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**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

FREEDOM FROM RELIGION	)	Civil Action No. 2:11-cv-00495-ROS
FOUNDATION, Inc.,	)	
<i>et al,</i>	)	
	)	PLAINTIFFS
Plaintiffs,	)	MOTION FOR PARTIAL
v	)	SUMMARY JUDGMENT; and
Janice K. Brewer,	)	MEMORANDUM OF
Governor of the State of Arizona,	)	POINTS AND AUTHORITIES;
	)	
	)	
Defendant.	)	
	)	

Plaintiffs Freedom From Religion Foundation (FFRF), Mike Wasdin,

Michael Renzulli, Justin Grant, John Cannistraro, Jim Sharpe, Fred

Greenwood, Crystal Keshawarz, and Barry Hess, (collectively FFRF or Plaintiffs) move the Court for an order granting partial summary judgment against Defendant Brewer on the Plaintiffs' Complaint, ruling (1) Plaintiffs have standing to bring this lawsuit; (2) prayer is inherently a religious activity; (3) prayer has no secular purpose; and (4) the proclamation by Defendant Brewer of the Arizona Days of Prayer have no secular purpose.

Partial summary judgment is proper in this case because there is no genuine issue of any material fact and because FFRF is entitled to judgment as a matter of law on these issues. Fed.R.Civ.P. Rule 56(a),(c).

This motion is based on the attached Memorandum of Points and Authorities, the attached Plaintiffs' Statement of Uncontroverted Facts ("PSUF"), the exhibits and declarations attached to PSUF.

The Motion also relies on all pleadings and filings to date in this action, all matters of which the Court must or may take judicial notice, and all other matters that may be brought to the Court's attention prior to or at the hearing on the Motion.

Date: September 30, 2011.

Morris Law Firm, pllc

/s/ Richard W. Morris

By: Richard W. Morris, J.D., Ph.D.  
Attorneys for Plaintiff

**PLAINTIFFS MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**Introduction**

Plaintiff FFRF is a Wisconsin non-stock corporation whose principal office is in Madison, Wisconsin; FFRF is a national 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.

FFRF has more than 16,000 members in the United States, including more than 400 members in Arizona, and a chapter in Maricopa County, who are opposed to government endorsement of religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. Plaintiffs Mike Wasdin, Michael Renzulli, and Justin Grant reside in Maricopa County, Arizona, are members of FFRF, and are nonbelievers in religion or in one or more gods. Other Plaintiffs are variously Christian, Jewish, Muslim or non-believers but are not members of FFRF.

The Plaintiffs ask this Court to render partial summary judgment against the Defendant Brewer, as authorized by Federal Rule of Civil Procedure Rule 56(a) and Rule 56 (c), for multiple violations of the separation

of church and state provisions of the Constitutions of the United States and Arizona. Plaintiff reserves the issues of statutory and compensatory damages, and attorneys' fees and costs, for future motions, proceedings or trial.

### **A. Statement of the Case**

Defendant Brewer has issued three proclamations for Arizona Days of Prayer during her tenure as Governor of the State of Arizona.

Plaintiffs argue the proclamations violate the constitutions of both the United States and the State of Arizona in that the proclamations violate the separation of church and state by governmental exhortations to pray and endorsement of religion in general.

To be clear, the Plaintiffs do not demand anyone be forced to come to the same conclusions as have they. Plaintiffs agree Governor Brewer has an individual right to pray as a private person and Plaintiffs oppose laws designed to restrict others from believing as they wish or praying.

The issue is the Day of Prayer proclamations issued by Governor Brewer present an apparent purpose to lend the official support of the government of the State of Arizona to any form of religious or anti-religious idea or activity, and the Plaintiffs contend the proclamations are both dangerous and unconstitutional.

The issue goes far deeper than a technicality such as whether a government fax machine was used to promote a religious event. The issue goes to the fundamental principle of separation of church and state. However, the issue does not come before the court until the issue of standing is first resolved.

### **B. Statement of Facts**

The facts which establish Plaintiffs' action are set forth in the Plaintiffs Statement of Uncontroverted Facts ("PSUF") filed concurrently with this brief as required by the rules of this Court. Rules of Practice of the United States District Court for the District of Arizona, Rule 1.10(l)(1).

Defendant Janice K. Brewer is the governor of the State of Arizona. *See* PSUF, Material Fact 1.

Defendant Janice K. Brewer issued a proclamation for a Day of Prayer on January 17, 2010, declaring that same day to be a "Day of Prayer for Arizona's Economy and State Budget. *See* PSUF, Material Fact 2.

Defendant Janice K. Brewer issued a proclamation for a Day of Prayer on April 21, 2010, declaring May 6, 2010, to be an "Arizona Day of Prayer." *See* PSUF, Material Fact 3.

Defendant Janice K. Brewer issued a proclamation for a Day of Prayer

on April 29, 2011, declaring May 5, 2011, to be an “Arizona Day of Prayer.” See PSUF, Material Fact 4.

Defendant Janice K. Brewer issued each of the proclamations for a Day of Prayer in her official capacity as governor. See PSUF, Material Fact 2; Material Fact 5.

Defendant Janice K. Brewer issued the proclamation for a Day of Prayer in 2011 upon the request of six Christians. She was in contact with two other individuals from Arizona expressing their support, one of whom explicitly states Christianity as her motivation. No other religions. No non-believers. Only Christians. See PSUF, Material Fact 6.

Each of the plaintiffs was individually harmed by the proclamations. See PSUF, Material Fact 7.

### **C. Summary Judgment Standard**

Summary judgment is proper in any case where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A plaintiff moving for summary judgment satisfies its burden by submitting summary judgment proof that establishes all elements of its cause of action as a matter of law. *San Pedro v. U.S.*, 79 F.3d 1065, 1068 (11th Cir. 1996). Plaintiff must show that no reasonable trier of fact could find other

than for plaintiff. *Calderone v. U.S.*, 799 F.2d 254, 259 (6th Cir. 1986).

## **D. Argument**

### **1. Plaintiffs Have Standing**

Plaintiffs recognize the federal doctrine of standing focuses on whether a plaintiff can demonstrate some personal legal interest has been invaded by the government. The person must have a personal stake in the outcome of the controversy. Each of the individual plaintiffs here has such a stake, as shown below.

FFRF has more than 16,000 members in the United States, including more than 400 members in Arizona, and a chapter in Maricopa County, and like the American Civil Liberties Union in other cases, is litigating on behalf of its members.

The U.S. Supreme Court acknowledged the difficulties inherent in the analysis of standing: “We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it.” *Valley Forge*, 454 U.S. at 471, 102 S.Ct. 752. “[Both the constitutional \*929 and prudential components] of standing doctrine incorporate[ ] concepts

concededly not susceptible of precise definition.” *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

For purposes of the FFRF case at bar, standing exists if the plaintiffs were “subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.” See *ACLU v. Rabun County Chamber of Commerce, Inc.*, (“*Rabun County*”), 698 F.2d 1098, 1108 (11th Cir.1983) quoting *Valley Forge*, 454 U.S. at 487 n. 22, 102 S.Ct. 752 (discussing *Schempp*, 374 U.S. 203, 83 S.Ct. 1560). This court (U.S. District Court for the District of Arizona) approves of the *Rabun County* standard. See *Arizona Civil Liberties Union v. Dunham*, (“*AzCLU*”), 112 F.Supp.2d 927 (2000).

Indeed, the Plaintiffs here were, and are, “subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.” See PSUF, Material Fact 8.

The Proclamations for days of prayer (the Proclamations) were publicly displayed in the media. See PSUF, Material Fact 9. The Proclamations are invasive due to the pervasiveness of media coverage. To avoid the Proclamations, Plaintiffs would be faced not with the option of merely altering a travel route, which alone would have been sufficient to establish the necessary injury in fact for standing in an establishment clause case. *Buono v.*



*Norton*, 212 F.Supp.2d 1202, 1212 -1213 (C.D.Cal., 2002).

Rather, they would need to avoid the media, in all forms—entirely, including the internet—an option close to impossible in this age. See PSUF, Material Fact 9. Moreover, no such avoidance is required. See *Suhre v. Haywood County*, 131 F.3d 1083, 1088 (4th Cir.1997).

Feelings of unwelcomeness and subordinate status may be even greater in the action at bar than when the mayor of a town issues a proclamation because the Proclamations were issued by the Governor, the highest elected official in the State of Arizona. See *Saladin v. City of Milledgeville*, 812 F.2d 687, 690 (11th Cir.1987) dealing with the inclusion of the word “Christianity” on a city seal.

Like the plaintiffs in *Saladin*, the Plaintiffs’ residency in Arizona placed them into unwelcome direct contact with the Proclamations. The plaintiffs here have more than an abstract interest in seeing the State of Arizona observe the Constitutions of Arizona and the United States: they are citizens of the state and directly affronted by the Proclamations. See PSUF, Material Fact 11.

The Plaintiffs also suffered the particularized injury of feeling unwelcome and excluded by the state wherein they reside. See PSUF,

Material Fact 10.

The stigmatization and denigration suffered by Plaintiffs is similar to that of being members of a racial minority as a result of discriminatory governmental conduct and supports standing. In essence, the Plaintiffs—atheists and believers alike—face stigmatization and denigration as an intellectual minority equally severe as the stigmatization and denigration faced by racial minorities. See PSUF, Material Fact 12.

**2. The Uncontroverted Evidence Establishes Prayer Is Inherently a Religious Activity.**

The two best known religious activities are prayer and sacrifice. Fortunately, we deal here only with the former. What is the meaning of “pray” and “prayer”? As a verb, the Merriam-Webster dictionary (a source previously cited by the Defendant) says:

transitive verb

1: entreat, implore often used as a function word in introducing a question, request, or plea

2: to get or bring by praying

intransitive verb

1: to make a request in a humble manner

2: to address God or a god with adoration, confession,  
supplication, or thanksgiving

<http://www.merriam-webster.com/dictionary/pray>

The Oxford English Dictionary, says:

noun

1. a solemn request for help or expression of thanks addressed to God or an object of worship: I'll say a prayer for him; a commitment to a life of holiness through prayer and Bible-reading (prayers) a religious service , especially a regular one , at which people gather in order to pray together: 500 people were detained as they attended Friday prayers; an earnest hope or wish: it is our prayer that the current progress on human rights will be sustained

<http://oxforddictionaries.com/definition/prayer?region=us>

verb

1. [no object]

address a solemn request or expression of thanks to a deity or other object of worship: the whole family is praying for Michael [with object]: pray God this is true wish or hope strongly for a particular outcome or situation: after several days of rain, we were praying for sun [with clause] : I prayed that James wouldn't notice

adverb

formal or archaic

used as a preface to polite requests or instructions: pray continue used as a way of adding ironic or sarcastic emphasis to a question: and what, pray, was the purpose of that?

<http://oxforddictionaries.com/definition/pray?region=us>

Defendant Brewer, contrary to the commonly understood definition of prayer, denied prayer has no secular purpose and objected “to the extent it calls for a legal conclusion.” See PSUF, Exhibit 7, Governor Brewer's Response Request for Admissions, Response to Request 9, page 4.

Whatever may be the subjective intent of the Governor, the objective manifestation of the various proclamations for days of prayer convey a government endorsement at best, and proselytizing at worst, of religion in general and her interpretation of the Christian religion in particular.

Prayer is commonly understood to be a form of religious practice that seeks to activate a volitional rapport to God or spirit through deliberate practice. For example, the Catholic Encyclopedia defines prayer as:

“[a]n act of the virtue of religion which consists in asking proper gifts or graces from God. In a more general sense it is the application of the mind to Divine things, not merely to acquire a knowledge of them but to make use of such knowledge as a means of union with God. This may be done by acts of praise and thanksgiving, but petition is the principal act of prayer.”

<http://www.newadvent.org/cathen/12345b.htm>

While other sects of Christianity and other religions may have slightly different definitions, it is fair to say the Catholic definition is representative of

the common understanding of the meaning of prayer.

Indeed, the very words of the January 17, 2010 proclamation, on their face, were intended to be commonly understood as a religious practice to activate a volitional rapport with God or a spirit through deliberate practice of prayer. Words such as a day of prayer “to humbly ask God for His forgiveness, blessings and guidance” and

[T]hroughout this day of prayer, we ask for God’s favor, blessing, wisdom and guidance to rest upon our state government, businesses and our citizens, that God would guide our state government leaders to resolve the state's budget deficit, renew the vitality of our state's economy and that God would aid and empower the citizens and businesses in our state and in our nation.

She ended as follows: “I, Janice K. Brewer, Governor of the State of Arizona, do hereby proclaim January 17, 2010 as a “Day of Prayer for Arizona's Economy and State Budget” and “ encourage all citizens to pray for God’s blessings on our State and our Nation.” PSUF, Exhibit 2. Emphasis added.

A government may not exhort, encourage, or extol the citizens to pray. The U.S. Supreme Court sums up the required position of government thusly:

The wholesome ‘neutrality’ of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful

sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)

There can be no misreading of the intent and commonly understood meaning of the words in the proclamations. But, assuming *arguendo*, the Governor meant a moment of reflection as she stated in her Answers to Interrogatories (See PSUF, Exhibit 8, page 5, Response to Interrogatory Number 2), her News Release of May 6, 2010, (“[L]et us join together to thank God for the many blessings He has bestowed upon us.” See PSUF, Exhibit 4) and News Release of May 5, 2011 (She quotes Psalms 91:1 and says “[L]et us join together and give praise for the many blessings He has bestowed upon us.” See PSUF, Exhibit 6) make explicit she was not conveying a secular message but solely one of religious meaning, thus demonstrating her “private” discovery response and her public statements are mutually exclusive.

Dr. John Compere, a former ordained minister, unequivocally states

“prayer is inherently a religious activity.” See PSUF, Exhibit 20, ¶ 8.

Plaintiffs argue no reasonable trier of fact could find other than prayer is inherently a religious activity.

**3. The Uncontroverted Evidence Establishes Prayer Has No Secular Purpose.**

Dr. John Compere, a former ordained minister, states in his expert opinion “prayer has no secular purpose.” See PSUF, Exhibit 20, ¶ 9.

Defendant Brewer refused to admit or deny prayer is a religious activity by claiming to admit or deny calls for a legal conclusion. See PSUF, Exhibit 7, Governor Brewer's Response Request for Admissions, Response to Request 10, page 4.

The Plaintiffs are asking this Court to make that legal conclusion.

The Plaintiffs, theists and atheists alike, are aware of no secular purpose for prayer. See PSUF, Material Fact 13.

**4. The Uncontroverted Evidence Establishes The Proclamations by Defendant Brewer of Arizona Days of Prayer Have No Secular Purpose**

The Day of Prayer proclamations of April 21, 2010 and April 29, 2011,

each have five clauses leading to the actual proclamation. Four of which expressly relate to religion or prayer or both, and one appears to give homage to the armed forces, all of which lead to the proclamation of the Arizona Day of Prayer. *See* PSUF, Exhibits 2 and 3.

The Day of Prayer Proclamation of January 17, 2010, expressly “encourages all citizens to pray for God’s blessings on our state and nation.” *See* PSUF, Exhibit 2.

None of the Proclamations, on their face, has a secular purpose.

Whether or not praying is obligatory is not the issue. This is the fallacy of diversion. The issue is whether government should ever endorse, in any manner whatsoever, religion because the force of government is always behind veil.

### **E. Conclusion**

Plaintiffs understand the issue of separation of church and state is a “hot potato,” and courts generally avoid the issue by dismissing cases for lack of standing, holding the matter is similar to an unhappy taxpayer complaining about some particular expenditure. However, the case at bar is not similar to a tax case, where the lack of standing rests upon the individuals not being harmed differently in a *de minimus* manner from all other citizens.



The Plaintiffs in this case suffered, and continue to suffer, individually and personally as set forth above by a direct violation of the Constitutions of the United States and the State of Arizona and 42 U.S.C 1983.

The importance of the FFRF case at bar was well stated by Mr. Justice Jackson in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 628, 63 S.Ct. 117, 1185, 87 L.Ed. 1628 (1943):

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to ... freedom of worship ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

For the reasons as explained above and established by the evidence submitted concurrently, Plaintiffs ask the court to grant this motion and render partial summary judgment in favor of Plaintiffs claims that (1) Plaintiffs have standing to bring this lawsuit; (2) prayer is inherently a religious activity; (3) prayer has no secular purpose; and (4) the proclamations by Governor Brewer for Arizona Days of Prayer have no secular purpose.

Date: September 30, 2011.

Respectfully submitted,  
**Morris Law Firm, pllc**

/s/ Richard W. Morris

By: Richard W. Morris, J.D., Ph.D.  
Attorneys for Plaintiffs

**Certificate of Service**

I certify on September 30, 2011, I electronically transmitted the above 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/ *Richard W. Morris*