NOT YET SCHEDULED FOR ORAL ARGUMENT

In the

United States Court of Appeals

For the

District of Columbia Circuit

Docket No. 09-5126

MICHAEL NEWDOW, et al.,

Plaintiffs-Appellants,

v.

HON. JOHN ROBERTS, JR.,
Chief Justice of the United States Supreme Court, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
District Court Case No. 1:08-cv-02248 · Trial Judge Reggie B. Walton

BRIEF OF APPELLEES JOSEPH LOWERY AND RICHARD WARREN

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

II. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

III. Related Cases

The related cases are as follows:

(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).

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

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

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

(9) *Newdow v. Bush*, 391 F. Supp. 2d 95 (D.D.C. September 14, 2005) (granting Defendants' motions to dismiss). *Newdow v. Bush*, No. Civ. S-01-218 (E.D. Cal.)

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ISSUES PRESENTED FOR REVIEW[1]

1. Do the appellants have standing to challenge clergy-led prayer made during a presidential inaugural ceremony?[2]
2. Is Plaintiff Newdow precluded from relitigating the issue of standing to challenge prayer offered by clergy at a presidential inaugural ceremony in view of the previous *Newdow v. Bush* cases?

STATEMENT OF FACTS

Plaintiff Newdow first challenged the inclusion of prayer in presidential inaugural ceremonies in 2001.[3] That decision was affirmed by the Ninth Circuit (herein referred to as "*Newdow I*").[4] Less than a year later, Plaintiff Newdow filed a similar case in the U.S District Court for the District of Columbia (herein referred

[1] Pursuant to FRAP 28(b), this brief will not include the jurisdictional statement, the statement of the case, or the standard for review.

[2] The appellants will collectively be referred to as "NEWDOW." When Dr. Michael Newdow is specifically referenced, this brief will indicate such by referring to him as "Plaintiff Newdow."

[3] *Newdow v. Bush*, No. Civ. S-01-218 (E.D. Cal.).

[4] *Newdow v. Bush*, 89 Fed. Appx. 624 (9th Cir. 2004).

to as "*Newdow II*").[5] Based on issue preclusion, the *Newdow II* court dismissed the case as a result of the Ninth Circuit's decision in *Newdow I*.

On November 4, 2008, Barack Obama was elected to the office of president of the United States. For his inaugural ceremony, the President-elect chose to follow a more than seventy year old precedent of having clergy offer prayer. As such, two prominent pastors, Rev. Richard Warren and Rev. Joseph Lowery, were selected to give the invocation and benediction. Because of this, Plaintiff Newdow and NEWDOW filed suit on December 30, 2008, for injunctive and declaratory relief relative to inaugural prayers. In addition, NEWDOW challenged the use of the phrase "so help me God" at the end of the oath of office.

STATUTES AND REGULATIONS

All applicable statutes and regulations are in the Brief for Appellants.

SUMMARY OF THE ARGUMENT

The addition of minors as plaintiffs is an attempt to gain standing under the school prayer line of cases. Establishment Clause cases involving students in a public school setting are inherently different than government functions open to the general public in which the event includes clergy-led prayer. Because children

[5] *Newdow v. Bush*, 391 F.Supp.2d 95 (D.D.C. 2005).

have no special standing in government functions open to the public, the addition of minors to this litigation will not provide Article III standing.

Plaintiff Newdow cannot pursue his claims challenging clergy-led prayer as a result of the prior litigation in *Newdow I* and *Newdow II*. This would include all of the issues addressed in the prior lawsuits, i.e., standing, redressability, and mootness.

INTRODUCTION

The Reverends Richard Warren and Joseph Lowery have been sued because, as nationally known clerical members, they were chosen by President Obama to provide the invocation and benediction, respectively, at the presidential inauguration. This brief will be confined to issues relative to inaugural prayer raised by NEWDOW. The use of the phrase, "so help me God" at the end of the presidential oath is outside of the scope of this discussion.

NEWDOW's goal in this appeal is to expand the Article III standing exception, found in Establishment Clause cases, carved out for minors in public school events, to all government ceremonies in which minors are in attendance. This brief will discuss why the addition of minors as plaintiffs has not conferred standing to challenge the recitation of prayers at presidential inaugurations. In addition, this brief will demonstrate why issue preclusion is appropriate as to Plaintiff Newdow.

ARGUMENT

I. NEWDOW Does Not Have Article III Standing.

The elements of standing are well settled. First, a plaintiff must have suffered an "injury in fact" which is concrete and particularized and is actual and imminent. Second, there must be a causal connection between the injury and the conduct at issue. Finally, it is essential that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In that presidential inaugurations occur only once every four years, NEWDOW does not have a "sufficient personal connection" to the ceremonies to meet the requisite injury-in-fact threshold to confer standing. *Newdow v. Eagan*, 309 F.Supp.2d 29, 35 (D.D.C. 2004), citing *Suhre v. Haywood County, N.C.*, 131 F.3d 1083, 1087, 1090 (4th Cir.1997). As the Supreme Court explained, the gist of standing is whether plaintiffs have alleged such personal stake in the outcome of the controversy as to assure concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962). This personal connection is essential because the courts, following *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86, (1982), have determined that Article III standing is not satisfied by mere psychological injuries.

To overcome this obstacle, NEWDOW has added minors (originally encaptioned as "UNNAMED CHILDREN") as parties to this litigation in an attempt to meet the "injury in fact" prong for Article III standing. But the minors who are plaintiffs are not akin to pupils enrolled in a public school attending school sponsored events that occur at least annually.

In contrast to the case before this Court, there has been sufficient personal contact in prior landmark cases involving prayer to confer standing. For example, in the educational setting (e.g., classrooms, school graduations, and athletic events) the relationship between the pupils and the frequency of the event are such that injury-in-fact was deemed present. See, *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jeffree*, 472 U.S. 38 (1985); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). As will be explained below, an inaugural ceremony by the executive branch is more analogous to legislative prayer than a schoolhouse setting. Thus, children have no standing in the present litigation.

A. Minor Plaintiffs

The purpose for the addition of children as plaintiffs is to meet the threshold for standing which was not present in *Newdow I* and *Newdow II*. NEWDOW is arguing that in a claim for a violation of the Establishment Clause, minors can meet the pleading standards for Article III standing, where adults, under identical circumstances, cannot.

> 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).

Appellants' Opening Brief ("AOB"), pg. 13.

NEWDOW has likely staked out this position based upon the language in *Newdow II* where the court stated,

> Consideration of the coercive effect of a prayer pertains only to the special case of school children, not to mature, sophisticated adults like Newdow. *See Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (noting the "heightened concerns" of "subtle coercive pressures" found in elementary and secondary public schools).

Newdow II, 391 F.Supp.2d at 101, footnote 3.

In a colloquy between the bench and Plaintiff Newdow at the January 16, 2009, hearing on the preliminary injunction, this issue was highlighted as follows:

> MR. NEWDOW: Well, if you look in *Lee versus Weisman,* then the whole issue that the Court distinguished from *Marsh v. Chambers* is the fact that it was a child who was in this constrained setting in a formal atmosphere.
>
> THE COURT: This isn't a constrained setting. That's a schoolhouse.

ER, 73:6-11.

The essential question is whether *Marsh v. Chambers* is controlling or the school prayer line of cases, particularly *Lee v. Weisman*. *Lee* and *Marsh* are, of

course, important as they relate to the merits. But a comparison of the two cases assists in determining whether the injury prong is met for purposes of Article III standing. Indeed, there is some natural intertwining of the merits when undertaking an analysis of the "injury in fact" prong within the Establishment Clause context. In sum, if the present case is analogous to legislative prayer, then *Marsh* is controlling and NEWDOW can show no injury in fact because there is no violation of the Establishment Clause. On the other hand, if the ceremony is similar to a public school event, then the minor plaintiffs will have a "sufficient personal connection" to meet the injury prong for standing.

This they cannot do for there are "inherent differences" between a public school setting, in which minors are the focus of the activity, and a legislative session (or executive function) where minors are not the center of attention. *Lee*, 505 U.S. at 596-597. Speaking of high school graduation ceremonies, Justice Kennedy, writing for the majority, explained, "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma." *Lee*, 505 U.S. at 587.

The *Lee* Court recognized that not all government events rise to the level of a public school function. For example, it was observed that in a legislative session, the public is free to enter and leave without any comment. *Lee*, 505 U.S. at 597,

citing *Marsh*, 463 U.S. at 792. Indeed, the majority in *Lee* was able to reconcile its decision with *Marsh* by acknowledging that not all state sponsored ceremonies are the same, particularly noting that the prayer line of cases "require us to distinguish the public school context." *Lee*, 505 U.S. at pg. 597. The exception found in *Lee* can be summed up with the self evident fact that students are the focal point of school events. Therefore, minors have special standing rights to challenge prayer at government events where the minors are the center of attention. "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592.

In contrast, a presidential inauguration would fall under *Marsh* because this is a ceremony for the public in general rather than one uniquely established for young people "in the elementary and secondary public schools." *Lee*, 505 U.S. at 592. Even if children were in attendance as the result of a field trip, this would not change the analysis. For, children would surely have the understanding that the inauguration is not directly about them. Because of this, the mere fact that some of the plaintiffs are children does not meet the standard for the "injury in fact" prong of standing under the exception carved out by the *Lee* Court.

It is the clergy/appellees' position that *Lee* is not controlling because it is fundamentally different than the case at bar. As the District Court Judge (Hon.

Reggie Walton) observed, an inauguration ceremony is not a constrained setting as is found in a schoolhouse. ER, 73:11. The inauguration is distinguished from an event in a schoolhouse in that: (1) the public is free to watch the event, (2) the public does not generally participate, (3) the public is free to come and go, and, (4) the focus is the President-elect. Hence, the minor plaintiffs are not uniquely situated such that they have a "sufficient personal connection" to the inaugural ceremony to reach the threshold of Article III standing any more than the adults or organizational plaintiffs.

The peculiar circumstances in an Establishment Clause cause of action within the public school setting which provide the sufficient personal connection for minors is not present for public government events in which invited clergy solemnize the occasion through prayer. Although a superficial reading of *Marsh* could limit the holding to legislative sessions, a review of the high court's dicta indicates that the analysis goes beyond invocations at state legislatures. The *Marsh* Court found "other deliberative public bodies" also open in prayer (*Id*., 463 U.S. 786) and that the judiciary begins with "God save the United States and this Honorable Court." *Id*. Because there is no substantive legal difference, relative to divine invocations, between the legislative and the executive branches, *Marsh* is controlling. As such, the unnamed plaintiff children cannot demonstrate injury sufficient to confer standing.

II. Issue Preclusion Bars Plaintiff Newdow from Relitigating Clergy-led Prayer at Presidential Inaugural Events.

Plaintiff Newdow asserts that issue preclusion does not apply to him as an individual. AOB, pg. 47. This is incorrect. The instant lawsuit represents the third action filed by Plaintiff Newdow challenging inaugural prayer. Plaintiff Newdow's first lawsuit was sparked by the 2001 inauguration of George W. Bush, when Plaintiff Newdow alleged that he was offended by clergy-led prayers. The suit was dismissed for lack of standing by a federal court seated in Sacramento. *Newdow v. Bush*, No. Civ. S-01-218 (E.D. Cal.). That dismissal was affirmed by the Ninth Circuit in 2004. *Newdow I*. Less than a year later Plaintiff Newdow challenged clergy-led prayers at the second inauguration of President Bush in federal court in Washington, D.C., just prior to the 2005 inauguration. *Newdow II*. Although the venue was different, the issue was the same, i.e., the recitation of prayers by invited clergy. *Id*., 98. In *Newdow II*, the District Court for the District of Columbia dismissed the case on the basis of issue preclusion as a result of the Ninth Circuit's decision in *Newdow I*. *Newdow II*, 391 F.Supp.2d at101.

"Issue preclusion" is aimed at preventing relitigation of issues that have already been resolved. *SBC Commissioners v. FCC*, 407 F.3d. 1223, 1229 (D.C. Cir. 2005). "[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*,

449 U.S. 90, 94 (1980) That is precisely the case before this Court. Plaintiff Newdow has filed two prior actions in federal courts seeking equitable relief to prevent clergy led prayer at presidential inaugurations. Both of those cases ended in judgments against Plaintiff Newdow.

Further, issue preclusion applies to standing. As such, even if the earlier decisions in both *Newdow I* and *Newdow II* on standing were hypothetically incorrect, Plaintiff Newdow would be precluded from relitigating his standing. *Cutler v. Hayes*, 818 F.2d 879, 888-889 (D.C.Cir. 1987). It is important to note that Plaintiff Newdow did not appeal *Newdow II*. Hence the opinion of the District Court filed in September of 2005 is binding. *Id*. at 888, (citing *Durfee v. Duke*, 375 U.S. 106, 116 (1963)).

A. There are no occurrences subsequent to the original dismissals of *Newdow I* and *Newdow II* which has cured the prior jurisdictional deficiencies relative to standing.

a. Lack of a precondition requisite.

In a second suit, the "curable defect" exception will apply when there is a "precondition requisite" to the proceeding that was not alleged or proven in the original suit. *Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1192 (D.C.Cir.1983) The key to the "curable defect" exception is that the jurisdictional deficiency in the first suit, here a lack of standing because the alleged injury was not sufficiently

concrete and specific, must be "remedied by *occurrences subsequent to the original dismissal.*" *Id.* (emphasis in original).

Plaintiff Newdow's attempted "cure" of the precondition requisite in 2005 was to purchase a ticket to the inaugural address. In 2005, Plaintiff Newdow purchased a ticket in order to see the inaugural address, rather than watch it on television. The *Newdow II* Court found that this precondition requisite did not fundamentally alter the conditions in *Newdow I*. ("[B]ecause there is no relevant distinction between being forced to confront, or choosing to avoid, offensive conduct, Newdow is precluded from relitigating his standing." *Newdow II*, 391 F.Supp.2d at 101.

Similarly, here Plaintiff Newdow attempts to cure the defect of having no evidence that he is a regular or frequent attendee of the inaugurals by attending the 2009 inauguration and alleging that he plans to attend every inaugural for the rest of his life. But, attending a single inauguration in 2009 does not show "frequent" or "regular" attendance. Furthermore, a plan to attend future events does not satisfy a precondition requisite because those events have not yet occurred and thus are not actual "occurrences" subsequent to the original action. For, the assertion that an injury will take place years later is "too remote temporally to satisfy Article III standing." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 226 (2003).

Finally, bringing a minor child to the inaugural also does not cure this defect as to Plaintiff Newdow. Since the defect was not cured by the new allegations in the instant case, the curable defect doctrine does not apply.

b. Change of facts are immaterial.

Where there is no significant change in controlling facts, issue preclusion applies. *Montana v. United States,* 440 U.S. 147 at 159. See *Restatement (Second) of Judgments* § 27 (1982) (the controlling facts must remain unchanged). Even if new facts were found to be different, under issue preclusion, an immaterial change in the controlling facts does not affect a judgment's preclusive effect.

There is no significant change between the controlling facts in *Newdow I* and *Newdow II* and in the instant case. In *Newdow II*, the court found no distinction between being forced to confront and choosing to avoid religious conduct, thereby precluding Plaintiff Newdow from relitigating his standing. *Newdow II*, 391 F.Supp.2d at 101. Importantly, Plaintiff Newdow failed to prove that he was a regular or frequent attendee or invitee of the presidential inaugurations. *Id.*, 391 F.Supp.2d at 104. As the District Court stated, without a

> "personal connection to the inauguration that would make his injuries particularized and concrete, Plaintiff Newdow's alleged injuries-general offense and outsider status-are akin to the psychological injuries occurring from the observation of offensive conduct that the Supreme Court in *Valley Forge* deemed insufficient to establish an injury-in-fact."

Id., 391 F.Supp.2d 104.

Similarly, none of Plaintiff Newdow's new circumstances in the instant case present a change in the controlling facts. Neither Plaintiff Newdow's claim of "anti-atheism" (AOB, pg. 53) nor his addition of taking a child to the inauguration proves this necessary personal connection. Thus, these new facts are immaterial for the purposes of issue preclusion. Moreover, the prior court determined that "the particular injury alleged by Plaintiff Newdow-watching an inauguration on television, physically attending it, or forgoing it-does not make a difference for purposes of the preclusion issue." *Id.*, 391 F.Supp.2d at 100, footnote 2. Therefore, the difference between voluntarily physically attending the inauguration with a child or without a child, and forgoing the inauguration as in *Newdow II*, is immaterial for purposes of issue preclusion.

c. Subsequent change in the law.

Plaintiff Newdow raises a novel argument against issue preclusion. Namely, that the law in the Ninth Circuit has "promulgate[d] an astonishing new rule of law" since *Newdow I*. AOB, pg. 56 citing *Barnes-Wallace v. City of San Diego*, 551 F.3d 891, 892 (9th Cir. 2008) (O'Scannlain, J., dissenting). It should be noted as an initial matter, Plaintiff Newdow points to no change in this appellate circuit relative to the rules on standing. As such, the decision in *Newdow II* is still the law of the case.

Plaintiff Newdow also asserts that the Ninth Circuit's opinion in *Newdow I* provided little analysis, i.e., he complains of the "sparsely worded opinion." AOB, pg. 48. Indeed, the Ninth Circuit succinctly stated that Newdow "lacks standing to bring this action because he does not allege a sufficiently concrete and specific injury." *Newdow I*, 89 Fed. Appx. at 625. But "[i]n issue preclusion, it is the prior *judgment* that matters, not the court's opinion explicating the judgment." *Yamaha Corp. of America v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992) (emphasis in original). Further, "[e]ven in the absence of *any* opinion a judgment bars relitigation of an issue necessary to the judgment." *Id*., citing *American Iron and Steel Inst. V. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989) (emphasis in original). For, "once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Yamaha*, *Id*., 254 citing *Securities Industrial Association v. Board of Governors*, 900 F.2d 360, 364 (D.C.Cir. 1990) (emphasis in original).

Finally, the innovations in standing by the Ninth Circuit described by Plaintiff Newdow were not only found to be "astonishing" to the dissenting judge in *Barnes-Wallace*, said innovations in standing by the Ninth Circuit are now under review by the U.S. Supreme Court. *Salazar, Sec. of the Interior v. Buono*, 129

S.Ct. 1313, 2009 WL 425076 (certiorari granted Feb. 23, 2009).[6] To the extent that Plaintiff Newdow is seeking this Circuit to change its long and orthodox history on Article III standing and adopt the Ninth Circuit's "astonishing" new test, the invitation should be declined.

B. Issue Preclusion as to Prior Named Parties.

Although it is conceded that many of the defendants are different, the lead plaintiff and the facts are essentially the same. "Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first cause." *Allen v. McCurry*, 449 U.S. 90, 94 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Importantly, "[a] party precluded from relitigating an issue with an opposing party…is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify according him an opportunity to relitigate the issue." *Yamaha*, *Id*., 961 F.2d at 254, footnote 11 quoting *Restatement (Second) of Judgments* § 29 (1982). In this latest case brought by Plaintiff Newdow, there is no basis to suggest that he lacked a full and fair opportunity to have his day in court in *Newdow I* and *Newdow II*. Hence, to the extent that either the plaintiffs

[6] The Ninth Circuit stayed further proceedings in *Barnes-Wallace* pending final determination of *Buono v. Salazar*, 129 S.Ct. 1313. *Barnes-Wallace v. City of San*

or defendants in the case at bar are the same as those named in *Newdow I* and *Newdow II*, issue preclusion applies to those parties to the litigation.

C. Plaintiff Newdow is precluded from relitigating with another person.

New parties to the action do not allow Plaintiff Newdow to circumvent the law and bring the same decided issue multiple, consecutive times. Importantly, "[a] party precluded from relitigating an issue with an opposing party… is also precluded from doing so *with another person* unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify according him an opportunity to relitigate the issue." *Yamaha*, *Id*., 961 F.2d at 254, footnote 11 quoting *Restatement (Second) of Judgments* § 29 (emphasis added).

The Supreme Court stresses the importance of taking into account a plaintiff's prior full and fair opportunity to litigate, for "permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.'" *Blonder-Tongue Laboratories, Inc. v. University of Illinois*, 402 U.S. 313, citing *Kerotest Mfg. Co. v. C-O-Two Co.,* 342 U.S. 180,

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Diego, 566 F.3d 851 (9th Cir. 2009).

185 (1952). In view of this, Plaintiff Newdow is precluded from litigating his clergy-led prayer claim on any legal theory with other plaintiffs.

D. Redressability

NEWDOW also does not have Article III standing for failure to meet the redressability prong. The *Newdow II* court stated: "The Court therefore concludes that only an injunction or declaratory judgment against the President would provide plaintiff with the relief he seeks." *Newdow II*, 391 F.Supp.2d at 105. In reviewing the case law, Judge Bates found that the judiciary cannot enjoin the President. *Id*., 391 F.Supp.2d at 105. If it is ultimately the President who determines whether or not there will be prayer at an inauguration, and which members of the clergy will provide it, then the judiciary lacks the authority to provide equitable relief. In that the President is not a named defendant, whether as an individual or the office, relief cannot be granted. Hence, the complaint should be dismissed for lack of redressability.

E. Mootness

The issue of future inaugurations was squarely before the *Newdow II* Court.

> Although the Inauguration has come and gone – with the inclusion of an invocation and benediction given by clergy – the Court's earlier ruling on the preliminary injunction did not dispose of the case because Newdow's complaint also sought a declaratory judgment and a permanent injunction against the inclusion of religious prayer at future Presidential Inaugurations….

Newdow II, 391 F.Supp.2d at 98.

The *Newdow II* Court also dismissed the case because it was moot. *Id.*, at 107-108. Specifically, the Court determined that the case does not fall under the exception of "capable of repetition, yet evading review" doctrine. It was the opinion of Judge Bates that "the period between a President's election and inauguration is not too short to permit judicial review." *Id*., 108.

Not only was the analysis by the *Newdow II* Court respecting mootness correct, this issue is also precluded because it was directly before an earlier court.

CONCLUSION

The issues of standing, mootness, and redressibility were all fully litigated in *Newdow I* and *Newdow II*. As such, this Court does not have the liberty to entertain additional litigation on these issues and thus the case should be dismissed based upon issue preclusion as to Plaintiff Newdow. Furthermore, the addition of unnamed children as plaintiffs will not cure the fundamental flaw of a lack of injury in fact. The reason is that this case is analogous to prayer at a legislative session in that students are not the focus of the inauguration ceremony while in a constrained setting. Because of this, the legal exception which provides standing for minors under the prayer line of cases is not applicable and the children thus do not have any more basis for standing than the adults or organizational plaintiffs.

In view of the foregoing, Reverends Warren and Lowery request that the District Court's decision be affirmed.

Date: September 30, 2009.

By: _/s/_Kevin T. Snider_____
Kevin T. Snider
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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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