# APPENDIX C

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NOTE: This document was reconstructed from a scanned version created shortly after it was filed in the District Court for the Eastern District of California. The OCR software distorted the date/time stamp and made a few other errors.

In response to Plaintiffs' contacts on this, "[t]he federal defendants take no position on your request for leave to file a 'reconstructed' version of the brief, and reserve the right to challenge the authenticity and relevance of the proposed attachment." Defendants PIC and Beliveau "take the same position." Defendant Warren "won't raise an objection to the filing." Plaintiffs were unsuccessful in contacting Defendant Lowery in time to obtain his view on this matter.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

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| REV. DR. MICHAEL A. NEWDOW, Plaintiff, v. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, Defendant. | CIV. No. S-01-0218 LKK/GGH PS<br>BRIEF IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE<br>DATE: June 14, 2001<br>TIME: 10:00 am<br>COURTROOM: #24 |

Defendant George W. Bush, President of the United States, submits the following brief in reply to plaintiff Michael A. Newdow's "Opposing Memorandum of Law in Response to Defendant's Motion to Dismiss with Prejudice" filed on June 1, 2001.

## I. ARGUMENT

### A. Newdow cannot allege the type of direct injury necessary to confer standing

Newdow remains unable to establish that he has suffered an "injury in fact," a critical element of standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723 (1990).

The Supreme Court has stated that a plaintiff must be able to establish that he had direct contact with the challenged government conduct. In *Valley Forge Christian College v. Americans for Separation of Church and State,* 454 U.S. 464, 102 S.Ct. 752, (1982) a group called "Americans United For Separation of Church and States" (Americans United) challenged the federal government's cost-free transfer of 77 acres of land near Philadelphia to the Valley Forge Christian College. Americans United, which described itself as a non-profit organization composed of 90,000 taxpayer members, learned of the transfer through a news release and filed suit. The district court dismissed the complaint on the ground that the plaintiffs lacked standing as taxpayers, and on the ground that plaintiffs had failed to alleged "any actual or concrete injury beyond a generalized grievance common to all taxpayers." 454 U.S. at 469, 102 S.Ct. at 757.

The Court of Appeal for the Third Circuit unanimously agreed that the plaintiffs lacked standing as taxpayers, but a majority held that plaintiffs had standing "merely as 'citizens,' claiming 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion." 454 U.S. at 470, 102 S.Ct. at 757, quoting from the Third Circuit's opinion at 619 F.2d 252, 262 (3rd Cir. 1980).

The Supreme Court rejected this "unusually broad and novel view of standing" (454 U.S. at 470, 102 S.Ct. at 757) and affirmed the requirement that essential to standing is a showing of "an actual injury redressable by the court." Jd., at 472, 102 S.Ct. at 758 (citations omitted). In rejecting the Court of

Appeals broad view of "citizen standing" the Supreme Court stated:

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

*Id*., at 485-486, 102 S.Ct. 765.

The Supreme Court held that Americans United, headquartered in Washington, D.C., with the named plaintiffs residing in Maryland and Virginia, could not allege an *"injury* or *any* kind, economic or otherwise, sufficient to confer standing" where the real estate transaction at issue was in Pennsylvania. 454 U.S. at 486-87, 102 S.Ct. at 766. (emphasis in original.)

Here, Newdow has not alleged any facts showing he had direct contact with the governmental conduct he challenges. Like the plaintiffs in *Valley Forge* who lived in a different state from where the real estate was located, Newdow was 3,000 miles away from the inaugural activities he watched on television. His lack of geographical proximity to the inaugural prayer dooms his claim to standing.

Furthermore, the Supreme Court rejected the idea that the Establishment Clause provides a

> special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.

454 U.S. at 487; 102 S.Ct. at 766-767.

Similarly, Newdow cannot "channel surf" searching for governmental wrongdoing. Certainly, given the broad reach of cable television, viewers have access to all sorts of televised government activities such as city council meetings. But does this mean that Newdow, who upon watching cable TV from his home in Sacramento observes the city council in Omaha, Nebraska, recite the Pledge of Allegiance to open a public meeting, could thereafter file a lawsuit in Sacramento, California, challenging this conduct on Establishment Clause grounds? Could Newdow file an action in Sacramento after hearing the President of the United States, speaking from Washington, D.C., conclude the State of the Union address with the words "God Bless America"? Newdow would undoubtedly believe both of these examples are constitutional violations, but defendant knows of no case that has defined standing in such broad terms that one who merely views allegedly unconstitutional conduct on television can file suit in the district where he resides.

No matter how Newdow tries to satisfy the standing requirement by vigorously asserting how offended he was or how the prayer made him feel like an outsider, the fact remains that Newdow alleges nothing more than a generalized complaint that Rev. Graham's prayer violated the Establishment Clause. He and every other atheist and non-Christian in the United States probably have the same complaint. However, the Supreme Court has repeatedly "rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be

administered according to law.'" *Valley Forge,* 454 U.S. at 482-83, 102 S.Ct. at 764. The Supreme Court has similarly rejected the notion that a plaintiff's commitment to the principles of separation of church and state confer standing because "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.,* at 486, 102 S.Cfc. 766.

Newdow sidesteps the requirement that he have direct contact with the challenged conduct, and instead focuses on the importance of his Establishment Clause claim. However, the requirement of standing "focuses on the party seeking to get his complaint before the court and not on the issues he wishes to have adjudicated." *Flast v. Cohen,* 392 U.S. 83, at 99, 88 S.Ct. 1942, at 1952 (1968).

Newdow may argue that his constitutional claim justifies an exception to the rigid requirement that he show an injury in fact because it may be difficult, if not impossible, for *anyone* to show an injury in fact. The Supreme Court rejected this reasoning in *Valley Forge* when it held that:

> Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional error, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. . . But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is no reason to find standing."

454 U.S. at 489, 102 S.Ct. at 767 (internal citations omitted).

Similarly, even though no person may be able to show that they suffered an injury in fact because of the recitation of a

prayer at the inauguration, that is no reason to find standing here.

**B. Newdow has not shown that he changed his behavior or has undertaken a special burden to avoid hearing the inaugural prayer.**

Newdow cites a long line of cases, including many from the Ninth Circuit, in which citizens complaining about public displays of allegedly religious symbols were found to have standing.[1] The present case does not, of course, involve a public display of a religious symbol, so their value in answering the standing question is negligible. Nevertheless, even a cursory analysis of those cases demonstrates that Newdow's reliance on them is misplaced.

In *Books v. City* of *Elkhart.* 235 F.3d 292 (7th Cir. 2000), *cert. denied.,* 2001 WL 267479 (May 29, 2001), plaintiff, a resident of Elkhart, had standing where he alleged he had to see a monument inscribed with the Ten Commandments if he wished to use a public building which housed the mayor's office, the city's legal and human relations department, the city court, the prosecutor's office, and the city council offices. *Id*., at 295. Plaintiff alleged that he

> passes the monument in his daily activities, including: riding his bicycle on a route that passes the Municipal Building; patronizing the Elkhart Public Library, which is located across the street from the Municipal Building, and visiting his landlord's office and his cousin's home, both of which are located near the Municipal Building. He

[1] See cases cited in footnote 5 on page 5 of Newdow's "Opposing Memorandum of Law in Response to Defendant's Motion to Dismiss with Prejudice."

> states that, in order to avoid seeing the Ten Commandments monument, he 'would have to assume the special burden of altering [his] daily routine so as to avoid this direct and unwelcome contact.'

*Id.,* at 297.

In finding that plaintiff Books had standing, the court relied on a long line of cases that granted standing to a plaintiff who demonstrated that he had "undertaken a special burden or has altered his behavior to avoid the offensive object." Jd., at 299. Those cases involved situations where the plaintiff had to avoid using a public park to avoid the religious object *(Goazales* v. *North Township,* 4 F.3d 1412, 1416-17 (7th Cir. 1993)); or altered his travel route *(Harris v. City of Zion,* 927 F.2d 1401, 1405 (7th Cir. 1991)). The *Books court* concluded that

> a plaintiff may allege an injury in fact when he is forced to view a religious object that he wishes to avoid but is unable to avoid because of his right or duty to attend the government-owned place where the object is located.

*Id*., 301.

The Ninth Circuit cases cited by Newdow have found standing in similar circumstances. In *American Jewish Congress* v. *City* or *Beverly Hills, 90* F.3d 379, 382 (9th Cir. 1996) plaintiffs had standing where they alleged that the city's permit process that allowed for the erection of a menorah in a city park interfered with their right to freely use and enjoy the park.

In *Separation of Church and States Committee v. City of Eugene of Lane County, State of Oregon,* 93 F.3d 617, 619, n. 2 (9th Cir. 1996) local citizens who alleged that the city's construction of a cross in a public park prevented them from

freely using the area in and around the park had standing.

In *Carpenter v. City & County of San Francisco,* 93 F.3d 627, (9th Cir. 1996), local citizens challenged the construction, on public property, of a 103-foot concrete and steel Latin cross. The decision did not address whether the plaintiffs had standing, but it is clear from the opinion that the plaintiffs lived or worked in the San Francisco area.

Similarly, in *Ellis v. City of La Mesa, 990* F.2d 1518 (9th Cir. 1993) city residents challenged the constitutionality of displays of Latin crosses in city and county parks and on the city's official insignia. Two of the individual plaintiffs alleged that they avoided using the parks because of the existence of the crosses. The third plaintiff, who was "deeply offended" by the presence of the cross on the city's insignia, declined to invite business clients to his home to avoid offending business clients. [2] The district court found, and the Ninth Circuit affirmed, that the two plaintiffs had been injured by not being able to freely use the public parks, and the third plaintiff had curtailed his activities to avoid contact with the insignia displayed in his city. Jd., at 1523.

The common thread that runs throughout all these cases is that plaintiffs who objected to the religious symbols lived or worked in the community where the symbol was displayed, and would see the symbol while going about their daily activities. Here, of course, Newdow does not allege that he was a resident of

[2] It is not at all clear from the decision how inviting business clients to the third plaintiff's home would expose them to the cross or the insignia.

Washington, D.C. on inauguration day who somehow had to alter his normal routine to avoid hearing speech he found offensive. Newdow has only alleged he watched the inauguration on television. While he certainly has the right to visit the nation's capital, did he have the right to attend the inaugural ceremonies in person? Probably not; nevertheless, Newdow's attempt to use the analytical framework applicable to religious displays on public properties simply does not work when the issue involves a speech that occurred months ago, thousands of miles away.

Finally, the requirement that a plaintiff's injury be more than abstract was recently highlighted in *Arizona Civil Liberties Union v. Dunham,* 112 F. Supp.2d 927 (D.Az.,2000). There the district court found that town residents who felt unwelcome and excluded by the town's proclamation of "Bible Week" had standing to challenge the proclamation under the Establishment Clause. At least one of the plaintiffs had received harassing and defamatory mail and phone calls after expressing her opposition to the proclamation. *Id*., at *934.* In finding that the plaintiffs had standing, the district court relied on *Valley Forge* and its progeny requiring direct contact with the challenged conduct. *Id*., at 929. Of significance to the instant case was the court's language distinguishing plaintiffs who resided in the town who were "directly and personally affected" by the proclamation with the abstract injury that would be suffered by

> a person residing hundred miles away who read about the Bible Week Proclamation issued in Gilbert and found it offensive to his or her beliefs about the Constitution's mandate.

*Id.,* at 933. The distant resident suffering only an abstract injury would not have standing under the rationale of *Valley Forge* and its progeny. *Id.,* at 933.

Newdow has not alleged facts showing he was "directly and personally" affected by the inaugural speech, and his injury--that of feeling like an outsider and excluded from an event that took place thousand of miles from his home--is similarly abstract and is insufficient to establish standing to pursue this action.

## V. CONCLUSION

For the reasons set forth above and in the Brief in Support of Motion to Dismiss, President Bush requests that this Court dismiss all claims against him with prejudice.

Date: June 6, 2001

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By: _____
KRISTIN S. DOOR
Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on **June 6, 2001,** she served a copy of the attached

**REPLY TO PLAINTIFF'*S* OPPOSITION TO MOTION TO DISMISS WITH PREJUDICE**

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the placets) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Sacramento, California, OR hand delivering said papers to the following:

Addressee(s):

Rev. Dr. Michael Newdow
c/o FACTS
P.O. BOX 233345
Sacramento, CA 95823

JUDITH SUTTON