IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

NO. 1-CA-CV 12-0684

FREEDOM FROM RELIGION FOUNDATION, INC. *ET AL.*,

Plaintiffs/Appellants,

vs.

JANICE K. BREWER, Governor of the State of Arizona,

Defendant/Appellee.

APPELLEE JANICE K. BREWER'S ANSWERING BRIEF

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STATEMENT OF THE CASE

Periodically, Appellee Janice K. Brewer, Governor of the State of Arizona (the "Governor"), has issued proclamations recognizing religious freedom as a guaranteed and protected right enabling people to freely pray if they so choose. The Governor's proclamations have often coincided with day of prayer proclamations issued by other Governors and the President of the United States pursuant to federal law since 1952.

Appellants, Freedom From Religion Foundation, Inc. ("FFRF") and some of FFRF's members, have taken issue with the Governor's day of prayer proclamations. After having virtually identical claims based on these proclamations dismissed in the United States District Court for Arizona due to lack of standing, and foregoing an appeal to the Ninth Circuit, Appellants took their dispute to new forum and filed suit in Maricopa County Superior Court. Indeed, Appellants merely excised their federal causes of action and reasserted their claim that the proclamations violate Article 2, Section 12 and Article 20, Paragraph 1 of the Arizona Constitution.

The Governor moved to dismiss Appellants' claims, pointing out that Appellants failed to establish a sufficiently concrete and particularized injury to meet Arizona's standing requirement, and that Appellants' claims were moot as to

past proclamations and would represent an improper advisory opinion as to potential future proclamations.

Maricopa County Superior Court Judge Eileen Willett dismissed Appellants' claims, holding that Appellants failed to establish that they suffered an injury sufficient to provide them with standing and that no exceptional circumstances warranted waiving the standing requirement. In addition, Judge Willett further concluded that Appellants' claims were moot as to past proclamations and sought an unlawful advisory opinion as to future proclamations.

This appeal followed.

STATEMENT OF FACTS

Accepting the allegations in Appellants' Complaint as true, Appellants consist of seven individuals who reside in Maricopa County, FFRF, and a local chapter of FFRF. R. 1 at 2-3.[1] The individual Appellants are described as both nonbelievers in religion or believers in various religions. *Id*. FFRF is described as a "membership organization whose purposes are to promote the fundamental constitutional principle of separation of church and state and to educate on matters relating to nontheism." *Id*. ¶ 2.

The Governor proclaimed an Arizona Day of Prayer in 2009, 2010, and 2011. *Id*. at ¶ 23. In addition, the Governor proclaimed January 17, 2010 as a Day

[1] References to "R" are to the electronic index of record on appeal.

of Prayer for the Arizona Economy and State Budget (together with the day of prayer proclamations, the "Proclamations"). *Id.* ¶ 24.

Appellants claim that they are "molested" by the Proclamations that "exhort[] the citizens of Arizona to pray" and create "a hostile environment for non-believers and many believers, who are made to feel as if they are second class citizens." *Id.* ¶¶ 26, 34, 37. The Proclamations also allegedly interfere with Appellants' "rights of personal conscience" and apparently run contrary to FFRF's mission "to protect its members from violations of the Constitutional principle of separation of church and state." *Id.* ¶¶ 38, 40.

Notably, Appellants' Complaint does not contain any allegation that the Proclamations caused Appellants any specific, palpable harm or injury.[2] *See, generally*, R. 1. Instead, Appellants merely claim a general feeling of "offense" and alleged interference with FFRF's mission. *Id.*

Appellants seek a declaration that the past Proclamations violate Article 2, Section 12 and Article 20, Paragraph 1 of the Arizona Constitution. *Id.* at 10. Appellants also speculate that Governor Brewer will issue similar proclamations in the future (*Id*. at ¶ 35) and seek a court order enjoining those unknown and unscripted proclamations. *Id*. at 10.

[2] Nor do Appellants allege in their Complaint that they are Arizona taxpayers. *See, generally,* R. 1.

THE RULING BELOW

The Governor moved to dismiss Appellants' Complaint on three separate grounds. First, the Governor asserted that Appellants failed to establish that they had suffered a concrete and particularized injury sufficient to meet Arizona's prudential standing requirement. *See* R. 4 at 5-10. The Governor further maintained that there was no basis to waive Arizona's standing requirement in this case. *See* R. 17 at 8-9. And the Governor noted that the declaratory relief sought by Appellants was moot as to past Proclamations and would represent an improper advisory opinion as it related to potential future proclamations that had not and may never be issued. *See* R. 4 at 10-11.

The Honorable Eileen Willett granted the Governor's motion to dismiss on all grounds. *See, generally,* R. 18. The trial court concluded that "Plaintiffs lack an injury sufficient to demonstrate that they have direct or representational standing." *Id.* at 1. The trial court went on to explain that "Plaintiffs have not . . . shown a direct injury, pecuniary or otherwise." *Id.* As to Appellants' argument that the standing requirement should be waived, the trial court concluded that "No exceptional circumstances . . . have been demonstrated to support the Court's waiver of the standing requirement." *Id.*

Finally, the trial court concluded that Appellants' "Declaratory Relief claim seeks an unlawful advisory opinion and all past proclamations are moot. Plaintiffs'

claims seek relief the Court cannot provide." *Id.*

ISSUES PRESENTED

(1) Did the trial court properly decide that Appellants lacked standing to bring their claims because Appellants failed to demonstrate that they suffered a particularized and concrete injury?

(2) Did the trial court properly conclude that there were no exceptional circumstances that justify the waiver of Arizona's prudential standing requirement?

(3) Did the trial court correctly conclude that Appellants' claims were moot as they relate to past Proclamations?

(4) Did the trial court correctly conclude that it could not enjoin future Proclamations because it would constitute a prohibited advisory opinion?

ARGUMENT

I. Standard of Review.

"Whether a party has standing to sue is a question of law that [appellate courts] review *de novo*." *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180 ¶ 15, 91 P.3d 1019, 1023 (App. 2004). Whether to waive the prudential requirement of standing is within the discretion of the appellate court; however, "[t]he paucity of cases in which [courts] have waived the standing requirement demonstrates both [the] reluctance to do so and the narrowness of this exception." *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 25, 961 P.2d 1013, 1019 (1998).

A court's determination that a claim is moot is subject to review *de novo. See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 (3d Cir. 1996) ("The district court's decision that this case is moot is also subject to plenary review."). In addition, issues related to ripeness and whether a party is seeking an unlawful advisory opinion are reviewed *de novo. See Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

II. Summary of Arizona's Prudential Standing Requirement.

As a matter of sound judicial policy, the Arizona Supreme Court has "long required that persons seeking redress in Arizona courts must first establish standing to sue." *Bennett v. Brownlow*, 211 Ariz. 193, 195 ¶ 14, 119 P.3d 460, 462 (2005); *see also Sears*, 192 Ariz. at 71 ¶ 24, 961 P.2d at 1019 (citing *Amory Park Neighborhood Ass'n v. Episcopal Cmty. Services In Arizona*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985), for the principle that Arizona courts consistently have required as a matter of judicial restraint that a party possess standing to maintain an action.). This standing requirement is "rigorous." *See Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6, 108 P.3d 917, 919 (2005).

"To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury." *Sears*, 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017. There must be "an injury in fact, economic or otherwise, caused by the complained-of conduct, and

resulting in a distinct and palpable injury . . . ." *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406 ¶ 8, 207 P.3d 654, 659 (App. 2008).

An injury sufficient to confer standing must be "particularized" and to the plaintiffs "themselves." *Arizona Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 13 ¶ 17, 219 P.3d 216, 223 (App. 2009). Consequently, an allegation of generalized harm that is not particularized, but instead that is shared alike by all or a large class of citizens is not sufficient to confer standing. *See Sears*, 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017. This distinct, palpable, and particularized injury requirement applies in all cases, "especially in actions in which constitutional relief is sought against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16, 81 P.3d 311, 315 (2003) (citation omitted).

Appellants bear the burden of establishing that they have satisfied these standing requirements. *Id.* To have standing in this case, Appellants must establish that they have suffered an injury as a result of the Proclamations that is distinct, palpable, and particularized. *See Sears*, 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017.

III. Appellants Lack Standing.

A. Standing Is Determined Without Reference to the Legal Arguments Underlying Appellants' Claims.

Appellants' Opening Brief launches into an assault on the Proclamations. Appellants' ad hominem attacks should be disregarded because they purportedly

go to the merits of Appellants' claims and are unrelated to the threshold issue of Appellants' lack of standing.

It is axiomatic that, "when resolving standing [appellate courts] look only to whether there have been sufficient allegations of particularized harm, not whether there is a likelihood of success on the merits." *Center Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 360 ¶ 28, 153 P.3d 374, 381 (App. 2007). Thus, the standing-related inquiry on appeal is limited to the issue of whether Appellants have alleged a distinct, palpable, and particularized injury sufficient to meet Arizona's prudential standing requirement. *See Sears*, 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017.

B. Appellants' Feelings of Offense and Exclusion Are Not Concrete or Particularized and Do Not Afford Appellants with Standing.

1. The Issuance of a Proclamation That Has No Legal Effect and That Can Be Ignored Does Not Confer Standing.

FFRF and its members regularly assert claims like those at issue here. Those claims are routinely dismissed for lack of standing. In considering whether FFRF and its members had standing to sue regarding President Obama's proclamation related to the National Day of Prayer, the Seventh Circuit recently recognized that "[n]o one is injured by a request that can be declined." *See Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011). The Seventh Circuit aptly observed that:

> [A]lthough this proclamation speaks to all citizens, no one is obliged to pray, any more than a person would be obliged to hand over money if the President asked all citizens to support the Red Cross and other charities. It is not just that there are no penalties for noncompliance; it is that disdaining the President's proclamation is not a "wrong."

Id. The Seventh Circuit concluded that President Obama's issuance of a day of prayer proclamation did not confer standing upon FFRF or its members. *Id.* at 808; *see also Freedom from Religion Found., Inc. v. Perry*, CIV.A. H-11-2585, 2011 WL 3269339 (S.D. Tex. July 28, 2011) (dismissing case brought by FFRF regarding Texas Governor's promotion of a prayer rally for lack of standing).

Similarly, Governor Brewer's Proclamations did not force Appellants to take any action or encourage any particular form of prayer. *See* R.1 Ex. 4, 6 and 7. No one is obliged to pray and there are no penalties for failing to do so.[3]

Indeed, United States District Court Judge Roslyn O. Silver recently examined the identical Proclamations at issue here and virtually identical claims brought by many of these same Appellants. Judge Silver dismissed those claims

[3] Governors have historically issued proclamations related to a wide variety of subjects that require nothing of the citizenry. For example, when former Governor Hull proclaimed "Elevator and Escalator Safety Awareness Week," and "Jump Rope for Heart Day," *see McDonald v. Thomas*, 202 Ariz. 35, 44 ¶ 26, 40 P.3d 819, 828 (2002), it did not compel Arizona's citizens to be especially careful on escalators, nor did it force them to jump rope. Similarly, the Proclamations at issue here are free to be ignored and require no action by Arizona citizens. For this reason, at least one District Court has held that "proclamations, without more, do not present the type of governmental action that encroaches upon First Amendment establishment prohibitions." *Zwerling v. Reagan*, 576 F. Supp 1373, 1378 (C.D. Cal. 1983).

for lack of standing under Article III of the United States Constitution, concluding that "no one, including Plaintiffs, is obligated to pray." *See* R. 4 Ex. A at 4.

Appellants fail to have standing to bring their claims because the Proclamations require nothing of Appellants and can be ignored.

2. Appellants Fail to Articulate Any Distinct, Particularized, and Palpable Injury Sufficient to Prove that They Have Standing.

In a futile attempt to establish standing, Appellants attempt to dress up their disagreement with the Proclamations by employing terms that imply that Appellants have been injured as a result of the Proclamations. However, the purported "injury" that Appellants articulate is not a sufficiently distinct, palpable, and particularized injury to confer standing.

Appellants' Complaint alleges that the Proclamations have harmed Appellants in the following ways:

- By creating "a hostile environment for non-believers and many believers, who are made to feel as if they are second class citizens." *See* R.1 ¶ 34.
- By causing Appellants to feel "subject to these unwanted exhortations to pray and the resulting government-sanctioned celebrations of religion . . . ." *Id.* ¶ 37.
- By interfering with Appellants' "rights of personal conscience." *Id.* ¶ 40.
- By apparently interfering with FFRF's mission to "protect its members from violations of the Constitutional principle of separation of church and state." *Id.* ¶ 38.

No other facts are pled in the Complaint that articulate the nature of harm that Appellants have allegedly suffered as a result of the Proclamations.

Appellants conspicuously fail to articulate *any specific action taken or expense incurred as a result of the Proclamations*. Without such an allegation, Appellants lack standing in this matter. *See Freedom From Religion Found., Inc*., 641 F.3d at 808 (ordering dismissal of plaintiffs' complaint challenging Presidential proclamations regarding a National Day of Prayer because "Plaintiffs have not altered their conduct one whit or incurred any cost in time or money. All they have is disagreement with the President's action.").

3. The Individual Appellants' Perceived Slight or Feeling of Offense Resulting from the Proclamations Are Insufficient to Establish Standing.

The individual Appellants' purported harm amounts to nothing more than generalized allegations that they disagree with the Proclamations, that they are offended by the Proclamations, or that the Proclamations caused them to feel excluded or unwelcome. This is not enough to confer standing upon them. A perceived slight or feeling of exclusion does not constitute a concrete or particularized injury sufficient to grant standing. This has long been recognized by both Arizona courts and the United States Supreme Court.

In *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the Supreme Court considered an Establishment

Clause claim brought by plaintiffs who complained when a federal agency donated surplus property to an educational institution that was supervised by a religious order. *Id*. at 464. The Court held that persons who objected to the transfer lacked standing, because the transfer did not injure them. *Id.* at 486-87. The Court concluded that:

> [Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-486; *see also Allen v. Wright*, 468 U.S. 737, 755 (1984) (noting that "abstract stigmatic injury" is insufficient by itself to create Article III injury in fact); *Humane Soc'y of U.S. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995) ("[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes.").

Similarly, Arizona has found that mere disagreement with government conduct is not a "distinct and palpable injury" sufficient to grant standing, but instead constitutes a "generalized harm that is shared alike by all or a large class of citizens." *Sears*, 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017. In *Sears*, the plaintiffs were attempting to prevent the Governor of Arizona from entering into a gaming compact with an Indian tribe, based upon the plaintiffs' allegation that, if implemented, the resulting casino would "expose their children to conduct contrary

to their values." *Id.* at 69-70 ¶ 17, 961 P.2d at 1017-18. The Arizona Supreme Court, sitting *en banc*, held that these allegations were insufficient because they represented "only generalized harm rather than any distinct and palpable injury."[4] *Id.* at 70 ¶ 17, 961 P.2d at 1018.

Indeed, a mere feeling of offense is insufficient to afford a person with standing, even when a plaintiff contends that Constitutional provisions are purportedly implicated. Such was the holding of *Wagenseller v. Scottsdale Memorial Hosp.*, 148 Ariz. 242, 245, 714 P.2d 412, 415 (App. 1984) ("The appellant argues that Ariz. Const. art. XX, which guarantees that no one shall be molested in person or property on account of his or her mode of religious worship or lack of the same, was violated because her disapproval of Smith's conduct was based on moral convictions founded in turn on religious beliefs. We think her argument is too attenuated. *Wagenseller was not required to do or refrain from doing anything*.") (emphasis added). This opinion was later vacated by the Arizona Supreme Court in an opinion that did not address Article 20. *See Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985)

[4] Appellants attempt to argue that their injury is unique and differs from that at issue in *Sears*. *See* Opening Brief at 15. However, no matter what label Appellants apply to their purported harm, it is clear from Appellants' Complaint that it is nothing more than a disagreement with government conduct. *See, generally*, R. 1. This is precisely the type of generalized harm that the *Sears* court found to be insufficient for standing.

(subsequently superseded by statute on grounds not related to standing). However, the Court of Appeals's language regarding Article 20 is instructive with regard to Appellants' claims.[5]

Here, because the individual Appellants' alleged injury is, at best, merely stigmatic and not concrete or particularized, the individual Appellants have failed to establish that they have standing.[6] Thus, the individual Appellants' claims must be dismissed in their entirety.

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[5] Appellants also cite to *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010), which Appellants claim stands for the proposition that a plaintiff has standing when his or her religious or irreligious sensibilities are affected by government conduct. *See* Opening Brief at 14-15. However, the government action at issue in *Catholic League* differs in material respects from the Proclamations at issue here. *Catholic League* dealt with a "local ordinance condemning the church and religious views of some of the municipality's residents" – an ordinance that the court described as "'hateful and discriminatory,' 'insulting and callous,' and 'insensitiv[e] and ignoran[t].'" *See Catholic League*, 624 F.3d at 1051 n.26, 1053. The Ninth Circuit acknowledged that an ordinance that *targets for scrutiny a specific religion and specific individuals* was markedly different from government action that included "vague and general religiosity." *Id.* at 1051 n. 26 (emphasis added). Of course, the Proclamations at issue here do not condemn or target a particular religion.

[6] Judge Silver expressly concluded that these very Appellants' feelings of being "slighted and excluded" were "insufficient to show injury", noting that "Plaintiffs have not shown injury beyond 'stigmatic injury' or feeling like an 'outsider.'" R. 1 Ex A at 4-5.

4. FFRF Lacks Direct and Representational Standing.

FFRF fares no better than the individual Appellants in its effort to establish standing. Organizations claiming direct injury must satisfy the same standing test as individuals by suffering from a concrete injury that is fairly traceable to the defendants' conduct. *See Home Builders Ass'n of Cent. Arizona v. Kard*, 219 Ariz. 374, 378-79 ¶ 21, 199 P.3d 629, 633-34 (App. 2008) (rejecting organizations claim of direct standing because there was no "allegation . . . of damage to [the organization]."); *see also Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) ("Frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'") (citation omitted).

To that end, "ordinary expenditures as part of an organization's purpose do not constitute the necessary injury-in-fact required for standing." *Plotkin v. Ryan*, 239 F.3d 882, 886 (7th Cir. 2001); s*ee also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) ("[P]laintiffs cannot bootstrap the cost of detecting and challenging illegal practices into injury for standing purposes."); *see also Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) (rejecting argument that "an organization devoted exclusively to advancing more rigorous enforcement of selected laws could secure standing simply by showing that one alleged illegality had 'deflected' it from pursuit of another . . . ."). To properly plead a

concrete injury, an organization must do more than allege "damage to an interest in 'seeing' the law obeyed or a social goal furthered." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).[7]

The Complaint alleges no concrete or particularized injury suffered by FFRF. *See, generally*, R. 1. At best, the Complaint merely reflects FFRF's abstract concern that the Proclamations run afoul of FFRF's stated purpose. *Id*. ¶ 38. FFRF's generalized grievance is not sufficient to meet its burden of establishing FFRF's direct standing. *See Plotkin*, 239 F.3d at 886; *Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1433.

Nor does FFRF have representational standing. In determining whether an organization has representative standing to assert claims on behalf of its members, Arizona courts examine whether the association has a legitimate interest in an actual controversy and whether judicial economy and administration will be promoted by allowing representational appearance. *See Kard*, 219 Ariz. at 377 ¶ 10, 199 P.3d at 632. In making this determination, courts consider whether (1) at least one of its members would otherwise have standing; (2) the interests at stake

[7] To allow FFRF's claim to proceed would essentially eviscerate Arizona's standing doctrine. Indeed, if an organization could obtain standing merely by expending resources in response to a government action, then standing could be obtained in every case through nothing more than bearing the expense of filing a lawsuit. Such an interpretation would run contrary to decades of carefully-developed standing principles.

in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit. *See Armory Park*, 148 Ariz. at 6, 712 P.2d at 919 (citation omitted).

In the absence of any injury to those that an organization wishes to represent, there can be no standing under Arizona law. *See Kard*, 219 Ariz. at 379 ¶ 21, 199 P.3d at 634 ("[A]llowing the subject complaint to proceed on a representational basis, without an allegation either of damage to [the organization] or to an identified member or of misconduct on a specific project, would similarly eviscerate our standing requirement."). FFRF's allegations fail to meet the requirements of the first element of the test because FFRF's individual members lack standing. *See* Part III(B)(1)-(3), *supra*.

C. Appellants' Claim that They Have Standing Due to "Tangible Loss" Also Fails.

1. Appellants Do Not Have Standing as Taxpayers.

Because they lack a direct injury sufficient to establish standing, the individual Appellants now claim to have taxpayer standing due to an alleged "tangible loss" suffered due to the fact that the Proclamations necessitated the expenditure of public funds. *See* Opening Brief at 7-9. Appellants argue that the Governor used "public money and property" in connection with the Proclamations,

thereby causing Appellants a tangible loss that provides them with standing. *Id.* (citing R. 1 ¶ 31).

This claim fails because no Appellant is alleged in the Complaint to be an Arizona taxpayer. This oversight is fatal to Appellants' claim. *See, generally,* R. 1; *Bennett*, 206 Ariz. at 527 ¶ 30, 81 P.3d at 318 (rejecting claim for taxpayer standing because the plaintiffs made no allegation that they filed the action in their capacity as taxpayers).

Moreover, even if Appellants had pled that they were taxpayers, that alone would be insufficient for standing purposes. As observed by the United States District Court for the District of Arizona, "absent a showing of direct injury, pecuniary or otherwise[,] the [United States] Supreme Court has refused to confer standing upon a state taxpayer[.]" *We Are America/Somos America, Coalition of Arizona, v. Maricopa County Bd. Of Supervisors*, 809 F. Supp. 2d 1084, 1111 (D. Ariz. 2011) (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613–14 (1989) (internal quotation marks omitted)). The rationale behind such a rule is that "the interests of state . . . taxpayers in their respective treasuries [are] shared with millions of others; [are] comparatively minute and indeterminable; and the effect upon future taxation . . . so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventative powers of a court of equity."). *Id.* (internal quotations and citations omitted).

While the *We Are America* case admittedly addresses the injury requirement under Article III of the United States Constitution, Arizona's prudential standing requirement similarly requires a direct and particularized injury for a person to have standing. *Arizona Ass'n of Providers for Persons with Disabilities*, 223 Ariz. at 13 ¶ 17, 219 P.3d at 223. Otherwise, the Arizona courts would have an endless flow of cases by general taxpayers challenging state actions simply because they are general taxpayers.[8]

2. The *Hickenlooper* Decision Relied on By Appellants Is Inapposite.

Even if Appellants had alleged that they were taxpayers, Appellants fail to cite to a single Arizona case affording an Arizona taxpayer standing to bring a lawsuit because the taxpayer is "offended" by the use of those taxpayer funds.[9]

[8] A taxpayer could next sue and maintain that suit in Arizona Superior Court to challenge (i) the Legislature's daily prayer, (ii) the "grateful to Almighty God for our liberties" reference in the preamble to the Arizona Constitution, or (iii) the invocation and closing prayer, often religious specific, that are fixtures at judicial investiture ceremonies. These are just a few examples of a likely endless list of lawsuits that could be filed by "offended" taxpayers.

[9] None of the cases cited by Appellants for the notion that Arizona taxpayers have standing to challenge government action similar to the Proclamations even address the standing issue. *See* Opening Brief at 9-10. Nowhere in *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009), *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), or *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010), did the Arizona Supreme Court engage the issue of taxpayer standing generally, let alone addressing the issue of taxpayer standing when the complaining parties' injury was nothing more than a feeling of offense.

Instead Appellants urge this Court to adopt the reasoning of the Colorado Court of Appeals in *Freedom from Religion Foundation, Inc. et al. v. Hickenlooper*, 2012 WL 1638718, __ P.3d __ (Colo. App. 2012).[10]

However, *Hickenlooper* addressed the standing requirements under Colorado law, which are significantly less restrictive than the standing requirements under federal law. *Id.* 2012 WL 1638718 at *11 (holding that federal law regarding standing is "significantly more restrictive than our own test for standing in Colorado."). Arizona law, by contrast, has a "rigorous" standing requirement that requires injury comparable to standing required under federal law. *See Fernandez*, 210 Ariz. at 140 ¶ 6, 108 P.3d at 919.

Case law confirms the similarity of the injury requirements under both Arizona and Article III notions of standing. *Compare Arizona Ass'n of Providers for Persons with Disabilities*, 223 Ariz. at 13 ¶ 17, 219 P.3d at 223 (requiring that the plaintiff establish particularized injury to be afforded with standing under Arizona law), to *Newdow v. Rio Linda Union Sch. Dist*., 597 F.3d 1007, 1016 (9th Cir. 2010) (requiring concrete and particularized injury in order to establish

[10] The *Hickenlooper* case is also subject to a petition for review to the Colorado Supreme Court. *See*, 06/21/2012 *Hickenlooper v. Freedom From Religion Foundation, Inc. et al.* Petition for Writ of Certiorari to the Colorado Supreme Court, *available at http://ffrf.org/legal/challenges/ongoing-lawsuits/#id-12364*. Thus, that decision may be revisited and potentially overturned.

standing under federal law). Thus, *Hickenlooper* is inapplicable here and cannot salvage Appellants' failure to establish a sufficient and particularized injury necessary to establish standing.

IV. A Waiver of the Standing Requirements Is Not Available Here.

Because they cannot properly plead an injury sufficient to establish standing, Appellants request, without a single citation to legal authority, that the Court waive the standing requirement and allow this case to proceed. *See* Opening Brief at 17-19. Arizona courts, however, can only elect to waive Arizona's standing requirements related to injury in "exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur" or, alternatively, when a case that is otherwise moot raises "fundamental questions of statutory construction or of the constitutionality of a statute or government action." *Sears*, 192 Ariz. at 71-72, 961 P.2d at 1019-20. Neither scenario is implicated here.

As to the first scenario, in a case similar to the case at bar, the Arizona Supreme Court rejected the plaintiffs' request to waive the standing requirement. *Id.* Despite the plaintiffs' alleged "deterioration of their quality of life" stemming from purported violations of the state and federal constitutions, no waiver was granted. *Id.* at 72 ¶ 29, 961 P.2d at 1020. The court concluded that the plaintiffs' offense at the prospect of a casino being built nearby did not represent a matter "of

such great moment or public importance as to convince us to consider this challenge to executive conduct." *Id.*

Similarly, this case does not involve a fundamental issue of great public importance because the Proclamations at issue do not injure Appellants or any other citizen. The Proclamations are nondenominational, not binding, and do not compel anyone to engage in or refrain from any action. There is no cost or penalty for ignoring the Proclamations. Indeed, the Appellants are not required to read the Proclamations and, even if read, they can be ignored. Frankly, the Appellants must choose to make the effort to even locate the Proclamations once issued. Accordingly, this case does not represent an exceptional circumstance in which Arizona's standing requirements can or should be waived. Thus, no waiver is available to Appellants.

V. Appellants Seek An Advisory Opinion, Are Asserting Claims that Are Moot, and Seek Relief that Is Unavailable.

At the core of Appellants' lawsuit is their desire to obtain a judgment declaring that the Proclamations violate the Arizona Constitution. *See* R.1 at 10. To the extent Appellants seek such a declaration regarding any past proclamations, their claim is moot. This Court cannot provide any meaningful relief regarding past proclamations. Those proclamations have already been disseminated; they cannot now be "undone."

In addition to seeking a declaration that past proclamations were unconstitutional, Appellants seek an injunction prohibiting Governor Brewer from making future prayer-related proclamations. *Id*. This Court cannot grant the requested relief.

First, it is not clear whether Governor Brewer will issue a prayer day proclamation in the future or what the content of any proclamation may be. Appellants' injury allegations in this regard are therefore entirely hypothetical. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-110 (1983). Moreover, even if Governor Brewer were to issue a prayer day proclamation in the future, this Court cannot begin to predict the substance of that proclamation, making any decision related thereto an improper, overbroad advisory opinion. *Citibank (Arizona) v. Miller & Schroeder Fin., Inc.*, 168 Ariz. 178, 182, 812 P.2d 996, 1000 (App. 1990) ("Courts should not render advisory opinions anticipative of troubles which do not exist; may never exist; and the precise form of which, should they ever arise, we cannot predict.") (citation and internal quotations omitted).

This was precisely the issue faced by the District of Columbia Court in *Newdow v. Bush* in the very similar context of inaugural prayers. There, the court found that it "cannot now rule on the constitutionality of prayers yet unspoken at future inaugurations of presidents who will make their own assessments and

choices with respect to the inclusion of prayer."[11] *Newdow v. Bush*, 391 F. Supp. 2d 95, 108 (D.D.C. 2005); *see also Lyons*, 461 U.S. at 105-110.

In this case, the Court would have to speculate on the content of any potential future prayer proclamations by Governor Brewer. Thus, offering any ruling on such future proclamations would constitute an advisory opinion. *See Citibank* 168 Ariz. at 182, 812 P.2d at 1000.

Finally, Appellants' requested relief – a declaration by this Court that the Proclamations are improper – would represent a violation of Article 3 of the Arizona Constitution. That Article prohibits one of the three branches of government from "exercis[ing] the powers properly belonging to either of the others." Ariz. Const. art. 3. *See Arizona Minority Coalition for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 220 Ariz. 587, 596 ¶ 25, 208 P.3d 676, 685 (2009) ("The separation of powers required by Article 3 of the Arizona Constitution 'prohibits judicial interference in the legitimate functions of the other

[11] The *Newdow* court also recognized that enjoining any future inaugural prayer would constitute a prohibited prior restraint on free speech. *See Newdow*, 355 F. Supp. 2d at 291 n. 3 ("Finally, there is the not insignificant problem that plaintiff is seeking a prior restraint of prayer in his motion for a preliminary injunction. Courts are particularly hesitant in issuing that relief, which potentially implicates First Amendment problems itself."). If future day of prayer proclamations are enjoined in this case, the injunction would similarly constitute a prior restraint prohibited by the First Amendment of the United States Constitution.

branches of our government.'"); *Mecham v. Gordon*, 156 Ariz. 297, 300, 761 P.2d 957, 960 (1988) ("[n]owhere in the United States is [separation of powers] more explicitly and firmly expressed than in Arizona.").

Here, by issuing a declaration that the Proclamations are improper, the Court would effectively be mandating to (or censoring) the Governor by dictating which proclamations she can and cannot issue or what specific wording can and cannot be used. This cannot be permitted. *See Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) (in connection with a challenge to a presidential inauguration reference to religion, the court, relying on federal notions of separation of powers, noted that "[a] court - whether via injunctive or declaratory relief - does not sit in judgment of a President's executive decisions.") (citation omitted).

CONCLUSION

For the foregoing reasons, the dismissal of Appellants' Complaint should be affirmed in full.

DATED this 28th day of December, 2012.

BALLARD SPAHR LLP

By: /s/ Joseph A. Kanefield
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OFFICE OF THE GOVERNOR, JANICE K. BREWER

By: /s/ Signed by Joseph A. Kanefield (w/permission)
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