

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHRISTINA CASTILLO COMER	§	
Plaintiff,	§	
	§	
v.	§	CA No. 1:08CV00511-LY
	§	
ROBERT SCOTT, Commissioner, Texas	§	
Education Agency, et al.,	§	
Defendants.	§	

DEFENDANT’S ADVISORY TO THE COURT OF NEW AUTHORITY

TO THE HONORABLE LEE YEAKEL:

The defendant respectfully calls the Court’s attention to part II-A of the opinion in *Pleasant Grove City, Utah v. Sumnum*, ___ S. Ct. ___, 2009 WL 454299 (2009), issued on February 25th, reviewing the law pertaining to “government speech” on religious matters. On the one hand, “government speech must comport with the Establishment Clause.” *Id.* At the same time: “The involvement of public officials in advocacy may be limited by law, regulation, or practice.” *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing Defendant's Advisory to the Court in accordance with the Electronic Case Files System of the Western District of Texas on this the 27th day of February, 2009, which will send notification to the following:

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and, I hereby certify that I have mailed copies of this document by regular U.S. Mail to the following non-CM/ECF participants:

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H

Supreme Court of the United States
PLEASANT GROVE CITY, UTAH, et al., Petitioners,
v.
SUMMUM.
No. 07-665.

Argued Nov. 12, 2008.

Decided Feb. 25, 2009.

Background: Religious organization brought § 1983 action alleging that its free speech rights were violated by city's denial of its request to erect monument in park in which a Ten Commandments monument already stood. The United States District Court for the District of Utah, Dee Benson, J., 2006 WL 3421838, denied organization's request for preliminary injunction, and organization appealed. The United States Court of Appeals for the Tenth Circuit, 483 F.3d 1044, Tacha, Chief Circuit Judge, reversed, and certiorari was granted.

Holding:The Supreme Court, Justice Alito, held that by allowing placement of donated permanent monuments in public park, city was exercising a form of government speech not subject to scrutiny under Free Speech Clause.

Reversed.

Justice Stevens filed concurring opinion, in which Justice Ginsburg joined.

Justice Scalia filed concurring opinion, in which Justice Thomas joined.

Justice Breyer filed concurring opinion.

Justice Souter filed opinion concurring in the judgment.

West Headnotes

[1] Constitutional Law 92 ↪1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1490 k. In General. Most Cited

Cases

Constitutional Law 92 ↪1563

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1563 k. Government-Sponsored

Speech. Most Cited Cases

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ↪1563

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1563 k. Government-Sponsored

Speech. Most Cited Cases

Under the First Amendment's Free Speech Clause, a government entity has the right to speak for itself, and is entitled to say what it wishes and to select the views that it wants to express. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ↪1563

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1563 k. Government-Sponsored Speech. Most Cited Cases

Under the First Amendment's Free Speech Clause, a government entity may exercise its freedom to express its views even if it receives assistance from private sources for the purpose of delivering a government-controlled message. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ¶1295

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(A) In General

92k1294 Establishment of Religion

92k1295 k. In General. Most Cited Cases

Government speech must comport with the Establishment Clause of the First Amendment. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ¶1759

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1759 k. Streets and Highways. Most Cited Cases

Constitutional Law 92 ¶1761

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1761 k. Parks and Forests. Most

Cited Cases

Under the First Amendment, members of the public retain strong free speech rights when they venture into public streets and parks. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ¶1759

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1759 k. Streets and Highways. Most Cited Cases

Constitutional Law 92 ¶1761

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1761 k. Parks and Forests. Most Cited Cases

In order to preserve the public's free speech rights, under the First Amendment government entities are strictly limited in their ability to regulate private speech in such traditional public fora as public streets and parks. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ¶1735

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1732 Public Forum in General
92k1735 k. Justification for Exclusion or Limitation. Most Cited Cases
The First Amendment allows reasonable time, place, and manner restrictions on speech in public

fora, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ↪1746

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1744 Designated Public Forum in General

92k1746 k. Nature and Requisites.

Most Cited Cases

Under the First Amendment, a government entity may create a designated public forum if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ↪1747

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1744 Designated Public Forum in General

92k1747 k. Justification for Exclusion or Limitation. Most Cited Cases

Under the First Amendment, government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ↪1741

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1740 Limited Public Forum in

General

92k1741 k. In General. Most Cited

Cases

Constitutional Law 92 ↪1743

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1740 Limited Public Forum in

General

92k1743 k. Justification for Exclusion or Limitation. Most Cited Cases

Constitutional Law 92 ↪1745

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1744 Designated Public Forum in

General

92k1745 k. In General. Most Cited

Cases

Constitutional Law 92 ↪1747

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1744 Designated Public Forum in

General

92k1747 k. Justification for Exclusion or Limitation. Most Cited Cases
Under the First Amendment, a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects; in such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ↪1730

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1730 k. In General. Most Cited Cases

Permanent monuments displayed on public property typically represent government speech within the meaning of the First Amendment. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ↪1761

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1761 k. Parks and Forests. Most Cited Cases

Municipal Corporations 268 ↪721(1)

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k721 Parks and Public Squares and Places

268k721(1) k. In General. Most Cited

Cases

By allowing placement of donated permanent monuments in public park, city was exercising a form of government speech not subject to scrutiny under the Free Speech Clause, and thus it did not violate religious organization's Free Speech Clause rights by refusing to allow that organization to place another permanent monument in the park; city effectively controlled the messages sent by the monuments in the park by exercising final approval authority over their selection. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ↪1761

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1761 k. Parks and Forests. Most Cited Cases

Municipal Corporations 268 ↪721(1)

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k721 Parks and Public Squares and Places

268k721(1) k. In General. Most Cited Cases

Free speech public forum doctrine did not apply to city's decision whether to accept or reject a donated monument for placement in a city park; park was able to accommodate only a limited number of permanent monuments before the essential function of the land would be defeated. U.S.C.A. Const.Amend. 1.

Syllabus^{FN*}

FN* The syllabus constitutes no part of the

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opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*1 Pioneer Park (Park), a public park in petitioner Pleasant Grove City (City), has at least 11 permanent, privately donated displays, including a Ten Commandments monument. In rejecting the request of respondent Summum, a religious organization, to erect a monument containing the Seven Aphorisms of Summum, the City explained that it limited Park monuments to those either directly related to the City's history or donated by groups with longstanding community ties. After the City put that policy and other criteria into writing, respondent renewed its request, but did not describe the monument's historical significance or respondent's connection to the community. The City rejected the request, and respondent filed suit, claiming that the City and petitioner officials had violated the First Amendment's Free Speech Clause by accepting the Ten Commandments monument but rejecting respondent's proposed monument. The District Court denied respondent's preliminary injunction request, but the Tenth Circuit reversed. Noting that it had previously found the Ten Commandments monument to be private rather than government speech and that public parks have traditionally been regarded as public forums, the court held that, because the exclusion of the monument was unlikely to survive strict scrutiny, the City was required to erect it immediately.

Held: The placement of a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause. Pp. ---- - ----.

(a) Because that Clause restricts government regulation of private speech but not government speech, whether petitioners were engaging in their own expressive conduct or providing a forum for private speech determines which precedents govern here. Pp. ---- - ----.

(1) A government entity "is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700, and to select the views that it wants to express, see, e.g., *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233. It may exercise this same freedom when it receives private assistance for the purpose of delivering a government-controlled message. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 562, 125 S.Ct. 2055, 161 L.Ed.2d 896. This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. In addition, public officials' involvement in advocacy may be limited by law, regulation, or practice; and a government entity is ultimately "accountable to the electorate and the political process for its advocacy," *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193. Pp. ---- - ----.

(2) In contrast, government entities are strictly limited in their ability to regulate private speech in "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567. Reasonable time, place, and manner restrictions are allowed, see *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794, but content-based restrictions must satisfy strict scrutiny, i.e., they must be narrowly tailored to serve a compelling government interest, see *Cornelius, supra*, at 800. Restrictions based on viewpoint are also prohibited. *Carey v. Brown*, 447 U.S. 455, 463, 100 S.Ct. 2286, 65 L.Ed.2d 263. Government restrictions on speech in a "designated public forum" are subject to the same strict scrutiny as restrictions in a traditional public forum. *Cornelius, supra*, at 800. And where government creates a forum that is limited to use by certain groups or dedicated to the discussion of certain subjects, *Perry Ed. Assn., supra*, at 46, n. 7, it may impose reasonable and viewpoint-neutral restrictions, see *Good News Club v. Milford Central School*, 533 U.S. 98, 106-107,

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121 S.Ct. 2093, 150 L.Ed.2d 151. Pp. ---- - ----.

(b) Permanent monuments displayed on public property typically represent government speech. Governments have long used monuments to speak to the public. Thus, a government-commissioned and government-financed monument placed on public land constitutes government speech. So, too, are privately financed and donated monuments that the government accepts for public display on government land. While government entities regularly accept privately funded or donated monuments, their general practice has been one of selective receptivity. Because city parks play an important role in defining the identity that a city projects to its residents and the outside world, cities take care in accepting donated monuments, selecting those that portray what the government decisionmakers view as appropriate for the place in question, based on esthetics, history, and local culture. The accepted monuments are meant to convey and have the effect of conveying a government message and thus constitute government speech. Pp. ---- - ----.

*2 (c) Here, the Park's monuments clearly represent government speech. Although many were donated in completed form by private entities, the City has "effectively controlled" their messages by exercising "final approval authority" over their selection. *Johanns, supra*, at 560-561. The City has selected monuments that present the image that the City wishes to project to Park visitors; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument; and it has now expressly set out selection criteria. P. ----.

(d) Respondent's legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain viewpoints does not mean that a government entity should be required to embrace publicly a privately donated monument's "message" in order to escape Free Speech Clause restrictions. A city engages in expressive conduct by accepting and displaying a privately donated monument, but it does not necessarily endorse the specific meaning that any particular donor sees in the monument. A

government's message may be altered by the subsequent addition of other monuments in the same vicinity. It may also change over time. Pp. ---- - - ----.

(e) "[P]ublic forum principles ... are out of place in the context of this case." *United States v. American Library Assn., Inc.*, 539 U.S. 194, 205, 123 S.Ct. 2297, 156 L.Ed.2d 221. The forum doctrine applies where a government property or program is capable of accommodating a large number of public speakers without defeating the essential function of the land or program, but public parks can accommodate only a limited number of permanent monuments. If governments must maintain viewpoint neutrality in selecting donated monuments, they must either prepare for cluttered parks or face pressure to remove longstanding and cherished monuments. Were public parks considered traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And if forum analysis would lead almost inexorably to closing of the forum, forum analysis is out of place. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650, distinguished. Pp. ---- - ----.

483 F.3d 1044, reversed.

*3 ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined. BREYER, J., filed a concurring opinion. SOUTER, J., filed an opinion concurring in the judgment.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT Jay A. Sekulow, for Petitioners.

Daryl Joseffer, for United States as amicus curiae, by special leave of the Court, supporting the Peti-

tioners.

A

Pamela Harris, for Respondent.

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Brian M. Barnard, Salt Lake City, Utah, Walter Dellinger, Pamela Harris, Irving L. Gornstein, Shannon Pazur, Kathryn E. Tarbert, O'melveny & Myers LLP, Washington, D.C., Martin S. Lederman, Washington, D.C., for Respondent.

For U.S. Supreme Court briefs, see:2008 WL 2445506 (Pet.Brief)2008 WL 3851624 (Resp.Brief)2008 WL 4264486 (Reply.Brief)

Justice ALITO delivered the opinion of the Court.

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 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.

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM"^{FN1} and be similar in size and nature to the Ten Commandments monument. App. 57, 59. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." *Id.*, at 61. The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

FN1. Respondent's brief describes the church and the Seven Aphorisms as follows:

"The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.' See The Teachings of Summum are the Teachings of Gnostic Christianity, <http://www.summum.us/philosophy/gnosticism.shtml> (visited Aug. 15,

