UNITED STATES DISTRICT COURT
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.

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

I. INTRODUCTION

Every year the President of the United States issues an official Prayer Proclamation and dedicates a National Day of Prayer. The President does this because Congress has legislatively mandated that he do so. The President has not hesitated to issue such Prayer Proclamations, which extol the virtues of prayer and exhort all Americans to engage in prayer. This annual message of religious endorsement is then disseminated by the President's Press Secretary with the intent that it will be made known to all Americans.

The posting of the President's Prayer Proclamation on a courthouse door, or mailing it directly to citizens, or handing it out at employment offices, would unquestionably run afoul of the Establishment Clause, just as disseminating it to all citizens merely compounds the offense. The government, after all, cannot endorse, promote or prefer religion over non-religion, and prayer is quintessentially a religious activity. For that reason, these plaintiffs have brought this matter to the Court's attention challenging the President's endorsement of religion, which the Establishment Clause prohibits.

Just as courts prohibit the display of religious monuments, creches, menorahs, and Ten Commandments where a reasonable observer would perceive endorsement, so also these plaintiffs ask the Court to enjoin the annual call to prayer that has been institutionalized by Congress and implemented by the President with a dedicated National Day of Prayer, official Prayer Proclamations, and celebration of religion. The court has the authority to determine the appearance of endorsement created by a creche or menorah or other religious display; this Court also has the authority and responsibility to examine the propriety of institutionalized exhortations of national prayer.

A. The Defendants Misapprehend The Requirements For Standing.

The defendants disagree that this Court has the authority to consider the constitutionality of annual Prayer Proclamations and dedications of a National Day of Prayer. They imply that the plaintiffs are officious intermeddlers and busybodies,

"roaming the country"for reasons to complain. The defendants also claim that exposure to the National Day of Prayer and Presidential Prayer Proclamations is not coercive and no one is forced to engage in prayer. Unlike the posting of the Ten Commandments in a courthouse, therefore, they contend that no one has "unwanted and unwelcome" exposure to Presidential Prayer Proclamations directed to the citizenry. The defendants, instead, apparently recommend that the plaintiffs merely close their eyes and cover their ears; the plaintiffs should just ignore the official exhortations of their government with which they disagree.

No one has standing to question the dedication of a National Day of Prayer and the issuance of Prayer Proclamations, by the defendants' reasoning. Whether constitutional or not, the defendants insinuate that no one can challenge the dedication of a National Day of Prayer and the issuance of Prayer Proclamations by the President.

The defendants' argument misperceives the nature of a Presidential Prayer Proclamation and the dedication of a National Day of Prayer. The plaintiffs are an intended part of the audience at which such governmental speech is directed. The intended audience for a Prayer Proclamation is broader than the intended audience for a local nativity scene, and these plaintiffs are part of the President's intended audience.

The plaintiffs are not obligated to avert their eyes and cover their ears when the government disseminates objectionable speech, which unlike private speech, may not endorse religion. The defendants' argument suggests that these individual plaintiffs are

obligated to forego being informed so as to avoid objectionable speech, but as this Court is aware, an informed Citizenry is a duty and it is a strength of our nation.

The Establishment Clause does not require forced or coercive exposure to religious endorsement. Coercion is not the touchstone of the Establishment Clause, which prohibits governmental endorsement of religion over non-ignore religion, even if done discreetly. The expectation that nonbelievers should merely ignore or avoid objectionable governmental speech does not prevent the offense. On the contrary, the defendants' expectation compounds the offence by emphasizing that religious believers are favored, while non-believers are political outsiders.

The defendants do not recognize their deafness to the offence caused by extolling prayer, while exhorting each citizen to "reaffirm in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States." (*See* Exhibit A attached to this Brief.) Not all Americans believe in God - - or even believe that religion is a useful and beneficent force in the affairs of men and nations. As Justice Black stated in his dissent in *Zorach v. Clauson*, 343 U.S. 306, 318-19 (1952) (Black, J., dissenting):

> It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the Constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere, zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim, and kill those they branded "heretics," "atheists," or "agnostics." The First Amendment was therefore to ensure that no one powerful sect or combination of sects

> could use political or governmental power to punish dissenters whom they could not convert to their faith. Now, as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all non-believers can be maintained.

Thomas Jefferson also recognized that belief in the existence of God is not a prescription for virtue and comfort. In Jefferson's letter to his nephew, Peter Carr, written from Paris on August 10, 1787, Jefferson famously observed:

> Question with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason than that of blindfolded fear . . . Do not be frightened from this inquiry by any fear of its consequences. If it ends in a belief that there is no God, you will find inducements to virtue in the comfort and pleasantness you feel in its exercise, and the love of others which it will procure you.

The exhortations of an official National Day of Prayer are not based on the intrinsic utility of religion, just as they are not justified by the presumed numerical insignificance of non-believers. On the contrary, religious identification surveys indicate that at least 15%, or 34 million adult Americans, are now non-religious. Less than 70% of Americans believe in a traditional theological concept of a personal God. The non-religious are the fastest-growing segment of the U.S. population, according to American Religious Identification Surveys. (*See* Exhibit F attached to this Brief for recent survey information.)

The individual plaintiffs in this suit do have standing to object to government speech directed at them. The Freedom From Religion Foundation also has standing in its representative and organizational capacity based upon the impediment to accomplishing

FFRF's organizational goal to ensure the constitutionally-required separation of church and state.

B. The Defendants Misconstrue The Essence of Prayer Proclamations.

The defendants' argument that Presidential Prayer Proclamations are *per se* constitutional, in any form or permutation, distorts the role of the Court in determining whether government speech gives the appearance of religious endorsement. The defendants ignore that governmental speech may convey improper support for religion depending upon history, content and context. Legislative invocations, for example, are not *per se* constitutional under the Establishment Clause, depending upon context and content. Similarly, a public nativity scene may or may not violate the Establishment Clause, again depending upon the particular display's history and context. Posting the Ten Commandments on government property also may or may not violate the Establishment Clause prohibition on religious endorsement. The same is true of Presidential Prayer Proclamations.

The defendants' suggestion that the Court abdicate any role in evaluating the Presidential Prayer Proclamations and dedication of National Prayer Days is unsupported by precedent, including by the Supreme Court. Although the defendants suggest that the Supreme Court has already determined the constitutionality of Presidential Prayer Proclamations, that is not true. The Supreme Court's prior references to Prayer

Proclamations do not answer the question now before this Court, which question cannot be determined in the abstract.

The defendants ignore the legislative intent behind Congress' direction that annual Prayer Days be dedicated by the President. They misunderstand and distort the history of the Establishment Clause and the separation of church and state. The defendants also ignore the context and content of Prayer Day Proclamations and Dedications, in which the President has explicitly aligned with the National Day of Prayer Task Force, a messianic evangelical organization. The alignment with the NDP Task Force provides content and context for Presidential Prayer Proclamations, which is relevant to the application of the reasonable observer test for determining improper endorsement.

The defendants incorrectly invite this Court to rule as a matter of law, without the chance for a full airing of the history, context and content of Presidential Prayer Day Proclamations, that such exhortations inherently comply with the Establishment Clause. No judicial authority, however, supports the proposition that governmental speech, such as Prayer Proclamations, is *per se* constitutional under the Establishment Clause in all circumstances. Official dedications of a National Day of Prayer and Presidential Prayer Proclamations do not constitute mere ceremonial deism if they indicate to a reasonable observer that a preference for religion is being communicated. Ceremonial deism and "ubiquitous" practices are tolerated under the Establishment Clause only where no religious endorsement occurs.

The Amended Complaint alleges with particularity that Prayer Proclamations and National Prayer Day celebrations, orchestrated with the NDP Task Force, do give the appearance of religious endorsement. That being the case, this Court cannot conclude on the pleadings that Presidential Prayer Proclamations are *per se* permissible under the Establishment Clause.

II. ALLEGATIONS OF THE AMENDED COMPLAINT.

The plaintiffs seek a declaration that Public Law 100-307, and Presidential Prayer Proclamations declaring an annual day of prayer and calling on citizens to pray, violate the Establishment Clause of the First Amendment to the United States Constitution.

The plaintiff, Freedom From Religion Foundation, Inc. ("FFRF"), is a Wisconsin non-stock corporation whose principal office is in Madison, Wisconsin; FFRF is a membership organization working for the separation of church and state and to educate on matters of nontheism. (Amended Complaint, ¶ 3.)

FFRF has more than 12,000 members, including members in every state of the United States, who are opposed to government endorsement of religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. (Amended Complaint, ¶ 4.)

FFRF's purposes are to promote the fundamental constitutional principle of separation of church and state and to educate on matters relating to nontheism. (Amended Complaint, ¶ 5.)

The plaintiff, Anne Nicol Gaylor, resides in Madison, Wisconsin, and she is a lifetime member of and president emerita of FFRF, and a member of the FFRF Board of Directors, and she is a non-believer who is opposed to governmental endorsement of religion. (Amended Complaint, ¶ 6.)

The plaintiff, Paul Gaylor, also resides in Madison, Wisconsin, and he is a lifetime member and Board member of FFRF, and he is a non-believer who is opposed to governmental endorsement of religion. (Amended Complaint, ¶ 7.)

The plaintiff, Annie Laurie Gaylor, also resides in Madison, Wisconsin, and she is a lifetime member of and co-president of FFRF, and she is the editor of FFRF's periodical "Freethought Today," and she also is a non-believer who is opposed to governmental endorsement of religion. (Amended Complaint, ¶ 8.)

The plaintiff, Dan Barker, also resides in Madison, Wisconsin, and he is a lifetime member of and co-president of FFRF, and he is Public Relations Director of FFRF, and he also is a non-believer who is opposed to governmental endorsement of religion. (Amended Complaint, ¶ 9.)

The plaintiff, Phyllis Rose, also resides in Madison, Wisconsin, and she is a lifetime member of FFRF and Secretary of the FFRF Executive Council, and she is a non-believer who is opposed to governmental endorsement of religion. (Amended Complaint, ¶ 10.)

The plaintiff, Jill Dean, also resides in Madison, Wisconsin, and she is a lifetime member and a Board member of FFRF, and she is a non-believer who is opposed to governmental endorsement of religion. (Amended Complaint, ¶ 11.)

The defendant, Barack Obama, is the President of the United States of America. (Amended Complaint, ¶ 12.)

President Obama is sued in his official capacity as the President of the United States in this action seeking a declaratory judgment that Public Law 100-307, mandating Presidential Proclamations of a National Day of Prayer each year, violates the Establishment Clause of the First Amendment to the United States Constitution. (Amended Complaint, ¶ 13.)

The defendant, Robert L. Gibbs, is the White House Press Secretary for President Obama. (Amended Complaint, ¶ 14.)

Secretary Gibbs is sued in his official capacity as the occupant of the Office of White House Press Secretary in this action seeking an injunction against future Presidential Prayer Proclamations. Secretary Gibbs is responsible for projecting prayer proclamations to all of the citizens of the United States, including by foreseeable and intended reporting by news media. (Amended Complaint, ¶ 15.)

The defendant, Shirley Dobson, is the Chairman of the National Day of Prayer Task Force ("NDP Task Force"), an entity created for the express purpose of organizing and promoting National Prayer Day observances conforming to a Judeo-Christian system

of values; Mrs. Dobson is responsible for overseeing and directing the promotion of National Day of Prayer observances. (Amended Complaint, ¶ 18.)

The Establishment Clause of the First Amendment to the United States Constitution prohibits government officials and persons acting in joint and concerted action with government officials from taking actions that endorse religion, including actions that prefer religion over non-religion. (Amended Complaint, ¶ 19.)

U.S. Presidents have issued and intend to continue to issue official Prayer Proclamations, including in 2009 and thereafter, declaring a National Day of Prayer, as mandated by Public Law 100-307. (Amended Complaint, ¶ 20.)

The designation of a National Day of Prayer has the intent and the effect of giving official recognition to the endorsement of religion; a National Day of Prayer has no secular rationale; the purpose of the National Day of Prayer is to encourage individual citizens to pray. (Amended Complaint, ¶ 21.)

Prayer is an inherently and quintessentially religious activity. (Amended Complaint, ¶ 22.)

Exhortations to pray in official Presidential proclamations, directed at all the citizens of the United States, including these plaintiffs, constitute an end in themselves intended to promote and endorse religion. (Amended Complaint, ¶ 23.)

Presidential Proclamations of a National Day of Prayer inherently violate the Establishment Clause of the United States Constitution by endorsing religion over non-religion. (Amended Complaint, ¶ 24.)

Press Secretaries publicly disseminate Presidential Prayer Day Proclamations. (Amended Complaint, ¶ 25.)

Presidential Prayer Proclamations violate the Establishment Clause by giving the appearance to an objective observer that the government prefers Judeo-Christian religious beliefs over other religious beliefs, including by aligning and partnering with the NDP Task Force as the official organizer of the National Day of Prayer, under the personal direction of Mrs. Dobson. (Amended Complaint, ¶ 26.)

President George Bush's 2008 Prayer Proclamation, for example, exhorted each citizen to pray and also expressly incorporated the NDP Task Force Theme and Biblical reference as part of the official Prayer Proclamation of the United States. (Amended Complaint, ¶ 27.)

President Bush's 2008 Proclamation stated:

> On this National Day of Prayer, we ask God's continued blessings on our country. This year's theme, "Prayer! America's Strength and Shield," is taken from Psalm 28:7, "The Lord is my strength and my shield; my heart trusts in Him and I am helped." (Amended Complaint, ¶ 28.)

President Bush adopted and incorporated the NDP Task Force Theme and Biblical reference as part of his National Day of Prayer Proclamation, but this Theme and Biblical reference were not otherwise mandated by Congress; instead President Bush aligned his

Prayer Proclamation with the NDP Task Force in joint and concerted action to endorse religion in violation of the Establishment Clause; the NDP Task Force is under the direction and control of Mrs. Dobson. (Amended Complaint, ¶ 29.)

The joint action between President Bush and the NDP Task Force in proclaiming and designating a National Day of Prayer indicated to objective observers a government preference for and endorsement of the religious creed of the NDP Task Force. (Amended Complaint, ¶ 30.)

The NDP Task Force identifies itself as the National Day of Prayer "Official Website," under the direction and control of Mrs. Dobson. (Amended Complaint, ¶ 31.)

President Bush, for his part, embraced the NDP Task Force, including by incorporating the content requested by the Task Force into his official Prayer Proclamation, said request directed and controlled by Mrs. Dobson. (Amended Complaint, ¶ 32.)

President Bush's alliance with the NDP Task Force created the intended impression that the NDP Task Force and the government were working hand-in-glove in organizing the National Day of Prayer, including through the efforts of Mrs. Dobson. (Amended Complaint, ¶ 33.)

The collaborative relationship between the NDP Task Force and the Presidency indicates to an objective observer that the President prefers and endorses the religious

principles of the NDP Task Force, under the direction and control of Mrs. Dobson. (Amended Complaint, ¶ 34.)

The evangelical mission of the NDP Task Force is to "communicate with every individual the need for personal repentance and prayer." (Amended Complaint, ¶ 35.)

Allegedly in accordance with Biblical truth, the NDP Task Force seeks to publicize and preserve America's alleged Christian heritage; encourage and emphasize prayer; and glorify the Lord in word and deed, which activities Mrs. Dobson oversees and directs. (Amended Complaint, ¶ 36.)

The NDP Task Force even requires that volunteer coordinators sign statements of belief that the "Holy Bible is the inerrant Word of the Living God." (Amended Complaint, ¶ 37.)

The NDP Task Force represents a Judeo-Christian expression of the National Day of Prayer observance, based on the NDP Task Force belief that the United States was birthed in prayer and in reverence for the God of the Bible. (Amended Complaint, ¶ 38.)

The NDP Task Force, in turn, has close ties to Focus On The Family, an aggressively evangelical religious organization. (Amended Complaint, ¶ 39.)

The chairman of the NDP Task Force is Shirley Dobson, who is married to Focus On The Family Board Chairman and founder, James Dobson; Mrs. Dobson oversees and directs the activities of the NDP Task Force, including as to the promotion of National Day of Prayer activities. (Amended Complaint, ¶ 40.)

The NDP Task Force is located in the Focus On The Family headquarters. (Amended Complaint, ¶ 41.)

An objective observer would perceive the government's alliance with the NDP Task Force, under the direction and control of Mrs. Dobson, to represent an endorsement of religion. (Amended Complaint, ¶ 42.)

The NDP Task Force, under the direction and control of Mrs. Dobson, aggressively promotes a Judeo-Christian creed, with the purpose and intent of mobilizing the Christian community in prayer through the vehicle of the National Day of Prayer. (Amended Complaint, ¶ 43.)

The NDP Task Force seeks to encourage prayer that is inherently religious and that is Christian. (Amended Complaint, ¶ 44.)

The NDP Task Force defines its concept of prayer and why people should pray in explicitly Christian terms. (Amended Complaint, ¶ 45.)

The joint and concerted action between U.S. Presidents and the NDP Task Force in issuing Prayer Proclamations, including those that expressly incorporate references to the NDP Task Force Theme and its Biblical precepts, clearly constitutes the endorsement of religion in violation of the Establishment Clause. (Amended Complaint, ¶ 46.)

Mandated Prayer Proclamations by each President, exhorting citizens to pray, constitute unabashed endorsements of religion, which endorsements are projected nationwide by Presidential Press Secretaries. (Amended Complaint, ¶ 47.)

Official prayer proclamations exhorting citizens to engage in prayer create a bond between church and state, including by calls to others for the celebration of religion in public affairs. (Amended Complaint, ¶ 48.)

Sheriff Dean Roland, in Burnett County, Wisconsin, for example, organized a prayer breakfast in recognition of the National Day of Prayer on May 1, 2008, to which event Sheriff Roland invited attendees on official Sheriff Department letterhead. (Amended Complaint, ¶ 49.)

The keynote speaker at Sheriff Roland's Prayer Breakfast was Wisconsin Supreme Court Justice Michael Gableman, who was a sitting Circuit Court Judge in Burnett County, and had just been elected to the Wisconsin Supreme Court. (Amended Complaint, ¶ 50.)

Justice Gableman recognized the National Day of Prayer proclaimed by the President, and mandated by Congress, as an official acknowledgment that continued reliance on Divine providence is intrinsic to and necessary for our nation's success and well-being. (Amended Complaint, ¶ 51.)

Justice Gableman stated that Divine guidance animates the fundamental philosophy guiding our nation. (Amended Complaint, ¶ 52.)

Justice Gableman further urged non-believers to "consider that science seems to be testing out what believers have known for centuries . . . There is evidence of an intelligent

order of the Universe, of which both man and nature are subservient." (Amended Complaint, ¶ 53.)

Justice Gableman concluded by encouraging citizens to engage in prayer in order to fulfill the vision upon which the United States was allegedly founded. (Amended Complaint, ¶ 54.)

The remarks of Justice Gableman exemplify the public endorsements of religion that Presidential Prayer Proclamations bring forth in the public domain. (Amended Complaint, ¶ 55.)

Governor Doyle, in his official capacity as Governor of the State of Wisconsin, also annually issues Prayer Proclamations, including a 2008 proclamation, which extol prayer and exhort Wisconsin citizens to pray. (Amended Complaint, ¶ 56.)

Governor Doyle's Prayer Proclamations are intended as, and give the appearance of, Wisconsin's official endorsement of religion. (Amended Complaint, ¶ 57.)

Governor Doyle, also aligns his Proclamations with the NDP Task Force, including by incorporating Task Force official themes. (Amended Complaint, ¶ 58.)

As a result of pressure from, and the influence of the NDP Task Force, under the direction and control of Mrs. Dobson, in fact, governors from all fifty of the United States now issue official proclamations declaring a National Day of Prayer on the first Thursday of May; in fact, in 2007, the NDP Task Force, under the direction and control of Mrs. Dobson, very publicly strong-armed the reluctant Governor of New York to issue a

Pray Proclamation, to which pressure the Governor acquiesced. (Amended Complaint, ¶ 59.)

In 2008, fifteen of the state proclamations explicitly incorporated the theme and Biblical reference selected by the NDP Task Force. (Amended Complaint, ¶ 60.)

At the direction of Mrs. Dobson, the NDP Task Force acts in concert with such state governors to issue proclamations endorsing prayer in order to show official endorsement of such religious activity. (Amended Complaint, ¶ 61.)

At the direction of Mrs. Dobson, the NDP Task Force provides Biblical references for such proclamations that align the proclamations with the Judeo-Christian principles on which the Task Force is based. (Amended Complaint, ¶ 62.)

Many of the official state proclamations, like past Presidential proclamations, explicitly incorporate the NDP theme and chosen Biblical reference. (Amended Complaint, ¶ 63.)

The 2008 Proclamation by Arkansas Governor Mike Beebe, for example, stated that the Day of Prayer theme was "Prayer! America's Strength and Shield," and further stated "As David reminds us in the Book of Psalms: "The Lord is my Strength and Shield; my heart trusts Him and I am helped." These references derived explicitly from the NDP Task Force. (Amended Complaint, ¶ 64.)

Colorado Governor Bill Ritter, Jr., also conformed the Colorado Day of Prayer Proclamation to the NDP Task Force's theme, stating that "The National Day of Prayer

acknowledges Psalm 28: 7 'The Lord is my Strength and Shield, my heart trusts in Him, and I am helped.' " (Amended Complaint, ¶ 65.)

Idaho Governor C.L. "Butch" Otter likewise aligned the Idaho 2008 Proclamation with the NDP Task Force, identifying "the motto of the National Day of Prayer and the State Day of Prayer to be 'Prayer! America's Strength and Shield, a reaffirmation of the Biblical exhortation in Psalm 28:7.' " (Amended Complaint, ¶ 66.)

Charlie Crist, Florida Governor, was another who incorporated the NDP Task Force theme and Biblical reference. (Amended Complaint, ¶ 67.)

Illinois similarly acted in concert with the NDP Task Force, stating that the theme for the National Day of Prayer 2008 was "Prayer! America's Strength and Shield," which was "inspired by the passage found in Psalm 28:7," according to Governor Blagojevich. (Amended Complaint, ¶ 68.)

The official 2008 Proclamation by Indiana Governor Mitchell E. Daniels, Jr., also paid tribute to the NDP Task Force theme, "inspired by the Scripture Psalm 28:7." (Amended Complaint, ¶ 69.)

Kentucky Governor Steven L. Beshear similarly recognized in his 2008 Proclamation the NDP Task Force theme for the National Day of Prayer, which he stated "is based on Psalm 28:7." (Amended Complaint, ¶ 70.)

The Louisiana 2008 Proclamation by Governor Bobby Jindal also incorporated the NDP Task Force theme and cited Psalm 28:7. (Amended Complaint, ¶ 71.)

Massachusetts Governor Deval L. Patrick was another Governor using the NDP Task Force references in his 2008 Proclamation, citing the theme "inspired by Psalm 28:7." (Amended Complaint, ¶ 72.)

Missouri Governor Matt Blunt also was on board with the NDP Task Force in his 2008 Proclamation, quoting Psalm 28:7, as well as the NDP Task Force National Day of Prayer theme. (Amended Complaint, ¶ 73.)

New Jersey Governor Jon S. Corzine joined with the other Governors in his 2008 Proclamation, quoting the NDP Task Force theme "which was taken from Psalm 28:7." (Amended Complaint, ¶ 74.)

John M. Huntsman, Jr., Governor of the State of Utah, cited the same NDP Task Force theme, said to be "inspired by Psalm 28:7." (Amended Complaint, ¶ 75.)

The 2008 proclamation by Virginia Governor Timothy M. Kaine also came from the NDP Task Force theme, which "comes from the Scripture Psalm 28:7." (Amended Complaint, ¶ 76.)

The Governor of Wyoming, Dave Freudenthal, also quoted Psalm 28:7, and incorporated the NDP Task Force theme. (Amended Complaint, ¶ 77.)

Dave Heineman, Governor of Nebraska, engaged in the same concert of action with the NDP Task Force in his 2008 Proclamation, citing the NDP Task Force theme, which "reflects the words in Psalm 28:7 that we find help as we trust in God." (Amended Complaint, ¶ 78.)

Other state proclamations also explicitly aligned themselves with the NDP Task Force theme for the 2008 Prayer Day. (Amended Complaint, ¶ 79.)

Other proclamations that make explicit reference to the NDP Task Force 2008 theme include proclamations by the Governor of Connecticut, M. Jodi Rell; the Governor of Delaware, Ruth Ann Minner; the Governor of Georgia, Sonny Perdue; the Governor of Nevada, Jim Gibbons; the Governor of New Mexico, Bill Richardson; the Governor of North Carolina, Michael F. Easley; the Governor of Oklahoma, Brad Henry; the Governor of South Dakota, M. Michael Rounds; the Governor of Tennessee, Bill Bredesen; and the Governor of Texas, Rick Perry. (Amended Complaint, ¶ 80.)

The concerted actions by these Governors to include the NDP Task Force theme and/or Biblical reference were not accidental or coincidental; they were the result of joint action with the NDP Task Force, at the direction of Mrs. Dobson. (Amended Complaint, ¶ 81.)

The influence of the NDP Task Force on the various governors is revealed by the 2008 Proclamation of the Governor of Montana, Brian Schweitzer, who actually addressed his proclamation in the form of a letter to the Montana State Coordinator for the National Day of Prayer Task Force, Pat Kempf. (Amended Complaint, ¶ 82.)

All of the governors have been influenced by the Presidential Proclamations of a National Day of Prayer and the admonitions of the NDP Task Force, so that all of the states issued proclamations declaring May 1, 2008 as a Day of Prayer, including Alabama

Governor Bob Riley; Alaska Governor Sarah Palin; Arizona Governor Janet Napolitano; California Governor Arnold Schwartzenegger; Hawaii Governor Linda Lingle; Iowa Governor Chester J. Culver; Kansas Governor Kathleen Sebelius; Maine Governor John E. Baldicci; Maryland Governor Martin O'Malley; Michigan Governor Jennifer M. Granholm; Minnesota Governor Tim Pawlenty; Mississippi Governor Haley Barbour; New Hampshire Governor John H. Lynch; New York Governor David A. Paterson; North Dakota Governor John Hoeven; Ohio Governor Ted Strickland; Oregon Governor Theodore R. Kulongoski; Pennsylvania Governor Edward G. Rendell; Rhode Island Governor Donald L. Carcieri; South Carolina Governor Mark Sanford; Washington Governor Christine O. Gregorie; and Vermont Governor James H. Douglas. (Amended Complaint, ¶ 83.)

Governor Joe Manchin III, Governor of the State of West Virginia, issued a 2008 prayer proclamation "encouraging all citizens to join in a national effort to better our country through increased spiritual awareness and active participation." (Amended Complaint, ¶ 84.)

Prayer proclamations by public officials, including proclamations by the President and governors of the United States, convey to non-religious Americans that they are expected to believe in God. (Amended Complaint, ¶ 85.)

Such official proclamations reflect the official policy of the Federal government and the states, sending a message that religion is preferred over non-religion. (Amended Complaint, ¶ 86.)

Many of the state proclamations also explicitly reference and align with the Presidential Proclamations, which Presidential Proclamations give the appearance of religious endorsement. (Amended Complaint, ¶ 87.)

Official prayer proclamations send a message that believers in religion are political insiders and non-believers are political outsiders. (Amended Complaint, ¶ 88.)

Official prayer proclamations are intended to convey a message of endorsement to each citizen with an exhortation that all citizens should engage in prayer. (Amended Complaint, ¶ 89.)

Official prayer proclamations are intended to be public and to become known by all citizens, to whom such prayer proclamations are directed; Presidential Prayer Proclamations constitute official government speech, projected to citizens throughout the United States, including via the internet and official press releases by Presidential Press Secretaries; designated National Prayer Days are intended to be, and they are, reported in public media available to citizens everywhere through newspapers and television coverage. (Amended Complaint, ¶ 90.)

Official prayer proclamations are intended to be, and they are received by citizens, including the plaintiffs, as exhortations to pray. (Amended Complaint, ¶ 91.)

These exhortations to pray are received by the citizens of the United States as official proclamations directed from the President, and similar proclamations are directed at the citizens of each state by official proclamations by the governors of those states, including Governor Doyle in Wisconsin. (Amended Complaint, ¶ 92.)

Designations of an official Day of Prayer by Presidential and Gubernatorial proclamations, encouraging celebration of prayer, create a hostile environment for non-believers, who are made to feel as if they are political outsiders. (Amended Complaint, ¶ 93.)

The individual plaintiffs in this lawsuit, as well as members of FFRF in all 50 United States, are subjected to these unwanted proclamations to pray and resulting public celebrations of religion in the public realm, including as a result of dissemination of such proclamations by Presidential Press Secretaries. (Amended Complaint, ¶ 94.)

The individual plaintiffs know of the annual Presidential Prayer Proclamations projected throughout the nation, including the 2008 Day of Prayer Proclamation, and official celebrations; knowledge of the annual Prayer Proclamations has existed for many years by the individual plaintiffs, but the governmental celebration of the annual National Day of Prayer has increased dramatically in recent years. (Amended Complaint, ¶ 95.)

The individual plaintiffs have been exposed to past Presidential Prayer Proclamations through media reporting by newspapers and television, as well as from reporting by members and non-members of FFRF, who object to the government

endorsement of religion via a designated annual Day of Prayer. (Amended Complaint, ¶ 96.)

Each of the individual plaintiffs is a deliberately active, involved and informed citizen who is interested in the actions of government officials. (Amended Complaint, ¶ 97.)

Each of the individual plaintiffs make a point of trying to know what government speech is being disseminated and projected by public officials, including by the American President and the Governor of their home state of Wisconsin. (Amended Complaint, ¶ 98.)

The individual plaintiffs have a right to, and they do, seek to inform themselves about public affairs, including Presidential and Gubernatorial proclamations of officially designated days of prayer. (Amended Complaint, ¶ 99.)

The individual plaintiffs have a right to know, and they do know, that their President and Governor are officially proclaiming days of prayer. (Amended Complaint, ¶ 100.)

The individual plaintiffs know that their President and Governor annually proclaim an official day of prayer, including from media coverage, complaints by FFRF members and non-members, and investigation on behalf of FFRF and as citizens. (Amended Complaint, ¶ 101.)

The individual plaintiffs are not required to avoid information or to remain uninformed as to the official pronouncements of their elected officials, including the President of the United States. (Amended Complaint, ¶ 102.)

An informed citizenry is desirable and it has a right to know that its President and Governor are actively promoting religion. (Amended Complaint, ¶ 103.)

Presidential and Gubernatorial proclamations are not intended to be secret, and if they were secret, the individual plaintiffs would have a right to investigate and learn of such prayer proclamations; here, these individual plaintiffs are well aware of Prayer Day Proclamations by U.S. Presidents and governors. (Amended Complaint, ¶ 104.)

The individual plaintiffs, as non-believers, are not required to avert their eyes, ears and minds to the official prayer proclamations of the President and the Governor. (Amended Complaint, ¶ 105.)

The Establishment Clause prohibits the public endorsement of religion by government officials, including by Presidents and governors, when that preference is a matter of official public record. (Amended Complaint, ¶ 106.)

Religious endorsement by public officials does not become constitutionally acceptable under the Establishment Clause merely because individuals informed themselves that it was occurring. (Amended Complaint, ¶ 107.)

The individual plaintiffs do know, including by investigation, that Presidential and Gubernatorial proclamations are publicly issued each year, which proclamations endorse

religion; these proclamations are publicly available, lest they not be acted upon. (Amended Complaint, ¶ 108.)

Knowledge and awareness of government speech endorsing religion, even if sought, does not vitiate or negate the constitutional offense to non-believers, like the individual plaintiffs in this case. (Amended Complaint, ¶ 109.)

Government speech endorsing religion, even if bearing a government warning or otherwise made accessible only to religious believers, would still violate the Establishment Clause, including by sending a message that believers are political insiders. (Amended Complaint, ¶ 110.)

Presidential and Gubernatorial prayer proclamations, in any event, are not secret, and designated days of prayer are known to the individual plaintiff through generally available media. (Amended Complaint, ¶ 111.)

The individual plaintiffs are differentially affected by prayer proclamations because they are non-believers, in contrast to believers who are identified by such proclamations as political insiders. (Amended Complaint, ¶ 112.)

The individual plaintiffs, moreover, are aware of Presidential and Gubernatorial prayer proclamations as a result of their advocacy work on behalf of FFRF members, many of whom have complained to FFRF over the course of years about the government's official designation of days of prayer. (Amended Complaint, ¶ 113.)

FFRF has more than 12,000 members, including members in each of the United States, and one purpose of FFRF is to represent and advocate on behalf of these throughout the United States. (Amended Complaint, ¶ 114.)

Future and continued unwanted contact with exhortations and public celebrations of prayer by government officials is imminent because future prayer proclamations and designations of official prayer days by the President and Press Secretary, acting in their official capacities, as well as by the various governors of the States, are already planned for 2009. (Amended Complaint, ¶ 115.)

With more than 12,000 members throughout the United States, FFRF members will continue to be exposed to unwanted proclamations of prayer and public celebrations of religion in the public domain, including as the result of Secretary Gibbs's actions in projecting awareness of National Day of Prayer. (Amended Complaint, ¶ 116.)

Official days of prayer are intended to be known by, and acted upon by each individual citizen, regardless of their creed or non-belief; such proclamations create a culture of officially-sanctioned religiosity. (Amended Complaint, ¶ 117.)

Official prayer day proclamations by the President, acting in his official capacity, and disseminated by the President's Press Secretary, and proclamations by the various governors, acting in their official capacities, also adversely affect the organizational interests of FFRF. (Amended Complaint, ¶ 118.)

Prayer proclamations and designations of Days of Prayer give official institutional support to the endorsement of religion by government, acting in the public realm. (Amended Complaint, ¶ 119.)

FFRF, as an organization, has the mission and purpose to promote the Constitutional principle of separation of church and state and to educate on matters relating to nontheism. (Amended Complaint, ¶ 120.)

Official prayer proclamations by the President, and disseminated by his Press Secretary, and proclamations by the Governors of the United States adversely affect the ability of FFRF to carry out its organizational mission, including because such proclamations and designation of public Days of Prayer give formal institutional and governmental recognition establishing religion. (Amended Complaint, ¶ 121.)

Official and institutional recognitions of religion in the public realm further call forth and encourage other public officials to engage in public ceremonies endorsing religion, including the quintessential religious act of prayer. (Amended Complaint, ¶ 122.)

The ability of FFRF to carry out its organizational mission to keep separate church and state is adversely affected by prayer proclamations and designations of Days of Prayer, because they precipitate and give official sanction to governmental endorsements of religion. (Amended Complaint, ¶ 123.)

Presidential Prayer Proclamations, for example, are frequently cited and incorporated in the resulting proclamations of the various governors as being authorized by the Federal government. (Amended Complaint, ¶ 124.)

Official proclamations of prayer, such as by the President and Governor Doyle, the governors of other states, and Secretary Gibbs, adversely affect the organizational interests of FFRF, and require the dedication of resources and time by FFRF, and they frustrate the accomplishment of FFRF's mission to keep separate church and state; Prayer Proclamations break down the separation of Church and State and contribute to improper governmental recognition of a preference for religion. (Amended Complaint, ¶ 125.)

The mandated actions of the American President, in his official capacity, in issuing prayer proclamations and dedicating days of prayer, and disseminated by his Press Secretary, violate the fundamental principle of the separation of church and state, including by actively and intentionally endorsing religion. (Amended Complaint, ¶ 126.)

The actions of Mrs. Dobson also violate § 1983 and the Establishment Clause because the NDP Task Force, under her direction and control, has been and continues to act in concert and collaboration with state officials to effect violations of the Establishment Clause by the governors of the various states, as well as in concert with the President. (Amended Complaint, ¶ 130.)

Mrs. Dobson continues to be a wilful participant with state and federal officials in joint action that violates the Establishment Clause through the various prayer

proclamations, including those proclamations that explicitly align themselves with the NDP Task Force Biblical references and Prayer Day themes, by the American President and the Governors from Arkansas, Colorado, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, New Jersey, Nebraska, Utah, Virginia, and Wyoming, each of whom issued proclamations in 2008 that explicitly incorporated the NDP Task Force Biblical reference to Psalm 28:7. (Amended Complaint, ¶ 131.)

The actions of the defendants are injurious to the interests of the plaintiffs individually, and to FFRF in its representative and organizational capacity, because the defendants' actions subject the plaintiffs to official admonitions and exhortations to pray, and expose them to unwanted endorsements of religion, which violate the Establishment Clause. (Amended Complaint, ¶ 132.)

III. THE INDIVIDUAL PLAINTIFFS HAVE STANDING TO COMPLAIN ABOUT GOVERNMENT SPEECH ENDORSING RELIGION, WHICH SPEECH IS DIRECTED AT THEM.

A. The Individual Plaintiffs Have Constitutionally Sufficient Contact With The Objectionable Speech.

The defendants' deny that the individual plaintiffs have standing to sue based on their exposure to Presidential Prayer Proclamations and dedications of a National Day of Prayer. The defendants essentially argue that the individual plaintiffs have not had to "walk by" unwelcome Presidential Prayer Proclamations, such as occurs with a creche or menorah at a county courthouse, and so the plaintiffs allegedly have not been injured. The defendants reason that unwelcome exposure to government speech necessarily must

have a pedestrian or walk-by attribute, which allegedly is missing with respect to Presidential Prayer Proclamations. Without "pedestrian" exposure to government speech endorsing religion, the defendants conclude that the plaintiffs are merely experiencing "psychic injury common to the general public."

The defendants misapprehend the contact with government speech necessary to support standing. Their interpretation of unwelcome exposure to government speech would effectively disqualify anybody from objecting, unless speech is physically placed in front of an individual by a government official. This test may work for parochial government speech with a limited intended audience, but government speech intended to reach the nation would no longer be objectionable by anyone. Ironically, the Establishment Clause then would only prohibit government speech endorsing religion at the local level, while insulating proclamations to the entire nation that endorse religion.

It is axiomatic that a crucial difference exists between government and private speech that endorses religion: Government speech endorsing religion is forbidden by the Establishment Clause, while private speech endorsing religion is protected by the Free Speech and Free Exercise clauses of the Constitution. *The Board of Education of West Side Community Schools (District 66) v. Mergens*, 496 U.S. 226, 250 (1990). The Supreme Court has consistently recognized this "crucial difference" between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion. Here, government speech is plainly at issue.

Because the Constitution prohibits government speech endorsing religion, the Supreme Court quite naturally has recognized that individuals objecting to such speech may bring suit to complain. In this respect, the courts have upheld standing for persons having unwelcome exposure to objectionable speech. With regard to local monuments or displays, therefore, it is enough that a plaintiff allege direct and unwelcome contact with the religious display, without showing any "special burden" or altered behavior. *Books v. Elkhart County*, 401 F.3d 857, 862 (7th Cir. 2005). *See also Books v. City of Elkhart*, 235 F.3d 292, 299-301 (7th Cir. 2000); *Doe v. County of Montgomery*, 41 F.3d 1156, 1160-61 (7th Cir. 1994) (the plaintiff is not required to show "special burden" or altered behavior in order to have standing).[1] In the cases of such displays, of course, the intended and foreseeable audience for the government speech is local, and measurable by foot traffic near the display. Standing for such persons is not defeated by voluntarily passing by the display, moreover, because involuntary or coerced exposure to government speech endorsing religion is not an essential element of an Establishment Clause violation. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962).

But not all government speech endorsing religion is marked by a physical presence in the public square, as this case illustrates. In fact, such means are not very effective as a way to communicate with large numbers of citizens. The Supreme Court has recognized

---

[1]The defendants' reliance on *Freedom From Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir. 1988), notably ignores a later similar case in which the plaintiffs all had standing to complain. *See Mercier v. City of La Crosse*, 395 F.3d 693 (7th Cir. 2005).

this reality in its analysis of public forums, noting that a forum often now exists "more in a metaphysical than in a spatial or geographic sense." *See Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). While this change affects the means of communication, it does not reduce the number of persons who may now have exposure to such governmental speech. The contrary is true. That is certainly the case with Presidential Proclamations.

By contrast, the complaint in *Valley Forge v. ACLU,* 454 U.S. 464 (1982), did not involve government speech at all, unlike Presidential Prayer Proclamations which constitute quintessential speech. That makes a difference, because prayer Proclamations are intended to be made known to all the citizens of the United States. A Presidential Proclamation, without an intended audience, would not be a proclamation at all. Unlike *Valley Forge*, and unlike cases involving local religious displays, therefore, the present case deals with government speech which the government intends to be broadcast and made known to the citizenry at large. In this circumstance, the defendants only disingenuously claim that the plaintiffs have "roamed the country" looking for their complaint.

The intended audience for a Presidential Proclamation is also distinguishable from the intended audience for legislative prayer. The Supreme Court has already recognized in *Allegheny County v. ACLU*, 492 U.S. 573, 603 n. 52 (1989), that Presidential Prayer Proclamations stand on a different footing than "ceremonial deism" such as legislative prayer. The Supreme Court stated:

> It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct.

A limited intended audience is a distinguishing fact about legislative prayer. In *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 289 (4th Cir. 2005), Judge Niemeyer specifically noted that "when a governmental body engages in prayer for itself and does not impose that prayer on the people, the governmental body is given greater latitude than when the government imposes prayer on the people." Judge Niemeyer further stated that "ever since *Marsh*, the Supreme Court has continued to recognize the distinction between prayer engaged in by the government for itself and prayer imposed on the people, subjecting the latter form of prayer to heightened scrutiny." Similarly, in *Van Zandt v. Thompson*, 839 F.2d 1215, 1218 (7th Cir. 1988), the Court viewed "a legislature's internal spiritual practices as a special case," warranting more deference than would be appropriate for government speech projected to an external audience.

When the intended audience for government speech is not internal, legal responsibility may certainly include speech that is republished, such as by the media. The principle is already well recognized in the law that the author or originator of speech may be liable for republication or repetition by third persons if such repetition was foreseeable. *See Weaver v. Beneficial Finishing Co.*, 98 S.E.2d 687, 690 (V.A. 1957); *Blueridge Bank*

v. Veribanc, Inc., 866 F.2d 681, 689 (4th Cir. 1989); *Wright v. Bachmurski*, 29 P.3d 979, 984-985 (Kan. App. 2001), and *Ringler Associates, Inc. v. Maryland Casualty Co*., 80 Cal. App. 4th 1165, 1180 (2000).

Government speakers, like other speakers, may intend and foresee that their speech will be broadcast through intermediaries, including the print and TV media. In fact, the role of the President's Press Secretary is precisely to disseminate governmental speech, such as Presidential Proclamations, so that they may be communicated to the public.

Here, the allegations of the plaintiffs' Amended Complaint make clear that the individual plaintiffs have come in contact with the President's Prayer Proclamations, including through media reporting by newspapers and television, as well as from reporting by members and non-members of the Freedom From Religion Foundation. (*See* Exhibit H, which summarizes FFRF survey of members.) The defendants do not deny such exposure, but question whether the means of the exposure should "count" for purposes of standing.

The individual plaintiffs are individuals who know and hear about government speech that is disseminated and projected by public officials, especially when they are part of the audience intended for the speech, such as in this case. The individual plaintiffs also have come in contact with Presidential Prayer Proclamations as part of their work on behalf of the Freedom From Religion Foundation, which responds to complaints about such Prayer Proclamations by members and non-members. The plaintiffs do not roam the

country looking for complaints; they are bombarded with such complaints by persons who object to the government's promotion of religion.

The individual plaintiffs do have the direct and concrete injury necessary to give them standing to object to Presidential Prayer Proclamations and dedications of a National Day of Prayer. The plaintiffs are part of the audience intended for that governmental speech. For the defendants to suggest that these plaintiffs cannot object to that speech assumes an arbitrary distinction with drastic consequences: Requiring pedestrian exposure as a prerequisite for standing ignores the reality of modern communication.

B. Standing Does Not Require Contact Plus Something More.

In cases involving government speech, exposure is sufficient to confer standing. The Seventh Circuit previously has already rejected the defendants' same argument that unwelcome contact with religious speech "is trivial and therefore not legally cognizable." *Books*, 401 F.3d at 861. In *Books*, the County argued that the plaintiff's injury was entirely psychological, and that such injuries, without more, do not confer standing. The Court rejected the defendant's argument, as other courts have done in government speech cases.

While the Supreme Court did state in *Valley Forge* that the psychological consequence produced by observation of conduct with which one disagrees is not an injury sufficient to confer standing under Article III, that was a tax-payer standing case which did not involve government speech. Since then, courts have uniformly found that

the *Valley Forge* decision does not mean that "psychological injury" can never be a sufficient basis for the conferral of Article III standing. If this were not the case, then none of the subsequent judicial precedents prohibiting government speech that endorses religion would have involved plaintiffs with standing, including the Supreme Court's decisions in *County of Allegheny,* and *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005). In cases involving unwelcome exposure to religious speech, "the spiritual, value-laden beliefs of the plaintiffs are often most directly affected by an alleged establishment of religion. Accordingly, rules of standing recognize that non-economic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Suhre v. Haywood County*, 131 F.3d 1083, 1087 (4th Cir. 1997).

The defendants, however, demand something more than exposure to unconstitutional government speech. The defendants claim that the contact must be involuntary or coercive - - and that citizens who pay attention to the speech broadcast by officials cannot complain. The Establishment Clause prohibition on governmental speech endorsing religion, however, is mandatory and self-executing; "assumption of risk" is not a defense.

Nor is "coming to the injury" a proper basis for objecting to standing in a government speech case. *Buono v. Norton*, 212 F.Supp2d 1202, 1211 (C.D. Cal. 2002). In *Buono*, the Court rejected the argument that standing is precluded in government speech cases if the plaintiffs "could have avoided the harm." The Court reasoned as follows:

> The government contends that Plaintiffs' exposure to the cross should be disregarded for purposes of standing because Plaintiffs could have avoided the harm. However, the Seventh Circuit has expressly rejected such an argument, and the Court adopts its reasoning. In *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (Posner, J.), the Seventh Circuit responded to Defendant's contention that "plaintiffs have inflicted this cost on themselves and can avoid it by continuing to follow their custom routes and shrugging off the presence of the . . . cross." 794 F.2d at 268. The Court held "that the injury to the Plaintiffs could have been averted . . . did not deprive the plaintiffs of standing," commenting that "if [they] lacked standing . . . no one would have standing." *Id*. at 268-69. By the government's logic, all individuals offended by a religious display could avoid it and thereby not be harmed by it. Such an argument flies in the face of standing jurisprudence and would render the Establishment Clause a nullity."

Buono, 212 F.Supp2d at 1211. In *Books v. City of Elkhart*, 235 F.3d 292, 297 (7th Cir. 2000), the Seventh Circuit also concluded that plaintiffs had standing, even though their injury was based, at least in part, on the fact that they "know the [religious symbol] is there, whether [they] see it or not."

The argument that the plaintiffs should just avert their eyes and cover their ears is not constitutionally required for standing. Even deliberate "testing" is sufficient for constitutional standing purposes. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), for example, the Supreme Court held that "testers" have standing to bring suit for alleged violations of the Fair Housing Act, even where the tester had no intention of buying or renting a home. Since *Havens Realty*, the law has become well established that such testers do suffer a cognizable injury that gives them standing to sue. *Kyles v. J.K.*

Guardian Security Services, Inc., 222 F.3d 289, 297 (7th Cir. 2000), citing *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990).

The Supreme Court's logic in *Havens Realty* was based on the fact that discrimination is still discrimination, whenever it occurs. The fact that a "tester" may discover such discrimination does not render that person an inappropriate party to complain.

The argument for standing in the present case is even more compelling. The Establishment Clause prohibits government officials from promulgating speech that gives the appearance of endorsing religion. This constitutional proscription would be violated even if the government tried to discreetly favor religion, such as with a "PG" warning. Here, in the present case, the government speech at issue actually was intended to be broadcast and to become known by all Americans, including these plaintiffs. As part of the intended audience, they certainly have the right to complain.

The defendants argue incorrectly that governmental speech endorsing religion cannot be questioned by non-believers who "voluntarily" come to know about the actions of their government, including government speech promoting religion. The defendants argue, in effect, that they may endorse religion without objection so long as exposure to such government speech is not forced or coercive. In fact, however, coercion is not a necessary element of a claim under the Establishment Clause. The Supreme Court has consistently rejected the view that coercion is the touchstone of an Establishment Clause violation. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962). To make a showing of coercion

an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy. *See Allegheny*, 492 U.S. at 628; *Abington School District v. Shempp*, 374 U.S. 203, 223 (1963). It also would render the Establishment Clause a nullity.

IV. THE FREEDOM FROM RELIGION FOUNDATION HAS ORGANIZATIONAL STANDING BASED ON ITS OWN INJURY, AS WELL AS REPRESENTATIVE STANDING.

The defendants argue incorrectly that the Freedom From Religion Foundation does not have organizational standing based upon its allocation of resources to address the consequences caused by Prayer Day dedications, which impede the accomplishment of the organization's goals. The defendants claim that organizations cannot manufacture standing merely by dedicating resources to the accomplishment of organizational goals. A defendant's action that affect the ability of an organization to accomplish its goals, however, is a basis for constitutional standing where the organization dedicates resources to uncover and overcome the defendant's wrongful conduct.

Here, the Freedom From Religion Foundation has organizational standing to sue based on its own injury. The Supreme Court recognized such organizational standing in *Havens Realty*, which makes clear that the only injury necessary to confer standing is allocation of the organization's resources to efforts directed against the wrongful conduct of the defendant. *See Bellwood*, 895 F.2d at 1526. In both *Havens Realty* and *Bellwood*, the plaintiffs expended resources in order to investigate and uncover the defendant's illegal discrimination, causing the plaintiffs to suffer an injury-in-fact.

In *Fair Employment Counsel of Greater Washington, Inc. v. B.M.C. Marketing Corp*., 28 F.3d 1268, 1277 (D.C.Cir. 1994), the Court also held that an organization's need to "counteract the defendants' assertedly illegal practices" is sufficient to confer standing because such a dedication of resources is a "manifestation of the injury that those practices had inflicted upon the organization's non-economic interest in encouraging open housing." *See* also *City of Chicago v. Leadership Council for Metropolitan Open Communities*, 982 F.2d 1986, 1096 (7th Cir. 1992) (the only injury which need be shown to confer standing is allocation of the agency's resources to efforts directed against discrimination). In short, the Circuit Courts agree that an organization meets Article III standing requirements where a defendant's alleged actions cause the organization to devote resources to combat the effects of the alleged wrongful action. *Fairhousing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 78 (3rd Cir. 1998).

The Courts, including the Seventh Circuit, do not consider the dedication of resources to be merely a self-inflicted injury, contrary to defendants' argument. In *Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007), for example, the Court expressly held that an organization suffers an injury when a statute "compels it to divert more resources to accomplishing its goals." The Court further held that "the fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Id*, citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-84 (2000). In

reaching its decision on standing, the *Crawford* Court followed a line of cases, beginning with *Havens Realty*, holding that an organization has standing to sue on its own behalf if a defendant's illegal acts cause the organization to allocate resources to counteract those illegal acts. These injuries are deemed sufficiently concrete to constitute cognizable injuries under Article III. *See Havens Realty*, 455 U.S. at 379.

The defendants' argument that the plaintiff's allocation of resources is wholly voluntary, and hence not an injury, is based on a distinction not legally recognized. As the Eleventh Circuit recently stated in *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008), the distinction between actions negating the efforts of an organization, which is admittedly an injury under *Havens Realty*, and an act or law merely causing the organization to voluntarily divert resources in response, finds no support in the law. When a drain on an organization's resources arises from "the organization's need to counteract the defendants' allegedly illegal practices, that drain is simply another manifestation of the injury to the organization's noneconomic goals." *Id*, citing *Fair Employment Council of Greater Washington*, 28 F.3d 1267-77.

In this case, the diversion of personnel, time and resources by the Freedom From Religion Foundation to counteract the effects of the defendants' Prayer Proclamations constitutes redressible injury under the Constitution. As alleged in the Amended Complaint, Presidential Prayer Day Proclamations and Prayer Day Dedications create a culture of acceptability as to governmental endorsement of religion. (*See* Exhibit B attached to this Brief, estimating 40,000 observances in 2008 "at state capitols, county

courthouses, on the steps of city halls, and in schools . . .") The Amended Complaint further alleges that all 50 states now proclaim a dedicated Day of Prayer to coincide with the federal government's proclamation. As a result, a massive nation-wide convulsion of governmental endorsement occurs, which undermines the ability of the Freedom From Religion Foundation to accomplish its goals and requires the dedication of resources to counteract the effects of the defendants' unconstitutional actions. This dedication of resources, moreover, is not limited to the costs of this present litigation. The Freedom From Religion Foundation dedicates internal resources responding to, objecting to, and advising members regarding the government's exhortations that the nation engage in prayer. (*See* Exhibits C and D attached to Brief for a sense of the divisiveness caused.)

The National Day of Prayer, proclaimed by the government while promoting and encouraging citizens to engage in prayer, clearly affects the institutional interests of an organization like the Freedom From Religion Foundation. The plaintiff is dedicated to maintaining the separation of church and state required by the Establishment Clause. This goal is chronically undermined every year by the defendants' actions, which require the allocation of resources to redress the defendants' unconstitutional actions. (*See* Exhibit B, with references to the number of religious observances precipitated by the National Day of Prayer.) The dedication of a National Day of Prayer by Presidential proclamation, pursuant to a specially enacted law of Congress, operates as an institutional barrier to the accomplishment of the plaintiff's organizational objectives. The Freedom From Religion Foundation, accordingly, has organizational standing to challenge the

government's annual "poke in the eye," which constitutes a concrete and particularized injury.[2]

V. PRESIDENTIAL PRAYER PROCLAMATIONS AND DEDICATIONS OF A NATIONAL DAY OF PRAYER GIVE THE APPEARANCE OF RELIGIOUS ENDORSEMENT.

A. The Endorsement Test is Fact Dependent.

The defendants contend that the plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted. They argue that Presidential Prayer Proclamations and dedications of a National Day of Prayer constitute mere acknowledgments and recognition of the role of prayer in our nation's history. The defendants also claim that official Prayer Days have no coercive effect and that they are like legislative prayer or other examples of ceremonial deism, as a matter of law.

Proclaiming a National Day of Prayer has been described by the Supreme Court, in *Allegheny County*, 492 U.S. at 603 n. 52, as "an exhortation from government to the people that they engage in religious conduct." In addition, the plaintiffs allege in this case that Presidential Prayer Day Proclamations, including those in 2008, are orchestrated with the NDP Task Force, a patently evangelical organization dedicated to the promotion of Christianity through public prayer. (*See* materials attached to this Brief as Exhibits B-D regarding the NDP Task Force and its relationship to the National Day of Prayer.) As a

[2]The Freedom From Religion Foundation also has representational standing based upon the standing of its members, including the individual plaintiff members and other FFRF members opposed to the National Day of Prayer. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). (See Exhibit H attached to this Brief summarizing survey of FFRF members.)

result, the content and context of Presidential Prayer Proclamations and Prayer Day dedications give the appearance of endorsement, including specifically the Christian faith, in violation of the Establishment Clause.

The defendants ignore virtually all of the allegations of the Amended Complaint relating to the context of Presidential Prayer Proclamations, as well as the source of content for such Proclamations incorporated at the behest of the NDP Task Force. The defendants, nonetheless, argue that an "objective observer" of the President's Prayer Proclamations would not construe them as religious endorsements - - but presumably only if the "objective observer" is deemed not to be aware of the history and context of the Prayer Proclamations, including the concerted action between the President and the NDP Task Force.

The Supreme Court's endorsement test considers whether a reasonable observer aware of the history and context of a religious event would find the event to have the effect of favoring or disfavoring religion. The courts are to ask whether an objective, reasonable observer, aware of the history and context in which the religious speech occurs, would fairly understand the speech to be a government endorsement of religion. *Books*, 401 F.3d at 867; *Sante Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000). This standard presupposes a person of ordinary understanding and sensibility, familiar with the circumstances surrounding the government's speech. Every government practice must be judged in its unique circumstances to determine whether it constitutes an

endorsement or disapproval of religion, as the Court explained in *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001):

> Under the second prong [*Lemon*], we ask, irrespective of the State's stated purpose, whether accepting this monument for display on the Statehouse grounds has the primary effect of conveying a message that the State is advancing or inhibiting religion. The question is: would a reasonable person believe that the display amounts to an endorsement of religion? An important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval of their individual religious choices. Again, to answer these questions we examine the content and context of the display.

The Establishment Clause is concerned with the message that the government may send to its citizenry about the significance of religion. *See Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), cited in *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987). Government messages of endorsement impermissibly send a prohibited signal to non-adherents "that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688. *See* also *McCreary County,* 545 U.S. at 860-61 (by showing a purpose to favor religion, the government sends a message to non-adherents that they are outsiders; indeed, the apparent purpose of government action can have an impact more significant than the result expressly decreed. If the government justified a decision with a stated desire to honor Christ, the divisive thrust of the official action would be inescapable).

The test of endorsement under the Establishment Clause is analogous to the standard for determining whether a statement suggests a discriminatory preference to an ordinary reader or listener, again such as under the Fair Housing Act. The standard for determining whether a statement violates that Act is whether the statement "suggests a preference to the ordinary reader or listener." *Fair Housing Congress v. Weber*, 993 F.Supp 1286, 1290 (C.D. Cal. 1997). A violation occurs when a communication either implies an obvious discriminatory preference or where the ordinary reader would infer a particular discriminatory preference. *Id*. at 1291, citing *Blomgren v. Ogle*, 850 F.Supp. 1427, 1440 (E.D. Wash. 1993). The relevant standard applied in such cases is defined in terms of "the natural interpretation of the ordinary reader." *Id*., citing *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972). If an ad suggests to an ordinary reader that a particular race is preferred or dispreferred, the Act is violated. *Id*. The ordinary reader "is neither the most suspicious nor the most insensitive of our citizenry." *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2nd Cir. 1991).

The "ordinary reader test" is similar in application to the test used by the courts to determine whether government speech has the appearance of improperly endorsing religion. The ordinary reader test, like the endorsement test, moreover, is fact dependent, which makes dismissal for failure to state a claim inappropriate in most cases. As the Court noted in *Ragin*, 923 F.2d at 1001, "the present complaint cannot be dismissed for failure to state a claim for relief . . . Given the ordinary reader test, it can hardly be said

that the allegations [of the Complaint] are insufficient to enable plaintiffs to prove" that discriminatory advertisements were published.

In the present case, the defendants not only ignore the factual context of concerted action between the President and the NDP Task Force; they also ignore the fact that a reasonable observer is aware that prayer is a quintessential religious practice, and that admonitions to pray inherently give the appearance of endorsement. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Promoting an intrinsically religious practice like prayer, therefore, will never satisfy the secular purpose requirement necessary for constitutionality. *Jagger v. Douglas County School District*, 862 F.2d 824, 830 (11th Cir. 1989). In fact, these principles were upheld in *Freedom From Religion Foundation v. Webb*, 93-CV-6056 (District Court, City and County of Denver, Colorado, 1993), in which Judge McMullen enjoined Denver Mayor Wellington Webb from actively participating in a Day of Prayer Against Violence ceremony:

> The challenged conduct here is Mayor Webb's press release and press conference endorsing the Day of Prayer. Since prayer is exclusively a religious act, the endorsement of a Day of Prayer would logically be interpreted by a reasonable person as an endorsement of religion. Because from all appearances, Mayor Webb was acting in his official capacity in issuing the press release and conducting the press conference endorsing the Day of Prayer, the Court concludes that a reasonable person would interpret his conduct as governmental endorsement of religion. As such, it violates the Establishment Clause.

(A true and correct copy of the Court's Decision is attached to this Brief as Exhibit I.)

The history and context of Presidential Prayer Proclamations cannot be properly considered on the pleadings. A motion to dismiss pursuant to F.R.C.P. 12(b)(6) tests the sufficiency of a plaintiff's complaint according to applicable legal principles. Such motions are looked on with disfavor and should not be granted unless it appears beyond doubt that the plaintiffs can prove no set of facts that would entitle them to relief. The Court must accept all averments of material fact as true, and all the allegations in the complaint must be viewed in a light most favorable to the plaintiff. *See Limestone Development Corp. v. Village of Lamont*, 520 F.3d 797, 803 (7th Cir. 2008).

Here, the plaintiffs' Amended Complaint includes detailed factual allegations relating to the joint and concerted action between the President and the NDP Task Force as to the dedication and celebration of official Days of Prayer, including collaboration on the content of the official Prayer Proclamations. The defendants, however, ignore all of the factual detail about this relationship between the President and the NDP Task Force, which relationship provides context that is relevant to whether a "reasonable observer," knowing of this concerted action, would find that the Presidents' Prayer Proclamations and Prayer Day dedications give the appearance of official endorsement of religion.

Context and content do count in determining whether public officials have crossed the line between "benign ceremonial deism" and actions that give the appearance of official endorsement of religion. *See Allegheny County,* 492 U.S. at 598-600. The defendants, nonetheless, simply ignore the detailed allegations of the plaintiffs' Amended

Complaint as if they did not exist. This is not a proper approach to a motion to dismiss for failure to state claims upon which relief may be granted. The court must instead treat the allegations of the Amended Complaint as true and draw reasonable inferences that would support the Amended Complaint.

The Amended Complaint is not one in which only bare legal conclusions are alleged. The plaintiffs specifically allege that the President has issued Prayer Proclamations and dedications of official Prayer Days, the content and purpose of which have been prompted by concerted action with the NDP Task Force. The plaintiffs are prepared to prove such concerted action between the President and the NDP Task Force, from which proof a reasonable observer could find that the appearance of government endorsement of religion has been established, including a preference for messianic Christianity. (*See* sampling of materials relating to NDP Task Force and the "hijacking" of the National Day of Prayer, attached to this Brief as Exhibits C and D.) For purposes of the present motion to dismiss, of course, the plaintiffs do not have to prove these allegations - - but they could. The Amended Complaint, from a pleading perspective, is certainly sufficient to state a claim upon which relief may be granted.

In order for the Court to grant the defendants' Motion to Dismiss, the Court necessarily must conclude that concerted action between the President and the NDP Task Force in issuing Prayer Proclamations and dedications of Prayer Days does not raise any issue of government endorsement of religion, i.e., that such collaboration is fully

consistent with government neutrality toward religion. That proposition is so untenable that even the defendants do not make the argument. Instead they try to just ignore the Amended Complaint, but that does not render it legally insufficient, nor will it make the facts less true.[3]

B. The Supreme Court Has Not Approved Presidential Prayer Day Dedications.

The defendants incorrectly imply that Prayer Proclamations and dedication of Prayer Days constitute nothing more than benign "recognition of the role of religion and prayer in American history," already approved by the Supreme Court. The allegations of the plaintiffs' Amended Complaint allege much more context and content than the defendants concede, but even without concerted action between the President and the NDP Task Force, official Prayer Proclamations are more than mere acknowledgments of the history and role of religion in America. Prayer Proclamations are not just "honorary;" they constitute government speech literally telling citizens to engage in prayer.

The Report of the Senate Committee on the Judiciary relating to the National Day of Prayer belies the defendants' claim that the National Day of Prayer "is simply acknowledgment of a tradition." The claim that Congress intended the National Day of Prayer Enactment for the secular purpose of "acknowledging the role of faith" in the Nation's history is simply not true. Instead, the Senate Report describes the intent of

[3]The reasoning applicable to Presidential Proclamations also applies to Governor Doyle's Proclamations, including as to the concerted action with the NDP Task Force.

Congress for the people of this country to "reaffirm" the Nation's supposed deep religious conviction:

> It would certainly be appropriate if, pursuant to this resolution and the proclamation it urges, that the people of this country were to unite in a day of prayer each year, each in accordance with his own religious faith, thus reaffirming in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States. (See Exhibit A attached to this Brief.)

The intent to "reaffirm in a dramatic manner" the supposed religious convictions of the nation does not reflect the claimed secular purpose of merely acknowledging the supposed role of religion in the nation's history. (*See* also Exhibit E attached to this Brief, contemporaneously reporting that the purpose of the National Day of Prayer was "to have the public assemble in churches, synagogues and other places of worship to offer prayers for world peace.")

Significantly, the Senate Report on the National Day of Prayer Legislation also exposes a very troublesome historical inaccuracy, which the defendants perpetuate in this case. The Senate Report states that "when the delegates to the Constitutional Convention encountered difficulties in the writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions." That statement is wrong, but it lies at the core of the defendants' attempt to justify the legislative enactment calling for a National Day of Prayer in 1952, more than 150 years after the signing of the United States Constitution. Leo Pfeffer, Church, State & Freedom

(1967), describes the real facts at page 121-122, in his scholarly examination of the Establishment Clause:

> It is perhaps symbolic of the difference in the relationship of state and religion between the Continental Congress and the new government established by the Constitutional Convention of 1787, that whereas the Continental Congress instituted the practice of daily prayers immediately on first convening, the Convention met for four months without any recitation of prayers. After the Convention had been in session for a month, the octogenarian Franklin, who in earlier years had been pretty much of a Deist, moved "that henceforth prayers imploring the assistance of heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service." The motion was received politely though not without embarrassment. According to the records of the Convention, "After several unsuccessful attempts for silently postponing the matter by adjourning, the adjournment was at length carried, without any vote on the motion."
>
> More than symbolic, it is deeply significant that whereas there was scarcely a document or promulgation issued by the Continental Congress that did not contain an invocation to "God" or one of the numerous synonyms of the Deity, the Constitution emerging from the Convention contained no such invocation or reference. This omission was not inadvertent.

The different treatments of religion by the Continental Congress and the Constitutional Convention is significant in its implications about the supposed historical meaning of the Establishment Clause. Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (1986), notes this significance, as well as the historical confusion still being perpetuated:

> The Constitutional Convention of 1787, which framed the Constitution of the United States, gave only slight attention to the subject of a Bill of Rights and even less to the subject of religion. In contrast to the Declaration of Independence and to many acts of the Continental Congress, the Constitution contains no references to God; the Convention did not even invoke divine guidance for its deliberations. Its finished product made no reference to religion except to prohibit a religious test as a qualification for federal office holders.
>
> There are no other references to the subject of religion at the Constitutional Convention, except for Benjamin Franklin's speech at a critical juncture of the proceedings on the reason that prayers should open its sessions. President Ronald Reagan, who sometimes reinvents history, mistakenly declared that as a result of Franklin's motion, "From that day on they opened all the Constitutional meetings with a prayer." Practical considerations - an unwillingness to let the public think the Convention was in trouble, lack of money to pay a minister, and deference to Philadelphia's Quakers - resulted in the death of the Franklin motion. The Convention, he noted, "Except three or four persons, thought prayers unnecessary."

Id. at 63-64.

They may have prayed at the Continental Congress, but they did not pray at the Constitutional Convention. That is a distinction that makes a difference. The Articles of Confederation adopted by the Continental Congress do not provide a litmus for the interpretation of the Establishment Clause of the United States Constitution. The Articles of Confederation were ratified on March 1, 1871, but they lasted only seven years. They were seriously defective. The Articles were subsequently replaced by the Constitution on June 21, 1788, and that Constitution has lasted more than 200 years. Whereas the Articles of Confederation, moreover, hardly recognized the separation between church

and state, the Constitution subsequently incorporated that separation, with continuing success.

In fact, the major architects of the Constitution vigorously opposed government meddling in religion, including the issuance of proclamations of prayer. Thomas Jefferson, for one, opposed such proclamations. "In his view, presidents should have nothing to do with Thanksgiving proclamations or days of prayer or times of devotion. These were religious matters falling into the exclusive province of religious, not political leaders; 'the right to issue such proclamations belong strictly to the former,' Jefferson declared, 'and this right can never be safer than in their own hands, where the Constitution has deposited it.'" Edwin S. Gaustad, Faith of Our Fathers: Religion in the New Nation, at p. 45 (1987). Jefferson's explanation for refusing to issue prayer proclamations, significantly, evidences that the First Amendment restricts not only Congress, but the President as well. In fact, no known authority supports the defendants' claim that the Establishment Clause has no applicability to the President.

James Madison shared Jefferson's view regarding the issuance of prayer proclamations. Madison's views are particularly compelling because Madison is falsely cited as a proponent of the Constitutionality of dedicated days of prayer. He was not. Although Madison did stray from his convictions during a time of war, he did not believe his actions were constitutional. Levy describes the circumstances:

> In his "Detached Memoranda" Madison also stated that "religious proclamations by the Executive recommending Thanksgivings and fasts are shoots from the same root with the Legislative Acts reviewed." Madison made this remarkable judgment about so innocuous an act as a Presidential recommendation for a day of Thanksgiving, another extreme example of non-preference on a matter respecting religion. He regarded such recommendations as violating the First Amendment: "They seem" he wrote, "to imply and certainly nourish the erroneous idea of a national religion." As a President, however, Madison had proclaimed several days of fast and thanksgiving, but he found extenuating circumstances in the fact that he was Chief Executive during the time a war was fought on national soil.

Levy, The Establishment Clause: Religion and the First Amendment, at 99-100. *See* also Pfeffer, Church, State & Freedom, at 266-67:

> Madison was unable to resist the demands to proclaim a day of thanksgiving, but after retiring from the Presidency he set forth five objections to the practice: (1) an executive proclamation can be only a recommendation, and an advisory government is a contradiction in terms; (2) in any event, it cannot act in Ecclesiastical matters; (3) a Presidential proclamation implies the erroneous idea of a national religion; (4) the tenancy of the practice is "to narrow the recommendation to the standard of the predominant sect," as is evidenced by Adams' calling for a Christian worship; and (5) "the liability of the practice to a subserviency to political views, to the scandal of religion as well as the increase of party animosities."[4]

The defendants' faulty history does not support the constitutionality of Pray Proclamations; nor does their interpretation of Supreme Court precedent. The United States Supreme Court has recognized in *Allegheny v. American Civil Liberties Union*, 492

[4]*See* also Exhibit G attached to this Brief, including pertinent excerpts of the Supreme Court's consideration of the history of the Religion Clauses to the Constitution.

U.S. at 603 n. 52, that official Prayer Proclamations stand on different footing than "ceremonial deism" such as legislative prayer. The Supreme Court stated:

> It is worth noting that just because Marsh sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct.

Significantly, the Court's doubt about the constitutionality of Prayer Day Proclamations in *County of Allegheny* came after the Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984), upon which the defendants rely.

The Supreme Court's concern about religious endorsements has found voice in subsequent recent decisions as well. For example, in *McCreary County,* 545 U.S. at 861, the Court noted that when the government designates Sunday closing laws, it advances religion only minimally because many working people would take the day off as one of rest regardless, "but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable." As a result, the Supreme Court has upheld Sunday closing statutes on secular grounds, after finding that the government had forsaken the religious purposes behind predecessor laws. *Id*.

The Supreme Court further noted in *McCreary* the difference between passive symbols and "insistent calls" for religious action. "Creches placed with holiday symbols

and prayers by legislators do not insistently call for religious action on the part of citizens; the history of posting the [Ten] Commandments [however] expressed a purpose to urge citizens to act in prescribed ways as a personal response to divine authority." 545 U.S. at 877 n. 24.

Finally, the Supreme Court noted in *McCreary* that the framers of the Constitution intended the Establishment Clause to require government neutrality in religion, "including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead extended the prohibition to state support for religion in general." *Id*., at 878. *See* also *Lee v. Weisman*, 505 U.S. 577, 503-506 (1992) (Justice J. Souter, concurring) ("President Jefferson steadfastly refused to issue Thanksgiving Proclamations of any kind, in part because he thought they violated the Religion Clauses.").

The Supreme Court, therefore, has not determined that Prayer Day Proclamations are proper acknowledgments of religion, even without the concerted action of patently evangelical organizations, which marks this case. The defendants' argument to the contrary is wrong.

Nor has the constitutionality of Prayer Proclamations and Prayer Day dedications been decided ancillary to any judicial recognition of holidays like Thanksgiving and Christmas. Judicial acknowledgment of such holidays, in fact, has been limited to

instances where the justification was based upon the secular aspects of such holidays. By contrast, courts have not sanctioned government recognition of holidays where the justification was based upon "religious connotations." For example, in *Ganulin v. United States*, F. Supp. 2d 824, 834-35 (S.D. Oh.1999), the Court concluded that the United States did not violate the Establishment Clause by giving federal employees a paid vacation day on Christmas, but only because the government was doing no more than recognizing the cultural significance of the holiday, rather than its religious significance. According to the court, "the conclusion that Christmas has a secular purpose is supported by cases analyzing the constitutionality of school, office, and courthouse closings on other days traditionally celebrated as holy days by Christians," including Good Friday. *Id*., at 833.

In *Granceier v. Middleton*, 173 F.3d 568, 574 (6th Cir. 1999), the Court summarized the law in regard to Good Friday closings, finally concluding that holiday closings are suspect "if the purpose for which they are instituted is religious." *See also Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991); *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995); and *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999). Government acknowledgment of various holidays with supposed religious connotations has been upheld only so long as the acknowledgment was not based on the religious significance of the holiday. In fact, that distinction lies at the heart of the Supreme Court's *Allegheny* decision regarding the symbolism of government speech.

C. Government Speech Must Be Evaluated By Content and Context.

Even with public displays of creches and Nativity scenes, the content and context of the display must be considered in order to determine whether any particular display gives the appearance of endorsement of the religious aspects of the Christmas holiday season. Courts have not simply generalized that religious holiday displays constitute no more than the "acknowledgment" of the historical significance of Christmas in America. Public displays, instead, are carefully scrutinized for any appearance of governmental endorsement of the religious significance of the holiday. Hence, in *Allegheny*, the Supreme Court concluded that the display of a creche had an unconstitutional effect, but a menorah display was allowed because that display in its particular physical setting was deemed a visual symbol for a holiday with a secular dimension.

When employing the proper analytical approach, therefore, a court is charged with the responsibility of "assessing the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion." *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000). The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends on its context. *Id*.

The appropriate emphasis has remained squarely on evaluating the totality of the circumstances when judging the constitutionality of public religious displays, including in

the Supreme Court's recent Ten Commandments decisions in *McCreary* and *Van Orden v. Perry*, 545 U.S. 677 (2005). In *McCreary* and *Van Orden*, the Supreme Court reached different conclusions as to the constitutionality of challenged Ten Commandments displays based upon the different circumstances and context of each display. Neither decision, however, leaves any doubt that if an objective observer could conclude from appearances and historic knowledge that the government was demonstrating a religious preference, then the Establishment Clause would be violated.

The concept of "ceremonial deism," suggested by the defendants, is dependent upon the conclusion that a reasonable observer would not view a religious display or government speech as having religious significance. "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate non-religious purposes." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 37 (2004) (J. O'Connor, concurring). This determination, as noted, necessarily involves evaluation of context and content, including circumstances that may change with the passage of time as the actions and motivations of officials change. *Pleasant Grove v. Summum*, __ U.S. __, 129 S. Ct. 1125, 1136 (2009).

Even practices such as legislative prayer are not constitutionally acceptable in all circumstances, as Justice Blackmun recognized in *County of Allegheny*, 492 U.S. at 604 n. 53, stating that "not even the unique history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with

any one specific faith or belief." *See* also *Henrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006). Nor does one acquire a vested or protected right in violation of the Constitution. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Here, the defendants are trying to avoid the essential analysis. First, they incorrectly equate the legislative prayer in *Marsh* with Presidential Prayer Proclamations which exhort participation in religious activity. Next, they try to equate Thanksgiving Proclamations marked by prayer with Proclamations extolling and exhorting prayer. The two are different. Finally, the defendants incorrectly claim that the National Day of Prayer supposedly reflects "an unbroken history of official acknowledgment of the role of religion in American life from at least 1789." This is not true, as some of the Presidential Proclamations even contradict this claim. For instance, the 1987 National Day of Prayer by Ronald Reagan acknowledged only intermittent Day of Prayer Proclamations before 1952:

> In 1952 the Congress of the United States, resuming a tradition observed by the Continental Congress from 1776 to 1783 and followed intermittently thereafter, adopted a resolution calling on the President to set aside and proclaim a suitable day each year as a National Day of Prayer.

In 1983 President Reagan's National Day of Prayer Proclamation similarly noted:

> Two hundred years ago in 1783, the Treaty of Paris officially ended the long, weary Revolutionary War during which a National Day of Prayer had been proclaimed every Spring for eight years. When peace came, the National Day of Prayer was forgotten.

Government speech, whether it involves legislative prayer, official Prayer Proclamations, government displays of Ten Commandments, or other religious symbols, must be evaluated in the particular circumstances of each case in order to determine whether the speech impermissibly endorses religion. In the present case, therefore, the question immediately before the Court is whether the plaintiffs' Amended Complaint alleges facts and circumstances relating to Presidential Prayer Proclamations and Prayer Day dedications from which a reasonable observer could find the appearance of endorsement. If the allegations support such a possibility, then the defendants' Motions must be denied.

The Court should assess the Amended Complaint by focusing on the content and context in which the government's use of religious symbolism appears. This requires highly fact-specific scrutiny which must be approached on a case-by-case basis. Analysis of an Establishment Clause challenge to government speech is ultimately dependent, in important part, on factual determinations, including what a reasonable observer might fairly understand to be the government's primary message, in its particular setting.

D. The Relationship With the NDP Task Force is Part of the Relevant Content and Context, But Ignored By The Defendants.

The relevant context in this case involves the President issuing Prayer Proclamations and dedicating Days of Prayer, in celebratory and festive circumstances, whereby citizens are encouraged to engage in prayer. (*See* Exhibits B and C attached to

this Brief.) The Prayer Proclamations are not issued in circumstances that merely give passive "acknowledgment" of the history of religion in America. Instead, the circumstances indicate a preference for religion, including Christianity, and the dedicated Prayer Days involve controversial exhortations to pray. (*See* Exhibit C and D attached to Brief referencing controversy.)

Presidential Prayer Proclamations also evidence concerted action with evangelical Christian organizations, including the NDP Task Force. The President's 2008 Prayer Proclamation expressly incorporated the preselected Biblical quote given to him by the NDP Task Force. A reasonable observer would know that the express reference in the President's Prayer Proclamation was derived from the NDP Task Force, which dictates a single theme to be used by the President and the governors of all 50 states, although the defendants completely ignore this fact. By agreeing to incorporate the NDP Task Force's annual theme, however, the President created the appearance of endorsement of the NDP Task Force. The alliance with the NDP Task Force created the intended impression that the NDP Task Force and government are working hand-in-glove in sponsoring National Day of Prayer.

Nor has the government aligned with a "benign" nondenominational organization. The NDP Task Force is a virulently Christian organization; its organization and promotion of the National Day of Prayer and corresponding state Prayer Days are based on exclusively Judeo-Christian principles; and the NDP Task Force Prayer Day

dedications are not passive acknowledgments of the historical significance of religion - - the NDP Task Force claims to publicize and preserve America's alleged Christian heritage, to encourage and emphasize prayer, and to glorify the Lord in word and deed.

Proper consideration of Prayer Proclamations and Prayer Day dedications must also take into account the inherent nature of prayer. In *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), the Court emphasized that prayer is the quintessential religious practice, such that no secular purpose generally can be inferred. *See* also *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test, citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). Exhortations from government officials to engage in religious conduct, such as by proclaiming a National Day of Prayer, are distinguishable from passive acknowledgment of religious heritages. *County of Allegheny*, 492 U.S. at 603 n. 52. The National Day of Prayer contemplates "reaffirmation" by action.

The circumstances of the present case, including the dedication of official Prayer Days, constitute calls to action that are distinguishable from "benign" acknowledgments of religion. Presidential Prayer Proclamations are issued in a context in which prayer is being promoted and extolled as a religious phenomenon. Prayer is being promoted as and for the sake of religion. There is no secular rationale for the Prayer Day celebrations marked by Presidential Prayer Proclamations, except the encouragement of prayer.

VI. THE ELECTION OF PRESIDENT OBAMA DID NOT MOOT OR RENDER SPECULATIVE THE PLAINTIFFS' OBJECTION TO CONGRESSIONALLY-MANDATED NATIONAL DAYS OF PRAYER.

The defendants argue unpersuasively that the election of President Obama essentially moots the plaintiffs' objection to dedications and prayer proclamations, or renders further objection wholly speculative. Although the defendants claim that prayer proclamations are historically ubiquitous, and statutorily mandated every year, they suggest that no reason exists to believe that President Obama will continue to issue offensive prayer proclamations. The defendants' suggestion, however, is implausible, but even if the President chose to impose a moratorium on further prayer proclamations, that would not moot the plaintiffs' case or make it unduly speculative.

Voluntary cessation of a challenged practice does not moot a pending action. A party cannot evade judicial review by temporarily altering questionable behavior. *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 999 (7th Cir. 2002). The Supreme Court, accordingly, imposes a stringent standard for determining whether an issue has been rendered moot by a defendant's voluntary conduct: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968). The party asserting mootness bears a heavy burden of persuading the Court that there is no reasonable expectation that challenged conduct will reappear in the future. *Friends of Earth, Inc. v. Laidlaw Environmental*

Services, Inc., 528 U.S. 167, 189 (2000). In the present case, the defendants have not satisfied their "heavy burden." In fact, the defendants point to the Congressional enactment directing the President to issue annual prayer proclamations as support for their position, and the Congressional enactment has not been repealed. The defendants also offer no evidence that the President has implemented an institutional prohibition on future enforcement of the law, which otherwise directs him to issue annual prayer proclamations. In these circumstances, the defendants' claim that this case is moot or speculative is totally unsupported, even by so much as a purported declaration of a temporary moratorium.

A temporary moratorium, in any event, would not render the plaintiffs' action moot. The Seventh Circuit recognized this in *Pleasureland Museum*, 288 F.3d at 999, where the Court rejected a mootness argument after the City of Mishawaka purported to "suspend enforcement" of the provisions of an ordinance until the "matter is resolved." The Seventh Circuit found that this standstill did not create mootness because the moratorium was not permanent and could be lifted at any time. The Court premised its holding upon the decision in *City of Los Angeles v. Lyons*, 461 U.S. 95, 97-98 (1983), where the Supreme Court held that a moratorium did not render a claim moot because the moratorium by its terms was not permanent. *See also White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000), recognizing that a government agency's moratorium, which "by its terms was not permanent," would not moot an otherwise valid claim for injunctive relief.

If the defendants had actually announced a temporary moratorium in this case, it would not render moot plaintiffs' claims. But the defendants have not declared a moratorium. The defendants, instead, merely suggest that the likelihood of future objectionable prayer proclamations is uncertain. This does not make it "absolutely clear" that their wrongful behavior or conduct cannot reasonably be expected to recur. The election of President Obama, in short, does not moot or make speculative the plaintiffs' objection to Presidential Prayer Proclamations and National Day of Prayer dedications.

VII. THE PLAINTIFFS' CLAIMS ARE REDRESSIBLE AGAINST THE PRESIDENT AND HIS PRESS SECRETARY.

Finally, the defendants contend incorrectly that plaintiffs' claims are not redressible by this Court. Although Congress has directed the President by statute to declare a National Day of Prayer each year, the defendants assert that the President allegedly is absolutely immune from suit challenging the constitutionality of such legislation. Whether the President's dedication of a National Day of Prayer violates the Establishment Clause or not, the defendants claim that such acts cannot be prevented by judicial action. The defendants, however, misread the authority on which they rely, which authority does not proscribe suit against the President as to the ministerial act of declaring a National Day of Prayer.

The United States system of government is founded on the rule of law, which includes the necessary function of an independent judiciary. The judiciary, in a system of

separated powers, has the right and the duty to determine the constitutionality of legislative and executive acts. That is what courts do. The present action, therefore, seeking a determination of the constitutionality of Congress' direction to the President to declare a National Day of Prayer, is not an unprecedented or questionable "usurpation" of power by the judiciary.

The Supreme Court has abided by the general principle that courts should not interfere with the exercise of Executive discretion. *See Mississippi v. Johnson*, 71 U.S. 475 (1866). The Court, however, has expressly "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty." *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Such relief would not step on the President's discretion.

The Supreme Court's caveat in *Franklin*, regarding "ministerial" duties, recognizes that judicial inquiry as to the constitutionality of a President's ministerial actions does not implicate separation of power concerns. If Congress prescribes a ministerial duty for the President, then judicial scrutiny of the constitutionality of that legislative mandate does not require a court to evaluate the President's exercise of discretion.

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. *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). A duty is discretionary if it involves judgment, planning, or policymaking; a duty is not discretionary if it involves

enforcement or administration of a mandatory duty at the operational level. *See Beatty v. Washington Metro Area Transit Authority*, 860 F.2d 1117, 1127 (D.C. Cir. 1988).

The plaintiffs seek a determination that Congress' mandate to the President violates the Establishment Clause. The President's execution of this mandate is not discretionary: The President must declare a National Day of Prayer. Whether or not such a mandate from Congress is constitutional under the Establishment Clause, therefore, does not require the Court to review the President's judgment, planning, or policy decision-making. As a result, the Supreme Court's reservation regarding standing to sue the President for discretionary actions is not implicated in this case.

The plaintiffs seek a determination of the constitutionality of a Congressional act, which is something this Court is not prohibited from issuing. Courts frequently rule upon the constitutionality of legislative actions taken by Congress. Declaring the underlying Congressional Act unconstitutional in this case, therefore, does not step upon the constitutional authority vested in the President. The President's actions can be reviewed for constitutionality, even if they are not reviewable for abuse of discretion. *Franklin*, 505 U.S. at 801; *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952); and *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935).

Suit against the President's Press Secretary, moreover, does not raise the same immunity issues involving the President. The plaintiffs have sued the President's Press Secretary, seeking an injunction against his dissemination of National Day of Prayer

Proclamations, which are the proclamations at issue in this case. This claim does not implicate immunity issues because the plaintiffs' alleged injury is likely to be redressed by declaratory relief against the Press Secretary. *Franklin*, 505 U.S. at 803; *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75, n. 20 (1978); *Allen v. Wright*, 468 U.S. 737, 752 (1984).

Concern about confronting the elected head of a co-equal branch of government, while still ensuring the rule of law, can often be successfully accommodated. This is true when the injury at issue can be rectified by injunctive relief against subordinate officials. *Swan*, 100 F.3d at 978. It is "substantially likely," moreover, that the President will abide by an authoritative direction to his Press Secretary, even though the President may not directly be bound by such a determination. *See Franklin*, 505 U.S. at 803.

Here, the plaintiffs' action against the President and his Press Secretary is not barred by separation of powers principles. On the contrary, it is the defendants who seek to eviscerate and limit the constitutional authority of this Court, whose role is to interpret and apply the United States Constitution, including the requirements of the Establishment Clause. The prohibitions of the Establishment Clause, moreover, are not discretionary; the Establishment Clause is a mandatory and self-executing limitation, and it is the role of the Court to finally interpret and apply the proscriptions of the Establishment Clause. The claim that the defendants essentially are not subject to the rule of law misunderstands the necessary role of the courts in our system of government.

Dated this 7th day of April, 2009.

BOARDMAN LAW FIRM
By:

/s/ Richard L. Bolton

Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-1709
Attorneys for Plaintiffs

F:\DOCS\wd\26318\17\A0798994.WPD