



***Pleasant Grove City v. Summum*: Upholding the Government’s Authority to Craft a Message Through Monuments, Memorials, and Artwork**

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The American Center for Law and Justice (ACLJ) has won a resounding victory and a unanimous decision in a case before the Supreme Court of the United States, *Pleasant Grove City v. Summum*, Case No. 07-665 (Feb. 25, 2009). The case will have major implications around the country and will ensure the viability of thousands of war memorials, government displays that include the Ten Commandments, and other commemorative monuments around the country.

The ACLJ represents Pleasant Grove City, Utah in a case involving the government’s authority to display monuments and memorials on public lands. A three-judge panel of the United States Court of Appeals for the Tenth Circuit ruled in favor of a group called Summum to erect its own monument of “Seven Aphorisms” in a city park in Pleasant Grove, the site of a long-standing display of the Ten Commandments donated to the city decades ago. The full appeals court split 6-6 and decided not to rehear the case. The ACLJ asked the Supreme Court to take the case and overturn the lower court’s decision which said that private parties have a First Amendment right to put up the monuments of their choosing in a city park, unless the city takes away all other donated monuments. ACLJ Chief Counsel Jay Sekulow presented oral arguments before the Court in November 2008.

Justice Alito authored the opinion of the Court which was joined by seven other Justices.¹ The opening paragraph of the opinion summarized the issues and holding of the case:

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches

¹ Justice Souter did not join the opinion but wrote a concurring opinion that stated that Pleasant Grove’s monuments are government speech.

and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

The Court noted that “[t]he parties’ fundamental disagreement . . . centers on the nature of [Pleasant Grove’s] conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?” The Court observed that “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” The Court observed that government speech is subject to constitutional limitations such as the Establishment Clause and, as with other government actions, the government is “ultimately accountable to the electorate and the political process for its advocacy.”

While noting that the public forum doctrine applies to government regulation of private expression, the Court held that such principles were not relevant to the case at hand. “There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.” The Court noted that, “[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land.”

The Court discussed a variety of examples of government monuments or memorials that were donated by private parties or financed with private funds such as the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. The Court observed that “cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”

The Court held that, “[i]n this case, it is clear that the monuments in Pleasant Grove’s Pioneer Park represent government speech.” The Court expressly rejected Sumnum’s “adopt the speech” theory:

The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape Free Speech Clause restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

The Court added that, “[e]ven when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.” Moreover, “[t]he ‘message’ conveyed by a monument may change over time. A study of war memorials found that ‘people reinterpret’ the meaning of these memorials as ‘historical interpretations’ and ‘the society around them changes.’” In addition, the Court observed that the Statue of Liberty has had different meanings during different time periods, from an expression of support for democracy to a symbol of friendship between France and the United States to a representation of American ideals to a beacon welcoming immigrants to a land of freedom.

Importantly, the Court declared that “public forum principles . . . are out of place in the context of this case.” While “[p]ublic parks have been used, ‘time out of mind, . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions,’ . . . ‘one would be hard pressed to find a ‘long tradition’ of allowing people to permanently occupy public space with any manner of monuments.” “A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.” The Court stated that, under Summum’s theory,

when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France’s offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

The Court noted that the concerns that the ACLJ raised about the adverse consequences of the lower court’s decision “are well founded” because, under the lower court’s decision, “[e]very jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought.” The Court observed that, “if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations.” The Court stated that, “as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.”

The Court concluded by stating:

In sum, we hold that the City’s decision to accept certain privately donated monuments while rejecting respondent’s is best viewed as a form of government speech. As a result, the City’s decision is not subject to the Free Speech Clause, and the Court of Appeals erred in holding otherwise. We therefore reverse.

All nine Justices voted in favor of Pleasant Grove and several wrote or joined concurring opinions. Justices Scalia and Thomas joined a concurring opinion that stated that, although no Establishment Clause claims had been raised in the case, Pioneer Park’s display (including the

Ten Commandments) is consistent with the Establishment Clause under *Van Orden v. Perry*, 545 U.S. 677 (2005). Their concurring opinion stated:

The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park's wishing well, its historic granary—and, yes, even its Ten Commandments monument—without fear that they are complicit in an establishment of religion.

Justice Breyer wrote a concurring opinion that stated that Pleasant Grove did not restrict Sumnum's freedom of speech in Pioneer Park because "[t]he City has not closed off its parks to speech; no one claims that the City prevents Sumnum's members from engaging in speech in a form more transient than a permanent monument." Justice Souter wrote a concurring opinion that proposed that, in a close case, courts should consider whether a "reasonable observer" would view the expression at issue as government speech or private speech. Justices Stevens and Ginsburg joined a concurring opinion to emphasize that potential abuses of the government speech doctrine will be checked by the Equal Protection and Establishment Clauses as well as political accountability.