Final Brief for Appellees Presidential Inaugural Committee and Emmett Beliveau

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel for appellees Presidential Inaugural Committee and Emmett Beliveau certify as follows:

A. PARTIES AND AMICI

All parties, intervenors, and amici appearing before the District Court and in this Court are listed in appellants' brief.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in appellants' brief.

C. RELATED CASES

The lead plaintiff, Newdow, has filed substantially similar lawsuits twice before, once in this District and once in California, and both were dismissed. In 2001, Newdow filed suit in the Eastern District of California seeking a declaration that the inaugural prayers at President George W. Bush's first inauguration violated the Establishment Clause. The District Court dismissed the case, and the United States Court of Appeals for the Ninth Circuit affirmed on the ground that Newdow lacked Article III standing. See Newdow v. Bush, No. CIV-S-01-218 (E.D. Cal. May 23, 2002) ("Newdow I"); Newdow v. Bush, 89 Fed. App'x 624, 2004 WL 334438 (9th Cir. Feb. 17, 2004) ("Newdow II") (memorandum op.).

Newdow filed a similar suit, this one aimed at enjoining prayer at President Bush's second inaugural ceremony, in the United States District Court for the District of Columbia in 2004. The District Court denied Newdow's motion for a

preliminary injunction and subsequently dismissed the case on the ground (among others) that Newdow lacked Article III standing. See Newdow v. Bush, 355 F. Supp. 2d 265 (D.D.C. 2005) ("Newdow III") (denying preliminary injunction); Newdow v. Bush, 391 F. Supp. 2d 95 (D.D.C. 2005) ("Newdow IV") (dismissing case). After his motion for a preliminary injunction was denied, Newdow sought an emergency injunction pending appeal from this Court. This Court denied that motion by summary order. See Newdow v. Bush, No. 05-5003, 2005 WL 89011 (D.C. Cir. Jan. 16, 2005) ("Newdow V").

Appellees are aware of no related cases currently pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, appellee Presidential Inaugural Committee states that it is a private, non-profit corporation organized under the District of Columbia Non-Profit Corporation Act. It has no parent company and issues no stock.

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IN THE

United States Court of Appeals for the District of Columbia Circuit

No. 09-5126

MICHAEL NEWDOW, *et al.*,

Appellants,

v.

HON. JOHN ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 08-cv-2248

FINAL BRIEF FOR APPELLEES PRESIDENTIAL INAUGURAL COMMITTEE AND EMMETT BELIVEAU

INTRODUCTION

While there are many reasons why the District Court was right to dismiss the Complaint at issue here, the most fundamental is this: The remedies the plaintiffs sought would not redress their purported injuries.

The District Court reached precisely that conclusion below. What is more, it reached the same conclusion—and lead plaintiff Michael Newdow affirmatively

conceded the point—when Newdow brought a near-identical case in connection with President Bush's second inauguration in 2005. Faced with a request to block clergy from speaking at that ceremony, the District Court concluded that "the only party against whom an injunction would redress Newdow's injury is President Bush," because the President "has ultimate decision-making power in selecting speakers for the Inauguration, including clergy." Newdow III, 355 F. Supp. 2d at 280. The court observed at that time that "[t]here is nothing in the record before the Court that would indicate that another defendant could prevent the President from inviting clergy of his choosing to give a religious prayer." Id. And if there were any doubt about the matter, it was resolved by Newdow's own concession: "At the hearing on the motion for preliminary injunction," explained the court, "Newdow conceded that only an injunction against the President can truly redress his injuries." Id.

Nothing has changed. The latest iteration of Newdow's lawsuit, filed by Newdow and a collection of co-plaintiffs (hereinafter "Newdow"), nowhere alleges that the Presidential Inaugural Committee or its former executive director (hereinafter "PIC"),[2] or any other defendant, had anything to do with President

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[2] Emmett Beliveau, named as a defendant in his capacity as the PIC's executive director, is no longer the executive director or an officer of the PIC. He resigned both positions in January 2009. See Docket No. 71 at 1 n.1.

Obama's decision to invite clergy to speak at the inaugural ceremony. It nowhere alleges that the PIC had anything to do with President Obama's decision to ask the Chief Justice to include the words "so help me God" in the oath of office. Indeed, it nowhere alleges any facts whatsoever about the PIC's involvement in the decisions of which plaintiffs complain. And it does not name as a defendant the President—the one party that Newdow previously conceded actually does make the decisions in question. It is no surprise, therefore, that the District Court in this case reached the same conclusion it had reached four years prior. Newdow failed to allege sufficient facts to suggest redressability, and he accordingly lacks standing to maintain his suit.

To be sure, Newdow's claims also fail for a host of other reasons—among them, mootness, preclusion, and lack of a legally cognizable injury. The brief filed by the Department of Justice on behalf of the governmental defendants (the "Government Brief") addresses these defects in detail, and the PIC joins the Government Brief in full. See Fed. R. App. P. 28(i). We write separately only with respect to redressability, because it is only in his redressability argument that Newdow makes points specific to the PIC.

STATEMENT OF THE ISSUE PRESENTED

1. Whether the District Court correctly held that Newdow's purported injuries were not redressable—and therefore that he lacked standing—where

(i) Newdow failed to allege that the PIC had any role in or control over President Obama's decision to invite clergy to the inauguration; and (ii) Newdow failed to allege that the PIC had any role in or control over President Obama's request to the Chief Justice to include the words "so help me God" in the oath of office.

STATUTES AND REGULATIONS

All relevant statutes and regulations are set forth in plaintiffs' Opening Brief except the following:

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, provides in pertinent part:

> Government shall not substantially burden a person's exercise of religion * * * [unless] 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.

42 U.S.C. § 2000bb-1(a)-(b).

The statutes governing inaugural ceremonies, 36 U.S.C. §§ 501-511, provide in pertinent part:

> (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.

36 U.S.C. § 501(1).

> (d) Indemnification.—The Inaugural Committee shall indemnify and save harmless the District of Columbia and the appropriate department, agency, or instrumentality of the United States Government against any loss or damage to, and against any liability arising from the use of, the reservation, ground, or public space, by the Inaugural Committee or a licensee of the Inaugural Committee.

36 U.S.C. § 503(d).

STATEMENT OF FACTS

A. The PIC

The PIC is a private, non-profit corporation organized under the District of Columbia Non-Profit Corporation Act. See Docket No. 12, Exh. A (PIC Certificate and Articles of Incorporation) (hereinafter "PIC Articles"). The corporation is responsible for organizing events in connection with the quadrennial presidential inauguration, subject to the direction of the President-elect. See Newdow III, 355 F. Supp. 2d at 280. This role is laid out by statute: Federal law defines the "Inaugural Committee" as the committee appointed by the President-elect to coordinate the inaugural events, 36 U.S.C. § 501(1); it allows the Secretary of the Interior and the Mayor of the District of Columbia to issue to the PIC temporary permits for the grounds surrounding the inaugural site, id. § 503(a); and it requires that the PIC indemnify the federal and District governments for liability incurred in connection with the festivities by the PIC or its licensees. Id. § 503(d).

The PIC's incorporators and directors are private citizens. See PIC Articles IX-X. The corporation receives no government funds; it finances inaugural celebration events with private donations.

B. Prior Lawsuits

This case represents lead plaintiff Newdow's third attempt to excise from the inaugural ceremonies allusions to God.

Newdow is a "well-known atheist litigant" who regularly files suit to block governmental actors, and others, from making public reference to deities. Newdow III, 355 F. Supp. 2d at 268. See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (seeking to block recitation of Pledge of Allegiance because it contains the phrase "under God"); Newdow v. Congress of U.S., 435 F. Supp. 2d 1066 (E.D. Cal. 2006) (seeking to bar United States from printing phrase "In God We Trust" on currency); Newdow v. Eagen, 309 F. Supp. 2d 29 (D.D.C. 2004) (seeking to bar Congressional chaplains from offering legislative prayer in the House and Senate). In 2001 and again in 2004, Newdow sued President Bush and other individuals and groups involved with the inauguration process—including the PIC—in an attempt to block "any member of the clergy * * * [from] deliver[ing] prayers at the * * * Inauguration." Newdow III, 355 F. Supp. 2d at 270; see also A. 40-41 (copy of Newdow I). Both times, his suits were dismissed as meritless.

In 2001, the District Court concluded (among other things) that it lacked jurisdiction to enjoin the President's inaugural choices and that Newdow lacked taxpayer standing. See Newdow v. Bush, No. CIV S-01-218 (E.D. Cal. Dec. 28, 2001) (magistrate's report and recommendation, later adopted in Newdow I) (hard copy in record below as Docket No. 13 Exh. 4). The Ninth Circuit affirmed on other grounds, holding that Newdow "lack[ed] standing to bring this action because he does not allege a sufficiently concrete and specific injury." Newdow II, 89 Fed. App'x at 625, 2004 WL 334438, at *1.

In 2004, Newdow filed a substantially similar action in the District Court for the District of Columbia, naming as defendants President Bush, the Joint Congressional Committee on Inaugural Ceremonies ("JCCIC"); Senator Lott (then Chairman of the JCCIC); various other governmental entities; the PIC and its then-executive director; and "one or more unnamed clergy (wo)men." Newdow III, 355 F. Supp. 2d at 270 & n.5. Alleging that witnessing prayers at the 2005 inauguration would make him feel like an "outsider," id. at 271, Newdow sought a declaratory judgment that inaugural prayers violate the Establishment and Free Exercise Clauses of the First Amendment and the RFRA. He also sought to enjoin the defendants "from utilizing clergymen to engage in Christian religious acts at the 2005 Inauguration or future Presidential inaugurations." Id. at 271.

In a pair of published opinions, the District Court first denied Newdow's motion for a preliminary injunction and then dismissed the action. At the preliminary injunction stage, the court concluded that Newdow likely was "precluded from relitigating his standing to bring an Establishment Clause action challenging inaugural prayers." Id. at 275. The court also concluded that it likely lacked the power to enjoin the President, id. at 280-82; that Newdow likely would fail on the merits of his Establishment Clause claim, id. at 286-89; and that Newdow did "not cite a single authority" in support of his RFRA claim. Id. at 290. Finally, the court concluded that Newdow likely could not show redressability sufficient to satisfy standing requirements. Id. at 279-80.

With respect to redressability, the District Court observed that "[t]o redress Newdow's alleged injuries, the Court would need to issue an injunction that would prevent the reading of religious prayers at the Inauguration." Id. at 279. The court therefore framed the operative question as: "to which, if any, of the defendants could an injunction issue that would achieve redress for Newdow." Id. It concluded that the only such defendant was President Bush:

> Newdow alleges that President Bush has "ultimate decision-making power" in planning the inaugural ceremony, including the power to decide who will participate in the ceremony. See Compl. ¶¶ 39, 44. President Bush also selects the clergy to give the invocation. Id. ¶ 40. * * *
>
> Reviewing the facts in the record, the only party against whom an injunction would redress Newdow's injury is President

> Bush. He has ultimate decision-making power in selecting speakers for the Inauguration, including clergy. There is nothing in the record before the Court that would indicate that another defendant could prevent the President from inviting clergy of his choosing to give a religious prayer. At the hearing on the motion for preliminary injunction, Newdow conceded that only an injunction against the President can truly redress his injuries.

Id. at 279-80.

The District Court accordingly denied the requested preliminary injunction. Id. at 291-92, 294. Newdow then sought an emergency injunction pending appeal. This Court denied the motion, holding in a summary order that "[a]ppellant has not shown a substantial likelihood of success on his challenge." Newdow V, 2005 WL 89011, at *1.

The District Court subsequently dismissed Newdow's complaint, holding that the case was moot and that Newdow had failed to meet the injury and redressability components of Article III standing. As to the latter, the court explained that Newdow "contends—and the Court concurs—that the President himself has the exclusive decision-making authority as to whether there will be religious prayer at an inauguration." Newdow IV, 391 F. Supp. 2d at 104. It followed that enjoining the PIC would have no effect: "[E]ven if the injunction were to issue against PIC, the President could still extend invitations to the clergy on his own." Id. For all of these reasons, the District Court dismissed the case. Newdow did not appeal.

C. The Current Lawsuit

1. On December 30, 2008—only three weeks before Inauguration Day—Newdow filed essentially the same lawsuit yet again, this time with 45 additional plaintiffs and the added claim that the President's oath of office also violates the First Amendment. The Complaint recycled most of Newdow's earlier theories. It alleged, for instance, that Supreme Court cases explicitly limited to school prayer, such as Lee v. Weisman, 505 U.S. 577 (1992), also govern the President-elect's inaugural choices. Docket No. 1 (Cmplt ¶ 145);[3] compare Newdow III, 355 F. Supp. 2d at 285 (noting Newdow's reliance on Lee). And it alleged that acknowledgements of God "ridicule public occasions." Id. (Cmplt ¶ 67); compare Newdow III, 355 F. Supp. 2d at 270 (noting Newdow's "ridicule" claim).

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[3] Newdow in passing mentions that at the eleventh hour, he moved to file a First Amended Complaint that added claims regarding the 2013 and 2017 inaugurations. Br. 6. The District Court determined that it need not rule on the motion, observing that even if the amendment were accepted, it would change nothing because Newdow's "speculative" allegations about future inaugurations suffered from the same defects that doomed his claims regarding 2009. A. 145. Newdow criticizes that approach, Br. 7, but he does not appeal from it. He instead asks this Court to "recognize" his claims about future inaugurals. Even if that were appropriate—and even if Newdow were entitled to an advisory opinion regarding events years in the future, which he is not—Newdow lacks standing to pursue and cannot succeed on the merits of those "future inauguration" claims either. In any event, the putative amended complaint is irrelevant to the arguments in this brief. We thus refer throughout to the operative complaint. See Docket No. 1.

Conspicuously, however, the Complaint did not remedy the fundamental defect that led to dismissal in 2005: It did not allege or demonstrate that the PIC (or any defendant) has any control over the President's inaugural-ceremony choices. Indeed, the Complaint nowhere made any allegation whatsoever regarding the PIC's actions. Instead, the Complaint made only an undifferentiated assertion that the "codefendants" were planning to offer "support * * * and facilitation" to defendants Warren and Lowery, who "will be giving one or more religious prayers" during the inauguration. Docket No. 1 (Cmplt ¶ 129). The Complaint nowhere explained that assertion. And it nowhere claimed that the PIC had anything to do with the inclusion of the words "so help me God" in the oath of office.

2. The Complaint sought, among other things, (i) a preliminary injunction blocking Chief Justice Roberts from including the words "so help me God" in the oath of office, and (ii) a preliminary injunction blocking all the defendants from "utilizing any clergy to engage in any religious acts" during the inaugural ceremonies. Docket No. 1 (Cmplt at 34). On January 15, 2009, the District Court (Walton, J.) heard argument on Newdow's injunction requests. The court denied the injunctions that same day, ruling from the bench that Newdow was unlikely to succeed on any of his claims because "there has not been a

sufficient injury shown to confer Article III standing" and because the court did not "have the ability to redress the harm that is being alleged." A. 101.

On the redressability issue, the District Court stated that "the bottom analysis really comes down to a question of who has the authority to have these words uttered at the inauguration." A. 99. The court concluded—as it had four years earlier—that only President Obama had that authority, and therefore that "the only way I can enjoin this is if I had the authority to enjoin President-Elect Obama." A. 101. Explained the court: "[E]ven if I could enjoin the [PIC], I think [the President would] be able to say, 'Come up on this stage.' I don't think anybody can stop that from occurring, and therefore, I fail to see how I have the ability to provide the redress that the Plaintiffs are seeking." A. 101.[4]

The District Court subsequently issued a written Order memorializing its oral holding with respect to the preliminary injunction. A. 61-63. And on March 12, 2009, the court dismissed the case, holding (among other things) that plaintiffs "identified no concrete and particularized injury" and "failed to demonstrate how the harm they allege is redressable by the relief they seek." A. 144-46. Newdow now appeals.

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[4] The court separately found that the PIC was not a state actor, but did not rely on that finding in denying the injunction or dismissing the case. See infra at 20-24.

SUMMARY OF ARGUMENT

The District Court's decision was correct because Newdow's Complaint utterly fails to allege facts suggesting that an injunction or declaration aimed at the PIC would redress his purported injuries. The Complaint fails to allege so much as a single fact about the PIC's actions in connection with the 2009 inauguration. A fortiori, it fails to allege facts sufficient to permit the inference that any court order aimed at the PIC would somehow prevent the President from (i) inviting clergy to speak at the inaugural ceremonies or (ii) seeking to include the words "so help me God" in the oath of office. And of course, Newdow admitted four years ago that he could not properly allege any such facts: He conceded that the President has the "ultimate decision-making power" in planning the inaugural ceremony and that "only an injunction against the President can truly redress his injuries." Newdow III, 355 F. Supp. 2d at 280.

Quite right. Newdow makes no attempt to allege any new or different facts this time around, or otherwise to suggest that circumstances have changed. Instead, he alleges no facts relevant to redressability. That hardly cures the defect in his prior lawsuit. The decision below should be affirmed.

ARGUMENT

I. NEWDOW'S LAWSUIT SUFFERS FROM NUMEROUS FATAL DEFICIENCIES, INCLUDING MOOTNESS AND LACK OF STANDING.

The Government correctly explains that (i) Newdow's Complaint is moot, (ii) Newdow failed to allege a concrete and particularized injury sufficient to meet Article III's standing requirements, (iii) Newdow's claims fail on the merits, and (iv) Michael Newdow, as an individual, is precluded from challenging the President's decision to invite clergy to speak at the inauguration. The PIC joins the Government's brief in full. See Fed. R. App. P. 28(i).

II. THE DISTRICT COURT CORRECTLY HELD THAT NEWDOW FAILED TO MEET THE "REDRESSABILITY" PRONG OF THE ARTICLE III STANDING INQUIRY.

A. Newdow Failed To Allege Facts Necessary To Infer Redressability.

1. A plaintiff has standing to sue in federal court if he suffered an injury-in-fact, the injury is "fairly traceable to the challenged action of the defendant," and it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." C-SPAN v. FCC, 545 F.3d 1051, 1054 (D.C. Cir. 2008) (quotation marks omitted) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992)). To determine redressability vel non, the court must examine 'whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged.' " County of Delaware, Pa.

v. Department of Transp., 554 F.3d 143, 149 (D.C. Cir. 2009) (quoting Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (en banc)).

Importantly, "the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998). Thus "[t]o survive a motion to dismiss, a plaintiff 'must allege facts from which it reasonably could be inferred that * * * if the court affords the relief requested, the asserted [injury] will be removed.' " National Wrestling Coaches Ass'n v. Department of Educ., 366 F.3d 930, 944 (D.C. Cir. 2004) (quoting Warth v. Seldin, 422 U.S. 490, 504 (1975)) (second alteration in National Wrestling). Where the plaintiff fails to allege such facts, and instead either offers nothing relevant to redressability or attempts to rely on "unadorned speculation," the action must be dismissed. See id. (affirming dismissal where the complaint offered "nothing to support appellants' claim that a favorable ruling would alter" the conduct complained of); see also National Wrestling Coaches Ass'n v. Department of Educ., 383 F.3d 1047, 1047 (D.C. Cir. 2004) (per curiam) (denying reh'g en banc) ("[A]ppellants have offered nothing but unadorned speculation to support their claim that a favorable decision from this court would redress their alleged injuries. The Supreme Court has made it clear that plaintiffs cannot rely on such speculation to satisfy the redressability prong of standing.").

2. The Complaint at issue here suffers from precisely the deficiency identified in National Wrestling: It "fail[s] completely to satisfy the redressability prong of Article III standing, for there is nothing to support appellants' claim that a favorable ruling would alter" the conduct of which Newdow complains. 336 F.3d at 944.

Newdow's Complaint alleges no facts suggesting that the PIC has a role in choosing whom the President invites to the inaugural ceremony. It alleges no facts suggesting that a judgment against the PIC could somehow prevent the President from inviting clergy. It alleges no facts suggesting that a judgment against the PIC could somehow affect the President's request to the Chief Justice to include the words "so help me God" in the oath of office. Indeed, the Complaint fails to allege any facts about the PIC's actions, or the PIC's purported connection to President Obama's challenged decisions, whatsoever: The PIC is mentioned exactly once in the Complaint's recitation of the causes of action (Docket No. 1 (Cmplt ¶¶ 99-168)) and then only to recount a statement from the PIC's website that "one of the key purposes of the inauguration is to engender national unity." Id. (Cmplt ¶ 165).

Nor does the Complaint offer anything more than "unadorned speculation" about the roles of other defendants. The closest the Complaint comes to a factual allegation is the following: "Defendants Warren and Lowery, with the support of and facilitation by their codefendants, will be giving one or more religious prayers

during that governmental ceremony." Id. (Cmplt ¶ 129). This assertion about "support and facilitation" is never explained; the Complaint nowhere says what sort of "support and facilitation" might be in the offing or which "codefendants" might be involved. The Complaint therefore offers "nothing to support appellants' claim that a favorable ruling would alter" the President's decision to invite clergy to the inaugural ceremonies or to include words of his choosing in the oath of office. National Wrestling, 336 F.3d at 944. Put another way, the Complaint does not explain why a court could conceivably infer the possibility of redressing Newdow's claims by way of an injunction against the PIC; much less does it allege facts sufficient to "nudge[ ]" that claim "across the line from conceivable to plausible." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1951 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)) (quotation marks omitted). It therefore "do[es] not meet the standard necessary to comply with Rule 8." Id. at 1952.

This complete absence of factual allegations suggesting redressability is no surprise considering that the lead plaintiff flatly admitted, in a substantively identical litigation, that no such facts exist. That concession, of course, applies only to Newdow himself. See Ashe v. Swenson, 397 U.S. 436, 442 (1970) (collateral estoppel "bars relitigation between the same parties of issues actually determined at a previous trial"). But it nonetheless explains why Newdow makes

no effort to suggest that an order directed at the PIC (or any of the defendants) would remedy his purported injuries. After all, just four years ago Newdow asserted that the President has " 'ultimate decision-making power' in planning the inaugural ceremony, including the power to decide who will participate in the ceremony," Newdow III, 355 F. Supp. 2d at 280 (quoting 2004 complaint), and subsequently "conceded that only an injunction against the President can truly redress his injuries." Id. There has been no change of circumstance in the intervening years—and more to the point, Newdow makes no attempt to allege one.

The District Court in this case recognized as much. After considering a full slate of briefs and hearing oral argument, the court concluded:

> I think the only way I can enjoin this is if I had the authority to enjoin President-Elect Obama * * * [E]ven if I could enjoin the [PIC], I think he'd be able to say, "Come up on this stage." I don't think anybody can stop that from occurring, and therefore, I fail to see how I have the ability to provide the redress that the Plaintiffs are seeking.

A. 101. That is exactly right, and Newdow's Complaint never suggests otherwise. Because Newdow failed to " 'allege facts from which it reasonably could be inferred that * * * if the court affords the relief requested, the asserted [injury] will be removed,' " National Wrestling, 366 F.3d at 944, the District Court's dismissal order was correct and should not be disturbed.

B. Newdow's Contrary Arguments Misunderstand The District Court's Holding And Are Incorrect In Any Event.

On appeal, Newdow largely ignores the District Court's holding quoted above. He instead plucks four other statements from the court's bench ruling and holds them up as the supposed rationales for the court's conclusion as to redressability. Br. 32-33. This is a classic straw man argument; the transcript makes clear that the statements Newdow cites came before the District Court's redressability discussion. They were not part of, and did not lead to, the redressability decision.

Specifically, Newdow asserts that the District Court concluded (i) that a trial court may not have the authority to enjoin the Chief Justice; (ii) that "if the President says 'so help me God,' there is no additional injury when the words are also said by the Chief Justice"; (iii) that the PIC is not a state actor; and (iv) that "[i]nability to enjoin the President deprives the Court of authority to enjoin his underlings." Br. 32-33 (citing A. 99, 90, 98, and 88, respectively). As an initial matter, Newdow mischaracterizes three of these statements when he calls them conclusions of law; two were questions asked by the court during colloquies with counsel (A. 88, 90), and a third—regarding power to enjoin the Chief Justice—was merely an observation that "real questions" existed about the scope of such power. A. 98. But the more important point is that the District Court did not begin its redressability analysis until after the last of these statements: The court discussed

the PIC's state-action status, mentioned its concerns about enjoining the Chief Justice, and only then turned to "this issue of redressability." A. 99. At that point the court explained—correctly—that "the bottom analysis really comes down to a question of who has the authority to have these words uttered at the inauguration." A. 99. The court's core redressability holding followed two pages later. A. 101.

In short, Newdow's attempt to take comments that did not go to redressability, and use them to impugn the District Court's holding, is without merit. And because Newdow never contests the District Court's actual holding—namely, that redressability was absent because the complained-of decisions were the President's alone—he has waived the right to do so. See Novak v. Capital Mgmt. & Dev. Corp., 570 F.3d 305, 311 n.3 (D.C. Cir. 2009) (arguments not raised in opening brief are waived).

We address in more detail Newdow's two "redressability" arguments relevant to the PIC:

1. State Action. Newdow argues that the District Court's redressability conclusion as to the PIC was based on the court's finding that PIC was a "private actor"; he says that finding is incorrect. Br. 33, 39-41. This argument—like his others—fails in its premise: The District Court did not find a lack of redressability on state-action grounds.

To be sure, the District Court did rule that the PIC is not a state actor, as PIC argued below (and as the court had concluded in 2005). A. 98-99, A. 101; see Newdow III, 355 F. Supp. 2d at 291 n.33 (finding that "Newdow ha[d] not raised a substantial" state-action argument as to the PIC "on the present record, which indicates only that the PIC—otherwise a privately incorporated and funded organization—is selected by the President."). But that finding was entirely separate from the redressability holding, as the District Court made clear: "I conclude I couldn't enjoin the Committee, but even if I could enjoin the Committee, * * * I fail to see how I have the ability to provide the redress that the Plaintiffs are seeking." A. 101 (emphasis added). Nor would it have made any sense if the District Court had equated lack of state action with lack of redressability. The state-action question goes not to standing, but instead to the plaintiff's ability to state a claim. See, e.g., Hallinan v. Fraternal Order of Police, 570 F.3d 811, 820-21 (7th Cir. 2009) (holding that "[p]roof of state action * * * is an element of the [Section 1983] claim" and criticizing the district court for "conclud[ing] that it lacked subject matter jurisdiction because the plaintiffs had failed to plead * * * state action"); accord Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982). The District Court therefore was quite right to keep the concepts separate. And because it did so, Newdow's state-action argument is entirely irrelevant to the standing question presented by this case. The District Court

dismissed the Complaint on standing grounds, see A. 146 (ordering dismissal "based on the plaintiffs' lack of standing to pursue any of the relief they are requesting"), and its Order can and should be affirmed on those same grounds.

In any event—and though this Court need not reach the question—the District Court was correct that the PIC is not a state actor, and therefore that Newdow cannot state a claim against the PIC. See Capitol Sq. Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 765-66 (1995) (First Amendment governs only state action, not private conduct); Village of Bensenville v. FAA, 457 F.3d 52, 60-61 (D.C. Cir. 2006) (RFRA is only "implicated" if a government entity is "the source" of an alleged substantial burden on religion).

The state-action question has two components: whether the PIC is a governmental entity, and if not, whether the PIC is sufficiently intertwined with government that its actions must be deemed those of the state. See generally Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995); Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2004). The answer to both questions is no. As to the first, the PIC is a private, non-profit corporation, run by private directors, that receives no government funds. Supra at 5-6. It therefore does not meet the tests used to determine when a corporate entity should be deemed a governmental body. See Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 84 (2d Cir. 2000) (corporation is not an organ of the state unless "the

government retains permanent authority to appoint a majority of the directors"); Hall v. American Nat'l Red Cross, 86 F.3d 919, 922 (9th Cir. 1996) (holding that the Red Cross is not a governmental entity because the majority of its governors are selected by local Red Cross chapters). Moreover, the federal statute governing the inaugural ceremonies confirms Congress' view that the PIC is not the government: It provides that the PIC must "indemnify and save harmless the District of Columbia and the appropriate department, agency, or instrumentality of the United States Government" for liability incurred in connection with its use of municipal property and infrastructure. 36 U.S.C. § 503(d). Such a provision would be unnecessary if the PIC were a governmental actor.

Nor does Newdow's Complaint allege any facts suggesting that the PIC is a de facto state actor due to entwinement with the government. It is Newdow's responsibility to allege such facts in order to avoid dismissal. See Anderson v. Suiters, 499 F.3d 1228, 1232 (10th Cir. 2007) (in claim arising under the Constitution, plaintiff must affirmatively allege state action). Thus, just as he did four years ago, Newdow has failed to state a claim.

On appeal, Newdow claims PIC is a state actor because it has taken on "the quintessential public governmental function"—organizing inaugural festivities. Br. 40. But that assertion of counsel does not cure the fatal deficiencies in the pleadings. And in any event, Newdow's assertion is wrong on the law. The

Supreme Court has made clear that the "traditional public function" test is a narrow one: Only if a private entity engages in activities "traditionally exclusively reserved to the State," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974), and that require core state authority, will that entity be deemed a state actor under this test. See id. at 352-53 (rejecting state-action argument and explaining that the case would be different "[i]f we were dealing with the exercise * * * of some power delegated * * * by the State which is traditionally associated with sovereignty, such as eminent domain"). Inaugural ceremonies do not involve the exercise of a core state power such as elections or eminent domain, and they may as easily be coordinated by a private contractor as by the government itself. Newdow's belief that the inaugural ceremony must be a traditional government function because it involves the President and receives extensive media attention does not accord with the case law.[5]

2. The President's "Underlings." Newdow also argues that the District's Court's redressability decision was based on the notion that "[i]nability to enjoin

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[5] Moreover, the quote Newdow proffers to support his assertion that the inaugural ceremonies are the "quintessential" government function—an observation that the inauguration is "an event less private than almost anything else conceivable," Mahoney v. Babbitt, 105 F.3d 1452, 1457-58 (D.C. Cir. 1997)—is inapposite. The passage is not about governmental functions but about whether Pennsylvania Avenue is a First Amendment "public forum" during the inauguration. See id.

the President deprives the Court of authority to enjoin his underlings." Br. 33. Newdow argues that that proposition is incorrect and that in fact the courts can enjoin the President's subordinates regardless of their power to enjoin the President directly. Id. at 42-44.

Here again, however, the argument is a pure straw man: The District Court nowhere indicated that its redressability holding was based on any such logic. On the contrary, the snippet Newdow cites to support the argument—see Br. 33 (citing A. 88)—comes from much earlier in the hearing, during a colloquy between the District Court and counsel; it is not even part of the court's oral ruling. The District Court's actual ruling centered on the simple fact that the decision to take the actions of which Newdow complains never belonged to the President's "underlings" in the first place. A. 99-101; accord Newdow III, 355 F. Supp. 2d at 280. It was the President's decision alone to invite clergy to speak at the inaugural ceremonies, and it was the President's decision alone to ask that the words "so help me God" be included in the oath of office. More to the point, the Complaint never alleged otherwise. The Complaint therefore failed to allege the facts necessary for Article III standing. See National Wrestling, 366 F.3d at 944; Warth, 422 U.S. at 504. Newdow's attempts to muddy the waters now do nothing to change that dispositive fact.

CONCLUSION

For all of the foregoing reasons, and those in the Government's brief, the District Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a) because it contains 5,820 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(1) and with the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2000 in 14 Point Times New Roman typeface.

/s/ Dominic F. Perella
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2009, I have caused the foregoing Final Brief for Appellees Presidential Inaugural Committee and Emmett Beliveau to be served electronically upon all parties registered through the Court's ECF electronic filing system. I have served two copies of the brief by first-class mail, postage prepaid, upon all parties that are not so registered.

/s/ Dominic F. Perella
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