No. 09-5126

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

MICHAEL NEWDOW, *et al.*,	)
Appellants,	)
v.	)
HON. JOHN ROBERTS, JR., *et al.*,	)
Appellees.	)

PROPOSED BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLEES

James Matthew Henderson, Sr.
(#452639)
Counsel of Record
Jay Alan Sekulow*
Stuart J. Roth*
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
(202) 546-8890
Attorneys for Amicus Curiae

Laura B. Hernandez*
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

* - Not admitted in this court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTEREST OF *AMICI*[1]

The American Center for Law and Justice (ACLJ) is a public interest organization dedicated to the defense of constitutional liberties secured by law. 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 *amicus curiae* in numerous cases before the lower federal courts, including this Court.

Amicus is dedicated to defending First Amendment freedoms, and opposes Newdow's relentless crusade to purge all religious expression in the federal government. Newdow has filed no less than nine lawsuits, and has wasted untold judicial resources.[2] His targeting of religious expression at Presidential

---

[1] This brief is filed upon Motion to the Court and with the consent of the Plaintiffs. The government and PIC Defendants take no position on the filing of *amicus* briefs in this matter. Attempts were made to contact Defendants Warren and Lowery; however, we have not received any response to date. *Amicus* ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

[2] *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002) (challenged the words "Under God" in the Federal pledge of allegiance) (dismissed on standing grounds in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)); *Newdow v. Carey*, No. 05 Civ. 17257 (E.D. Cal. Sept 14, 2005) (Ninth Circuit decision pending - challenging again the recitation of the Pledge of Allegiance, but this time with three other families as co-parties); *Newdow v. Eagen*, 309 F. Supp.

inaugurations is particularly meritless given the controlling decision of the Supreme Court of the United States in *Marsh v. Chambers*, 463 U.S. 783 (1983).

ARGUMENT

I. Newdow And His Fellow Appellants Lack Standing Because Their Offense At Inaugural Prayer Does Not Qualify As a Concrete, Particularized Injury.

The Supreme Court of the United States has "'consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992)). The requirement of a particularized and concrete injury serves "to assure that the legal questions

---

2d 29 (D.D.C. 2004) (challenged the practice of legislative prayer by a paid chaplain); *California Parents for the Equalization of Educational Materials v. Noonan*, 600 F. Supp. 2d 1088 (E.D. Cal. 2009) (challenging the textbooks used in California public schools); *Newdow v. Congress of United States*, 435 F. Supp. 2d 1066 (E.D. Cal. 2006) (challenging the phrase "In God We Trust" on United States coins and currency); *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. Dec. 28, 2001) (challenging the invocation by Rev. Franklin Graham at the President Bush's 2001 Presidential Inauguration); *Newdow v. Bush*, 391 F. Supp. 2d 95 (D.D.C. 2005) (challenging the use of clergy recited prayers at President Bush's 2005 Presidential Inauguration; *The Freedom From Religion Foundation v. Hanover Sch. Dist.*, 2008 U.S. Dist. LEXIS 63473 (D. N.H. Aug. 7, 2008) (challenging on behalf of FFRF, the use of federal funds to support the recitation of the Federal pledge of allegiance).

presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Article III standing requirements are most important "when matters of great national significance are at stake" because they safeguard this Court's duty to "guard jealously and exercise rarely [its] power to make constitutional pronouncements." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

The cases of *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) and *United States v. Richardson*, 418 U.S. 166, 179–180 (1974) established that being disturbed by a governmental violation of the Constitution is never enough, by itself, to qualify as a concrete, particularized injury under Article III. *Schlesinger*, 418 U.S. at 220; *Richardson*, 418 U.S. at 176–77. *See also Richardson*, 418 U.S. at 191 (Powell, J., concurring) ("The power recognized in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of . . . citizen standing.").

In *Valley Forge*, 454 U.S. at 482–90, the principles articulated in *Richardson* and *Schlesinger* were applied to claims brought to enforce the Establishment Clause. The *Valley Forge* Court repudiated the notion that offense at alleged

Establishment Clause violations is somehow distinguishable from the offense suffered by the plaintiffs in *Schlesinger* and *Richardson*: The court knew of "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." *Id.* at 484–85. The Court noted further that "the proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Id*. at 485 (quoting *Schelsinger*, 418 U.S. at 227).

Valley Forge could not have been clearer that Article III standing cannot be premised upon mere psychological offense at the government's alleged complicity in religion. The "psychological consequence presumably produced by *observation* of conduct with which one disagrees," does not constitute "an injury sufficient to confer standing under Article III." *Id.* at 485 (emphasis added). Under *Valley Forge*, it does not matter how severe the offense to spiritual or other personal values or how outrageous or unconstitutional the government conduct is. *Id.* at 484 (rejecting the argument that "Article III burdens diminish as the importance of the claim on the merits increases"). The plaintiff must show that he personally suffered a "distinct and palpable" injury apart from mere offense at exposure to the government conduct. *Id*. at 488. Newdow and the other Appellants have failed to meet this high burden.

Appellants' attempt to distinguish *Valley Forge* is unavailing. They make the circular argument they are offended, and therefore they are injured. They assert further it is not for court to determine whether religious speech that they find offensive is injurious. See Appellants' Br. at p. 16. If Appellants' reasoning is followed to its logical conclusion, the possibilities become limitless. If a standing arises from offense to the spiritual values of certain groups of citizens, then for example, pacifist Quakers could sue over the President's endorsement of the United States' involvement in the Afghanistan war. Catholics who adhere to church teaching on the sanctity of human life from conception could take offense at the President's promotion of the pro-choice viewpoint. Such offenses are qualitatively indistinguishable from those suffered by the Appellants. They are offenses against the spiritual values of relatively small segments of the population. Under *Valley Forge*, however, such offenses simply do not qualify as a concrete, particularized injury.

Appellants' reliance on the United States Supreme Court's school prayer cases is also misplaced. See Appellants' Br. at 17. In fact, the *Valley Forge* Court distinguished *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203 (1963) by pointing out that the plaintiffs in that case suffered injury because "impressionable schoolchildren were *subjected* to unwelcome religious exercises or were *forced* to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22

(emphasis added). Unlike public school children who are *compelled to be there and listen*, Appellants are not forced to watch or listen to the prayers given at presidential inaugurations. Obviously, there are no truancy penalties for failure to attend or watch on television the presidential inauguration. No government authority can discipline those who fail to "pay attention" to those who speak at the inaugurations. A correct understanding of the school prayer cases requires that plaintiff show some *coercion*, not mere observation. *See Schempp*, 374 U.S. at 224; *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310–13 (2000) (religious conformity coerced when religious exercise before public high school event risks social disapproval of those who do not participate); *see also Bowen v. Roy*, 476 U.S. 693, 703 (1986) (objecting citizens cannot dictate how government orders its internal operations).

Finally, Appellants' reliance on Establishment Clause cases in which the Supreme Court did not address standing is improper. The Supreme Court consistently has held that it "is not bound by a prior exercise of jurisdiction in a case where [jurisdiction] was not questioned and it was passed *sub silentio*." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (citations omitted); *See also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—

even on jurisdictional issues—are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478–79 (2006). *Valley Forge* is the Court's last word on citizen standing in Establishment Clause cases, and under *Valley Forge*, Appellants have not proven that they suffered a concrete, particularized injury.[3]

II. Appellants' Loose Interpretation of the Concrete, Particularized Injury Requirement Would Expand the Judicial Role at the Expense of Separation of Powers.

The standing requirements of Article III are essential to maintain the proper separation of powers between the Congress, the Executive, and the Judiciary, and between the federal government and the states. *E.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 611–12 (2007) (plurality); *id*. at 617–18 (Kennedy, J., concurring); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006); *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77 (1992). Appellants' attempt to make a federal case out of their personal offense at government speech fosters "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent

[3] To the extent the Court has doubts about the proper boundaries of the injury requirement in Establishment Clause cases, *Amicus* respectfully suggests that the court stay decision in this case, pending the United States Supreme Court's decision this term in *Salazar v. Buono*, No. 08-472.

with sound principles of federalism and the separation of powers." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). Article III's requirement that plaintiffs prove concrete and particularized injury protects against the accretion of power in the judiciary. Whenever "one or more of the branches seek to transgress the separation of powers," "liberty is always at stake." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see also Schlesinger*, 418 U.S. at 222 ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); *Richardson*, 418 U.S. at 179–80 (Founding Fathers did not intend judiciary to act as Athenian democracy overseeing the conduct of the national government). Appellants should be denied their effort to "enlist the federal courts to superintend . . . the speeches, statements and myriad daily activities" of government officials. *Hein*, 551 U.S. at 611–12 (plurality).

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed.

Respectfully submitted this 15th day of October, 2009,

/s/ James M. Henderson

James Matthew Henderson, Sr.
(#452639)
Counsel of Record
Jay Alan Sekulow*
Stuart J. Roth*
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
(202) 546-8890
Attorneys for Amicus Curiae

Laura B. Hernandez*
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

* - Not admitted in this court

CERTIFICATE OF SERVICE

I certify that, on October 15, 2009, a true and correct copy of this document was served by Federal Express on the following counsel in this case:

Robert V. Ritter
Appignani Humanist Legal Center
1777 T. Street, NW
Washington, DC 20009
Counsel for Plaintiffs

Brad P. Rosenberg
United States Department of Justice
Civil Div., Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20001
Counsel for Government Defendants

Joe Lowery
3121 Cascade Rd S.W.
Atlanta, GA 30311
Defendant

E. Desmond Hogan
Hogan & Hartson
555 Thirteenth St., N.W.
Washington, D.C. 20004
Counsel for PIC Defendants

Rick Warren
1 Saddleback Parkway
Lake Forest, CA 92630
Defendant

I certify that, on January 13, 2009, a true and correct copy of this document was served by United States mail, along with a courtesy copy by electronic mail, on the following counsel in this case:

Michael Newdow
P.O. Box 233345
Sacramento, CA 95823
newdowlaw@cs.com
Counsel for Plaintiffs

/s/ James M. Henderson
James Matthew Henderson, Sr.
Counsel for Amicus