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MICHAEL NEWDOW, ET AL Docket No. 08-2248
 Plaintiffs,

 v. Washington, D.C.
 January 15, 2009
 2:00 p.m.

JOHN ROBERTS, JR., ET AL
 Defendants.
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1 P-R-O-C-E-E-D-I-N-G-S

2 (2:00 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Civil Action No. 08-2245.

4 Michael Newdow, et al versus John Roberts, Jr., et al.

5 Counsel, can you please come forward and identify yourself for
6 the record.

7 MR. NEWDOW: Michael Newdow, pro se and lead counsel
8 for the Plaintiffs.

9 MR. O'QUINN: Good afternoon, Your Honor. John
10 O'Quinn on behalf of the Federal Defendants, and I'm joined by
11 the Assistant Attorney General Greg Katsas and by Jim
12 Gilligan, Brad Rosenberg and Eric Beckenhauer, all of the
13 Federal Programs Branch.

14 THE COURT: Good afternoon to everyone.

15 MR. HOOVER: Good afternoon, Your Honor. Craig
16 Hoover from Hogan & Hartson representing Defendants
17 Presidential Inaugural Committee and Executive Director Emmett
18 Beliveau.

19 THE COURT: Good afternoon.

20 MR. SNIDER: Good afternoon, Your Honor. Kevin
21 Snider of Pacific Justice Institute representing Defendant
22 Rick Warren.

23 THE COURT: You're moving, I think, seeking to
24 appear pro hac vice?

25 MR. SNIDER: Yes.

1 THE COURT: We did receive a motion, but we didn't
2 receive an affidavit from you.

3 MR. SNIDER: Okay.

4 THE COURT: Which is required by the Rules, but --

5 MR. SNIDER: My --

6 THE COURT: -- I'll give you the opportunity to file
7 that subsequent to the hearing. I assume you're a member in
8 good standing of some bar?

9 MR. SNIDER: I am, Your Honor, of California. I was
10 retained yesterday afternoon and got on a flight here, so --

11 THE COURT: And you're not subject to any type of
12 sanctions for inappropriate behavior as a lawyer?

13 MR. SNIDER: I am not, Your Honor.

14 THE COURT: Very well. Then I'll grant your request
15 but file your affidavit.

16 MR. SNIDER: Thank you. Appreciate that, Your
17 Honor.

18 THE COURT: Okay. We're here today on the
19 Plaintiffs' really should be a motion for a temporary
20 restraining order, but in effect, considering the timing of
21 the filing, it really has the effect of being a preliminary
22 injunction.

23 And Mr. Newdow, I assume you're going to argue on
24 behalf of the Plaintiffs in this case, so you may proceed.

25 MR. NEWDOW: Thank you, Your Honor.

1 THE COURT: A couple of questions I have, though. I
2 read, with great care, the opinion issued by Judge Bates where
3 a similar suit was filed back in 2004, and one of the things
4 that Judge Bates noted was the timing of the filing in that
5 case and was somewhat troubled by the fact that there had been
6 a delay in the filing; and therefore, as is the case here, we
7 are addressing this issue on the heels of the actual
8 inauguration.

9 And in light of the admonition that had been
10 administered by Judge Bates, I was sort of perplexed as to why
11 you had not brought this action sooner than what you did,
12 because it seems to me that conceivably it could have been
13 filed at any time, but clearly could have been filed once it
14 was declared that President-Elect Obama was going to be
15 elected. And even if not at that point, once -- I think it
16 was on the 23rd of December when the plans -- inauguration
17 plans were made formalized that a request could have been made
18 at that point.

19 If that had been done, I would have held an
20 emergency hearing during the Christmas holiday, and depending
21 upon how I ruled, either side would have had the opportunity
22 to have taken this case to the Circuit and then conceivably to
23 the Supreme Court so we could get a definitive ruling, but the
24 lateness of the filing, obviously, makes it difficult for all
25 of that to be accomplished.

1 MR. NEWDOW: I agree, and I apologize for not
2 getting it earlier, but you know, I was actually quite hopeful
3 that Barack Obama would be somebody who wouldn't be doing what
4 he's doing, and it takes a ton of time to create these
5 filings. It took a lot of work.

6 THE COURT: I know. I mean, this filing seems to be
7 almost identical to the filing that was made back in 2004,
8 except for the issue related to the oath.

9 MR. NEWDOW: That issue was large, and you still
10 have to go over it, you have to make sure you get all the
11 Plaintiffs together. If it conceivably could have been done
12 earlier, I certainly would have tried. I also, for whatever
13 it's worth, I'm an emergency physician. That's how I make a
14 living, and I worked like crazy last month, so to do all this
15 simultaneously is rather difficult.

16 THE COURT: So, I guess my first question is in
17 reference to the challenge to the invocation and the
18 benediction, why aren't you precluded, under issue preclusion,
19 from pursuing your claims in reference to those two events in
20 light of the ruling that was made out of the Ninth Circuit
21 back in 2001 and in light of Judge Bates' ruling?

22 MR. NEWDOW: I think I probably would be as an
23 individual Plaintiff, but I don't think that applies to the
24 other Plaintiffs.

25 THE COURT: The others stand in the same footing as

1 you do, don't they?

2 MR. NEWDOW: Well, no, because especially since I
3 now brought in a minor child who's going to be at the
4 inauguration, you know, as a consequence.

5 THE COURT: How is her status any different?

6 MR. NEWDOW: Well, if you look in *Lee versus*
7 *Weisman*, then the whole issue that the Court distinguished
8 from *Marsh v. Chambers* is the fact that it was a child who was
9 in this constrained setting in a formal atmosphere.

10 THE COURT: This isn't a constrained setting.
11 That's a schoolhouse.

12 MR. NEWDOW: I think it is. Actually, I think it's
13 far more constrained. There's guards all over the place.
14 Inside she has to wait two hours to get into the setting to
15 begin with. She's not going to be able to move. She's going
16 to be with many adults. She'll be much less uncomfortable
17 than she would be with her fellow students.

18 I think this is far more constrained, and it's the
19 inauguration of the President of the United States. It's not
20 a high school graduation. I think that's a far more formal
21 and imposing atmosphere.

22 THE COURT: When -- because as I understand the
23 suggestion that was made in the affidavit is that she was
24 going to be by herself.

25 MR. NEWDOW: Probably will be by herself, yes.

1 THE COURT: I find that difficult to believe, which
2 is why I had real concerns about giving any credence to the
3 affidavits without the individuals being present and subject
4 to cross-examination because I find it very difficult to
5 believe that, being a father myself of a daughter, that I
6 would be prepared to let my daughter travel all the way across
7 country by herself and then come into what we may have two or
8 three million people present and have my 15-year-old daughter
9 by herself under those circumstances.

10 I found it somewhat questionable that that in fact
11 would occur, which is why I had real problems with giving any
12 degree of credence to those affidavits.

13 MR. NEWDOW: I can explain that. First of all, let
14 me say that the Defendants have allowed me to present them and
15 they're not challenging anything in the affidavits, at least
16 for this proceeding, so it will just be the Court.

17 And what we plan on is this child will fly across
18 country --

19 COURT REPORTER: Excuse me. If you would move just
20 a little bit further back so I can hear you.

21 MR. NEWDOW: Back. Okay. Sorry. She will fly
22 across country and she will be -- have her mother drop her
23 off. She will then fly across country. I have -- my
24 daughter, I've allowed her to do that. There will be someone
25 at the gate to pick her up. She will then be with somebody

1 the whole time.

2 I will personally escort her to the entrance for the
3 tickets. I will stay with her as long as I can, and then she
4 will go in there. We have phone contact. I understand the
5 cell phone may be problems. We have backup plans totally in
6 place, and this is in Washington, D.C. with I don't know how
7 many security and police people around, and I didn't think it
8 would be unsafe.

9 We have multiple people watching her, and I think
10 this is quite adequate security and it's an opportunity that
11 she's looking forward to immensely, so I don't think it's
12 unreasonable at all.

13 THE COURT: Well, be that as it may, I still, I
14 guess, don't understand how -- in reference to the benediction
15 and the invocation, how she would not be similarly, as would
16 all of the other Plaintiffs, be precluded from raising these
17 same issues that were raised both in 2001 and 2004.

18 MR. NEWDOW: Well, again, I think as different
19 Plaintiffs, the issue preclusion to occur, the Court is --
20 there's no binding precedent for this court. Sorry, I need to
21 stand back. No binding precedent. The -- you're not bound by
22 Judge Bates' opinion. I think that opinion was wrong. I
23 think there's clearly standing.

24 The sequence was that in 2001, the Government said,
25 "Newdow, you don't have standing because you're watching it on

1 TV. That's not the same as being in Washington."

2 THE COURT: You probably have a better chance of
3 hearing what's being said if we're watching it on TV than
4 being present.

5 MR. NEWDOW: That may well be. The Court of Appeals
6 just said, "Newdow, you didn't suffer an injury in fact,"
7 which I think is completely contrary to case law. They didn't
8 give an analysis at all.

9 Then Judge Bates, in 2004 says, "Oh, it's issue
10 preclusion because you -- we already decided in the Ninth
11 Circuit," but the Ninth Circuit, at least from the arguments
12 of the Federal Defendants was that, "Oh, look, it's not the
13 same as being in the same place."

14 And then he says, "Oh, it is the same," because he
15 looks at *Abington v. Schempp* because *Abington v. Schempp* said
16 it's the same, but in *Abington v. Schempp* they said it's the
17 same because you do have standing, not because you don't have
18 standing, and so I think that there's a lot of flaws in Judge
19 Bates' opinion and you're not bound.

20 THE COURT: Well, even on the issue of standing,
21 what's -- what's the -- what's the harm, from a standing
22 perspective, that's so significant that the harm is sufficient
23 to give you standing in this situation?

24 MR. NEWDOW: It's the exact same harm that was in
25 *Lee versus Weisman*. The Supreme Court said that's a harm and

1 ruled in the favor of that child who is in that setting who
2 had to listen to -- has no choice but to listen to somebody
3 pray to God, and this, of course, affect their -- it also
4 violates the neutrality principle. It violates the purpose
5 prong of *Lemon*. It violates the effects prong of *Lemon*. It
6 violates the endorsement. It violates every single test that
7 the Supreme Court has ever raised.

8 And so I think she has clear harm. It violates the
9 stigmatic injury that was referred to in *Allen v. Wright*,
10 which is among the most serious harms of discriminatory
11 government treatment, according to the Supreme Court. I don't
12 see how she wouldn't have a harm.

13 THE COURT: If you can show injury, how do you
14 establish redressability?

15 MR. NEWDOW: Redressability, this Court certainly
16 can tell the --

17 THE COURT: I can tell the Chief Justice what he can
18 do?

19 MR. NEWDOW: I think so. There's no separation of
20 powers issue there. The Chief Justice is not above the law,
21 and he's required to abide by it as well.

22 THE COURT: I can tell the President-Elect what he
23 can do?

24 MR. NEWDOW: I'm not asking you to tell the
25 President-Elect. I'm asking you to tell the Presidential

1 Inaugural Committee that they -- I know that I can't get on
2 that dais.

3 THE COURT: As I understand, you appreciate that
4 President-Elect Obama has a First Amendment right himself to
5 say "so help me God" at the end of the oath if he so chooses.

6 MR. NEWDOW: And that's -- we have that in our
7 complaint. He absolutely has that right.

8 THE COURT: If that's true, then doesn't that
9 undermine the suggestion that there is an injury, because if
10 you and the other Plaintiffs are prepared to be present and
11 hear him say that, how are you injured to a greater extent
12 just because the Chief Justice says it?

13 MR. NEWDOW: Because in one sense we have somebody
14 exercising his free exercise rights. The only reason Barack
15 Obama has the right to do that is because he's doing it under
16 his individual free exercise rights.

17 I think he doesn't have the right to do that as the
18 Chief Executive, but you have conflicting rights and we're
19 willing to waive that. But the Chief Justice has no free
20 exercise right. The Chief Justice is representing the highest
21 individual of law in our nation.

22 THE COURT: So is Mr. -- so is President-Elect
23 Obama.

24 MR. NEWDOW: He is, but he has free exercise rights.
25 He's taking the oath as he sees fit. The Chief Justice has --

1 THE COURT: If he asks the Chief Justice, which I
2 understand is the case, to utter those words, what's the
3 difference?

4 MR. NEWDOW: He has -- I mean, he has the right to
5 have separate but equal bathrooms at the inaugural, too. He
6 has the right to exclude people, you know, no one -- no judge
7 is going to tell him he can't exclude -- I think I have it in
8 my brief -- Mexican/Americans or any other group. He can
9 wiretap people. He can do all sorts of things that violate
10 the Constitution that the Court cannot redress, but that
11 doesn't mean --

12 THE COURT: But I guess the -- but the concern I'm
13 expressing is if you and the other Plaintiffs are willing to
14 either watch it on TV or be present and hear him utter the
15 words and therefore subjected to those words by someone who's
16 going to occupy the highest position in the land, I guess I
17 find it somewhat difficult to understand how hearing the Chief
18 Justice utter those same words in some way has a greater
19 impact on your sensitivities as compared to him saying it.

20 MR. NEWDOW: It's not a -- I wouldn't phrase it in
21 terms of sensitivity. I would phrase it in terms of having
22 the idea that the Government of the United States, represented
23 by the Chief Justice -- first of all, two wrongs don't make a
24 right. But even so, the Chief Justice is not, again, doesn't
25 have free exercise of right. He is saying to the world that

1 the oath of the President of the United States, which is in
2 quotations, the only thing in quotations in the Constitution,
3 and it says that this shall be taken, this one shall be taken,
4 all right, and they present the oath, he changes that.

5 Could we say that this is one nation under, you
6 know, sorry, so help me Caucasian Americans or Black Americans
7 or something like that? I don't think so.

8 THE COURT: That's a totally different issue
9 because, obviously, at the end of the Constitution, it was
10 clear that the signatories to it had a belief in a supreme
11 being by saying that it was being dated in the year of Our
12 Lord.

13 MR. NEWDOW: Well, if that's the argument, then you
14 have to say that we are a Christian nation because the only
15 Lord that goes back 1787 years from then was Jesus Christ. I
16 don't think that that's an appropriate argument because I
17 think that what that was is a term of art. We say "B.C." and
18 "A.D." all the time, and it's before Christ. I say that.
19 It's not used to mean anything religious.

20 All right. Here we're talking about having
21 chaplains come up to the podium and say, "Let us pray to God."
22 We're talking about the Chief Justice adding purely religious
23 words to an oath which is set forth in the Constitution. We
24 keep hearing these arguments that, you know, these
25 textualists, how you have to apply the Constitution.

1 THE COURT: You're dealing with the merits. I'm not
2 there yet.

3 MR. NEWDOW: Okay.

4 THE COURT: And I'm not sure I have to get there
5 because I do have, as Judge Bates did, concerns about the
6 issue of preclusion and I do have concerns about the issue of
7 standing, and I'm dealing now with the -- with the issue of
8 standing and the redressability issue and --

9 MR. NEWDOW: If I might. Let's --

10 THE COURT: I mean, do you agree that if,
11 technically, President-Elect Obama was actually the President
12 at the time he was uttering the words "so help me God," are
13 you saying that that would make it different than him uttering
14 those words at the time he's actually taking the oath to
15 become President?

16 MR. NEWDOW: I think, again, I think that the
17 President, whether he's President-Elect or President, has free
18 exercise rights. He is there as an individual. He can
19 express his belief in Jesus or God or Buddha or no god or
20 anything he wants as an individual and he doesn't lose his
21 individual status as President.

22 The Chief Justice does lose his individual status.
23 He's not there telling you, "This is how I feel about God."
24 He's telling you, "This is what the Constitution says about
25 God," and that sends a message which gets repeated constantly

1 to send the stigmatic injury to people, especially
2 impressionable children that this is a country for people who
3 believe in God, and you guys, you Atheists, we'll accept you
4 here, but understand you're not the real Americans, just like
5 when we had separate but equal water fountains. What was the
6 harm there?

7 The harm is that we send the message, as Justice
8 Harlan said in his dissenting *Plessy v. Ferguson*. What we are
9 really saying, the real meaning of that is that the Negro
10 citizens are so inferior and degraded that they cannot sit on
11 public coaches with -- occupied by White citizens.

12 THE COURT: That's very different. I mean, there we
13 were talking about actual preclusion from engaging in certain
14 activity because of one's skin color. That's very different
15 from your situation. You're not being precluded from doing
16 anything.

17 MR. NEWDOW: Well, I would argue with that. First
18 of all, it happened to Whites as well as it happened to
19 Blacks. Whites couldn't ride in Blacks' railroad cars, Blacks
20 couldn't ride on Whites' railroad cars, and that's why the
21 Supreme Court said this is equal. But Justice Harlan said,
22 "Let's look at the real message here. The real message is
23 that those people aren't as good as us." And that's exactly
24 the message that's being sent at the inauguration.

25 THE COURT: Because people of color could not do

1 certain things.

2 MR. NEWDOW: No, because people of color -- they
3 could both go to water fountains.

4 THE COURT: You are not required to go to a
5 different inauguration. You are permitted to go to this one.

6 MR. NEWDOW: I have no choice. This is much worse,
7 At least in *Plessy v. Ferguson*, ostensibly, we could say
8 there's equality. Who could possibly say that my view -- or
9 our view that God doesn't exist is being treated the same as
10 the view that God does exist when the Chief Justice of the
11 United States take the oath of office in quotations in the
12 Constitution and alters it to say, "Oh, yes, so help me God."

13 THE COURT: At the request of President-Elect Obama.

14 MR. NEWDOW: And the precedent -- I mean, especially
15 in the -- it's interesting we have separation of powers and we
16 can't tell the President what to do, but the President can
17 tell the Chief Justice of the United States --

18 THE COURT: He can't tell him. He could ask him.

19 MR. NEWDOW: He can ask him to violate the
20 Constitution?

21 THE COURT: Well, if the Chief Justice didn't want
22 to utter those words, I assume he wouldn't have to, and Obama,
23 I guess, would have to go to somebody else, but the
24 President-Elect can't force the Chief Justice to say those
25 words. He's only agreeing to do it based upon the request of

1 President-Elect Obama.

2 MR. NEWDOW: And our argument is he has no right to
3 do what the President-Elect asks when it violates the
4 Constitution, and clearly to say "so help me God" sends a
5 message that we in the United States believe in God, and that
6 message has been heard loud and clear.

7 I can show you e-mails up the wazoo that keep
8 telling me how we are a Christian nation, we believe in God,
9 you don't like it, get out. And we have that -- you have a
10 brief -- you have, excuse me, an article from Penny Edgell, I
11 think her name is, from the University of Minnesota.
12 30 percent of the population doesn't like -- won't trust
13 Atheists, think they're immoral. Where does that come from?
14 We have 50 percent of the population won't vote for an
15 Athiest. 4 percent won't vote for a Black, 4 percent won't
16 vote for a Catholic, 50 percent won't vote for an Athiest.
17 How come? Because the Government keeps sending this message,
18 "Real Americans believe in God," and they're not allowed to
19 send that message.

20 The United States Supreme Court has said repeatedly,
21 you have 35 separate majority opinions, says Government must
22 remain neutral in terms of religion. The harm that we're
23 talking about is the exact same harm that was the one that
24 James Madison spoke about. Why couldn't Patrick Henry get his
25 bill across? Because it degrades from the equal rank of

1 citizens all those whose opinions in religion do not bend to
2 those of the legislative authority. We continually send this
3 message, and it's time to stop.

4 We have a pledge that -- the argument from the
5 Defendants here, the Federal Defendants says, "Look, it's okay
6 because we have a pledge of allegiance that says we're a
7 nation under God. We have a national motto that says in God
8 we trust." This court starts off -- didn't today -- God save
9 the United States and this Honorable Court, or the Supreme
10 Court does. Can you imagine in other group, "We are a nation
11 under Caucasians; in Caucasians we trust"? Let this court
12 start as "Save the United States and this honorable court in
13 the name of Caucasians"? We'd go crazy about that.

14 How is this in any way different? It isn't,
15 constitutionally. It is only because somebody doesn't see the
16 harm when we talk about God belief and we do see the harm when
17 we talk about race, and our Constitution treats race and
18 religion identically. All right. I understand the difference
19 between immutable characteristic and something that's, quote
20 chosen, but our Constitution says there is no difference.
21 It's not cognizant of that difference.

22 And what we're doing there -- this is *Brown versus*
23 *Board of Education*. The argument being, you know, "Oh, it's
24 okay. We can have separate but equal schools because we have
25 separate but equal water fountains and separate but equal

1 swimming pools and separate but equal cafeterias," seems to me
2 to be to be a very hollow argument, and that's the argument
3 being made here.

4 THE COURT: I must say I just don't buy your analogy
5 between *Brown* and this situation. I think they are totally
6 different circumstances, and the impact of racism was a lot --
7 which is why I did not agree to take judicial notice of the
8 pleadings filed in *Brown* because I don't think -- unless you
9 had some expert testimony that would show that some type of
10 analogy could be drawn between the impact of what was
11 happening back in 1954 as it related to people of color as
12 compared to the impact that the attitude about religion may
13 have on people who don't believe in God.

14 MR. NEWDOW: I don't deny for a second that the
15 impact upon Blacks is far greater than the impact upon
16 Atheists, but that is the function of the fact that you can
17 tell a Black when that person walks in the room, you can't
18 tell an Athiest when they walk in the room. You can't tell an
19 Atheist when they walk in the room. And when you look at the
20 actual animus against individuals, it far exceeds in the case
21 of Atheists.

22 You see it. We have 50 attorney generals sitting
23 here advocating for something that's subversive to the
24 principle of equality. In *Brown versus Board of Education*,
25 Texas also had an attorney general who sent a letter of an

1 amicus brief that said, "Oh, look at our history, this is
2 okay, we had in Texas, for 80 years we had segregation. It's
3 the rule of the people." He only could get 10 people to join
4 him there. Now we got 50.

5 All right. I think that shows the animus against
6 Atheists. The only difference is because of the fact that you
7 can see it, and so the Blacks suffer, and I don't deny that
8 Atheists haven't suffered as much as Blacks have, but that's
9 hardly the basis to make a constitutional distinction.

10 THE COURT: Let me hear from the Defendants on the
11 issues of issue preclusion and standing.

12 MR. NEWDOW: Thank you, Your Honor.

13 MR. O'QUINN: Thank you, Judge Walton.

14 In five days the President-Elect Barack Obama will
15 be sworn in as our 44th President, and while this is an
16 important issue for the life of our nation, it is also a
17 deeply personal event for him and his family as it has been
18 for his predecessors throughout the years.

19 To commemorate and celebrate this occasion, he's
20 invited two pastors of two different theological backgrounds
21 of different life experiences to pray at his behest and on his
22 behalf and he's asked the Chief Justice of the United States,
23 in according with long-standing tradition, to administer the
24 Presidential oath.

25 THE COURT: On the issue of issue preclusion, there

1 seems to be an acknowledgment that Mr. Newdow would be
2 precluded from arguing in this proceeding the proscription he
3 seeks against the invocation in the benediction. He suggests,
4 however, that the other Plaintiffs, namely, I guess, the minor
5 would not be precluded because of her special status as a
6 minor. What is your position regarding that?

7 MR. O'QUINN: Judge Walton, I certainly agree that
8 Mr. Newdow, as the lead Plaintiff is precluded based on his
9 prior litigation of these issues. I do think that it is a
10 harder question for the Court with respect to the other
11 Plaintiffs.

12 The Court would have to satisfy itself on that this
13 is a case where offense of claim preclusion is appropriate and
14 would have to satisfy itself that Mr. Newdow had adequately
15 and vigorously represented all of their interests, including
16 taking those issues up on appeal.

17 I know he did seek a stay from the preliminary
18 injunction four years ago and obviously he took the issues up
19 to the Ninth Circuit from the case that he initiated eight
20 years ago. I don't think he necessarily sought to appeal
21 Judge Bates' final decision four years ago, and I think the
22 Court would have to satisfy itself that despite that, that all
23 of the Plaintiffs' interests have been adequately represented.

24 With respect to the allegations involving a minor
25 child, for purposes of the prior court decisions as to

1 standing, if you think that there's been adequate
2 representation such that in the normal course claim preclusion
3 would apply, I don't think that there's anything different
4 with respect to a minor child for purposes of establishing
5 standing than there would be for an adult, and that is a
6 showing of actual injury and also of redressability. You have
7 the --

8 THE COURT: Although I assume, from what Mr. Newdow
9 was saying, is that joining an analogy between the school
10 cases and this case, that a showing of injury is made with
11 less effort regarding a child under these circumstances as
12 compared to an adult.

13 MR. O'QUINN: I don't think that's an accurate
14 characterization of the Supreme Court's case law. I mean, to
15 be sure, the Supreme Court has treated the public school
16 setting as different from other types of public events and *Lee*
17 *v. Weisman* itself draws a distinction. For example, in
18 Justice Kennedy's opinion, he talks about the, quote, subtle
19 coercive pressures inherent in elementary and secondary public
20 schools, but that's something that's inherent to the schools,
21 not to the fact that a person is a minor.

22 Because if that were the case, if you were talking
23 about injury in this context, then the establishment clause
24 would work like a light switch and potentially flip on
25 whenever a child happened to walk by the ten commandments in

1 the *Van Orden* case but not be applicable when it's an adult
2 walking by, and that's certainly not consistent with the lines
3 that the Supreme Court has drawn.

4 The lines that the Court has drawn with respect to
5 children has to do with the fact that they're in a public
6 school setting. Even if they're not -- even if they're not --

7 THE COURT: I assume you're taking the position I
8 assume then that that line of cases would equally apply if you
9 were talking about a college setting where you have adults?

10 MR. O'QUINN: The only case that I'm aware of in
11 which that -- that reasoning has been applied to the college
12 setting was the *VMI* prayer case, and there the Court, I think,
13 focused on sort of the unique coercive effects of mandatory
14 prayer in the military academy setting. I think the Supreme
15 Court has been quite clear that there is a difference when
16 you're talking about secondary and elementary education from
17 higher education, and we see that particularly play out in
18 some of its free exercise cases.

19 THE COURT: And is that because of the age of
20 children who are in elementary and secondary school and
21 therefore the fact they conceivably -- there's a greater
22 coercive impact when you're talking about a child?

23 MR. O'QUINN: It's certainly linked to the age of
24 the children, although it doesn't necessarily turn on that
25 since I assume that a number of the quote/unquote children at

1 high school graduations that the *Lee v. Weisman* decision would
2 govern are probably 18 years old and therefore aren't minors
3 in the eyes of the law.

4 I think it has to do with the environment of our
5 largely mandatory but with, you know, opt-out alternatives but
6 largely mandatory public education system that is state run
7 and sponsored which is quite different from the college
8 environment, even though there are colleges, obviously, quite
9 a few, that are publicly sponsored.

10 So, there's nothing in the Court's cases that is
11 turning solely on the -- on the age of a child for standing
12 purposes, and indeed, *Allen versus Wright* involves schools but
13 the Court didn't purport to apply any type of special standing
14 rules to children implicated there. I think the line that the
15 Court has drawn is the public -- the elementary and secondary
16 public school environment from everything else.

17 And you think about that in terms of how *Marsh*
18 *versus Chambers* plays out. It makes no difference if a school
19 field trip is taken to see the legislature in session and they
20 happen to see a prayer. Suddenly it's not that the
21 establishment clause swings into action because an
22 impressionable child happens to be there. What's different is
23 the setting.

24 And so coming back to the question that we're
25 dealing with on standing --

1 THE COURT: What about the free exercise provision?

2 MR. O'QUINN: Excuse me, I'm sorry?

3 THE COURT: What about the free exercise provision?
4 Even if you assume that the invocation and the benediction and
5 the oath don't connote supporting a religion, what about the
6 free exercise rights? I assume the perspective is that they
7 have a right to be present, and to be forced to listen to a
8 religious message is infringement upon their free exercise
9 rights.

10 MR. O'QUINN: Well, I think the concern that was
11 articulated, particularly in *Lee v. Weisman*, was that because
12 of the public school environment, the person would feel
13 compelled not just to simply be there but to participate or at
14 least it would be signified, in Justice Kennedy's words, that
15 by standing there they were acquiescing in the conduct, and I
16 certainly don't think that anyone -- any reasonable observer,
17 as Justice O'Connor describes it in articulating her view of
18 how the establishment clause operates, I certainly don't think
19 that a reasonable observer would think that everyone who
20 stands respectfully during the inauguration or a session of
21 Congress or a session of the Supreme Court agrees and
22 acquiesces in everything that is being said and certainly not
23 necessarily in the prayers that may be said at the beginning
24 or at the end.

25 So I don't think this is an area where --

1 THE COURT: So is that the nature of the injury that
2 you are saying would have to be shown, that the person would
3 have to feel that they were coerced to agree or accepting to
4 what is being said?

5 MR. O'QUINN: Well, I don't think it would actually
6 be enough that they would just feel that they were coerced. I
7 think you would have to show that the person was actually
8 being coerced or that it was the kind of environment where
9 coercion was assumed, and that's exactly the way that Justice
10 Kennedy characterizes it in *Lee versus Weisman*.

11 I mean, again, when he talks about the subtle
12 coercive effects of the public school environment, that's what
13 he is concerned about. I don't think that there's a credible
14 claim of coercion, whether it's a child or whether it's an
15 adult who's in attendance at the inaugural simply because the
16 President-Elect, who's day this is, chooses to begin it the
17 same way that George Washington did and that is with an
18 invocation. And it's certainly not any more coercive that one
19 of the pastors that the President-Elect has invited to attend
20 might begin with the words, "Let us pray," than when George
21 Washington purported to speak on behalf of all of his fellow
22 citizens as his first official act as President of the United
23 States.

24 So there is certainly not any kind of real coercion
25 or a semblance of coercion that the Supreme Court was

1 concerned about in the context of public schools.

2 Now, the dissent in *Lee v. Weisman* said, "Well, you
3 don't have to attend your graduation. Shouldn't that be good
4 enough?" But the majority rejected that on the theory that
5 that's absurd. The -- a high school graduate, to say that
6 they don't have to attend their graduation, is sophistry but
7 certainly not sophistry to say that a person doesn't have to
8 attend an inauguration, doesn't have to tune it in, and if
9 they watch it on TV, that they can choose to watch parts of it
10 and not watch other parts of it.

11 It's certainly something that one voluntarily
12 chooses to engage in, and this is somewhat analogous given
13 that it is the President-Elect's day. If you look at the
14 affidavit that's been submitted in which the child says, "This
15 is a special day and I want to be there to see President-Elect
16 Obama sworn in," it's a little strange to say, "Well, I'd like
17 to see him sworn in, but I don't want to see him do it the way
18 that he wants to do it." It's sort of like somebody invites
19 you to their house and then when you get there you start
20 moving the furniture around.

21 This is -- while it is certainly an important event
22 in the life of the nation, this is an important event for the
23 President-Elect, and that leads me to the point of
24 redressability. And certainly there is nothing different with
25 respect to the minor child or any of the Plaintiffs than there

1 was for Mr. -- for Mr. Newdow four years ago or eight years
2 ago on the point of redressability, because at the end of the
3 day, the only person who can decide who his guests are going
4 to be and what the program is that he's going to have at his
5 inaugural is the President-Elect, and this -- this Court,
6 under well settled --

7 THE COURT: Can I -- can I order that he -- although
8 he himself, as conceded by the Plaintiffs, can utter the words
9 "so help me God," but order that the Chief Justice not utter
10 those words?

11 MR. O'QUINN: Well, if you did, you still wouldn't
12 redress the injury that Plaintiffs are claiming because -- or
13 at least, as I understand it, because the President-Elect
14 could simply ask one of the other justices to administer the
15 oath. I think Justice Stevens is going to administer the oath
16 of office to the vice president.

17 THE COURT: But I guess the position is that anybody
18 who would utter those words who's in an official governmental
19 capacity should be constrained or restrained from doing so.

20 MR. O'QUINN: Well, I think that, Judge Walton, you
21 hit -- while we're talking about this from a perspective of
22 injury, and then I'll come back to the redressability point,
23 although they are somewhat related on this particular point,
24 if, as Plaintiffs concede, they suffer no injury from hearing
25 someone stand there and sincerely invoke the traditional

1 supplication "so help me God" at the conclusion of their oath,
2 it's -- it really is sophistry to say that they are seeing --
3 that they experience some kind of actual injury as cases like
4 *Valley Forge* contemplate that, by seeing those same words
5 spoken by the person who is administering the oath.

6 What they at that point are then just alleging is a
7 general interest in seeing the Government not violate the
8 constitutional interests as they interpret them, not the kind
9 of specific there's a real injury to me allegation that is
10 required certainly by cases like *Valley Forge*, and there is
11 nothing in any of the declarations that have been submitted
12 that actually show what that injury is.

13 There is snippets within the complaint and within
14 the preliminary injunction motion to the effect of feeling
15 like second-class citizens or feeling -- feeling ostracized,
16 but that is precisely the kind of claim that has been rejected
17 by the Supreme Court as a matter of standing jurisprudence and
18 as a matter of substantive law.

19 THE COURT: Well, but Mr. Newdow draws the
20 distinction between the impact those words have if spoken by
21 the Chief Justice as an officer of the United States as
22 compared to President-Elect Obama who is uttering them in his
23 personal capacity.

24 MR. O'QUINN: Well, if the claim that he's making is
25 one of particular injury because it's the Chief Justice qua

1 Chief Justice who is administering the oath, as the Chief
2 Justice has traditionally done in planned inaugural events for
3 much of our nation's history, this court should be very wary
4 of attempting to enjoin the Chief Justice for precisely the
5 same reasons that the Court doesn't have authority to enjoin
6 the President or Congress, namely, that the Chief Justice is a
7 constitutional officer.

8 And certainly if you look at cases like *Franklin*
9 *versus Massachusetts* and particularly the analysis in Justice
10 Scalia's separate opinion in that case, the Court would
11 certainly be wary of enjoining the Chief Justice as a
12 constitutional officer even separate and apart --

13 THE COURT: Let me put it in another context. If a
14 hired judge, whether it be a circuit judge or a member of the
15 Supreme Court, was engaging in clearly unconstitutional
16 behavior -- I'm not talking about this situation but some
17 other context in which it was a clear violation of the
18 Constitution -- could a district court judge issue an order
19 that would be redressable, considering the fact that they are
20 higher court judges and I assume don't have to really listen
21 to what I have to say?

22 MR. O'QUINN: Well, I don't think that it's -- I
23 don't think it's quite that point. I think that certainly if
24 they're acting in their judicial capacity and undertaking what
25 perhaps a district court judge might view to be

1 unconstitutional activity but as a judicial act, it's very
2 clear they would have absolute immunity from suit and in
3 fulfilling judicial acts. So I don't think that a court -- I
4 certainly don't think a district court can enjoin that.

5 THE COURT: That was not a judicial act -- quasi
6 judicial or something of that nature.

7 MR. O'QUINN: This is concededly not a judicial act,
8 and the point that the Court should be cautious and frankly
9 probably lacks the authority when it comes to constitutional
10 officers is a point that it would only apply to the Chief
11 Justice and the associate justices of the Supreme Court. It's
12 not a point that would be made with respect to lower court
13 judges because they are not officers identified in the
14 Constitution, just as, you know, the Secretary of Defense is
15 not an officer identified in the Constitution in the way that
16 the President is.

17 So if you were extrapolating *Mississippi versus*
18 *Johnson*, I think that extrapolation would only apply to
19 members of the Supreme Court themselves. But that -- all of
20 that only swings into action if you get past the notion that
21 at the end of the day, the President-Elect can have anybody
22 administer the oath or probably could have nobody administer
23 the oath. There's certainly no requirement in the
24 Constitution that a person administer the oath.

25 THE COURT: There is no legislation or anything that

1 says who can administer the oath to the President-Elect?

2 MR. O'QUINN: That is not addressed in the
3 Constitution.

4 THE COURT: No, it's not in the Constitution. Is it
5 anywhere else?

6 MR. O'QUINN: Not that I'm aware of. There
7 certainly is legislation that in different circumstances
8 allows different officers of the United States to administer
9 oaths, but if you sort of take it back to first principles,
10 there would have been no judicial officers of the United
11 States when George Washington was sworn in, so it would be
12 strange to say that it has to be someone of a particular
13 stripe.

14 THE COURT: Somebody on a TV show recently got it
15 wrong because they said -- I don't know where they got it from
16 but they claim that there's something out there that says that
17 the oath has to be administered or can be administered by any
18 state or federal judge. I don't know of that, but...

19 MR. O'QUINN: I'm sure -- I'm sure the oath can be
20 administered by any state or federal judge and any notary
21 public.

22 THE COURT: But there's no requirement that such an
23 officer do it?

24 MR. O'QUINN: No, there's not, and if there were to
25 be such a requirement, it would have to be found in the text

1 of the Constitution itself, and it's certainly not. And that
2 gets back to the point of redressability. I mean, if the
3 Court were to issue --

4 THE COURT: So if -- so if President-Elect Obama
5 decided that he wanted a nongovernmental official to
6 administer the oath, would that make it any different?

7 MR. O'QUINN: In terms of the -- it's hard to see
8 why it would be any different in terms of the injury that the
9 Plaintiffs are alleging other than just a general etherial
10 interest in seeing their government work a certain way. I
11 don't think that it -- in terms of the injury of
12 having --

13 THE COURT: Would it mitigate the injury if it was a
14 nongovernmental official because, as I say, Mr. Newdow seems
15 to be suggesting that because of the status of the Chief
16 Justice or presumably, I guess, any justice or anybody in a
17 government capacity who would be administering the oath, that
18 there is a difference in the injury suffered because of the
19 person's official status?

20 MR. O'QUINN: Well, I mean, in some respects I'd
21 almost say that's a better question for the Plaintiffs in the
22 sense that it's not obvious to me that they would say that
23 they've experienced the same injury if a notary public -- and
24 there's at least one example in our nation's history where a
25 President was sworn in by his father who was a notary public,

1 that they would say that they've experienced the same kind of
2 injury, but it seems to me that that -- that they get -- that
3 either they run into a redressability problem or they run into
4 an actual injury problem; that is to say that if they concede
5 it would be perfectly fine for anyone else to administer the
6 oath to the President-Elect, even if it's a person who doesn't
7 feel as official, that person would still be doing an official
8 act and that shows that their whole interest in this is a very
9 generalized interest as opposed to a concrete specific harm.

10 THE COURT: Okay. Anything else?

11 MR. O'QUINN: I think those are the key points with
12 respect to preclusion and standing. Thank you, Your Honor.

13 THE COURT: Anything that the other Defense --
14 Defendants have that hasn't been raised on these two issues?

15 MR. HOOVER: May it please the Court. Craig Hoover
16 for the Presidential Inaugural Committee. Your Honor, just
17 very briefly, on redressability. We don't have anything to
18 add on issue preclusion to what the Federal Defendants have
19 said.

20 On redressability, there's a lack of standing to sue
21 the Presidential Inaugural Committee and it's executive
22 director just as there was four years ago, because they simply
23 didn't make the decision to invite Reverend Warren or Reverend
24 Lowery to administer the invocation or benediction. That's a
25 decision by President-Elect Obama.

1 And as Judge Bates noted last time around, Your
2 Honor, he said in the case of the Presidential inauguration,
3 there certainly has been no suggestion that but for the
4 involvement of the Presidential Inaugural Committee, the
5 President would not have invited clergy to give an invocation
6 and benediction. That applies with equal force here.

7 Again, there is just a lack of redressability, but I
8 don't need to go into more detail because I think the Federal
9 Defendants have already addressed redressability in general.

10 THE COURT: Thank you.

11 MR. SNIDER: Your Honor, may it please the Court.
12 We believe that of course the first *Newdow versus Bush* in the
13 Ninth Circuit and the second one, the Bates -- Judge Bates'
14 decision is issue preclusion, particularly as it relates to my
15 client Rick Warren, because those cases did not involve the
16 oath. They involved clergy. So we believe those cases are on
17 point.

18 THE COURT: They equally apply to the child?

19 MR. SNIDER: That's the second thing I would like to
20 address, and that is the -- as to the minor child, the
21 Plaintiffs are raising two cases. One is they're saying that
22 *Lee v. --* or *Weisman versus -- Lee v. Weisman* and *Marsh v.*
23 *Chambers* is -- takes precedent over *Marsh v. Chambers*. We
24 would disagree with that.

25 And first the essential -- we believe the *Marsh* is

1 controlling and the reason is, is that *Marsh* involved
2 legislative prayer. In this case, we have the executive
3 branch. We don't see that there is a substantial legal
4 difference between clergy invited to a government function by
5 elected officials if it's the legislative branch or an
6 executive branch. The Plaintiffs have failed to articulate
7 what is the difference. If there is --

8 THE COURT: You're addressing the merits, and I
9 haven't gotten there yet.

10 MR. SNIDER: Well, that, I believe, goes to standing
11 because if *Marsh* -- if *Marsh* controls, then *Lee* does not. And
12 if *Lee* -- and because that's the only reason they're able
13 to --

14 THE COURT: So you're saying that because of the
15 nature of what is happening at the inauguration being
16 analogous to what happens in a legislative session, that they
17 can't show injury.

18 MR. SNIDER: Right.

19 THE COURT: If the two can be equated.

20 MR. SNIDER: Right. And in *Weisman*, that is not on
21 point, and that's how they -- that's the only opportunity they
22 have for standing is with the minor child in saying, "Well,
23 this is like *Weisman*, a graduation, a high school graduation."

24 And Justice Souter's concurrence in *Weisman* is
25 helpful. He distinguished *Marsh* by explaining that *Marsh* was

1 a case in which, and I'm quoting, government officials invoke
2 spiritual inspiration entirely for their own benefit, and
3 that's at 630 of the opinion. But he says that that
4 distinguishes *Marsh* from a high school graduation.

5 Hence, just because by chance minors are present at
6 the inauguration does not somehow shoehorn this case into
7 standing for minors in the way that *Weisman* was, and that's
8 all I have for you. Thank you, Your Honor.

9 THE COURT: Reply.

10 MR. NEWDOW: There's so many. Let me start by
11 having the Court consider for a second South Carolina's
12 Constitution of 1778, which said, "We hereby decree that the
13 Christian Protestant religion shall be deemed and is hereby
14 constituted to be the established religion of this state."
15 What's the harm? Clearly that violates the establishment
16 clause.

17 If the Government of the United States looked back
18 at its history --

19 THE COURT: That's because it's advocating
20 particular religions, right?

21 MR. NEWDOW: No. It's because it's advocating for a
22 religious belief that excludes some people, which is exactly
23 what we have here. Doesn't matter. Justice Kennedy addressed
24 that in *Lee versus Weisman*. He said the fact that we make it
25 a narrower field, just at best narrows the numbers, at worst

1 increases the sense of isolation in the front.

2 All right. It doesn't matter. There's nothing in
3 the Constitution that says how many people you can exclude
4 based on religious belief. And anybody who sits there, we had
5 it -- at the founding of our nation, we were a Protestant
6 Christian nation. We hated Catholics. Catholics were the
7 Atheists of our founding. It's in the Declaration of
8 Independence and everywhere else. Imagine what it would be
9 like for a Catholic to hear that we are a Protestant nation if
10 we don't -- if the racial analogy is not seen by you, and I
11 would point out that under *Hernandez*, "It's not within the
12 judicial ken to question the centrality of particular
13 beliefs."

14 I don't believe it's for the courts to tell
15 individual litigants how much offensiveness comes from
16 being -- hearing this religious dogma, but --

17 THE COURT: Well, the Supreme Court has said that
18 because they've said that any type of injury is not sufficient
19 to satisfy standing.

20 MR. NEWDOW: Except in religion. That's what the
21 establishment -- the establishment clause sets apart religion
22 from everything else. It's not --

23 THE COURT: There are no cases that I know of that
24 say that any claim of religious injury is in and of itself
25 sufficient to show an injury sufficient to show standing.

1 MR. NEWDOW: How do we get *Lynch v. Donnelly*? How
2 do we get *Allegheny County*? What was the harm there? All
3 right. Somebody seeing something that expresses a religious
4 view on the part of the government and then saying, "Wait a
5 second. I'm a part of this constituency. Why do I have to
6 have this religious dogma that I find offensive that I don't
7 agree with? Why do I have to feel like a second-class citizen
8 because of this?"

9 THE COURT: But, you know, the courts haven't
10 totally written out of American society religion, because if
11 your position is correct, then the courts would have just
12 said, "You can't say anything in any setting about religion;
13 otherwise, if you do, you have a per se violation."

14 MR. NEWDOW: Then we're -- I believe you're missing
15 the point of the endorsement test in that. It's not a
16 question of talking about it. We can talk about the fact that
17 the framers, George Washington believed in God. No question
18 about it. We can talk about religion, how it's had an effect
19 in the classrooms and in -- talk about the Philadelphia bible
20 riots and whatever else you want to talk about, we can bring
21 in what religion has done. You can talk about religion. You
22 can't endorse a religious view. You can't say God exists.

23 THE COURT: One could argue that if the Supreme
24 Court has authorized materials, for example, being given to a
25 religious school that that is in fact endorsing religion.

1 MR. NEWDOW: The only time they do that is when they
2 say we give it open to everybody and therefore religion is
3 treated the same. There's not everybody here. Nobody can get
4 up on the dais and talk about anything they want. The only
5 people who are being invited, except for some musicians and
6 poets, are people to talk about God and that God exists, and
7 we have that in conjunction with the fact that the Chief
8 Justice of the United States takes it upon himself to alter
9 the text. I can't believe this is even being discussed in a
10 manner contrary to what the tenor of that Constitution says.
11 We have no religious test, shall ever be required.

12 THE COURT: That's true. I mean, are you saying
13 that President-Elect Obama has said that anybody who speaks
14 has to make pronouncements in favor of God?

15 MR. NEWDOW: I'm saying the only people he's invited
16 to speak, except a poet, is people to talk about God, and even
17 if he did that, I mean, think about Madison's memorial
18 remonstrance, which said that we couldn't pay teachers of the
19 Christian religion. We certainly can pay teachers of geology
20 and French literature and highway science. We can pay
21 teachers of anything except religion.

22 THE COURT: Maybe one can presume that Reverend
23 Lowery and the other minister are going to say something about
24 God or a supreme being but we don't know that's the case.

25 MR. NEWDOW: Well, I mean, we don't know anything in

1 terms of the future. I mean, we don't know that the
2 inauguration is going to take place either, but I think we can
3 be fairly certain that when you invite a clergy member and if
4 you call the invocation to God and if the benediction is in
5 the name of God, that they'll likely be talking about God, and
6 they will be sending a message to people who don't believe in
7 God just as if they were talking -- do it the other way. Make
8 believe it is Protestant Christian.

9 All right. "In the name of Protestant Christianity,
10 do you swear to uphold this Constitution? We're going to
11 invite Protestant Christian teachers to talk about the glory
12 of Protestant Christianity." Would that be allowed? What is
13 the constitutional difference between Protestant Christianity
14 and God?

15 THE COURT: Well, I assume your position is that
16 *Marsh* is not good law?

17 MR. NEWDOW: Well, I think the Supreme Court has
18 taken that position in *Santa Fe*.

19 THE COURT: They haven't definitively said that.

20 MR. NEWDOW: Excuse me?

21 THE COURT: They haven't definitively said that.

22 MR. NEWDOW: No, but nobody has standing to
23 challenge it again. The only people who have standing are
24 legislators and no legislator will be a legislator if he
25 challenges it, so we're stuck. Atheists can't get elected to

1 office because the Government keeps sending this message that
2 they're second-class citizens. We have this huge stigmatic
3 injury, which is the injury that the establishment clause is
4 all about. We have a free exercise clause. That's something
5 that's separate.

6 THE COURT: And you agree then if *Marsh* is good law,
7 that *Marsh* would apply to this setting as it did with the
8 legislative setting?

9 MR. NEWDOW: Not at all. The legislative session
10 and was raised by them was that the legislative session is
11 only for the legislators. All right. If people happen --

12 THE COURT: There are other people in the audience.

13 MR. NEWDOW: Very rare, and they come in and watch.
14 It's not for them. Here, this is for -- Barack Obama says,
15 this is not my inaug- -- I just got an e-mail from him
16 yesterday. "Dear Michael" -- it's nice of him -- he says and
17 he says, "This is not my inauguration. This is everybody's
18 inauguration."

19 He has these people and who say, "Let us pray" --
20 not you, Barack Obama -- but all the people who are watching
21 this incredible ceremony, the most important thing we do in
22 our nation, let us all watch and let's pray together to God.

23 THE COURT: Well, realistically, I mean, the
24 legislature is not just an event. A legislative session is
25 not just an event that's for the benefit of the legislators.

1 I don't see where I have any less interest, probably more so,
2 in the legislative session and what is taking place by way of
3 enacting law as compared to a ceremony like the inauguration.
4 I mean, what the legislature does may have a profound impact
5 on me based upon what they do by way of enacting legislation,
6 whereas, what happens at a ceremony like the inauguration is
7 not.

8 MR. NEWDOW: Well, I mean, I think the Supreme Court
9 alluded to the fact in *Lee versus Weisman* that nobody shows up
10 for the prayer in legislation. There is three or four
11 Congressmen talking and doing whatever else they do. You
12 don't make law at the time of the prayer. No one even knows
13 it's there. All right. It's a very informal thing, people
14 are coming in and out all the time. That's the whole
15 difference that they said that they tried to characterize
16 between the graduation prayer in *Lee versus Weisman* versus the
17 legislative prayer. Legislative prayer, we pay these guys tax
18 dollars to talk about God.

19 It's a questionably valid construct because in
20 *Santa Fe*, when the Supreme Court said specifically that the
21 religious liberty protected by the First Amendment is abridged
22 when the state affirmatively sponsors the particular religious
23 practice of prayer.

24 THE COURT: Yeah, but I mean, if the founders of the
25 Constitution, when they wrote the First Amendment,

1 nonetheless, have those type of religious activity taking
2 place, it seems to me you can't categorically say that they
3 intended for there to be no mention regarding religion in
4 order to not abridge the establishment clause.

5 MR. NEWDOW: Well, that's the issue in *Marsh v.*
6 *Chambers*. In *Marsh v. Chambers*, James Madison, the father of
7 the Constitution who spoke about the legislative prayer, he
8 said, "It's a palpable violation of equal rights as well as
9 Constitutional principles," and the Chief Justice of the
10 United States in *Marsh v. Chambers* footnotes that and he says,
11 "Madison expressed doubts." I think that's a fairly
12 inaccurate display of what exactly happened.

13 THE COURT: It's not for me to question the
14 rationale of the Supreme Court because, as I understand in
15 *Marsh*, they did look at the historical backdrop and did
16 conclude that if the founders had some aspect of religious
17 activity related to their legislative activity, that that was
18 a reflection that they did not intend to write religion
19 totally out of American life.

20 MR. NEWDOW: Well, again, the question if *Marsh* is
21 still good law. *Marsh* distinguishes *Lee versus Weisman*. If
22 that were the case, then we'd have graduation prayer allowed.
23 There's obviously a difference. And what *Marsh* made a big
24 deal about was the fact that it goes down to the original
25 founding of the nation. This goes back to 1937.

1 We haven't had chaplains at prayer until -- before
2 1937. So I think there's a huge difference there and you have
3 *Marsh* -- you have *Lee versus Weisman* since *Marsh*, which
4 said -- all the difference is, it said here we have children,
5 here's an impressionable child, you're in a constrained
6 setting, it's immensely formal, it's controlled by the
7 Government, it's completely different from what you have in
8 legislative prayer.

9 THE COURT: But they say that there was in fact some
10 form of prayer dating all the way back to President
11 Washington's inauguration.

12 MR. NEWDOW: And that's incorrect. After the
13 inauguration they walked to St. Paul's Chapel and they had a
14 prayer service. I have no problem if Barack Obama and
15 everybody else in government on their own privately goes out
16 and worships God. They have every right to do that. They
17 don't have the right to use the machinery of the state to do
18 that. And George Washington didn't do that and no one did it
19 in the presidential inauguration, even if you count that as
20 being something, which it isn't part of the inauguration, per
21 se, no one did it again until 1937. That's hardly --

22 THE COURT: I mean, I don't know. I understand your
23 position regarding the historical backdrop, but I think it may
24 be questionable as to what extent there was some reference to
25 religion at inaugurations before 1937. I understand you

1 believe that there was none, but there is some evidence that
2 would suggest that there was.

3 MR. NEWDOW: I believe that the Defendant cited the
4 Epstein article. The Epstein article is the one that says
5 there was no presidential inaugural prayer. The vice
6 president inside the confines of the senate, where again
7 you're not doing this for the whole public, that person used
8 prayer, but the President never used inaugural prayer
9 between -- if you want to call Washington's inaugural prayer,
10 which I don't, it was after the inauguration -- up until 1937,
11 and there's no contradiction in that.

12 The only contradiction is in terms of this "so help
13 me God" myth. You have an amicus brief from one of the
14 premier historians on George Washington who has told you that
15 nobody can find any such evidence and it's highly unlikely,
16 it's totally inconsistent with George Washington. It's a
17 myth.

18 THE COURT: Isn't the fact that it's been routinely
19 done since 1937 in and of itself significant?

20 MR. NEWDOW: Oh, I don't know how significant. I'll
21 go back to the racial analogy. How significant was it that
22 since the beginning of the founding of the nation we had
23 Blacks segregated? All right. The Congress had put in place
24 the 14th Amendment, said we should have colored only schools
25 in Washington, D.C. All right. It's a practice that's

1 subversive to the principle of equality.

2 This is a practice subversive to the principle of
3 equality. We had -- a year-and-a half ago Congress passed --
4 the House passed House Resolution 431 who looked about to
5 celebrate the -- to commemorate the *Loving v. Virginia*
6 decision.

7 All right. *Loving v. Virginia*, they start off
8 talking about our history and tradition. In 1661, Maryland
9 brought in the first Anti-Miscegenation Act and in 1883 the
10 Supreme Court, exactly 100 years before 1983, *Marsh v.*
11 *Chambers*, the Supreme Court said it's okay to have
12 anti-miscegenation statutes.

13 In 1948, 38 of the 48 states had anti-miscegenation
14 statutes, and they stopped it. Why? Because it's a practice
15 subversive to the principle of equality. The Supreme Court
16 has stated that you don't have -- that history and tradition
17 doesn't allow you to interfere when basic civil rights are at
18 stake. This is the first civil right that comes out in the
19 Bill of Rights, the establishment clause.

20 And again, I will say, look at what the
21 establishment clause is about. Clearly, one nation under --
22 or to have the Government say we are a Protestant Christian
23 nation violates the establishment clause. What harm is there?

24 Every single argument they're making there, you
25 could make against that. The harm is it turns people into

1 second-class citizens, and you're not allowed to do that.

2 THE COURT: Anything else?

3 MR. NEWDOW: The redressability. The idea that
4 Barack Obama wants this. Barack Obama, the President may want
5 anything. The President has -- says you can do illegal
6 wiretaps. I mean, the argument they're making is, "Oh, well,
7 somebody else -- he can get somebody else to do illegal
8 wiretaps"; therefore, the courts couldn't rule against illegal
9 wiretaps. That seems to me to be a frivolous argument.

10 You have the power to tell the Presidential
11 Inaugural Committee don't let people go on stage, certainly
12 those two people who we know are coming.

13 THE COURT: I can't tell the Inauguration Committee.
14 I mean, I think this is clearly President Obama's choice. So
15 even if I told the Presidential Committee, President Obama
16 doesn't have to abide by that.

17 MR. NEWDOW: And how is he going to get somebody on
18 the stage? All right. How is this any different from any
19 executive branch agency that you say you can't do that, you
20 can't violate your environmental protection laws or whatever.
21 President Obama can appoint another environmental committee.
22 I mean, that's not an --

23 THE COURT: They're not a governmental entity, are
24 they?

25 MR. NEWDOW: They certainly are in this realm. They

1 are taking on the grandest ceremony that the Government has.
2 They have this special access. They are the ones in control
3 who gets up to speak at the dais. The Supreme Court has
4 stated -- I forgot the case that I cited. The Supreme Court
5 clearly stated when people, individuals take on a governmental
6 function, they are treated like governmental entities. What
7 is private about this?

8 THE COURT: It's President-Elect Obama who's making
9 the choice who speaks.

10 MR. NEWDOW: And it gets executed as through any
11 executive branch agency, through some agency, and you have the
12 power to control those agencies and say, "Stop, that violates
13 the Constitution."

14 THE COURT: So if I told the Presidential Committee
15 that they are enjoined, you're saying that President Obama
16 would have to abide by that?

17 MR. NEWDOW: I'm saying yes. If President Obama
18 wants to get together another Presidential Committee and have
19 a conflict between the powers of our government, yeah, he can
20 do that, just as when you tell me, "Environmental Protection
21 Agency, you can't do this," he can appoint another
22 environmental agency. How is that different?

23 THE COURT: My view in that regard is if I told the
24 Presidential Committee that they were enjoined, that would
25 have no effect. I think President-Elect Obama could require

1 that those or ask those people appear and the Presidential
2 Committee couldn't stop it.

3 MR. NEWDOW: And how are they going to get on the
4 dais? I can't get on the dais.

5 THE COURT: They walk down there and walk up there
6 and --

7 MR. NEWDOW: And they have to -- there's security
8 all over the place. You can't get up on that stage unless
9 those people allow you.

10 THE COURT: They can't tell the secret service or
11 the marshal's service, whoever is going to provide security,
12 that they can't -- that they can't permit those people to come
13 on the stage.

14 MR. NEWDOW: They certainly can say, "I have a court
15 order that says I can't allow you to do that." Do I -- how --

16 THE COURT: And President-Elect Obama says, "And I'm
17 telling you to come up here and do it."

18 MR. NEWDOW: And we have that possibility with every
19 single executive agency in the country since the beginning of
20 time. The President can only say, "I don't agree with what
21 the courts say."

22 THE COURT: Yeah, but I don't -- I can't issue an
23 edict to the President. I can issue it to maybe his secretary
24 but I can't issue it to him.

25 MR. NEWDOW: I'm not asking you to issue it to him.

1 That's exactly what we're -- we're asking through his
2 secretary or his executive branch agency or whatever you want
3 to call it, this group that has this governmental function to
4 put on the inauguration and you can issue an injunction to
5 them saying, "You are not allowed to let these people on."

6 Now, if they get stuck between it, that maybe have
7 to take --

8 THE COURT: You seem to be saying that I do have the
9 authority then to enjoin the President?

10 MR. NEWDOW: No. I don't think I'm saying that at
11 all.

12 THE COURT: That's the effect of what you're saying
13 because if -- if President-Elect Obama, which I believe he
14 can, can overrule what the Presidential Committee says, then
15 the only way I can stop from that occurring that you want me
16 to enjoin would be to say, "President-Elect Obama, you can't
17 have these individuals speak, or if they speak, they can't say
18 anything about religion."

19 MR. NEWDOW: And I'm lost then on how that's
20 different between EPA saying that Amoco, you can go pollute
21 the environment, and you send and admit an injunction, and
22 President Obama says I think it's okay what Amoco is doing.
23 EPA, go ahead and allow them to pollute the environment.

24 How is this in any way different? The Government
25 judiciary always tells the lower branches of the Government --

1 of the presidency of the executive branch and the
2 congressional branch what they can or cannot do, and that's
3 always a possibility that higher-ups will say we don't want to
4 do it. The judiciary says, but since *Marbury versus Madison*
5 we said we're going to accede to what the judiciary says.

6 THE COURT: Okay. Anything else?

7 MR. NEWDOW: There's a million things, but I would
8 just point out another thing that they're talking about, you
9 know, if Joe the plumber comes in and gives the inauguration,
10 there's a crucial difference between Government speech
11 endorsing religion, which the establishment clause forbids,
12 and private speech endorsing religion, which the free speech
13 and free exercise clauses protect. That's the key here.

14 I mean, we're talking about Government coming in.
15 The Chief Justice of the United States, the highest officer
16 changing the constitutional text and saying that God exists.
17 He may not do that in that role and --

18 THE COURT: See, on the issue of injury, I guess
19 that's where I'm having some difficulty. I understand what
20 you're saying, but it seems to me, if the injury is the fact
21 that there appears to be some type of support for religion by
22 the Government as an entity, I just am having a difficult time
23 making a distinction between if the President-Elect utters
24 those words and you are there and hear them as compared to the
25 Chief Justice of the United States. It seems to me that the

1 President-Elect is in effect in a co-equal status as the Chief
2 Justice. He's only going through this formality. He is, in
3 effect, President and it's only the taking of the oath
4 admittedly required by the Constitution but still a formality
5 before he actually becomes President, and I just am having a
6 difficult time understanding how, if the President-Elect,
7 who's going to be the head of this nation from the executive
8 branch perspective, speaks the words, how you are somehow hurt
9 to a greater extent if the Chief Justice says it.

10 MR. NEWDOW: Because we can recognize that the
11 President-Elect has free exercise rights and he's allowed to
12 get up and say that. The Chief Justice, as an administrator
13 here, using the oath of office as prescribed in the text of
14 the Constitution, does not have free exercise rights.

15 THE COURT: Are there any cases that support the
16 proposition that for standing purposes that there is a greater
17 harm based upon what you say?

18 MR. NEWDOW: I would repeat what I just said.
19 There's a crucial difference between --

20 THE COURT: But any cases that say that there is a
21 difference in the harm from a standing perspective because it
22 is someone in an official capacity like the Chief Justice
23 saying it as compared to the person who's actually taking the
24 oath?

25 MR. NEWDOW: Every single case says that. *Lee*

1 *versus Weisman* says that. The reason that the Rabbi couldn't
2 give his invocation was because he was representing the
3 Government. The Rabbi can give an invocation anywhere else.
4 He wants to go out to the front lawn and do it, go ahead. You
5 can't do it -- you know, he speaks for himself. If he's in
6 the audience and he's talking to people, no one can enjoin him
7 there.

8 When he gets on the stage acting as a member of the
9 Government, he certainly can't do that. When -- I mean,
10 virtually every case. Why couldn't you put a Christmas tree
11 in the staircase of Allegheny County? Because the courthouse
12 is the Government. You want to put the Christmas tree outside
13 anywhere else, that's fine. I mean, that's the whole question
14 is whether or not this is the endorsement of Government, per
15 se, or individuals. And again, the President has free
16 exercise rights as an individual and we are not challenging
17 that.

18 I don't see how this is problematic. It seems to me
19 every single case, that's the case that -- that's the question
20 that the Supreme Court always asks. Who is doing the acting?
21 A governmental actor or an individual? And for the President,
22 he's a hybrid, and we're willing to say, there's a conflict
23 there. There's no conflict for the Chief Justice. There's no
24 conflict for this Presidential Inaugural Committee. They are
25 serving as governmental actors. They have no free exercise

1 right to violate the Constitution or to violate the
2 establishment clause.

3 THE COURT: Okay. Let me take a short break.

4 THE DEPUTY CLERK: Remain seated.

5 (A BRIEF RECESS WAS TAKEN.)

6 THE DEPUTY CLERK: All rise. This honorable court
7 is back in session. Please be seated and come to order.

8 THE COURT: Let me ask counsel for the Committee,
9 could you explain the circumstances of the creation and how
10 it's funded and how its officers are selected?

11 MR. HOOVER: Your Honor, the statute that we cited,
12 36 U.S.C. 501 actually underscores the private nature. We
13 obviously disagree with the characterization that it's a
14 quasi-governmental entity. That's made in conclusory fashion.
15 There's no showing whatsoever that it is a state actor for
16 purposes of First Amendment analysis, and that statute
17 specifically talks about indemnification, for example, of
18 federal agencies, that the Committee has to indemnify. The
19 Committee has articles of incorporation. We have attached
20 those to those our opposition.

21 It is a private not for profit corporation formed
22 under the D.C. Nonprofit Corporation Act. Its incorporators
23 and directors are private citizens. And the key component
24 here, the only case that the Plaintiff relies on, and this is
25 in the reply brief, Your Honor, for the notion that this is

1 somehow a state actor for purposes of First Amendment is the
2 *Lebron* case.

3 *Lebron* case is a case involving Amtrak, and in that
4 case the Court looked very closely at the fact that Amtrak was
5 under the direction and control of the federal government and
6 specifically that the federal government retained permanent
7 authority to appoint a majority of the directors of Amtrak and
8 that permanent authority was viewed as significant in terms of
9 the analysis.

10 Now, that's not the situation.

11 THE COURT: Funded by the federal government, too,
12 Amtrak, at least in part.

13 MR. HOOVER: Absolutely, whereas, there's private
14 funding to the Inaugural Committee.

15 THE COURT: Is there any federal or governmental
16 funds that fund it?

17 MR. HOOVER: Privately funded. What they do to put
18 on the balls, what they do is funded by private donations, and
19 the key here is if there is a change in the directors,
20 directors aren't appointed by the President of the United
21 States like Amtrak.

22 Directors are appointed by the current -- then
23 current directors, and so what you have is a situation where
24 like the Red Cross, like Yale University, there are two cases.
25 Because *Lebron* was cited to Your Honor --

1 THE COURT: Are those entities created pursuant to a
2 federal enactment?

3 MR. HOOVER: Those entities were argued to be in two
4 cases. One out of the Ninth Circuit, one out of the Second
5 Circuit, argued to be governmental actors under *Lebron*. The
6 courts, in both of those cases, and I'll give you the cites,
7 we didn't have an opportunity to give you those because *Lebron*
8 was cited in the reply brief, in both of those cases, the
9 Court found that there was no permanent retention of authority
10 by a governmental entity because only two out of 18 -- two out
11 of 15 directors at Yale are appointed by the Government and
12 eight out of 50 of the Red Cross are appointed by the
13 Government.

14 In that case, *Lebron* was distinguished and there was
15 no permanent control exercised by virtue of having a majority,
16 the President appointing or a state appointing a majority of
17 the directors. Here --

18 THE COURT: Are there any entities that have been
19 created by an act of Congress where the courts have held that
20 despite that, they are not state actors?

21 MR. HOOVER: Well, the *Red Cross* case, Your Honor,
22 was a perfect example.

23 THE COURT: Red Cross is a creation of --

24 MR. HOOVER: I believe it's a federally chartered
25 entity, and we can certainly check that, but the Red Cross is

1 federally chartered, and in this case the Plaintiff said it's
2 a state actor and the Court said no. You're not a state actor
3 if the Government is not -- for purposes of the First
4 Amendment, if the Government is not continuing to control. So
5 I think the *Red Cross* is your best example.

6 Here, there aren't any directors appointed by the
7 Government, and so I think that the notion that this is a
8 state actor, the whole problem with this analysis that you can
9 go out and enjoin, I mean Your Honor -- Your Honor noticed two
10 of the problems. President Obama -- President-Elect Obama is
11 the one who is going to decide who to invite, and if you go
12 out and try to -- even if you could enjoin, even if it were a
13 state actor, which it's not, it's not going to stop him from
14 having Reverend Warren or Reverend Lowery deliver the
15 invocation.

16 You're absolutely right that it doesn't control
17 security. Next thing you know, they'll be asking you to
18 enjoin the Secret Service and the U.S. Marshals who are there
19 at the podium. And so -- but the bottom line is, absent being
20 a state actor for purposes of First Amendment, there's no
21 injunction because there's no likelihood of success of a
22 violation of an establishment clause violation or a RFRA
23 violation.

24 And with regard to *Lebron*, when you look at the
25 reply brief that actually cites it and then moves on, the

1 reply brief at page 14 says in a footnote, the director
2 provision is of no event here, or words to that effect.

3 Your Honor, and that's just a declaration by the
4 Plaintiff that it's of no event. When you read the *Red Cross*
5 case, and I'm going to give you the cite to -- the *Red Cross*
6 case is *Hall versus American National Red Cross*, 86 F3d 919,
7 Ninth Circuit, 1996. The other case is *Hack versus President*
8 *and Fellows of Yale College*, 237 F3d 81, Second Circuit, 2000,
9 both of those cases make clear that the key aspect in Red
10 Cross, the Court said, because the Government has not retained
11 permanent authority to appoint the majority of the Red Cross
12 governing board, Red Cross is not a government actor. That's
13 86 F3d at 922.

14 There's no such retention of authority with respect
15 to the Presidential Inaugural Committee.

16 THE COURT: Okay. Thank you.

17 Before I would be able to reach the merits of the
18 claims that are being advanced, obviously, case authority says
19 I have to conclude that there is in fact standing to pursue
20 this matter.

21 I seem to appreciate the fact that the Government is
22 conceding that, but for Mr. Newdow, the issue preclusion would
23 not preclude the other Plaintiffs from being able to pursue
24 this matter, so I won't resolve this matter on that basis,
25 other than to conclude that in reference to the invocation and

1 the benediction, that Mr. Newdow, regarding those claims,
2 individually would be precluded from pursuing those claims,
3 but on the other hand, I would agree that the other Plaintiffs
4 cannot be so precluded.

5 On the issue of standing. Obviously, one of the
6 things that I have to be able to find in order to conclude
7 that there is standing is that there is a concrete and
8 particularized injury that's been established by the
9 Plaintiffs, and obviously one of the other two -- three things
10 that have to be shown is that the claim -- or the claims being
11 made are in fact redressable.

12 On the issue of whether there is a sufficient
13 Article III standing that's been established, it seems to me
14 that the suggestion that's being made by the Plaintiffs is
15 that if there is a claim of a First Amendment establishment
16 clause violation, that that in and of itself, just making the
17 claim is sufficient in order to establish injury sufficient to
18 establish standing, and I don't think that is the state of the
19 law.

20 In my view, the *Valley Forge* case rejects that
21 proposition and there has to be more shown than just an
22 allegation that one feels that they -- that their First
23 Amendment rights have been -- have been violated, and that
24 brings me to the issue of what is the nature of the injury
25 that's being alleged here?

1 Obviously, the individual perspective of a person
2 who is a nonbeliever and they're feeling that any invocation
3 of religion in a setting like this is going to cause them
4 injury, I don't think is sufficient in and of itself to
5 establish Article III standing; otherwise, it seems to me I
6 have to totally reject the analysis that was conducted in the
7 *Valley Forge* case.

8 Although, technically maybe assessing whether *Marsh*
9 is still good law goes to the issue of the merits as compared
10 to standing, it does seem to me that you have to look at *Marsh*
11 and assess is it good law in the face of subsequent Supreme
12 Court precedent because obviously, it seems to me, if it is
13 good law, then it does have to factor in on the issue of
14 whether, when a claim of this nature is made regarding this
15 type of activity, whether the claim is sufficient to establish
16 harm so as to afford a Plaintiff the ability to proceed with
17 the case on standing grounds.

18 And my reading of the law is that while obviously in
19 subsequent cases the Supreme Court have -- has constructed
20 other tests in assessing whether there has been a First
21 Amendment violation, that the Supreme Court has not directly
22 rejected *Marsh* and in fact has, in subsequent cases,
23 distinguished *Marsh* from other circumstances and therefore did
24 not reject *Marsh* but said that the setting or the
25 circumstances of other cases are distinguishable and therefore

1 did not apply what the Court concluded in the *Marsh* decision.

2 So, it is my view that I have to respect what the
3 Supreme Court has said in past rulings, and therefore have to
4 respect the *Marsh* decision absent a clear pronouncement that
5 *Marsh* has been rejected, which I don't find to be the case.

6 That being my conclusion, I just can't find a
7 difference, although I understand the position that's being
8 argued by the Plaintiffs, I can't find that there is a
9 remarkable or substantive difference between what occurs in
10 the legislature when a prayer is administered by someone who
11 has been retained by -- by the legislature of the Congress or
12 some other legislature to perform that function as compared to
13 what is happening here.

14 Yes, it may be true that on most occasions the
15 general public is not present during legislative sessions,
16 that's not always the case, and I don't think one can
17 categorically say that's the case because when there are
18 issues appearing before a legislature that are of public
19 interest, it's not unusual, in my experience, for members of
20 the general public to be present. And if those members of the
21 general public are present, pursuant to the *Marsh* decision, if
22 there is a prayer that's said in their presence, that would
23 not amount to an establishment clause or freedom of expression
24 clause or religion clause, freedom of exercise clause would
25 not be found under those circumstances.

1 And while obviously this is a different setting, it
2 seems to me it really is, in substance, no different than
3 that, yes, there is a larger crowd that's present; yes, in
4 general, there may be a greater degree of interest in
5 reference to what is taking place, but I don't see that as the
6 determining factor as to whether we are talking about a
7 different type of speech, ceremonial speech as compared to
8 something -- something else.

9 I think the school cases are in fact very different
10 than this situation because you are talking about a level of
11 coercion that's very different than what you have here.
12 Children are required to attend school and if they are
13 required to attend school and speech is taking place that's of
14 a religious nature at the auspices of the state, the school,
15 then, it seems to me, that's a very different situation, and
16 obviously, to some degree, the age of the child and the
17 vulnerability of a child is going to have some level of
18 impact.

19 I think that's why this young lady has been, at
20 least in part, named as a party in this case because of the
21 belief, I believe, from the Plaintiff's perspective, that she
22 stands in a different setting or footing because of the school
23 cases as compared to the adult Plaintiffs in this case. And
24 even -- which I think has a greater analogy to this situation
25 as compared to the classroom setting is the graduation

1 setting, but even there you're talking about a very different
2 circumstance than what you're talking about here, because it's
3 clear that the Supreme Court said in the setting of a
4 graduation situation, that there's a expectation that if
5 somebody is going to graduate, that they're going to appear
6 and as a result of that they're going to feel a level of
7 coercion to appear, and therefore, because of that, they
8 should not be subject to a Government sponsored speech that
9 makes reference to religion.

10 So, on the issue of whether there has been a
11 sufficient showing of harm, it seems to me that we are talking
12 about ceremonial speech, we are talking about a situation
13 where there is some evidence that would suggest that there was
14 reference to God all the way back to George Washington and
15 there's evidence on the other side that would tend to suggest
16 that that was not the case, that the religious aspects of the
17 ceremony took place at some different setting in private, but
18 there clearly is evidence indicating that at least since 1937
19 there has been the interjection of religion into the inaugural
20 process.

21 And I think even with that, you are talking about a
22 historical backdrop to the proceedings that makes what is
23 being said at these proceedings ceremonial in nature, and I
24 think it's difficult to suggest that somehow there is -- that
25 the fact that these religious statements will be made, that

1 that is somehow going to give the impression that the
2 Government is in fact supporting religion.

3 And I think also, on the issue of harm -- while I
4 appreciate from an individual's perspective, if they are a
5 nonbeliever, they're feeling that somehow they are harmed by
6 these statements of a religious nature being made at the
7 inauguration, I have a hard time buying into the analogy that
8 somehow this can be equated to the harm that occurs as it
9 relates to racial discrimination that existed once in this
10 country. I think the two are very different and there clearly
11 was empirical data in the race situation that clearly showed
12 that separating the races and the discrimination that resulted
13 as a result of that was in fact having a profound impact on
14 people of color, and obviously that factored in significantly
15 into the decision ultimately that was made in *Brown* that
16 separate but equal was in fact unconstitutional.

17 I have nothing before me from an empirical data that
18 would suggest that the statements that are made at the
19 inauguration of a religious nature in some way, as it was
20 being suggested by Mr. Newdow, in some way caused the American
21 public to have a dislike for people who are nonbelievers.

22 My belief is that those attitudes that exist among
23 people who have those feelings about nonbelievers is a product
24 of their own belief, and I don't believe there's anything
25 that -- at least I don't have anything in this case that's

1 been submitted to me at this point, that would suggest that
2 because these statements are being made at the inauguration of
3 a religious nature that somehow that is factoring in to the
4 perception that the Government is supporting religion and it's
5 because of that that people who are believers are having a
6 dislike towards people who are nonbelievers. I think it
7 emanates from something very different from that. It emanates
8 from their core belief in a God as compared to those who
9 don't, and because of that, that is why the attitude exists.

10 So that gives me pause in concluding that we are
11 talking here about an injury that is sufficient to confer
12 Article III standing to the Plaintiffs in this case.

13 But, be that as it may, because I do have serious
14 concerns about whether the showing of Article III standing can
15 be established based upon the nature of the injury that's
16 being alleged here, I also have real concerns about the other
17 redressability component of standing which obviously has to be
18 satisfied in order for me to conclude that there is in fact
19 standing in this case, and it suggests that if I enjoin the
20 Committee that that would have the effect that the Plaintiffs
21 are seeking to accomplish.

22 Well, I do have, based upon what's been indicated, a
23 real question as to whether I would even have the authority to
24 enjoin the Committee in light of the fact that what's being
25 indicated to me by counsel for the Committee, it seems to me

1 that we are not talking about a state actor, that we are
2 talking about a private actor, and as such, I would not have
3 the authority to enjoin them just like I would not have the
4 authority to enjoin President-Elect Obama, obviously, for
5 different parameters because obviously he does have the right
6 to utter the words of a personal belief that he has.

7 And then on the issue of whether I have the
8 authority to enjoin the Chief Justice. I don't believe
9 there's any case authority that specifically addresses the
10 issue of whether a law court judge has the authority to enjoin
11 a higher judge, either on the circuit level or on the Supreme
12 Court, but I think it's highly questionable as to whether I
13 have such authority. It seems to me that probably the way
14 that one would, assuming you can enjoin the Chief Justice
15 based upon a sufficient otherwise showing of standing, that
16 the case would, I assume, have to come to this court, work its
17 way up to the Circuit, ultimately to the Supreme Court, and if
18 the majority of Supreme Court justices took a position adverse
19 to what the Chief Justice was doing or was about to do, then
20 conceivably, I guess the Court, with a majority ruling, would
21 be able to enjoin the Chief Justice, but I have real questions
22 about whether I have the authority to do that.

23 But I think on this issue of redressability, the
24 bottom analysis really comes down to a question of who has the
25 authority to have these words uttered at the inauguration, and

1 I think in order to enjoin these words from being uttered, I
2 would have to have the authority to enjoin the
3 President-Elect. And while technically, yes, he's not
4 President, I think he still stands in the shoes of the
5 President and I don't think I could enjoin him from having
6 whoever he wants to appear.

7 And again, on the issue of injury, in my view it is
8 significant that if the Plaintiffs are prepared to appear and
9 be present when the inauguration takes place and acknowledge
10 that it can't -- that they cannot stop President-Elect Obama
11 from making reference to God if he so chooses, I find it very
12 difficult to conclude that if that's the case and they're not
13 going to be harmed to the extent -- not going to be harmed to
14 the extent that they don't feel they can't go because of the
15 injury they would suffer from hearing him say it, I just find
16 it difficult to conclude that somehow the Chief Justice saying
17 it is going to have a greater impact than President-Elect
18 Obama saying it. Because while technically he's not
19 President, he clearly, it seems to me, in the eyes of the
20 American citizenry, is more influential at the time he steps
21 on that stage as compared to President Bush, although
22 technically, President Bush is still the President.

23 So, it seems to me that if one is going to be harmed
24 by the attorney -- by -- not going to be harmed to the extent
25 that they're willing to be present and hear the words if

1 President Barack Obama says it, I think it's very difficult to
2 suggest that somehow the harm is remarkably greater if the
3 Chief Justice does it. But, as I say, I think the only way I
4 can enjoin this is if I had the authority to enjoin
5 President-Elect Obama, and I just don't think I can accomplish
6 what the Plaintiffs want by doing that, because since I
7 conclude I couldn't enjoin the Committee, but even if I could
8 enjoin the Committee, I think he'd be able to say, "Come up on
9 this stage." I don't think anybody can stop that from
10 occurring, and therefore, I fail to see how I have the ability
11 to provide the redress that the Plaintiffs are seeking.

12 So, based upon my conclusion that there has not been
13 a sufficient injury shown to confer Article III standing and
14 my conclusion that I don't have the ability to redress the
15 harm that is being alleged, I would have to conclude that I
16 don't have the authority to exercise standing with this case,
17 and -- or at least at this stage would conclude that a
18 sufficient showing to exhibit substantial likelihood of
19 success on the merits has not been shown and on the issue of
20 irreparable harm that a sufficient showing of irreparable harm
21 has not been shown, and those are the two hallmarks of whether
22 injunctive relief is appropriate, although there are the other
23 two factors.

24 And I think, considering my ruling in reference to
25 the first three issues, I think the balance of harm,

1 considering the fact that we are on the eve of the
2 inauguration and if I issued an order granting the injunction,
3 I think it would have a tremendous impact on the progression
4 of the process of proceeding with the inauguration, I would
5 have to conclude that the balance of harm weighs in favor of
6 the Defendants and that the public interest also weighs in
7 favor of the Defendants, so I would have to conclude that a
8 sufficient showing to conclude that injunctive relief is
9 appropriate has not been made.

10 And as I said earlier, when I was asking my
11 questions, we really are talking about something other than a
12 temporary restraining order at this point because the
13 Plaintiffs chose to wait until the time that they did, which
14 made it impossible for us to have an earlier hearing, so the
15 practical impact might be, if I granted the relief, something
16 other than a temporary restraining order, but in fact a
17 injunction, and therefore, I am of the view that I just -- it
18 will not be appropriate at this time for me to enjoin what the
19 Plaintiffs seek.

20 I will issue an order requiring that -- I mean, I
21 guess I could resolve the case at this point, but I think I
22 should issue an order having the Plaintiff show cause why the
23 case, under the circumstances, should not be dismissed, and
24 I'll address that once those submissions are made. Thank you.

25 THE DEPUTY CLERK: All rise.

(PROCEEDINGS END AT 4:09 P.M.)

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CERTIFICATE OF REPORTER

I, Catalina Kerr, certify that the foregoing is a
correct transcript from the record of proceedings in the
above-entitled matter.

Catalina Kerr

Date