No. 10-757

In the Supreme Court of the United States

MICHAEL NEWDOW, ET AL., PETITIONERS

v.

JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK STERN
LOWELL V. STURGILL, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners lack standing to challenge the possible inclusion of the phrase "so help me God" and prayer in the 2013 and 2017 presidential inaugural ceremonies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statute:

Miscellaneous:

In the Supreme Court of the United States

No. 10-757

MICHAEL NEWDOW, ET AL., PETITIONERS

v.

JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 603 F.3d 1002. The order of the district court (Pet. App. 47-50) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2010. A petition for rehearing was denied on June 29, 2010 (Pet. App. 43-44). The petition for a writ of certiorari was filed on September 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this Establishment Clause challenge to the inclusion of the phrase "so help me God"

and prayer in the presidential inauguration ceremony shortly before the January 2009 inauguration of President Obama. The district court dismissed the suit on the ground that petitioners lacked standing. Pet. App. 47-50. The court of appeals affirmed. *Id.* at 1-42.

1. In 2008, Barack Obama was elected President of the United States. Then-President-elect Obama chose to take his oath of office in an inauguration ceremony to be conducted on the West Front of the United States Capitol Building. To help make the necessary arrangements for the ceremony, Congress created a Joint Congressional Committee on Inaugural Ceremonies (JCCIC), as it had for previous inaugurations. Pet. App. 6; see S. Con. Res. 67, 110th Cong., 2d Sess. (2008) (enacted). Additional support for the inauguration was provided by a joint military inter-service committee, the Armed Forces Inaugural Committee (AFIC). Pet. App. 6. President-elect Obama also created a private entity, the Presidential Inaugural Committee (PIC), to coordinate numerous ceremonial events associated with the 2009 inauguration, including the inaugural parade and inaugural balls. *Ibid.*; see 36 U.S.C. 501(1) (defining the PIC as "the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony").

Through the PIC, President-elect Obama requested two private clergy members—Reverends Rick Warren and Joseph Lowery—to deliver an invocation and a benediction, respectively, during the inauguration ceremony. President-elect Obama also requested that the Chief Justice of the United States, John G. Roberts, Jr., administer the presidential oath of office and recite the words "so help me God" after reciting the oath pre-

scribed by the Constitution. See U.S. Const. Art. II, § 1, Cl. 8; Pet. App. 6-7.

2. After learning of President-elect Obama's plans for his inauguration, petitioners filed this suit against the JCCIC and its chairperson; the AFIC and its chairperson; the PIC and its then-director; the Chief Justice; and Reverends Warren and Lowery (collectively, respondents). The complaint sought declaratory and injunctive relief barring the Chief Justice from reciting the words "so help me God" as part of his administration of the oath of office to President-elect Obama or at any future presidential inauguration, and barring defendants from "utilizing any clergy" to engage in any religious acts at President Obama's inauguration or any future presidential inauguration. 1:08-cv-02248 Compl. paras. I-VII (filed Dec. 30, 2008); Pet. App. 7.

On January 5, 2009, petitioners moved for a preliminary injunction. After a hearing, the district court denied the motion, concluding, among other things, that petitioners lacked standing because they could not show any concrete and particularized injury, and any injury would not be redressed by an order against respondents. See C.A. App. 62.

Petitioners did not appeal the denial of their motion for a preliminary injunction, and President Obama's inauguration proceeded on January 20, 2009. Reverends Warren and Lowery delivered an invocation and a benediction, respectively, and President Obama and Vice-President Biden both recited "so help me God" after taking their oaths of office, as did the Chief Justice and Justice Stevens in administering those oaths. See 155 Cong. Rec. S667-S669 (daily ed. Jan. 20, 2009).

After additional briefing, the district court dismissed the complaint for lack of standing. Pet. App. 47-50. Al-

though petitioners had moved to amend their complaint to add allegations that the 2013 and 2017 inaugural ceremonies might improperly incorporate religious references, the court chose not to rule on the motion because the court believed that the amended complaint did not contain any allegations that would establish standing. See *id.* at 49 n.22.[1]

3. The court of appeals affirmed the district court's dismissal of the complaint. The court first held that petitioners' challenge to the 2009 inauguration was moot.[2] Pet. App. 10-13. The court next held that it would consider petitioners' amended complaint, which included challenges to the 2013 and 2017 inaugurations, because "the motion for leave to amend should have been granted as of right." *Id.* at 13-14 n.3. With respect to the future inaugurations, the court held, petitioners lack standing. Assuming, without deciding, that petitioners "claimed [an] injury [that] is an injury in fact and that it can fairly be traced to the conduct of" respondents, the court concluded that petitioners' claims are not redressable. *Id.* at 13-22. The court observed that petitioners acknowledged that "[t]he inaugural ceremony is a peculiar institution, the whole of which is subject to the President's or President-elect's discretion," and that the content of the inaugural ceremony—whether it contains any religious references or prayer—is entirely dependent on the President's or President-elect's wishes. *Id.* at 18. The individuals and entities that petitioners had named as defendants would participate in the inaugural pro-

---

[1] The reference to footnote "22" is a typographical error in the petition appendix. The reference should be to footnote "1."

[2] Petitioners do not challenge that determination before this Court. See Pet. i.

ceedings only in the manner requested by the President, the court explained, and they "possess no authority—statutory or otherwise—to actually decide whether future inaugural ceremonies will contain the offending religious elements." *Id.* at 17.

The court therefore emphasized that petitioners had not sued the President or President-elect, and that in any event, a court would not have the authority to enter an injunction directly against the President in the exercise of his executive functions or against the President-elect (a private citizen) in the exercise of his personal religious beliefs. Pet. App. 20. The court concluded that "[t]he future President is * * * a 'third party not before the court' whose 'independent action' results in the alleged injury," rendering any relief granted against respondents ineffective in redressing petitioners' alleged injury. *Id.* at 19 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); and citing *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).[3]

Judge Kavanaugh concurred in the judgment. In his view, petitioners had standing because a declaration of petitioners' legal rights could form the basis of an injunction against persons or entities who are selected to assist with future inaugurations. See Pet. App. 27-28. Judge Kavanaugh would have affirmed the dismissal of the complaint on the ground that petitioners' claims are foreclosed by *Marsh* v. *Chambers*, 463 U.S. 783 (1983), which upheld a state legislature's practice of opening legislative sessions with prayer. Judge Kavanaugh ex-

[3] The district court also held that petitioners cannot sue unnamed persons and entities that will support future inaugurations because that would require the court to issue an "injunction against the world." Pet. App. 17.

plained that the challenged religious elements in the inauguration, like the legislative prayer at issue in *Marsh*, are "deeply rooted in the Nation's history and tradition," Pet. App. 33, and are not used "to proselytize or advance any one, or to disparage any other, faith or belief," *id.* at 32 (quoting *Marsh*, 463 U.S. at 794-795).

ARGUMENT

Petitioners contend (Pet. 4-15) that the court of appeals erred in concluding that petitioners lack standing because their claims regarding the 2013 and 2017 inaugurations are not redressable. Further review is not warranted. The court of appeals' decision is correct, and it reflects the court's fact-bound evaluation of the unique arrangement by which the inaugural ceremony is organized and its content determined. The decision does not conflict with any decision of this Court or any court of appeals. Finally, even if petitioners had standing, review would not be warranted, because petitioners' Establishment Clause claims lack merit.

1. "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lance* v. *Coffman*, 549 U.S. 437, 439 (2007) (per curiam). "One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Ibid.*; see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The plaintiff has the burden to allege facts demonstrating standing, *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990), and the standing inquiry is "especially rigorous" where, as here, reaching the merits of the dispute would require a court to decide whether an action taken by one of the other

two branches of the federal government is unconstitutional, see *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

a. Applying settled principles of Article III standing to the circumstances of this case, the court of appeals concluded that petitioners failed to satisfy the redressability component of Article III standing. That conclusion does not warrant this Court's review. Mere "speculati[on]" that an alleged injury will be redressed by a favorable decision is insufficient to establish Article III standing; rather, a plaintiff must show that it is "likely" that granting the relief sought will alleviate the injury. *Lujan*, 504 U.S. at 561 (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

Petitioners challenge the constitutionality of the references to God that may be made by the Chief Justice and prayer leaders during future inauguration ceremonies. Pet. App. 14-15. They have named as defendants the Chief Justice, who administered the presidential oath during the 2009 inaugural ceremony; the private ministers who offered prayers in 2009; and the committees created to assist in planning the 2009 ceremony. *Id.* at 6. They seek an injunction preventing respondents from uttering or facilitating the challenged references in future inaugurations. *Id.* at 47-48, 49 n.22. As petitioners acknowledge (Pet. 2), however, the President or President-elect has complete discretion over the content of his or her inaugural ceremony, and respondents "possess no authority—statutory or otherwise—to actually decide whether future inaugural ceremonies will contain the offending religious elements." Pet. App. 17.

Because the content of the inaugural ceremony is entirely dependent on the President or President-elect's wishes, only a judicial order running against the President or President-elect would result in the relief that

petitioners seek. But petitioners have not filed suit against the President or President-elect.[4] Consequently, petitioners' asserted injury results from "the independent action of some third party not before the Court." *Simon*, 426 U.S. at 42. An injunction against any of the respondents would not afford petitioners any meaningful relief, and petitioners' alleged injury is therefore not redressable through a favorable result in this case.[5] See Pet. App. 17-18.

Petitioners argue (Pet. 4-7) that the court of appeals' observation that if any injunction were entered against respondents, the President or President-elect would "simply find other willing assistants" to carry out his wishes, Pet. App. 18, could "immunize from judicial review an extraordinary array of executive branch actions," Pet. 4, by permitting the President to disregard injunctions against subordinate officials. To the contrary, the court of appeals' decision does not purport to establish any general rule regarding redressability in the context of injunctions against subordinate Executive

---

[4] In any event, as the court of appeals correctly held, a court would not have the authority to enjoin the President in the performance of his executive duties. See Pet. App. 20 ("A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions.") (citing *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867)); *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992) (plurality opinion). And as the court noted, petitioners "fail to cite any authority allowing this court to declare unlawful the personal religious expression of a private citizen like the President-elect." Pet. App. 20.

[5] Petitioners' claim against the JCCIC, the AFIC, and their chairpersons is not redressable for the additional reason that the JCCIC and the AFIC were formed for the sole purpose of making the necessary arrangements for the 2009 inauguration, *e.g.*, S. Con. Res. 67, 110th Cong., 2d Sess. (2008) (enacted), and they have now ceased to exist. See Gov't C.A. Br. 38.

Branch officials; indeed, the majority of the respondents are not even part of the Executive Branch. Rather, the court's conclusion that the prospect of redressing petitioners' claims through an order against respondents is "speculative," *Simon*, 426 U.S. at 43-44, reflects only its fact-bound evaluation of the "peculiar institution" of the inaugural ceremony and the likelihood that a judicial order against respondents could provide relief in view of the complete authority the President or President-elect exercises over the ceremony's content and participants. Pet. App. 18. For purposes of future ceremonies, the President or President-elect will have complete discretion over whether to have a ceremony at all, what responsibilities (if any) to give the committees, which individuals to invite to participate in the ceremony, and—most importantly—what content to request of the participants.[6] See *ibid.* In such a situation, the court of appeals reasonably concluded, if some potential participants were subject to an injunction limiting their ability to take part, the President or President-elect would exercise his authority over the content of the ceremony by choosing individuals who are able to participate in the

[6] For this reason, *Lee* v. *Weisman*, 505 U.S. 577, 586 (1992), on which Judge Kavanaugh would have relied to find petitioners' claims redressable, Pet. App. 27, is distinguishable. In *Lee*, the Court adjudicated an Establishment Clause suit against school officials who "direct[ed] the performance of a formal religious exercise," 505 U.S. at 586, and who were responsible for deciding whether to invite clergy to deliver invocations and benedictions at high school graduation ceremonies. See *id.* at 580-581 (noting that school district policy permitted, but did not require, school principals to invite clergy to deliver prayers at graduation ceremonies). Thus, injunctive relief against the named defendants in *Lee* redressed the plaintiffs' claims.

manner that he wishes.[7] See *id.* at 18-19; see, *e.g.*, *Glover River Org.* v. *United States Dep't of the Interior*, 675 F.2d 251, 254-256 (10th Cir. 1982) (finding injury not redressable because the requested order would not require the President to fund the projects in which the plaintiff was interested).

This case is thus distinguishable from the decisions on which petitioners rely. In *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), the plaintiffs challenged the method employed by the Secretary of Commerce in calculating the decennial census. Although the requested injunction requiring the Secretary to conduct the census in a certain manner would have redressed the alleged harm only if the President, in exercising his statutory duty to transmit to Congress a statement of the number of representatives to which each State would be entitled under the census, chose to abide by the Secretary's conclusions, a plurality of the Court concluded that "it is substantially likely" that the President "would abide by [the court's] authoritative interpretation of the census

---

[7] Judge Kavanaugh argued that the possibility that respondents' responsibilities might be transferred to others does not affect redressability because "'a declaration of the [petitioners'] legal right . . . could form the basis of an injunction' against the entity to which [a named defendant's] responsibilities are transferred." Pet. App. 27 (citation omitted). The decision on which Judge Kavanaugh relied concerned a claim that became moot with respect to certain defendants because they ceased to exist, but that still could have been redressed by other existing named defendants. See *Center for Arms Control & Non-Proliferation* v. *Pray*, 531 F.3d 836, 838-839 & n.* (D.C. Cir. 2008). Here, in contrast, petitioners' claim is not redressable by any of the named defendants. Nor may petitioners use this suit to obtain, as the court of appeals correctly held and petitioners do not contest (Pet. 4 & n.6), an injunction against all unknown "persons the future President could possibly invite" to participate. Pet. App. 16-17.

statute * * * even though [he] would not be directly bound by such a determination." *Id.* at 803. That conclusion was based on the fact that "the Commerce Secretary was legally responsible for providing the President with advice and information on which he would base his final decision," Pet. App. 21, making it reasonably likely that a favorable judgment would influence the President's conduct. See *Franklin*, 505 U.S. at 803. Here, in contrast, there is no such advisory relationship between respondents and the President or President-elect, and the President alone has the discretion to determine the content of the ceremony.

Petitioners also rely (Pet. 5, 7) on *Swan* v. *Clinton*, 100 F.3d 973 (D.C. Cir. 1996), and *Made in the USA Foundation* v. *United States*, 242 F.3d 1300 (11th Cir.), cert. denied, 534 U.S. 1039 (2001), but both decisions are inapposite. In both cases, the court acknowledged that there are occasions on which only injunctive relief against the President himself would address the plaintiff's injury, but held that given the statutory and regulatory frameworks at issue, the defendant officials had sufficient statutory authority so that an injunction governing their performance of their official duties would likely provide the plaintiffs with "partial relief" even though the President would not be bound to comply with the order. *Swan*, 100 F.3d at 979-981; see *Made in the USA Found.*, 242 F.3d at 1310-1311. That is not the case here, where respondents possess no authority other than to carry out the President's or President-elect's wishes.[8]

[8] Petitioners suggest (see Pet. 3) that their claims against respondents must be redressable because there must be a remedy for alleged violations of the Establishment Clause that take place during the inaugural ceremony. But as this Court has explained, "[t]he assump-

b. Even if petitioners could satisfy the Article III requirement of redressability, the other elements of standing also are not present. For the reasons stated above, petitioners cannot establish that any injury-in-fact arising out of future inauguration ceremonies is fairly traceable to the individuals and entities named as defendants. Because only the President or President-elect can be said to have caused any injury petitioners might suffer, here causation and redressability overlap as "two sides of [the same] coin." *Dynalantic Corp.* v. *Department of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997); see *Simon*, 426 U.S. at 43-44. In addition, as the district court concluded, see Pet. App. 49-50, petitioners cannot identify any concrete and particularized injury arising from the possibility that prayer and the phrase "so help me God" will appear in future inaugurations. See generally *Lujan*, 504 U.S. at 560, 564 n.2; *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 482-483 (1982); see also *Newdow* v. *Bush*, 89 Fed. Appx. 624, 625 (9th Cir. 2004) (unpublished) (holding that plaintiff lacked standing to challenge inclusion of clergy prayers at the 2001 inauguration because he did "not allege a sufficiently concrete and specific injury").

2. Further review is also unwarranted because, as Judge Kavanaugh explained in his opinion concurring in the judgment, even if petitioners had standing, their Establishment Clause challenge is without merit.

In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the Court upheld the practice of opening state legislative

---

tion that if [one party has] no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 489 (1982) (first set of brackets in original; citation omitted).

sessions with prayer because that practice was "deeply embedded in the history and tradition of this country," *id.* at 786, and because the prayers "had [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.

The practice of asking clergy to deliver inaugural prayers and using the words "so help me God" after the President's oath of office is consistent with the Establishment Clause for the same reasons. Both the use of the phrase "so help me God" and the inclusion of prayer in the inaugural ceremony are longstanding traditions dating back to the nation's founding. "The First Congress—the same Congress that drafted and approved the First Amendment—mandated 'so help me God' in the oaths of office for federal judges," and "[s]tate constitutions in effect at the ratification of the First Amendment similarly included 'so help me God' in state officials' oaths of office." Pet. App. 33 (Kavanaugh, J., concurring in the judgment); see *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984) (noting the "special significance" of the "interpretation of the Establishment Clause by * * * the First Congress"); see also Pet. App. 34 (Kavanaugh, J., concurring in the judgment) (noting that the words "so help me God" "remain to this day a part of oaths prescribed by law at the federal and state levels"). Likewise, formal prayers "'have been associated with presidential inaugurations since the inauguration of George Washington.'" *Id.* at 36 (Kavanaugh, J., concurring in the judgment) (citation omitted); Gov't C.A. Br. 42-46 (discussing historical instances of inaugural prayers).

In addition, neither the use of the words "so help me God" nor the practice of clergy prayers at presidential inaugurations has been exploited to advance any one, or

disparage any other, religious belief. See *Marsh*, 463 U.S. at 794-795; Pet. App. 37-39 (Kavanaugh, J., concurring in the judgment). The words "so help me God," similar to other phrases that this Court has approved in other ceremonial contexts,[9] are not sectarian or proselytizing, and the religious references that have appeared in inaugural prayers have reflected the kinds of nonsectarian sentiments that this Court approved of in *Marsh*. See *Lynch*, 465 U.S. at 677-678 (describing numerous "expressions of religious belief" in civic life, and observing that such expressions are consistent with "accommodation of all faiths and all forms of religious expression"); Pet. App. 38-40 (Kavanaugh, J., concurring in the judgment).

---

[9] See, *e.g.*, *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) (approving the phrase "God save the United States and this Honorable Court" with which this Court opens each of its sessions); *Lynch*, 465 U.S. at 676 (approvingly describing the use of "In God We Trust" in the National Motto and on coins and currency and the phrase "One nation under God" in the Pledge of Allegiance). Accordingly, "it comes as no surprise that the Supreme Court several times has suggested, at least in dicta, that the Constitution permits 'so help me God' in officially prescribed oaths of office." Pet. App. 34-35 (Kavanaugh, J., concurring in the judgment) (citing, *e.g.*, *School Dist.* v. *Schempp*, 374 U.S. 203, 212-213 (1963), and *Zorach*, 343 U.S. at 312-313).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MARK STERN
LOWELL V. STURGILL, JR.
Attorneys

APRIL 2011