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 SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Part IV, in which the CHIEF JUSTICE, JUSTICE KENNEDY and JUSTICE THOMAS join.

The Establishment Clause of the First Amendment, made binding upon the States through the Fourteenth Amendment, provides that government "shall make no law respecting an establishment of religion." The question in this case is whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government.

Capitol Square is a 10-acre, state-owned plaza surrounding the Statehouse in Columbus, Ohio. For over a century the square has been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious. Ohio Admin. Code Ann. §128–4–02(A) (1994) makes the square available "for use by the public . . .

for free discussion of public questions, or for activities of a broad public purpose," and Ohio Rev. Code Ann. §105.41 (1994), gives the Capitol Square Review and Advisory Board responsibility for regulating public access. To use the square, a group must simply fill out an official application form and meet several criteria, which concern primarily safety, sanitation, and non-interference with other uses of the square, and which are neutral as to the speech content of the proposed event. App. 107– 110; Ohio Admin. Code §128–4–02 (1994).

It has been the Board's policy "to allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square." Brief for Petitioner 3–4. Such diverse groups as homosexual rights organizations, the Ku Klux Klan and the United Way have held rallies. The Board has also permitted a variety of unattended displays on Capitol Square: a State-sponsored lighted tree during the Christmas season, a privately-sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival. Although there was some dispute in this litigation regarding the frequency of unattended displays, the District Court found, with ample justification, that there was no policy against them. 844 F. Supp. 1182, 1184 (SD Ohio 1993).

In November 1993, after reversing an initial decision to ban unattended holiday displays from the square during December 1993, the Board authorized the State to put up its annual Christmas tree. On November 29, 1993, the Board granted a rabbi's application to erect a menorah. That same day, the Board received an application from respondent Donnie Carr, an officer of the Ohio Ku Klux Klan, to place a cross on the square from December 8, 1993, to December 24, 1993. The Board denied that application on December 3, informing the Klan by letter that the decision to deny "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." App. 47.

Two weeks later, having been unsuccessful in its effort to obtain administrative relief from the Board's decision, the Ohio Klan, through its leader Vincent Pinette, filed the present suit in the United States District Court for the Southern District of Ohio, seeking an injunction requiring the Board to issue the requested permit. The Board defended on the ground

that the permit would violate the Establishment Clause. The District Court determined that Capitol Square was a traditional public forum open to all without any policy against free-standing displays; that the Klan's cross was entirely private expression entitled to full First Amendment protection; and that the Board had failed to show that the display of the cross could reasonably be construed as endorsement of Christianity by the State. The District Court issued the injunction and, after the Board's application for an emergency stay was denied, 510 U. S. ___ (1993) (STEVENS, J., in chambers), the Board permitted the Klan to erect its cross. The Board then received, and granted, several additional applications to erect crosses on Capitol Square during December 1993 and January 1994.

On appeal by the Board, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment. 30 F. 3d 675 (1994). That decision agrees with a ruling by the Eleventh Circuit, *Chabad-Lubavitch* v. *Miller*, 5 F. 3d 1383 (1993), but disagrees with decisions of the Second and Fourth Circuits, *Chabad-Lubavitch* v. *Burlington*, 936 F. 2d 109 (CA2 1991), cert. denied, 505 U. S. 1218 (1992), *Kaplan* v. *Burlington*, 891 F. 2d 1024 (CA2 1989), cert. denied, 496 U. S. 926 (1990), *Smith* v. *County of Albemarle*, 895 F. 2d 953 (CA4), cert. denied, 498 U. S. 823 (1990). We granted certiorari. 513 U. S. ___ (1995).

First, a preliminary matter: Respondents contend that we should treat this as a case in which freedom of speech (the Klan's right to present the message of the cross display) was denied because of the State's disagreement with that message's political content, rather than because of the State's desire to distance itself from sectarian religion. They suggest in their merits brief and in their oral argument that Ohio's genuine reason for disallowing the display was disap-

proval of the political views of the Ku Klux Klan. Whatever the fact may be, the case was not presented and decided that way. The record facts before us and the opinions below address only the Establishment Clause issue;[1] that is the question upon which we granted certiorari; and that is the sole question before us to decide.

Respondents' religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. ___ (1993); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990); *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981). Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron*, *supra*, at 647, or even acts of worship, *Widmar*, *supra*, at 269, n.6. Petitioners do

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[1]Respondents claim that the Sixth Circuit's statement that "[z]ealots have First Amendment rights too" even if their views are unpopular, shows that the case is actually about discrimination against political speech. That conclusion is possible only if the statement is ripped from its context, which was this: "The potency of religious speech is not a constitutional infirmity; the most fervently devotional and blatantly sectarian speech is protected when it is private speech in a public forum. Zealots have First Amendment rights too." 30 F. 3d 675, 680 (CA6 1994). The court was obviously addressing zealous (and unpopular) *religious* speech.

not dispute that respondents, in displaying their cross, were engaging in constitutionally protected expression. They do contend that the constitutional protection does not extend to the length of permitting that expression to be made on Capitol Square.

It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. *Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983). The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802–803 (1985). If the former, a State's right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place and manner restrictions (a ban on all unattended displays, which did not exist here, might be one such), but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. *Perry Ed. Assn., supra,* at 45. These strict standards apply here, since the District Court and the Court of Appeals found that Capitol Square was a traditional public forum. 844 F. Supp., at 1184; 30 F. 3d, at 678.

Petitioners do not claim that their denial of respondents' application was based upon a content-neutral time, place, or manner restriction. To the contrary, they concede—indeed it is the essence of their case—that the Board rejected the display precisely because its content was religious. Petitioners advance a single justification for closing Capitol Square to respondents' cross: the State's interest in avoiding official endorsement of Christianity, as required by the Establishment

Clause.

There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. See *Lamb's Chapel, supra,* at ___ (slip op., at 10–11); *Widmar, supra,* at 271. Whether that interest is implicated here, however, is a different question. And we do not write on a blank slate in answering it. We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content. *Lamb's Chapel*, *supra*; *Widmar*, *supra*.

In *Lamb's Chapel*, a school district allowed private groups to use school facilities during off-hours for a variety of civic, social and recreational purposes, excluding, however, religious purposes. We held that even if school property during off-hours was not a public forum, the school district violated an applicant's free-speech rights by denying it use of the facilities solely because of the religious viewpoint of the program it wished to present. 508 U. S., at ___ (slip op., at 6–11). We rejected the district's compelling-state-interest Establishment Clause defense (the same made here) because the school property was open to a wide variety of uses, the district was not directly sponsoring the religious group's activity, and "any benefit to religion or to the Church would have been no more than incidental." *Id.*, at ___ (slip op., at 10). The *Lamb's Chapel* reasoning applies *a fortiori* here, where the property at issue is not a school but a full-fledged public forum.

Lamb's Chapel followed naturally from our decision in *Widmar*, in which we examined a public

university's exclusion of student religious groups from facilities available to other student groups. There also we addressed official discrimination against groups who wished to use a "generally open forum" for religious speech. 454 U. S., at 269. And there also the State claimed that its compelling interest in complying with the Establishment Clause justified the content-based restriction. We rejected the defense because the forum created by the State was open to a broad spectrum of groups and would provide only incidental benefit to religion. *Id.*, at 274. We stated categorically that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Ibid.*

Quite obviously, the factors that we considered determinative in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

Petitioners argue that one feature of the present case distinguishes it from *Lamb's Chapel* and *Widmar*: the forum's proximity to the seat of government, which, they contend, may produce the perception that the cross bears the State's approval. They urge us to apply the so-called "endorsement test," see, *e.g.*, *Allegheny County* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573 (1989); *Lynch* v. *Donnelly*, 465 U. S. 668 (1984), and to find that, because an observer might mistake private expression for officially endorsed religious expression, the State's content-based restriction is constitutional.

We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the

"endorsement test" which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us. "Endorsement" connotes an expression or demonstration of approval or support. The New Shorter Oxford English Dictionary 818 (1993); Webster's New Dictionary 845 (2d ed. 1950). Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." *Allegheny County, supra,* at 593 (citing cases). We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion. See, *e.g.*, *Bowen* v. *Kendrick*, 487 U. S. 589, 608 (1988); *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481, 486–489 (1986); *Mueller* v. *Allen*, 463 U. S. 388 (1983); *McGowan* v. *Maryland*, 366 U. S. 420 (1961). Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, *Lynch*, *supra*, or else government action alleged to *discriminate in favor* of private religious expression or activity, *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. ___ (slip op., at 18–20) (1994), *Allegheny County, supra*. The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test.

Petitioners rely heavily on *Allegheny County* and *Lynch,* but each is easily distinguished. In *Allegheny County* we held that the display of a privately-sponsored crèche on the "Grand Staircase" of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not, however, open to all on an equal basis, so the County was *favoring* sectarian religious expression. 492

U. S., at 599–600, and n. 50 ("[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays"). We expressly distinguished that site from the kind of public forum at issue here, and made clear that if the staircase were available to all on the same terms, "the presence of the crèche in that location for over six weeks would then *not* serve to associate the government with the crèche." *Ibid.* (emphasis added). In *Lynch* we held that a city's display of a crèche did not violate the Establishment Clause because, in context, the display did not endorse religion. 465 U. S., at 685–687. The opinion does assume, as petitioners contend, that the *government's* use of religious symbols is unconstitutional if it effectively endorses sectarian religious belief. But the case neither holds nor even remotely assumes that the government's neutral treatment of *private* religious expression can be unconstitutional.

Petitioners argue that absence of perceived endorsement was material in *Lamb's Chapel* and *Widmar*. We did state in *Lamb's Chapel* that there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed," 508 U. S., at ___ (slip op., at 10). But that conclusion was not the result of empirical investigation; it followed directly, we thought, from the fact that the forum was open and the religious activity privately sponsored. See *ibid*. It is significant that we referred only to what would be thought by "the community"—not by outsiders or individual members of the community uninformed about the school's practice. Surely some of the latter, hearing of religious ceremonies on school premises, and not knowing of the premises' availability and use for all sorts of other private activities, *might* leap to the erroneous conclusion of state endorsement. But, we in effect said, given an open forum and private sponsorship, erroneous conclusions do not count. So

also in *Widmar*. Once we determined that the benefit to religious groups from the public forum was incidental and shared by other groups, we categorically rejected the State's Establishment Clause defense. 454 U. S., at 274.

What distinguishes *Allegheny County* and the dictum in *Lynch* from *Widmar* and *Lamb's Chapel* is the difference between government speech and private speech. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U. S., at 250 (O'CONNOR, J., concurring).[2] Petitioners assert, in effect, that that distinction disappears when the private speech is conducted too close to the symbols of government. But that, of course, must be merely a subpart of a more general principle: that the distinction disappears whenever private speech can be mistaken for government speech. That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake.

Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would

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[2]This statement in JUSTICE O'CONNOR's *Mergens* concurrence is followed by the observation: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U. S., at 250. JUSTICE O'CONNOR today says this observation means that, even when we recognize private speech to be at issue, we must apply the endorsement test. *Post*, at 4. But that would cause the second sentence to contradict the first, saying in effect that the "difference between *government* speech . . . and *private* speech" is *not* "crucial."

violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate*. But those situations, which involve governmental *favoritism*, do not exist here. Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years. Private religious speech cannot be subject to veto by those who see favoritism where there is none.

The contrary view, most strongly espoused by JUSTICE STEVENS, *post*, at 11–12, but endorsed by JUSTICE SOUTER and JUSTICE O'CONNOR as well, exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 61, 70–71 (1976); *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557 (1980). It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives, see *Cohen* v. *California*, 403 U. S. 15, 26 (1971), than to private prayers. This would be merely bizarre were religious speech simply *as* protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech con-

nected to the State only through its occurrence in a public forum.

Since petitioners' "transferred endorsement" principle cannot possibly be restricted to squares in front of state capitols, the Establishment Clause regime that it would usher in is most unappealing. To require (and permit) access by a religious group in *Lamb's Chapel*, it was sufficient that the group's activity was not in fact government sponsored, that the event was open to the public, and that the benefit of the facilities was shared by various organizations. Petitioners' rule would require school districts adopting similar policies in the future to guess whether some undetermined critical mass of the community might nonetheless perceive the district to be advocating a religious viewpoint. Similarly, state universities would be forced to reassess our statement that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U. S., at 274. Whether it does would henceforth depend upon immediate appearances. Policy makers would find themselves in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other. Every proposed act of private, religious expression in a public forum would force officials to weigh a host of imponderables. How close to government is too close? What kind of building, and in what context, symbolizes state authority? If the State guessed wrong in one direction, it would be guilty of an Establishment Clause violation; if in the other, it would be liable for suppressing free exercise or free speech (a risk not run when the State restrains only its *own* expression).

The "transferred endorsement" test would also disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause. That principle is the basis for the constitutionality of a broad range of laws, not

merely those that implicate free-speech issues, see, *e.g.*, *Witters*, *supra*; *Mueller*, *supra*. It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement.[3]

If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the

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[3]If it is true, as JUSTICE O'CONNOR suggests, *post*, at 5, that she would not "be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a public forum that the government has administered properly," then she is extending the "endorsement test" to private speech to cover an eventuality that is "not likely" to occur. Before doing that, it would seem desirable to explore the precise degree of the unlikelihood (is it perhaps 100%?)—for as we point out in text, the extension to private speech has considerable costs. Contrary to what JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE STEVENS argue, the endorsement test does not supply an appropriate standard for the inquiry before us. It supplies no standard whatsoever. The lower federal courts that the concurrence identifies as having "applied the endorsement test in precisely the context before us today," *post*, at 4, have reached precisely *differing* results —which is what led the Court to take this case. And if further proof of the invited chaos is required, one need only follow the debate between the concurrence and JUSTICE STEVENS' dissent as to whether the hypothetical beholder who will be the determinant of "endorsement" should be *any* beholder (no matter how unknowledgeable), or the *average* beholder, or (what JUSTICE STEVENS accuses the concurrence of favoring) the "ultra-reasonable" beholder. See *post*, at 8–12 (O'CONNOR, J., concurring in judgment); *post*, at 12–13 (STEVENS, J., dissenting). And of course even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach

Square to be identified as such. That would be a content-neutral "manner" restriction which is assuredly constitutional. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). But the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.[4]

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Religious expression cannot violate the

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consistent answers as to what any beholder, the average beholder, or the ultra-reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield.

[4]For this reason, among others, we do not inquire into the adequacy of the identification which was attached to the cross ultimately erected in this case. The difficulties posed by such an inquiry, however, are yet another reason to reject the principle of "transferred endorsement." The only principled line for adequacy of identification would be identification that is legible at whatever distance the cross is visible. Otherwise, the uninformed viewer who does not have time or inclination to come closer to read the sign might be misled, just as (under current law) the uninformed viewer who does not have time or inclination to inquire whether speech in Capitol Square is publicly endorsed speech might be misled. Needless to say, such a rule would place considerable constraint upon religious speech, not to mention that it would be ridiculous. But if one rejects that criterion, courts would have to decide (on what basis we cannot imagine) how large an identifying sign is large enough. Our Religion Clause jurisprudence is complex enough without the addition of this highly litigable feature.

Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar respondents' cross from Capitol Square.

The judgment of the Court of Appeals is

affirmed.