

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CAPITOL SQUARE REVIEW AND ADVISORY BOARD,
ET AL., Petitioners v. VINCENT J. PINETTE,
DONNIE A. CARR AND KNIGHTS OF THE KU KLUX
KLAN

CASE NO: No. 94-780

PLACE: Washington, D.C.

DATE: Wednesday, April 26, 1995

PAGES: 1-54

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

CAPITOL SQUARE REVIEW AND :

ADVISORY BOARD, ET AL., :

Petitioners :

v. : No. 94-780

VINCENT J. PINETTE, DONNIE A. :

CARR AND KNIGHTS OF THE KU :

KLUX KLAN :

- - - - -X

Washington, D.C.

Wednesday, April 26, 1995

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:12 a.m.

APPEARANCES:

MICHAEL J. RENNER, ESQ., Columbus, Ohio; on behalf of
the Petitioners.

BENSON A. WOLMAN, ESQ., Columbus, Ohio; on
behalf of the Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF MICHAEL J. RENNER, ESQ. On behalf of the Petitioners	3
ORAL ARGUMENT OF BENSON A. WOLMAN, ESQ. On behalf of the Respondents	30

1 P R O C E E D I N G S

2 (10:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-780, Capitol Square Review and Advisory
5 Board v. Vincent J. Pinette.

6 Mr. Renner.

7 ORAL ARGUMENT OF MICHAEL J. RENNER

8 ON BEHALF OF THE PETITIONERS

9 MR. RENNER: Mr. Chief Justice, and may it
10 please the Court:

11 I will attempt to preserve several minutes for
12 rebuttal.

13 This Court today is faced with a factual pattern
14 which requires the analysis of the friction that is
15 created when two prongs of the First Amendment rub against
16 each other. Ohio suggests that this Court adopt a
17 workable rule that any purely religious display which is
18 unattended and positioned at the very seat of Government
19 should be considered as a violation of the Establishment
20 Clause.

21 QUESTION: Mr. Renner, what do you mean when you
22 say at the very seat of Government?

23 MR. RENNER: Mr. Chief Justice, the seat of
24 Government would be a building or structure from which the
25 public realizes the power of Government does its work.

1 This could be obviously a capital building, it could be a
2 city hall, it could be a county courthouse, it could be a
3 Federal building.

4 QUESTION: Would it have to be located, say, at
5 least in a county seat?

6 MR. RENNER: I am not aware -- well, I don't
7 think there are any -- there would be Federal post office
8 buildings that, for instance in cities other than county
9 seats which --

10 QUESTION: So when you say the seat of
11 Government, you're not talking about a geographical
12 location of a capital or a county seat.

13 MR. RENNER: That's correct, Your Honor. We're
14 talking about a facility which the reasonable observer,
15 the public, the common man, would associate as being
16 governmental in its authority and from which governmental
17 activities are carried out.

18 QUESTION: Well, do you really mean, then,
19 anything more than a Government building?

20 MR. RENNER: Probably not, Your Honor. There
21 are probably some Government buildings that are in rented
22 office structures, for instance, and which the reasonable
23 observer might not recognize the building as that of
24 Government, in which case our rule would not carry the
25 same weight.

1 QUESTION: Do you think the reasonable observer
2 can conclude that petition and assembly are important
3 activities to take place at the seat of Government,
4 assuming that that is a valid legal category?

5 MR. RENNER: Well, Justice Kennedy, the
6 reasonable observer does understand that assemblies,
7 demonstrations, speeches and rallies take place at the
8 seat of Government frequently, yes.

9 QUESTION: And is the Capitol Square a public
10 forum, in your view?

11 MR. RENNER: Justice O'Connor, the Capitol
12 Square has been recognized -- certainly the State of
13 Ohio's Capitol Square has been recognized as a public
14 forum.

15 QUESTION: And do you accept that?

16 MR. RENNER: We accept that it is a public
17 forum, Your Honor, but if I could explain that just
18 because it is a public forum doesn't mean that unattended
19 displays are recognized as being anything other than a
20 governmental display.

21 QUESTION: Well, now, as I understand it, at one
22 time the board here had adopted a regulation saying that
23 all displays on the square had to be attended by someone.
24 Wasn't that the regulation?

25 MR. RENNER: I believe there was --

1 QUESTION: No unattended displays permitted at
2 the Christmas season?

3 MR. RENNER: Well, that's correct. I think the
4 tenor of the resolution was there would be no displays at
5 the Statehouse grounds, Your Honor.

6 QUESTION: And that would have been a content-
7 neutral sort of a time, place, and manner regulation, I
8 suppose.

9 MR. RENNER: We would certainly believe that's
10 correct, Your Honor.

11 QUESTION: And the board could certainly adopt
12 that as a policy, couldn't it?

13 MR. RENNER: That's correct.

14 QUESTION: And it also, I suppose, could
15 designate a certain part of the Capitol Square where it
16 would allow displays by different groups.

17 MR. RENNER: That would be correct also, Your
18 Honor.

19 QUESTION: And it hasn't attempted to do that.

20 MR. RENNER: It didn't attempt to adopt that --
21 it adopted the regulation you first suggested, but did
22 not --

23 QUESTION: And then withdrew it.

24 MR. RENNER: -- adopt the regulation, the
25 second --

1 QUESTION: Has the board permitted other groups
2 to have displays in the Capitol Square area during the
3 holiday season?

4 MR. RENNER: Yes. I guess I have to answer yes,
5 Your Honor, because the State itself has a holiday
6 display. The State owns the holiday display. It owns the
7 Christmas tree. As part of a previous holiday, several
8 previous holiday displays, it has allowed the petition of
9 one of the Jewish branches in the city to erect a menorah
10 in conjunction with that holiday display.

11 QUESTION: And any other groups?

12 MR. RENNER: The United Way at one time
13 requested the State to have positioned in front of the
14 State Capitol building a thermometer showing the progress
15 of the United Way Campaign in the community, which the
16 State readily approved.

17 QUESTION: And has the board denied access to
18 Capitol Square to groups other than the KKK?

19 MR. RENNER: Your Honor, other than the ones
20 that you and I have just discussed, I'm not aware of any
21 petitions for unattended displays on the Statehouse
22 grounds.

23 QUESTION: One last question. I understand that
24 the cross that was erected or proposed to be erected and
25 in fact was by the KKK here had a disclaimer attached to

1 it saying it was not a display of the Government.

2 MR. RENNER: That's correct, Your Honor, and I
3 believe there's a photograph attached to the documents
4 presented to the Court of the disclaimer. It was of a
5 cardboard nature which did receive immediate wind damage,
6 but it was there.

7 QUESTION: And, of course, the board could have
8 required other types of disclaimers on more permanent
9 material if it chose, could it not?

10 MR. RENNER: There is an infinite variety of
11 potential disclaimers that could be employed. You're
12 correct, Your Honor.

13 QUESTION: Mr. Renner, one of the points that
14 you make is that the court of appeals seem to have applied
15 a rule that so long as the forum is public, and so long as
16 the actual sponsor is private, that's the end of the
17 matter, and I'm not sure that the court of appeals applied
18 that rule.

19 I'm looking at page A8 of the petition appendix,
20 and on that page the court quotes from a prior case,
21 refers to those two factors, but the quotation goes on to
22 say, "Although these facts are not automatically
23 determinative, recent precedent indicates that they should
24 carry much more weight than the details of the display
25 emphasized by the plaintiffs."

1 Now, I might very well agree with you that the
2 manner in which the appearance of this display was
3 analyzed was not a very nuanced treatment, but I also have
4 difficulty in going as far as you would have us go and say
5 that the court of appeals was just applying an automatic
6 rule, public forum, private sponsor, end of issue, because
7 it did say that these are not automatically determinative.

8 Why should we find a legal error on the record
9 that we have, including the court's opinion?

10 MR. RENNER: Justice Souter, the reason that we
11 believe that there was legal error in the Sixth Circuit is
12 because, though there were various portions of the Sixth
13 Circuit decision which address other factors -- it even
14 mentioned the enforcement analysis -- the court still
15 pronounced as its conclusion that any private speech in a
16 public forum is permissible.

17 It didn't say, any private speech which doesn't
18 impact reasonable observers in a negative way or in a
19 positive way with regard to their understanding of the
20 religious nature. It didn't say, any private speech
21 that's accompanied by a disclaimer. It just said, as its
22 conclusion, that any private speech in a public forum is
23 appropriate speech regardless of its content.

24 QUESTION: Mr. Renner, could you -- I'm not
25 clear as to what kind of unattended displays were

1 permitted under Ohio's law. Did they have to be related
2 to Christmas or Hanukkah? It was only during the holiday
3 season, I understand, but during that season, could the
4 Libertarian Party have put up a display?

5 MR. RENNER: Justice Scalia, the answer to that
6 question is no. The display that was permitted at the
7 Statehouse ground involved a long tradition of Ohio's
8 owned and operated Christmas tree.

9 Once various courts of this land, including our
10 own Sixth Circuit, and some analysis by this Court in the
11 Allegheny case, determined that a holiday display which
12 included both a Christmas tree and the menorah was not a
13 purely religious display but had a holiday connotation,
14 Ohio followed that pronouncement and permitted the
15 erection of the menorah.

16 QUESTION: But there was that content limitation
17 on unattended displays. The only unattended displays you
18 were going to allow were those whose message pertained to
19 the holidays, and none others.

20 MR. RENNER: Well --

21 QUESTION: Can you do that?

22 MR. RENNER: You're correct, Justice Scalia, the
23 State, of course, which was making its decisions under the
24 guidance of court determinations, had concluded that it
25 would be an Establishment Clause violation to allow purely

1 religious displays to be exhibited.

2 QUESTION: I'm not talking about purely
3 religious. I'm talking about anything else. Can you
4 limit your permission for unattended displays to just
5 those that have to do with the holiday season and for all
6 other purposes no one can have an unattended display?

7 MR. RENNER: Oh, I think not, Your Honor. If in
8 fact displays are going to be permitted in the public
9 forum, we think the State probably has the right to say,
10 no displays may be presented.

11 QUESTION: Yes.

12 MR. RENNER: But if displays are going to be
13 presented --

14 QUESTION: Right.

15 MR. RENNER: -- then the free speech and equal
16 access provisions would require us to provide them to all
17 speech content.

18 QUESTION: So the Libertarian Party could have
19 put up an unattended display.

20 MR. RENNER: That would be my under -- as long
21 as it were not purely religious, Your Honor.

22 QUESTION: I see. Now, why wouldn't the State
23 be worried that people would think the State was endorsing
24 the Libertarian Party?

25 MR. RENNER: They might be, Your Honor.

1 QUESTION: But that's okay.

2 MR. RENNER: Well, there's no proscription in
3 the Constitution that the State may not be involved --

4 QUESTION: The State can endorse the Libertarian
5 Party?

6 MR. RENNER: I'm not aware of a restriction.

7 QUESTION: If you want to be a real Ohioan you
8 should support the Libertarian Party? They can say that?

9 MR. RENNER: Well, I would hope that they
10 wouldn't, Your Honor, but I don't think it's violation of
11 the Establishment Clause.

12 QUESTION: They really can support a particular
13 political party officially and say you're not -- you know,
14 you're not a patriotic Ohioan if you don't vote
15 Libertarian?

16 MR. RENNER: Well, I --

17 QUESTION: I wasn't aware of that.

18 MR. RENNER: Well, as I'm standing here, Your
19 Honor, I'm trying to think of what proscription in the
20 Constitution or the Bill of Rights which would proscribe
21 that. It certainly would not be an Establishment Clause
22 proscription.

23 QUESTION: But you wouldn't worry -- but in any
24 case, you wouldn't worry about that being identified with
25 the State --

1 MR. RENNER: Well --

2 QUESTION: -- by allowing it up in front of the
3 State building?

4 MR. RENNER: As the attorneys for the State of
5 Ohio we would certainly want to review all other
6 constitutional provisions and statutes.

7 QUESTION: And if the Nazi Party did it I guess
8 the legislature wouldn't worry about the Nazi Party
9 display being associated with the State, would it?

10 MR. RENNER: Your Honor, to say that they
11 wouldn't worry about it would be disingenuous.

12 QUESTION: Well, but they have this regulation
13 that you say permits it.

14 MR. RENNER: That's correct. The regulation
15 would not -- the regulation which we have advised the
16 board to work under would not proscribe forms of speech
17 other than those that violate the Establishment Clause.

18 QUESTION: Whether it's lawful or not, I find it
19 difficult to believe that the members of the Ohio
20 Legislature wouldn't worry about the Nazi Party being
21 associated with the State.

22 MR. RENNER: I agree with that, Your Honor.

23 QUESTION: And if they don't worry about it with
24 the Nazi Party, I don't know why they would worry about it
25 with the KKK or with a cross, or with a religious symbol.

1 It just seems implausible to me that they are really
2 worried about the State being identified with the messages
3 that they're allowing to be put there. Why would they
4 worry about it with religion and not with other things?

5 MR. RENNER: Well, I hope that it would be
6 because, Your Honor, that religion has a specific
7 qualification in the First Amendment, and I would hope
8 that the State worries about the things that their
9 attorneys suggest that they worry --

10 QUESTION: Well, I'm not worried about it
11 whether it's -- it is in the First Amendment, but you also
12 have to establish a risk of identification, and if there's
13 a real risk of identification, I doubt whether the Ohio
14 Legislature would say, anybody with any sort of an
15 unpleasant message can stick it up in front of our
16 Statehouse. If they were really worried about
17 identification, I doubt whether they'd do that.

18 MR. RENNER: Your Honor, I think I would agree
19 with your analysis. As the record below indicates, the
20 State did struggle considerably with the notion of
21 allowing the Ku Klux Klan to rally or put up displays at
22 the Statehouse, but they did permit them to rally.

23 QUESTION: Mr. Renner, may I ask the other side
24 of the coin from Justice Scalia's question? Do you
25 understand the rule in the Sixth Circuit, which I guess

1 there was a case arose in Michigan before this one, to
2 make it necessary for the State to permit the Libertarian
3 Party to put up a sign such as you describe if they want
4 to?

5 MR. RENNER: No, I don't understand it that way,
6 Your Honor. I --

7 QUESTION: You don't understand the court of --
8 the rationale of the court of appeals to require that?

9 MR. RENNER: It would require that if in fact
10 those forums of speeches were allowed to others.

11 QUESTION: They said it's an open --

12 MR. RENNER: I think the State of Ohio could
13 proscribe all unattended displays, but I think once speech
14 is opened up, the only way that the State of Ohio could
15 forbid any speech is if it were a violation of some other
16 constitutional provision.

17 QUESTION: Well --

18 MR. RENNER: And that's what we assert is the
19 problem here in this case.

20 QUESTION: Wasn't there testimony in the record
21 here from a rabbi that said that a menorah was a religious
22 symbol?

23 MR. RENNER: There was, Your Honor, and he
24 testified quite vehemently that it was a purely religious
25 symbol, as viewed by members of his faith.

1 QUESTION: I take it your argument today is that
2 the menorah would have to fall in the same category as the
3 cross. Your opening statement was that no religious
4 symbol, and yet Ohio itself made the distinction.

5 MR. RENNER: It is correct, Justice Ginsburg,
6 that Ohio made the distinction, but it was based on
7 directives that Ohio felt had been provided to it by
8 superior courts.

9 QUESTION: But do I take it from your opening
10 statement at this argument that you have now reconsidered
11 and you -- I thought you said in the beginning of your
12 argument that no religious symbol could be in front of a
13 building that is identified with Government.

14 MR. RENNER: That is our belief, Justice
15 Ginsburg. We are still, however, living with a decision
16 that, as we read the Allegheny County case, that says that
17 the menorah is not a purely religious symbol.

18 QUESTION: Was that an opinion of the Court?

19 MR. RENNER: It was in the opinion --

20 QUESTION: Did it command the votes of five
21 justices?

22 MR. RENNER: I do not believe that it did, Your
23 Honor. It was in the opinion of Justice Blackmun, who of
24 course read the opinion for the Court, but I don't believe
25 that section of it did command the five votes. It is,

1 however, the guidance that the State of Ohio has worked
2 with since it was rendered.

3 QUESTION: Does your theory ask us to presume
4 what a reasonable observer would conclude? Do we have to
5 make that as some sort of an empirical inquiry in all of
6 these cases?

7 MR. RENNER: Justice Kennedy, I don't believe
8 it's necessary. I think that our result is achieved
9 whether we use the analysis of the endorsement test and
10 use the analysis of a reasonable observer, or if we use
11 the analysis of Lee v. Weisman, in which there was an
12 indirect, coercive effect because of the mandatory nature
13 of subjecting the school students to the prayer.

14 This is very much like that because the
15 placement of this cross will automatically require many
16 thousands of citizens to view this message, the message of
17 the cross superimposed upon the State Capitol building,
18 so --

19 QUESTION: But even if we stipulate, then, that
20 most people, certainly most reasonable people, will not
21 conclude that the State is sponsoring or has anything to
22 do with this message, that the message is still
23 prohibited, or the message must still be suppressed?

24 MR. RENNER: If it were a fact that nobody, or
25 no reasonable people would associate the State of Ohio --

1 QUESTION: Well, we usually in the law talk
2 about a reasonable observer for a starting point, and I'm
3 asking you if your theory doesn't require us to assume
4 that a reasonable observer would attribute this message to
5 the sponsorship of the State.

6 MR. RENNER: I'm saying, Justice Kennedy, I
7 don't think it requires that analysis. I think -- I think
8 that analysis supports the result we urge upon the Court,
9 because we think that a reasonable observer under these
10 circumstances, with a message as powerful as that of an
11 unattended cross in the presence of the State Capitol
12 building, that there would be countless reasonable
13 observers who would be connecting those two images --

14 QUESTION: But if this is not a part --

15 MR. RENNER: -- but it doesn't require that.

16 QUESTION: Well, then we must assume that under
17 your theory even if a reasonable observer would not
18 attribute this message to the State, the State still is
19 required to suppress it.

20 MR. RENNER: The answer to that question, I
21 think, Your Honor, lies in the decision of Lee v. Weisman
22 in which the reasonable observer analysis was not required
23 either, but --

24 QUESTION: But that was different, because the
25 whole assumption there was that the State was sponsoring

1 the message, and that's not this case at all.

2 MR. RENNER: Well, I would invite the Court to
3 consider the parallels, because it was in that case, after
4 all, private speech that was rendered by the rabbi that
5 was in question.

6 QUESTION: But that wasn't the assumption of the
7 opinion. The assumption of the opinion was that it was
8 State-sponsored.

9 MR. RENNER: Well, I think the Court concluded
10 it was State-sponsored by some fact patterns that
11 connected the rabbi with the message, and with the school
12 system in that case, that the rabbi was invited by the
13 school system to give the benediction and the invocation.

14 QUESTION: But that hasn't occurred here.

15 MR. RENNER: It has not, but I also do not
16 believe, Your Honor, that Lee v. Weisman would have turned
17 on a situation in which the rabbi called up the school and
18 said that my daughter's graduating, may I present the
19 invocation for the school system. In other words, if
20 there was --

21 QUESTION: Was there any indication in Lee v.
22 Weisman that a graduation is a public forum?

23 MR. RENNER: Well, there is none, and we would
24 suggest --

25 QUESTION: And haven't you conceded that this is

1 a public forum?

2 MR. RENNER: We have conceded that it is a
3 public forum for speeches and discussions. We would
4 emphasize to the Court that there is no history of private
5 use of this plot of ground in front of the State Capitol
6 building for attended -- unattended displays other than
7 those which were approved and supported by the State
8 government.

9 QUESTION: Well, are you then saying that the
10 reasonable observer test is passed here, or are you -- as
11 distinct from saying that it need not be applied?

12 MR. RENNER: Oh, I think if we apply the
13 reasonable observer test, which we encourage this Court to
14 do, we would have to conclude that when we have a message
15 as powerful as the cross, placed in front of a building
16 that's recognizable as the State government --

17 QUESTION: You're saying it meets the test.

18 MR. RENNER: That's right. Well, it meets --

19 QUESTION: But you're not saying that the test
20 is irrelevant to the decision of the case.

21 MR. RENNER: No, I'm not, Your Honor. I'm
22 saying that the rule that we suggest that the Court adopt,
23 whether the Court were to apply the endorsement analysis
24 or were to apply the indirect coercion analysis, the fact
25 patterns would result in this conclusion.

1 QUESTION: What would the reasonable observer be
2 expected to know? Would the reasonable observer be
3 expected to know everything that had been displayed, say
4 for the last 12 months, the last 5 years?

5 MR. RENNER: No, obviously not, Mr. Chief
6 Justice. The reasonable observer, in fact, contrary to
7 what was said in the Sixth Circuit, that a reasonable
8 observer knows all relevant facts, we submit that a
9 reasonable observer is a common man, an average man that
10 is not either a hypothetical dolt, as suggested in the
11 Sixth Circuit, or one that --

12 QUESTION: Does a reasonable person know how to
13 read, though, do you suppose?

14 MR. RENNER: I think most of them certainly
15 would.

16 QUESTION: I would think so, and they can read
17 the disclaimer, can they not?

18 MR. RENNER: They can read the disclaimer if,
19 Justice O'Connor, they're close enough to assemble to be
20 able to see the disclaimer.

21 QUESTION: I just think your argument is so far-
22 fetched it's just hard to bring it down to reality, to the
23 real world. Here is this thing with a sign that says,
24 this isn't Government sponsored --

25 MR. RENNER: Well --

1 QUESTION: -- and the board has every power to
2 protect itself by any reasonable regulation, and yet it
3 comes here arguing for this remarkable proposition to
4 suppress speech in a discriminatory fashion. I just think
5 your argument falls short of what this Court's cases have
6 required.

7 MR. RENNER: If I may, Justice O'Connor, discuss
8 the notion of the reasonable observer who can read and,
9 under the fact patterns of this case, what we have is a
10 10-foot high cross displayed in the middle of the
11 Statehouse grounds surrounded by 8 to 10 25-story or
12 higher buildings from which people can observe this scene
13 of the Statehouse and the cross at distances far greater
14 than they are capable of reading any disclaimer. This --

15 QUESTION: Mr. Renner, can you clarify, because
16 the record at one point refers to this as a 10-acre area,
17 and in another place it's just one block. What are we
18 talking about? What is this area, and how close is the
19 association? How close are these symbols?

20 MR. RENNER: Your Honor, I will try to describe
21 this as visually as I can paint with words.

22 The Capitol Square is nearly a square parcel of
23 land. It comprises a total of approximately 10 acres. A
24 large portion of that is consumed directly in the middle
25 by the State Capitol building of the State of Ohio.

1 Directly to its east, on the eastern portion, is
2 what is called an annex, or now the Senate office
3 building, which is connected to that and uses up most of
4 the ground to the east of the building.

5 To the west of the building is the front of the
6 Capitol. It faces the main street in the City of
7 Columbus, and it is probably 500 feet in width and
8 probably 300 feet from the street to the Capitol building.

9 It is this location that the government has used
10 to display all of its unattended displays. That's where
11 our statues are, where our flags are, where our unattended
12 messages from the government of the State of Ohio are
13 positioned, and it is in this area, in a grassy portion --
14 there are several quadrants surrounded by sidewalks,
15 grassy portions of this plaza. In the middle of one of
16 those grassy portions is where the cross was placed.

17 QUESTION: How far was it from high street?

18 MR. RENNER: Approximately 100 feet, Your Honor.

19 QUESTION: Mr. Renner --

20 QUESTION: Are you arguing -- and I hadn't
21 perceived this before -- that because the government has
22 in the past customarily used this area to display its
23 messages, therefore a reasonable observer would say if the
24 message is displayed there, it must be the government's?
25 If so, what are the other messages that -- or displays

1 that the government has placed there that would lead to
2 that inference?

3 MR. RENNER: Well, Your Honor, first of all I
4 would refer to unattended displays that were put up there
5 on a temporary basis, such as the United Way thermometer.

6 QUESTION: Well, you mentioned such as, and I
7 don't mean to be picky, but do we get beyond such as?

8 MR. RENNER: We don't.

9 QUESTION: The thermometer always comes up, but
10 is there anything else?

11 (Laughter.)

12 MR. RENNER: We don't get beyond it, Your Honor.
13 The history of unattended displays here includes those
14 permanently displayed by the government. The United
15 Way --

16 QUESTION: Well, it means the Christmas tree, it
17 means the thermometer, and I guess after Allegheny it
18 means the menorah next to the Christmas tree.

19 MR. RENNER: That is correct, Your Honor.

20 QUESTION: And the menorah may or may not be
21 identified with the Government --

22 MR. RENNER: And that --

23 QUESTION: -- but do we have any other factual
24 premises from which to draw that?

25 MR. RENNER: We do not, and if I might add, the

1 one testimony that we have in the record of a witness
2 called by the respondents indicated that when he viewed
3 the thermometer, he viewed this as government support for
4 the thermometer.

5 Our premise is that in this context, in this
6 location which is so predominantly historically a place
7 where government displays its messages, that a reasonable
8 observer will understand a message to be related to --

9 QUESTION: How does the menorah fare under your
10 reasonable observer test?

11 MR. RENNER: The menorah has been suggested to
12 us by courts of previous jurisdiction --

13 QUESTION: Under your -- not what some plurality
14 opinion of this Court might say, but under the reasonable
15 observer test.

16 MR. RENNER: Well, under the reasonable observer
17 test, we find it hard to believe that there would be very
18 many reasonable observers who would think that a menorah
19 is anything other than a purely religious symbol.

20 QUESTION: Nonetheless, the board approved it.

21 MR. RENNER: The board approved it, Your Honor,
22 as described before, based on the previous --

23 QUESTION: Is it your position a reasonable
24 observer would think it's a religious symbol sponsored by
25 the State?

1 MR. RENNER: Well, we think that it has such a
2 favored location on a prominent position of governmental
3 property that the only conclusion that a reasonable
4 observer would have is that it's approved and supported --

5 QUESTION: Mr. Renner --

6 MR. RENNER: -- by the government.

7 QUESTION: May I ask you one question -- excuse
8 me. I just want to -- is it your position that you can
9 permit the menorah while denying the cross?

10 MR. RENNER: That's not our position, Your
11 Honor.

12 QUESTION: Well, that's what it seemed to be,
13 and I just wanted to be sure it wasn't.

14 MR. RENNER: No. Our position is that we have
15 permitted the menorah based on helpful suggestions that
16 have been previously rendered --

17 (Laughter.)

18 MR. RENNER: -- that the menorah is not purely
19 religious.

20 QUESTION: Mr. Renner, there's just something
21 that's inconsistent with the defense that Ohio comes up
22 with.

23 You're here representing Ohio, you're an
24 assistant attorney general for Ohio, and you're saying,
25 this is a terrible thing if somebody puts up a sign in

1 this location people will think that it represents the
2 views of the State, but it's the State that has invited
3 people to put up signs here.

4 If you really were worried about people
5 confusing private messages to the State's message, you
6 could have established this location for signs somewhere
7 else. But to say that, put it up here, and then say,
8 however, not religious ones here because someone might
9 confuse that message with our message, well, why weren't
10 you worried about that for all other messages? I don't
11 understand that. That doesn't seem reasonable to me.

12 MR. RENNER: Your Honor, first of all, I'm not
13 certain that the State has ever invited the use of this
14 property for displays, but --

15 QUESTION: You said that any display could go
16 up.

17 MR. RENNER: I'm saying that we, based on
18 analysis of equal access, that we would not deny any
19 display based on speech content, but I would put out that
20 when the United Way barometer went up, it went up with the
21 approval of the State of Ohio, and people saw it as having
22 the approval of the State of Ohio, and that was
23 permissible because the State of Ohio is not required
24 constitutionally not to support the United Way.

25 QUESTION: Just close it to the public forum and

1 you would have no problem.

2 MR. RENNER: That's correct, Your Honor, but
3 we're not required to do that, because the First Amendment
4 only requires us to forestall from participating in
5 religious --

6 QUESTION: But it doesn't seem reasonable to me
7 to both do it and then come in complaining about people's
8 messages being mistaken for those of the State when you
9 have invited people, all people, not just religious groups
10 but all people to come in and stick their message up in
11 front of the Statehouse.

12 MR. RENNER: I don't think that's an accurate
13 description of what the State of Ohio --

14 QUESTION: Have you invited anybody to put a
15 message up whose message you disagree with?

16 MR. RENNER: I don't know that we've ever
17 invited anybody to put a message up.

18 QUESTION: Well, have you permitted anybody to
19 put a message up whose message you disagree with?

20 MR. RENNER: We've only permitted United Way --

21
22 QUESTION: Everything you've done is consistent
23 with the view --

24 MR. RENNER: No. The answer is no.

25 QUESTION: -- that whenever it's there you --

1 people will think you endorse it, is that right?

2 MR. RENNER: That's correct, Your Honor, and I'd
3 like to preserve the remainder of my time, if I may.

4 QUESTION: I'd like to ask you one quick
5 question, please.

6 Could you just repeat like in 30 seconds or very
7 briefly, what -- I quite agree with you, I don't see how
8 you could have a menorah and not have a cross. I don't
9 really -- I understand the difficulty of finding a
10 distinction, so you'd say, don't have either.

11 I see the picture, and I can understand you say,
12 gee, people will think this cross right in front of the
13 Statehouse is a State cross, but what I don't -- that's
14 your argument, all right. But what's the legal test that
15 will say whether it should be back 10 feet, 20 feet, 30
16 feet? What is the legal test?

17 It sounds as if the lower courts did apply a
18 reasonable observer test. Are you disagreeing with their
19 application of it?

20 MR. RENNER: Oh, absolutely.

21 QUESTION: What is this Court supposed to do, in
22 your opinion? Is this Court supposed to say, I've never
23 been to this square. I don't know if this photograph
24 really telescopes distances. What do you want us to do?

25 MR. RENNER: Your Honor, I want you to instruct

1 the Sixth Circuit that if they're going to apply a
2 reasonable observer test and a public forum notion they
3 still must determine what a reasonable observer would see
4 as the message from that public forum.

5 They must determine whether the -- is this a
6 State message or a private message? They must not simply
7 assume that because it's in a private forum everybody --
8 in a public forum, everybody is going to know it's private
9 speech.

10 QUESTION: Thank you, Mr. Renner.

11 MR. RENNER: Thank you, Your Honor.

12 QUESTION: Mr. Wolman, we'll hear from you.

13 ORAL ARGUMENT OF BENSON A. WOLMAN

14 ON BEHALF OF THE RESPONDENTS

15 MR. WOLMAN: Mr. Chief Justice, and may it
16 please the Court:

17 The State has chosen to recast some of the
18 events that have occurred in this matter. The record does
19 not support the notion that the menorah and the United Way
20 thermometer were the only items there.

21 The district judge in his finding of fact number
22 13 specifically noted that the United Way thermometer and
23 booths and arts festival displays, in addition to the
24 menorah and the State's tree, were examples. That's the
25 word the district judge used based on his findings, based

1 on his familiarity with the particular setting.

2 What is before the Court, we believe, is that
3 here we have a quintessential public forum, a public forum
4 in which the State has permitted a variety of displays,
5 and those displays suddenly the State chooses to confine.
6 Suddenly it chooses to say, my client's symbol shall not
7 be there, and it relies upon its claim of Establishment
8 Clause.

9 QUESTION: Mr. Wolman, is this an all-purpose
10 public forum at all times? That is, as I understood it,
11 unattended displays have only been allowed during the
12 holiday season. Am I correct in that?

13 MR. WOLMAN: No, Justice Scalia. In fact, the
14 record here reflects that such things as the arts
15 festival, which were not held during winter weather, and
16 which there were displays and booths, those, for instance,
17 were in the summer, and there's no --

18 QUESTION: I said unattended displays. I assume
19 these merchants did not walk away and leave their wares
20 just sitting there.

21 MR. WOLMAN: That may be during the daytime, but
22 the unattended displays of art have appeared there
23 overnight. Those are not just fold up the tents and
24 leave.

25 Nonetheless, there were -- the United Way

1 display was to the best of everyone's understanding not a
2 part of any holiday seasonal display, so it was a year-
3 round matter, and what we have here is the State suddenly
4 announcing a new rule, a new rule not having previously
5 precluded any display from being there. The record
6 doesn't reflect any given instance where that happened.

7 The new rule we think clearly violates the
8 precedents of this Court going back a substantial period,
9 and even in the modern era, *Larson v. Valente* as an
10 example, where the Court had held that where there might
11 be a compelling interest in the State to not violate the
12 Establishment Clause, nonetheless the State has a duty to
13 use mechanisms, mechanisms so as to preserve freedom of
14 expression, mechanisms that are, to use the Court's
15 language, closely fitted to the circumstances.

16 QUESTION: Well, Mr. Wolman, do you concede that
17 reasonable time, place, and manner regulations can be
18 adopted by the board, or the city --

19 MR. WOLMAN: Yes, Justice O'Connor.

20 QUESTION: -- for the use of this area?

21 MR. WOLMAN: Yes, Justice O'Connor.

22 QUESTION: And would one such possibility be no
23 unattended displays?

24 MR. WOLMAN: One possibility might be no
25 unattended displays at any time, including religious and

1 nonreligious. We would maintain that they could say, no
2 unattended displays so long as there was some legitimate
3 reason for extracting that part of the speech of the --
4 speech in that forum from what it is at present.

5 QUESTION: And I suppose they could designate a
6 certain smaller area of the open space for use by anyone
7 who has a display.

8 MR. WOLMAN: They could indeed.

9 QUESTION: Could a reason be that they didn't
10 want the Ku Klux Klan to get in on the act?

11 MR. WOLMAN: There is substantial evidence in
12 the record to suggest that, Justice Kennedy. It could
13 well be. The State did initially have public statements
14 and discussions regarding that it did not wish to have the
15 Klan display.

16 QUESTION: Could that be a legitimate reason for
17 adopting a rule prohibiting all unattended displays?

18 MR. WOLMAN: No, Justice Kennedy.

19 QUESTION: Why not? A perfectly valid
20 regulation can be passed from a number of motives, and it
21 seems to me if the State decides, you know, we're getting
22 a lot of flack from people who see this Klan display up
23 here of the cross, and we're taking heat from it, and we
24 realize we can't just ban the Klan's cross, but we're
25 going to ban everything and just avoid the problem. Why

1 would that raise a constitutional question?

2 MR. WOLMAN: We believe that when there is a
3 traditional public forum, as there is in this case, the
4 State cannot be in the position, as it did in this case,
5 of making ad hoc willy nilly judgments.

6 QUESTION: Well, but I'm not talking about an ad
7 hoc willy nilly judgment. I'm talking about a State
8 decision that we are simply not going to have any
9 unattended displays at any time in the future. It's
10 pulling in the limits of the forum.

11 MR. WOLMAN: It could pull in the limits of the
12 forum. We believe it ought not to be doing so for any
13 unholy -- any type of unholy reason.

14 QUESTION: But my question is, suppose,
15 following up the Chief Justice's question, the Commission
16 says, we have had for years a Christmas tree and a
17 menorah. Now we have a sign that is very controversial.
18 It's a symbol of hate to many people. The only way we can
19 stop this is to have a new rule, no unattended displays.
20 Is that constitutionally permissible?

21 MR. WOLMAN: We believe not. We believe that --

22 QUESTION: So that once you have this rule, the
23 State in perpetuity, or at least for the reasonable
24 future, has to allow the Ku Klux Klan cross?

25 MR. WOLMAN: No, Justice Kennedy. We believe

1 that time, place, and manner restrictions must be
2 reasonable.

3 The jurisprudence of this Court has for decades
4 held that time, place, and manner restrictions, reasonable
5 time, place, and manner restrictions are appropriate, but
6 should not be content-based. We do maintain that the
7 State could, indeed, exclude all unattended displays.

8 QUESTION: Why are you -- let me ask you a
9 question about that content-based -- supposing the State
10 regarded the Capitol grounds as something like a very
11 giant bulletin board that they put in their front hall.

12 Could they not say, we will only allow messages
13 to go up there that the State in general endorses, like
14 some kind of a poster saying don't smoke, or don't drink,
15 or contribute to the United Way, and so forth, things like
16 that that are not very controversial? Could they limit
17 the forum in that way, by content but only those things
18 the State thinks are -- that a sound public policy, it's
19 bipartisan and the rest, would support?

20 MR. WOLMAN: And, Justice Stevens, yes, in that
21 particular hypothetical example, they are not looking to
22 the content of individual speakers. They are withdrawing
23 the whole area as a public forum and just labeling it as a
24 State area.

25 QUESTION: Is that right? I mean, you think

1 that's an innocuous limitation? An innocuous limitation
2 is a limitation to only -- that kind of speech that the
3 State likes?

4 MR. WOLMAN: Well, frankly --

5 QUESTION: I think that's absolutely the worst
6 kind of limitation.

7 MR. WOLMAN: Justice Scalia, we do not find that
8 acceptable. We believe that this is a public forum area.
9 There's no question in my mind that the entire Statehouse
10 grounds could not be withdrawn from --

11 QUESTION: Mr. Wolman, do you believe the
12 Establishment Clause has nothing to say here? You have
13 answered the question so far that you can't distinguish
14 between the political message and the religious message,
15 certainly not one religion and another.

16 Mr. Renner seemed to be saying, well, we have to
17 be a little extra concerned about the endorsement notion
18 because there's an Establishment Clause that we have to do
19 something with.

20 How do you fit the Establishment Clause into the
21 way you view this question?

22 MR. WOLMAN: Justice Ginsburg, we believe that
23 the Establishment Clause clearly creates a legitimate
24 interest for the State to make an inquiry. When you have
25 a public forum, we do acknowledge the State has a

1 legitimate interest in honoring the Establishment Clause
2 and following its commands.

3 In this particular instance and in general the
4 State makes a major mistake. The Establishment Clause is
5 to be read along with the Free Exercise Clause and the
6 other expression clauses of the First Amendment. We
7 believe the Establishment Clause and the Free Exercise
8 Clause are co-guarantors of religious liberty.

9 It was not -- the Establishment Clause was not
10 designed to be hostile to religious expression.

11 QUESTION: Well, could we bring it down to this
12 case, and to make it concrete, if you can focus your
13 attention on the Second Circuit's decision in the Kaplan
14 case, and there Judge Feinburg and one of his colleagues
15 thought that no viewer -- in that case it happened to be a
16 menorah. It could have been cross -- no viewer, seeing
17 this religious symbol in front of the city hall, could
18 reasonably think that it was there without the approval of
19 the government.

20 Now, we're not taking there the statement of a
21 dolt who is not acquainted with public forum law, but two
22 respected judges from the Second Circuit, and what do we
23 make of that reaction?

24 MR. WOLMAN: Justice Ginsburg, we believe that
25 the Establishment Clause serves a very significant

1 interest for the Society, and as applied to this case, we
2 think the district court and, indeed, the circuit as well,
3 properly applied the reasonable observer test.

4 The State's position on this would ban all
5 religious expression in this context. We believe the
6 reconciliation of potentially conflicting provisions of
7 the Constitution requires a narrowly tailored approach,
8 closely fitted is I think the appropriate language, and in
9 so doing, the State has all of the time, place, and manner
10 restrictions that it customarily can use within the forum.
11 It can use those here. The State can use disclaimers if
12 it feels it becomes necessary, all of those.

13 QUESTION: You didn't ask to have this placed in
14 the particular place. You put it where you were told to
15 put it, is that --

16 MR. WOLMAN: It was not placed in a particular
17 place. It was placed closer to the street than to the
18 building.

19 Perhaps to understand, since Mr. Renner made
20 reference to the exhibit in their petition for cert, I
21 would encourage you in our brief on the merits to look at
22 supplemental exhibit 106 at the very end. That, I think,
23 gives you the kind of display.

24 The Klan cross was not up at that moment. It
25 had been vandalized. But you can see other crosses,

1 little ones, that were there, too. I appreciate the
2 State's photography from a low angle, shooting upward.
3 We, of course, engaged in distant photography.

4 QUESTION: But you wouldn't have any -- you
5 didn't say, we must have it at this location.

6 MR. WOLMAN: No, not at all. The State could
7 have said where, if it applied that to all symbols.

8 QUESTION: As far as the location and the size
9 of the sign, you --

10 MR. WOLMAN: The State didn't insist on a sign
11 of any particular size. The State was given --

12 QUESTION: Could it have?

13 MR. WOLMAN: It could have.

14 QUESTION: Could it have said, we want this sign
15 to be not of cardboard, we want it to be legible, large
16 letters -- could it have said that?

17 MR. WOLMAN: It could have, and on the facts in
18 this case, it took so long for the processes to go forward
19 my clients very speedily put together their symbol and the
20 disclaimer after the district court ruled a couple of days
21 before Christmas.

22 QUESTION: How about the size of the religious
23 symbol? Could the State have said, we will allow these
24 symbols but not so that they overwhelm the space, or
25 dictate a limit on the size?

1 MR. WOLMAN: Justice Ginsburg, the State may
2 well have limitations on size of any of the displays
3 within the forum, and if it ultimately became necessary,
4 in order to serve a compelling State interest of
5 Establishment Clause protection, the State could have
6 suggested limitations.

7 As it was, on the record in this case you had
8 the menorah, which was 14-feet high across, 10-feet high,
9 a Christmas tree at a distance which was 20-feet high.

10 QUESTION: Mr. Wolman, I confess not to
11 understand your argument, how you wish us to decide this
12 case. I had thought that the principle you would espouse
13 was the Lamb's Chapel principle, that if the State does
14 this for all others it is no violation of the
15 Establishment Clause to treat religion the same way as
16 others. Is that what you're appealing to?

17 MR. WOLMAN: That is correct.

18 QUESTION: But you've mentioned some case-by-
19 case evaluation. How does that fit with case-by-case
20 evaluation? Do you want us to evaluate, case by case,
21 whether there's too much identification with the
22 Statehouse, or do you want us to simply say, if you do it
23 for everybody else, you have to do it for religion? Which
24 is the approach you're urging?

25 MR. WOLMAN: Justice Scalia, we believe that

1 presumptively the speech should be treated -- religious
2 speech should be treated the same, presumptively, but --

3 QUESTION: But not necessarily.

4 MR. WOLMAN: But not an irrebuttable
5 presumption.

6 QUESTION: I see.

7 MR. WOLMAN: In other words, there may --

8 QUESTION: So maybe if I thought this is too
9 closely associated with the State Capitol, I -- it's just
10 a factual matter, whether I think the crosses are too
11 close to the Capitol, and if they are, then even though
12 you're allowing other speech, the cross can be excluded.

13 MR. WOLMAN: No, not excluded, Justice Scalia.
14 The State could impose time, place, and manner
15 restrictions and take a variety of measures, not
16 exclusions.

17 QUESTION: But not exclusions. Then it is not a
18 case-by-case evaluation you're urging on us.

19 MR. WOLMAN: No, it -- well --

20 QUESTION: It is, or it isn't?

21 MR. WOLMAN: Justice Scalia --

22 QUESTION: I'm talking about exclusion. I'm not
23 talking about -- let's leave time, place, and manner out
24 of here.

25 MR. WOLMAN: Exclusion, you're absolutely

1 correct, is not a case-by-case.

2 QUESTION: If you allow others to do it, you're
3 saying you have to allow crosses there.

4 MR. WOLMAN: That's correct, and time, place,
5 and manner restrictions might be appropriate in terms of,
6 if there is that overwhelming appearance of endorsement
7 that the State seems so worried --

8 QUESTION: Well, Mr. Wolman, that's what I
9 thought you had been getting at before, and I guess you've
10 relinquished this position if it was yours, but let me
11 just put it forward and get your response to it.

12 Let's assume that we do have something like a
13 Lamb's Chapel situation. It seems to me one of the
14 characteristics of the Lamb's Chapel situation is that the
15 use that has been allowed of the public facilities,
16 whatever they may be, has been sufficiently nonselective
17 and universal that sort of everybody knows that there is
18 no endorsement implication when suddenly a religious group
19 comes along and says, yes, we want to have a meeting in
20 this room, too.

21 I thought you were leaving open the door,
22 however, to a situation in which the religious use is in
23 some visual or some other way so remarkable, or so
24 different from, in some sense different from the prior
25 nonreligious uses, that somebody would not necessarily

1 know that there was no endorsement here.

2 And in a case like that, I thought you were
3 leaving the door open to a reasonable observer kind of
4 analysis, and I thought, so in that sense you're allowing
5 a case-by-case, or the possibility of a case-by-case
6 exception, even though you accept as a general, or propose
7 as a general rule the Lamb's Chapel analysis. Did I
8 misunderstand you in that respect?

9 MR. WOLMAN: I think not. I think I was
10 stating, one hopes sufficiently articulated, that when
11 there is this tradition, as in Lamb's Chapel, when there
12 is this understanding of the access to the forum, that
13 reasonable observers would understand the nature of the
14 forum.

15 QUESTION: So you've retracted the answer you
16 gave me, in other words.

17 MR. WOLMAN: No.

18 QUESTION: Right?

19 MR. WOLMAN: No, I believe not, Justice --

20 QUESTION: It has to be one or the other. We're
21 not talking about time, place, and manner. We're talking
22 about, having made the determination that you let other
23 people do it, must you let religious people do it, and I
24 thought your answer to me was yes, but you're answer to
25 Justice Souter --

1 MR. WOLMAN: No.

2 QUESTION: -- is not necessarily. If it's, you
3 know, a reasonable observer would confuse it with the
4 State, then you don't have to let them do it.

5 MR. WOLMAN: No, Justice Scalia. The reasonable
6 observer approach does not justify a ban. The reasonable
7 observer approach, that approach may only justify the use
8 of appropriate time, place, and manner devices.

9 QUESTION: So that means there would be no
10 content regulation. Does that mean, under the history of
11 this particular public forum, that if I came in and asked
12 you for an injunction requiring you to allow me to put up
13 a sign, "Vote for George Bush," someone that Ohio did not
14 endorse, they would have to allow that sign in that forum?

15 MR. WOLMAN: I believe that the State rules do
16 not prohibit that, and that the State --

17 QUESTION: So the answer is yes.

18 MR. WOLMAN: Yes.

19 QUESTION: They would have to allow that.
20 They'd have to allow political campaigning on the -- by --

21 MR. WOLMAN: That's correct.

22 QUESTION: Has that ever been done?

23 MR. WOLMAN: I do not know if that --

24 QUESTION: Is there anything in the record
25 suggesting --

1 MR. WOLMAN: I don't know of anything
2 specifically on that in the record. There was, after all
3 of this, a candidate for Governor who chose to camp out
4 for roughly a month on the Statehouse lawn, but of course,
5 that would have been attended.

6 QUESTION: That was attended.

7 (Laughter.)

8 QUESTION: I don't wish to make you retravel
9 ground you've already traveled, but I am still not clear
10 as to your answer whether or not at this juncture the
11 State could say, because there is highly unpopular speech
12 attended to the Ku Klux Klan symbol, we are enacting a
13 rule, no unattended symbols.

14 MR. WOLMAN: No. We believe that the State
15 cannot say, because there is hostility to this symbol, we
16 are closing it down. That's closing it down because of --

17 QUESTION: Could the State say that because
18 there is controversy over religious symbols generally at
19 Christmastime, we are going to leave the field, as it
20 were, and prohibit all unattended displays?

21 MR. WOLMAN: No, Justice Kennedy.

22 QUESTION: Well, can they abandon the public
23 forum? Can they terminate the public forum?

24 MR. WOLMAN: The State cannot terminate the
25 public forum, which -- this is one of the most

1 quintessential ever. This is the central square, the city
2 square.

3 QUESTION: But is every city square in every
4 State in the -- every capitol square in every capital in
5 the United States a public forum, and if not, why can't
6 Ohio say, we want to be like everybody else, and not make
7 it a public forum?

8 MR. WOLMAN: This is in fact --

9 QUESTION: Well, what is your position on that?

10 MR. WOLMAN: No. We believe that State Capitol
11 buildings and county buildings are traditional locations
12 for speech and, in fact, as this Court has noted in
13 Edwards v. South Carolina, this is one of those areas most
14 important to have speech.

15 QUESTION: So we can have a Ku Klux Klan cross
16 on every Statehouse lawn in the United States?

17 MR. WOLMAN: We could, depending on events that
18 occurred.

19 QUESTION: Not could, we must.

20 QUESTION: I think I see what you're getting at.
21 You regard the unattended as a time, place, and manner
22 restriction. You're saying you have to allow people to
23 march and picket and assemble and protest there, but you
24 don't have to allow unattended displays, is that it?

25 MR. WOLMAN: The State, for neutral reasons, not

1 content-based, the State could choose not to have
2 unattended displays.

3 QUESTION: And that's a time, place -- that's a
4 manner restriction.

5 MR. WOLMAN: Yes.

6 QUESTION: And is it also your position, in
7 answer to Justice Souter and me, that the State could
8 place a manner restriction only upon religious displays
9 out of Establishment Clause concerns? That is, everybody
10 else can have an unattended display, but if, on a case-
11 by-case basis, there's too much of a risk of associating
12 it with the Capitol, religious groups cannot have
13 unattended displays. Is that what you were saying to
14 Justice Souter?

15 MR. WOLMAN: No, we would --

16 QUESTION: No?

17 MR. WOLMAN: We would say that religious
18 displays must be permitted, not banned.

19 QUESTION: They're permitted. They just have to
20 be attended, that's all.

21 MR. WOLMAN: No. We're saying if there are
22 other forms of displays, political, social, whatever those
23 forms of displays, then the religious symbols must be
24 permitted. We do maintain --

25 QUESTION: On the same rules that every other

1 display is permitted. In other words, you're saying
2 everybody's got to play by the same rules.

3 MR. WOLMAN: Everyone has to play --

4 QUESTION: Right.

5 MR. WOLMAN: -- by the same rules.

6 QUESTION: And that's as far as you go, isn't
7 it?

8 MR. WOLMAN: Not quite.

9 QUESTION: Well --

10 QUESTION: Then you are saying the Establishment
11 Clause doesn't operate.

12 MR. WOLMAN: No. We are saying that in those --

13 QUESTION: It's not relevant, that --

14 MR. WOLMAN: Well, I think one is not --

15 QUESTION: But if you said, if everything is the
16 same, the Establishment Clause doesn't apply to all
17 speech.

18 MR. WOLMAN: If everything is the same, the
19 Establishment Clause would not apply, but these things
20 happen in different ways in different places, and
21 everything may not be the same. There may be some
22 circumstance where, for instance, the State --

23 QUESTION: Well, could you give me an instance
24 where you could ban a religious symbol, but could not ban
25 the thermometer?

1 MR. WOLMAN: I can't think --

2 QUESTION: Or you could ban the Klan cross, but
3 you could not ban the red cross, which people I think
4 don't associate with religion.

5 MR. WOLMAN: I cannot think of an example where
6 you could outright ban.

7 QUESTION: So then, the Establishment Clause you
8 say really doesn't bear on this problem.

9 MR. WOLMAN: The Establishment Clause may bear
10 where, if absent certain types of handling of displays it
11 becomes necessary for some special reason, given the
12 extraordinarily immense display as an example, it may be
13 appropriate to have in general time, place, and manner
14 restrictions.

15 QUESTION: Well, Mr. Wolman, supposing you have
16 not the State Capitol in Columbus, where you have 10
17 acres, but a State Capitol which has a much, much smaller
18 grounds, and they've got some beautiful flowers planted
19 there, and they say, you know, we're not having any
20 displays here at all on these grounds. There's a capital
21 park across the street that you can go to, but we just
22 don't have any displays, attended or unattended, on these
23 grounds. Is that permissible?

24 MR. WOLMAN: That's content neutral, and it is
25 permissible.

1 QUESTION: Well then, why can't Ohio return to
2 that sort of a thing even though previously it wasn't?

3 MR. WOLMAN: It could return to it, if --

4 QUESTION: But I thought you said they can never
5 get out of their public forum.

6 MR. WOLMAN: No, I was speaking of the general
7 public forum, slightly distinguished from displays.

8 If they have a content-neutral reason for not
9 having the displays there --

10 QUESTION: What if they just have a content-
11 neutral rule?

12 MR. WOLMAN: Yes.

13 QUESTION: Why do we have to inquire into their
14 motive why they have a content-neutral rule?

15 MR. WOLMAN: If they do have a content-neutral
16 rule, then, indeed, they could exclude unattended displays
17 from the public forum, for a variety of reasons. I mean,
18 it may be that unattended at night creates problems.
19 People might walk into them, lighting, there's all kinds
20 of reasons one can come up with why --

21 QUESTION: No, they're just doing it because
22 they just don't like the KKK thing. It gets a lot of
23 their citizens mad, and they say, well, if we let
24 everybody else do it, we have to let the KKK do it, and
25 it's not worth it. We're just not going to have any

1 unattended displays. Can they do that?

2 MR. WOLMAN: No.

3 QUESTION: On the other hand, if the State is
4 broke, and it says, the only way we can balance the budget
5 is to sell our 10-acre plot for an office building, you'd
6 let them do that, wouldn't you?

7 MR. WOLMAN: We would, indeed.

8 QUESTION: So there's one circumstance in which
9 they can totally eliminate the public forum and you agree.

10 (Laughter.)

11 QUESTION: Mr. Wolman --

12 MR. WOLMAN: That's absolutely correct.

13 QUESTION: Mr. Wolman -- I hate to interrupt
14 you, but I'd like to ask just a couple of questions, if I
15 may.

16 You say that this is a religious symbol. What
17 is the religion of the Klan?

18 MR. WOLMAN: The Klan members hold themselves
19 out in this record as Christians. They hold themselves
20 out as the symbol being not just a symbol of their faith,
21 but a symbol of history, a symbol of history that many of
22 us may find, at the very least, disquieting.

23 Nonetheless, it reflects a symbol of the
24 Confederate cross, the Scottish clans of the 1300's --
25 it's not just a religious symbol. It has a variety of

1 meanings, as do most types of symbols.

2 QUESTION: But I think the argument -- the
3 reason I ask is so much of the argument is based on the
4 assumption that this cross is a religious symbol. Now, is
5 there testimony to the effect that it is a religious
6 symbol.

7 MR. WOLMAN: There is testimony as to the mixed
8 purpose, and indeed, not just testimony, but the
9 disclaimer itself specifically recited -- it's at page 12
10 of our brief in chief. The disclaimer itself specifically
11 said it was to express respect for the holiday season and
12 to in fact test the government of the State of Ohio,
13 challenge them over their discriminatory application,
14 granting the application of the menorah.

15 QUESTION: Well, if it has a -- and I don't know
16 what the mix is. Let's say, 50-50, 50 whatever other
17 reasons, and 50 religious, then how does that become a
18 free exercise problem?

19 MR. WOLMAN: Well, we believe that free exercise
20 is not a problem. We believe that --

21 QUESTION: Well, I mean, it's a problem in this
22 case.

23 MR. WOLMAN: In this case, the State is
24 asserting that the Establishment Clause bans it, and we
25 think they're totally off-base in doing it.

1 QUESTION: Well, now, with that said, what is --
2 what does a burning cross symbolize?

3 MR. WOLMAN: A burning cross, I believe, would
4 symbolize the general orientation of the Ku Klux Klan
5 against racial minorities, not just you, ethnic
6 minorities, myself and others, a whole variety of
7 purposes.

8 QUESTION: So there are some people -- as I
9 understand the record, there were some concerns that some
10 of the citizens of Columbus, when they saw that, could
11 actually see fire on that cross.

12 MR. WOLMAN: Could see fire, you mean
13 figuratively?

14 QUESTION: That's right.

15 MR. WOLMAN: Perhaps some could. The record
16 here indicates, though, there were no security issues.
17 The judge specifically --

18 QUESTION: But doesn't the record suggest,
19 though, that there was some concern that people would see
20 more than the religious symbol in that cross?

21 MR. WOLMAN: Yes, I think that's true, and
22 that's a political message, and one very much protected by
23 the Free Speech Clause.

24 QUESTION: But that message doesn't implicate
25 the Establishment Clause.

1 MR. WOLMAN: We believe not. The political
2 message does not.

3 QUESTION: Do you think that the political --
4 with respect to the cross, that the political message for
5 the Klan overwhelms the religious free exercise
6 considerations, that if someone -- if I said that a member
7 of the Ku Klux Klan is carrying a cross down Pennsylvania
8 Avenue, would the average person, or the reasonable
9 person, think that that, that the Klan is engaged in an
10 exercise of religion, or a political statement?

11 MR. WOLMAN: My own personal views, but not in
12 the record, are that I would view it as mostly a political
13 statement, but we -- and in fact we believe that the State
14 has used the Establishment Clause as a make-weight in this
15 matter. The Establishment Clause is not irrelevant, but
16 we think that it has been --

17 QUESTION: So we're shoe-horning a political
18 case into the religious component of the First Amendment.

19 MR. WOLMAN: We believe the State has done just
20 that.

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wolman.
23 The case is submitted.

24 (Whereupon, at 11:13 a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, ET AL.,
Petitioner v. VINCENT J. PINETTE, DONNIE A. CARR
AND KNIGHTS OF THE KU KLUX KLAN.

CASE NO. :94-780

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Don Mari Federico*

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'95 MAY -3 P3:04