

No. 07-665

In The
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, et al.
Petitioners,

v.

SUMMUM,
Respondent.

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

**AMICUS CURIAE BRIEF OF
THE RUTHERFORD INSTITUTE
IN SUPPORT OF RESPONDENT**

John W. Whitehead
Counsel of Record
James J. Knicely
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

TABLE OF CONTENTS

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Table of Authorities | ii |
| Questions Presented..... | 1 |
| Interest of Amicus Curiae | 1 |
| Statement of Facts | 2 |
| Summary of Argument | 2 |
| Argument..... | 6 |
| I. Mere Governmental Ownership Of Property That Advances A Demonstrably Private Message Does Not Establish Adoption Of That Private Speech As “Government Speech.” | 6 |
| II. The Government Speech Doctrine Should Not Be Expanded To Allow “Favored” Speech To Be Shielded From First Amendment Scrutiny And To Remove Protections Afforded To “Disfavored” Speech. | 18 |
| III. Misapplication Of The Government Speech Doctrine Improperly Immunizes Government From Political Accountability, In Violation Of Constitutional Principles Otherwise Undergirding The Doctrine. | 23 |
| Conclusion | 28 |

TABLE OF AUTHORITIES

CASES

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| <i>ACLU of Tenn. v. Bredesen</i> , 441 F.3d 370 (6th Cir. 2006) | 6 |
| <i>Adland v. Russ</i> , 307 F.3d 471 (6th Cir. 2002) | 7 |
| <i>Alden v. Maine</i> , 527 U.S. 706 (1999)..... | 25 |
| <i>Alder v. Duval County Sch. Bd.</i> , 206 F.3d 1070 (11th Cir. 2000) | 8 |
| <i>Avocados Plus Inc. v. Johanns</i> , 421 F. Supp. 2d 45 (D.D.C. 2006)..... | 8 |
| <i>Bd. of Regents of Univ. of Wis. Sys. v.</i> <i>Southworth</i> , 529 U.S. 217 (2000) | 24 |
| <i>Boos v. Barry</i> , 485 U.S. 312 (1988)..... | 9 |
| <i>Cochran v. Veneman</i> , 252 F. Supp. 2d 126 (M.D. Pa. 2003), <i>aff'd sub nom Cochran</i> <i>v. Sec'y of Agriculture</i> , 2005 WL 2755711 (3d Cir. 2005) | 7 |
| <i>Cornelius v. NAACP Legal Def. and Educ.</i> <i>Fund, Inc.</i> , 473 U.S. 788 (1985)..... | 9, 15 |
| <i>Greer v. Spock</i> , 424 U.S. 828 (1976) | 9 |
| <i>Heffron v. Int'l Soc. For Krishna</i> <i>Consciousness, Inc.</i> , 452 U.S. 640 (1981) | 9 |

| | |
|----------------------------------------------------------------------------------------------------------|--------|
| <i>Int'l Soc. For Krishna Consciousness, Inc. v. Lee</i> , 505 U.S. 672 (1992) | 23 |
| <i>Johanns v. Livestock Mktg. Ass'n</i> , 544 U.S. 550 (2005) | passim |
| <i>KKK v. Curators of the Univ. of Mo.</i> , 203 F.3d 1085 (8th Cir. 2000) | 8, 10 |
| <i>Lee v. York County Sch. Div.</i> , 484 F.3d 687 (4th Cir. 2007) | 10 |
| <i>Legal Servs. Corp. v. Velazquez</i> , 531 U.S. 533 (2001) | 24 |
| <i>Linnemeir v. Bd. of Trs. of Purdue Univ.</i> , 260 F.3d 757 (7th Cir. 2001) | 7 |
| <i>McCreary County v. ACLU of Ky.</i> , 545 U.S. 844 (2005) | 12 |
| <i>Modrovich v. Allegheny County</i> , 385 F.3d 397 (3d Cir. 2004) | 7 |
| <i>Paramount Land Co. v. Cal. Pistachio Comm'n</i> , 491 F.3d 1003 (9th Cir. 2007) | 6, 10 |
| <i>People For The Ethical Treatment of Animals, Inc. v. Gittens</i> , 414 F.3d 23 (D.C. Cir. 2005) | 7 |
| <i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37 (1983) | 9 |

| | |
|--------------------------------------------------------------------------------------------------------------------------|------------|
| <i>Planned Parenthood of S.C., Inc. v. Rose</i> , 361 F.3d 786 (4th Cir. 2004) | passim |
| <i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995) | 13 |
| <i>Simpson v. Chesterfield County Bd. of Sup'rs</i> , 404 F.3d 276 (4th Cir. 2005) | 7, 10 |
| <i>Sons of Confederate Veterans v. Virginia</i> , 305 F.3d 241 (4th Cir. 2002) | passim |
| <i>Summum v. City of Ogden</i> , 297 F.3d 995 (10th Cir. 2002) | 11 |
| <i>Summum v. Pleasant Grove City</i> , 483 F.3d 1044 (10th Cir. 2007) | 3, 9 |
| <i>Summum v. Pleasant Grove City</i> , 499 F.3d 1170 (10th Cir. 2007) | 15, 16, 17 |
| <i>Turner v. City Council of the City of Fredericksburg</i> , ___ F.3d ___, 2008 WL 2815041 (4th Cir. 2008) | 6, 10 |
| <i>United States v. Grace</i> , 461 U.S. 171 (1983) | 9 |
| <i>Van Orden v. Perry</i> , 545 U.S. 677 (2005) | 11 |
| <i>Wells v. City and County of Denver</i> , 257 F.3d 1132 (10th Cir. 2001) | 7, 10 |

Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98 (D. Mass. 2003)8, 10

Women's Emergency Network v. Bush, 323 F.3d 937 (11th Cir. 2003) 7

OTHER

Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 *Hastings L.J.* 983 (2005) 13, 25

Frederick Schauer, *The Exceptional First Amendment*, Faculty Research Working Papers, JFK School of Government (February 2005) (<http://papers.ssrn.com/sol3/papers.cfm?abstract-id=668543>) 19

QUESTIONS PRESENTED

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?

2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?

3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

INTEREST OF AMICUS CURIAE¹

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

¹ Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part.

Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between government and citizens.

The Rutherford Institute works to preserve the most basic freedoms of our Republic—in this case, the right of a private party to be heard in a public forum on an equal basis with other private parties, free from unconstitutional viewpoint discrimination.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the response of Respondent Summum to the Petition for Certiorari.

SUMMARY OF ARGUMENT²

Pleasant Grove City contends that when government owns and controls a permanent monument or series of monuments that display private messages on public property, there is no First Amendment right to display competing messages because the displays are “government speech.” The City’s indiscriminately broad position is, however, belied by the anatomy of the speech in question. What the City ignores is that, “speech in fact can be, at once, that of a private individual *and*

² The argument in this brief is limited to the question of whether a privately donated monument displayed on public property by a municipality is government or private speech.

the government.”³ If the City did, in fact, adopt the private speech engraved on a monument as its own, the First Amendment would presumably not apply in most situations and Summum would arguably have no right to erect its own monument.⁴ But if the City did not *expressly* adopt such private speech as its own, it may have engaged in unlawful viewpoint discrimination by favoring one private speaker and denying similar access to another.

Rather than yield to puerile, nonsensical shibboleths such as “the Statue of Liberty does not require a Statue of Tyranny” or facile fear-mongering about “cluttered junkyards of monuments” in the public square,⁵ this Court should

³ *Sons of Confederate Veterans v. Virginia*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (emphasis added).

⁴ Even “government speech” may be subject to First Amendment scrutiny. “When a legislative majority singles out a minority viewpoint in . . . pointed fashion, free speech values cannot help but be implicated.” *Sons of Confederate Veterans*, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc).

⁵ The City argues that if Summum is allowed to display its monument, the City will be inundated with requests from other individuals wishing to erect their own monuments. However, “[t]he record contains no evidence to support Pleasant Grove’s contention that an injunction in this case will prompt an endless number of applications for permanent displays in the park.” *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1056 (10th Cir. 2007). Even if the Petitioner would be so inundated, this *potential* harm to the Petitioner must be weighed against the Respondent’s *actual* First Amendment injury. *Id.*

instead respond with caution and careful deliberation. In resolving the difficult issues presented in this case, it is important that precious First Amendment freedoms in public places be protected. To determine what constitutes “government speech” and when—if indeed ever—so-called “government speech” may be restrained by the First Amendment, this Court should establish exacting standards when government grants access to favored private speech, but denies it to others.

Before granting the blanket exemption that Pleasant Grove City seeks from First Amendment viewpoint discrimination proscriptions, it is important to require the City to demonstrate that it did in fact adopt the private messages displayed on the park monuments as its own and to justify that the basis for denying access to other conflicting messages was not viewpoint related. The existing Ten Commandments monument in the city park was designed, constructed, and paid for by the Fraternal Order of Eagles. The record in this case fails to show that the City adopted the Eagles’ message as its own. If it did no more than permit the Eagles to display the monument and its message—as reflected in the record—why, indeed, should it rise to the level of “government speech”? In such circumstances, where the City has granted dominant access in a public forum to one private message over another and where it has not clearly demonstrated adoption of the privately promoted message, the City should not, under the guise of “government speech,” be exempt from the restraints of First Amendment viewpoint discrimination.

If the City is left free to use a private surrogate to advance a particularly favored message,

the shield of democratic accountability that otherwise underpins the government speech doctrine actually serves as a means of unconstitutional viewpoint discrimination. Moreover, the City's position—that merely granting access to a forum automatically shrouds speech with the protection of the government speech doctrine, “without [the City] necessarily subscribing to the precise messages engraved thereon,”⁶—only proves that it is not, in fact, “government speech” because the message is admittedly not one from government. As such, “government speech” becomes a fiction of law, with dangerous consequences for free speech. This Court should, therefore, decline the City's invitation to consider mere invocation of the government speech doctrine as a blanket, automatic defense to First Amendment claims, but should restrict it to those instances in which government has unambiguously adopted a particular message as its own and is clearly identified on the record as having done so.

Finally, because the present case raises substantial and significant questions of fact as to whether the City did, in fact, adopt the message of the Fraternal Order of Eagles or any of the other messages appearing on privately donated structures as its own, this Court should remand the case back to the District Court for evidentiary findings and trial. As the District Court recognized below, the issue is in material dispute, and the present record is insufficient to establish whether the City intended to communicate a message or whether it loosely granted access to some speakers for permanent access and arbitrarily denied access to the same

⁶ Brief for Petitioners, p. 32

public space to other private speakers for unjustifiable reasons.

ARGUMENT

I. Mere Governmental Ownership Of Property That Advances A Demonstrably Private Message Does Not Establish Adoption Of That Private Speech As “Government Speech.”

The central question in this case is whether Pleasant Grove City’s grant of access for the display of privately donated monuments in a public park is “government speech” and, if so, whether the City’s actions in refusing to accept the Summum monument are nevertheless constitutionally defective.⁷ These questions cannot be answered by

⁷ Pleasant Grove City rightly recognizes that this is a free speech “access” case. See Petr.’s Br. 19. While the government speech doctrine has only been addressed in a handful of cases by this Court—usually in the context of “compelled” speech—the government speech doctrine has led to considerable differences in interpretation by the federal circuits in a variety of cases. See, e.g., *Turner v. City Council of the City of Fredericksburg*, ___ F.3d ___, 2008 WL 2815041 (4th Cir. 2008) (prayer by city councilman opening city council meeting was “government speech”); *Paramount Land Co. v. Cal. Pistachio Comm’n.*, 491 F.3d 1003 (9th Cir. 2007) (factual differences in actual oversight between the beef promotion scheme in *Johanns* and the pistachio scheme in this case were legally insufficient to justify an injunction); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (“Choose Life,” as it is to appear on the face of Tennessee specialty license plates, is a government-crafted message because Tennessee “sets the overall message to be

communicated and approves every word that is disseminated” on the “Choose Life” plate); *Cochran v. Veneman*, 252 F.Supp.2d 126 (M.D. Pa. 2003), *aff’d sub nom Cochran v. Sec’y of Agriculture*, 2005 WL 2755711 (3d Cir. 2005) (initial finding that Dairy Act promotional program constituted private speech, and thus compelled speech was subject to First Amendment scrutiny, was later reversed in light of the *Johanns* decision); *People For The Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005) (District’s Commission on the Arts and Humanities decision to deny a group’s sponsorship package was a permissible regulation of “government speech”); *Simpson v. Chesterfield County Bd. of Sup’rs*, 404 F.3d 276 (4th Cir. 2005) (county program inviting outside ministers to provide legislative prayer was “government speech”); *Modrovich v. Allegheny County*, 385 F.3d 397 (3d Cir. 2004) (Ten Commandments plaque donated by private group for display at courthouse constituted impermissible “government speech”); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (“Choose Life” license plates not “government speech”); *Women’s Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (Florida license plate program is structured to benefit the organizations that apply for and sponsor the plates, not the State itself, and there is insufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent “government speech”); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (Ten Commandments monument donated by private group was “government speech” that violated the Establishment Clause); *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001) (Coffey, J., dissenting) (choice of campus play was “government speech” because University required performance; was approved by a five-member panel from the University’s theater department; was advertised in a school-sponsored newspaper; was subject to University approval; and took place on the campus of the University); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001) (City of Denver’s decision to prohibit a sign promoting

surmise and conjecture, but require careful determination as to whether the City in fact chose to adopt and advance a specific message in permitting private monuments to be permanently displayed in a public forum. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

The City contends throughout its brief that when the government selects permanent displays for erection in a government-owned park, “the selection of objects for display in that park is **government speech**, not private speech. No ‘forum’ for private speech is thereby created.” Petr.’s Br. 18.⁸ It

atheist views in a Christmas display was not actionable because the message advanced by the City was the City’s message to the community); *Alder v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (neutral mechanism whereby the students elect speaker to give an unrestricted message do not establish an utterance of the state and the student’s speech is her own); *KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (KKK barred from serving as a group underwriter by public radio station denied their support because public underwriting acknowledgements constituted “government speech”); *Avocados Plus Inc. v. Johanns*, 421 F.Supp.2d 45 (D.D.C. 2006) (the Beef Act and the Avocado Act are identical in all relevant aspects, with the Secretary exercising the same degree of control over the Avocado Board as he does over the Beef Board); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98 (D. Mass. 2003) (candy canes distributed with messages at Christmas are not “government speech” per se).

⁸ Whether government regulation of private speech violates the First Amendment depends on context. Forum analysis determines whether the speaker speaks in a traditional public forum, a designated public forum, or a non-public forum. It is now axiomatic that in identifying the type of forum, courts consider the nature of the government property in question, the government policy with respect to

contends that other private groups may not in such circumstances “elbow into” such displays and that permitting them to do so would create a “Me too!” and “My turn!” right of access and a “veritable dumping ground” for monuments. *Id.* at 11, 29, 32, 34. The City essentially argues that when government merely accepts a privately donated monument for display, it is free to advance the private speech of others on public property without restraint. But this simplistic, categorical argument—relying more on aphorisms than persuasive analysis—unnecessarily and ill-advisedly cedes free reign to government to show favoritism to the content of specific private messages in a public forum and should be rejected.

Rather than pursuing the black and white approach suggested by the City, more than one jurist has properly recognized that “[w]hat is, and what is not, ‘government speech’ is a nebulous concept, to say the least.” *Sons of Confederate Veterans*, 305 F.3d at 251 (Gregory, J., dissenting from the denial of rehearing en banc). The complexities that arise from private speech on government property are readily apparent in the many lower court cases

that property, the compatibility of the speech with the forum, and the type of access sought. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). See also *Boos v. Barry*, 485 U.S. 312 (1988); *Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *United States v. Grace*, 461 U.S. 171 (1983); *Heffron v. Int’l Soc. For Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). In the present case, the Tenth Circuit determined that the forum consists of “permanent monuments in a city park.” *Pleasant Grove City*, 483 F.3d 1044.

involving alleged “governmental messages,” transmitted via candy canes, license plates, plays, sponsorships, teacher bulletin boards, holiday displays, legislative prayer, commencement speeches, and economic marketing programs.⁹ The issue is complex because “[s]peech in fact can be, at once, that of a private individual and the government.” *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc). Take, for example, the Fraternal Order of Eagles’ Ten Commandments monument that Pleasant Grove City permitted to be displayed. Although the City took possession and control of the monument, it ignores reality, as the City appears to do, to deny that:

The Eagles designed, produced, and
donated the Ten Commandments
Monument, all with the avowed

⁹ See, e.g., *Turner*, ___ F.3d ___, 2008 WL 2815041; *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (teacher’s postings on classroom bulletin board plainly constitute school-sponsored speech bearing the imprimatur of the school); *Paramount Land Co.*, 491 F.3d 1003; *Simpson*, 404 F.3d 276; *Planned Parenthood*, 361 F.3d at 794 (Michael, J.) (“The speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two.”); *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc) (“It is difficult if not impossible to separate sufficiently what is indisputably the speech act by the private speaker from what is equally indisputably the speech act by the government.”); *Wells*, 257 F.3d at 1154 (Briscoe, J., dissenting) (“[T]he holiday display is not solely government speech, but contains private speech. . . .”); *KKK*, 203 F.3d 1085; *Westfield High Sch. L.I.F.E. Club*, 249 F.Supp.2d 98.

purpose of providing a moral code for youth to emulate. Indeed, the Eagles presented similar monuments to municipalities across the country, all toward the same aim.... [T]he Eagles, free from any City control, composed the speech contained on the Monument—a fact underlined by the Monument’s explicit acknowledgment of the Eagles as the Monument’s creators.

Sumnum v. City of Ogden, 297 F.3d 995, 1004-05 (10th Cir. 2002). The Eagles’ efforts were apparently spurred by a desire to improve civic morality. See *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (Fraternal Order of Eagles “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.”). The extent to which the City sought to foster a similar purpose or to endorse the actual Ten Commandments message engraved on the monument is unknown because the record is inadequate to determine in just what “voice” the City was speaking when it granted access to the Eagles’ private display. Petr.’s Br. 28. The District Court in the present case denied judgment on the pleadings and a preliminary injunction because there was a genuine factual dispute concerning whether the City adopted as its own the message advanced by the Fraternal Order of Eagles. It was also unclear whether the *post hoc* adoption and implementation of a policy regarding the erection of permanent monuments in a city park was intended to paper over the alleged viewpoint discrimination. Pet. App. 3b. These issues should not

be finally resolved without careful scrutiny and a complete evidentiary record. *Cf. McCreary County v. ACLU of Ky.*, 545 U.S. 844, 848 (2005) (Court treated *post hoc* resolutions designed to justify the continued erection of monuments of the Ten Commandments with skepticism).

The government speech doctrine has rightly been recognized as “relatively new, and correspondingly imprecise.” *Johanns*, 544 U.S. at 574 (Souter, J., dissenting).¹⁰ Because it is relatively undeveloped and the doctrine has immense potential for abuse of individual free speech rights, the conclusory, meat-ax approach advanced by Pleasant Grove City—that expression is “government speech” when government counsel says it is—should be

¹⁰ The lack of certainty concerning the applicability and boundaries of the government speech doctrine is confirmed by the wide range of diverse opinions in the federal circuits. Aside from the numerous differing opinions produced by the Tenth Circuit in this case, the Fourth Circuit has also struggled for coherence on the doctrine. *See, e.g., Sons of Confederate Veterans*, 305 F.3d 241 and *Planned Parenthood*, 361 F.3d 786. The panel decision in the *Sons of Confederate Veterans* case, written by Judge Williams, was unanimous, but the petition for rehearing en banc, denied by a vote of 6-5, revealed the uncertainties. Judges Wilkinson and Luttig wrote opinions concurring in denial, while Judges Niemeyer and Gregory each wrote separate dissenting opinions. In the *Planned Parenthood* case, the panel hearing the case published three separate opinions, and on petition for rehearing en banc, denied by a vote of 8-5, Judge Wilkinson wrote an opinion concurring in the denial and Judge Shedd wrote an opinion dissenting from denial of rehearing en banc, which was joined by Judge Williams.

rejected for a more deliberate and discriminate development of this nascent area of the law. There is no reason to adopt the suggested blanket exemption from conventional, accepted free speech standards formulated by this Court over the last seventy years. This case can, and should, be decided on careful application of those standards and by elaborating further on standards as to what is and is not “government speech.”

There is no question that government has the right to communicate its own message in the public square or that when government itself speaks, it has discretion to discriminate as to both content and viewpoint. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). But the complex inter-relationships between government and the private sector and the continuous intersection of government with individuals on public property and at public events frequently create ambiguities as to whether a message is essentially a private or a public one. Government may be merely accommodating private speech, facilitating or even endorsing the advancement of a private message, or it may be promulgating a truly governmental message. Conversely, the voice of government may very easily be advanced in league with private entities in a manner that evidences no discernable connection of the message with government.¹¹ Private entities may thus assume

¹¹ For examples of government’s use of private actors to advance its anti-drug message, *see* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 *Hastings L.J.* 983 (2005). “Under a little-known agreement with the major television networks, the White House Office of National Drug Control Policy reviewed the scripts of more than 100

roles as government advocates or unidentified surrogates, disseminating messages that are difficult to trace back to their public author. In other words, the line between public speech and private speech rights is often very difficult to discern. Any doctrinal lines that are drawn should, therefore, be clearly defined as to what is and is not “government speech,” as well as regarding the extent to which government may impinge upon private speech rights when it advances the message of another private party in a public forum, as opposed to its own.

When government asserts that an expressly private message is its own, “disfavored” private speech becomes subject to onerous burdens. With no First Amendment restrictions, government is free to devote the full resources of its funding and property to the advancement of a particular viewpoint in a public forum, effectively limiting the access and ability of other speakers to express conflicting messages. The proposed expansion of the government speech doctrine advanced by Pleasant Grove City would allow government, when challenged, to argue that the acceptance, ownership, control, and display of a privately donated monument on City property transforms the “voice” of the donor and its message on the donated monument into “government speech.” Thus, with no formal adoption of the message and despite engraved markings on the Ten Commandments monument

episodes of television shows such as “E.R.,” “Beverly Hills 90210,” and “Cosby.”.... In exchange for broadcasting programming that the White House found to convey “proper” anti-drug messages, the networks received more than \$20 million worth of credit for required public service broadcasting.” *Id.*

identifying the speech as that of the Eagles, the City nevertheless contends that its mere decision to permit the display removes it from First Amendment purview and provides sufficient grounds for it to exclude others from advancing opposing or conflicting, or even consonant, messages in the public square because the monument is ostensibly “government speech.” Teaming up with favored private groups such as the Eagles or the Boy Scouts, the City is thus empowered to distort opportunities for speech in the public square, granting access for the express messages of those private groups but escaping scrutiny under the First Amendment for failing to accommodate others. Such blurring of the lines represents a serious affront to First Amendment rights and, if taken to its logical conclusion, would permit government to act as the unrestrained arbiter of private speech displayed permanently in public places.

The principal purpose of public fora—the free exchange of ideas—is unduly compromised by the indiscriminate and wholesale expansion of the government speech doctrine suggested by Pleasant Grove City. It is well-established that speakers can only be excluded from a traditional or limited public forum when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *See, e.g., Cornelius*, 473 U.S. at 800. Even if government may, as Judge McConnell suggests, “create designated public forums with respect to fixed monuments,”¹² if it permits private groups to advance messages in

¹² *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting from the denial of rehearing en banc).

such places, it has created a designated public forum where, again, government is not permitted to discriminate as to content without demonstrating a compelling state interest.

The City suggests that its obvious ownership and control of the monuments transforms them into “government speech,” but government does not speak simply because it owns a physical object that may convey speech. As Chief Judge Tacha said:

This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

Pleasant Grove City, 499 F.3d at 1179 (Tacha, C.J., response to dissent from denial of rehearing en banc). Instead, as has been explained, the appropriate and critical inquiry is whether the message is a government-crafted message. See, e.g., *Johanns*, 544 U.S. at 560 (holding that the beef advertising campaign constituted “government speech” because the “message set out in the beef promotions is from beginning to end the message established by the Federal Government.”).

Pleasant Grove City's position also opens the door for mass viewpoint discrimination, leaving it free to "accept any private message as its own without subjecting the message to the political process, a result that would shield the government from First Amendment scrutiny *and* democratic accountability." *Pleasant Grove City*, 499 F.3d at 1180 (Tacha, C.J., response to dissent from denial of rehearing en banc) (emphasis added). To ensure political accountability, therefore, it is important to require Pleasant Grove City to demonstrate that it did in fact adopt the private speech displayed on the monuments in the park as its own speech. If it did, there would be no First Amendment claim for viewpoint discrimination. If it did not (because the display of the Ten Commandments was not clearly "government speech"), it would be private speech or, as Judge Luttig and others have suggested, a "hybrid" of government and private speech¹³ (where government has opened access to government property for messages with both private and public content). These latter situations demand careful scrutiny. Here, the courts must ask whether the City favored messages on the other monuments (either by arbitrarily granting one speaker permanent access to public property to advance a message or

¹³ Although this Court has never recognized the concept of "hybrid speech," the idea that speech can be both private and governmental at the same time receives considerable support in the federal circuits. *See, e.g., Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc) ("[T]he particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.").

through animus against Summum's message) crossing over into unlawful viewpoint discrimination.

Unless there are to be no standards for governmental action, two questions cannot be resolved on the present record in this case. One, did Pleasant Grove City *actually adopt* the messages on the monuments in the city park as its own speech? Second, if not, did the City give more favorable access to one private view over another in a public forum? No determination can be made of the City's rejection of the proposed Summum monument without further fact-finding as to these questions. For this reason, the case should be remanded with instructions to establish a record on which the case can be properly disposed.

II. The Government Speech Doctrine Should Not Be Expanded To Allow "Favored" Speech To Be Shielded From First Amendment Scrutiny And To Remove Protections Afforded To "Disfavored" Speech.

Equality of access and government neutrality toward the expression of viewpoints in the public square lie at the heart of the First Amendment. As Professor Frederick Schauer has observed:

[A]lthough... drawing distinctions is an inevitable part of the legislative, regulatory, and judicial enterprises, there remains a pervasive American

suspicion of official valuation of ideas and enterprises. And while the libertarian culture that such attitudes of distrust engender is hardly restricted to freedom of communication, this skepticism about the ability of any governmental institution reliably to distinguish the good from the bad, the true from the false, and the sound from the unsound finds its most comfortable home in the First Amendment.¹⁴

In a similar vein, writing in a difficult case involving a state legislature's decision to deny the Confederate Flag symbol on a vanity license plate, Judge Wilkinson expressed concern that "[w]hen a legislative majority singles out a minority viewpoint in such pointed fashion, free speech values cannot help but be implicated."¹⁵ Judge Wilkinson explained his concern as follows:

[T]he First Amendment was not written for the vast majority.... It belongs to a single minority of one. It is easy enough for us as judges to uphold expression with which we personally agree, or speech we know will meet with general

¹⁴ Frederick Schauer, *The Exceptional First Amendment*, Faculty Research Working Papers, JFK School of Government (February 2005), at 24, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=668543> (last viewed June 11, 2008).

¹⁵ *Sons of Confederate Veterans*, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc).

approbation. Yet pleasing speech is not the kind that needs protection.

Our Constitution safeguards contrarian speech for several reasons. As the Civil Rights Movement demonstrates, yesterday's protest can become tomorrow's law and wisdom. Other contrarian speech should move popular majorities to reaffirm their own beliefs rather than suppress those of others. The reminders of history's most tragic errors only deepen our commitment to the dignity of all citizens: The Constitution that houses the First Amendment also shelters the Fourteenth, an everlasting reminder that a nation betrothed to liberty and equal justice under law must remain vigilant to realize both.

Sons of Confederate Veterans, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc). Moreover, the affront is more readily apparent when the private speech being favored or disfavored falls into certain categories. Elsewhere, Judge Wilkinson has noted that “[i]t is one thing for states to use license plates to celebrate birds and butterflies, military service, historical events and scenic vistas. It is quite another for the state to privilege private speech on one side—and one side only—of a fundamental moral, religious, or political controversy.” *Planned Parenthood of S.C., Inc. v. Rose*, 373 F.3d 580, 581 (4th Cir. 2004)

(Wilkinson, J., concurring in the denial of rehearing en banc).

If this Court denies the display of Summum's monument, it implies that the Summum monument is an unwelcome view, unworthy of equality or consideration. But, as Judge Wilkinson opined:

The fact that Americans have deep differences of opinion... is all the more reason to recognize the unifying force of the First Amendment principle—namely, that none of us has the right to compel assent to our views, but that all of us have the right to express them. The state's failure to be neutral on the right to speak about our most divisive issues will give rise to great resentment. The confidence that all are treated equally with respect to belief, conscience, and expression enables Americans to transcend difference and to make “e pluribus unum” the lasting legacy of our nation.

Id. at 581-82. This does not mean that every citizen or community group has the right to install a permanent monument in the public square. It does mean, however, that the burden is on government to make clear, when it grants permanent access to a *private* group to advance a private message, what its reasons are for doing so, as well as to justify the basis for denying access to other groups or messages.

The problem in this case is that the City's argument on its role in accepting the display is highly ambiguous and conflicted, undermining the

ostensible protection of political accountability. On the one hand, the City suggests that its mere grant of access to the Fraternal Order of Eagles for the permanent display of its Ten Commandments monument transforms it into “government speech.” Petr.’s Br. 20-39. Conversely, at the same time, the City contends that its grant of access for the display was done “without necessarily subscribing to the precise messages engraved thereon.” *Id.* at 32. The City thus asks this Court to create a new fiction of law for “government speech.” The fiction would give government a free pass under the First Amendment for *private* speech that government chooses to display, while at the same time permit government to disclaim that it subscribes to the precise message advanced by the private group. Thus, the publicly displayed private message would be “government speech” because government permits it to be displayed, but not in the sense that it reflects a “governmental message.” The fine tuning of this legal fiction is almost incomprehensible and should, therefore, be rejected. For purposes of the First Amendment, speech should either be truly “government speech” or, if not, should be governed by conventional free speech standards. Accordingly, this Court should reject Pleasant Grove City’s invitation to transform the government speech doctrine into a convenient rubber stamp for government to reject disfavored private speech at will. It is a fundamental First Amendment principle that government action imposing state orthodoxy, censoring speech based on content, or favoring speakers or viewpoints should be subject to rigorous scrutiny. If its power is to be without limits (as the City suggests), the government speech doctrine will

provide an unrestricted and convenient means to advance state orthodoxy and silence disfavored messages, diluting First Amendment protections and threatening the vitality of free speech.¹⁶ If government is to speak through private means and permit domination of the public square by such means, it should be required as a constitutional matter to adopt formally the privately promoted message as its own or at least state a reasonable, viewpoint-neutral justification for doing so.

III. Misapplication Of The Government Speech Doctrine Improperly Immunizes Government From Political Accountability, In Violation Of Constitutional Principles Otherwise Undergirding The Doctrine.

There is a further sound reason for the requirement that government clearly identify speech as its own: political accountability. Individuals generally have no constitutional right to challenge “government speech” under the Free Speech Clause. The justification for the “government speech” exemption is that “government speech” is ordinarily subject to the political scrutiny and accountability

¹⁶ It is important to remember that “[t]he First Amendment is often inconvenient.... Inconvenience does not absolve the government of its obligation to tolerate speech.” *Int’l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring in judgment).

that is part and parcel of the First Amendment's Petition Clause:

The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). However, when the government hides its actions and messages from political accountability behind the veil of private party speech, it transgresses the constitutional and democratic values that purportedly undergird the government speech doctrine. When the political safeguards that justify "government speech" are removed, the government should not be afforded such discretion and latitude. In such circumstances, the protective shield of the government speech doctrine should be set aside to prevent discriminatory decision-making.

When government grants access to public property for speech in which it participates with private groups, that speech should not benefit from a jurisprudential designation of "government speech"

unless (1) that speech is transparently advanced by government on the public record as its own, and (2) any private message that is adopted as its own advances a legitimate, rationally-related, non-discriminatory governmental purpose.

By cloaking public messages with private voices, government may surreptitiously distort discourse in the public square, potentially skewing the political process. Non-transparent governmental communication more easily permits government to avoid the repercussions of unpopular speech. Furthermore, while the government is likely to associate itself with a popular message, it can minimize the political ramifications of an unpopular message simply by advancing its interests covertly, through a private speaker.¹⁷ This contradicts the political accountability that has been recognized as “so essential to our liberty and republican form of government.” *Alden v. Maine*, 527 U.S. 706, 751 (1999). As Justice Souter has asked, if “[n]o one hearing a commercial for Pepsi or Levi’s thinks Uncle Sam is talking behind the curtain... [w]hy would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?” *Johanns*, 544 U.S. at 577-78 (Souter, J., dissenting). The extension of this deception into the everyday lives of this country’s citizens, particularly in an age of anonymous technological communication, is of legitimate constitutional concern.

Lack of political accountability reaches its zenith when the public is unaware that viewpoint discrimination has occurred, especially when the government has a virtual monopoly on the forum and can use private surrogates as mouthpieces, with

¹⁷ Lee, *supra* note 13.

no need for identification of the actual source of the message. Justice Souter identified such concerns in his *Johanns* dissent: “[I]f government relies on the government speech doctrine... it must make itself politically accountable by indicating that the content actually is a government message....” *Johanns*, 544 U.S. at 571 (Souter, J., dissenting). Government is best conducted in the sunlight; negation of free speech protections under the government speech doctrine should be legitimized only when government acts transparently in formally adopting a message as its own.

If the speech of private groups under the First Amendment is to be subordinated and suppressed in the name of “government speech” because of the ostensible protection of political accountability, then it should be done only when “government speech” is transparently and unequivocally governmental. Citizens who object to the government’s message may then elect new representatives if a particular governmental message is offensive. Allowing government to cloak its advocacy and at the same time be exempt from First Amendment restrictions dilutes, and even removes, traditional political controls and mocks an essential underpinning of democracy, i.e., the transparency necessary for government to work.¹⁸ Moreover, the “First Amendment harm cannot be mitigated by the possibility that a few cognoscenti may actually understand how the [government speech] scheme works.” *Johanns*, 544 U.S. at 579 (Souter, J.,

¹⁸ See *Planned Parenthood*, 361 F.3d at 795-96 (“The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.”).

dissenting). There needs to be “a practical opportunity for political response; esoteric knowledge on the part of a few will not do.” *Id.*

If government is clearly advocating a message that it has adopted as its own, it should be able to plead the “government speech” defense. If government cannot satisfy this threshold, it should not be permitted to do so. Shielding a private party’s speech from First Amendment scrutiny by false labeling is constitutionally mendacious. Indeed, such a tactic is entirely at odds with substantive First Amendment principles.

Amicus does not suggest that the government speech doctrine be abandoned, but rather that it be developed with great care and scrutiny in view of its potential for abuse. To protect private speech rights, *Amicus* suggests that in order to invoke the “government speech” exemption for the permanent display of a privately donated monument, government must fully adopt, and identify itself as adopting, the private message as its own. Furthermore, it must justify the display by a legitimate, rationally related, non-discriminatory governmental purpose. These requirements would minimize the risk that disfavored speech could be easily discriminated against by cloaking a favored message under the pretense of “government speech.” They would also ensure that the audience is provided with a reasonable opportunity to know that the government is speaking so that it may be held politically accountable for its message.

CONCLUSION

For the aforementioned reasons, therefore, this Court should remand the case back to the District Court for further fact-finding into whether the City adopted the messages displayed on the monuments as its own speech and to apply whatever standards this Court determines to dispose properly of the case.

Respectfully submitted,

John W. Whitehead
Counsel of Record
James J. Knicely
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888

July 31, 2008