

SUPREME COURT OF THE UNITED STATES

No. 94-780

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT
[June 29, 1995]

JUSTICE GINSBURG, dissenting.

We confront here, as JUSTICES O'CONNOR and SOUTER point out, a large Latin cross that stood alone and unattended in close proximity to Ohio's Statehouse. See *ante*, at 5-6 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 10-11 (SOUTER, J., concurring in part and concurring in judgment). Near the stationary cross were the government's flags and the government's statues. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message.

If the aim of the Establishment Clause is genuinely to uncouple government from church, see *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947), a State may not permit, and a court may not order, a display of this character. Cf. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 197-214 (1992) (negative bar against establishment of religion implies affirmative establishment of secular public order). JUSTICE SOUTER, in the final paragraphs of his opinion, suggests two arrangements that might have distanced the State from "the principal symbol of Christianity around the world," see *ante*, at 10: a

sufficiently large and clear disclaimer, *ante*, at 11-12;¹ or an area reserved for unattended displays carrying no endorsement from the State, a space plainly and permanently so marked. *Ante*, at 12-13. Neither arrangement is even arguably present in this case. The District Court's order did not mandate a disclaimer. See App. to Pet. for Cert. A26 ("Plaintiffs are entitled to an injunction requiring the defendants to issue a permit to erect a cross on Capitol Square"). And the disclaimer the Klan appended to the foot of the cross² was unsteady: it did not identify the Klan as sponsor; it failed to state unequivocally that Ohio did not endorse the display's message; and it was not

¹Cf. *American Civil Liberties Union v. Wilkinson*, 895 F. 2d 1098, 1101, n. 2, 1106 (CA6 1990) (approving disclaimer ordered by District Court, which had to be "prominently displayed immediately in front of" the religious symbol and "readable from an automobile passing on the street directly in front of the structure"; the approved sign read: "This display was not constructed with public funds and does not constitute an endorsement by the Commonwealth [of Kentucky] of any religion or religious doctrine.") (quoting District Court); *McCreary v. Stone*, 739 F. 2d 716, 728 (CA2 1984) (disclaimers must meet requirements of size, visibility, and message; disclaimer at issue was too small), *aff'd*, 471 U. S. 83 (1985) (*per curiam*); Parish, *Private Religious Displays in Public Fora*, 61 U. Chi. L. Rev. 253, 285-286 (1994) (disclaimer must not only identify the sponsor, it must say "in no uncertain language" that the government's permit "in no way connotes [government] endorsement of the display's message"; the "disclaimer's adequacy should be measured by its visibility to the average person viewing the religious display").

²The disclaimer stated: "[T]his cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." See App. to Pet. for Cert. A15-A16.

shown to be legible from a distance. The relief ordered by the District Court thus violated the Establishment Clause.

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Whether a court order allowing display of a cross, but demanding a sturdier disclaimer, could withstand Establishment Clause analysis is a question more difficult than the one this case poses. I would reserve that question for another day and case. But I would not let the prospect of what might have been permissible control today's decision on the constitutionality of the display the District Court's order in fact authorized. See *ante*, at 21 (appendix to dissent of STEVENS, J.) (photograph of display).