Religious Liberties

Monumentally Speaking: *Pleasant Grove City v. Summum*

*By Kimberlee Wood Colby**

In a case brought by a quirky religion against a small city council, *Pleasant Grove City, et al., v. Summum, a corporate sole and church,* No. 07-665,[1] the Supreme Court grapples with the critical distinction between private speech and government speech, a demarcation necessary to the proper application of both the Free Speech Clause[2] and Establishment Clause[3] that currently perplexes the lower courts.[4] The case arose when the city council of Pleasant Grove, Utah, refused to allow Summum, a religious group, to erect a monument featuring its principles, or "Seven Aphorisms," in a public park next to a Ten Commandments monument installed in 1971 by the Fraternal Order of Eagles.

The Ten Commandments monument is largely a red herring: the case raises a free speech rather than a religious liberty issue. The specific question before the Court is whether the Free Speech Clause requires the city to allow any private group to place its individual monument in a city park alongside other permanent monuments. The case does not involve a federal Establishment Clause challenge to the city's display of the Ten Commandments monument or a Free Exercise Clause challenge to the city's denial of Summum's request for access.[5]

At oral argument on November 12, 2008, the Court wrestled with three key themes: 1) if monuments in public parks are government speech, and the limits to be placed, if any, on the ability of government to speak in viewpoint discriminatory ways; 2) the implications for future Establishment Clause doctrine of ruling that a Ten Commandments monument is government speech; and 3) the shortcomings of the Court's current public forum analysis for determining access of private speakers to public spaces.

The city's victory seems a near certainty. The question is whether the Court reaches that result by further defining the nascent government speech doctrine or on the narrow ground that selection of monuments simply falls outside forum analysis or through a broad restructuring of public forum analysis. Interestingly, because the decision could have far-reaching consequences for private speakers, many conservative organizations in their briefs amici curiae cautioned the Court that any decision should be written to prevent antagonistic government officials from designating all expression on public property as "government speech" in order to exclude citizens from expressing their religious or conservative viewpoints in public spaces.

I. Factual Background

A. Summum's Mission

According to Summum's website, "'summum' means 'the sum total of all creation'"[6] and has as its mission "[t]o help you liberate and emancipate you from yourself and turn you into an Overcomer."[7] Claude Rex Nowell King[8] founded Summum around 1975 in Utah, after having a series of encounters "with Beings not of this planet" who "opened [his] awareness to the Principles."[9] Summum teaches that its basic principles, the Seven Aphorisms, were given to Moses before he received the Ten Commandments; however, Moses decided the Israelites were not yet ready for the Aphorisms and substituted the Ten Commandments.[10]

Since its founding, Summum has endeavored to have its Seven Aphorisms monument erected next to Ten Commandments monuments on courthouse lawns and in public parks in several Utah cities.[11] The Tenth Circuit's decision to require Pleasant Grove to erect the Summum monument can best be understood in the context of several earlier cases and two Supreme Court cases involving displays in parks, which are:

- 1973: The Tenth Circuit holds the Ten Commandments monument erected by the Fraternal Order of Eagles near the entrance to the Salt Lake County courthouse does not violate the Establishment Clause.[12]
- 1995: In *Capitol Square Review and Advisory Board v. Pinette,*[13] the Supreme Court holds that Ohio must allow the Ku Klux Klan to erect a temporary, unattended display of a religious symbol, a cross, on statehouse grounds on an equal access basis with other community groups allowed to erect temporary, unattended displays.
- 1997: When Summum sues to erect its "Seven Aphorisms" monument next to the Salt Lake County Ten Commandments monument, the Tenth Circuit holds that both monuments are private religious speech protected by the First Amendment.[14]
- 2002: When Summum sues Ogden, Utah, either to remove a Ten Commandments monument on municipal grounds or to allow Summum to install its monument,[15] the Tenth Circuit rejects the city's claim that the Ten Commandments monument is government speech rather than the Eagles' private speech.[16]
- 2005: In *Van Orden v. Perry,*[17] the Supreme Court holds that the Establishment Clause is not violated by a Ten Commandments monument donated by the Eagles 40 years earlier and installed on Texas state capitol grounds.
- 2007: The Tenth Circuit keeps alive Summum's lawsuit against Duchesne, Utah, challenging the city's refusal to transfer a small plot of parkland to Summum after the city transferred to a private party a similar plot of parkland upon which a Ten Commandments monument stands.[18]

B. Summum Sues Pleasant Grove

In 2003, the Pleasant Grove city council refused to allow Summum to place its monument in a public park next to a Ten Commandments monument erected by the Eagles.[19] The

* *Kimberlee Wood Colby has worked on religious liberty issues for the Center for Law and Religious Freedom of the Christian Legal Society since graduating from Harvard Law School in 1981.* *Isaac Fong, Casey Mattox, and Tim Tracey deserve special thanks for their thoughtful comments on a draft of this article.*

Society of Separationists had separately sued Pleasant Grove to compel removal of the Ten Commandments monument as a violation of the Establishment Clause.[20]

Donated by the Eagles in 1971, the Ten Commandments monument is but one of fifteen permanent displays in Pleasant Grove's Pioneer Park. Eleven privately donated displays include: a millstone from the town's first flour mill, a stone from the first Mormon Temple in Nauvoo, Illinois, a wishing well, an historic winter sheepfold, the town's first granary and first fire station, park benches, a tree and plaque in memory of a citizen, and a brick monument commemorating September 11, 2001.[21] The park also contains the town's first city hall, the oldest extant Utah school building, a log cabin, and a rose garden planted to honor two residents.[22]

Pleasant Grove denied Summum's request on the ground that permanent displays in Pioneer Park were limited to items which "directly relate to the history of Pleasant Grove" or are "donated by groups with long-standing ties to the Pleasant Grove community."[23] Pleasant Grove subsequently adopted a written policy that an "item must directly relate to the history of Pleasant Grove and have historical relevance to the community." An item must be "donated by an established Pleasant Grove civic organization with strong ties to the community or… a historical connection with Pleasant Grove City."[24] Importantly, in seeking injunctive relief under the federal Free Speech Clause to erect its monument in Pioneer Park,[25] Summum stipulated that its monument did not meet either criterion of the policy.[26]

C. The Tenth Circuit Orders Installation of Summum's Monument

The Tenth Circuit reversed the district court's denial of a preliminary injunction and entered injunctive relief.[27] The court rejected both the city's argument that it had not created a public speech forum that triggered access for the Summum monument and the city's alternative suggestion that the monument was governmental speech, for which the city cited the Supreme Court's application of Establishment Clause analysis to a virtually identical Eagles' monument in *Van Orden*.[28] Reiterating its earlier rulings,[29] the Tenth Circuit ruled that the Ten Commandments monument was the Eagles' private speech. Relying on *Pinette*,[30] the Tenth Circuit rejected the city's reliance on *Van Orden* to characterize the monument as governmental speech because "the Establishment Clause prohibits governmental *endorsement* of religion, which can occur in the absence of direct governmental speech."[31] The Tenth Circuit also distinguished cases in which "the Supreme Court chose not to apply forum principles in certain contexts in which the government has discretion to make content-based judgments in selecting what *private* speech it makes available to the public."[32]

Instead, the Tenth Circuit determined that Pioneer Park was a traditional public forum, defining "the relevant forum" as the "permanent monuments in the city park."[33] Strict scrutiny applied because the city "exclude[d] monuments on the basis of subject matter [historical relevance] and the speaker's identity [organization with ties to community]."[34] Because the city had not "offer[ed] any reason why" its "interest in promoting its history" was compelling, Summum had demonstrated a substantial likelihood of success on the merits.[35] The court left open the question whether the city's policy was a "post hoc façade for content-based discrimination."[36] In balancing the harms to the parties, the court dismissed as "speculative" the city's "contention that an injunction… will prompt an endless number of applications for permanent displays in the park."[37]

D. Dissents from Rehearing Draw the Battle Lines

The Tenth Circuit evenly split on its denial of rehearing en banc with three opinions that foreshadowed the arguments presented to the Supreme Court.[38] In a dissent joined by Judge Gorsuch, Judge McConnell hammered the panel's decision "that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks."[39] He emphasized the ruling's ramifications: "Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter."[40] Nor could "[a] city that accepted the donation of a statue honoring a local hero" refuse "to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag."[41]

Instead, Judge McConnell reasoned "that any messages conveyed by the monument" are "government speech"[42] because Pleasant Grove "owned the monuments, maintained them, and had full control over them"[43] and "could have removed them, destroyed them, modified them, remade them, or … sold them."[44] By accepting donation of the monuments and displaying them on its property, the city "embraced the message[] as [its] own."[45] Judge McConnell noted that in *Van Orden,*[46] "[w]ithout dissent on this point, the Court unhesitatingly concluded the [Ten Commandments] monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech."[47] If the monument is government speech, the government "'may make content-based choices'" and "adopt whatever message it chooses—subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause."[48]

In a separate dissent, Judge Lucero also denounced the panel's decision as "forc[ing] cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them."[49] He disagreed, however, with Judge McConnell's premise that the monument was government speech, because "private parties conceived the message and design of the monuments without any government input."[50] Stressing that a monument is "permanent" rather than "transitory" speech,[51] Judge Lucero discerned a "limited" rather than "traditional" public forum, in which the city "may make content-based determinations about what monuments to allow… but may not discriminate as to viewpoint."[52] He noted "some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access."[53]

In response to the dissents, Judge Tacha denied that the panel opinion opened the "floodgates to any and all private speech"[54] and protested that there was no distinction "between transitory and permanent expression for purposes of forum analysis."[55] Warning against "an unprecedented, and dangerous, extension of the government speech doctrine,"[56] Judge Tacha feared that characterizing monuments as government speech

"would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own," effectively "remov[ing] the government's regulation of permanent non-religious speech from all First Amendment scrutiny."[57]

II. The Supreme Court Weighs Government Speech, the Establishment Clause, and Forum Analysis

Judging from the tenor of oral argument (admittedly a hazardous business), the Supreme Court seems likely to reverse. Quite simply, the Court is unlikely to require a government that honors a war hero, or a particular war's fallen fighters, to permit a private party to erect a monument assailing the war hero's honor, or the justness of the war.[58] Similarly, when the government commemorates the victims of the September 11th attacks, it need not countenance a private party's memorial for the Al-Qaeda terrorists in the same park. The federal government may erect a statue of General Grant in front of the Capitol without similarly honoring General Lee.[59] To promote tourism or civic pride, a city may invite private organizations to decorate statuary animals for installation in public locations, without accepting an animal rights group's statue portraying a mistreated circus animal.[60]

While the result seems fairly straightforward, the path by which the Court will reach its result is less clear. The Court is sorting through the amorphous boundaries of current government speech doctrine, the implications of finding a Ten Commandments monument to be government speech for future Establishment Clause litigation, and the shortcomings of current forum analysis for regulating placement of monuments from private donors in public parks.

A. Government or Private Speech?

The parties' briefing focused on whether government's placement of a monument from a private donor on government property constitutes private speech or government speech. Drawing on Judge McConnell's dissent, Pleasant Grove and the United States,[61]as amicus, both urged the Court to hold that the selection of monuments for placement in public parks constitutes government speech.

The Court's nascent government speech doctrine[62] recognizes the obvious: governments throughout history have engaged in their own speech in order to advance specific social, economic, and political agendas. Equally as obvious, private individuals are necessarily involved in government speech—both in determining what government will say and serving as government's actual mouthpieces. Government cannot speak without human agents.

Denomination of speech as *either* private *or* government speech is crucial for at least two reasons. First, it determines whether the government may restrict speech based upon content or viewpoint without violating the Free Speech Clause. Under public forum analysis, government may almost never limit access for private speakers to public property on the basis of viewpoint, and often may not limit access on the basis of content.[63] When the government is the speaker, however, it presumably may limit its speech on the basis of both content and viewpoint.[64] Therefore, if the selection of monuments is government speech, the city's denial of access is permissible even if the decision is based on the content or viewpoint of the Summum monument.

Second, the determination that speech is private or government is critical to the proper application of both the Establishment and Free Speech Clauses when a religious speaker seeks access to public facilities. As the Court has repeatedly explained, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[65] In upholding the right of access for private religious speakers to government property, the Court often has rejected the government's claim that the Establishment Clause would be violated by equal access for religious speakers because students or the general public might mistakenly view the religious speech as endorsed by the government.[66]

In order to avoid the difficulty of categorizing speech as private or government, at oral argument, Justice Souter suggested that the Court recognize a hybrid category of mixed private and government speech,[67] as at least one amicus curiae brief urged.[68] A "mixed speech" category, however, would further complicate public forum analysis, which already suffers from ill-defined categories that even federal judges find head-splittingly difficult to apply.[69] Indeed, current forum analysis is so malleable that government officials sometimes attempt to manipulate their forum policies in order to exercise unbridled discretion in their grants or denials of access depending on a speaker's viewpoint.[70]

1. When and How Private Speech Becomes Government Speech

At oral argument, the primary battlefield was the definition of *when and how* a privately donated monument becomes government speech. The Ten Commandments monument in Pioneer Park bears an inscription indicating it was donated by a private party, the Eagles, who also chose its message. Obviously, if the city had commissioned all the objects on display in its park and had dictated the message conveyed by each object, the objects would constitute government speech.

Like most governments, however, over several decades, the city accepted display objects from a variety of private individuals and organizations. That a display object has transmuted from private into government speech seems to follow from the fact that the city effectively owns, controls, and maintains the display.[71] To decide that an object donated by a private organization could never become government speech would mean that a city could never accept a private donation without opening its park to all other displays offered by any private organization. Thus, a city would have to turn down a generous collector's offer of a Rodin sculpture for fear of having to accept an egotistical citizen's sculpture of himself.

Summum itself conceded that privately donated displays, including a Ten Commandments monument, could be converted into government speech, but only if the government demonstrated it had "adopted" the speech by a formal resolution, a sign next to the monument indicating it reflected the city's views, or a formal designation as a government monument.[72] In order to finesse the dramatic national impact of its argument, Summum maintained that most monuments' messages already were government speech (either initially commissioned

or subsequently adopted by a government[73]) but contended that Pleasant Grove had failed to take the steps necessary to adopt the Eagles' Ten Commandments monument as its own.[74] Summum's adoption argument encountered heavy skepticism from several Justices, including Justice Souter who suggested the requirement might be "almost a silly exercise in formality"[75] in light of the fact that the city permitted the monument to be installed and then maintained it for many years.

2. The Risks for Conservative Speakers of an Expansive Government Speech Doctrine

Pleasant Grove and the United States argued that government speech does not necessarily equate with the *actual message inscribed* on the monument but instead is *the process of selecting the object for display*.[76] That is, the government need not agree with an object's superficial message in order to consider the object worthy of display. New York City probably does not concur with John Lennon's wish for "no countries" in his "Imagine" lyrics, even though the city commemorates the song with a memorial plaque embedded in Central Park. Similarly, a city could display the Ten Commandments as recognition of the city's cultural heritage without adopting its religious injunctions as the government's own message.

Summum urged that if "selection" alone were enough to convert private speech into government speech, the government could circumvent basic equal access doctrine and engage in content and viewpoint discrimination against, and even among, religious speakers.[77] Government could use the government speech doctrine to "shield itself from the prohibition on content- and viewpoint-discrimination simply by taking title to expressive items before granting preferential access to a forum."[78] For example, "[a] school could…'select' secular speakers for preferential access to its facilities and exclude religious speech, on the theory that it had thereby adopted the message of the secular speakers as its own and immunized itself from Free Speech Clause review."[79]

If unchecked, the government speech doctrine could suck the already thin oxygen out of public forum protection of religious and conservative speech. While the "government speech by selection" argument works well in the context of selection of monuments for display in parks, government must not be allowed to transform a genuine expressive forum—whether traditional public forum, designated public forum, or nonpublic forum—into a free speech "dead zone" simply by invoking the government speech doctrine.

According to several amici, including the Boy Scouts, veterans groups, and conservative religious advocacy groups, *government censorship* could readily be rehabilitated as *government speech*, through "selection" or "adoption" of preferred private speech, to the exclusion of unpopular conservative or religious speakers. For example, the American Legion and other veterans groups warned that "[a]bsent clear limitations and guidelines, this case could be misused to permit government co-opting of private speech as government speech in order to rob truly private speech of its protection."[80] Similarly, the Boy Scouts reminded the Court that, despite the Court's upholding the Scouts' right to exclude homosexual individuals from Scout leadership,[81] the Scouts have been subject to numerous "attacks by persons who seek to exclude Boy Scouts from participation in government programs and attacks from government entities themselves."[82] As the Scouts further noted, government officials "have been excluding religious and other groups from access to facilities and programs on account of their religious or moral values and their efforts to maintain their distinctive identities."[83]

Many government officials are biased against religious or conservative speakers. As Supreme Court precedents demonstrate,[84] religious speech has been particularly vulnerable to government attempts to gerrymander a forum by claiming that all speech in the forum is government speech or (at a minimum) government-sponsored speech.[85] In its amicus brief, the Alliance Defense Fund urged the Court specifically to note that "gerrymandering to exclude private religious expression is unlawful."[86] Too often in the past, government officials seeking to exclude religious speakers have claimed that all speech in a forum was sponsored by the government, endorsed by the government, or otherwise attributable to the government, so that the religious speakers must—or, at a minimum, could—be excluded without violating the Free Speech Clause.[87] Allowing the government to exclude all religious speech simply by claiming it was adopting as its own all speech on a particular piece of government property would seriously jeopardize the hard-fought protection gained by private religious speakers in the face of secularists' assaults on religious speech in the public square over the past three decades.

In particular, school officials frequently exclude religious speakers from a speech forum by claiming all speech in the forum is government-sponsored speech. For example, a New Jersey school district allowed all community groups to send informational fliers home to parents via students' backpacks but refused to allow a religious community group to do the same, primarily on Establishment Clause grounds, but also on the grounds that the fliers were school-sponsored speech. Then-Judge Alito found that the community groups' fliers were private speech rather than "[s]chool- or government-sponsored speech" because the school district was not trying "to convey its own message but simply assisting community organizations."[88] The Supreme Court itself has disapproved of school districts' attempts to circumvent equal access for religious student groups by claiming that all student groups were school-sponsored and, therefore, a religious student group could be excluded because "obviously" a school could not sponsor its speech.[89]

Furthermore, the Becket Fund for Religious Liberty explained that some *permanent* speech on government property may be private rather than government speech. Governments often raise funds for schools, stadiums, zoos, or parks by inviting private citizens to purchase bricks or tiles inscribed with the purchasers' own messages for permanent installation on government property. Predictably, some government officials have insisted that the Establishment Clause requires exclusion of private citizens' religious messages.[90] For example, the Chicago Park District sold blank bricks to citizens, who could dictate any message, but rejected a couple's brick dedicated to their children because it included the name of Jesus.[91] Parents of two Columbine victims were not allowed to include religious themes on their tiles that were among hundreds of tiles painted by community members for inclusion in the high school's new wall mural. The school asserted that all tiles painted by com-

munity members constituted government speech.[92]

Nor does a government approval process transform private speech into government speech. Even in the traditional public forum, such as streets and parks, government officials routinely require prior approval of the time and place of a parade, rally, or protest.[93] Courts have sometimes relied on the existence of an approval process to buttress the characterization of speech as "government speech" or "government-sponsored" speech. Such circular reasoning, however, could easily eviscerate freedom of speech.

Finally, religious speech is particularly vulnerable to suppression through forum manipulation because government officials often suppress religious speech out of a mistaken notion that the Establishment Clause prohibits even private religious speech on public property. After the Establishment Clause's proper scope is explained to them, government officials too often switch to *post hoc* rationalizations to justify their censorship. A deplorable example occurred recently in a high school near Yorktown, Virginia, the site of George Washington's final victory securing American independence. School officials required a high school teacher to remove from his bulletin board a National Day of Prayer poster portraying General George Washington kneeling in prayer.[94] School policy allowed teachers to place items of personal interest on their classroom bulletin boards, including pictures of sports figures.[95] School officials initially ordered the picture removed because they believed it violated the Establishment Clause but then switched to a "curriculum control" claim (essentially a particularized "government speech" claim) to justify their censorship of George Washington's picture.[96]

Then a picture of George Washington praying is censored in Virginia schools—and that suppression is upheld by a federal appellate court[97]—concerns about expansion of government speech doctrine merit careful attention. Government speech doctrine needs to be crafted to ensure protection of conservative and religious speakers from government officials' censorship.

3. Is Viewpoint Discrimination Permissible?

A basic presumption of government speech doctrine is that, once speech is determined to be government speech, the government may choose its message free from the usual constraints on content or viewpoint discrimination. Indeed, "when the State is the speaker…it is entitled to say what it wishes,"[98] and "some government programs involve, or entirely consist of, advocating a position."[99] As the Deputy Solicitor General observed during oral argument, if the government could not advocate a particular viewpoint, the United States could not participate as amicus curiae.[100]

This common sense view that government must be allowed to advocate its own viewpoint to the exclusion of other viewpoints[101] contrasts starkly with the bedrock premise that government may not engage in viewpoint discrimination among private speakers.[102] During oral argument, several justices voiced concern as to whether government speech really should operate without even a minimal viewpoint neutrality requirement. Justice Stevens posited the hypothetical of whether the government could delete the names of homosexual members of the military from a war memorial.[103] Justice Breyer and Justice Kennedy echoed similar concerns.[104] Justice Breyer also queried whether the government could accept sculptures for a sculpture garden only by Democratic sculptors while rejecting Republican sculptors' pieces.[105]

B. Establishment Clause Violation?

At oral argument, the Court unexpectedly dwelled on the Establishment Clause implications for future Ten Commandments cases of holding a Ten Commandments monument to be government speech. Chief Justice Roberts almost immediately asked Pleasant Grove's counsel: "[Y]ou're really just picking your poison, aren't you? I mean, the more you say that the monument is Government speech to get out of… the Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause."[106] Justice Kennedy initially characterized the issue as "critical."[107] Justice Ginsburg disputed the city's assertion that *Van Orden* settled the Establishment Clause question "[b]ecause you don't have here a 40-year history of this monument being there."[108] Pleasant Grove's counsel countered: "There is a 36 year history here."[109] To which Justice Scalia quipped: "I think 38 is the cut-off point."[110]

The Court's focus on the Establishment Clause was unexpected for three reasons. First, Summum chose not to bring a federal Establishment Clause claim, so it cannot be a ground for decision in this case.[111] Second, in *Van Orden,*[112] the Court held that Texas' display of a nearly identical Ten Commandments monument did not violate the Establishment Clause. Third, Justice Alito's replacement of Justice O'Connor, a *Van Orden* dissenter, presumably buttresses the longevity of the Court's plurality opinion upholding the display's constitutionality.

Despite not bringing an Establishment Clause claim, Summum pressed a second Establishment Clause violation:[113] by excluding the Seven Aphorisms monument while including the Ten Commandments monument, Pleasant Grove discriminated among religious viewpoints.[114] Unlike most allegations of viewpoint discrimination, this allegation might be considered a constitutional violation even if the speech is government speech because the Establishment Clause restricts government speech.[115]

C. Forum: Traditional, Designated, Nonpublic, or Nonexistent?

1. Private Speech in a Traditional Public Forum

For the past twenty-five years, access for private speakers to government property has been controlled by the categorization of the forum to which access is sought. The three categories of fora and their corresponding levels of speech protection are: 1) a traditional public forum, such as public parks, streets, and sidewalks, from which a private speaker may not be excluded except for a compelling state interest; 2) a designated public forum in which the government has opened specific government space to a broad range of speakers from which a private speaker may not be excluded except for a compelling state interest, except that the government may restrict the forum to specific subject matter or speaker class; and 3) a nonpublic forum in which the government has reserved its space for specific purposes and may exclude speakers if the exclusion is reasonable and viewpoint-neutral.[116]

Relying heavily on *Pinette*,[117] in which the Supreme Court required equal access for a private group's unattended display of a religious symbol, Summum primarily rested its argument

on the fact that a park is the quintessential traditional public forum. Therefore, the city's policy was unconstitutional because it refused monuments based on content ("historical relevance") and speaker identity ("organization with strong ties to the community" or "historical connection" to the city).[118] Even though Summum stipulated that it did not meet the criteria of the policy,[119] it must be allowed to erect its monument because the park is a traditional public forum to which access may not be limited on the basis of content of speech or class of speaker.

Summum's strongest argument may also be its weakest: if a park is a traditional public forum for the purpose of placement of monuments by private individuals, as Summum argued, then the presence of the Eagles' Ten Commandments monument (or any monument at all) is *irrelevant*. That is, Summum has a right to erect its monument in a public park that has no monuments in it, simply by virtue of the fact that the park is a traditional public forum. Summum stoutly argued that a city may shut its parks to all permanent displays,[120] but there is no logical reason why this is so if the park is a traditional public forum for placement of monuments by private speakers.[121] At argument, Justice Souter and Justice Ginsburg challenged this use of traditional public forum analysis for privately created, permanent monuments.[122]

Here the intuitive recognition that there is something different between temporary speech and permanent speech resonates. Judge Lucero's dissent below rested on the sense that a park is *the* traditional public forum for speech like leafleting, carrying signs, oratory, and even unattended displays that remain in place a few weeks, but not "for all uses, particularly for the installation of permanent displays."[123] As Pleasant Grove and the United States urge, there is "no historic tradition of depositing unapproved, unattended monuments on public parkland" for substantial periods of time.[124]

Importantly, at oral argument, several Justices expressed frustration with forum analysis as the only framework for determining free speech rights of private speakers on government property.[125] Justice Kennedy deemed "this case… an example of… the tyranny of labels…. [I]t just seems wooden and rigid to say… it's a public forum for something that will last 30 years for which there is only limited space. It just doesn't make common sense."[126] A few days before, at oral argument in *Ysursa v. Pocatello Education Association,* Chief Justice Roberts had "confessed" he had "never understood forum analysis."[127]

Change in forum analysis is overdue because it has become an increasingly muddled and bewildering doctrine both in the Supreme Court and the courts below.[128] The categorization of the relevant forum has become disturbingly unpredictable even for lawyers well-versed in the area. Ironically, public forum analysis itself threatens to chill private speech because it is too vague for the lower courts to apply with the consistency and predictability necessary to allow citizens to know where and when they may safely speak in public space. It seems unwise, however, to make a substantial overhaul of the doctrine in a case in which alternatives to public forum analysis have not been briefed.[129]

2. Private Speech but Forum Analysis does not Apply in this Specific Context

Because forum analysis does not work well for many situations involving private speakers' access to government space, the Supreme Court sometimes abandons forum doctrine. In *American Library Association,* a plurality noted that "forum analysis and heightened judicial scrutiny are incompatible" with the government in its role as patron of the arts, television broadcaster, or librarian.[130] The *difference* between the "no forum" approach and the "government speech" approach is subtle: the speech simply is not explicitly recognized as government speech. Yet the result is the same. As an alternative to finding the city's selection of monuments to be government speech, therefore, the Court may decide that no forum for private speech exists in the government's selection process of privately donated objects for permanent display in a park.[131]

CONCLUSION

When the result reached by a lower court seems particularly extreme, the Supreme Court may be tempted to respond in kind. While this case presents an opportunity for drastic development of government speech doctrine or dramatic discarding of public forum analysis, a narrower approach under either doctrine is more likely to achieve the desired outcome: preservation of the government's ability to control placement of monuments in public parks and simultaneous protection of conservative and religious speakers' expression of currently unpopular viewpoints in public spaces.

Endnotes

1 Summum v. Pleasant Grove, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court,* 499 F.3d 1170 (10th Cir. 2007), *cert. granted,* 128 S. Ct. 1737 (2008) (No. 07-665).

2 *See, e.g.,* Johanns v. Livestock Mktg. Assoc., 544 U.S. 550, 557-559, 562-564 (2005) (whether speech is government or private determines Free Speech Clause protection).

3 *See, e.g.,* Bd. of Ed. of Westside Cmty. Schs. (No. 66) v. Mergens, 496 U.S. 226, 250 (1990) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (original emphasis).

4 Recent cases wrestling with the delineation between government and private speech have focused on highway sponsorship signs, specialty and vanity license plates, and fundraising programs in which the public is invited to purchase tiles or bricks inscribed with personalized messages to be installed in sidewalks or walls. *See, e.g.,* Sons of Confederate Veterans v. Comm'r of Va. Dep't. of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002) (specialty plates owned by government but private speech); Perry v. McDonald, 280 F.3d 159, 166 (2d Cir. 2001) (vanity plates constitute private speech on government-owned property); Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (specialty plates are mixture of private and government speech); Robb v. Hungerbeeler, 370 F.3d 735, 744-45 (8th Cir. 2004) (state adopt-a-highway program signs are both private and government speech); Demmon v. Loudoun Cty. Pub. Schs., 342 F. Supp.2d 474, 489 (E.D. Va. 2004) (personalized messages on bricks in school walkway are private speech); Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 923-924 (10th Cir. 2002) (tiles affixed to school wall are school-sponsored speech but not government speech).

5 Summum brought claims under the Utah Constitution's establishment and free speech clauses that the Tenth Circuit found it had waived. *Pleasant Grove,* 483 F.3d at 1047-48 & n.3.

6 Summum, Summum Sealed Except to the Open Mind, About Summum, http://www.summum.us/about/ (last visited Dec. 15, 2008).

7 Summum, The Purpose and Mission of Summum, http://www.summum.us/about/purpose.shtml (last visited Dec. 15, 2008).

8 Summum, Claude "Corky" Rex Nowell (King) aka Corky Ra—a Brief Biography, http://www.summum.us/about/corkybio.shtml (last visited Dec. 15, 2008).

9 Summum, The First Encounter, http://www.summum.us/about/firstencounter.shtml (last visited Dec. 15, 2008). The Seven Principles apparently are Psychokinesis, Correspondence, Vibration, Opposition, Rhythm, Cause and Effect, and Gender. *See* Summum, Seven Summum Principles, http://www.summum.us/philosophy/principles.shtml (last visited Dec.15, 2008). *See also* Summum v. City of Ogden, 297 F.3d 995, 998 n.2 (10th Cir. 2002) (describing "Seven Principles Monument" in more detail).

10 Brief for Respondent at 1-2 & n.1, Pleasant Grove v. Summum, No. 07-665 (U.S. Aug. 15, 2008) (hereinafter "Resp. Br.") (citing Summum, The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (visited Aug. 15, 2008)). *See* Resp. Br. at 4 n.4.

11 The precise wording of the proposed monument is not in the record; however, the inscription for another proposed Summum monument containing the Seven Principles is found at *City of Ogden,* 297 F.3d at 998 n.2. *See* Resp. Br. at 4 n.4 (noting website location of depiction of proposed monument).

12 Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973).

13 Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

14 Summum v. Callaghan, 130 F.3d 906, 919-921 (10th Cir. 1997).

15 *City of Ogden,* 297 F.3d at 998.

16 *Id.* at 999, 1004-1006 (applying Tenth Circuit's factors for distinguishing private from government speech in *Wells v. City and County of Denver,* 257 F.3d 1132, 1140-42 (10th Cir. 2001)).

17 545 U.S. 677 (2005).

18 Summum v. Duchesne, 482 F.3d 1263 (10th Cir.), *reh'g denied by an equally divided court,* 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-690 (U.S. Nov. 21, 2007).

19 *Pleasant Grove,* 483 F.3d at 1047.

20 Soc'y of Separationists v. Pleasant Grove, 416 F.3d 1239 (10th Cir. 005) (remanding to district court in light of *Van Orden,* 545 U.S. 677, and *McCreary v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005)).

21 Brief for the United States as Amicus Curiae Supporting Petitioners at 2-3, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2521267 (hereinafter "U.S. Br.").

22 U.S. Br. at 3.

23 *Pleasant Grove,* 483 F.3d at 1047.

24 Appendix to the Petition for Writ of Certiorari, App. H at 1h-4h (hereinafter "Pet. App."). The policy is unclear whether an item must meet both criteria or simply one. *Id.* at 3h (no conjunction between two criteria). See Resp. Br. at 6-7, 22-23 (criticizing policy's ambiguity). The policy also provides that the item must not create a safety hazard or be obscene. Pet. App., App. H at 4h.

25 Summum did not bring federal Establishment Clause or Free Exercise Clause claims. While Summum brought claims under the Utah Constitution's establishment and free speech clauses, it waived those claims. *Pleasant Grove,* 483 F.3d at 1047-1048 n.3.

26 Brief for Petitioners at 7 n.3, Pleasant Grove v. Summum, No. 07-665 (U.S. June 16, 2008), 2008 WL 2445506 (hereinafter "Pet. Br.").

27 *Pleasant Grove,* 483 F.3d at 1057.

28 *Id.* at 1047 n.2.

29 *City of Ogden,* 297 F.3d at 1006; *Callaghan,* 130 F.3d at 913, 919.

30 515 U.S. 753.

31 *Pleasant Grove,* 483 F.3d at 1047 n.2 (citing *Pinette,* 515 U.S. at 774 (O'Connor, J., concurring in part and concurring in judgment)).

32 *Id.* at 1052 n.4 (citing *United States v. Am. Library Ass'n,* 539 U.S. 194, 205 (2003) (plurality opinion) (library book selection); *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 673 (1998) (programming selection by public broadcaster); *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 585 (1998) (awarding grants to artists)).

33 *Pleasant Grove,* 483 F.3d at 1050.

34 *Id.* at 1052.

35 *Id.* at 1053. The court similarly rejected the city's interests in aesthetics and safety as insufficiently narrowly tailored. *Id.* at 1055.

36 *Id.* at 1055 n.9.

37 *Id.* at 1056.

38 499 F.3d 1170 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc); *id.* at 1174 (McConnell, J., dissenting from denial of rehearing en banc); *id.* at 1178 (Tacha, J., response to dissents). The Tenth Circuit simultaneously denied a petition for rehearing en banc in *Summum v. Duchesne,* 482 F.3d 1263 (10th Cir. 2007) (Summum sought to force city to sell it a plot of parkland), *reh'g denied by an equally divided court,* 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed,* No. 07-690 (U.S. Nov. 21, 2007).

39 499 F.3d at 1174-75 (McConnell, J., dissenting).

40 *Id.* at 1175 (McConnell, J., dissenting).

41 *Id.* (McConnell, J., dissenting).

42 *Id.* (McConnell, J., dissenting).

43 *Id.* at 1176 (McConnell, J., dissenting). Judge McConnell agreed that a government could by policy or action "create designated public forums with respect to fixed monuments," although the city had not done so here. *Id.* at 1175 (McConnell, J., dissenting).

44 *Id.* at 1177 (McConnell, J., dissenting).

45 *Id.* (McConnell, J., dissenting).

46 545 U.S. 677.

47 499 F.3d at 1175-76 (McConnell, J., dissenting) (original emphasis). Judge McConnell cited numerous recent federal appellate decisions treating Ten Commandments displays as state action and/or government speech in Establishment Clause challenges. *Id.* at 1176 (McConnell, J., dissenting) (citing *ACLU Neb. Foundation v. City of Plattsmouth,* 419 F.3d 772, 778, 774 (8th Cir. 2005); *Van Orden v. Perry,* 351 F.3d 173, 176 (5th Cir. 2003); *Adland v. Russ,* 307 F.3d 471, 489 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766, 770 (7th Cir. 2001); *Books v. City of Elkhart,* 235 F.3d 292, 301 (7th Cir. 2000); *Modrovich v. Allegheny,* 385 F.3d 397, 399-400 (3d Cir. 2004)).

48 499 F.3d at 1177 (McConnell, J., dissenting) (quoting *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819, 834 (1995)); *id.* at 1178 (McConnell, J., dissenting) (accepting that the monuments could be challenged under the Establishment Clause and refusing "to speculate on the outcome of any such litigation").

49 *Id.* at 1174 (Lucero, J., dissenting).

50 *Id.* at 1172 (Lucero, J., dissenting).

51 *Id.* at 1171 (Lucero, J., dissenting).

52 *Id.* (Lucero, J., dissenting).

53 *Id.* at 1174 (Lucero, J., dissenting).

54 *Id.* at 1178 (Tacha, J., response).

55 *Id.* (Tacha, J., response).

56 *Id.* at 1179 (Tacha, J., response).

57 *Id.* at 1182 (Tacha, J., response).

58 Pleasant Grove and the United States emphasized the "parade of horribles" likely if government may not discriminate on the basis of content or viewpoint in accepting or rejecting monuments for public parks. *See* Pet. Br. at 50-53 (numerous examples, including "notorious" minister's attempt to

erect anti-homosexual monuments in public parks); U.S. Br. at 19-20, 28.

59 People for the Ethical Treatment of Animals v. Gittens, 414 F.3d 23, 29 (D.C. Cir. 2005). As a factual note, the federal government commissioned and paid for the General Grant statue in front of the Capitol. U.S. Br. at 16-17 & n.7.

60 *Gittens,* 414 F.3d at 25-26.

61 *See* Pet. Br. at 18, 20-22; U.S. Br. at 15.

62 *See* Johanns v. Livestock Mktg. Assoc., 544 U.S. 550 (2005); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Rust v. Sullivan, 500 U.S. 173 (1991). *See also,* Note, *Government Speech Doctrine—Compelled Support for Agricultural Advertising*, 119 Harv. L. Rev. 277, 278 (2005).

63 *See, e.g., Rosenberger*, 515 U.S. at 829-830.

64 *See Johanns,* 544 U.S. at 533 ("Government's own speech…is exempt from First Amendment scrutiny.").

65 *Mergens*, 496 U.S. at 250 (plurality op.) (Equal Access Act, 20 U.S.C. §§ 4071-4074 (2008), did not violate Establishment Clause and required equal access for student religious group to public secondary school facilities).

66 *See, e.g.,* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (Free Speech Clause required, and Establishment Clause did not prohibit, equal access for religious community group to elementary school classrooms after school); *Rosenberger,* 515 U.S. 819 (same for religious student publication to student activity fees funding by public university); *Pinette*, 515 U.S. 753 (same for unattended, temporary display of cross on state capitol grounds); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (same as to religious community group seeking evening use of school auditorium); *Mergens,* 496 U.S. 226 (federal Equal Access Act required access for high school religious student group and Establishment Clause not violated); Widmar v. Vincent, 454 U.S. 263 (1981) (Free Speech Clause required, and Establishment Clause did not prohibit, equal access for religious student group to university facilities). *But see* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (student-led pre-game prayer was not private speech but government-endorsed speech that violated Establishment Clause).

67 Transcript of Oral Argument at 11-13, 30-31, Pleasant Grove v. Summum, 128 S. Ct. 1737 (U.S. Nov. 12, 2008) (No. 07-665), 2008 WL 4892845, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-665.pdf (hereinafter "Transcript of Oral Argument").

68 *See* Amicus Curiae Brief of the American Jewish Congress in Support of Respondent at 27-33, Pleasant Grove v. Summum, No. 07-665 (U.S. Aug. 19, 2008), 2008 WL 3895913 (proposing test to analyze hybrid speech); Resp. Br. at 44 (citing Planned Parenthood of S.C., 361 F.3d at 793 (specialty plates as "mixture of private and government speech" to which private speech protection against viewpoint discrimination applied); Robb, 370 F.3d at 744-45 (state Adopt-A-Highway program included both private and government speech)).

69 *See, e.g., Callaghan,* 130 F.3d at 914 ("[T]here is some confusion over th[e] term [limited public forum] in the case law….Summum's (and the district court's) confusion is readily understandable in light of the inconsistent manner in which the Supreme Court itself has used this term."); Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) ("The designated public forum has been the source of much confusion."); Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) ("[O]ur Circuit's analysis of what constitutes a 'designated public forum,' like our sister Circuits', is far from lucid. Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.') (citations omitted); Christian Legal Soc'y v. Walker, 453 F.3d 853, 865 n.2 (7th Cir. 2006) ("The forum nomenclature is not without confusion. Court decisions also speak of "limited public" fora; most recently this phrase has been used interchangeably with "nonpublic" fora, which means both are subject to a lower level of scrutiny….But "limited public forum" has also been used to describe a subcategory of "designated public forum," meaning that it would be subject to the strict scrutiny test…. That confusion has infected this litigation.") (citations omitted); Goulart v. Meadows, 345 F.3d 239, 249 (4th Cir. 2003) ("There is some confusion over the terminology used to describe this third category, as the Supreme Court and lower courts have also used the term 'limited public forum.'").

70 *See, e.g.,* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 769-72 (1988). *Compare, e.g.,* Child Evangelism Fellowship v. Montgomery Cty. Pub. Schs., 457 F.3d 376, 386-389 (4th Cir. 2006) (access required for community religious group that had been denied access under forum policy that conferred unbridled discretion for school officials to grant access to community groups in viewpoint discriminatory manner) (the author was co-counsel for Child Evangelism Fellowship) *with* Goulart v. Meadows, 345 F.3d 239, 244, 254-255 (4th Cir. 2003) (homeschooler community group denied access to community center for educational activities the homeschoolers wanted to count toward fulfilling state educational requirements, even though they could use community center for broad variety of "enrichment activities," including activities *subsequently* reported toward state educational requirements).

71 U.S. Br. at 13-14 (citing Serra v. General Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (artist who challenged government's decision not to display his sculpture "relinquished his own speech rights in [the] sculpture when he voluntarily sold it to [the government]")).

72 Resp. Br. at 33-34.

73 *Id.* at 13, 33-34, 54-58.

74 *Id.* at 13, 34-36.

75 Transcript of Oral Argument at 38, 50-56.

76 Pet. Br. at 32-34; U.S. Br. at 8, 17, 19.

77 Resp. Br. at 37.

78 *Id.* at 14. *See* Note, *Government Speech Doctrine—Compelled Support for Agricultural Advertising*, 119 Harv. L. Rev. at 278 ("[A]lthough the First Amendment must make some allowance for government speech, if this doctrine is not carefully limited, it may pose a grave threat to the First Amendment's ability to guard against government distortions of the speech market."); *id.* at 285 ("Government speech seems to present the significant risk of a 'falsified majority,' a self-perpetuating feedback loop in which a majority is maintained not by virtue of the idea uniting it, but through continual reinforcement.") (citation omitted).

79 Resp. Br. at 37 (citing *Lamb's Chapel,* 508 U.S. 384). *See also id.* at 41-42 (noting Court could have reached opposite results in *Pinette*, 515 U.S. 753, and *Rosenberger*, 515 U.S. 819, under government speech doctrine).

80 Brief Amici Curiae of the American Legion, et al., in Support of Petitioner at 13-14, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2555218.

81 Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

82 Brief of Amicus Curiae Boy Scouts of America in Support of Neither Party at 1, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2555221 (hereinafter "BSA Br.") (citing numerous actions to deny Boy Scouts access to government property, including: Barnes-Wallace v. Boy Scouts of Am., 530 F.3d 776 (9th Cir. 2008) (challenge to city lease of park because Scouts require members to believe in God); Winkler v. Gates, 481 F.3d 977 (7th Cir. 2007) (challenge to Defense Department's aid to Scouts' annual jamboree); Evans v. Berkeley, 129 P.3d 394 (Cal. 2006) (city denied berthing space to sailing program based on Scouts' membership requirements); Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003) (Connecticut denied participation in government employees' charitable giving campaign because of Scouts' membership requirements); Boy Scouts of Am. v. Till, 136 F.Supp. 2d 1295 (S.D. Fla. 2001) (school district denial of meeting space in public school due to Scouts' membership requirements)).

83 *Id.* at 7.

84 See cases listed *supra* note 66.

85 *See, e.g., Pinette,* 515 U.S. at 760 (Scalia, J., majority op.) ("government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince") (original emphasis); *Mergens,* 496 U.S. at 244-245 (O'Connor, J., plurality op.) (rejecting circumvention of equal access by which "school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content.").

86 Brief of Amici Curiae, Alliance Defense Fund and Family Research Council, Supporting Petitioners at 12, Pleasant Grove v. Summum, No. 07-

665 (U.S. June 23, 2008), 2008 WL 2521266.

87 See government officials' claims in the cases listed *supra* note 66.

88 Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 524-525 (3rd Cir. 2004) (Alito, J.) (noting that the school did not write, pay for, or have any role in producing the fliers which contained a disclaimer of school sponsorship) (the author was co-counsel for Child Evangelism Fellowship). *See also,* Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp.2d 98, 115-118 (D. Mass. 2003) (rejecting school district prohibition of high school students' distribution of candy canes with religious message in school hallways by claiming all speech by student group bore school's "imprimatur").

89 *See, e.g., Mergens,* 496 U.S. at 248 (plurality op.) (school district claiming that all student groups were curriculum-related, including a "Surf Club" in Lincoln, Nebraska); Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 224-225 (3d Cir. 2003) (rejecting school district attempt to define forum to exclude religious group); Pope v. East Brunswick Bd. of Ed., 12 F.3d 1244, 1253-54 (3d Cir. 1993) (same).

90 Kiesinger v. Mexico Academy and Cent. Sch., 427 F. Supp.2d 182 (N.D.N.Y. 2006) (school district removed bricks purchased by citizens for school sidewalk if they referred to Jesus but left bricks referring to God); Demmon v. Loudoun Cty. Pub. Sch., 342 F. Supp.2d 474 (E.D. Va. 2004) (school officials removed bricks with crosses from school walkway).

91 Brief Amici Curiae of the Becket Fund for Religious Liberty and Robert and Mildred Tong in Support of Petitioners at 1, 4-5, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2555220 (discussing Tong v. Chicago Park Dist., 316 F.Supp. 2d 645 (N.D. Ill. 2004)).

92 Fleming v. Jefferson Cty. Sch. Dist., 298 F.3d 918 (10th Cir. 2002) (school district invited school community to paint tiles for Columbine High School wall but rejected tiles with religious symbols). The Tenth Circuit found the tiles to be "school-sponsored" speech rather than "government speech" but allowed the parents' religious speech to be excluded. *Id.* at 923-924.

93 *See, e.g.,* Thomas v. Chicago Park Dist., 534 U.S. 316 (2002).

94 Lee v. York Cty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

95 *Id.* at 690-691.

96 *Id.* at 691, 698-700 & n.17.

97 *Id.* at 689.

98 *Rosenberger,* 515 U.S. at 833.

99 *Johanns,* 544 U.S. at 559. Other cases have noted this aspect of government speech without actually holding that government speech was at issue. *See, e.g.,* Legal Servs. Corp., 531 U.S. at 541; Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229, 235 (2000); Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666, 674-675 (1998); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment); Rust v. Sullivan, 500 U.S. 173, 194-195 (1991); Wooley v. Maynard, 430 U.S. 705, 717 (1977).

100 Transcript of Oral Argument at 28.

101 See *supra* note 99.

102 *See, e.g., Rosenberger,* 515 U.S. at 829 ("Viewpoint discrimination is thus the most egregious form of content discrimination.")

103 Transcript of Oral Argument at 23-24.

104 *Id.* at 23-29.

105 *Id.* at 27.

106 *Id.* at 4.

107 *Id.* at 5.

108 *Id.* at 7.

109 *Id.*

110 *Id.*

111 Summum brought claims under the Utah Constitution's establishment and free speech clauses that the Tenth Circuit found it had waived. *Pleasant Grove,* 483 F.3d at 1047-48 & n.3. Even those amici who are strict separationists urged that the judgment below be reversed, albeit urging that the "proper framework for adjudicating Summum's claims" was the Establishment Clause rather than the Free Speech Clause. Brief of American Jewish Committee, Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee for Religious Liberty, and People for the American Way Foundation as Amici Curiae in Support of Neither Party at 34, Pleasant Grove v. Summum (U.S. June 23, 2008), No. 07-665, 2008 WL 2550615.

112 545 U.S. 677.

113 Resp. Br. at 12 ("[T]he record shows a targeted anti-Summum gerrymander, aimed at suppressing one particularly disfavored religious view. The City has thus transgressed the most fundamental First Amendment boundaries, taking sides in a theological debate by granting preferential access to a traditional public forum."); *id.* at 20-21, 53.

114 Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

115 *See, e.g.,* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (student-led pre-game prayer was not private speech but government-endorsed speech that violated Establishment Clause).

116 *See generally* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983); *Forbes,* 523 U.S. at 677-78.

117 515 U.S. 753.

118 Resp. Br. at 11; Pet. App., App. H at 3h.

119 Pet. Br. at 7 n.3.

120 Resp. Br. at 10, 18-19, 29, 43, 48, (citing *Pinette,* 515 U.S. at 761 (plurality opinion); *id.* at 783 (Souter, J., concurring)).

121 Pet. Br. at 39-40.

122 Transcript of Oral Argument at 45 (Justice Souter: "[Y]our use of public forum is just by kind of remote analogy here, and …I'm not sure that it's helping you or would help us if we used it as criterion for decision."); *id.* at 44 (Justice Ginsburg: "I don't know of any tradition that says people can come to the park with monuments and put them up if they will, so long as they meet the equivalent of time, place and manner."); *id.* at 46 (Justice Kennedy: "[Y]ou can stick with it as long as you want…but suppose that we were to say that we were unconvinced by the comparison between speeches and parades on the one hand and monuments on the other, so we did not apply the public forum analogy.").

123 499 F.3d at 1173 (Lucero, J., dissenting).

124 Pet. Br. at 43; U.S. Br. at 13.

125 Transcript of Oral Argument at 24 (Justice Breyer: "[T]he problem I have is that we seem to be applying these subcategories in a very absolute way. Why can't we…ask the question…is the restriction proportionate to a legitimate objective?...[A]re we bound…to apply what I think of as an artificial kind of conceptual framework?").

126 Transcript of Oral Argument at 35.

127 Transcript of Oral Argument at 34, Ysursa v. Pocatello Education Association, 128 S. Ct. 1762 (Nov. 3, 2008) (No. 07-869), 2008 WL 4771231, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-869.pdf. (Chief Justice Roberts: "Since we are in confessional mode, I've never understood forum analysis.")

128 See *supra* note 69.

129 *E.g.,* Empl. Div. v. Smith, 494 U.S. 872 (1990) (Court unexpectedly overhauled free exercise of religion analysis without briefing on issue of new test).

130 *Amer. Library Ass'n,* 539 U.S. at 204-205 (plurality opinion) (selection of public library books); *Finley,* 524 U.S. at 585 (government funding of art); *Forbes,* 523 U.S. at 673 (public television broadcasting).

131 Pet. Br. at 42; U.S. Br. at 21 n.13.