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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW, Plaintiff, v. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, Defendant.	CIV. No. S-01-0218 LKK/GGH PS OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

Defendant George W. Bush, President of the United States, files the following objections to the Findings and Recommendations [hereafter "F&R] filed by Magistrate Judge Hollows on July 18, 2001.

I. ARGUMENT

A. Standing

1. Newdow suffered no particularized injury.

The Magistrate Judge found that plaintiff Michael Newdow, who was offended when he heard Reverend Graham recite a prayer during the televised inaugural festivities on January 20, 2001,

has satisfied the "injury in fact" requirement of standing. The Magistrate Judge found that, like the school children who were not required to leave their classroom during Bible readings [1], plaintiff was not required to turn off his television set to avoid viewing televised inaugural activities he found offensive. F& R, p. 6. The court equated Newdow's desire to watch the televised proceedings with plaintiffs who have been found to have standing when they alleged they avoided public places or services to avoid public religious displays. [2] However, the differences between those plaintiffs and Newdow are clear: those plaintiffs all lived or worked in the community where the religious symbols were being displayed, or, in the case of the school children, were in the classroom where the Bible readings occurred. Those plaintiffs established that they were forced to make real changes in their daily routines so as to avoid the displays they found offensive. Newdow, in contrast, does not live or work in Washington, D.C. and had to undertake no special burden for the minute or so that the prayer was recited.

The Magistrate Judge rejected defendant's argument that Newdow could simply have turned off the television to avoid

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[1] *School District of Abington v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560 (1963).

[2] E.g., *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379, 382 (9th Cir. 1996)(persons who avoided public park because of religious symbol had standing); *Hewitt v. Joyner*, 940 F2d 1561, 1564 (9th Cir. 1991)(same); *cf. Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999)(en banc)(parents lacked standing to protest school prayer at graduation because she had no students remaining in the school district and did not allege she would attend future graduations).

programming he found offensive, concluding that Newdow's exposure to offensive material broadcast over the airwaves gave him standing. F&R, p. 5. However, the Magistrate Judge cited no case that holds that anyone viewing a televised event has standing to challenge the constitutionality of the event. Instead, the Magistrate Judge quotes a line from *Finley v. National Endowment for the Arts*, 100 F.3d 671, 686 (9th Cir. 1996)(Kleinfeld, J. dissenting), rev. on other grounds, 524 U.S. 569, 118 S.Ct. 2168 (1998) in support of his broad view of standing. [3] However, the quote was taken out of context. The quote related to how a public forum can be created, not to the entirely different issue of who has standing to file a lawsuit. *Finley*, at 686.

Moreover, the Magistrate Judge's broad view of the standing requirement completely eviscerates long-standing principles that one seeking to invoke the jurisdiction of the federal courts must show that he has suffered an "...'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) `actual or imminent,' not `conjectural' or `hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. at 2136 (citations omitted). An alleged injury to an interest "which is held in common by all members of the public" is not the sort of "[c]oncrete injury, whether actual or

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[3] "Defendant's "in person" standing requirement is unknown to the law. 'This is because [First Amendment] speech is often disseminated by print and electronics, rather than by standing in front of people and talking to them.' *Finley v. National Endowment for the Arts*, 100 f.3d 671, 686 (9th Cir. 1996)(Kleinfeld, J. dissenting)." F&R at 5-6.

threatened" which "is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220-21 (1974).

Here, all Newdow alleged is an injury he holds in common with other members of the public: an objection to the recitation of a prayer at the presidential inauguration. His "injury" is no different than the ideological injury millions of other atheists and non-Christians may have experienced on January 20, 2001, and is insufficiently "concrete and particularized" to establish standing. Yet, under the Magistrate Judge's broad view of standing, every person in the United States who viewed the inaugural activities--potentially many millions of viewers--could file a suit similar to Newdow's. But the specter of millions of suits being brought in the 94 federal judicial districts underscores the need for the requirement that a plaintiff suffer a "particularized" injury before invoking the resources of the courts.

2. <u>The 2005 Inauguration is too distant in time to satisfy the requirement that the threatened injury be imminent</u>.

The Magistrate Judge also rejected President Bush' argument that Newdow could not satisfy the requirement that a party seeking injunctive relief must demonstrate an imminent threat of irreparable injury. *Adarand Constructors, Inc. v.* Pena, 515 U.S. 200, 210, 115 S.Ct. 2097, 2104 (1995); *Cole v. Oroville Union High School District*, 228 F.3d 1092, 1100 (9th Cir. 2000)(dismissing complaint regarding prayer at graduation ceremony for want of standing because plaintiffs had not shown a