

No. 10-757

IN THE
Supreme Court of the United States

MICHAEL NEWDOW, ET AL.;

Petitioners,

v.

JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE
UNITED STATES, ET AL.;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITES STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

By Petitioners:

Whether the United States Court of Appeals for the District of Columbia Circuit erred by ruling that there is no redressability when a plaintiff's rights are abridged by individuals carrying out the President's wishes.

By Respondents:

Whether the court of appeals correctly held that petitioners lack standing to challenge the possible inclusion of the phrase "so help me god" and prayer in the 2013 and 2017 presidential inaugural ceremonies.

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INTRODUCTION

This case involves a challenge to the governmental espousal of Monotheism that, over the last eighty years, has become an integral part of the nation's presidential inaugurations. In a split decision,¹ the United States Court of Appeals for the District of Columbia Circuit ruled that Plaintiffs (Petitioners here) lack standing because the judicial branch cannot redress their injuries.

The potential ramifications of this ruling are alarming. In the wake of the D.C. Circuit's standing analysis, a vast array of potential actions against executive branch actors are now to be dismissed because any "[f]uture President could simply find other willing assistants not subject to the injunction to carry out his wishes." Pet. App. 18-19. In other words, whenever a "future President is free to use any decisionmaking process he desires ... and is not obligated to consult anybody," he need not "take any cognizance of the opinions issuing from this court." Pet. App. 22.

Thus, in the "court with special responsibility to review legal challenges to the conduct of the national government," John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 389 (2006), it has been decreed that "a President **is** above the law." *United States v. Nixon*, 418 U.S. 683, 715 (1974) (emphasis added to state the contrary to the point *Nixon* was making). Surely, such a ruling cannot be permitted to stand.

¹ The opinion of the Court of Appeals, reported at 603 F.3d 1002, is provided at Pet. App. 1-42. Although Judge Kavanaugh concurred in the judgment, he disagreed with the panel majority's standing determination. Pet. App. 23-28.

PROCEEDINGS IN THIS COURT

A Petition for Certiorari in this case was filed by Plaintiffs on September 27, 2010. A Brief for the Federal Respondents in Opposition (hereafter “Br. in Opp.”) was filed on April 8, 2011. Pursuant to Supreme Court Rule 15.6, Petitioners now file this Reply Brief.

ANALYSIS

I. Respondents Do Not Address the Arguments Made in the Petition for Certiorari

In his concurrence, Judge Kavanaugh found that redressability exists in this case:

As to the causation and redressability elements of standing, plaintiffs’ alleged injury is fairly traceable to the defendants here – namely, the officer who recites the official Presidential oath (the Chief Justice) and the entity that runs the events and organizes the speakers (the Presidential Inaugural Committee). ... An injunction against the named defendants is therefore also likely to redress plaintiffs’ alleged injuries.

Pet. App. 26-27 (citations omitted). Yet, just as the panel majority failed to address Judge Kavanaugh’s redressability arguments in its opinion, Respondents

here fail to address the arguments made by Plaintiffs in their Petition.

Instead, Respondents parrot the analysis used by the panel majority:

Because the content of the inaugural ceremony is entirely dependent on the president or president-elect's wishes, only a judicial order running against the president or president-elect would result in the relief that petitioners seek.

Br. in Opp. at 7-8. That *non sequitur*, however, is completely contrary to this Court's jurisprudence:

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

Franklin v. Massachusetts, 505 U.S. 788, 803 (1992). Thus, a judicial order running against the President's underlings would provide Plaintiffs with redress. See Petition for Certiorari at 10-14.

As was also noted in the Petition, the inevitable separation-of-powers issues that would result from a lawsuit against the President can be obviated by "recogniz[ing] that the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers," 505 U.S. at 826 (Scalia, J., concurring in part and concurring in

the judgment), and that “[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.” *Id.* at 828.

Respondents do not seriously examine or discuss these matters. Like the panel majority, they never even attempt to explain how the inaugural setting differs in any constitutionally significant manner from the myriad other settings where executive branch activity is “entirely dependent” upon the president’s wishes. With “settled law [being] that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States,” *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982), they allege there is some impenetrable barrier even to jurisdiction over his minions.

This case concerns the rights of a large body of citizens to the protections of the first ten words of the Bill of Rights. That is obviously a broad public interest, and “[w]hen judicial action is needed to serve broad public interests ... the exercise of jurisdiction [over the President/executive branch] has been held warranted.” *Nixon*, 457 U.S. at 754. It might be recalled that enjoining the chief executive’s subordinates “from executing a direct Presidential order,” *id.* at n.36 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952)), was considered appropriate even when (in *Youngstown*) a vital governmental need was hanging in the balance. Where (as here) all that hangs in the balance is the infusion of the nation’s most important ceremony with activities “directly subversive of the principle of equality,” *Loving v. Virginia*, 388 U.S. 1, 12 (1967), enjoining those who are doing the President’s bidding must be appropriate as well.

“The power to interpret the Constitution in a case or controversy remains in the Judiciary.” *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). It will be a meaningless power, however, if the other branches of government are given free reign to act contrary to that interpretation. That will be the result if Respondents’ argument prevails and the Judiciary ceases to exercise its jurisdiction due to unjustified separation-of-powers concerns.

II. The Arguments Made by Respondents Are Inconsequential

Respondents throw together a hodgepodge of inconsequential arguments that can be readily dispensed with. Because Plaintiffs are unable to discern any cohesive thesis to those arguments, they will be addressed in the order presented in the Brief in Opposition.

In regard to the denial of redressability “[b]ecause the content of the inaugural ceremony is entirely dependent on the President or President-elect’s wishes,” Br. in Opp. 7, one can simply consider other constitutional violations to highlight the flawed nature of the argument. Could a president also racially segregate the inaugural’s bathrooms, ban nearby demonstrations, exclude women, and order the National Guard to incarcerate every attendee who voted Republican because those actions, also, were his “wishes”? And, if so, what would limit such actions to inaugurations? Under Respondents’ theory, all presidential “wishes” could be carried out with impunity by any of his subordinates. Surely, this cannot be a correct interpretation of the law.

The arguments in the Brief in Opposition’s note 4 are straw men. Plaintiffs have never asked a court “to enjoin the President in the performance of his executive duties.” Br. in Opp. 8 n.4. Nor have they ever had any desire for “this court to declare unlawful the personal religious expression of a private citizen like the President-elect.’ Pet. App. 20.” Br. in Opp. 8 n.4. It is only against inferior officials that Plaintiffs seek an injunction, and it is not the religious expression of private citizens, but of public officials acting on behalf of the government, that they aim to have declared unlawful.

Even if some of the defendants in this case are not public officials, this Court has “said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes.” *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995). After all, “[t]he Constitution constrains governmental action ‘by whatever instruments or in whatever modes that action may be taken.’” *Id.* at 392 (citation omitted). Moreover, “when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.” *Evans v. Newton*, 382 U.S. 296, 299 (1966). Thus, when the Constitution is being violated at “the transcendent ritual of America’s democracy and representative government,”² which the D.C. Circuit previously acknowledged to be “an event less private than

² As described by Donald R. Kennon, Ph.D., Chief Historian of the United States Capitol Historical Society. (Remarks of January 14, 2009, given at the Foreign Press Center, accessed on April 16, 2011 at <http://fpc.state.gov/114510.htm>.)

almost anything else conceivable,” *Mahoney v. Babbitt*, 105 F.3d 1452, 1457 (D.C. Cir. 1997), it is specious to speak of the official infusion of that event with homage to a deity as merely “the personal religious expression of a private citizen.”

The argument that “Petitioners’ claim against the JCCIC, the AFIC, and their chairpersons is not redressable for the additional reason that the JCCIC and the AFIC ... have now ceased to exist,” Br. in Opp. at 8 n.5, readily falls under the doctrine of “capable of repetition but evading review”:

[T]he established exception to mootness for disputes capable of repetition, yet evading review ... applies where “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.”

FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007) (citations omitted). As in *FEC*, “[b]oth circumstances are present here.” *Id.*

Respondents argue that the President has “complete discretion over whether to have a ceremony at all, what responsibilities (if any) to give the committees, which individuals to invite to participate in the ceremony, and—most importantly—what content to request of the participants.” Br. in Opp. at 9. They then allude to *Lee v. Weisman*, 505 U.S. 577, 586 (1992), contending that redressability in the instant case is

“distinguishable” from redressability in *Lee* because of these characteristics. Br. in Opp. at 9 n.6. Yet, just like the school officials in *Lee*, the President is “responsible for deciding whether to invite clergy to deliver invocations and benedictions at [the] ceremonies.” Br. in Opp. at 9 n.6. Similarly, just as “policy permitted, but did not require, school principals to invite clergy to deliver prayers at graduation ceremonies,” *id.*, policy permits, but does not require, presidents to invite clergy to deliver prayers at inaugurations. To whatever degree such policies exist – at high school graduations or national presidential inaugural ceremonies – they are trumped by the Establishment Clause.

As for the “complete discretion” the President has in directing an inaugural ceremony, a case raised by Respondents themselves demonstrates this is hardly a unique situation. In *Center for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836 (D.C. Cir. 2008) (discussed in Br. in Opp. at 10 n.7), the President had “complete discretion” to establish the commission at issue. Additionally, in *Pray* (as in the case at bar), it could have been contended that “if some potential participants were subject to an injunction limiting their ability to take part, the President ... would exercise his authority over the content of the [commission] by choosing individuals who are able to participate in the manner that he wishes.” Br. in Opp. at 9-10. Yet, the *Pray* court specifically stated that:

Even if the Center’s claims against the Commission and its executive director became moot when the Commission relinquished custody of

its records and ceased to exist, this case is not moot because, regardless whether mandamus relief is available, a declaration of the Center's legal right to the materials could form the basis of an injunction against the NSC, which would redress the Center's claimed injury.

Pray, 531 F.3d at 839 n.* (citations omitted).

Glover River Org. v. United States Dep't of the Interior, 675 F.2d 251 (10th Cir. 1982), also raised by Respondents, bolsters Plaintiffs' claims as well. In *Glover*, a flood control organization sought an injunction against the Secretary of the Interior because he had listed a fish as a threatened species, allegedly without first filing a required Environmental Impact Statement. The Tenth Circuit found that the organization lacked standing because "[n]o stipulated facts or record testimony supports the existence of a substantial nexus between the relief requested and the elimination of plaintiff's injury." 675 F.2d at 255. That is completely inapposite to the instant case, where that nexus is incontrovertible.

Where *Glover* is on point relates to the Tenth Circuit's having "no difficulty in concluding that **the potential** for recurring flooding in the absence of the construction of dams or other flood control projects constitutes a sufficient injury for standing purposes." *Id.* at 254 (emphasis added). The flood control organization in *Glover* referenced flooding that had occurred ten years prior to the appellate court's decision, and it was quite possible that similar flooding would never recur within the lifetime of any

organization member. This is totally contrary to inaugurations, which have occurred every four years since the nation was founded, and which have incorporated the challenged infusions of Monotheism in every one of the nineteen public inaugural ceremonies since 1937. *See* Complaint, Appendix B.

Also unavailing are Respondents' attempts to distinguish the instant case from those in which judicial review of executive branch decisions has been upheld by this Court. Whether or not the President has discretion to act – which, in actuality, he had in *Franklin v. Massachusetts*, 505 U.S. 788 (1992) – the expectation remains “that the President ‘would abide by [the court’s] authoritative interpretation’” of the law. Br. in Opp. at 10 (citing *Franklin*, 505 U.S. at 803).

Similarly, the contention that *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996) and *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001), are inapposite (due to some statutory authority granted to the President’s subordinates), *see* Br. in Opp. at 11, is without any basis. If one may expect (for standing purposes) “that the President ‘would abide by [the court’s] authoritative interpretation’” of the law, then the same expectation must exist for any other individual performing governmental activity.³

³ In their discussion of *Swan* and *Made in the USA*, Respondents write that “Petitioners suggest (see Pet. 3) that their claims against respondents must be redressable because there must be a remedy for alleged violations of the Establishment Clause that take place during the inaugural ceremony.” Br. in Opp. at 11 n.8. Petitioners made no such suggestion at all. Their claims against respondents are redressable because the relief requested will provide redress.

Respondents' half-hearted attempt to argue that "petitioners cannot identify any concrete and particularized injury arising from the possibility that prayer and the phrase 'so help me god' will appear in future inaugurations," Br. in Opp. at 12, is clearly without merit. It is true that the panel majority chose to "assume, without holding, that plaintiffs' claimed injury is an injury in fact and that it can be fairly traced to the conduct of the defendants." Pet. App. at 15. However, as Judge Kavanaugh ably demonstrated in his concurrence, the injury in fact and causation requirements of standing exist. Pet. App. at 23-26. Petitioners need not restate the relevant arguments at this time. Suffice it to say that they personally suffer the injuries that stem from being unwillingly forced to confront the challenged government-sponsored religious pronouncements.

As Judge Kavanaugh further noted, this Court "has consistently decided Establishment Clause cases involving objections to government-sponsored religious displays or speech in public settings." Pet. App. at 24. If "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines,'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990) (citations omitted), it may fairly be assumed that the members of this Court adhered to that independent obligation in those cases. Accordingly, the respective plaintiffs must have met all standing requirements, including those for injury in fact and causation. Thus, again (in this "Establishment Clause cas[e] involving objections to government-sponsored religious displays or speech in [a] public settin[g]"), Plaintiffs here also meet those requirements.

III. The Merits Question Is Not Before the Court

Respondents' final argument is that "even if petitioners had standing, their Establishment Clause challenge is without merit." Br. in Opp. at 12. The merits question, however, was not raised in the "Question Presented" by either Petitioners or Respondents, *see* page i, *supra*, and has not been addressed by Petitioners. Should the Court choose to consider that issue, Petitioners will gladly follow the Court's lead. Until that time, however, the merits question is not appropriate for discussion in terms of granting or denying the Petition. *See* Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").

CONCLUSION

The precedent that will be established by the panel majority's opinion is extremely dangerous, with the potential to immunize the executive branch from judicial review for a host of constitutional transgressions in a breathtaking array of circumstances. Respondents, in their Brief in Opposition, have done nothing to dispel the need for concern regarding that danger. Accordingly, Petitioners respectfully request that this Court grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners lack standing to challenge the possible inclusion of the phrase “so help me God” and prayer in the 2013 and 2017 presidential inaugural ceremonies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 603 F.3d 1002. The order of the district court (Pet. App. 47-50) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2010. A petition for rehearing was denied on June 29, 2010 (Pet. App. 43-44). The petition for a writ of certiorari was filed on September 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this Establishment Clause challenge to the inclusion of the phrase “so help me God”

and prayer in the presidential inauguration ceremony shortly before the January 2009 inauguration of President Obama. The district court dismissed the suit on the ground that petitioners lacked standing. Pet. App. 47-50. The court of appeals affirmed. *Id.* at 1-42.

1. In 2008, Barack Obama was elected President of the United States. Then-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. To help make the necessary arrangements for the ceremony, Congress created a Joint Congressional Committee on Inaugural Ceremonies (JCCIC), as it had for previous inaugurations. Pet. App. 6; see S. Con. Res. 67, 110th Cong., 2d Sess. (2008) (enacted). Additional support for the inauguration was provided by a joint military inter-service committee, the Armed Forces Inaugural Committee (AFIC). Pet. App. 6. President-elect Obama also created 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. *Ibid.*; see 36 U.S.C. 501(1) (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”).

Through the PIC, President-elect Obama requested two private clergy members—Reverends Rick Warren and Joseph Lowery—to deliver an invocation and a benediction, respectively, during the inauguration ceremony. President-elect Obama also requested that the Chief Justice of the United States, John G. Roberts, Jr., administer the presidential oath of office and recite the words “so help me God” after reciting the oath pre-

scribed by the Constitution. See U.S. Const. Art. II, § 1, Cl. 8; Pet. App. 6-7.

2. After learning of President-elect Obama's plans for his inauguration, petitioners filed this suit against the JCCIC and its chairperson; the AFIC and its chairperson; the PIC and its then-director; the Chief Justice; and Reverends Warren and Lowery (collectively, respondents). The complaint sought declaratory and injunctive relief barring the Chief Justice from reciting the words "so help me God" as part of his administration of the oath of office to President-elect Obama or at any future presidential inauguration, and barring defendants from "utilizing any clergy" to engage in any religious acts at President Obama's inauguration or any future presidential inauguration. 1:08-cv-02248 Compl. paras. I-VII (filed Dec. 30, 2008); Pet. App. 7.

On January 5, 2009, petitioners moved for a preliminary injunction. After a hearing, the district court denied the motion, concluding, among other things, that petitioners lacked standing because they could not show any concrete and particularized injury, and any injury would not be redressed by an order against respondents. See C.A. App. 62.

Petitioners did not appeal the denial of their motion for a preliminary injunction, and President Obama's inauguration proceeded on January 20, 2009. Reverends 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 the Chief Justice and Justice Stevens in administering those oaths. See 155 Cong. Rec. S667-S669 (daily ed. Jan. 20, 2009).

After additional briefing, the district court dismissed the complaint for lack of standing. Pet. App. 47-50. Al-

though petitioners had moved to amend their complaint to add allegations that the 2013 and 2017 inaugural ceremonies might improperly incorporate religious references, the court chose not to rule on the motion because the court believed that the amended complaint did not contain any allegations that would establish standing. See *id.* at 49 n.22.¹

3. The court of appeals affirmed the district court’s dismissal of the complaint. The court first held that petitioners’ challenge to the 2009 inauguration was moot.² Pet. App. 10-13. The court next held that it would consider petitioners’ amended complaint, which included challenges to the 2013 and 2017 inaugurations, because “the motion for leave to amend should have been granted as of right.” *Id.* at 13-14 n.3. With respect to the future inaugurations, the court held, petitioners lack standing. Assuming, without deciding, that petitioners “claimed [an] injury [that] is an injury in fact and that it can fairly be traced to the conduct of” respondents, the court concluded that petitioners’ claims are not redressable. *Id.* at 13-22. The court observed that petitioners acknowledged that “[t]he inaugural ceremony is a peculiar institution, the whole of which is subject to the President’s or President-elect’s discretion,” and that the content of the inaugural ceremony—whether it contains any religious references or prayer—is entirely dependent on the President’s or President-elect’s wishes. *Id.* at 18. The individuals and entities that petitioners had named as defendants would participate in the inaugural pro-

¹ The reference to footnote “22” is a typographical error in the petition appendix. The reference should be to footnote “1.”

² Petitioners do not challenge that determination before this Court. See Pet. i.

ceedings only in the manner requested by the President, the court explained, and they “possess no authority—statutory or otherwise—to actually decide whether future inaugural ceremonies will contain the offending religious elements.” *Id.* at 17.

The court therefore emphasized that petitioners had not sued the President or President-elect, and that in any event, a court would not have the authority to enter an injunction directly against the President in the exercise of his executive functions or against the President-elect (a private citizen) in the exercise of his personal religious beliefs. Pet. App. 20. The court concluded that “[t]he future President is * * * a ‘third party not before the court’ whose ‘independent action’ results in the alleged injury,” rendering any relief granted against respondents ineffective in redressing petitioners’ alleged injury. *Id.* at 19 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); and citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).³

Judge Kavanaugh concurred in the judgment. In his view, petitioners had standing because a declaration of petitioners’ legal rights could form the basis of an injunction against persons or entities who are selected to assist with future inaugurations. See Pet. App. 27-28. Judge Kavanaugh would have affirmed the dismissal of the complaint on the ground that petitioners’ claims are foreclosed by *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld a state legislature’s practice of opening legislative sessions with prayer. Judge Kavanaugh ex-

³ The district court also held that petitioners cannot sue unnamed persons and entities that will support future inaugurations because that would require the court to issue an “injunction against the world.” Pet. App. 17.

plained that the challenged religious elements in the inauguration, like the legislative prayer at issue in *Marsh*, are “deeply rooted in the Nation’s history and tradition,” Pet. App. 33, and are not used “to proselytize or advance any one, or to disparage any other, faith or belief,” *id.* at 32 (quoting *Marsh*, 463 U.S. at 794-795).

ARGUMENT

Petitioners contend (Pet. 4-15) that the court of appeals erred in concluding that petitioners lack standing because their claims regarding the 2013 and 2017 inaugurations are not redressable. Further review is not warranted. The court of appeals’ decision is correct, and it reflects the court’s fact-bound evaluation of the unique arrangement by which the inaugural ceremony is organized and its content determined. The decision does not conflict with any decision of this Court or any court of appeals. Finally, even if petitioners had standing, review would not be warranted, because petitioners’ Establishment Clause claims lack merit.

1. “Article III of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’” *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam). “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.*; see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The plaintiff has the burden to allege facts demonstrating standing, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), and the 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, 819-820 (1997).

a. Applying settled principles of Article III standing to the circumstances of this case, the court of appeals concluded that petitioners failed to satisfy the redressability component of Article III standing. That conclusion does not warrant this Court’s review. Mere “speculati[on]” that an alleged injury will be redressed by a favorable decision is insufficient to establish Article III standing; rather, a plaintiff must show that it is “likely” that granting the relief sought will alleviate the injury. *Lujan*, 504 U.S. at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

Petitioners challenge the constitutionality of the references to God that may be made by the Chief Justice and prayer leaders during future inauguration ceremonies. Pet. App. 14-15. They have named as defendants the Chief Justice, who administered the presidential oath during the 2009 inaugural ceremony; the private ministers who offered prayers in 2009; and the committees created to assist in planning the 2009 ceremony. *Id.* at 6. They seek an injunction preventing respondents from uttering or facilitating the challenged references in future inaugurations. *Id.* at 47-48, 49 n.22. As petitioners acknowledge (Pet. 2), however, the President or President-elect has complete discretion over the content of his or her inaugural ceremony, and respondents “possess no authority—statutory or otherwise—to actually decide whether future inaugural ceremonies will contain the offending religious elements.” Pet. App. 17.

Because the content of the inaugural ceremony is entirely dependent on the President or President-elect’s wishes, only a judicial order running against the President or President-elect would result in the relief that

petitioners seek. But petitioners have not filed suit against the President or President-elect.⁴ Consequently, petitioners' asserted injury results from "the independent action of some third party not before the Court." *Simon*, 426 U.S. at 42. An injunction against any of the respondents would not afford petitioners any meaningful relief, and petitioners' alleged injury is therefore not redressable through a favorable result in this case.⁵ See Pet. App. 17-18.

Petitioners argue (Pet. 4-7) that the court of appeals' observation that if any injunction were entered against respondents, the President or President-elect would "simply find other willing assistants" to carry out his wishes, Pet. App. 18, could "immunize from judicial review an extraordinary array of executive branch actions," Pet. 4, by permitting the President to disregard injunctions against subordinate officials. To the contrary, the court of appeals' decision does not purport to establish any general rule regarding redressability in the context of injunctions against subordinate Executive

⁴ In any event, as the court of appeals correctly held, a court would not have the authority to enjoin the President in the performance of his executive duties. See Pet. App. 20 ("A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions.") (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867)); *Franklin v. Massachusetts*, 505 U.S. 788, 802-803 (1992) (plurality opinion). And as the court noted, petitioners "fail to cite any authority allowing this court to declare unlawful the personal religious expression of a private citizen like the President-elect." Pet. App. 20.

⁵ Petitioners' claim against the JCCIC, the AFIC, and their chairpersons is not redressable for the additional reason that the JCCIC and the AFIC were formed for the sole purpose of making the necessary arrangements for the 2009 inauguration, *e.g.*, S. Con. Res. 67, 110th Cong., 2d Sess. (2008) (enacted), and they have now ceased to exist. See Gov't C.A. Br. 38.

Branch officials; indeed, the majority of the respondents are not even part of the Executive Branch. Rather, the court’s conclusion that the prospect of redressing petitioners’ claims through an order against respondents is “speculative,” *Simon*, 426 U.S. at 43-44, reflects only its fact-bound evaluation of the “peculiar institution” of the inaugural ceremony and the likelihood that a judicial order against respondents could provide relief in view of the complete authority the President or President-elect exercises over the ceremony’s content and participants. Pet. App. 18. For purposes of future ceremonies, the President or President-elect will have complete discretion over whether to have a ceremony at all, what responsibilities (if any) to give the committees, which individuals to invite to participate in the ceremony, and—most importantly—what content to request of the participants.⁶ See *ibid.* In such a situation, the court of appeals reasonably concluded, if some potential participants were subject to an injunction limiting their ability to take part, the President or President-elect would exercise his authority over the content of the ceremony by choosing individuals who are able to participate in the

⁶ For this reason, *Lee v. Weisman*, 505 U.S. 577, 586 (1992), on which Judge Kavanaugh would have relied to find petitioners’ claims redressable, Pet. App. 27, is distinguishable. In *Lee*, the Court adjudicated an Establishment Clause suit against school officials who “direct[ed] the performance of a formal religious exercise,” 505 U.S. at 586, and who were responsible for deciding whether to invite clergy to deliver invocations and benedictions at high school graduation ceremonies. See *id.* at 580-581 (noting that school district policy permitted, but did not require, school principals to invite clergy to deliver prayers at graduation ceremonies). Thus, injunctive relief against the named defendants in *Lee* redressed the plaintiffs’ claims.

manner that he wishes.⁷ See *id.* at 18-19; see, e.g., *Glover River Org. v. United States Dep't of the Interior*, 675 F.2d 251, 254-256 (10th Cir. 1982) (finding injury not redressable because the requested order would not require the President to fund the projects in which the plaintiff was interested).

This case is thus distinguishable from the decisions on which petitioners rely. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the plaintiffs challenged the method employed by the Secretary of Commerce in calculating the decennial census. Although the requested injunction requiring the Secretary to conduct the census in a certain manner would have redressed the alleged harm only if the President, in exercising his statutory duty to transmit to Congress a statement of the number of representatives to which each State would be entitled under the census, chose to abide by the Secretary's conclusions, a plurality of the Court concluded that "it is substantially likely" that the President "would abide by [the court's] authoritative interpretation of the census

⁷ Judge Kavanaugh argued that the possibility that respondents' responsibilities might be transferred to others does not affect redressability because "'a declaration of the [petitioners'] legal right . . . could form the basis of an injunction' against the entity to which [a named defendant's] responsibilities are transferred." Pet. App. 27 (citation omitted). The decision on which Judge Kavanaugh relied concerned a claim that became moot with respect to certain defendants because they ceased to exist, but that still could have been redressed by other existing named defendants. See *Center for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836, 838-839 & n.* (D.C. Cir. 2008). Here, in contrast, petitioners' claim is not redressable by any of the named defendants. Nor may petitioners use this suit to obtain, as the court of appeals correctly held and petitioners do not contest (Pet. 4 & n.6), an injunction against all unknown "persons the future President could possibly invite" to participate. Pet. App. 16-17.

statute * * * even though [he] would not be directly bound by such a determination.” *Id.* at 803. That conclusion was based on the fact that “the Commerce Secretary was legally responsible for providing the President with advice and information on which he would base his final decision,” Pet. App. 21, making it reasonably likely that a favorable judgment would influence the President’s conduct. See *Franklin*, 505 U.S. at 803. Here, in contrast, there is no such advisory relationship between respondents and the President or President-elect, and the President alone has the discretion to determine the content of the ceremony.

Petitioners also rely (Pet. 5, 7) on *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), and *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir.), cert. denied, 534 U.S. 1039 (2001), but both decisions are inapposite. In both cases, the court acknowledged that there are occasions on which only injunctive relief against the President himself would address the plaintiff’s injury, but held that given the statutory and regulatory frameworks at issue, the defendant officials had sufficient statutory authority so that an injunction governing their performance of their official duties would likely provide the plaintiffs with “partial relief” even though the President would not be bound to comply with the order. *Swan*, 100 F.3d at 979-981; see *Made in the USA Found.*, 242 F.3d at 1310-1311. That is not the case here, where respondents possess no authority other than to carry out the President’s or President-elect’s wishes.⁸

⁸ Petitioners suggest (see Pet. 3) that their claims against respondents must be redressable because there must be a remedy for alleged violations of the Establishment Clause that take place during the inaugural ceremony. But as this Court has explained, “[t]he assump-

b. Even if petitioners could satisfy the Article III requirement of redressability, the other elements of standing also are not present. For the reasons stated above, petitioners cannot establish that any injury-in-fact arising out of future inauguration ceremonies is fairly traceable to the individuals and entities named as defendants. Because only the President or President-elect can be said to have caused any injury petitioners might suffer, here causation and redressability overlap as “two sides of [the same] coin.” *Dynalantic Corp. v. Department of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997); see *Simon*, 426 U.S. at 43-44. In addition, as the district court concluded, see Pet. App. 49-50, petitioners cannot identify any concrete and particularized injury arising from the possibility that prayer and the phrase “so help me God” will appear in future inaugurations. See generally *Lujan*, 504 U.S. at 560, 564 n.2; *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 482-483 (1982); see also *Newdow v. Bush*, 89 Fed. Appx. 624, 625 (9th Cir. 2004) (unpublished) (holding that plaintiff lacked standing to challenge inclusion of clergy prayers at the 2001 inauguration because he did “not allege a sufficiently concrete and specific injury”).

2. Further review is also unwarranted because, as Judge Kavanaugh explained in his opinion concurring in the judgment, even if petitioners had standing, their Establishment Clause challenge is without merit.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the practice of opening state legislative

tion that if [one party has] no standing to sue, no one would have standing, is not a reason to find standing.” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 489 (1982) (first set of brackets in original; citation omitted).

sessions with prayer because that practice was “deeply embedded in the history and tradition of this country,” *id.* at 786, and because the prayers “had [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794-795.

The practice of asking clergy to deliver inaugural prayers and using the words “so help me God” after the President’s oath of office is consistent with the Establishment Clause for the same reasons. Both the use of the phrase “so help me God” and the inclusion of prayer in the inaugural ceremony are longstanding traditions dating back to the nation’s founding. “The First Congress—the same Congress that drafted and approved the First Amendment—mandated ‘so help me God’ in the oaths of office for federal judges,” and “[s]tate constitutions in effect at the ratification of the First Amendment similarly included ‘so help me God’ in state officials’ oaths of office.” Pet. App. 33 (Kavanaugh, J., concurring in the judgment); see *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (noting the “special significance” of the “interpretation of the Establishment Clause by * * * the First Congress”); see also Pet. App. 34 (Kavanaugh, J., concurring in the judgment) (noting that the words “so help me God” “remain to this day a part of oaths prescribed by law at the federal and state levels”). Likewise, formal prayers “‘have been associated with presidential inaugurations since the inauguration of George Washington.’” *Id.* at 36 (Kavanaugh, J., concurring in the judgment) (citation omitted); Gov’t C.A. Br. 42-46 (discussing historical instances of inaugural prayers).

In addition, neither the use of the words “so help me God” nor the practice of clergy prayers at presidential inaugurations has been exploited to advance any one, or

disparage any other, religious belief. See *Marsh*, 463 U.S. at 794-795; Pet. App. 37-39 (Kavanaugh, J., concurring in the judgment). The words “so help me God,” similar to other phrases that this Court has approved in other ceremonial contexts,⁹ are not sectarian or proselytizing, and the religious references that have appeared in inaugural prayers have reflected the kinds of nonsectarian sentiments that this Court approved of in *Marsh*. See *Lynch*, 465 U.S. at 677-678 (describing numerous “expressions of religious belief” in civic life, and observing that such expressions are consistent with “accommodation of all faiths and all forms of religious expression”); Pet. App. 38-40 (Kavanaugh, J., concurring in the judgment).

⁹ See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (approving the phrase “God save the United States and this Honorable Court” with which this Court opens each of its sessions); *Lynch*, 465 U.S. at 676 (approvingly describing the use of “In God We Trust” in the National Motto and on coins and currency and the phrase “One nation under God” in the Pledge of Allegiance). Accordingly, “it comes as no surprise that the Supreme Court several times has suggested, at least in dicta, that the Constitution permits ‘so help me God’ in officially prescribed oaths of office.” Pet. App. 34-35 (Kavanaugh, J., concurring in the judgment) (citing, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 212-213 (1963), and *Zorach*, 343 U.S. at 312-313).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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