UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR, PAUL GAYLOR, DAN BARKER, PHYLLIS ROSE, and JILL DEAN, Plaintiffs, v. PRESIDENT BARACK OBAMA, WHITE HOUSE PRESS SECRETARY ROBERT L. GIBBS, WISCONSIN GOVERNOR JIM DOYLE, and SHIRLEY DOBSON, CHAIRMAN OF THE NATIONAL DAY OF PRAYER TASK FORCE, Defendants.	Case No. 08-CV-588

REPLY IN SUPPORT OF
THE FEDERAL DEFENDANTS' MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs' Brief in Opposition to Motions to Dismiss (Dkt. No. 57, 04/08/2009) ("Opposition" or "Opp.")[1] repeatedly attempts to divert this Court's attention from the arguments that President Barack Obama and White House Press Secretary Robert Gibbs (the "federal defendants") made in their Memorandum of Law in Support of the Federal Defendants' Motion to Dismiss the First Amended Complaint (Dkt. No. 48, 03/09/2009) ("Memorandum" or "Mem."). That diversion is necessary because plaintiffs cannot — and do not — rebut several key arguments that the federal defendants made.

First, plaintiffs fail to even mention Newdow v. Bush, which is on all fours with this case. Newdow v. Bush discussed in detail the "personal connection" requirement that is necessary to establish injury, and hence standing, in the Establishment Clause context. Plaintiffs' failure to come to grips with that concept dooms this entire case, as none of the individual plaintiffs has adequately alleged his or her standing to challenge the National Day of Prayer.

Second, plaintiffs attempt to convert the disagreement that the Freedom From Religion Foundation ("FFRF") has with the National Day of Prayer into an "injury." But there are no allegations of a concrete and particularized injury to FFRF, beyond generalized allegations that the National Day of Prayer adversely affects FFRF's ability to carry out its mission of keeping separate church and state. Such conclusory allegations are simply insufficient to establish organizational standing.

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[1] Plaintiffs originally filed their Opposition on April 7, 2009 (Dkt. No. 56). The next day, plaintiffs filed an Opposition that identified the exhibits attached thereto. (Dkt. No. 57). As the docket sheet in this case indicates that Document No. 56 should be disregarded (as it has been replaced by Document No. 57), this brief responds to Document No. 57.

Third, plaintiffs attempt to downplay the extraordinary nature of the relief that they are requesting — an injunction running personally against the President of the United States of America — by arguing that courts regularly invalidate laws such as the National Day of Prayer statute. That is not the issue. Plaintiffs seek both to invalidate the National Day of Prayer statute and to enjoin the President from issuing any proclamations or designations of a day of prayer. Such relief would involve nothing less than this Court dictating whether and how the President communicates with the Nation's citizens. Under normal circumstances such relief would literally be unprecedented. The fact that plaintiffs' allegations here all relate to a prior presidential administration makes the relief that plaintiffs request all the more remarkable.

Fourth, and finally, plaintiffs fail to address adequately the precedent establishing that the National Day of Prayer is consistent with the Establishment Clause. The Supreme Court has spoken on the constitutionality of the National Day of Prayer, and even if there is some subsequent ambiguity regarding the Supreme Court's pronouncement, there is none regarding nearly-identical Thanksgiving Day proclamations. The best that plaintiffs can do is assert that Thanksgiving Day and National Day of Prayer proclamations are "different," without ever explaining how they are different. That is insufficient to undercut the well-settled status of the National Day of Prayer.

For these reasons, as set forth in more detail below, plaintiffs' First Amended Complaint should be dismissed for lack of standing and subject matter jurisdiction, or, in the alternative, for failure to state a claim.

ARGUMENT

I. THE INDIVIDUAL PLAINTIFFS LACK STANDING.

As the federal defendants noted in their opening Memorandum, a consistent theme among Establishment Clause cases in the Seventh Circuit and elsewhere is that a plaintiff must allege a personal connection to challenged conduct, such as direct and unwelcome contact with that conduct, in order to have standing. See Mem. at 9-14. Plaintiffs attempt to divert this Court's attention from that requirement by attacking arguments that the federal defendants did not make and by ignoring the case that is most analogous to plaintiffs' claim here. Plaintiffs' attempts, however, cannot mask that they lack standing to bring this lawsuit.

Plaintiffs fail to come to grips with Newdow v. Bush, 391 F. Supp. 2d 95 (D.D.C. 2005), in which the Untied States District Court for the District of Columbia rejected, on standing grounds, a challenge brought by Michael Newdow to prayers at the 2005 Presidential Inauguration. Newdow v. Bush and this case are almost identical in the issues that they present: Both involve infrequent events of a national scope, including an element of prayer that is disseminated to a national audience. Nonetheless, Judge John D. Bates of the United States District Court for the District of Columbia held that Mr. Newdow lacked standing to challenge prayers at the 2005 Presidential Inauguration because he lacked a personal connection to it:

> Here, Newdow lacks any of the indicia of a personal connection found in other prayer or public-display cases. Certainly the Presidential Inauguration is a national event, but it is only held once every four years. In order to come into contact with the allegedly offensive prayers, Newdow must either watch it on television or make a special trip to Washington to observe the prayers in person. He can also avoid the prayers by not watching the television, or by not making the trip to Washington. But, under either scenario, he does not have the necessary personal connection to establish standing. Newdow does not come into regular contact with the inaugural prayers, nor is he forced to change his typical routine to avoid them. . . . Hence, without a personal connection to the inauguration that would make his injuries particularized and concrete, Newdow's alleged injuries

> — general offense and outsider status — are akin to the psychological injuries occurring from the observation of offensive conduct that the Supreme Court in Valley Forge deemed insufficient to establish an injury-in-fact.

Newdow v. Bush, 391 F. Supp. 2d at 104. Judge Bates's decision was no aberration: It reflected Mr. Newdow's second failed attempt to obtain standing to challenge inaugural prayers, as Mr. Newdow brought a similar challenge to prayers at the 2001 Presidential Inauguration. That challenge was dismissed at the district court level, and that dismissal was affirmed by the Ninth Circuit. See Newdow v. Bush, 89 Fed. Appx. 624, 625, 2004 WL 334438, at **1 (9th Cir. Feb. 23, 2004) (noting that Newdow "lacks standing to bring this action because he does not allege a sufficiently concrete and specific injury").

More recently, Mr. Newdow brought a challenge to the 2009 Presidential Inauguration. Unlike Mr. Newdow's previous challenges to inaugural prayer, the 2009 lawsuit contained additional named plaintiffs, including the Freedom From Religion Foundation, Anne Laurie Gaylor, and Dan Barker — all three of whom are also named plaintiffs here. (Unlike previous challenges to inaugural prayer, plaintiffs also sought to enjoin the Chief Justice from administering the oath of office to the President with the concluding phrase, "so help me God.") Specifically, plaintiffs alleged that they were atheists who were attempting to attend the inauguration in person, or who planned to watch the inauguration on television. See Complaint ¶¶ 8-46, Newdow v. Roberts, No. 08-cv-2248-RBW (D.D.C. Dec. 30, 2008), attached hereto as Ex. A. For example, plaintiffs Barker and Gaylor alleged that "[t]hey plan to view the inauguration at home on television on January 20, 2009." Id. ¶ 11; see also id. ¶ 8 (plaintiff Newdow alleged that he will "attend the actual event" if he obtains a ticket; otherwise, "he plans to view the ceremony via the large video displays being set up on the Capitol mall."). Plaintiffs alleged that, "[u]nder the Establishment Clause, Plaintiffs have a right to view their government

in action without being forced to confront official endorsements of religious dogma with which they disagree . . . . especially . . . when that dogma stigmatizes them in the process." Id. ¶ 83. Plaintiffs also asserted that inaugural prayer (and the Chief Justice's use of the phrase "so help me God") will, among other things, "exacerbate Plaintiffs' 'outsider' status." Id. ¶ 95. Notwithstanding these allegations, Judge Reggie B. Walton of the United States District Court for the District of Columbia — just like Judge Bates four years previously and the Ninth Circuit before that — found that plaintiffs lacked standing because "they have identified no concrete and particularized injury." Order, Newdow v. Roberts, No. 08-cv-2248-RBW (D.D.C. March 12, 2009), notice of appeal filed 04/13/2009, attached hereto as Ex. B.

Plaintiffs here assert that they "know and hear about government speech that is disseminated and projected by public officials." Opp. at 36. But the underlying allegations in plaintiff's First Amended Complaint in this case are no different from some of these same plaintiffs' allegations in the challenge to the 2009 Presidential Inauguration. Compare First Amended Complaint (Dkt. No. 38, 02/10/2009) ("FAC") ¶ 98 ("Each of the individual plaintiffs is a deliberately active, involved and informed citizen who is interested in the actions of government officials."); id. ¶ 99 ("Each of the individual plaintiffs make a point of trying to know what government speech is being disseminated and projected by public officials . . . ."); id. ¶ 100 ("The individual plaintiffs have a right to, and they do, seek to inform themselves about public affairs, including Presidential and Gubernatorial proclamations of officially designated days of prayer.") with Complaint ¶ 83, Newdow v. Roberts ("[u]nder the Establishment Clause, Plaintiffs have a right to view their government in action without being forced to confront official endorsements of religious dogma with which they disagree . . . . especially . . . when that dogma stigmatizes them in the process."). Whatever the merits of an "informed citizenry," see FAC

¶ 104, those benefits do not magically convert plaintiffs' mere knowledge of the existence of a National Day of Prayer into a concrete and particularized injury arising therefrom.

Rather than addressing Newdow v. Bush, plaintiffs create a strawman by refuting defendants' supposed "argument" that standing in the Establishment Clause context requires a "pedestrian or walk-by attribute." Opp. at 32.[2] What the federal defendants actually said was that "[c]ases involving the display of religious objects . . . emphasize direct and unwelcome contact with sectarian symbols, messages, or conduct." Mem. at 10. That, of course, is also the position that plaintiffs take. See Opp. at 33 ("it is enough that a plaintiff allege direct and unwelcome contact with [a] religious display"). The problem with that standard for the plaintiffs — and perhaps the reason plaintiffs attempt to divert this Court's attention with the strawman — is that plaintiffs have no such "direct and unwelcome contact" with the National Day of Prayer. To the contrary, their First Amended Complaint makes clear that the plaintiffs affirmatively sought-out prayer day activities, see generally FAC ¶¶ 98-101, and that their knowledge of the event is based on "media reporting by newspapers and television, as well as from reporting by members and non-members of FFRF," FAC ¶ 97. See also FAC ¶¶ 102 ("The individual plaintiffs know that their President and Governor annually proclaim an official day of prayer, including from media coverage, complaints by FFRF members and non-members, and investigation on behalf of FFRF and as citizens.").

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[2] In attacking this strawman, plaintiffs describe the forum of governmental speech for purposes of establishing a concrete and particularized injury as a "metaphysical" concept. See Opp. at 34 (citing Rosenberger v. Recotor & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995)). But the forum at issue in the Rosenberger case was the University of Virginia's Student Activities Fund which, by definition, is limited to the University's students. And, in any event, Rosenberger did not involve standing.

Valley Forge Christian College v. Americans United for the Separation of Church and State forecloses plaintiffs' attempt to hang their standing hat on media reports. In that case, the Supreme Court held that a group of plaintiffs lacked standing to challenge the transfer of government property to a religious educational institution where they learned of that transfer "through a news release." Id., 454 U.S. 464, 487 (1982). So plaintiffs attempt to distinguish Valley Forge by arguing both that it did not involve government speech, and that courts have "uniformly found that the Valley Forge decision does not mean that 'psychological injury' can never be a sufficient basis for the conferral of Article III standing." Opp. at 37-38. But plaintiffs' argument that psychic injury can never provide a basis for standing is another strawman. As Judge Bates noted in Newdow v. Bush,

> In many cases that address the observance of allegedly offensive religious prayer or displays, however, a core component of the alleged harms is this same "psychic injury." See Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290, 309, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (offensive religious messages make some, including plaintiffs with standing, feel like political outsiders). The key point, though, is that a plaintiff cannot rely exclusively on abstract "psychic injuries" to establish standing; rather, a plaintiff must establish a "personal connection between [him or herself] and the challenged display in his or her home community." Suhre v. Haywood County, 131 F.3d 1083, 1087 (4th Cir. 1997); see also Valley Forge, 454 U.S. at 485-86, 102 S.Ct. 752 (psychic injury alone not sufficient for standing); Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 681-83 (6th Cir. 1994) (student had standing to sue over constitutionality of religious portrait at school he formerly attended); Saladin v. City of Milledgeville, 812 F.2d 687, 692-93 (11th Cir. 1987) (plaintiff who was part of city and received mail from city could challenge religious symbols on city's seal).

Newdow v. Bush, 391 F. Supp. 2d at 103. Judge Bates's citation to Valley Forge and Suhre v. Haywood County (which is also cited by plaintiffs on page 38 of their Opposition) establishes what the parties apparently agree upon: direct and unwelcome contact with, or some sort of personal connection to, allegedly wrongful conduct is necessary to confer standing before a court can even consider "psychic injury." And Judge Bates's opinion also refutes plaintiffs' notion

that Valley Forge is inapplicable to government speech cases, since Newdow v. Bush involved inaugural prayer — a form of governmental speech. See also Order, Newdow v. Roberts, No. 08-cv-2248-RBW (03/12/2009) (finding plaintiffs lacked standing to challenge the Chief Justice's use of the phrase "so help me God" in administering the oath of office to President Obama).

The remainder of plaintiffs' standing arguments fall by the wayside. Plaintiffs argue that "coming to the injury" is not "a proper basis for objecting to standing in a government speech case," Opp. at 38, but for that proposition cite a case that involved a religious display, namely, a cross in a national preserve. Once again, that case involved a personal connection between the plaintiffs and the challenged conduct, as "each [p]laintiff came into a direct and unwelcome contact with the cross." Buono v. Norton, 212 F. Supp. 2d 1202, 1211 (C.D. Cal. 2002), aff'd, 371 F.3d 543 (9th Cir. 2004).[3] Similarly, plaintiffs cite a handful of libel and defamation cases to argue that the republishing of speech may result in liability for the original author of the libelous words. See Opp. at 35-36. Not only are these cases entirely inapposite, but none involve standing.[4] Finally, plaintiffs assert that they are part of the intended audience for prayer proclamations, id. at 34, 36-37, 40, and that requiring a personal connection to such

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[3] The case also casts doubt on plaintiffs' argument that they are somehow injured by visiting the White House's web site to obtain a National Day of Prayer proclamation. See Buono, 212 F. Supp. 2d at 1212 (noting that plaintiff's intention "to visit the cross regularly 'because he finds the presence of the cross . . . offensive' may not establish injury in fact" (citing Valley Forge, 454 U.S. at 487)).

[4] In another attempt to escape the Establishment Clause jurisprudence that precludes their standing, plaintiffs analogize to "testers" that have been found to have standing in the housing and hiring discrimination context. See Opp. at 39-40. The cases that plaintiffs cite for this proposition, like the libel and defamation cases that plaintiffs also cite, are completely inapposite to the Establishment Clause.

proclamations would "insulate[ ] proclamations to the entire nation that endorse religion," id. at 32. But as the federal defendants already noted, it is difficult to fathom how a proclamation — which after all is nothing more than a public announcement — can result in a concrete and particularized injury. See Mem. at 16-17. In any event, "'[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" Valley Forge, 454 U.S. at 489 (quoting Schlesinger v. Reservists Cmtee. to Stop the War, 418 U.S. 208, 227 (1974)).

II. FFRF LACKS STANDING.

FFRF "must satisfy the same standing test as individuals by suffering from a concrete injury that is fairly traceable to the defendants' conduct . . . ." Plotkin v. Ryan, No. 99 C 53, 1999 WL 965718, at *5 (N.D. Ill. Sept. 29, 1999), aff'd, 239 F.3d 882 (7th Cir. 2001). Plaintiffs' brief, however, confuses FFRF's philosophical opposition to the National Day of Prayer with an injury arising therefrom.

According to plaintiffs, "FFRF, as an organization, has the mission and purpose to promote the Constitutional principle of separation or church and state and to educate on matters relating to nontheism." FAC ¶ 121. There is no dispute that FFRF, as an institution, opposes the National Day of Prayer. But a "conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing. Frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'" Nat'l Treas. Employees Union v. United States, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (quoting Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1433 (D.C. Cir. 1995)); see also Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (distinguishing injury to an "organization's activities" from a "setback to the organization's abstract social interests"). Demonstrating actual

harm to an organization is necessary to ensure that individuals cannot "obtain judicial review of otherwise non-justiciable claims simply by incorporating, drafting a mission statement, and then suing on behalf of the newly formed and extremely interested organization." Nat'l Treasury Employees Union, 101 F.3d at 1429.

Faced with this standard, plaintiffs attempt to convert FFRF's opposition to the National Day of Prayer into an actual injury to FFRF. That attempt fails. At bottom, the relevant question to determine whether FFRF has organizational standing is not whether the National Day of Prayer represents a setback to FFRF's goal of separating church and state. Rather, the question is: Has FFRF adequately alleged that the National Day of Prayer makes it more difficult for FFRF to "promote the Constitutional principle of separation of church and state" or to "educate on matters relating to nontheism"? FAC ¶ 121. The answer is no.

Plaintiffs have not alleged any facts from which it plausibly could be concluded that the National Day of Prayer has perceptibly impaired FFRF's ability to advocate for the separation of church and state. See Havens Realty, 455 U.S. at 379. A showing of injury "requires 'more than allegations of damage to an interest in 'seeing' the law obeyed or a social goal furthered.'" Nat'l Taxpayers Union, 68 F.3d at 1433 (citing Am. Legal Found. v. FCC, 808 F.2d 84, 91 (D.C. Cir. 1987)). But that is all that is alleged here — FFRF believes (wrongly) that the National Day of Prayer represents a "setback" to its "social goal" of promoting church-state separation, Opp. at 44; Havens Realty, 455 U.S. at 379; Nat'l Taxpayers Union, 68 F.3d at 1433, and devotes resources to "responding to" and "objecting to" prayer day proclamations that "undermine[ ]" that "goal," Opp. at 44; Nat'l Taxpayers Union, 68 F.3d at 1433. The existence of the National Day of Prayer similarly does nothing to preclude FFRF from "educat[ing] on matters relating to nontheism." FAC ¶ 121. Plaintiffs' First Amended Complaint is silent as to the form of this

"education" and offers no specifics as to how the National Day of Prayer has "subjected [FFRF] to operational costs beyond those normally expended to review, challenge, and educate the public about" matters relating to nontheism. Nat'l Taxpayers Union, 68 F.3d at 1434. In other words, there are no allegations that FFRF has had to "expend resources in a matter that keeps [it] from pursuing its true purpose" of advocating for church-state separation. Id.

None of the cases cited by plaintiffs changes this analysis. Plaintiffs cite Village of Bellwood v. Dwivedi to argue that "the only injury necessary to confer standing is allocation of the organization's resources to efforts directed against the wrongful conduct of the defendant." Opp. at 41 (citing Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990)). But the court in Village of Bellwood made clear that its analysis was limited to fair-housing agencies. See Village of Bellwood, 895 F.2d at 1526 ("the only injury which need be shown to confer standing on a fair housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination" (emphasis added)). That is because "[t]hese are opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the defendant's discrimination." Id. Plaintiffs similarly paraphrase Chicago v. Matchmaker Real Estate Sales Center, see Opp. at 42, but that case also makes clear that the plaintiff's status as a "fair-housing agency" was critical to the court's analysis. See Chicago v. Matchmaker Real Estate Sales Ctr., 982 F.2d 1086, 1095 (7th Cir. 1992) ("[T]he only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination. . . . This standard is clearly satisfied in this case. The Leadership Council is a fair-housing agency." (emphasis added) (internal citations and quotation marks omitted)). And in Crawford v. Marion County Election Board, a case not involving a fair housing agency, the court

found organizational standing only upon a showing of a specific, concrete, and quantifiable injury upon the Democratic Party; namely, a new voter identification law "compell[ed] the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." Crawford v. Marion County Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), aff'd, 128 S. Ct. 1610 (2008).

All these cases make clear that a plaintiff organization must allege a concrete injury; "ordinary expenditures as part of an organization's purpose do not constitute the necessary injury-in-fact required for standing." Plotkin v. Ryan, 239 F.3d 882, 886 (7th Cir. 2001). The allegations in Plaintiffs' First Amended Complaint fail to identify any resources expended to correct an injury beyond FFRF's "ordinary expenditures." In that regard, plaintiffs' assertion that "[t]he defendants' argument that the plaintiff's allocation of resources is wholly voluntary, and hence not an injury," Opp. at 43, is yet another strawman that plaintiffs attack. The issue is whether a plaintiff organization has had to expend resources in response to a defendant's conduct that is separate and apart from its "ordinary expenditures." Because the resources FFRF claims to expend to combat the National Day of Prayer are indistinguishable from its "ordinary expenditures," it lacks standing.[5]

[5] The parties are in agreement that FFRF's representational standing turns on the standing of the individual plaintiffs. See Mem. at 18; Opp. at 45 n.2. Plaintiffs, however, also refer to a membership survey attached to the back of their Opposition brief. See Opp. at 45 n.2. Plaintiffs' First Amended Complaint makes no mention of this survey, and plaintiffs have nonetheless failed to allege that any of FFRF's members have the requisite standing to challenge the National Day of Prayer. See Part I, supra.

III. PLAINTIFFS' REQUESTED RELIEF RAISES INSURMOUNTABLE JUSTICIABILITY CONCERNS.

Plaintiffs seek to do far more than challenge the constitutionality of the National Day of Prayer statute. In amending their Complaint, plaintiffs added specific requests for injunctive relief, including injunctive relief against the President of the United States of America. See FAC, Prayer for Relief ¶ F. However, both declaratory and injunctive relief against the President raises substantial separation of powers concerns and, therefore, redressability concerns. See Mem. at 39-42; Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (a plaintiff must establish that it is "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision"). Plaintiffs attempt to downplay the sweeping relief that they request by asserting that what they really want is "a determination of the constitutionality of Congress' direction to the President to declare a National Day of Prayer." Opp. at 70. That gambit cannot mask that plaintiffs have requested that this Court issue an injunction directing what the President can, and cannot, say in his public proclamations.

Even if this Court finds that the National Day of Prayer statute is unconstitutional, the President could still issue a proclamation declaring a National Day of Prayer. That is presumably why plaintiffs are seeking a separate injunction against the President to prevent him from "making designations of official days of prayer." FAC, Prayer for Relief ¶ F. The fact that the relief plaintiffs request is worded so broadly — precluding any designation in any form of an official day of prayer — reveals that plaintiffs are trying to prevent any sort of Presidential prayer proclamation.

Plaintiffs attempt to sidestep this separation-of-powers issue by describing Presidential prayer day proclamations as being purely "ministerial." See Opp. at 70-71. There are two

problems with this argument. If this Court finds that the National Day of Prayer statute is unconstitutional, and the President nonetheless wishes to declare a day of prayer, then the President would be acting entirely within his own discretion to declare such a day. Such is not a "ministerial" act. And even when the President issues a prayer day proclamation pursuant to the National Day of Prayer statute, he nonetheless exercises discretion in the actual phrasing of the proclamation.[6] After all, it is in large part the discretion that was exercised by the prior administration in selecting a "theme" for the 2008 proclamation that prompted this lawsuit. In light of the factual allegations that plaintiffs have made regarding that proclamation, they cannot now be heard to say that the President's issuing of prayer proclamations pursuant to the National Day of Prayer statute is purely ministerial and therefore "does not require the Court to review the President's judgment, planning, or policy decision-making." Opp. at 71.

In the alternative, plaintiffs cite a series of cases to argue that "[t]he President's actions can be reviewed for constitutionality." Opp. at 71. But as the federal defendants already noted in their motion to dismiss, see Mem. at 41 n.39, the cases that plaintiffs cite do not stand for the proposition that a court can enjoin Presidential conduct, even if that conduct is reviewed for constitutionality. Instead, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." Franklin v. Massachusetts, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)). The defendant "officer" here is the White House Press Secretary, but the Court cannot enjoin him from "issuing" prayer proclamations or "making designations of official days of

[6] Of course, this scenario would only apply in the future if the Court does not find that the National Day of Prayer statute is unconstitutional.

prayer"; at most, it can enjoin him from disseminating those proclamations that will have already been issued by the President. E.g., FAC ¶¶ 14, 16, 21, 26, Prayer for Relief ¶¶ B, F.[7] And even if it did so, the President could have someone else "disseminate" his proclamation, or could simply designate a day of prayer at an event — such as a speech or press conference — that is covered by the media. See Newdow v. Bush, 391 F. Supp. 2d at 104 (injunction against inaugural committee responsible for extending invitations to clergy would not redress plaintiff's alleged injuries arising from clergy-led inaugural prayer, since "the President could still extend invitations to the clergy on his own").[8]

The only injunction that can preclude any future prayer day proclamations is one against the President himself. As the defendants already noted, such an injunction would be so "extraordinary" that it would "raise judicial eyebrows." Franklin, 505 U.S. at 802 (plurality opinion) (emphasis added); see also Newdow v. Bush, 391 F. Supp. 2d at 104-07 (concluding that plaintiff's alleged injuries arising from inaugural prayer were not redressable by the court); see generally Mem. at 39-42. That is especially the case in light of the speculative nature of any future Presidential prayer day proclamations should this Court find the statute unconstitutional,

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[7] In this regard, plaintiffs' assertion that the President "will abide by an authoritative direction to his Press Secretary, even though the President may not directly be bound by such a determination," Opp. at 72, is misplaced. See Franklin, 505 U.S. at 825 (Scalia, J., concurring) ("Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power."). An injunction preventing the White House Press Secretary from "disseminating" a Presidential prayer day proclamation says nothing about whether the President has the threshold authority to issue the proclamation. In that regard, there would be no "direction" for the President to follow.

[8] Indeed, the President's inherent authority to issue proclamations raises its own set of redressability concerns regarding plaintiffs' request for a declaration that the National Day of Prayer statute violates the constitution.

see City of Los Angeles v. Lyons, 461 U.S. 95, 105-110 (1983); see also Newdow v. Bush, 391 F. Supp. 2d at 107-08; see generally Mem. at 38-39, and the sweeping scope of an injunction that, at bottom, would have this Court direct whether and how the President communicates with the Nation's citizens.[9]

IV. THE NATIONAL DAY OF PRAYER IS CONSTITUTIONAL.

A. This Court Can Look to the History of the National Day of Prayer to Determine Its Constitutionality.

This Court is not operating on a blank slate. The Supreme Court in Lynch v. Donnelly described the National Day of Prayer as consistent with the Establishment Clause. See Lynch v. Donnelly, 465 U.S. 668, 677-78 (1984) (citing National Day of Prayer as one of "countless . . . illustrations of the Government's acknowledgment of our religious heritage and government sponsorship of graphic manifestations of that heritage").

The federal defendants previously acknowledged, and the plaintiffs have latched on to, a footnote in a subsequent Supreme Court decision discussing the National Day of Prayer. See County of Allegheny v. ACLU, 492 U.S. 573, 603 n.52 (1989). Unlike Lynch v. Donnelly — in which the Court's discussion of the National Day of Prayer was a necessary part of the Court's analysis of the constitutionality of the City of Pawtucket's Christmas display — the footnote in County of Allegheny v. ACLU was nothing more than a legal aside, written in response to Justice Kennedy's separate opinion. That difference matters: "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996). The footnote

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[9] As the defendants noted in their Memorandum, at minimum the Court should decline to exercise its discretionary power to issue a declaratory judgment against the President in these circumstances. See Mem. at 41-42.

in County of Allegheny was not "necessary to [the] result" in that case; the analysis in Lynch v. Donnelly was. And in any event, the language that plaintiffs cite to distinguish the National Day of Prayer from legislative prayers was followed by the notation that, "as [proclaiming a National Day of Prayer] is not before us, we express no judgment about its constitutionality." County of Allegheny, 492 U.S. at 603 n.52.[10]

Moreover, and like the legislative prayers at issue in Marsh v. Chambers, the history of the National Day of Prayer dates back to the founding of our nation. See Memorandum at 24 (noting that the First Congress urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of almighty God" (quoting Lynch, 465 U.S. at 675 n.2 (emphasis added) (citations omitted)).[11] As noted in Marsh, the actions of the First Congress are "contemporaneous and weighty evidence" of the Constitution's "true meaning." Marsh v. Chambers, 463 U.S. 783, 790 (1983) (citation and quotation marks omitted). And while plaintiffs take issue with the continuity of such proclamations, see Opp. at 63, there is no dispute about the First Congress's request for a day of prayer. See Opp. at 63; Lynch, 465 U.S. at 675 n.2; see generally Mem. at 23-26; Brief in Support of Amicus Parties, Dkt. No. 59 (04/13/2009) at 4-8 & App. A.[12]

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[10] As defendants noted, Judge Marion has referred favorably to Lynch's analysis of the National Day of Prayer, even after the Court's decision in County of Allegheny. See Memorandum at 20 n.15; Books v. City of Elkhart, 235 F.3d 292, 323, 325 (7th Cir. 2000) (Marion, J., concurring in part and dissenting in part).

[11] The Amicus Brief filed by the American Center for Law and Justice and various Members of Congress sets forth in detail the history of Presidential prayer proclamations. See Brief in Support of Amicus Parties, Dkt. No. 59 (04/13/2009), at 4-8; see also id. at App. A (Presidential and Congressional Proclamations Calling the Nation to Prayer).

[12] Plaintiffs assert that Thomas Jefferson and James Madison opposed prayer proclamations, while conceding that James Madison nonetheless issued such proclamations. See

For these reasons, and as the defendants argued in their Memorandum, this Court can reject outright plaintiffs' challenges to the National Day of Prayer. See Mem. at 26-27; see also Van Orden v. Perry, 545 U.S. 677, 686 (noting that Lemon test was "not useful" in determining constitutionality of Ten Commandments monument, turning instead to "the nature of the monument and . . . our Nation's history") (plurality opinion).

B. The Factual Allegations Contained in the First Amended Complaint are Irrelevant to the Legal Issues Raised by this Case.

Plaintiffs assert that the defendants have "ignored" the factual allegations contained in the First Amended Complaint. But plaintiffs' factual allegations are limited to President Bush's 2008 proclamation, and are therefore irrelevant to plaintiffs' facial challenge to the constitutionality of the National Day of Prayer statute. That is because "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all its applications." Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Id. Whatever quarrel plaintiffs have with the 2008 proclamation, their factual allegations regarding that proclamation do not demonstrate that there is "no set of circumstances" under which a Presidential proclamation pursuant to that statute could pass constitutional muster. As "[f]acial challenges are disfavored," id. at 1391, this Court need not –

Opp. at 56-57. Whatever Thomas Jefferson's and James Madison's views regarding prayer proclamations may have been, it is undisputed that other founding fathers thought prayer proclamations were acceptable. See Lynch, 465 U.S. at 675 n.2 ("Presidents Adams and Madison also issued Thanksgiving Proclamations, as have almost all our Presidents").

and should not — apply factual allegations regarding one proclamation issued by a former President to this and future Presidents in order to hold that the National Day of Prayer statute is unconstitutional in all circumstances, especially in light of the broad discretion that the President has in shaping the language of presidential proclamations.[13] And because plaintiffs have failed to provide factual allegations that, if true, would demonstrate that the National Day of Prayer statute is unconstitutional in all conceivable applications, plaintiffs' claim regarding the statute should be dismissed. Indeed, plaintiffs' repeated insistence that the constitutionality of a prayer day proclamation depends on the content of the proclamation and the context in which it was formulated reveals that plaintiffs all but concede that their facial challenge must fail.

For these same reasons, plaintiffs' allegations regarding past proclamations are irrelevant to plaintiffs' request for an injunction against President Obama. To be sure, plaintiffs have alleged that the National Day of Prayer Task Force has influenced prior presidential prayer day proclamations. See FAC ¶¶ 28-35; see also Opp. at 50, 65. But plaintiffs' First Amended Complaint contains no allegations whatsoever that the National Day of Prayer Task Force is somehow involved with or has influenced the preparation of a prayer day proclamation by the Obama administration. Indeed, President Obama has not yet issued his first National Day of Prayer proclamation. In short, and notwithstanding plaintiffs' assertion in their opposition brief

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[13] In yet another strawman argument, plaintiffs assert that the defendants have "suggest[ed] that no reason exists to believe that President Obama will continue to issue . . . prayer proclamations." Opp. at 67. Plaintiffs also refer to some sort of voluntary "moratorium" on further prayer proclamations. Id. The only circumstance under which President Obama has discretion to not issue a National Day of Prayer proclamation is if this Court finds that the National Day of Prayer statute is unconstitutional. If so, the President would have discretion to determine whether to nonetheless issue a prayer proclamation. In any event, the federal defendants never suggested that the President would "impose a moratorium," so plaintiffs' arguments attacking that position are simply irrelevant.

purpose of the National Day of Prayer is to acknowledge the role of prayer in society. See generally Mem. at 27-31 (describing the secular purpose of the National Day of Prayer). Indeed, the 2008 prayer day proclamation specifically states that "[t]he Congress, by Public Law 100-307, as amended, has called upon our Nation to reaffirm the role of prayer in our society by recognizing each year a 'National Day of Prayer.'" See Compl., Ex. 1.[15] In any event, the Seventh Circuit has spoken on the issue, noting that the National Day of Prayer is a "generally accepted and constitutionally permissible acknowledgment[ ] of the role of religion in American life." Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988) (citing Lynch, 465 U.S. at 676-78).

Nor do prayer day proclamations "tell citizens to engage in prayer," literally or otherwise; to the contrary, the terms of the National Day of Prayer are entirely voluntary, as they do not "require anyone to pray, of course." County of Allegheny, 492 U.S. at 672 (Kennedy, J., concurring in part and dissenting in part). Indeed, the 2008 proclamation with which plaintiffs take issue merely "ask[s] the citizens of our Nation to give thanks, each according to his or her own faith, for the freedoms and blessings we have received and for God's continued guidance, comfort, and protection," and "invite[s] all Americans to join in observing this day with appropriate programs, ceremonies, and activities." Compl, Ex. 1. In this regard, there is nothing "quintessential[ly] religious" about prayer proclamations. See Opp. at 49, 66.[16] To the contrary,

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[15] Plaintiffs have also referred to a newspaper article published in 1952 regarding the National Day of Prayer statute. See Opp. at 53 & Ex. E. That unsubstantiated newspaper article sheds no light on the National Day of Prayer's purpose other than to note the obvious — that members of the public will pray on the National Day of Prayer.

[16] Plaintiffs cite an inapposite series of cases to argue that prayer is a "quintessential religious practice." Opp. at 49, 66. Some of the cases plaintiffs cite involved school prayer. As the Supreme Court has stated, however, "there are heightened concerns with protecting freedom

Justice O'Connor — the very author of the Endorsement Test — has specifically noted that Presidential Proclamations for "public prayers of Thanks" "would probably withstand Establishment Clause scrutiny given their long history." Wallace v. Jaffree, 472 U.S. 79, 81 & n.6 (1985) (O'Connor, J., concurring) (emphasis added); see generally Lynch, 465 U.S. at 677-78 (describing National Day of Prayer as one of "countless . . . illustrations of the Government's acknowledgment of our religious heritage"); Van Zandt, 839 F.2d at 1221 (citing Lynch's acknowledgment of National Day of Prayer); Books v. City of Elkhart, 235 F.3d at 325 (Marion, J., concurring in part and dissenting in part) (describing National Day of Prayer as an "accepted practice[ ]"); DeBoer v. Village of Oak Park, 267 F.3d 558, 570 (7th Cir. 2001) (describing National Day of Prayer as a "national observance designed to afford citizens who believe that prayer is an important component of civic obligation the opportunity to discharge that obligation").

In response, plaintiffs assert — without explanation — that "Thanksgiving Proclamations marked by prayer" are "different" from National Day of Prayer proclamations. See Opp. at 63. A review of last year's Thanksgiving Day proclamation reveals that they are not so different:

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of conscience from subtle coercive pressure in the elementary and secondary public schools." Lee v. Weisman, 505 U.S. 577, 592 (1992). North Carolina Civil Liberties Union v. Constangy, 947 F.2d 1145, 1150 (4th Cir. 1991), involved a state court judge who opened his court proceedings with a prayer. On the specific facts of that case, including that the judge did not "solemnify" all proceedings in his courtroom, the Fourth Circuit concluded that the district court's finding that the courtroom prayers lacked a secular purpose was not clearly erroneous. Id. at 1150. Moreover, the court did not rule out the possibility that prayer could have a secular purpose. See id. at 1150 ("prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the Lemon test" (emphasis added)). Finally, plaintiffs cite an unpublished sixteen-year-old state court decision granting a preliminary injunction that prevented the Mayor of Denver from participating in a Day of Prayer Against Violence ceremony. See Opp. at 49 (citing Freedom From Religion Found. v. Webb, 93-CV-6056 (District Court, City and County of Denver, Co., 1993)). Whatever resemblance the facts of that case may have to some of the allegations here, the case is of little precedential value.

> Thanksgiving is a time for families and friends to gather together and express gratitude for all that we have been given, the freedoms we enjoy, and the loved ones who enrich our lives. We recognize that all of these blessings, and life itself, come not from the hand of man but from Almighty God.
>
> Every Thanksgiving, we remember the story of the Pilgrims who came to America in search of religious freedom and a better life. Having arrived in the New World, these early settlers gave thanks to the Author of Life for granting them safe passage to this abundant land and protecting them through a bitter winter. Our Nation's first President, George Washington, stated in the first Thanksgiving proclamation that "It is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." While in the midst of the Civil War, President Abraham Lincoln revived the tradition of proclaiming a day of thanksgiving, asking God to heal our wounds and restore our country.
>
> Today, as we look back on the beginnings of our democracy, Americans recall that we live in a land of many blessings where every person has the right to live, work, and worship in freedom. Our Nation is especially thankful for the brave men and women of our Armed Forces who protect these rights while setting aside their own comfort and safety. Their courage keeps us free, their sacrifice makes us grateful, and their character makes us proud. Especially during the holidays, our whole country keeps them and their families in our thoughts and prayers. Americans are also mindful of the need to share our gifts with others, and our Nation is moved to compassionate action. We pay tribute to all caring citizens who reach out a helping hand and serve a cause larger than themselves.
>
> On this day, let us all give thanks to God who blessed our Nation's first days and who blesses us today. May He continue to guide and watch over our families and our country always.
>
> NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim November 27, 2008, as a National Day of Thanksgiving. I encourage all Americans to gather together in their homes and places of worship with family, friends, and loved ones to strengthen the ties that bind us and give thanks for the freedoms and many blessings we enjoy.
>
> IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of November, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

Proclamation 8322, Thanksgiving Day, 2008 (Nov. 21, 2008), 73 Fed. Reg. 72,301 (emphasis added). Even though Thanksgiving Day proclamations are infused with religious language, "they

will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed." Van Orden, 545 U.S. at 723 (Stevens, J., dissenting); see Lynch, 465 U.S. at 675-76 (describing history of Thanksgiving as being "celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God" and noting that "Executive Orders and other official announcements of the Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms.").[17] Because plaintiffs fail to distinguish National Day of Prayer proclamations from Thanksgiving Day proclamations, and because it is indisputable that Thanksgiving Day proclamations incorporating religious themes are constitutional, this Court should conclude that National Day of Prayer proclamations are constitutional.[18]

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[17] Plaintiffs attempt to describe Thanksgiving and Christmas holidays as having secular justifications, stating that "courts have not sanctioned government recognition of holidays where the justification was based upon 'religious connotations.'" Opp. at 59-60. Nonetheless, the Supreme Court has expressly noted that the Thanksgiving "holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance." Lynch, 465 U.S. at 675 (emphasis added) (internal footnote omitted).

[18] Plaintiffs fail to respond to the federal defendants' argument that the fifty-year gap between the enactment of the National Day of Prayer statute and this lawsuit reveals that the event cannot be construed to endorse religion. See Mem. at 35 (citing Van Orden, 545 U.S. at 702-03 (Breyer, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should dismiss plaintiffs' First Amended Complaint with prejudice.

Dated: April 24, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2009, I electronically filed a copy of the Federal Defendants' Reply in Support of the Federal Defendants' Motion to Dismiss the First Amended Complaint using the ECF System for the Western District of Wisconsin, which will send notification of that filing to all counsel of record in this litigation.

/s/ Brad P. Rosenberg
Brad P. Rosenberg

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

COMPLAINT

MICHAEL NEWDOW;
ELLERY SCHEMPP;
MEL LIPMAN;
DAN BARKER AND
ANNIE-LAURIE GAYLOR;
ROBERT SHERMAN;
MARGARET DOWNEY;
AUGUST BERKSHIRE;
MARIE CASTLE;
STUART BECHMAN;
HERB SILVERMAN;
JASON TORPY;

[1] *Pro hac vice* application pending

HARRY GREENBERGER;
KIRK HORNBECK;
JIM CORBETT;
CATHARINE LAMM;
RICHARD WINGROVE;
CHRISTOPHER ARNTZEN;
JOHN STOLTENBERG;
KATHERINE LACLAIR;
LOUIS ALTMAN;
PAUL CASE;
JERRY SCHIFFELBEIN;
ANNE, PHILIP AND JAY RICHARDSON;
DAN DUGAN;
ANNA MAE ANDREWS;
ELIZA SUTTON;
RICHARD RESSMAN;
"UNNAMED CHILDREN;"

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PLAINTIFFS,

v.

HON. JOHN ROBERTS, JR.
CHIEF JUSTICE OF THE U.S. SUPREME COURT
SUPREME COURT OF THE UNITED STATES
ONE FIRST STREET NE
WASHINGTON, DC 20543

PRESIDENTIAL INAUGURAL COMMITTEE ("PIC")
WASHINGTON, DC 20599

EMMETT BELIVEAU, EXECUTIVE DIRECTOR, PIC
WASHINGTON, DC 20599

JOINT CONGRESSIONAL COMMITTEE
ON INAUGURAL CEREMONIES ("JCCIC")
UNITED STATES SENATE
331 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

SENATOR DIANNE FEINSTEIN, CHAIRPERSON, JCCIC
UNITED STATES SENATE
331 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

ARMED FORCES INAUGURAL COMMITTEE ("AFIC")
JOINT FORCE HEADQUARTERS - NATIONAL CAPITAL REGION
US ARMY MILITARY DISTRICT OF WASHINGTON
103 THIRD AVENUE - FORT LESLEY J. MCNAIR
WASHINGTON, DC 20319-5058

MAJOR GENERAL RICHARD J. ROWE JR., CHAIRPERSON, AFIC;
JOINT FORCE HEADQUARTERS - NATIONAL CAPITAL REGION
US ARMY MILITARY DISTRICT OF WASHINGTON
103 THIRD AVENUE - FORT LESLEY J. MCNAIR
WASHINGTON, DC 20319-5058

REV. RICK WARREN;
REV. JOE LOWERY;

DEFENDANTS.

COMPLAINT

Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. This is a civil action claiming violations of the First and Fifth Amendments of the Constitution of the United States of America. As such, this Court has jurisdiction under 28 U.S.C. § 1331.
2. This action is founded upon the Constitution of the United States of America. As such, this Court has jurisdiction over Defendants under 28 U.S.C. § 1346(a)(2).
3. This is a civil action claiming violations of 42 U.S.C. §§ 2000bb et seq. (Religious Freedom Restoration Act (RFRA)). As such, this Court has jurisdiction under 42 U.S.C. §§ 2000bb-1(c) and 28 U.S.C. § 1331.
4. This action seeks declaratory relief. As such, this Court has jurisdiction under 28 U.S.C. § 2201(a) and 28 U.S.C. § 2202.[2]
5. This action seeks injunctive relief. As such, this Court has jurisdiction under 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1343(a)(4).
6. This action is in the nature of mandamus, and seeks to compel those Defendants who are "officer[s] or employee[s] of the United States or any agency thereof" to perform their duties owed Plaintiffs under the terms of the First and Fifth Amendments of the Constitution of the United States. As such, this Court has jurisdiction under 28 U.S.C. § 1361.
7. Defendants PIC, JCCIC and AFIC all reside in this judicial district.[3] The events giving rise to this claim all have taken place, are taking place or will be taking place in this judicial district. Venue is therefore proper under 28 U.S.C. § 1391(b).

[2] It might be noted that Fed. R. Civ. P. Rule 57 states in pertinent part that, "The court may order a speedy hearing of a declaratory-judgment action."
[3] The remaining defendants may or may not reside in this judicial district.

PARTIES

I. Plaintiffs

8. Plaintiff Michael Newdow is a citizen of the United States, a resident of the State of California, Reverend of the First Atheist Church of True Science ("FACTS"), a member of the Freedom From Religion Foundation ("FFRF") and the American Humanist Association ("AHA"), and an Atheist. He is awaiting responses from Senators Dianne Feinstein and Barbara Boxer to learn if he will be getting a ticket to the inauguration on January 20, 2009. If he does, he will attend the actual event. If he does not, he plans to view the ceremony via the large video displays being set up on the Capitol mall.

9. Plaintiff Ellery Schempp is a citizen of the United States, a resident of the State of Massachusetts, a member of the Unitarian-Universalist Church, First Parish, in Bedford, Massachusetts, a member of the Freedom From Religion Foundation ("FFRF"), the American Humanist Association ("AHA"), the National Center for Science Education ("NCSE"), Americans United for Separation of Church and State ("AUC&S"), the Secular Coalition for America ("SCA"), the Center for Naturalism, and the Skeptic Society, and a Secularist, Humanist and Atheist. He will view the inauguration at via cable television and on the Internet, in the company of friends, on January 20, 2009.

10. Plaintiff Mel Lipman is a citizen of the United States, a resident of the State of Florida, president of AHA, Vice President of the International Humanist and Ethical Union, a member of American Atheists ("AA") and FFRF and a Jewish Atheist, Humanist and Free-thinker. He plans to view the inauguration at home on television on January 20, 2009.

11. Plaintiffs Dan Barker and Annie-Laurie Gaylor are citizens of the United States, residents of the State of Wisconsin, co-Presidents of FFRF, and Atheists. They plan to view the inauguration at home on television on January 20, 2009.

12. Plaintiff Robert Sherman is a citizen of the United States, a resident of the State of Illinois, and an Atheist. He plans to view the inauguration on a big screen television in Washington, DC on January 20, 2009.

13. Plaintiff Margaret Downey is a citizen of the United States, a resident of the State of Pennsylvania, a member of AHA, FFRF, SCA, AA and AAI, and an Atheist. She plans to view the inauguration with a family on television on January 20, 2009.

14. Plaintiff August Berkshire is a citizen of the United States, a resident of the State of Minnesota, president of Minnesota Atheists, a member of AHA, FFRF and AAI, and an Atheist. He plans to view the inauguration at home on television on January 20, 2009.

15. Plaintiff Marie Castle is a citizen of the United States, a resident of the State of Minnesota, communications director of Atheists For Human Rights ("AFHR"), a member of FFRF and AA, and a "Valiant Atheist." She plans to view the inauguration with other AFHR members on a big-screen television on January 20, 2009.

16. Plaintiff Stuart Bechman is a citizen of the United States, a resident of the State of California, President of Atheist Alliance International ("AAI"), President of Atheists United ("AU"), a member of FFRF and AA, and an Atheist. He will not be viewing the inauguration because "I find the presence of religious authorities in the ceremony to be exceptionally offensive and a violation of my rights as a US citizen to expect our elected leaders to adhere to the First Amendment of our Constitution."

17. Plaintiff Herb Silverman is a citizen of the United States, a resident of the State of South Carolina, President of the Secular Coalition for America ("SCA"), a member of AHA and FFRF, and an Atheist. He plans to view the inauguration at home on television on January 20, 2009.

18. Plaintiff Jason Torpy is a citizen of the United States, a resident of the State of New York, President of the Military Association of Atheists & Freethinkers ("MAAF") and board member of AHA, graduate of West Point, Iraq War veteran and a Nontheist. He plans to view the inauguration with other Nontheists at a group event in New York City.

19. Secular Coalition for America ("SCA"), a member of AHA and FFRF, and an Atheist. He plans to view the inauguration at home on television on January 20, 2009.

20. Plaintiff Harry Greenberger is a citizen of the United States, a resident of the State of Louisiana, President of the New Orleans Secular Humanist Association ("NOSHA"), a member of AHA, FFRF and AA, and an Atheist. He plans to view the inauguration at home on television on January 20, 2009.

21. Plaintiff Kirk Hornbeck is a citizen of the United States, a resident of the State of Maryland, a member of FFRF and AHA, and an Atheist. He plans to view the inauguration on January 20, 2009, via the large video displays being set up on the Capitol mall.

22. Plaintiff Jim Corbett is a citizen of the United States, a resident of the State of Washington, a member of AHA and AA, and an Atheist and a humanist. He plans to view the inauguration at home on television on January 20, 2009.

23. Plaintiff Catharine Lamm is a citizen of the United States, a resident of the State of New Hampshire, a member of FFRF, and a Secular Humanist. She plans to view the inauguration at home on television on January 20, 2009.

24. Plaintiff Richard Wingrove is a citizen of the United States, a resident of the State of Virginia, a member of FFRF, and an Atheist. He plans to view the inauguration on January 20, 2009, via the large video displays being set up on the Capitol mall.

25. Plaintiff Christopher Arntzen is a citizen of the United States, a resident of the District of Columbia, a member of AHA and FFRF, and an Atheist. He plans to view the inauguration on January 20, 2009, via the large video displays being set up on the Capitol mall.

26. Plaintiff John Stoltenberg is a citizen of the United States, a resident of the State of Wisconsin, a member of AHA and FFRF, and a Freethinker/Atheist. He plans to view the inauguration at home on television on January 20, 2009.

27. Plaintiff Katherine LaClair is a citizen of the United States, a resident of the State of New Jersey, and a Humanist. She will be attending the actual inaugural ceremony on January 20, 2009.

28. Plaintiff Louis Altman is a citizen of the United States, a resident of the State of Illinois, a member of the Board of AHA, a member of FFRF, and an Atheist, a Humanist, a Freethinker and a nontheistic American. He will be watching the inaugural ceremony at home on television on January 20, 2009.

29. Plaintiff Paul Case is a citizen of the United States, a resident of the State of Washington, a member AA and Seattle Atheists ("SA"), and an Atheist. He will be watching the inaugural ceremony at home on television on January 20, 2009.

30. Plaintiff Jerry Schiffelbein is a citizen of the United States, a resident of the State of Washington, Treasurer of Seattle Atheists ("SA"), Vice President of Humanists of Washington, and a Secular Humanist, Atheist and Freethinker. He will be watching the inaugural ceremony at home on television on January 20, 2009.

31. Plaintiffs Anne M. Richardson, Philip I. Richardson, Jay R. Richardson are citizens of the United States, residents of the State of Virginia, members of Washington Area Secular Humanists ("WASH"), and Atheists. They will view the ceremony via the large video displays being set up on the Capitol mall.

32. Plaintiff Dan Dugan is a citizen of the United States, a resident of the State of California, and a secular Humanist. He will be watching the inaugural ceremony at home on television on January 20, 2009.

33. Plaintiff Anna Mae Andrews is a citizen of the United States, a resident of the State of California, a member of AHA and a Humanist and an Atheist. She will be watching the inaugural ceremony at home on television on January 20, 2009.

34. Plaintiff Eliza Sutton is a citizen of the United States, a resident of the State of Washington, a member of AHA, FFRF and Seattle Atheists, and an Atheist. She will be watching the inaugural ceremony at home on the Internet or listening on the radio on January 20, 2009.

35. Plaintiff Richard Ressman is a citizen of the United States, a resident of the State of California, and an "occasional-practicing Jew." He will be watching the inaugural ceremony at home on television on January 20, 2009.

36. Plaintiffs "Unnamed Children" are the children of one or more of the above-mentioned adult plaintiffs (and/or members of AHA and/or FFRF), who will be watching the inaugural exercises along with their parents.

37. Plaintiff American Humanist Association ("AHA") is dedicated to ensuring a voice for those with a positive, nontheistic outlook. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the American Humanist Association is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist

philosophy. AHA has more than 10,000 members in every state as well as the District of Columbia.

38. Plaintiff Freedom From Religion Foundation ("FFRF") is a national association of Freethinkers (Atheists and Agnostics), established as a 501(c)(3) educational group in 1978, which works to protect its members by keeping church and state separate. The Foundation, based in Madison, Wisconsin, has members in every state as well as the District of Columbia. Current total membership is more than 13,000.

39. Plaintiff Minnesota Atheists ("MNA") is the oldest, largest, and most active Atheist organization in the state of Minnesota. It was founded in 1991 and is a 501(c)3 nonprofit educational organization. Its purposes are: to provide a community for Atheists; to educate the public about Atheism; and to promote separation of state and church.

40. Plaintiff Atheists for Human Rights ("AFHR") is a staunch advocate for religion-free government uninfluenced by sectarian religious beliefs, that supports an inclusive society that does not give preferential treatment to any religious group. It has membership throughout the United States, many of whom will be watching the inaugural events on the big screen TV at its headquarters in Minneapolis, Minnesota.

41. Plaintiff Atheist Alliance International ("AAI") is an umbrella group of over 60 Atheist and humanist organizations across the United States, founded in 1992 and dedicated to promoting the worldview of positive Atheism and pursuing the restoration of the First Amendment.

42. Plaintiff Atheists United ("AU") is the preeminent Atheist organization in southern California, founded in 1982 and dedicated to providing a community for Atheists and others with a reality-based worldview and fighting the societal stigmas and stereotypes about Atheism through education and advocacy.

43. Plaintiff New Orleans Secular Humanist Association ("NOSHA") is the only secular organization covering Southern Louisiana and the Mississippi Gulf coast, providing monthly meetings, quarterly newsletters, informative website and public access television programs. Without supernaturalism, its members celebrate reason and humanity.

44. Plaintiff University of Washington Secular Student Union ("UWSSU") was formed in the summer of 2006 to provide students at the University of Washington in Seattle, Washington, who are Atheist, Agnostic, and otherwise nonreligious students with a place to discuss their lack of faith, and to provide all students with a forum to discuss and debate general issues of religion and philosophy. The Secular Student Union is a student-created and student-run organization. Almost every major college and university campus across the nation has an organization that is similar to the Secular Student Union and members of these organizations communicate via the Internet, Facebook and other electronic media to share ideas and programs around their philosophical perspective. Members of the group include self-described Atheists, Agnostics, Freethinkers, and other non-theists perspectives.

45. Plaintiff Seattle Atheists ("SA") is a nonprofit educational corporation organized to develop and support the Atheist, Rationalist, secular Humanist, Agnostic, Skeptic and non-theist communities; to provide opportunities for socializing and friendship among these groups; to promote and defend their views; to protect the first amendment principle of state-church separation; to oppose any discrimination based upon religious conviction, particularly when it is directed at the non-religious; to expose the dangers of supernaturalism and superstition; to promote science; and to work with other organizations in pursuit of common goals.

46. Plaintiff Atheists of Florida ("AOF"), is a 501(c)(3) nonprofit, educational corporation founded to heighten public awareness about Atheism and to monitor state/church separation issues.

II. Defendants

47. Defendant Hon. John Roberts, Jr., the Chief Justice of the United States, is the nation's highest judicial officer. He is being sued in his official and in his individual capacity.

48. Defendant Presidential Inaugural Committee ("PIC") is the quasi-governmental[4] "committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony."[5]

49. Defendant Emmett Beliveau is the executive director of PIC.

50. Defendant Joint Congressional Committee on Inaugural Ceremonies ("JCCIC") is the committee established by S. Con. Res. 67, 110th Cong., 2d Sess., 154 Cong. Rec. 21, S820-21 (Feb 8, 2008) "authorized to utilize appropriate equipment and the services of appropriate personnel of departments and agencies of the Federal Government, under arrangements between the joint committee and the heads of the departments and agencies, in connection with the inaugural proceedings and ceremonies."

51. Defendant Dianne Feinstein is a United States Senator who is serving as chairperson of JCCIC.

52. Defendant Armed Forces Inaugural Committee ("AFIC") is "a joint service committee charged with coordinating all military ceremonial support for the presidential inaugural."[6]

53. Defendant Major General Richard J. Rowe Jr. is the Commander of AFIC.

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[4] See 36 U.S.C. § 501 et seq. See, also, 69 Fed. Reg. (No. 193) 59775 (October 6, 2004) (to be codified at 11 C.F.R. pts. 104 & 110) ("The inaugural committee ... receives special privileges in the District of Columbia beginning five days before and ending four days after the inaugural ceremony.")

[5] 36 U.S.C. § 501(1).

[6] As described at the AFIC website, accessed at http://www.afic.northcom.mil/about.html on December 20, 2008.

54. Defendant Rev. Rick Warren is a clergyman who has been chosen to provide the invocation at the upcoming presidential inaugural exercises.

55. Defendant Rev. Joe Lowery is a clergyman who has been chosen to provide the benediction at the upcoming presidential inaugural exercises.

INTRODUCTION

56. The First Amendment of the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

57. The United States Supreme Court has extended the ambit of these words to include any governmental actor.[7]

58. In explaining the Establishment Clause, the Supreme Court has stated, "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[8] It is clearly not neutral when the government places "so help me God" in its oaths or sponsors prayers to God, knowing that some individuals believe that God does not exist.

59. The Supreme Court has similarly claimed that "The government may not ... lend its power to one or the other side in controversies over religious authority or dogma."[9] By placing "so help me God" in its oaths and sponsoring prayers to God, government is lending its power to one side of perhaps the greatest religious controversy: God's existence or non-existence.

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[7] "To be sure, the First Amendment is phrased as a restriction on Congress' legislative authority ... [but it] binds the Government as a whole, regardless of which branch is at work in a particular instance." Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 511 (1982) (Brennan, J., dissenting).

[8] McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (citation omitted).

[9] Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

60. The Supreme Court has stated that the Establishment Clause requires a "purpose" analysis, which "aims at preventing the relevant governmental decisionmaker ... from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."[10] There can be no purpose for placing "so help me God" in an oath or sponsoring prayers to God, other than promoting the particular point of view that God exists.

61. The Supreme Court has looked at the "effects" of government activity, especially in terms of "endorsement" of any religious dogma, and agreed that "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[11] That the effect of placing "so help me God" in its oaths and sponsoring prayers to God has been perceived by adherents of Monotheism as an endorsement of their individual religious choices is unequivocal. A member of the Supreme Court, itself – joined by two of his colleagues – has used those very actions to contend that government may assist "the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people,* and with respect to our national endeavors,"[12] and that "the Establishment clause ... permits the disregard of devout Atheists."[13]

62. The Supreme Court has continued, noting that "[t]he inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years."[14] Plaintiffs "Unnamed Children" are children in their formative years, who will watch as the government alters the sole constitutionally

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[10] Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1986).
[11] Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985).
[12] McCreary County v. ACLU, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).
[13] Id. at 893.
[14] Id.

prescribed oath by adding "so help me God" to it, and as the government gives Monotheistic clergy unique access to the grandest ceremony in our national existence solely for the purpose of praying to God.

63. Yet despite all of the foregoing, Defendant Roberts – who, as Chief Justice of the United States, embodies the rule of law and the devotion of our government to the United States Constitution more than any other individual – will (with no authority whatsoever) alter the text of that document to infuse the inaugural ceremony with purely religious dogma.

64. Furthermore, the remaining Defendants will bring to the inauguration of the President – the grandest ceremony in our national existence – two chaplains to extol the glory of God. This is the case even though the Supreme Court has specifically pronounced that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."[15]

65. Plaintiffs are American "Humanists," "Freethinkers" and/or Atheists, who sincerely believe that there is no such thing as god, or God, or any supernatural force. On the contrary, under their belief system(s), "supernatural" is an oxymoron.

66. Although it has been written that "acknowledgements" of God "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society,"[16] Plaintiffs strongly disagree with this claim.

67. In fact, to Plaintiffs, such "acknowledgements" (much less endorsements) of God do not solemnize those occasions at all. On the contrary, they ridicule public occasions, making a mockery of the wonders of nature and of human achievement.

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[15] Santa Fe Independent School District v. Doe, 530 U.S. 290, 313 (2000).
[16] Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

68. To Plaintiffs, such "acknowledgements" (much less endorsements) of God do not express confidence in the future. On the contrary, they serve to remind Plaintiffs of the most egregious past human conduct, where people have done such unfathomable acts as literally burning others alive, merely because their victims held different religious views.

69. "Acknowledgements" of God remind Plaintiffs of the myriad wars fought by those convinced that their religious "truths" justified intolerance, and of September 11, 2001, when a fanatic and his religious followers turned four of our airplanes into bombs, murdering 3,000 of our citizens ... all in the name of God.

70. Nor do Plaintiffs find that "acknowledgements" of God encourage the recognition of what is worthy of appreciation in society. Rather, to Plaintiffs, such "acknowledgements" reflect a falsehood that readily leads to such views as those expressed by Hon. Leon Bazile (who wrote that antimiscegenation statutes were proper because "Almighty God ... did not intend for the races to mix"[17]), by Supreme Court Justice Joseph Bradley, who contended that women should not be lawyers because their "paramount destiny and mission ... are to fulfill the noble and benign offices of wife and mother,"[18] and by Rev. Raymund Harris (who claimed to "successfully prove, that the SLAVE-TRADE is perfectly consonant to ... Christian Law, as delineated to us in the Sacred Writings of the Word of God"[19]).

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[17] Loving v. Virginia, 388 U.S. 1, 3 (1967) ("Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." (quoting the trial judge, Hon. Leon Bazile)).

[18] Bradwell v. State, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.").

[19] Harris R. *Scriptural researches on the licitness of the slave-trade, shewing its conformity with the principles of natural and revealed religion, delineated in the sacred writings of the word of God.* (John Stockdale: London, 1788 (reprinted by John Winter: Fredericktown, MD; 1790)) as provided in Early American Imprints, Series I, Evans, 1639-1800, No. 22555.

71. If the declarations of God's glory were meant merely as positive reflections of the Monotheistic views of believers, they would still violate the First Amendment's religion clauses. Plaintiffs, however, contend that the "real meaning" of these declarations goes far beyond that unconstitutional "benignity," for they contain an element analogous to the "real meaning" of the "separate but equal" laws of our nation's earlier history and tradition. Specifically, the "real meaning" is that Atheists are "so inferior and so degraded"[20] that their religious views warrant no respect.

72. That "real meaning" has been exhibited time and again in our past. Congress, itself, when it interlarded the Pledge of Allegiance with the words "under God" in 1954, specifically noted that it was acting "to deny ... Atheistic ... concepts."[21]

73. Along these same lines, Defendant Rev. Rick Warren has repeatedly asserted, "I could not vote for an Atheist because an Atheist says, 'I don't need God.'"[22]

74. It is well known that Defendant Roberts is a Catholic. In Catholicism, many similar examples of the "real meaning" of proclamations of God's glory and/or importance exist. For instance, in a relatively recent encyclical, the Pope spoke of how he had "frequently and with urgent insistence denounced the current trend to Atheism which is alarmingly on the increase."[23]

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[20] Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.").

[21] H.R. 1693, 83rd Cong., 2d Sess., at 2).

[22] Tran, My-Thuan. *Warren: Character is key.* Los Angeles Times (August 18, 2008), p. B-1. Rev. Warren also made this claim on national television on the Larry King Show: "I couldn't vote for a person who is an Atheist." August 18, 2008. Accessed on December 25, 2008, at http://transcripts.cnn.com/TRANSCRIPTS/0808/18/lkl.01.html.

[23] Encyclical DIVINI REDEMPTORIS (On Atheistic Communism) of Pope Pius XI, dated March 19, 1937, and accessed at http://www.ewtn.com/library/encyc/p11divin.htm on December 27, 2008.

75. Perhaps most importantly, the "real meaning" is stated in the Holy Bible, which will be used during the inaugural ceremonies. That book calls anyone who is an Atheist a "fool,"[24] while further making the outlandish, degrading and insulting declarations that Atheists "are corrupt, ... have done abominable works, [and] there is none that doeth good."[25]

76. It doesn't end there. That book decrees that Plaintiffs "shall surely be put to death!"[26]

77. According to defendant PIC, President-elect Barack Obama and Vice President-elect Joe Biden share a "commitment to ... ensure that as many Americans as possible ... will be able to come together to unite the country and celebrate our common values and shared aspirations."[27]

78. Additionally, in its preparations for the inaugural events, the PIC "unveiled the official theme for the inauguration ... "Renewing America's Promise."[28] That promise was purportedly depicted in the words of the President-elect: "[I]n America, we rise or fall as one nation and one people. That sense of unity and shared purpose is what this Inauguration will reflect."[29]

79. Similarly, "[t]he PIC also outlined a preliminary schedule of official inaugural events that underscores a commitment to organizing activities that are inclusive."[30]

80. Yet, despite the foregoing, Defendants will have an invocation and a benediction during the inauguration. Both of these activities are completely exclusionary, showing absolute

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[24] Psalms 14:1.
[25] Id.
[26] Leviticus 24:16 states "whoever blasphemes the name of the Lord shall surely be put to death." Denials of God's existence – such as those made by each of the instant plaintiffs – are considered "blasphemy."
[27] Accessed at http://www.pic2009.org/pressroom/entry/presidential_inaugural_launch/ on December 12, 2008.
[28] Accessed at http://www.pic2009.org/pressroom/entry/theme_and_preliminary_information/ on December 25, 2008.
[29] *Id.*
[30] *Id.*

disrespect to Plaintiffs and others of similar religious views, who explicitly reject the purely religious claims that will be endorsed, i.e., (a) there exists a God, and (b) the United States government should pay homage to that God.

81. That defendants would engage in such disrespect – while claiming to be dedicated to "unity," "common values," "shared aspirations," "shared purpose," and "a commitment to organizing activities that are inclusive" – is but further evidence of the "real meaning" of the decision to spatchcock clergy into the inauguration.

82. Plaintiff individuals all desire and plan to watch the inauguration of their 44th President, Barack Obama, on January 20, 2009.

83. Under the Establishment Clause, Plaintiffs have a right to view their government in action without being forced to confront official endorsements of religious dogma with which they disagree. This is especially the case when that dogma stigmatizes them in the process.

84. Being forced to confront such religious dogma as the price to pay for observing a governmental ceremony is a substantial burden upon Plaintiffs' rights of Free Exercise as well.[31] One cannot freely live as an adherent to a religious ideology when the government uses its "power, prestige and financial support"[32] to impose a contrary religious doctrine while such individuals are observing its ceremonies.

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[31] "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. **While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.**" Thomas v. Review Board, Ind. Empl. Sec. Div., 450 U.S. 707, 717-718 (1981) (emphasis added)

[32] Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

85. To directly violate and abridge any citizen's fundamental constitutional rights under the Establishment and Free Exercise Clauses of the First Amendment demands that the courts examine the challenged governmental activity under a strict scrutiny standard.[33]

86. That standard places the burden of proof upon the governmental actors to demonstrate that their actions serve a compelling interest and that those actions are narrowly tailored to serve that interest.[34] Defendants cannot meet this standard for their actions being challenged in this litigation.

87. Any religious belief or religious expression not adhered to by all is, constitutionally, sectarian. Appendix A.

88. Prayers that declare there is a God exclude Atheistic Americans such as Plaintiffs here, making them feel as "outsiders" due to their personal religious beliefs.

89. Even clergy who have given inaugural prayer recognize this fact. For instance, Rev. Pruden – who gave the invocation at President Truman's 1949 inaugural – noted that: "If you are going to use a phrase or idea that is immediately contrary to their [the audience's] tradition or training they just feel left out and not part of the experience."[35]

90. The prayers given for the past eighteen inaugural ceremonies, spanning only the past 72 years, have been constitutionally sectarian inasmuch as they endorsed the idea that there exists a god, which is a religious view adhered to by only a portion of the American people.

91. In addition to constitutional sectarianism, prayers given over the past 72 years have demonstrated colloquial sectarianism as well, by including patently Christian prayer at every

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[33] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).
[34] Id.
[35] Statement of Rev. Edward Hughes Pruden, as quoted in Medhurst MJ. "*God Bless the President: The Rhetoric of Inaugural Prayer.*" (The Pennsylvania State University, 1980) (Available on microfilm from University Microfilms International, Ann Arbor, MI (800-521-0600) at 174.

inauguration since the unconstitutional practice of including clergy to pray at presidential inaugurations began in 1937. Appendix B.

92. With this pedigree – as well as with the incoming President's repeated declarations of his Christian faith – it is likely that Defendants Warren and/or Lowery will also give patently Christian prayer at the coming inaugural exercises.

93. AHA has had members who have personally been unwillingly confronted with the inaugural prayers since its inception in 1941. There have been no less than sixteen public inaugurations since that time. In every one of these, (Christian) Monotheistic clergy have been granted a unique platform to espouse their religious dogma.

94. As it is, Atheists are the most despised minority in the land.[36] Plaintiffs contend that it is the sort of government-sponsored activity at issue in this case – i.e., where the "power, prestige and financial support"[37] of government is placed behind Monotheism – that stigmatizes them and perpetuates, if not instigates, this situation.

95. Defendants are acting in concert to further worsen the social condition of Plaintiffs. They are engaging in and promoting governmental activities that (a) will exacerbate Plaintiffs' "outsider" status, (b) will have religious purposes, (c) will have religious effects, (d) will endorse the purely religious notion that there exists a God, (e) will show a preference for that exclusionary religious belief, (f) will affiliate government with that religious belief, (g) will signal the disapproval of Plaintiffs' religious views, (h) will violate the governmental neutrality required in matters of religion, (i) will inculcate the specific religious belief that

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[36] "Atheists are at the top of the list of groups that Americans find problematic ... It is striking that the rejection of Atheists is so much more common than rejection of other stigmatized groups." Edgell P, Hartmann D, and Gerteis J. *Atheists as "other": Moral Boundaries and Cultural Membership in American Society*. American Sociological Review, Vol. 71 (April. 2006), p. 211-234 at 230.

[37] Engel v. Vitale, 370 U.S. 421, 431 (1962). See note 32, supra.

God exists (and likely the specific religious belief that Jesus Christ is the Son of God), and (j) will place government's "imprimatur" on those specific religious beliefs.

96. Moreover, Defendants know that they will impose these harms not only upon the adult plaintiffs in this case, but upon the minor plaintiffs as well.

97. Such impositions, upon impressionable young children, amount to the coercive imposition of religious dogma specifically denounced by the Supreme Court in nine out of nine public school cases (where religious dogma is imposed upon children in a governmental setting). McCollum v. Board of Education, 333 U.S. 203 (1948) (religious teaching); Engel v. Vitale, 370 U.S. 421 (1962) (prayer); Abington School District v. Schempp, 374 U.S. 203 (1963) (Bible-reading); Epperson v. Arkansas, 393 U.S. 97 (1968) (forbidding the teaching of evolution); Stone v. Graham, 449 U.S. 39 (1980) (posting Ten Commandments); Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence/prayer); Edwards v. Aguillard, 482 U.S. 578 (1987) ("creation science"); Lee v. Weisman, 505 U.S. 577 (1992) (graduation benedictions); and Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (prayer at football games).

98. In view of the foregoing, Plaintiffs set forth the following Causes of Action.

CAUSES OF ACTION

COUNT 1: THE ALTERATION OF THE PRESIDENTIAL OATH OF OFFICE SPECIFIED IN ARTICLE II OF THE CONSTITUTION, TO BE PERPETRATED BY DEFENDANT ROBERTS WITH NO AUTHORITY WHATSOEVER, VIOLATES THE ESTABLISHMENT CLAUSE

99. The introductory allegations set forth in paragraphs 1-98 are realleged herein.

100. Of all governmental officials, the one who most personifies the rule of law and the supremacy of the Constitution is the Chief Justice of the United States. 28 U.S.C. § 1. One might argue that he, more than anyone, has a duty to maintain the document's purity.

101. The oath of office for the President of the United States is specified in the Constitution's Article II, Section 1. In its entirety, it reads:

> "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

102. It is to be noted that the words, "so help me God" are not included in this oath.

103. That "so help me God" was added to the presidential oath by George Washington is a myth. There is no contemporaneous account supporting this claim, which was first made in 1854,[38] apparently on the basis of a recollection of Washington Irving. Irving was six years old in 1789, when the first inaugural was held. A historical claim based upon nothing but the alleged recollection of a six year old, first made more than six decades later, is of highly questionable validity. Combined with the fact that Irving's report of where he was standing during the inauguration would have made it impossible for him to have heard the oath at all, that validity falls to zero.

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[38] Griswold RW. *The Republican Court: American Society in the Days of Washington* (New York: D. Appleton & Co.; 1856), p. 141.

104. In fact, it isn't until 1881, ninety-two years after George Washington's initial ceremony, that the first use of the "so help me God" phrase can be verified. That occurred when Vice President Chester A. Arthur took the oath upon hearing of President James Garfield's death.[39]

105. The phrase, if used at all during the next half century, was apparently used only intermittently until 1933, at President Franklin Roosevelt's first inauguration. (It is known that neither President Herbert Hoover nor Chief Justice William Howard Taft used those words at Hoover's inauguration in 1929.[40])

106. Since 1933, "so help me God" has been used at every public inaugural ceremony, with that unauthorized alteration interposed each time by the Chief Justice of the United States.[41]

107. If President-elect Obama (as a black man fully aware of the vile effects that stem from a majority's disregard of a minority's rights, and as a Democrat fully aware of the efficacy his Republican predecessor's "so help me God" oath additions) feels that the verbiage formulated by the Founders is so inadequate that he needs to interlard his oath with a purely religious phrase deemed unnecessary by the first twenty presidents, Plaintiffs have no objection at this time. The President, like all other individuals, has Free Exercise rights, which might permit such an alteration.

108. No such Free Exercise rights, however, come into play on the part of the individual administering the oath to the President.

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[39] *Arthur Inaugurated.* The Washington Post (1877-1954); Sep 23, 1881; ProQuest Historical Newspapers, The Washington Post (1877 - 1989) pg. 1.

[40] Bendat J. *Democracy's Big Day: The Inauguration of Our President 1789-2009.* (iUniverse Star: New York; 2008) at 30-32.

[41] Accessed at http://www.aoc.gov/aoc/inaugural/pres_list.cfm?RenderForPrint=1 on December 28, 2008.

109. It has been announced that on January 20, 2009, "President-elect Barack H. Obama will take the Oath of Office, using President Lincoln's Inaugural Bible, administered by the Chief Justice of the United States, the Honorable John G. Roberts, Jr."[42]

110. Absent constitutional amendment, there is no authority to alter the text of the Constitution, the provisions of which are "fixed and exclusive." United States Term Limits v. Thornton, 514 U.S. 779, 790 (1995) (discussing "the Framers' intent that the [congressional] qualifications in the Constitution be fixed and exclusive."[43]).

111. Thornton involved a challenge to an Arkansas constitutional amendment, placing term limits on the state's federal congressmen. If a state (which has powers reserved to it under the Tenth Amendment) has no authority to even democratically pass an amendment to its own constitution that affects a federal constitutional provision, then surely no unelected official (who has no supporting constitutional provision) can literally alter the document's text without any process other than his own will.

112. This is especially true when the alteration is "contrary to the manifest tenor of the Constitution,"[44] as is the case here. Article VI, clause 3 of the Constitution states, "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." More to the point, the opening clause of the Bill of Rights states that government "shall make no law respecting an establishment of religion."

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[42] From the "Inaugural Schedule" as given at the Presidential Inaugural Committee's website at http://www.pic2009.org/pages/schedule/, accessed on December 27, 2008.

[43] Interestingly, Thornton **four times** quotes James Madison's Federalist No. 52 for the proposition that "the door of this part of the federal government is open to merit of every description, ... without regard to ... any particular profession of religious faith." 514 U.S. at 794, 807, 808 and 822 (n.32). Additionally, Federalist No. 57, where the "Father of the Constitution" wrote "No qualification of ... religious faith ... is permitted to fetter the judgment or disappoint the inclination of the people," is quoted twice. Id. at 808 and 819.

[44] Hamilton A. Federalist #78. Accessed at http://avalon.law.yale.edu/18th_century/fed78.asp on December 28, 2008.

113. It might be argued that the change is permissible inasmuch as it is only four words that are being appended to the text. Yet could Defendant Roberts intrude the single word "not" into the oath, before, say, the words "solemnly," "faithfully" or "preserve"? What criterion determines what changes are or are not acceptable?

114. Similarly, one can consider "so help me Protestant Christianity," which is constitutionally indistinguishable from the "so help me God" phrase currently in vogue. Surely, no one today would argue that this language would be permissible. Yet our colonial history is just as anti-Catholic as it is anti-Atheist. Appendix C.

115. James Madison, "the Father of the Constitution," warned us that governmental actions such as those being challenged in this case have real effects. In what has been called "the most important document explaining the Founders' conception of religious freedom,"[45] cited in no less than 35 separate opinions, in 32 separate cases, and by sixteen different Justices, Madison informed us that each such action "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[46]

116. That Madison was absolutely correct can, perhaps, best be seen in the dissenting opinion referenced at paragraph 61, supra. Again, a current Supreme Court Justice – joined by two of his brethren, no less[47] – wrote that our Constitution "permits the disregard of devout Atheists."[48]

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[45] McConnell M. *New Directions in Religious Liberty: "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age.* 1993 B.Y.U.L. Rev. 163, 169 (1993).
[46] Madison J. *Memorial and Remonstrance Against Religious Assessments*, as provided in the Appendix to Everson v. Board of Education, 330 U.S. 1, 63-72 (1947) at 69.
[47] Justice Kennedy, who joined in Justice Scalia's McCreary dissent, distanced himself from that portion of the opinion.
[48] McCreary County v. ACLU of Kentucky, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

117. This is extraordinary: three Justices of the Supreme Court contended that the Constitution of the United States of America – with its Due Process and Equal Protection Clauses, and with religion addressed only in the negative (stating that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,"[49] and that our governmental officials "shall make no law respecting an establishment of religion"[50]) – "permits the disregard" of the sincerely held religious views of Plaintiffs in this case.

118. The methodology by which this conclusion was reached pertains directly to the instant litigation. Despite being authored by a renowned "textualist" (who has, himself written that "no tradition can supersede the Constitution"[51]), the opinion reached this conclusion not by referencing any text, but by referencing an ever-increasing mass of so-called "traditions."

119. This was the case even though each of those "traditions" is "directly subversive of the principle of equality."[52]

120. Included in the "traditions" used to justify "the disregard of devout Atheists" was the action being challenged here: i.e., the appending of "so help me God" to the presidential oath of office. When performed by the Chief Justice of the United States as part of the inauguration of the President, it wields enormous power in reinforcing the false notion that the United States is a nation where Monotheism is officially preferred, thus stigmatizing Plaintiffs and others who hold contrary religious views.

121. To personally experience the Chief Justice of the United States altering the Constitution to further a religious ideal completely contrary to the religious ideals held by

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[49] United States Constitution, Article VI, cl. 3.
[50] United States Constitution, Amendment I.
[51] Rutan v. Republican Party of Illinois, 497 U.S. 62, 96 (n.1) (1990) (Scalia, J., dissenting).
[52] Zablocki v. Redhail, 434 U.S. 374, 398 (1978) (Powell, J., concurring).

Plaintiffs is a concrete injury that furthers their marginalization and disenfranchisement before their very eyes.

122. For those Plaintiffs watching the inaugural ceremony with their children, this action – by the nation's highest judicial official – is especially intrusive and harmful.

123. An oath-administrator's addition of "so help me God" to the constitutionally-prescribed presidential oath of office violates every Establishment Clause test enunciated by the Supreme Court, including the neutrality test, the purpose prong of the Lemon test, the effects prong of the Lemon test, the endorsement test, the outsider test and the imprimatur test.

124. Additionally, especially with impressionable children watching, this addition violates the coercion test.

125. Plaintiffs have a right to view the inauguration of their president without having their Chief Justice "degrad[ing them] from the equal rank of Citizens."

COUNT 2: GOVERNMENT-SPONSORED INVOCATIONS TO GOD AND BENEDICTIONS IN THE NAME OF GOD, PROVIDED AT THE INAUGURATION OF THE PRESIDENT BY GOVERNMENT-INVITED CLERGY, VIOLATE THE ESTABLISHMENT CLAUSE

126. The allegations set forth in paragraphs 1-125 are realleged herein.

127. On December 17, 2008, Defendant JCCIC announced that Defendant Warren and Defendant Lowery would be providing, respectively, and invocation and benediction at the inauguration. Appendix D.

128. The invocation and the benediction will infuse the inaugural exercises with explicitly religious dogma.

129. Specifically, Defendants Warren and Lowery, with the support of and facilitation by their codefendants, will be giving one or more religious prayers during that governmental ceremony.

130. Although the Supreme Court has noted that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it," Walz v. Tax Commission, 397 U.S. 664, 678 (1970), it has, in one case which "clearly demonstrates the utter inconsistency of our Establishment Clause jurisprudence," McCreary, 545 U.S. at 899 (n.8) (Scalia, J., dissenting), permitted legislative chaplain-led prayers.

131. That permission was based largely on that practice's "unambiguous and unbroken history of more than 200 years," Marsh v. Chambers, 463 U.S. 783, 792 (1983), which is totally different from clergy-led prayers at presidential inaugurations. "Not until January 20, 1937, was a prayer offered as an official part of the American ceremony of inauguration."[53] Furthermore, of the nation's 57 public presidential inaugurations, 39 were devoid of clergy-led prayers. Only 18 included them.[54]

132. Thus – even accepting for the moment that historically-based violations of the principles underlying the Establishment Clause are permissible, Marsh – the practice at issue in this litigation is not historically-based.

133. Other "[i]nherent differences" from Marsh, noted to be important by the Supreme Court, exist in this case. In a state legislature, members are exclusively "adults." Lee v. Weisman,

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[53] Medhurst MJ. "*God Bless the President: The Rhetoric of Inaugural Prayer.*" (The Pennsylvania State University, 1980). (Available on microfilm from University Microfilms International, Ann Arbor, MI (800-521-0600). At 71.

[54] Gleaned by analyzing the data at http://memory.loc.gov/ammem/pihtml/pioaths.html.

505 U.S. 577, 597 (1992). At the inauguration will be numerous impressionable children (including some Plaintiffs here).

134. Similarly, those attending legislative sessions are "free to enter and leave with little comment and for any number of reasons." Id. Those with tickets to the inaugural event are not at all "free" in this manner, and the predicted turnout at the mall suggests that any "freedom" of movement will be debatable at best.

135. Likewise, there will be "[t]he influence and force of a formal exercise," id., far stronger than in Lee, that was felt in that case to be an important distinguishing feature from the prayers Marsh.

136. Moreover, Lee pointed to the government's "high degree of control over the precise contents of the program," 505 U.S. at 597, which served to "make the prayer a state-sanctioned religious exercise in which the [listener] was left with no alternative but to submit." Id. Surely, contrasted with a single high school event, that character is only heightened at the nation's grandest ceremony, directed not only to the entire nation, but to the entire world.

137. What must also be noted is that Marsh contended that the legislative prayers at issue were permissible because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." Marsh, 463 U.S. at 794-95. It is hard to conceive of a more ludicrous claim from the point of view of Atheists. In fact, that this statement was made only serves to shine a light on the disenfranchised status of Plaintiffs and their religious compatriots, who were obviously never even considered by the Marsh Court.

138. Lastly, in the two cases involving government-sponsored prayers decided by the Supreme Court since Marsh, language completely contrary to the Marsh holding has been spoken. In Lee, 505 U.S. at 589, the Court surmised:

> [T]hough the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself. ... The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.

139. Eight years later, the high Court issued a dictum that unequivocally flies in the face of the legislative chaplain ruling from 1983:

> [T]he 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).

140. Accordingly, presidential inaugurations fall outside of the ambit of Marsh; Lee and Santa Fe control the outcome of this litigation.

141. Moreover, clergy-led invocations and benedictions violate every Establishment clause test enunciated by the Supreme Court. Specifically (in addition to the coercion test of Lee), they violate the neutrality test, the purpose prong of the Lemon test, the effects prong of the Lemon test, the endorsement test, the outsider test and the imprimatur test.

COUNT 3: THE ALTERATION OF THE PRESIDENTIAL OATH OF OFFICE, TO BE PERPETRATED BY DEFENDANT ROBERTS, AND THE GOVERNMENT-SPONSORED, CLERGY-LED INVOCATION AND BENEDICTION, TO BE PERPETRATED BY THE REMAINING DEFENDANTS, VIOLATE THE FREE EXERCISE CLAUSE

142. The allegations set forth in paragraphs 1-141 are realleged herein.

143. Individuals have a right to observe their government in action. Richmond Newspapers v. Va., 448 U.S. 555 (1980) (applying this principle to the observation of criminal trials).

144. This right surely must be free from governmental endorsement of purely religious claims.

145. Planning to watch the inaugural ceremonies, but wishing to avoid any government-sponsored religious dogma (much less Christian, monotheistic religious dogma), Plaintiffs are placed in the untenable position of having to choose between not watching the presidential inauguration or being forced to countenance endorsements of purely religious notions that they expressly deny. To be placed in this position is a violation of Plaintiffs' Free Exercise rights:

> The essence of the Government's position is that, with regard to a civic, social occasion of this importance, it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.

Lee v. Weisman, 505 U.S. 577, 596 (1992).

146. In fact, "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine." Sherbert v. Verner, 374 U.S. 398, 404 (1963).

147. The Supreme Court has written that the exercise of religion includes "assembling with others for a worship service." Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

148. Thus, the use of clergy to espouse the glory of God at a public ceremony is clearly a religious exercise.

149. Yet the High Court has also written that "[t]hose in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular." Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993).

150. Plaintiffs' religious practices include avoiding prayer to God, just as a Seventh Day Adventist's religious practices include not working on Saturday, Sherbert, or an Amish person's religious practices include not being exposed to modern society. Wisconsin v. Yoder, 406 U.S. 205 (1972).

151. Accordingly, forcing Plaintiffs to choose between attending the inauguration of their president or acting contrary to their religious tenets – as occurs when the government imposes clergy-led prayer at the ceremony – is a violation of Plaintiffs' Free Exercise rights.

COUNT 4: THE ALTERATION OF THE PRESIDENTIAL OATH OF OFFICE, TO BE PERPETRATED BY DEFENDANT ROBERTS, AND THE GOVERNMENT-SPONSORED, CLERGY-LED INVOCATION AND BENEDICTION, TO BE PERPETRATED BY THE REMAINING DEFENDANTS, VIOLATE RFRA

152. The allegations set forth in paragraphs 1-151 are realleged herein.

153. In response to the Supreme Court's diminution of the protections under the Free Exercise Clause, Congress enacted 42 U.S.C. §§ 2000bb et seq. Known as the Religious Freedom Restoration Act ("RFRA"), this legislation states, in pertinent parts:

> § 2000bb(a)(3):
> "The Congress finds that governments should not substantially burden religious exercise without compelling justification."

§ 2000bb(b)(1) and (b)(2):

> "The purposes of this chapter are to restore the compelling interest test ... and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government."

§ 2000bb-1(b)(1) and (b)(2):

> "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."

§ 2000bb-2(4):

> "[T]he term "exercise of religion" means religious exercise, as defined in section 2000cc–5 of this title." [§ 2000cc–5(7)(A) "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."]

§ 2000bb-3(a):

> "This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."

§ 2000bb-3(c):

> "Nothing in this chapter shall be construed to authorize any government to burden any religious belief."

154. There is certainly no compelling state interest in having the government advocate for a religious view or sponsor a religious exercise. On the contrary, the compelling interest is in maintaining religious neutrality. "There is no doubt that compliance with the Establishment Clause is a [compelling] state interest." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).

155. Accordingly, the demands of strict scrutiny have not been met and Defendants must be enjoined from their planned religious activities.

COUNT 5: THE ALTERATION OF THE PRESIDENTIAL OATH OF OFFICE, TO BE PERPETRATED BY DEFENDANT ROBERTS, AND THE GOVERNMENT-SPONSORED, CLERGY-LED INVOCATION AND BENEDICTION, TO BE PERPETRATED BY THE REMAINING DEFENDANTS, VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

156. The allegations set forth in paragraphs 1-155 are realleged herein.

157. The Fifth Amendment states (in pertinent part) that "No person shall ... be deprived of ... liberty ... without due process of law."

158. "The Due Process Clause of the Fifth Amendment ... has both substantive and procedural components; it performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring that the federal sovereign act impartially." Fullilove v. Klutznick, 448 U.S. 448, 548 (1980) (Stevens, J., dissenting).

159. In terms of substantive due process, the allegations in this Complaint demonstrate that Plaintiffs have lost in the past, and will lose on January 20, 2009, their basic liberties to religious freedom under both the Establishment and the Free Exercise Clauses of the First Amendment.

160. They also have in the past (and will have after January 20, 2009) been denied procedural due process, inasmuch as there is no way – except via the courts – that they can have their religious views respected.

161. Moreover, by being denied equivalent treatment in terms of their religious views and practices, their rights have been and will be abrogated under the Equal Protection component of the Fifth Amendment's Due Process clause. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 105 (2001).

COUNT 6: THE ALTERATION OF THE PRESIDENTIAL OATH OF OFFICE, TO BE PERPETRATED BY DEFENDANT ROBERTS, AND THE GOVERNMENT-SPONSORED, CLERGY-LED INVOCATION AND BENEDICTION, TO BE PERPETRATED BY THE REMAINING DEFENDANTS, ARE VOID AS AGAINST PUBLIC POLICY

162. The allegations set forth in paragraphs 1-161 are realleged herein.

163. On January 20, 2009, the nation's next inaugural ceremony is scheduled to take place. Presidential inaugurals are the Nation's grandest official ceremonies, intended to unite our citizens and to instill confidence in our Constitutional system of government.

164. Interlarding those ceremonies with clergy who espouse sectarian religious dogma does not unite, but rather divides, our citizenry. Similarly, instead of instilling confidence in our governmental structure, it tears at the very foundation upon which that structure is built.

165. Accordingly, beyond their constitutional infirmities, the aforementioned activities are void as against public policy. As has been emphasized by Defendant PIC, itself, one of the key purposes of the inauguration is to engender national unity. See paragraphs 77-79, supra.

166. Placing religious dogma completely contrary to the beliefs held by Plaintiffs (and others) into the inaugural ceremony frays that unity.

167. Furthermore, the primary act of the inauguration is the administration of the presidential oath of office, where the incoming Chief Executive declares that he "will to the best of [his] ability, preserve, protect and defend the constitution of the United States."

168. It is also void as against public policy, as well as an offense of the highest magnitude, for Defendants here to violate the Constitution as the new President is swearing to "preserve, protect and defend" it.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

I. To declare that unauthorized addition of "so help me God" to the constitutionally-prescribed presidential oath of office by the individual administering that oath to the President violates the Establishment and Free Exercise Clauses of the First Amendment, as well as 42 U.S.C. §§ 2000bb et seq. (Religious Freedom Restoration Act (RFRA));

II. To declare that the government-sponsored use of any clergy (much less an openly Christian clergy) at a presidential inauguration violates the Establishment and Free Exercise Clauses of the First Amendment, as well as 42 U.S.C. §§ 2000bb et seq. (Religious Freedom Restoration Act (RFRA));

III. To enjoin Defendant Roberts, in his official capacity and in his individual capacity, from altering the constitutionally-prescribed text of the presidential oath of office while administering that oath to the President-elect at the January 20, 2009 inauguration, as well as at any future presidential inauguration;

IV. To enjoin the remaining Defendants – and/or similarly situated government officials – from utilizing any clergy to engage in any religious acts at the January 20, 2009 inauguration, as well as at any future presidential inauguration;

V. In the alternative, to enjoin these Defendants – and/or similarly situated government officials – from utilizing clergy to engage in overtly Christian religious acts at the January 20, 2009 inauguration, as well as at any future presidential inauguration;

VI. To allow Plaintiffs to recover costs, expert witness fees, attorney fees, etc. as may be allowed by law; and

VII. To provide such other and further relief as the Court may deem proper.

Respectfully submitted,

/s/ - Michael Newdow

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[55] *Pro hac vice* application pending

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL NEWDOW, et al., Plaintiffs, v. HON. JOHN ROBERTS, JR., CHIEF JUSTICE OF THE U.S. SUPREME COURT, et al., Defendants.	Civil Action No. 08-2248 (RBW)

ORDER

On December 30, 2008, the plaintiffs filed this lawsuit seeking to enjoin defendant John Roberts, Jr., Chief Justice of the United States Supreme Court, from uttering the words "so help me God" as part of the presidential oath of office, which he delivered to the President-Elect during the Presidential Inaugural ceremony on January 20, 2009, as well as to enjoin the remaining defendants from permitting members of the clergy from presenting an invocation and benediction as part of that ceremony, and to declare that these acts violate the Establishment and Free Exercise Clauses of the First Amendment and 42 U.S.C. § 2000bb-1 (2008). The Court denied the plaintiffs' motion for a preliminary injunction on January 15, 2009, after holding a hearing at which both sides presented oral arguments. On January 16, 2009, based upon the parties' written submissions and representations at the hearing on the motion, the Court issued an order requiring the plaintiffs to show cause why this case should not be dismissed based on the plaintiffs' lack of standing and issue preclusion as to plaintiff Michael Newdow. On February 23, 2009, the plaintiffs submitted a written response to the Court's order, see Plaintiffs' Response to Order to Show Cause #1, and all defendants, the federal defendants, the Presidential Inaugural

Committee ("PIC"), former PIC Executive Director Emmett Believeau, Reverend Richard D. Warren and Reverend Joseph E. Lowery, filed responses to the plaintiffs' submission on March 11, 2009, see Response to Plaintiffs' Response to Order to Show Cause; Opposition of Defendants, Rev. Richard D. Warren and Rev. Joseph E. Lowery, to Plaintiffs' Response to Order to Show Cause; Federal Defendants' Response to Plaintiffs' Response to the Court's Show-Cause Order Regarding Standing and Issue Preclusion.

Upon review of the parties' written submissions, the Court finds that the plaintiffs have failed to demonstrate that an injunction against any or all of the defendants could redress the harm alleged suffered by plaintiffs.[1] The Court also finds that although plaintiff Newdow was not precluded from litigating the issue of whether he has standing to challenge the inclusion of the words "so help me God" as part of the presidential oath of office, he is precluded from relitigating the issue of whether he has standing to challenge the invocation and benediction that were presented at the 2009 Presidential Inauguration based upon his participation in prior litigation, both before this Court and appealed to the United States Appeals Court for the District of Columbia Circuit, and before the United States District Court for the Eastern District of California and appealed to the United States Court of Appeals for the Ninth Circuit, resulting in findings that he has no standing to challenge clergy administered prayer at the Presidential Inauguration. Moreover, the Court finds that none of the plaintiffs in this case have standing to

[1] The Court notes that the plaintiffs filed a motion on March 10, 2009, seeking to amend their complaint to add an additional 230 plaintiffs, including forty children, and several additional named and unnamed defendants, as well as include allegations that the 2013 and 2017 Inaugural ceremonies might improperly incorporate religious references. See generally Plaintiffs' Motion for Leave to Submit First Amended Complaint; Plaintiffs' Assented-To Motion to Submit Child-Related Addresses (in the First Amended Complaint) Under Seal. Although the Court takes no position on that motion, even were it to grant the plaintiffs leave to amend their complaint, the amended complaint would not confer standing upon the plaintiffs because the additional plaintiffs are similarly situated to the current plaintiffs, and the speculative nature about what will occur at the next two Inaugural ceremonies lacks any persuasive value.

challenge the defendants' actions as pled in the complaint because they have identified no concrete and particularized injury. And, even if the plaintiffs could establish such an injury, they have failed to demonstrate how the harm they allege is redressable by the relief they seek, or that the Court has any legal authority to award the relief requested. Therefore, the Court finds that the plaintiffs lack standing to bring this action and that it must dismiss this case.

Accordingly, it is hereby

ORDERED that plaintiff Newdow is precluded from challenging the issue of whether he has standing to contest the utterance of prayer at the Presidential Inaugural ceremony based on prior judicial determinations that he lacks standing. It is further

ORDERED that this case is **DISMISSED** based on the plaintiffs' lack of standing to pursue any of the relief they are requesting.

SO ORDERED this 12th day of March, 2009.

/s/
REGGIE B. WALTON
United States District Judge