IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 6/11/2013
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BY: mjt

FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin non-profit corporation; VALLEY OF THE SUN CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, an Arizona non-profit corporation; MIKE WASDIN, an individual; MICHAEL RENZULLI, an individual; JUSTIN GRANT, an individual; JIM SHARPE, an individual; CRYSTAL KESHAWARZ, an individual; and BARRY HESS, an individual, Plaintiffs/Appellants, v. JANICE K. BREWER, Governor of the State of Arizona, Defendant/Appellee.	1 CA-CV 12-0684 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2012-070001

The Honorable Eileen S. Willett, Judge

AFFIRMED

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K E S S L E R, Judge

¶1 This appeal requires us to determine whether Appellants[1] have standing to seek injunctive and declaratory relief against Governor Janice Brewer. Under two provisions of the Arizona Constitution, Appellants challenged Governor Brewer's proclamations of a day of prayer, but the superior court found the Appellants lacked standing to bring their challenge and, dismissed the complaint. The record clearly demonstrates that Appellants did not allege or seek to allege taxpayer standing, did not allege any distinct and palpable harm to themselves, and that this case does not merit a waiver of Arizona's prudential standing requirements. Accordingly, we affirm the dismissal of the complaint.

[1] Appellants are six residents of Maricopa County, the Wisconsin-based Freedom from Religion Foundation, Inc., and its Arizona chapter, Valley of the Sun Chapter of the Freedom from Religion Foundation.

FACTUAL AND PROCEDURAL HISTORY

¶2 The individual Appellants are people who believe or do not believe in religion. The organizational Appellants are "membership organization[s] whose purpose[] [is] to promote the fundamental constitutional principle of separation of church and state and to educate on matters relating to nontheism."[2] In January 2012, Appellants sought declaratory relief by filing a complaint alleging that the Governor's 2010 and 2011 prayer proclamations, appended to this decision as Appendix A, violated Article 2, Section 12 and Article 20, Par. 1, of the Arizona Constitution.[3] Specifically, they alleged that the Governor's proclamations violated Article 2, Section 12 "when she used her government position, acting in her official capacity for which she was paid by public money, to appropriate and apply public

[2] The parent organization "has the mission and purpose to advocate on behalf of its members to protect its members from [state/church separation] violations."

[3] The 2010 "Arizona Day of Prayer" proclamation states in part "Americans of every race, background and creed come together in churches, synagogues, temples, mosques and their own homes to pray for guidance, wisdom and courage." The 2011 "Arizona Day of Prayer" proclamation is substantially the same. In addition, the Governor issued another 2010 proclamation for a "Day of Prayer for Arizona's Economy and State Budget." The proclamation stated in part: "throughout this day of prayer, we ask for God's favor, blessing, wisdom and guidance to rest upon our state government, businesses and our citizens, that God would guide our state government leaders to resolve the state's budget deficit, renew the vitality of our state's economy and that God would aid and empower the citizens and businesses in our state and in our nation."

money and property by endorsing religious worship, exercise or instruction, and supporting religious establishment."[4] They also alleged that the proclamations "attacked the [individuals'] protected right" "from molestation in person or property on account of his or her mode of religious worship, or lack of [the] same" in violation of Article 20, Par. 1.[5] They contended

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[4] Article 2, Section 12 provides in relevant part:

> No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

This constitutional provision has been described as the "Religion Clause" and "Arizona's analog to the federal Establishment Clause," that is "intended to ensure the separation of church and state." *Cain v. Horne*, 218 Ariz. 301, 305, ¶ 6, 183 P.3d 1269, 1273 (App. 2008), *vacated on other grounds by* 220 Ariz. 77, 202 P.3d 1178 (2009) (*"Cain II"*).

[5] Article 20, Par. 1 has been called "Arizona's 'perfect toleration of religion' clause," *Barlow v. Blackburn*, 165 Ariz. 351, 354, 798 P.2d 1360, 1363 (App. 1990), and provides: "Perfect toleration of religious sentiment shall be secured to every inhabitant of this State, and no inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same."

With respect to this provision, our supreme court has previously stated that:

> [t]he prohibitions against the use of public assets for religious purposes were included in the Arizona Constitution to provide for the historical doctrine of separation of church and state the thrust of which was to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches.
>
> . . . .

that the proclamations "make non-believers and many believers political outsiders by sending a message to non-believers that they are not welcome to fully participate in government processes," and the designation of a day of prayer "creates a hostile environment for non-believers and many believers, who are made to feel as if they are second class citizens." They also sought to enjoin the Governor from proclaiming any days of prayer in 2012 and thereafter.

¶3 The Governor moved to dismiss Appellants' complaint pursuant to Arizona Rule of Civil Procedure ("Rule") 12(b)(1) arguing that the superior court lacked subject-matter jurisdiction.[6] Specifically, the Governor argued that Appellants: (1) lacked standing because a proclamation has no

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> We believe that the framers of the Arizona Constitution intended by this section to prohibit the use of the power and the prestige of the State or any of its agencies for the support or favor of one religion over another, or of religion over nonreligion. The State is mandated by this constitutional provision to be absolutely impartial when it comes to the question of religious preference, and public money or property may not be used to promote or favor any particular religious sect or denomination or religion generally.

Pratt v. Ariz. Bd. of Regents, 110 Ariz. 466, 468, 520 P.2d 514, 516 (1974) (internal citation and quotation marks omitted).

[6] The motion to dismiss did not alternatively argue that Appellants failed to state a claim, and the merits of the alleged constitutional violations were not addressed in the superior court proceedings.

legal effect and can be ignored; (2) failed to articulate a particularized and palpable injury because there was no "alteration of conduct" alleged and a "perceived slight or feeling of exclusion" does not confer standing; (3) do not have representational standing because the Freedom From Religion Foundation's individual members lack standing; and (4) were seeking to pursue moot claims and/or an advisory opinion because past proclamations cannot be "undone" and the content of potential future proclamations cannot be predicted.

¶4 Despite the fact they had not alleged in the complaint that they were Arizona taxpayers, Appellants opposed the motion, asserting that "[t]his is more than a mere 'taxpayer' case." Rather, "[t]he issue goes far deeper than a few citizens opposed to some small portion of their tax dollars being illegally spent by the Governor in the service of her preferred mode of religious worship." Appellants asserted that they had standing because they alleged they suffered a "tangible loss" as articulated in the complaint:

> [The] 2010 and 2011 proclamations . . . violated Article II, Section 12, of the Arizona Constitution when [the Governor] used her government position, acting in her official capacity for which she was paid by public money, to appropriate and apply public money and property by endorsing religious worship, exercise or instruction, and supporting religious establishment.

¶5 In addition, Appellants maintained that they suffered personal harm "beyond merely being forced to pay for conduct with which they disagree" because the proclamations have "deprived them of their Constitutionally codified protections from molestation in religious matter[s]." Appellants also asserted that the proclamations make them "political outsiders" and "second class citizens." Finally, Appellants argued that the standing requirements should be waived because the controversy is important and the violations are likely to recur.

¶6 The superior court dismissed the complaint with prejudice after determining that Appellants "lack[ed] an injury sufficient to demonstrate that they have direct or representational standing," and "[i]n the absence of a particularized and concrete injury . . . [Appellants'] claims cannot go forward." The court stated that Appellants "have not alleged that they filed their claims in their capacity as taxpayers, nor have they shown a direct injury, pecuniary or otherwise." The court also held there were "[n]o exceptional circumstances . . . to support the Court's waiver of the standing requirement," and Appellants were seeking "an unlawful advisory opinion."

¶7 Appellants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).

ISSUES ON APPEAL AND STANDARD OF REVIEW

¶8 Both parties re-urge the arguments they asserted below. Subject-matter jurisdiction and standing are issues of law, which we review *de novo*. *Mitchell v. Gamble*, 207 Ariz. 364, 367, ¶ 6, 86 P.3d 944, 947 (App. 2004) (subject-matter jurisdiction); *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 15, 91 P.3d 1019, 1023 (App. 2004) (standing); *Hill v. Peterson*, 201 Ariz. 363, 365, ¶ 5, 35 P.3d 417, 419 (App. 2001). We also review a dismissal of a complaint for a lack of subject-matter jurisdiction *de novo*. *See Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We will "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom."[7] *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008); *see also Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4, 121 P.3d 1256, 1259 (App. 2005). However, "we do not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal

[7] The same standard applies to motions to dismiss for lack of standing. *See Varga v. Valdez*, 121 Ariz. 233, 235, 589 P.2d 476, 478 (App. 1978), *overruled on other grounds by Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 433, 600 P.2d 44, 46 (App. 1979).

conclusions alleged as facts." *Id.*; *see also Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. "[C]onclusory allegations of law and unwarranted inferences will not defeat an otherwise proper[ly] [filed] motion to dismiss." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007) (internal quotation marks omitted).

DISCUSSION

I. Standing

¶9 In analyzing the standing issue, we are faced with a paucity of Arizona precedent applying standing principles to the two constitutional issues raised. Accordingly, we will summarize and apply general Arizona standing principles and, to the extent they are consistent with Arizona law, look to federal precedent on standing for Establishment Clause purposes.

¶10 Arizona courts "are not constitutionally constrained to decline jurisdiction based on lack of standing." *Sears v. Hull*, 192 Ariz. 65, 71, ¶ 24, 961 P.2d 1013, 1019 (1998). Arizona, however, has placed limits on a party's standing to sue another. To have standing to sue, a plaintiff must have suffered injury in fact, economic or otherwise, from the allegedly illegal conduct, and the injury must be distinct and palpable so that the plaintiff has a personal stake in the outcome. *See Bennett v. Brownlow*, 211 Ariz. 193, 196, ¶ 17, 119 P.3d 460, 463 (2005); *Fernandez v. Takata Seat Belts, Inc.*, 210

Ariz. 138, 140, ¶ 6, 108 P.3d 917, 919 (2005); *Sears*, 192 Ariz. at 69, ¶ 16, 961 P.2d at 1017; *see also* A.R.S. § 12-1832 (2003) (authorizing any person "whose rights . . . are affected by a statute" to seek declaratory relief on the validity of the statute and "obtain a declaration of rights, status or other legal relations thereunder"). Moreover, while Arizona does not have a case or controversy requirement to establish standing, *Sears*, 192 Ariz. at 71, ¶ 24, 961 P.2d at 1019, Arizona courts have articulated a "prudential" component of standing as a matter of judicial restraint to ensure that the judicial branch does not impermissibly intrude on the powers of the other branches of government under our separation of powers doctrine. *Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶ 19, 81 P.3d 311, 316 (2003); *see also Brownlow*, 211 Ariz. at 195, ¶ 14, 119 P.3d at 462; *Takata*, 210 Ariz. at 140, ¶ 6, 108 P.3d at 919. As our supreme court stated in *Bennett v. Napolitano*, "[t]his court has, as a matter of sound judicial policy, required persons seeking redress in the courts first to establish standing, especially in actions in which constitutional relief is sought against the government." 206 Ariz. at 524, ¶ 16, 81 P.3d at 315. In addition to preventing advisory opinions, such restraint is exercised to ensure a case is "ripe for decision and not moot, and that the issues [will] be fully developed

between true adversaries." *Brownlow*, 211 Ariz. at 196, ¶ 16, 119 P.3d at 463.

¶11 Despite differences between federal and state standing requirements, we "have previously found federal case law instructive." *Takata*, 210 Ariz. at 141, ¶ 11, 108 P.3d at 920 (quoting *Bennett*, 206 Ariz. at 525, ¶ 22, 81 P.3d at 316). Federal courts must find Article III standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982); *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *see Bennett*, 206 Ariz. at 525, ¶ 18, 81 P.3d at 316 (holding that the core components required to establish Article III standing are injury that is: (1) "fairly traceable to the defendant's allegedly unlawful conduct"; and (2) "likely to be redressed by the requested relief");[8] *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (stating that "[t]he minimum constitutional requirements for standing were explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 [(1992)].").

¶12 In addition, federal courts subscribe to certain judicially imposed limits on standing based on prudential

[8] The fairly traceable and redressable components have been described as two facets of a single causation requirement. *Allen*, 468 U.S. at 753 n.19. Fairly traceable relates to the connection between the allegedly unlawful conduct and the plaintiff's injury, whereas, redressibility relates to the connection between the plaintiff's injury and the judicial relief requested. *Id.*

concerns: a plaintiff cannot raise another person's rights; the right must be personal to the plaintiff; generalized grievances are more appropriately addressed in the representative branches; and the complainant must fall within the zone of interest protected by the law invoked. *Valley Forge*, 454 U.S. at 474-75; *Allen*, 468 U.S. at 751; *see also Mullin v. Sussex County, Delaware*, 861 F. Supp. 2d 411, 417 (D. Del. 2012) ("In addition to establishing Article III standing, a party must establish prudential standing." (internal quotation marks omitted)). Prudential principles bear a "close relationship to the policies reflected in the Art. III requirement of actual or threatened injury amenable to judicial remedy. . . . That requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations." *Valley Forge*, 454 U.S. at 475. Despite the federal standards, it is fair to say that federal law on standing for Establishment Clause purposes is not the epitome of consistency. *See id.* ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.").

¶13 In applying these standards, we must carefully examine "a complainant's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752. In Establishment Clause cases, the concept of concrete injury can be particularly elusive "because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (quoting *Vasquez*, 487 F.3d at 1250); *see also Ariz. Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927, 929 (D. Ariz. 2000) (citing circuit courts cases that acknowledge "that the injury necessary to establish standing in Establishment Clause cases is a difficult and elusive concept"); *Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012).

II. Injury

¶14 Appellants argue the superior court erred in dismissing their complaint with prejudice because they have standing as taxpayers and as citizens suffering intangible, yet palpable harm by the Governor's proclamations. We address each argument in turn.

A. Pecuniary injury: taxpayers

¶15 Appellants alleged in their complaint that the Governor violated Article 2, Section 12, of the Arizona

Constitution "when she used her government position, acting in her official capacity for which she was paid by public money, to appropriate and apply public money and property by endorsing religious worship, exercise or instruction, and supporting religious establishment." On appeal, Appellants argue that their specific alleged injury with respect to that constitutional provision is pecuniary in nature, and specifically tax-related because they suffered injury in the form of taxpayers' dollars being spent on the proclamations.

¶16 We reject Appellants contention because their complaint did not allege they were Arizona taxpayers. Nor did they ever seek to amend their complaint to allege such status. Yet Appellants urge this Court to attribute the potential pleading failure to the superior court by arguing:

> In an act of "gotcha" jurisprudence, the Superior Court relied on Appellants' failure to allege taxpayer standing to dismiss the case, but then prevented leave to amend or refile by dismissing the case with prejudice. The case's relevance to taxpayer status was asserted numerous times by [the Freedom from Religion Foundation], as was their status as such, though not formally so stated in the complaint.

Rule 15(a)(1)(B) automatically permits an amendment when a Rule 12(b) motion to dismiss is filed. Appellants had the opportunity to amend their complaint when the Governor filed a Rule 12(b) motion and argued the pleading failure therein. In

addition, Appellants never sought leave of court to amend their complaint before it was dismissed, Ariz. R. Civ. P. 15(a)(1)(B), nor did they seek relief in a post-trial motion after it was dismissed, *see generally* Ariz. R. Civ. P. 59, 60. It is therefore disingenuous to attempt to shift blame to the superior court for their failure to plead taxpayer status in the complaint. To the extent Appellants' action was dismissed based on the failure to plead taxpayer standing, we find no error.[9]

[9] We do not address whether Appellants could meet the standards for taxpayer standing. However, we note that "the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court." *Winn*, 131 S. Ct. at 1440. The narrow exception to the general prohibition is a taxpayer asserting Establishment Clause claims. *Id.* at 1445; *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (articulating two-prong test to determine whether exception should apply); *see also Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 609 (2007) ("We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause."). Similarly, taxpayer status under state law does not automatically confer standing to challenge government conduct. "For a taxpayer to maintain an action to restrain an allegedly illegal expenditure of public funds, he must be a contributor to the particular fund to be expended." *Smith*, 123 Ariz. at 433, 600 P.2d at 46.

B. Non-pecuniary injury: psychological consequence

¶17 Appellants also argue that the issuance of the proclamations has caused them to suffer the following injuries outlined in their complaint: "sending a message to non-believers that they are not welcome to fully participate in government processes" creating "a culture of government-sanctioned religiosity which molest[s]" Appellants and "a hostile environment for non-believers and many believers, who are made to feel as if they are second class citizens"; being "molested by and subjected to these unwanted exhortations to pray and the resulting government-sanctioned celebrations of religion in the public realm"; interfering with Appellants' "rights of personal conscience" and with the Freedom from Religion Foundation's mission to "protect its members from violations of the Constitutional principle of separation of church and state."

Appellants rely on an unpublished decision of the Colorado Court of Appeals to support their argument that they suffered "tangible losses" in the form of taxpayer money being spent on materials and supplies to create the proclamations, postal expenses for mailing the proclamations, space on computer servers to store electronic copies, and salaried members of the Governor's office expending resources on the proclamations as a part of their duties. Not only does the case rely on Colorado jurisprudence and is not binding on us, but we will not consider it because it is an unpublished decision and Appellants' citation of it violates Arizona rules which bar citation of unpublished decisions except under limited circumstances not present here. *See Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n.3, 701 P.2d 1182, 1185 n.3 (1985); *Walden Books Co. v. Dep't of Revenue*, 198 Ariz. 584, 589, ¶¶ 20-23, 12 P.3d 809, 814 (App. 2000).

¶18 The Governor argues that like the plaintiffs in *Valley Forge*, "Appellants' purported harm amounts to nothing more than generalized allegations that they disagree with the [p]roclamations" and such "perceived slight or feeling of exclusion does not constitute a concrete or particularized injury" sufficient to support standing.

¶19 While we disagree that any purported psychological harm is insufficient to confer standing without resultant economic harm, we agree that Appellants' alleged harm does not meet Arizona's requirement for distinct and palpable injury. Rather, the complaint appears to simply plead conclusions of law as facts, merely parroting language from the Arizona Constitution and cases to assert a distinct and palpable injury. Such conclusory pleading is insufficient to defeat a motion to dismiss. *See Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346; *Jeter*, 211 Ariz. at 389, ¶ 4, 121 P.3d at 1259. Accordingly, we conclude Appellants lack standing.

¶20 As discussed below, what we glean from Establishment Clause standing cases is that to properly allege standing in the absence of directive conduct (such as requiring school prayer), the complaint must allege some resultant change of behavior by the plaintiffs to avoid the alleged violative and offensive conduct or that the alleged violation is so pervasive and continuing that it of necessity affects on a practical level how

the plaintiffs interact with government. The complaint does not meet those standards.

¶21 Before turning to those cases, however, we must first dispose of the Governor's argument that the Supreme Court has rejected psychological harm as sufficient to confer standing in this context. The Governor relies on *Valley Forge*, in which plaintiffs filed suit challenging a transfer of government property in Pennsylvania to an organization run by a religious group. *Valley Forge*, 454 U.S. at 468-69. Plaintiffs were individual residents of Virginia and Maryland and an organization from Washington, D.C. *Id.* at 486-87. The district court granted summary judgment in favor of the defendants and the Third Circuit reversed. *Id.* at 469-70. Although the court of appeals agreed that plaintiffs lacked taxpayer standing, it ultimately determined that plaintiffs "had standing merely as citizens, claiming injury in fact to their shared individuated right to a government that shall make no law respecting the establishment of religion." *Id.* at 470 (internal quotation marks and citation omitted). After resolving the taxpayer standing issue against the plaintiffs, the Supreme Court further determined that the "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot *alone* satisfy the requirements of

[Article] III." *Id.* at 483 (emphasis added). The court concluded that the complaint was deficient because,

> [a]lthough [plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under [Article] III, even though the disagreement is phrased in constitutional terms.

Id. at 485.

¶22 Contrary to any implication in the Governor's argument, the Court did "not retreat from [its] earlier holdings that standing may be predicated on noneconomic injury." *Id.* at 486. Rather, it simply could not "see that [plaintiffs] have alleged an *injury* of *any* kind, economic or otherwise" to establish standing. *Id.* (describing remoteness of plaintiffs from the alleged unlawful conduct and harm). In so doing, the Court only confirmed that a plaintiff may not merely assert generalized claims that the government has not acted in accordance with law, *Allen*, 468 U.S. at 754, and that a psychological consequence must be different than or in addition

to the injury produced by mere "observation of conduct with which one disagrees," *Valley Forge*, 454 U.S. at 485.[10]

¶23 Indeed, since *Valley Forge*, federal courts have repeatedly held in cases involving religious symbols and displays, that spiritual harm from unwelcome direct contact with offensive religious or anti-religious symbols was sufficient for the more rigorous Article III standing. *See Vasquez*, 487 F.3d at 1252-53 (citing cases); *Dunham*, 112 F. Supp. 2d at 930-32 (citing cases); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010) (stating that "[a]llegations of personal contact with a state-sponsored image suffice to demonstrate . . . direct injury" for purposes of standing in Establishment Clause cases) (citation omitted)); *Hinrichs v. Speaker of the House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584, 590 n.5 (7th Cir. 2007) ("In the context of an alleged Establishment Clause violation . . . 'allegations of direct and unwelcome exposure to a religious message' are sufficient to

[10] While we disagree with the Governor, we recognize that the distinction in *Valley Forge* is, at best, muddled. *See Freedom from Religion Foundation, Inc. v. Obama*, 641 F.3d 803, 812 (7th Cir. 2011) (Williams, J., concurring) ("The Court simply has not been clear as to what distinguishes the psychological injury produced by conduct with which one disagrees from an injury that suffices to give rise to an injury-in-fact in Establishment Clause cases."); *see also Awad*, 670 F.3d at 1121 ("Since *Valley Forge*, the Supreme Court has not provided clear and explicit guidance on the difference between psychological consequence from disagreement with government conduct and noneconomic injury that is sufficient to confer standing.").

show the injury-in-fact necessary to support standing." (citation omitted)); *Newdow v. Bush*, 355 F. Supp. 2d 265, 278 (D. D.C. 2005) (citing cases); *Mullin*, 861 F. Supp. 2d at 418-19 ("Plaintiffs have adequately alleged an injury in fact by alleging direct and unwelcome exposure to The Lord's Prayer.").

¶24 However, courts dealing with standing to bring Establishment Clause challenges have determined that injury occurs when a plaintiff takes steps to avoid a religious display in an area where they live or work or that the allegedly violative conduct is so pervasive that it affects how the plaintiff deals with government on a practical, daily basis. *See, e.g.*, *Barnes-Wallace v. City of San Diego*, 530 F.2d 776, 785 (9th Cir. 2008) (determining in case in which plaintiffs sued the Boy Scouts of America alleging that the city's lease of public park land to the Boy Scouts violated the religion clauses of the state and federal constitutions, that the plaintiffs have shown both personal emotional harm and the loss of recreational enjoyment); *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) (determining that unlike *Valley Forge*, plaintiffs' avoidance and inability to freely use public property on which a cross had been erected was an inhibition that constituted a "personal injury suffered . . . *as a consequence* of the alleged

constitutional error." (quoting *Valley Forge*, 454 U.S. at 485)).[11]

¶25 Alternatively, standing may be conferred without a showing of the plaintiff avoiding the alleged violative religious symbol if the violation is so pervasive and direct that it is a direct attack on the plaintiff's belief system or practically affects how the plaintiff deals with government. Thus, in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, the San Francisco city council issued a non-binding resolution opposing the Vatican's directive that the Catholic archdiocese stops placing children in need of adoption with homosexual households. 624 F.3d 1043, 1047. The plaintiffs were a Catholic civil rights organization and two devout Catholics who live in San Francisco and sued based on the official resolution denouncing their church and doctrines of religion. *Id*. at 1048. In finding standing, the court of appeals distinguished *Valley Forge* stating: "the plaintiffs here are not suing on the mere principle of disagreeing with San

[11] Some federal decisions since *Valley Forge* explain that although a change in behavior or affirmative avoidance of allegedly offensive conduct is generally sufficient to confer standing, it is not necessary to satisfy Article III standing requirements. *See Dunham*, 112 F. Supp. 2d at 932. This is said to be because a requirement that a plaintiff make a behavioral change in order to establish standing is too onerous a burden and "imposes an extra penalty on individuals already alleged to be suffering a violation of their constitutional rights." *Id*. (citing *Suhre v. Haywood County*, 131 F.3d 1083, 1088 (4th Cir. 1997)); *Vasquez*, 487 F.3d at 1252.

Francisco, but because of that city's direct attack and disparagement of their religion." *Id.* at 1050 n.26. The court explained further stating that "the psychological consequence [in *Valley Forge*] was merely disagreement with the government, but in the other[] [cases], for which the Court identified a sufficiently concrete injury, the psychological consequence was exclusion or denigration on a religious basis within the political community." *Id.* at 1052. The court stated that the resolution was more compelling than any of the religious symbol cases because symbols often are ambiguous unlike the directly offensive language in the resolution. *Id*. at 1050.

¶26 The court listed numerous Supreme Court cases in which standing was adequate for jurisdiction including among others, cases involving: prayer at a football game; a religious invocation at a graduation; and a moment of silence at school. *Id.* at 1049-50 (citing cases including *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (football game), *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation), and *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence)). *Catholic League* explained that standing was adequate in those cases despite the fact that "[n]o one was made to pray, or to pray in someone else's church, or to support someone else's church, or limited in how they prayed on their own, or made to worship, or prohibited from worshiping . . . [and] even though nothing was

affected but the religious or irreligious sentiments of the plaintiffs." *Id.* at 1050.

¶27 The injury in *Catholic League* was sufficiently concrete because plaintiffs' averred that: they live in San Francisco; are Catholic; have come in contact with the resolution; the resolution sends a government message of disapproval and hostility toward their religious beliefs that sends a clear message they are outsiders and not full members of the political community thereby chilling their access to government, forcing them to curtail their political activity and lessen contact with defendants. *Id.* at 1053.

¶28 In *Vasquez v. Los Angeles County*, plaintiff, a resident and employee of Los Angeles County, filed suit after the county removed the cross from its seal. 487 F.3d at 1247-48. The Ninth Circuit held that "in the Establishment Clause context, spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing." *Id.* at 1253. Interpreting the determination of standing in *School District of Abington v. Schempp*, 374 U.S.

203, 224 n.9 (1963),[12] *Vasquez* stated that standing existed in *Schempp* because of the "spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Id*. at 1251 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)). The court determined that Vasquez had standing because, unlike *Valley Forge*, he was a member of the community where the seal was located, he had frequent and regular forced contact with the seal, and he was directly affected. *Id*. at 1251; *see also Galloway v. Town of Greece*, 681 F.3d 20, 30 n.4 (2d Cir. 2012), *cert. granted*, 2013 WL 2149830 (May 20, 2013) (citizens of community who attended city meetings which opened with a prayer had standing to challenge use of prayer).

¶29 In *Arizona Civil Liberties Union v. Dunham*, the district court determined plaintiffs had standing to bring suit against the mayor of the Town of Gilbert for issuing a "Bible Week" proclamation. 112 F. Supp. 2d at 933-34. Plaintiffs were the Arizona Civil Liberties Union and three individual residents of Gilbert. *Id.* at 927. Emphasizing the importance of plaintiffs' proximity to the harm, the court distinguished the

[12] In *Schempp*, public school students and their parents sued the school district for opening each day of school with a Bible reading and voluntary prayer. 374 U.S. at 205-06, 224 n.9 ("The parties . . . are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.").

plaintiffs' injury with the injury in *Valley Forge*, stating that if plaintiffs had lived hundreds of miles away, read about Bible Week, and found it offensive to their beliefs about constitutional mandates, it would amount to the type of non-injury articulated in *Valley Forge*. *Id*. at 933. The court noted that plaintiffs also provided independent evidence verifying their feelings of being shunned, confirming the legitimacy of feelings of exclusion, which the court thought would be enhanced due to their residency in Gilbert. *Id.* at 934.

¶30 The harm in *Dunham* was sufficiently individualized because in addition to their commitment to the separation of church and state, the plaintiffs felt unwelcome and excluded by the town wherein they reside; an individual injury that directly affected them. *Id*. at 933. The injury in *Dunham* was most comparable to a feeling of second-class citizenship which the court thought may be enhanced because the proclamation was issued by the town's highest elected official, the mayor. *Id.* at 932.

¶31 Finally, in *Newdow v. Bush*, the plaintiff alleged that he found religious prayers offensive and prayers read at a presidential inauguration would make him feel like an outsider and a second-class citizen. 355 F. Supp. 2d at 277. While the court found that Newdow had standing because he had attended

inaugurations before, was going to attend the 2004 inauguration and would attend more in the future, he stated a more particularized and concrete injury than the general public which "potentially transform[ed] his injury from an abstract common concern for obedience to the law into a more concrete and particularized injury." *Id.* (internal quotations omitted). Acknowledging that Newdow purchased a ticket and planned to be at the inauguration the court stated: "[t]here is a legitimate question whether Newdow has established a 'personal connection' with the Inauguration." *Id.* at 279. The court therefore concluded that Newdow had a colorable claim of injury-in-fact.[13]

¶32 Appellants' complaint meets neither the above standards nor the similar standing requirements under Arizona caselaw. Unlike *Catholic League*, the proclamations are not a direct attack on the Appellants' specific belief systems. Unlike *Buono*, there is no allegation that the Appellants had to change their behavior to avoid the proclamations. Unlike *Vasquez*, *Dunham*, and *Newdow*, there is no allegation that the proclamations affected how the Appellants dealt with state government. Indeed, there is no allegation regarding how the

[13] Nonetheless, Newdow could not prove that his injury was redressable by the court. *Id.* at 281. The only relief that could redress Newdow's alleged injury was an injunction against the President which the court was too reluctant, based on separation of powers principles, to award; thus, the court determined Newdow could not succeed on the merits. *Id.* at 280-82.

Appellants even learned about the proclamations or that the alleged harm to them was anything more than a general feeling of second-class citizenship and outsider status. Rather, Appellants simply took language and conclusory labels from the Arizona Constitution ("molesting") and various cases ("second-class citizenship" and "outsider" status) to attempt to allege facts for standing. As we have explained, we will only consider well-pled facts as true, not legal conclusions in the guise of facts. *Jeter*, 211 Ariz. at 389, ¶ 4, 121 P.3d at 1259. Conclusory allegations of law and unwarranted inferences will not defeat an otherwise properly filed motion to dismiss. *Vasquez*, 487 F.3d at 1249; *see also Awad*, 670 F.3d at 1121 ("In the context of alleged violations of the Establishment Clause, [the Tenth Circuit] has held that standing is clearly conferred by non-economic religious values. . . . [However,] plaintiffs alleging non-economic injury must be directly affected by the laws and practices against which their complaints are directed." (internal citation and quotation marks omitted)).

¶33 As the above cases illustrate, individualized harm must be shown rather than harm allegedly suffered by the general public. This is similar to Arizona standing concepts: "An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears*, 192 Ariz. at 69, ¶ 16, 961 P.2d at 1017; *see*

id. at 70, ¶ 21, 961 P.2d at 1018 (distinguishing a case by stating that standing in that case existed because the plaintiff alleged a harm that was distinct from that suffered by the general public notwithstanding that other people in plaintiff's immediate neighborhood suffered the same injury); *Center Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 358, ¶ 20, 153 P.3d 374, 379 (App. 2007) (stating damage must be "peculiar to the plaintiff," and "more substantial than that suffered by the community at large").

¶34 Here, the complaint contends only that the proclamations "attacked the [individuals'] protected right" "from molestation in person or property on account of his or her mode of religious worship, or lack of [the] same." Appellants have offered no explanation why their feeling of offense is any greater than that of a large segment of the general public nor how such purported psychological harm amounted to a discrete and palpable injury. Accordingly, we conclude they lack standing to bring their complaint.

III. Waiving the standing requirement

¶35 Without citation to authority, Appellants request that their "injuries be recognized even if standing is otherwise denied." Appellants contend that we need only determine that the issue raised is of great importance or that the alleged violation will recur to waive the standing requirement.

Relying on *Sears*, 192 Ariz. at 71-72, ¶¶ 25-29, 961 P.2d at 1019-20, the Governor argues that the circumstances here are not exceptional and do not involve issues of great public importance. We conclude there is no basis to waive standing requirements.

¶36 As discussed above, because standing is not a constitutional mandate in Arizona, the standing requirement can be waived if there are exceptional circumstances, such as in cases of critical public importance. *Bennett*, 206 Ariz. at 527, ¶ 31, 81 P.3d at 318 (declining review for lack of standing; explaining that supreme court's review of merits in a previous case where there was a lack of standing should not be taken as an indication the court will engage in such review in the future without plaintiff first establishing standing); *Sears*, 192 Ariz. at 71, ¶ 24, 961 P.2d at 1019 (listing cases exemplifying the limited and exceptional circumstances where standing has been waived); *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 217 n.1, 714 P.2d 386, 387 n.1 (1986) (waiving standing requirement because case involved claim that statute governing procedures for municipal annexation violated the equal protection clauses of the federal and state constitutions, and the action directly raised issues of great public importance that were likely to recur); *State v. B Bar Enterprises*, 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 n.2 (1982) (determining that appellants lacked

standing to assert their privacy claim, but the court considered that claim along with the due process claims because the challenge occurred in conjunction with a constitutional claim properly argued and required the court to determine the constitutionality of a statute that had not yet been interpreted). Arizona courts have rarely applied the narrow exception to waive the standing requirement. *Brownlow*, 211 Ariz. at 195-96, ¶ 15, 119 P.3d at 462-63; *Bennett*, 206 Ariz. at 527, ¶ 31, 81 P.3d at 318.

¶37 In *Sears*, our supreme court refused to waive the standing requirement in a case involving plaintiffs' challenge to the Governor's entry into a gaming compact with an Indian tribe. 192 Ariz. at 67, ¶ 1, 961 P.2d at 1015. The court determined that, unlike the cases in which it had waived standing, there were no issues of great public importance to justify waiving the standing requirement. *Id.* at 72, ¶ 29, 961 P.2d at 1020 ("[T]he Sears' opposition to gaming and their interpretation of the statutes involved, are not of such great moment or public importance as to convince us to consider this challenge to executive conduct.").

¶38 Similarly here, Appellants allege only that the proclamations offend them and cause them to feel like outsiders and second-class citizens. While we acknowledge those feelings, in this context we do not consider them to be so critical "as to

convince us to consider this challenge to executive conduct." *Id.* Appellants' injuries are largely unarticulated and a lack of alleged facts to show sufficient injury itself is what prevents Appellants from establishing standing here. As noted above, Appellants could have pled standing and could have sought to amend their complaint to so plead a factual basis for standing, but declined to do so even in the face of the Governor's motion. To find a basis to waive standing requirements in this context would result in the limited rule for waiver taking precedence over the standing requirements themselves. We therefore decline to waive the standing requirement. [14]

[14] Given our conclusion the Appellants lacked standing to sue, did not seek to allege taxpayer standing, and the standing requirements should not be waived, we do not address the Governor's arguments that the complaint is moot or that it seeks an advisory opinion. However, we do reject out of hand the Governor's argument that any injunction would violate her rights to free speech. "The Free Speech Clause restricts government regulation of private speech; [and although] it does not regulate government speech . . . . [t]his does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause." *Pleasant Grove City v. Summum*, 555 U.S. 460, 460-61 (2009).

CONCLUSION

¶39 For the reasons stated above, we affirm the superior court's dismissal of the complaint.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
LAWRENCE F. WINTHROP, Chief Judge

Janice K. Brewer
Governor

Office of the Governor

*** ARIZONA DAY OF PRAYER ***

WHEREAS, the religious freedom guaranteed us by the First Amendment to the United States Constitution and the diversity of faiths practiced in America have made our land a beacon for people who seek freedom to worship according to their conscience; and

WHEREAS, Americans of every race, background and creed come together in churches, synagogues, temples, mosques and their own homes to pray for guidance, wisdom and courage; and

WHEREAS, just as we rely on prayer for courage, hope and renewal in our private lives, so too do we turn to prayer at times of joy, crisis and tragedy in our public life as a Nation and a State; and

WHEREAS, Congress, by Public Law 100-307, has called on our citizens to reaffirm the role of prayer in our society and to honor the religious diversity our freedom permits by recognizing annually a "National Day of Prayer"; and

WHEREAS, we are especially mindful of the heroic men and women serving in our Armed Forces, especially those serving abroad.

NOW, THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, do hereby proclaim May 6, 2010 as

*** ARIZONA DAY OF PRAYER ***

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona

Janice K. Brewer
GOVERNOR

DONE at the Capitol in Phoenix on this twenty-first day of April in the year Two Thousand and Ten, and of the Independence of the United States of America the Two Hundred and Thirty-fourth.
ATTEST:

Ken Bennett
Secretary of State

Janice K. Brewer
Governor

Office of the Governor

*** ARIZONA DAY OF PRAYER ***

WHEREAS, the religious freedom guaranteed us and protected by the First Amendment of the United States Constitution and the diversity of faiths practiced in America have made our land a beacon for people who seek freedom to worship according to their conscience; and

WHEREAS, Americans of every race, background and creed come together in churches, synagogues, temples, mosques and their own homes to pray for guidance, wisdom and courage; and

WHEREAS, just as we rely on prayer for courage, hope and renewal in our private lives, so likewise do we turn to prayer at times of joy, crisis and tragedy in our public life as a Nation and a State; and

WHEREAS, Congress, by Public Law 100-307, has called on our citizens to reaffirm the role of prayer in our society and to honor the religious diversity our freedom permits by recognizing annually a "National Day of Prayer"; and

WHEREAS, we are especially mindful of the heroic men and women serving in our Armed Forces, especially those serving abroad.

NOW, THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, do hereby proclaim May 5, 2011 as

*** ARIZONA DAY OF PRAYER ***

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona

Janice K. Brewer

GOVERNOR

DONE at the Capitol in Phoenix on this twenty-ninth day of April in the year Two Thousand and Eleven, and of the Independence of the United States of America the Two Hundred and Thirty-fifth.

ATTEST:

Ken Bennett

Secretary of State

Janice K. Brewer
Governor

Office of the Governor

*** DAY OF PRAYER FOR ARIZONA'S ECONOMY AND STATE BUDGET ***

WHEREAS, throughout our national history, government leaders, including Presidents George Washington and Abraham Lincoln, Governors and Congress, have called for a day of prayer to humbly ask God for His forgiveness, blessings and guidance during times of difficulty; and

WHEREAS, the unique motto of the State of Arizona, *Ditat Deus*-"God Enriches"- acknowledges the blessings of God; and

WHEREAS, Arizona is suffering from the severe effects of a prolonged national and state economic recession that threatens the livelihood of many of our citizens and challenges the quality of life for all citizens; and

WHEREAS, throughout this day of prayer, we ask for God's favor, blessing, wisdom and guidance to rest upon our state government, businesses and our citizens, that God would guide our state government leaders to resolve the state's budget deficit, renew the vitality of our state's economy and that God would aid and empower the citizens and businesses in our state and in our nation.

NOW, THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, do hereby proclaim January 17, 2010 as a

*** DAY OF PRAYER FOR ARIZONA'S ECONOMY AND STATE BUDGET ***

and encourage all citizens to pray for God's blessings on our State and our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona

Janice K. Brewer

GOVERNOR

DONE at the Capitol in Phoenix on this seventh day of January in the year Two Thousand and Ten, and of the Independence of the United States of America the Two Hundred and Thirty-fourth.

ATTEST:

Ken Bennett

Secretary of State