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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin non-profit corporation, VALLEY OF THE SUB CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, an Arizona non-profit corporation, MIKE WASDIN, an individual, MICHAEL RENZULLI, an individual, JUSTIN GRANT, an individual, JIM SHARPE, an individual, FRED GREENWOOD, an individual, CRYSTAL KESHAWARZ, an individual, and BARRY HESS, an individual.

Plaintiffs,

vs.

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

Defendant.

CV2012-070001

**MOTION TO DISMISS**

(Assigned to the Honorable Jose S. Padilla)

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## INTRODUCTION

Governor Janice K. Brewer ("Governor Brewer") has issued Day of Prayer proclamations. *See* Compl. ¶ 23. Prior Arizona governors and United States presidents also have issued Day of Prayer proclamations. Governor Brewer also proclaimed that

January 17, 2010 was a Day of Prayer for Arizona's Economy and State Budget (together with the Arizona Day of Prayer proclamations, the "Proclamations"). *Id.* ¶ 24.

Plaintiff Freedom From Religion Foundation, Inc. ("FFRF") and several of its members (collectively "Plaintiffs") have taken offense to the Proclamations, claiming that the Proclamations have resulted in Plaintiffs feeling "as if they were second class citizens." *Id.* ¶ 34. Plaintiffs originally filed suit in United States District Court for the District of Arizona in March 2011 (the "Federal Court Lawsuit"), claiming that the Proclamations represented a violation of provisions of the United States and Arizona Constitutions and 42 U.S.C. § 1983.

On December 12, 2011, the Honorable Roslyn O. Silver dismissed the Federal Court Lawsuit for lack of standing. Judge Silver concluded that:

> "The case before the Court is not a direct attack or disparagement of any person's belief system. It is a generalized proclamation which does not require any action by Plaintiffs. . . . Plaintiffs lack standing because Governor Brewer's proclamations do not injure Plaintiffs."[1]

Undeterred, those plaintiffs who filed the Federal Court Lawsuit have now brought an almost identical lawsuit in this Court, seeking declaratory relief as to the past Proclamations and an injunction prohibiting Governor Brewer from issuing further Day of Prayer proclamations. *See* Compl. at 10.

Plaintiffs' claims, however, suffer from the same fundamental defect that resulted in the dismissal of the Federal Court Lawsuit – Plaintiffs have alleged no specific and concrete injury arising from the Proclamations. Thus, Plaintiffs lack the standing required under Arizona law and this case should be dismissed. Moreover, to the extent Plaintiffs seek a ruling regarding the legality of past proclamations, their claims are moot because the Court cannot provide any meaningful relief regarding the past proclamations. Similarly, Plaintiffs' claims for declaratory relief regarding potential future proclamations are not ripe and any ruling regarding those future proclamations would constitute an

[1] *See* Federal Court Lawsuit 12/12/2011 Order at 5. For the Court's convenience, the December 12, 2011 Order from the Federal Court lawsuit is attached hereto as Exhibit A.

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advisory opinion. Therefore, pursuant to Arizona Rule of Civil Procedure 12(b)(1), this Court should dismiss this lawsuit for lack of subject-matter jurisdiction.

## BACKGROUND

Plaintiffs consist of seven individuals who reside in Maricopa County, FFRF, and a local chapter of FFRF. *See* Compl. ¶¶ 1-10. The individual plaintiffs are described as both nonbelievers in religion or believers in various religions. *Id.* ¶¶ 4-10. 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.* ¶ 1.

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

Conspicuously absent from Plaintiffs' Complaint is any allegation that the Proclamations caused Plaintiffs any specific, palpable harm or injury. Instead, Plaintiffs merely claim a general feeling of "offense" and alleged interference with FFRF's mission.

## LEGAL STANDARD

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 Amory Park Neighborhood Ass'n v. Episcopal Cmty. Services In Arizona,* 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (the question of standing is not a constitutional mandate

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because Arizona has no counterpart to the "case and controversy" requirement of Article III of the United States Constitution). This standing requirement is "rigorous" and is enforced as a matter of "prudential or judicial restraint." *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 v. Hull*, 192 Ariz. 65, 69 ¶ 16, 961 P.2d 1013, 1017 (1998). 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 (Ct. 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 (Ct. 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, 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. Napalitano,* 206 Ariz. 520, 524 ¶ 16, 81 P.3d 311, 315 (2003) (citation omitted).

The plaintiff bears the burden of establishing these standing requirements. *See Buckelew v. Town of Parker*, 188 Ariz. 446, 453, 937 P.2d 368, 375 (Ct. App. 1996) ("[T]o be entitled to relief, [the plaintiff] must first prove his allegations of standing"). To determine whether Plaintiffs have standing in this case, the Court should examine the Complaint to determine if it identifies an injury that is distinct, palpable, and particularized. *See Sears* 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017.

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## ARGUMENT

### I. Plaintiffs Lack Standing.

#### A. The Issuance Of A Proclamation That Has No Legal Effect And That Can Be Ignored Does Not Confer 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 denied." *See Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011).[2] 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 Plaintiffs to take any action or encourage any particular form of prayer. *See* Compl. 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, in examining the identical Proclamations at issue

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[2] 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.

[3] Indeed, 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).

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here, concluded that "no one, including Plaintiffs, is obligated to pray." *See* Ex. A at 4. Thus, the Proclamations alone are insufficient to confer standing to Plaintiffs.

### B. Plaintiffs Fail To Articulate Any Distinct, Particularized, and Palpable Injury Sufficient To Prove That They Have Standing.

Realizing that the issuance of the Proclamations is insufficient to establish standing, Plaintiffs attempt to articulate some injury or harm that they suffered as a result of the Proclamations. However, the "injury" that Plaintiffs articulate is not sufficiently distinct, palpable, and particularized injury to confer standing.

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

Plaintiffs' Complaint alleges that the Proclamations have injured Plaintiffs 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* Compl. ¶ 34.
- By causing Plaintiffs to feel "subject to these unwanted exhortations to pray and the resulting government-sanctioned celebrations of religion . . . ." *Id.* ¶ 37.
- By interfering with Plaintiffs "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 Plaintiffs have allegedly suffered as a result of the Proclamations.

Importantly, Plaintiffs fail to articulate any specific action taken or expense incurred as a result of the Proclamations. Without such an allegation, Plaintiffs 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.").

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

The individual plaintiffs' purported injuries amount to nothing more than generalized allegations that they disagree with the Proclamations, that they are offended by the Proclamations, and 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 an 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, 102 S. Ct. 752, 70 L. Ed. 2d 700 (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, 102 S. Ct. at 754, 70 L. Ed. 2d 700. The Court held that persons who objected to the transfer lacked standing, because the transfer did not injure them. *Id.* at 486-87, 102 S. Ct. at 765-767, 70 L. Ed. 2d 700. 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, 102 S. Ct. at 765, 70 L. Ed. 2d 700; *see also Allen v. Wright*, 468 U.S. 737, 755, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (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.

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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." *Id.* at 70 ¶ 17, 961 P.2d at 1018.

Here, because the individual plaintiffs' alleged injury is, at best, merely stigmatic and not concrete or particularized, the individual plaintiffs have failed to establish that they have standing. Indeed, Judge Silver concluded that these very Plaintiffs' 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.'" Ex. A at 4-5. Thus, the individual plaintiffs' claims must be dismissed in their entirety.

3. FFRF Lacks Standing.

FFRF fares no better than the individual plaintiffs in its effort to allege 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 (Ct. 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*

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*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).[4]

The Complaint alleges no concrete or particularized injury suffered by FFRF. *See, generally,* Complaint. At best, the Complaint merely reflects FFRF's abstract concern with "the Constitutional principle of separation of church and state and . . . educat[ion] on matters relating to nontheism," Compl. ¶ 1. 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 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,*

[4] 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.

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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 I.B.2, *supra*.

Moreover, even if the individual plaintiffs could show an injury sufficient to establish standing (which they cannot), the individual plaintiffs are not a homogeneous group of individuals that could have suffered a similar harm. Indeed, some of the Plaintiffs purport to be non-believers in religion while others purport to believe different religions. *See* Compl. ¶¶ 4-10. The Proclamations would affect these individuals in different ways, requiring individual participation in the lawsuit to establish the fact and extent of any injury. Thus, FFRF's allegations fail to meet the third element of the above-articulated test because individual participation in the lawsuit would be required Therefore, FFRF lacks representational standing to assert the grievances of its members.

## II. Plaintiffs' Declaratory Relief Claims Are Moot And/Or Seek An Advisory Opinion.

Among the relief Plaintiffs seek is a judgment declaring that the Proclamations violate the Establishment Clause of the United States Constitution and the Arizona Constitution. *See* Compl. at 10. To the extent Plaintiffs seek such a declaration regarding any past proclamations, such a 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, Plaintiffs' Complaint seeks an injunction prohibiting Governor Brewer from making future prayer-related proclamations. *See* Compl at 10. This Court cannot grant the requested relief.

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First, it is not clear whether Governor Brewer will issue a prayer day proclamation in the future. Plaintiffs' injury allegations in this regard are therefore entirely hypothetical. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-110, 103 S. Ct. 1660, 1666-70, 75 L. Ed. 2d 675 (1983). Moreover, assuming that 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 (Ct. 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." *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.

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## CONCLUSION

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

RESPECTFULLY SUBMITTED this 3rd day of May, 2012.

BALLARD SPAHR LLP

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

OFFICE OF THE GOVERNOR, JANICE K. BREWER

By: /s/ Signed by Joseph A. Kanefield (w/permission)
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I certify that on this 3rd day of May, 2012, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Superior Court, Maricopa County, for filing using the AZTurboCourt System.

COPY of the foregoing mailed this
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| Freedom From Religion Foundation, Inc.., et. al.<br><br>Plaintiffs,<br><br>vs.<br><br>Janice K. Brewer, Governor of the State of Arizona,<br><br>Defendant. | No. CV-11-495-PHX-ROS<br><br>**ORDER** |

Pending before the Court is Defendant's motion to dismiss (Doc. 27). For the reasons below, the motion will be granted.

**BACKGROUND**

Plaintiffs allege Defendant is violating the Establishment Clause of the United States Constitution, the Arizona Constitution, and 42 U.S.C. § 1983 by proclaiming a day of prayer. (Doc. 26). Plaintiffs are: the Freedom From Religion Foundation, Inc. ("FFRF"), an organization "opposed to government endorsement of religion"; the Valley of the Sun Chapter of FFRF; three individual members of FFRF who are identified as nonbelievers in religion or one or more gods; and four individuals who are not alleged to be members of FFRF and are identified as believers of the Jewish, Christian or Muslim faiths and gods. (Doc. 26, ¶ 1-10). FFRF has more than 16,000 members in the United States and more than 400 members in Arizona. (Id., ¶ 2). Defendant is Janice K. Brewer, Governor of the State of Arizona, sued in her official capacity. (Id., ¶ 11-13).

On August 24, 2011, Plaintiffs filed an Amended Complaint seeking declaratory and injunctive relief. (Doc. 26). Plaintiffs allege Governor Brewer proclaimed an Arizona Day of Prayer in 2009, 2010 and 2011. (Id., ¶ 20). These days of prayer coincided with the days of prayer proclaimed by President Barack Obama. (Id.). In addition, Governor Brewer proclaimed a Day of Prayer for the Budget in 2010. (Id., ¶ 21). Unless enjoined, Governor Brewer is expected to issue a similar proclamation for an Arizona Day of Prayer in 2012. (Id., ¶ 42).

On September 13, 2011, Governor Brewer moved to dismiss the Amended Complaint. (Doc. 27). Plaintiffs filed a response, and Governor Brewer filed a reply.[1]

**ANALYSIS**

Under the Establishment Clause of the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. The Establishment Clause applies to the states through the Fourteenth Amendment. *E.g., Wallace v. Jaffree*, 472 U.S. 38, n. 10 (1985). "Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies,' and 'Article III standing . . . enforces the Constitution's case-or-controversy requirement.'" *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 597-98 (2007) (quotations omitted). "[O]ne of the controlling elements in the definition of a case or controversy under Article III is standing." *Id.* (quotation omitted).

"Standing is the first question because, *unless the case presents a justiciable controversy, the judiciary must not address the merits.*" *Freedom From Religion Foundation v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011) (emphasis added). To show standing, Plaintiffs must demonstrate injury, causation, and redressability. *Id.; Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). The focus here is on injury. To qualify for standing purposes, the injury must be: "injury in fact - an invasion of a legally protected interest which is (a)

[1] On September 30, 2011, Plaintiffs filed a motion for partial summary judgment. Upon stipulation of the parties, the Court extended the deadline to respond to the motion for partial summary judgment until 30 days after the Court rules on the motion to dismiss.

concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and quotations omitted).

In *Freedom From Religion Foundation v. Obama*, the Seventh Circuit vacated the district court's decision holding President Obama's proclamation of a day of prayer violated the Establishment Clause, and remanded to dismiss for want of a justiciable controversy. 641 F.3d at 805, 808. The Seventh Circuit stated, "although this proclamation speaks to all citizens, no one is obliged to pray, any more than a person would be obliged to hand over his money if the President asked all citizens to support the Red Cross and other charities. . . . No one is injured by a request that can be declined." *Id.* at 806. Like Plaintiffs in this case, the plaintiffs in *Freedom From Religion Foundation v. Obama* alleged they were "injured because they feel excluded, or made unwelcome, when the President asks them to engage in a religious observance that is contrary to their own principles." *Id.* at 806-07. The Seventh Circuit stated, "hurt feelings differ from legal injury." *Id.* at 807. "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." *Id.* at 808. As such, the plaintiffs lacked injury to confer Article III standing. *Id.*

In *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), the Ninth Circuit affirmed the district court's ruling that the plaintiffs lacked standing to bring an Establishment Clause challenge to 36 U.S.C. § 302, which recognized "In God We Trust" as the national motto. *Id.* at 643.[2] The plaintiffs alleged the national motto "turns Atheists into political outsiders and inflicts a stigmatic injury upon them." *Id.* The Ninth Circuit held "an abstract stigmatic injury resulting from such outsider status is insufficient to confer standing." *Id.* (quotation omitted). Mere awareness of the motto was not the kind of "unwelcome direct contact" giving rise to injury sufficient to confer Article III standing. *Id.*

Governor Brewer's proclamations proclaim a day of prayer (Doc. 26, Exs. 4, 6 and

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[2] The Ninth Circuit held the plaintiff did have standing to challenge the motto on coins and currency because the plaintiff showed a "concrete, particularized, and personal injury resulting from his frequent contact with the motto." *Lefevre*, 598 F.3d at 642.

7), and one proclamation "encourage[s] all citizens to pray for God's blessings on our State and our Nation." (Id., Ex. 6). Though "encouraged," no one, including Plaintiffs, is obligated to pray. Nor are Plaintiffs forced to alter their physical routine or bear a monetary expense to avoid a religious symbol. *Freedom From Religion Foundation v. Obama*, 641 F.3d at 808.

Instead, Plaintiffs here have argued they feel slighted and excluded because they were "exhorted" to pray by the Governor's proclamations. "Exhort" is defined as to "make urgent appeal." Webster's Third New International Dictionary 796 (2002). But the proclamations simply "proclaim" a day of prayer and, in the January 2010 proclamation, citizens are "encourage[d]" to pray. (Doc. 26, Ex. 6). "Encourage" is defined as "to spur on." Webster's Third New International Dictionary 747 (2002). This is insufficient to show injury. *Id.; see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) (plaintiffs failed "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 . . . ."); *Freedom From Religion Foundation v. Texas Governor Rick Perry,* No. H-11-2585, 2011 WL 3269339 (S.D. Tex. July 28, 2011) (dismissing case for lack of standing where FFRF sought to enjoin Texas Governor from promoting prayer rally); *Lefevre*, 598 F.3d 638. Plaintiffs have failed to identify personal injury.

Plaintiffs provide affidavits to establish they turned off the television and altered conversational habits to avoid the topic of religion or the day of prayer. Plaintiffs allege this constitutes injury sufficient to confer standing. Plaintiffs, however, do not explain why their alleged injury is different than injuries in other Establishment Clause cases in which the plaintiffs did not have standing, such as the President's day of prayer proclamation. Essentially, Plaintiffs seek a ruling obliquely holding that injury sufficient to confer standing exists under the Establishment Clause where government action is covered in the news or the subject of a social conversation. The Court declines to depart from Establishment Clause

case law on this ground. Plaintiffs have not shown injury beyond "stigmatic injury" or feeling like an "outsider." *Lefevre*, 598 F.3d at 643. As such, Plaintiffs' alleged injury is insufficient to establish standing.[3]

Plaintiffs rely on *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010), for the proposition that they suffer injury sufficient to establish standing where their religious or irreligious sensibilities are affected by government conduct. However, in *Catholic League*, the government action was not a proclamation of a day of prayer which anyone could ignore. The government action was a "local ordinance condemning the church and some of the municipality's residents," which the Ninth Circuit described as "a government condemnation of a particular church or religion." *Catholic League*, 624 F.3d at 1051 n. 26; *id* at 1053. The Ninth Circuit recognized an ordinance targeting a specific religion and specific individuals was distinguishable from a proclamation that includes "vague and general religiosity." *Id.* at 1053. The Ninth Circuit distinguished *Catholic League* from *Lefevre* because in *Catholic League* the plaintiffs were "not suing on the mere principle of disagreeing with San Francisco, but because of that city's direct attack and disparagement of their religion." *Catholic League*, 624 F.3d at 1051 n. 26. The case before the Court is not a direct attack and disparagement of any person's belief system. It is a generalized proclamation which does not require any action by Plaintiffs. As such, *Catholic League* is not controlling.

Plaintiffs lack standing because Governor Brewer's proclamations do not injure Plaintiffs. Without standing, the Court need not address the merits of the case. As such, Governor Brewer's motion to dismiss for lack of standing will be granted.[4]

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[3] This case is more similar to *Freedom From Religion Foundation v. Obama*, 641 F.3d 803 than *Arizona Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927 (D. Ariz. 2000).

[4] This order resolves all claims. Plaintiffs' Establishment Clause claim and Section 1983 claim for violation of the Establishment Clause are discussed above. Given the Court's ruling, Plaintiffs' Arizona Constitutional challenge is not properly before this Court. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir.2001) ("[I]f the court

Accordingly,

**IT IS ORDERED** Defendant's motion to dismiss **(Doc. 27)** is **GRANTED**.

**IT IS FURTHER ORDERED** all other pending motions are denied as moot.

**IT IS FURTHER ORDERED** the **Clerk of the Court** shall enter **Judgment in favor of Defendant.**

DATED this 9th day of December, 2011.

Roslyn O. Silver
Chief United States District Judge

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dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims.").