ORAL ARGUMENT NOT YET SCHEDULED

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 UNITED STATES SUPREME COURT, *et al.*,

Defendants-Appellees.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

APPELLEE BRIEF FOR FEDERAL DEFENDANTS/APPELLEES

_____

Tony West
Assistant Attorney General

Channing D. Phillips
Acting United States Attorney

Mark Stern
(202) 514-5089
Lowell V. Sturgill Jr.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

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

MICHAEL NEWDOW, et al.,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 09-5126
JOHN ROBERTS, JR., et al.,	)	
Defendants-Appellees.	)	

CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES

Appellees Hon. John G. Roberts, Jr., Joint Congressional Committee on Inaugural Ceremonies, Sen. Dianne Feinstein, Armed Forces Inaugural Committee, and Major Gen. Richard J. Rowe, Jr. hereby submit this Certificate of Parties, Rulings, and Related Cases.

A. Parties and Amici

The parties who participated in this case in the district court include the following:

Plaintiffs:

The following plaintiffs are named in the complaint.[1]

Michael Newdow

Ellery Schempp

Mel Lipman

Dan Barker and Annie-Laurie Gaylor

Robert Sherman

Margaret Downey

August Berkshire

Marie Castle

Stuart Bechman

Herb Silverman

Jason Torpy

Harry Greenberger

Kirk Hornbeck

Jim Corbett

---

[1] Plaintiffs attempted to add numerous additional parties as plaintiffs and defendants in the district court by filing a motion for leave to file an amended complaint. See District Court Docket No. 66. The district court never ruled on that motion, and thus those persons were never made parties below.

Catharine Lamm

Richard Wingrove

Christopher Arntzen

John Stoltenberg

Katherine Laclair

Louis Altman

Paul Case

Jerry Schiffelbein

Anne, Philip and Jay Richardson

Dan Dugan

Anna Mae Andrews

Eliza Sutton

Richard Ressman

“Unnamed Children”

The American Humanist Association

The Freedom from Religion Foundation

Military Association of Atheists and Freethinkers

Minnesota Atheists

Atheists for Human Rights

Atheist Alliance International

Atheists United

New Orleans Secular Humanist Association

University of Washington Secular Student Union

Seattle Atheists

Atheists of Florida

Defendants

The Complaint names the following defendants:

Honorable John Roberts, Jr., Chief Justice of the United States Supreme Court

Presidential Inaugural Committee ("PIC")

Emmett Beliveau, Executive Director, PIC

Joint Congressional Committee on Inaugural Ceremonies ("JCCIC")

Senator Dianne Feinstein, Chairperson, JCCIC

Armed Forces Inaugural Committee ("AFIC")

Major General Richard J. Rowe, Jr., Chairperson, AFIC

Rev. Rick Warren

Rev. Joe Lowery

Intervenors

There were no intervenors

Amici

American Center for Law and Justice

Peter R. Henriques, Fred Anderson, John E. Ferling, Martha Saxon

Margaret Downey

States: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the U.S. Virgin Islands (U.S. Territory)

B. Rulings Under Review

The ruling under review is the March 12, 2009 Order of the United States District Court for the District of Columbia (Honorable Reggie B. Walton). The Order is not currently published.

C. Related Cases

There are two related cases, which produced a number of opinions. The first case, Newdow v. Bush, filed in federal district court in California, produced the following opinions and substantive orders available on Lexis:

1. Newdow v. Bush, 2001 U.S. Dist. Lexis 25937 (E.D. Cal. July 18, 2001)
2. Newdow v. Bush, 2001 U.S. Dist. Lexis 25936 (E.D. Cal. Dec. 28, 2001)
3. Newdow v. Bush, 2002 U.S. Dist. Lexis 27758 (E.D. Cal. Mar. 26, 2002)
4. Newdow v. Bush, 2002 U.S. Dist. Lexis 27759 (E.D. Cal. May 23, 2002)
5. Newdow v. Bush, 89 Fed. Appx. 624, 2004 U.S. App. Lexis 3452 (9th Cir. Feb. 17, 2004)

A second case, filed in federal district court in the District of Columbia, produced the following opinions and substantive orders:

1. Newdow v. Bush, 355 F. Supp. 2d 265 (D.D.C. Jan. 14, 2005)
2. Newdow v. Bush, 2005 U.S. App. Lexis 1311 (D.C. Cir. Jan. 16, 2005)
3. Newdow v. Bush, 2005 U.S. App. Lexis 6546 (D.C. Cir. Apr. 14, 2005)
4. Newdow v. Bush, 391 F. Supp. 2d 95 (D.D.C. Sept. 14, 2005)

Lowell V. Sturgill Jr.
Attorney, Civil Division
Appellate Staff, Room 7241
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 514-3427
Lowell.Sturgill@USDOJ.GOV

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Cases: **Page**

---

[1] Authorities upon which the federal defendants principally rely are marked by an asterisk.

Constitution:

Statutes:

Legislative Materials:

Miscellaneous:

GLOSSARY

AFIC	Armed Forces Inaugural Committee
JCCIC	Joint Congressional Committee on Inaugural Ceremonies
PIC	Presidential Inaugural Committee
RFRA	Religious Freedom Restoration Act

ORAL ARGUMENT NOT YET SCHEDULED

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

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

Statement of Jurisdiction

The complaint alleges claims under the First and Fifth Amendments to the Constitution, asserting jurisdiction in the district court pursuant to 28 U.S.C. 1331, 1346(a)(2), 1343(a)(4), 1361, and 2202. *See* Complaint, ¶¶ 1-6, Appendix ("App.") 5. On March 12, 2009, the district court entered an order dismissing all the claims of all the parties. *See* Order (App. 144). Plaintiffs filed a notice of appeal on April 9, 2009. *See* App. 147. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

Statement of the Issues Presented for Review

1. Whether plaintiffs' claims relating to the 2009 inauguration are moot.

2. Whether plaintiffs lack Article III standing to bring this action.

3. Whether plaintiffs' claims are foreclosed by Supreme Court precedent.

Statutes Involved

The statutes involved in this appeal are reproduced in Appellants' Brief and in an Addendum to this Brief.

Statement of the Case

After having tried unsuccessfully in two prior suits to obtain an injunction barring inaugural prayers by clergy, plaintiff Newdow filed this action, along with various new plaintiffs, to make the same claim with respect to President Obama's 2009 inauguration. Newdow and the new plaintiffs also challenge Chief Justice Roberts' recital of the words "so help me God" following the oath he recited to President Obama. Plaintiffs have not, however, sued President Obama, who stated the same words after taking his oath. Instead, they sued, among other defendants, a joint congressional committee Congress created to make the necessary arrangements for President Obama's inauguration ceremony and that committee's chairperson; a joint armed forces committee that was created to support the 2009 inauguration and that committee's chairman; and Chief Justice Roberts.

After filing their complaint, plaintiffs moved for a preliminary injunction barring defendants from allowing any inaugural prayers by invited clergy at the 2009 inauguration and barring Chief Justice Roberts from including the words "so help me God" in his recitation of the presidential oath. After briefing and a hearing, the district court denied the motion. Plaintiffs chose not to appeal that ruling, and the 2009 inauguration took place as planned. Subsequently, the district court ordered plaintiffs to explain why this action should not be dismissed as moot and for lack of Article III standing. After the parties briefed the issue, the district court dismissed this case for lack of standing, noting, among other things, that plaintiffs' alleged injuries are too generalized to provide standing and are not redressable. This is an appeal of that ruling.

Statement of Facts

1. Prior *Newdow* Litigation Regarding Inaugural Prayer

a. *Newdow I*

In February, 2001, shortly after the presidential inauguration of that year, Michael Newdow filed a challenge to the inaugural prayer that the Rev. Franklin Graham delivered at that inauguration. *See* Complaint, *Newdow* v. *Bush*, No. 01-0218 (E. D. Cal.) ¶¶ 12-13, Federal Defendants' Supplemental Appendix (hereinafter "Supp. App.") 3-4. The complaint requested a declaration that President Bush

violated the Establishment Clause by "utilizing any clergyman (much less a Christian minister) in his inauguration," and an injunction barring President Bush "from repeating this or engaging in any similar religious acts." *Id.* at 7 (Supp. App. 7).

The district court dismissed that action insofar as Newdow sought an order that the President or a chaplain may not say any prayer as part of a presidential inauguration, *see* Order of Sept. 28, 2001 (Supp. App. 24), adopting the Magistrate Judge's conclusion that the "history of inaugural prayers, like the history of legislative prayers, indicates that they were not viewed [by the framers] as violating the Establishment Clause." See Magistrate Judge Findings and Recommendations at 9 (Supp. App. 19). Subsequently, the district court accepted the Magistrate Judge's recommendation that the remainder of Newdow's first inaugural prayer suit be dismissed because a court cannot enjoin or grant declaratory relief against the President or Congress or any member thereof concerning the planning or carrying out of a presidential inaugural ceremony. *See* May 23, 2002 Order (Supp. App. 54); Supp. App. 32-35. Likewise, the district court also adopted the Magistrate Judge's conclusion that Newdow lacked standing to challenge the content of prayer at future inaugurations because, among other reasons, the court could not assume that any future presidential inauguration would necessarily include the kind of specific religious references that Rev. Graham's prayer contained. *See* Supp. App. 35-38.

Newdow appealed the district court's rulings in *Newdow I*, but the Ninth Circuit affirmed, holding that Newdow "lacks standing to bring this action because he does not allege a sufficiently concrete and specific injury." *Newdow* v. *Bush*, 2004 WL 334438 *1 (9th Cir. Feb. 17, 2004) (citation omitted).

b. *Newdow II*

On December 21, 2004, Newdow filed a second lawsuit challenging the practice of inaugural prayer, this time in the United States District Court for the District of Columbia. This suit sought a declaratory judgment that inaugural prayers violate the Establishment and Free Exercise Clauses and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb, and requested the court to enjoin the defendants "'from utilizing any clergymen to engage in any religious act" and "from utilizing clergymen to engage in Christian religious acts at the 2005 Inauguration or future Presidential inaugurations." *Newdow* v. *Bush*, 355 F. Supp. 2d 265, 271 (D.D.C. 2005).

On January 14, 2005, the district court denied Newdow's application for a preliminary injunction. *See Newdow* v. *Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005). Newdow filed an emergency motion for an injunction pending appeal with this Court, but that motion was denied on the ground that Newdow "has not shown a substantial likelihood of success on his challenge." *Newdow* v. *Bush*, 2005 WL 89011 (D.C. Cir.

Jan. 16, 2005). Three days later, the Supreme Court also denied a motion for an injunction pending appeal filed with that Court. *See Newdow* v. *Bush*, No. 04A623 (S. Ct. Jan. 19, 2005).

After the 2005 inauguration took place, the district court dismissed Newdow's second inaugural prayer suit. *See Newdow* v. *Bush*, 391 F. Supp. 2d 95 (D.D.C. 2005). The court held (1) that Newdow was precluded by *Newdow I* from relitigating his standing, *id.* at 101; (2) that Newdow lacked standing to challenge religious activity at the 2005 inauguration or at any future inaugurations because he "does not come into regular contact with the inaugural prayers, nor is he forced to change his typical routine to avoid them," *id.* at 104; and (3) that Newdow's claims were not redressable because "the President himself has the exclusive decision-making authority as to whether there will be religious prayer at an inauguration," *ibid.*, and because the court lacked authority to enjoin the President. *See id.* at 106. The district court also held that Newdow's challenge to the 2005 inauguration was moot because the court "cannot now rule on the constitutionality of prayers yet unspoken at future inaugurations," *id.* at 108, and because "the period between a President's election and inauguration is not too short to permit judicial review." *Ibid.* For the same reasons, the court held that Newdow lacked standing to challenge ceremonial prayer at future presidential inaugurations. *See ibid.* Newdow did not appeal those rulings.

2. The Present Suit

On November 4, 2009, Barack Obama was elected President of the United States. Pursuant to the Twentieth Amendment of the Constitution, President Obama's term of office was set to begin at noon on January 20, 2009. *See* U.S. Const. Amend. XX, § 1.

Similar to the other Presidents who have been elected since 1989, *see* http://inaugural.senate.gov/history/chronology/index.cfm (Supp. App. 113), President-Elect Obama chose to take his oath of office in an inauguration ceremony to be conducted on the West Front of the United States Capitol Building. As a result, Congress created a Joint Congressional Committee on Inaugural Ceremonies ("JCCIC") to help make the necessary arrangements for the ceremony, naming Senator Feinstein as Chairperson. *See* S. Con. Res. 67 (Feb. 28, 2008).[1] Additional support for the inauguration was set to be provided by a joint military inter-service committee (the Armed Forces Inaugural Committee, or "AFIC"), whose Chairman was General Richard J. Rowe, Jr. *See* Groppel Decl. (App. 49-53). President-elect Obama requested the Chief Justice of the United States, John G. Roberts, Jr., to administer the presidential oath of office.

[1] Additional information regarding the JCCIC may be found at http://inaugural.senate.gov.

In addition, the President-elect appointed a private entity, the Presidential Inaugural Committee ("PIC"), to coordinate numerous ceremonial events associated with the 2009 inauguration, including the inaugural parade and inaugural balls,[2] and requested two private clergy members (Revs. Rick Warren and Joseph Lowery) to deliver an invocation and a benediction, respectively, during the inauguration ceremony.

Approximately two weeks after learning of the President-elect's plans for his inauguration, plaintiffs filed this suit against the JCCIC and its Chairperson, Senator Dianne Feinstein; the AFIC and its Chairperson, Major General Richard J. Rowe, Jr.; Chief Justice Roberts; the PIC and its then-Executive Director (Emmett Beliveau); and Revs. Warren and Lowery. *See* Complaint, ¶¶ 47-55 (App. 13-14). The complaint, which was filed on December 30, 2008, sought a declaration that adding "so help me God" to the presidential oath of office by the individual administering that oath to the President, and the government-sponsored use of any clergy at a presidential inauguration, both violate the Establishment and Free Exercise Clauses of the First Amendment. *See* Complaint, R1, p. 38.

---

[2] *See* 36 U.S.C. 501 (defining the PIC as "the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony").

The complaint also sought injunctive relief in the form of an order (1) barring Chief Justice Roberts from reciting the words "so help me God" as part of his administration of the oath of office to President Obama or at any future presidential inauguration, and (2) barring defendants from utilizing any clergy to engage in any religious acts at President Obama's inauguration or any future presidential inauguration. *See* Complaint, R1, p. 38.

On January 5, 2009, plaintiffs moved for a preliminary injunction. Plaintiffs sought to preclude Chief Justice Roberts from reciting the words "so help me God" as part of the presidential oath, and to bar the remaining defendants from complying with President Obama's wish to solemnize the occasion with an invocation and benediction. After a hearing, the district court denied the motion by order of January 16, 2009. The district court concluded that plaintiffs lack standing to bring this action because they cannot show any concrete and particularized injury, because the injury they allege would not be redressed by an order running against the defendants they chose to sue, and because the Court lacked authority to award the relief they requested. *See* Order at 2 (App. 62). The court also concluded that Newdow is collaterally estopped from relitigating whether he has standing to challenge the inclusion of an invocation and benediction at the 2009 Inauguration based upon his prior unsuccessful attempts to bar such activities in 2001 and 2005. *See ibid.*

Newdow chose not to appeal the district court's denial of his motion for a preliminary injunction, and President Obama's inauguration proceeded as planned on January 20, 2009. Revs. Warren and Lowery delivered an invocation and a benediction, respectively, and President Obama and Vice-President Biden both recited "so help me God" after taking their oaths of office, as did Chief Justice Roberts and Justice Stevens in administering those oaths. *See* 155 Cong. Rec. S661-S668 (daily ed.) (Jan. 20, 2009) (Supp. App. 108-112).

Subsequently, the district court directed the plaintiffs to show cause why their action should not be dismissed for lack of standing and, with respect to plaintiff Newdow, on collateral estoppel grounds. *See* Order at 2 (App. 62). The court also directed plaintiffs to explain why this case is not moot. *See* Order (App. 103). Based on the parties' responses to those requests, the court dismissed the complaint for the reasons identified in its order denying plaintiffs' motion for a preliminary injunction. *See* App. 144-146. The district court also noted that it would not be ruling on plaintiffs' motion for leave to amend their complaint (which sought to add plaintiffs and to challenge the 2013 and 2017 inaugurations), because the additional plaintiffs are similarly situated to the current plaintiffs and because "the speculative nature about what will occur at the next two Inaugural ceremonies lacks any persuasive value." Order at 2 (App. 145). Plaintiffs appeal that order.

Summary of Argument

Plaintiffs' claims as they relate to the 2009 Inauguration are moot. Plaintiffs seek only injunctive and declaratory relief, and no order from this Court can change the fact that Revs. Warren and Lowery offered ceremonial prayers and that Chief Justice Roberts (to honor President Obama's wishes) included the words "so help me God" in administering the presidential oath.

Plaintiffs suggest that their claims come within the exception to the mootness doctrine for issues that are capable of repetition, yet evade review. They can prove neither element of that exception. A claim is capable of repetition only if there is a demonstrated probability it will recur, and not if its recurrence is speculative or conjectural. As we explain below, it is purely conjectural whether the Presidents-elect in 2013 or 2017 (the inaugurations plaintiffs specify) will invite anyone to offer an inaugural prayer, or will want to include the words "so help me God" in their oaths of office (which is why Chief Justice Roberts included those words in administering President Obama's oath). Moreover, plaintiffs are barred from arguing that their inaugural oath and prayer claims would "evade review" because plaintiffs failed to appeal the denial of their motion for a preliminary injunction or otherwise seek interim relief from this Court to protect the status quo prior to the 2009 presidential inauguration.

Plaintiffs also lack standing to bring this action. The harms they allege are far too generalized to show the kind of concrete, direct, and personal harm Article III requires. Plaintiffs all watched the 2009 inauguration on television, on the internet, or via some other form of mass media exposure. Millions of other Americans did the same thing, however, and plaintiffs' allegations of "mass media standing" would essentially allow any interested citizen to bring a federal case to ensure that the government implements the law correctly. Accordingly, as the Supreme Court has repeatedly held, that kind of interest does not provide standing to sue in federal court. Plaintiffs also cannot identify any cognizable Article III injury regarding the 2013 and 2017 inaugurations because it is completely speculative whether those events will include any of the practices plaintiffs find objectionable. Whatever happens in 2013 and 2017 is completely dependent on who is elected the President-elect in those years, and that is obviously a matter of pure conjecture at this point.

Plaintiffs also cannot show that any of the named federal defendants caused the injuries they allege, or that an order from this Court running against those defendants would redress any of those injuries. As the district court correctly concluded, the content of any inauguration is fairly traceable only to the President-elect, who determines the content of his or her inaugural ceremony. For the same reason, only an order against the President-elect could truly prevent the injuries plaintiffs allege.

As the district court rightly concluded, none of the federal defendants can prevent the President-elect from inviting someone to say an inaugural prayer or to administer the presidential oath in the form the President wishes. Furthermore, the two federal inaugural committees who are defendants here (the JCCIC and the AFIC) ceased all operations after the 2009 inauguration took place, and no relief could be obtained against the JCCIC or its Chair for separation of powers reasons anyway.

Because the Court lacks Article III jurisdiction over any of plaintiffs' claims, it should affirm the dismissal of those claims without reaching the merits. The Court also could affirm on the merits, however, if it holds that it has jurisdiction to do so, because those claims are foreclosed by Supreme Court precedent. In *Marsh* v. *Chambers*, the Supreme Court upheld the practice of opening legislative prayers on a rationale that is equally applicable to inaugural prayer. Likewise, the Supreme Court also has specifically approved the practice of using the words "so help me God" in the President's oath of office, words the First Congress itself decided should be part of the oath of office for federal judges.

Statement of the Standard of Review

Appellate review of a district court order dismissing a party's complaint for lack of standing is *de novo*. *See*, *e.g.*, *Young America's Foundation* v. *Gates*, 573 F.3d 797, 799 (D.C. Cir. 2009).

Argument

I. Plaintiffs' Challenge to the 2009 Inauguration is Moot.

Article III of the Constitution allows federal courts to decide only cases or controversies. *See*, *e.g.*, *Burke* v. *Barnes*, 479 U.S. 361, 363 (1987). A live case or controversy must exist not only when a case is filed, but "at the time that a federal court decides the case." *Id.* at 363. *See also Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) ("[t]o qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed'"), *quoting Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). Thus, when a case becomes moot, *i.e.*, "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome,'" *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980) (citation omitted), the court no longer has power to decide the matter.

The heart of the mootness doctrine is the court's ability to grant effective relief. Thus, it is settled law that an action becomes moot if it becomes impossible for a court, at any stage in the proceedings, to remedy the complained-of injuries. *See Arizonans for Official English*, 520 U.S. at 68. *See also Fund for Animals, Inc.* v. *U.S. Bureau of Land Management*, 460 F.3d 13, 22 (D.C. Cir. 2006); *Beethoven.com LLC* v. *Library of Congress*, 394 F.3d 939, 950 (D.C. Cir. 2005).

Plaintiffs' complaint seeks only declaratory and injunctive relief with respect to the 2009 presidential inauguration. *See* pp. 8-9, *supra*. This Court, however, cannot issue any meaningful injunctive relief pertaining to that event. No injunction can unspeak the Chief Justice's use of "so help me God" in administering President Obama's oath of office, or change the fact that Rev. Warren and Rev. Lowery offered inaugural prayers. Moreover, it is hornbook law that a request for declaratory relief does not prevent a case from becoming moot where, as here, the event in question has already occurred and the court cannot order any effective relief for the plaintiff. *See Moore's Federal Practice* (3d ed. 2009), § 101.95, p. 101-261 (citing cases). *See generally Aulenback, Inc.* v. *FAA*, 103 F.3d 156, 162 (D.C. Cir. 1997); *Nashville Lodging Co.* v. *Resolution Trust Corp.*, 59 F.3d 236, 250 (D.C. Cir. 1995). As a result, plaintiffs' challenge to the 2009 inauguration is moot.

Plaintiffs' challenge to the 2009 inauguration does not fall within the exception to the mootness doctrine for cases that are capable of repetition, yet evade review. That exception is a narrow one, which applies only in extraordinary circumstances. *See Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). Plaintiffs bear the burden of proving that this exception applies here, *see*, *e.g.*, *Southern Co. Services, Inc.* v. *FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005), and for the reasons explained below, they cannot meet that burden.

A. Plaintiffs' Claims Are Not "Capable of Repetition" Because There Is No "Demonstrated Probability" That the Actions They Challenge Will Recur in 2013 or 2017.

"For an injury to be deemed capable of repetition, "there must be a 'reasonable expectation' or 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Spirit of the Sage Council* v. *Norton*, 411 F.3d 225, 253-54 (D.C. Cir. 2005), *quoting Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). A mere "theoretical possibility" that the same controversy will recur involving the same party is not enough, *id.* at 254, *quoting Beethoven.com LLC*, 394 F.3d at 951; *accord Pharmachemie B.V.* v. *Barr Laboratories, Inc.*, 276 F.3d 627, 634 (D.C. Cir. 2002), nor is reliance on a future occurrence that is "speculative," *id.* at 631, or that depends on a "combination of . . . contingencies," *id.* at 634.

For example, in *Fund for Animals*, this Court held that the capable of repetition doctrine did not apply to a challenge to an expired agency strategy for restoring wild horses and burros on public lands. In so ruling, this Court noted that "[h]ow a herd will be managed in the future is anyone's guess," since the possibility plaintiffs' asserted future harms would occur could depend on "climate, how many new births occur, on the mortality rate of the horses, on whether fertility control is used as a management tool, and on many other factors specific to a herd and to the area in which it is located." 460 F.3d at 22.

Similarly, in *People for the Ethical Treatment of Animals, Inc.* v. *Gittens*, 396 F.3d 416 (D.C. Cir. 2005), this Court held that a group's challenge to its exclusion from a public arts program was not "capable of repetition" because "[t]o conclude that a dispute like this would arise in the future requires us to imagine a sequence of coincidences too long to credit." *Id.* at 424 (noting that "[t]he District would have to sponsor another such arts display; it would have to call upon private parties to participate in the design of the objects, while it retained ownership of the resulting artwork; [and] in light of the particular art, PETA would have to believe it could advance its cause by participating in the program").

Similar to *Fund for Animals* and *Gittens*, there is no "demonstrated probability" that the 2013 and 2017 presidential inaugurations will include prayers or the words "so help me God" in the President-elect's oath, and the possibility that those events will occur is dependent on a combination of contingencies. Those contingencies include who is elected President in those years; what those Presidents-elect will want to be said at their inaugurations; whom they will invite to participate in their inaugurations; and, indeed, whether they will have any kind of public inauguration ceremony at all.

Thus, for the same reasons the claimed future harms in *Fund for Animals*, *Gittens*, and other similar cases were too conjectural to provide a live controversy, plaintiffs' concerns about what may happen in 2013 and 2017 also are too speculative to support Article III standing. *See also Habecker* v. *Town of Estes Park*, 518 F.3d 1217, 1225 (10th Cir. 2008) (holding that an alleged injury that is dependent on the outcome of an election too speculative to present Article III case or controversy); *Winpisinger* v. *Watson*, 628 F.2d 133, 137-39 (D.C. Cir. 1980) (same), *cert. denied*, 446 U.S. 929 (1980).

B. Plaintiffs' Claims Regarding the 2013 and 2017 Inaugurations Also Would Not Evade Review.

In *Armstrong* v. *FAA*, 515 F.3d 1294 (D.C. Cir. 2008), this Court "join[ed] every other circuit to have considered the matter and conclude[d] that a litigant who could have but did not file for a stay to prevent a counter-party from taking any action that would moot his case may not, barring exceptional circumstances, later claim his case evaded review." *Id.* at 74 (citations omitted). *See also*, *e.g.*, *Iowa Protection and Advocacy Servs.* v. *Tanager, Inc.*, 427 F.3d 541, 544 (8th Cir. 2005) (noting that an action does not evade review for purposes of applying the mootness doctrine if the party could have sought, but did not seek, expedited review or an injunction pending appeal).

Armstrong precludes plaintiffs from arguing that their claims regarding the 2013 and 2017 inaugurations would evade review. Although plaintiffs sought a preliminary injunction from the district court that would have prevented the harms they challenge, they failed to appeal the denial of that motion in this Court or to seek any kind of stay or emergency injunction pending appeal from the district court or from this Court. *See* p. 10, *supra*.[3] "When a party has these legal avenues available, but does not utilize them, the action is not one that evades review." *Iowa Protection*, 427 F.3d at 541.

II. Plaintiffs Lack Article III Standing to Bring this Action.

"Article III of the Constitution limits the jurisdiction of federal courts to "'Cases'" and "'Controversies.'" *Lance* v. *Coffman*, 549 U.S. 437, 439 (2007). "One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Ibid.*, *citing Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). *Accord FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) (plaintiff has burden to allege facts demonstrating standing, *i.e.*, that the plaintiff "is a proper party to invoke judicial resolution of the dispute'") (citation omitted).

---

[3] Although plaintiffs submitted an amended complaint that asserted claims regarding the 2013 and 2017 inaugurations, their original complaint also sought relief with respect to future inaugurations. *See* Complaint, R1 (Prayer for Relief).

The Article III standing inquiry is "especially rigorous" where, as here, reaching the merits of the dispute would require a court to decide whether an action taken by one of the other two branches of the Federal government is unconstitutional. *See Raines* v. *Byrd*, 521 U.S. 811, 819-20 (1997).[4]

Because plaintiffs' claims relating to the 2009 inauguration are moot, this Court need not address whether they have standing to bring those claims. As we explain below, however, the district court correctly held that plaintiffs lack Article III standing to bring those claims, as well as their claims relating to the 2013 and 2017 inaugurations.

A. Plaintiffs Cannot Establish Article III Injury In Fact With Respect To Any Of Their Claims.

To identify the kind of harm that will support Article III standing, a plaintiff must be able to prove injury that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (citations omitted). As we demonstrate below, plaintiffs cannot satisfy these jurisdictional requirements either with respect to the 2009 inauguration or with respect to the 2013 and 2017 inaugurations.

---

[4] Here, of course, plaintiffs have sued, among other defendants, a joint committee of Congress (the JCCIC) and its Chairperson, Senator Feinstein, as well as an Executive Branch committee (the AFIC) and its Chairperson.

1. Plaintiffs Have Not Alleged Any Injury that is Particularized and Concrete, As Opposed to Generalized and Abstract.

As the Supreme Court has consistently held, neither a "generalized grievance" nor harm that is "abstract" is sufficient to support Article III standing. *See Lujan*, 504 U.S. at 560 (citations omitted); *see also id.* at 573 (a plaintiff who seeks relief that "no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy"); *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public"). Standing may not be predicated on an interest that is held by the public at large "because of the necessarily abstract nature of the injury all citizens share." *Schlesinger*, 418 U.S. at 220-221. The requirement of particularized harm thus helps ensure that the federal courts are not transformed into councils that virtually anyone can invoke "to require that the Government be administered according to law . . .." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-483 (1982) (citations omitted).

a. In *Valley Forge*, the Supreme Court applied these principles in a context that is particularly relevant. The plaintiffs in *Valley Forge* sought to challenge a transfer of federal property to a religious organization. Plaintiffs learned about the transfer by viewing a news release. *See* 454 U.S. at 486-487. The Supreme Court held that the plaintiffs' alleged harm was too generalized, and that to rule otherwise would allow citizens "to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

The harm plaintiffs allege in this case is the same kind of harm alleged in *Valley Forge* – unwanted exposure to government-related religious activity through the mass media. The plaintiffs in this case witnessed the 2009 inauguration the same way millions of other Americans did – by watching it on television, on the internet, or through some other form of mass media.[5] Similarly, while all the plaintiffs express the intent to view future presidential inaugurations, none identifies any intent to do so in any way that would not be shared by "a large class of citizens." *Warth*, 422 U.S. at 499.

---

[5] Newdow alleges that he and a child had tickets to the 2009 inauguration but that they ended up watching the inauguration on television. *See* First Amended Complaint, ¶ 8 (App. 118). Likewise, two other plaintiffs allege they had tickets to the 2009 inauguration, but that they planned to watch the event on one of the large video screens that were erected on the Mall for that purpose. *See* Complaint, ¶¶ 24, 25 (App. 8-9). Another plaintiff alleged that she would be attending the ceremony but did not specify how she planned to watch the event. *See id.* ¶ 27 (App. 9).

It follows, then, that none of these plaintiffs has suffered, or will suffer, the kind of particularized harm that Article III standing principles require, as the district court held below, and as the Ninth Circuit correctly found in *Newdow I*, *see* p.5, *supra.* *Accord Caldwell* v. *Caldwell*, 545 F.3d 1126 (9th Cir. 2008) (public school child's parent's viewing of internet web site regarding evolution that was created and maintained by a public university failed to state injury-in-fact cognizable under Article III), *cert. denied*, 129 S. Ct. 1617 (2009).

The Supreme Court's decision in *Lujan* further confirms the fatally generalized nature of plaintiffs' alleged injury here. In *Lujan*, the Court held that "[i]t goes beyond the limit . . . to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." 504 U.S. at 567. As the Court went on to explain, "[i]t cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world." *Ibid*.

To hold that the plaintiffs' media access to presidential inaugurations provides Article III injury would expand the doctrine of standing in precisely the way *Lujan* forbids, by allowing plaintiffs "anywhere in the world" to bring a federal court action challenging anything they choose to view on television, the internet, or any other

mass media source. That kind of standing regime would open the door for any citizen with a strongly-held view of the law to file suit in federal court "to require that the Government be administered according to law . . ." *Valley Forge*, 454 U.S. at 482-483 (citations omitted), an idea the Supreme Court has consistently rejected.

Plaintiffs' view of the law also would effectively allow a plaintiff to create his or her own Article III standing,[6] an idea the Supreme Court also has repeatedly denounced. *See Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (holding that "self-inflicted" injuries do not establish Article III standing). *See also McConnell* v. *FEC*, 540 U.S. at 228 (plaintiffs lacked standing to challenge election financing law based on their alleged inability to compete effectively in elections because that alleged inability "stems not from the operation [of the law,] but from their own personal 'wish' not to solicit or accept large contributions"). For all the above reasons, therefore, the harm plaintiffs allege in this case is insufficiently particularized to support Article III standing requirements.

---

[6] For example, plaintiff Newdow explains that he resolved to attend the 2009 inauguration and future inaugurations "to cure the alleged 'defect'" the district court had found in the standing allegations he advanced in support of his attempt to obtain a federal injunction against prayers at the 2005 presidential inauguration. Appellants' Brief at 52.

b. Plaintiffs' alleged injuries also are too fleeting, too irregular, and too abstract to satisfy Article III. As the Supreme Court noted in *Valley Forge*, "a plaintiff does not sufficiently allege injury-in-fact for the purposes of Article III standing where the only harm is psychological injury 'produced by observation of conduct with which one disagrees.'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). *Accord Allen* v. *Wright*, 468 U.S. 737, 755 (1984) ("abstract stigmatic injury" insufficient by itself to create Article III injury in fact); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury); *Kurtz* v. *Baker*, 829 F.2d 1133, 1141 (D.C. Cir. 1987) ("allegations of stigmatic injury will not suffice to link a plaintiff personally to the conduct he challenges unless . . . the plaintiff personally has been denied a benefit"), *cert. denied*, 486 U.S. 1059 (1988).

For example, in *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1918 (2009), this Court recently held that former Navy Chaplains lacked standing to argue that the Navy was unlawfully favoring Catholic chaplains in its retirement policies. The plaintiff chaplains alleged that they had standing because they came into personal contact with Catholic chaplains whom they alleged had been wrongfully retained. *See* 534 F.3d at 40.

This Court rejected that argument, holding that the plaintiffs had alleged nothing more than mere awareness of allegedly unconstitutional activity, which *Valley Forge* held insufficient to identify cognizable Article III injury-in-fact. *See* 534 F.3d at 37. By the same reasoning, the fact that the plaintiffs here have a deep personal aversion to all things religious does not give them Article III standing where, as here, their only personal connection to the stimuli they find so offensive occurs via mass media exposure, at most once every four years. *See Caldwell* v. *Caldwell*, 545 F.3d at 1133 (parent's exposure to government-run web site concerning evolution too abstract to provide Article III injury); *id.* at 1134 (Fletcher, J., concurring) ("inability unreservedly to use a government-run website" does not necessarily provide Article III injury; "[a]ccessing a web site is quick and easy, and the alleged offense from the content of one page out of 840 that one need not read or tarry over is fleeting at best"). Thus, as in *Lujan*, plaintiffs have failed to prove that they would be "'directly' affected" by prayers or the words "so help me God" in presidential inaugurations "apart from their ''special interest' in th[e] subject.'" 504 U.S. at 562 (citations omitted). *See also Valley Forge*, 454 U.S. at 486 ("the psychological consequence presumably produced by observance of conduct with which one disagrees" does not create Article III injury-in-fact).

Moreover, this is not a case, similar to the school prayer cases plaintiffs cite,[7] where the plaintiffs are required or coerced in any way to be exposed to unwanted religious activity. The National Mall is not a public school, and plaintiffs are in no way obliged to watch the President-elect, who is a private citizen with Free Exercise Clause rights, as plaintiffs concede, *see* Transcript of Jan. 15, 2009 Hearing at 12 (Supp. App. 105), recite his oath of office. Likewise, no President-elect is required by the Constitution or by any law to televise his or her swearing-in or open it to the public at all. Thus, the fact that any particular President-elect chooses to do so does not thereby confer on the general public any constitutionally-cognizable interest in dictating the content of his or her inaugural ceremony.[8]

---

[7] Only a few of those cases even discussed standing. Those that did not are not precedent concerning standing. *See In re Navy Chaplaincy*, 534 F.3d at 764 ("cases in which jurisdiction is assumed *sub silentio* are not binding for the proposition that jurisdiction exists") (citation omitted).

[8] Neither is there any merit to plaintiffs' suggestion that the Supreme Court's Free Exercise Clause jurisprudence precludes a court from analyzing whether they have Article III injury in this case. *See* Appellants' Br. at 16. While a court in a Free Exercise case may not question the truth, logic, or centrality of a plaintiff's religious beliefs, a plaintiff always needs Article III standing to bring an action in federal court, and a court has an independent obligation to assure itself that each element of Article III's case or controversy requirement is met in each case. *See*, *e.g.*, *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142, 1152 (2009) (rejecting the idea that a court is required to accept a party's "self-descriptions" of their basis for asserting Article III injury). *See also In re Navy Chaplaincy*, 534 F.3d 756, 762 (D.C. Cir. 2008) (holding that the "mere allegation" of Establishment Clause injury, without more, is not sufficient to show injury-in-fact for purposes of Article III standing).

2. Plaintiffs Also Cannot Prove Article III Injury With Regard to the 2013 and 2017 Inaugurations Because the Government Action They Are Concerned Will Occur is Conjectural and not Imminent.

Plaintiffs also cannot show Article III injury insofar as they wish to challenge what may occur in the 2013 and 2017 inaugurations because any such harm is far too speculative to provide an Article III case or controversy. As the Supreme Court has consistently noted, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Lujan*, 504 U.S. at 564 (citation omitted).

The 2009 presidential inauguration obviously has already taken place, and plaintiffs have not alleged or proved that it will cause them any "continuing, present adverse effects" that are cognizable under Article III. *See City of Los Angeles* v. *Lyons*, 461 U.S. 95, 107 n.8 (1983) ("emotional consequences of a prior act simply are not a sufficient basis for an injunction"). As a result, plaintiffs have standing to challenge the 2013 and 2017 inaugurations only if they can show harm that is (1) not "conjectural or hypothetical," and (2) "imminent." As we explain below, plaintiffs can make neither showing.

a. Whether the 2013 and 2017 Inaugurations Will Include the Activities Plaintiffs Oppose is Completely Speculative.

In *Lujan*, the Supreme Court held that a plaintiff who wishes to sue in federal court to challenge future activity must show that his or her alleged injury is "“”’*certainly* impending.”””’ 504 U.S. at 564 n.2 (emphasis in original) (citations omitted). *See also Lyons*, 461 U.S. at 105 (plaintiff who alleged he was subjected to an illegal "chokehold" by Los Angeles police did not have standing to seek an injunction against an alleged city policy of applying such chokeholds in nonlethal situations); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (holding that certain plaintiffs lacked standing to obtain injunction against possibility of future discriminatory enforcement of criminal law against them).

For example, in *Rizzo* v. *Goode*, 423 U.S. 362 (1976), the Supreme Court held that certain plaintiffs lacked standing to obtain an injunction against alleged widespread illegal and unconstitutional police conduct aimed at minority citizens and city residents in general. As the Supreme Court explained, the plaintiffs' alleged injury, which rested upon "what one or a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception" of departmental procedures, was simply too "attenuated" to support Article III standing. *See id.* at 372.

This case is like *Rizzo*. Whatever occurs at the 2013 and 2017 presidential inaugurations will depend on what some "unknown person" – the President-elect for those terms – decides regarding his or her inauguration. Neither the Constitution or any law provides any guidance or requirement concerning what may be said at a presidential inauguration, other than what words must be included in the presidential oath of office. Indeed, no law requires the President-elect to hold an inaugural ceremony at all, much less open it to the public. Neither does any law require the President-elect to invite another person to administer the presidential oath of office. All the Constitution requires is that the President-elect recite the constitutionally prescribed oath. *See* U.S. Const. Art. II, § 1, ¶ 8.

For all the above reasons, therefore, the district court below was right to conclude that plaintiffs' claims regarding future inaugurations are far too speculative to support Article III standing, *see* App. 144-146, which is the second time the district courts in this Circuit have so held. *See Newdow II*, 391 F. Supp. 2d at 108 (holding that Newdow lacked standing to request any court to "rule on the constitutionality of prayers yet unspoken at future inaugurations of Presidents who will make their own assessments and choices with respect to the inclusion of prayer").

Plaintiffs' claims against Chief Justice Roberts regarding future inaugurations are beset by additional contingencies. Whether Chief Justice Roberts will recite the words to which plaintiffs object in 2013 and 2017 will depend on, among other possible circumstances, (1) whether the Presidents-elect in 2013 and 2017 will invite the Chief Justice to administer their oaths of office;[9] (2) if so, whether Chief Justice Roberts will still hold that post in 2013 and 2017; and (3) whether the Presidents-elect in those years will decide to use those words in taking their oath of office, *see* Minear Decl., (App. 42) (noting that Chief Justice Roberts used the words "so help me God" because President Obama intended to do so himself). Thus, plaintiffs cannot assert "certainly impending" harm against Chief Justice Roberts concerning future inaugurations for these additional reasons, as well as for the other reasons stated above.

---

[9] Thus, for example, President Washington's first oath was administered by Robert Livingston, Chancellor of the State of New York; President Washington's second oath was administered by William Cushing, Associate Justice of the Supreme Court; President Tyler's oath was administered by William Cranch, Chief Justice of the U.S. Circuit Court; President Arthur's first oath was administered by John R. Brady, Justice of the New York State Supreme Court; President Theodore Roosevelt's first oath was administered by John R. Hazel, U.S. District Judge for the Western District of New York; President Coolidge's first oath was administered by John C. Coolidge, his father, a Notary Public; and President Johnson's first oath was administered by Sarah T. Hughes, U.S. District Judge for the Northern District of Texas. *See* The Architect of the Capitol, Presidential Oaths of Office, http://www.aoc.gov/aoc/inaugural/pres_list.cfm?renderforpring-1 (last visited Jan. 6, 2009).

b. Plaintiffs Also Cannot Identify Article III Injury With Respect to the 2013 and 2017 Inaugurations Because Any Such Harm is not "Imminent."

In *McConnell* v. *FEC*, 540 U.S. 93 (2003), plaintiffs challenged an amendment to a provision of the Communications Act of 1934 which requires that broadcast stations must sell a qualified candidate the "lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. 315(b)(1). The amendment plaintiffs challenged would have denied a candidate the benefit of that lowest unit charge unless the candidate "'provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office,' or the candidate . . . clearly identifies herself at the end of the broadcast and states that she approves of the broadcast." *Id.* at 225 (citation omitted).

The "McConnell plaintiffs" argued that they had standing to challenge the amendment set out above because Senator McConnell had testified "that he plans to run advertisements critical of his opponents in the future and that he had run them in the past." 540 U.S. at 225. In rejecting that argument, the Supreme Court noted that "[b]ecause Senator McConnell's term does not expire until 2009, the earliest day he could be affected by [the amendment challenged] is 45 days before the Republican primary election in 2008." Since it would be approximately five years before that day

would take place, the Supreme Court held that this alleged injury was "too remote temporally to satisfy Article III standing." *Id.* at 226.

The same is true here. The 2013 presidential inauguration is almost four years away, and the 2017 election almost eight. For the reasons expressed in *McConnell*, therefore, any putative harm that plaintiffs may suffer from those events is far too remote to support Article III standing to sue now.[10]

2. Plaintiffs Also Cannot Demonstrate That The Harm They Allege Was, or Will Be, Caused By the Named Defendants In This Action.

To prove Article III standing, plaintiffs also must be able to show "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 . . . th[e] result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560, 561, *citing Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Plaintiffs cannot meet this requirement with respect to the 2009 inauguration or the 2013 and 2017 inaugurations.

---

[10] For similar reasons, plaintiffs' challenge to the content of the 2013 and 2017 presidential inauguration ceremonies is not ripe for review at this time. *See* Moore's Federal Practice (3d ed. 2009), § 101.71, at p. 101-205 (noting that a suit in which a plaintiff lacks standing because he or she has not yet suffered injury in fact "also could be said to suffer from a lack of ripeness because the circumstances have not yet developed to the point where the court can be assured that a live controversy exists") (footnote omitted).

President-elect Obama determined the content of the 2009 inauguration. Thus, it was President-elect Obama who decided to invite Revs. Warren and Lowery to deliver an invocation and a benediction, respectively, and to invite Chief Justice Roberts to administer the presidential oath of office. The prayers rendered and the oath stated at the 2009 inauguration, therefore, were "fairly traceable" to the President-elect (who is not a defendant here) and not to any of the federal defendants who are before the Court. *See Newdow* v. *Bush*, 391 F. Supp. 2d at 104 (Newdow's 2005 inaugural prayer challenge not redressable against Congress or any Congress member because "the President himself has the exclusive decision-making authority as to whether there will be religious prayer at an inauguration"). Similarly, what will be said, and who will participate in, future presidential inaugurations are matters that will be decided by future Presidents-elect. Thus, if any such practices were to occur in the future, they would be "fairly traceable" only to any President-elect.

Plaintiffs argue that the named defendants had control over what is said during the 2009 inauguration because they "control[led] the venue and its access." Appellants' Br. at 31. The district court rightly rejected this argument, however, *see* App. 101, correctly observing that the *President-elect* controls the content of his or her inauguration – a proposition Newdow conceded in litigating his 2005 inaugural prayer action. *See Newdow*, 355 F. Supp. 2d at 280. *See also* Groppel Decl., ¶ 6-10

(App. 51-52) (noting that the AFIC had no control over whether clergy would be used at the 2009 inauguration and no authority over the content, wording, or manner of administration of the presidential oath of office).

In addition, as the district court also correctly found, plaintiffs cannot identify any cognizable harm resulting from Chief Justice Roberts' inclusion of the words "so help me God" that is distinct from, and additional to, the non-redressable harm plaintiffs allegedly suffered from hearing President-elect Obama say those words. *See* Hearing Transcript at 69-70 (App. 101) (noting that plaintiffs are not going to be harmed in any cognizable Article III sense "to the extent they are willing to be present and hear the words if President Obama says [them,]" because it is "very difficult to suggest that somehow the harm is remarkably greater if the Chief Justice" also says them). For all the above reasons, therefore, plaintiffs cannot prove the element of Article III causation with respect to any of their claims.

3. Plaintiffs Cannot Show That the Harm They Allege Is Redressable Against the Federal Defendants.

To establish standing, a plaintiff also must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'" in the case plaintiff seeks to bring. *Lujan*, 504 U.S. at 561 (citation omitted). For several reasons, plaintiffs cannot satisfy this element on any of their claims.

a. An Injunction Against The Federal Defendants Would Not Prevent the Harms Of Which Plaintiffs Complain Because the President-Elect Controls the Content of His or Her Inaugural Ceremony.

Plaintiffs claims are not redressable against the federal defendants for the same reasons plaintiffs cannot prove the element of causation: control over the content of the inauguration rests with the President-elect, who plaintiffs have chosen not to name as a defendant. *See* App. 99-100 (noting that "on the issue of redressability, the . . . analysis really comes down to a question of who has authority to have these words uttered at the inauguration, and I think in order to enjoin these words from being uttered, I would have to have the authority to enjoin the President-elect").[11]

Moreover, plaintiffs' claims also are not redressable against the federal defendants because nothing would have prevented President-elect Obama from simply inviting someone other than Revs. Warren and Lowery to provide ceremonial prayers, and someone other than Chief Justice Roberts to administer the presidential oath of office.

---

[11] Plaintiffs do not allege that Chief Justice Roberts had any role in inviting Revs. Warren and Lowery to deliver ceremonial prayers at the 2009 inauguration or that the Chief Justice would play any such role in the 2013 and 2017 inaugurations. Thus, plaintiffs cannot establish the element of redressability, or of causation, against Chief Justice Roberts concerning their inaugural prayer claims.

Plaintiffs suggest that the district court could have directed Chief Justice Roberts not to say the words "so help me God" in administering the oath of office to President-elect Obama because the administration of the presidential oath is a "ministerial act." Appellants' Br. at 34. As we have explained, however, Chief Justice Roberts decided to recite the words "so help me God" in administering President-elect Obama's oath because the *President-elect* had expressed the intention of doing the same thing himself. *See* p. 31, *supra*. Thus, the conduct plaintiffs challenge in this case with respect to Chief Justice Roberts resulted from a *discretionary* judgment on his part, and not from any legal duty imposed on him by the Constitution or by any law or regulation, much less any duty that could be described as ministerial.[12] Moreover, as we have already noted, even if an injunction against Chief Justice Roberts were to have been lawfully available, plaintiffs' claims against the Chief Justice would still not be redressable because President Obama could have invited some other person to administer his oath in the same way Chief Justice Roberts did.

---

[12] For example, while the Constitution states what words the President-elect must recite in taking his or her oath of office, *see* U.S. Const. Art. II, § 1, ¶ 8, it does not prevent the President-elect from reciting other words after taking his or her oath, and the presidential oath clause says nothing whatsoever about what the person who administers the presidential oath of office may say in doing so.

b. Plaintiffs' Claims Against the JCCIC, the AFIC, and the Chairpersons of those Committees Also Are Not Redressable Because the JCCIC and the AFIC No Longer Exist.

The Joint Congressional Committee on Inaugural Ceremonies ("JCCIC") was organized, and Sen. Feinstein appointed Chairperson of that Committee, for the sole purpose of providing the necessary arrangements for the 2009 Inauguration. *See* S. Con. Res. 67, 110th Cong. As a result, the JCCIC closed down its operations after the 2009 inauguration, and has for all practical and legal purposes ceased to exist. For the same reasons, Sen. Feinstein's role as Chair of that Committee also has come to an end. As a result, an injunction against the defendant JCCIC or Sen. Feinstein would not have any effect, either with respect to the 2009 inauguration or with respect to any future inauguration.

For the same reasons, plaintiffs also can obtain no meaningful relief against the defendant Armed Forces Inaugural Committee ("AFIC") or its Chairperson (Major Richard Rowe). The AFIC was organized for the sole purpose of assisting with the 2009 inauguration. *See* p. 7, *supra*. As a result, that Committee ceased all operations on March 31, 2009, and there is no Chairperson of that Committee, which no longer exists.

c. The Doctrine of Separation of Powers Precludes a Court From Granting Injunctive Relief Against the Defendant JCCIC or Senator Feinstein.

Even if the JCCIC had not naturally ceased to exist after the 2009 inauguration, plaintiffs could not obtain any relief against the JCCIC or its chairperson because of separation of powers concerns. No federal court has Article III power to direct any member of Congress or any congressional committee to take any official act or to refrain from taking any such act. As the Supreme Court explained in *Mississippi* v. *Johnson*, 71 U.S. 475 (1866), "[t]he Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department." *Id.* at 500. *See also Franklin* v. *Massachusetts*, 505 U.S. 788, 829 (Scalia, J., concurring) (noting that a court may no more "direct . . . the Congress to perform particular legislative duties" than it may order the President to take specific official acts); *Hearst* v. *Black*, 87 F.2d 68, 72 (D.C. Cir. 1936) (refusing to enjoin acts taken in performance of Congress's discretion). As a result, no court would have authority to grant injunctive or declaratory relief against the JCCIC or its chairperson with respect to their official legislative duties in assisting with the inauguration of the President.[13]

---

[13] We also note that plaintiff Newdow is collaterally estopped to argue that he has standing to challenge inaugural prayer, as he conceded below, *see* Transcript of Jan. 15, 2009 Hearing at 6-7 (Supp. App. 103-104), because, among other reasons,

III. Plaintiffs' Establishment Clause Claims Are Foreclosed On The Merits By Supreme Court Precedent.

Because this Court lacks jurisdiction to hear plaintiffs' claims, this Court should affirm the judgment below on that ground. If the Court were to conclude that it has jurisdiction over this action, however, it should still affirm because plaintiffs' Establishment Clause claims are foreclosed by Supreme Court precedent. *See generally Jones* v. *Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009) (court of appeals may affirm on any ground properly raised).

A. Plaintiffs' Challenge To the Practice of Inaugural Prayer Is Foreclosed By the Supreme Court's Decision in *Marsh* v. *Chambers*.

In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the Supreme Court rejected an Establishment Clause challenge to a state legislature's practice of beginning each of its sessions with a prayer offered by a chaplain paid out of public funds. *See id.* at 784-785. As explained below, the practice of inaugural prayer is constitutional for the same reasons the Supreme Court upheld opening legislative prayers in *Marsh*.

1. In *Marsh*, the Supreme Court noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the

---

he watched the 2009 inauguration in the same way he viewed the 2001 inauguration. *See* p. 22, *supra*. This Court need not reach this issue, however, because the Court lacks jurisdiction over this case for the reasons explained above.

history and tradition of this country." 463 U.S. at 786. As the Court explained, "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer," *id.* at 787-788, and a "statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789." *Id.* at 788 (citation omitted). Three days later, the Supreme Court noted, "the final agreement was reached on the language of the Bill of Rights . . .." 463 U.S. at 788 (citation omitted).

Based on the above history, the Supreme Court concluded that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment . . .." *Marsh*, 463 U.S. at 788 (footnote omitted). As the Court explained, "[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Id.* at 790. As a result, *Marsh* held that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not "an 'establishment of religion,'" but a "tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 786, 792 (emphasis added).

a. In upholding opening legislative prayers, *Marsh* did not draw any distinction between legislative prayer and prayer and references to God by the Executive or Judicial Branches. To the contrary, the Court phrased its holding and rationale in broad terms that could equally apply to all three branches. *See* 463 U.S. at 786 (noting that "[t]he opening sessions of legislative *and other deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country") (emphasis added); *id.* at 792 (noting that "[t]o invoke Divine guidance on a *public body* entrusted with making the laws" is not an establishment of religion) (emphasis added).

Moreover, the Supreme Court supported its holding in *Marsh* by referring to historical examples of ceremonial references to God by the Judicial and Executive Branches. For example, the Court noted that "[i]n the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court," and that "[t]he same invocation occurs at all sessions of this Court," 463 U.S. at 786 – a practice that originated with Chief Justice Marshall. *See Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Likewise, the Supreme Court noted, on the same day that final agreement was reached on the language of the Bill of Rights, "the House [of Representatives] resolved to request *the*

President to set aside a Thanksgiving Day to acknowledge 'the many signal favors of Almighty God.'" 463 U.S. at 788 n.9 (emphasis added). These references show that the Court did not draw any distinctions between the legislative, judicial, and executive branches with respect to the permissibility of ceremonial prayer and references to God.

b. *Marsh* also bars plaintiffs' inaugural prayer claims in this case because that practice, similar to opening legislative prayer, is "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. For example, George Washington, after swearing his oath of office on a Bible, offered the following prayer in his first inaugural address: "[i]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes." *Inaugural Addresses of the Presidents of the United States*, S. Doc. 101-10, p. 2 (1989). Shortly thereafter, in accordance with resolutions passed by the Senate and House of Representatives, *see* S. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2106 (1996) (footnote omitted), President Washington and members of the Senate and House

walked to St. Paul's Chapel, where Bishop Samuel Provoost, Chaplain of the Senate, read prayers from the Book of Common Prayer. *See id.* at 2107 (footnote omitted).

It is inconceivable that the members of the First Congress, who drafted the Establishment Clause, would have thought that Clause would prohibit the practice of presidential inaugural prayer – since they themselves passed the joint resolution, noted above, which directed the President, Vice-President and members of Congress to proceed after the President's oath "to Saint Paul's Chapel to hear divine service performed by the Chaplains of Congress." J. Gales, *The Debates and Proceedings in the Congress of the United States*, Vol. I (Gales and Seaton, 1834), at 18, *quoted in* M. Medhurst, "God Bless the President": The Rhetoric of Inaugural Prayer 60 (1980) (unpublished Ph.D. dissertation) (Supp. App. 64). *See Marsh*, 463 U.S. at 788 (noting that the same members of the First Congress who drafted the Establishment Clause also authorized the appointment of paid legislative chaplains).[14]

The practice of prayers being given at and in connection with presidential inaugurations has continued since the time of the First Congress. For example, Thomas Jefferson, whose views regarding church and state have been given substantial weight by the Supreme Court in interpreting the Establishment Clause,

---

[14] The above evidence also shows that the history of prayer at presidential inaugurations is inextricably linked with the history of legislative prayer, which *Marsh* upheld.

see, *e.g.*, *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 13 (1947), offered the following prayer in his first inaugural address: "[M]ay that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." *Inaugural Addresses of the Presidents of the United States*, *supra*, at 17. *See also id.* at 22-23 (noting that Jefferson invited his audience to join him in a similar prayer at his second inauguration).

Likewise, James Madison, who was the principal drafter of the Bill of Rights, *see Everson*, 330 U.S. at 13; *id.* at 523 (Jackson, J., dissenting), offered a similar prayer in his first inaugural address, where he invoked "the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." *Inaugural Addresses of the Presidents of the United States*, *supra*, at 28.

The practice of having clergy offer prayers in connection with presidential inaugurations also has continued since the First Congress.[15] During the period of

[15] Moreover, even if there were no such evidence of prayer *by clergy* at presidential inaugurations, the fact that Presidents themselves have said such prayers since our nation's earliest days would support the constitutionality of a prayer by clergy. If it is constitutional for the President himself or herself to say a prayer at his or her inauguration, it would make no sense to say that the President may not request

1793-1937, the Senate chaplain delivered the inaugural prayers in the Senate chambers as part of the administration of the oath of office to the Vice-President. *See* Epstein, 96 Colum. L. Rev. at 2174 n.137. *See also* Medhurst, *supra*, at 76 (Supp. App. 76) (noting that the inauguration of the Vice-President was held separately, and before, the inauguration of the President during those years so the Vice-President could "act in his role as President of the Senate and thus [] preside over the Senate on inauguration day"). Since 1937, the Vice President-elect has taken his oath of office in the same inauguration ceremony as the President-elect. *See* Medhurst, *supra*, at 76-77 (Supp. App. 76-77). Thus, since that time, Presidents-elect have resumed the original practice of having a clergy member recite a prayer during the presidential inauguration itself. *See* Epstein, 96 Colum. L. Rev. at 2107 (noting that prayers by Christian ministers "have been part of every [presidential] inaugural ceremony during the last sixty years"). These facts show that ceremonial inaugural prayer is "deeply embedded" in our nation's history and "woven into the fabric" of our current culture, *Marsh*, 463 U.S. at 786, 792, similar to the legislative prayers upheld in *Marsh*.

---

a clergy member to pray for him or her.

B. Supreme Court Precedent Also Forecloses Plaintiffs' Challenge To the Inclusion of "So Help Me God" in the Presidential Oath of Office.

In *Marsh*, as previously noted, the Supreme Court rejected an Establishment Clause challenge to the practice of legislative prayer because, among other reasons, Members of the First Congress voted to appoint and to pay a Chaplain for each House in the same week they also voted to approve the draft of the First Amendment for submission to the States. *See* 463 U.S. at 790. As the Court rightly concluded, "[i]t can hardly be thought that [those members] intended the Establishment Clause to the Amendment to forbid what they had just declared acceptable." *Ibid.*

The same reasoning supports upholding the constitutionality of President Obama's decision to include the words "so help me God" in his oath of office, and Chief Justice Roberts' decision to honor that decision by reciting the same words as he administered the oath to President Obama. In addition to authorizing opening legislative prayer, the First Congress also prescribed the following oath for federal judges when it passed the Judiciary Act of 1789:

> I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States. *So help me God*.

Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (Sept. 24, 1789) (emphasis added) (codified as amended at 28 U.S.C. § 453). This oath remains nearly unchanged from its original form and, notably, still contains the phrase "So help me God." 28 U.S.C. § 453.[16]

As the Supreme Court held in *Marsh* with respect to legislative prayer, it would defy reason to conclude that the members of the First Congress, who drafted the Establishment Clause, thought it to be violated by appending the words "so help me God" to the presidential oath, when they included precisely those words in the judicial oath. See *Marsh*, 463 U.S. at 790 (actions of the First Congress are "contemporaneous and weighty evidence" of the Constitution's "true meaning") (citation omitted); *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936)

---

[16] Section 8 of the Judiciary Act was originally codified in Section 712 of the Revised Statutes. *See* R.S. § 712 (1874). It was later reenacted as Section 257 of the Judicial Code of 1911. *See* Act of Mar. 3, 1911 ("An Act to codify, revise, and amend the laws relating to the judiciary."), ch. 231, § 257, Pub. L. No. 61-475, 36 Stat. 1087, 1161 (codified at 28 U.S.C. § 372 (1940)). The same Act repealed Section 712 of the Revised Statutes. *See id.* § 297, 36 Stat. 1168. The oath was recodified to its current location in the United States Code in 1948. *See* Act of June 25, 1948 ("An Act to revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary.'"), § 453, Pub. L. No. 80-773, 62 Stat. 869, 907 (codified at 28 U.S.C. § 453). From 1789 until the present day, the only modification to the oath (other than minor punctuation changes) took place in 1990, when the words "according to the best of my abilities and understanding, agreeably to" were stricken and replaced with the word "under." *See* Judicial Improvements Act of 1990, § 404, Pub. L. No. 101-650, 104 Stat. 5089, 5124 (Dec. 1, 1990).

(construction "placed upon the Constitution . . . by the men who were contemporary with its formation" is "almost conclusive").

If that were not enough to rebut plaintiffs' oath claims in this case, the Supreme Court has unreservedly described oaths ending with the words "so help me God" as consistent with the Establishment Clause, and has used them as a benchmark to measure the constitutionality of other government action. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), in declining to invalidate a state program allowing students to be released from public school for religious instruction, the Court cautioned against "press[ing] the concept of separation of Church and State to . . . extremes" by invalidating "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies" such as "'so help me God' in our courtroom oaths." *Id.* at 313. Similarly, in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), the Court explained, in the course of invalidating laws requiring Bible reading in public schools, that the Establishment Clause does not proscribe the numerous public references to God that appear in historical documents and ceremonial practices, such as oaths ending with "So help me God." *Id.* at 213. Were the Establishment Clause construed otherwise, a plaintiff "could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court,'" *Zorach*, 343 U.S. at 313, an objection which, if entertained, would reflect not

neutrality but "hostility toward religion." *Schempp*, 374 U.S. at 225.

Although *Zorach* and *Schempp* did not involve direct challenges to the recitation of the words "so help me God" after the presidential oath, they are nonetheless controlling precedent on the constitutionality of that practice. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996); *cf. United States* v. *Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (citation omitted). The Supreme Court's analysis of oaths ending in "so help me God" in *Zorach* and *Schempp* was an integral part of the rationale of each decision, since that analysis provided the constitutional baseline for permissible official acknowledgments of religion, against which the practices at issue in *Zorach* and *Schempp* were then measured.[17] Thus, the Supreme Court's express approval of the exact presidential oath language plaintiffs challenge in this case constitutes binding precedent.

---

[17] Likewise, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," *Seminole Tribe*, 517 U.S. at 67, that patriotic and ceremonial references to God such as the one in the Pledge of Allegiance ("one Nation under God"), the National Motto ("In God we trust"), our National Anthem ("And this be our motto 'In God is our Trust.'"), formal court cries ("God save the United States and this Honorable Court"), and, of course, public oaths, do not offend the Establishment Clause.

Finally, we note that the addition of the phrase "so help me God" in the presidential oath of office has long been traced to President George Washington's first inauguration. *See McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) ("George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words 'so help me God.'"); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 26-27 (2004) (Rehnquist, C.J., concurring) (noting that Washington "repeated the oath, adding, 'So help me God.'") (citing M. Riccards, *A Republic, If You Can Keep It: The Foundation of the American Presidency, 1700-1800*, at 73-74 (1987)). Other sources confirm that every subsequent President has followed Washington's lead, adding the words "so help me God" after the oath of office. 1 *Guide to the Presidency* 561 (Nelson, ed.) (2008).[18] Accordingly, the solemnization of the presidential oath with the words "so help me God," just like the practices of legislative prayer and inaugural prayer, is "deeply embedded in the history and tradition of this country," *Marsh*, 463 U.S. at 786, and, as already explained, is fully consistent with the Establishment Clause.

[18] Plaintiffs contend that President Washington's inclusion of the words "so help me God" in his first inaugural oath is a "myth," but they do not deny that there is at least one contemporaneous record of President Washington's having done so. *See* Complaint, p. 20 (App. 16).

C. Plaintiffs' RFRA Claims Also Are Foreclosed by Supreme Court Precedent.

Plaintiffs, who are all professed atheists, also bring claims under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb. RFRA provides that a "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the application of the burden to the person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest." *Id.* § 2000bb.

Plaintiffs cannot state a claim under RFRA because they are challenging what is at most the government's conduct of its own internal operations – how the President-elect chooses to memorialize and solemnize his taking the constitutionally-prescribed oath of office. Neither the Free Exercise Clause nor RFRA[19] "require[s] the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699-700 (1986) (noting that the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate

[19] As this Court recognized in *Henderson* v. *Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), Congress enacted RFRA in response to *Employment Division* v. *Smith*, 494 U.S. 872 (1990), "to restor[e] the test set forth in *Sherbert* v. *Verner*, 374 U.S. 398, (1963), as the standard for Free Exercise challenges to laws of general applicability." 253 F.3d at 15.

the conduct of the Government's internal procedures"). *Accord Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988). Thus, the clergy prayers and oath of office about which plaintiffs complain do not impose a "substantial burden" on plaintiffs' alleged exercise of religion, or, in this case, of "non-religion."

Moreover, plaintiffs have failed to identify any specific religious "'exercise' which is the subject of the burden to which [they object]," which is a prerequisite for bringing a RFRA or a Free Exercise suit. *See Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (noting that a RFRA or Free Exercise plaintiff must identify a "religious observance that the [challenged policy] impedes" or an "act[] in violation of his religious beliefs that it pressures him to perform"). Plaintiffs are free to conduct themselves as atheists whether or not clergy prayers or the phrase "so help me God" are uttered on January 20, 2009. Moreover, even if plaintiffs could identify a substantial burden on their professed atheistic/religious beliefs, they could still not state a claim under RFRA because the government has a compelling interest in allowing the President-elect to arrange for his inauguration as he sees fit.

Conclusion

For the foregoing reasons, this Court should affirm the district court's decision to dismiss this case against the federal defendants.

Respectfully submitted,

Tony West
Assistant Attorney General

Channing D. Phillips
Acting United States Attorney

Mark Stern
(202) 514-5089
/s/Lowell V. Sturgill Jr.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

September 2009

Certificate of Compliance

I hereby certify that the text of the accompanying Brief is composed in Times New Roman typeface, with 14-point type, in compliance with the type-size limitations of Federal Rule of Appellate Procedure 32(a)(5)(B). The Brief contains 12,716 words, according to the word count provided by Wordperfect 12.

s/s Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2009, I served the foregoing Appellee Brief for the Federal Defendants/Appellees on all parties who are registered with the Court's CM/ECF system by filing the document on that system, and on any other parties, if any, by delivering two copies of the brief to Federal Express for next-day delivery.

s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

Statutory Addendum

Table of Contents

42 U.S.C. 2000bb-1

(a) In General

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

36 U.S.C. 501

For purposes of this chapter –

(1) "Inaugural Committee" means the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony; and

(2) "inaugural period" means the period that includes the day on which the Presidential inaugural ceremony is held, the 5 calendar days immediately preceding that day, and the 4 calendar days immediately following that day.

47 U.S.C. 315 (b)(1)

The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed –

(A) subject to paragraph (2), during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(B) at any other time, the charges made for comparable use of such station by other users thereof.

1 Stat. 73, 76, Sec. 8

Sec. 8. *And be it further enacted*, That the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: "I, A.B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the constitution and the laws of the United States. So help me God."

28 U.S.C. 453. Oaths of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office:: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."