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No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

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

AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. It believes that the well-being of the Jewish community is dependent on a rigorous policy of government non-discrimination between faiths as well as a vibrant marketplace of ideas. It also believes that government speech must be subject to different rules than those that govern state regulation of private speech, lest every extremist group claim the right to speak in government's name.

The brief is filed with written leave of the parties.

SUMMARY OF ARGUMENT

1. Because existing law recognizes only two categories of speech in pubic *fora*—purely private and purely governmental speech—the parties litigated and the court below decided this case on

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

that biaxial model. That model, however, does not adequately reflect the spectrum of ways in which private and government speech interact.

2. In some cases—and in this one—government and private speakers speak simultaneously, expressing a common idea toward a common end. Each speaker seeks not only to speak, but to enjoy the benefit of speaking together with its partner. Such hybrid speech deserved to be treated as a separate category for purposes of determining an entitlement to access to public places

3. Pleasant Grove City sought not only to speak on its own behalf, but to associate itself with the speech of the Fraternal Order of Eagles. For its part, the Eagles wanted to send its message not only under its own auspices, but under the auspices of local government.

The Eagles designed this monument along the lines of some 150 others displayed around the nation (and tens of thousands of paper copies). The message was aimed at an evil (juvenile delinquency) identified by the Eagles. The text of Ten Commandments displayed on the monument was the product of an inter-faith committee convened by the Eagles.

4. The Ten Commandments monument which triggered this litigation is a textbook example of hybrid speech. It sits where only government speech has been permitted; title resides in the City; and the City pays maintenance costs, But in every other

way—from design to the message's identification with the Eagles, this is also the Eagles' speech.

5. Thus, while Petitioners and Respondent are correct about what should follow if its characterization of speech as public or private is correct, neither characterization of the speech here is entirely accurate.

6. The bare fact that legal title is in the City is not inconsistent with sending a joint message from the monument, just as a private party being a state actor for some purposes does not convert it into an arm of government for all purposes.

7. In hybrid cases, while there is sufficient governmental action to subject its speech to constitutional limits, notably the Establishment Clause, the governmental aspects of the case do not overwhelm and obscure the concurrent private speech aspects.

8. *Johanns v. Livestock Marketing Assoc.*, 544 U.S. 550 (2005), emphasized that the generic "consumer beef" advertisements for which beef producers were taxed were "from beginning to end" government speech. The content was prepared by a body whose members were all government employees or appointees. The content of the advertisements were dictated by statute. No private person was identified with the message. Hence, the Court found treated the advertisements as government speech.

9. This *Johanns* Court reserved the question of whether the same result would obtain if certain

individuals were compelled to identify with the government's message. 554 U.S. at 564-65. That reservation defeats Pleasant Grove City's efforts to invoke *Johanns*—a government speech case—as controlling in this very different hybrid case.

10. *Wooley v. Maynard*, 430 U.S. 705 (1977) is also a hybrid speech case. The state motto to which Wooley objected was undoubtedly government speech. Its display on his car, though, retained a private character, sufficient to give rise to a coerced speech claim.

11. In other contexts which are in fact hybrid situations, courts have needlessly and futilely struggled to label speech as exclusively private or public.

12. Among the most common hybrid cases are those involving specialty ("affinity") license plates, on which a group places its motto, and vanity license plates, where individuals pick identifying letters and numbers to communicate some message. In those instances, private speech (the personalized aspect of the plate) is married to government speech (the information that identifies the car). Courts have struggled to label these plates as either private or public speech, creating complex tests leading to a crazy-quilt pattern of holdings.

13. In the case of legislatively created specialty plates for an anti-abortion group, but not their ideological opponents, the Fourth and Sixth Circuits have reached conflicting decisions about the identity of the speech as official or unofficial.

14. The hunt for an either/or characterization of affinity plates is as misguided as the parallel effort here.

15. The sharp dichotomy between public and private speech arose in the public forum cases, where the speaker seeks nothing from government but access to its property. Those speakers seek not government's endorsement, but the convenience, visibility and accessibility of publicly owned spaces. For this reason, private religious speech in a public forum poses no Establishment Clause problem because no government endorsement is sought or given.

16. By contrast, in hybrid speech cases, the private speaker seeks not only to speak, but to enjoy government's endorsement. Conversely, government seeks not only to speak in its own name, but to benefit from association with a respected private group.

17. The hybrid category will generally not be applicable when government hires a private group to deliver the government's own message, as was the case in *Rust v. Sullivan*, 500 U.S. 173 (1991). But outright viewpoint discrimination in the choice of speakers acting in tandem with, but not at the behest of, government, ought to be unconstitutional.

18. Pleasant Grove's rules for accepting displays underscore the City's ratification of Eagles speech, as they permit displays only from organizations with a long-standing relationship to the City, a criterion

relevant only if the Eagles are concomitantly speaking with the City.

19. This case presents an opportunity to begin to craft rules for hybrid cases. Following is a list of a first-cut at enumerating such rules:

(a) Rules must be in writing and promulgated in advance to avoid obscuring improper and standardless discretion;

(b) Broad content-based rules (*e.g.*, monument must relate to local affairs, or must relate to an event occurring a specified number of years in the past) are acceptable because of the presence of government speech.

(c) Outright viewpoint discrimination would be impermissible, given the presence of private speech.

20. Pleasant Grove City proffered two rules as justifying accepting the Eagles' Ten Commandments but excluding Summum's aphorisms. The first required a "long-standing relationship" between the City and the group seeking to "donate" a monument. In this case, that rule is a pretext. The Eagles existed in Pleasant Grove City for only two years prior to the City's acceptance of their monument. By any fair use of the English language, this is not long-standing (especially when all but one of the remaining park exhibits illustrates 19th century events).

The second rule required monuments to relate to local history. With the exception of a 9/11 monument commemorating a singular event (and, perhaps, a

recreation of a Mormon sacred building located in Illinois), all the displays in the park did so. There is no indication that the Ten Commandments had some unique impact on Pleasant Grove City as opposed to whatever role they play in American society generally.

ARGUMENT

I. THIS COURT SHOULD RECOGNIZE A CATEGORY OF SPEECH WHICH IS BOTH PUBLIC AND PRIVATE

A. The Biaxial Approach To Speech—Either Public Or Private—Inadequately Accounts For Intermediate Hybrid Cases

Petitioners and the Respondent agree on three principles relevant to the disposition of this case. Government (a) must treat all private viewpoints equally, whether in directly regulating speech or deciding on a speaker's access to a public forum of any sort; (b) must not itself speak in ways that express a preference for one faith over others; but (c) need not be viewpoint neutral when it speaks wholly for itself. Each of these principles is predicated on the existence of a sharp line between public and private speech. Existing precedents do not recognize an intermediate, hybrid category in which government and private party speak in tandem to their mutual advantage.

Standing alone, each of these three principles is sound. In this case, however, they fall short of

leading to a satisfactory result—not because any of them are unsound standing alone or in combination, but because the either/or paradigm of all public or private speech is false, or, more precisely, greatly over-simplified. It does not accurately reflect the full range of interactions between private parties and government in regard to speech, nor does it permit appropriately nuanced judicial responses.

This is not to say that there are no clear-cut cases. In some cases speech is either purely private or purely public. Compare, *e.g.* *United States v. American Library Ass'n*, 539 U.S. 194 (2003); *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005)[2] (public speech), with *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (private speech). But some speech is both, a hybrid, at once deliberately public and private.

The current legal regime does not account for such middle ground cases. To treat this third category as if only one party was speaking, instead of the speech being the simultaneous expression of official and private speakers, is to distort both the character of the speech and the law.

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[2] See also *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 61, n.4 (2006) (military recruiters' on-campus speech was wholly government speech).

B. In Hybrid Cases, The Speech Is Deliberately Both Public And Private

The Pleasant Grove City Ten Commandments monument falls easily into this intermediate hybrid category. It is neither exclusively public nor exclusively private. It is, by the deliberate choices of the Eagles and the City, the joint speech of both. The Ten Commandments display would not achieve its full purpose for either if the City or the Eagles spoke only for itself. The entire point of the enterprise is for the City and the Eagles to speak with one voice.

The government wants not only to speak on its own behalf, but to endorse and amplify the Eagles' own religious speech and to bask in the reflected glory of a nationally respected group. The Fraternal Order of Eagles, for its part, is interested in having the City amplify and bless its speech with an official imprimatur, all the while retaining its own distinct voice.

Notwithstanding this state of affairs, the parties litigated this case below within the traditional biaxial framework. Each accepted that the only relevant decisional categories were public or private. That was a legitimate litigation strategy given the precedents. It is not a sound basis for decision by this Court.

Pleasant Grove City's position is simple enough. "In analyzing Summum's assertion, the first question must be whether this case is about private speech or government speech." [Petitioners' Brief at 21 (emphasis added).] The City insists that the

speech at issue is wholly its own, and that Summum's claims are entirely insubstantial.

If its minor premise were correct, Pleasant Grove City's legal conclusion would be unassailable. This Court has repeatedly rejected the proposition that the First Amendment requires government to provide the means for citizens to disagree with its own speech. Challenges to government's speech are worked out at the ballot, not the courthouse. See *e.g.*, *American Library Association v.*, *supra*; *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). M. Yudoff, When Government Speaks (1983). The problem is that the monument is not exclusively official speech.

Summum for its part argued below that the monument was purely the Eagles' private speech, and that the City's decision to exclude Summum's own competing monument while accepting the Eagles' was impermissible viewpoint based discrimination against private speech. The problem with this proposition, too, is in its minor premise. The Ten Commandments monument is not merely private speech.

The judges on the divided court below found themselves enmeshed in the same constricted method of analysis: was the monument public or private speech? See, 483 F.3d 1044 (10th Cir. 2007) (panel opinion) (private speech); 499 F.3d 1170, 1181 (Lucero, J., dissenting from rehearing en banc); *id.* at 1175 (McConnell, J., same); *id.* at 1178 (Tacha, J.) (concurring in denial of rehearing *en banc*).

Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005), hints at the existence of a third category of speech, a category which should govern here: hybrid—public and private—speech.

This Court should take its own hint and add a new hybrid category to the courts' analytical arsenal. Full recognition of that additional category is appropriate both because it would accurately reflect complex realities and because it will lead to principled and precise decision-making.

II. PLEASANT GROVE CITY'S TEN COMMANDMENTS MONUMENT BEARS OVERLAPPING CHARACTERISTICS OF GOVERNMENT AND PRIVATE SPEECH

Summum, true to the either/or categorization under which it litigated below, argued that the original private sponsorship of Pleasant Grove City's Ten Commandments monument by the Fraternal Order of Eagles wholly overrode the evident public elements embodied in the City's acceptance of title to, and display of, the monument, and that it remained therefore wholly private speech. This is too simplistic an approach to assessing the nature of the speech at issue.

By accepting the Eagles designed monument into its park, a place where private parties cannot erect permanent structures at will, and by accepting title and ownership to the monument, the City did more than merely allow access for someone else's private speech. It adopted that speech as its own.

This conclusion is strengthened because the City asserts on-going responsibility for maintaining the monument, [Petitioners' Brief at 3], a responsibility it would not bear with regard to a purely private display. A municipality is not legally obligated to maintain a privately erected temporary holiday display merely because it stands on public land. Cf. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Conversely, however, it cannot accurately be said that the bare fact of the City's title to the monument silences the Eagles' voice and obscuring its large hand in shaping the monument's message. Ownership of the physical monument is not inconsistent with sending a joint message.

Contrary to Pleasant Grove City's argument, the City did not seek to speak only for itself. It sought to join with the Eagles in speaking. The arrangements here are, to borrow a term from family law, an open adoption, not a closed one. Cf. *In Re: Guardianship of K.M.O.*, 161 N.J. 337, 736 A.2d 1246 (1999).

In the run-of-the-mill public forum case, government is asked to allow property it holds in trust for the public to be used as a platform for private speech. No governmental endorsement is sought, given or reasonably perceived. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

In *Pinette*, as in most public forum cases, the challenge to access came from government. In that

case Ohio was anxious not to be associated with the speech of a racist group. Likewise, in *Good News*, the Milford School District was anxious not to be aligned with Good News' religious message. In neither case did government affirmatively endorse the private speaker's sectarian message.

Pleasant Grove City is anxious to be associated with both the speech emblazoned on the Eagles' Ten Commandments monument and with the Eagles. True, the City's association with the Eagles and the Eagles' speech means that it must meet constitutional restrictions on official public speech, notably the Establishment Clause. Judge McConnell acknowledged as much in dissent from the denial of rehearing *en banc*. But that does not exhaust Pleasant Grove City's constitutional responsibilities, because of the monument's co-existing private speech.

Van Orden v. Perry, 545 U.S. 677 (2005), addressing another Eagles monument donated to a government body, is not to the contrary. That decision establishes only that a donated Eagles Ten Commandments monument is sufficiently governmental to be subject to the Establishment Clause, not that it is exclusively governmental speech. The latter issue was neither raised nor decided in *Van Orden*.

One can be a state actor without losing one's overall private status. The fact that conduct is state action or under color of law does not mean that the private party so acting is in all respects a government actor.

State action is present when "a private actor operates as a 'willful participant in joint activity with the state.'" *Brentwood Academy v. Tenn. Secondary School Athletic* Ass'n, 531 U.S. 288, 295 (2001). That this Court describes such activity both as "private" and "joint" demonstrates there is nothing incoherent about that dual status. A defense lawyer's use of race-based peremptory challenges is state action, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); his malpractice in the same case is not, *cf.*, *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender not state actor for malpractice purposes).

The entire point of a new hybrid speech category is exactly that each speaker retains its own character, such that rules developed for both public and private speech need to be taken into account in assessing the nature of the speech.

III. THIS COURT SHOULD TAKE THIS OPPORTUNITY TO RECOGNIZE A CATEGORY OF HYBRID SPEECH

A. *Johanns* Presages The Recognition Of Hybrid Speech

The existence of a hybrid category of speech, neither public nor private, is presaged by *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), a case unsuccessfully challenging a tax on beef producers to pay for generic advertisements urging beef consumption. Ranchers opposed to generic advertising asserted that the tax they paid to support the campaign was unconstitutional

government coerced speech. Cf. *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

Johanns limned the parameters of the "relatively new and correspondingly imprecise" government speech doctrine, *Johanns*, 544 U.S. at 573 (Souter, J., dissenting). It reaffirmed the broad leeway accorded government itself to favor some viewpoints over competing ones when speaking exclusively on its own behalf. The majority acknowledged, however, that several questions remained open about the outer boundaries of the doctrine.

A question raised but not answered in *Johanns* was the status of governmental speech concomitantly perceived as, or in fact also attributable to, an identifiable unwilling private speaker. Does that joint speech constitute coerced private speech despite the fact that it retains its governmental character? 554 U.S. at 564, n. 7; *id.* at 564-65. That question assumes the possibility of speech which is neither exclusively public nor exclusively private, but both—precisely the situation here presented for decision.

Johanns did not reach that question. There was no proof that the Beef Advisory Board's speech was viewed in part as that of an identifiable individual. "We have only the funding tagline itself … that, standing alone, is not sufficiently specific to convince a reasonable fact-finder that any particular [producer] … would be tarred with the content of each trademarked ad." 544 U.S. at 566.

Given *Johanns'* reservations, Pleasant Grove City's reliance on *Johanns* as dispositive [Petitioners' Brief at 29-31] is misplaced. The care *Johanns* took to paint the speech as from "beginning to end the message established by the Federal government." 544 U.S. at 560, belies the claim that it is controlling here.

In *Johanns*, "the government set[ ] the overall message to be communicated, and approve[d] every word that [was] to be disseminated." *Id*. at 562. And not just at the end of the process. "Government officials over[saw] every step of the process; the statute itself lays out the broad criteria and aim of the government's speech." The persons who supervised the ad campaign were either federal employees or private persons appointed or removable by the Secretary of Agriculture. *Id.* at 560.

If a concurrent overlay of private speech had been present in *Johanns*, "the analysis would be different," *id*. at 562, n. 7, even though technical "ownership" of the speech would have been the same.

The suggestion that a hybrid category exists garners further support from *Wooley v. Maynard*, 430 U.S. 705 (1977), holding that New Hampshire could not require drivers to display the state motto ("Live free or die") on a license plate. An official state motto is undeniably state speech. Its display on a private car necessarily is also private speech, or the holding in *Wooley*—that the state could not insist on the motto's display on a license plate whose display it may require—makes no sense. *Wooley* rests on the assumption that in some contexts license plates at

once have elements of official speech and private speech.

B. Other Frequently Encountered Circumstances Better Fit A Hybrid Category Than Stark Public/Private Categories

Wooley and this case are not outliers, not justifying the creation of an additional analytic category.[3] The problem arises in other contexts,

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[3] The mix of *amici* supporting Petitioners is, however, unusual, combining those who have long defended the display of most religious monuments both by government and on government property with those opposing all, or almost all, such displays. For the former, support for Pleasant Grove City means that it is likely that only conventional (Judeo-Christian) monuments will be displayed, as governments are unlikely to accept displays from unpopular religious groups. Most of the latter would prefer that there be no religious monuments in public places. They believe, however, that, given *Van Orden*, the policies behind the Establishment Clause are best served by adopting a rule that limits the number of permanent religious displays in public parks, even as it tolerates Ten Commandments monuments.

AJCongress unsuccessfully urged that *Van Orden* be decided in favor of Van Orden. This Court disagreed. In these circumstances, *amicus* AJCongress believes that there is far less risk of a government endorsement of religion if more religious symbols are allowed than if a central symbol of the "Judeo-Christian" tradition is all that government chooses to display, invoking some (perhaps dubious) secular rationale.

including the issuance of vanity and affinity group plates. It has likewise arisen in connection with private group sponsorship of public broadcasting by a racist group, *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000). Absent a category that accurately reflects their complexities, the courts have struggled to analyze those cases. They have jerry-built amorphous, multi-part tests to delineate a non-existing boundary between the public and the private.

The Ninth Circuit recently observed with some asperity in a hybrid speech case, that "there is some question as to what standard we should apply in differentiating between public and private speech," *Arizona Life Coalition v. Stanton*, 515 F.3d 956, 963 (9th Cir. 2008).

The results are unsurprisingly uneven and unpredictable, given the absence of fit between the legal rubrics and reality. The problem is mostly not with the tests, nor the difficulty of distinguishing public from private speech. The problem is the refusal to acknowledge the existence of a hybrid category.

A review of the license plate cases illustrates the importance of forthrightly recognizing a hybrid category. Many states now issue upon individual request various vanity or affinity group license plates. See, *e.g.*, S. Lonce, *Free Speech on Wheels*, New York Times (July 5, 2008). The former involves the car owner selecting a personalized combination of letters and numbers expressing a personal

message (*e.g.*, GUNNUT; John 3:16; GOMETS) as a substitute for a random selection of identifying letters and numbers. The latter involves an organization placing its symbol or slogan, or both, on a license plate available for purchase by members and supporters (Choose Life; Preserve Choice; VFW).

The vanity plate always reflects a personal, private choice. Affinity or specialty group plates are created either by a special act of the legislature, or by a sufficient number of persons expressing an interest in the creation of a "specialty" or "affinity" plate. Tenn. Code Ann. 55-4-306; Va. Code Ann. § 46.2-746.22; SC. Code Ann. 56-3-8190.

The federal and state courts have repeatedly confronted disputes over these plates:

> (1) When the state excludes a particular message from an individual's vanity plate because it is religious, see *Pruitt v. Wilder*, 840 F.Supp. 414 (E.D. Va. 1994) (invalidating ban on references to a deity as viewpoint discrimination); *Byrne v. Terrill*, 2005 W.L. 2043011 (D. Vt. 2005) (upholding exclusion of reference to John 3:16); or offensive on some real or imagined ground: *Lewis v. Wilson*, 253 F.3d 1073 (8th Cir. 2001) (requiring issuance of Aryan-1 plate); *Perry v. McDonald*, 280 F.3d 159 (2nd Cir. 2001) (upholding refusal to issue SHTHPNS plate); *Higgins v. Driver & Motor Vehicles Service Branch*, 335 Or. 481, 72 P.3d 628 (2003) (upholding ban on reference to alcohol); *Martin v. State*, 175 Vt. 80, 819 A.2d 742 (Vt. 2003) (ordering issuance of "Irish"

plate). See, generally, Validity, Construction and Operation of State Statutes Regulating Issuance of Special or Vanity License Plates, 8 A.L.R. 6th 639 (2008). As is evident from the citations, the case law is in some considerable disarray over the question of whether the speech on a vanity plate is public or private.

(2) Legislative preference for one group and viewpoint (*e.g.*, pro-life) over another, competing viewpoint (*e.g.*, pro-choice) in creating affinity (or specialty) plates, compare *ACLU v. Bredesen*, 445 F.3d 370 (6th Cir. 2006) (permitting such discrimination because plate is entirely government speech) with *Planned Parenthood v. Rose*, 361 F.3d 786, rehearing *en banc* denied, 373 F.3d 580 (4th Cir. 2004) (holding such discrimination illicit). *Sons of Confederate Veterans, Inc. ex rel Griffith v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (ordering issuance of affinity plate displaying Confederate flag); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (ordering issuance of pro-life affinity plate).

The problem is particularly acute with regard to affinity plates created by special legislative action. *Bredesen* and *Rose*, two circuit court decisions, illustrate the conflicting positions. In Virginia and Tennessee, a state legislature created an affinity plate for a group opposed to abortion. No affinity plate was created for pro-choice groups. In each case, pro-choice groups sued, insisting that the

preferential status granted pro-life groups violated the Constitution.

Access to the license plate could be had only with the assent of the state legislature, which controlled what appeared on the plate. Even as the plate fulfilled the government regulatory purpose of identifying vehicles, the affinity marker conveyed an exclusively private message about a private organization. The affinity plate was simultaneously a platform for public and private speech.

The Sixth Circuit found, paraphrasing *Johanns*, that the pro-life message was "state speech, 'because the state retains the power to approve every word disseminated at its behest,'" 441 F.3d at 375.

The Fourth Circuit on identical facts categorized the affinity plate as private speech because the state did not design the motto or purport to be offering its own view of the abortion controversy. In doing so, the Fourth Circuit indicated that it was being forced into a procrustean bed of choosing between private or public speech when in fact it confronted (what *Amicus* proposes to call) hybrid speech, 361 F.3d at 793-94.

The Fourth Circuit distilled an unwieldy four-part test from its precedents:

1. the central "purpose" of the program in which the speech in question occurs;
2. the degree of "editorial control" exercised by the government or

private entities over the content of the speech;

3. the identity of the "literal speaker"; and
4. whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

This formless and complex test has now been accepted by the Ninth Circuit, *Arizona Life Coalition*, *supra*, 515 F.3d at 964. But this complex inquiry—which led to opposite results in *Rose* and *Bredesen*—would be simplified if courts were not forced into an either/or selection, but could recognize a joint enterprise for what it was.

C. The Private/Public Speech Doctrine Arose In Public Forum Cases Where No Government Endorsement Was Sought

The emergence of a divide between private and public speech paralleled the emergence of the public forum doctrine. Public forum doctrine governs cases in which would-be speakers seek bare access to publicly controlled property. *E.g.*, *Hague v. C.I.O.*, 307 U.S. 496 (1939) (public streets); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (school mailbox).

The three- or four-part division of publicly-owed property (traditional public, designated public, non-public, and, perhaps, the limited designated public forum) all are relevant when private speakers seek to speak in their own behalf from government owned property. Private speakers do not seek official endorsement of their speech when seeking to speak from a government site. They seek rather the convenience, visibility and accessibility of publicly owned spaces.

That a speaker seeks nothing but access has important legal consequences. Beginning with *Widmar v. Vincent*, 454 U.S. 263 (1981) and continuing through *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), this Court has repeatedly held that purely private speech on public property creates no Establishment Clause difficulties (along the lines of governmental endorsement), because the government adds, and the speaker seeks, nothing of government's own.

The public forum doctrine has over time expanded beyond its original focus on physical access to government property to encompass access to specialized government funding, *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995) (student activity fees) and other intangible government benefits. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985). In these cases, too, the doctrine retains its core feature: private speakers, speaking for themselves only, seek access to government assets as a 'platform' for <u>their</u> speech.

They do not seek to have government amplify their speech by adding its own voice to theirs.

In hybrid cases, however, none of this is wholly true. The private speaker does not merely seek to use a convenient public space for its own speech, but also to co-opt, and speak together with, the public authority. The speaker seeks not only to speak, but simultaneously to enjoy government amplification of its speech. Reciprocally, the government seeks not only to speak on its own behalf, but to join with a distinguished private speaker.

D. The Ten Commandments Monument Remained In Large Part The Eagles' Speech

The record is unfortunately sparse about the details of the Eagles' monument, but it does not appear to differ from the monuments the Eagles erected around the country. What follows is based on the description of Eagles' monuments in *Van Orden*, *supra*, and the earlier decision of the Colorado Supreme Court in *State v. Freedom From Religion Foundation*, 898 P.2d 1013 (1995).

Far from being government speech "from beginning to end," the Pleasant Grove City Ten Commandments monument was designed and prepared by a local chapter of the Fraternal Order of Eagles, following the pattern set by, and as part of, a national campaign conducted by the Eagles for over 50 years.

That campaign promotes the widespread public dissemination of the Commandments in partnership

with government to combat a national evil (juvenile delinquency) identified by the Eagles, and with a cure identified by it. *Van Orden*; *Freedom From Religion*. In *Van Orden* and *Freedom From Religion*, the Ten Commandments monuments bore the symbol of the Eagles. According to the website of the national office of the Eagles, the Ten Commandments display has been reproduced in several hundred thousand paper copies, and, more to the point, on at least 150 "large granite monuments in public places" in 34 states. http://www.foc.com/events/ten-commandments.aspx (visited 8/3/08).

Shortly after their Ten Commandments program was conceived, the actual text of the Ten Commandments (as displayed on the Pleasant Grove City monument and its counterparts around the country) was fixed by an interfaith committee convened by the Eagles to produce a broadly acceptable text of the Commandments, given the wide range of Ten Commandments translations used by different faiths. *Van Orden*, *supra*; *Freedom From Religion*, *supra*, 898 P.2d at 1017.

Pleasant Grove City had no hand in the selection of the text, understandably so, since the promulgation of an "official" biblical translation is beyond government's ken. *Engel v.* Vitale, 370 U.S. 421 (1962).

In accepting ownership and displaying the monument in a park, Pleasant Grove City ratified the Eagles-designed monument whole. Although that adoption made the monument the City's own for many purposes, it did not once and for all cut off the

'parental rights' of the Eagles, or obscure the fact that the speech remained at once and at the same time also that of the Eagles.

Moreover, one of the supposedly viewpoint neutral rules adopted by Pleasant Grove City after Summum demanded a place for its monument to regulate who may be a government speech partner is whether the group has long-standing ties to the Pleasant Grove community.[4] 483 F.3d at 1047. But if the speech on the monument is exclusively the City's, what possible difference could there be in the length of a donor group's presence in the City? The idea is either one the City wishes to propagate or it is not. The length of a donor's association with the City is understandably relevant, though, if the donor's voice continues to be heard in tandem with the City's.

E. The Hybrid Category Will Not Encompass Cases In Which Government Appoints Agents To Speak On Its Behalf

Not every case will fall into the hybrid or joint category. Most will not. They will involve identifiably private or governmental speech. Even where a private group is paid to speak on government's behalf, there will likely not be hybrid speech. *Rust v. Sullivan*, 500 U.S. 173 (1991).

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[4] The other criteria was whether the monument "directly relate[s] to the history of Pleasant Grove," *id.*, a criteria discussed below, p. 37.

Rust is relied on by Petitioners, but it does not negate the existence of a hybrid speech category. That case involved private family planning clinics paid to speak on behalf of government. They do not fall into the intermediate hybrid category. The clinics challenging the "gag rule" about abortion were exclusively agents of the government, paid to convey the government's message. From "beginning to end," *Johanns*, 544 U.S. at 560, the speech of the clinics about birth control (and their silence on abortion) was that of government.

Where a government-funded speaker cannot be thought of as government's agent, the rules are different. Thus, government-funded lawyers are not subject to the same control as family planning clinics. The very nature of their work requires Legal Services lawyers to confront the government, not speak on its behalf. Hence, *Rust* did not sustain a ban on their litigating certain law suits. *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001).

The continuing private voice in regard to the Pleasant Grove City Ten Commandments monument overlapping the City's speech compels a different constitutional analysis than in *Rust*. The relationship between the Eagles and the City is symbiotic in distributing benefits. It ought to be symbiotic in the obligations it imposes.

It is not, on our view of the case, terribly important whether the forum here is a traditional public forum (a park), a designated forum, or even a non-public forum. In each of these circumstances, government, making access available for private

speakers, may not engage in overt, *ad hoc*, viewpoint discrimination of the sort Summum alleges occurred here. That viewpoint discrimination manifests itself at two levels—first, and most enduringly, in the unfettered choice of half-private, half-public monuments the City permits in its parks.

Equally, there is viewpoint discrimination in the City's choice of partners. Popular and established religious groups are fit partners. Unpopular, or fledgling ones, are not. The unguided and standardless choice of partners for joint speech is constitutionally problematic in its own right.

IV. THIS COURT SHOULD BEGIN THE PROCESS OF ESTABLISHING RULES FOR HYBRID SPEECH

A. The Presence Of Both Government And Private Speech Requires A Unique Set Of Rules

The rules for equal access by private speech to a public forum, on the one hand, and official speech which generates no right to private access for competing views, on the other, are in broad outline reasonably well-settled. Given that this Court has not previously recognized a hybrid category of speech, it has unsurprisingly not yet enunciated special rules to govern it.

It took many cases to work out rules for regulating access to, and speech in, the various categories of public forums. It is not to be expected that in a fully developed set of rules for hybrid speech will emerge in this first case. But a beginning

can be made, drawing on rules governing government interaction with speech generally.

(i) Written rules adopted in advance

Written rules governing hybrid speech must be adopted in advance. These rules must be sufficiently definite to avoid standardless exercises of discretion which can mask blatant viewpoint discrimination in a choice of government's speech partners. As this Court explained in *Forsythe County v. Nationalist Movement,* 505 U.S. 123, 131 (1992), "[i]f the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' … by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted …." (Citations omitted.)

Absent clearly stated written rules that are "narrowly drawn, reasonable and [embody] definite standards," *Forsythe County*, *supra*, 505 U.S. at 133, citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), neither the public nor a reviewing court can be certain that a particular speech partnership was created or rejected pursuant to viewpoint neutral criteria applied evenhandedly. Cf. *Thomas v. Chicago Parks Dist.*, 534 U.S. 316, 324 (2002) ("granting waivers to favored speakers, or more precisely, denying them to unfavored speakers would of course be unconstitutional").

Thus, a rule that monuments must relate to civic, patriotic or historical events and not advance

purely commercial interests would be perfectly acceptable. A rule that simply authorized the executive to join in a partnership acceptable to community sentiment would not be, because it sets out no neutral criteria for deciding what speech is acceptable for joint sponsorship.

Written rules would not prohibit government from departing from any limitations it promulgates. Government remains free to speak exclusively for itself. A rule such as proposed in the previous paragraph might prohibit, for example, a monument to the liberation of South America from Spanish rule erected in a partnership of a municipality and a local ethnic organization, but it would not prohibit a city from erecting such a monument at its own initiative and expense. Nor would the result change if the private group merely suggested a possible monument to city officials, leaving to them its design and financing.[5]

(ii) Time, place and manner rules are acceptable

Content neutral rules limiting the size or shape of monuments, or regulating their placement and length of stay are examples of permissible time,

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[5] This case provides no occasion to consider what category ought to be assigned to monuments or speech initiated and designed by government, but paid for by public subscription, such as Grant's Tomb in New York City, see ww.nps.gov/gegr/historyculture/index.htm, or the Washington Monument in Washington, which was funded by a combination of federal and private funds.

place or manner restrictions. *Rock Against Racism v. Ward*, 481 U.S. 781 (1989). These, too, would be acceptable.

(iii) Content based discrimination is acceptable

As with the designated public forum—with which the joint speech shares in common the fact that entry is not of right or tradition, but dependent on an anterior governmental decision to open up an opportunity for speech, *Perry*, *supra*—rational and broad content based restrictions should be permissible in recognition of government's active speaking role.

However, courts need to be certain that the content based restrictions are not covert surrogates for viewpoint discrimination. Unfortunately, this Court's decisions do not make the distinction between content and viewpoint as clear as it might be (see *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)). Nevertheless, the thrust of the distinction is clear.

Likewise a rule providing that monuments will only be erected to commemorate events more than a certain (reasonable) number of years in the past—similar to rules promulgated by the U.S. Postal Service for issuance of postage stamps[6]—should pass muster, especially since with the passage of time, monuments honoring all events will qualify.

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[6] Reproduced as Appendix A.

(iv) Viewpoint discrimination is impermissible in hybrid speech

Outright viewpoint discrimination—at least if not required by some other constitutional provision such as the Establishment Clause or the Equal Protection Clause—in any context but exclusive official speech is an intolerable First Amendment evil. This is so both as to the message conveyed from a joint platform and the choice of partners. Being seen as allied with government is in itself a significant advantage for a private speaker, and not one that in a hybrid case should be denied on the basis of viewpoint without compelling justification.

This Court has held that even in a non-public forum, where there is no independent right of access, viewpoint discrimination is prohibited. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). If this is so of instances where the speech is disassociated from government, it *a fortiori* ought to be true where private speech is undertaken in active partnership with government.

In its own speech, government is entitled to honor the status quo. It is not free to do so when regulating access to public spaces for private speech, even where the speech has an overlapping government component as well.

The First Amendment values particularly speech challenging the status quo, for that constitutional guarantee was fashioned to assure unfettered interchange of ideas for the bringing about of "political and social changes desired by the people."

Legal Services Corp. v. Velasquez, 531 U.S. 533, 548 (2001), citing *New York Times v. Sullivan,* 376 U.S. 254, 269 (1964). Cf. *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (invalidating campaign finance law favoring incumbents). So long as the private voice is heard, the ban on viewpoint discrimination should be enforced with full vigor.

(v) Government may not use size or popularity of a sponsoring group as a surrogate for viewpoint discrimination

A rule that allows partnerships with larger, more established organizations, but not smaller ones, would be constitutionally doubtful. In the Establishment Clause context, this Court has observed that rules favoring larger religious groups pose special constitutional difficulties *Mitchell v. Helms*, 530 U.S. 739, 810 (2000). The same should be true in the speech context. At a minimum, the effect of Pleasant Grove City's policy of jointly sponsoring a Ten Commandments monument, but not one expressing the central dogmas of a small, upstart faith, inevitably has the effect of suggesting a strong preference for the "Judeo-Christian tradition. These concerns carry special constitutional force, *Larson v. Valente*, 456 U.S. 228 (1982).

Taking cognizance of this point, Congress, in codifying rules for access to school spaces for student clubs in the Equal Access Act, 20 U.S.C. § 4071, *et seq.*, prohibited schools from requiring student initiated clubs to have a minimum number of members before invoking the Act, *id.* at § 4071(d)(6).

The obvious purpose of that limit was to prevent invocation of the Act only by popular religious and ideological groups, to the exclusion of the small, counter-cultural, groups most in need of protection from official suppression.

V. THE RULES ADOPTED BY PLEASANT GROVE CITY DO NOT PASS MUSTER

In this case, Pleasant Grove City promulgated formal rules, but only after Summum had first sought to erect its monument. 483 F.3d at 1047. Although the courts below did not make formal findings of fact, neither of the rules it did ultimately promulgate justify acceptance of the Ten Commandments monument and rejection of the proposed Summum monument.

The first of these rules allows Pleasant Grove City to accept monuments for display if the donating group had a long-standing relationship (a term not otherwise defined) with the City. The Fraternal Order of Eagles existed in Pleasant Grove City for only two years before donating its monument. 483 F.3d at 1044. That is not long-standing. Almost all of the other monuments in the park (except a September 11 monument) relate to 19th century events, illustrating what long-standing means. Two years is barely enough to establish that a group has something more than a passing presence. On any fair use of language, it does not qualify as long-standing.

The invocation of a rule which is transparently insufficient is evidence of pretext. Pretext in the

present context, as elsewhere, ought to count as affirmative evidence of an illicit purpose. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) ("'uncouth' 28 sided municipal boundary" proof of racially malignant intent); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000) (pretextual explanation for adverse employment action positive evidence of disparate treatment).

The second rule permitted monuments which illuminated, or related to, an event or person with a relationship to Pleasant Grove City. 483 F.3d at 1052. Most of the monuments erected by the City easily satisfy this criteria, the two exceptions are a memorial to the singular national tragedy of September 11, and a replica of a 19th century Mormon sacred site in Illinois, which might explain where the City's original settlers came from.

As far as appears in the opinion of the Court of Appeals, and in Pleasant Grove's Brief in this Court, there was no special influence of the Ten Commandments in Pleasant Grove City. Pleasant Grove City in fact claims no such relationship. The rule the City invokes, if it is to serve its intended purpose of limiting the universe of possible monuments, must exclude monuments of universal societal significance. The Ten Commandments monument would satisfy the latter criteria in light of *Van Orden v. Perry*, 545 U.S. 677 (2005), but not the

more restrictive criteria of being a special local interest. This rule, too, appears to be nothing more than a pretext for viewpoint discrimination.

CONCLUSION

For the reasons stated, the judgment must be affirmed.

Respectfully submitted,

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No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

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

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States Postal Service
Stamp Subject Selection Criteria

U.S. POSTAL SERVICE
STAMP SUBJECT SELECTION CRITERIA*

1. It is a general policy that U.S. postage stamps and stationery primarily will feature American or American-related subjects.
2. No living person shall be honored by portrayal on U.S. postage.
3. Commemorative stamps or postal stationery items honoring individuals usually will be issued on, or in conjunction with significant anniversaries of their birth, but no postal item will be issued sooner than five years after the individual's death. The Committee will not accept or consider proposals for a subject until at least three years after his/her death. The only exception to the five-year rule is the issuance of stamps honoring deceased U.S. presidents. They may be honored with a memorial stamp on the first birth anniversary following death.
4. Events of historical significance shall be considered for commemoration only on anniversaries in multiples of 50 years.
5. Only events, persons, and themes of widespread national appeal and significance will be considered for commemoration. Events, persons or themes of local or regional significance may be

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* Available at www.usps.com/communications/ organization/ csac.htm.

recognized by a philatelic or special postal cancellation, which may be arranged through the local postmaster.

6. Stamps or stationery items shall not be issued to honor fraternal, political, sectarian, or service/ charitable organizations. Stamps or stationery shall not be issued to promote or advertise commercial enterprises or products. Commercial products or enterprises might be used to illustrate more general concepts related to American culture.
7. Stamps or stationery items shall not be issued to honor cities, towns, municipalities, counties, primary or secondary schools, hospitals, libraries, or similar institutions. Due to the limitations placed on annual postal programs and the vast number of such locales, organizations and institutions in existence, it would be difficult to single out any one for commemoration.
8. Requests for observance of statehood anniversaries will be considered for commemorative postage stamps only at intervals of 50 years from the date of the state's first entry into the Union. Requests for observance of other state-related or regional anniversaries will be considered only as subjects for postal stationery, and again only at intervals of 50 years from the date of the event.
9. Stamps or stationery items shall not be issued to honor religious institutions or individuals whose

principal achievements are associated with religious undertakings or beliefs.

10. Semipostal stamps are designed to raise funds for causes determined to be in the national public interest and appropriate. Semipostal stamps are sold for a price above their postage value. The differential between the sales price and the postage value of semipostal stamps consists of an amount (less a deduction for the Postal Service's reasonable costs) to be given to other executive agencies in furtherance of specified causes. The Postal Service issues semipostals in accordance with the Stamp Out Breast Cancer Act and the Semipostal Authorization Act.
11. Requests for commemoration of universities and other institutions of higher education shall be considered only for stamped cards and only in connection with the 200th anniversaries of their founding.
12. No stamp shall be considered for issuance if one treating the same subject has been issued in the past 50 years. The only exceptions to this rule are traditional themes such as national symbols and holidays.