

**ORAL ARGUMENT SCHEDULED FOR DECEMBER 15, 2009**

**CASE NO. 09-5126**

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

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**MICHAEL NEWDOW, et al.**

**Plaintiffs-Appellants,**

**v.**

**HON. JOHN ROBERTS, JR., CHIEF JUSTICE OF THE U.S.  
SUPREME COURT, et al.**

**Defendants-Appellees,**

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**On Appeal from the United States District Court  
for the District of Columbia**

**(District Court #1:08-cv-02248)**

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**APPELLANTS' REPLY BRIEF**

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## SUMMARY OF THE ARGUMENT

Although Defendants make numerous arguments in response to Plaintiffs' Opening Brief, none are persuasive. From the Federal Defendants' first contention (that Plaintiffs' challenge is moot) to the many misconstrued standing claims to the merits issues that properly belong before the District Court on remand, the law simply does not support any of the objections Defendants have raised.

Regarding mootness, it is, of course, true that the 2009 inaugural has passed. However, Plaintiffs filed an Amended Complaint challenging the 2013 and 2017 inaugurals. And even if that Amended Complaint is disregarded, this case involves issues of a continuing character, which (under District of Columbia Circuit precedent) may not be defeated when the harms are capable of repetition, yet evading review. With the time from the announcement of the inaugural program to the ceremony so short and the likelihood of recurrence every four years so great, mootness is inapplicable in this litigation.

Defendants continue to misconstrue *Valley Forge* in arguing that Plaintiffs lack standing. The injuries alleged are personalized and concrete, and do not rest solely upon a generalized belief that the Constitution has been violated. Additionally, under the Supreme Court's standing principles, the harms are imminent.

The District Court's errors in considering redressability are amplified by the Defendants in their briefs. What they seem to be arguing is that the mechanics of judicial review, for some inexplicable reason, do not exist in this case. Plaintiffs remain puzzled as to the basis of this argument. The relief they request – an injunction and/or declaration for lower level officials to follow – is routinely sought every time the judiciary hears a challenge to an executive or legislative action or program. Plaintiffs addressed this matter in their Opening Brief, and even supplemented the discussion with listings of nearly thirty cases, from this Circuit alone, within the past year. Yet none of the Defendants even attempted to distinguish the instant case from those others.

Because the dismissal of this case was based solely on a lack of standing, Plaintiffs' appeal is limited to that issue. Nonetheless, Defendants suggest that this Court of Appeals should decide the case on the merits at this premature stage. That is as inappropriate as it would be unfair. If Plaintiffs have standing – as they most assuredly do – they deserve an opportunity to present their evidence and fully argue the merits of their case in the court below.

## ARGUMENT

### I. Plaintiffs' Challenge to the 2009 Inauguration is Not Moot<sup>1</sup>

#### (A) Case Law Demonstrates that this Litigation is Not Moot

On the opening day of Congress in 1968, members of the Jeannette Rankin Brigade sought to protest the nation's involvement in Vietnam. After being prevented from holding their protest as planned, they filed suit. The District Court denied all relief and dismissed the complaint. *See Jeannette Rankin Brigade v. Chief of Capitol Police*, 421 F.2d 1090 (D.C. Cir. 1969).

As in the instant case, the event that formed the gravamen of the *Brigade* complaint “ha[d] long since ended,” *id.* at 1092, when the case reached the Court of Appeals. Yet, even though the *Brigade* plaintiffs (unlike Plaintiffs here) had no definite plans to ever again engage in the actions that led to their litigation, this Circuit specifically refused to deem that case moot. “The rights asserted, imbedded in the Constitution, are of a continuing character[,] ... the questions involved are continuing and ‘their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review.’” *Id.* (citation omitted).

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<sup>1</sup>Plaintiffs continue to maintain that the mootness question is obviated by the First Amended Complaint. AOB at 6-8.

**(B) The “Capable of Repetition, Yet Evading Review” Exception Definitely Applies in this Litigation**

As alluded to in *Brigade*, there is an “established exception to mootness for disputes capable of repetition, yet evading review.” *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). “The exception applies where ‘(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.’” *Id.* (citation omitted). As in *Wisconsin Right to Life*, “[b]oth circumstances are present here.” *Id.*

**(1) The Action is in its Duration Too Short**

Set by 3 U.S.C. § 1, presidential elections occur “on the Tuesday next after the first Monday in November, in every fourth year ... .” The Twentieth Amendment, Section 1, sets the presidential inauguration “at noon on the 20<sup>th</sup> day of January.” Accordingly, Plaintiffs have, as a maximum, only two and one half months (approximately 75 days) from when they learn of the potential key Defendants in this type of inaugural litigation until the challenged activity takes place. This, of course, doesn’t take into account any delay in forming a Presidential Inaugural Committee, or in announcing who will administer the presidential oath and what clergy will be leading the audience in prayers. In the instant case, that announcement occurred on December 17, 2008. Appendix at 18 (Complaint ¶

127). Thus, there were only 34 days (which embraced the winter holiday season, no less) to litigate the issue.

Citing *First National Bank v. Bellotti*, 435 U.S. 765, 774 (1978), the District Court (Hon. John D. Bates) in *Newdow v. Bush*, 391 F. Supp. 2d 95, 108 (D.D.C. 2005) asserted that “the period between a President’s election and inauguration is not too short to permit judicial review.” Yet, in *Bellotti*, an eighteen-month period was determined to be “too short a period of time for appellants to obtain complete judicial review.” Accordingly, Plaintiffs respectfully submit that Judge Bates was mistaken. The “proceedings” in the case he oversaw only progressed to the preliminary injunction stage, where a plaintiff is required to address four factors, *see, e.g., Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009), none of which apply in the underlying action. Thus, by ruling that the case was moot (and that the “capable of repetition, yet evading review” exception to mootness does not apply – all before any discovery was held or testimony was heard), 391 F. Supp. 2d at 107-108, Judge Bates set the stage for repetition by ending the case before adequate review ever took place.

In addition to *Bellotti*, myriad other cases show that 34 (or even 75) days is simply too short to litigate issues such as those raised in this litigation. *Wisconsin Right to Life, supra*, is an excellent on-point example. In fact, the Supreme Court specifically stated there that “[w]e have recognized that the ‘capable of repetition,

yet evading review’ doctrine, **in the context of election cases**, is appropriate.” 551 U.S., at 463 (citation omitted) (internal quotation marks removed) (emphasis added). The instant litigation falls within that “election cases” category.

**(2) There is “a Reasonable Expectation” that Plaintiffs Will be Subject to the Same Action Again**

The Federal Defendants contend that a repetition of the asserted injuries “is purely conjectural.” Appellee Brief for Federal Defendants/Appellees (hereafter “Federal Brief”) at 11. Yet, that repetition is certainly less conjectural than it was for the plaintiffs in *Lee v. Weisman*, 505 U.S. 577, 584 (1992), where the Supreme Court specifically noted, “it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.” That directly on-point and analogous case should end this discussion.

Nonetheless, the Federal Defendants cite case law, which, in reality, corroborates that the “reasonable expectation” criterion of *Wisconsin Right to Life* has been met in this case: “For an injury to be deemed capable of repetition, there must be a reasonable expectation or demonstrated probability that the same controversy will recur involving the same complaining party.” Federal Brief at 16 (citations and internal quotations omitted). More than 200 declarations signed under penalty of perjury verify that Plaintiffs will personally view the future inaugurals. Document 69. And the documentation by the Architect of the Capitol demonstrates that those inaugurals are virtually certain to take place with clergy-

led prayers and a Chief Justice’s “so help me God” oath addition. AOB Appendix at 17 (citing [http://www.aoc.gov/aoc/inaugural/pres\\_list.cfm?RenderForPrint=1](http://www.aoc.gov/aoc/inaugural/pres_list.cfm?RenderForPrint=1)).

The further case citations brought by Defendants reveal a very strained argument. Do they seriously equate the probability of a recurrence of completely discretionary future agency treatments of wild horse and burro herds with the probability of a recurrence of the rituals that have now been established for constitutionally mandated presidential oath-taking? Federal Brief at 16 (citing *Fund for Animals, Inc. v. U.S. Bureau of Land Management*, 460 F.3d 13 (D.C. Cir. 2006)). Do they truly believe that a case involving “a sequence of coincidences too long to credit,” *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416 (D.C. Cir. 2005) (cited in Federal Brief at 17), is relevant to the deliberately replicated events that have occurred at every one of the last nineteen public inaugural ceremonies? The Federal Defendants’ three additional cases – *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), *O’Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976), Federal Brief at 29 – all involved claims that a specific injury would occur when some (hopefully unlikely) future criminal behavior would be met in a chance manner by certain individuals who were among many potential responders. Defendants’ citation of four of these five cases as “[a]uthorities upon which the federal defendants principally rely,” Federal Brief at iv, reinforces the weakness of their claim. Such cases are flatly

inapposite to the religious intrusions objected to in this case, which (as Defendant clergy themselves note) follow “a more than seventy year old precedent.” Brief of Appellees Joseph Lowery and Richard Warren (hereafter “Clergy Brief”) at 2.<sup>2</sup>

### (3) *Armstrong v. FAA Supports Plaintiffs*

The Federal Defendants cite *Armstrong v. FAA*, 515 F.3d 1294 (D.C. Cir. 2008) for the proposition that Plaintiffs have waived the right to claim that this case is capable of repetition, yet evades review. Federal Brief at 18-19. According to them, this waiver occurred because Plaintiffs failed to appeal the District Court’s denial of the preliminary injunction. *See* AOB Appendix at 61-63.

This is an argument without merit. To begin with, a preliminary injunction, as noted at page 5, *supra*, is a separate request for relief that uses a different standard for adjudication. Plaintiffs are not appealing from the denial of the preliminary injunction. They are appealing from the lower court’s Order of March 12, 2009, AOB Appendix at 144-46. Under the lesson of *Armstrong*, then, they have **not** waived their “capable of repetition, yet evading review” claim.

In fact, by seeking the preliminary injunction, Plaintiffs here did precisely what *Armstrong* mandates. In other words, Plaintiffs did attempt “to prevent a

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<sup>2</sup> Because the Clergy Brief largely confuses merits issues with the standing inquiry, most of the points made in that brief will not be addressed in this one. Plaintiffs will note, however, that to speak of an “Article III standing exception, found in Establishment Clause cases ... [for those] in attendance,” Clergy Brief at 3, is a unique approach to the Bill of Rights.

counter-party from taking any action that would moot his case.” *Armstrong*, F.3d at 1297. The preliminary injunction motion in the case at bar was equivalent to the motion for a stay required by *Armstrong*.

Finally, in *Armstrong*, “the issue presented ... will never arise again.” 515 F.3d at 1296. Here, as has been the case with each public inaugural ceremony for the past 70-plus years, the challenged religious intrusions (absent judicial intervention) will be repeated every four years.

## II. Plaintiffs Have Standing

### (A) Plaintiffs' Asserted Injuries are Not Generalized

The Federal Defendants claim that “[t]he harms [Plaintiffs] allege are far too generalized” for them to have standing. Federal Brief at 12. “Millions of other Americans did the same thing,” they contend. *Id.* But “standing is not to be denied simply because many people suffer the same injury,” *United States v. SCRAP*, 412 U.S. 669, 687 (1973), and “[t]he fact that other citizens or groups of citizens might make the same complaint ... does not lessen appellants’ asserted injury,” *Public Citizen v. Department of Justice*, 491 U.S. 440, 449-50 (1989).

Moreover, “[m]illions of other Americans” **did not** do “the same thing.” To write that the injury suffered by Plaintiffs was “shared in substantially equal measure by all or a large class of citizens,” Federal Brief at 21 (citation omitted), is to have no understanding of what the injury entails. Plaintiffs were forced to confront government-sponsored religious claims that turn them into political outsiders. Those millions of others became “insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). Thus, only a relative few suffered the harms being alleged.

The citation to *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (citations omitted) was anticipated and dealt with in the Opening Brief. Although the Federal Brief starts

with a correct analysis (noting that “mere awareness of allegedly unconstitutional activity [is what] *Valley Forge* held insufficient to identify cognizable Article III injury-in-fact.” Federal Brief at 26), the lesson of *Valley Forge* is then twisted to argue, in essence, that Plaintiffs lack standing because they had that awareness.

Every plaintiff who sues the government for violating a constitutional provision has “awareness of allegedly unconstitutional activity.” What *Valley Forge* says is simply that this is not enough. Not only must there be that awareness, but that awareness must stem from some personal injury. Thus, when Defendants essentially limit their discussion to Plaintiffs’ attempt “to require that the Government be administered according to law,” Federal Brief at 21, they are not even addressing the *Valley Forge* holding.

The plaintiffs in *Valley Forge* lacked standing because the “allegedly unconstitutional activity” was not directly “observed, read, or heard by the plaintiffs.” *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008). Rather, it was “learned of ... through a news release,” *Valley Forge*, at 469, which is not at all what occurred with Plaintiffs here. On the contrary, the Plaintiffs here directly observed and heard the governmental intrusions of (Christian) Monotheism at the inaugural exercises. Thus, like the plaintiffs in *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington Township School District v. Schempp*, 374 U.S. 203 (1963), *Marsh v. Chambers*, 463 U.S. 783 (1983), *Lynch v. Donnelly*, 465 U.S. 668 (1984),

*Wallace v. Jaffree*, 472 U.S. 38 (1985), *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), *Lee v. Weisman*, 505 U.S. 577 (1992), *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), Plaintiffs here have standing.<sup>3</sup>

The reference to *Caldwell v. Caldwell*, 545 F.3d 1126 (9th Cir. 2008) also misses the mark. In that case, a parent affirmatively sought to prove that public schools were violating the Establishment Clause (by teaching evolution). Nothing in the record suggests that Plaintiffs here had similar goals, i.e., to police the government and ensure that its agents would not infuse the inauguration with religion. On the contrary, Plaintiffs sought merely to do as the millions of other spectators did – i.e., view, participate in, and enjoy this historic event.<sup>4</sup>

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<sup>3</sup> Arguing by conflating alternative definitions, the Federal Defendants claim that *Valley Forge* precludes Plaintiffs’ standing because both cases involved “mass media.” Federal Brief at 22. This is disingenuous. The “mass media” in *Valley Forge* was a news release, carrying a report of the activities. The “mass media” in the instant case (e.g., television screens at home and video monitors on the National Mall) transmitted live coverage of the activities themselves. *Cf. Lee v. Weisman* and *Santa Fe*, in which the challenged activities were transmitted by school sound systems (which are also “mass media”).

<sup>4</sup> In the Federal Brief at 24 (n.6), it is claimed that, in the AOB, “Newdow explains that he resolved to attend the 2009 inauguration and future inaugurations ‘to cure the alleged “defect”’ the district court had found in the standing allegations.” That’s a significant mischaracterization of what Plaintiffs wrote. The “defect” to be cured was the Complaint’s missing allegation (i.e., that “[t]here is no evidence” that he planned to view future inaugurations). Nothing suggests that Newdow did not already have such viewing plans. AOB at 52.

**(B) The Harm at the 2013 Inauguration is “Imminent”**

Plaintiffs have already demonstrated that they have met the “actual or imminent” requirement for standing. AOB at 28-30. Defendants counter by citing to *McConnell v. FEC*, 540 U.S. 93 (2003), where the Supreme Court wrote that an injury that might occur five years in the future was “too remote temporally to satisfy Article III standing.” *Id.* at 226. Since the entire question relates to the overall certainty that the given injury will be suffered by the given individual, Plaintiffs suggest that “imminence” allows for a greater delay when events are more likely to transpire. Accordingly, acts such as inaugural prayers and “so help me God” intrusions would be “imminent” for a longer duration than the fluid campaign strategy of a Senator who may not even be running in the next election.

Even if this suggestion is incorrect, *McConnell* merely says that an interval not “too remote temporally” is something less than five years. How much less? The Supreme Court provided an answer in *Lee v. Weisman*, which has a timeline that mirrors virtually exactly the one in the case at bar. A temporary restraining order was sought by the Weismans four days before Deborah’s June 29, 1989 middle school (i.e., 8<sup>th</sup> grade) graduation. *Lee*, 505 U.S. at 584. Plaintiffs filed their preliminary injunction motion fifteen days before the January 20, 2009 inauguration. Document 4. In the month following the denial of their TRO motion, the Weismans amended their complaint, seeking relief at future graduations. Two

months after the preliminary injunction motion was denied, Plaintiffs sought to file an amended complaint, seeking relief at future inaugurations. Document 56.

Deborah's next graduation would be when she finished high school (i.e., 12<sup>th</sup> grade), four years after her amended complaint was filed. *Lee*, 505 U.S. at 584.

The four years until the next (2013) inauguration in this case, therefore, is not "too remote temporally."

### **(C) Redressability Exists**

#### **(1) The President(-Elect)'s Ultimate Decision-Making Authority Does Not Preclude Judicial Review**

Plaintiffs do not dispute that "the President-elect controls the content of his or her inauguration." Federal Brief at 34. However, that fact no more precludes the Courts from issuing injunctive or declarative relief here than it does in any other situation involving the executive branch of government. In fact, Plaintiffs made that argument strongly in their Opening Brief, AOB at 42-44, with listings of nearly thirty cases where precisely such relief was issued against "lower level" executive branch officials. In their briefs, Defendants have been completely mute in answering that argument.<sup>5</sup>

The deep flaw in the contention made by the Federal Defendants on page 37 of their Brief (i.e., that Plaintiffs' claim is not redressable because Chief Justice

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<sup>5</sup> Rather than answer, Defendant PIC contends that "Newdow never contests ... that redressability was absent because the complained-of decisions were the President's alone." PIC Brief at 20. As just demonstrated, that is patently false.

Roberts was only abiding by the President-Elect's request, and "President Obama could have invited some other person to administer his oath in the same way.") is perhaps best demonstrated by means of an analogy. Suppose that during the inauguration (in response to the President's request), a federal official "cordoned off the perimeter of Pershing Park in northwest Washington, D.C. and arrested everyone there," *Barham v. Ramsay*, 434 F.3d 565, 568 (D.C. Cir. 2006).

According to this Circuit, that official's claim even to qualified immunity would be denied. *Id.* at 572-77. The fact that the President (or Congress) "could have invited some other person" to make the mass arrest surely would not alter that outcome.

Additionally, the defense that "U.S. Const. Art. II, § 1, ¶ 8 ... does not prevent the President-elect from [engaging in mass arrests]," Federal Brief at 37 (n.12), would hardly be persuasive. That § 1, ¶ 8 does not prevent him from violating the Establishment Clause is similarly inconsequential.

The Final Brief for Appellees Presidential Inaugural Committee and Emmett Beliveau (hereafter "PIC Brief") has a similar error, as evidenced in its "Statement of the Issue Presented." There, the focus is on "President Obama's decision[s]." PIC Brief at 3-4. Yet the Complaint is not concerned with the decision-making processes that led to the infusion of sectarian religious espousals into the inauguration. It is concerned only with the acts that resulted from that decision-making. Like the police chief in *Brigade*, see at page 3, *supra*, PIC and the others

named in the Complaint are appropriate defendants because they were involved in effectuating the constitutional violation. Thus, PIC is not being sued for “inviting clergy to speak” or for “seeking to include the words ‘so help me God’ in the oath of office.” PIC Brief at 13. It is being sued for **permitting and assisting in the delivery** of those religious activities at the purely governmental function that is the “transcendent ritual of America’s democracy.” Those acts the Court certainly has the power to enjoin and/or declare constitutionally infirm.

## **(2) The Court Has the Power to Grant Declaratory Relief**

Although Plaintiffs concur that the “separation of powers” doctrine limits the Court’s ability to enjoin Congress, they sharply dispute the leap that the Federal Defendants take (without any authority provided) that declaratory relief is also unavailable. Federal Brief at 39. After all, Congress itself expressly granted that power in 28 U.S. § 2201: “In enacting the Declaratory Judgment Act, Congress recognized the substantial effect declaratory relief would have on legal disputes ... [and] recognized that declaratory relief would ‘settle controversies,’ and permit the federal courts ‘the power to exercise in some instances preventive relief.’” *California v. Grace Brethren Church*, 457 U.S. 393, 410 n.21 (1982) (citations omitted).

Defendants’ reference to *Hearst v. Black*, 87 F.2d 68 (D.C. Cir. 1936), Federal Brief at 39, does little to further their cause. In fact, *Hearst* specifically

stated, “if the bill had been filed while the trespass was in process it would have been the duty of the lower court ... to enjoin the acts complained of,” *Id.* at 71, and concludes with what is, in effect, declaratory relief precisely of the sort sought by Plaintiffs here: “[T]he assumption may properly be indulged that, attention being called to the unlawful nature of [its actions], the Senate will not use its proceeds in disregard of appellant’s rights.” *Id.* at 72.

This assumption also applies to the executive branch. As the Supreme Court stated in *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992):

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

*Franklin* (cited in Federal Brief at 39) also noted that “the President’s actions may still be reviewed for constitutionality.” *Id.* at 801. In his concurrence, Justice Scalia reinforced this idea, essentially spelling out the clear error of the District Court and the Defendants in this case:

[Nothing] ... in any way suggests that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive, -- just as unlawful legislative action can be reviewed, not by suing Members of Congress for the performance of their legislative duties, but by enjoining those congressional (or executive) agents who carry out Congress’s directive.

505 U.S. at 828-29 (Scalia, J., concurring) (citations omitted).

### **(3) The Case Law Cited by Defendants Supports Plaintiffs**

Numerous other cases are cited by Defendants on the “redressability” matter. Properly understood, none support their contentions. In *C-Span v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008); *County of Delaware, Pa. v. Department of Transp.*, 554 F.3d 143 (D.C. Cir. 2009); and *National Wrestling Coaches Ass’n v. Department of Educ.*, 383 F.3d 1047 (D.C. Cir. 2004) (per curiam) (denying reh’g en banc); redressability was unmet because in each case it was speculative at best that the requested relief, **even if implemented**, would redress the alleged injury. Never did any of those decisions suggest that redressability was unmet because the defendants would disobey their respective courts and never implement their orders.

In the case at bar, if the Defendants follow the Court’s orders, the injuries will unquestionably be redressed. With the exception of the District Court rulings in the instant case and in *Newdow v. Bush*, 391 F. Supp. 2d 95 (D.D.C. 2005), Defendants (like the two respective judges) have not provided a single case where redressability was deemed unmet because the President could simply order his underlings to disregard a valid court decree. The reason for this is simple: With judicial review being the cornerstone of our jurisprudential system, *Marbury v. Madison*, 5 U.S. 137 (1803), there are no such cases.

**(4) PIC’s Contention That The Requested Relief Will Not Obviate Plaintiffs’ Injuries Is Unsupportable**

Defendant PIC does not argue that it would ignore a court order, but that “Newdow failed to allege facts from which it reasonably could be inferred that \*\*\* if the court affords the relief requested, the asserted [injury] will be removed.” PIC Brief at 18 (internal quotation marks and citation omitted). This makes little sense. PIC is the “committee appointed ... to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony,” Appendix at 13 (Complaint ¶ 48).<sup>6</sup> As such, it certainly has the power to inform the clergy that they won’t be able to step onto the national stage that it (PIC) controls. Thus, if the Court “declare[s] that the government-sponsored use of any clergy ... at a presidential inauguration violates the Establishment and Free Exercise Clauses of the First Amendment,”<sup>7</sup> and/or the Court “enjoin[s PIC] from utilizing any clergy to engage in any religious acts ... at any future presidential inauguration,”<sup>8</sup> PIC will be most capable of remedying the constitutional violations.

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<sup>6</sup> Or, as PIC itself notes, “[t]he corporation ... responsible for organizing events in connection with the quadrennial presidential inauguration.” PIC Brief at 5.

<sup>7</sup> Document 1 at 38 (Complaint page 34, Prayer for Relief II).

<sup>8</sup> *Id.* (Prayer for Relief IV).

**(5) The Evanescent Nature of the JCCIC and the AFIC (and Their Respective Chairpersons) Does Not Alter the Redressability Argument**

Citing no legal authority, the Federal Defendants contend that “Plaintiffs’ Claims Against the JCCIC, the AFIC, and the Chairpersons of those Committees Also Are Not Redressable Because the JCCIC and the AFIC No Longer Exist.” Federal Brief at 38. This Circuit’s case law contradicts that contention, specifically noting in such a situation that “a declaration of the [plaintiff’s] legal right ... could form the basis of an injunction against [another party], which would redress the [plaintiff’s] claimed injury.” *Center for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836, 839 (note) (D.C. Cir. 2008).

**(D) Defendants’ Miscellaneous Additional Standing Arguments are Without Force**

Defendants include a potpourri of additional arguments, each of which can be readily dispensed with.

**(1) Coercion is Unnecessary for Standing**

Defendants attempt to distinguish the coercion in the inauguration from the coercion upon which the plaintiffs prevailed in each of the school prayer cases. They do so by arguing, “The National Mall is not a public school, and plaintiffs are in no way obliged to watch the President-elect.” Federal Brief at 27.

Even if coercion (as discussed in *Lee* and *Engel*) were a standing as well as a merits issue (which it is not), nothing in the Supreme Court’s Establishment Clause

jurisprudence suggests that standing exists only when individuals are “obliged” to be in the locale where the unwilling exposure to governmental endorsements of religion occurs. “Freedom of religion” would be an otiose liberty interest, indeed, if it were limited to coercive situations.

**(2) Plaintiffs Did Not Suggest That Courts Are Precluded From Analyzing Their Article III Standing**

The Federal Defendants mischaracterize Plaintiffs’ argument when they write, “Neither is there any merit to plaintiffs’ suggestion that the Supreme Court’s Free Exercise Clause jurisprudence precludes a court from analyzing whether they have Article III injury in this case.” Federal Brief at 27 (n.8). Nowhere did Plaintiffs make such a suggestion. They simply referenced clear Supreme Court doctrine, perhaps best enunciated in *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990): “Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.” In other words, even if judges truly believe that the purely religious messages being challenged in this case have lost their religious character, they are prohibited from imposing that assessment on others who, like Plaintiffs here, disagree. At the very least, the parties must be provided with an opportunity to present evidence regarding this religious interpretive difference.

### (3) Federal Defendants' Note 15 Misses the Entire Point

Seeming to recognize the rectitude of Plaintiffs' claim that clergy-led prayer is a recent addition to inaugurations, the Federal Defendants argue:

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

Federal Brief at 45-46 (n.15) (emphasis in original).<sup>9</sup> Again, the Defendants miss the point. The President, as an individual, has First Amendment rights that do not apply to the government *per se*. Just as he may constitutionally say, "I believe there should be separate bathrooms for blacks and whites," he may constitutionally pray to God or Jesus or any other entity, whenever he desires.<sup>10</sup> That does not

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<sup>9</sup> It is highly disingenuous to suggest that the inaugural clergy are praying only for the President. As President Obama, himself, acknowledged, "This inauguration isn't about me. It's about all of us." Nakamura DA. *Obama: This Inauguration is Not About Me. It's About All of Us*. WashingtonPost.com (January 14, 2009). Accessed on October 22, 2009 at [http://voices.washingtonpost.com/inauguration-watch/2009/01/obama\\_this\\_election\\_is\\_not\\_abo.html](http://voices.washingtonpost.com/inauguration-watch/2009/01/obama_this_election_is_not_abo.html).

<sup>10</sup> Plaintiffs recognize some will be offended by the analogy of prayer to racial segregation. However, for much of our nation's history, the latter was felt to be as positive an aspect of society as the former is today. Just as the majority of our citizens eventually came to agree that segregation is wrong, the majority may come to agree that belief in God is wrong, too. "[T]he First Amendment forbids the use of the power or prestige of the government to control, support, or influence the

mean, however, that he may use the machinery of the government and call in third parties to impose those beliefs on the public, no matter how long the history or how great the popular support.

**(4) Defendant PIC's Role Has Been Specified**

Defendant PIC'S assertion that, “[t]he Complaint fails to allege so much as a single fact about the PIC’s actions in connection with the 2009 inauguration,” PIC Brief at 13, is demonstrably wrong. Plaintiffs cited 36 U.S.C. § 501(1) to note that PIC is “in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony.” Appendix 13 (Complaint ¶ 48).

Complaint ¶ 64 states that “the remaining Defendants [including PIC] will bring to the inauguration of the President ... two chaplains to extol the glory of God,”

Document 1, page 12, and ¶ 95 protests PIC’s “engaging in and promoting governmental activities” that violate the Establishment Clause. Document 1, page

18. The Complaint also notes that the chosen clergy espouse their constitutionally sectarian religious claims “with the support of and facilitation by their

codefendants.” Complaint ¶ 129, Document 1, page 26. Accordingly, it is fatuous

to argue that “the Complaint nowhere made any allegation whatsoever regarding the PIC’s actions.” PIC Brief at 11.

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religious beliefs and practices of the American people.” *Lee*, 505 at 601 (Blackmun, J., concurring).

### **III. The Merits Arguments, Which are Not Part of this Appeal, are in Plaintiffs' Favor**

#### **(A) The Merits Arguments are Not Part of this Appeal**

The Federal Defendants, citing to *Jones v. Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009) for the proposition that a “court of appeals may affirm on any ground properly raised,” Federal Brief at 40, contend that Supreme Court precedent should foreclose Plaintiffs’ merits arguments. Defendants’ citation, however, is highly misleading. What *Bernanke* actually says is that “we may affirm a judgment on any ground the record supports, and that **the opposing party had a ‘fair opportunity’ to address.**” 557 F.3d at 676 (citations omitted) (emphases added). To whatever extent the record supports Defendants’ merits claims (and Plaintiffs argue that it doesn’t support them at all), Plaintiffs have had no opportunity whatsoever to present evidence in opposition.<sup>11</sup> Furthermore, the arguments that took place were made in the context of a motion for a preliminary injunction (which, as noted, involves a much different adjudicatory approach). In fact, even when limited to a preliminary injunction motion, “[b]oth precedence and prudence ... counsel a remand to the district court so that a ‘full understanding of

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<sup>11</sup> For instance, the key claim made by Defendants is that the challenged acts are merely “ceremonial.” Federal Brief at 6, 8, 11, 36, 42, 43, 46, 49, 50. Besides bald assertion, there is nothing in the record to support this contention, which (i) would unquestionably be denied by the invited clergy, (ii) runs completely counter to the Supreme Court’s repeated warnings against judicial determinations of the meaning of religious activities, (iii) violates a Biblical Commandment (according to many Christians and Jews), and (iv) is bogus.

the issues’ may be attained.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 305 (D.C. Cir. 2006).

Finally, significant due process concerns are raised when Plaintiffs are left with only a small portion of a Reply Brief to make their merits arguments to this Court. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Plaintiffs have not had that opportunity in regard to the merits issues. To paraphrase Defendant PIC, “The District Court dismissed the Complaint on standing grounds, ... and its Order can and should be [reversed] on those same grounds.” PIC Brief at 22.

### **(B) “History and Tradition” is on Plaintiffs’ Side**

To the extent they can make room to address the merits, Plaintiffs will first note that the “history and tradition” upon which Defendants so deeply ground their argument is actually in Plaintiffs’ favor. At **none** of the original presidential oath-taking ceremonies were there “so help me God” additions<sup>12</sup> or clergy-led prayers. Furthermore, the “history and tradition” remained as such for well over one

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<sup>12</sup> The claim made by the Federal Defendants – that Plaintiffs “do not deny that there is at least one contemporaneous record of President Washington’s having [added ‘so help me God’ to the oath],” Federal Brief at 51 (n.18) – could not be less accurate. As recounted in Complaint ¶ 103 (Appendix 16), the sole narrative upon which that myth is based comes from Washington Irving, who was a six year old child when President Washington was inaugurated. Irving first made his claim not contemporaneously in 1789, but **more than six decades later**, in the 1850s!

hundred years ... i.e., far longer (and more consistent with “the First Congress”<sup>13</sup>) than the less than eighty-year span that began in the 1930s (where the Chief Justice first interlarded the oath with that purely religious phrase, and where clergy were first given preferential and unique access to lead the nation in (Christian) Monotheistic prayer).

**(C) Every Supreme Court Test (Along With the Basic Principle of Equality) Supports Plaintiffs on the Merits**

The Supreme Court has developed numerous principled tests to assess for Establishment Clause violations. Under each, Plaintiffs should prevail.

Starting with the neutrality test (deemed “the touchstone for our analysis,” *McCreary*, 545 U.S. at 860), a ruling against Plaintiffs cannot be seriously maintained. When the government appends “so help me God” to the constitutionally-prescribed presidential oath and then sponsors invocations and benedictions to God, it is anything but “governmental neutrality between ... religion and nonreligion.” *Id.*

Pursuant to the *Lemon* test, Plaintiffs will readily show that the challenged acts were instituted for religious purposes, and that (as common sense indicates)

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<sup>13</sup> The Federal Defendants (citing *Marsh v. Chambers*) highlight that the First Congress’s procedures are especially probative. Federal Brief at 41. Yet the 1789 oath-taking ceremony did **not** include the “so help me God” phrase, and clergy-led prayer only took place after the ceremony had ended. More importantly in this Establishment Clause litigation, neither of these acts occurred at all for well over a century once the First Amendment was ratified. Thus, again, the “history and tradition” falls **in Plaintiffs’ favor**.

they have impermissible religious effects. Under the “endorsement test,” the contention that there is no endorsement of God’s existence (when the Chief Justice adds “so help me God” and clergy pray to God) is nonsensical. Coercion – a Free Exercise Clause test that, alone, proves an Establishment Clause violation<sup>14</sup> – has already been demonstrated. *See* pages 20-21, *supra*. By any reasonable definition, the government’s “imprimatur,” is placed upon (Christian) Monotheism when it espouses that religious ideology at the “transcendent ritual of America’s democracy.” Finally, it simply cannot be gainsaid that the challenged acts are “directly subversive of the principle of equality.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

**(D) The Supreme Court Has Never “Unreservedly Described Oaths Ending With the Words ‘So Help Me God’ as Consistent With the Establishment Clause”**

The contention that “the Supreme Court has unreservedly described oaths ending with the words ‘so help me God’ as consistent with the Establishment Clause,” Federal Brief at 49, is an extraordinary exaggeration. In *Zorach v. Clauson*, 343 U.S. 306 (1952) and *Abington School District v. Schempp*, 374 U.S. 203 (1963), the quoted phrases were pure dicta, provided within lists of assorted practices that were never litigated and were completely ancillary to the questions

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<sup>14</sup> “Although ... proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient.” *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring).

actually before the Court.<sup>15</sup> Of special note is that *Abington* itself invalidated a practice which that same “dicta list methodology” had supported only a year earlier. In *Engel v. Vitale*, 370 U.S. 421 (1962), “Bible-reading in the schools” (struck down in *Abington* after the practice was actually scrutinized) was among the assumedly permissible religious references Justice Douglas listed. 370 U.S. at 437 (Douglas, J., concurring).

**(E) Defendants’ Reliance on *Marsh v. Chambers* is Misplaced**

Defendants’ reliance on *Marsh v. Chambers*, 463 U.S. 783 (1983) – a case that has been deemed “a special nook -- a narrow space tightly sealed off from otherwise applicable first amendment doctrine,” *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (R.B. Ginsburg, J., dissenting) – is testament to the feeble nature of their argument. Although it was a pure Establishment Clause case, *Marsh* did not once discuss the meaning of that Clause. That’s understandable, since the *Marsh* decision flies in the face of every one of the tests just discussed. In fact, in claiming that legislative prayer was not objectionable to the Framers, *Marsh* had to relegate the words of the Father of the Constitution (and of the Bill of Rights) to a footnote, contending that “[James] Madison expressed doubts concerning the chaplaincy practice.” 463 U.S. at 791 (n.12). “[E]xpressed doubts” is an interesting

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<sup>15</sup> The Federal Defendants’ contention that those dicta were “portions of the opinion necessary to th[e] result” and “carefully considered language,” Federal Brief at 50 (citations omitted), is plain silly.

way to characterize Madison’s prose: “The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles.” 3 Wm. & Mary Q. 534, 558 (E. Fleet ed. 1946).

Moreover, as Defendants themselves point out, the “history and tradition” that was used to justify the *Marsh* prayers was for “legislative and other deliberative bodies.” Federal Brief at 40-41 (citing *Marsh*, 463 U.S. at 786). Nothing in the Supreme Court’s jurisprudence warrants extending that Establishment Clause contortion beyond this “legislative/deliberative-body exception.” *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191 (5<sup>th</sup> Cir. 2006). Thus, although “*Marsh* did not draw any distinction between legislative prayer and prayer and references to God by the Executive or Judicial Branches,” Federal Brief at 42, *Marsh* also drew no distinction between legislative prayer and prayer in the public schools. Yet *Lee v. Weisman* (decided seventeen years after *Marsh*) shows that such distinctions exist.

Another distinction, especially obvious in this case, is the one between practices of recent origin and practices that have an “unambiguous and unbroken history of more than 200 years.” 463 U.S. at 792. As noted, the challenged practices here were nonexistent longer than they have existed. When one adds to this the Court’s subsequent pronouncement that “the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular

religious practice of prayer,” *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000), the claim that it is permissible for government to affirmatively sponsor that particular religious practice at presidential inaugurations is untenable.

## CONCLUSION

Defendants’ Briefs do nothing to diminish the arguments made in the Appellants’ Opening Brief. Plaintiffs, again, respectfully request that this Court reverse the ruling of the District Court.

Respectfully submitted this 29<sup>th</sup> day of October, 2009,

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**CERTIFICATE OF COMPLIANCE  
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,  
AND TYPE STYLE REQUIREMENTS**

- (1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
- (2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in size 14 Times New Roman font.

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

**CASE NO. 09-5126**

**Newdow v. Roberts**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2009, I filed the following document:

**APPELLANTS' REPLY BRIEF**

electronically with the Clerk of the United States Court of Appeals for the District of Columbia Circuit, using the CM/ECF system. Accordingly, service will assumedly be made upon:

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