

## KEEPING THE GOVERNMENT'S RELIGION PURE: *PLEASANT GROVE CITY V. SUMMUM*

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In January, the Supreme Court decided *Pleasant Grove City v. Summum*.<sup>1</sup> Summum, a religious organization, sought the right to put up a permanent monument of its Seven Aphorisms—its version of the Ten Commandments—in a local city park. At the time, the park had about fifteen other monuments, including a traditional Ten Commandments display. But this was a Free Speech case, not an Establishment Clause case. The plaintiffs were not trying to use the First Amendment to have the existing Ten Commandments display removed; they were instead trying to use the First Amendment to force the city into displaying their monument as well.

Most people expected the plaintiffs to lose. And they did, clearly and unanimously. I publicly predicted that Summum would lose on the day the Supreme Court granted certiorari,<sup>2</sup> and suggested that it might be unanimous a few hours after oral argument.<sup>3</sup> But I do not claim any special powers of foresight. My point is actually the opposite—anyone with experience in this area could recognize that the plaintiffs faced an uphill climb. They were asking for a sweeping change in the law, and it was no surprise that they did not get it.

This Essay explains the decision in *Summum*, giving special focus to the religious dimensions of the case. *Summum*, again, was decided on Free Speech grounds. It was not an Establishment Clause case. But it nevertheless reveals much about the course that the Supreme Court is now charting with the Establishment Clause.

### I. THE BACKGROUND OF *SUMMUM*

The facts in *Summum* were straightforward. Pioneer Park is a small park in the historic district of Pleasant Grove City, a small city in Utah.

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<sup>1</sup> 129 S. Ct. 1125 (2009) (link).

<sup>2</sup> Posting of Christopher C. Lund to <http://www.mail-archive.com/religionlaw@lists.ucla.edu/msg07294.html> (Mar. 31, 2008, 13:41:21 PDT) (link).

<sup>3</sup> Posting of Christopher C. Lund to Prawfsblawg, *Oral Argument in Summum*, <http://prawfsblawg.blogs.com/prawfsblawg/2008/11/oral-argument-i.html> (Nov. 13, 2008, 12:45 EST) (link).

The park had about fifteen permanent objects, one of which was a Ten Commandments display that had been donated to the City by the Fraternal Order of Eagles and erected in 1971.<sup>4</sup> In 2003, and again in 2005, Summum sought and was denied permission to put up its own display—a display commemorating its Seven Aphorisms, which Summum believes are essentially the real Ten Commandments brought down by Moses from Sinai.<sup>5</sup>

Summum’s legal claim was similarly straightforward. The Free Speech Clause prohibits government from discriminating among private speakers based on the content or viewpoint of their speech.<sup>6</sup> Summum therefore argued that Pleasant Grove could not allow the Fraternal Order of Eagles to display their Ten Commandments in Pioneer Park without simultaneously allowing Summum to display its Seven Aphorisms. But the City had a ready response to this argument. Although government may not discriminate among private speakers on the basis of their speech, altogether separate rules govern speech that comes from the government itself. When the government itself speaks, it can generally choose to say what it likes. The usual prohibitions on content and viewpoint discrimination do not apply.<sup>7</sup> And this holds true even when the government uses private parties to convey its message.<sup>8</sup>

Thus, it was this disagreement over the identity of the speaker that was at the heart of the case. If the existing Ten Commandments display were considered the Eagles’ speech, Summum would win; if the display were considered the City’s speech, Summum would lose.

## II. THE FREE SPEECH CLAUSE ANALYSIS

Distinguishing between private and government speech is famously difficult, but at the extremes the difference is clear. Think of *Summum* in terms of some raw numbers. If Pleasant Grove City had been offered 100 diverse, permanent displays for Pioneer Park and accepted 99 of them, the park would seem like a public forum for private speech. The presence of so many monuments—and the City’s manifested lack of concern over their contents—would cut against the claim that the government was somehow speaking through its selection of monuments. To use the Court’s terminology, the City’s action would be construed as an attempt to “facilitate private speech” rather than as an attempt to “promote a governmental message.”<sup>9</sup>

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<sup>4</sup> See Joint Appendix at 98–102, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 2415597.

<sup>5</sup> *Id.* at 57–64.

<sup>6</sup> See, e.g., *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) (link).

<sup>7</sup> See Joseph Blocher, *School Naming Rights and the First Amendment’s Perfect Storm*, 96 GEO. L.J. 1, 30 (2007) (“Government speech essentially operates as an ‘exception’ to the First Amendment.”) (link).

<sup>8</sup> See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005) (link); *Rust v. Sullivan*, 500 U.S. 173 (1991) (link).

<sup>9</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (link).

In such a circumstance, *Summum* would be constitutionally entitled to put up its monument.

Similarly, if Pleasant Grove City had been offered 100 permanent displays and accepted only 1 of them, then that would suggest a finding of governmental—rather than private—speech. The City's exclusion of other messages would send a clear signal that it meant to adopt the display as its own. It would be clear that the City was trying to “speak or subsidize transmittal of a message it favors,” rather than trying to “encourage a diversity of views from private speakers.”<sup>10</sup> In that circumstance, *Summum*'s claim would clearly fail.

*Summum* involved a situation that fell somewhere between these two hypothetical extremes. The strongest fact in *Summum*'s favor was that its display was apparently the only display ever to be excluded from Pioneer Park.<sup>11</sup> That was a bad fact for the City. It suggested discrimination, of course, but it did not really get at the key issue—which was whether the government was being discriminating in its own speech (which would be fine) or whether the government was being discriminating in its preference of other peoples' speech (which would be unconstitutional).

More constitutionally pertinent was the fact that few monuments were ever accepted by the park. In the sixty years preceding *Summum*'s request to display its Seven Aphorisms, the City only accepted about six monuments from outside groups. That was, on average, about one monument approved every decade.<sup>12</sup> And a decision to approve one additional monument each decade simply does not seem like a decision to create a public forum for private speech—rather, it seems like Pleasant Grove is selecting individual monuments in which it sees particular merit or importance. That is why the Court in *Summum* could so quickly conclude that permanent monuments in a city park are usually governmental speech.<sup>13</sup> In a way, the Court was just concluding as a matter of law what everyone knows as a matter of common sense: that a local government that approves the display of a few objects in a public park does not mean that it intends to open up the park for permanent monuments by any and all groups.<sup>14</sup>

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<sup>10</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (link).

<sup>11</sup> Brief for Respondent at 12, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 WL 3851624 (“The City has never denied a single other request to donate a display; only *Summum* has been barred from the park.”).

<sup>12</sup> Joint Appendix, *supra* note 4, at 98–102. I am ignoring some of the objects in the park, such as the Wishing Well (donated in 1946) and the Park Benches (donated in 1977), which seem to send no clear message at all. But even including them, there are at most ten monuments donated by private groups in the last sixty years—which would be roughly one monument approved every six years. *Id.*

<sup>13</sup> *Summum*, 129 S. Ct. at 1134.

<sup>14</sup> Another important aspect of *Summum* was the fact that the plaintiffs were seeking permanent control over part of Pioneer Park, rather than just temporary access to it. For an exploration of that aspect of the decision, see Joseph Blocher, *Property and Speech in Summum*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2009).

A bit more should be said about the details of Summum's argument. Again, Summum claimed that the Ten Commandments display was really the Eagles' speech, not the City's. As explained above, that argument was hard to square with the number of objects in the park. It was also hard to square with certain facts about the Ten Commandments display itself. The display was donated to the City in 1971. And for the subsequent thirty-eight years, the City owned it, controlled it, and kept it in a park also exclusively owned by the City. To be sure, the Eagles periodically resurfaced—they, for example, apparently cleaned the display a few years before the litigation.<sup>15</sup> But, by and large, the Eagles had been out of the picture. And that too strongly cut against a finding that, almost forty years later, the monument was still their speech. Summum tried to counter this point by arguing that it could not be the government's speech until the City adopted it by some sort of official action.<sup>16</sup> But this claim fell flat. Justice Souter suggested that such a requirement would be "a silly exercise in formality."<sup>17</sup> And he was right—it would have been trivially easy for Pleasant Grove to formally adopt the Ten Commandments display, thereby mooting Summum's case. Such an adoption, of course, would have added some fuel to a potential Establishment Clause challenge, which presumably was part of the reason why Summum was advocating for it in the first place.<sup>18</sup> Yet the deeper problem with Summum's argument was that there was no obvious reason (and nothing in the Court's precedents) suggesting that the government had to officially adopt a message before it became government speech. As Justice Scalia harshly put it to Summum's counsel, "it may be a very nice world [you are imagining,] but it happens not to be the world under which our Constitution has subjected this country."<sup>19</sup>

### III. *SUMMUM* AND THE ESTABLISHMENT CLAUSE

I now turn to the religious dimensions of this case. The religious aspects of *Summum* all lie below the surface. Forms of the word "religion" appear only five times in the majority opinion—twice to describe Summum as a religious organization, twice in referring to John Lennon's musical lyrics in "Imagine," and once in referring to a hypothetical case.<sup>20</sup> Yet perpe-

<sup>15</sup> See Brief for Respondent, *supra* note 11, at 4; Joint Appendix, *supra* note 4, at 144–45.

<sup>16</sup> See Brief for Respondent, *supra* note 11, at 30–45; see also Transcript of Oral Argument at 36–46, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 4892845 (pressing this argument).

<sup>17</sup> See Transcript of Oral Argument, *supra* note 16, at 38; see also *Summum*, 129 S. Ct. at 1141 (Souter, J., concurring) (making the same point).

<sup>18</sup> The plaintiffs brought up this point in their brief, and the Supreme Court seized upon it at oral argument. See Brief for Respondent, *supra* note 11, at 34 n.11 (noting how "[a] straightforward adoption . . . might of course raise Establishment Clause issues"); Transcript of Oral Argument, *supra* note 16, at 63 (remark of Souter, J.) ("[Y]ou want this clear statement [that the display is the City's speech.] You want a statement . . . that would satisfy you, and it would also be the poison pill in the Establishment Clause. Isn't that what's . . . driving this?").

<sup>19</sup> See Transcript of Oral Argument, *supra* note 16, at 42.

<sup>20</sup> *Summum*, 129 S. Ct. at 1129 & n.1, 1135 & n.2, 1136 n.5 (majority opinion).

tually looming in the background were certain questions. What about the Establishment Clause? Does the existing Ten Commandments display in the park violate it? And why did the plaintiffs push this somewhat implausible Free Speech Clause claim instead of a more conventional Establishment Clause claim?

History plays an important role in the explanation. In 2005, the Supreme Court considered together two cases, each involving an Establishment Clause challenge to a Ten Commandments display.<sup>21</sup> The Court split on both cases. One display was upheld, and one display was struck down. Four justices would have struck both down;<sup>22</sup> four justices would have upheld both.<sup>23</sup> The necessary fifth vote in both cases was Justice Breyer's. And Breyer voted to strike down the display in *McCreary County*, but to uphold the one in *Van Orden*. All the other Justices recognized the Ten Commandments as religious in nature, even as they differed on the question of the monuments' constitutionality. But Justice Breyer explained his vote in *Van Orden* by claiming that the display in that case was properly conceived of as not religious—or, at least, that in context the display was more secular than religious.<sup>24</sup>

Filing their complaint after *Van Orden* and *McCreary County*, the plaintiffs in *Summum* chose not to bring an Establishment Clause claim.<sup>25</sup> In some sense, they did not need to—at the time, there was actually another lawsuit, *Society of Separationists v. Pleasant Grove City*, that challenged Pioneer Park's Ten Commandments display on Establishment Clause grounds.<sup>26</sup> But the plaintiffs in *Society of Separationists* eventually decided to voluntarily dismiss their suit, apparently believing it was doomed under *Van Orden* and *McCreary County*.<sup>27</sup>

This is the backdrop to *Summum*: *Summum* is litigated under the assumption that the Ten Commandments display in Pleasant Grove is secular in nature, yet that is an assumption only one Justice seems to believe in, and

<sup>21</sup> See *Van Orden v. Perry*, 545 U.S. 677 (2005) (link); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (link).

<sup>22</sup> See *Van Orden*, 545 U.S. at 737 (O'Connor, J., dissenting); *id.* at 737 (Souter, J., dissenting, joined by Stevens and Ginsburg, JJ.); *McCreary County*, 545 U.S. at 850 (opinion of Souter, J., joined by Stevens, O'Connor, Ginsburg, and Breyer, JJ.)

<sup>23</sup> See *Van Orden*, 545 U.S. at 681 (plurality opinion of Rehnquist, C.J., joined by Kennedy, Scalia, & Thomas, JJ.); *McCreary County*, 545 U.S. at 885 (Scalia J., dissenting, joined by Rehnquist, C.J., Thomas, J., and in part by Kennedy, J.).

<sup>24</sup> See *Van Orden*, 545 U.S. at 701 (2005) (Breyer, J., concurring) (claiming that the display “communicates not simply a religious message, but a secular message as well,” and that the “nonreligious aspects of the tablets' message . . . predominate”).

<sup>25</sup> See Joint Appendix, *supra* note 4, at 18–21.

<sup>26</sup> See *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005) (link).

<sup>27</sup> See Order Granting Plaintiffs' Motion for Voluntary Dismissal Under Fed. R. Civ. P. 41(a), *Soc'y of Separationists v. Pleasant Grove City*, No. 2:03-CV-839 BSJ (D. Utah Feb. 15, 2006). For a thoughtful and more in-depth discussion of other parts of this history, see Bernadette A. Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2009).

he only in part.<sup>28</sup> So let us suspend this assumption. If we consider the Ten Commandments display and the proposed Seven Aphorisms display as religious monuments and as religious statements—which they surely are, at least to some extent—then what does *Summum* mean for religious liberty? It is to that topic that I now turn.

#### A. *The Religious Implications of Summum*

In *Van Orden* and *McCreary County*, the Court was presented with the issue of whether government could endorse the Ten Commandments. But left hanging in the air was a question: endorse them *over what*? In *Van Orden* and *McCreary County*, that question was always tacit, always comfortably hidden from view. In *Summum*, it becomes explicit. Endorsing the Ten Commandments means rejecting alternative versions of those Commandments. Pleasant Grove puts up the Ten Commandments and rejects *Summum*'s Seven Aphorisms so as to send the message that the Ten Commandments are true or important to the community, but the Seven Aphorisms are not. And the obvious and inevitable message of exclusion sent to *Summum* is of no constitutional consequence. Notable here, perhaps, was the Solicitor General's brief in support of the City. It compared the City's display of the Ten Commandments to a memorial commemorating the September 11th attacks, while comparing *Summum*'s proposed display to a memorial commemorating the al-Qaeda terrorists that carried them out. The implication, of course, was that *Summum*'s message could properly be treated like al-Qaeda's: as false, dangerous, and un-American.<sup>29</sup>

*Summum* also teaches an important lesson about the relationship between exclusion and endorsements. Courts and commentators sometimes overlook how governmental endorsements of religion concomitantly involve rejections of nonconforming religions. Professor Noah Feldman, in a recent and influential book, argued that courts should abstain from striking down governmental religious speech in part because "[t]alk can always be reinterpreted and more talk can always be added, so religious speech and symbols need not exclude."<sup>30</sup> But this maybe misses the crucial point—which is that government usually does not want to add more talk. *Summum* is itself the proof of that. Pleasant Grove did not want to allow *Summum*'s monument, because doing so would have undermined the very point of dis-

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<sup>28</sup> Recall that Justice Breyer's position is not that the Ten Commandments are devoid of religious aspects, but merely that the nonreligious aspects of certain Ten Commandments displays can sometimes "predominate" over the religious aspects. See *supra* note 24. Also keep in mind that the Court itself once rejected a similar claim out of hand. See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." (footnote omitted)) (link).

<sup>29</sup> See Brief for the United States as Amicus Curiae Supporting Petitioners at 10, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 WL 2521267.

<sup>30</sup> NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 238–39 (2005).

playing the Ten Commandments in the first place. And this leads to another point. We sometimes speak of religious endorsements as causing exclusion—as if, in an ideal world, we might conceivably separate the endorsement from the exclusion. But this misunderstands something important. Exclusion and endorsement cannot be separated; they are flip sides of precisely the same coin. For it is only by excluding other messages that government can create religious endorsements. After all, to endorse every message is really to endorse no message at all. Thus, in this sense, the government speech doctrine applied in *Summum* is actually a prerequisite to the government's very ability to endorse religion—the government needs the power to exclude contrary messages simply in order to create a religious endorsement at all. *Summum* is therefore inescapably right and follows as a necessary corollary of *Van Orden*—if the government is going to have a religion, it must be able to keep that religion pure.

There is another oddity to *Summum*, another oddity of applying the government speech doctrine to issues of religious speech. The justification behind the government speech doctrine has always been in the idea of democratic accountability. If you do not like what the government says about abortion or inflation or beef,<sup>31</sup> you have a remedy. You can vote the relevant government officials out of office and replace them with people who will voice your views instead. As the Supreme Court put it in *Summum*, “a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy,’” and so, “[i]f the citizenry objects, newly elected officials later could espouse some different or contrary position.”<sup>32</sup>

These lines from *Summum* are pulled from other cases, and they make little sense here in the context of religious speech. Telling *Summum* that its “remedy” lies in winning elections is absurd; it returns *Summum*, a minuscule and marginalized religious minority, to seek redress of religious discrimination in the very same political process that treated it unequally in the first place. And it is deeply inconsistent with the Court's usual statements about religious liberty—it turns on its head the Court's famous and longstanding maxim that matters of religion “may not be submitted to vote; they depend on the outcome of no elections.”<sup>33</sup> Moreover, no matter how many elections *Summum* wins, it will never be able to replace the existing Ten Commandments display with a display of its Seven Aphorisms. For the Establishment Clause would clearly forbid that as an overly denominational (or “sectarian”) religious endorsement.<sup>34</sup>

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<sup>31</sup> See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (applying the government-speech doctrine to statements about beef advertising) (link).

<sup>32</sup> 129 S. Ct. at 1132 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 219, 235 (2000)).

<sup>33</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (link).

<sup>34</sup> Even the right half of the Court, which has a narrower conception of the Establishment Clause, would find such a thing unconstitutional. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia J., dissenting) (agreeing that government cannot put up displays that are “reasonably un-

I now turn to two areas of Religion Clause litigation where *Summum* may be relevant in upcoming years. The first is equal access cases, and the second is government endorsement cases. In neither area will *Summum* radically change the law—indeed, in both areas *Summum* likely reinforces the conclusions that courts are already reaching. Yet, as *Summum* casts some new light on these old issues, it is still well worth exploring.

### B. Going Forward: *Summum* and the Equal Access Cases

A fascinating aspect of *Summum* is how it crosses up the usual party lines. The plaintiffs in *Summum* attacked the City's display of the Ten Commandments. So, going into the case, one would have expected the traditional left to support *Summum*'s claim and the traditional right to oppose it.<sup>35</sup> The reality was more complex. For example, the Rutherford Institute, a conservative public interest organization, filed on *Summum*'s behalf,<sup>36</sup> and many groups on the traditional left (for example, Americans United for Separation of Church and State, the Baptist Joint Committee, the Council for Secular Humanism) filed briefs "in support of neither party."<sup>37</sup> Some sort of explanation therefore seems appropriate.

And the explanation is this. For years, conservative groups have argued that it is unconstitutional to exclude religious voices from the public square. A long line of cases now establishes that religious speakers are constitutionally entitled to equal access to government property for speech-related purposes.<sup>38</sup> One can see then why conservative public interest groups had some natural sympathy toward *Summum*'s claim; after all, *Summum* too was seeking equal access to government property for religious speech. And, of course, *Summum* created similar difficulties for groups on the political left. While liberal groups supported *Summum*'s attack on this particular Ten Commandments display, they also recognized that *Summum*'s legal theory (if adopted by the Court) could potentially undermine the legal basis for their traditional opposition to equal access

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derstood as a government endorsement of a particular religious viewpoint").

<sup>35</sup> This was certainly true to some extent. The American Center for Law and Justice, a conservative public interest organization, represented the City on appeal. And this put the ACLJ in a slightly difficult position, for it had to ensure that its own arguments would not come back around to harm it in future equal access cases. See Brief for Petitioners, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 2445506.

<sup>36</sup> See Brief of the Rutherford Institute as Amicus Curiae Supporting Respondent, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 3153440.

<sup>37</sup> See Brief of Am. Jewish Comm. et al. as Amici Curiae in Support of Neither Party, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 2550615 (link); Brief of the Ctr. for Inquiry and the Council for Secular Humanism as Amici Curiae in Support of Neither Party, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 2521265 (link).

<sup>38</sup> See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981) (link).

claims. Thus, in this way, *Summum* crossed up both sides of the political spectrum.

And indeed, *Summum* well illustrates the conceptual difficulties that equal access cases can pose for the Free Speech Clause. For example, imagine Pleasant Grove were to set up and adhere to a written policy allowing all monuments that meet certain criteria to be permanently displayed in Pioneer Park. Such a policy would create a public forum, and the criteria stated in the policy would define the forum's parameters. Any group whose proposed monument fit the parameters—that is, any group whose monument fit the criteria stated in the policy—would have a constitutional right to put up its display in the park. Yet that, of course, was not the case in *Summum*. In *Summum*, there was no clear policy, and satisfying the policy's criteria did not guarantee anyone a spot in the park anyway.<sup>39</sup> And this is what makes *Summum*'s outcome somewhat unsettling—part of what saves Pleasant Grove here is its lack of transparency. By keeping its criteria for monument selection vague, Pleasant Grove immunizes itself from liability. This hardly encourages responsible governmental action.<sup>40</sup>

We see the corrupt incentives that this can create in equal access cases. Perhaps the most well known of these cases is *Good News Club v. Milford Central School*.<sup>41</sup> In *Good News*, a school district excluded a Christian club from meeting on school grounds after school hours, while it continued allowing other clubs to meet. The Supreme Court held this to be viewpoint discrimination in a public forum and thus unconstitutional under the Free Speech Clause. But perhaps, after *Summum*, a school district like Milford could be more strategic and discriminate more rather than less. For, in theory, if Milford is selective enough, at some point its determination of which clubs can meet in its buildings after school looks like government speech, thereby making it constitutionally immune to any Free Speech challenge.<sup>42</sup>

Consider, for example, a case from northern Virginia where a religious group, Child Evangelism Fellowship, sued the Montgomery County public

<sup>39</sup> There were serious factual disputes about whether Pleasant Grove consistently applied its policy, but a few things were clear. First, Pleasant Grove did not develop *any* written policy until 2004, a year after *Summum* made the request to put up its monument. The written policy was therefore not applied to *Summum*; it was written as a way of explaining why *Summum*'s display had not been acceptable under earlier uncoded standards. Second, being deemed acceptable under the policy's criteria did not entitle anyone to erect their display. As Pleasant Grove put it, “[t]he city’s internal policy sets criteria that are necessary, but not themselves sufficient, for acceptance and display of a proposed monument.” Brief for Petitioners, *supra* note 35, at 46.

<sup>40</sup> In other contexts, the Supreme Court has seen this sort of standardless discretion as incompatible with First Amendment values. See, e.g., *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758 (1988) (“[T]he absence of express standards makes it difficult to distinguish . . . between a licensor’s legitimate denial of a permit and its illegitimate abuse of censorial power.”) (link).

<sup>41</sup> 533 U.S. 98 (2001) (link).

<sup>42</sup> *Summum* raised this concern in their brief, claiming that a victory for Pleasant Grove might undermine the Court’s equal access cases. See Brief for Respondent, *supra* note 11, at 37, 47.

school system, claiming a right to send its flyers home with local school-children.<sup>43</sup> The school district generally allowed flyers of various types to be distributed in its classrooms and denied access to only a scarce few (including Child Evangelism Fellowship). To be precise, Montgomery County allowed 415 flyers—from over 225 different groups—and disallowed only 32.<sup>44</sup> The question then is whether the 32 denials are enough to convert the school district’s decision into governmental speech. One line in particular in *Summum* supports such a claim. Late in the opinion, the *Summum* court said that “where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.”<sup>45</sup> The Montgomery County school district surely did not permit, and would not have permitted, certain types of flyers—like, say, partisan political flyers, or flyers celebrating the use of illegal drugs, or flyers recruiting for the NRA, Planned Parenthood, or the Klan.<sup>46</sup> Montgomery County would surely have closed the forum before tolerating such flyers. But, if that is the case, then the above quotation from *Summum* suggests that no public forum ever really existed in the Montgomery County Schools and that Montgomery County’s decisions to tolerate (or exclude) certain flyers are actually protected by the government speech doctrine. Such an outcome, of course, would doom many First Amendment claims of equal access.

It is probably not fair to take *Summum* that far. Certainly the bare holding in *Summum* does not require that. And *Summum*’s facts, again, are quite extreme; they are light years away from those of cases like *Good News* and *Child Evangelism Fellowship*, which involve public spaces being made simultaneously available to a wide variety of organizations. Yet there is a deep tension between the equal access cases and the government speech doctrine—a tension that, at some point, the Supreme Court will have to consider and resolve. Until then, everything is open to argument, and we can expect state and local governments to do their best to take advantage of *Summum*.

### C. *Going Forward: Summum and Religious Endorsements*

*Summum* also has potential implications in cases where government endorses religion. In those areas, *Summum* will mean that the government has unbridled discretion to shape the endorsement as it chooses. Of course, for the most part, the Establishment Clause forbids government from mak-

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<sup>43</sup> Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs., 373 F.3d 589 (4th Cir. 2004) (link).

<sup>44</sup> *Id.* at 593–94.

<sup>45</sup> Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1138 (2009).

<sup>46</sup> This point was thoughtfully made by Professor Marty Lederman. See Posting of Marty Lederman to <http://lists.ucla.edu/pipermail/religionlaw/2004-July/017117.html> (July 1, 2004, 6:56 PDT) (link).

ing religious endorsements. *Summum* will certainly not change that. But there are domains where government *can* endorse religion, and as the Court's composition changes, those domains may grow or shrink. So we can learn a bit about these possibilities by considering what *Summum* will mean in an area where the government does currently speak religiously—namely, legislative prayer.

Consider the facts of *Turner v. City of Fredericksburg*.<sup>47</sup> There, the City Council of Fredericksburg adopted a policy requiring all prayers (which were traditionally given by city council members) to be nonsectarian. That is, prayers could not use language specific to particular denominations; they could not, for example, refer devotionally to Jesus Christ. But one city council member, Hasmel Turner, insisted on addressing his prayers to Jesus Christ. When he was excluded from giving prayers altogether, he sued, claiming a violation of the Free Speech Clause.

Turner's claims were difficult before *Summum*, and *Summum* may well be the final nail in the coffin. Applying the government speech doctrine to religious speech means that government simply has unqualified control over the religious message. It could require all legislative prayers to be non-denominational, or gender-neutral, or patriotic, or gay-friendly. And those rules will hold even when government delegates the right to pray to outside individuals. Private citizens tapped to lead legislative prayers are still praying on behalf of the government; they therefore still must obey the government's restrictions. This conclusion follows from *Summum* itself, but even more apposite is the most notorious case in the government speech canon, *Rust v. Sullivan*.<sup>48</sup> *Rust* involved a challenge to a government act that provided doctors with family-planning funds but conditioned the money on the doctors not discussing abortion with patients. The Supreme Court in *Rust* upheld this gag rule on the theory that the government was trying to send an anti-abortion message and thus had the power to regulate even ostensibly private speakers (the doctors) in order to ensure the anti-abortion message was properly conveyed.<sup>49</sup>

Thus, if the government can put a gag rule on the doctors in *Rust*, it seems it can put a gag rule on legislative prayer givers as well, constraining their religious vocabulary however the government sees fit. Indeed, a complete adoption of the government speech doctrine in legislative prayer cases would even allow government to pick and choose prayergivers based on their religious affiliations—it would mean, for example, that the City of Fredericksburg could choose to allow only Christians to pray, or Protestants, or Lutherans.<sup>50</sup> Fortunately, the Court's legislative prayer cases them-

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<sup>47</sup> 534 F.3d 352 (4th Cir. 2008) (link).

<sup>48</sup> 500 U.S. 173 (1991) (link).

<sup>49</sup> See *id.* at 192–94.

<sup>50</sup> There have been such cases. See, e.g., *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) (involving a legislative prayer scheme that excluded Muslims, Jehovah's Witnesses, Jews, and Mormons).

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selves forbid discriminating against speakers in this way.<sup>51</sup> Still, Justice Souter's concurrence in *Sumnum* rightly recognizes the tension between the two lines of cases.<sup>52</sup> And the only way to reconcile the two is by limiting the government's ability to speak religiously—by keeping cases like *Van Orden* and *Marsh* narrow exceptions or by overruling them altogether.

### CONCLUSION

*Pleasant Grove City v. Sumnum* is not a groundbreaking case. But it does offer the opportunity for some reflection on the intricate intersection between the Free Speech, Free Exercise, and Establishment Clauses. This Essay has aspired to cover the decision, its assumptions, and its implications. And it will not be long until the next page is written. Only a month ago, the Supreme Court agreed to consider another case with both Free Speech and Establishment Clause aspects, *Salazar v. Buono*.<sup>53</sup> *Buono* is a far harder case than *Sumnum*, and the Court will have a tougher time with the issues of governmental and private speech it raises. But that is another article for another day.<sup>54</sup>

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as prayergivers); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005) (involving a legislative prayer scheme that excluded a Wiccan) (link).

<sup>51</sup> In *Marsh v. Chambers*, the Court upheld legislative prayer, but warned that it would not accept a legislative prayer program where prayergivers were picked on the basis of “impermissible motive[s],” such as their religious affiliations. 463 U.S. 783, 793 (1983) (link). That language is an explicit departure from the government speech doctrine. For more on the impermissible motive requirement and legislative prayer, see Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. (forthcoming 2010) (manuscript on file with SSRN, <http://ssrn.com/abstract=1335910>) (link).

<sup>52</sup> 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring) (“But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause’s stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others . . .”).

<sup>53</sup> *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom. *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

<sup>54</sup> For a head start on the issues in *Buono* (and an explanation of why the issues there are harder than those in *Sumnum*), see Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2009); Posting of Christopher C. Lund to Prawfsblawg, <http://prawfsblawg.blogs.com/prawfsblawg/2009/02/salazar-v-buono.html> (Feb. 24, 2009, 18:05 EST) (link).