CASE SCHEDULED FOR ORAL ARGUMENT ON NOVEMBER 14, 2016

No. 16-5047

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

A.N.S.W.E.R. COALITION, (ACT NOW TO STOP WAR AND END RACISM),
APPELLANT,

v.

W. RALPH BASHAM, DIRECTOR, SECRET SERVICE, AND SALLY JEWELL,
SECRETARY, U.S. DEPARTMENT OF THE INTERIOR,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORRECTED REPLY BRIEF FOR APPELLANT

CARL L. MESSINEO
MARA VERHEYDEN-HILLIARD
THE PARTNERSHIP FOR CIVIL JUSTICE FUND
617 Florida Avenue, NW
Washington, DC 20001
T (202) 232-1180; F (202) 747-7747
cm@justiceonline.org
mvh@justiceonline.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

**Authorities upon which we chiefly rely are marked with an asterisk.*

Other Authorities

Regulations

GLOSSARY

ANSWER	Act Now to Stop War and End Racism Coalition
DOI	Department of the Interior
NPS	National Park Service
PIC	Presidential Inaugural Committee
PICA	Presidential Inaugural Ceremonies Act

I. Summary of Argument

The government urges a radical expansion of the government speech doctrine that it has never before sought. The government asks the Court to expand the government speech doctrine to allow agencies to take quintessential public fora at the central moment of their use by the people for assembly, speech and debate, and petitioning of the government, and redesignate them into exclusive government speech zones for use by a private actor whose viewpoint is aligned with the government.

The speech at issue, while favored by the government, does not doctrinally constitute "government speech" nor do the government's restrictions advance the interests undergirding the government speech doctrine. The government cannot establish the applicability of the three *Walker* factors and even urges abandonment of the requirement of government control. NPS advances the government speech doctrine because it fails a public forum analysis and seeks to immunize itself from the Free Speech Clause.

The public forum analysis framework applies where, as here, the government provides a forum for private speech. More precisely, the government is not creating a forum but is administering access to quintessential traditional public forum space to be used by private actors or individuals for free speech.

The government's challenged regulations restrict access to spectator space

abutting the Inaugural Parade for exclusive use of its favored permittee, the PIC. The government acknowledges that the viewpoint of the PIC is favored as a pro-government viewpoint.

The regulations are identity-based, content-based and viewpoint-based restrictions on speech. The government has never asserted a compelling interest. It fails to show that discriminatory allocation of public forum space is needed to advance a substantial government interest. Finally, the government does not challenge that it unconstitutionally delegates to PIC the authority to determine on a viewpoint basis who may access the public fora of Freedom Plaza abutting the Inaugural parade.

II. Introduction and Overview

In an unprecedented filing, the government asserts the authority to take quintessential public forum spaces at critical moments of public discourse and redesignate them as exclusive government speech or No Free Speech Zones.

Unable to meet its burden under public forum analysis, the government now seeks to circumvent long-held and established First Amendment requirements by claiming that it is the speaker. *See* Appellee's Br. 16 ("the Free Speech Clause of the First Amendment is not implicated"). It does so in an attempt to assert the government speech doctrine. The marked feature of the challenged regulatory

preference is the exclusion or blocking of dissenting organizations and their voices in favor of elevating generally pro-administration viewpoints in the marketplace of ideas. Government-supportive speech cannot be conflated, doctrinally, with "government speech."

In its government speech analysis, the government submits that the challenged public space set-aside is authorized precisely because it allows the government to exclude disfavored views. *See* Appellee's Br. 18 ("the government is entitled to its own speech without the need to include other views").

This assertion and concession is fatal to the government's position under the applicable framework, i.e., public forum analysis, which prohibits viewpoint- or content-based discrimination absent a compelling interest (which is not claimed here). The government fails to meet its burden even under a substantial government interest standard.

Nor is the government speech doctrine applicable. The government does not speak from PIC Bleacher Areas or control speech of the private citizens from these areas. It does not adopt the expressions from bleacher areas as the government's expression of policy or messaging.

Access to a unique public demonstration forum such as Freedom Plaza – which ANSWER was permitted to use alongside PIC for the 2009 Inauguration – presents a classic example of appropriate public forum analysis. Yet, ANSWER is

barred from ever accessing Freedom Plaza for organized collective expression of dissent on this key day.

There is no limitation to the scope of these zones. The new theory the government advances provides unlimited usurpation of public space. With the ruling it requests, the government can return to its 1997 position rejected by this Court, where it sought a blocking permit for the entire length of Pennsylvania Avenue and sought to exclude dissenters under penalty of arrest. The request, *sub silentio*, is for effective reversal of *Mahoney v. Babbitt* as well as radical restriction of public forum doctrine.

The government turns to *Quaker Action IV* claiming that "the Court held that in order for the government to engage in its own speech … [it could] establish in advance by regulation a schedule of recurrent annual events that would constitute NPS events." Appellee's Br. 19. Nowhere in *Quaker Action* does the Court address government speech. *See A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975). In fact, the Court expressed concerns that there be standards and procedures for the selection of any set-aside events to avoid political overtones where such designations were used by NPS to abridge dissent. *See* Appellant's Br. 59-60. Least of all does *Quaker Action* support redesignation at key moments of free speech and political expression to become events of private advocacy groups supporting the government's viewpoint.

When NPS promulgated regulations regarding annual celebration events thereafter, it did not assert that these events constituted government speech, which by definition excludes competing viewpoints. To the contrary, the government described the set-aside as a practical measure for repeating thematic events and "encourage[d] the expression of views regarding these events and participation in them by all members of the public." JA 407.[1] These events expressly permitted persons with dissenting views to enter and leaflet in advocacy of their views. *Id.* ("[t]he distribution of literature within a National Celebration Event is permissible …").

When NPS promulgated the regulations at issue, and received nearly 3,000 comments, vastly in opposition, at no point did the government in its required Response to Comments and Explanation of the Final Regulations state that the regulations were advancing government speech. JA 818, 819-22.

Quaker Action is clear that the government's authority to reserve space for recurring annual NPS-sponsored events applies only in the absence of discrimination or political overtones or abridgments. Numerous special event

[1] NPS asserted it would conduct public meetings "to obtain the views of members of the public on proposals as well as to solicit any additional suggestions for activities within the theme and format of the Christmas Pageant." NPS also stated that upon expansion of activities included in National Celebration Events it would follow these procedures in developing the event format and that persons and groups were welcome to apply to participate in a set-aside event's program. JA 407.

activities were identified on a recurrent basis, including "musical presentations, athletic events, pageants, dramas, walking tours." JA 407. At the time that NPS promulgated regulations following the *Quaker Action* Court's instructions, it sought to establish a constitutionally fair permitting scheme that accommodated recurring National Celebration Events when it came to competing use of public space in a manner that did not have political overtones or worked to the abridgement of dissenting speech. It was to allow for non-discriminatory inclusion. Nothing in *Quaker Action* authorized the decades-later creation of exclusion zone set-asides for a private, partisan speaker.

Moreover, the space at issue here is not the Inaugural swearing-in ceremony or the parade route itself. The public forum space that NPS seeks to set-aside for exclusive, partisan use is the spectator space abutting the activity of the parade along Pennsylvania Avenue.

NPS seeks to redesignate, to remove from its historic and traditional use for public free speech, the only demonstration plaza and many sidewalks abutting the Presidential Inaugural Parade, "an event less private than almost anything else conceivable." Use of these spaces along Pennsylvania Avenue, "America's Main Street," for public expression is woven into the fabric of the national experience and cannot be removed by agency fiat.

NPS does not set aside these spaces so it can erect bleachers and permit

public use on an equal access, non-viewpoint basis. NPS seeks to enhance the visibility of one group, one which is politically aligned with the viewpoint of the incoming administration, and to block the manifestation of collective dissent on Freedom Plaza. NPS asserts a new doctrinal authority to so redesignate quintessential public fora at times of political speech and debate.

III. The Government Speech Doctrine Does Not Apply

A. The Purposes of the Government Speech Doctrine Are Not Advanced

The purpose of the government speech doctrine is very discrete, as acknowledged in the opposition brief, i.e., to protect "[G]overnment statements (and government actions and programs) that take the form of speech." Appellee's Br. 17 (quoting *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46) (2015).

"Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials . . . had to include in [any recycling-related] letter a long plea from the local trash disposal enterprise demanding the contrary?" *Walker*, 135 S. Ct. at 2246.

The doctrinal purpose, to prevent the forced acceptance of private actors' contrary viewpoints in government statements and programs, is not jeopardized by permitting ANSWER to compete for access to Freedom Plaza on equal footing

with all other viewpoints – space that is spectator and expressive-use space alongside the parade, not participation in the parade itself.

The government's position in this case, stripping First Amendment protections from free speech in traditional public forums, jeopardizes the very essence of working democratic government. *See Walker*, 135 S. Ct. at 2246 ("First Amendment rules [are] designed to protect the marketplace of ideas"); *Id.* (*citing Stromberg v. California*, 283 U.S. 359, 369) (1931) ("our constitutional system seeks to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people") (internal quotations omitted).

The government's relationship to quintessential public fora is that of steward. The inauguration is a public event and the spaces abutting the parade route are those which "have immemorially been held in trust for the use of the public and, time out of mind have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

The government now seeks to commandeer this public space by labeling a favored private entity as a vehicle of government expression. The government cannot be allowed to engage in viewpoint-based and content-based discrimination in the administration of access to quintessential public forum space (as it now

admits here) and avoid the long-standing prohibitions on such government conduct imposed by the Free Speech Clause by simply adopting a favored-speaker's message as its own. In *Summum* Justice Alito recognized "the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

Recasting as government speech the free speech expressions of persons standing on the sidelines of the Presidential Inaugural Parade allows the most dangerous of authorities to the government. It allows the government to elevate and enhance those private views that it favors, distorting the marketplace of ideas, masking discriminatory conduct and "by its own *ipse dixit* destroy[ing] the public forum status" of public space. *Mahoney v. Babbitt*, 105 F.3d 1452, 1458 (D.C. Cir. 1997) (citation omitted).

NPS boldly asserts it may so act, creating spaces outside the protections of the Free Speech Clause of the First Amendment, "so long as such use is within reason." Appellee's Br. 15. This declaration is not only wrong and unreasonable, but is dangerous.

There is no "reasonability" claim by the government that can allow it to assert government speech in quintessential public fora and by that stroke eliminate the protections the First Amendment grants to the people and that have stood for

225 years. As we mark this significant anniversary of a world-admired democratic and human right, it bears noting that it has stood firm because it has not been eviscerated in the face of disfavored speech or in the interests of expediency.

B. The Government Identifies No Case in Which the Government Speech Doctrine Has Been Applied to Traditional Public Forums

ANSWER contended, as held in *Mahoney v. Babbitt*, that where the government allocates access to quintessential public forum space for political free speech courts apply public forum analysis under the Free Speech Clause to determine if restrictions are constitutional. Appellant's Br. 7, 20-23.

All of the Supreme Court cases finding government speech involved specific mediums not open to the public, which constitute classes distinct from quintessential public forum space. *Id.* 20-23.

"[I]f public places are all potential canvases for government speech, then it is possible that anything that is done in those places will either have to conform to the government's identity and image or be subject to exclusion." Timothy Zick, *Summum, the Vocality of Public Places and the Public Forum*, 2010 BYU L. Rev. 2203, 2222 (2010).

The government identifies no case in which the government speech doctrine has been held to determine the allocation of access to quintessential public forum space for persons engaged in assembly and speech activities. Its citation to *Oberwetter v. Hilliard*, 639 F.3d 545 (D.C. Cir. 2011) is inapposite. The interior of

the Jefferson Memorial "is a nonpublic forum" with "solemn commemorative purpose that is incompatible with the full range of free expression that is permitted in public forums." *Oberwetter*, 639 F.3d at 552. The government's brief emphasizes that the *Oberwetter* ruling turns on the fact that it is a nonpublic forum, "built by the government for the precise purpose of promoting a particular viewpoint about Jefferson." Appellee's Br. 20 (quoting *Oberwetter*, 639 F.3d at 554).

This contrasts starkly with Freedom Plaza, "a raised urban landscape designed to accommodate demonstrations" (JA 775) or the Pennsylvania Avenue sidewalks, "a forum as public as ever, but if anything more so" on Inauguration Day, *Mahoney*, 105 F.3d at 1458.

In its filing in *Summum*, NPS was at pains to emphasize that the government speech doctrine was appropriate there precisely because permanent park monuments constituted a "nonpublic forum[,]" Brief for the United States as Amicus Curiae Supporting Petitioners at 9, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) and because the government had "continuing exercise of control over the completed display[,]" *id.* at 14.

The government was emphatic that circumstances present in the case *sub judice* are distinguishable from those in a government speech case.

> Municipal parks are traditional public fora with respect to speeches, demonstrations, and other acts of private expression that are limited in

> duration. This Court's decisions make clear…that the nature of a forum is determined by the type of access being sought as well as the status of the underlying property.

Id. 9.

The government in *Summum* assured the Court that "applying the government speech doctrine in this context [will not] have any bearing on rules applicable in a true First Amendment forum." *Id.* 21. "'[I]mplant[ing] a physical structure . . . on public property,' though certainly a communicative act, is a far cry from the more dynamic and transitory purposes for which traditional public fora have historically been used, such as 'speaking, parading, handbilling, waving a flag, or carrying a banner.'" *Id.* 25 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 803-804 (1995) (Stevens, J. dissenting)).

NPS's position lays the legal foundation for government censorship and control of free speech in a quintessential public forum, just as NPS tried to do with the threatened arrest of dissenters in *Mahoney*, because recognition of the applicability of the government speech doctrine as newly asserted here carries with it the authority to exclude all other viewpoints.

C. The Government Identifies No Case in Which the Government Speech Doctrine Applies to the Speech of Private Persons or to Transitory Speech in Public Fora

The speech at issue is not speech by the government directly.

At issue is the speech of private individuals, specifically PIC ticketholders

and any members of the public admitted under the 10-Minute Parade Rule. Appellant's Br. 21; Appellee's Br. 29 (referencing same as "people occupying PIC bleachers"); *Id.* 26 (referencing same as "Government Supporters" – without acknowledgment that the 10-Minute Rule admits members of the public without discrimination on the basis of viewpoint).

The government identifies no case in which private individuals' speech has been held to constitute "government speech." There is no ultimate curating of the speech being allowed to exist in this public forum. The space at Freedom Plaza is not being used to present the State as the speaker or to communicate an official view or policy position.

Unable to offer a single case where private actors' speech has been deemed "government speech," the government argues that the character of government speech is not destroyed where it "is aided by actions taken by a private entity." Appellee's Br. 22-23. As examples, the government argues that in *Summum* permanent monuments "were often privately funded or donated," *id.* 23, and in *Walker* "license plate message[s] may be suggested by a private party," *id.*

In both examples, the government had detailed, formal, written pre-publication review and approval processes in which government-exercised selectivity over the messages proposed by the private individuals or actors and enforced complete control over final communication. *See Summum*, 555 U.S. at

471-72 (city "exercised selectivity" including "editorial control . . . through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals"); *Walker*, 135 S.Ct. at 2249 (Texas State Motor Vehicles Board reviewed written submission of messages prior to publication, selecting and rejecting some, and exercised "direct control over the messages conveyed").

These formal, standards-driven submission, rejection and approval processes are methods whereby privately initiated messages become adopted and published by the government as "government speech," a doctrinal term of art.

No comparable process is present with respect to the planned and spontaneous free speech expressions of individuals admitted to PIC Bleacher Areas as ticketholders or members of the public under the 10-Minute Parade Rule. The Constitution rightly precludes such prior restraint and compelled speech as repugnant to the dedicated purposes of such forums.

NPS's position takes the government out of the government speech doctrine. It submits no case holding that the government speech doctrine is satisfied by the transitory political expressions of private individuals. *See Summum*, 555 U.S. at 464 (public forum analysis applies to transitory speech in public forums).

NPS argues, "government can only speak through people." Appellee's Br. 28. The government speaks through officials and employees, subject to

governmental control. There is no evidence of control or approval of the free speech expressions of private individuals in the bleachers.

The NPS argues that the PIC has a special status conveyed by statute. ANSWER addressed the Presidential Inaugural Ceremonies Act (PICA) in its opening brief. *See* Appellant's Br. 49-51. Even if one assumes *arguendo* the status argued by NPS, there remains no record evidence that any PIC exercises control and approval over speech in its bleachers. Any PIC is subject to agency and law enforcement action if it fails to release unclaimed bleacher seats to members of the public "without regard to viewpoint or content of message." Addendum 8, 36 C.F.R. § 7.96(g)(4)(iii)(B)(1); JA 387, 73 Fed. Reg. at 67741.

NPS claims that ANSWER's position on appeal is "directly at odds" with lower court references to PIC's speech as government speech. NPS submits that ANSWER may not "disavow its prior position that PIC's speech is government speech." No disavowal is needed. ANSWER has never referenced PIC's speech as "government speech" as recognized under the legal doctrine at issue.

In District Court the government never invoked *Walker* or it's the government speech doctrine. Appellant's Br. 23-24. The first reference was in the court's final opinion. *Id.* The invocation of *Walker* by the court in its final opinion necessitates a more precise analysis.

PIC's speech, where it speaks directly, *is* directly aligned with the incoming

government – it offers pro-administration views. It offers government-supportive and thus government-favored speech but that is not the same as the government itself speaking. The PIC identified itself as a private speaker, just like the demonstrators. *See* Defendant the Presidential Inaugural Committee's Motion to Dismiss the First Amended Complaint, *Int'l Action Center v. United States of America*, Civil Action No. 01-00072 (GK) (D.D.C. May 15, 2001) ECF No. 16, at 3, 15 (2001 PIC represents that it is a "private corporation," that "[t]he PIC, like the Plaintiffs, was a mere holder of permits on the day of the inauguration …" and was "just like any other private entity (including the protesters) . . . ").

D. The Government Fails to Establish Applicability of the Three *Walker / Summum* Factors

The government eschews a mechanistic presentation of the 3 *Summum / Walker* factors, owing to the fact that they cannot be resolved in favor of its position.

1. The Government Presents No Record Evidence of the First *Summum / Walker* Factor (History of Medium Conveying Government Speech) Being Satisfied

The historic use of the space at issue has been as a quintessential public forum. The sidewalks and parkland alongside Pennsylvania Avenue in the nation's capital have been traditionally open for free speech, assembly and debate. Freedom Plaza, among them, is historically recognized as a location for demonstrations and dissent. Evaluating the medium's history demonstrates that the government does

not have a long-standing tradition of using these traditional public forums to communicate. Unlike the history of the State speaking through monuments or license plates, traditional public fora are the medium used by the populace to communicate to the government and they are held in trust by the government for the benefit and use of the people.

The government argues that the analysis of a medium's historic use is particularized to the use of the space on Inauguration Day. However, the history that must be evaluated includes the public forum itself and in this case the forum has traditionally been directly known for expression and the free exchange of ideas. The difference is that on Inauguration Day the government now seeks by regulation to restrict whose expression may be present or dominant on Freedom Plaza.

Even evaluating the medium as to Inauguration Day, there is no record evidence that bleachers have always been placed in Freedom Plaza or its prior incarnations or the other specific areas up and down Pennsylvania Avenue designated as exclusion zones.

Moreover, there is no record – not until around 1996 when NPS assumed jurisdiction over the spaces at issue – of inaugural committee bleachers being set aside on a partisan basis. *See* Appellant's Br. 26-31.

NPS compiled the Administrative Record, culling from over 200 years of

Inaugurations. Were such a history of partisan discrimination in access to the "public grandstands" – tickets for which at times were sold at local department stores at nominal cost – NPS would point to a mountain of such evidence.

NPS points to only two record citations.

First, NPS obscurely submits that in 1881 President Garfield had a Presidential Reviewing Stand in front of the White House. Appellee's Br. 27 (citing JA 1126). The Presidential Reviewing Stand, bearing the Presidential seal, is highly distinctive, and has official ceremonial function and security considerations that distinguish it. *See* Appellant's Br. 34. As NPS observes, Appellee's Br. 27, ANSWER does not seek inclusion in the President's Reviewing Stand but, contrary to NPS's claim, that does not dispose of the legal issues presented.

Second, NPS submits that in the 1800s and early 1900s public grandstands were erected with "flamboyant construction," an opaque reference that does not connote partisan discrimination, and were "bedecked with flags," another reference that does not connote partisan discrimination. Appellee's Br. 28 (citing JA 969).

NPS's record is no record at all.

With respect to the post-1996 history, the government merely notes that ANSWER concedes such discrimination occurred in 1997, 2001 and 2005 – indeed, these have all been the subject of quadrennial constitutional rights

litigation. NPS fails to mention that, as ANSWER submits, in 2009 and 2013, the Obama PICs – while delegated the authority to discriminate on the basis of partisan selection of ticket-holders – reportedly sold substantial portions of their tickets to the public on a non-partisan basis at nominal cost. Appellant's Br. 30-31.

2. The Government Presents No Record Evidence of the Second *Summum / Walker* Factor (Close Identification Between Speech and Government)

There is no basis why a reasonable observer would identify the free speech of people along the parade route, whether standing or in bleachers, to constitute official government speech. Appellant's Br. 31-34.

NPS argues that the evaluation must be focused on the bleachers only, excluding other spaces.

NPS submits two arguments in support of its claim that fully informed observers readily identify speech from bleachers as official government speech.

First, NPS argues that since there is a Presidential Reviewing Stand at the White House, reasonable observers would understand that those seated in the separate bleachers elsewhere along Pennsylvania Avenue are engaged in official government speech. Appellee's Br. 29-30. This is comparing apples to oranges. *See* Appellant's Br. 34 (observing the distinctiveness of Presidential Reviewing Stands at the White House).

Second, NPS argues that there is not a long history of bleachers "erected

with any frequency by those not engaged in government speech." Appellee's Br. 30. In other words, since inaugural committees have historically been the entities which financed and/or erected bleachers, the ticketholders and occupants of the bleachers therefore must be identified with the U.S. Government.

This conflates who fronts the funds for the bleachers with who occupies the bleachers.

The record reflects: Historically, until the mid-20th century, "Pennsylvania Avenue merchants" fronted a guarantee fund which "financed the construction of public grandstands, for which tickets were sold." JA 969. Historically, tickets for the "public grandstands" were not even distributed by PICs, but at times "were sold in Washington department stores for a nominal fee." JA 1030. NPS does not seem to suggest shop clerks engaged purchasers in a partisan political vetting. As recently as 1985, bleacher tickets were not given as incentives for PIC donations, but were sold at arms-length necessitating refund upon cancellation. JA 1087.

A "reasonable and fully informed observer" would have read in the widespread media accounts that the 2009 and 2013 Obama PICs distributed thousands of bleacher tickets to the public at nominal cost on a non-partisan basis. Appellant's Br. 30-31 nn. 5, 6.

3. The Government, Conceding Absence of Government Control Over Speech at Issue, Argues That the Third *Summum / Walker* Factor is Not a Required Factor

ANSWER demonstrated the complete absence of government control of the speech emanating from the bleachers. Appellant's Br. 34-36.

NPS concedes "that there was no evidence as to the extent to which the government controls the speech in PIC bleachers," Appellee's Br. 31, and doesn't offer even a single record citation suggesting government control. *See Id.* 38 (NPS: "nothing about this set-aside indicates any attempt by the government to . . . control the content of specific kinds of speech").

Showing how far afield NPS's position is, the government argues that "[the Supreme] Court did not state that [government] control was a requirement for there to be government speech." Appellee's Br. 31. NPS submits that government control is only a mere "consideration" that this Court may dispense with at will. *Id.*

According to NPS, a requirement of government control would be "unworkable." Appellee's Br. 31.

Yet, as cited by ANSWER in opening, in *Johanns*, the Supreme Court found the government "exercises final approval authority over every word" of the speech at issue. Appellant's Br. 35 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561) (2005). The Supreme Court in *Walker* found Texas "maintains direct control over the messages conveyed on its specialty plates" and, going beyond

mere verbatim, "has sole control over the design, typeface, color, and alphanumeric patterns." *Id.* (quoting *Walker*, 135 S. Ct. at 2249). The Supreme Court in *Summum* referenced the speech as "a government-controlled message" 555 U.S. at 468, finding the city "effectively controls" the messaging by "exercising final approval authority" over works including "editorial control" over substance and form. Appellant's Br. 35 (quoting *Summum*, 555 U.S. at 472, 473).

In *Johanns*, the Supreme Court was explicit: "The message set out in the beef promotion is **from beginning to end** the message established by the Federal Government." *Johanns*, 544 U.S. at 560 (emphasis added).

The government does not even control PIC's allocation of tickets, i.e., to whom or how distribution may or must be made, let alone the speech of ticketholders.

Bizarrely, NPS cites as an example of "government speech" the expressions of the "many thousands of people" on the National Mall on July 4th. *See* Appellee's Br. 32. One is reminded of the fact that in 1998 NPS banned both alcohol and household furniture from the Mall on the Fourth, owing to the fact that for decades there was a long-standing tradition of hard partying on the Mall, with participants abandoning sofas and couches in the alcohol-infused haste to depart. This cannot seriously be considered "government speech" without which "government would not work."

The government's argument is even more perplexing as the regulatory set aside for the Fourth of July Celebration is limited to the "Washington Monument Grounds and the Lincoln Memorial Reflecting Pool area," for fireworks deployment. JA 788. The government did not create a regulatory set aside for the vast areas of the National Mall where the public gathers nor does it create a viewpoint-based or content-based exclusion zone or provide for an exclusive use set aside for a favored permittee. The space is open, the public is allowed access, regardless of viewpoint or speech. No one is politically vetted for admittance. If persons wish to convey a "message" contrary to NPS's view of what constitutes "celebrating the independence of this nation," Appellee's Br. 32, they may. The Mall, a quintessential public forum, is not reserved for government speech nor should it be. Demonstration of dissent is permitted. Any doctrinal expansion that would authorize such abridgment would lay the foundation for a dystopian future.

In fact, the government's National Mall example brings to the fore the difference between non-discriminatory priority use of space for National Celebration Events at which all people are welcome and allowed in with equal opportunity for access, and the constitutionally infirm regime instituted for the Inauguration which creates swaths of exclusion zones for the benefit of one favored private, partisan entity.

NPS recognizes that the ruling it seeks would enable it to redesignate any

public forum space as reserved for "government speech," an authority contrary to constitutional norms and decades of public forum doctrine.

IV. NPS Fails To Meet Its Burden Under Public Forum Analysis

A. NPS Avoids the Heart of the Issue: *Discriminatory* Versus *Non-Discriminatory* Allocation

The heart of the issue, in the public forum analysis, is whether compelling or substantial interests are substantially and materially advanced by a *discriminatory* advance allocation of bleacher locations that are not advanced in a *non-discriminatory* allocation. Appellant's Br. 48; *Id.* 51 ("public forum space used for expressive purposes . . . must be permitted on a non-discriminatory basis").

NPS cannot explain why it must discriminate and why it refuses to issue permits or otherwise administer access to public spectator space on Inauguration Day on a non-discriminatory basis.

NPS inaccurately asserts that ANSWER seeks that a PIC may "never . . . reserve space in a public forum for the Inaugural Parade." Appellee's Br. 39.

As stated in opening, and before the District Court, "[t]he relief requested would not preclude PIC from having bleacher seats." Appellant's Br. 54.

There are multiple conceivable non-discriminatory systems of allocation of public space. One non-discriminatory system is the long-standing constitutionally tested first-come first-served permitting system. NPS does not assert that Freedom

Plaza or any space (aside from PIC media platforms, which are not at issue) is of distinction or necessity to a PIC. Throughout its filing, NPS asserts the space PIC needs for bleachers is limited. There is ample sidewalk and park space available for its needs to be fully met, even if sometimes it might not get Freedom Plaza.

Without endorsement, Appellant submits that multiple options exist for a constitutionally fair administration of spectator space on Inauguration Day that does not abridge dissent or elevate a favored viewpoint. Arguably, perhaps the government could open the space to equal access to all on a first-come first-served basis – the general public, administration supporters and dissenters alike – without exclusive-use space being permitted and eliminate its requirement that such permits are necessary for dissenters who number 25 or more to avoid arrest.

NPS does not claim any substantial government interest is advanced by denying permits to demonstration groups for Freedom Plaza or by setting aside that space for a PIC, *see* Appellee's Br. 42. Unable to present any such interest, NPS falls back on a request that the Court grant NPS "a certain amount of leeway" with respect to Freedom Plaza. *Id.* Whatever "leeway" exists in other contexts, it is not legally permissible where fundamental constitutional rights of free speech and assembly are restricted, as here.

Other non-discriminatory systems for allocating space conceivably exist. Perhaps NPS could hold all permits for Inauguration Day space for consideration

post-election, resolving those areas for which multiple applications have been received through lottery or multiple occupancy where feasible. It is up to NPS to present a system of NPS's selection that withstands constitutional review.

NPS doesn't dispute, for example, that Freedom Plaza accommodates multiple occupancy, or that ANSWER had a demonstration permit on a substantial portion of the elevated plaza alongside PIC's bleachers and PIC media platform in 2009 without harm to purported government interests.

NPS doesn't want dissent on display in Freedom Plaza, especially near media platforms. At oral argument, NPS stated an interest in enhancing "visible presence" of government supporters on Freedom Plaza. NPS doubles down on this claim, stating an interest in having government supporters on Freedom Plaza because media stands are there. *See* Appellee's Br. 44. This is why NPS wants to ban demonstration permits from the plaza, to sanitize it of collective dissent. It is stage management.

No substantial, much less compelling, interests are harmed by utilizing a non-discriminatory allocation system.

ANSWER is not guaranteed it would receive any particular space under any given system, but it would be promised the ability to apply without discrimination under whatever constitutional system is implemented.

B. Public Forum Analysis Must Be Applied Separately to Freedom Plaza and to Pennsylvania Avenue Sidewalks

NPS submits that public forum analysis need not be applied "on a block-by-block basis[,]" observing that in *Mahoney* the Court treated the Pennsylvania Avenue sidewalks as a singular type of public forum for analysis. Appellee's Br. 41.

In *Mahoney*, the matter before the Court was the wholesale restriction on dissenting speech along the sidewalks of Pennsylvania Avenue. ANSWER does not ask the Court to engage in a block-by-block analysis of the sidewalks in this matter either.

The Court must conduct its analysis discretely, applying it separately to each public forum type. *See* Appellant's Br. 57 (citing *Mahoney*, 105 F.3d at 1459; *Quaker Action*, 516 F.2d at 733). Where there is no unique distinction between space, there is no requirement of distinct analysis. For example, should there be a direct challenge to the government's set-aside of exclusive space in front of the Trump Hotel, that area would be the public forum at issue, rather than all of the sidewalks along Pennsylvania Avenue, because of its unique characteristics for those who wish to convey a message to a political figure and possible president-elect.

NPS does not dispute that Freedom Plaza is a quintessential public forum

with unique history, dedication, physical characteristics, design and purpose for facilitating demonstrations. *See* Appellant's Br. 40-41, 54-58, 4. Its objective characteristics distinguish it from Pennsylvania Avenue sidewalks and other spaces that make up the Pennsylvania Avenue National Historic Park.

C. The Challenged Distinction is Identity-Based, Viewpoint-Based and Content-Based

NPS, having argued in its government speech analysis that it absolutely is the incoming president's viewpoint that is favored by the challenged set-aside, turns around and contends in its public forum analysis that the set-aside does not favor the government viewpoint at the expense of others, including ANSWER.

Although the speech of those in the bleachers does not satisfy the government speech doctrine, NPS is correct that the set-aside favors the government's preferred speech and viewpoint.

As set forth in opening, the challenged identity-based distinction for the PIC is a viewpoint- and content-based distinction. Appellant's Br. 41-46.

NPS's arguments in opposition are addressed below.

The government is unable to overcome the requirements of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

NPS argues that there can be no viewpoint discrimination where each PIC represents a different administration. Appellee's Br. 37; *But see* Appellant's Br.

44-45 (addressing this argument). The viewpoint favored is that of the then-President or government. Dissent, whether from the political "left" or "right," is abridged in favor of the presiding orthodoxy or status quo.

NPS argues that "the regulatory preference for PIC excludes anyone not designated for inclusion by PIC." Appellee's Br. 37. ANSWER agrees, and further notes that each PIC since 1996 includes and excludes ticketholders on a viewpoint basis, *see* Appellant's Br. 11-12, 30-31; that ANSWER was politically vetted and excluded by the 2013 Obama PIC on a viewpoint basis, *see* Appellant's Br. 16-17; and that ANSWER and dissenting groups are always blocked from competing for a permit for Freedom Plaza and designated spaces, *see* Appellent's Br. 4, 36, 38, 54.

NPS's argument that "there is no evidence that all those who favor the government buy, or can even afford to buy, tickets to PIC bleachers[,]" Appellee's Br. 38, is pointless. There are over 320 million people in the United States. By this logic, one could argue that no employment discrimination in filling a job position could exist as there will always be persons of the favored race or gender who also do not get the position.

NPS's argument that the Obama PICs sold some tickets on a non-partisan basis, Appellee's Br. 38, doesn't change the constitutional harm. ANSWER is still permanently blocked from exercising its right to engage in collective expression and assembly in Freedom Plaza and the spaces discriminatorily allocated to PIC.

NPS's claim that PICs simply "provide guaranteed space for those willing to pay for it" is disingenuous, suggesting that inaugural committee seats are available on a non-partisan basis. *See* Appellee's Br. 38; Appellant's Br. 30-31 (1997, 2001 and 2005 PICs distributed all tickets on a partisan basis, the two Obama PICs elected a hybrid approach); *Id.* 5 (NPS allows each PIC to distribute tickets on any basis, including viewpoint or partisan basis).

D. The Government Fails to Show That Discriminatory Administration and Allocation of Public Forum Space is Needed to Advance Any Substantial or Compelling Government Interest

NPS fails to identify any interest that is harmed or not achieved by applying a non-discriminatory system of space allocation. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 196 (1997) (claims of government purpose or harm must be proven "upon substantial evidence"); *Edwards v, District of Columbia*, 755 F.3d 996, 1003 (D.C. Cir. 2014); Appellant's Br. 48.

NPS now references four claimed interests. All are abstract. None are specific. There is no proof that regulatory discrimination advances any.

NPS claims a significant interest "in the Inauguration celebration for a newly elected President," Appellee's Br. 39, without showing that the celebration would be impaired if, for example, PIC's bleachers were unable to be located on Freedom Plaza if there was a prior application under a first-come first-served system or if, by way of another example, a PIC shared multiple occupancy of Freedom Plaza *as*

it did in 2009 with ANSWER. *See also* Appellant's Br. 25 (suggestion is baseless that "celebration" of a peaceful transition of power or of inauguration must abridge dissent).

NPS claims "a significant government interest in demonstrating democracy in action both at home and abroad," Appellee's Br. 39, without showing how regulatory discrimination advances that interest or how excluding a demonstration of dissent on Freedom Plaza and other areas advances a demonstration of democracy in action. Democracy cannot tolerate stage-managed assemblies in an effort to present public adulation of the country's leaders.

NPS asserts a "significant interest in assisting PIC to meet its statutory responsibilities to plan inaugural activities," Appellee's Br. 41, but no planning activities are conducted in the bleacher seats. As described in ANSWER's opening, *see* Appellant's Br. 49-51, PICs are not created by statute and they do not possess statutory responsibilities.

NPS asserts a "significant interest in furthering Inauguration-related activities that are organized and paid for by PIC," Appellee's Br. 41, yet most or many of PIC's Inauguration-related activities are for lavish galas and to amass large fundraising profits, purposes which are private pecuniary interests and not government interests, *see* Appellant's Br. 52-54.

NPS claims a significant interest in "executing the Inaugural parade[,]"

Appellee's Br. 42, but nothing in the location of bleachers affects parade execution.

Finally, NPS does not oppose or challenge ANSWER's presentation and argument regarding NPS's unconstitutional delegation of authority to the PIC to determine on a viewpoint basis who may access the public fora of Freedom Plaza and other spaces.

Conclusion

Wherefore, Appellant respectfully submits that the District Court's January 28, 2016, Opinion and Order should be reversed and the matter remanded, as requested in Appellant's opening brief.

October 24, 2016

Respectfully submitted,

/s/ Carl Messineo
Carl Messineo (#450033)
/s/ Mara Verheyden-Hilliard
Mara Verheyden-Hilliard (#450031)
PARTNERSHIP FOR CIVIL JUSTICE
617 Florida Avenue, NW
Washington, DC 20001
(202) 232-1180

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure because the brief contains 6,901 words, excluding the parts of the brief exempted. This brief complies with the typeface and style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point.

October 24, 2016

/s/ Carl Messineo
Carl Messineo
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October 2016, the foregoing Corrected Reply Brief for Appellant has been served by this Court's Electronic Case Filing System (ECF).

October 24, 2016

/s/ Carl Messineo
Carl Messineo
Attorney for Appellant