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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW,

Plaintiff, No. CIV S-01-0218 LKK GGH PS

vs.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,

Defendant. FINDINGS AND RECOMMENDATIONS

_____/

This action, in which plaintiff is proceeding pro se, has been referred to the undersigned pursuant to E.D. Cal. L.R. 72-302(c)(21). This action is proceeding against defendant George W. Bush, President of the United States, on the complaint filed February 1, 2001. Defendant's motion to dismiss, for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), filed May 4, 2001, is presently pending before the court. On June 14, 2001, oral argument was held. Plaintiff appeared on his own behalf. Kristin Door appeared on behalf of defendant. Having considered the argument and the record, the undersigned makes the following findings and recommendations. E.D. Cal. L.R. 78-230(h).

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LEGAL STANDARD FOR MOTION TO DISMISS.

A complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that plaintiff can prove no set of facts in support of its claims which would entitle plaintiff to relief. NOW, Inc. v. Schiedler, 510 U.S. 249, 256, 114 S. Ct. 798, 803 (1994); Cervantes v. City of San Diego, 5 F.3d 1273, 1274-75 (9th Cir. 1993). Dismissal may be based either on the lack of cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal theories. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

The complaint's factual allegations are accepted as true. Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir.1984). The court construes the pleading in the light most favorable to plaintiff and resolves all doubts in plaintiff's favor. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.1995). General allegations are presumed to include specific facts necessary to support the claim. NOW, 510 U.S. at 256, 114 S. Ct. at 803, quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).

The court may disregard allegations contradicted by the complaint's attached exhibits. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir.1998). Furthermore, the court is not required to accept as true allegations contradicted by judicially noticed facts. Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987). The court may consider matters of public record, including pleadings, orders, and other papers filed with the court. Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166 (1991). "The court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." Clegg v. Cult Awareness Network, 18 F.3d 752 (9th Cir. 1994). Neither need the court accept unreasonable inferences, or unwarranted deductions of fact. See Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 595-96 (1972). Unless it is clear that no amendment can cure its defects, a pro se litigant is entitled to notice and an opportunity to amend the complaint before dismissal. See Lopez v. Smith, 203 F.3d 1122, 1127-28 (9th Cir.2000) (en banc); Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

ANALYSIS

Plaintiff seeks a declaration that defendant President Bush violated the Establishment Clause of the First Amendment when he permitted the Reverend Franklin Graham to say a prayer at the inauguration on January 20, 2001. Plaintiff also seeks to enjoin the President from repeating this "or engaging in similar religious acts." Plaintiff does not seek to recover any damages.[1]

Defendant moves to dismiss on two grounds. First, defendant argues that plaintiff lacks standing. Second, defendant argues that plaintiff's claim is without merit. However, with due respect to the parties, and based on ambiguities in the complaint, the all or nothing approach taken by defendant, and possibly plaintiff, does not square with the case law. It is one issue to determine whether any prayer can be asserted at an inauguration, and quite another to determine whether the prayer utilized went over the line in terms of advancing one religion over another. Therefore, the court will break out the two issues for analysis herein.

A. Is Any Prayer at All Appropriate

Standing

To demonstrate standing, a plaintiff must 1) "have suffered an 'injury in fact'–an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural or hypothetical;"'" (2) "there must be a causal connection between

[1]The tenor of the complaint is that prayer per se at presidential inaugurations violates the Establishment Clause. The court did not understand that plaintiff would approve of a prayer given by the President himself.

the injury and the conduct complained of–the injury has to be 'fairly ...trace...[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court; '" and (3) "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136-2137 (1992).

Defendant argues that while it is clear that plaintiff was offended by the prayer, this falls short of an actual concrete injury sufficient to confer standing.

Defendant relies heavily on Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752 (1982), the Supreme Court held that psychological injury alone did not establish standing in an action brought pursuant to the Establishment Clause. The Court also identified the proximity of the plaintiffs to the challenged conduct as affecting standing. In particular, the Valley Forge plaintiffs, "Americans United for Separation of Church and State, Inc...and four of its employees, learned of the conveyance [of federally-owned land in Pennsylvania to Valley Forge Christian College] through a news release." 454 U.S. at 469, 102 S. Ct. at 756. The Supreme Court found that the plaintiffs, who lived in Virginia and Maryland, lacked standing to allege violation of the Establishment Clause.

> Although respondents 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 err or, 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 Art. III, even thought the disagreement is phrased in constitutional terms.
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> We simply cannot see that respondents have alleged an injury of any kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, PA. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not

constituted as ombudsmen of the general welfare.

454 U.S. at 485-86, 102 S. Ct. at 766-767.

Nonetheless, when a person alleges that he has avoided, or will avoid, public places or services on account of an "offensive" religious symbol or statement, the courts have found that the personal exposure to the religious symbol/statement is unlike the remote after-the-fact exposure in Valley Forge and is sufficient to confer standing. American Jewish Congress v. City of Beverly Hills, 90 F.3d 379, 382 (9th Cir. 1996) (persons who avoided public park because of religious symbol had standing); Hewitt v. Joyner, 940 F.2d 1561, 1564 (9th Cir. 1991) (same); *cf* Doe v. Madison School Dist. No. 321, 177 F.3d 789, 797 (9th Cir. 1999) (en banc) (parent lacked standing to protest school prayer at graduation because she had no students remaining in the school district and did not allege that she would attend future graduations.)

Defendant asserts that plaintiff's "electronic exposure" in lieu of personal appearance at the inaugural festivities makes all the difference in the standing equation. Defendant appears to concede that if plaintiff had alleged that he had heard the prayer in person he would have standing. However, the Presidential inauguration is a historic event of national importance to which the public is invited, if not encouraged, to view on television. Defendant cites to no authority that one cannot be offended in the First Amendment sense by speech transmitted by electronic means as opposed to an in-the-place sensory hearing. Moreover, defendant's distinction would pose arbitrary and unworkable standards. What would be the case if a person attended the inauguration in person, but was located so far away that the president was only a speck on the horizon, and he could only "hear" and "see" the president by means of an electronically transmitted simulcast of the speech imposed on a remote screen and speaker system? Defendant's "in person" standing requirement is unknown to the law. "This is because [First Amendment] speech is often disseminated by print and electronics, rather than by standing in front of people and talking to them." Finley v. National Endowment for the Arts, 100 F.3d

671, 686 (9th Cir. 1996) (Kleinfeld, J. dissenting), maj. opn. reversed on other grounds, 524 U.S. 569, 118 S.Ct. 2168 (1998).

Defendant argues that plaintiff could have turned off his television in order to avoid being subjected to the prayer. However, "[i]n evaluating standing, the Supreme Court has never required that Establishment Clause plaintiffs take affirmative steps to avoid contact with challenged displays or religious exercises." Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1987). For example, the student plaintiffs in School District of Abington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963) who challenged a school Bible reading, had the option to leave the classroom during the reading. They chose not to assume this burden, and the Supreme Court still found that they had standing to challenge this practice. Schempp, 374 U.S. at 224 n. 9, 83 S. Ct. at 1572-73. Accordingly, defendant's argument that plaintiff lacks standing because he could have avoided contact with the inauguration by turning off his television is without merit.

Defendant also argues that where a party seeks injunctive relief, establishing standing includes demonstrating a real and immediate threat of irreparable injury. Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1100 (9th Cir. 2000). Defendant argues that plaintiff has failed to show that he is in danger of suffering immediate, irreparable harm.

In Cole, the plaintiffs alleged that the Oroville Union High School District violated their freedom of speech by refusing to allow plaintiff Niemeyer to give a sectarian, proselytizing valedictory speech and plaintiff Cole to give a sectarian invocation at their graduation. The Ninth Circuit concluded that the other parties who were added to the students' lawsuit—Chris Niemeyer's brother, Jason, and various Oroville students, parents, and others—lacked standing, in part, because the likelihood of their being selected to speak at a graduation or their attending a future graduation where some student speaker would attempt to offer sectarian speech or invocation was too speculative to satisfy the injury in fact requirement of Article III. 228 F.3d at 1100.

In the instant case, as will be discussed infra, the reading of an inaugural prayer is

a tradition which occurs every four years. Therefore, the threat of injury is not speculative. That this injury (in the view of plaintiff) occurs every four years does not render it any less real or immediate than the injury suffered by students challenging high school graduation ceremonies on Establishment Clause grounds. Defendant's implicit suggestion that plaintiff must wait until shortly before an inauguration to bring his action is not realistic.

Defendant next argues that plaintiff fails to meet the third test for standing, i.e. redressability. In order to meet this prong, the plaintiff must show that he would "personally benefit in a tangible way from the court's intervention." Warth v. Seldin, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210 (1975). Defendant contends that plaintiff's request that the court declare that President Bush violated the First Amendment would do little more than provide plaintiff with the satisfaction of having the court declare that the prayer violated the Establishment Clause.

As discussed above, plaintiff seeks an order prohibiting any prayer from being read at an inauguration. *An order prohibiting inaugural prayers would personally benefit* plaintiff. Accordingly, defendant's argument that plaintiff has not met the third test for standing is without merit.

For the reasons discussed above, the court finds that plaintiff has standing to bring his Establishment Clause claim, at least insofar as plaintiff seeks a total ban on prayer at the Presidential inauguration. Defendant also argues that plaintiff does not have taxpayer standing to bring this action. However, the court does not reach this problematic issue, see Doe v. Madison School Dist., supra, because plaintiff has standing for the reasons discussed above.

Merits

Defendant argues that the recitation of a prayer at the inauguration does not violate the Establishment Clause of the First Amendment.

In Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983), the Supreme Court held that the Nebraska legislature's practice of opening each legislative session with an invocation did not violate the Establishment Clause. The Supreme Court recognized the

historical tradition of opening "legislative and other deliberative public bodies" with prayer. 463 U.S. at 786, 103 S. Ct. at 3333. The Court observed, "It can hardly be thought that in the same week the Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they *intended the Establishment Clause to forbid what they had just declared acceptable.*" *463 U.S. at* 790, 103 S. Ct. at 3335. "*This unique history leads us to accept the interpretation of the First* Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." 463 U.S. at 791, 103 S. Ct. at 3335.[2]

Formal prayers by Christian ministers have been associated with inaugurations since the inauguration of George Washington. Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L.Rev. 2083, 2106(1996). Prior to President Washington's first inauguration, a Senate committee resolved that "'after the oath shall have been administered to the President, he, attended by the Vice-President, and members of the Senate, and House of Representatives, [shall] proceed to St. Paul's Chapel, to hear divine service, to be performed by the chaplain of Congress already appointed.'" Id. "The Senate passed this resolution, and the House did likewise, with a minor amendment, the day before Washington's inauguration." Id. Immediately after the administration of the oath of office and President Washington's first inaugural address, the President walked with the members of the *House and Senate to St. Paul's Chapel where the Senate Chaplain read prayers from the Book of* Common Prayer. Id.

"From President Washington's second inauguration in 1793 until President

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[2] In Marsh, the Court of Appeals for the Eighth Circuit applied the three part test of Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111 (1971), in holding that the chaplaincy practice violated the Establishment Clause. 463 U.S. at 786, 103 S. Ct. at 3333. In evaluating the case, the Supreme Court did not apply the Lemon test. Instead, it focused on the historical significance of legislative prayers. Because the facts of the instant case are so similar to those of Marsh, this court will also not apply the Lemon test, and will instead focus on the historical significance of inaugural prayers.

Franklin Roosevelt's second in 1937, the Senate's Chaplain delivered the inaugural prayers in the Senate chambers as a part of the administration of the oath of office to the vice president." Id. at 2174 fn. 137. "These prayers were technically not part of the 'inaugural ceremony' of the President, which typically took place outside of the Capitol following the Senate proceedings." Id. After this time, prayers were read during the inauguration ceremony. David M. Smolin, Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics, 29 Loy. L.Rev. 1487, 1504 (1996). In addition, every President has included reverent references to the deity in his inaugural address to the nation. 96 Colum. L. Rev. at 2109.

Like prayers opening legislative sessions, inaugural prayers are a historical tradition. While the prayers have only been "technically" included in the inaugural ceremony since 1937, they have always been part of the inauguration proceedings. The history of inaugural prayers, like the history of legislative prayers, indicates that they were not viewed as violating the Establishment Clause.[3] Clearly, if legislative prayers do not violate the Establishment Clause, neither do inaugural prayers.[4]

Accordingly, defendant's motion should be granted on grounds that prayers per se at the Presidential inauguration do not violate the Establishment Clause.

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[3] In Marsh, the Supreme Court also observed that the plaintiff was an adult, "presumably not readily susceptible to 'religious indoctrination,'...or peer pressure." 463 U.S. at 792, 103 S.Ct. at 3336. At oral argument, plaintiff in the instant case mentioned the possibility of amending his complaint to include his daughter as a plaintiff. The Supreme Court's holding in Marsh was based on the historical significance of legislative prayer–not on the age of the plaintiff. Therefore, allowing plaintiff to amend the complaint to include his daughter as a plaintiff would not change the result of the court's recommendation.

[4] Plaintiff argues that Marsh v. Chambers is no longer good law as it has been criticized in later cases. While Marsh may have been distinguished in later cases, it has not been overturned. Marsh is controlling in the instant case as the facts are quite similar in both cases. The Marsh line of authority is thus completely separate from the general-religious-speech-at-a public-event authority, e.g., high school graduation, see Cole, supra. While other cases might bring harder interpretive problems in determining whether a certain function was historical in nature, the present case does not.

B. The Specific Prayer Given

While it is clear that plaintiff abhors the thought of *any* inaugural prayer, it is less clear that he would advocate a back-up argument– that the specific prayer offered at the inauguration violated the Establishment Clause. The complaint and opposition to the motion to dismiss are of two minds. At one point, plaintiff asserts that he is a minister of a religion that "specifically denies the existence of God." Paragraph 30. Plaintiff does not ask for tailored relief, rather, plaintiff seeks the future exclusion of *any* clergyman [saying prayers] at the Presidential inauguration. In his opposition to the motion to dismiss, plaintiff asserts at one point (p.35 n.30): "Plaintiff denies that any prayer can be 'nonsectarian'..." At hearing, plaintiff initially made it clear that he sought the abolition of an inaugural prayer regardless of its sectarian or non-sectarian nature.

On the other hand, the complaint does make reference to the specifics of the prayer given by Rev. Franklin Graham (son of the Rev. Billy Graham), e.g., "By stating the prayer was 'in the name of the father, and of the son, the Lord Jesus Christ, and of the Holy Spirit, the prayer further excluded theistic non-Christians." Paragraph 15.[5] The prayer (attached to the complaint) also included: "May this be the beginning of a new dawn for America as we humble ourselves before you and acknowledge you alone as our Lord, our Savior and our Redeemer." The opposition to the motion to dismiss does stress at times the nature of the wording of the specific prayer offered at the inauguration. Finally, at hearing, plaintiff did slip back into an attack on the words of the prayer itself after he had seemingly, unequivocally asserted that he was not complaining about the words of the prayer.

Defendant does not recognize any ambiguities, but treats the issue herein as only being one of any prayer at all at the inauguration. Thus, there is no argument made by defendant that the specific prayer itself passed Constitutional muster.

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[5] See also: "The prayer showed a preference for a particular religious belief. Thus, it violated the Establishment Clause." Paragraph 18.

The issue of the specifics of the prayer as it may or may not violate the Establishment Clause could make a difference. Plaintiff's standing to raise the argument that the specifics of the prayer are in question becomes problematic as he may be attempting to argue the rights of third parties, i.e., theistic non-Christians, and he, as an expressed non-theistic person may have no right to do that. Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067 (1997); U.S.Dept. Of Labor v. Triplett, 494 U.S. 715, 730, 110 S.Ct. 1428, 1437 (Marshall, J. concurring) (1990). Moreover, the prospect of having the Rev. Franklin Graham preside as chaplain at future inaugurations is much more remote than the prospect of having prayer per se again at the Presidential inauguration. This leads the court to question whether any relief could be fashioned in this case on the specifics of the prayer issue.

This issue poses serious problems for defendant as well in that Marsh does not stand for the proposition that any and all prayer is acceptable at governmental, historical functions. Cole v. Niemeyer, supra, 228 F.3d at 1103. Indeed, courts have found difficulty with prayers or symbols that directly reference doctrines or figures in a particular religion or sect. See e.g., the very fractured decision in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 598-599, 109 S.Ct. 3103-04 (1989) (Nativity scene with inscription "Glory to God in the Highest" was sectarian); Coles v. Cleveland Board of Education, 171 F.3d 369, 384 (6th Cir. 1999) (prayer used to open Board of Education meetings violated the Establishment Clause in part because of the specific reference to Jesus and the Bible along with the fact that the Board president was a Christian minister); Freedom From Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000) (violation of Establishment Clause in having statue of Christ proximate to the highway which gave the message "Christ guide us on our way"); but see American Civil Liberties Union v. Capitol Square and Review, 243 F.3d 289 (6th Cir. en banc) (Ohio motto-- "With God, All Things Are Possible," which was derived from the New Testament, does not violate the Establishment Clause).

The court is unwilling to finally recommend the dismissal of the complaint on the

specifics of the prayer at issue given the above ambiguities, and the fact that the parties have not addressed this issue.

Accordingly, IT IS HEREBY RECOMMENDED that the President's motion to dismiss filed May 4, 2001, be granted insofar as plaintiff complains about permitting a chaplain (or the President) from making any prayer at the Presidential inauguration. However, the motion should be denied insofar as plaintiff is attacking the specifics of the prayer as a violation of the Establishment Clause. Further proceedings should ensue on this latter issue.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within ten (10) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten (10) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: July 17, 2001.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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United States District Court
for the
Eastern District of California
July 18, 2001

* * CERTIFICATE OF SERVICE * *

2:01-cv-00218

Newdow

v.

Bush

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 18, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Michael A Newdow VC/GGH
First Amendmist Church of True Science
PO Box 233345
Sacramento, CA 95823 SJ/LKK

Kristin Sudhoff Door
United States Attorney
501 I Street
Suite 10-100
Sacramento, CA 95814

Jack L. Wagner, Clerk

BY: _____
Deputy Clerk