

No. A-623

IN THE
SUPREME COURT OF THE UNITED STATES

REV. DR. MICHAEL NEWDOW,

Movant

-vs-

HON. GEORGE W. BUSH, et al.,

Respondents.

On Application for Injunction
Pending Appeal

**Motion for Leave to File Brief Amicus Curiae and
Brief Amicus Curiae of the American Center
for Law and Justice Supporting Respondents**

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The American Center for Law and Justice (ACLJ) respectfully moves this Honorable Court for leave to file the attached brief amicus curiae in support of the Respondents in the above-captioned case.

All the parties have consented to the filing of a brief as amicus curiae by the ACLJ, and evidence thereof is submitted to the Office of the Clerk under separate cover. Nonetheless, because this Court's Rules do not provide for the filing of such a brief at this stage, the ACLJ respectfully requests leave to file this brief.

In addition to the agreement of the parties to the filing of the brief, an important additional circumstance warrants this Court's Order allowing the filing. Reverend Doctor Newdow complains that he will suffer constitutional injuries if an injunction does not issue to prevent the offering of prayers during the Presidential Inaugural Ceremony on January 20, 2005. Literally, if this Court concludes that it is necessary to decide this matter in time to be meaningful, it will do so within the immediate following day. Given that exigent circumstance, the ACLJ will likely not have any other opportunity to bring to the Court's attention its views on this matter.

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 injunctive relief against the offering of prayer during the Inaugural on January 20, 2005.

Wherefore, the American Center for Law and Justice respectfully prays that the Court grant the motion and allow the filing of the attached brief.

Dated: January 19, 2005.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT¹

The American Center for Law and Justice (ACLJ) is a non-profit corporation incorporated under Virginia law and tax exempt status under 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 THE AMICUS CURIAE

The ACLJ is committed to insuring the ongoing viability of constitutional freedoms. ACLJ attorneys have presented argument in numerous cases before this Court, including several cases involving the Establishment Clause. 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 Reverend Doctor Newdow's application for injunctive relief against the offering of prayer during the Inaugural on January 20, 2005.

Reverend Doctor Newdow follows a strategy that, if successful, would lead to an expurgation of all religious observances and references from American public life. That strategy is not justified by the Establishment Clause and its success would spell disaster for required and appropriate accommodations. Newdow's targeting of religious expression in the federal government is particularly ill-

1. This Statement is filed with the consent of all parties. Documents indicative of that consent are being submitted to the Clerk of the Supreme Court. No counsel for any of the parties to the litigation of this matter authored this Statement in whole or in part, and no one, other than the amicus, made any monetary contribution to the preparation and submission of this Statement.

considered given the this Court's decision in *Marsh v. Chambers*. His long-range efforts 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 his will undoubtedly embolden further challenges to other religious expressions in the Capitol,² including the several religious works of art, and various religious inscriptions in the Capitol Complex,³ as well as the prayer rooms in House and Senate Office buildings.⁴ The ACLJ supports the Respondents here and urges the Court to deny the application.

2. 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.

3. 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.

4. 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."

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, *supra*.

To justify the request for injunctive relief, Newdow has patched together quotations from various cases of this Court. Unsurprisingly to this amicus, Newdow relies principally upon contextually inapt quotations from decisions arising in the context of public schools. Based on those inapt, contextually irrelevant quotations, Newdow concludes that permitting any prayer at the Presidential inauguration offends the Constitution and violates the Religious Freedom Restoration Act.

Newdow’s conclusion rests on the flawed premise that this Court’s decision upholding the constitutionality of legislative chaplains in *Marsh v. Chambers*, 463 U.S. 783 (1983), is no

longer good law. 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 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 this Court's subsequent explanations of it. The gravamen of Newdow's challenge to prayer delivered during the inauguration of President Bush is that the inaugural prayers make Newdow into an outsider. With meager analysis, Newdow summarily concludes that inaugural prayer violates the Establishment Clause. In his efforts to dodge the historical precedent test of *Marsh*, Newdow misapprehends this Court's Establishment Clause jurisprudence.

In fact, nothing in the Court's current Establishment Clause jurisprudence suggests that if given the opportunity, this 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*, this Court would reach the same result.

ARGUMENT IN OPPOSITION TO APPLICATION FOR INJUNCTION

In essence, the Reverend Doctor Newdow has applied to this Court for an unobtainable object, namely an injunction against the inevitable. As Justice O'Connor recently observed,

[S]ome references to religion in public life and government are the inevitable consequence of our

Nation's origins. Just as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the Religion Clauses . . . it should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.

Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring in judgment) (citations omitted). Not only are such reference inevitable, they are, as Justice O'Connor proceeded to explain, beneficial and advisable:

Facially religious references can serve other valuable purposes in public life as well. [S]uch references '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 centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion

over non-religion.

Newdow, 124 S. Ct. at 2322-23 (citation omitted).

**I. THE DENIAL OF THE APPLICATION IS
CONSISTENT WITH THIS COURT’S PRIOR
DECISION IN *MARSH V. CHAMBERS*.**

Marsh v. Chambers, 463 U.S. 783 (1983), controls this case and militates against granting the application for an injunction pending appeal. In *Marsh*, this 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, this 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 this 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.

In *Marsh*, this 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 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*, this 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.* This 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, this Court would, on the historical evidence, 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.⁵ 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.⁶ Three are particularly telling: George Washington’s invocation of divine assistance, *supra* at 3,

5. 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)).

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

John Adams, and Thomas Jefferson.

John Adams expressly placed confidence for the governance of the Nation in the

guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.⁷

Thomas Jefferson, in two opportunities to give Inaugural Addresses never omitted an invocation of the Divine. In his first address, Jefferson concluded with this prayer: “[M]ay that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity.”⁸ He closed his second address with this invocation of Divine assistance:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessities and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you

7. See INAUGURAL ADDRESSES, *supra* n.6, at 12.

8. See INAUGURAL ADDRESSES, *supra* n.6, at 17.

the peace, friendship, and approbation of all nations.⁹

George Washington, the first President under the Constitution, pursuant to a congressional resolution, after the oath of office was administered and the President had given his inaugural address, along with the Vice President and members of Congress proceeded to St. Paul's Chapel for the recitation of prayers by the chaplain of Congress.¹⁰ 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.¹¹ Moreover, inaugural prayers during the last two centuries have incorporated the Lord's Prayer found in the book of Matthew.

Nevertheless, Newdow, having examined this Court's 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*.

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

9. See INAUGURAL ADDRESSES, *supra* n.6, at 22-23.

10. Epstein, *supra* n.5, at 2107.

11. Epstein, *supra* n.5, at 2106-08.

qualified) approval of the Court’s *Lemon*¹² test, including current Justices O’Connor and Stevens, have expressly stated that *Marsh* is reconcilable with the *Lemon* test, and the endorsement test.

Starting with the majority opinion in *Lynch v. Donnelly*, 465 U.S. 668, 688-90 (1984), the Court has reaffirmed its holding in *Marsh*. In *Lynch*, this 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. This 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

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

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).

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*, 465 U.S. at 688-90 (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)).

II. THIS COURT’S SCHOOL PRAYER CASES DO NOT UNDERMINE *MARSH* OR THE CONSTITUTIONALITY OF PRESIDENTIAL INAUGURAL PRAYER.

Newdow’s reliance on 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 this 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 this 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*

is legally or factually relevant to the constitutionality of prayer at presidential inaugurations. In fact, in *Santa Fe*, this 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), this 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 other decisions of this Court involving religious activity in public schools fails.

CONCLUSION

The application should be denied.

Dated: January 18, 2005.

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