UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR, PAUL GAYLOR, DAN BARKER, PHYLLIS ROSE, and JILL DEAN,	)	
Plaintiffs,	)	
v.	)	Case No. 08-CV-588
PRESIDENT BARACK OBAMA, WHITE HOUSE PRESS SECRETARY ROBERT GIBBS, WISCONSIN GOVERNOR JIM DOYLE, and SHIRLEY DOBSON, CHAIRMAN OF THE NATIONAL DAY OF PRAYER TASK FORCE,	)	
Defendants.	)	

DEFENDANT SHIRLEY DOBSON'S REPLY IN SUPPORT OF HER MOTION TO DISMISS FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs' Brief in Opposition to Motions to Dismiss ("Opposition") confirms that Plaintiffs lack standing. Plaintiffs admit that none of them suffered injury that is in anyway different from the general population. Indeed, throughout their Opposition, Plaintiffs reiterate that the prayer proclamations were intended to reach a national audience, thus confirming that their alleged injuries are not individualized, but shared in common with the rest of the population. None of the proclamations were sent to Plaintiffs. The proclamations were not issued during any public meeting where government business occurred, such as a town council meeting or legislative session. Indeed, Plaintiffs have not even alleged that they attended any public meetings where they heard the proclamations. This case is not like the monument cases where a person had to walk by the monument in order to fulfill civic duties, or walk under a religious sign in order to get into a courtroom.[1] This case does not involve a religious display in a national park where a person has to see it every time he visits the park. Rather, this is a case where every single American could claim the same alleged injuries as Plaintiffs here. Where the entire population shares the same alleged injuries, the matter is not an appropriate issue for a federal court to decide.[2]

In the same way, Plaintiff Freedom from Religion Foundation, Inc. ("FFRF") lacks organizational standing as none of their members have standing. Although Plaintiffs try to bootstrap organizational standing because they have spent money and resources combating prayer proclamations, such expenditures do not confer Article III standing. Plaintiffs allege that

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[1] *See McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *Suhre v. Haywood*, 131 F.3d 1083 (4th Cir. 1997).

[2] *See Hein v. Freedom from Religion Foundation*, 551 U.S. 587, 127 S.Ct. 2553, 2563 (2007) (stating that when the plaintiffs' interests are the same as the public at large, "deciding a constitutional claim based solely on taxpayer standing 'would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.'")(quoting *Frothingham v. Mellon*, 262 U.S. 447, 489 (1923)).

they are similar to the organizational plaintiffs in *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982)(organization that actively tried to find housing for minorities) and *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007) (political organization that actively sought to register voters). But the injuries caused by the defendants' conduct in those cases were specific and tangible for a specific group of people – the denial of housing to African Americans and the denial of voting rights to the poor. In this case, the alleged wrongdoing of the Defendants only caused psychic harm – being offended by prayer. If no single person can obtain standing because of being offended by prayer, then a group of offended persons cannot cobble their concerns together to obtain standing.

Plaintiffs also lack standing as their alleged injuries cannot be redressed by a favorable court decision. Even if this Court were to declare 36 U.S.C. § 119 ("Public Law") unconstitutional, the President can still issue prayer proclamations, as has been done throughout this nation's history.[3] The Public Law does not mention any public official other than the President, so it has absolutely no bearing on prayer proclamations by governors. So striking down the Public Law will not afford Plaintiffs any relief. In addition, this Court cannot enjoin future proclamations by the President as it would violate the separation of powers doctrine. The Plaintiffs' argument that this Court can enjoin ministerial acts of the President does not apply in this case as the issuance of a prayer proclamation is not a ministerial act.[4]

Plaintiffs lack standing to bring any claim against future proclamations as any injury from such proclamations is speculative and not concrete. Plaintiffs do not know what type of

[3] *See* Amici Curiae Opposition of the American Center for Law and Justice, et al., filed in Support of the Defendants' Motions to Dismiss the First Amended Complaint.

[4] Plaintiffs' argument that President Bush aligned himself with Shirley Dobson demonstrates that the issuance of prayer proclamations is not a ministerial act, but involves the President's discretion as to content and form.

proclamation President Obama will issue. He might issue a highly inclusive invitation to pray, asking that all Americans of all faiths and no faith pray in their own individual way.

Even if Plaintiffs have standing, they fail to state a claim. The Establishment Clause does not apply to the President. Plaintiffs' only response to this was to claim that Defendant Dobson[5] did not cite any authority for this argument. But Defendant cited the United States Constitution! Is there a higher legal authority in this country other than the Constitution? Plaintiffs could not cite one case holding that the Establishment Clause applies to the President, and Defendant's counsel is unaware of any either. And this makes perfect sense because the text of Amendment I of the U.S. Constitution says "Congress shall make no law respecting the establishment of religion ...." It does not apply to the President.

Furthermore, proclaiming a national day of prayer does not violate the Establishment Clause. This case is controlled by *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), where the Supreme Court held that a legislature can hire a person for the express purpose of giving a prayer for the legislature. Plaintiffs did not cite directly to *Marsh* even one time in their Opposition, yet it is the most applicable precedent on this matter. If a legislature can hire a Christian minister to give a prayer for the legislature, then the President and other public officials can surely ask citizens to pray in their own respective ways for free. The Public Law and the proclamations in this case simply follow the history and traditions of this nation to seek Divine guidance. No one who understands this nation's history and traditions would think that prayer proclamations are anything other than the "tolerable acknowledgment of beliefs widely held among the people of this country."[6] And as such, they do not violate the Establishment Clause.

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[5] When "Defendant" is referred to in the singular, it is referring to Defendant Shirley Dobson, on whose behalf this Opposition is written.

[6] *Marsh*, 463 U.S. at 792.

II. PLAINTIFFS LACK STANDING.[7]

A. Plaintiffs Have Not Suffered An Injury In Fact.

Plaintiffs have only alleged generalized grievances that could be shared with the rest of the country – not the specific harm that is needed to confer Article III standing. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (plaintiffs do not have standing "to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens."). This is because "[t]he judicial power of the United States defined by Art. III is not an unconditional authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). "The federal courts are not empowered to seek and strike down any governmental act that they deem to be repugnant to the Constitutional. Rather, federal courts sit 'solely to decide on the rights of individuals.'" *Hein*, 127 S.Ct. at 2562 (*quoting Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803)). Federal courts

> have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. The question may be considered only when the justification for some *direct injury* suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.... The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some *direct injury* as the result of its enforcement, and *not merely that he suffers in some indefinite way in common with people generally.*

Frothingham v. Mellon, 262 U.S. 447 (1923) (emphasis added).

Plaintiffs do not allege that they have been harmed in any specific way other than they were offended by the proclamations. Plaintiffs do not allege that they came into direct and

[7] Plaintiffs attached several documents to their Opposition that were not referenced in their Amended Complaint, such as various news clips, websites, FFRF surveys and FFRF articles. The exhibits should be stricken as they are not documents referred to in the complaint. However, to the extent this Court decides to consider them and convert this to a summary judgment motion pursuant to Fed.R.Civ.P. 12(d), the Defendant requests an opportunity to take discovery on these issues and respond.

unwelcome contact with the proclamations in any way different than the general population. They do not allege that the President or his press secretary mailed them the proclamation. They do not allege that the proclamations were read in any public meeting that they had to attend in order to fulfill their civic duties. They do not allege that they had to view the proclamation every time they visited a national park. In fact, the Amended Complaint states that Plaintiffs either purposely sought the proclamations out or heard about them through the general media. *See* Comp. ¶¶ 95-110.

But this is not direct harm. This is harm that every single American shares. For example, Plaintiffs allege that the President intended the proclamation to reach a national audience, which includes them. *See* Opposition, 34-37. But this negates standing, not confers it. If the President intended a national audience, then being offended by the proclamation is nothing more than a generalized grievance, shared by the rest of the country. *See Hein*, 127 S.Ct. at 2563 (stating that when the interests are the same as the public at large, deciding a constitutional claim based solely on taxpayer standing "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.")(quoting *Frothingham*, 262 U.S. at 489).

Valley Forge is directly on-point – if the harm the plaintiffs claim is purely psychological offense to the government conduct in question, then the plaintiffs lack standing. In *Valley Forge*, the United States gave away land worth at least $577,500 to a sectarian religious college. *Id.* at 468. Like the Plaintiffs in this case, the plaintiffs in *Valley Forge* believed in a strict separation of church and state. But the Court held that such psychological harm does not confer Article III standing.

> [T]he psychological consequence presumably produced by observation of conduct with which one disagrees ... is not an injury sufficient to confer standing under

> Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Id. at 485-86.

Plaintiffs try to distinguish *Valley Forge* by stating that the government conduct there was not targeted at the plaintiff, while in this case, the government conduct (the prayer proclamations) is targeted at the entire nation, which includes the Plaintiffs. *See* Opposition 34. But plaintiffs' distinction undermines their standing. If the intended audience is the entire nation, then Plaintiffs have not alleged an injury that is any different than the rest of the population. If everyone is affected by it equally, then such injuries are shared by everyone and are generalized grievances. *See Hein*, 127 S.Ct. at 2562 ("The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.").

A plaintiff cannot "roam the country" seeking to be offended, and then claim standing based on the offense alone. *See Valley Forge,* 454 U.S. at 487. Plaintiffs claim that they did not have to roam the country in order to encounter the proclamations, but that their members brought it to their attention. *See* Opposition, 36. But this is not a meaningful distinction. Nowhere in their Amended Complaint did they allege that they had to view the proclamations in order to fully engage as citizens or fulfill their civic duties. The proclamations were not posted on any courthouse door. They were not read at a public meeting that they attended. Rather, they had to seek out the proclamations in order to be offended, and this does not confer standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *see also Hinrichs v. Speaker of the House of Representatives of the Indiana General*

Assembly, 506 F.3d 584 (7th Cir. 2007) (stating that a plaintiff must show that "he has sustained, or is immediately in danger of sustaining some direct injury ... and not merely that he suffers in some indefinite way in common with people generally.").

Plaintiffs claim that since *Valley Forge*, "courts have uniformly found that the *Valley Forge* decision does not stand for the proposition that 'psychological injury' can never be a sufficient basis for the conferral of Article III standing." Opposition, 37. But Plaintiffs failed to cite a single case standing for this proposition. Instead, Plaintiffs cite *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (crèche in county courthouse); *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005) (Ten Commandments display in county courthouse), and *Suhre v. Haywood*, 131 F.3d 1083 (4th Cir. 1997) (Ten Commandments display in county courtroom). Each of these cases involved a religious display on country property where civic business is conducted. In none of these cases did the court hold that mere psychological injury was enough to confer standing. In each case, the alleged injury impacted the ability of the plaintiffs to conduct civic business.

Plaintiffs allege that with regard to local monuments or displays, it is enough to confer standing that a plaintiff alleges he or she has come into direct and unwelcome contact with the religious display. *See* Opposition, 33; citing *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000)(*Books I)*; *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005) (*Books II*); and *Doe v. County of Montgomery*, 41 F.3d 1156 (7th Cir. 1994). But a proclamation is not the equivalent of a local monument or display. The facts of these cases highlight the difference. In *Books I and II*, the plaintiff claimed injury because he had to *pass* a religious monument on the lawn of a County administrative building. The court described the injuries as follows: "Books and his fellow plaintiff in our earlier *Books* case alleges that they were forced to come into direct and

unwelcome contact with the City of Elkhart's outdoor Ten Commandments monument *when they entered the municipal building to conduct business or attend public meetings and when they visited the adjacent public library.*" *Id.* Similarly in *Doe*, the plaintiff had to pass under a sign over the courthouse door that read "THE WORLD NEEDS GOD" every time he entered the courthouse. *See* 41 F.3d at 1156. In such cases, "it is enough for standing purposes that a plaintiff allege that he must come into direct and unwelcome contact with the religious display to participate fully as a citizen and to fulfill legal obligations." *Books II*, 401 F.3d at 861 (citations omitted). But unlike these cases, the Plaintiffs here do not have to view the proclamations in order to conduct their public business or fulfill their civic obligations.[8]

Plaintiffs allege that standing is not defeated if a person "voluntarily" passes an offensive display. *See* Opposition, at 33. But a person does not have standing to challenge a religious display if he only voluntarily learns of its existence and is thus offended. The person still has to voluntarily "come into direct and unwelcome contact with the" religious display to participate fully as citizens and to fulfill legal obligations. *Books II*, 401 F.3d at 861. Thus, even if a plaintiff voluntarily walked past a religious monument in order to enter a courthouse rather than enter through another entrance, the plaintiff would have standing. *Books I*, 235 F.3d at 300. But here, Plaintiffs have made no such showing. They did not have to view the proclamation in order to fulfill any civic duty. And their "duty" to learn of governmental proclamations is no different than the rest of the population.

Buono v. Norton, 212 F.Supp.2d 1202 (C.D. Calif. 2002), cited by the Plaintiffs, does not support Plaintiffs' standing. In *Buono*, two persons who regularly visited a national park were

[8] Even if Plaintiffs did attend a prayer event, which they have not alleged that they did, they would still lack standing. They would only be attending the event to subject themselves to the prayers for purposes of filing the lawsuit. Attending a NDP event to hear prayers is not the equivalent of attending a town board meeting and hearing a prayer as they would not be attending the meeting to conduct any civic business other than to be offended.

offended by the display of a cross in the national park. One of the plaintiffs went to the location of the cross specifically for the purpose of being offended. But the court stated that doing so did not give that plaintiff standing! "The fact that Schwartz initially proactively sought to find the cross is also irrelevant. Standing sufficient to warrant the imposition of prospective injunctive relief is not based on Schwartz's previous visits to the Preserve, but rather on such future visits. ***While the fact that he intends to visit the cross regularly "because he finds the presence of the cross ... offensive" might not establish an injury in fact,*** Schwartz also asserts that his 'enjoyment of the area' will be lessened due to the presence of the cross when he passes through the Preserve in the future for reasons other than checking on the status of the cross." *Id.* at 1212. Thus, the plaintiff did not have standing to challenge the religious display because he went to it to be offended. Rather, he had standing because of his future loss of enjoyment of visiting the park due to the existence of the cross. Here, the existence of the proclamations will not hinder Plaintiffs' ability to enjoy a public park, or fulfill any civic duty.

Plaintiffs cite *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) for the proposition that plaintiffs have standing if they "know the [religious symbol] is there, whether [they] see it or not." *See* Opposition, 39. Plaintiffs have seriously misrepresented the ruling in *Books*. The above quote Plaintiffs provided was from the facts section of the opinion, not the analysis. They were quoting a statement from the *plaintiff himself* who said he "know [s] the Ten Commandments monument is there whether [he] see[s] it or not." *Id.* at 297. But in the analysis section of the opinion where the court addressed the standing issues, the court was clear that in order to have standing, the plaintiff must come into "direct and unwelcome contact with the [religious] monument to participate fully as citizens ... and to fulfill certain legal duties." *Id.*

Nowhere in the opinion did the court insinuate that it would be enough for standing if a person did not come into direct contact with the item, but rather, only "knew that it was there."[9]

Plaintiffs argue that requiring "pedestrian exposure as a prerequisite for standing ignores the reality of modern communication." *See* Opposition, 37. But the mode of communication is not the deciding factor here. In order to have standing, Plaintiffs have to be harmed in some specific way that is not shared by the general population. Whether the prayer proclamation is disseminated via posting on a wall, or blasted through the internet, the issue is the same – has Plaintiff been harmed in a specific way not shared by the general population? Here, the answer is no.

Plaintiffs cite *Allegheny County v. ACLU*, 492 U.S. 573 (1989) and *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005) for the proposition that prayer proclamations are different than legislative prayers. *See* Opposition, 34. This argument, made in support of standing, has no bearing on standing. Even if legislative prayers were different than prayer proclamations (and there is no meaningful difference), Plaintiffs must still be harmed in some way that is not shared by the general population. For example, in *Simpson*, the plaintiff was a person who attended the public meetings and was thus subjected to the prayers. Here, there were no meetings and no direct personal contact with the proclamations.

In addition, Plaintiffs misrepresented the Court's statement. Plaintiffs cite to a footnote from *Allegheny* that stated that *Marsh* might be different than National Day of Prayer proclamations. But Plaintiffs cut off the quote so that it did not contain the following sentence,

[9] In addition, "offended observer" standing does not apply in this case. Defendant's counsel is unaware of any Supreme Court or Circuit court opinion that has held that the offended observer test applies against a federal defendant. All of the cases cited by Plaintiffs pertaining to the offended observer test, with the exception of *Buono v. Norton*, 212 F.Supp.2d 1202 (C.D. Calif. 2002), involved a state or local defendant, not a federal defendant.

which is "But, as this practice is not before us, we express no judgment about its constitutionality." *See* 492 U.S. at 603 n. 52.

Plaintiffs argue that if they are denied standing, then no one would have standing to challenge unconstitutional actions that violate the Establishment Clause. This same argument was already rejected in *Hein*. *See* 127 S.Ct. at 2571 (rejecting the argument that if plaintiffs did not have standing to challenge Executive Branch expenditures in violation of the Establishment Clause, then a parade of horribles would occur, by stating that the political process could correct the problem). But furthermore, it is incorrect. If a person were specifically harmed, he or she would have standing to challenge the proclamations. For instance, if a government employee, such as the press secretary, were required to attend a religious ceremony, he or she could claim a specific injury. An employee who was required to write a religious proclamation could claim a constitutional injury. But the general public does not have standing to challenge government action based only on being aware that it occurred.

B. FFRF Does Not Have Organizational Standing.

Plaintiffs claim that FFRF has organizational standing as Defendants' actions have affected FFRF's ability to accomplish its goals. *See* Opposition, 41. But this is not the law. In order to have organizations standing (outside of having members who themselves have standing), the Defendants' actions must still injure the members in some specific way that is not shared by the general population. A review of the cases pertaining to organizational standing shows the differences in the cases where organizational standing has been awarded and this case, where it would not be appropriate.

In *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), cited by the Plaintiffs, individuals and an organization ("HOME") brought suit against the owner of an apartment

complex alleging that certain racial steering practices violated the Fair Housing Act.[10] *Havens* dealt with the standing of three different types of persons. First, there was an African American "renter plaintiff" who wanted to rent an apartment from Havens, but was falsely told that no apartments were available. *Id.* at 368. Clearly, this person had standing to sue. Second, there were "tester plaintiffs" who asked Havens, the owner of the apartment complex, if there were apartments available to rent as a means to test them to see if they were complying with the Act. The African American testers who were falsely told "no" had standing because, according to the Court, the Act conferred standing on "any person" who was given false information about available housing based on race. *See id.* at 373. But the Caucasian testers, who were correctly told there were vacancies, did not have standing because they were not given false information, and thus were not injured. *See id.* at 375. Thus, even though the Caucasian testers were aware of illegal activities, this awareness did not confer standing to sue in federal court.

Third, the Court held that HOME had organizational standing apart from representing its members. The Court first stated that special rules do not apply for organizational standing. According to the Court, "In determining whether HOME has standing under the Fair Housing Act, we conclude the same inquiry as in the case of an individual: Has the plaintiff 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *Id.* at 378-79 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). HOME alleged that Haven's discriminatory practices impaired its efforts to assist minorities in finding affordable housing. *See id.* at 379. The Court held that this was enough for standing.

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low and moderate-income homekeepers, there can be no question that the organization has suffered injury to the organization's activities-with the consequent drain on the

[10] *Havens* dealt with "standing to sue under the Fair Housing Act of 1968", not standing to bring an Establishment Clause claim. *See id.* at 366.

> organization's resources-constitutes ***far more than simply a setback to the organization's abstract social interests.***

Id. (emphasis added).

So in *Havens*, the complained of action – discriminatory housing practices – had a real impact on people – it denied them a place to live. Persons were being denied housing due to their skin color. HOME had to spend money and resources to counteract these discriminatory actions in finding people housing. Here, FFRF is not trying to counteract discriminatory housing practices and spending money to find people homes who were victims of the discriminatory conduct. Rather, they allege they are being frustrated in their abstract social interest in eliminating the National Day of Prayer. This type of injury does not confer Article III standing. *See Valley Forge*, 454 U.S. at 474.

Plaintiffs cite *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), for the proposition that "an organization suffers an injury when a statute 'compels it to divert more resources to accomplishing its goals.'" *See* Opposition, 42 (quoting *Crawford*, 472 F.3d at 951). Plaintiffs' argument is flawed for several reasons. First, this quote is not in *Crawford.* In fact, the undersigned did a search of all federal cases for this quote, or a similar one, and could not find a single case. But furthermore, *Crawford* does not stand for the proposition that an organization has Article III standing simply because its goals are frustrated. In *Crawford,* the Democratic Party challenged a state law that required photo identification to vote. The Democratic Party alleged that the voter ID law would have a disparate impact on lower income voters, and because lower income voters tended to vote for the Democratic candidate, it would have a disparate impact on the Democratic Party. *See id.* at 951. The court thus concluded that "the new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from

bothering to vote." *Id. Crawford* is very much like *Havens* in that it dealt with a real, tangible injury – the right to vote. It did not pertain to mere psychic injuries, such as being offended or the goal of eradicating offensive prayers.

In the same way, *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11TH Cir. 2008), is not applicable. In *Browning*, a political organization brought suit challenging Florida's voter registration statute because it would require the organization to use its scarce time and resources in correcting voter mismatches rather than registering new voters, thus causing them specific injury.

Havens, Crawford, and *Browning* are not applicable to FFRF's standing in this case. Each of those cases dealt with a special interest organization expending money and resources to counteract tangible injuries caused by the governmental action in question. Here, the only money being spent by FFRF is to promote its agenda to be free from *knowing about* the National Day of Prayer. This is purely an abstract social interest and psychic injury. If individual plaintiffs who are offended by the prayer proclamations do not have standing, they cannot cobble their claims together and spend some money to fight the proclamations to manufacture standing.

C. Plaintiffs Lack Standing As Their Injuries Cannot be Redressed.

In order to have standing, a plaintiff must not only allege a particularized injury, but also that the injury can be redressed by a favorable court decision. *Valley Forge Christian College*, 454 U.S. at 472. Here, Plaintiffs' requested remedy would not redress their alleged injuries, and further would violate the Separation of Powers Doctrine.

1. Any Relief Directing The President On What He Can Say Would Violate The Separation of Powers Doctrine.

In *Hein,* the Supreme Court addressed whether a person has standing to challenge the expenditures of the Executive Branch in violation of the Establishment Clause. Even though

Hein dealt with tax-payer standing, the Court's response is applicable here as well. The Court stated:

> Relaxation of standing requirements is directly related to the expansion of judicial power, and lowering the taxpayer standing bar to permit challenges of purely executive actions would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. The rule respondants propose would enlist the federal courts to superintend, at the behest of any federal taxpayer, ***the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials***. This would be quite at odds with ... *Flast's* own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances' about the conduct of government, and would open the Judiciary to an arguable charge of providing government by injunction.... ***It would deputize federal courts as virtually continuing monitors of the wisdom and soundness of Executive action, and that, most emphatically, is not the role of the judiciary.***

127 S.Ct. at 2570 (citations omitted)(emphasis added).

Plaintiffs respond by saying that courts can enjoin the President from performing "ministerial" duties. *See* Opposition, 71. But issuing prayer proclamations is not a ministerial duty, but a discretionary function of the presidency. A ministerial duty is one that admits of no discretion, so that the government official in question has no authority to determine whether or not to perform the duty. *See Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996). A duty is discretionary if it involves judgment, planning, or policymaking. *See Beatty v. Washington Metro Area Transit Authority*, 860 F.2d 1117 (D.C. Cir. 1988). Here, Plaintiffs' allegations prove the discretionary nature of presidential prayer proclamations. There is nothing in the Public Law concerning the content of the proclamations. The President could issue a proclamation inviting only Christians to pray, all faiths to pray, or those of no faith to pray in their own way through meditation. Plaintiffs also allege that President Bush aligned himself with Mrs. Dobson, but there is nothing in the Public Law that requires this action, making it ministerial.

But more to the point, the President can issue proclamations with or without Congressional approval. In fact, many presidents have issued prayer proclamations without Congressional direction. *See Amici Curiae* Brief of the American Center for Law and Justice, et al., A6-A22. Because the issuance of proclamations is not simply a ministerial function, Courts do not have the power to enjoin the President in the manner requested by the Plaintiffs.[11]

2. Declaring the Public Law Unconstitutional Would Not Redress Plaintiffs' Alleged Injuries.

Plaintiffs allege they have been injured due to Governor Doyle's prayer proclamations and the presidential prayer proclamations. But even if this Court were to strike down the Public Law, it would not give Plaintiffs any relief. The Public Law does not pertain to any public official other than the president. Thus, it has no bearing whatsoever on Governor Doyle's prayer proclamations. In addition, even if the Public Law is stricken, the President could still issue prayer proclamations, as presidents have done throughout our history. Thus, Plaintiffs lack standing to challenge the Public Law as they cannot obtain a remedy that would redress their alleged injuries.

3. Declaring Previous Presidential Prayer Proclamations Unconstitutional Will Not Redress Plaintiffs' Alleged Injuries.

Plaintiffs seek a declaratory judgment that previous presidential prayer proclamations are unconstitutional. But declaratory judgments, by themselves, do not redress past injuries. Retrospective declaratory judgments are nothing more than advisory opinions, which a federal court is prohibited from giving. *See Community for Creative Non-Violence v. Hess*, 745 F.2d 697, 700-01 (D.C.Cir.1984) ("it is settled that a declaratory judgment is properly denied when the disputed practice has ended, such as through the repeal of a challenged statute."); *see also*

[11] In the same way, the Establishment Clause is best viewed as a structural right (similar to the separation of powers doctrine), as compared to an individual right. *See* Carl Esbeck, *The Establishment Clause As A Structural Restraint On Governmental Power*, 84 Iowa L. Rev. 1 (1998).

U.S. v. Fischer, 833 F.2d 647 (7th Cir. 1987) ("advisory opinions are forbidden by Article III of the Constitution and by the Federal Declaratory Judgment Act"). Plaintiffs did not respond to this argument.

D. Plaintiffs' Claims Against Future Prayer Proclamations Are Not Ripe.

In addition, Plaintiffs lack standing to challenge future prayer proclamations as any injuries from such proclamations are highly speculative, and not concrete. *See Lujan,* 504 U.S. at 560-1 (stating injury must be "concrete and particularized," and "actual or imminent," not "conjectural or hypothetical"). Any alleged injuries are speculative because we do not know what future prayer proclamations, if issued, will say. The main target of Plaintiffs' Amended Complaint is the supposed adoption of Task Force Themes in prayer proclamations by President Bush. But President Bush is no longer the president and cannot issue any more prayer proclamations. Plaintiffs have made no allegation that President Obama and Shirley Dobson have acted jointly and in concert concerning the National Day of Prayer for 2009. It would be pure speculation and guesswork to predict any alleged relationship between President Obama and Shirley Dobson. It would require even more speculation to guess what President Obama's proclamation, if one is issued, would say. It very well could encourage Christians, Hindus, Muslims, Jews, Wiccans, and *even Atheists* to pray or meditate in their own way. Plaintiffs are asking this court to guess what relationship President Obama and Shirley Dobson will have, and what any prayer proclamation, if one is issued, will say. Such guess work does not confer Article III standing.

Plaintiffs argue that voluntary cessation of conduct does not moot a case. *See* Opposition, 68. But this is not about mootness. President Obama has never issued a prayer proclamation. He has never "aligned" himself with Mrs. Dobson. It is just pure speculation to

guess what Obama's prayer proclamation might state, or how he might disseminate it. To suggest that just because President Bush did things a certain way that President Obama will follow is to deny the reality of the oval office.

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM.

A. The Establishment Clause Is Not Enforceable Against The President.

The First Amendment is perfectly clear, "Congress shall make no law respecting the Establishment of religion ..." By its terms, it does not apply to the President. Surely, the drafters of the First Amendment understood the difference between the President and Congress as they were the ones responsible for creating the three branches of government!

Plaintiffs' only response to this argument is that "no known authority supports the defendants' claim that the Establishment Clause has no applicability to the President." *See* Opposition, 57. But Defendants' cited authority was the United States Constitution. Is there a higher legal authority in this country? What authority are Plaintiffs looking for if the Constitution does not count as "known authority"? The first task in deciphering the meaning of a Constitutional provision is to apply the plain meaning of the text. *See Lamie v. United States Trustee*, 540 U.S. 526 (2004) ("The starting point in discerning congressional intent is the existing statutory text"); *Park 'N Fly v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (stating it is well established that "when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms."). The language is clear – the Establishment Clause applies to Congress, not the President.

The Supreme Court agrees that the Establishment Clause was designed to combat *congressional* action. In *McGowan v. Maryland*, the Supreme Court stated: "The purpose of the

Establishment Clause was to assure that the *national legislature* would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of *legislation*." 366 U.S. 420 (1961) (emphasis added).[12] Not a single decision by the Supreme Court has found the Executive to be bound by the Establishment Clause. Instead, the Court's Establishment Clause jurisprudence has focused on either legislative enactments or, under the incorporation doctrine and through the Fourteenth Amendment, state or local governments. *See, e.g., id.* (adjudicating a challenge to state Blue laws).[13]

Cooper v. United States Postal Service, 482 F.Supp.2d 278 (D. Conn. 2007) did find that an executive agency is bound by the Establishment Clause. But this district court decision did not address the threshold question of whether the Clause can be properly applied to a non-legislative entity at all, making its holding inapplicable to this issue. Further, executive agencies are distinguishable from the Executive himself. Executive agencies exercise not only executive power but also quasi-legislative power, bringing them within the reasonable scope of the Establishment Clause's limitations. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). But the Executive himself is not Congress, does not possess legislative powers, and is not bound by the Establishment Clause.

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[12] *See also Buckley v. Valeo*, 424 U.S. 1 (1976) ("We have, of course, held that the Religion Clauses "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" require *Congress*, and the *States* through the Fourteenth Amendment, to remain neutral in matters of religion."); *School Dist. Of Abington Tp., Pa. v. Schempp*, 374 U.S. 203 (1963) ("As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all *legislative* power respecting religious belief or the expression thereof.").

[13] *See also Engel v. Vitale,* 370 U.S. 421 (1962) (state public schools); *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970) (city tax system); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (state public schools); *Lee v. Wiseman*, 505 U.S. 577 (1992) (state public schools); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (state public school).

B. Plaintiffs Have Utterly Ignored the Leading Prayer Case, *Marsh v. Chambers.*

Plaintiffs argue that prayer proclamations are unconstitutional, but never once mention or tried to distinguish the leading case on official prayers – *Marsh v. Chambers*, 463 U.S. 783 (1983). In fact, Defendant's counsel was unable to locate even a single direct citation to *Marsh* in Plaintiffs' Opposition.[14] This deliberate avoidance of the most applicable case can only be seen as an attempt to have this Court overrule the essential holding of *Marsh*. *Marsh* is directly applicable because it involved a practice that has been going on since the Founding Father's era and is a reflection of our nation's religious heritage.

In upholding legislative prayer, the Supreme Court stated, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." 463 U.S. at 790. The Court pointed out that the historical record shows that the "opening of sessions of legislative and *other deliberative public bodies* with prayer is deeply embedded in the history and traditions of this country." *Id.* at 786 (emphasis added). The *Marsh* Court determined that the First Congress "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official seal of approval on one religious view," but rather, "conduct whose ... effect ...[harmonized] with the tenets of some or all religions." *Id.*/ at 792. The Court concluded, "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*

[14] Indeed, the only reference to *Marsh* is on page 35 of the Opposition Brief where Plaintiffs argue they have standing and quote from *Allegheny*, which mentions *Marsh*.

In the same way, the practice of issuing public proclamations to pray dates back to George Washington and the First Congress. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality); *see also Amici Curiae* Brief of the American Center for Law and Justice, A1-A59. A public proclamation seeking prayer is not a step towards establishment, it is simply a tolerable acknowledgement of this nation's religious heritage.

Plaintiffs cite historical evidence that a few founding fathers did not like the practice of prayer proclamations. *See* Opposition, 54. But unanimous support of a practice is not required in order to show it has historically been followed in the United States. These same founding fathers mentioned by the Plaintiffs were probably as equally opposed to legislative prayers, but this does not mean that legislative prayers did not historically occur. As Defendant's initial Brief and the Amicus Brief of the American Center for Law and Justice make clear, the practice of official proclamations by the president, with or without congressional approval, has been going on since before the days of George Washington.

C. Plaintiffs' Endorsement Test Analysis Is In Error.

The thrust of Plaintiffs' arguments against the constitutionality of prayer proclamations is based on the endorsement test. *See* Opposition, 45-67. As explained above, Plaintiffs have erroneously relied on the Endorsement test to the exclusion of the *Marsh* test. A careful reading of the Supreme Court's Establishment Clause cases since *Marsh* show that *Marsh* is still controlling law in this area. Whenever a Court majority has addressed *Marsh*, it has defended the decision.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Id.* at 674. "[American] history is replete with official references to the value

and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court even referred to the National Day of Prayer as another constitutional acknowledgment of America's religious heritage. *Id.* at 677. The Court concluded,

> This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history. In our modern, complex society whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Id. at 678 (citations omitted).

Likewise, the Court in *Allegheny* supported the reasoning in *Marsh* when it stated, "The concurrence [in *Lynch*] ... harmonized the result in *Marsh* with the endorsement principle in a rigorous way, explaining that legislative prayer is a [constitutional] form of acknowledgment of religion ...." 492 U.S. at 595 n.46 (citations omitted).

Even the creator of the Endorsement test, Justice O'Connor, agreed that government acknowledgments of religion that date to the adoption of the Establishment Clause cannot properly be held to violate it. *See Wallace v. Jaffree*, 472 U.S. 38, 79-80 (1985) (O'Connor, J., concurring). In her concurring opinion in *Lynch*, she rejected the idea that legislative prayer violated the Establishment Clause. *See id.* at 688-90. Justice O'Connor stated that government acknowledgments of religion such as legislative chaplains and Thanksgiving Day proclamations

> serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id. at 693 (O'Connor, J., concurring); *see also Wallace v. Jaffree,* 472 U.S. at 79-80 (O'Connor, J., concurring) (""Whatever the provision of the Constitution that is at issue, I continue to believe that 'fidelity to the notion of constitutional – as opposed to purely judicial – limits on government action requires us to impose a heavy burden on those who claim that practices accepted when [the provision] was adopted are now constitutionally impermissible. ...As Justice Holmes once observed, "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.") (citations omitted).

Specifically referring to the National Day of Prayer proclamations, Justice O'Connor opined that such proclamations would "probably withstand Establishment Clause scrutiny given their long history." *Id.* at 81 n.6. Consequently, even if the endorsement test were applicable, proclamations to pray easily pass the test. A reasonable observer, knowing the unique history of prayer proclamations in this country, would not perceive them to be anything more than toleration of religious practices that have been occurring in this nation for over 200 years. *See also Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Justice Breyer Concurring) ("Neither can 'this Court's other tests readily explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving."); *id.* at 723 (Stevens, J. dissenting) ("Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents.... In this sense, although Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which

the separation of church and state is aimed."); *Elk Grove Unified School Dist.*, 542 U.S. at 26 (Rehnquist, concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound"); *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984) ("Our history is replete with official references to the value and invocation of Divine guidance").

D. President Bush's 2008 Prayer Proclamation Was Constitutional.

In Defendant's initial brief, she pointed out that President Bush's 2008 Prayer Proclamation was no different than President George Washington's in 1789, *see Van Orden*, 545 U.S. at 687, and that it was no different than the prayer given by the state chaplain in *Marsh*. Plaintiffs do not dispute this in their Opposition. Instead, Plaintiffs' argument really boils down to two premises: (1) that the state violates the Constitution when it seeks prayer, and (2) the supposed alignment of President Bush with Shirley Dobson makes his proclamations different from previous proclamations, and thus unconstitutional.

Plaintiffs' first premise – that the state violates the Constitution when it seeks prayer – is incompatible with *Marsh*, as explained above, and must be rejected. Plaintiffs' second premise must also be rejected. Assuming Plaintiffs' allegations to be true for purposes of this motion to dismiss, it is irrelevant that Mrs. Dobson formed a group to promote the National Day of Prayer and actively encouraged elected officials to proclaim a day of prayer. There is nothing wrong or insidious with private persons encouraging others, even public officials, to pray. There is nothing unconstitutional with a private person petitioning her elected officials to support a National Day of Prayer. In any event, the proclamations that were issued did not violate the Establishment Clause.[15]

[15] It's Mrs. Dobson's position that Plaintiffs' "entwinement" claims that President Bush and Governor Doyle acted jointly with Mrs. Dobson are likewise without merit. However, because the alleged result of such joint action are

E. Governor Doyle's 2008 Prayer Proclamation Was Constitutional.

In her initial brief, Defendant pointed out that Governor Doyle's 2008 Prayer Proclamation also passes constitutional review. In the proclamation, Governor Doyle adopted a nonsectarian theme which was not the same as the Task Force's 2008 theme. His theme was, "America, Unite in Prayer." He then asked people of all faiths in Wisconsin to pray. It is no different than the previous prayer proclamations issued by various presidents, including George Washington's. Plaintiffs did not dispute this in their Opposition.

CONCLUSION

Plaintiff FFRF has been peddling its liberal standing arguments across the country in an effort to eradicate what they deem to be offensive religious expression. But no court has bought it, including the United States Supreme Court, and this Court should not either. *See, e.g., Hein v. Freedom from Religion Foundation*, 551 U.S. at 587, *Freedom From Religion Foundation, Inc. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008) (public interest group lacked standing to challenge integration of faith into health care services to veterans); *Freedom From Religion Foundation, Inc. v. City of Green Bay,* 581 F.Supp.2d 1019 (E.D.Wis. 2008) (FFRF lacked standing to challenge display of nativity scene on roof of city hall); *Freedom From Religion Foundation, Inc. v. Olson*, 566 F.Supp.2d 980 (D.N.D. 2008) (plaintiffs lacked standing to challenge use of funds to support religion).

This case should be dismissed for three simple reasons. First, prayer proclamations have not injured the Plaintiffs in any way distinct from the general population. As they point out in

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the prayer proclamations, and such proclamations are constitutionally sound, this Court does not need to decide the entwinement claims. Should the Court determine otherwise, Mrs. Dobson requests that she be permitted to submit additional briefing on that issue after this Court rules on her motion for a more definitive statement. Based on the allegations in the Amended Complaint, it is unclear whether Plaintiffs are claiming that Mrs. Dobson acted jointly with state actors, or the Task Force did. Until Plaintiffs clear this matter up, Mrs. Dobson is unable to adequately respond.

their own briefs, the prayer proclamations were intended for a national audience. These proclamations were not read at any government meeting, or posted at the local town hall. Plaintiffs do not have to see them in order to perform civic duties or to fully engage as citizens. This case is about pure psychic injuries in that plaintiffs are intensely opposed to prayers, but such cases are not justicable.

Secondly, even if Plaintiffs had been injured, such injuries could not be redressed by a favorable court decision. Courts cannot enjoin the President from asking the nation to pray, which is what Plaintiffs are seeking. Such an order would violate the Separation of Powers doctrine.

And third, even if Plaintiffs have standing, prayer proclamations do not violate the Establishment Clause. This nation has a long history of issuing prayer proclamations, going back to George Washington's first Thanksgiving Day proclamation. As such, they are simply a tolerable acknowledgment of this nation's religious history and traditions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2009, I electronically filed a copy of the above using the ECF System for the Western District of Wisconsin, which will send notification of that filing to all counsel in this litigation who have entered an appearance, including counsel for plaintiffs.

/s/Joel Oster
Joel Oster