IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FREEDOM FROM RELIGION FOUNDATION, INC.,	:	
Plaintiff,	:	Civil Action No. 1:12-cv-00536-CCC
v.	:	(Conner, J.)
REP. RICK SACCONE, CLANCY MYER, and ANTHONY FRANK BARBUSH,	:	
Defendants.	:	

BRIEF IN SUPPORT OF THE MOTION OF THE LEGISLATIVE DEFENDANTS TO DISMISS PLAINTIFF'S COMPLAINT

Defendants, Representative Rick Saccone, Clancy Myer, and Anthony Frank Barbush, submit this brief in support of their motion pursuant to Rule 12(b)(6) to dismiss the complaint of plaintiff, Freedom From Religion Foundation, Inc. ("FFR").

I. INTRODUCTION

At the beginning of this year, the Pennsylvania House of Representatives unanimously passed a resolution, H.R. No. 535, declaring 2012 to be the "Year of the Bible" in Pennsylvania (the "Resolution"). This *Resolution* is not a law – it is simply a nonbinding expression of the House's collective opinion

regarding the value of religion in the Commonwealth.[1] FFR, a self-proclaimed advocate for the separation of church and state, disagrees with the sentiments expressed in the resolution, and has filed suit against a state legislator and two legislative officials, seeking a judicial declaration that the Resolution is unconstitutional and that the actions of the legislative defendants in introducing, voting for, and publishing the Resolution somehow violated 42 U.S.C. § 1983. This lawsuit cannot go forward, however, because FFR lacks standing and the legislative defendants are immune from suit. The House of Representatives' acknowledgement of America's religious heritage is protected legislative speech, which reflects the deeply held view of many Pennsylvanians and does not injure FFR, its members, or anyone else.

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[1] The Pennsylvania House and Senate routinely pass such nonbinding resolutions on a variety of topics. Examples include: recognizing former Army Corporal Frank W. Buckles, America's last survivor of World War I (H.R. 313, 2011); designating the month of May 2012 as "Asian-Pacific American Heritage Month" in Pennsylvania (H.R. 714, 2012); recognizing April 22, 2012, as "Earth Day" in Pennsylvania (S.R. 287, 2012); commemorating the 100th anniversary of the Girl Scouts of the United States of America (S.R. 267, 2012); designating the month of May 2012 as "Jewish American Heritage Month" in Pennsylvania (H.R. 743, 2012); honoring a high school football team for winning a state championship (H.R. 161, 2011); designating the week of January 16 through 22, 2012, as "Martin Luther King, Jr., Holiday Week" (S.R. 238, 2011); recognizing May 2011 as "YMCA Appreciation Month" in Pennsylvania (S.R. 116, 2011); observing March 1, 2011 as "St. David's Day" in Pennsylvania (S.R. 46, 2011); recognizing February 7, 2012, as "National Black HIV/AIDS Awareness Day" in Pennsylvania (H.R. 557, 2012); and designating April 2011 as "Outdoor Heritage Month in the Pennsylvania Alleghenies" (H.R. 133, 2011).

In its complaint, FFR seeks to litigate religious history itself, from the Spanish Inquisition, past the Quakers and Jamestown colonists, all the way to "[M]odern day examples of religious violence." (Compl. ¶¶ 43-65.) What is conspicuously missing from FFR's pleading, however, is any evidence that the challenged Resolution actually caused either FFR or its members to suffer an "injury in fact." And without such an "injury in fact," FFR lacks Article III standing, just as it lacked standing in its recent, failed attempts to enjoin President Obama from issuing religious proclamations and to stop Texas Governor Rick Perry from supporting a prayer rally. FFR certainly has a right to disagree with the collective opinion of the Pennsylvania House of Representatives as expressed in the Resolution. However, such disagreements are to be vetted in the public square, not the federal courthouse.

FFR's claims are also barred by the constitutionally-based doctrine of legislative immunity, which protects state legislators, the legislative body, and legislative staff for their "speech or debate" – that is, any activities performed within the sphere of legitimate legislative activity. Because FFR has sued exclusively legislative parties for the passage of a legislative enactment (an activity falling squarely within the legislative sphere), all of the legislative defendants are absolutely immune from suit, and FFR's complaint must be dismissed.

II. FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint, FFR is a non-profit corporation that advocates for the separation of church and state. (Compl. ¶ 5.) Defendant Representative Rick Saccone is an elected member of the Pennsylvania House of Representatives. (Compl. ¶ 9.) The other two Defendants are officers of the Pennsylvania House of Representatives: Anthony Frank Barbush is its Chief Clerk, (Compl. ¶ 10), and Clancy Myer its Parliamentarian. (Compl. ¶ 11).

FFR alleges that Representative Saccone sponsored the Resolution. (See Compl. ¶ 15; House Resolution No. 535, attached as Exhibit "A.") The Resolution passed unanimously in the Pennsylvania House of Representatives on January 24, 2012, by a vote of 193-0. (Compl. ¶ 15.) Following the House's passage of the Resolution, the complaint alleges the Chief Clerk and Parliamentarian listed and published the Resolution, just as any other resolution or bill might be published, including on the House's website. (Compl. ¶ 20.)

Because of FFR's philosophical disagreement with the Resolution, it challenged the legislative enactment by filing a complaint on March 26, 2012. FFR claims, on behalf of itself and its members, that the Resolution violates the Establishment Clause of the First Amendment to the United States Constitution,

and Article I, Section 3, of the Pennsylvania Constitution,[2] by "expressly giving the government's endorsement to religion . . . specifically to the Judeo-Christian principles of the Bible." (Compl. ¶ 40.) FFR protests that the Resolution creates a "hostile environment" in which the Foundation's members, who are "nonbelievers," are made to feel "marginalize[d]" and "disparage[d]." (Compl. ¶¶ 67, 68.) In short, FFR alleges that it was offended by the Resolution, and that the Resolution somehow deprived its members of their constitutional rights in violation of 42 U.S.C. § 1983. It is under this theory that FFR seeks various forms of injunctive and declaratory relief, including an order enjoining the legislative defendants from publishing and distributing the duly-enacted, nonbinding Resolution and a declaration that "the theocratic principles of the Bible do not constitute the official, preferred, or endorsed religion of the State of Pennsylvania."

III. ARGUMENT

Plaintiff FFR fails to state a claim for which relief may be granted, and the complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of

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[2] FFR suggests that its claims arise under both the First Amendment to the federal Constitution as well as Article I, Section 3 of the Pennsylvania Constitution. (Compl. at p. 12.) Of course, § 1983 applies only to alleged violations of *federal* law. Regardless, Article I, Section 3 of the Pennsylvania Constitution does not provide any greater rights than does the federal Establishment Clause, and the analysis below under Establishment Clause jurisprudence therefore is dispositive of both theories. See Springfield Sch. Dist., Delaware County v. Dept. of Ed., 397 A.2d 1154, 1170-71 (Pa. 1979).

Civil Procedure, for the following reasons.[3] First, neither FFR nor its members have suffered any injury in fact as a result of the Resolution, and, therefore, FFR lacks standing to assert its claims. Second, the named defendants are all legislative personnel who carried out activities within the legitimate legislative sphere. As such, FFR's claims are absolutely barred by the doctrine of legislative immunity, and the complaint must be dismissed with prejudice.

A. FFR Lacks Standing

"In every federal case, the party bringing the suit must establish standing to prosecute the action." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004). This standing requirement flows from Article III of the Constitution, which "limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). In order to have standing for any of its claims, FFR must show, among

[3] Rule 12(b)(6) allows a court to dispose of actions at the pleading stage where, as a matter of law, the complaint fails to state a claim for which relief may be granted. This case is particularly ripe for disposition at this stage, because it presents purely legal questions, no additional facts are needed for resolution of the claims, and further facts cannot be developed from the legislative defendants in any event, because the doctrine of legislative immunity strictly limits discovery into the legislative domain. See, e.g., Brown v. Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 421 (D.C. Cir. 1995) ("A party is no more entitled to compel congressional testimony – or production of documents – than it is to sue congressman."); Miller v. Transamerican Press, Inc., 709 F.2d 524, 528-29 (9th Cir. 1983); Burtnick v. McLean, 76 F.3d 611, 613 (4th Cir. 1996).

other things, "injury in fact," which means that it must have a "concrete" harm that is "distinct and palpable, as opposed to merely abstract." Whitmore v. Ark., 495 U.S. 149, 155 (1990) (internal quotation marks omitted); see also Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2562 (2007) (plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"); Valley Forge, 454 U.S. at 472 (plaintiff must show that he "personally has suffered some actual or threatened injury"). The injury in fact requirement "is a hard floor of Article III jurisdiction." Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009).

Also implicit in the concept of standing are certain "prudential" considerations, including a "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." Newdow, 542 U.S. at 12. The United States Supreme Court has repeatedly held that an abstract claim that the government has failed to observe the Constitution does not confer standing, as "[s]uch claims amount to little more than attempts to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." Valley Forge, 454 U.S. at 483 (internal quotation marks omitted); see also Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998) ("[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared

grievance."); Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 298 n.2 (3d Cir. 2003) ("The Supreme Court has prohibited generalized grievances, which prevents individuals from suing if their only injury is as a taxpayer concerned with having the government follow the law."); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 200 (3d Cir. 1986) ("The Supreme Court has consistently rejected claims of citizens standing predicated upon the right, possessed by every citizen, to require that the government be administered in accordance with the Constitution.").

The practice rejected by the Court in Valley Forge is precisely what FFR is attempting here. FFR merely claims that the legislative defendants participated in the passage and publication of a nonbinding resolution, the content of which FFR and its members purportedly find objectionable. That is not "harm" felt in any concrete way. FFR is simply trying to use this federal forum as an avenue to redress generalized grievances against the state government. The Supreme Court has flatly rejected standing under these circumstances. Valley Forge, 454 U.S. at 473 (explaining that federal courts must filter out "appeals to their authority which would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders," thereby ensuring that the judicial system does not devolve into a "publicly funded forum[] for the ventilation of public grievances") (internal quotation marks omitted).

FFR is intimately familiar with the threshold standing requirement, both generally and on the specific fact pattern presented here. Time after time after time, FFR has brazenly ignored it, only to have its meritless litigatory crusades abruptly halted under the watchful eye of the federal judiciary. For example, FFR brought suit against President Obama in Freedom From Religion Found. v. Obama, challenging, on Establishment Clause grounds, the constitutionality of a federal statute creating a "National Day of Prayer" and seeking an order prohibiting the President from issuing prayer proclamations. 641 F.3d 803, 805 (7th Cir. 2011). Attempting to manufacture an "injury in fact," FFR argued in Obama, as it does here, that the religious message implicit in the challenged statute and proclamations made its non-religious members feel "excluded" and "unwelcome." Id. at 806-07. The Court of Appeals for the Seventh Circuit wasted no time rejecting this argument, and, based on long-established Supreme Court precedent, explained that "[t]he 'psychological consequence presumably produced by observation of conduct with which one disagrees' is not an 'injury' for the purpose of standing," and "a feeling of alienation cannot suffice as injury in fact." Id. at 807-08 (quoting Valley Forge, 454 U.S. at 485).

FFR suffered a similar fate in Freedom From Religion Found. v. Perry, No. 11-2585, 2011 WL 3269339 (S.D. Tex. July 28, 2011). Undeterred by its loss on standing grounds in the Seventh Circuit in Obama, and turning a blind

eye to the bedrock standing principles enunciated by the United States Supreme Court, FFR sought to enjoin Texas Governor Rick Perry from promoting a prayer rally dubbed "The Response: a call to prayer for a nation in crisis." FFR, in an ineffectual attempt to concoct an "injury," complained that the Governor's religious message caused FFR's members to "feel like political outsiders." Id. at *2. Again this argument was soundly rejected. Echoing the Court of Appeals for the Seventh Circuit, and also relying on well-settled Supreme Court jurisprudence, the Perry court concluded that "feelings of exclusion or being unwelcome arising from an invitation to engage in a religious observance that is contrary to their own principles are . . . not sufficient to confer standing because they are nothing more than the value interest of concerned bystanders." Id. at *5 (internal quotation marks omitted) (citing United States v. SCRAP, 412 U.S. 669, 667 (1973)).

Here, in its latest attempt to use the federal judicial system as a soapbox to further its philosophical agenda, FFR has attempted to resurrect the same flawed argument that was plainly and forcefully rejected in Obama and Perry. In an effort to obscure the fact that neither FFR nor its members have suffered any true harm as a result of the Resolution, FFR dedicates nearly two full pages of its complaint attempting to conjure an Article III injury where none exists. It asserts, among other things, that the Resolution "impermissibly marginalizes" non-Christians and non-believers, (Compl. ¶ 67), "creates a hostile environment,"

(Compl. ¶ 68), and, by "crediting the claims of theocrats and religious revivalists," harms FFR's ability to safeguard constitutional principles. (Compl. ¶ 72.) These purported "injuries" are insufficient to impart Article III standing, as courts have repeatedly admonished that neither the "value interests of concerned bystanders" nor the "abstract injury in nonobservance of the Constitution" are sufficient to satisfy Article III's requirement of real and concrete injury. See, e.g., Valley Forge, 454 U.S. at 473; Obama, 641 F.3d at 808.

The fact remains that, like the executive proclamations in Obama and Perry, the legislative resolution here does not require any action or inaction on the part of FFR, its members, or anyone else. It simply does not mandate anything. The Resolution here is just one of the multitude of other nonbinding resolutions passed by the Pennsylvania House and Senate, which are nothing more than invitations and acknowledgements that may be freely and effortlessly disregarded. And as the Court of Appeals for the Seventh Circuit aptly noted, "[n]o one is injured by a request that can be declined." Obama, 641 F.3d at 806. Because FFR's complaints are simply "generalized grievances," and it has not and cannot establish a "concrete" injury in fact, this Court must dismiss the action in its entirety. See Harris v. Corbett, No. 11-2228, 2012 WL 1565357, at *10 (M.D. Pa. May 2, 2012).

B. FFR's Claims are Barred by Legislative Immunity

Under the guise of §1983, FFR impermissibly seeks to embroil this federal Court in the inner workings of a state legislature. But such claims cannot stand. The Supreme Court has unequivocally held that state legislators and staff are entitled to "absolute immunity" from suit under §1983 for their legislative activities. Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998). Accordingly, FFR's claims against the legislative defendants must be dismissed in their entirety.

The right of legislators to be protected from liability for their legislative acts is a principle that has its genesis in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries, and thereafter was embraced by this Nation's founders, who enshrined it within the Speech and Debate Clause of the United States Constitution:

> [F]or any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONST. art. I, § 6, cl. 1; see also Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951). By the Speech or Debate Clause, the Framers sought to buttress the separation of governmental powers, which requires "some practical security for each [branch] against the invasion of others." THE FEDERALIST No. 48 (James Madison); see also Youngblood v. DeWeese, 352 F.3d 836, 839-40 (3d Cir. 2003) (tracing history of legislative immunity). Such immunity is essential to the survival of our democratic process, ensuring that the exercise of legislative

discretion is not "inhibited by judicial interference or distorted by the fear of personal liability." Bogan, 523 U.S. at 51.

It is from this jurisprudential lineage that the federal courts have developed the doctrine of common-law legislative immunity, which protects state lawmakers from being subjected to suit in federal courts for their legislative acts. Bogan, 523 U.S. at 49 ("[S]tate and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities."); Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 732 (1980) (confirming that "state legislators enjoy common-law immunity for their legislative acts"); Fowler-Nash v. Democratic Caucus of the Pennsylvania House of Representatives, 469 F.3d 328, 330-32 (3d Cir. 2006) (recognizing that "the Tenney Court extended legislative immunity to state legislators and officials as federal common law"). Indeed, common-law legislative immunity is "coterminous" with the absolute immunity afforded to members of Congress and their staff under the Speech and Debate Clause of the United States Constitution. Youngblood, 352 F.3d at 839 (citing Supreme Court of Virigina, 446 U.S. at 732-33). As such, it extends not only to state legislators themselves, but also to "legislative staff members, officers, or other employees of a legislative body," Rodriguez v. Pataki, 280 F. Supp. 2d 89, 95 (S.D.N.Y. 2003) (internal quotation marks omitted), and protects against claims for damages as well as claims seeking

declaratory and/or injunctive relief. See Bogan, 523 U.S. at 49; Supreme Court of Virginia, 44 U.S. at 732-33.

Absolute legislative immunity is to be "broadly [construed] to effectuate its purposes," Youngblood, 352 F.3d at 842 (quoting Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975), and extends to "all actions taken 'in the sphere of legitimate legislative activity.'" Bogan, 523 U.S. at 54 (quoting Tenney, 341 U.S. at 376). In determining whether an alleged act falls within the scope of legislative immunity, courts focus solely on "the nature of the act, rather than on the motive or intent of the official performing it," because "it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators." Bogan, 523 U.S. at 54-55. The sphere of legitimate legislative activity includes, of course, introducing and voting for legislation, and also includes other related activities that are "part of the legislative process," such as signing legislation into law. See id. at 54; see also Youngblood, 352 F.3d at 840 (providing examples of acts falling within the legislative sphere).

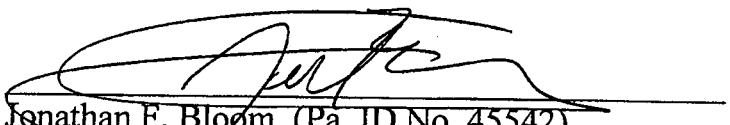
Here, the acts complained of by FFR — introducing, voting for, and publishing a House Resolution — fall squarely within what has been found by courts to constitute "legitimate legislative activity" as a matter of law. See Bogan, 523 U.S. at 54 (describing such activities as "quintessentially legislative"). By its claims, FFR challenges the legitimate legislative activities of a member of the

Pennsylvania House of Representatives (Saccone), the House's Chief Clerk (Barbush), and its Parliamentarian (Myers). The doctrine of legislative immunity precludes such an intrusive judicial foray into the politics, procedures, and prerogatives of state lawmaking. Indeed, it is difficult to imagine a legislative act more plainly protected from litigation than a legislative resolution. At its essence, a legislative resolution is *legislative speech.* Nothing more. Nothing less. As such, the legislative defendants are immune from suit in connection with such legislative activity, and FFR's complaint must be dismissed with prejudice.

IV. CONCLUSION

For all the foregoing reasons, the motion of the legislative defendants to dismiss the complaint should be granted and the complaint dismissed with prejudice in its entirety.

Respectfully submitted,



Jonathan F. Bloom (Pa. ID No. 45542)
Karl S. Myers (of Counsel)
Ian M. Long (of Counsel)
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098
(215) 564-8000

Attorneys for Defendants,
Representative Rick Saccone, Clancy Myer, and
Anthony Frank Barbush,

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