IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REV. DR. MICHAEL A. NEWDOW,	)	
Plaintiff,	)	
v.	)	Civil Action No. 04-2208 (JDB)
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, et al.,	)	
Defendants.	)	

FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In this action, plaintiff, the Rev. Dr. Michael A. Newdow, a citizen and resident of the State of California, seeks to enjoin defendants "from allowing any clergy or other invited guest to give any religious prayer at the Presidential Inaugural ceremonies scheduled to occur on January 20, 2005."[1] Verified Complaint ("Compl."), ¶ 8, prayer for relief, ¶ I.; Motion for Preliminary Injunction, Dec. 21, 2004, at 2. This is the second suit by Newdow seeking to enjoin the longstanding practice of Inaugural prayer, a practice that traces back to the Inauguration of President Washington in 1789. The first suit was dismissed by the United States District Court for the Eastern District of California in 2002, a dismissal affirmed by the United States Court of Appeals for the Ninth Circuit. Newdow v. Bush, C.A. No. 01-00218-LKK (E.D. Cal. 2002), aff'd, No. 02-16327, 89 Fed. Appx. 624, 2004 WL 334438 (9th Cir. Feb. 17, 2004) ("Newdow I") (Tab A). Notwithstanding his first failed effort to enjoin the saying of prayers by clergy at Inaugural ceremonies, Newdow has filed this second action, only 30 days prior to the January 20, 2005 Inauguration.

Plaintiff's motion for a preliminary injunction should be denied, and his complaint should be dismissed. First, plaintiff lacks standing to assert his claims and to seek a preliminary injunction. The doctrine of "issue preclusion" bars Newdow from re-litigating his standing to challenge prayers at Inaugurations. Both the Eastern District of California and the Ninth Circuit considered – but rejected – Newdow's prior assertions of standing to challenge the saying of prayers by clergy at the Inaugural ceremonies. Plaintiff's suit and his theories of standing here

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[1] The Federal Defendants are George W. Bush, President of the United States, the Joint Congressional Committee on Inaugural Ceremonies ("JCCIC"), Senator Trent Lott, the Joint Task Force-Armed Forces Inaugural Committee ("JTF-AFIC"), and Major General Galen B. Jackman. The private defendants are the Presidential Inaugural Committee and its Executive Director, Gregory J. Jenkins.

are virtually indistinguishable from those in the prior case. His current action should be dismissed for this reason alone. Moreover, even if not precluded by the prior decisions, Newdow continues to lack standing to challenge clergy prayers at the Inaugural ceremonies under the facts of the present case. Although plaintiff is personally offended by such prayers, and feels like a "second class citizen" or "outsider" due to what he describes as "religious dogma," a citizen's discomfort or disagreement with government action does not establish standing for the purposes of the "case or controversy" requirements of Article III of the Constitution.

Second, even if the Court were to conclude that Newdow has standing and his suit could proceed, he cannot demonstrate a substantial likelihood of success on the merits, as he must do in order to obtain a preliminary injunction. Newdow cannot prevail on his claim that clergy prayers at the Inauguration violate either the First Amendment's Establishment Clause or the Religious Freedom Restoration Act. The Supreme Court's decision in Marsh v. Chambers, 463 U.S. 783 (1983), which upheld the Nebraska legislature's practice of opening legislative sessions with prayer offered by a paid chaplain, explained that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786. The historical record shows that presidential Inaugural prayer, like legislative prayer, is "deeply rooted" in that same history and tradition, and is similarly constitutional.

Nor has Newdow satisfied the other requirements for the issuance of a preliminary injunction. Newdow has not shown that failure to issue that injunction would result in irreparable injury to him. In contrast, the requested preliminary injunction would substantially injure defendants and other affected interests. The plans for the January 20, 2005 Inaugural

ceremonies are proceeding; they should not be obstructed by Newdow's personal objection to clergy prayer. The preliminary injunction Newdow seeks is fundamentally at odds with the broader public interest in maintaining the nation's traditional Inaugural ceremonies.

BACKGROUND

A. Plaintiff's Prior Litigation Challenging Inaugural Prayers

Newdow's first challenge to Inaugural prayers was filed on February 1, 2001, shortly after the January 20, 2001 Inaugural ceremonies. At those ceremonies, the Reverend Franklin Graham delivered a prayer.[2] Newdow alleged that Reverend Graham's prayer violated the Establishment Clause because "[t]o offer prayer at an official governmental ceremony is a religious act per se," and because Rev. Graham's prayer "was clearly sectarian as well." See 2001 Complaint, ¶¶ 12-13. Newdow requested a declaration that President Bush violated the Establishment Clause by "utilizing any clergyman (much less a Christian minister) in his inauguration," and an injunction barring President Bush "from repeating this or engaging in any similar religious acts." Id. at 7.

President Bush moved to dismiss the complaint for lack of Article III standing and because Rev. Graham's prayer did not violate the Establishment Clause. On July 17, 2001, the Magistrate Judge issued Findings and Recommendations, concluding that Newdow had Article III standing to bring his action, but suggested that the action be dismissed "insofar as plaintiff complains about permitting a chaplain (or the President) from making any prayer at the Presidential inauguration." July 17, 2001 Findings and Recommendations, at 12 (Tab C). The

[2] Newdow alleged that he, like millions of other Americans, watched that Inauguration on television. See Feb. 1, 2001 Complaint ("2001 Complaint"), ¶ 28 (Tab B). Federal defendants are filing herewith various unpublished materials, including pleadings from Newdow I. Newdow has reproduced the text of Rev. Graham's prayer as Appendix A to his Complaint in this case, and the benediction by Pastor Kirbyjon H. Caldwell as Appendix B thereto.

Magistrate Judge noted that "[f]ormal prayers by Christian ministers have been associated with inaugurations since the inauguration of George Washington." Id. at 8 (citation omitted). "In addition," the Magistrate Judge observed, "every President has included reverent references to the deity in his inaugural address to the nation." Id. at 9. Thus, the "history of inaugural prayers, like the history of legislative prayers, indicates that they were not viewed [by the framers] as violating the Establishment Clause." Id., citing Marsh v. Chambers, supra. The Magistrate Judge recommended against dismissal, however, "insofar as plaintiff is attacking the specifics of [Rev. Graham's] prayer as a violation of the Establishment Clause." Id. at 12. The parties had not specifically addressed this issue in their briefs, and it was unclear whether Newdow actually was challenging the specifics of Rev. Graham's prayer. See id. at 10.

President Bush and Newdow both filed objections to the Magistrate Judge's findings and recommendations,[3] but the District Court adopted the findings and recommendations. See Order of September 28, 2001 (Tab D). Thus, the District Court dismissed Newdow's action insofar as Newdow sought an order that the President or a chaplain may not say any prayer as part of a presidential Inauguration, but refused to dismiss the entire case. See id. at 12.

President Bush moved to dismiss Newdow's claim that the specific content of Rev. Graham's prayer violated the Establishment Clause. On December 28, 2001, the Magistrate Judge issued findings and recommendations suggesting that "the entire case be dismissed for lack of jurisdiction because the courts cannot enjoin the President [or grant declaratory relief] in the circumstances of this case." December 28, 2001 Findings and Recommendations at 13 (Tab E).

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[3] President Bush filed objections to the Judge's conclusion that Newdow had Article III standing to challenge the giving of any prayer at a presidential Inauguration.

The Magistrate Judge concluded that "the inauguration of the President, and what may be said by the President or his speakers, is wholly integral to the Executive Branch," id. at 7, and involves nonministerial decisions that courts lack constitutional authority to regulate. See id. at 4-7 & n.4. In the alternative, the Magistrate Judge recommended that the entire case be dismissed because (a) "prayer per se at the Presidential inauguration does not violate the Establishment Clause," as the District Court had already held, (b) "Newdow lacks standing to challenge the content of the prayer given at future inaugurations," and (c) declaratory relief was unavailable for the same reasons. See id. at 13.[4]

Newdow filed objections to the Magistrate Judge's December 28, 2001 Findings and Recommendations, and also filed a Motion for Leave to Amend his Complaint to assert claims against Senator Mitch McConnell, in his capacity as Chair of the Joint Congressional Committee on Inaugural Ceremonies, and certain other new defendants. The Magistrate Judge issued a final set of findings and recommendations, which suggested that the motion be denied. See March 26, 2002 Findings and Recommendations at 8 (Tab F). The Magistrate Judge concluded that a court would lack constitutional authority to regulate Congress's participation in planning and carrying out a presidential Inauguration ceremony, for the same reasons the Magistrate Judge had earlier concluded that a court would lack the power to control what the President or anyone else says at a presidential Inauguration. Id. at 6. The Magistrate Judge also concluded that the motion to add

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[4] Newdow lacked standing to challenge the content of the prayer given at future Inaugurations because courts lack constitutional authority to "set[] forth the content of permissible prayer for future presidential inaugurations," December 28, 2001 Findings and Recommendations at 9, and because the court could not assume that any future presidential Inauguration would necessarily include the kind of specific religious references Rev. Graham's prayer contained. See id. at 10.

Senator McConnell should be denied because Newdow no more had standing to challenge the content of Rev. Graham's invocation by suing Senator McConnell than by suing President Bush. See id. at 6. For example, the Magistrate Judge observed, a court could not issue an injunction directing the President, a Senator, or any other government official to "watch what [the President] and his chosen speakers say" at a presidential Inauguration ceremony. Id. at 7.

The Magistrate Judge rejected Newdow's suggestion that the President or the Joint Congressional Committee on Inaugural Ceremonies "could be ordered to ban clergy from the guest list. . . ." Id. at 7. That kind of an order, the Magistrate Judge observed, would be clearly invalid from a First Amendment standpoint. See id. at 8.[5] Since substituting Senator McConnell "or any other Inauguration associated person or entity" would not affect his recommendation in favor of dismissal, the Magistrate Judge resubmitted his December 28, 2001 Findings and Recommendations, as supplemented, to the District Court. Newdow filed objections, but the District Court adopted the Recommendations in full; it dismissed this case in its entirety, with prejudice. See May 23, 2002 Order at 2 (Tab G).

Newdow appealed that order to the Ninth Circuit. On February 17, 2004, that Court affirmed the judgment of dismissal. Newdow v. Bush, 89 Fed. Appx. 624, 625, 2004 WL 334438, at **1 (9th Cir. Feb. 17, 2004). Newdow had appealed "the judgment of the district court dismissing with prejudice his action alleging that the inclusion of clergy-led prayer at a presidential inauguration is unconstitutional in general, and that the prayer offered by Rev. Franklin Graham at the 2001 inauguration of President Bush was unconstitutional in particular."

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[5] See generally McDaniel v. Paty, 435 U.S. 618 (1978) (holding unconstitutional state statute disqualifying clergy from holding state office).

Id. Noting that "we may affirm on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning," the Court held that Newdow "lacks standing to bring this action because he does not allege a sufficiently concrete and specific injury. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 482-86 . . . (1982)." Id. The Court added that the district court had not abused its discretion in denying Newdow's motion to file an amended complaint "because amendment would be futile." Id.

B. Arrangements For The January 20, 2005 Inauguration

On January 20, 2005, President George W. Bush will be sworn in to serve his second term as the 43rd President of the United States. See U.S. Const., Amend XX, § 1. Pursuant to a concurrent resolution of Congress, the Joint Congressional Committee on Inaugural Ceremonies is authorized "to make the necessary arrangements" for the Inauguration of President Bush and Vice President Cheney, and the rotunda of the United States Capitol can be used for the Inauguration. See Senate Concurrent Resolutions 93 and 94, 150 Cong. Rec. S1695 (Feb. 26, 2004), 150 Cong. Rec. H1081-82 (March 16, 2004); S. Con Res. 2, 109th Cong., reprinted in 151 Cong. Rec. S7 (daily ed. Jan. 4, 2005). Senator Trent Lott serves as Chair of that Committee.[6] The Presidential Inaugural Committee ("PIC") is a private organization appointed by the President-Elect that coordinates numerous ceremonial events connected with the Inauguration, including the Inaugural parade and Inaugural balls. 36 U.S.C. § 501.

[6] More information on this Committee can be accessed at http://inaugural.senate.gov.

C. Newdow's Challenge To Clergy Prayer At The January 20, 2005 Inauguration

On December 21, 2004, Newdow filed the instant suit, and Motion for a Preliminary Injunction, challenging the constitutionality of the use of any member of the clergy to deliver prayers at the forthcoming Inauguration. Compl., ¶¶ 35-47. Named as defendants are President Bush, the Joint Congressional Committee on Inaugural Ceremonies ("JCCIC"), Senator Trent Lott, the Chairman of the JCCIC, the Joint Task Force - Armed Forces Inaugural Committee ("JTF-AFIC" or "Task Force"), Major General Galen B. Jackman, its Commander (collectively, the "Federal defendants"),[7] the Presidential Inaugural Committee and its Executive Director, Greg Jenkins, and "one or more unnamed clergy (wo)men." Id., ¶¶ 9-16.

Newdow describes himself as "an atheist, who sincerely believes that there is no such thing as god, or God, or any supernatural force." Id., ¶ 19. Newdow contends that "acknowledgments of God (much less endorsements of God) do not solemnize public occasions," but instead "ridicule public occasions, making a mockery of the wonders of nature and of human achievement." Id., ¶ 20. In describing the January 20, 2001 Inauguration, Newdow complains that "two Christian ministers were intruded into that governmental function, for the express purpose of giving sectarian, Christian prayer," and asserts that President Bush thereby "stained the Nation's inaugural ceremony with a gross violation of the First Amendment's Establishment Clause." Id., ¶¶ 23-25.[8] Newdow "witnessed these purely religious exercises," and that made

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[7] The JTF-AFIC is responsible for a variety of military ceremonial duties at the ceremony (military band, military salute battery, ushers), but does not provide any chaplain or religious support. Declaration of Thomas L. Groppel ("Groppel dec."), ¶¶ 5-6 (Tab H).

[8] Although Newdow provides an extensive description of his objections to the January 20, (continued...)

him "feel like a second class citizen and a 'political outsider' on account of his religious beliefs." Id., ¶ 26. Newdow asserts that "[b]eing forced to confront that religious dogma as the price to pay for observing a governmental ceremony is a substantial burden upon Plaintiff's Free Exercise right." Id., ¶ 28.

Turning to the upcoming Inauguration, Newdow claims that "upon information and belief," President Bush, "with the assistance and participation" of the other defendants, "will again infuse the inaugural exercises with explicitly religious dogma, thus replicating the aforementioned constitutional violations on January 20, 2005." Id., ¶ 42. Newdow asserts that "Proposed Clergy - at Defendant Bush's behest - will be giving one or more religious prayers during that government ceremony," and that the other defendants will support that action through various means. Id., ¶¶ 43, 45-47. Newdow further asserts that federal tax dollars will be spent "in furthering Proposed Clergy's prayers." Id., ¶¶ 69-73.

Newdow claims "a fundamental constitutional right to observe and participate in the Nation's official ceremonies free from governmental endorsement of religion," and that he plans to attend the Inaugural ceremonies, but that he "[wishes] to avoid any government-sponsored religious dogma" at that event. Id., ¶¶ 74-76. Newdow claims that he is "placed in the untenable position of having to choose between not participating in the presidential inauguration or being forced to countenance purely religious ideals that he expressly denies and that turn him into an 'outsider.'" Id., ¶ 76.

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[8](...continued)
2001, Inauguration, Compl., ¶¶ 23-26, 51-52, 57-67, his Complaint nowhere refers to his subsequent litigation challenging those events, any of the adverse rulings, or its ultimate dismissal.

Newdow seeks a declaratory judgment that "utilizing any clergymen (much less an openly Christian minister and an openly Christian pastor) in a presidential inauguration" violates the Establishment and Free Exercise Clauses and the Religious Freedom Restoration Act. Compl., prayer for relief, ¶ I. Newdow seeks an injunction against defendants "from utilizing any clergymen to engage in any religious acts at the January 20, 2005 presidential inauguration as well as any future inauguration," or, in the alternative, enjoining defendants "from utilizing clergymen to engage in Christian religious acts at the January 20, 2005 presidential inauguration as well as any future inauguration." Id., ¶¶ II., III.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO ASSERT HIS CLAIMS OR TO SEEK AN INJUNCTION.

A. The Doctrine Of Issue Preclusion Bars Newdow From Re-Litigating His Standing To Challenge Prayers At Inaugurations.

Under the doctrine of issue preclusion, also called "collateral estoppel," a judgment in a prior suit precludes re-litigation of an issue where the same issue was actually litigated and lost by a party to the prior suit; the issue was necessarily determined by a court of competent jurisdiction; and preclusion in the second case would not result in any basic unfairness to the party bound by the decision in the prior suit. Yamaha Corp. of America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992); see also, Montana v. United States, 440 U.S. 147, 153 (1979); Qwest Corp. v. F.C.C., 252 F.3d 462, 466 (D.C. Cir. 2001).

As discussed above, in 2001, Newdow asserted essentially the same challenge to the recitation of prayers at Presidential Inaugurations in Newdow I. Although that challenge pertained to the 2001 Inauguration and included a post facto objection to a specific prayer

delivered by a clergy member, Newdow asserted the same theories of injury in fact and taxpayer standing to support his standing to bring that suit as he does in the current action. Because both of these issues were decided against Newdow in the prior case, he is precluded from re-litigating these issues now.[9]

1. Newdow Is Precluded From Re-litigating His Alleged Injury In Fact.

Newdow's present assertion that he will be injured because his observing prayers at the Inauguration offends him and makes him feel like an "outsider" are nearly identical to his prior theory of injury in fact in Newdow I.[10] Newdow admits that his alleged injury in both cases is the same by pleading that "[t]he 2001 prayers made Plaintiff . . . feel like an 'outsider' on both accounts. It is presumed that Proposed Clergy's prayers will make Plaintiff feel like an 'outsider' as well." Compl. at ¶ 57.

In Newdow I, the Ninth Circuit rejected Newdow's assertions and held that he lacked standing to bring his claim because he did not allege a sufficiently concrete and specific injury.

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[9] The doctrine of issue preclusion is not restricted to the litigants who were parties to the first litigation. See, e.g., Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n. 4, 327 (1979) (indicating that the requirement of mutuality of the parties has been abandoned and explaining that defensive use of issue preclusion involves a defendant who seeks to prevent a plaintiff from litigating an issue the same plaintiff has previously litigated and lost against another defendant); McLaughlin v. Bradlee, 803 F.2d 1197, 1201 (D.C. Cir. 1986); Hinton v. Shaw Pittman Potts & Trowbridge, 257 F. Supp.2d 96, 99-100 (D.D.C. 2003).

[10] Compare 2001 Complaint at ¶¶ 28-30 (indicating that the prayer at the 2001 Inauguration made plaintiff feel like an "outsider") with Mem. in Support of Motion for Preliminary Injunction at 5 ("Pl. Mem.") (Newdow "will be required to confront Defendant Bush's religious dogma as the price for exercising his right to participate in the inauguration of his president."); and Compl. at ¶ 21 (explaining that acknowledgments of God are offensive to plaintiff).

Newdow v. Bush, 2004 WL 334438, at ** 1.[11] In support of its ruling, the Court cited to the portion of the Supreme Court's decision in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 482-86 (1982), which found that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Article III terms, even though the disagreement is phrased in constitutional terms."

Newdow points to no intervening change in the law, and there are no material changes in the controlling facts of the present case to suggest that preclusion on the issue of Newdow's injury is not warranted. In his Complaint, Newdow extensively cites to the prayers recited at the 2001 Inauguration to explain his present alleged injury by presuming that the clergy prayers at the 2005 Inauguration will be similar to those given in 2001. See Compl. at ¶¶ 57-67. He makes no allegation and offers no evidence that the prayers at the 2005 Inauguration will differ materially in their subject matter or tone from the 2001 Inaugural prayers, which the Ninth Circuit concluded caused no concrete and particularized injury to Newdow.

The fact that Newdow may attend the 2005 Inauguration in-person, as opposed to watching it on television, as he did in 2001, is not sufficient to alter the nature of his alleged injury. While cases have held that some citizens who are personally exposed to public displays of religious symbols or statements have standing to assert an Establishment Clause claim, these

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[11] Citing to unpublished opinions for their preclusive effect is permissible under both D.C. Circuit and Ninth Circuit Rules. See D.C. Circuit Rule 28(c)(2) (providing that "[u]npublished dispositions of other courts of appeals and district courts may be cited when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition is relevant."); Ninth Circuit Rule 36-3(b)(i) (indicating that unpublished dispositions may be cited when relevant to the doctrines of law of the case, res judicata, or collateral estoppel).

cases have involved plaintiffs who lived or worked in the community where the symbol or statements were displayed and the citizens would either be repeatedly exposed to the religious displays or be specially burdened by having to avoid the places or services where the displays occurred.[12] That showing cannot be made here. In fact, Newdow would be going out of his way to make a special trip to Washington, D.C. specifically to witness the Inauguration. This Court previously found that Newdow's own in-person observation of an allegedly offensive Senate prayer on one occasion was not "the type of extensive interaction with allegedly offensive religious displays in one's community that have supported standing for Establishment Clause claims" in other cases. Newdow v. Eagen, 309 F. Supp.2d 29, 35 (D.D.C. 2004). Newdow's alleged injury of being offended and feeling like an "outsider" remains the same as it was in 2001. As the Ninth Circuit found, that injury is insufficient to support his standing to assert this claim.

As demonstrated, the Ninth Circuit's prior ruling that Newdow lacked standing to challenge clergy-led prayer at an Inauguration because he failed to allege a sufficiently concrete and specific injury should preclude Newdow from relitigating this issue now. The issue of Newdow's injury was necessarily decided by the Ninth Circuit; in fact, it was the sole basis for dismissing plaintiff's prior action. Newdow v. Bush, 2004 WL 334438, **1 (9th Cir. 2004). Finally, precluding Newdow from relitigating the issue of injury would not be unfair to him. Plaintiff had a full and fair opportunity to assert his injury in the prior action, including litigating

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[12] See, e.g., American Jewish Congress v. City of Beverly Hills, 90 F.3d 379, 382 (9th Cir. 1996) (finding that persons who went out of their way to avoid a public park which contained a religious symbol had standing); Books v. City of Elkhart, 235 F.3d 292, 295-299 (7th Cir. 2000) (finding that plaintiff who would have to assume the burden of altering his daily routine to avoid seeing a monument of the Ten Commandments in a city building had standing).

the issue on appeal. Moreover, decisions regarding issues of standing are appropriate for issue preclusive treatment.[13] This Court should conserve its resources and that of the parties by declining to revisit Newdow's standing, and finding that the Ninth Circuit's decision precludes Newdow from re-litigating his alleged injury in fact. See Montana v. United States, 440 U.S. 147, 153-54 (1979).

2. Newdow Is Precluded From Re-litigating His Alleged Taxpayer Standing.

In his prior case, Newdow also alleged a theory of taxpayer standing that is essentially the same as his present theory of taxpayer standing.[14] In fact, Newdow's current allegations of taxpayer standing are based almost entirely on his understanding of how the 2001 Inauguration ceremonies were financed and his presumption that the same expenditures will be made for the 2005 Inauguration. See Compl. at ¶¶ 70-71.

In Newdow I, the Magistrate Judge rejected Newdow's theory of taxpayer standing. See December 28, 2001 Findings and Recommendations at 10-11.[15] The court determined that

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[13] See Cutler v. Hayes, 818 F.2d 879, 889 (D.C. Cir. 1987) (stating that "[p]rinciples of collateral estoppel clearly apply to standing determinations"); Ammex, Inc. v. United States, 384 F.3d 1368, 1372 (Fed. Cir. 2004) (precluding plaintiff from asserting that it has standing under the Export Clause); Harley v. Minnesota Mining and Manufacturing Co., 284 F.3d 901, 909 (8th Cir. 2002) (finding that plaintiffs' lack of injury in fact in prior case precluded subsequent suit).

[14] Compare 2001 Complaint at ¶ 25 (alleging the "federal tax dollars were spent – under the taxing and spending power of Article I, 8, of the Constitution – to hold the ceremony, to assist Rev. Graham, and to broadcast the Defendant's religious message." with Compl. at ¶ 70 (indicating that "Federal tax dollars were spent – under the taxing and spending power of Article I, 8 of the Constitution – to further the religious messages of Rev. Graham and Pastor Caldwell.").

[15] The Magistrate Judge's December 28, 2001 Findings and Recommendations were resubmitted in the Magistrate's March 26, 2002 Findings and Recommendations, which were

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Newdow could not "identify any direct expenditure of taxpayer dollars targeted to the giving of the invocation at the President's inauguration" and that the other funds used to conduct the Inauguration would have been spent regardless of the prayers. Id. at 11.

The lower court's rejection of Newdow's theory of taxpayer standing is entitled to preclusive effect in this case. Newdow asserts the same theory of taxpayer standing in this suit. Newdow can point to no changes in the facts and circumstances surrounding the funding of the 2005 Inauguration to suggest that it would differ materially from the financing of the 2001 Inauguration.[16] The issue of taxpayer standing also was actually litigated by the parties and necessarily decided by the district court.[17] Preventing Newdow from re-litigating his theory of taxpayer standing in this case would not result in any basic unfairness to him.[18] Accordingly, the

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[15](...continued)
adopted in full by order of the District Court on May 23, 2002.

[16] Although Newdow's current Complaint includes more specific examples of the types of expenditures expected to be made at the Inauguration, see Compl. at ¶ 70, the general theory is the same. See McLaughlin v. Bradlee, 803 F.2d 1197, 1203 (D.C. Cir. 1986) (finding that application of collateral estoppel does not require that plaintiff's claims in the subsequent litigation be identical to those raised in the prior case, but merely "the basic issue in both [cases] is the same.") (internal quotations and citations omitted).

[17] While the lower court also determined that Newdow's challenge should be dismissed because the court lacked jurisdiction to enjoin the President, see December 28, 2001 Findings and Recommendations at 4-7, its alternative holding of finding no standing is entitled to preclusive effect. See, e.g., Magnus Elec., Inc. v. La Republica Argentina, 830 F.2d 1396, 1402 (7th Cir. 1987) (indicating that general rule is that judgment that rests alternatively on either of two independently sufficient grounds precludes relitigation of either).

[18] Although Newdow lost on his theory of taxpayer standing in the district court, Newdow elected not to raise the issue in his appeal to the Ninth Circuit. Newdow's failure to raise the issue on appeal, however, does not alter the preclusive effect of the district court's ruling. See, e.g., Qwest Corp. v. F.C.C., 252 F.3d 462, 466 (D.C. Cir. 2001) (indicating that a losing party's failure to appeal an adverse judgment leaves the preclusive effect of the judgment
(continued...)

Court should find that the decisions rejecting Newdow's theories of standing in Newdow I preclude Newdow from maintaining standing to assert his present challenge.

B. Newdow Lacks Standing in the Present Case.

Even if the Court determines that Newdow can pursue this case despite the prior decisions in Newdow I, the Court should rule that Newdow lacks standing to challenge clergy prayer at the Inauguration, either as a citizen or as a federal taxpayer.

The "judicial power of the United States defined by Article III is not an unconditioned authority to determine the constitutionality of legislative or executive acts," but is limited to the resolution of actual "cases" and "controversies." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982)("Valley Forge"). The doctrine of "standing is an essential and unchanging part of the case-or-controversy requirement of Article III," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).[19] The Supreme Court has observed that "[its] standing inquiry has been especially rigorous" in cases such as the one at bar, where "reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

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[18](...continued)
the same as if the party had appealed and lost); GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1213 (S.D.N.Y. 1981) (explaining that failure to raise certain issues on appeal does not alter their preclusive effect for collateral estoppel purposes).

[19] "[T]he party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 104 (1998). Federal courts should presume that they lack jurisdiction "unless the contrary appears affirmatively from the record." Renne v. Geary, 501 U.S. 312, 316 (1991).

To have standing, a plaintiff first "must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical' . . . ." Lujan, 504 U.S. at 560 (citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of . . . ." Id. (citations omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. (citations omitted). Newdow cannot satisfy his burden of proving standing because he cannot prove injury in fact or redressability.

1. Newdow Does Not Have A Concrete And Particularized Injury Sufficient To Qualify As An Injury In Fact.

Newdow contends that he will be injured by the anticipated clergy prayers because he finds such prayers offensive and they make him feel like an "outsider." See Pl. Mem., p. 5; Compl., ¶¶ 21, 56, 57, 76. A plaintiff's assertion of injury to his feelings does not, by itself, establish the kind of "concrete and particularized" injury Article III requires. Lujan, 504 U.S. at 560. The "psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms." Valley Forge, 454 U.S. at 485-486. Thus, Article III injury "is not measured by the intensity of the litigant's interest or the fervor of his advocacy." Id. at 486.[20]

District Judge Henry H. Kennedy recently found that very similar allegations of injury by Newdow did not confer standing to challenge Congress's practices regarding legislative prayer

[20] Accord Allen v. Wright, 468 U.S. 737, 755-756 (1984) ("abstract stigmatic injury" insufficient by itself to create Article III injury in fact); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury).

and its use of chaplains. In Newdow v. Eagen, 309 F.Supp.2d 29, 34-35 (D.D.C. 2004), appeal dismissed, No. 04-5195, 2004 WL 1701043 (D.C Cir. July 29, 2004), that court held that Newdow's alleged injury of being "forced to 'confront religious dogma he finds offensive'" was not a concrete and particularized injury because it consisted merely of emotional harm that has been rejected as a basis for standing under the principles in Valley Forge.[21] In that case, Newdow visited the Senate and observed a chaplain's prayer he found objectionable. Id. at 34. In this case, he proposes to travel to Washington to the Inauguration to listen to prayer(s) that, he declares, will be objectionable "religious dogma." Compl., ¶¶ 70-71. In neither situation is there the kind of sustained or continued interaction with objectionable religious activities that could confer standing. Newdow v. Eagen, 309 F.Supp.2d at 35 (collecting the cases).

The D.C. Circuit also has found that injured feelings alone do not constitute Article III injury. In Kurtz v. Baker, 829 F.2d 1133, 1141 (D.C. Cir. 1987), the Court determined that a secular humanist lacked standing to challenge his exclusion from the U.S. House and Senate guest chaplains program. In rejecting plaintiff's theory that the exclusion injured him by stigmatizing secular humanists and atheists, the court noted that "allegations of stigmatic injury will not suffice to link a plaintiff personally to the conduct he challenges unless . . . the plaintiff

[21] In Valley Forge, the Supreme Court held that plaintiffs, residents of Maryland and Virginia, lacked standing to bring their Establishment Clause challenge to conduct to which they objected in Pennsylvania. Valley Forge, 454 U.S. at 487 (stating that Establishment Clause did not "provide a special license to roam the country in search of governmental wrongdoing").

personally has been denied a benefit."[22] Newdow's feelings of being an "outsider" do not give him standing to challenge Inaugural prayers.[23]

Moreover, Newdow's injury is not particularized or specific to him, but rather is merely a generalized grievance that may be shared by other citizens who might prefer to hear no clergy prayer (or perhaps a different type of such prayer) at the Inauguration. Such an injury is not specific enough under Article III, which requires a plaintiff to show that he or she is "in danger of suffering [a] particular concrete injury" that is not "undifferentiated and common to all members of the public." United States v. Richardson, 418 U.S. 166, 176-77 (internal quotation marks omitted).[24] Newdow's anticipated exposure to clergy prayer at the Inauguration does not qualify as a sufficiently particularized injury.

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[22] Accord, United States Catholic Conference v. Baker, 885 F.2d 1020, 1024-1025 (2d Cir. 1989) (pro-choice clergy lacked standing to challenge Catholic Church's tax-exempt status based on alleged stigma arising from "'government favoritism to a different theology'"); Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 201 (3d Cir. 1986) (religious groups lacked standing to challenge adoption of diplomatic relations with the Vatican based on suggestion that such relations would cast their religious views in an adverse light in the religious market).

[23] In Allen v. Hickel, 424 F.2d 944, 946-47 (D.C. Cir. 1970), the court found that plaintiffs, all citizens of the D.C. metropolitan area, suffered injury "in the impairment of non-economic values" sufficient to afford them standing to challenge the display of a creche in the Pageant of Peace on federal parkland -- the Ellipse. Allen, however, was decided prior to, and is inconsistent with, the Supreme Court's decision in Valley Forge. Moreover, injury to citizens of the District of Columbia area from improper diversion of local parkland is significantly more concrete than any injury Newdow may suffer from his voluntary decision to travel from Sacramento to Washington, D.C. to confront the prayers to be given at the upcoming Inauguration.

[24] Such "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches" are inappropriate for judicial determination. Valley Forge, 454 U.S. at 475 (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)).

2. Newdow Lacks Standing Because His Claim for Relief Is Not Redressable.

Newdow also lacks standing because he cannot prove that the injury he alleges can be "'redressed by a favorable decision.'" Lujan, 504 U.S. at 560 (internal citations omitted). Newdow seeks an injunction to prevent the defendants "from allowing any clergy or other invited guest to give any religious prayer at the official Presidential Inaugural ceremonies . . . ." Mot. for Preliminary Injunction at 2. That claim, however, is not redressable because the judiciary lacks the authority to issue injunctive or declaratory relief against its co-equal branches of the government – namely the President and Congress. Long ago, the Supreme Court explained this principle, which is based on the separation of powers:

> The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

Mississippi v. Johnson, 71 U.S. 475, 500 (1866).[25] This rule has been reaffirmed on numerous subsequent occasions. See, e.g., Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) (stating that "[t]he functions of government under our system are apportioned . . . . The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other."); Clinton v. Jones, 520 U.S. 681, 718-19 (1997) (Breyer, J. concurring) (recognizing "the apparently unbroken historical tradition . . . implicit in the separation of powers that a President may not be ordered by the Judiciary to

[25] By noting that a court may not "restrain" the President or Congress in their official functions, but may take "cognizance" of presidential or congressional acts in appropriate cases, the Court is describing the difference between injunctive and declaratory relief, which is beyond the judicial capacity, and damages, which are available where there is a waiver of sovereign immunity and other prerequisites are met. Newdow does not seek damages in this case.

perform particular Executive acts") (internal quotations and citations omitted); Swan v. Clinton, 100 F.3d 973, 977 (D.C. Cir. 1996) (explaining that courts have no jurisdiction to enjoin the President in his official acts, nor do they have the power to issue declaratory relief against the President).

In Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992), the plurality of the Court noted that although prior cases had "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty . . . in general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" (quoting Mississippi v. Johnson, 71 U.S. at 501). What the President says at his own Inauguration, and who else may be invited to speak, obviously are discretionary, not ministerial, acts.[26] Accordingly, even if the clergy prayers at the Inauguration could be attributed to an "official" act by President Bush, Franklin would clearly preclude a court from issuing any injunctive or declaratory relief against the President in that regard. See Swan, 100 F.3d at 977 n.1 (court may not grant declaratory relief against the President where Franklin would bar injunctive relief).

The same principle prevents the Court from enjoining Senator Lott and the Joint Congressional Committee on Inaugural Ceremonies ("JCCIC") for their roles in the Inaugural program. The Supreme Court has held that the courts may not enjoin the President *or Congress* in the conduct of their official functions. Mississippi v. Johnson, 71 U.S. at 500; see also Franklin, 505 U.S. at 829 (Scalia, J., concurring) (noting that a court may no more "direct . . . the

[26] See generally Mississippi v. Johnson, 71 U.S. at 498-499 ("a ministerial duty . . . is one in respect to which nothing is left to discretion"); Swan, 100 F.3d at 977 (same).

Congress to perform particular legislative duties" than it may order the President to take specific official acts); Hearst v. Black, 87 F.2d 68, 72 (D.C. Cir. 1936) (refusing to enjoin acts taken in performance of Congress's discretion). In Newdow I, the Magistrate Judge recognized this principle and concluded that the court lacked jurisdiction to grant injunctive or declaratory relief against either the President or Congress regarding what may be said by the President or his speakers at a presidential Inauguration.[27] Accordingly, Plaintiff's purported injury is not redressable with respect to these defendants.[28]

C. Newdow Lacks Taxpayer Standing To Bring This Action.

Newdow's attempt to claim standing as a taxpayer also fails. He asserts that tax dollars were spent at the 2001 Inauguration under the taxing and spending power of Article I, §8 of the Constitution for various services (security, transportation, and printing of programs) to facilitate the clergy prayers, and that the same expenditures will be made at the January 20, 2005 Inauguration. Compl., ¶¶ 70-71. This assertion of taxpayer standing is insufficient because Newdow cannot show that any federal funds will be spent directly and specifically to support the

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[27] See December 28, 2001 Findings and Recommendations at 4-7 (finding no jurisdiction to enjoin the President); March 26, 2002 Findings and Recommendations at 4-8 (denying Newdow's Motion to Amend Complaint to add Senator McConnell, as chairperson of the JCCIC, because courts cannot enjoin Congress). Although the Magistrate Judge phrased his decision in terms of jurisdiction, he also correctly phrased it in terms of standing as well. See pp. 5-6, supra. To say that a court lacks jurisdiction to enjoin the President or Congress in a particular respect is also to say that a party's request for such relief is not "redressable." Lujan, 504 U.S. at 560.

[28] An injunction against either Major General Galen B. Jackman or the Joint Task Force-Armed Forces Inaugural Committee ("JTF-AFIC") also would fail to redress Newdow's alleged injury in this case. Neither Major General Jackman nor JTF-AFIC have any control over the clergy who provide the prayers, nor do they provide any support in particular for the clergy to deliver prayers during the Inauguration. See Groppel Dec. at ¶¶ 6, 8. Accordingly, an injunction against either of these defendants would not prevent the clergy from delivering their prayers.

recitation of clergy prayers at the Inauguration. Moreover, even if he could demonstrate that government funds will be spent directly on the Inaugural prayers, he cannot establish that such expenditures are made pursuant to Congress's specific taxing and spending authority under Article I, § 8 of the Constitution.

A litigant does not typically have Article III standing to challenge government taxation or expenditures simply by virtue of taxpayer status because "[a]ny tangible effect of the challenged statute on the plaintiff's tax burden was remote, fluctuating, and uncertain." Frothingham v. Mellon, 262 U.S. 447, 487 (1923). In Flast v. Cohen, 392 U.S. 83, 102-03 (1968), the Court acknowledged a "narrow exception" to this general rule and found that, in certain types of Establishment Clause cases, a plaintiff can demonstrate federal taxpayer standing by showing two elements: (1) that the challenged government action is an "exercise[] of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution"; and (2) that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power."

Newdow cannot satisfy the first element of the taxpayer standing test because, as a threshold matter, he cannot identify any expenditure of tax dollars made specifically to support clergy prayers at the Inauguration. Taxpayers do not have standing to object to only incidental expenditures related to the activity that they seek to challenge.[29] Newdow's references to the

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[29] See Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429, 433-34 (1952) (holding that taxpayer lacked standing unless he could show that Bible reading increased any tax he paid; allegation that school spent tax funds on teacher salaries, equipment, building maintenance, etc. was insufficient to confer standing); Doe v. Madison School District, 177 F.3d 789, 794-95 (9th Cir. 1999)(en banc) (a taxpayer who alleged that a school spent tax dollars on "renting a hall, printing graduation programs, buying decorations, and hiring security guards"

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funds expected to be spent by JCCIC and JTF-AFIC on security, maintenance, printing programs, etc., see Compl. at ¶ 70, fail to identify any funds used solely for the prayers. The clergy members will not be appearing at any expense to the government. Declaration of Gregory J. Jenkins ("Jenkins decl."), ¶ 10. See Kurtz v. Baker, 829 F.2d 1133, 1140 (D.C. Cir. 1987) (stating that "[a]s there is no allegation that guest chaplains receive a stipend from the federal government, we cannot see how the practice of inviting guest chaplains to offer the opening prayer is an exercise of Congress's taxing and spending power."). The expenditures and level of support to be provided by the government for the Inauguration will not be affected whatsoever by the inclusion of clergy members reading prayers. See Groppel decl., ¶ 8; Jenkins decl., ¶¶ 5, 10.[30]

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[29](...continued)
lacked standing to challenge the school's practice of having prayers at high school graduation ceremonies. The court observed that "those are ordinary costs of graduation that the school would pay whether or not the ceremony included a prayer" and noted that "Doe identifies no tax dollars that defendants spent solely on the graduation prayer, which is the only activity she challenges.).

[30] No more availing is Newdow's claim that tax dollars will be spent to reprint in the Congressional Record a transcript of the Inaugural proceedings, including the text of any prayers delivered. See Compl. at ¶ 70; *see also* 147 Cong. Rec. S 421-23 (Jan. 22, 2001) (2001 Inaugural proceedings). The Supreme Court and the D.C. Circuit have made clear that Flast's "narrow exception" to the rule against taxpayer actions requires the plaintiff to identify a "substantial expenditure of federal tax funds" in violation of the Establishment Clause. Flast, 392 U.S. at 103 (emphasis added); see also id. at 122 n.9 (Harlan J., dissenting) (explaining that he took this phrasing to mean that the "Court's standing doctrine . . . excludes any program in which the expenditures are 'insubstantial'"); Public Citizen v. Simon, 539 F.2d 211, 215 n.11 (D.C. Cir. 1976) (stating that "Flast requires not only that the challenge be to a spending program but also that the expenditures be 'substantial'"). Whatever the incidental expense of including in the Congressional Record a portion of the Inaugural proceedings that the plaintiff finds objectionable, it cannot be said that such expense is "substantial."

In Kurtz v. Kennickell, 622 F. Supp. 1414, 1416 (D.D.C. 1985), Judge Oberdorfer found taxpayer standing to challenge the printing and publishing of annual compilations of prayers by congressional chaplains. In that case, however, the prayers were printed and bound into books on an annual basis at a cost of up to $30,000 per year. Id. at 1415. Moreover, Judge Oberdorfer left
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For these same reasons, the Magistrate Judge in Newdow I found that Newdow lacked taxpayer standing. December 28, 2001 Findings and Recommendations at 10-11. Newdow also lacks taxpayer standing here, where the inclusion of clergy prayer will not add to the public cost of the Inauguration.

Even if Newdow could identify some federal money devoted solely to the Inaugural prayers, he cannot prove that such expenditures emanate from Congress's specific taxing and spending authority under Article I, § 8 of the Constitution. Any money spent on the Inauguration by JCCIC or Senator Lott is not derived from Congress's power to tax and spend but rather is in fulfillment of the constitutional requirement for administration of an oath to the President under Article II, Section 1, Clause 7.

Not every congressional expenditure is an exercise of Congress's taxing and spending authority. The taxing and spending power provides constitutional authority for "federal taxing

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[30](...continued)
no doubt that a number of justiciability concerns would bar the consideration of the Congressional Record publication claim that the plaintiff advances here. See Murray v. Morton, 505 F. Supp. 144, 146 n.1 (D.D.C. 1981) (Oberdorfer, J.) (noting that Journal of Proceedings Clause, U.S. Const. Art. 1, Sect. 5, Cl. 3, "is such an absolute constitutional commitment of Congress' right to publish its proceedings, whatever they may be, as to foreclose justiciability of the publication claim"), vacated on other grounds, Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983) (en banc) (holding that challenge was so insubstantial that it failed to raise a substantial constitutional question). Indeed, in addition to the Journal of Proceedings Clause, the Speech or Debate Clause, Art. I, § 6, Cl. 1, of the Constitution bars any claim against the Congress, or a Member of it, concerning the publication of material in the Congressional Record. See Hutchinson v. Proxmire, 443 U.S. 111, 116 n. 3 (1979) (stating "we assume, without deciding, that a speech printed in the Congressional Record carries immunity under the Speech or Debate Clause as though delivered on the floor"); Miller v. Transamerican Press, Inc., 709 F.2d 524, 529 (9th Cir. 1983) (holding that insertion of material into Record is protected by Speech or Debate Clause and that, as a consequence, congressman could invoke privilege to avoid answering questions during deposition); Rusack v. Harsha, 470 F. Supp. 285, 296 n. 18 (M.D. Pa.1978) (holding that Speech or Debate Clause protects against suit based on insertion of material into Congressional Record).

and spending programs." Flast, 392 U.S. at 101. Such "programs" involve Congress's attempt to promote the "general welfare," U.S. Const., Art. I, § 8, cl. 1, by the "expenditure of public moneys for public purposes . . . not limited by the direct grants of legislative power found in the Constitution." South Dakota v. Dole, 483 U.S. 203, 207 (1987) (internal citation omitted). Accordingly, the taxing and spending power has been held to authorize traditional spending programs, such as providing federal funds to local agencies for the education of low-income families. See, e.g., Flast, 392 U.S. at 86. Thus, Congress is not confined to rely solely on its authority under the Taxing and Spending Clause, provided that another constitutional provision supplies it power to spend for a particular purpose.[31]

Where, as here, Congress's taxing and spending power is not specifically implicated, courts have consistently rejected claims of taxpayer standing. See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (no standing where plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); United States v. Richardson, 418 U.S. 166, 175 (1974) (no standing where plaintiffs' challenge "[was] not addressed to the taxing or spending power, but to statutes regulating the CIA"); Valley Forge, 454 U.S. at 480 (no taxpayer standing where the challenged government action "was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8"); Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 199 (3d Cir. 1986) (no taxpayer standing to challenge

[31] See Richardson v. Kennedy, 313 F. Supp. 1282, 1285 (W.D. Pa. 1970) (finding that taxpayer lacked standing to challenge congressional pay raise enacted under authority of Article I, § 6, cl. 1), aff'd mem., 401 U.S. 901 (1971). Clearly, organizing the logistics for the Presidential Inauguration ceremony is not a typical Congressional spending program under Article I, § 8.

ambassadorship to Vatican because spending was authorized by Congress's power over foreign affairs). Because the spending by JCCIC on the Inauguration is not done pursuant to Congress'staxing and spending authority under Article I, § 8,[32] Newdow does not have taxpayer standing to assert his claim.[33]

II. NEWDOW IS NOT ENTITLED TO A PRELIMINARY INJUNCTION.

Even if the court were to find that Newdow has standing to assert his claims, he is not entitled to receive the injunctive relief he seeks. A grant of preliminary injunctive relief under Fed. R. Civ. P. 65(a) "is considered an extraordinary remedy in this circuit." Sociedad Anonima Vina Santa Rita v. United States Dep't of the Treasury, 193 F. Supp. 2d 6, 13 (D.D.C. 2001) (citations omitted). Because preliminary injunctive relief is "a drastic and unusual judicial measure," see Marine Transport Lines, Inc. v. Lehman, 623 F. Supp. 330, 334 (D.D.C. 1985), the power to issue such an injunction, "especially a mandatory one, should be 'sparingly exercised,'" see Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (citations omitted). Thus, to prevail in a request for a preliminary injunction, a plaintiff bears the burden of demonstrating that:

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[32] Any spending on the Inauguration undertaken by the JTF-AFIC and its commander clearly is not congressional spending under Article I, § 8. As discussed above, JTF-AFIC will not spend any money specifically associated with the prayers recited at the Inauguration. Moreover, as part of the Department of Defense, JTF-AFIC is within the Executive Branch, and courts have rejected taxpayer standing to challenge executive actions that were not based on a Congressional enactment under Article I, § 8. See, e.g., Schlesinger, 418 U.S. at 228 (no standing where plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); cf. Bowen v. Kendrick, 487 U.S. 589, 618-19 (1988) (permitting taxpayer standing to challenge implementation of statutory grant program by Executive Branch officials).

[33] Even if the Court were to find that Newdow somehow satisfied the Flast standards, Newdow would still need to demonstrate causation and redressability in order to have standing. See Kurtz v. Baker, 829 F.2d 1133, 1140 (D.C. Cir. 1987).

(1) there is a substantial likelihood of success on the merits; (2) failure to grant the injunction would result in irreparable injury; (3) the requested injunction would not substantially injure other interested parties; and (4) the public interest would be furthered by the injunction. Katz v. Georgetown Univ., 246 F.3d 685, 687-88 (D.C. Cir. 2001) (citation omitted); National Head Start Ass'n v. Department of Health and Human Services, 297 F. Supp. 2d 242, 246-47 (D.D.C. 2004). These factors "must be balanced against each other, but it is especially important for the movant to demonstrate a likelihood of success on the merits." 297 F. Supp. 2d at 247. As demonstrated infra, plaintiff Newdow has failed to carry that burden here.

A. Plaintiff Has Failed to Demonstrate a Substantial Likelihood of Success on the Merits.

1. Plaintiff's Establishment Clause Claims Are Foreclosed By The Supreme Court's Decision In Marsh v. Chambers And By This Court's Decision in Newdow v. Eagan.

In Marsh v. Chambers, 463 U.S. 783 (1983), the Supreme Court rejected an Establishment Clause challenge to the Nebraska state legislature's practice of beginning each of its sessions with a prayer offered by a chaplain who is paid out of public funds. See 463 U.S. at 784-85. As we demonstrate below, there is no basis in logic or history that could support distinguishing prayers at presidential Inaugurations from the legislative prayers upheld in Marsh. Plaintiff Newdow's effort to enjoin the saying of prayers by clergy at the January 20, 2005 Inaugural ceremonies therefore is wholly at odds with the Supreme Court's decision in Marsh.

Second, District Judge Henry H. Kennedy of this Court recently rejected plaintiff Newdow's attempt to enjoin the saying of prayers by chaplains appointed by the Senate and House of Representatives, applying Marsh and the same legal principles. Newdow v. Eagan, 309 F.

Supp.2d 29 (D.D.C.), appeal dismissed, No. 04-5195, 2004 WL 1701043 (D.C Cir. July 29, 2004). Newdow asserted there many of the same arguments he has advanced in his Motion for a Preliminary Injunction, but Judge Kennedy properly relied on Marsh in upholding the Legislative Branch's chaplaincy program. That analysis supports the constitutionality of clergy prayer at the January 20, 2005, Inaugural ceremony.

a. Marsh v. Chambers Forecloses Newdow's Challenge To Inaugural Prayers.

(1) The Nation's Historical Custom Of Prayers At Legislative And Inaugural Ceremonies.

In upholding the practice of legislative prayer in Marsh, the Supreme Court noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786. "From colonial times through the founding of the Republic and ever since," Chief Justice Burger observed, "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." Id. Thus, the Court explained, "the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain." 463 U.S. at 787. Later, "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer," id. at 787-788, and a "statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789." Id. at 788 (citation omitted). Three days later, the Court noted, "final agreement was reached on the language of the Bill of Rights. . . ." Id. (citation omitted).

Based on the above history, the Supreme Court concluded that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening

prayers as a violation of that Amendment. . . ." 463 U.S. at 788 (footnote omitted). As the Court explained, "[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." Id. at 790. See also id. at 788 (noting that the practice of legislative prayer begun by the First Congress has "continued without interruption since that early session of Congress"). For the above reasons, Marsh held, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment of religion,' but a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792.[34]

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

The Supreme Court also supported its holding in Marsh by referring to historical examples of ceremonial references to God by the Judicial and Executive Branches. For example, the Court

[34] See also id. at 791 (legislative prayer presents no more potential for establishment than the provision of transportation to students attending religious schools, grants for higher education to religious colleges, or tax exemptions for religious organizations) (citations omitted).

noted that "[i]n the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court,'" and that "[t]he same invocation occurs at all sessions of this Court," 463 U.S. at 786 – a practice that originated in the days of Chief Justice Marshall. See Engel v. Vitale, 370 U.S. 421, 446 (1962)(Stewart, J., dissenting).

Likewise, Marsh noted, on the same day that final agreement was reached on the language of the Bill of Rights, "the House [of Representatives] resolved to request the President to set aside a Thanksgiving Day to acknowledge 'the many signal favors of Almighty God.'" 463 U.S. at 788 n.9 (emphasis added). These references show that the Supreme Court in Marsh did not intend to draw any distinctions between the legislative, judicial, and executive branches with respect to the permissibility of ceremonial prayer and references to God.

Plaintiff Newdow seeks to distinguish clergy prayers at Inaugurations from the legislative chaplain prayers at issue in Marsh on the theory that the Inaugural prayers do not have the same "unambiguous and unbroken history of more than 200 years" to justify them, noting that the current practice of inviting clergy to say an Inaugural prayer in connection with the president's Inauguration dates back to 1937, with the second Inauguration of President Franklin D. Roosevelt. Pl. Mem., pp. 16-17 (citation omitted); Compl., ¶ 30. Newdow also tries to distinguish "legislative prayer" from Inaugural prayer on the theory that the former "is not intended for the public at large." Id. Newdow, however, is fundamentally mistaken both in his interpretation of the relevant history and in his effort to distinguish legislative chaplain prayer from Inaugural prayer.

First, Inaugural prayer, like legislative prayer, originated at the Founding and has continued to this day. Shortly after President Washington was sworn in in 1789, in accordance with resolutions passed by the Senate and House of Representatives, see S. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2106 (1996) (footnote omitted), he and members of the Senate and House walked to St. Paul's Chapel, where Bishop Samuel Provoost, Chaplain of the Senate, read prayers from the Book of Common Prayer. See id. at 2107 (footnote omitted).

It is inconceivable that the members of the First Congress, who drafted the Establishment Clause, would have thought that Clause would prohibit the practice of presidential Inaugural prayer – since they themselves passed the resolution, noted above, which directed the President, Vice-President, and members of Congress to proceed after the President's oath "to Saint Paul's Chapel, to hear divine service, to be performed by the Chaplain of Congress already appointed." M. Medhurst, "God Bless the President": The Rhetoric of Inaugural Prayer 60 (1980) (unpublished Ph.D. dissertation) (citing J. Gales, The Debates and Proceedings in the Congress of the United States, Vol. I (Gales and Seaton, 1834) (Tab I). Cf. Marsh, 463 U.S. at 788 (noting that the same members of the First Congress who drafted the Establishment Clause also authorized the appointment of paid legislative chaplains).[35]

During the period of 1793-1937, the Senate chaplain delivered the Inaugural prayers in the Senate chambers as part of the administration of the oath of office to the Vice-President. See Epstein, 96 Colum. L. Rev. at 2174 n.137. See also Medhurst, supra, at 76 (noting that the

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

Inauguration of the Vice-President was held separately, and before, the Inauguration of the President during those years so the Vice-President could "act in his role as President of the Senate and thus [] preside over the Senate on inauguration day"). Since 1937, the Vice President-elect has taken his oath of office in the same Inauguration ceremony as the President-elect. See Medhurst, supra, at 76-77. Thus, since that time, presidents-elect have resumed the original practice of having a clergy member recite a prayer during the presidential Inauguration itself. See Epstein, 96 Colum. L. Rev. at 2107 (noting that prayers by Christian ministers "have been part of every [presidential] inaugural ceremony during the last sixty years").

In addition to prayer by *clergy*, the longstanding practice of Inaugural prayer also includes prayer by Presidents. George Washington, after swearing his oath of office on a Bible, offered the following prayer in his first Inaugural address: "[i]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes. . . ." Inaugural Addresses of the Presidents of the United States, S. Doc. 101-10, p. 2 (1989) (Tab J).

Thomas Jefferson, whose views regarding church and state have been given substantial weight by the Supreme Court in interpreting the Establishment Clause, see, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947), offered the following prayer in his first Inaugural address: "[M]ay that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." Inaugural Addresses of the Presidents

of the United States, supra, at 17. See also id. at 22-23 (Jefferson invited his audience to join him in a similar prayer at his second Inauguration).

Likewise, James Madison, who was the principal drafter of the Bill of Rights, see Everson, 330 U.S. at 13; id. at 523 (Jackson, J., dissenting), offered a similar prayer in his first Inaugural address, where he invoked "the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." Inaugural Addresses of the Presidents of the United States, supra, at 28.[36] In sum, Inaugural prayer is just as "deeply embedded in the history and tradition of this country" as legislative prayer. Marsh, 463 U.S. at 486.

Second, Newdow's attempt to distinguish legislative chaplain prayer as "not intended for the public at large" also misses the mark. Pl. Mem., p. 17. Both legislative clergy prayer and Inaugural clergy prayer are directed to the public officials, and are being said for their benefit, e.g., that they will receive guidance as they perform their official duties and serve the public interest.[37]

Marsh also refutes Newdow's contention that clergy prayers violate the Establishment Clause to the extent that those prayers invoke Christian or other denominational terms or beliefs.

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[36] Even if there were no such evidence of prayer by clergy at presidential Inaugurations, the fact that presidents themselves have said such prayers since our nation's earliest days supports the constitutionality of a prayer by clergy. If it is constitutional for the President to say a prayer at his Inauguration, as Presidents Washington, Jefferson, and Madison and others have done – which Newdow does not appear to challenge in this case -- it would make no sense to say that the President may not request a clergy member to pray for him.

[37] For example, the prayer delivered by Rev. Franklin Graham at the January 21, 2001 Inauguration asked that "our new [P]resident and all who advise him" be given "calmness in the face of storms, encouragement in the face of frustration, and humility in the face of success." See Appendix A to Compl.

See Pl. Mem., pp. 24-25, Compl., ¶¶ 51-67. Assuming, arguendo, that the clergy who will be invited to say a prayer at the January 20, 2005 ceremony will utter a prayer of such type, Newdow's objection nevertheless is without any merit.[38]

In Marsh, the Supreme Court rejected the respondents' argument that the Nebraska legislature had improperly selected a clergyman of only one denomination as its chaplain for the past 16 years, and that his prayers violated the Establishment Clause because they were in the "Judeo-Christian tradition." 463 U.S. at 793. First, the Court declared that "[w]e, cannot any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergy man of one denomination advances the beliefs of a particular church." Id. Noting evidence that the clergyman had been reappointed because "his performance and personal qualities were acceptable to the body" that had appointed him, the Court added that guest chaplains also had officiated during the clergyman's absence. Id. Finally, the Court emphasized that "[t]he content of [otherwise permissible ceremonial] prayer is not of concern to judges where, as here, 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." 463 U.S. at 794-95.

For the same reasons, Newdow's dual objection to the potential selection of a "Christian minister," or to the specific content of the prayer that such clergy may say at the January 20, 2005 ceremony, must be rejected. Compl., prayer for relief, ¶ I. The Supreme Court in Marsh declined to overturn the Nebraska legislature's choice of a Presbyterian chaplain. It also expressed its

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[38] Because, as of the date of the filing of this brief, no clergy prayer has been said, and the specific content of the prayer is unknown, Newdow's challenge to the specific content of such prayer is, technically speaking, not "ripe" for adjudication. See Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967). For the purposes of this opposition, however, Federal defendants will assume such a prayer will be said.

unwillingness to sit in review of any specific prayers said by that chaplain. This Court also should decline Newdow's explicit demand to enjoin the use of clergy who will engage in "religious acts" or "Christian religious acts" on January 20, 2005. Id., ¶¶ II, III.[39]

As Marsh recognized, where a prayer constitutionally may be said in connection with an official government ceremony, some leeway has to be given to allow the speaker to pray within his or her own tradition, if nothing else than as an accommodation to the religious obligations of the person giving the prayer. See Marsh, 465 U.S. at 791-92 (approving practice of legislative prayer even though the prayers had come from the "Judeo-Christian tradition"); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144-145 (1987) (noting that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause") (footnote omitted).[40] To hold otherwise would be effectively to require prayers to be not religious at all, or to require the courts to prescribe the form and content of permissible ceremonial prayers, which the First Amendment would certainly not

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[39] Even if the Court were to examine the content of previous Inaugural prayers, including Rev. Graham's January 20, 2001 prayer, it could readily conclude that such prayers have contained the same kinds of general entreaties for the well-being of the Nation and the President and Vice President that Inaugural prayers have routinely included since the nation's earliest days. See Appendix A to Compl. (reproducing Rev. Graham's invocation); see also Epstein, 96 Colum. L. Rev. at 2109 (quoting Inaugural prayers offered by Presidents Washington, Jefferson, and Madison); id. at 2174 n.8 (quoting Inaugural prayers offered by various clergy members). Such prayers also closely resemble the kinds of legislative prayers that have been offered by paid legislative chaplains since the beginning of the Republic. See Epstein, 96 Colum. L. Rev. at 2174 nn. 117-118.

[40] For these reasons, a rabbi's invocation of the "God of Abraham, Isaac, and Jacob," or an imam's reference to "Allah," cannot be described as either an effort to "proselytize" a specific faith, or as "disparaging" other faiths. See, e.g., Snyder v. Murray City Corp., 159 F.3d 1227, 1234-1235 & n.10 (10th Cir. 1998) (proselytization refers to "aggressive" attempts to "convert" citizens to a particular view).

allow. See, e.g., Lee v. Weisman, 505 U.S. 577, 588 (1992) (a government may not direct or control content of prayers at public events).[41]

Moreover, as the Tenth Circuit correctly observed in Snyder, "all prayers 'advance' a particular faith or belief in one way or another." 159 F.3d at 1234 n.10. Thus, to hold that a clergy member's prayer is unconstitutional because he or she mentioned Jesus Christ would be to hold that no prayer may be offered at a presidential Inauguration. Because, for the reasons explained above, it is clear that such prayers may be said, Newdow's challenge to any specific prayer also must fail. As the Sixth Circuit explained in Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997), cert. denied, 523 U.S. 1024 (1998), "[a]ny prayer has a religious component," but the Establishment Clause does not require the "extirp[ation] from public ceremonies [of] all vestiges of the religious acknowledgments that have been customary at civic affairs in this country since well before the founding of the Republic." Id. at 236-37.[42]

(2) Marsh, Not Lee v. Weisman Or Santa Fe, Is The Controlling Authority In This Case.

Newdow argues that the Supreme Court's more recent decisions in Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) ("Santa Fe"), control this case, rather than Marsh, and that those decisions "raise substantial doubts as to

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[41] Newdow notes that Marsh recited the fact that the Nebraska legislature's chaplain had deleted references to Christ from his prayers, Pl. Mem., p. 18, 463 U.S. at 793 n.14, and that in County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989), the clergy prayers were distinguished from a creche scene as being nonsectarian. But that decision also stated that "[l]egislative prayer does not urge citizens to engage in religious practices," and emphasized that the issue was not before the Court. Id. at n.52.

[42] Accord Tanford v. Brand, 104 F.3d 982, 985 (7th Cir.) (upholding, under Marsh, invocation and benediction at public university graduation ceremony), cert. denied, 522 U.S. 814 (1997).

whether or not Marsh remains good law." Pl. Mem., p. 22. Newdow's assertions are wholly incorrect.[43]

In Lee, the Supreme Court struck down a city policy allowing prayers at public middle school and high school graduation ceremonies. The Court stated that "[e]ven for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma." 505 U.S. at 586. The Court stressed that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us." Id. at 587. The Court stated that a student objecting to the prayer faced "a real conflict of conscience," and that the state could not require the student "to forfeit his or her rights and benefits as the price of resisting conformance to state-

[43] A court may not assume that a Supreme Court decision has been implicitly overruled by later Supreme Court decisions or opinions, see, e.g., Agostini v. Felton, 521 U.S. 203, 217 (1997). Moreover, Marsh's holding and rationale have been consistently reaffirmed by the Supreme Court, See Lynch v. Donnelly, 465 U.S. 668, 673-674 (1984) (relying on Marsh in upholding inclusion of a nativity scene in city Christmas display); id. at 1369 (O'Connor, J., concurring) (noting that certain government acknowledgments of religion are permissible because of their "history and ubiquity"); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 625 (1989) (O'Connor, J.) (reiterating support for Marsh's reliance on "history and ubiquity"); and it has been applied by the courts of appeals in a number of different contexts. See, e.g., Snyder, 159 F.3d at 1234 (applying Marsh to uphold invocational prayer at city council meetings); Chaudhuri, 130 F.3d at 237 (applying Marsh to uphold prayers at public university functions); Tanford, 104 F.3d at 986 (applying Marsh to uphold prayers at public university commencement); Katcoff v. Marsh, 755 F.2d 223, 232 (2d Cir. 1985) (applying Marsh to uphold practice of military chaplains).

sponsored religious practice." Id. at 586. The Court then found the graduation setting "analogous to the classroom setting, where we have said the risk of compulsion is especially high." Id. at 596.

The Court then expressly distinguished its decision in Marsh. As it concluded: "Inherent differences between the public school system and a session of a state legislature distinguish this case" from Marsh. Id. at 596. The Court remarked on the "obvious differences" between the two situations - "the atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event [graduation] most important for the student to attend." 505 U.S. at 597. The Court noted the "influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in Marsh." Id. In addition, at the high school graduation, the faculty and administration exercised "a high degree of control" over the contents of the program and the students' dress and decorum. Id. The Court stated that "[i]n this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state sanctioned religious exercise in which the student was left with no alternative but to submit. This is different from Marsh and suffices to make the religious exercise a First Amendment violation." Id.

Similarly, in Santa Fe, the Court invalidated a school district policy that permitted students to lead an "invocation" prior to the beginning of varsity football games. The Court explained that its analysis "is properly guided by the principles that we endorsed in Lee." 530 U.S. at 302.[44] It noted that the invocation was "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property," and the message was

[44] Santa Fe did not cite or even discuss Marsh, much less overrule it.

broadcast over the school's public address system, subject to the control of school officials. Id. at 307. Although attendance at the games, for most students, was not mandatory, the Court concluded that, for many students, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." Id. at 312.

This case clearly is controlled by Marsh, rather than Lee or Santa Fe. First, Newdow is a mature adult, not an impressionable young student. Second, despite his assertion that he "will be required to confront Defendant Bush's religious dogma as the price for exercising his right to participate in the inauguration of his president," that claim (Pl. Mem., p. 11; Complaint, ¶¶ 74-76) is no different from that of the dissenting legislator in Marsh, who heard the legislative chaplain's prayers at each session. Moreover, Newdow has not been forced to "confront" prayer at the Inauguration in any respect. He has made a conscious, voluntary decision to travel from Sacramento to Washington to attend the Inaugural ceremonies.

b. This Court's Decision In Newdow v. Eagan Also Supports Dismissal Of Newdow's Challenge To The Inaugural Prayers.

In Newdow v. Eagan, supra, Newdow challenged Congress's practices regarding prayer and chaplains, arguing, inter alia, that such practices violate the Establishment Clause. District Judge Henry H. Kennedy, however, granted defendants' motions to dismiss those claims. That ruling supports dismissal of Newdow's challenge here.

Each House of Congress has a chaplain elected by its members; each chaplain receives a federal salary by statute. As Judge Kennedy noted, "[t]hroughout history, the House and Senate Chaplains have been theists." 309 F. Supp.2d at 32. Judge Kennedy found that "[c]ontrolling precedent has either expressly or impliedly rejected Newdow's Establishment Clause claim on the

merits," specifically relying upon Marsh. Id. at 39-40. Judge Kennedy also cited Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983), which dismissed a similar challenge to Congressional chaplains "for want of a substantial constitutional question." Id. at 40.

Judge Kennedy then rejected Newdow's assertion that the Supreme Court had "silently overruled Marsh," including Newdow's reliance on Lee v. Weisman and Santa Fe, stating that "[t]his Court has no authority to conclude that the Supreme Court's more recent cases have, by implication, overruled an earlier precedent." Id. at 40-41 (citations and internal quotation marks omitted). Judge Kennedy then concluded that "[n]one of the seventeen Supreme Court decisions Newdow relies upon criticized the decision in Marsh," and, in fact, several of them had reaffirmed that decision. Id. at 41. Moreover, "Lee and Santa Fe, the cases from which Newdow primarily quotes to support his position that Marsh was implicitly overruled, deal with religious activity in public schools. The Court has frequently stated that state-sponsored religious activity in public schools raises particular Establishment Clause concerns." Id. (citations omitted). Judge Kennedy then noted that the language Newdow relied upon from Lee and Santa Fe "does not impliedly overrule Marsh. Indeed, Lee specifically mentioned the constitutional difference between legislative chaplaincies and the coercive school prayer at issue." Id. Judge Kennedy therefore dismissed Newdow's Establishment Clause claim.

As in Newdow v. Eagan, plaintiff Newdow advances here essentially the identical arguments concerning the Supreme Court's decisions and the alleged inapplicability of Marsh. Newdow's efforts to "shoe horn" school prayer cases into the unique situation of a Presidential Inauguration ceremony should be rejected, just as Judge Kennedy declined to apply such cases to the Congressional chaplaincy program.

2. Newdow Cannot Show An Establishment Clause Violation Even If The Lemon v. Kurtzman Test Is Applied To His Claims.

As recently modified, the Lemon v. Kurtzman [403 U.S. 602 (1971)] test focuses on whether government action has a secular purpose and secular effects. See Agostini v. Felton, 521 U.S. 203, 222-223 (1997).[45] In Marsh, the Supreme Court did not apply the Lemon test when it upheld ceremonial prayers. Because Marsh is controlling here, this Court also need not address the Lemon test. The practice of Inaugural clergy prayer, however, easily satisfies that test.

First, as Justice O'Connor has explained, "government acknowledgments of religion in public life . . . such as the legislative prayers upheld in Marsh . . . serve the secular purposes of 'solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society.' Because they serve such secular purposes and because of their 'history and ubiquity,' such governmental acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs." County of Allegheny, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in the judgment). See also Marsh, 463 U.S. at 792 ("to invoke Divine guidance on a public body . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country").

The lower courts have reached the same conclusion in upholding the constitutionality of public ceremonial prayers. See Chaudhuri, 130 F.3d at 236 ("[a] prayer may serve to dignify or to

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[45] Lemon stated that a law would survive an Establishment Clause challenge if it (1) has "a secular legislative purpose," (2) has a "principal or primary effect" that "neither advances nor inhibits religion," and (3) does not "foster an excessive government entanglement with religion." Lemon, 403 U.S. at 612-13 (quotation marks and citation omitted). In Agostini, the Court refined the "Lemon test" to treat the "excessive entanglement" inquiry as "an aspect of the inquiry into a statute's effect." Agostini, 521 U.S. at 233.

memorialize a public occasion"); Tanford, 104 F.3d at 986 (invocation and benediction prayers at university graduation "serve legitimate secular purposes of solemnizing public occasions rather than approving particular religious beliefs."). Consistent with the above cases, there should be no question that an Inaugural prayer serves the permissible secular purpose of solemnizing the presidential Inauguration in a way that, as explained above, reflects a historical practice that traces to our nation's very first presidential Inauguration. Contrary to Newdow's claim (Pl. Mem., p. 20), the purpose of the Inaugural prayer is not impermissibly "religious."

Second, the primary effect of an Inaugural prayer is not to promote or advance religion. In cases involving ceremonial government acknowledgments of religion, the "primary effects" prong of the Lemon test turns on whether the reasonable, objective observer, acquainted with the history and context relevant to the government action at issue, would perceive it as government "endorsement" of religion. See, e.g., Santa Fe, 530 U.S. at 308; County of Allegheny, 492 U.S. at 631 (O'Connor, J., concurring); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring in part and concurring in the judgment). See also id. at 779-780 (noting that endorsement "is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort").

As Justice O'Connor has explained, public acknowledgments of religion "such as the legislative prayers upheld in Marsh . . . are not understood as conveying an endorsement of particular religious beliefs," because of their "history and ubiquity" and because they serve the permissible secular purposes noted above. County of Allegheny, 492 U.S. at 625. Significantly, the majority in County of Allegheny shared Justice O'Connor's view on this point. See 492 U.S. at 602 (noting that the Supreme Court in Lynch v. Donnelly had described the national motto ("In

God we Trust") and Pledge of Allegiance (with the phrase "under God") as "consistent with the proposition that government may not communicate an endorsement of religious belief").

The Supreme Court's statements apply to the practice of Inaugural prayer. Similar to the legislative prayers upheld in Marsh, Inaugural prayer serves the permissible secular purpose of solemnizing a ceremony in a manner that traces back to the earliest days of our Nation, and involves no greater appearance of endorsement of religion than any of the other ceremonial references to God that are ubiquitous in our nation's history and culture.

The Supreme Court has catalogued those other permissible religious references in a number of different opinions, including Marsh, 463 U.S. at 786-790; Lynch v. Donnelly, 465 U.S. at 675-677; and Zorach v. Clauson, 343 U.S. 306, 312-313 (1952). Those references include, among others, the practice of opening court sessions with "God save the United States and this honorable Court," the federal statutes making Thanksgiving and Christmas paid holidays for federal employees, see Lynch, 465 U.S. at 676; and the statute that directs the President to declare a National Day of Prayer each year. See id. at 677.[46]

For the same reasons, an Inaugural prayer delivered by a member of the clergy does not constitute government endorsement of religion because of any of its particular content. A reasonable observer acquainted with all the facts also would not understand the content of such a prayer to be the government's "endorsement" of religion. Allowing a member of the clergy to give

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[46] References to God also are prominent in the National Anthem, see Engel v. Vitale, 370 U.S. 421, 449 & n.5 (1962) (Stewart, J., dissenting); the Gettysburg Address, see Sherman v. Community Consol. Sch. Dist. No. 21, 980 F.2d 437, 446 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993); the Declaration of Independence, see ibid., the Constitution itself. See U.S. Const. Art. VII (referring to the "Year of our Lord"), and the nation's currency and coins. See Gaylor v. United States, 74 F.3d 214, 216-18 (10th Cir. 1996)(rejecting Establishment Clause challenge to use of the national motto, "In God we trust," and its reproduction on currency and coins).

a prayer is not placing the "imprimatur" of the government on such prayer, despite Newdow's claim to the contrary. Pl. Mem., p.20.

As the Supreme Court has repeatedly emphasized, "'there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" Santa Fe, 530 U.S. at 302 (citation omitted). See also Adler v. Duval County School Bd., 250 F.3d 1330, 1336-38 (11th Cir.) (school policy allowing students to vote on whether a student message would be given at beginning and closing of school graduation ceremonies did not raise any Establishment Clause issue because school exercised no control over content of student messages), cert. denied, 534 U.S. 1065 (2001).[47] For the above reasons, this Court should reject Newdow's claims even if it applies the Lemon test.[48]

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[47] See also Rigdon v. Perry, 962 F.Supp. 150, 159 (D.D.C. 1997) (holding that "[w]hile military chaplains may be employed by the military to perform religious duties, it does not follow that every word they utter bears the imprimatur of official military authority; if anything, the content of their services and counseling bears the imprimatur of the religious ministries to which they belong.").

[48] Newdow argues that the "clergy-led prayers lead to divisiveness" – "[t]he constant litigation over issues such as that in the case at bar demonstrates that governmental favoritism and endorsement of religion is divisive." Pl. Mem. pp. 21, 14. This attempts to argue a facet of the "excessive entanglement" inquiry that has been superseded by the Court's ruling in Agostini, as described supra. But that argument does not advance Newdow's claim in any event. At most, the Supreme Court inquired into "political divisiveness" in cases involving direct aid to church-sponsored schools or colleges, Lynch v. Donnelly, 465 U.S. at 684. Cf. Zelman v. Simmons-Harris, 536 U.S. 639, 662 n.7 (2003)(noting rejection of the "divisiveness" factor in more recent challenges to recent aid programs). Moreover, "[a] litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement." Lynch, at 684-85.

3. Plaintiff's "Free Exercise" Claim Under The Religious Freedom Restoration Act Is Without Merit.

Plaintiff also argues that he is likely to prevail on the merits because the clergy prayers infringe his "Free Exercise rights" under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb et seq. Pl. Mem., pp. 19-20. That claim also is without any legal merit.

RFRA provides that a "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the application of the burden to the person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest." Id. § 2000bb-1.[49] Congress enacted RFRA in response to Employment Division v. Smith, 494 U.S. 872 (1990). In Smith, the Court held that the Free Exercise Clause does not exempt individuals from complying with "neutral, generally applicable" laws, even if the laws substantially burden religious exercise. 494 U.S. at 881. In Congress's view, Smith "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Although RFRA has been held unconstitutional as to the States, City of Boerne v. Flores, 521 U.S. 507 (1997), it still applies to the federal government. See, e.g., Holy Land Foundation for Relief & Development v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003); Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001).

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[49] RFRA defines the "'exercise of religion' as any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 20000cc-5(7)(A), incorporated by 42 U.S.C. § 2000bb-2(4).

Assuming, arguendo, that a professed atheist like plaintiff Newdow (see Complaint, ¶ 19) can invoke RFRA, his RFRA claim nevertheless is without merit.[50] First, because Newdow is challenging what is, in essence, the government's conduct of its own internal operations – how the President chooses to memorialize and solemnize his taking the constitutionally-prescribed Oath of office (see Art. II, § 1, U.S. Const.) – Newdow fails to state a claim for relief under RFRA.[51] It is settled law that the Free Exercise Clause "does not require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." Bowen v. Roy, 476 U.S. 693, 699-700 (1984). That Clause "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." Id. As the Supreme Court has explained:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. Sherbert, supra, 374 U.S., at 404, . . . This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise

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[50] The Supreme Court has not decided whether an atheist can sue under the Free Exercise Clause. Several lower courts, however, have assumed that atheism is a religion for purposes of Title VII of the Civil Rights Act of 1964. Reed v. Great Lakes Companies, Inc., 330 F.3d 931, 934 (7th Cir. 2003)(noting the case law).

[51] Although Newdow refers to the Free Exercise Clause, as well as the Fifth Amendment, Equal Protection, Due Process, and "privacy rights," Compl., ¶¶ 1, 28, 76, Newdow appears to seeks redress solely under the Establishment Clause and RFRA. Because the Inaugural ceremony constitutes a "rule of general applicability" within the meaning of Employment Division v. Smith, 494 U.S. 872 (1990), Newdow could not assert a Free Exercise Clause claim against Inaugural prayers. His brief references to the Fifth Amendment, Due Process, and Equal Protection add nothing to his substantive claims.

> lawful actions. The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Sherbert, supra, at 412, . . . (Douglas, J., concurring).

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988).

Newdow seeks to enjoin a governmental ceremony, not a governmental program that either regulates the lives of citizens or provides benefit or aid to them.[52] The clergy prayers do not impose a "substantial burden" on Newdow's alleged exercise of religion, or, in this case, of "non-religion." Newdow is free to conduct himself as an atheist whether or not the clergy prayers are uttered on January 20, 2005.[53] Newdow identifies no tangible impairment of his exercise of his right to profess atheism from the saying of such prayers.[54] The only "injury" Newdow identifies, that he will have to "confront . . . religious dogma" by listening to a clergy prayer if he travels to Washington and attends the Inauguration (Compl., ¶ 28), is a circumstance entirely of his own making, done to seek to bolster his possible legal standing to sue here. No "substantial burden"

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[52] Although Newdow refers to "a fundamental constitutional right to observe and participate in the Nation's official ceremonies free from governmental endorsement of religion," Complaint, ¶ 74, the Constitution describes no right to observe the Inaugural ceremonies.

[53] Indeed, given Newdow's obvious zeal to challenge practices that he believes violate the Establishment Clause, most recently the inclusion of the term "under God" in the Pledge of Allegiance, see Elk Grove Unified School Dist. v. Newdow, __ U.S.___ ; 124 S.Ct. 2301 (2004), it is difficult to conceive how any government practice will affect his strongly-held beliefs.

[54] See Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001)(rejecting RFRA claim by religious group that wished to sell t-shirts on the Mall: "plaintiffs cannot claim that the regulation [proscribing such sales] forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct that their religion requires."); Branch Ministries v. Rossotti, 211 F.3d 137, 141 (D.C. Cir. 2000)(holding that IRS's revocation of tax-exempt status of a church due to its having engaged in political activity did not violate RFRA; the sole effect of the loss of such status would be decrease the amount of monies available to the church for its religious practices).

on his "Free Exercise right" arises out of that wholly voluntary conduct. Newdow is deprived of no "benefit" in voluntarily attending the Inauguration, if he proceeds with his plan to do so.[55] As District Judge Kollar-Kotelly observed in a recent case, "[a] substantial burden does not arise merely because 'the government refuses to conduct its own affairs in ways that comport with the religious beliefs of particular citizens.'" Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 180 (D.D.C. 2000) (holding that a statement of policy on genetically-modified food did not violate RFRA) (citation omitted).

In any event, even if Newdow could assert a prima facie showing of a "substantial burden" on his "free exercise" rights under RFRA, that burden is overcome by the government's wholly legitimate interest in the Inauguration going forward as planned, with one or more prayers said by clergy invited for the occasion. The "solemnization" of this important occasion, which legitimately includes having a member of the clergy say a prayer that may bestow blessings upon the President and Vice President, and pray for their success in leading this country for the next four years, is a "compelling" governmental interest. Finally, there is simply no "least restrictive means" that would accommodate the directly-conflicting interests – Newdow's interest in there being absolutely no clergy prayers versus the President's interest in there being one or more such clergy prayers.

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[55] This situation is readily distinguishable from cases like Thomas v. Review Bd, Indiana Emp. Sec. Dvn., 450 U.S. 707, 717-18 (1981), in which the Court held that a state could not deny unemployment compensation benefits to an employee who terminated his job because his religious beliefs forbade his participation in the production of armaments. See Compl., ¶ 28. See, e.g., United States v. Any and All Radio Station Equipment, 93 F. Supp.2d 414, 418 (S.D.N.Y. 2000) (rejecting RFRA claim by a church subjected to forfeiture proceeding due to operation of an unlicensed radio station — "claimants have not demonstrated that the FCC's moratorium on Class D licenses and the prohibition on operating an radio station without a license puts pressure on them to modify their behavior and violate their beliefs.").

B. Failure To Grant The Requested Injunction Would Not Result In Irreparable Injury To Plaintiff Newdow.

In addition to showing a substantial likelihood of success on the merits, a plaintiff seeking preliminary injunctive relief must establish that he or she will suffer irreparable harm if the injunction is not granted. Sociedad Anonima, supra, 193 F. Supp.2d at 13-14. It is a "well known and indisputable principle[]" that vague or speculative injury cannot constitute "irreparable harm" sufficient to justify injunctive relief. See Wisconsin Gas Co. v. Federal Regulatory Comm'n, 758 F.2d 669, 674 (D.C. Cir. 1985). Rather, "the injury must be both certain and great; it must be actual and not theoretical." Id. Injunctions are not intended "to prevent injuries neither extant nor presently threatened, but only merely 'feared.'" Committee in Solidarity v. Sessions, 929 F.2d 742, 745-46 (D.C. Cir. 1991) (citations omitted).

Here, plaintiff cannot satisfy that standard. The only injury that Newdow identifies is that he "will be required to confront Defendant Bush's religious dogma as the price for exercising his right to participate in the inauguration of his president." Pl. Mem., p. 15. But that is a misstatement of the situation — the Inauguration "requires" nothing from Newdow. Newdow is neither compelled to attend it as an observer, nor is he compelled to watch it on television or listen to it on the radio or via the Internet. Indeed, for reasons stated previously describing Newdow's lack of injury in fact for standing purposes, see section II. B. 1, the tenuous nature of Newdow's alleged injuries defeat any claim of irreparable harm.[56]

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[56] Newdow's suggestion that the irreparable harm in this case is analogous to Congress passing a law that would formally establish a religion, Pl. Mem., p. 5, is nonsensical. It is a settled principle that each Establishment Clause case must be decided upon its own facts. See Lynch v. Donnelly, 465 U.S. at 678 ("In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed.").

Several other factors should lead to denial of the requested preliminary injunction. First, the relief that Newdow seeks is essentially the ultimate relief in this case with respect to the upcoming Inauguration. But a preliminary injunction, standing on its own, should not constitute an adjudication of the merits of a case. See, e.g., University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits."); Heckler v. Redbud Hosp. Dist., 473 U.S. 1308, 1313-14 (1985).

Second, Newdow faces a particularly high burden of persuasion because he seeks to change what constitutes "the status quo" – the planned clergy prayer scheduled to occur at the Inauguration. LeBoeuf, Lamb, Greene & MacRae, LLP. v. Abraham, 180 F. Supp.2d 65, 71 (D.D.C. 2001). "[T]he moving party must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from the denial of the injunction." A district court should not issue a mandatory preliminary injunction unless the facts and the law clearly favor the moving party. Nat'l Conference on Ministry to Armed Forces v. James, 278 F. Supp. 2d 37, 43 (D.D.C. 2003).

Newdow also has unreasonably delayed seeking injunctive relief. An inexcusable delay in filing such a motion is grounds for its denial. Brink's, Inc. v. Board of Governors of the Federal Reserve Sys., 466 F. Supp. 112, 116 (D.D.C. 1979); National Council of Arab Americans v. City of New York, 331 F. Supp.2d 258, 265-66 (S.D.N.Y. 2004) (applying doctrine of laches to deny plaintiff's motion, noting delay in seeking review of denial of demonstration permit). A "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." Oakland Tribune, Inc. v. Chronicle Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985); see also GTE

Corp. v. Williams, 731 F.2d 676, 678-79 (10th Cir. 1984). Newdow could have filed this suit well in advance of the scheduled Inauguration. Yet he waited until only 30 days before the Inauguration to seek injunctive relief. Whether this Court applies the "laches" doctrine or simply assesses Newdow's delay as a factor in considering the equities, Newdow's timing has been unreasonable, placing defendants and the Court in the awkward posture of responding and evaluating the case in a highly-compressed time period, including any further judicial review.

C. The Requested Injunction Would Substantially Injure Other Interested Parties.

Injunctive relief should not be granted where it would substantially injure other interested parties. See Katz v. Georgetown Univ., 246 F.3d at 687-88. "[E]ven where denial of a preliminary injunction will harm the plaintiff, the injunction should not be issued where it would work a great and potentially irreparable harm to the party enjoined." Dorfmann, 414 F.2d at 1173.

Plaintiff Newdow's securing an injunction against clergy prayer at the Inauguration would obviously "silence" the speech interests of the clergy chosen to say any prayer or benediction at the ceremony. More importantly, that injunction would directly injure the President's own interests in having a prayer said for his success in leading the nation forward. It would be extraordinary for a court to interfere with the decisions on how the ceremony inaugurating the President would be conducted.

D. The Requested Injunction Would Not Serve The Public Interest.

The final factor in considering the issuance of a preliminary injunction is the broader public interest. Even where a party has made the required showing of irreparable injury, preliminary relief may be withheld where its issuance would be contrary to the public interest.

While the public interest is a critical factor to weigh in evaluating any application for preliminary relief, it is especially crucial when, for example, the suit seeks to restrain governmental action pursuant to a statute designed for the public interest. See Weinberger v. Romeo-Barcelo, 456 U.S. 305, 312-13 (1982); Yakus v. United States, 321 U.S. 414, 440-41 (1944).

Here, preliminary injunction would not serve the public interest. That interest is best served by allowing the Inaugural ceremony to proceed as planned, and in a manner wholly consistent with the practice of clergy prayer at presidential Inaugurations that stretches back to President Washington's Inauguration in 1789. There is no reason to "reverse course" and abandon a widely-accepted, noncontroversial aspect of the Inaugural ceremony after over 200 years of this proper solemnization of a national event.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's motion for a preliminary injunction and should dismiss Newdow's Complaint.

Respectfully submitted,

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Dated: January 7, 2005

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REV. DR. MICHAEL NEWDOW,	)	
Plaintiff,	)	
v.	)	Civil Action No 04-2208(JDB))
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of plaintiff's Motion for a Preliminary Injunction, Federal Defendants' Opposition thereto, and plaintiff's reply in support thereof, it is hereby

ORDERED that plaintiff's motion is denied.

_____
UNITED STATES DISTRICT JUDGE

This ____ day of _____ 2005.

LOCAL RULE 7.1(k) CERTIFICATE

Pursuant to Local Rule 7.1(k), the attorneys who are entitled to be notified of any order, judgment, or stipulation are as follows:

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