

United States Court of Appeals for the Tenth Circuit

SUMMUM v. PLEASANT GROVE CITY

April 17, 2007.

Before TACHA, Chief Circuit Judge, EBEL, Circuit Judge, and KANE, District Judge.

TACHA, Chief Circuit Judge.

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BACKGROUND

A city park in Pleasant Grove, Utah, contains a number of buildings, artifacts, and permanent displays, many of which relate to or commemorate Pleasant Grove's pioneer history. . . For purposes of this appeal, the most important structure is a Ten Commandments monument, donated by the Fraternal Order of Eagles in 1971, two years after it established a local chapter in Pleasant Grove.

In September 2003, Summum, a religious organization with headquarters in Salt Lake City, Utah, sent the mayor of Pleasant Grove a letter requesting permission to erect a monument containing the Seven Aphorisms of Summum in the city park. . . . Approximately two months after Summum made its request, the mayor sent Summum written notification that the city had denied its request because the proposed monument did not meet the city's criteria for permanent displays in the park. According to the letter, all permanent displays in this particular park must "directly relate to the history of Pleasant Grove" or be "donated by groups with long-standing ties to the Pleasant Grove community."

. . . Summum contends that the city violated its rights by excluding its monument while allowing other permanent monuments of an expressive nature (e.g., the Ten Commandments) to be displayed in the park. . . .

DISCUSSION

I. Preliminary Injunction Standard

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II. Preliminary Injunction Analysis

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*A. Substantial Likelihood of Success on the Merits*

1. Identifying the nature of the relevant forum

. . . In identifying the relevant forum, the court looks at both "(1) the government

property to which access is sought and (2) the type of access sought.” In this case, Summum seeks to display its monument among other monuments in Pleasant Grove's city park. The permanent monuments in the city park therefore make up the relevant forum.

Having identified the relevant forum, the reviewing court must also determine whether the forum is public or nonpublic in nature. In general, the forum will fall into one of three categories:

(1) a traditional public forum (e.g., parks and streets), (2) a designated public forum (i.e., the government voluntarily transforms a nonpublic forum into a traditional public forum, thereby bestowing all the free speech rights associated with the traditional public forum, albeit on a potentially temporary basis, onto that now ‘designated public forum’), or (3) a nonpublic forum (i.e., the government retains the right to curtail speech so long as those curtailments are viewpoint neutral and reasonable for the maintenance of the forum's particular official uses).

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The city park is, however, a traditional public forum. Indeed, the Supreme Court has characterized streets and parks as “quintessential public forums.” . . .

. . . Because the park is a public forum, the city's restrictions on speech are subject to strict scrutiny.

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. . . But in a public forum, content-based restrictions are presumptively invalid. In order for a content-based restriction to survive strict scrutiny, the government must “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” As we explain below, Pleasant Grove has failed to justify its restriction on speech under this standard.

## 2. Application of strict scrutiny to content-based restrictions in a traditional public forum

Pleasant Grove concedes that its restriction on speech in the park is content based. Because the city's restrictions are content based, they may not be analyzed under the less exacting intermediate scrutiny applied to content-neutral restrictions regulating the time, place, or manner of expression in public forums.

. . . Even though the injunction in this case is disfavored and Summum's request is therefore analyzed under a heightened standard, in the context of a First Amendment challenge, Pleasant Grove bears the burden of establishing that its content-based restriction on speech will “more likely than not” survive strict scrutiny.

. . . The only interest Pleasant Grove asserted is an interest in promoting its history. The city's failure to offer any reason why this interest is compelling is sufficient for Summum to meet its burden in demonstrating a substantial likelihood of success on the merits.

But even if we assume that Pleasant Grove's stated interest is compelling, the city has also failed to establish that the content-based exclusion of Summum's monument is “necessary, and narrowly drawn,” to serve the city's interest in promoting its history. As the Supreme Court

has explained, defining a governmental interest this narrowly (i.e., the promotion of the city's history in this particular park) turns the *effect* of the regulation into the governmental interest.

Furthermore, the city may not use content-based restrictions to advance a particular ideology. The city may further its interest in promoting its own history by a number of means, but not by restricting access to a public forum traditionally committed to public debate and the free exchange of ideas.

In addition to the city's stated interest in promoting its history, the 2004 city resolution governing monuments in the park contains aesthetic and safety justifications for the speech restriction. Cities have substantial interests in the aesthetic appearance of their property. To further these interests, Pleasant Grove may pass a reasonable content-neutral resolution regulating the time, manner, or place of speech in the park. For example, it could ban all permanent displays of an expressive nature by private individuals.

Here, however, the city has furthered its objectives by passing a content-based resolution, which excludes all speech that does not meet its historical relevance criteria; the resolution is therefore subject to strict scrutiny. We need not decide whether the city's interests in aesthetics and safety are compelling because the resolution is not narrowly tailored to achieve its stated interests. The city has not offered any reason why monuments with its preferred historical content will preserve park space and reduce safety hazards more effectively than monuments containing other content. . . . Summum's monument is similar in size, material, and appearance to the Ten Commandments monument already displayed in the park. The city's exclusion of the monument based on its content cannot be justified by an interest in aesthetics or safety.

Because Pleasant Grove has not demonstrated that application of its historical relevance criteria is more likely than not to be justified by its stated interests, we conclude that Summum has established a substantial likelihood of success on the merits and proceed to a determination of whether Summum has satisfied its burden under the remaining three factors necessary for a preliminary injunction.

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LUCERO, J., dissenting from denial of rehearing en banc.

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As an initial matter, I agree with the panel that these monuments do not constitute government speech. Under the *Wells* framework, the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact. . . .

. . . Because the government property involved in these cases consists of the city parks, and the access sought is the installation of permanent monuments, the panel correctly concludes that the relevant forum consists of permanent monuments in the city parks. In the next step of the forum analysis, however, the panel asserts that the relevant forum is the *entire* park, regardless of the type of access sought. . . . As in *Perry* and *Cornelius*, Summum seeks access to a particular means of communication, but the nature of the forum necessarily hinges both on the method of communication and on the location.

The panel gives great weight to the conception that city parks are “quintessential public forums,” but in my view, permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public. . . . In short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues of Balto the Husky or the sword-wielding King Jagiello, to note two of the more popular attractions in New York City's Central Park.

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In my view a park is not a traditional public forum insofar as the placement of monuments is concerned, but that still leaves the question of whether it is a designated public forum or a nonpublic forum. Although there is a disagreement among our sister circuits regarding the categorization of limited public fora, this circuit and recent Supreme Court opinions have treated limited public fora as a species of nonpublic fora. In the present cases, the city governments have not allowed the kind of “general access” or “indiscriminate use” of park property that is a hallmark of a designated public forum. Instead, they have “create[d] a channel for a specific or limited type of expression where one did not previously exist,” and have thus established limited public fora. . . . Here, the cities have permitted a few monuments to be erected for specific purposes—in the case of Pleasant Grove, to memorialize the city's history, and in the case of Duchesne, to honor service groups. Having created limited public fora, the cities may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks.

There are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora, and the need for further briefing and argument on this point is one reason why en banc proceedings are necessary. . . .

McCONNELL, J., joined by GORSUCH, J., dissenting from denial of rehearing en banc.

. . . This means that Central Park in New York, which contains the privately donated Alice in Wonderland statute, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

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. . . By tradition and precedent, city parks-as "traditional public forums"-must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties. . . .

. . . In neither case did the city, by word or deed, invite private citizens to erect monuments of their own choosing in these parks. It follows that any messages conveyed by the monuments they have chosen to display are "government speech," and there is no "public forum" for uninhibited private expression.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech.

Our own leading precedent on government speech confirms these holdings. . . .

The instant cases are easier than *Wells*, because ownership of the "speech" in these cases is clear: the Ten Commandments monument in *Duchesne* was donated by the Cole family to the City of Duchesne, and the Ten Commandments monument in *Pleasant Grove* was donated by the Fraternal Order of Eagles to the City of Pleasant Grove. At the relevant time, the cities owned the monuments, maintained them, and had full control over them. But even if ownership were not clear, the second and fourth prongs of the *Wells* test would nonetheless be dispositive: The cities exercised total "control" over the monuments, and they bore "ultimate responsibility" for the monuments' contents and upkeep. Indeed, because the cities owned the monuments, they could have removed them, destroyed them, modified them, remade them, or (following state law procedures for disposition of public property) sold them at any time. Indeed, the City of Duchesne attempted to do just that-sell the monument along with the plot of land on which it sits.

The only difference from *Wells* is that in the *Summum* cases, the cities did not design these monuments. The cities, however, accepted the statues, treated them as public property, and displayed them for their own purposes on public land. The cities were under no obligation to accept the statues, and could have objected to their content. . . .

Once we recognize that the monuments constitute government speech, it becomes clear that the panel's forum analysis is misguided. Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government's "own speech ... is controlled by different principles." . . . The government may adopt whatever message it chooses-subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause-and need not alter its speech to accommodate the views of private

parties. In other words, just because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing.

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This does not mean that the Ten Commandments monuments in Duchesne and Pleasant Grove are immune to First Amendment challenge. Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause, as applied to the States through the Fourteenth Amendment. . . .

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TACHA, J., response to dissent from denial of rehearing en banc.

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Because the opinions contain clear discussions of the legal authority on which they rely, I need not respond at length to the allegation that they are unsupported by Supreme Court precedent. I need only say that the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction, so crucial to the reasoning of both dissents, lacks the support of both precedent and logic. . . .

As Supreme Court precedent makes clear, the type of speech does not, and should not, determine the nature of the forum.

. . . 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. . . .

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In short, the government does not speak just because it owns the physical object that conveys the speech. Instead, as the Supreme Court has explained, the appropriate inquiry is whether the government controls the content of the speech at issue, that is, whether the message is a government-crafted message. . . . A city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could 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.

. . . *Van Orden* and the circuit cases cited by the dissent stand for the simple proposition that a city's acceptance and display of a privately donated monument with religious content may constitute state *action* violating the Establishment Clause. But none of these cases supports the proposition that, when the state acts to accept a monument, it automatically turns the message that monument conveys into state speech.

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. . . Although individuals may constitutionally challenge government sponsorship or endorsement of religion, they generally have no constitutional right to challenge government speech under the Free Speech Clause. In the free speech context, the fact that government speech is exempt from constitutional challenge is justified because it is subject to the political process. .

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. . . The speech in these cases was not subject to political safeguards; the facts simply do not implicate government speech because the cities exercised no control over the content of the messages.

Thus, in the context of the Free Speech Clause, we cannot extend the government speech doctrine any further. To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own. Moreover, because the Establishment Clause would apply only to religious expression, an expanded government speech doctrine would effectively remove the government's regulation of permanent non-religious speech from all First Amendment scrutiny. Such an approach is clearly contrary to established First Amendment principles. . . .