CASE SCHEDULED FOR ORAL ARGUMENT NOVEMBER 14, 2016

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5047

A.N.S.W.E.R. Coalition, (Act Now to Stop War and End Racism), Appellant,

v.

W. RALPH BASHAM, Director, U.S. Secret Service, and SALLY JEWELL, Secretary, U.S. Department of The Interior, Appellees.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties. Appellant is A.N.S.W.E.R. Coalition (Act Now to Stop War and End Racism), who was the Plaintiff in the District Court. Appellee is Sally Jewell, Secretary, U.S. Department of the Interior, who was a defendant in the District Court.[1] There was no amicus curiae in the District Court.

B. Ruling Under Review. The ruling at issue is the January 28, 2016 Order and Memorandum Opinion by the Honorable Paul L. Friedman granting summary judgment to Appellee on Counts III and IV.

C. Related Cases. This case has not previously been before this Court. Appellee's counsel are aware of no other related cases.

[1] Appellant is not pursuing an appeal of the District Court's grant of summary judgment on Count II to W. Ralph Basham, Director, U.S. Secret Service.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

***Cases chiefly relied upon are marked with an asterisk.**

Federal Statutes

Other Authorities

ISSUES PRESENTED

In the opinion of appellee United States Department of the Interior, the following issues are presented:

1. Whether the District Court correctly concluded that a limited regulatory set-aside for the Inauguration, granted by the National Park Service ("NPS") to its co-sponsor, the Presidential Inaugural Committee ("PIC"), in connection with this NPS-designated event, constitutes government speech.

2. Whether if the regulatory set-aside for PIC does not constitute government speech, it is content and viewpoint neutral.

3. Whether the District Court correctly concluded that the regulatory set-aside for PIC is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.

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STATEMENT OF JURISDICTION

District Court jurisdiction was based on 28 U.S.C. § 1331 and the First Amendment to the Constitution. This Court has jurisdiction under 28 U.S.C. § 1291.

COUNTERSTATEMENT OF THE CASE

Appellant ANSWER originally brought this case in 2005 seeking emergency injunctive relief to prohibit the National Park Service ("NPS") from setting aside any space along the Pennsylvania Avenue sidewalks lining the Inaugural Parade for the exclusive use by the Presidential Inaugural Committee ("PIC"), NPS's co-sponsor of this NPS-designated event. Although demonstrators like ANSWER could, and did, apply for permits to obtain space on the Pennsylvania Avenue sidewalks during the Inaugural Parade that was for the permittee's exclusive use, ANSWER claimed that the government is not entitled to the exclusive use of *any* portion of the Pennsylvania Avenue sidewalks during the Inaugural Parade that the government sponsors and, with PIC, largely pays for. The District Court correctly rejected such a manifest injustice that essentially would prohibit the government from having what ANSWER and other demonstration groups could obtain -- exclusive use of a limited portion of the Pennsylvania Avenue sidewalks on Inauguration Day.

II. Factual and Procedural History

A. Factual Background

The Presidential Inaugural Ceremonies Act, 36 U.S.C. § 503, provides that the Secretary of the Department of the Interior is authorized to grant to PIC permits

for the use of Park Service areas, subject to any restrictions, terms and conditions as may be imposed by NPS. The Act provides that permits for PIC are not just for the "inaugural period," defined as five calendar days before and four calendar days after the Inauguration, but also "includ[es] a reasonable time before and after the inaugural period." 36 U.S.C. §§ 501(2); 503(a).

NPS has traditionally submitted applications on behalf of PIC, which does not even exist until after a presidential election has been decided. See ANSWER Coalition v. Kempthorne, 537 F. Supp.2d 183, 187 & n.6 (D.D.C. 2008) ("ANSWER"). On November 12, 2003, and December 19, 2003, NPS submitted an application on behalf of the anticipated 2004 PIC, in connection with the 2005 Inauguration. Id. at 187. NPS subsequently issued a permit to PIC for designated portions of the Pennsylvania Avenue sidewalks along the Inaugural parade route, and other parkland including Freedom Plaza. Id. at 188.

On January 2, 2004, ANSWER submitted a permit application for January 1, 2005 to January 20, 2005, seeking to use some of the same space covered by the PIC application. Id. at 187-188. Under NPS regulations, that permit was deemed granted because it was not denied within twenty-four hours. Id. However, the regulations also authorized NPS to revoke a deemed-granted permit under certain circumstances, and on December 23, 2004, NPS revoked in part ANSWER's permit

application due to the fact that the PIC permit application preceded in time ANSWER's application. Id. at 189.

B. Proceedings in District Court

ANSWER filed suit on January 14, 2005, along with other plaintiffs, seeking emergency injunctive relief in connection with the permits issued to ANSWER and PIC for January 20, 2005, the space allocated for members of the general public along the Inaugural Parade Route that day, and the security measures put in place by the United States Secret Service. The District Court held a hearing on January 18, 2005, at the conclusion of which the Court orally denied ANSWER's request for emergency injunctive relief. R. 11.

On Inauguration Day 2005, ANSWER announced that its "mass rally on the inaugural parade route today was so successful." JA 1261. ANSWER stated that its rally at John Marshall Park was "[t]he first thing [President] Bush saw as the presidential motorcade began the parade route" and that thousands of demonstrators picked up signs from ANSWER "and were able to line **both** sides of Pennsylvania Avenue from 3rd to 7th Streets." Id. (emphasis added).

ANSWER subsequently filed an Amended Complaint. JA 80-107. The Amended Complaint raised numerous allegations and sought an order precluding NPS, in connection with its application on PIC's behalf, from deviating from strict

compliance with NPS regulations. JA 106. ANSWER also sought an order requiring NPS to make the Pennsylvania Avenue sidewalks abutting the Inaugural Parade open to all members of the public, with the exception of the District of Columbia's reviewing stand in from of the Wilson Building. Id.

The parties filed cross-motions for summary judgment, and by Memorandum and Opinion dated March 20, 2008, the District Court granted ANSWER summary judgment on Count I and denied NPS summary judgment on Count III.[2] ANSWER, 537 F. Supp.2d at 206. The District Court concluded that the process of granting PIC a permit that did not comply with NPS's permit regulations affecting other permit seekers constituted an impermissible deviation from NPS's permitting system not authorized by the Presidential Inaugural Ceremonies Act and, therefore, violated ANSWER's First Amendment rights. Id. at 199-204.

With respect to Count III of the Amended Complaint, the Court held that NPS "cannot reserve *all* of Pennsylvania Avenue for itself, leaving only the Ellipse and the northern part of John Marshall Park to protesters." Id. at 205 (emphasis in original). The Court noted, however, that its holding left open the question of "[h]ow much, if any, of Pennsylvania Avenue sidewalks can be reserved for the

[2] Count II raised claims against the Secret Service which are not at issue in this appeal.

exclusive use of the government and its ticketed guests on Inauguration Day[,]" and that much of this space must be left open to demonstrators and members of the general public. Id.

In response to the District Court's decision, on August 8, 2008, NPS published proposed amended regulations governing, among other things, certain aspects of the Inaugural Parade. JA 390-404. In the preamble to the proposed rules NPS explained:

> With respect to the Inaugural parade, the proposed rule would create a regulatory priority use for limited, designated park areas for the PIC, the Armed Forces Inaugural Committee, and the Architect of the Capitol or the Joint Congressional Committee on Inaugural Ceremonies, entities whose role in the Inauguration has traditionally necessitated such access. These limited park areas along the Inaugural route on Pennsylvania Avenue from 3rd to 15th Streets are designated in the attached maps. The designated areas would be relatively small, and leave the majority of park areas along the parade route available to the public and demonstrators regardless of viewpoint or message. This allocation of space would result in a fair and equitable distribution of park areas, consistent with the First Amendment and the Presidential Inaugural Ceremonies Act.

Id. at 391 (also citing this Court's decision in A Quaker Action Group v. Morton, 516 F.2d 717, 729 (D.C. Cir. 1975)).

NPS's preamble to the proposed rules further explained that:

> The proposed rule would retain the existing regulatory preference for the PIC for the White House sidewalk and all but the northeast quadrant of Lafayette Park. The proposed rule would allocate to the public and demonstrators, however, most of Pennsylvania Avenue National

> Historic Park. Specifically, 7,024 linear feet or 70 percent of Pennsylvania Avenue National Historic Park that abuts the street, which also comprises 625,882 square feet or 84 percent of Pennsylvania Avenue National Historic Park, would be open to the public and demonstrators. The proposed rule would thus reduce areas designated for PIC's bleachers on the parade route to 1,284 linear feet or 13 percent of Pennsylvania Avenue National Historic Park that abuts the street, which also comprises 63,936 square feet or 9 percent of Pennsylvania Avenue National Historic Park.

Id. Finally, the proposed rules provided that any member of the public could use a ticketed PIC bleacher seat if the ticket holder had not claimed the seat ten minutes before the Inaugural Parade was to pass by the bleacher containing that seat. Id.

Following a comment period and review of the comments submitted, which included no comments from ANSWER, on November 17, 2008, NPS published its final amended regulations governing, among other things, the aspects of the Inaugural Parade set forth above that are relevant to ANSWER's claims. JA 385-389. The additional priority use accorded to PIC remained as that provided in the proposed rule. Id. at 385-86. But the preamble to the final rules demonstrates the care with which NPS considered the comments submitted. Id. at 385-389.

For example, "1,700 comments stated that the proposed regulation would 'privatize' the parade route; interfere with, distance, or limit the public's ability to view the Inaugural Parade; or prevent demonstrators from exercising their First Amendment rights." NPS responded:

> The allocations in the final rule comport with the Court of Appeal's opinion in *A Quaker Action Group* v. *Morton*. The final rule also fulfills the Department of Interior's obligations under the Presidential Inaugural Ceremonies Act to provide areas on Federal Parkland for use by the Inaugural Committee for Inaugural activities and still provide access for the conduct of demonstrations. Section 501(1) of the Act expressly designates the Inaugural Committee as "the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities associated with the ceremony" (36 U.S.C. 501(1)). Section 503(a) of the Act provides that the "Secretary of the Interior may grant to the Inaugural Committee a permit to use the reservations or grounds during the Inaugural period, including a reasonable time before and after the Inaugural period." (*Id.* § 503(a)).
>
> The final rule does not "privatize" the parade route, is not discriminatory, and does not interfere with, distance, or limit the public's ability to view the Inaugural Parade. Nor does it prevent the exercise of First Amendment rights. Rather, as the attached maps of the parade viewing area detail, the final rule ensures that the majority of Pennsylvania Avenue, National Historic Park is open to the public. Consistent with the First Amendment and other long-standing NPS regulations, the majority of Pennsylvania Avenue, National Historic Park is open to demonstrators regardless of viewpoint or the content of the message.

JA 386-87. The final rule also noted that an earlier NPS regulatory preference for PIC for the White House sidewalk and all but the northeast quadrant of Lafayette Park had been in existence for twenty-eight years, having been adopted in 1980 in accordance with the Presidential Inaugural Ceremonies Act. Id. at 387, *citing* 45 Fed. Reg. 84997 and 84998 (Dec. 24, 1980).

The preamble also emphasized that "there are many open and expansive areas along the Inaugural route which are not designated for PIC bleachers and which provide prime venues to observe the Parade," and that the "rule substantially reduces the area that in the past has been designated for the PIC's bleachers." JA 387. Therefore, correspondingly, "the final rule substantially increases the park areas available to the public and demonstrators. In 2005, these no-longer allocated areas contained 25 PIC bleachers and could accommodate 11,344 PIC ticket-holders." Id.

Additionally, the final rules included the proposed "'10-minute parade rule'" to address concerns from one commentator that certain PIC bleacher seats remained empty at the prior Inaugural Parade. As explained in the preamble to the final rules:

> If a PIC bleacher seat in Pennsylvania Avenue, National Historic Park or Sherman Park has not been claimed by the ticket-holder ten minutes before the Inaugural Parade is scheduled to pass the bleacher's block, then any member of the public, without regard to viewpoint or content of the message, may at that time occupy the unclaimed seat. The NPS will require PIC to notify ticket-holders (and include a statement on each ticket) when they need to be in their bleacher to avoid losing their seats. The NPS will also require that PIC place marshals at PIC bleachers to assist ticket-holders and inform the NPS or the United States Park Police (Park Police) of any unclaimed seats under the 10-minute parade rule. Should the NPS or Park Police determine that PIC is not in compliance, appropriate action will be taken.

Id.

Instead of supplementing its Complaint to challenge the final regulation, on May 18, 2010, ANSWER moved to enforce what it claimed was the District Court's March 20, 2008 injunctive order, which ANSWER argued prohibited NPS from amending its regulations in the manner undertaken. ANSWER asked the Court to rescind the amended regulation at 36 C.F.R. § 7.96(g)(4)(iii)(B)(1), which grants to PIC additional priority use of certain limited portions of Pennsylvania Avenue on Inauguration Day. See R. 105.

By Opinion and Order dated March 5, 2012, the District Court denied ANSWER's motion. ANSWER Coalition v. Salazar, No. 05-0071, 2012 WL 8667570, at *8 (D.D.C. Mar. 5, 2012). The Court emphasized that the Amended Complaint did not challenge the constitutionality of NPS's permit system as set forth in its regulations; instead, ANSWER challenged NPSs "*deviation*" from its permit regulations. Id. at *6-7 (emphasis in original). The Court noted, however, that in response to the Court's March 20, 2008 decision, NPS had amended its regulations to include a priority use for PIC for certain portions of the sidewalks along Pennsylvania Avenue during the Inauguration. Id. This Court "conclude[d] that the amended regulations do not violate the terms of the injunction." Id. at *7.

On February 10, 2012, ANSWER filed a Supplemental Pleading, alleging that 36 C.F.R. § 7.96(g) still exempts PIC from being governed by the regulation's

"first-come first-served" system of priority and discriminates in favor of a private entity that supports the incoming administration. JA 108-15. ANSWER claimed that enforcement of the PIC regulatory preference violates the First Amendment and the Fifth Amendment's Equal Protection Clause because it is viewpoint-based and/or content-based which serves no compelling government purpose and fails to constitute a reasonable time, place and manner restriction.

By Opinion and Order dated January 28, 2016, the District Court granted summary judgment to NPS on Count III and Count IV. JA 46-79. The Court noted that NPS regulations since 1980 have contained a set-aside on the sidewalk in front of the White House and three-quarters of Lafayette Park for the exclusive use of PIC. Id. In light of NPS's amended regulations, the Court framed the issue remaining in the case pertaining to NPS as "how much, if any, of the Pennsylvania Avenue sidewalks and Freedom Plaza can constitutionally be reserved for the exclusive use of PIC and its ticketed guests on Inauguration Day . . . ." Id. at 62.

The Court first analyzed whether the First Amendment was implicated by the limited regulatory set-aside to PIC. The Court concluded that it was not, because the set-aside involved government speech. The Court observed that "since the founding of this nation, the United States government has used the Presidential Inaugural Ceremony and its attendant celebrations to 'speak to the public.'" JA 66

(citation omitted). The Court concluded that "the Inauguration Ceremony and Parade are 'closely identified in the public mind with' the United States government." Id. at 67 (citation omitted).

Although the PIC is not a government entity, the Court found this was "not fatal to the government speech paradigm[.]" Id. Under the Presidential Inaugural Ceremonies Act, the Court observed that PIC is responsible for planning most of the inaugural celebration activities, including the Inaugural Parade. The PIC is controlled by the President-elect, who becomes President hours before the Inaugural Parade. The government and PIC together fund activities associated with the Parade. Id. Looking at all the considerations together, the Court held that "PIC's speech constitutes government speech[,]" especially because the President "'sets the overall message to be communicated[,]'" and PIC "'is directly responsible to the new elected President.'" Id. at 69 (citations omitted).

With respect to the effect of the NPS regulatory set-aside on the speech of others, the Court found the regulation to be narrowly tailored to serve significant government interests. JA 70. The Court held that the government interest in the Inaugural Parade and helping PIC fulfill its statutory duties to plan activities connected to the Parade was a "significant and important interest[.]" Id. at 71. The Court further held that reserving a modest amount of space "for PIC's exclusive

use for facilities directly related to effective execution of the Parade[,]" as well as providing "reasonable viewing areas for the President's ticketed guests" and "facilities for the media outlets from across the globe" that broadcast the Parade, and "portable toilets for the public[,]" all amounted to a "modest restriction of the space available to the general public" and ANSWER. Id. at 71-72. Thus, the Court concluded that the regulation was narrowly tailored to serve the government's important interests. Id.

Finally, the Court "easily" held that the regulation left open ample alternative channels of communication. JA 73. The whole set-aside for PIC "reserves only 16% of the Inaugural Parade route, leaving the vast majority of the Pennsylvania Avenue sidewalks and portions of Freedom Plaza open to ANSWER and the general public." Id. at 72. The Court noted that ANSWER had been granted space for its demonstrations at past inaugurations, declared that it had been able to demonstrate successfully, and its claim of a special need for access to Freedom Plaza was unsupported by any caselaw. Id.

This appeal followed.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's grant of summary judgment. See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515

U.S. 557, 567 (1995).

SUMMARY OF ARGUMENT

The District Court correctly concluded that the limited regulatory set-aside for PIC constitutes government speech. Although a private coordinating entity, PIC is statutorily recognized as having a crucial role in connection with the Presidential Inauguration. Indeed, PIC's existence is solely for the purpose of planning the inaugural ceremonies and activities for the newly elected President who controls the overall message PIC conveys. The Inauguration and Inaugural Parade are closely identified with the government, which co-sponsors these events with PIC. The ties that bind the two together make PIC's speech government speech, which ANSWER conceded in District Court. As such, the First Amendment is not implicated with regard to PIC's speech.

If PIC's speech is found not to be government speech, then under the First Amendment the NPS regulatory set-aside for PIC is content and viewpoint neutral. In enacting this regulation, NPS was aware of no specific content or viewpoint a PIC might assert. NPS simply provided limited spaces on the Pennsylvania Avenue sidewalks for its co-sponsor PIC to provide media stands, seats to ticket-holders, and other facilities related to the effective execution of the Parade.

This set-aside serves a significant government interest in assisting the entity recognized by statute as being responsible for inaugural ceremonies and activities to meet those responsibilities in connection with an event co-sponsored by the government. The limited regulatory set-aside for PIC is narrowly tailored to serve that interest and leaves 84% of the sidewalks abutting the Inaugural Parade available to ANSWER, other demonstrators, and members of the public. This provides ample alternative channels of communication for First Amendment speech.

ARGUMENT

I. NPS is Entitled to a Limited Regulatory Preference for Government Speech on Inauguration Day.

A. Government Speech Does not Implicate First Amendment Principles.

NPS's regulatory set-aside for limited space along the Pennsylvania Avenue sidewalks to be used by PIC for its bleachers during the Inaugural Parade that PIC and NPS co-sponsor constitutes government speech in a traditional public forum. The Supreme Court has made clear, repeatedly, that the government is entitled to use government property to engage in government speech as long as such use is within reason.

In Pleasant Grove City v. Summum, 555 U.S. 460 (2009), a religious organization sought permission to erect a permanent monument with religious

messages in a public park that already contained other permanent monuments, including a Ten Commandments monument that had been donated by a private organization. Id. , 555 U.S. at 464-65. The city had selectively chosen the permanent monuments it wished to display in the park. Id. at 473. The Supreme Court made clear that it has repeatedly held that the government has the right to engage in its own speech. Id. at 467, *citing*, *e.g.*, Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 139, n.7 (1973) (Stewart, J., concurring); Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229 (2000).

Not only does the government have a right to its own speech, but when it exercises that right the Free Speech Clause of the First Amendment is not implicated. Summum, 555 U.S. at 467. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." Id.

The Supreme Court found that by accepting the monument donations and placing them in a city park, the city had engaged in government speech which allowed it to control which monuments were placed in the park. Summum, 555 U.S. at 470-472. The Court acknowledged the plaintiff's concerns that allowing

such government speech in a public park could "be used as a subterfuge for favoring certain private speakers over others based on viewpoint." Id. at 1134. But the Court found such concern unwarranted in this case because the city had made no effort to abridge traditional speech rights that could be exercised by others in the park, in places other than where the city monuments comprising government speech actually stood. See id. at 474.

More recently in Walker v. Texas Div., Sons of Confederate Veterans Inc., 135 S. Ct. 2239 (2015), the Supreme Court considered a First Amendment challenge to the state's rejection of a request for a specialty car license plate featuring a Confederate battle flag. In upholding the state's decision, the Court reiterated that "[w]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." Id. at 2245. "[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." Id. at 2245-46. The Court emphasized its prior holding in Bd. of Regents of Univ. of Wis. System v. Southworth, that "'the government can speak for itself[,].'" and need not, when doing so, include alternative views. Walker, 135 S. Ct. at 2246, *quoting* Southworth, 529 U.S. at 229.

This Court has similarly held that the government is entitled to its own speech without the need to include other views. As far back as 1975 this Court recognized that NPS periodically sought to set-aside public forum property for certain NPS-sponsored activities. In A Quaker Action Group, this Court addressed the issue of events sponsored or co-sponsored by NPS and the fact that, at that time, such events were exempt from ordinary NPS permit requirements. Id., 516 F.2d at 728. This Court held that even NPS sponsored or co-sponsored events required the issuance of a permit for the event. Id., 516 F.2d at 729. Notably, however, this Court also made clear that:

> if the Park Service wishes, it could retain a system of "NPS events," reserve time in, say, Lafayette Park, and even publish advance schedules. This could be done, for instance, by establishing in advance an announced schedule of recurrent annual events.

Id.[3]

Unable to counter this express holding that the government is entitled, under proper circumstances, to hold its own events for its own speech, ANSWER responds that this Court emphasized that NPS's permit system must be enforced uniformly without discrimination among First Amendment speakers. Appellant's Brf. at

[3] The Court's reference to Lafayette Park was because the case involved NPS restrictions in Lafayette Park. Nothing in the Court's opinion indicates that NPS's ability to reserve time ahead for NPS sponsored or co-sponsored events is limited to Lafayette Park.

58-59. There is no dispute that in A Quaker Action this Court was concerned that the government not discriminate against private groups seeking to engage in First Amendment activity by without advance notice labeling some event as an "NPS event" and according it special treatment. 516 F.2d at 728-29. This Court noted that without any announced standards for what would be selected as an "NPS event," the government remained free to restrict First Amendment activity in certain public gatherings by simply designating them at any time as NPS events. Id. To avoid this potential problem, this Court held that in order for the government to engage in its own speech, it needed either to obtain a permit like any other group, or to establish in advance by regulation a schedule of recurrent annual events that would constitute NPS events. Id.

Thus, contrary to ANSWER's argument, this Court has made clear that a set-aside for NPS events that is established in advance, with notification to the public, will not violate the First Amendment.

Since this Court's decision in A Quaker Action, this Court has repeatedly held that the government may engage in its own speech both on public forum property and nonpublic forum property without the need to include other views. In Oberwetter v. Hilliard, 680 F.3rd 545 (D.C. Cir. 2011), with respect to NPS's

regulation prohibiting demonstrations or special events inside the Jefferson Memorial, this Court stated that:

> Oberwetter argues that the government engages in viewpoint discrimination by hosting its own official birthday ceremony in the Memorial while excluding her celebratory dance. This argument fails because the government is free to establish venues for the exclusive expression of its own viewpoint. See Pleasant Grove v. Summum, 555 U.S. 460 (holding that when the government erects a monument on public property, it is not obligated to allow other monuments expressing alternative viewpoints); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny."). It would be strange indeed to hold that the government may not favor its own expression inside the Jefferson Memorial, which was built by the government for the precise purpose of promoting a particular viewpoint about Jefferson.

Id. at 553-54. Although unlike Pennsylvania Avenue the inside of the Jefferson Memorial is a non-public forum, id. at 553, the Oberwetter decision stands for the proposition that it is not viewpoint discrimination for the government to reserve some space for its own expression.

This proposition was also recognized by this Court in Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997), a case on which ANSWER heavily relies. In Mahoney the NPS granted PIC a permit to use *all* of the Pennsylvania Avenue sidewalks on Inauguration Day in 1997. The result was that the plaintiff was unable to obtain a permit for a group demonstration on the Pennsylvania Avenue sidewalks during the Inaugural Parade. This Court found that fact notable in its

analysis, by observing that NPS "issued itself a permit *not for a limited segment of the Pennsylvania Avenue sidewalks for the time of the Parade*, but for the entire length of the Pennsylvania Avenue sidewalks for a five-month period[,]" which was much longer than NPS regulations allowed other permittees to obtain. Id. at 1458 (emphasis added).

In reversing the District Court's upholding of the PIC permit, this Court made clear that: "We do not purport to hold that the government can never control the use of segments of its own property against actual inconsistent usage by persons attempting First Amendment expression. . . but [not] for the *entire length of Pennsylvania Avenue sidewalks*" prior to, and on, Inauguration Day. Id. at 1458 (emphasis added).

By this statement this Court in Mahoney simply recognized the principle that the government may use government property for government speech within reason. And the Court did not consider it within reason for the government to lay a claim to all segments of the Pennsylvania Avenue sidewalks on Inauguration Day. Had this Court concluded in Mahoney that the government had no right to use any segments of the Pennsylvania Avenue sidewalks on Inauguration Day, it would have made no sense to point out that the permit to PIC involved the "entire length of the

Pennsylvania Avenue sidewalks" and not just "a limited segment[.]" Id., 105 F.3d at 1458.

Despite ANSWER's numerous citations to the Mahoney case throughout its brief, ANSWER fails to address the Mahoney Court's statement that the government may at times control the use of segments of its own property, or that the permit at issue was for all the Pennsylvania Avenue sidewalks and not just a limited segment of them. Both of these statements, however, make clear that on Inauguration Day the government may control for its own use some portion of the Pennsylvania Avenue sidewalks.

In fact, consistent with this Court's statement in Oberwetter, it would be strange indeed to hold that the government may not favor its own expression anywhere along the Pennsylvania Avenue sidewalks during the Inaugural Parade that is organized and financed by the government, with help from private parties, for the precise purpose of celebrating the democratic inauguration of a newly elected president.

B. Government Speech Receiving Assistance from Private Sources Remains Government Speech.

ANSWER makes much of the fact that NPS's regulatory set-aside at issue here is for a private entity -- the PIC -- and not for a specific government entity. Appellant's Brf. at 19-20. But the Supreme Court has made clear that the mere fact

that the government speech is aided by actions taken by a private entity does not necessarily destroy the government character of the speech.

In Summum, the permanent monuments that the city accepted for installation in its park were often privately funded or donated. Nonetheless, the Court clearly held that "[a] government entity may exercise the same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." Id., 555 U.S. at 468. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995). Indeed, "[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land." Id., 555 U.S. at 470-471.

Similarly in Walker, the fact that a license plate message may be suggested by a private party did not alter the government nature of the message. Id., 135 S. Ct. at 2251. As the Supreme Court stated, "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the government nature of the message or transform the government's role into that of a mere forum-provider." Id.

ANSWER argues that the PIC is a private entity unaccountable to the government and thus its actions cannot be equated with government speech.

Appellant's Brf. at 19-20. This argument, however, is directly at odds with ANSWER's position in District Court.

As the District Court noted in footnote 9 of its decision:

> Indeed, even ANSWER itself, throughout its briefs, characterizes PIC as representing the government, even going so far at times as to label PIC's speech 'government speech.' See, e.g., Pl. Opp. & Cross-Mot. re Counts III and IV at 2 (PIC is "the advocacy and fundraising vehicle of the government."); id. at 11 (referring to the set-aside as a "permanent ban . . . in favor of the government's supporters and speech"); id. at 13 (describing PIC as "represent[ing] [the] government's viewpoint" and the set-aside as a "favored reservation of public forum space for government speech"); id. at 14 ("government sponsored expression"); id. at 15 (set-aside is "viewpoint-based discrimination in favor of government speech"); id. at 18 (PIC "represent[s] the viewpoint of the government" and "its expressive activities are co-sponsored by the government"); id. at 27 ("The Inauguration will go on regardless of reserved PIC bleacher seats for government speech."); Pl. Reply re Counts III and IV at 3 (describing PIC's speech as "that of the government"); id. at 4 ("PIC uses these areas to express the viewpoint of the government"); id. at 23 ("the government's speech").

JA 67, n.9. Given this concession, ANSWER should not be heard now to disavow its prior position that PIC's speech is government speech.

Nonetheless, ANSWER's argument cannot withstand scrutiny. Although it is true that PIC is a private entity, it is a special kind of private coordinating entity that exists solely to further the speech of the newly elected President, as recognized by statute.

This Court in Newdow v. Roberts, 603 F.3d 1002 (D.C. Cir. 2010), noted that a PIC is "a private coordinating group[,]" created by the President-elect, and "recognized by statute as 'the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony.'" Id. at 1006, *citing* 36 U.S.C. § 501(1). ANSWER effectively ignores the fact that PIC does not exist until a new President has been elected; that it is created solely to help coordinate activities associated with the inauguration of the newly elected President, and that the connection to the newly elected President is recognized by statute. Additionally, Congress has provided that the NPS "may grant to the Inaugural Committee a permit to use the reservations or grounds during the inaugural period, including a reasonable time before and after the inaugural period." 36 U.S.C. § 503. Thus, even though a private entity, PIC has been accorded statutory recognition as the entity in charge of the Inaugural ceremony and related activities, which includes the Inaugural Parade.

This involves interacting with government agencies such as NPS and others, to plan these inaugural-related activities. As this Court recognized in Newdow:

> The then President-elect created a private coordinating group, the Presidential Inaugural Committee ("PIC"), recognized by statute as 'the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony.' 36 U.S.C. § 501(1). By concurrent resolution, Congress established the Joint Congressional Committee on Inaugural

> Ceremonies ("JCCIC") and authorized it to "utilize appropriate equipment and the services of appropriate personnel of departments and agencies of the Federal Government" to "make the necessary arrangements for the inauguration of the President-elect." S. Con. Res. 67, 110th Cong. (2008). The U.S. military services, pursuant to 10 U.S.C. § 2553, jointly formed the Armed Forces Inaugural Committee ("AFIC") to assist the JCCIC and the PIC in "[p]lanning and carrying out" security and safety measures, ceremonial duties, and other appropriate activities for the inauguration. Id. § 2553(b).

Id., 603 F.3d at 1006.

Thus, the fact that the government co-sponsors the Inaugural Parade with PIC does not render the speech conveyed by the newly elected President and his or her supporters during the Inaugural Parade, as coordinated by PIC, that of a private entity. As the District Court observed, PIC exists solely for the purpose of planning inaugural festivities for the incoming President, who becomes president, and therefore part of the government, before the Inaugural Parade begins. JA 68.

Under the circumstances, ANSWER's claim that the speech of PIC is not the same thing as government speech, merely because PIC is a private entity, necessarily fails. See Appellant's Brf. at 19.

C. The Government Speech during the Inaugural Parade Includes the PIC Bleachers Set Up for Government Supporters to Watch the Parade.

The District Court concluded that historically the government has used the Presidential Inauguration and its ceremonies, including the Inaugural Parade, to

convey government speech to the public. JA 66. ANSWER counters that government speech during the Inauguration is limited to the Inauguration Swearing-in Ceremony at the Capital and the Inaugural Parade, neither of which is at issue. Instead, ANSWER argues that the proper medium for analysis are the Pennsylvania Avenue sidewalks and whether they have historically been used to convey government speech during the Inaugural Parade. ANSWER claims that because historically there have been demonstrations along the Pennsylvania Avenue sidewalks during the Inaugural Parade, *none* of the Pennsylvania Avenue sidewalks can be found to be historically associated with government speech. Appellant's Brf. at 24-31.

The record demonstrates, however, that bleachers erected in connection with the Inaugural Parade have indeed been used to convey government speech. For example, in 1881, President James Garfield reviewed the parade from a specially built stand in front of the White House. JA 1126. That tradition exists to today and given that the reviewing stand is limited to the President and his guests, it cannot reasonably be argued that this stand is not associated with government speech. The fact that ANSWER does not challenge the set-aside for the Presidential reviewing stand does not make this fact irrelevant to the analysis.

In the nineteenth and early twentieth century, reviewing stands such as PIC's bleachers were erected "with flamboyant construction, bedecked with flags" and overseen by one of the inaugural committee heads. JA 969. Plainly these stands sought to convey a visual celebration of the new President. ANSWER's claim that seats on these bleachers were sold on a "non-partisan basis" is unsupported by the record citation on which it relies. Appellant's Brf. at 29, *citing* JA 969. In fact, none of ANSWER's citations regarding the sale of seats on inaugural bleachers supports ANSWER's claim that these seats were sold on a non-partisan basis. Appellant's Brf. at 30, *citing* JA 1030, 1035 & 1087.

ANSWER concedes that from at least as far back as the 1997 Inauguration of President Clinton, seats on PIC bleachers were sold to supporters of the newly elected President. Appellant's Brf. at 30. If the PIC exists solely to plan inaugural activities for the President-elect, who becomes President and, therefore, part of the government before the Inaugural Parade begins, then bleachers set up for supporters of the newly elected President are necessarily being used for those engaged in government speech. The government can only speak through people and the decisions in Walker and Summum make clear that those people do not have to be government employees; private parties can also help convey government speech.

ANSWER also argues that there is no basis for a reasonable observer to believe that the speech of the people along the Inaugural Parade route constitutes government speech. Appellant's Brf. at 32-33. This argument misses the mark, however, because it focuses on the speech of all the individuals lining the Pennsylvania Avenue sidewalks along the Inaugural Parade route. No one has suggested that all the individuals on the Pennsylvania Avenue sidewalks during the Inaugural Parade are engaged in government speech.

The pertinent question is whether a reasonable observer would believe that people occupying PIC bleachers are engaged in government speech. And the District Court correctly concluded that:

> [R]easonable observers would readily identify the Parade and the activities surrounding it, including the official viewing stands for the President's ticketed guests, as representing the viewpoint of the United States government.

JA 69.

Given that there is a reviewing stand erected by PIC for the President, reasonable observers would conclude that the PIC bleachers similarly contained people supportive of the President, whose expression was part of the President's overall message. The specific message conveyed need not be delineated in order to be considered government speech nor does the message have to be uniform. The

Supreme Court in Summum held that a single message is not a prerequisite for government speech. Id., 555 U.S. at 474.

Moreover, ANSWER identifies no evidence that bleachers are erected with any frequency by those not engaged in government speech. There is no evidence that some entity unassociated with the government erects bleachers and sells tickets to individuals without regard to the speech they might convey from those bleachers. Although ANSWER erected bleachers in 2005, no one would have mistaken their bleachers for government speech. JA 1261, 1265-66.

Accordingly, the District Court correctly concluded that a reasonable observer would view the PIC bleachers as containing those engaged in government speech.

Finally, ANSWER claims that because the government does not exercise continued control over the content of the speech emanating from PIC bleachers, it cannot qualify as government speech. Appellant's Brf. at 34-36. ANSWER argues that the Supreme Court decisions in Walker and Summum "require complete, full and final government control over every last word of expression for this factor to be satisfied." Appellant's Brf. at 35. Significantly, ANSWER cites no authority for this proposition. Id.

The Supreme Court in Walker discussed factors the Court believed to be relevant "considerations" to the question whether government speech was at issue. Walker, 135 S. Ct. at 2249. The Court did not state that such control was a requirement for there to be government speech. Id. Instead, the Supreme Court analyzed a number of factors to make this determination, and recognized that those factors may differ from case to case. For example, as the Court noted in Walker, not every element considered in Summum was relevant to the analysis in Walker. Walker, 135 S. Ct. at 2249.

In Summum, the Court made clear that the message conveyed by the government speech may not be specific or easily identified. For example, "[t]he 'message' conveyed by a monument may change over time." Id., 555 U.S. at 477.

The District Court noted that there was no evidence as to the extent to which the government controls the speech in PIC bleachers. JA 67. Nonetheless, because PIC is directly responsible to the new President, the District Court concluded that "PIC's speech is government speech[.]" JA 69. ANSWER points to no evidence that speech in PIC bleachers is somehow at odds with the President's speech.

Moreover, it would be unworkable to hold that in order for government speech to occur, the government must control every word uttered in order for the

government to be permitted to set aside government property for a government-sponsored event.

The best example of this issue is NPS's July 4th celebration on the National Mall. Just like the NPS regulatory set-aside for limited park areas for PIC bleachers, NPS by regulation has also set aside a portion of the National Mall on July 4th for this other "national celebration event." The July 4th celebration is not a private event -- it is a government-sponsored event taking place on quintessential public forum property with a message celebrating the independence of this nation. 36 C.F.R. §§ 7.96(g)(1)(iii) and (g)(4)(ii)(C). On that day permits are not issued for demonstrations or special events for the portion of the Mall where the July 4th celebration occurs if it would "significantly interfere with the National Celebration Event[]." 36 C.F.R. § 7.96(g)(4)(iv). This Court can take judicial notice of the fact that many thousands of people attend this celebration on an annual basis.

Under ANSWER's theory, unless the government controls "every last word of expression" uttered on the limited area of the Mall set aside for the July 4th celebration, the celebration does not constitute government speech and thus, presumably, the government should not be allowed to have a regulatory set-aside for this government-sponsored event. Yet this Court in A Quaker Action made clear that NPS may set aside public forum property for NPS-sponsored events, and no

mention was made of any requirement that NPS control all of the expression occurring at such an event. Id., 516 F.2d at 729,

The District Court properly looked at all the facts and circumstances surrounding the use of PIC bleachers, correctly declining to find one consideration as controlling. This is precisely what the Supreme Court did in Walker and Summum. And the result reached by the District Court is consistent with this Circuit's precedent, dating back to A Quaker Action, holding that the government may, with advance notice and within reason, set aside segments of its property for periodic use by the government.

That is what NPS has done by regulation in according limited portions of the Pennsylvania Avenue sidewalks to PIC for its use during the Inaugural Parade. The District Court correctly concluded that this speech is not subject to First Amendment scrutiny. Although its effect on the speech of others is subject to such scrutiny, as demonstrated below the NPS regulation comfortably passes constitutional muster.

II. NPS's Regulations Pass Constitutional Muster Under the Public Forum Analysis.

Even if this Court concludes that the regulatory set-aside for PIC's bleachers does not constitute government speech, the regulations should still be upheld under the First Amendment because they are content neutral and do not discriminatorily favor a certain point of view, they are narrowly tailored to serve a significant

government interest, and they leave open ample alternative channels of communication.

A. The Limited Regulatory Preference for PIC Is Content-Neutral and Viewpoint-Neutral.

In a traditional public forum such as the Pennsylvania Avenue sidewalks at issue here, the government ordinarily may not regulate the speech of private citizens based on the content of the message – i.e., the subject matter conveyed. E.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972). As the Supreme Court explained, "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or message expressed." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015). In order to be content-based, the regulation must draw a distinction based on the message the speaker conveys. Id.

The Supreme Court in Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994), held that "'the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" Id., *quoting* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The Supreme Court went on to explain in Turner that:

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based. [citations omitted] By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. [citations omitted]

Id. at 643.

Flowing from this concept, the government also may not regulate private speech based upon the viewpoint expressed, i.e., the government may not regulate in such a way as to favor one view over another with respect to the subject matter of the speech allowed. E.g., Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). Thus, absent compelling reasons, the government may not regulate private speech when the regulatory purpose is to restrict the opinion of the speaker. See, e.g., Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983). Any restrictions based on the content of private speech, or the viewpoint the private speech expresses, will be subjected to strict scrutiny by the courts. Perry, 460 U.S. at 45.

If the regulation does not distinguish between prohibited and permitted speech of private parties based on the content or viewpoint of the speech, the regulation is not subject to strict scrutiny. Rather, an intermediate level of scrutiny is applicable. See, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U.S. at 642; Frisby v. Schultz, 487 U.S. 474, 481 (1988); American Library Ass'n v. Reno, 33

F.3d 78, 84 (D.C. Cir. 1994). This is the appropriate level of scrutiny warranted in this case because no restrictions have been adopted based on content or viewpoint of private speech.

ANSWER argues that the challenged regulations distinguish based on identity and that an identify-based distinction is a viewpoint-based distinction. Appellant's Brf. at 41-42. The cases cited by ANSWER, however, do not establish such a *per se* rule.

Indeed, the Supreme Court in Reed stated that "[c]haracterizing a distinction as speaker based is only the beginning -- not the end -- of the inquiry." Id., 135 S. Ct. at 2230-31. Speech restrictions based on identity may be content neutral or they may indicate a preference for the content of the speech conveyed by the speaker. Id. at 2230. Only in the latter circumstance is strict scrutiny warranted. Id.

ANSWER argues that the regulation at issue here seeks to regulate speech based upon its content or message, because it provides a preference for an entity that supports the incoming administration. Appellant's Brf. at 44-45. On the contrary, the regulatory set-aside of small areas of the Pennsylvania Avenue sidewalks for the organization created after an election, and responsible for planning the inaugural activities, does not render the regulation one based on the content or viewpoint of the speech.

ANSWER points to no specific ideas or views that NPS's regulation is intended to favor, nor can ANSWER because the regulation applies to a PIC regardless of the ideas or views expressed. Even assuming that a PIC is a partisan entity representing the viewpoint of the President who created that particular PIC, different PICs represent different viewpoints. A PIC for a Republican President will undoubtedly have a different viewpoint on many issues from a PIC for a Democratic President. No particular content of expression or viewpoint is protected by NPS's regulation; the content and viewpoint will vary from election to election and is unknowable by NPS in advance of the election results. Thus, the regulation does not favor certain ideas over others. See White House Vigil for the ERA Comm. v. Clark, 746 F.2d 1518, 1527 (D.C. Cir. 1984) ("There is nothing in the text of the history of the regulations to suggest that one group's viewpoint is to be preferred at the expense of others."); see also American Library Assoc. v. Reno, 33 F.3d at 84-85.

ANSWER argues that even if no specific viewpoint is expressed, under NPS's regulation the government's "favored views are *always* granted preferential treatment." Appellant's Brf. at 45 (emphasis in original). On the contrary, the regulatory preference for PIC excludes anyone not designated for inclusion by PIC, whether the person supports the government or not. ANSWER identifies no

evidence that all those who support the government may use the space for which PIC is accorded a priority preference. PIC sells tickets for seats on its bleachers and there is no evidence that all those who favor the government buy, or can even afford to buy, tickets to PIC bleachers. ANSWER also concedes that PIC sells tickets to members of the public who are not identified as government supporters. Appellant's Brf. at 30-31.

Thus, the regulatory preference for PIC, to the extent that it sets aside limited portions of Pennsylvania Avenue on Inauguration Day for a priority use by PIC ticket-holders, affects those who support the government and those who do not. The distinction is the purchase of a ticket, and regardless of viewpoint those without a ticket must find another spot along the remaining 84% square feet of Pennsylvania Avenue sidewalks not included in the priority preference for PIC. JA 387.

In the end, the regulatory set-aside for PIC is designed to grant a co-sponsor of the Inaugural Parade limited space on Pennsylvania Avenue sidewalks during the Parade to provide guaranteed space for those willing to pay for it. Nothing about this set-aside indicates any attempt by the government to favor a particular point of view or control the content of specific kinds of speech. Instead, this simply represents what this Court held in A Quaker Action Group was permissible – reserving space in a public forum for a limited time, in a limited way, for a

government-designated event. Prohibiting this, as ANSWER seeks to do, would discriminate against the government by never allowing its co-sponsor PIC to reserve space in a public forum for the Inaugural Parade when others are allowed to do so under NPS's permit system.[4]

B. The Regulation Is Narrowly Tailored To Serve Significant Government Interests.

1. Government Interests at Stake.

It is self-evident that there is a significant government interest in the Inauguration celebration for a newly elected President. As this Court recognized in Mahoney, the Inauguration is an event marking "the observance of the inauguration of the Chief Executive of the United States. . . ." Id. at 1458. It is beyond dispute that this event marks an important peaceful transition of power which itself is worthy of celebration, regardless of one's views of the incoming administration. Being able to hold this celebration, and the activities attendant to it such as the Inaugural Parade which is broadcast to the nation and the entire world, plainly serves a significant governmental interest in demonstrating democracy in action both at home and abroad. The enactment of the Presidential Inaugural Ceremonies Act,

[4] Because PIC is not created until after the November election, and those seeking a permit for the Inaugural Parade may submit an application up to one year in advance of the Inaugural Parade, JA 371, PIC could never stand on equal footing with others seeking permits for Inauguration Day.

with its recognition of a Presidential Inaugural Committee "to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony[,]" 36 U.S.C. § 501, evidences a Congressional recognition of the importance of this event.

PIC not only provides bleachers for those desiring tickets to the Inaugural Parade,[5] PIC also provides an announcer and a media area for broadcasting the Inaugural Parade far and wide. JA 770, ¶¶ 8-9. Importantly, PIC's media area at Freedom Plaza "provides a unique view down Pennsylvania Avenue to the Capitol" and "has been an important and traditional area for PIC-sponsored television and radio that enables them to broadcast to a national and world-wide television and radio audience the parade as it travels from the Capitol." Id. at ¶ 8.

These activities, along with the other inaugural activities that PIC is responsible for, obviously have costs associated with them. PICs spend millions of dollars on inaugural-related activities. JA 475. The Presidential Inaugural Ceremonies Act makes PICs responsible for inaugural activities but provides no funds for them. 36 U.S.C. § 721(b)(2). NPS has a limited budget and no appropriated funds to pay for the inaugural activities that PIC traditionally pays for.

[5] Although in past inaugurations the PIC bleacher area was much larger, the amended regulation has reduced the space allocated to PIC bleachers to 13 percent of Pennsylvania Avenue's National Historic Park. JA 387.

JA 771, ¶ 10. Thus, PICs obviously need to raise money and the sale of tickets for PIC bleachers is one way they do that.

Therefore, as a co-sponsor of the Inaugural Parade, NPS has a significant interest in assisting PIC to meet its statutory responsibilities to plan inaugural activities, including the Inaugural Parade at which members of the public and demonstrators like ANSWER want to attend to express their views. Contrary to ANSWER's claim, the government need not show that without this preference there will be no inauguration celebration and activities. Appellant's Brf. at 48. Instead, the government is entitled to designate the Presidential Inaugural Ceremonies as a "national celebration event" co-sponsored by NPS and PIC, and provide PIC a regulatory preference under the permit regulations in order to advance the government's significant interest in furthering Inauguration-related activities that are organized and paid for by PIC.

ANSWER argues that the government has failed to show that it has a significant interest in including Freedom Plaza in the set-aside for PIC. Appellant's Brf. at 49. ANSWER cites no authority for the proposition that the government must show a significant interest for the set-aside on a block-by-block basis.[6] Id.

[6] In Mahoney this Court declared "the sidewalks of Pennsylvania Avenue [] decidedly constitute *a* public forum[,]" not a series of separate public forums for

Nonetheless, as indicated above, there certainly is a substantial interest in granting PIC a preference to Freedom Plaza so that it can broadcast the Inaugural Parade from the best vantage point. JA 770, ¶ 8. ANSWER disclaims any challenge to the PIC media platforms on Freedom Plaza. Appellant's Brf. at 51. ANSWER cites no authority for the proposition that the government must show a substantial interest in every other foot of ground accorded to PIC under its regulation. Such a requirement would be contrary to both the Supreme Court's and this Court's recognition that NPS is the manager of the nation's parks and is entitled to a certain amount of leeway in that regard within a constitutionally acceptable zone. See Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1983); White House Vigil for the ERA Comm. v. Clark, 746 F.2d 1518, 1531-32 (D.C. Cir. 1984).

2. The Regulation Is Narrowly Tailored.

The District Court properly concluded that not only did the government have "a significant and important interest in planning and executing the Inaugural Parade[,]" but also that "the regulation is narrowly tailored to serve that interest." JA 71. The Court found that:

> To further the government's interest in PIC fulfilling that statutory mandate, NPS has reserved approximately 16% of the parade route for PIC's exclusive use for facilities directly related to effective execution

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each block. Id., 105 F.3d at 1457 (emphasis added).

> of the Parade. The reserved spaces are used to provide reasonable viewing areas for the President's ticketed guests -- a substantial source of PIC's private fundraising -- facilities for the media outlets from across the globe that cover that cover the Inaugural Ceremony and Parade, and portable toilets for the public. That modest restriction of space available to the general public is narrowly tailored and cannot be said to burden "substantially more speech than is necessary" to further the government's interest. Ward v. Rock Against Racism, 491 U.S. at 799.

JA 72.[7]

The test for "narrowly tailored" cannot be equated with "the least restrictive means." Ward, 491 U.S. at 798-99. As the Supreme Court reiterated in Regan v. Time, Inc., 468 U.S. 641, 657 (1984), "[t]he less-restrictive alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." See also, e.g., Clark, 468 U.S. at 299; American Library Ass'n v. Reno, 33 F.3d at 88. A regulation is "narrowly tailored" to serve substantial government interests if it targets no more than the interest is seeks to serve. Taxpayers for Vincent, 466 U.S. at 808-10.

The Presidential Inaugural Ceremonies Act expresses a Congressional intent to allow PIC the use of some of federal land in connection with its inaugural activities, and this Court's decision in A Quaker Action recognizes the

[7] As noted earler, PIC bleacher areas comprise only 13% of the parade route. JA 387.

government's ability to reserve some of its land within reason for a government-sponsored event. NPS's amended regulation provides the PIC a limited segment of the Pennsylvania Avenue sidewalks for its use during the Inaugural Parade, and any empty PIC seats have to be made available to members of the general public.

This limited priority preference, therefore, adequately satisfies the narrowly tailored requirement. ANSWER's observation that in 2009, as a result of a settlement, PIC was accorded access to less space on Freedom Plaza, Appellant's Brf. at 49, merely demonstrates ANSWER's disagreement with the location PIC was accorded by NPS's amended regulation. But ANSWER has no right to exercise its First Amendment activities wherever and whenever it wants. The Supreme Court has made clear that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981). And there is nothing unreasonable about NPS granting PIC additional space for its bleachers in the same vicinity as PIC's media stand.

ANSWER relies on this Court's decision in Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014), as support for its claim that NPS's regulation fails

the narrowly tailored test. Appellant's Brf. at 48. But ANSWER's reliance on Edwards is inapt.

In Edwards this Court held that the District of Columbia's tour guide licensing scheme violated the First Amendment because the District failed to show that the challenged regulation advanced the District's interests in a material way. Id. at 1003. The Court reached this conclusion after finding that the District's position "reveal[ed] the scheme's lack of coherence and impermissibly underinclusive scope." Id. at 1007.

Here, by contrast, there is nothing incoherent about the limited priority preference accorded to PIC under NPS's amended regulation, and ANSWER certainly would not argue that such a preference is underinclusive. Thus, the decision in Edwards does nothing to advance ANSWER's claims.

As the final regulation granting PIC limited preferential space on Pennsylvania Avenue for Inauguration Day makes clear, NPS has "dealt with constitutional values with scrupulous care" White House Vigil, 746 F.2d at 1527 (describing the NPS efforts and upholding NPS regulation on the use of the White House sidewalk). For the Inauguration, NPS took careful steps to increase the areas along Pennsylvania Avenue that would be open to members of the general public and demonstrators, thereby reducing the amount of space that had traditionally been

set aside for PIC bleachers. JA 770-71, ¶ 9; JA 387. This has resulted in an increase in the amount of space made available to members of the general public and demonstrators seeking to participate in activities attendant to the Inaugural Parade.

Because NPS's regulation granting PIC limited space on Pennsylvania Avenue is directly tied to helping PIC carry out Inauguration-related activities, yet reduced the space that PIC was previously granted, and affords ANSWER, other demonstration groups, and the general public more space for their activities, the regulation is narrowly tailored to serve the significant governmental interest in having a national celebration associated with the inauguration of the nation's Chief Executive.

C. The Regulation Permits Ample Alternative Channels of Communication.

The District Court "easily conclude[d] that the regulatory set-aside provides ample alternative channels for ANSWER's communication at the Inaugural Parade." JA 73. ANSWER and others may seek to communicate their messages in various ways on the majority of the Pennsylvania Avenue sidewalks during the Inauguration. The regulation burdens speech only in an indirect and insubstantial way, in that ANSWER cannot have access to all of the exact space it sought for its demonstration activities.

At the 2005 Inauguration and at each inauguration since then, ANSWER has been granted ample prime space for its demonstration activities. In the 2013 Inauguration, ANSWER was granted space at a portion of its desired location – Freedom Plaza - and did engage in demonstration activities for a limited time period in that location on Inauguration Day, January 21, 2013. JA 777 ¶ 24; JA 779 ¶ 26. Indeed, the space in Freedom Plaza granted to plaintiff was "the same area that ANSWER Coalition used for the 2005 Inauguration. . . ." JA 776-77 ¶ 21. ANSWER was also offered the use of John Marshall Park, JA 776, ¶ 20, which ANSWER had used in 2005, resulting in its "so successful" rally where thousands of demonstrators picked up signs from ANSWER's rally site "and were able to line **both** sides of Pennsylvania Avenue from 3rd to 7th Streets." JA 1261 (emphasis added).

Additionally, ANSWER and other demonstrators were granted greater rights than members of the general public, in that they were allowed through the checkpoints to Pennsylvania Avenue before members of the general public were allowed in. JA 779 ¶¶ 25-26, JA 781 ¶¶ 31-32; JA 782 ¶ 34.

ANSWER, therefore, was granted space at its preferred location for demonstration activities, along with additional space along Pennsylvania Avenue. Accordingly, even though ANSWER was not afforded access to all of Freedom

Plaza, ANSWER has no basis to claim that ample avenues of communication were not afforded to ANSWER for its First Amendment activities on Inauguration Day. Accord Clark, 468 U.S. at 295 (outright ban on one manner of speech valid where it did not constitute "any barrier to delivering to the media, or to the public by other means, the intended message.")

The District Court correctly concluded that with 84% of the Pennsylvania Avenue sidewalks lining the Inaugural Parade route available to ANSWER, other demonstrators, and members of the general public, NPS's limited regulatory set-aside for PIC left open ample alternative avenues of communication for expressive activities. JA 72-73.

The foregoing demonstrates that ANSWER's First Amendment rights have not been violated by NPS's amended regulation granting PIC limited park areas for priority use on Inauguration Day.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the January 28, 2016 Opinion and Order of the District Court should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this brief conforms to the type-volume limitation imposed by Fed. R. App. P. 32(a) and consists of 10,585 words.

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CERTIFICATE OF SERVICE

I certify that the accompanying Brief for Appellee was served upon appellant through this Court's ECF System on September 28, 1916, and will be served by U.S. mail, first class postage prepaid, addressed to:

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