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15 *Attorneys for Defendant Janice K. Brewer, Governor of the State of Arizona*

16 **UNITED STATES DISTRICT COURT**

17 **FOR THE DISTRICT OF ARIZONA**

18 **FREEDOM FROM RELIGION**  
19 **FOUNDATION, INC.**, a Wisconsin non-  
20 **profit corporation, VALLEY OF THE**  
**21 SUB CHAPTER OF THE FREEDOM**  
**22 FROM RELIGION FOUNDATION, an**  
**23 Arizona non-profit corporation, MIKE**  
**24 WASDIN, an individual, MICHAEL**  
**25 RENZULLI, an individual, JUSTIN**  
**26 GRANT, an individual, JIM SHARPE, an**  
**27 individual, FRED GREENWOOD, an**  
**28 individual, CRYSTAL KESHAWARZ, an**  
**individual, and BARRY HESS, an**  
**individual.**

Plaintiffs,

vs.

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

Defendant.

Case No. 2:11-CV-00495-ROS-PHX

**MOTION TO DISMISS**

(Assigned to Chief Judge Roslyn O. Silver)

**INTRODUCTION**

1  
2 In recent years, Governor Janice K. Brewer (“Governor Brewer”) issued  
3 proclamations declaring May 6 as an Arizona Day of Prayer. See First Amended  
4 Complaint (“FAC”) ¶ 20. Governor Brewer also proclaimed that January 17, 2010 was a  
5 Day of Prayer for Arizona’s Economy and State Budget (together with the Arizona Day  
6 of Prayer proclamations, the “Proclamations”). *Id.* ¶ 21.

7 Plaintiff Freedom From Religion Foundation, Inc. (“FFRF”) and several of its  
8 members (collectively “Plaintiffs”) have taken offense to the Proclamations, claiming  
9 that the Proclamations have resulted in Plaintiffs feeling “as if they were second class  
10 citizens.” *Id.* ¶ 41. Plaintiffs filed suit, claiming the Proclamations represent a violation  
11 of provisions of the United States and Arizona Constitutions and 42 U.S.C. § 1983. See,  
12 generally, FAC. Plaintiffs’ FAC seeks declaratory relief as to the past Proclamations, an  
13 injunction prohibiting Governor Brewer from issuing further proclamations regarding  
14 prayer, and attorneys’ fees incurred in connection with this lawsuit. See FAC at 12-13.

15 Plaintiffs’ claims, however, suffer from a fundamental defect – Plaintiffs have  
16 alleged no specific and concrete injury arising from the Proclamations. Thus, Plaintiffs  
17 lack Article III standing to sue in this Court. Because Plaintiffs lack standing, this case  
18 does not present a justiciable case or controversy. Moreover, to the extent Plaintiffs seek  
19 a ruling regarding the legality of past proclamations, their claims are moot because the  
20 Court cannot provide any meaningful relief regarding the past proclamations. Similarly,  
21 Plaintiffs’ claims for declaratory relief regarding potential future proclamations are not  
22 ripe and therefore any ruling regarding those future proclamations would constitute an  
23 advisory opinion. Therefore, pursuant to Federal Rule of Civil Procedure 12(b)(1) and  
24 12(h)(3), this Court should dismiss this lawsuit for lack of subject-matter jurisdiction.<sup>1</sup>

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<sup>1</sup> Though Governor Brewer previously filed an Answer in this matter (Dkt. #10),  
an amended complaint has since been filed. Moreover, a post-answer motion raising lack  
of subject matter jurisdiction is “properly before the court as a Rule 12(h)(3) suggestion  
of lack of subject matter jurisdiction.” *Augustine v. United States*, 704 F.2d 1074, 1075,  
n. 3 (9th Cir. 1983).

1 **BACKGROUND**

2 Plaintiffs consist of seven individuals who reside in Maricopa County, Arizona,  
3 FFRF, and a local chapter of FFRF. *See* FAC. ¶¶ 1-10. The individual plaintiffs are  
4 described as both nonbelievers in religion or believers in various religions. *Id.* ¶¶ 4-10.  
5 FFRF is described as a “membership organization whose purposes are to promote the  
6 fundamental constitutional principle of separation of church and state and to educate on  
7 matters relating to nontheism.” *Id.* ¶ 1.

8 Plaintiffs claim that the Proclamations “exhort[] the citizens of Arizona to pray.”  
9 *Id.* ¶ 30. Plaintiffs allege that the Proclamations create “a hostile environment for non-  
10 believers, who are made to feel as if they are second class citizens.” *Id.* ¶ 41. Plaintiffs  
11 further allege that they are “molested by these unwanted exhortations to pray and the  
12 resulting government-sanctioned celebrations of religion . . . .” *Id.* ¶ 44. The  
13 Proclamations also somehow allegedly interfere with Plaintiffs’ “rights of personal  
14 conscience.” *Id.* ¶ 48. Plaintiff FFRF claims that the Proclamations “frustrat[e] FFRF’s  
15 mission to keep separate church and state.” *Id.* ¶ 46.

16 Conspicuously absent from Plaintiffs’ FAC is any allegation that the  
17 Proclamations caused Plaintiffs any actual specific harm. Instead, they merely claim a  
18 general feeling of “offense” and alleged interference with FFRF’s mission.

19 **LEGAL STANDARD**

20 “Article III of the Constitution limits the judicial power of the United States to the  
21 resolution of ‘Cases’ and ‘Controversies’, and ‘Article III standing . . . enforces the  
22 Constitution’s case-or-controversy requirement.’” *Hein v. Freedom From Religion*  
23 *Found., Inc.*, 551 U.S. 587, 597-98 (2007) (citation omitted). “[O]ne of the controlling  
24 elements in the definition of a case or controversy under Article III’ is standing.” *Id.*  
25 (citation omitted).

26 “[T]he irreducible constitutional minimum of standing,” *Lujan v. Defenders of*  
27 *Wildlife*, 504 U.S. 555, 560 (1992), requires that a plaintiff show that:

1 (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized  
 2 and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is  
 3 fairly traceable to the challenged action of the defendant; and (3) it is likely,  
 as opposed to merely speculative, that the injury will be redressed by a  
 favorable decision.

4 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81  
 5 (2000). “Strict[] adherence” to these requirements is necessary where a plaintiff requests  
 6 a court to decide whether action taken by one of the other two branches of government is  
 7 unconstitutional. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

8 The plaintiff bears the burden of establishing these requirements at every stage of  
 9 the litigation, as it does for “any other essential element of the case.” *Cent. Delta Water*  
 10 *Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). If a plaintiff fails to establish  
 11 standing to assert a claim, then the federal court lacks subject matter jurisdiction over that  
 12 claim and the claim should be dismissed in its entirety pursuant to Federal Rule of Civil  
 13 Procedure 12(b)(1). *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115,  
 14 1122 (9th Cir. 2010) (“Because standing and ripeness pertain to federal courts’ subject  
 15 matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss.”).

16 To survive a motion to dismiss for lack of standing, a plaintiff must allege facts in  
 17 its complaint that, if proven, would confer standing upon them. *Warren v. Fox Family*  
 18 *Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). Thus, to determine whether  
 19 Plaintiffs have Article III standing in this case, the Court should examine the FAC to  
 20 determine if it identifies an injury that is both “(a) concrete and particularized and (b)  
 21 actual or imminent, not conjectural or hypothetical.” *See Sacks v. Office of Foreign*  
 22 *Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006).

## 23 ARGUMENT

### 24 I. PLAINTIFFS LACK ARTICLE III STANDING.

#### 25 A. The Issuance Of A Proclamation That Can Be Ignored Does Not 26 Confer Standing.

27 In considering whether FFRF and its members had standing to sue regarding  
 28 President Obama’s proclamation related to the National Day of Prayer, the Seventh

1 Circuit recently recognized that “[n]o one is injured by a request that can be denied.”<sup>2</sup>  
 2 *See Freedom From Religion Found., Inc. v. Obama, et al.*, 641 F.3d 803, 806 (7th Cir.  
 3 2011).<sup>3</sup> The Seventh Circuit aptly observed that:

4 [A]lthough this proclamation speaks to all citizens, no one is obliged to  
 5 pray, any more than a person would be obliged to hand over money if the  
 6 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.”

7 *Id.* The Seventh Circuit concluded that President Obama’s issuance of a proclamation  
 8 related to the National Day of Prayer did not confer standing upon FFRF or its members.  
 9 *Id.* at 808;<sup>4</sup> *see also Freedom From Religion Found., Inc. v. Texas Governor Rick Perry*,  
 10 \_\_\_F. Supp. 3d\_\_\_, 4:11-CV-02585, 2011 WL 3269339 (S.D. Tex. July 28, 2011)  
 11 (dismissing case brought by FFRF regarding Texas Governor’s promotion of a prayer  
 12 rally for lack of standing).

13 Similarly, Governor Brewer’s Proclamations did not force Plaintiffs to take any  
 14 action. *See* FAC. Ex. 4, 6 and 7. No one is obliged to pray and there are no penalties for  
 15 failing to do so.<sup>5</sup> Thus, the Proclamations alone are insufficient to confer standing to  
 16 Plaintiffs.

17 **B. Plaintiffs Fail To Articulate Any Injury Sufficient To Prove That They**  
 18 **Have Standing.**

19 Perhaps realizing that the issuance of the Proclamations alone is insufficient to

20 \_\_\_\_\_  
 21 <sup>2</sup> This decision explicitly overruled the Western District of Wisconsin’s order  
 attached as Exhibit 3 to Plaintiffs’ FAC.

22 <sup>3</sup> Freedom From Religion Foundation, Inc. filed a petition for rehearing en banc  
 of the Seventh Circuit’s decision, which was denied on June 16, 2011. *See* Ex. A.

23 <sup>4</sup> For the Court’s convenience, the *Freedom From Religion Foundation* decision  
 was attached in its entirety to Governor Brewer’s Answer. (Dkt. #10-1).

24 <sup>5</sup> Indeed, governors have historically issued proclamations related to a wide  
 25 variety of subjects that require nothing of the citizenry. For example, when former  
 26 Governor Hull proclaimed “Elevator and Escalator Safety Awareness Week,” and “Jump  
 27 Rope for Heart Day,” *see McDonald v. Thomas*, 202 Ariz. 35, 44, 40 P.3d 819, 828  
 (2002), it did not compel Arizona’s citizens to be especially careful on escalators, nor did  
 28 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).

1 establish Plaintiffs' standing, Plaintiffs attempt to articulate some injury or harm that they  
 2 suffered as a result of the Proclamations. However, the "injury" that Plaintiffs articulate  
 3 is not sufficiently particularized, concrete, or personal to confer standing.

4 1. Plaintiffs Do Not Allege Any Alteration Of Conduct Based On The  
 5 Proclamations.

6 Plaintiffs' FAC alleges that the Proclamations have injured Plaintiffs in the  
 7 following ways:

- 8 • By creating "a hostile environment for non-believers, who are made to feel  
 9 as if they are second class citizens." *See* FAC. ¶ 41.
- 10 • By causing Plaintiffs to feel "molested by these unwanted exhortations to  
 11 pray and the resulting government-sanctioned celebrations of religion . . ." *Id.* ¶ 44.
- 12 • By interfering with Plaintiffs "rights of personal conscience." *Id.* ¶ 48.
- 13 • By "frustrating FFRF's mission to keep separate church and state." *Id.*  
 14 ¶ 46.
- 15 • By "requiring [FFRF's] dedication of corrective resources and time . . ." *Id.*

16 No other facts are pled in the FAC that articulate the nature of harm that Plaintiffs have  
 17 allegedly suffered as a result of the Proclamations.<sup>6</sup>

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

25 \_\_\_\_\_  
 26 <sup>6</sup> Indeed, a review of the FAC reveals that no Plaintiff has even alleged they were  
 27 directly exposed to the Proclamations. This fact alone is fatal to Plaintiffs' claims  
 28 because "[s]tanding to challenge invocations as violating the Establishment Clause has  
 not previously been based solely on injury arising from mere abstract knowledge that  
 invocations were said." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir.  
 2007).

1                   2.     The Individual Plaintiffs' Perceived Slight Or Feeling Of Offense  
 2                                   Resulting From The Proclamations Are Insufficient To Establish  
 3                                   Standing.

4             The individual plaintiffs' purported injuries amount to nothing more than  
 5 generalized allegations that they disagree with the Proclamations, that they are offended  
 6 by the Proclamations, and that the Proclamations caused them and others to feel excluded  
 7 or unwelcome. This is not enough to confer Article III standing upon them.

8             The Supreme Court has long held that a perceived slight or feeling of exclusion is  
 9 insufficient to grant standing. In *Valley Forge Christian Coll. v. Ams. United for*  
 10 *Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the Supreme Court considered  
 11 an Establishment Clause claim brought by plaintiffs who complained when a federal  
 12 agency donated surplus property to an educational institution that was supervised by a  
 13 religious order. *Id.* at 464. The Court held that persons who objected to the transfer  
 14 lacked standing, because the transfer did not injure them.<sup>7</sup> *Id.* at 486-87. The Court  
 15 concluded that:

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

22 *Id.* at 485; *see also Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556  
 23 (1984) (noting that "abstract stigmatic injury" is insufficient by itself to create Article III  
 24 injury in fact); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13  
 25 (1974) ("abstract injury in nonobservance of the Constitution" is insufficient to confer  
 26 Article III injury); *Human Soc'y of United States v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir.  
 27 1995) ("[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-  
 28 in-fact for standing purposes.").

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29                   <sup>7</sup> For similar reasons, Plaintiffs lack standing to challenge the Proclamations  
 30 under Article II, Section 12 of the Arizona Constitution, which addresses appropriating  
 31 public money for religious worship.

1 Two recent Ninth Circuit decisions have confirmed the bedrock principle of law  
2 that general offense is insufficient to impart standing. In *Newdow v. Rio Linda Union*  
3 *Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010), the Ninth Circuit approved of the trial court’s  
4 ruling that certain atheists lacked standing to argue that Congress’s addition of “under  
5 God” to the Pledge of Allegiance violated the Establishment Clause. *Id.* at 1016-17. The  
6 Ninth Circuit noted that the “[p]laintiffs are unable to show the 1954 amendment causes  
7 them to suffer any concrete and particularized injury because nothing in the Pledge  
8 actually requires anyone to recite it.” *Id.* at 1016. “Instead . . . , plaintiffs would, at most,  
9 be asserting ‘generalized grievances more appropriately addressed in the representative  
10 branches’, which do not confer standing.” *Id.* (citation omitted). Similarly here, the  
11 Proclamations do not require anyone to pray, and, despite Plaintiffs’ “generalized  
12 grievances,” they do not possess Article III standing.<sup>8</sup>

13 In a related case decided the same day, the Ninth Circuit held that other plaintiffs  
14 lacked standing to bring an Establishment Clause challenge to 36 U.S.C. § 302, “which  
15 merely recognizes ‘In God We Trust’ as the national motto.” *Newdow v. Lefevre*, 598  
16 F.3d 638, 643 (9th Cir. 2010) (footnote omitted). Although the plaintiffs there alleged  
17 that the national motto “turns Atheists into political outsiders and inflicts a stigmatic  
18 injury upon them,” the Ninth Circuit ruled that “an ‘abstract stigmatic injury’ resulting  
19 from such outsider status is insufficient to confer standing.” *Id.* (citation omitted). The  
20 plaintiffs’ mere awareness of the motto statute did not provide the kind of “unwelcome  
21 direct contact” that can give rise to Article III injury-in-fact. *Id.*

22 Here, because the individual plaintiffs’ alleged injury is merely stigmatic and not  
23 concrete or particularized, the individual plaintiffs have failed to establish that they have  
24

25  
26 <sup>8</sup> Moreover, the plaintiffs in the *Rio Linda* case were directly and repeatedly  
27 exposed to the pledge of allegiance. *See Rio Linda*, 597 F.3d at 1012. Yet the Ninth  
28 Circuit still held that the *Rio Linda* plaintiffs did not plead sufficient injury to establish  
standing. *Id.* at 1016. Here, Plaintiffs exposure to the Proclamations is attenuated, at  
best, and therefore falls well short of establishing any concrete or particularized injury  
sufficient to establish Article III standing.



1 Article III standing. Thus, the individual plaintiffs' claims must be dismissed in their  
2 entirety.

3 3. FFRF Lacks Both Direct And Representational Standing.

4 FFRF fares no better than the individual plaintiffs in its effort to allege standing.  
5 "Our decisions make clear that an organization's abstract concern with a subject that  
6 could be affected by an adjudication does not substitute for the concrete injury required  
7 by Art[icle] III." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). Instead,  
8 organizations claiming direct injury must satisfy the same standing test as individuals by  
9 suffering from a concrete injury that is fairly traceable to the defendants' conduct. *See*  
10 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *see also Nat'l Treas.*  
11 *Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) ("We, of course,  
12 recognize that conflict between a defendant's conduct and an organization's mission is  
13 alone insufficient to establish Article III standing. Frustration of an organization's  
14 objectives 'is the type of abstract concern that does not impart standing.'") (citation  
15 omitted).

16 To that end, "ordinary expenditures as part of an organization's purpose do not  
17 constitute the necessary injury-in-fact required for standing." *Plotkin v. Ryan*, 239 F.3d  
18 882, 886 (7th Cir. 2001); *see also Fla. State Conference of NAACP v. Browning*, 522  
19 F.3d 1153, 1166 (11th Cir. 2008) ("[P]laintiffs cannot bootstrap the cost of detecting and  
20 challenging illegal practices into injury for standing purposes."); *see also Fair Emp't*  
21 *Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir.  
22 1994) (rejecting argument that "an organization devoted exclusively to advancing more  
23 rigorous enforcement of selected laws could secure standing simply by showing that one  
24 alleged illegality had 'deflected' it from pursuit of another"). To properly plead a  
25 concrete injury, an organization must do more than allege "damage to an interest in  
26 'seeing' the law obeyed or a social goal furthered." *Nat'l Taxpayers Union, Inc. v.*  
27 *United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

28

1 To allow FFRF's claim to proceed would essentially eviscerate the courts' current  
 2 concept of standing. Indeed, if an organization could obtain standing merely by  
 3 expending resources in response to a government action, then Article III standing could  
 4 be obtained through nothing more than bearing the expense of filing a lawsuit. Such an  
 5 interpretation would run contrary to decades of carefully-developed standing principles.

6 The FAC alleges no concrete or particularized injury suffered by FFRF. *See,*  
 7 *generally,* FAC. On the contrary, FFRF's allegations that the Proclamations adversely  
 8 affect its ability to "carry out its organizational mission in the State of Arizona to keep  
 9 church and state separate," and that the Proclamations "require the dedication of  
 10 corrective resources and . . . frustrate the accomplishment of FFRF's mission to keep  
 11 separate church and state," FAC. ¶ 46, merely reflect FFRF's abstract concern with "the  
 12 Constitutional principle of separation of church and state and . . . educat[ion] on matters  
 13 relating to nontheism," FAC. ¶ 1. FFRF's generalized grievance is not sufficient to meet  
 14 its burden of establishing FFRF's direct standing. *See Plotkin*, 239 F.3d at 886; *Nat'l*  
 15 *Taxpayers Union, Inc.*, 68 F.3d at 1433.

16 Nor does FFRF have representational standing. An organization has  
 17 representational standing to sue if: (1) at least one of its members would otherwise have  
 18 standing; (2) the interests at stake in the litigation are germane to the organization's  
 19 purpose; and (3) neither the claim asserted nor the relief requested requires an individual  
 20 member's participation in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*,  
 21 432 U.S. 333, 343 (1977). But FFRF's allegations fail to meet the requirements of the  
 22 first element of the test because FFRF's individual members lack standing. *See Part*  
 23 *I.B.2, supra*. Thus, FFRF lacks representational standing to assert the grievances of its  
 24 members.

25 4. The Court Should Take Guidance From The Seventh Circuit's  
 26 Recent Ruling That FFRF And Its Members Lacked Standing To  
 27 Challenge A Proclamation Regarding A National Day of Prayer.

28 Closely tracking the reasoning manifest by the Ninth Circuit in *Rio Linda* and  
*Lefevre*, the Seventh Circuit recently ruled that FFRF and its members lacked Article III

1 standing to bring a lawsuit related to a Presidential proclamation regarding a National  
2 Day of Prayer. *See Freedom From Religion Found., Inc.*, 641 F.3d at 808. There, the  
3 Seventh Circuit observed that “offense at the behavior of the government, and a desire to  
4 have public officials comply with (plaintiff’s view of) the Constitution, differs from legal  
5 injury.” *Id.* at 807. The Seventh Circuit noted that, “unless all limits on standing are  
6 abandoned, a feeling of alienation cannot suffice as injury in fact.” *Id.* at 808. Simply  
7 stated, “[t]he psychological consequence presumably produced by observation of conduct  
8 with which one disagrees is not an injury for the purpose of standing.” *Id.* at 807-08  
9 (internal citations and quotation marks omitted).

10 A similar result is mandated here. Neither the individual plaintiffs nor FFRF has  
11 articulated any injury sufficient to establish Article III standing to pursue their current  
12 claims regarding Governor Brewer’s Proclamations. Thus, Plaintiffs’ claims should be  
13 dismissed in their entirety because this Court lacks subject matter jurisdiction.

14 **II. PLAINTIFFS’ DECLARATORY RELIEF CLAIMS ARE MOOT AND/OR**  
15 **SEEK AN ADVISORY OPINION.**

16 Among the relief Plaintiffs seek is a judgment declaring that the Proclamations  
17 violate the Establishment Clause of the United States Constitution and the Arizona  
18 Constitution. *See* FAC at 12. To the extent Plaintiffs seek such a declaration regarding  
19 any past Proclamations, such a claim is moot. This Court cannot provide any meaningful  
20 relief regarding the proclamations that took place in January 2010, April 2010, or April  
21 2011. *See* FAC ¶ 20-21. Those proclamations have already been disseminated; they  
22 cannot now be “undone.”

23 In addition to seeking a declaration that the past Proclamations were  
24 unconstitutional, Plaintiffs’ FAC seeks an injunction prohibiting Governor Brewer from  
25 “proclaiming any day of prayer in 2012 and thereafter.” *See* FAC at 12. This Court  
26 cannot grant the requested relief.

27 First, it is not clear whether Governor Brewer will issue a prayer day proclamation  
28 in the future. Plaintiffs’ injury allegations in this regard are therefore entirely

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1 hypothetical. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-110 (1983). Moreover,  
2 assuming that Governor Brewer were to issue a prayer day proclamation in the future,  
3 this Court cannot begin to predict the substance of that proclamation. This was precisely  
4 the issue faced by the District of Columbia Court in *Newdow v. Bush* in the very similar  
5 context of inaugural prayers. There, the court found that it “cannot now rule on the  
6 constitutionality of prayers yet unspoken at future inaugurations of presidents who will  
7 make their own assessments and choices with respect to the inclusion of prayer.”  
8 *Newdow v. Bush*, 391 F. Supp. 2d 95, 108 (D.D.C. 2005); see also *Lyons*, 461 U.S. at  
9 105-110.

10 In this case, the Court would have to speculate on the content of any potential  
11 future prayer proclamations by Governor Brewer. This Court cannot issue an injunction  
12 regarding such an “abstract proposition[ ]” or it will run afoul of the case or controversy  
13 requirement of Article III. *Protestant Mem’l Med. Ctr. v. Maram*, 471 F.3d 724, 729 (7th  
14 Cir. 2006).

15 **CONCLUSION**

16 For the above-stated reasons, Governor Brewer respectfully requests that this  
17 Court dismiss Plaintiffs’ claims.

18 RESPECTFULLY SUBMITTED this 13th day of September, 2011.

19 BALLARD SPAHR LLP

20 By: /s/ Joseph A. Kanefield  
Joseph A. Kanefield

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27 *the State of Arizona*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 13, 2011, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Rosalin Sanhadja

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