional interpretation could have ramifications for religious liberty in many contexts beyond the facts of the present case.

B. Interpreting the Preference Clause Independently Is Consistent with This Court's Rejection of a Lockstep Approach in Cases Involving a Range of Individual Rights Provisions.

Colorado is among the many sovereign states in the nation that has taken the notion of independent state constitutional meaning seriously. For decades, this Court has "recognized and exercised [its] independent role on a number of occasions and . . . determined that the Colorado Constitution provides more protection for our citizens than do similarly or identically worded provisions of the United States Constitution." *Young*, 814 P.2d at 842 (plurality opinion). What is more, in cases examining freedom of expression, which is closely linked to religious liberty in both the U.S. and Colorado Constitutions, this Court has unambiguously pioneered its own way and defined speech rights independently for

over a century. *Bock*, 819 P.2d at 59 ("Colorado's tradition of ensuring a broader liberty of speech is long. For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment.").

Taking these principles of independence seriously, this Court has held that a remarkable range of rights under the Colorado Constitution provide greater protection than those available under the U.S. Constitution. In a series of decisions, for example, this Court has held that Article II, Section 7 of the state constitution restricts the government's efforts to obtain private information from third parties, even though such conduct does not even constitute a search governed by the Fourth Amendment. *See, e.g.*, *People v. Corr*, 682 P.2d 20, 27-28 (Colo. 1984) (telephone toll records); *People v. Sporleder*, 666 P.2d 135, 141-42 (Colo. 1983) (telephone pen registers); *Charnes v. DiGiacomo*, 612 P.2d 1117, 1124 (Colo. 1980) (bank records); *see also People v. Oates*, 698 P.2d 811, 815-16 (Colo. 1985) (holding that law enforcement agents' placement of a beeper on a suspect's property was a search under the Colorado Constitution even though it would not be a search under the Fourth Amendment). This Court also has held that, although the Sixth Amendment to the U.S. Constitution does not require the state to provide twelve jurors for all criminal trials, the Colorado Constitution does. *People v.*

Rodriguez, 112 P.3d 693, 698, 702 (Colo. 2005). And in *Young*, the Court held that, while it was unclear whether the Eighth Amendment prohibited a state from enforcing a law that permitted imposition of capital punishment when the aggravating and mitigating factors were equally balanced, the state constitutional prohibition against cruel and unusual punishment made such a law invalid. 814 P.2d at 846 (plurality opinion).

But by no means has this Court's expansive interpretation of the Colorado Constitution been limited to criminal justice cases. This Court has also held that the state constitution's Takings Clause extends to more government conduct than the federal Takings Clause. *Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 347 (Colo. 1994). And, as stated above, this Court has interpreted free speech rights under the Colorado Constitution to be more expansive than federal First Amendment rights on numerous occasions. *See, e.g.*, *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1056 (Colo. 2002); *Bock*, 819 P.2d at 59.

Amici maintain that this Court's approach to interpreting the Preference Clause should be no less independent.

III. THE GOVERNORS' PROCLAMATIONS VIOLATE THE PREFERENCE CLAUSE.

As noted above, the Preference Clause states, "[n]or shall any preference be given by law to any religious denomination or mode of worship." COLO. CONST. art. II, § 4. The Preference Clause thus explicitly bars government actions[4] that *give a preference to a mode of worship*. The Colorado Day of Prayer Proclamation clearly gives preference to prayer, one of the most fundamental modes of worship undertaken by a wide range of religions. Moreover, the content of the proclamations also expresses a preference for some religious faiths over others.

A. The Governors' Proclamations Embrace and Support the Act of Prayer, Thereby Expressing a Preference for a Particular Mode of Worship.

Ironically, the Governor seeks to promote the specific religious practice of prayer while simultaneously demeaning it. To defend the Colorado Day of Prayer Proclamations, the Governor argues that his actions are nothing more than an

[4] The State's suggestion that the Governors' Proclamations are not "law" has absolutely no support in case law. This Court has never even hinted that the Preference Clause is limited to statutes or formally enacted law, and has applied it in cases involving the State's placement of a Ten Commandments monument in a public park, *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995), and the City and County of Denver's erection and maintenance of a holiday display on public property, *Conrad I*, 656 P.2d 662 (Colo. 1982). Neither of these actions amounted to passage of a "law."

honorary gesture acknowledging a private group's desire to celebrate prayer. In the Governor's view, the Colorado Day of Prayer is tantamount to his recognition of "Chili Appreciation Society International Day." Gov. Br. at 2, 45.

Notwithstanding the Governor's degrading characterization, prayer is a solemn, personal religious practice that is carried out in accordance with a person's individualized belief system. Prayer is "a central act of religion," and has been called "the very soul and essence of religion." Allan Hugh Cole, Jr., *Prayer*, *in* 2 ENCYCLOPEDIA OF PSYCHOLOGY AND RELIGION 700 (David A. Leeming, Kathryn Madden & Stanton Marlan eds., 2010) (quoting William James). It has been an important element of most religions throughout the history of humankind. Sam D. Gill, *Prayer*, *in* 11 ENCYCLOPEDIA OF RELIGION 7367 (Lindsay Jones et al. eds., 2d ed. 2005). Central to the issue at the heart of this case, prayer is a subject of "prescribed ways of worship." *Id*. at 7370. Constitutional values of religious freedom and liberty demand that prayer be both protected from interference by the State and barred from being thrust upon those who prefer, for whatever personal reason, not to pray.

While prayer is an important mode of religious worship, many persons worship or express their religious beliefs in other ways: through silent reflection and meditation, through music and singing, through reading of sacred texts,

through serving others, or through living their lives according to a particular code. As this Court has recognized, "the Preference Clause flatly prohibits any preferential treatment cognizable under the Colorado Constitution." *Conrad I*, 656 P.2d at 672. Each year, when the Governor has issued his proclamation announcing the Colorado Day of Prayer, he has signaled to citizens of the state that Colorado's government prefers prayer to other modes of religious worship.

B. The Contents of the Governors' Proclamations Express a Preference For Some Religions Over Others.

Moreover, the Governors' proclamations contain specific language that reflects a governmental preference for some religious traditions over others. For example, the 2004 Proclamation includes the following language: "WHEREAS, in 2004, the National Day of Prayer acknowledges Leviticus 25:10 with the theme 'Let Freedom Ring.'" *Hickenlooper*, 2012 WL 1638718, at *4 (citing record). The express invocation of a biblical passage from the Old Testament carries with it unequivocal favoritism of the religious faiths that treat that text as holy. Likewise, in other years, the Governors' Proclamations have contained direct quotations from Bible passages (both Old Testament and New Testament) and promoted themes that reflect particular religious views that are not universally shared:

> 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";
>
> WHEREAS, in 2006, the National Day of Prayer acknowledges 1 Samuel 2:30 – "Those who honor me, I will honor," and the theme "America, Honor God";
>
> 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 will I hear from heaven and will forgive their sin and will heal their land";
>
> 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."

Id. at 5 (citing record). The content of the proclamations thus conveys an unmistakable message of official preference for particular religious beliefs and denominations.

The Governor's attempt to minimize the public significance of his proclamations by denoting them as "honorary" is entirely unconvincing. A proclamation from the chief executive office of the state is a powerful symbol and places the imprimatur of the State on prayer as a mode of worship, as well as on the particular religious faiths supported by the Proclamations. If the Proclamations do no more than acknowledge the practice of prayer, then a governor could just as easily disclaim other proclamations that would clearly send a message of

discrimination, such as recognizing a private group's choice to exclude members on the basis of race, gender, or disability.

Because they represent the State's unconstitutional preference for a mode of worship and for some religious denominations over others, the Governors' Proclamations recognizing the Colorado Day of Prayer violate Article II, Section 4 of the Colorado Constitution.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed in its entirety.

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Respectfully submitted,

Daniel Mach
Heather L. Weaver
ACLU Program on Freedom of Religion and Belief
915 15th Street, NW, Suite 600Washington, D.C. 20005
(202) 675-2330
HWeaver@aclu.org

Alan K. Chen, #11PB0032
Justin Pidot, D.C Bar Reg. #979074
University of Denver Sturm College of Law
2255 E. Evans Avenue, Room 455E
Denver, Colorado 80208
(303) 871-6283
achen@law.du.edu

Ayesha N. Khan
Alex J. Luchenitser
Americans United for Separation
of Church and State
1301 K Street NW
Suite 850, East Tower
Washington, DC 20005
(202) 466-3234
luchenitser@au.org

Mark Silverstein, #26979
Sara Rich, #36904
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203
(303) 777-5482
msilverstein@aclu-co.org

ATTORNEYS FOR THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF COLORADO, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

CERTIFICATE OF SERVICE

I certify that on November 8, 2013, I served a copy of the foregoing document to the following by:

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Attorneys for Petitioner

John W. Suthers, Attorney General
Daniel D. Domenico, Solicitor General
Michael Francisco, Assistant Solicitor General
Matthew D. Grove, Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203

Attorneys for Respondents

Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
Box 927
Madison, WI 53701-0927

Daniele W. Bonifazi
John H. Inderwish
6377 S. Revere Parkway #400
Centennial, CO 80111