

No. 07-665

In The
Supreme Court of the
United States

PLEASANT GROVE CITY, *ET AL.*, *Petitioners*,
v.
SUMMUM, *Respondent*.

On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit

**Brief of Amici Curiae James Madison Center
for Free Speech Supporting Petitioners**

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (telephone)
812/235-3685 (facsimile)
jboppjr@aol.com
awoudenberg@bopplaw.com

June 23, 2008

Question Presented

Whether Pioneer Park's monuments constitute government speech, even though they were donated to the city by private citizens, and, as a result, the monument displays in the park are not subject to regulation as a public forum.

Table of Contents

Table of Authorities	iv
Statement of Interest	1
Summary of Argument	2
Argument	3
I. Forum Analysis Is Inapplicable to Govern- ment Speech.	3
II. Pioneer Park's Displays Are Government Speech	5
III. Private Participation Does Not Render Government Speech Private.	8
Conclusion	14

Table of Authorities

Cases

<i>American Civil Liberties Union of Tennessee v. Bredesen</i> , 441 F.3d 370 (6th Cir. 2006)	6, 9-10, 12
<i>Board of Regents of Univ. of Wis. System v. Southworth</i> , 529 U.S. 217 (2000)	3, 4
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	10
<i>Cornelius v. NAACP Legal Defense and Educational Fund, Inc.</i> 473 U.S. 788 (1985)	4
<i>Davis v. FEC</i> , No. 07-320 (2008)	1
<i>FEC v. Wisconsin Right to Life</i> , 127 S. Ct. 2652 (2007)	1
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.</i> , 513 U.S. 557 (1995)	10
<i>Johanns v. Livestock Marketing Ass'n</i> , 544 U.S. 550 (2005)	<i>passim</i>
<i>Legal Services Corp. v. Valazquez</i> , 531 U.S. 533 (2001)	4, 13
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003)	1
<i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37 (1983)	4-5
<i>Rosenberger v. Rector & Visitors of the Univ. of Va.</i> , 515 U.S. 819 (1995)	4
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991)	5, 9, 11-12
<i>U.S. v. Kokinda</i> , 497 U.S. 720 (1990)	4
<i>Wisconsin Right to Life v. FEC</i> , 546 U.S. 410 (2006)	1

Constitution, Statutes, Regulations & Rules

U.S. Const. amend I *passim*
U.S. Const. amend XVI *passim*
7 U.S.C. § 2901(b) 5
7 U.S.C. § 2903 8
22 U. S. C. § 4411(b) 11
26 U.S.C. § 501(c)(3) 1
99 Stat. 1597 5
58 Fed. Reg. 7455, 1993 WL 13149866 (1993) 9
53 Fed. Reg. 2922, 1988 WL 276839 (1988) 9
Resolution No. 2004-019 6, 7

Statement of Interest¹

The mission of the James Madison Center for Free Speech (“Madison Center”) is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison’s belief that “the right of free discussion . . . [is] a fundamental principle of the American form of government.” The Madison Center also provides non-partisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). See <http://www.jamesmadisoncenter.org>. The Madison Center and its counsel have been involved in numerous election law cases, including recent challenges to the Bipartisan Campaign Act of 2002 (“BCRA”) in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (“*WRTL I*”), *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (“*WRTL II*”), and *Davis v. FEC*, No. 07-320 (2008).

¹No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Summary of Argument

This case turns on the nature of government speech. Forum analysis is only relevant when the government permits private speech on government property or in a government program. However, when the government is itself the speaker, it is not subject to the requirements of a forum.

To determine whether the government is speaking, this Court in *Johanns* established criteria that look at the level of control the government exercised over the message in the program involved. Whether the government was advancing a message that was subject to its control is the key in determining whether the government was speaking rather than creating a forum for private individuals to speak.

Pleasant Grove is the speaker here. Its message in Pioneer Park is a historical one, “commemorating” events in the city’s history. It advances this message by approving the placement of privately donated “plaques, structures, displays), permanent signs and monuments” in its public parks or on city property that conform to its message. Because the city retains final approval authority over the message conveyed by the displays and continues to exert control over the them, the city is not creating a forum for private discussion, but is instead advancing its own message.

That Pleasant Grove’s message involves the participation of nongovernmental parties does not render it private speech. As this Court has held, mere private participation in a government program, whether with the development of its message or its transmittal, does not convert the governmental mes-

sage to a private one. If it did, government programs that engage in promoting important public policies would be required to also express the contrary viewpoint. This is neither desirable nor tenable. Pleasant Grove—indeed any governmental entity—historically has been and should continue to be able to promote legitimate public policy goals, with the participation of private individuals who wish to support those goals, without the mandatory inclusion of contradictory messages.

Argument

The Tenth Circuit Court erroneously decided that Summum was deprived of its First Amendment rights by being excluded from a traditional public forum. App. 21a. In so doing, the court committed a series of jurisprudential missteps. It first assumed that Pioneer Park was inherently a public forum for purposes of forum analysis, App. 10a, and that assumption was premised upon the assumption that forum analysis was applicable. App. 8a-9a. However, the court neglected to evaluate the most fundamental component to this case: Whether the displays in the park at issue were government speech, rather than private speech, so that forum analysis was not applicable. This brief will focus on this omission.

I. Forum Analysis Is Inapplicable to Government Speech.

“The government, as a general rule, may . . . advocate and defend its own policies.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). In doing so, “it may make legitimate and appropriate steps to ensure that its message is neither

garbled nor distorted.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). “[I]n the end, [the government is] accountable to the electorate and the political process for its advocacy.” *Southworth*, 529 U.S. at 235. Because the government can be a speaker, the preliminary question in cases such as this must always be whether the relevant “program was designed to facilitate private speech [or] to promote a governmental message.” *Legal Services Corp. v. Valazquez*, 531 U.S. 533, 543 (2001).

When a government program or property permits private speech, this Court’s forum analysis jurisprudence becomes relevant. Three types of fora exist: a traditional public forum, a designated or limited public forum, and a nonpublic forum. A traditional public forum is a place which has traditionally been devoted to assembly and debate. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). A designated or limited public forum is one that the government opened up for public expressive activity. *Id.* A nonpublic forum is created when the government affords very selective access to government property based upon subject matter or speaker identity. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* 473 U.S. 788, 806 (1985).

Whether a forum is traditionally public, is designated for a specific type of speech, or is nonpublic in nature affects the level of control the government may legitimately exert over the speech in that forum. See *U.S. v. Kokinda*, 497 U.S. 720, 726 (1990) (citing *Perry*, 460 U.S. 37). The government may limit content in a limited public or nonpublic fora, but may not limit content of a traditional public forum. *Perry*, 460 U.S. at

955 n.7. However, the government may not engage in viewpoint discrimination in any fora. *Id.* at 954-55.

If the government is the speaker, however, forum analysis is irrelevant and the government may choose the content and viewpoint of its speech. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (holding that a beef promotion program was clearly government speech and did not amount to compelled private speech); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that Title X's exclusion of abortion-related services and advocacy from its funding constitutionally advanced the government's policies regarding family planning). The government in such circumstances neither creates a forum nor even affords selective access to a forum. Instead, the government is advancing its own policy. *Johanns*, 544 U.S. at 561-63.

II. Pioneer Park's Displays Are Government Speech.

To determine whether speech is government speech rather than private speech, this Court articulated two criteria in *Johanns*, 544 U.S. 550. In *Johanns*, the Court upheld as "government speech" provisions of *The Beef Promotion and Research Act of 1985*, 99 Stat. 1597, which created a federal policy to promote the marketing and consumption of beef and beef products, using funds raised by an assessment on cattle sales and importation. *See* 7 U.S.C. § 2901(b). The Court determined that the message of beef promotions was "government speech" for two reasons. First, "Congress and the Secretary [of Agriculture] set out the overarching message and some of its elements," *Johanns*, 544 U.S. at 560, and "the Secretary exercises final approval authority over every word used in every promotion

campaign.” *Id.* Second, “[t]he Secretary of Agriculture . . . oversees the program . . . and retains absolute veto power over the advertisements’ content.” *Id.* at 563. That “the content is effectively controlled by a nongovernmental entity” did not render it private speech because “from beginning to end the message [was] established by the Federal Government,” and the nongovernmental entity’s “members are answerable to the Secretary.” *Id.* at 560-61. What was relevant to the Court was 1) whether the government controlled the overall message conveyed, and 2) whether the government retained control over the promulgation of that message.

While the factual framework of *Johanns* involved government-compelled speech through funding, its analysis in determining the nature of the speech involved has broader applications. The Sixth Circuit decision in *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), demonstrates this. In *Bredesen*, the appellate court evaluated Tennessee’s specialty license plate program to determine whether the “Choose Life” plate constituted government speech or was part of a designated forum. *Id.* at 375. The court relied upon *Johanns* to find that the program was government speech. *Id.* Tennessee had “the right to wield ‘final approval authority’” over the plates in question, because approval of the plate with the “Choose Life” message was legislatively adopted. *Id.* at 376.

Pioneer Park works much the same way. First, the City of Pleasant Grove, by Resolution No. 2004-019, App. 1h-4h, determined that permanent placement of “any plaque, structure, display, permanent sign, or

monument” in a public park, such as Pioneer Park, must be approved by the city council, *id.* at 2h, and are eligible for approval if the displays satisfied such factors as that they “directly relate to the history of Pleasant Grove” and “commemorate” some such historical event. App. 2h-3h. The city council, thus, wields “final approval authority” over the displays in Pioneer Park.²

Second, the city council continues to have control over its message after a donation of a display is accepted. The donors are not free to remove their contribution in the park at their leisure. Danklef Dep. at 44. Only the city is authorized to do so. This continued control, coupled with the city council’s initial ability to accept or refuse a donation to the park at the outset, renders Pioneer Park’s display to be government speech under *Johanns*.

Indeed, the analogous nature of this case to that in *Johanns* is significant. Just as Congress created a coordinated program to promote its message that beef and beef products are desirable, *Johanns*, 544 U.S. at 561, so here Pleasant Grove created a coordinated effort with its residents to promote its historical message in Pioneer Park. Like Congress, the city council had specific factors it weighs to ensure its message is conveyed, expressly articulated by Resolution No. 2004-019. App. 1h-4h. And like the Secretary, the city council retains absolute veto power to change

²That the city council considers factors rather than specific, mandatory requirements confirms a level of discretion and ultimate veto power consonant with government speech rather than a forum.

the message or the form of the message at any time. While the specific details of each display were designed or determined in the first instance by the individuals who sought to donate their display to the park, ultimately the city retained complete authority to determine if the message the display contained was and remains the message that Pleasant Grove seeks to communicate.

The displays in the park were placed there under governmental supervision and remained there at the city's discretion to convey the city's message. No further constitutional inquiry is required to affirm Pleasant Grove's ability to refuse to accept and display Summum's monument.

III. Private Participation Does Not Render Government Speech Private.

That individuals participate in composing the elements of Pleasant Grove's historical message does not undermine the governmental nature of that message. To determine otherwise fails for at least two reasons.

First, it is inconsistent with this Court's jurisprudence. In *Johanns*, the Beef Promotion and Research Order, created by statute, 7 U.S.C. § 2903, was promulgated by the Secretary of Agriculture subject to "notice and public comment" *Id.* at 2903(a). Once adopted, the federal government paid third parties to create and disseminate its "Beef. It's What's for Dinner" message. *Johanns*, 544. at 566-67. In *Rust*, the federal government gave Title X funds to family counseling doctors contingent upon restrictions that prohibited discussion of abortion with their patients, a regulation that is subject to "notice and comment" pursuant to the

Administrative Procedures Act. *See* 58 Fed. Reg. 7455, 1993 WL 13149866 (1993). The regulations were revised based on the public comments received from third party sources. 53 Fed. Reg. 2922, 2931, 1988 WL 276839 (1988). And in the passage of the “Choose Life” plate, the plate was proposed by private individuals and adopted by the Tennessee legislature. *Bredesen*, 441 F.3d at 376. In all three cases, despite private involvement, the speech at issue was deemed governmental. *Johanns*, 544 U.S. at 560; *Rust*, 500 U.S. at 193; *Bredesen*, 441 F.3d at 376.

This is logical. One who adopts a position advocated by another cannot legitimately be said to be speaking on that person’s behalf. Likewise, a court’s decision derived from legal arguments advanced by counsel cannot be said to be the private opinion of counsel. It is clearly the decision of the court. Taking the suggestions of its citizens, or utilizing non-governmental agencies and businesses to help shape and propagate its message, does not convert the government’s message into a private one.

Pleasant Grove allows its residents to assist it in the development of the city’s message. Organizations and individuals donate items to be displayed in the city’s parks. This does not render the message private, since the city council has final authority over the permanent display of all such items, which must, at minimum, meet the city’s requirements and can subsequently be removed by the city at anytime. *See* App. 1h-4h. At most, such donations demonstrate support for Pleasant Grove’s message and a communal interest in advancing it. *See Bredesen*, 441 F.3d at 377 (“While it is true that [] voluntary dissemination itself

qualifies as expressive conduct, the government's reliance on private volunteers to express its policies does not create a 'forum' for speech requiring viewpoint neutrality.”).

A second problem is that, as a policy matter, converting government speech into private speech merely because private individuals become involved in it has far reaching, adverse consequences. If private participation automatically converts government speech into a forum that requires viewpoint neutrality, the government's ability to advance or support certain public policy goals would be severely undermined. Government could only craft a genuinely government message if it alone was the only one involved with every minute detail necessary to conceive, develop and disseminate the message. And, if a government message was always private speech, whenever private citizens had first suggested the message, they would comment on proposed government action at their peril, rendering their First Amendment right to petition our government into a hollow right indeed, and this Nation's experiment in “self-government” would be seriously undermined.

Such an approach would also have the absurd result that government could only effectively deliver its message, if it were not supported by private citizen involvement. While the government may not involuntarily associate an individual or organization with an undesired message, *Johanns*, 544 U.S. at 568 (Thomas, J., concurring) (citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 513 U.S. 557, 576-77 (1995)), the government can constitu-

tionally use taxpayer funds to advance its goals. See *Rust*, 550 U.S. 173. Yet if private citizen involvement in the development or promotion of the government’s message makes it private speech, the government would have to either refuse to involve those who support its goals or else risk compromising its own message.

For example, governments typically produce public service announcements (“PSAs”) as components in programs to encourage or discourage private conduct—such as television and radio programs designed to “just say no” to smoking or to unprotected or promiscuous sex, or to encourage continuing education and the like. These PSAs are often privately produced and broadcasted for free. But under the Tenth Circuit’s theory of this case, such voluntary private involvement in producing a government PSA would—like the voluntary submission of a donated monument to a park—logically render the government subject to the charge of unlawful viewpoint discrimination, and the government would then be required either to produce PSAs with a contradictory message or to cease producing PSAs at all.

Indeed, this Court has noted this untenable result in *Rust*: A rule that said that government cannot

“choose[] to fund a program dedicated to advance certain permissible goals, [without] necessarily discourage[ing] alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U. S. C. § 4411(b), it

was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.

Id. at 194. Likewise, the *Bredesen* court understood that such an approach

would force the government to produce messages that fight against its policies, or render unconstitutional a large swath of government actions that nearly everyone would consider desirable and legitimate. Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a First Amendment right not to express agreement. For instance, government can distribute pins that say ‘Register to Vote,’ issue postage stamps during World War II that say ‘Win the War,’ and sell license plates that say ‘Spay or Neuter your Pets.’ Citizens clearly have the First Amendment right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute ‘Don’t Vote’ pins, to issue postage stamps in 1942 that say ‘Stop the War,’ or to sell license plates that say ‘Spaying or Neutering your Pet is Cruel.’

Id. at 378-79. This would seriously undermine the government’s ability to pursue legitimate public policy goals.

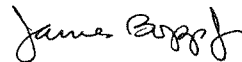
The displays in Pioneer Park serve to convey Pleasant Grove’s message. This is an example of the government selectively, but permissibly, enlisting the help of private citizens to convey the city’s message

and to assist the city in financing it in a way that this Court has approved. Exclusion of Summum's "The Seven Aphorisms" may likewise be deemed "necessary to define the contours" of the city's scheme, *Velazquez*, 531 U.S. at 547, because allowing the monument in the park is outside of the city's historical purpose.

Conclusion

Because Pleasant Grove is engaged in governmental speech when it approves displays to be placed in its public parks, it may set the requirements for such displays in accordance with its own vision for the parks. The Tenth Circuit decision to the contrary is erroneous and should be reversed.

Respectfully submitted,



James Bopp, Jr.,
Counsel of Record
Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (telephone)
812/235-3685 (facsimile)