PLEASANT GROVE CITY v. SUMMUM: IDENTIFYING GOVERNMENT SPEECH & CLASSIFYING SPEECH FORUMS

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I. INTRODUCTION

On April 17, 2007, a Tenth Circuit panel granted a preliminary injunction requiring Pleasant Grove City ("Pleasant Grove") to erect and display in a municipal park a monument containing the "Seven Aphorisms" of a religious organization known as Summum.[1] Summum had previously offered to donate the monument hoping it would be displayed in the park owned by Pleasant Grove alongside a Ten Commandments monument donated by the Fraternal Order of Eagles ("Eagles").[2] Summum claimed that Pleasant Grove violated its rights under the Free Speech Clause of the First Amendment[3] by accepting and displaying the Ten Commandments monument but rejecting the Seven Aphorisms monument.[4]

The Tenth Circuit agreed with Summum and granted the injunction based on two findings. First, following circuit precedent, the court treated the Ten Commandments monument as the private speech of the Eagles and not the government speech of Pleasant Grove.[5] Second, the court found that a municipal park was a public forum if it permanently displays privately-donated monuments.[6] On

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1. Summum v. Pleasant Grove City (*Pleasant Grove I*), 483 F.3d 1044, 1047 (10th Cir. 2007).

2. *Id.*

3. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

4. *Pleasant Grove I*, 483 F.3d at 1047.

5. *Id.* at 1047 n.2 (citing Summum v. City of Ogden, 297 F.3d 995, 1006 (10th Cir. 2002) (holding an identical Ten Commandments monument was the private speech of the Eagles)).

6. *Id.* at 1050.

August 24, 2007, the Tenth Circuit denied Pleasant Grove's petition for rehearing en banc by a 6-6 vote.[7] On March 31, 2008, the United States Supreme Court granted Pleasant Grove's certiorari petition.[8]

II. FACTS

Pleasant Grove City, Utah, maintains a history-themed park—Pioneer Park.[9] The city owns and displays in the park many privately-donated monuments, including the Ten Commandments monument donated by the Eagles.[10] Pleasant Grove claims that all privately-donated monuments in the park meet historical-relevance criteria in that the monuments (1) portray the pioneer heritage of Pleasant Grove or (2) were donated by a person or group with long-standing ties to Pleasant Grove.[11]

In 2004, Pleasant Grove adopted a written policy for monument selection at Pioneer Park to codify existing practices.[12] Under the policy, the city council may exclude any proposed monument either for failure to meet the historical-relevance criteria[13] or for aesthetic or safety reasons.[14] The council also decides where any accepted monument is placed.[15]

Summum is a religious organization based in Salt Lake City.[16] In September 2003, before Pleasant Grove adopted its written policy for monument selection, Summum asked the city to accept and display a monument containing its "Seven Aphorisms" in Pioneer Park.[17] The monument was to be similar in size and appearance to the Ten Commandments monument.[18] Pleasant Grove declined Summum's proposal because the monument failed the historical-relevance

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7. Summum v. Pleasant Grove City (*Pleasant Grove II*), 499 F.3d 1170 (10th Cir. 2007).
8. Summum v. Pleasant Grove City (*Pleasant Grove I*), 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (U.S. Mar. 31, 2008) (No. 07-665).
9. Petition for Writ of Certiorari at 4, Pleasant Grove City v. Summum, No. 07-665 (Nov. 20, 2007).
10. *Id.* at 5.
11. *Pleasant Grove I*, 483 F.3d at 1052 n.5.
12. *Id.* at 1055 n.9.
13. *Id.* at 1047.
14. *Id.* at 1054.
15. *Pleasant Grove II*, 499 F.3d at 1177 (McConnell, J., dissenting).
16. *Pleasant Grove I*, 438 F.3d at 1047.
17. *Id.*
18. *Id.*

criteria.[19] In May 2005, Summum again asked the city to erect its Seven Aphorisms monument but was ignored.[20] In response, Summum filed suit in federal district court seeking, among other things, injunctive relief requiring Pleasant Grove to accept and place the monument in the park.[21] Summum claimed it was entitled to such relief because Pleasant Grove's actions amounted to unconstitutional speech discrimination pursuant to the First Amendment's Free Speech Clause.[22]

III. LEGAL BACKGROUND

The Tenth Circuit's two principal findings in the *Pleasant Grove* case derive from two prior Tenth Circuit cases involving Summum. In *Summum v. City of Ogden*[23] and in *Summum v. Callaghan*[24] the court entertained similar challenges against a city and a county, respectively. The city and the county each displayed a Ten Commandments monument donated by the Eagles on government property but declined to display Summum's Seven Aphorisms monument.

A. Government Speech vs. Private Speech in the Tenth Circuit

In *Callaghan* the Ten Commandments monument was located in front of a county courthouse;[25] in *Ogden* it was located on the lawn of a municipal building.[26] In both cases the court treated the monuments as the private speech of the Eagles rather than as government speech.[27] This differentiation was important because Free Speech jurisprudence recognizes a fundamental distinction between government speech and private speech.[28] Specifically, when the government speaks, no "forum" for private speech is created. Put another way, when the government speaks it may craft its own

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002).
24. Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997).
25. *Id.* at 909.
26. *Ogden*, 297 F.3d at 997.
27. *Id.* at 1004; *Callaghan*, 130 F.3d at 913–16; *see also* discussion *infra* Part III.C.
28. *See, e.g.*, Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234–35 (2000) ("The Court has not held, or suggested, that when the government speaks the [forum analysis] rules [for private speech] we have discussed come into play.").

message without worrying about speech discrimination.[29] In contrast, when private speech is permitted on government property, a "forum" for speech is created and the government is required to follow certain policies and procedures that ensure speech discrimination does not occur.[30]

In *Callaghan* the court simply treated the Ten Commandments monument in front of the county courthouse as the Eagles's private speech without explanation,[31] perhaps because the county did not assert that the monument was government speech. In *Ogden*, however, the city argued that it was not involved in unconstitutional speech discrimination because the monument *was* government speech and therefore created no forum for speech on the municipal lawn.[32]

To determine whether the monument was government speech, the *Ogden* court utilized a four-factor test adopted by the Tenth Circuit in *Wells v. City and County of Denver*.[33] Under this test, a court is likely to hold that government speech is at issue when some or all of the following factors are present: (1) the central purpose of the speech is to promote the views of the government; (2) the government exercises editorial control over the content of the speech; (3) the literal speaker is an employee of the government; or (4) the ultimate responsibility for the content of the speech rests with the government.[34]

Applying this test, the court held that the monument was the Eagles's private speech because only the fourth factor was met.[35] The court reasoned that the city maintained ultimate responsibility for the monument's content because the city owned the monument and was

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29. *See generally* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541–42 (2000) (the government has the "latitude" to restrict private speech when conveying its own message); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a *governmental message*, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.") (emphasis added).

30. *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 44–46 (1983).

31. *Callaghan*, 130 F.3d at 913–16.

32. *Ogden*, 297 F.3d at 1003–04.

33. Wells v. City and County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (citing Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000)).

34. *Id.* at 1141.

35. *Ogden*, 297 F.3d at 1004–05.

free to sell, modify, or even destroy it at will.[36] As to the first three factors, the court found as follows: First, the central purpose of the monument was to promote the views of the Eagles, not the views of the city.[37] This was evident because the Eagles donated monuments to numerous cities with the professed intent of providing a moral code for youth to emulate.[38] Second, the city did not exercise editorial control over the monument's content because it accepted the monument in completed form.[39] Third, the city was not the literal speaker because it had not altered the monument's content in any way after the monument was donated.[40]

B. Government Speech vs. Private Speech in Other Circuits

Many circuits do not utilize the *Wells* test to determine if privately-donated displays constitute government speech. Rather, these circuits hold that the government speaks when it owns or selects the display that is exhibited on government property.

For example, in *PETA v. Gittens*, the D.C. Circuit held that the selection of private sculpture designs for display in a public park constituted government speech.[41] Specifically, the court held that the government spoke when it determined which sculptures to include in the display.[42] Similarly, in *ACLU v. Schundler* the Third Circuit held that a Christmas crèche display in front of the city hall was government speech because the crèche was owned by the city and displayed on city property.[43] And in *Serra v. United States General Services Administration*, the Second Circuit held that the government spoke when it made the decision to remove a donated sculpture from a government plaza.[44] Lastly, in *Freedom from Religion Foundation v. Marshfield*, the Seventh Circuit treated an expressive display as the private speech of a landowner who purchased the land and the display from the government.[45]

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36. *Id.* at 1005.
37. *Id.* at 1004.
38. *Id.*
39. *Id.*
40. *Id.* at 1004–05.
41. PETA v. Gittens, 414 F.3d 23, 28–29 (D.C. Cir. 2005).
42. *Id.*
43. ACLU v. Schundler, 104 F.3d 1435, 1444 (3d Cir. 1997).
44. Serra v. U.S. Gen. Serv. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988).
45. Freedom from Religion Found. v. Marshfield, 203 F.3d 487, 491 (7th Cir. 2000).

C. Forum Analysis Applied to Private Speech

Forum analysis is used to identify unconstitutional speech discrimination and applies only to private speech.[46] It does not apply to government speech.[47] Thus, in *Callaghan* and *Ogden*, after finding the Ten Commandments monuments were private speech, the Tenth Circuit engaged in forum analysis.

The first step of forum analysis is to determine if the speech is constitutionally protected.[48] Most speech is protected, whether religious or secular.[49] If protected, the second step is to identify the relevant forum where the speech is to occur.[50] This is a two-step process that requires identifying (1) the government property the speaker seeks to access and (2) the type of access the speaker seeks.[51]

The third step is to determine the relevant forum's classification. There are three possible forum classifications: (1) traditional public forums; (2) designated public forums; and (3) nonpublic forums.[52] Traditional public forums are government properties that *by tradition* are used for public communication (e.g., parks or streets).[53] Designated public forums are nonpublic government properties that the government has opened to public communication *by designation (*i.e., the government formally authorizes public communication on nonpublic government property).[54] Nonpublic forums are government properties that are not open to public communication *either by tradition or by designation.*[55]

The classification of the forum determines the standard of review the court will apply to speech restrictions in that forum.[56] Speech restrictions in traditional public forums and designated public forums will trigger strict scrutiny if they are content-based (i.e., the

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46. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 44–46 (1983).
47. *Id.*
48. Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985).
49. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (noting that only certain narrow and well-defined classes of speech such as "fighting words" are not protected by the First Amendment).
50. *Cornelius*, 473 U.S. at 800–02.
51. *Id.*
52. *Perry Educ. Ass'n*, 460 U.S. at 45–46.
53. *Id.* at 45.
54. *Id.* at 46.
55. *Id.*
56. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

restrictions discriminate on the basis of subject matter, viewpoint, or identity of the speaker).[57] Content-based speech restrictions must serve a compelling state interest and be the narrowest method of achieving that interest to survive strict scrutiny.[58] Content-neutral restrictions, which control the time, place, or manner of speech in a public forum, will receive intermediate scrutiny.[59] In nonpublic forums, speech restrictions will be subject to reasonable basis scrutiny.[60] To survive reasonable basis scrutiny[61] the restrictions must comport with a government policy that is both reasonable and viewpoint neutral.[62]

Applying the first step of forum analysis as outlined above, the Tenth Circuit in *Callaghan* and *Ogden* concluded that Summum's monuments constituted protected speech.[63] The Tenth Circuit then applied the second forum analysis step in both cases. In *Callaghan*, it determined that the relevant forum was the *courthouse lawn*.[64] Although the *Callaghan* court did not explain how it came to this determination, it appears to have applied only the first of the two steps required when identifying the relevant forum (i.e., it identified the government property to which Summum sought access but did not define the type of access sought).[65] The *Ogden* court made a more detailed finding regarding the relevant forum. First, it observed that the government property to which Summum sought access was the municipal building's lawn.[66] Then it observed the type of access sought was the right to place a permanent monument on the lawn.[67] Thus, the *Ogden* court concluded that the relevant forum was the *permanent monuments on the municipal building's lawn*, rather than the lawn generally.[68]

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57. *Perry Educ. Ass'n*, 460 U.S. at 45.
58. *Id.*
59. *Id.*
60. Cornelius v NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985).
61. "Reasonable basis" is synonymous with "rational basis." *Id.* at 821 (Blackmun, J., dissenting).
62. *Id.* at 806 (majority opinion).
63. Summum v. Callaghan, 130 F.3d 906, 913–14 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002).
64. *Callaghan*, 130 F.3d at 913–14.
65. *See id.* at 913–19 (applying forum analysis to the courthouse lawn without discussing the specific type of access sought).
66. *Ogden*, 297 F.3d at 1002.
67. *Id.*
68. *Id.*

In the final step of the forum analysis, the Tenth Circuit in both cases classified the relevant forum as nonpublic.[69] The bases for these classifications were that neither tradition nor designation evidenced that a courthouse lawn or a gallery of permanent monuments on a municipal lawn was a forum for public communication.[70]

Finally, both courts applied reasonable basis scrutiny and concluded that the rejection of Summum's monument was not a reasonable and viewpoint neutral policy and was therefore unconstitutional speech discrimination.[71] In *Callaghan*, the court focused on the county's total lack of a policy to guide county officials in selecting appropriate monuments for display on the courthouse lawn.[72] The court held that the unfettered discretion of county officials "raise[d] the specter of . . . viewpoint censorship" and was presumptively unreasonable.[73] The *Ogden* court also focused on a lack of city policy regarding monument selection.[74] Significantly, the *Ogden* court added that a government can demonstrate a reasonable and viewpoint neutral policy by showing either (1) a written policy or (2) a well-established practice that directs official decisions regarding the selection and display of private monuments.[75] The city of Ogden failed to make either showing because it had no written policy and because the displays on the municipal lawn did not conform to the criteria of the purported unwritten policy the city claimed to follow.[76]

IV. HOLDING

Following the analysis in *Summum v. Callaghan* and *Summum v. City of Ogden*, the Tenth Circuit held in *Summum v. Pleasant Grove City* that the Ten Commandments monument in Pioneer Park was the private speech of the Eagles.[77] Pleasant Grove argued that its rejection of Summum's monument was not speech discrimination because the Ten Commandments monument was government speech,

69. *Id.*; *Callaghan*, 130 F.3d at 919.
70. *Ogden*, 297 F.3d at 1002; *Callaghan* 130 F.3d at 915–16.
71. *Ogden*, 297 F.3d at 1011; *Callaghan*, 130 F.3d at 921–22.
72. *Callaghan*, 130 F.3d at 919.
73. *Id.* (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763 (1988)).
74. *Ogden*, 297 F.3d at 1007–09.
75. *Id.* at 1007.
76. *Id* at 1007–09.
77. Summum v. Pleasant Grove City (*Pleasant Grove I*), 483 F.3d 1044, 1047 n.2 (10th Cir. 2007).

but was unsuccessful. Absent en banc reconsideration, the court was bound to follow precedent and treat the Ten Commandments monument as private speech.[78]

Continuing to follow *Ogden* and *Callaghan*, the court next held Summum's monument to be protected speech.[79] It then proceeded with forum analysis. Following *Ogden*'s precedent, the court observed that the government property to which Summum sought access was the city park and the type of access sought was the display of a permanent monument there.[80] It thus identified the relevant speech forum as the *permanent monuments in the park*.[81]

The court then classified the monument gallery as a traditional public forum.[82] In reaching this conclusion the court focused solely on the nature of a city park as a prototypical public forum.[83] It held that the type of access sought was germane to identifying the relevant forum *but not* to determining the classification of that forum.[84] Thus, because the monuments were located in a traditional public forum (the park) they were themselves deemed a traditional public forum.[85]

The court next noted that though Pleasant Grove did have "substantial interests" in maintaining the aesthetic appearance of its parks,[86] the restrictions on the display of monuments were not merely aesthetic: they were content based.[87] Thus, Pleasant Grove could ban all permanent displays by private individuals, which would survive intermediate scrutiny,[88] but it could not exclude displays on the basis of subject matter (the item must portray pioneer history) or identity of the speaker (the speaker must have long-standing ties to Pleasant Grove), which are subject to strict scrutiny.[89]

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78. Petition for Writ of Certiorari at 9–10, Pleasant Grove City v. Summum, No. 07-665 (Nov. 20, 2007).

79. *See Pleasant Grove I*, 483 F.3d at 1047 n.2.

80. *Id.* at 1050.

81. *Id.*

82. *Id.*

83. *Id.* at 1051.

84. *Id.*

85. *See id.* (explaining that the type of access sought is relevant to identifying the relevant forum but that the nature of the forum is determined by the nature of the property on which it is located).

86. *Id.* at 1053.

87. *Id.* at 1052.

88. *Id.* at 1054.

89. *Id* at 1052.

Finally, the court cited what it felt was a special line of cases in which the Supreme Court has not applied forum analysis to content-based speech restrictions in public forums.[90] The court interpreted these cases as requiring a government to be free from forum analysis when it is acting in the particular role of librarian, television broadcaster, or arts patron.[91] According to the court, the Supreme Court's rationale was that government cannot be effective when acting in these particular roles unless it has unfettered discretion to make content-based decisions about what private speech to provide to the public.[92] The court felt the Supreme Court's reasoning was limited to these three specific roles and that Pleasant Grove's role in maintaining a history-themed park was not analogous.[93]

V. ANALYSIS

The Tenth Circuit's decision in *Summum v. Pleasant Grove City* is problematic for a number of reasons, foremost of which is its characterization of the Ten Commandments monument as private speech. As outlined above, Pleasant Grove owns the monument, has sole authority to approve its display in the park and designate its placement, and may remove, modify, sell, or destroy it at any time.

The city has allowed the monument to remain in the park some twenty-seven years because it comports with the park's historical-relevance criteria.[94] As described previously, the majority of circuits hold that privately-donated displays owned by the government and selected for display by the government are government speech. In a similar vein, the Supreme Court itself has held that "compilation of the speech of third parties . . . [is a] communicative act[]."[95]

Also, one may doubt the correctness of the conclusion in *Summum v. City of Ogden* that the Ten Commandments monument was private speech. The *Ogden* court held that the Ten

90. *Id.* at 1052 n.4 (citing United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585 (1998)).

91. *Id.*

92. *Id.*

93. *Id.*

94. Reply to Brief in Opposition at 3, Pleasant Grove City v. Summum, No. 07-665 (Mar. 7, 2008).

95. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998).

Commandments monument only satisfied the fourth prong of the Tenth Circuit's four-factor test for government speech.[96] But the Ten Commandments monument at issue in *Pleasant Grove* probably satisfies the second prong (requiring "editorial control" over the speech) as well because Pleasant Grove had the power to alter the content of the monument before it was placed in the park and simply chose not to.[97] All of these considerations militate toward treating the Ten Commandments monument as government speech.

Another troubling aspect of the Tenth Circuit's ruling was the treatment of the gallery of monuments in the park as a traditional public forum. This classification was based entirely on the fact that parks are traditionally used for civic discourse.[98] However, this discourse typically takes the form of temporary speech or assembly (such as distributing leaflets or holding a rally),[99] not erecting *permanent monuments*.[100] Furthermore, basing the forum classification solely on the nature of the property to which Summum sought access (the park) made identifying the type of access sought (placing a permanent monument in the park) pointless. The classification analysis would have been no different had the court simply identified the relevant forum as *the park* rather than *monuments in the park*.

The *Pleasant Grove* holding that permanent monuments in a city park are traditional public forums creates a difficult legal hurdle for displays in city parks. Any city that declines to display privately-donated monuments in a park where others have been allowed will probably be subjected to strict scrutiny.[101] Like Pleasant Grove, most cities will not be able to demonstrate a compelling state interest in maintaining historic, or other, themes associated with their parks.[102] Thus, they will face the unfortunate predicament of either accepting all privately-donated monuments for display in their parks or, as the *Pleasant Grove* court suggested, adopting the content-neutral policy

96. Summum v. City of Ogden, 297 F.3d 995, 1004–05 (10th Cir. 2002).

97. Summum v. Pleasant Grove City (*Pleasant Grove II*), 499 F.3d 1170, 1176–77 (10th Cir. 2007) (McConnell, J., dissenting).

98. *Pleasant Grove I*, 483 F.3d at 1051.

99. *Pleasant Grove II*, 499 F.3d at 1173 (Lucero, J., dissenting).

100. *Id.*

101. *Pleasant Grove I*, 483 F.3d at 1053 (explaining that cities bear the burden of showing their content-based speech restrictions are based on compelling interests and narrowly tailored).

102. *Id.*

of banning all private displays in order to survive intermediate scrutiny.[103]

If the court had instead ruled that the gallery of park monuments was a nonpublic forum, such a holding would have allowed Pleasant Grove (and other cities) to maintain their themed parks by demonstrating that placement decisions are based on a reasonable and viewpoint neutral written policy or well-established practice.[104] Although Summum's request predated Pleasant Grove's adoption of a written policy, the city may nevertheless have been able to show a well-established practice of allowing only those privately-donated monuments that met its historical-relevance criteria to be displayed in the park. As evidence of this practice, the city could have shown that all monuments currently in the park conform to the historical-relevance criteria Pleasant Grove claims to follow.[105]

One final troubling point is that it is unclear whether there is a special line of Supreme Court cases that requires the government to be free from forum analysis when playing the role of television broadcaster, librarian, or arts patron. The three cases cited by the Tenth Circuit in support of this proposition do not explicitly state that the roles of television broadcaster, librarian, or arts patron are exempt from forum analysis. Rather, each case simply appears to explain why government conduct in these roles is not subject to strict scrutiny.[106] That said, even if the Tenth Circuit's reading of these cases was correct, the court gave no explanation as to why the logic of these cases would not extend to Pleasant Grove.[107] After all, doesn't selecting items for a history-themed park involve content-based decisions similar to selecting items for an art-themed park?

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103. *Id.* at 1054.

104. Summum v. City of Ogden, 297 F.3d 995, 1008 (10th Cir. 2002).

105. Petition for Writ of Certiorari at 4–5, Pleasant Grove City v. Summum, No. 07-665 (Nov. 20, 2007) (describing in detail the monuments currently located in the park).

106. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003) (holding public library internet access is a nonpublic forum not subject to strict scrutiny); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998) (declaring the selection of programming to be a form of government speech not subject to speech discrimination claims); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) (holding that the government may make *grants* to artists based on the merit of their art even though direct regulation of this sort would not survive strict scrutiny).

107. *See Pleasant Grove I*, 483 F.3d at 1052 n.4.

VI. ARGUMENTS AND DISPOSITION

A. Strengths and Weaknesses of Pleasant Grove's Case

The strengths of Pleasant Grove's case have largely been outlined above. First, most circuits would defensibly treat the Ten Commandments monument as government speech. Second, the gallery of permanent monuments in a public park is probably a nonpublic forum. Third, there is not a strong distinction between a government acting as a procurer of historical monuments on the one hand and as a patron of the arts or public broadcaster on the other. Finally, the ruling below will probably place Tenth Circuit cities in the unenviable position of either accepting all privately-donated monuments for display in their parks or banning all private displays.

The principal weakness of Pleasant Grove's case is that Summum may be able to successfully argue that the decision below was a narrow one that only implicates situations in which the government does not expressly adopt the speech of privately-donated monuments.[108] Language in *Summum v. City of Ogden* suggests that the government may "adopt" private speech as its own and thereby transform it into government speech.[109] However, this alternative was not mentioned in the *Summum v. Pleasant Grove City* decision so its vitality as a legal rule is questionable.

B. Strengths and Weakness of Summum's Case

The weaknesses of Summum's case mirror the strengths of Pleasant Grove's case outlined above. The principle strength of Summum's case is that it has found its way to the Supreme Court in a preliminary posture. The procedural matter litigated on appeal and for which review was granted was the appropriateness of a preliminary injunction.[110] It is possible that if the case were to be fully litigated it would be resolved in a way that does not require addressing the constitutional questions for which certiorari was granted. For example, it would be unnecessary to determine whether permanent park monuments are a public forum if it were shown that

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108. Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 23, Pleasant Grove City v. Summum, No. 07-665 (Feb. 21, 2008).

109. *Ogden*, 297 F.3d at 1003–04.

110. *Pleasant Grove I*, 483 F.3d at 1048.

Pleasant Grove engaged in viewpoint discrimination because such discrimination is unconstitutional in both public *and* nonpublic forums.[111]

C. Likely Disposition

It is likely the Supreme Court will hold that Pleasant Grove's Ten Commandments monument is government speech and therefore did not create a forum for private speech. Although the Supreme Court has not developed its own specific test for identifying government speech, the test employed by many lower courts treats privately-donated displays as government speech when they are both owned and selected for display by the government. Under this test, Pleasant Grove's Ten Commandments monument qualifies as government speech. Also, the Tenth Circuit's own test for government speech suggests that Pleasant Grove maintained the requisite control and authority over the monument's content to treat it as government speech. As a result, Pleasant Grove will have legal sanction to decline to display Summum's Seven Aphorisms monument.

111. Respondent's Brief in Opposition to Petition for a Writ of Certiorari, *supra* note 108, at 21.