ORAL ARGUMENT DESIRED – NOT YET SCHEDULED

CASE NO. 09-5126

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL NEWDOW, et al.

Plaintiffs-Appellants,

v.

HON. JOHN ROBERTS, JR., CHIEF JUSTICE OF THE U.S. SUPREME COURT, et al.

Defendants-Appellees,

On Appeal from the United States District Court
for the District of Columbia

(District Court #1:08-cv-02248)

APPELLANTS' OPENING BRIEF

PUBLIC COPY – MATERIAL UNDER SEAL DELETED

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amici

(A) Plaintiffs (Individuals)

(1) Newdow, Michael

(2) Schempp, Ellery

(3) Lipman, Mel

(4) Barker, Dan

(5) Gaylor, Annie-Laurie

(6) Sherman, Robert

(7) Berkshire, August

(8) Castle, Marie

(9) Bechman, Stuart

(10) Silverman, Herb

(11) Torpy, Jason

(12) Greenberger, Harry

(13) Hornbeck, Kirk

(14) Wingrove, Richard

(15) Arntzen, Christopher

(16) Stoltenberg, John

(17) LaClair, Katherine

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(18) Altman, Louis

(19) Case, Paul

(20) Schiffelbein, Jerry

(21) Richardson, Anne

(22) Richardson, Jay

(23) Dugan, Dan

(24) Andrews, Anna Mae

(25) Sutton, Eliza

(26) Ressman, Richard

(27) Abelman, Marsha W.

(28) A-Doe1[1]

(29) Aldred, Stephen

(30) A-Doe2

(31) Allewalt, Linda

(32) Alman, Isadora

(33) A-Doe3

(34) Avery, Timothy G.

(35) Balzano, Donald P.

(36) B-Doe1Parent1

[1] On July 10, 2009, the Court granted Plaintiffs' unopposed motion for leave to submit child-identifying information under seal. Per Curiam Order [1195744].

Material Under Seal Deleted

(37) Barnes, Chad

(38) B-Doe2

(39) Beat, Lawrence W.

(40) Becker, Zachary

(41) Beekhuis, G. J.

(42) Benedict, Marc J.

(43) B-Doe3

(44) Berger, Gary Lee

(45) Berry, James H.

(46) B-Doe4

(47) Blazo, Al

(48) Borrell, Lorraine A.

(49) Borrell, Richard M.

(50) Bossom, Chris

(51) Brabander, Gregory T.

(52) Brandt, Marle

(53) Braun, Burkhard R.

(54) B-Doe5

(55) B-Doe6

(56) B-Doe7

Material Under Seal Deleted

(57) B-Doe8

(58) B-Doe1Parent2

(59) B-Doe1Child1

(60) B-Doe1Child2

(61) Burke, Julianne F.

(62) Burke, Michael

(63) Butcher, Linda

(64) Cassels, Jean

(65) C-Doe1

(66) C-Doe2

(67) C-Doe3

(68) Cox, Christopher

(69) Cramer, Sally J.

(70) C-Doe4

(71) Crow, Gail M.

(72) Dabbs, Edward J.

(73) Darwin, Steven P.

(74) Davidson, Joseph

(75) Davis Jr., Herbert A.

(76) Destler, David M.

Material Under Seal Deleted

(77) D-Doe1

(78) E-Doe1

(79) Eisenberg, Bernard

(80) Ellis, Brian P.

(81) Farren, Jamie L.

(82) Fleming, David J.

(83) Floyd, Lauren

(84) Gahagan, Gary

(85) Garvin, Jonathan

(86) Ghermann, Ernst F.

(87) Gilthorpe, Stefan

(88) Gleason, Bruce

(89) Goodman, Joseph P.

(90) Grimaudo, Leonard T.

(91) Grimes, Richard O.

(92) Guardino, Beverly J.

(93) Guillen, Gary A.

(94) Gulledge, Christopher J.

(95) Gulsby Sr., John A.

(96) Guzman, Louis E.

Material Under Seal Deleted

(97) Haider, William R.

(98) Halasz, Richard

(99) Haley, Jeffrey T.

(100) Hall, William J.

(101) Hamel, David O.

(102) Hart, Diane

(103) Hart, Brian

(104) Hawkins, Gary D.

(105) H-Doe1

(106) Heard, Gloria J.

(107) Hecker, Walter G.

(108) Helton, Robert S.

(109) Hoaks, Trina J.

(110) Holste, Peter N.

(111) Hommerding, Emily

(112) Honnigford, Bruce N.

(113) Hughes, Wendy

(114) Hunn Jr., Wilfred A.

(115) Hunsberger, Virginia M.

(116) Huntsman, David P.

Material Under Seal Deleted

(117) Jacobson, Michael

(118) Jochums Jr., Robert E.

(119) Johnson, Troy P.

(120) Jones, Linda W.

(121) J-Doe1

(122) Jones, Ronald A.

(123) Kane, George F.

(124) Kaplan, Wendy

(125) Kessinger, M.D., Rovena L.

(126) Kirby, Susan L.

(127) Knox, Donna J.

(128) K-Doe1

(129) Koch, Don

(130) Kottow, Travis

(131) LaCourt, Marilyn

(132) L-Doe1

(133) Lapinsky, ZoAnn

(134) Last, Eric R.

(135) Leach, Christopher

(136) Lerner, Lawrence S.

Material Under Seal Deleted

(137) Leung, Carol

(138) Leung, Granville

(139) Lewis, Gerald J.

(140) Li, June H.

(141) Lieb, Anne-Rosemarie

(142) L-Doe2

(143) Lipp, Dallas W.

(144) Lobdell, James E.

(145) Lubin, Donald P.

(146) Mack, Anthony

(147) Mack, Jillian

(148) Mack, Susan

(149) Mansker III, Andrew J.

(150) Marchetti, Peter

(151) Marquis, Victor O.

(152) Marquisee, Eleanor

(153) Marquisee, Mark

(154) Martin, Richard M.

(155) Mauriello, David

(156) Maxwell, Sarah A.

Material Under Seal Deleted

(157) McCollum, James T.

(158) McCormick, Andrea H.

(159) M-Doe1Parent1

(160) M-Doe1Parent2

(161) Mitteldorf, Harriet

(162) Monllor, Javier

(163) Monroe, Phillip

(164) M-Doe2

(165) Morgan, Thomas J.

(166) Morris, Garrett

(167) Muñoz, Anthony

(168) Murphy, Michael J.

(169) Nagornyy, Viktor

(170) Nelson, Connie B.

(171) Neubauer, Steven

(172) Norman, Jeanette M.

(173) Nydick, Barbara A.

(174) Oliver, Dale

(175) Pabian, David P.

(176) Paige, Jennifer

Material Under Seal Deleted

(177) Park, Carolie

(178) Petry, Marsha

(179) Plazinski, Lori

(180) Price, Joel W.

(181) Purdon, Jeffrey R.

(182) R-Doe1

(183) R-Doe2

(184) Rapp, Robert C.

(185) Ready Jr., Robert F.

(186) Reeder, Gregory L.

(187) R-Doe3

(188) Ridder, Martin

(189) Riddering, Thomas K.

(190) Robinson, Susan P.

(191) Rodosovich, Ted

(192) Romanowski, Scott

(193) Rose, David

(194) Rosenthal, Neal

(195) Rothstein, Polly

(196) Saia, Chris

Material Under Seal Deleted

(197) Saltzman, Jonah

(198) Sanden, Mary

(199) S-Doe1

(200) Schaich, David

(201) Schlueter, Roger S.

(202) S-Doe2

(203) Sellnow, Paul

(204) S-Doe3

(205) Sierichs Jr., William C.

(206) Silverman, Sarah A.

(207) Silverman, Carl H.

(208) Sitzes, Charlie C.

(209) Skomer, Debra A.

(210) Smith, Nancy S.

(211) Smith, Mike

(212) Solomon, Steven L.

(213) S-Doe4

(214) Stauffer, M. Laura

(215) Stauffer, Ronald P.

(216) Steiner, John

Material Under Seal Deleted

(217) S-Doe5

(218) Stone, Martin M.

(219) Storey, Paul

(220) Straus, Marvin

(221) Stubbs, Eric M.

(222) Swales, Gregory F.

(223) Tanner, Victor

(224) T-Doe1

(225) T-Doe2

(226) T-Doe3

(227) Theris, Niko

(228) Thorlin III, John F.

(229) Tierney, Sean M.

(230) Tjaden, Paul J.

(231) Tracey, Teri L.

(232) T-Doe4

(233) Trezos, Thanos

(234) Tucker, George K.

(235) VanTussenbrook, Scott V.

(236) Viceroy, Andrew D.

Material Under Seal Deleted

(237) Vix, Damon P.

(238) V-Doe1

(239) V-Doe2

(240) W-Doe1Parent1

(241) Wayne, Frank R.

(242) W-Doe 2

(243) Westphal, Karla

(244) Weyers, Joseph D.

(245) W-Doe1Parent2

(246) Wittmann, Dustin

(247) York II, Earl D.

(248) Young, Andrew M.

(249) Zehrer, Terrence

(250) Zerba, George W.

(251) Zerba, Mary P.

(252) Ziolkowski, Steven

(253) Zumach, Henry H.

(B) Plaintiffs (Organizations)

(1) The American Humanist Association

(2) Freedom From Religion Foundation

(3) Military Association of Atheists & Freethinkers

(4) Minnesota Atheists

(5) Atheists for Human Rights

(6) Atheist Alliance International

(7) Atheists United

(8) New Orleans Secular Humanist Association

(9) University Of Washington Secular Student Union

(10) Seattle Atheists

(11) Atheists of Florida

(12) Central Minnesota Friends Free of Theism

(13) Humanist Society of Santa Barbara

(14) Freethinkers of Colorado Springs, Inc.

(15) Atheists of Broward County, FL, Inc.

(16) Humanists of Washington

(17) Pennsylvania Nonbelievers

(18) Freethought Society of Greater Philadelphia

(19) Boston Atheists

(C) Defendants

(1) Hon. John Roberts, Jr., Chief Justice of the United States

(2) Other Unnamed Oath Administrator(s)[2]

(3) Presidential Inaugural Committee ("PIC")

(4) Other PIC Defendants[2]

(5) Joint Congressional Committee on Inaugural Ceremonies ("JCCIC")

(6) Senator Dianne Feinstein, Chairperson, JCCIC

(7) Armed Forces Inaugural Committee ("AFIC")

(8) Major General Richard J. Rowe Jr., Chairperson, AFIC

(9) United States Secret Service ("USSS")[2]

(10) Mark Sullivan, Director, USSS[2]

(11) United States Marshals Service ("USMS")[2]

(12) John F. Clark, Director, USMS[2]

(13) Other Governmental "Roe" Defendants[2]

(14) Rev. Rick Warren

(15) Rev. Joe Lowery

(16) Other Unnamed Clergy[2]

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[2] Named in the First Amended Complaint, Appendix, at 113-14 (Document 66-3:4-5), these defendants were never served (since the case was dismissed by the District Court without a ruling on Plaintiffs' Motion for Leave to Submit First Amended Complaint).

(D) Intervenors

There were no intervenors in the District Court. There are no intervenors in this Court.

(E) Amici

The following amici were granted leave to file briefs in the District Court:

(1) The State of Texas et al. (01/12/09 (#24));

(2) Peter R. Henriques et al. (01/14/09 (#35));

(3) American Center for Law and Justice (01/14/09 (#35)); and

(4) Margaret Downey (01/14/09 (#35)).

In this Court, leave to file an amicus brief was granted to the American Center for Law and Justice on 06/24/2009. A notice "of intention to participate as amicus curiae in support of appellees" was filed by the State of Texas on 06/09/2009.

II. Rulings Under Review

The only ruling at issue in this case is the Order of dismissal, filed on March 12, 2009 by Hon. Reggie B. Walton. Document 74. It is provided in the Appendix to the Briefs at Appendix, at 144-46. There is no official citation.

III. Related Cases

Plaintiffs' counsel is unaware of any related cases pending in this court or in any other court. There are, however, two past related cases:

(A) Similar Challenge at the 2001 Inauguration

(1) *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 18, 2001) (Magistrate Judge's recommendation to grant in part and deny in part Defendant's motion to dismiss).

(2) *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. December 28, 2001) (Magistrate Judge's recommendation to grant Defendant's motion for summary judgment).

(3) *Newdow v. Bush*, 2002 U.S. Dist. LEXIS 27758 (E.D. Cal. March 26, 2002) (Magistrate Judge's recommendation to dismiss the case with prejudice).

(4) *Newdow v. Bush*, 2002 U.S. Dist. LEXIS 27759 (E.D. Cal. May 23, 2002) (Order adopting Magistrate Judge's March 26, 2002 Findings and Recommendations and dismissing the case with prejudice).

(5) *Newdow v. Bush*, 89 Fed. Appx. 624, 2004 U.S. App. LEXIS 3452 (9th Cir. February 17, 2004) (affirming District Court's Order of May 23, 2002).

(B) Similar Challenge at the 2005 Inauguration

(1) *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. January 14, 2005) (denying Plaintiff's motion for preliminary injunction).

(2) *Newdow v. Bush*, 2005 U.S. App. LEXIS 1311 (D.C. Cir. January 16, 2005) (denying emergency motion for injunction pending appeal).

(3) *Newdow v. Bush*, 2005 U.S. App. LEXIS 6546 (D.C. Cir. April 14, 2005) (dismissing appeal of denial of preliminary injunction as moot).

(4) *Newdow v. Bush*, 391 F. Supp. 2d 95 (D.D.C. September 14, 2005) (granting Defendants' motions to dismiss).

(CORPORATE) DISCLOSURE STATEMENT

None of the Plaintiff corporate, association or similar parties has any parent corporation or any publicly held corporation that owns 10% or more of its stock. No member of any Plaintiff corporate, association or similar party has issued shares or debt securities to the public.

The general nature and purpose, insofar as relevant to the litigation, of each Plaintiff corporate, association or similar party is as follows:

(1) The American Humanist Association

Plaintiff American Humanist Association ("AHA") is a 501(c)(3) educational association dedicated to ensuring a voice for those with a positive, nontheistic outlook. Headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the American Humanist Association is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy. AHA has more than 10,000 members in every state as well as the District of Columbia. AHA was founded in 1941, and members are thought to have watched every inauguration since those ceremonies were first televised. Additionally, it is believed that AHA members have personally attended presidential inaugurations since at least the 1960s. AHA anticipates that members will watch each and every future inauguration until the organization disbands. There are no plans to disband at this time.

(2) Freedom From Religion Foundation

Plaintiff Freedom From Religion Foundation ("FFRF") is a national association of Freethinkers (Atheists and Agnostics), established as a 501(c)(3) educational association to promote nontheism. It works to protect its members by keeping church and state separate. Based in Madison, Wisconsin, the Foundation has members in every state as well as the District of Columbia. Current total membership is more than 14,000. FFRF started in 1976, and went national in 1978. The Foundation, on behalf of its membership, has protested the inclusion of "so help me God" in the Presidential Inauguration ever since its inception, consistently writing presidents-elect, pointing out that the oath as dictated in the Constitution is secular and god-free. The Foundation wrote President-Elect Barack Obama on December 22, 2008 to request that he recite the oath as prescribed in the Constitution. Members take careful note of the Inaugural swearing-in, due to concern over the mingling of religion with this most civil of all ceremonies. Its membership has consistently expressed dismay during the 30 years of its national existence over the inclusion of "God" in the Inaugural Oath and the use of formal prayer by invited ministers. With many careful political observers among its

membership, the Foundation has every reason to assume its members will continue to have a strong interest in attending or watching the Presidential Inauguration well into the future. FFRF has no plans to disband.

(3) Military Association of Atheists & Freethinkers

The Military Association of Atheists and Freethinkers ("MAAF") is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to its community services, MAAF takes action to educate and train both the military and civilian community about its issues and respond to insensitive practices that illegally promote religion over non-religion within the military. MAAF has special concern for the legality of actions by senior military officials including the Commander-In-Chief. MAAF has been in existence since 2000, and members are believed to have watched each of the presidential inaugurations since that time. Because members are primarily active duty and veteran US service members,

they have a special interest in the government and the Commander-In-Chief. It is expected that members will be watching every future inauguration until the organization disbands. There are no plans to disband at this time.

(4) Minnesota Atheists

Plaintiff Minnesota Atheists ("MNA") is the oldest, largest, and most active Atheist organization in the state of Minnesota. It was founded in 1991 and is a 501(c)(3) nonprofit educational organization. Its purposes are: to provide a community for Atheists; to educate the public about Atheism; and to promote separation of state and church. With currently 400 members, it is highly likely that every inaugural since 1991 was watched by at least some of its members, including their children. Its membership is steadily growing, and it has no plans to disband. Therefore, it is likely that every inauguration from now on will be watched by at least some of its members, including their children.

(5) Atheists for Human Rights

Plaintiff Atheists for Human Rights ("AFHR") advocates for religion-free government uninfluenced by sectarian religious beliefs, that supports an inclusive society that does not give preferential treatment to any religious group. It has membership throughout the United States, many of whom watched the inaugural events on the big screen TV at its headquarters in Minneapolis, Minnesota.

(6) Atheist Alliance International

Plaintiff Atheist Alliance International ("AAI") is an umbrella group of over 60 Atheist and humanist organizations across the United States, founded in 1992 and dedicated to promoting the worldview of positive Atheism and pursuing the restoration of the First Amendment. The ethical and constitutional conduct of the US government, especially in regards to church-state separation, has always been of keen interest to its membership. Members have observed or attended at least the last 4 inaugurations, and have regularly discussed the event sponsors' and participants' blatant disregard of the US Constitution in regards to church-state separation. No members are known to have attended this year's inauguration in

person, but many, along with their children, viewed the ceremonies on television. A similar number refused to watch and forbad their children from watching because of their revulsion of the unconstitutional religious proselytizing that they expected to happen at the ceremony. Because of the interest over this issue, AAI expects that members and their children and grandchildren will observe or attend every future inauguration for the life of the organization. The organization has no plans to disband at this time.

(7) Atheists United

Plaintiff Atheists United ("AU") is the preeminent Atheist organization in southern California, dedicated to providing a community for Atheists and fighting the societal stigmas and stereotypes about Atheism through education and advocacy. AU was founded in 1982, partly as a response to the religious proselytizing conducted at the 1981 presidential inauguration of Ronald Reagan. Members of the organization have always been keenly interested in the inauguration, but regularly disappointed and upset at the ongoing church-state violations observed in the past six inauguration ceremonies since its founding. Many members attended this year's

ceremony in person. Many, along with their children, viewed the ceremonies on television. A similar number refused to watch and forbad their children from watching because of their revulsion of the unconstitutional religious proselytization that they expected to happen at the ceremony. Because of the interest over this issue, AU expects its members and their children and grandchildren to observe or attend every future inauguration for the life of the organization. The organization has no plans to disband at this time.

(8) New Orleans Secular Humanist Association

Plaintiff New Orleans Secular Humanist Association ("NOSHA") is the only secular organization covering Southern Louisiana and the Mississippi Gulf coast, providing monthly meetings, quarterly newsletters, informative website and public access television programs. Without supernaturalism, its members celebrate reason and humanity. NOSHA was organized in 1999. It is believed that most of its members viewed on television the inaugurations in 2001, 2005 and 2009. The members anticipate viewing all of the future inaugurations. The organization is growing and has no plans to terminate activities.

(9) University Of Washington Secular Student Union

Plaintiff University of Washington Secular Student Union ("UWSSU") was formed in the summer of 2006 to provide students at the University of Washington in Seattle, Washington, who are Atheist, Agnostic, and otherwise nonreligious, with a place to discuss their lack of faith, and to provide all students with a forum to discuss and debate general issues of religion and philosophy. The Secular Student Union is a student-created and student-run organization. Members communicate with other similar groups via the Internet, Facebook and other electronic media to share ideas and programs around their philosophical perspective. Members of the group include self-described Atheists, Agnostics, Freethinkers, and other nontheists.

(10) Seattle Atheists

Plaintiff Seattle Atheists ("SA") is a nonprofit educational corporation organized to develop and support the Atheist, Rationalist, secular Humanist, Agnostic, Skeptic and non-theist communities; to provide opportunities for socializing and friendship among these groups; to promote and defend their views; to protect the first amendment principle of state-church separation; to oppose any

discrimination based upon religious conviction, particularly when it is directed at the non-religious; to expose the dangers of supernaturalism and superstition; to promote science; and to work with other organizations in pursuit of common goals. SA has been in existence since 2004, and members are believed to have watched the 2005 inauguration of President Bush. Members watched the Barack Obama inauguration on January 20, 2009, and plan to watch future presidential inaugurations.

(11) Atheists of Florida

Plaintiff Atheists of Florida ("AOF") is a 501(c)(3) nonprofit, educational corporation founded to heighten public awareness about Atheism and to monitor state/church separation issues. AOF has been in existence since 1992, and members are believed to have watched all five presidential inaugurations since that time. It is expected that members will be watching every future inauguration until the organization dissolves. There are no plans to dissolve at this time.

(12) Central Minnesota Friends Free of Theism

Plaintiff Central Minnesota Friends Free of Theism ("CMFFOT") is a non-profit organization that began in 1997 to promote the separation of church and state and provide a community for Atheists, Humanists, and agnostics in Central Minnesota. Many members are involved in secular organizations seeking to better society.

(13) Humanist Society of Santa Barbara

Plaintiff Humanist Society of Santa Barbara ("HSSB") is a 501(c)(3) non-profit corporation incorporated in California. Its purpose is to foster a community of Secular Humanists in the greater Santa Barbara County area dedicated to improving the human condition through rational inquiry and creative thinking unfettered by superstition, religion or any form of dogma. It has been in existence for 12 years and has approximately 150 members.

(14) Freethinkers of Colorado Springs, Inc.

Plaintiff Freethinkers of Colorado Springs, Inc. ("FTCS") is a Colorado not-for-profit corporation and educational organization of freethinkers, advocating the use of critical thinking, logic and reason

to evaluate the credibility of claims, especially with respect to religion, the supernatural and tradition. It holds monthly meetings, promotes the rational basis of morality, defends the separation of church and state, and contends that freedom of religion includes freedom from religion.

(15) Atheists of Broward County, FL, Inc.

Plaintiff Atheists of Broward County, Fl., Inc. ("ABC"), and also known as Florida Atheists and Secular Humanists ("FLASH"), is a non-profit educational organization founded in 2007, supporting science education, separation of state and church (especially in public places of learning), and creating a community for nonbelievers in South Florida.

(16) Humanists of Washington

Plaintiff Humanists of Washington ("HOW") is a 501(c)(3) educational corporation comprised of secular humanists and freethinkers from across the state of Washington. Founded in 1979, it is the oldest, largest and most active humanist organization in the state. HOW espouses a life-affirming, secular view of the universe,

built on a foundation of reason, science, and democracy, and supports intellectual freedom, free inquiry, critical thinking and human compassion.

(17) Pennsylvania Nonbelievers

Plaintiff Pennsylvania Nonbelievers, Inc. ("PAN") is a Pennsylvania non-profit educational corporation for atheists, agnostics, secular humanists and other nonbelievers, primarily in central Pennsylvania. Founded in 1998, it holds monthly meetings in two locations and advocates the positive values of reason, rational thinking, and understanding the natural origin of our world and our personal freedoms and responsibilities. Its members have watched past inaugurations on television, including 2009, and plan to watch future inaugurations, including 2013. They have felt excluded from the American political process by the addition of the religious phrase, "so help me God," to the Constitutional oath of office and the inclusion of divisive religious prayers in the ceremonies.

(18) Freethought Society of Greater Philadelphia

Plaintiff Freethought Society of Greater Philadelphia ("FSGP") was founded in 1993 and today serves over 100 members most of whom are in the Greater Philadelphia, Pennsylvania area. FSGP holds monthly meetings and advocates reason, rationalism, freethought and humanism. FSGP provides forums in which freethinkers can gather for informational and educational meetings, and for social events and networking with like-minded individuals. Its Helping Hands committee participates in a variety of service and volunteer activities throughout the year.

(19) Boston Atheists

Plaintiff Boston Atheists ("BA") is an unincorporated association founded in October 2002 for the purpose of building a sense of community and shared interests among secularists, nontheist humanists, skeptics, freethinkers, and self-identified atheists in metropolitan Boston, Massachusetts. Each month, the BA sponsors social gatherings, discussion and reading groups, and participation at public events. Among the more than 450 members of the BA, opinion varies as to how best mediate communication and cooperation

between religious- and reality-based communities. Nonetheless, within the group there is wide agreement that a prevalence of unjustified belief is detrimental to civic and societal health, and that the foregrounding of religious ritual in government, such as the inclusion of prayers in the Presidential inauguration, is both unconstitutional and unconscionably divisive.

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STATEMENT OF JURISDICTION

I. District Court's Jurisdiction

This civil action claims violations of the First and Fifth Amendments to the United States Constitution. The District Court, therefore, had subject matter jurisdiction under 28 U.S.C. § 1331. With requests for both declaratory and injunctive relief, the District Court also had jurisdiction under 28 U.S.C. § 2201(a), 28 U.S.C. § 2202 and 28 U.S.C. § 1361.

II. Court of Appeals' Jurisdiction and Timeliness of the Appeal

This appeal stems from a final order that disposed of all parties' claims, rendered by the District Court for the District of Columbia. Specifically, on March 12, 2009, the District Court entered an Order dismissing the case "based on the plaintiffs' lack of standing to pursue any of the relief they are requesting." Appendix, at 146 (Document 74:3). This Court of Appeals has jurisdiction under 28 U.S.C. § 1291. The Notice of Appeal of the Plaintiffs-Appellants was timely filed on April 9, 2009. Appendix, at 147-48 (Document 75).

ISSUES PRESENTED FOR REVIEW

I. STANDING

Did the District Court err in ruling that plaintiffs who are personally offended and degraded when they are unwillingly subjected to the federal government's intrusions of (Christian) Monotheism into the quadrennial presidential inaugural exercises lack standing to challenge the constitutionality of those religious endorsements?

II. ISSUE PRECLUSION

Did the District Court err in ruling that Plaintiff Newdow (who challenged the federal government's intrusion of clergy-led (Christian) Monotheistic prayer into the 2001 and 2005 presidential inaugural ceremonies) "is precluded from challenging the issue of whether he has standing to contest the utterance of prayer" at subsequent inaugurations?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution, Article II, clause 8:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof …

28 U.S.C. § 1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where a direct review may be had in the Supreme Court. ...

28 U.S.C. § 1331. Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1361. Action to compel an officer of the United States to perform his duty

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or

> employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 2201. Creation of remedy

> (a) In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202. Further relief

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Fed. R. Civ. P. Rule 15(a)(1)(A):

> A party may amend its pleading once as a matter of course ... before being served with a responsive pleading.

Fed. R. Civ. P. Rule 15(a)(2):

> In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

STATEMENT OF THE CASE

The Supreme Court has repeatedly stated that standing accrues to any party who has personally suffered a palpable injury, caused by the defendant, and likely to be redressed by the relief sought. Following this clear edict, the High Court (in addition to the United States Court of Appeals for the District of Columbia Circuit as well as each of the eleven numbered federal Courts of Appeals) has ruled that the standing requirements are met when a plaintiff is personally exposed to unwelcome religious claims or espousals, initiated or furthered by a government agent, and subject to a court order deeming the activity to be in violation of the Constitution's religion clauses.

In this case, Plaintiffs have alleged that they wish to participate as observers at "the transcendent ritual of America's democracy and representative government,"[3] i.e., the quadrennial presidential inaugural ceremonies. Yet, in order to participate, they must endure an unwelcome religious alteration of the Chief Executive's oath of office as it is administered by the Chief Justice of the United States. Furthermore, in addition to this unconstitutional act at the very focus of the entire ceremony, they must countenance unwelcome clergy-led religious prayers, both before and after the official oath-taking.

[3] Description provided by the Chief Historian of the United States Capitol Historical Society (remarks of Donald R. Kennon, Ph.D., January 14, 2009, at the Foreign Press Center, accessed at http://fpc.state.gov/114510.htm on August 24, 2009).

Despite the overwhelming case law to the contrary, the District Court has ruled that the Plaintiffs here lack standing to make this legal challenge. Plaintiffs now appeal that ruling.

PRELIMINARY NOTE REGARDING THE OPERATIVE COMPLAINT

On March 10, 2009, Plaintiffs filed a Motion for leave to file a First Amended Complaint (hereafter, "FAC"). Appendix, at 113 (Document 66). Because no responsive pleading was ever filed, Plaintiffs had an absolute right for the FAC, Document 66-3, to be accepted. Fed. R. Civ. P. Rule 15(a)(1)(A) ("A party may amend its pleading once as a matter of course ... before being served with a responsive pleading.").

Moreover, even when this right is not absolute, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. Rule 15(a)(2). This is a "mandate ... to be heeded." *Foman v. Davis,* 371 U.S. 178, 181 (1962), and "refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.*

In accordance with the foregoing, this Circuit has construed Rule 15(a) such that, "'the District Court shall freely giv[e] leave to amend the pleadings under

Rule 15(a) when justice requires.'" *Jones v. D.C. Dep't of Corr*., 429 F.3d 276, 279 (D.C. Cir. 2005) (citing *Harris v. Secretary, United States Dep't of Veterans Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997)). So, too, have the other Courts of Appeals. *See, e.g*., *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 441 F.3d 1287, 1296 n.3 (11th Cir. 2006) ("When the plaintiff has the right to file an amended complaint as a matter of course, ... the plain language of Rule 15(a) shows that the court lacks the discretion to reject the amended complaint ... ."); *Schiffels v. Kemper Fin. Servs., Inc*. 978 F.2d 344, 354 (7th Cir. 1992) ("The defendants had not filed an answer when the district court dismissed [Plaintiff's] claim. … Since [Plaintiff] did not have an opportunity to amend her complaint in the district court, we will remand this case to the district court to give her that opportunity."); *Caine v. Hardy*, 905 F.2d 858, 863 (5th Cir. 1990) (when defendants "never filed a responsive pleading," plaintiff "should have been permitted 'as a matter of course' to amend his complaint").

With the District Court having acknowledged the Motion to Amend, having taken no position on it, and having stated that its allegations would not alter the Court's ruling, Appendix, at 145 (Document 74:2 n.1), Plaintiffs respectfully request that this Court recognize the FAC's claims regarding the 2013 and 2017 future inaugurals, thus eliminating any mootness argument. *See, e.g.*, Appendix, at 119 (Document 66-3:33, ¶ 89). Additionally, the Court is requested to

acknowledge that the FAC includes a number of additional child plaintiffs (and/or their parents, litigating in their behalves), as well as additional defendants who are believed to control access to the inaugural platform. Because the FAC was not formally accepted by the District Court, Plaintiffs will generally reference the Original Complaint in this Opening Brief. However, because the FAC is more inclusive, it has been referenced as the source for the listing of parties required pursuant to Circuit Rule 28(a)(1)(A). Pages i-xv, *supra*. Other FAC references will be made where believed to be appropriate for the Court's review.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

I. A Brief History of Religion at Presidential Inaugurations

Of the fifty-six public inaugural ceremonies since President John Adams took office in 1797, fifty-five have had the Chief Justice of the United States administering the presidential oath of office.[4] Until possibly as late as 1929, those oath administrators remained true to the Constitution, reciting the words as they are written – **within quotation marks** – in the document's Article II. Appendix, at 16-17 (Document 1, ¶¶ 102-105). Since 1933, however, the purely religious phrase, "so help me God," has been spatchcocked into the ceremony by the Chief Justice. Appendix, at 17 (Document 1, ¶ 106).

Also unheard at presidential inaugural ceremonies (this time until 1937) were clergy-led prayers. Appendix, at 19 (Document 1, ¶ 131); Appendix, at 45-48 (Document 13-10:13, 18-20 (cited by federal Defendants)). Starting that year, at the second inauguration of President Franklin D. Roosevelt, (Christian) clergy espousing (Christian) Monotheistic religious doctrine became part and parcel of

[4] There was no Chief Justice when President Washington was first inaugurated in 1789, and (with no precedent to follow) Associate Justice William Cushing was chosen to do the honors in 1793. From then on, however (with the sole exception of Millard Fillmore, whose unplanned 1850 ceremony took place in the House of Representatives the day after President Taylor died), Chief Justices of the United States have administered the oath at every public inauguration. See http://www.aoc.gov/aoc/inaugural/pres_list.cfm?RenderForPrint=1, as referenced in the Original Complaint, at note 41. Appendix, at 17.

the inaugural ceremonies. Appendix, at 20-23 (Document 1-3). (Christian) Monotheistic clergy-led prayer have been fixtures at every public inauguration ever since. *Id*.

II. Plaintiff Newdow and the Inaugural Ceremonies of 2001 and 2005

As will be discussed in greater detail (at page 44 et seq, *infra*), Plaintiff Newdow challenged the infusion of (Christian) Monotheism at the 2001 and 2005 inaugurations of President George W. Bush.

III. The Current Lawsuit (Involving the Inaugurations of 2009 and Beyond)

On November 4, 2008, Barack Obama was elected President of the United States. Like other minorities, Atheists were optimistic that Mr. Obama, as both a constitutional scholar and a black man, would be sensitive to the myriad ways due process and equal protection guarantees can be abridged. Accordingly there was hope that an end would come to the (Christian) Monotheistic practices noted above. Appendix, at 72 (CT at 6:2-4).

That hope was dashed on December 17, 2008, when Defendant JCCIC announced that two Christian clergy would be offering prayers as part of the official inaugural ceremony. Appendix, at 24-25 (Document 4-3). Accordingly, on December 30, 2008, thirty named individuals and eleven organizations – all of

whom had previously been greatly looking forward to attending a religiously neutral civic ceremony – filed suit. Appendix, at 1-3.[5] Requesting injunctive and declaratory relief, Plaintiffs challenged the coming inaugural prayers. Appendix, at 18. (Document 1, Count 2). Additionally, they challenged the presumed repetition (by the Chief Justice) of the unauthorized religious ("so help me God") addition to the oath of office. Appendix, at 16 (Document 1, Count 1).

Plaintiffs moved for a preliminary injunction on January 5, 2009. Document 4. A hearing was held on January 15, Appendix, at 66-102 (Document 49). The next day, the Court issued an Order finding "that the plaintiffs have not met their burden to show that a preliminary injunction is warranted." Appendix, at 61 (Document 42:1). The Court also issued an Order to Show Cause as to "why this Court should not dismiss this case based on the plaintiffs' lack of standing and issue preclusion as to plaintiff Newdow." Appendix, at 62 (Document 42:2).

A second Order to Show Cause was issued on February 10, 2009. With the 2009 inauguration having passed, the Court sought to know why the case should not be dismissed on the basis of mootness. Appendix, at 103 (Document 50).

Subsequently, Plaintiffs sought leave to file a First Amended Complaint ("FAC"), which added challenges to the inevitable (absent judicial intervention) inclusion of (Christian) Monotheism at the coming 2013 and 2017 inaugurations.

[5] The Complaint also was filed on behalf of "Unnamed Children." Appendix, at 10 (Document 1, ¶ 36).

Appendix, at 119 (Document 66-3:33, ¶ 89). This obviously invalidated the mootness contention.[6] The FAC also listed further plaintiffs, so that more than 250 individuals (involving over forty children) and nineteen organizations are now seeking redress. Appendix, at 113-16 (Document 68-3:1-4). Additional defendants were named, as well.[7] Appendix, at 116-17 (Document 68-3:4-5).

On March 12, 2009, the District Court issued an Order stating (1) that "plaintiff Newdow is precluded from challenging the issue of whether he has standing to contest the utterance of prayer at the Presidential Inaugural ceremony based on prior judicial determinations that he lacks standing;" and (2) that "this case is **DISMISSED** based on the plaintiffs' lack of standing to pursue any of the relief they are requesting." Appendix, at 146 (Document 74:3). Specifically, the Court found that Plaintiffs "have identified no concrete and particularized injury. And, even if the plaintiffs could establish such an injury, they have failed to demonstrate how the harm they allege is redressable by the relief they seek, or that the Court has any legal authority to award the relief requested." *Id*.

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[6] Plaintiffs believe the FAC allegations regarding future inaugurals turn mootness into a non-issue. Should Defendants dispute this, Plaintiffs will address the matter – including the "capable of repetition but evading review" doctrine – in their Reply Brief. *See* Document 67.

[7] As noted on page xv (n. 2), *supra*, Other Unnamed Oath Administrator(s), Other PIC Defendants, United States Secret Service ("USSS"), Mark Sullivan, Director, USSS, United States Marshals Service ("USMS"), John F. Clark, Director, USMS, Other Governmental "Roe" Defendants, and Other Unnamed Clergy have yet to be served, since there was never any ruling on the Motion for Leave to File the FAC.

SUMMARY OF THE ARGUMENT

The Supreme Court, the U.S. Court of Appeals for the District of Columbia, and every one of this Court's numbered sister circuits have specifically deemed that standing exists whenever unwelcomed exposure to religious prayer or displays is foisted upon individuals by government. Plaintiffs in this case – especially the children – have suffered unwelcomed exposure to prayer that is legally indistinguishable from that which gave rise to standing in *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington Township School District v. Schempp*, 374 U.S. 203 (1963), *Wallace v. Jaffree*, 472 U.S. 38 (1985), *Marsh v. Chambers*, 463 U.S. 783 (1983), *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), along with the myriad similar prayer cases in the Courts of Appeals. Case Listing #1.[8] Surprisingly, despite this extensive pedigree, the District Court found that Plaintiffs "have identified no concrete and particularized injury." Appendix, at 146 (Document 74:3).

The District Court also found that Plaintiffs "have failed to demonstrate how the harm they allege is redressable by the relief they seek, or that the Court has any legal authority to award the relief requested." *Id.* Plaintiffs disagree. Not only do Federal Courts have injunctive powers to end constitutional infractions, they have (and have had for more than two centuries) the power to "say what the law is."

[8] Three case listings follow the end of this Opening Brief.

Marbury v. Madison, 5 U.S. 137, 177 (1803). Legislative and executive branch officials are expected to abide by such judicial determinations.

As far as Plaintiff Newdow and the matter of issue preclusion, there is no need to address this topic. Once one plaintiff has been shown to have standing, courts have no occasion to invest precious judicial resources reviewing the standing of others. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981); *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998). Nonetheless, should the Court examine the circumstances surrounding Plaintiff Newdow's prior litigation, it will be seen that issue preclusion should not apply.

STANDARD OF REVIEW

> We review *de novo* a dismissal for lack of standing, *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1273 (D.C. Cir. 2007), on the assumption the allegations of the complaint relevant to standing are true, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991). A membership organization has standing to sue if, inter alia, "at least one of its members would have standing to sue in his own right." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977)).

Young America's Foundation v. Gates, ___ F.3d ___, No. 08-5366, (D.C. Cir. July 24, 2009) (slip op., at 4).

ARGUMENT

I. Plaintiffs Have Standing

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). (Ellipses and brackets in original. Citations omitted.)

(A) Plaintiffs Have Suffered an "Injury-in-Fact"

(1) Plaintiffs' Injury-in-Fact is "Concrete and Particularized"

"The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In this case,

Plaintiffs unequivocally have that "personal stake," inasmuch as they are seeking to uphold their personal rights to view the inauguration of their President without having to countenance governmental endorsements of (Christian) Monotheism.

It is important to note that the standing question is distinct from merits considerations, and that "[i]n considering standing, we must assume the merits in favor of the party invoking our jurisdiction." *Emergency Coalition to Defend Educational Travel v. United States Department of the Treasury,* 545 F.3d 4, 10 (D.C. Cir. 2008). Thus, in making the standing determination, the Court must assume that Defendants' actions do, in fact, violate the Establishment, Free Exercise, and Equal Protection Clauses.

It is also important to note that religious liberty includes the right of individuals to determine for themselves how harmful is a governmental espousal of religious dogma. Thus, it "is not within the judicial ken," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), for the Court to contend that Defendant Roberts' unauthorized "so help me God" addendum is not injurious. Similarly, any contention that clergy-led prayers are "ceremonial" or otherwise lack religious significance "is not to turn upon a judicial perception." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). After all, "[i]n the realm of religious faith … the tenets of one man may seem the rankest error to his neighbor," *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), and "what is one man's comfort and inspiration is another's

jest and scorn." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). Moreover, even if Plaintiffs, themselves, were to consider the injury to be trivial, "'an identifiable trifle is enough for standing to fight out a question of principle.'" *United States v. SCRAP*, 412 U.S. 669, 690 n.14 (1973) (citation omitted).

Especially with children involved, this case is not significantly different from the school prayer cases, in which parents and children obviously have standing to challenge government-sponsored prayers. *Engel v. Vitale*, *Abington Township School District v. Schempp*, *Wallace v. Jaffree*, *Lee v. Weisman*, and *Santa Fe Independent School District v. Doe*. As the Supreme Court specifically stated in *Abington*:

> [T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.

374 U.S. at 225 n.9 (citations omitted).

Perhaps the District Court was confused by *Valley Forge College v. Americans United*, 454 U.S. 464 (1982), where an organization "firmly committed to the constitutional principle of separation of church and State," *id.*, at 486, sought to invalidate the transfer of government property to a Christian college. Noting that the property was "located in Chester County, Pa. The named plaintiffs reside in

Maryland and Virginia; their organizational headquarters are located in Washington, D. C. They learned of the transfer through a news release," *id*., at 487, the Supreme Court held that the plaintiffs lacked standing. This was because no plaintiff "suffered, or [wa]s threatened with, an injury other than their belief that the transfer violated the Constitution." *Id*. n.23. Article III, said the justices, does not give litigants "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.*

In other words, *Valley Forge* stands for the "particularized" notion reiterated ten years later in *Lujan*: "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." 504 U.S. at 561 n.1. In this case, that criterion has definitely been met: each Plaintiff has been personally and individually injured because each may personally and individually enjoy the "transcendent ritual of America's democracy" only at the cost of having to personally and individually endure the governmental espousal of what they, personally and individually, find to be offensive, purely religious dogma that degrades them, personally, from the equal rank of citizens.[9]

[9] "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." Madison J. *Memorial and Remonstrance Against Religious Assessments*, as provided in the Appendix to *Everson v. Board of Education*, 330 U.S. 1, 69 (1947).

A careful reading of *Valley Forge* in its entirety shows this idea to be expressed with the utmost clarity. Nonetheless, confusion has arisen, largely from the following passage:

> 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.

Id., at 485 (emphasis in original). Justice Rehnquist's choice of the word, "observation," was unfortunate, inasmuch as – out of context – it appears to imply that standing does not accrue when harm results from personal "observation" of specific governmental acts. Yet that was not at all the lesson of *Valley Forge*. "Although the Supreme Court explicitly stated that injuries that merely amount to 'the psychological consequence presumably produced by observation of conduct with which one disagrees' are insufficient to confer standing under Article III, we believe that this statement cannot be read without taking the particular circumstances of that case into account." *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 489 n.3 (6th Cir. 2004).

First of all, the plaintiffs in that case did **not** personally observe the property transfer behind the litigation. Rather, they "learned of the transfer through a news release." *Id*., at 487. But the point of *Valley Forge* is that even if those plaintiffs

had personally observed the transfer, more was necessary. As a result of that observation, they also needed to personally sustain an injury that "fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

This understanding is corroborated by numerous cases, including this Circuit's *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 428 (D.C. Cir. 1998) (en banc). There, animal welfare advocates had standing "when they **observed** primates living under [inhumane] conditions" (emphasis added) because the "aesthetic interest in the observation of animals," *id*., at 432, was within the zone of interests protected by the law in question. As long as a plaintiff has also "suffered his injury in a personal and individual way--for instance, by seeing [it] with his own eyes," *id*., at 433, the injury-in-fact requirement is met.

The more recent case of *Chaplaincy of Full Gospel Churches v. United States Navy (In re Navy Chaplaincy)*, 534 F.3d 756, 764 (D.C. Cir. 2008), teaches the same lesson. There, the Court denied standing to Protestant Navy chaplains who challenged a system that they contended favored their Catholic colleagues. In doing so, the Court noted:

> If plaintiffs had alleged that the Navy discriminated against them on account of their religion, plaintiffs would have alleged a concrete and particularized harm sufficient to constitute injury-in-fact for standing purposes. But plaintiffs have conceded that they themselves did not suffer employment discrimination on account of their

> religion. They have conceded that the Navy did not deny them any benefits or opportunities on account of their religion. Rather, they suggest that *other* chaplains suffered such discrimination.

Id., at 760 (citation omitted) (emphasis in original). It also specifically highlighted the difference between that case and "religious display and prayer cases" such as the case at bar:

> [W]e nonetheless find significant differences between plaintiffs' case and the religious display and prayer cases. In the religious display and prayer cases, the Government was actively and directly communicating a religious message through religious words or religious symbols -- in other words, it was engaging in religious speech that was observed,[10] read, or heard by the plaintiffs in those cases.

Id., at 764. Surely, had *Chaplaincy*'s Protestant chaplains been forced to hear explicitly (and exclusively) Catholic prayers at every meeting, during which oaths ending, "so help us, Pope Benedict XVI" were used, they would have suffered injuries that fall within the zone of interests protected by the Establishment Clause. Plaintiffs here suffer those identical injuries.

[10] Again, it can be seen that to read *Valley Forge* as denying standing because – in addition to the harms that give rise to standing – a complainant also sustains "the psychological consequence presumably produced by **observation** of conduct with which one disagrees," 454 U.S. at 485, turns that case on its head. In fact, one does not even need to actually observe the given governmental activity. Just the desire to do so suffices for standing: "Of course, **the desire to ... observe** an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63 (emphasis added)).

"In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases," *Allen v. Wright*, 468 U.S. 737, 751-52 (1984). Accordingly, one can look to the Supreme Court's Establishment Clause cases to find that standing exists when plaintiffs personally observe unwelcome religious displays. *See, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Ten Commandments); *Van Orden v. Perry*, 545 U.S. 677 (2005) (same); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (crèche, menorah and Christmas tree); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (crèche). Being personally subjected to the unwelcome claim that God exists (along with its concomitant message that political insider status requires acknowledging that God) – thrust into the midst of the Constitution's sole oath of office by the nation's Chief Justice – involves the same injury dynamics as transpired in those display cases.

That Plaintiffs also have standing due to unwelcome exposure to inaugural clergy is similarly demonstrated by comparison with other cases. The plaintiffs in *Engel*, *Abington*, *Wallace*, *Marsh*, *Lee* and *Santa Fe* – all of whom not only successfully passed the standing hurdle, but eventually prevailed – suffered the identical injury alleged in this case: being personally confronted with government-sponsored prayer.

Plaintiffs' declarations – especially those accompanying the First Amended Complaint – illustrate the principles just discussed. Looking just at Document 69-3 (i.e., declarations only from those plaintiffs with last names beginning with A, B or C), one sees the multitude of individualized, personalized and concrete injuries experienced by Plaintiffs. For James Berry, "[t]he Christian prayers before and after the ceremony, and the insertion of the words, 'so help me God,' in the presidential oath in this non-religious event **ruined, for me, what otherwise would have been a grand event**." Appendix, at 129 (emphasis added). When Lawrence Beat, an Air Force veteran, personally observed the inauguration, he found "**all the prayers made me feel excluded from the political process and a second-class citizen**." Furthermore, "when Chief Justice Roberts asked the president to say, 'So help me God,' **I felt threatened and sick to my stomach**." Appendix, at 127 (emphases added). Gail Crow "did feel the usual discomfort I always undergo when the expected references to the Bible are made and during prayers which are called fancy names like invocation." Appendix, at 140. Illuminated by the lessons from such cases as *Lujan* (injury-in-fact "requires that the party seeking review be himself among the injured," 504 U.S. at 563) and *Glickman* (an injury sufficient for standing occurs when there is "'aesthetic harm and emotional and physical distress,'" 154 F.3d at 430 (citing to the *Glickman* plaintiff's affidavit)), the injuries here surely meet the injury-in-fact criteria.

Even assuming, *arguendo*, that those injuries are insufficient for standing, the involvement of children renders the District Court's injury-in-fact determination totally unsupportable. In *Glickman*, an individual had standing from observing what he believed was the government's inappropriate treatment of a macaque. The parents here, then, certainly have standing when they observe what they believe is inappropriate governmental treatment of their own children. One father has asserted that he saw his child "being harmed emotionally and mentally due to [the religious intrusions at the inauguration]." Appendix, at 125. Another suffered personalized parental harm as his daughter "reacted to the various prayers and the 'so help me god' line in a very emotional manner. She expressed disgust and disappointment at the inappropriate content." Appendix, at 130.

Moreover, there are direct injuries to the children, themselves, as the coercion concern of the school prayer cases comes into play. *See*, *e.g.*, Appendix, at 134 (child sensing "the most important leaders of our country are discriminating against me as an atheist."); Appendix, at 125 (father wary of the official religious exercises "damaging [his children's] self-esteem and sense of worth."); Appendix, at 135 (mother fearing her children "may feel they are not truly 'Americans' because they are Atheists.").

Despite the foregoing, and the mass of case law that specifically addressed the standing question (including, *e.g.*, *Abington*, *Lee*, and *Glickman*), Plaintiffs

expect that Defendants will argue (as they did in the District Court, *see* Appendix, at 143 (Document 73:7)) that the dictum provided by the *Chaplaincy* majority:

> It is a well-established rule that "cases in which jurisdiction is assumed *sub silentio* are not binding authority for the proposition that jurisdiction exists." *John Doe, Inc. v. DEA*, 376 U.S. App, D.C. 63, 484 F.3d 561, 569 n.5 (D.C. Cir. 2007) (internal quotation marks omitted).

534 F.3d at 764, is of consequence here. Plaintiffs' initial response is to refer to another well-established rule: Dicta are also not binding authority. *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821). More importantly, the particular dictum in *Chaplaincy* is one that Plaintiffs believe is quite disrespectful to a Supreme Court that has written:

> [W]e are required to address the issue [of standing] even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines."

FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-231 (1990) (citations omitted). The suggestion that nine of nine justices – in case after case – have forgotten to consider their "independent obligation[s]" seems both demeaning and unwarranted.

Moreover, the reference to the "*sub silentio*" dictum is a red herring. The *Chaplaincy* majority specifically differentiated the plaintiffs in that case (who lacked standing) from plaintiffs "[i]n religious display and prayer cases, [where]

the Government … was engaging in religious speech that was observed, read, or heard by the plaintiffs in those cases." 534 F.3d at 764. With the *Chaplaincy* dissent arguing that the plaintiffs had standing even without that type of exposure, it is clear that that panel would have been unanimous in holding that the instant plaintiffs suffered an injury-in-fact.

As previously alluded to, that standing accrues in these prayer situations has been found not only by the Supreme Court and by this Circuit, but by every other circuit, as well. Case Listing #1. Included among those cases are three decided by en banc panels, one of which specifically addressed standing. In *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc), the Fifth Circuit stated, "The question is whether there is proof in the record that [the plaintiffs] were exposed to, and may thus claim to have been injured by, invocations given at [the challenged government functions].[11] That proof pervades the record in the case at bar. *See, e.g.*, Appendix, at 6-10 (Document 1, ¶¶ 8-36), detailing how each individual plaintiff would be viewing the inaugural); Appendix, at 47 (Document 13-10:77, provided by Defendants Roberts et al., explaining how President Franklin D. Roosevelt's 1937 inauguration "set a precedent for all future inaugurals. Whereas the chaplain's prayer was originally directed to the Senators,

[11] Because the plaintiffs in *Tangipahoa Parish* (in contrast to the instant Plaintiffs) did not provide proof that they, personally, were exposed to the prayers at issue, they were deemed to lack standing.

it now became directed to all attending the inaugural ceremonies, as well as those listening or viewing via the media."); Appendix, at 60 (Document 25:11, wherein Amicus Texas et al. refers to the activity Plaintiffs were to view as "[p]ublic acknowledgements of God."); Appendix, at 65 (Document 48:4, admitting that "Dr. Warren will invoke divine blessing."); Appendix, at 24-25 (Document 4-3, listing the invocation and benediction that will be part of the inauguration); Appendix, at 73-75 (CT 7:2-9:13, detailing how minor child will be among adults and governmental officials while viewing the religious acts); Appendix, at 125-140 (small sampling of declarations revealing that each plaintiff viewed (or purposely avoided due to its religious content) the 2009 inaugural and would be doing the same for future inaugurals).

Although standing was not specifically examined in either of the other en banc opinions, the Tenth Circuit did note: "Although there are many kinds of Establishment Clause claims, the prayer cases typically arise in a procedural posture that pits an audience member of a particular faith, often a minority religious view, against a government-sanctioned speaker who has recited a prayer, often expressing a majoritarian religious view, during a government-created prayer opportunity." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1231 (10th Cir. 1998) (en banc). That is precisely what occurred for each plaintiff in the instant litigation.

As for Defendant Roberts' unauthorized addition of "so help me God" to the Constitution's text, the religious display cases, rather than the prayer cases, are probably more on point. However, case law there, as well, overwhelmingly demonstrates that Plaintiffs here have standing. *See, e.g.*, Case Listing #2, providing (in addition to the Supreme Court's five religious display cases, all of which were decided without any lack of standing contention) an example from ten of the eleven numbered U.S. Courts of Appeals. Once more, standing exists when (as in the case at bar) there are "allegations of direct and unwelcome exposure to a religious message." *Doe v. County of Montgomery*, 41 F.3d 1156, 1159 (7th Cir. 1994).

(2) Plaintiffs' Injury-in-Fact is "Actual or Imminent, Not 'Conjectural' or 'Hypothetical'"

Although the District Court referenced "the speculative nature about what will occur at the next two Inaugural ceremonies," Appendix, at 145 (Document 74:2 n.1), the fact is that the Chief Justice has added the purely religious phrase, "so help me God," to the constitutionally-prescribed oath in every public inaugural ceremony since 1933, Appendix, at 17 (Document 1, ¶ 106), and that every such ceremony has had (Christian) clergy leading the audience in prayer to God since 1937. Appendix, at 20-23 (Document 1-3). Thus, as was demonstrated this past January 20, the "actual" standing criterion is met, for a history of an event that

occurs 100% of the time over a span of more than 70 years surely makes that event "'likely' as opposed to merely 'speculative.'" *Lujan*, 504 U.S. at 561.

It has also been suggested that the "actual or imminent" criterion is not met because there is no "imminence" in a quadrennial injury: "Certainly the Presidential Inauguration is a national event, but it is only held once every four years." *Newdow v. Bush*, 391 F. Supp. 2d 95, 104 (D.D.C. 2005). The initial response to this argument is that the Supreme Court would not have used "or" if it intended "and." "[T]he plaintiff must have suffered an 'injury in fact' ... which is ... 'actual **or** imminent.'" *Lujan*, 504 U.S. at 560 (emphasis added)). Accordingly, having demonstrated that the injury is "actual" and not "conjectural," imminence is not required.

Moreover, even if "imminence" were required, there is "imminence" as that term pertains to the standing inquiry. As the Eleventh Circuit has noted in *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (citation omitted), "An imminent injury is one that is 'likely to occur immediately,'" where "immediacy requires only that the anticipated injury occur with some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." In other words, "imminence" for standing is synonymous with "not too speculative." ("'[I]mminence' is ... a somewhat elastic concept, [whose] purpose ... is to ensure

that the alleged injury is not too speculative for Article III purposes." *Lujan*, 504 U.S. at 564 n.2. There is nothing speculative at all about the fact that Plaintiffs will suffer the same injuries that have occurred with perfect quadrennial regularity for three quarters of a century.

Lastly, there is *Lee v. Weisman*. In that case, the Supreme Court specifically found standing for an eighth grader and her father who would be confronted four years later, precisely as in the case at bar. There, however, only one future prayer was at issue. For the instant Plaintiffs, prayers will recur every four years for the rest of their lives.

(B) There is a Causal Connection Between the Injuries and the Conduct Complained Of

That there is a causal connection between Plaintiffs' first injury (i.e., being forced to hear the oath administered with purely religious verbiage they find offensive as the price to pay for watching the inauguration of their President) and the conduct of Defendant Roberts cannot be denied. As seen from the Declaration of the "Counselor to the Chief Justice," Jeffrey P. Minear, Defendant Roberts chose to alter the constitutionally-prescribed text and add the "so help me God" phrase. Appendix, at 42 (Document 13-9).

The necessary causality also exists with the Complaint's other injury (i.e., being forced to hear clergy-led prayer as the price to pay for watching the

inauguration). Like Defendant Roberts, the other defendants controlled whether or not the offensive religious verbiage would be espoused. The Supreme Court's prayer cases clearly demonstrate that such individuals – i.e., those who control the venue and its access – are appropriate defendants. *Engel v. Vitale* (school board members appropriate defendants); *Wallace v. Jaffree* (governor, school board and other public officials appropriate defendants); *Marsh v. Chambers* (state treasurer and members of the executive board of the legislative council appropriate defendants); *Lee v. Weisman* (school principals, superintendent and committee members appropriate defendants); *Santa Fe Independent School District v. Doe* (school district appropriate defendant).

Basically, the "causation" component of standing is determined by asking, "Is the line of causation between the illegal conduct and injury too attenuated?" *Allen v. Wright*, 468 U.S. at 752. In the instant case, there is virtually no attenuation. Each instance of "illegal conduct" (i.e., altering the presidential oath of office and enabling clergy-led prayers) causes the injuries being asserted (i.e., Plaintiffs being forced to personally witness the governmental endorsements of offensive religious dogma as the price to pay for watching inaugurations).

(C) Plaintiffs' Injuries Will Be "Redressed By a Favorable Decision"

The District Court found "that the plaintiffs have failed to demonstrate that an injunction against any or all of the defendants could redress the harm alleged

suffered by plaintiffs." Appendix, at 145 (Document 74:2). Plaintiffs are puzzled by this finding, inasmuch as "[t]he redressability inquiry poses a simple question: 'If plaintiffs secured the relief they sought, . . . would [it] redress their injury'?." *Wilderness Soc'y v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (citation omitted). The harms complained of in this case will disappear once the Chief Justice stops altering the oath of office specified in the Constitution's Article II, and once the other Defendants stop using their powers to put into place inaugural invocations and benedictions honoring God. Whether accomplished by injunctive or declarative means, the relief sought by Plaintiffs will come to fruition once they are no longer personally compelled (as the price to pay for exercising their right to observe the inauguration of the President) to suffer through government-sponsored messages claiming that the United States favors religious views that are completely incompatible with, and contradictory to, their own.

From the transcript of the hearing held on January 15, 2009, Appendix, at 66-102, it appears that the District Court contended it could not provide the relief sought because:

i. A District Court is impotent to tell the Chief Justice what to do, Appendix, at 99 (CT 68:7-13);

ii. If the President says "so help me God," there is no additional injury when the words are also said by the Chief Justice, Appendix, at 90 (CT 54:5-9);

iii. PIC is a private actor, Appendix, at 98-99 (CT 67:22-68:3); and

iv. Inability to enjoin the President deprives the Court of authority to enjoin his underlings. Appendix, at 88 (CT 52:12-18).

Plaintiffs believe none of these contentions is persuasive.

(1) District Courts Have the Power to Tell the Chief Justice to Abide by the Constitution

More than two centuries ago, the Supreme Court made it clear that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 162 (1803). Furthermore, it highlighted that, "[i]t is not by the office of the person ..., but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined." *Id*., at 170. In that case (involving the actions of the Secretary of State), the Court went on to say that although the judiciary cannot intervene when "executive discretion is to be exercised," *id*., a judicial remedy is available when an official is "directed by law to do a certain act affecting the absolute rights of individuals." *Id*., at 171.

In other words, in terms of the President and his subordinates (where judicial intervention raises separation-of-powers concerns), there is a difference between executive activity and mere ministerial duties. This distinction was further discussed in *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866):

> A ministerial duty … is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law;

and in *Wilbur v. United States*, 281 U.S. 206, 218-19 (1930):

> Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary.

In the case at bar, the Chief Justice is asked to do nothing but administer the oath of office as specified in the Constitution. It is a purely "ministerial" (and certainly a non-judicial) function. Appendix, at 85 (CT 32:7 ("This is concededly not a judicial act.")).

If the courts have jurisdiction over the President when such ministerial duties are at issue, *Johnson*, 71 U.S., at 499 ("In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held,

might be required by mandamus."), then they surely have jurisdiction when a ministerial function includes no separation-of-powers issue.

As for the Court's concern about "whether a law court judge has the authority to enjoin a higher judge," Appendix, at 99 (CT 68:10-11), judicial hierarchy is not relevant to the instant action against the Chief Justice. As is the case when judicial immunity is at issue, "[i]t is only for acts performed in his 'judicial' capacity," *Stump v. Sparkman*, 435 U.S. 349, 360 (1978), that such protections arise. As has been wryly noted in that context, "A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum, either." *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970).

When Defendant Roberts administered the oath of office, it had nothing whatever to do with his judicial role. It was a purely administrative act, and – just as is the case with judicial immunity – the individual performing it does not acquire any legal protections that would not be available to any others.

In fact, administrative (as opposed to judicial) acts garner no judicial immunity even if they are "essential to the very functioning of the courts," *Forrester v. White*, 484 U.S. 219, 228 (1986). Thus, in *Ex parte Va.*, 100 U.S. 339 (1880), a state judge was actually arrested and jailed because he refused to permit

blacks to serve as jury members. Even though that activity was intimately related to a trial, the Supreme Court denied that jurist's habeas corpus request:

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. ... It is merely a ministerial act.

Id., at 348. Surely the administration of the presidential oath of office has far less to do with any judicial function than selecting a jury. So, too, does it have less to do with judicial function than enforcing a Bar Code, yet "judges acting to enforce the Bar Code [sh]ould be treated like prosecutors, and thus [are] amenable to suit for injunctive and declaratory relief. Once again, it [i]s the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] our immunity analysis." *Forrester*, 484 U.S. at 228-29 (citation and "Cf." omitted). Whether Defendant Roberts is Chief Justice or not is of no importance to the command of Article II, Section 1. Appendix, at 83-84 (CT 32:5 – 33:6). Accordingly, Defendant Roberts should be treated the same as any other oath administrator.

(2) The President's Use of "So Help Me God" Does Not Excuse the Harm Resulting from the Chief Justice's Addition of Those Purely Religious Words

At the January 15 hearing, the Federal Defendants argued:

> [I]f, as Plaintiffs concede, they suffer no injury from hearing someone stand there and sincerely invoke the traditional supplication "so help me God" at the conclusion of their oath, it's -- it really is sophistry to say ... that they experience some kind of actual injury ... by seeing those same words spoken by the person who is administering the oath.

Appendix, at 82-83 (CT 29:24 – 30:5). This argument, apparently bought into by the District Court, Appendix, at 78, 90 and 100-01 (CT 12:8-12, 54:5-9, 69:7-70:3), completely misses the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 250 (1990). Plaintiffs have no objections whatsoever to private individuals claiming that God exists or praying to their chosen divinities. On the contrary, Plaintiffs cherish the diversity of religious opinion that exists in this nation, and thrill at the opportunity to debate those harboring contrary views on an equal basis in the public square. It is only "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief," *Engel v. Vitale*, 370 U.S. 421, 431 (1962), that Plaintiffs take issue, especially when – as is in the case at bar – that power, prestige and support degrades them, personally, from the equal rank of citizens and turns them, personally, into political outsiders.

In other words, the "distinction between if the President-Elect utters those words and you are there and hear them as compared to the Chief Justice of the United States," Appendix, at 89 (CT 53:22-25), is huge. Those who observe someone individually adding "so help me God" to an oath he is taking (especially after the oath administrator first recited the oath **without** those words) immediately recognize that the addendum reflects nothing but the oath-taker's personal religious beliefs. When the administrator, however, has first included that phrase as a component of the text (which the oath-taker then repeats), the obvious message is that homage to God is part and parcel of the state's official (religious) orthodoxy.

Plaintiffs also dispute the District Court's argument that a second violation of their basic constitutional rights is permissible because legal obstacles exist to block a remedy to a first violation. Appendix, at 90 (CT 54:5-9). "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). Thus, to whatever extent Barack Obama's Free Exercise rights did not mitigate his Establishment Clause violation, "[t]wo wrongs do not make a right." *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 435 (D.C. Cir. 1986). Each additional governmental dig at Plaintiffs' religious views further marginalizes and disenfranchises them.

(3) PIC is Unquestionably a State Actor for the Purposes of This Litigation

According to its own Articles of Incorporation, Defendant PIC exists "to carry out the functions and activities connected with the inauguration of the President of the United States." Appendix, at 29 (Document 12-2:3). Yet PIC claims that it "is not a governmental entity subject to the strictures of the Establishment Clause ... PIC is, instead, a private, non-profit corporation." Appendix, at 28 (Document 12:7).

That those are not the definitive characteristics has been explicitly stated by the Supreme Court:

> [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Evans v. Newton, 382 U.S. 296, 299 (1966). Similarly, "[State action] does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966). *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the

government and, as a result, be subject to constitutional constraints." Thus, in case after case, private individuals and entities that take on governmental tasks have been deemed "state actors." *See, e.g.*, *West v. Atkins*, 487 U.S. 42 (1988) (private physician attending to prison inmates medical needs is a state actor); *Edmonson* (private attorney exercising peremptory challenges in civil litigation is a state actor); *Evans* (private trustees of a park deemed to be state actors); *Brentwood Academy v. Tennessee Secondary Sch. Ath. Ass'n.*, 531 U.S. 288 (2001) (private association regulating interscholastic athletic competition involving both private and public schools is state actor).

In view of the foregoing, the argument that PIC is not a state actor is untenable. The instant case involves what is perhaps the quintessential public governmental function: the inauguration of the nation's President. As this Circuit has described it, "the observance of the inauguration of the Chief Executive of the United States [is] an event less private than almost anything else conceivable." *Mahoney v. Babbitt*, 105 F.3d 1452, 1457 (D.C. Cir. 1997).

Also of importance is whether the physical location involved is controlled by the state's agents. "If ... the ... governmental entity rations otherwise freely accessible ... facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." *Gilmore v. Montgomery*, 417 U.S. 556, 574 (1974). Here, the locale is strictly

controlled by government, with police, Secret Service agents, and numerous other officials ensuring that only government-approved individuals come anywhere near the inaugural platform. To suggest that PIC – as a participant in this intensely regulated setting amidst the very center of the federal government's real estate – is a "private actor" simply flies in the face of reality. *See* Appendix, at 122-23 (Declaration of Michael Newdow, ¶ 5, attesting to having seen "only two types of vehicles" at the inauguration. "The first type was comprised of those belonging to police and other law enforcement authorities. The other type consisted of upscale SUVs ... all with license plates that read "PIC 2009.")

Defendant AFIC (indisputably a governmental entity) worked to "provide significant ceremonial support to the 56th Presidential Inaugural" by, among other things, "planning and carrying out ceremonial activities."[12] Appendix, at 50 (Document 14-2, ¶¶ 3-4). Defendant JCCIC (also purely governmental) "makes logistical arrangements for the Inauguration." Appendix, at 33 (Document 13:11). For Defendant PIC, which exists "to carry out the functions and activities connected with the inauguration of the President of the United States," page 39, *supra*, to claim it is not also a "governmental actor" for the purposes of this litigation is sophistry.

[12] Remarkably, "[t]he DoD Guidelines and policy do not permit AFIC to provide chaplain or religious support." Appendix, at 51 (Document 14-2:3, ¶ 7).

(4) The Inability to Enjoin the President Does Not Deprive the Court of Its Authority to Enjoin Defendants Here

Plaintiffs will assume, *arguendo*, that the Court lacks jurisdiction to direct the President to abide by the Constitution during the inauguration. That lack of injunctive jurisdiction against the Chief Executive, however, does not deprive Plaintiffs of standing to seek declaratory relief against the instant Defendants. *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) ("Having found that [the plaintiffs] are actually injured, traceability and redressability are easily satisfied - - each injury is traceable to the President's [actions], and would be redressed by a declaratory judgment that the [actions] are invalid.").

In fact, with Defendants being subordinates, injunctive relief is also available. In *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) – a case almost directly on point regarding the standing analysis (except that the injunction in *Franklin* targeted the Secretary of Commerce (i.e., one of the nation's highest ranking officials), rather than the PIC (and similar "lower level" individuals and entities targeted here)) – the Supreme Court explicitly wrote that "injunctive relief against executive officials like the Secretary of Commerce is within the courts' power." Moreover:

> For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate, because we conclude that **the injury alleged is likely to be redressed by declaratory relief against the Secretary alone**.

Id., at 803. (emphasis added).

Franklin also addressed the matter of the executive branch disregarding a judicial determination:

> [W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the ... constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Id. Thus, the District Court's concern regarding the President (i.e., that "he'd be able to say, 'Come up on this stage.' I don't think anybody can stop that from occurring, and therefore, I fail to see how I have the ability to provide the redress that the Plaintiffs are seeking," Appendix, at 101 (CT 70:8-11)) was expressly discounted by the justices.

The argument that courts cannot enjoin executive branch officials because the President can always find others to act contrary to the judiciary's instructions would turn the concept of judicial review into a nullity, and invalidate the standing determinations of an endless number of cases. Courts routinely grant standing to litigants challenging executive branch decisions. The District Court, itself (within just the one year prior to its March 12, 2009 Order) had heard at least ten cases without expressing concerns of redressability, despite the fact that the President (with or without Congress's agreement) could have simply substituted another

actor to circumvent the given judicial decree. Appendix, at 104-05 (Document 51-3). Similarly, in just the past two months, this Court has issued rulings in at least nineteen such cases. Case Listing #3.

II. Issue Preclusion is a Non-Issue in this Case

(A) Issue Preclusion Does Not Concern the Claim Against Defendant Roberts

As an initial matter, it should be recognized that neither of "the prior judicial determinations" involved the Chief Justice's unauthorized alteration of the constitutionally-provided presidential oath of office. Accordingly, the District Court did not apply any "issue preclusion" to Newdow vis-à-vis his standing to make that challenge, since it involves a governmental activity readily differentiated from the addition of (Christian) Monotheistic clergy (which was the gravamen of the 2001 and 2005 inaugural cases). As the Supreme Court has noted

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.

United States v. Moser, 266 U.S. 236, 242 (1924).

(B) Issue Preclusion Does Not Concern the Non-Newdow Plaintiffs

The District Court recognized that there is no issue preclusion as to the non-Newdow plaintiffs. Appendix, at 94-95 (CT 60:21-61:4). This follows from well-established legal principles:

> [L]itigants ... who never appeared in a prior action ... may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Lab. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971). Similarly:

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.

Martin v. Wilks, 490 U.S. 755, 761-62 (1989) (citations omitted).

(C) Issue Preclusion Regarding Plaintiff Newdow Need Not Be Addressed

As Plaintiffs will demonstrate in the next section, the District Court erred in denying Newdow standing to challenge inaugural clergy-led prayer on the basis of issue preclusion. However, even if issue preclusion were appropriately applied to

Newdow in this particular claim, there is no reason to address the matter. As the Supreme Court reiterated just this year, once any plaintiff is recognized to have standing, courts "need not consider" the standing of other plaintiffs: "'[W]e have at least one individual plaintiff who has demonstrated standing . . . . Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.'" *Horne v. Flores*, 557 U.S. ___, No. 08-289 (2009), slip op. at 9-10 (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 264 (in text at n. 9) (1977)). *See also Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977) (Once one plaintiff "has the requisite standing [courts] have no occasion to decide the standing of the other appellees."); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) (Once one plaintiff has been shown to have standing, "we do not consider the standing of the other plaintiffs.").

As it must, this Circuit follows the Supreme Court's lead in this regard: "For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim." *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (citing *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)). Accordingly, since the non-Newdow Plaintiffs have standing to raise the claims in this case, there is no need to consider Newdow's standing.

(D) Issue Preclusion Does Not Bar Plaintiff Newdow from Asserting Standing to Challenge Clergy-led Prayer

Watching the inaugural ceremony of President Bush in 2001, Plaintiff Newdow was turned into a political "outsider" as he viewed what he considered "an offense of the highest magnitude." Appendix, at 35 (Document 13-2:6). Specifically, he watched as Rev. Franklin Graham prayed "in the name of the father, and of the son, the Lord Jesus Christ, and of the Holy Spirit,"[13] Appendix, at 37 (Document 13-2:8), after which Pastor Kirbyjon Caldwell led the audience "in the name that is above all other names, Jesus the Christ."[14] So taken aback by these activities, he filed suit to end this offensive and unconstitutional practice. Appendix, at 34 (Document 13-2:1).

The defense in that 2001 case argued that Newdow lacked standing because he watched the proceedings on television, rather than viewed them in person.

> 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.

Appendix, at 108 (Document 51-4:3). *See also* Appendix, at 75-76 (CT 9:24-10:1).

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[13] 147 Cong. Rec. 7, S422 (January 22, 2001).
[14] *Id*., at S423.

The Magistrate Judge disagreed, finding that Newdow had suffered an injury-in-fact:

> After hearing on the President's initial motion to dismiss, the undersigned found that Newdow had standing to challenge the statement of prayers per se at the inauguration. "Electronic" attendance was found to be the same for standing purposes as physical attendance.

Appendix, at 39 (Document 13-6 at 2:3-5). However, a recommendation was made to grant the President's Motion to Dismiss, mostly for defects in redressability (e.g., "the courts ha[ve] no jurisdiction to enter an injunction against the President." Appendix, at 39 (Document 13-6 at 2:20). The Magistrate Judge's Findings and Recommendations were adopted by the District Court on May 23, 2002. Appendix, at 40-41 (Document 13-7).

Newdow appealed to the Ninth Circuit. That Court, in a very sparsely worded opinion, ruled that "'[Newdow] lacks standing to bring this action because he does not allege a sufficiently concrete and specific injury.'" Appendix, at 31 (Document 13:7). In other words, the Court of Appeals contradicted the District Court (which had found that Newdow's injury was concrete and specific), but gave no indication as to why. Furthermore, the panel did not rule on redressability.

Since Newdow was unaware of a single prayer case where a plaintiff was deemed not to have suffered a concrete and specific injury after personally witnessing a challenged prayer, Appendix, at 109 (Document 51-5, ¶ 5), the only

reasonable conclusion was that the Ninth Circuit found, as Defendant Bush had argued, that televised viewing is different from in-person viewing.

By that time, Newdow's already great interest in presidential inaugurals had blossomed. Appendix, at 110 (Document 51-5, ¶¶ 9-14). Thus, he decided he would travel to Washington, D.C., to attend the 2005 inaugural. He contacted his senator's office soon after President Bush's reelection and successfully reserved a ticket. Appendix, at 111 (Document 51-6). Shortly after learning that that ceremony would once more have clergy-led prayers, he again filed suit, this time in the District Court for the District of Columbia, Appendix, at 32 (Document 13:8), assuming that (by having made arrangements to attend the ceremony in person) he would have cured the defect obliquely referenced in the Ninth Circuit's ruling.

Despite having argued four years earlier that Newdow's "lack of geographical proximity to the inaugural prayer dooms his claim to standing" because he did not have "direct contact with the governmental conduct he challenges," *see* page 47, *supra,* the government this time argued that "[t]he fact that Newdow may attend the 2005 Inauguration in-person, as opposed to watching it on television, as he did in 2001, is not sufficient to alter the nature of his alleged injury." Appendix, at 57 (Document 16-3:21). The argument apparently resonated with Hon. John D. Bates, who heard the case. *Newdow v. Bush*, 391 F. Supp. 2d 95 (D.D.C. 2005). Judge Bates wrote that "the particular injury alleged by Newdow --

watching an inauguration on television, physically attending it, or forgoing it -- does not make a difference for purposes of the preclusion issue." *Id*., at 100 n.2. But this, of course, was completely contrary to what the Ninth Circuit must have held to reach its conclusion.

Judge Bates then ruled that, even if issue preclusion did not exist, Newdow lacked standing. First, Newdow lacked an injury-in-fact, mainly because:

> [Newdow] does not have the necessary personal connection to establish standing. Newdow does not come in regular contact with the inaugural prayers ... There is no evidence that he is a frequent or regular attendee or invitee at Presidential Inaugurations.

Id., at 104. Additionally, Judge Bates found that Newdow's injury was not redressable, and that the case was moot.

Because there was a possibility that the Court of Appeals would agree that there was no injury-in-fact because "Newdow does not come in regular contact with the inaugural prayers," Newdow opted not to appeal the ruling. *See* Appendix, at 58 (Document 16-4) (Court of Appeals Order dismissing the case on mootness grounds after preliminary injunction motion (and emergency appeal thereof) denied). Instead, he resolved to cure the alleged "defect" by showing an unmistakable pattern of attending presidential inaugurations. Appendix, at 109-10 (Document 51-5 (MN Decl, ¶¶ 6-8)).

With that defect cured, issue preclusion does not apply. Additionally, issue preclusion does not apply because there are new facts, there has been a change in the law in the Ninth Circuit, and applying issue preclusion would work a "basic unfairness."

(1) The "Precondition Requisite" has Now Been Supplied

"In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit. No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend on the same precondition." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4437 at 180 (2d ed. 2002).

According to Judge Bates, as of January 2005 Newdow had not shown "regular contact with the inaugural prayers ... There is no evidence that he is a frequent or regular attendee ... at Presidential Inaugurations." *Newdow v. Bush*, 391 F. Supp. 2d at 104. That evidence now exists. Newdow "viewed the 2001 presidential inauguration on television, ... actually had a ticket for the 2005 inauguration, ... '[o]n January 20, 2009, ... traveled to Washington, DC, to view the inauguration of President Obama' ... [and] 'plan[s] to view every future inauguration for the rest of [his] life.'" Appendix, at 118 (Document 66-3:7, ¶ 8).

In view of the foregoing, to preclude Newdow from litigating in the case at bar would definitely work a "basic unfairness." With:

(a) Overwhelming case law showing that personally witnessing unwanted government-sponsored religious prayer is an injury-in-fact;

(b) Defendant Bush (in the 2001 case) having asserted that Newdow did not suffer this injury-in-fact because "Newdow was 3,000 miles away from the inaugural activities he watched on television;"

(c) The District Court in that case having ruled that Newdow had suffered an injury-in-fact; and

(d) The Ninth Circuit having ruled – with no explanation – that Newdow had not suffered an injury-in-fact,

Newdow had every reason to assume that witnessing the inauguration in person would cure that 2001 injury-in-fact standing defect.

Having cured that defect in 2005, but learning (for the first time) of another defect (i.e., that he lacked standing because "[t]here is no evidence that he is a frequent or regular attendee or invitee at Presidential Inaugurations," *Newdow v. Bush*, 391 F. Supp. 2d at 104), Newdow had no reason to appeal Judge Bates' decision at that time. Rather, he waited another four years to cure that newly-asserted defect. When there are two grounds for dismissal, "a rule which gives res judicata effect to both grounds leaves the losing party who concedes the adequacy

of one no appellate remedy for the patent invalidity of the other except a frivolous appeal." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983).

(2) There are New Factual Issues in the Instant Litigation

"[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979). There are two such changes in the instant case.

The first change concerns Defendant Warren, who specifically exhibited an animus toward Atheists such as Newdow. Appendix, at 15 (Document 1, ¶ 73). With no reason given by the Ninth Circuit in its ruling that Newdow had not suffered an injury-in-fact, it may well be that the panel would have found such a display of anti-Atheism sufficient to give standing (even with a television viewing). Similarly, Judge Bates never dealt with such an explicit bias against America's Atheistic citizens.

Also different in the current case is the fact that Newdow was accompanying the minor child to the inaugural. That child's parents had entrusted her care to Newdow, and he thus had a special duty to protect her from offensive religious dogma. This fact situation, also, did not exist in either of the prior cases.

(3) The Law Has Changed

An exception to issue preclusion occurs when there are any "significant changes in ... legal principles." *Montana v. United States*, 440 U.S. 147, 157 (1979). *See also American Medical International, Inc. v. Secretary of Health, Education & Welfare*, 677 F.2d 118, 120-21 (D.C. Cir. 1981). As was stated in the Supreme Court case upon which this doctrine is largely founded, when "a proper application of the [new legal] principles ... might well have produced a different result, ... collateral estoppel should not ... b[e] used." *Commissioner v. Sunnen*, 333 U.S. 591, 607 (1948).

In the Ninth Circuit, where it was initially stated that Newdow lacked standing because he had suffered no injury-in-fact, *Newdow v. Bush*, 89 Fed. Appx. 624 (9th Cir. 2004), a marked change in the legal principles regarding standing has transpired. In *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008),[15] a government entity (the City of San Diego) leased portions of two city parks to the Boy Scouts of America ("BSA"). Because BSA discriminates against those who do not believe in God, a group of agnostics challenged the lease on Establishment Clause grounds. The Ninth Circuit found the plaintiffs had suffered an injury-in-fact in that case even though "no religious symbols," *id*., at 782, were present at

[15] On May 15 of this year, the Ninth Circuit issued the following order: "[F]urther proceedings in this court are stayed pending the final determination of the Supreme Court of the United States of the petition for certiorari filed by the Defendants-Appellees on March 31, 2009 (Sup. Ct. Docket No. 08-1222), and pending the decision by the Supreme Court of *Buono v. Salazar*, 129 S. Ct. 1313, 173 L. Ed. 2d 582 (2009))." *Barnes-Wallace v. City of San Diego*, 566 F.3d 851 (2009).

either of the parks, and even though there was no allegation that the plaintiffs would be personally exposed to anything religious at all! According to the panel, the injury existed merely because "the plaintiffs have shown both personal emotional harm and the loss of recreational enjoyment." *Id*., at 785.

Clarifying this injury further, the Ninth Circuit wrote, "Our Establishment Clause cases have recognized an injury-in-fact when a religious display causes an individual such distress that she can no longer enjoy the land on which the display is situated." *Id*., at 784. If that applies to an individual who:

(a) Is seeking to engage in recreational activity;

(b) Is visiting a local park (where no religious dogma is espoused); and

(c) Is never exposed to any religious claim at all (from a private group merely leasing land from the government)

then it surely must apply to Newdow, who:

(a) Is seeking to view "the transcendent ritual of America's democracy;"

(b) Is visiting the nation's capital (where "so help me God" was added to the President's oath of office and clergy-led prayers were issued); and

(c) Is personally exposed to those religious claims (contrary to his own beliefs) made by government-appointed agents, acting on behalf of the government, itself.

The extent to which *Barnes-Wallace* changed the Ninth Circuit's approach to standing in Establishment Clause cases can be appreciated by reviewing Judge O'Scannlain's dissent from the denial of rehearing en banc. *Barnes-Wallace v. City of San Diego*, 551 F.3d 891 (9th Cir. 2008). As Judge O'Scannlain stated in his opening sentence, *Barnes-Wallace* "promulgate[d] an astonishing new rule of law for the nine Western States. Henceforth, a plaintiff who claims to feel offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact." *Id*., at 892. Furthermore, he wrote:

> This case ... constitutes a precedential decision on the issue of standing.
>
> Indeed, ... the majority's opinion has already had collateral consequences. One district court in our circuit has already cited the majority's order as binding precedent to reach a conclusion it might not otherwise have reached. See *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1205 (S.D. Cal. 2008) ("If Plaintiffs' claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing. ... In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish 'injury in fact.' ... *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784-85 (9th Cir. 2008). ...").

551 F.3d at 893 n.2. Thus, because issue preclusion is not applicable when there is a change of the relevant law, issue preclusion does not apply against Newdow in the instant case.

(4) Application of Issue Preclusion Would Work a "Basic Unfairness"

When issue preclusion is considered, "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992). Such unfairness exists "where a 'precondition requisite' to the court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983). As explained, that has occurred in this case.

Newdow was (and remains) unaware of a single Supreme Court, D.C. Circuit or Ninth Circuit case where an injury-in-fact was not found for a plaintiff challenging, on Establishment Clause grounds, a government-sponsored prayer he personally witnessed. Appendix D (MN Decl, 51-5 ¶ 5). Even if Defendants or the Court can ultimately find an exception to this observation, the conclusion is irrefutable: the general rule is that standing exists for such individuals. Newdow should not be precluded because a Circuit Court (that now, under *Barnes-Wallace*, would be obligated to grant him standing) denied standing without any explanation, especially where there are new facts to Newdow's claim, and where he has cured a prior defect.

It is also basically unfair to preclude a second lawsuit when there has been a change in the facts or the law that led to the defeat in the prior litigation. "[T]he

principle of collateral estoppel ... is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). In this case, two new factual issues have arisen that alter the standing analyses that were used previously. Additionally, the law of the Ninth Circuit (where the initial determination that Newdow lacked standing arose) has undergone an "astonishing" change, to one which unquestionably would result in Newdow now being deemed to have suffered an injury-in-fact in the 2001 case. "Collateral estoppel is generally inappropriate when the issue is one of law and there has been a change in the legal context after the first decision." *Pharm. Care Mgmt. Ass'n v. District of Columbia*, 522 F.3d 443, 447 (D.C. Cir. 2008).

In view of the foregoing (combined with the overwhelming and pervasive weight of actual prayer case standing jurisprudence that has been shown virtually everywhere except for this sequence of cases), it would work a "basic unfairness" to Newdow to apply issue preclusion due to the vagaries of the Ninth Circuit's 2004 opinion (subsequent to the 2001 inaugural challenge), upon which Judge Bates' 2005 decision was based.

CONCLUSION

The case law of the Supreme Court, this Court of Appeals, and every one of this Court's sister Courts of Appeals, demonstrates that plaintiffs who are subjected to unwelcome government-sponsored prayers and religious displays have standing to challenge those governmental activities. Plaintiffs here, including numerous children, have alleged being subjected to precisely those activities. Accordingly, they have suffered the harms the Establishment Clause seeks to prevent – i.e., being personally offended due to the governmental espousal of religion, and being degraded from the equal rank of citizens and turned into political outsiders on the basis of their own religious beliefs. These harms, perpetrated by the Defendants in this case, will be redressed once the judiciary issues the requested injunctive and/or declaratory relief.

Plaintiffs respectfully request that this Court reverse the ruling of the District Court.

Respectfully submitted this 31st day of August, 2009,

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(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ - Michael Newdow August 31, 2009

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CASE LISTING #1

Standing in U.S. Supreme Court and Court of Appeals "Prayer" Cases

U.S. Supreme Court

1. *Engel v. Vitale*, 370 U.S. 421 (1962)

2. *Abington Township School District v. Schempp*, 374 U.S. 203 (1963)

3. *Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983)

4. *Wallace v. Jaffree*, 472 U.S. 38 (1985)

5. *Lee v. Weisman*, 505 U.S. 577, 584-85 (1992)

6. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000)

1st Circuit

Weisman v. Lee, 908 F.2d 1090 (1990), *aff'd*, 505 U.S. 577 (1992)

2nd Circuit

Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49 (2001)

3rd Circuit

American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1480 (3rd Cir. 1996) (en banc)

4th Circuit

Wynne v. Great Falls, 376 F. 3d 292 (4th Cir. 2004)

5th Circuit

Doe v. Tangipahoa Parish School Bd., 494 F.3d 494 (5th Cir. 2007) (en banc)

6th Circuit

Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999)

7th Circuit

Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997)

8th Circuit

Warnock v. Archer, 380 F.3d 1076 (8th Cir. 2004)

9th Circuit

Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998)

10th Circuit

Snyder v. Murray City Corp., 159 F.3d 1227, 1231 (10th Cir. 1998) (en banc)

11th Circuit

Pelphrey v. Cobb County, 547 F.3d 1263, 1279 (11th Cir. 2008)

CASE LISTING #2

Standing in U.S. Supreme Court and Court of Appeals "Religious Display" Cases

U.S. Supreme Court

1. *Stone v. Graham*, 449 U.S. 39 (1980)

2. *Lynch v. Donnelly*, 465 U.S. 668 (1984)

3. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)

4. *Van Orden v. Perry*, 545 U.S. 677 (2005)

5. *McCreary County v. ACLU*, 545 U.S. 844 (2005)

D.C. Circuit

Chaplaincy of Full Gospel Churches v. United States Navy (In re Navy Chaplaincy), 534 F.3d 756, 764 (D.C. Cir. 2008)

1st Circuit

No relevant appellate cases found.

2nd Circuit

Cooper v. United States Postal Serv., ___ F.3d ___, No. 07-4825 (2nd Cir. August 20, 2009)

3rd Circuit

ACLU-NJ ex rel. Miller v. Twp. of Wall, 246 F.3d 258, 265 (3rd Cir. 2001)

4th Circuit

Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997)

5th Circuit

Murray v. Austin, 947 F.2d 147, 151 (5th Cir. 1991)

6th Circuit

ACLU of Ohio Found., Inc. v. Ashbrook, 375 F.3d 484, 490 (6th Cir. 2004)

7th Circuit

Books v. Elkhart County, 401 F.3d 857, 861 (7th Cir. 2005)

8th Circuit

ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc)

9th Circuit

Barnes-Wallace v. City of San Diego, 530 F.3d 776, 784 (9th Cir. 2008), stayed, 566 F.3d 851 (2009)

10th Circuit

Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784, 793-94 (10th Cir. 2009)

11th Circuit

Glassroth v. Moore, 335 F.3d 1282, 1292 (11th Cir. 2003)

CASE LISTING #3

Cases Decided by the United States Court of Appeals for the District of Columbia Circuit in the Past Two Months Where Standing Existed Against the Executive Branch

(1) *Oryszak v. Sullivan*, ___ F.3d ___, No. 08-5403 (D.C. Cir. August 14, 2009)

(2) *Alaska Airlines v. DOT*, ___ F.3d ___, No. 07-1209 (D.C. Cir. August 7, 2009)

(3) *Neiland Cohen v. U.S.A.*, ___ F.3d ___, No. 08-5088 (D.C. Cir. August 7, 2009)

(4) *Abington Crest Nursing and Rehab. Center v. Sibelius*, ___ F.3d ___, No. 08-5120 (D.C. Cir. August 4, 2009)

(5) *Cobell v. Salazar*, ___ F.3d ___, No. 08-5500 (D.C. Cir. July 24, 2009)

(6) *Young America's Foundation v. Gates*, ___ F.3d ___, No. 08-5366 (D.C. Cir. July 24, 2009)

(7) *Arkansas Dairy Cooperative Association v. USDA*, ___ F.3d ___, No. 08-5406 (D.C. Cir. July 24, 2009)

(8) *Dearlove v. SEC*, ___ F.3d ___, No. 08-1132 (D.C. Cir. July 24, 2009)

(9) *Secretary of Labor v. National Cement Company of California, Inc.*, ___ F.3d ___, No. 08-1312 (D.C. Cir. July 21, 2009)

(10) *American Equity Investment Life Ins. Co. v. SEC*, ___ F.3d ___, No. 09-1021 (D.C. Cir. July 21, 2009)

(11) *Southeast Alabama Medical Center v. Sebelius*, ___ F.3d ___, No. 08-5156 (D.C. Cir. July 17, 2009)

(12) *Ad Hoc Telecommunications Users Committee v. FCC*, ___ F.3d ___, No. 07-1426 (D.C. Cir. July 17, 2009)

(13) *Zivotofsky v. Secretary of State*, ___ F.3d ___, No. 07-5347 (D.C. Cir. July 10, 2009)

(14) *Taylor v. Solis*, ___ F.3d ___, No. 07-5401 (D.C. Cir. July 10, 2009)

(15) *Natural Resources Defense Counsel v. EPA*, ___ F.3d ___, No. 06-1045 (D.C. Cir. July 10, 2009)

(16) *Catawba County, NC v. EPA*, ___ F.3d ___, No. 05-1064 (D.C. Cir. July 7, 2009)

(17) *Exxon Mobil Corp. v. FERC*, ___ F.3d ___, No. 07-1306 (D.C. Cir. July 7, 2009)

(18) *Guard Publishing Company v. NLRB*, ___ F.3d ___, No. 07-1528 (D.C. Cir. July 7, 2009)

(19) *Stillwell v. OTS*, ___ F.3d ___, No. 08-1259 (D.C. Cir. July 7, 2009)