

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. DR. MICHAEL A. NEWDOW,)

)

Plaintiff,)

v.)

)

GEORGE W. BUSH, *et al.*,)

)

)

Defendants.)

Civil Action No. 04-cv-02208-JDB

PROPOSED BRIEF AMICUS CURIAE OF
THE AMERICAN CENTER FOR LAW AND JUSTICE, INC.,
IN SUPPORT OF THE DEFENDANTS

CORPORATE DISCLOSURE STATEMENT

The American Center for Law and Justice (ACLJ) is a non-profit corporation incorporated under the laws of the Commonwealth of Virginia and has been granted tax exempt status by the Internal Revenue Service (IRS) pursuant to 501(c)(3) of the Internal Revenue Code. The IRS recognizes the ACLJ as a public interest law firm. The ACLJ has no parent corporations and issues no stock.

INTEREST OF AMICI

The ACLJ is committed to insuring the ongoing viability of constitutional freedoms. ACLJ attorneys have presented argument in numerous cases before the Supreme Court of the United States, including several cases involving the Establishment Clause. ACLJ attorneys have participated as counsel of record for parties and/or amici curiae in numerous cases before the lower federal courts, including this Court.

Amicus has dedicated time and effort to defending and protecting First Amendment freedoms. It is this commitment to the integrity of the United States Constitution and Bill of Rights

that compels it to oppose the motion for preliminary injunction. Newdow's strategy to purge all religious observances and references from American public life must not be permitted to move forward.

Newdow's targeting of religious expression in the federal government is particularly ill-considered given the decision of the Supreme Court of the United States in Marsh v. Chambers. This personal crusade serves no purpose other than to waste judicial resources at a time in our Nation's history when those resources are needed in cases involving real threats to American liberties. Moreover, a strategy like Newdow's will undoubtedly embolden further challenges to other religious expressions in the Capitol, including the several religious works of art,¹ and various religious inscriptions in the Capitol Complex,² as well as the prayer rooms in House and Senate Office buildings.³

The ACLJ urges the Court to deny the motion for a preliminary injunction, and to enter

1. For example, in the Rotunda of the Capitol Building are paintings with religious themes, such as The Apotheosis of Washington, depicting the ascent of George Washington into Heaven, and the Baptism of Pocahontas, portraying Pocahontas being baptized by an Anglican minister.

2. For example, a wall in the Cox Corridor of the Capitol is inscribed with a line from Katherine Lee Bates' Hymn, America the Beautiful, "America! God shed his grace on Thee, and crown thy good with brotherhood from sea to shining sea." The National Motto, "In God We Trust," is inscribed on a wall in the House Chamber. In the prayer room of the House Chamber, two distinctly religious statements are inscribed: 1) "Annuit coeptus," which means "God has favored our undertakings;" 2) "Preserve me, O God - for in thee do I put my trust," Psalm 16:1.

3. Newdow's overall strategy seeks to proscribe religious expression well beyond the Capitol including presidential addresses invoking the name of God, the invocation "God save the United States and this Honorable Court" prior to judicial proceedings, oaths of public officers, court witnesses, and jurors and the use of the Bible to administer such oaths, the use of "in the year of our Lord" to date public documents, the Thanksgiving and Christmas holidays, the National Day of Prayer, and the national motto "In God We Trust."

judgment for the Defendants.

SUMMARY OF ARGUMENT

In his first inaugural address, President Washington proclaimed that “no people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States,” because “every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency.” INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 10, 101st Cong., 1st Sess. 2 (1989). Thus, the Inauguration of the man who was “first in war, first in peace, and first in the hearts of his countrymen,” was blessed with an invocation of Divine Aid by the very Chief Executive. Every subsequent Inaugural has likewise afforded the Chief Executive the opportunity to expressly invoke Divine Aid, or to acknowledge the working of the Divine Hands in the enterprise that is this great Nation. See generally INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 10, 101st Cong., 1st Sess. (1989).

In 2001, Michael Newdow filed suit in the Eastern District of California complaining that the practice of offering prayers as part of the Presidential Inaugural ceremonies violated the United States Constitution. The district court in that case dismissed his case with prejudice and the Ninth Circuit affirmed the dismissal. Now, four years later, the Reverend Doctor Newdow has repaired once again to federal court to complain about prayer at inaugural ceremonies and to obtain injunctive relief against such pretended constitutional wrongs.

Like so many other unsuccessful litigants, Newdow would like a “do over” rule for constitutional decisions. Finality of judgments, essential to respect for the law and efficiency of the judicial process, bars even the most worthy claimant from having more than one bite at the same

apple. Newdow's previous failure on the merits of the precise kind and nature as presented here warrants a dismissal of his complaint here and strongly counsels against likely success on the merits, an important consideration in deciding the motion for preliminary injunction.

To justify the request for injunctive relief, Newdow has patched together quotations from various Supreme Court cases. Unsurprisingly to this amicus, since this pattern of his pre-dates this lawsuit, he relies principally upon contextually inapt quotations from Supreme Court decisions arising in the context of public schools. With little or no coherent argument, Newdow concludes that permitting any prayer at the Presidential inauguration offends the Constitution and substantially burdens his rights under the Religious Freedom Restoration Act.

Newdow's conclusion rests on the flawed premise that the Supreme Court's decision upholding the constitutionality of legislative chaplains in Marsh v. Chambers, 463 U.S. 783 (1983), is no longer good law.⁴ See Prel. Inj. Brief at 15-16. As this Court knows, a willing mind can find a proof text for virtually any given proposition from the Supreme Court's extensive Establishment Clause jurisprudence. An accurate understanding of the Court's Establishment Clause cases, however, requires a more considered analysis.

Newdow's failure to undertake such an analysis is evident.

Newdow fails to account for Marsh, either the text of it or subsequent explanations of it by the Court. The gravamen of Newdow's challenge to prayer delivered during the inauguration of President Bush is that the inaugural prayers turned Newdow into an outsider. With meager analysis, Newdow summarily concludes that inaugural prayer violates the Establishment Clause. See Prel.

4. Newdow asserts that substantial doubts exist as to whether or not Marsh remains good law. Prel. Inj. Brief at 15-16.

Inj. Brief at 13-14. In his efforts to dodge the historical precedent test of Marsh, Newdow misrepresents the Court's Establishment Clause jurisprudence.

In fact, nothing in the Court's current Establishment Clause jurisprudence suggests that if given the opportunity, the current Supreme Court would overrule its decision in Marsh v. Chambers. To the contrary, post-Marsh statements by various Justices establish that if presented for the first time with the question raised in Marsh, the Court would reach the same result. Even assuming arguendo that Newdow were correct that subsequent Supreme Court decisions cast doubt on Marsh's continued validity, the Supreme Court requires the lower courts to follow controlling precedent, leaving the Supreme Court the prerogative of overruling its own cases, if it so chooses.

ARGUMENT

I. THE REVEREND DOCTOR NEWDOW LOST ALREADY HIS CLAIM THAT INAUGURAL PRAYER VIOLATES THE UNITED STATES CONSTITUTION.

Michael Newdow sued President Bush in his official capacity on February 1, 2001, alleging that the occurrence of any prayer at the Presidential Inauguration, and the content of the prayer given at the January 2001 Inauguration, violated the First Amendment's Establishment Clause.⁵ Newdow sought a declaratory judgment that the President violated the Establishment Clause by allowing the Reverend Franklin Graham to pray at his 2001 inauguration and an injunction preventing the President, in his official capacity, from "repeating this or engaging in similar religious acts" in the future.⁶ The district court granted in part the President's motion to dismiss for failure to state a

5. Newdow v. Bush, No. 01-218, Magistrate's Findings and Recommendations, at 1 (E.D. Cal. Mar. 26, 2002) (adopted by District Judge on May 21, 2002 in order which dismissed the case with prejudice).

6. Newdow v. Bush, No. 01-218, Complaint, at 7 (E.D. Cal).

claim in September 2001 because, although Newdow had standing to challenge the giving of prayer in general at inaugurations, “prayers per se at the Presidential Inauguration do not violate the Establishment Clause.”⁷

Concerning the content of any specific inauguration prayer, the President’s motion for summary judgment was granted and the case was “dismissed with prejudice” in May 2002 on two alternative grounds.⁸ First, the court held “[t]hat the entire case [should] be dismissed for lack of jurisdiction because the courts cannot enjoin the President in the circumstances of this case, nor . . . grant declaratory relief against [him].”⁹ In the alternative, the court held that Newdow lacked standing to question the content of any specific inauguration prayer because his alleged injuries “could not be redressed by an injunction or declaratory relief.”¹⁰ Due to the lack of jurisdiction and Newdow’s lack of standing, the court stated, “the case should not proceed to the merits.”¹¹ The court also rejected Newdow’s attempt to add additional defendants late in the litigation.¹²

The Ninth Circuit Court of Appeals affirmed the judgment on a different prong of the standing test, holding that “Newdow lacks standing to bring this action because he does not allege

7. Newdow v. Bush, No. 01-218, Magistrate’s Findings and Recommendations, at 7, 9 (E.D. Cal. July 17, 2001) (adopted by District Judge on Sept. 28, 2001).

8. Newdow v. Bush, No. 01-218, Order, at 2 (E.D. Cal. May 21, 2002).

9. Newdow v. Bush, No. 01-218, Magistrate’s Findings and Recommendations, at 13 (E.D. Cal. Dec. 28, 2001) (adopted by District Judge on May 21, 2002 in order which dismissed the case with prejudice).

10. Id. at 9. “[N]o present injunction could be realistically framed to encompass future, speculative, religious inaugural invocations.” Id. at 10.

11. Id. at 12.

12. Newdow v. Bush, No. 01-218, Magistrate’s Findings and Recommendations, at 3 (E.D. Cal. Mar. 26, 2002).

a sufficiently concrete and specific injury.”¹³

Although the doctrines of res judicata and collateral estoppel are related, each has a different effect upon a lawsuit involving parties who have already been involved in litigation.

There is no uniform terminology relating to the doctrine of res judicata. In its broadest sense, res judicata has been used to refer to the binding effect of a judgment in a prior case on the claims or issues in pending litigation. Used in this manner, the doctrine has two primary applications, commonly referred to as claim preclusion (or true res judicata) and issue preclusion (or collateral estoppel). These two branches of the broad res judicata doctrine have the same policy underpinning – the need for finality in judicial proceedings ‘to secure the peace and repose of society by the settlement of matters capable of judicial determination,’ as well as other judicial concerns, such as fairness to parties, fostering respect for and reliance upon court judgments and reducing overcrowded court dockets. However, the application and effect of these two doctrines is quite different. Claim preclusion prevents a party from suing on a claim which has been previously litigated to a final judgment by that party or such party’s privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action. Issue preclusion prevents relitigation of issues actually litigated and necessary for the outcome of the prior suit, even if the current action involves different claims.¹⁴

Res judicata is a doctrine by which earlier litigation can have a preclusive effect on later litigation. The term res judicata can refer to one of two different but closely related doctrines.¹⁵ It may refer to merger and bar (claim preclusion), which prevents relitigation of issues already decided (or different claims that should have been decided) arising out of the same claim or case and controversy as a previous case.¹⁶ This doctrine is most commonly referred to as res judicata. It also

13. Newdow v. Bush, 89 Fed. Appx. 624, 625 (9th Cir. 2004).

14. 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.10(1)(a).

15. RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982).

16. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18-20 (1982). “Merger refers to the effect of a judgment in favor of a plaintiff (or cross-plaintiff) in extinguishing any further claim based on the same facts or circumstances The concept of bar prevents a plaintiff who loses in litigation from bringing a subsequent action based on the same transaction or series of transactions by simply

may refer to the second form of res judicata, which is collateral estoppel by prior judgment (issue preclusion). Issue preclusion forbids relitigation of the same issue in a subsequent case that has already been decided as between the parties in a previous case.

An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment, . . . a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.¹⁷

Also, the judgment must be final for the principles of res judicata to apply, and “for purposes of issue preclusion (as distinguished from merger and bar), ‘final judgment’ includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.”¹⁸

A. The Same Parties, or Their Privies, Are Involved in Both Cases.

“[A] valid judgment on the merits precludes a subsequent action on the same claim by the ‘parties and those in privity with them.’”¹⁹ “[P]arties’ as used in discussing the requirement for identity of parties as a basis for claim preclusion refers to parties in interest, *i.e.*, those parties whose interests are so closely aligned that a judgment against one should be preclusive as to all.”²⁰ “A government official sued in his or her official capacity is considered to be in privity with the

asserting additional facts or by proceeding under a different legal theory.” 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.10(2).

17. Id.

18. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982).

19. 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.40(3)(a) (quoting *Nevada v. United States*, 463 U.S. 110, 129-30 (1983)).

20. Id.

government. Therefore, a judgment for or against an official will preclude a subsequent action on the same claim by or against another official or agency of the same government.”²¹

It is clear that *res judicata* applies to, and bars re-litigation of these claims against the President since the same parties, or ones virtually represented by parties in the prior litigation, are presented in this new litigation.

B. The Prior Litigation Involved the Same Claim or Cause of Action.

“When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of [*res judicata*], the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”²² “Traditionally, . . . the phrase ‘cause of action’ has been used to describe the factual nexus which must exist between a pending case and a prior adjudication to justify application of the claim preclusion doctrine. The doctrine has often been described as holding that a valid judgment, properly pled, bars a second suit on the same ‘cause of action.’”²³

The factual similarity between the initial suit and this subsequent suit would likely lead a court to determine that Newdow is attempting to relitigate the same cause of action that he brought in 2001. Even if a court determined that the same claim or cause of action did not exist between the parties, relitigation of any factual or legal issues actually decided in the first case may be precluded

21. 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.40(3)(e)(2)(A) (citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402 (1940)).

22. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

23. 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.10(3)(a).

by collateral estoppel. A court would likely draw a similar conclusion in a challenge to the upcoming Inauguration prayer, as the question of the constitutionality of prayer in general has already been decided.

C. The Prior Litigation Was Terminated by a Final Judgment On the Merits.

“[I]t is familiar law that only a final judgment is res judicata as between the parties.”²⁴ A federal court judgment becomes final “after it has been set forth in a separate document and entered into the civil docket by the clerk.”²⁵ The district court clearly entered a final judgment in Newdow’s earlier litigation on May 23, 2002 when the judgment and order dismissing the case were entered into the court’s docket.²⁶

1. *The partial dismissal of Newdow’s claim for failure to state a claim was “on the merits.”*

In Newdow’s original Inaugural prayer lawsuit, the district court’s partial dismissal for failure to state a claim upon which relief may be granted was a determination on the merits which is subject to the doctrine of res judicata. Federal Rule of Civil Procedure 41(b) states that “any dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.”²⁷ This would include a judgment which “determines that the plaintiff has no cause of action.”²⁸ The district court held that

24. G. & C. Merriam Co. v. Saalfield, 241 U.S. 22, 28 (1916).

25. 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.30(2)(b) (citation omitted).

26. See Newdow v. Bush, No. 01-218, Docket Sheet, at 52, 53 (E.D. Cal).

27. FED. R. CIV. P. 41(b).

28. 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.30(3)(a) (quoting Harper Plastics, Inc. v. Amoco Chems. Corp., 657 F.2d 939, 943 (7th Cir. 1981)). “When the defendant prevails, the

Newdow had standing to challenge the general practice of inauguration prayer and dismissed his claim to due to its lack of merit. This dismissal constitutes a judgment on the merits and is subject to the doctrine of res judicata in any subsequent case.

2. *Although the dismissal of Newdow’s claim for lack of subject matter jurisdiction was not “on the merits” for res judicata purposes, he will still be precluded from bringing a new claim for practical reasons.*

Under Federal Rule of Civil Procedure 41(b), a dismissal “for lack of jurisdiction” is not “an adjudication upon the merits.”²⁹ “Because standing is jurisdictional, lack of standing precludes a ruling on the merits.”³⁰ “The commentators agree that standing is an analytical prerequisite to reaching the merits of a suit.”³¹

That the dismissal for lack of jurisdiction was not a judgment “on the merits” does not mean that Newdow will be able to bring a successful claim in the future. A dismissal based on a lack of justiciability, including a lack of standing, “does not preclude a second action on the same claim if the justiciability problem can be overcome.”³² It falls to Reverend Newdow to prove to this Court that it has jurisdiction over his claim even though the original court lacked jurisdiction. This will

judgment may be on the merits . . . upon a dismissal with prejudice for failure to state a claim.” *Id.*

29. FED. R. CIV. P. 41(b). In cases where the defendant “prevail[s] because the court determines that it has no subject matter jurisdiction . . . the resulting judgment of dismissal is not a determination of the claim, but rather a refusal to hear it, and the plaintiff may thereafter pursue it in an appropriate forum or when the preconditions have been met.” 18 MOORE’S FEDERAL PRACTICE – CIVIL § 131.30(3)(b).

30. *Media Techs. Licensing, LLC, v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003) (interpreting the law of the Ninth Circuit).

31. *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (8th Cir. 1981).

32. *Id.* (emphasis added).

be difficult or impossible for two reasons.

First, a dismissal of a case for lack of subject matter jurisdiction has “preclusive effect . . . as to the issue of the lack of subject matter jurisdiction of the court entering the dismissal.”³³ Federal Courts of Appeals have stated that “a decision to dismiss based on any of the doctrines under the justiciability heading should preclude relitigation of the same justiciability issue,”³⁴ and that “dismissals based on justiciability issues should preclude . . . relitigation of the same justiciability issue.”³⁵ Even where res judicata does not apply, the doctrine of collateral estoppel dictates that “[d]ismissal for lack of subject matter jurisdiction precludes relitigation of the issues determined in ruling on the jurisdictional question.”³⁶ “The doctrine of issue preclusion [i.e. collateral estoppel] forecloses relitigation of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment in a prior action between the parties.”³⁷ It is irrelevant whether the original court’s determination that it lacked jurisdiction was actually correct because “[s]ubstantive error . . . does not deprive a procedurally adequate judicial proceeding of preclusive effect.”³⁸

[A]n ‘erroneous conclusion’ reached by the court in the first suit does not deprive the defendants in the second action ‘of their right to rely upon the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of

33. 18 MOORE’S FEDERAL PRACTICE - CIVIL § 131.30(1)(d)(ii) (emphasis added).

34. McCarney, 657 F.2d at 233.

35. DiGiore v. Ryan, 172 F.3d 454, 466 (7th Cir. 1999), overruled in part on other grounds by Whetsel v. Network Prop. Servs., 246 F.3d 897, 904 (7th Cir. 2001).

36. Cortes, 229 F.3d at 14.

37. Duncan, 713 F.2d at 541.

38. Cortes, 229 F.3d at 14 n.3.

the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].³⁹

Thus, the doctrine of res judicata precludes Newdow from relitigating the Eastern District of California's lack of jurisdiction over his original claim as well as his lack of standing.

Second, even if this Court were to hold that it was not bound by res judicata, a motion to dismiss for lack of subject matter jurisdiction should be successful. The trial court in Newdow's original suit correctly held that all courts lack jurisdiction to enjoin the President. It is a settled principle of law that "[t]he judicial department cannot enjoin the President in the performance of his official duties."⁴⁰ Four Justices of the Supreme Court recently reaffirmed that the Court "has no jurisdiction of a bill to enjoin the President in the performance of his official duties."⁴¹ In the same case, Justice Scalia cited the same quote as well as a book which stated that "[n]o court has ever issued an injunction against the president himself or held him in contempt of court."⁴² Justice Scalia added that, "[u]nless the other branches are to be entirely subordinated to the Judiciary, we cannot direct the President to take a specified executive act or the Congress to perform particular legislative duties."⁴³ A recent court of appeals case has noted that there is "serious doubt as to whether courts

39. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (quoting Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927)).

40. 32 Am. Jur. 2d FEDERAL COURTS § 10 (citing Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867)).

41. Franklin, 505 U.S. at 802-03 (O'Connor, J., plurality) (quoting Johnson, 71 U.S. (4 Wall.) at 501).

42. Id. at 827 (Scalia, J., concurring in part) (quoting C. PYLE & R. PIOUS, THE PRESIDENT, CONGRESS, AND THE CONSTITUTION 170 (1984)).

43. Id. at 829 (Scalia, J., concurring in part).

have the power to direct or enjoin the President in the performance of his official duties.”⁴⁴ The trial court’s holding in *Newdow*’s original litigation that it lacked jurisdiction was correct, and any subsequent court will likely hold that it also lacks jurisdiction if the President filed a motion to dismiss for lack of jurisdiction.

II. THE SUPREME COURT’S DECISION IN *MARSH V. CHAMBERS* REQUIRES THIS COURT TO AFFIRM THE DISTRICT COURT’S DISMISSAL OF NEWDOW’S COMPLAINT.

Marsh v. Chambers, 463 U.S. 783 (1983), controls this case and supports the district court’s dismissal of the *Newdow*’s Complaint. In *Marsh*, the United States Supreme Court conducted a searching examination of the nation’s history when considering a challenge to the Nebraska state legislature’s practice of opening its sessions with prayer by a paid chaplain. Upholding the practice, the Court rested its legal conclusion on the fact that the “opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.” 463 U.S. at 786 (emphasis added). As the Court reasoned, “[i]n this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the Practice authorized by the First Congress their actions reveal their intent.” *Id.* at 790.

The *Marsh* Court observed that the First Congress “did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s official seal of approval on one religious view,” *id.* at 792 (internal quotation marks and citation omitted); rather, the framers merely

44. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 (11th Cir. 2001); see also *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996); *Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2002), overruled on other grounds by *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

considered “invocations as conduct whose effect harmonized with the tenets of some or all religions.” *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

In Marsh, the Court held further that there was no establishment of religion even though the same Presbyterian minister had served as the chaplain for 16 years and had his salary paid from public funds. “To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.* The Supreme Court concluded that “legislative prayer presents no more potential for establishment” than practices previously upheld, such as grants for higher education at religious institutions and tax exemptions for religious organizations. *Id.* at 791 (citations omitted).

Rejecting Newdow’s arguments to the contrary, the district court in his prior lawsuit concluded that prayer at presidential inaugurations is controlled by Marsh. Presidential inaugurations have included formal prayers by Christian ministers since the inauguration of George Washington.⁴⁵ Moreover, the Inaugural Addresses of virtually every President have invoked assistance of the Divine to the enterprise of the Presidency and for the blessing of the Nation and its People.⁴⁶ Pursuant to a congressional resolution, after the oath of office was administered and the President had given his inaugural address, he, along with the Vice President and members of

45. Steven B. Epstein, RETHINKING THE CONSTITUTIONALITY OF CEREMONIAL DEISM, 96 Colum. L. Rev. 2083 (1996), citing Martin Jay Medhurst, “God Bless the President”: The Rhetoric of Inaugural Prayer, 61 (1980) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with the Pennsylvania State University Library).

46. See generally INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 10, 101st Cong., 1st Sess. (1989).

Congress proceeded to St. Paul's Chapel for the recitation of prayers by the chaplain of Congress.⁴⁷ Although no longer conducted in a church, inaugural prayers remain integral to the inauguration ceremony to this day. Every inaugural ceremony for the last sixty-five years has included explicit supplications to Jesus Christ.⁴⁸ Moreover, inaugural prayers during the last two centuries have incorporated the Lord's Prayer found in the book of Matthew.⁴⁹

Nevertheless, Newdow, having examined the Supreme Court public school religions cases, including Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000), suspects that Marsh is constitutionally suspect. In the alternative, Newdow attempts to sidestep the controlling precedent of Marsh.

A. No Supreme Court Establishment Clause Case Decided Subsequent to *Marsh v. Chambers* Undercuts *Marsh's* Vitality.

Contrary to Newdow's assertions, it is quite clear that a solid majority of the current Supreme Court would reach the same result if Marsh v. Chambers were before it today. None of its subsequent decisions suggest any diminution of Marsh's vitality. In fact, whenever a Court majority has addressed Marsh, it has defended the Marsh decision. More importantly, those Justices who have expressed continuing (if qualified) approval of the Court's Lemon⁵⁰ test, including current

47. Id. at 2107.

48. Epstein, "Rethinking the Constitutionality of Ceremonial Deism," 96 COLUM. L. REV. 2083, 2106-08 (1996).

49. Magistrate Judge Hollows found that under Marsh "presidential invocations to the Deity, i.e., prayers, at inaugurations were historical and commonplace" and that "[a]s such, the prayers in general did not offend the Establishment Clause of the First Amendment to the Constitution." See Findings and Recommendations, No. CIV S-01-0218 LKK GGH PS, December 28, 2001, at 2.

50. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Justices Scalia, Rehnquist, Thomas and Kennedy have been clear in opining that the *Lemon* test should be discarded. See, e.g., Lee v.

Justices O'Connor and Stevens, have expressly stated that Marsh is reconcilable with the Lemon test, and the endorsement test, which is merely an elaboration on the Lemon test.

Starting with the majority opinion in Lynch v. Donnelly, 465 U.S. 668, 688-690 (1984), the Court has reaffirmed its holding in Marsh. In Lynch, the Court recognized the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life.” Id. at 674. “Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.” Id. at 675. The Court listed many examples of our “government’s acknowledgment of our religious heritage,” leading off with the historic practice of employing Congressional chaplains. Id. at 672, 676.

The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court’s emphasis that the First Congress “was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.” It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

Id. at 676 (citations omitted).

The Court concluded that this history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused “to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective

Weisman, 505 U.S. 577, 644 (Scalia, J., and Thomas, J., dissenting); Allegheny County v. ACLU, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting).

as illuminated by history.” In our modern, complex society whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court. *Id.*

In *Lynch*, Justice O’Connor, who also joined in the majority opinion, squarely repudiated the notion that legislative prayer violated any of the Supreme Court’s Establishment Clause tests, including, most importantly, her newly minted “endorsement test.” See *Lynch v. Donnelly*, 465 U.S. 668, 688-90 (1984) (O’Connor, J., concurring). Justice O’Connor introduced the endorsement test to clarify the Court’s *Lemon* test, specifically the second prong that asks whether the governmental practice or policy has the effect of advancing or inhibiting religion. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). Citing with approval the Court’s decision in *Marsh*, Justice O’Connor stated that governmental acknowledgments of religion such as legislative chaplains 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.

For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. *Id.* at 693 (O’Connor, J., concurring).

A year later in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O’Connor repeated her approval of the Court’s decision in *Marsh*. “The Court properly looked to history in upholding legislative prayer[.] ... As Justice Holmes once observed, if a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.” *Id.* at 80 (O’Connor, J., concurring) (internal editing marks and citations omitted). The

architect of the endorsement test has thus been quite unequivocal that the Supreme Court's decision in Marsh is fully reconcilable with the endorsement test.

In Allegheny County v. American Civil Liberties Union, 492 U.S. 573 (1989), the majority, which Justice Stevens joined, approved Justice O'Connor's harmonization of the endorsement test with Marsh. "The concurrence [in Lynch] ... harmonized the result in Marsh with the endorsement principle in a rigorous way, explaining that legislative prayer (like the invocation that commences each session of this Court) is a [constitutional] form of acknowledgment of religion." 492 U.S. at 595 n.46 (citations omitted). The majority opinion further defended Marsh by observing that "[l]egislative prayer does not urge citizens to engage in religious practices." Id. at 601 n.52.

The three dissenting Justices in Allegheny, Justices Kennedy, Rehnquist and Scalia, went even further than the majority and Justice O'Connor. The dissenters indicated that using the endorsement test to strike down national traditions such as legislative prayer would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the nation's religious heritage. Justice Kennedy explained that the Establishment Clause does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. "[W]e must be careful to avoid the hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." 492 U.S. at 657 (Kennedy, J., concurring) (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 670-71 (1970)).

B. Lower Courts Consistently Have Relied on Marsh to Sustain the Constitutionality of Government Practices Similar to Inaugural Prayer

A federal court of appeals presented with a claim similar to Newdow's ruled that Marsh was dispositive. In Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988), the speaker of the Illinois House of Representatives introduced legislation providing for the conversion, using taxpayer funds, of a state capitol hearing room into a prayer room. The room was for the members of the General Assembly to use for prayer and meditation. The Court of Appeals for the Seventh Circuit ruled that the legislation posed no Establishment Clause problems. 839 F.2d at 1224.

The court noted that although there was no historical evidence that the First Congress set aside a legislative prayer room, Marsh also stood for the broader proposition that legislatures may, consistent with the Establishment Clause, acknowledge "in relatively modest and nonintrusive ways, some role for spiritual practices in their work." Id. at 1219. Significantly, the Seventh Circuit rejected the argument that the constitutionality of the legislative prayer room must be evaluated under the Supreme Court's various Establishment Clause tests, instead of the analysis in Marsh v. Chambers.

Based on Marsh we are inclined to view a legislature's internal spiritual practices as a special case. We read Marsh to derive partly from the traditions of the nation and of the states and partly from a degree of deference to the internal spiritual practices of another branch of government or of a branch of the government of another sovereign. The Illinois legislature's argument from tradition, while weaker than the Nebraska legislature's argument from tradition in Marsh, has some force. Defendants cannot point to the establishment of a prayer room by the First Congress or to a long and unbroken practice of state legislatures' providing such facilities. They can, however, point to a broader tradition, discussed in Marsh, of legislatures' acknowledging, in relatively modest and nonintrusive ways, some role for spiritual values in their work. We do not read Marsh as limiting this tradition to the specific practices that date back to the enactment of the Bill of Rights.

Id. at 1219 (emphasis added). Cf. Sands v. Morongo Unified School District, 809 P.2d 809, 819 n.9

(Cal. 1991) (Marsh and Van Zandt establish that the judiciary ought to defer to the legislative branch in matters pertaining to that branch's internal affairs). In fact, the courts have uniformly upheld the practice of opening legislative sessions and other similar gatherings with prayers. See Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979) (opening of county board meetings with prayer by unpaid clergy); Colo v. Treasurer and Receiver Gen., 378 Mass. 550, 392 N.E.2d 1195 (1979) (opening of legislative sessions with prayer by paid clergy); Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968) (opening of town meeting with prayer by unpaid clergy). Like prayer before a legislative session or other similar public gathering, the broad tradition of including prayer in presidential inaugurations is merely an example of the executive branch acknowledging the role for spiritual values in its work in a relatively modest and nonintrusive way.

III. THE SUPREME COURT'S SCHOOL PRAYER CASES DO NOT UNDERMINE *MARSH* OR THE CONSTITUTIONALITY OF PRESIDENTIAL INAUGURAL PRAYER.

Newdow's reliance on Supreme Court decisions arising in the public school context is as telling as the Emperor's parade through town in his New Clothes. His attempt to create doubt regarding the vitality of Marsh based on decisions arising in the public school context is likewise a transparent attempt to avoid governing law. Newdow's reliance on obiter dicta, from the Supreme Court's cases addressing state-sponsored religious activity in the public schools, advises this Court as clearly as an honest admission from him would, that he has no binding authority to justify his conclusions.

Newdow ignores completely the Supreme Court's frequently articulated conviction that state-sponsored religious activity in the public schools raises unique Establishment Clause concerns. Accordingly, neither Lee v. Weisman nor Santa Fe legally or factually relevant to the

constitutionality of prayer at presidential inaugurations. In fact, in Santa Fe, the Supreme Court noted that “nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.” 530 U.S. at 313.

In Lee v. Weisman, 505 U.S. 577, 592 (1992), the Court explained that, “[a]s we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” In Board of Educ. of Westside Comm. Sch. v. Mergens, 496 U.S. 226 (1990), Justice Kennedy carefully explained the Court’s distinct approach to Establishment Clause issues arising in public school settings:

The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw. These special circumstances attend prayer “involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority.” School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring). See also Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987) (“The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary”).

491 U.S. at 261-62.

Justice O’ Connor has also pointed out the Court’s oft-stated recognition of a fundamental difference between government acknowledgments of religious heritage, such as Presidential prayers or legislative prayers, and government-sponsored religious exercises directed at what the Court considers to be impressionable school children. Presidential prayers are “received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling

religious indoctrination.” Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O’Connor, J., concurring). Of course, legislative prayers are directed to an even narrower, and presumably more acquiescent, audience. There is no conceivable risk of coercing religious belief. Newdow’s attempt to inspire doubts about Marsh’s vitality from the Supreme Court’s decisions involving religious activity in public schools fails.

Even if there were any doubts about Marsh’s continuing vitality, the Supreme Court has been quite clear that the lower courts are to apply controlling precedent even if subsequent cases appear to have undercut that precedent’s reasoning. See, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997) (“if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions”). Therefore, even assuming arguendo that Newdow’s assertions about Marsh’s vitality had any merit, lower courts (including this Court) are yet obliged to apply Marsh until the Supreme Court says otherwise.

CONCLUSION

For the foregoing reasons, the motion for the preliminary injunction should be denied.

Dated: January 7, 2005.

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