IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REVEREND DR. MICHAEL A. NEWDOW, Plaintiff,	)	
v.	)	No. 1:02CV01704 (HKK)
JAMES M. EAGEN, III, et al., Defendants.	)	

THE UNITED STATES OF AMERICA'S
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

The United States of America hereby moves to dismiss plaintiff's amended complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Dismissal is appropriate under Rule 12(b)(1) because plaintiff's claims are not justiciable. Dismissal is appropriate under Rule 12(b)(6) because, even assuming justiciability, plaintiff has failed to state a claim upon which relief may be granted. The reasons for this motion are set forth in the accompanying memorandum of points and authorities.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES OF AMERICA'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Three and one-half months after briefing on the defendants' motions to dismiss was completed, plaintiff has filed an amended complaint ("Amd. Compl.") in the above-captioned case, which challenges the constitutionality of Congress's legislative chaplaincy. Plaintiff's purpose is not entirely clear; the amendments are slight, and do not advance his claims. For example, other than three paragraphs and an appendix discussing "[a]dditional [g]overnmental [c]onsequence[s] of Marsh," see Amd. Compl. ¶¶ 33-35 & App. II, plaintiff's amended complaint offers nothing new in support of his claim that Congress's chaplaincy practice is inconsistent with the Establishment Clause, Article VI's Religious Test Clause, or the Supremacy Clause. These claims, we have explained at length, are untenable in light of the Supreme Court's decision twenty years ago in Marsh v. Chambers, 463 U.S. 783 (1983), which generally upheld legislative chaplaincies, the D.C. Circuit's en banc decision twenty years ago in Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983), which specifically upheld Congress's chaplaincy practice, and the other authorities cited in our dismissal briefs. See Memorandum of Points and Authorities in Support of the United States of America's Motion to Dismiss ("U.S. Dism. Br.") at 17-23; Reply Memorandum of Points and Authorities in Support of the United States of America's Motion to Dismiss ("U.S. Reply Br.") at 6-10.

Plaintiff's few substantive amendments appear designed principally to respond to defendants' arguments that plaintiff lacks standing to bring his claims. Specifically, plaintiff's amended complaint adds the House and Senate chaplains as defendants, see Amd. Compl. ¶¶ 8, 11, and also alleges that plaintiff recently traveled from his home in California to the District of Columbia to observe a prayer delivered by a guest Senate chaplain. See id. ¶¶ 79-81. As we explain below, however, neither of these amendments is sufficient to confer injury-in-fact, or

cure any other standing defect in this case. For these reasons, and those set forth in our prior briefs, plaintiff's amended complaint should be dismissed.

ARGUMENT

Both the United States and the congressional defendants moved to dismiss plaintiff's original complaint ("Compl.") for lack of standing and on the merits. Because plaintiff's amended complaint is largely identical to his original complaint, and because the parties already have briefed the standing and merits issues at length, this memorandum addresses only the new allegations in plaintiff's amended complaint.[1] Otherwise, to avoid burdening the Court with duplicative papers, we incorporate by reference the briefs filed in support of our motion to dismiss plaintiff's initial complaint. See U.S. Dism. Br. at 1-23; U.S. Reply Br. at 1-10.

I. PLAINTIFF LACKS STANDING

Plaintiff's original complaint cited three bases for standing: (i) plaintiff's pending "application" to be chaplain (see Compl. ¶¶ 75-76); (ii) plaintiff's status as a federal taxpayer (see id. ¶¶ 81-89); and (iii) the alleged "personal reproach" plaintiff experienced as a result of a prayer offered by then-Senate Chaplain Dr. Lloyd Ogilvie. See id. ¶¶ 90-93. Plaintiff's amended complaint repeats these allegations. See Amd. Compl. ¶¶ 82-89, 90-97, 98-102. Moreover, in an apparent effort to stave off dismissal on standing grounds, plaintiff's amended complaint (i) adds Reverend Daniel Coughlin, the Chaplain of the House of Representatives, and "Jan Doe," the

[1] In addition to the portions of plaintiff's amended complaint discussed in this memorandum, the new complaint appears to contain certain technical and cosmetic changes which are not relevant to the substance of our dismissal arguments. See, e.g., Amd. Compl. ¶¶ 98-100.

yet-to-be-elected Chaplain of the Senate,[2] as defendants (see id. ¶¶ 8, 11), and (ii) alleges that plaintiff recently visited Congress and viewed a morning prayer delivered by a guest Senate chaplain. See id. ¶¶ 79-81. Neither amendment affects the standing issue.

A. Naming the House and Senate Chaplains as Defendants Does Not Create Standing

Plaintiff's addition of the House and Senate chaplains as defendants does not impact any standing argument the United States has made in this case. Plaintiff does not allege that these defendants have in any way "injured" him. And, to the extent plaintiff has added these defendants to bolster his claim that a prayer offered by then-Senate Chaplain Dr. Ogilvie caused him "personal reproach," we have explained that such allegations simply cannot establish injury-in-fact under the D.C. Circuit's decision in Kurtz v. Baker, 829 F.2d 1133, 1141 (D.C. Cir. 1987), cert. denied, 486 U.S. 1059 (1988). See U.S. Dism. Br. at 16 (citing Kurtz); U.S. Reply Br. at 6 (same).

Moreover, while not strictly a standing issue, plaintiff, in his prayer for relief, seeks to "enjoin Defendants Coughlin and Doe from utilizing their unique and privileged offices to espouse any particular religious dogma, such as the contention that there exists any god or gods." Amd. Compl. p. 20, ¶ VI. As the Supreme Court has stated, however, the "content of the [legislative] prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." Marsh, 463 U.S. at 794-95. Plaintiff has not alleged any such "exploitation" by Reverend Coughlin or any guest Senate chaplain. He alleges that a guest Senate chaplain

[2]Since plaintiff filed his original complaint, Dr. Ogilvie has retired as Senate Chaplain. See Amd. Compl. ¶ 68. His successor has not yet been elected.

delivered a prayer addressing "[o]ur God," see Amd. Compl. p. 15 n.43, but invocation of "Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion . . .; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." Marsh, 463 U.S. at 792.

B. Plaintiff's Allegation that He Observed a Legislative Prayer Does Not Create Standing

In his only new standing allegation, plaintiff asserts that, on April 11, 2003, he "visit[ed]" the United States Senate, witnessed a prayer delivered by a guest Senate chaplain, and was "'turned into an 'outsider'" by the chaplain's reference during the prayer to "[o]ur God." Amd. Compl. p.15 n.43.[3] According to plaintiff, "[t]o be forced to confront religious dogma he finds offensive whenever he chooses to exercise his right to observe his legislators" constitutes injury-in-fact. Id. ¶ 81. Plaintiff is wrong. Although standing may, in appropriate circumstances, be predicated on "noneconomic" injury, plaintiff's allegations are insufficient to satisfy Article III's injury-in-fact requirement.

The starting point for analyzing "noneconomic" standing in the Establishment Clause context is Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). In that case, four individuals and an organization to which they belonged challenged the conveyance of federally-owned land to a religious college. In holding that the plaintiffs lacked standing, the Court stated:

[a]lthough respondents claim that the Constitution has been violated, they claim

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[3]Plaintiff also asserts more generally that he "observ[es] his legislature on television," Amd. Compl. p. 15 n.43, has "physically visited Congress numerous times," id., and "plans in the future" to "observe his Congress in session." Id. ¶ 80. For the reasons explained below, these allegations also are insufficient to confer standing.

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

Id. at 485-86 (emphasis in original). Moreover, the Court continued:

> [w]e simply cannot see that respondents have alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.

Id. at 486-87 (emphasis in original) (footnotes omitted).

The plaintiffs in Valley Forge learned of the land transfer through a news release, and, since the Court's decision, lower courts have been split over whether an Establishment Clause plaintiff may predicate standing based on direct exposure to state activity that offends his beliefs, or whether a plaintiff must also allege that he has altered his behavior as a result of the offending activity. See, e.g., City of Edmond v. Robinson, 517 U.S. 1201, 1201-03 (1996) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting from denial of certiorari) (reviewing Circuit split on this issue). Although the D.C. Circuit does not appear to have addressed this issue in a post-Valley Forge decision (cf. n.4 infra), district courts in the D.C. Circuit have at least suggested that, to have standing to challenge an offensive religious activity or display, a plaintiff must allege either that he has altered his behavior as a result of the offending activity, see Jewish War Veterans of the United States v. United States, 695 F.Supp. 3, 9-11 (D.D.C. 1988), or that he is forced to confront the offending activity on a regular basis or in the course of a normal

routine. See Fordyce v. Frohnmayer, 763 F.Supp. 654, 656 (D.D.C. 1991).

Plaintiff cannot establish standing under these principles. For example, plaintiff does not allege that he has altered his behavior as a result of Congress's legislative prayer practice. To the contrary, he alleges that he "has in the past – and plans in the future – to observe his Congress in session." Amd. Compl. ¶ 80. Nor does plaintiff allege that he is forced to confront Congress's prayer practice as part of a regular routine or activity. He lives and works in California, see Amd. Compl. ¶¶ 5, 83, and plainly had to *change* his regular routine – by traveling across the country to the District of Columbia – in order to view the guest chaplain's prayer. See id. at p. 15 n.43. As the Supreme Court stated in Valley Forge, a claim that the Government has violated the Establishment Clause "does not provide a [plaintiff] special license to roam the country in search of governmental wrongdoing and to reveal [his] discoveries in federal court." 454 U.S. at 487.

Indeed, even in cases permitting standing based solely on direct exposure to an offensive religious display or activity (i.e., without requiring a showing of altered behavior), courts have stressed that, where "there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie." Suhre v. Haywood County, 131 F.3d 1083, 1087, 1090 (4th Cir. 1997) (county resident and "user of the courts" has standing to challenge Ten Commandments display in county courthouse where he "must confront the religious symbolism whenever he enters the courtroom on either legal or municipal business"); see also Washegesic v. Bloomingdale Pub. Schs., 33 F.3d 679, 681-83 (6th Cir. 1994) (former student has standing to challenge religious portrait at school where he still attends events and has "continuing direct contact" with offensive object; "[t]he practices of our own community may create a larger psychological wound than someplace we are just passing through"), cert.

denied, 514 U.S. 1095 (1995); Saladin v. City of Milledgeville, 812 F.2d 687, 692-93 (11th Cir. 1987) (plaintiffs have standing to challenge city seal containing the word "Christianity" where they are "part of the City" and, with respect to some plaintiffs, "regularly receive" correspondence bearing the seal).[4]

The activity plaintiff challenges here takes place over 2,500 miles from his home, and any "injury" he has suffered by traveling across the country and viewing a single prayer offered by a guest chaplain is, at most, a "generalized grievance," not a direct and individuated injury-in-fact.[5] See Valley Forge, 454 U.S. at 470; Suhre, 131 F.3d at 1091 ("casual or remote contact will not suffice to establish standing in a religious display case"); Swomley, 526 F. Supp. at 1275 (plaintiff who "visited" offensive display for research purposes lacks standing; any injury is merely a "generalized grievance"). Extending standing in such circumstances would "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of

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[4]In a pre-Valley Forge case, Allen v. Hickel, 424 F.2d 944, 946-47 (D.C. Cir. 1970), the D.C. Circuit found that residents of the District of Columbia had standing to sue the government for permitting a creche to be constructed and maintained on the Ellipse. The court's standing decision is phrased in broad terms, and it is not clear how much of the D.C. Circuit's decision survives Valley Forge. See Jewish War Veterans, 695 F.Supp. at 10 (discussing Allen). But even assuming Allen has some vitality today, as one district court has explained, "the plaintiffs in Allen all satisfied the 'injury in fact' requirement . . . by virtue of the fact that they were all residents of metropolitan Washington, D.C., the site of the putatively illegal federal act." Swomley v. Watt, 526 F.Supp. 1271, 1275 (D.D.C. 1981) (dismissing Establishment Clause challenge to the "Holy City," a replica of "Jerusalem at the time of Christ" maintained at a federal game reserve, for lack of standing). Plaintiff, of course, is not a resident of the District of Columbia.

[5]Plaintiff's contention that he "plans in the future" to "observe his Congress in session" (Amd. Compl. ¶ 80) is not sufficient to create standing under the Supreme Court's case law. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (plaintiffs' "profession of an 'intent[]' to return" to the site where they allegedly were deprived of the opportunity to observe animals of the endangered species is not enough to support a finding of actual or imminent injury).

concerned bystanders,'" turning the courts "into judicial versions of college debating forums." Valley Forge, 454 U.S. at 473. The Supreme Court has emphatically rejected such an approach to standing. See id. For all of these reasons, and those set forth at length in our prior briefs, plaintiff's claims should be dismissed for lack of standing.

II. CONGRESS'S CHAPLAINCY PRACTICE IS LAWFUL

On the merits of his claims, plaintiff's amended complaint adds only three paragraphs and an appendix addressing the "[a]dditional [g]overnmental [c]onsequence[s] of Marsh." See Amd. Compl. ¶¶ 33-35 & App. II. In these new paragraphs, plaintiff contends that legislative prayer has "resulted in numerous controversies across the nation," id. ¶ 33, and that these "controversies" – described in an appendix of newspaper articles – "provide[] further evidence of the need to overturn Marsh." Id. ¶ 35.

We have explained at length that this Court has no authority to "overturn" the Supreme Court's decision in Marsh, see U.S. Dism. Br. at 17-18; U.S. Reply at 7, and plaintiff does not contend otherwise. See Plaintiff's Opposing Memorandum of Law in Response to Defendants' Motions to Dismiss at 2-3 (noting that plaintiff must "bring[] this case through the lower courts" in order to "ask[] the [Supreme] Court to revisit the issue [decided in Marsh]"). Moreover, even taking plaintiff's argument on its own terms, Marsh upheld the constitutionality of legislative prayer notwithstanding a history of occasional controversy. See 463 U.S. at 788-89 n.10 (noting that Congress's chaplaincy was challenged in the 1850s); see also id. at 800-01 n.10 (Brennan, J., dissenting) (noting, with examples, that legislative prayer has at times given rise to "serious controversy" and "serious political divisiveness"). Thus, plaintiff's new argument, like his old arguments, already has been considered and rejected by the U.S. Supreme Court.

CONCLUSION

For all of the foregoing reasons, this action should be dismissed on justiciability grounds, or, assuming justiciability, on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 16, 2003, I caused copies of the foregoing motion to dismiss plaintiff's amended complaint and memorandum in support to be served by first-class mail, postage prepaid, and by electronic mail, on:

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