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## Constitutional Law - Open the Floodgate to Public Parks: The Tenth Circuit Welcomes All to Put Up Personal Permanent Monuments; *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) cert. granted, 128 S.Ct. 1737 (2008)

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CASE NOTE

**CONSTITUTIONAL LAW—Open the Floodgates to Public Parks:  
The Tenth Circuit Welcomes All to Put Up Personal Permanent  
Monuments; *Summum v. Pleasant Grove City*, 483 F.3d 1044  
(10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008).**

*Joshua Tolin\**

INTRODUCTION

Pleasant Grove, a small city in Utah, has numerous parks, one of which, Pioneer Park, contains historical buildings, statues, and artifacts.<sup>1</sup> Among those displays stand the town's first city hall and fire department, a pioneer era school house, and a granite stone from the first Mormon temple, recognizing the community's first settlers.<sup>2</sup> Pioneer Park also contains a monument depicting the Ten Commandments, donated by the Fraternal Order of Eagles and placed in the park in 1971.<sup>3</sup>

Approximately forty miles away, in Salt Lake City, is the headquarters for Summum, a non-profit religious group.<sup>4</sup> In September 2003, Summum formally requested that Pleasant Grove allow the erection of a monument containing the Seven Aphorisms of Summum in Pioneer Park.<sup>5</sup> Summum proposed its monument be similar in size and nature to the Ten Commandments monument already present in the park.<sup>6</sup> The mayor denied Summum's request, explaining

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\* M.B.A., Candidate for J.D., University of Wyoming, 2010. I would like to thank my teachers, friends, and family for the many lessons and continued support. Special thanks to Professor Lisa Rich for her assistance with this note.

<sup>1</sup> *Summum v. Pleasant Grove City (Pleasant Grove I)*, 483 F.3d 1044, 1047 (10th Cir. 2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Throughout the 1950s, '60s, and '70s, the Eagles donated similar monuments to communities across the United States in an effort to promote morals to America's youth. *Summum v. Ogden*, 297 F.3d 995, 998 (10th Cir. 2002).

<sup>4</sup> *Pleasant Grove I*, 483 F.3d at 1047. Corky Nowell founded Summum as a non-profit organization in 1975. Keenan Lorenz, Survey, *Summum v. Pleasant Grove City: The Tenth Circuit "Binds the Hands of Local Governments as They Shape the Permanent Character of Their Public Spaces"*, 85 DENV. U. L. REV. 631, 638 n.73 (2008). Mr. Nowell founded Summum after he started experiencing encounters with aliens ("Beings"). *Id.* Mr. Nowell continued having these encounters and legally changed his name to Summum Bonum Amon Ra, the name the Beings called him. Welcome to Summum, <http://www.summum.us/about/welcome.shtml> (last visited Nov. 17, 2008). The Beings introduced Mr. Nowell to the principles of Summum. *Id.*

<sup>5</sup> *Pleasant Grove I*, 483 F.3d at 1047. Summum's philosophy includes seven aphorisms: Psychokinesis, Correspondence, Vibration, Opposition, Rhythm, Cause and Effect, and Gender. Lorenz, *supra* note 4, at 638 n.73.

<sup>6</sup> *Pleasant Grove I*, 483 F.3d at 1047.

all permanent displays in the park must directly relate to the city's history or be donated by community groups.<sup>7</sup> Summum met neither of these requirements, but still made a second proposal attempt, which the city again denied.<sup>8</sup> Summum then filed suit in the United States District Court for the District of Utah, claiming the city violated Summum's First Amendment right to free speech.<sup>9</sup>

The district court denied Summum's request for a preliminary injunction requiring the city to display its monument in the park, and Summum subsequently appealed to the United States Court of Appeals for the Tenth Circuit.<sup>10</sup> The Tenth Circuit, sitting in panel, reversed the district court's ruling and held the following: (1) the donated Ten Commandments monument constitutes the private speech of the Eagles, as opposed to the governmental speech of the city; (2) the city park constitutes a traditional public forum, which requires any discriminatory content-based decisions be subjected to strict scrutiny review; and (3) the city did not meet this heightened standard and unconstitutionally discriminated against Summum's speech.<sup>11</sup> Accordingly, the court required Pleasant Grove to allow Summum to display the Seven Aphorisms monument.<sup>12</sup> In an evenly split decision, the Tenth Circuit denied rehearing en banc.<sup>13</sup> The United States Supreme Court subsequently granted certiorari.<sup>14</sup>

If the United States Supreme Court does not reverse the Tenth Circuit's decision, the City of Pleasant Grove will not be the only governmental entity affected.<sup>15</sup> Affirming the Tenth Circuit's decision will effectively force the City of Casper, Wyoming to permit Pastor Fred Phelps to build a flagrantly anti-

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* While Summum maintains its headquarters in nearby Salt Lake City, the group claims no ties with the City of Pleasant Grove. *See id.* Summum also does not claim its monument relates to the history of the city. *See id.*

<sup>9</sup> *Id.* For information on the Ten Commandments and the Establishment Clause, see generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.2 (3d ed. 2006); 5 RONALD D. ROTUNDA & JOHN E. NOWAK, NOWAK AND ROTUNDA'S TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.3 (4th ed. 2008); Antony Barone Kolenc, "Mr. Scalia's Neighborhood": A Home for Minority Religions?, 81 ST. JOHN'S L. REV. 819 (2007); Haynes Maier & Eric R. Mull, Casenote, *Holy Moses: What Do We Do with the Ten Commandments?*, 57 MERCER L. REV. 645 (2006).

<sup>10</sup> *Pleasant Grove I*, 483 F.3d at 1048.

<sup>11</sup> *Id.* at 1047 n.2, 1050, 1057.

<sup>12</sup> *Id.* at 1057.

<sup>13</sup> *Summum v. Pleasant Grove City (Pleasant Grove II)*, 499 F.3d 1170, 1171 (10th Cir. 2007).

<sup>14</sup> *Pleasant Grove City, Utah v. Summum (Pleasant Grove III)*, 128 S. Ct. 1737 (2008). The United States Supreme Court heard oral arguments on November 12, 2008. Transcript of Oral Argument at 1, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665). However, the Court has yet to issue an opinion on the case.

<sup>15</sup> *See infra* notes 182–91 and accompanying text.

homosexual statue condemning one of the city's former residents.<sup>16</sup> Moreover, failure to reverse would prohibit governments at all levels across the country from regulating their public lands.<sup>17</sup>

This case note argues the Tenth Circuit erroneously decided *Summum v. Pleasant Grove City (Pleasant Grove I)* in favor of Summum.<sup>18</sup> First, this note introduces the panel's decision in *Pleasant Grove I* and the opinions of *Summum v. Pleasant Grove City (Pleasant Grove II)*, in which the Tenth Circuit denied rehearing en banc.<sup>19</sup> Second, this note analyzes the Tenth Circuit's reliance on *Summum v. Ogden*, which held a privately-donated monument remains the speech of the donor.<sup>20</sup> Third, it analyzes the panel's holding that a public park constitutes a traditional public forum for the erection of permanent monuments.<sup>21</sup> This note demonstrates the Tenth Circuit erred in its First Amendment analysis and the United States Supreme Court should reverse the Tenth Circuit's decision.<sup>22</sup>

#### BACKGROUND

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech."<sup>23</sup> The United States Supreme Court, however, has expressly stated the United States Constitution does not protect this right absolutely.<sup>24</sup> As such, the government can regulate speech, but courts must determine when regulation violates the Constitution.<sup>25</sup>

When a government restricts speech on government property, a reviewing court follows a multi-step framework to determine whether the restriction violates the individual's right to freedom of speech.<sup>26</sup> First, the court determines who speaks on the government property.<sup>27</sup> When the government speaks, the United States Constitution entitles it to make content-based decisions and engage in viewpoint-based decision making.<sup>28</sup> However, when dealing with private speech,

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<sup>16</sup> See *infra* notes 182–88 and accompanying text.

<sup>17</sup> See *infra* notes 189–91 and accompanying text.

<sup>18</sup> See *infra* notes 80–199 and accompanying text.

<sup>19</sup> See *infra* notes 80–109 and accompanying text.

<sup>20</sup> See *infra* notes 110–53 and accompanying text.

<sup>21</sup> See *infra* notes 154–99 and accompanying text.

<sup>22</sup> See *infra* notes 110–99 and accompanying text.

<sup>23</sup> U.S. CONST. amend. I.

<sup>24</sup> *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961).

<sup>25</sup> CHEMERINSKY, *supra* note 9, at 924–25. See generally Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

<sup>26</sup> See *infra* notes 31–73 and accompanying text.

<sup>27</sup> See *infra* notes 31–45 and accompanying text.

<sup>28</sup> See *infra* note 31 and accompanying text.

the reviewing court conducts a forum analysis to determine the constitutional validity of the exclusion.<sup>29</sup> Depending on the forum classification, the court uses the applicable standard to determine if the exclusion satisfies constitutional requirements.<sup>30</sup>

### *Government vs. Private Speech*

In a free speech case, a court first decides who speaks on the government property, the government itself or a private individual.<sup>31</sup> To make this determination, the United States Court of Appeals for the Tenth Circuit applies a four-factor test adopted from the United States Court of Appeals for the Eighth Circuit.<sup>32</sup> The Eighth Circuit developed the four-factor test in *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, and the Tenth Circuit first adopted the test in *Wells v. City & County of Denver*.<sup>33</sup>

The United States Supreme Court has not adopted a specific framework for this determination, but in *Johanns v. Livestock Marketing Association*, the Court held a beef advertising campaign constituted government speech.<sup>34</sup> While the Court did not specify the test used, its analysis included factors similar to those in the four-factor test.<sup>35</sup> The Court assessed the purpose of the program, who had editorial control of the speech, and who exercised ultimate control over the advertising campaign.<sup>36</sup>

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<sup>29</sup> See *infra* notes 46–49 and accompanying text.

<sup>30</sup> See *infra* notes 50–73 and accompanying text.

<sup>31</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). If a court classifies the speech at issue as private, the court then completes a forum analysis to determine the degree to which the government can restrict access. *Id.* However, if a court classifies the speech as governmental, the United States Constitution entitles the government to make content-based decisions and engage in viewpoint-based decision making. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); see *infra* notes 194–95 and accompanying text (explaining restrictions on government speech).

<sup>32</sup> *Summum v. Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002). Prior to adopting the four-factor test, the Tenth Circuit had no formal framework to determine speech ownership. See *Wells v. City & County of Denver*, 257 F.3d 1132, 1140–42 (10th Cir. 2001). Previously, however, in *Summum v. Callaghan*, the Tenth Circuit—without analysis—characterized a privately-donated Ten Commandments monument as private speech. 130 F.3d 906, 919 n.19 (10th Cir. 2002).

<sup>33</sup> *Wells*, 257 F.3d at 1140–42 (adopting the four-factor test to determine a “Happy Holidays” sign erected by the government represents governmental speech for the purposes of free speech analysis); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000) (developing the four-factor test to determine state-sponsored radio announcements recognizing private donors constitute government speech).

<sup>34</sup> 544 U.S. 550, 560 (2005).

<sup>35</sup> *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008) (adopting the four-factor test after recognizing the United States Supreme Court followed similar reasoning in *Johanns*); see *Johanns*, 544 U.S. at 560–61.

<sup>36</sup> *Johanns*, 544 U.S. at 560–61.

### *The Wells Factors*

Because the United States Supreme Court has not clearly specified how to make this determination, the United States Court of Appeals for the Tenth Circuit uses the test it adopted in *Wells*.<sup>37</sup> Whether the speech belongs to the government or another relevant actor depends on the balancing of the following four factors: (1) the central purpose of the government program in which the speech occurs, (2) the amount of editorial control over the content, (3) the identity of the literal speaker, and (4) with whom ultimate responsibility of the content rests.<sup>38</sup> In addition to the Tenth and Eighth Circuits, the United States Courts of Appeals for the Fourth and Ninth Circuits apply this four-factor test.<sup>39</sup>

Shortly after adopting this four-factor test, the Tenth Circuit, in *Summum v. Ogden*, applied it to a Ten Commandments monument donated by the Eagles and displayed on municipal grounds.<sup>40</sup> In analyzing the first factor, the court held the central purpose of the monument was to promote the views of the donors.<sup>41</sup> In assessing the second factor of the *Wells* test, the court recognized the Eagles, and not the city, exercised complete control over designing the entirety of the monument, including its content.<sup>42</sup> While recognizing the city may have become the literal speaker after accepting the donation, under the third *Wells* factor, the court concluded the Eagles constituted the literal speaker of the text on the monument.<sup>43</sup> In addressing the final *Wells* factor, the court recognized Ogden became the true owner of the monument when the city accepted the donation.<sup>44</sup> In sum, the court concluded the Ten Commandments monument represented the speech of the Eagles, and not that of the city government.<sup>45</sup>

### *Free Speech Fora*

If a court classifies the speech at issue as private, the court then completes a forum analysis to determine which speech the government can exclude from the

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<sup>37</sup> *Ogden*, 297 F.3d at 1004.

<sup>38</sup> *Wells*, 257 F.3d at 1141.

<sup>39</sup> *E.g.*, *Ariz. Life*, 515 F.3d at 964–65; *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dept. of Motor Vehicles*, 288 F.3d 610, 618–19 (4th Cir. 2002).

<sup>40</sup> *Ogden*, 297 F.3d at 1004–05.

<sup>41</sup> *Id.* at 1004.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1005.

<sup>45</sup> *Ogden*, 297 F.3d at 1005 (recognizing three of the four factors support the finding of private speech).

property.<sup>46</sup> In doing so, the court considers both the government property at issue and the type of access sought by the excluded speaker.<sup>47</sup> Once the court identifies the forum in question, it then determines the proper forum classification, as the United States Supreme Court set forth in *Perry Education Association v. Perry Local Educators' Association*.<sup>48</sup> The *Perry* court distinguished three categories: the traditional public forum, the designated public forum, and the nonpublic forum.<sup>49</sup>

### *Traditional Public Fora*

The United States Constitution affords the most protection to individual rights in the first *Perry* classification, the traditional public forum.<sup>50</sup> Traditional public fora include those places which have always been reserved for the public's use.<sup>51</sup> This category includes public streets and parks, because the public has historically used them in order to assemble, communicate, and discuss issues.<sup>52</sup> In traditional public fora, the government cannot make content-based exclusions without satisfying a strict level of scrutiny by proving that such regulation is necessary to serve a compelling state interest.<sup>53</sup> Furthermore, to satisfy strict scrutiny, the exclusion must be narrowly drawn to protect that interest.<sup>54</sup> The Constitution, however, does not completely prohibit government from regulating speech on public property.<sup>55</sup> In traditional public fora (as well as designated and nonpublic fora), the government may enact time, place, and manner of expression regulations, so long as they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.<sup>56</sup>

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<sup>46</sup> *Cornelius*, 473 U.S. at 797. Forum analysis is only required for protected speech on government property. *Id.* If the proposed speech represents a type of unprotected or less-protected speech, e.g., obscenity, libel, or commercial speech, different standards apply and a forum analysis is unnecessary. ROTUNDA & NOWAK, *supra* note 9, § 20.1.

<sup>47</sup> *Cornelius*, 473 U.S. at 797.

<sup>48</sup> 460 U.S. 37, 45–47 (1983).

<sup>49</sup> *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 45–47).

<sup>50</sup> *Perry*, 460 U.S. at 45.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). A government makes content-based exclusions when it restricts access to a forum based on the subject matter of the speech excluded or on the identity of the individual trying to speak. *Id.* at 49. For example, *Pleasant Grove* required that Pioneer Park monuments relate to the history of the town (subject matter) or be donated by an individual or group with long-standing ties to the community (speaker identity). *Summum v. Pleasant Grove City (Pleasant Grove I)*, 483 F.3d 1044, 1052 n.5 (10th Cir. 2007).

<sup>54</sup> *Perry*, 460 U.S. at 45.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 45–46.

### *Designated Public Fora*

The *Perry* court recognized a second classification, the designated public forum.<sup>57</sup> A government creates a designated public forum, and this type of forum carries with it the same use protections as those associated with traditional public fora.<sup>58</sup> In order to create a designated public forum, the government must intentionally open a nonpublic forum for the purpose of free speech.<sup>59</sup> For example, the City of Chattanooga, Tennessee created a designated public forum when it opened a municipal theater for use by its citizens.<sup>60</sup> Nothing requires a government to create these fora.<sup>61</sup> However, even if it chooses to do so, nothing requires a government to keep them open indefinitely.<sup>62</sup> As long as a government keeps a designated public forum open to the public, the courts will use the standard of review applicable to traditional public fora.<sup>63</sup>

### *Nonpublic Fora*

Lastly, the *Perry* court recognized a residual category of public property, the nonpublic forum.<sup>64</sup> A nonpublic forum includes any public property not considered a traditional public forum or designated by the government as a public forum.<sup>65</sup> An army base, for example, represents a nonpublic forum.<sup>66</sup> Nonpublic fora carry with them different standards of regulation.<sup>67</sup> In addition to the time, place, and

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<sup>57</sup> *Cornelius*, 473 U.S. at 802; *see Perry*, 460 U.S. at 45.

<sup>58</sup> *Cornelius*, 473 U.S. at 802.

<sup>59</sup> *Id.* (“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”); *see Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995) (plaza opened for free speech by statute).

<sup>60</sup> *Perry*, 460 U.S. at 45 (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), as an example of a designated public forum); *see Se. Promotions*, 420 U.S. at 555 (recognizing city created a public forum when it opened a municipal theater for use by the public and unconstitutionally excluded a theater company by refusing to permit the performance of the musical “Hair” at the public theater).

<sup>61</sup> *Perry*, 460 U.S. at 45–46.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* If a government does not want a court to apply the traditional public forum standards to a designated public forum, it can revert the forum back to a nonpublic forum by removing the public’s access. *Id.* A traditional public forum, however, cannot be changed into another forum type. *Id.* at 45.

<sup>64</sup> *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 46.

<sup>65</sup> *Perry*, 460 U.S. at 46.

<sup>66</sup> *Greer v. Spock*, 424 U.S. 828, 836–37 (1976).

<sup>67</sup> *Id.*

manner regulations permitted for each of the forum types, in a nonpublic forum, the government may utilize more expansive (i.e., content-based) exclusions, as long as they are both reasonable and viewpoint-neutral.<sup>68</sup>

### *Limited Public Fora*

While the *Perry* court categorized only three forum types, federal courts have developed a fourth label, the limited public fora.<sup>69</sup> At times, courts use this label when referring to a designated public forum; at other times, courts treat limited public fora as a type of nonpublic fora.<sup>70</sup> Recently, the United States Supreme Court used “limited public forum” when applying the less restrictive standard reserved for *Perry*’s third category, nonpublic fora.<sup>71</sup> In *Arkansas Educational Television Commission v. Forbes*, the Court clarified that a public forum is designated when “generally open” to the public or specific classes of groups, but is a nonpublic forum when the government allows merely “selective access.”<sup>72</sup> The classification of limited public forum, therefore, refers to a nonpublic forum the government opened for selective access, requiring restrictions to be reasonable and not viewpoint-based.<sup>73</sup>

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<sup>68</sup> U.S. Postal Serv. v. Greenburgh Civic Ass’n, 453 U.S. 114, 131 n.7 (1981); *Cornelius*, 473 U.S. at 806.

<sup>69</sup> E.g., *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (“The school property, when not in use for school purposes, was neither a traditional or designated public forum; rather it was a limited public forum . . . .”); *Callaghan*, 130 F.3d at 914–15 (“We use the term ‘limited public forum’ here to denote a particular species of nonpublic forum . . . .”).

<sup>70</sup> *Compare* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (applying viewpoint discrimination and reasonableness test to limited public forum), *with* *Widmar v. Vincent*, 454 U.S. 263, 272 (1981) (applying strict scrutiny to limited public forum).

<sup>71</sup> *Callaghan*, 130 F.3d at 914–15; e.g., *Good News*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829–30; *Lamb’s Chapel*, 508 U.S. at 390, 393–94; see W. Brent Woodall, *Fixing the Faulty Forum Framework: Changing the Way Courts Analyze Free Speech Cases*, 2 FIRST AMEND. L. REV. 295, 307 (2004) (“Thus, in *Good News Club* the Court once again rejected the guidance of *Perry* and indicated that a limited public forum is a type of nonpublic forum.”).

<sup>72</sup> 523 U.S. 666, 679 (1998). For example, in *Widmar*, the only United States Supreme Court decision treating a limited public forum as a designated public forum, a university kept its facilities generally open to all student groups. See *Widmar*, 454 U.S. at 272. However, in the most recent United States Supreme Court decisions involving limited public fora, the government merely granted selective access, and the Court has treated such fora as nonpublic. E.g., *Good News*, 533 U.S. at 106 (facility access for limited purposes during limited after-school hours); *Rosenberger*, 515 U.S. at 832 (publication funding for specific subset of student organizations); *Lamb’s Chapel*, 508 U.S. at 389–90 (facility access for limited purposes during limited after-school hours).

<sup>73</sup> *Callaghan*, 130 F.3d at 916; Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 77 (2004). But see Woodall, *supra* note 71, at 313–15 (recognizing the United States Supreme Court’s recent decisions and arguing for a return to the original *Perry* framework, wherein courts treat limited public fora as a species of designated public fora).

*Summum and the Constitutionality of the Ten Commandments*

Summum first began its legal crusade against government-displayed Ten Commandments monuments in 1994.<sup>74</sup> In *Summum v. Callaghan*, Salt Lake County allowed the Eagles to install a Ten Commandments monument on the lawn outside the county courthouse.<sup>75</sup> In its complaint, Summum alleged violation of the Establishment, Free Exercise, and Due Process Clauses of the United States Constitution.<sup>76</sup> Since filing its first complaint, Summum has filed lawsuits claiming Establishment Clause and Freedom of Speech Clause violations against multiple Utah municipal and county governments.<sup>77</sup>

In 2005, the United States Supreme Court decided *Van Orden v. Perry*, in which it held Texas' display of a privately-donated Ten Commandments monument on government property did not violate the Establishment Clause.<sup>78</sup> Since the Court's decision in *Van Orden* effectively closed the door on the Ten Commandments and Establishment Clause claims, Summum narrowed its claims to the freedom of speech.<sup>79</sup>

## PRINCIPAL CASE

*United States District Court for the District of Utah*

*Summum v. Pleasant Grove City (Pleasant Grove I)* presented the question of whether a city violated an organization's free speech rights under the United States Constitution.<sup>80</sup> Summum, a religious group, argued Pleasant Grove unconstitutionally denied its request to erect a permanent monument espousing its Seven Aphorisms in Pioneer Park, a public municipal park.<sup>81</sup> Summum claimed this violated the Constitution because the city, at the same time, displayed other

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<sup>74</sup> Freedom of Speech, <http://www.summum.us/about/freespeech.shtml> (last visited Nov. 17, 2008).

<sup>75</sup> *Callaghan*, 130 F.3d at 909–10.

<sup>76</sup> *Id.* at 910.

<sup>77</sup> See *Pleasant Grove I*, 483 F.3d at 1047; *Summum v. Duchesne City*, 482 F.3d 1263, 1267 (10th Cir. 2007); *Ogden*, 297 F.3d at 999; *Callaghan*, 130 F.3d at 911.

<sup>78</sup> 545 U.S. 677, 692 (2005).

<sup>79</sup> See *Pleasant Grove City, Utah v. Summum (Pleasant Grove III)*, 128 S. Ct. 1737, 1737 (2008); *Pleasant Grove I*, 483 F.3d at 1048; Alberto B. Lopez, *Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 209 (2003) ("In fact, the free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment's clause against the establishment of religion.") (internal quotations omitted).

<sup>80</sup> 483 F.3d 1044, 1047 (10th Cir. 2007).

<sup>81</sup> *Id.*; see *supra* notes 4–5 and accompanying text (providing background information on the religion of Summum).

privately-donated statues, including a Ten Commandments monument.<sup>82</sup> The United States District Court for the District of Utah denied an oral motion for a preliminary injunction to force display of Summum's proposed monument, and Summum appealed the ruling.<sup>83</sup>

*United States Court of Appeals for the Tenth Circuit*

Sitting in panel, the United States Court of Appeals for the Tenth Circuit reversed the district court, holding Pleasant Grove violated Summum's constitutionally guaranteed rights to free speech.<sup>84</sup> The court's decision was threefold: (1) a donated Ten Commandments monument, which sat in the park, constitutes the private speech of its donors; (2) the city park constitutes a traditional public forum, which requires the court to subject any content-based decisions to strict scrutiny; and (3) Pleasant Grove failed to meet this heightened standard of scrutiny.<sup>85</sup>

The Tenth Circuit cited two of its previous decisions, *Summum v. Ogden* and *Summum v. Callaghan*, when it concluded the Ten Commandments monuments remain the private speech of its donors.<sup>86</sup> In *Callaghan*, the Tenth Circuit concluded a similarly donated Ten Commandments monument involved private speech, as it expressed the views of its donors.<sup>87</sup> Five years later in *Ogden*, the Tenth Circuit applied the four-factor *Wells* test it had since adopted to conclude the Ten Commandments monument did not constitute governmental speech, but the private speech of the donors.<sup>88</sup>

After dispensing with the private speech characterization in a footnote, the *Pleasant Grove I* court conducted a forum analysis to determine the appropriate

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<sup>82</sup> *Pleasant Grove I*, 483 F.3d at 1047.

<sup>83</sup> *Id.* at 1048.

<sup>84</sup> *Id.* at 1057.

<sup>85</sup> *Id.* at 1047 n.2, 1050, 1057.

<sup>86</sup> *Id.* at 1047 n.2. Both cases involved a similar Ten Commandments monument located on government property and Summum's attempts to display its own monument. *See* *Summum v. Ogden*, 297 F.3d 995, 999 (10th Cir. 2002) (Ten Commandments displayed on municipal building grounds); *Summum v. Callaghan*, 130 F.3d 906, 909–10 (10th Cir. 1997) (Ten Commandments displayed on county courthouse lawn).

<sup>87</sup> *Callaghan*, 130 F.3d at 919 n.19.

<sup>88</sup> *Ogden*, 297 F.3d at 1006. Between *Callaghan* and *Ogden*, the Tenth Circuit decided *Wells v. City & County of Denver*, in which it adopted a test from the Eighth Circuit to determine when it classifies speech as private as opposed to governmental. *See* *Wells v. City & County of Denver*, 257 F.3d 1132, 1140–42 (10th Cir. 2001) (adopting the four-factor test); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000) (developing the four-factor test).

level of scrutiny to apply to the city's denial of Summum's request.<sup>89</sup> The court identified the forum in question as the "permanent monuments in the city park."<sup>90</sup> Once the court determined the relevant forum, it then turned to classifying the forum into one of the three original *Perry* classifications: (1) traditional public forum, (2) designated public forum, or (3) nonpublic forum.<sup>91</sup>

In determining the relevant classification, the Tenth Circuit noted the district court incorrectly categorized the monuments in the city park as a nonpublic forum because it applied the reasonable and viewpoint-neutral test.<sup>92</sup> The Tenth Circuit, instead, classified the monuments in the park as a traditional public forum.<sup>93</sup> The court reasoned that because of the forum's location inside a city park, which the United States Supreme Court characterized as a traditional public forum, the Pleasant Grove forum constituted—by default—a traditional public forum.<sup>94</sup>

Once the Tenth Circuit determined the monuments in the park to be a traditional public forum, it reviewed Pleasant Grove's speech restrictions based on the corresponding level of review, strict scrutiny.<sup>95</sup> As Pleasant Grove based its exclusions on subject matter and speaker identity, the city conceded it made content-based exclusions.<sup>96</sup> In applying this heightened level of scrutiny, the court

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<sup>89</sup> *Pleasant Grove I*, 483 F.3d at 1047 n.2, 1050. The panel did not specifically characterize the monuments in Pioneer Park as private speech. *Id.* at 1047 n.2. Before reaching the discussion section of its decision, the Tenth Circuit mentioned in a background footnote that it had previously characterized a similar donated Ten Commandments monument as private speech. *Id.* In its discussion, the Tenth Circuit skipped the *Wells* test and applied the forum analysis posthaste. *Id.* at 1050.

<sup>90</sup> *Id.* at 1050.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* Courts apply this test to nonpublic fora; a reviewing court will hold content-based exclusions constitutional if it considers the exclusions both reasonable and viewpoint-neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). The Tenth Circuit, however, failed to recognize the United States Supreme Court's and its own holdings that this standard applies also to limited public fora. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (accepting parties' classification of limited public forum and applying viewpoint discrimination and reasonableness test to limited public forum); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (applying viewpoint discrimination and reasonableness test to limited public forum); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390, 393–94 (1993) (accepting lower court's classification of limited public forum and applying reasonableness standard); *Callaghan*, 130 F.3d at 916 ("Regulations of speech in a nonpublic or limited public forum are subject to the more deferential reasonableness standard.").

<sup>93</sup> *Pleasant Grove I*, 483 F.3d at 1050.

<sup>94</sup> *Id.* at 1050–51; *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (classifying public streets and parks as traditional public fora).

<sup>95</sup> *Pleasant Grove I*, 483 F.3d at 1052–53.

<sup>96</sup> *Id.* at 1052, 1052 n.5.

held Pleasant Grove's interest in promoting its history was not compelling.<sup>97</sup> Alternatively, even if Pleasant Grove possessed a compelling interest, its exclusion was not necessary and narrowly drawn to serve that interest.<sup>98</sup> As such, the court held Pleasant Grove's speech restrictions violated the United States Constitution.<sup>99</sup> The panel concluded the trial court should have granted the preliminary injunction and ordered the city to allow erection of Summum's proposed monument.<sup>100</sup>

#### *Petition for Panel Rehearing and Rehearing En Banc*

Pleasant Grove subsequently filed a petition for panel rehearing and a petition for rehearing en banc in *Summum v. Pleasant Grove City (Pleasant Grove II)*.<sup>101</sup> The original panel denied rehearing, and the court denied rehearing en banc by an evenly split six-to-six vote.<sup>102</sup>

#### *Dissenting Opinion (Judge Lucero)*

Judge Lucero filed a dissenting opinion from the denial of rehearing en banc, in which he agreed the application of the *Wells* test indicated the Ten Commandments monument remains the private speech of the Eagles.<sup>103</sup> Judge Lucero, however, concluded the permanent monuments in the park represented a nonpublic forum, not a traditional public forum.<sup>104</sup>

#### *Dissenting Opinion (Judge McConnell, joined by Judge Gorsuch)*

Judge McConnell also filed a dissenting opinion from the denial of rehearing en banc, in which Judge Gorsuch joined.<sup>105</sup> Judge McConnell disagreed with the

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<sup>97</sup> *Id.* at 1053.

<sup>98</sup> *Id.* ("As the [United States] 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.") (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) ("[T]his sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored.")).

<sup>99</sup> *Id.* at 1054 (evaluating likely merits of the case based on procedural posture).

<sup>100</sup> *Pleasant Grove I*, 483 F.3d at 1057.

<sup>101</sup> 499 F.3d 1170, 1171 (10th Cir. 2007).

<sup>102</sup> *Id.* The original panel included Chief Judge Tacha, Judge Ebbel, and Judge Kane, sitting by designation from the United States District Court for the District of Colorado. *Pleasant Grove I*, 483 F.3d at 1045. The active judges hearing the en banc petitions included Chief Judge Tacha and Judges Kelly, Henry, Briscoe, Lucero, Murphy, Hartz, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes. *Pleasant Grove II*, 499 F.3d at 1170. The Tenth Circuit local rules require a majority of the active judges to order a rehearing en banc; therefore, an equally divided vote allowed the lower decision to stand. *Id.* at 1171.

<sup>103</sup> *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting).

<sup>104</sup> *Id.* at 1173–74.

<sup>105</sup> *Id.* at 1174 (McConnell, J., dissenting).

court's holding that the donated monuments remain the private speech of the donors.<sup>106</sup> Judge McConnell further explained that once the court recognizes the statues as government speech, the need for a forum analysis disappears.<sup>107</sup>

*Response to the Dissenting Opinions (Chief Judge Tacha)*

Chief Judge Tacha then took the self-described “unprecedented step” of responding to the dissents from the denial of rehearing en banc to reinforce the original panel's decision, which she authored.<sup>108</sup> Writing separately in her response to the dissents, Chief Judge Tacha reiterated the panel's holdings that privately-donated monuments remain the private speech of the donors and a city park constitutes a traditional public forum for the erection of monuments.<sup>109</sup>

ANALYSIS

In *Summum v. Pleasant Grove City (Pleasant Grove I)*, the Tenth Circuit made two major errors in its ultimate conclusion.<sup>110</sup> The Tenth Circuit incorrectly relied on its previous holdings that privately-donated monuments remain the private speech of the donors for First Amendment purposes.<sup>111</sup> Had it applied the *Wells* four-factor test to the facts, the court would have concluded the privately-donated Ten Commandments monument constitutes governmental speech.<sup>112</sup> Even if the court had not applied the *Wells* test to hold the speech governmental, following a thorough forum analysis, it should have determined a city park constitutes a nonpublic forum for the erection of monuments, requiring the court to apply a lesser standard of review.<sup>113</sup>

*Private Speech vs. Government Speech*

In its first of three substantive holdings in this case, the Tenth Circuit characterized the Ten Commandments monument as the private speech of its donors, as opposed to the governmental speech of the city that acquired it.<sup>114</sup> The panel conducted no analysis of its own, but cited two of its previous decisions,

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<sup>106</sup> *Id.* at 1177.

<sup>107</sup> *Id.*

<sup>108</sup> *Pleasant Grove II*, 499 F.3d at 1178 (Tacha, C.J., responding to dissents).

<sup>109</sup> *Id.* at 1178–82.

<sup>110</sup> See *infra* notes 114–99 and accompanying text.

<sup>111</sup> See *infra* notes 114–34 and accompanying text.

<sup>112</sup> See *infra* notes 134–53 and accompanying text.

<sup>113</sup> See *infra* notes 154–99 and accompanying text.

<sup>114</sup> *Summum v. Pleasant Grove City (Pleasant Grove I)*, 483 F.3d 1044, 1047 n.2 (10th Cir. 2007). Because *Summum* sought access to display its Seven Aphorisms monument in Pioneer Park, where the government already displayed some monuments, the court must determine if the

*Summum v. Callaghan* and *Summum v. Ogden*.<sup>115</sup> However, those decisions do not create a sound basis for the holding in *Pleasant Grove I*, as one case lacked analysis on the issue and the other misapplied the test for determining speech ownership.<sup>116</sup>

In *Wells v. City & County of Denver*, the Tenth Circuit adopted a test from the Eighth Circuit to characterize speech as governmental or private in nature.<sup>117</sup> The *Wells* test determines whether the speech in question belongs to the government or another relevant actor by weighing the following four factors: (1) the central purpose of the program in which the speech occurs, (2) the amount of editorial control the government exercises over the content, (3) the identity of the literal speaker, and (4) with whom ultimate responsibility of the content rests.<sup>118</sup>

The Tenth Circuit, however, adopted the *Wells* test to resolve speech ownership questions after it decided *Callaghan*; therefore, *Callaghan* should not be determinative on this issue.<sup>119</sup> Moreover, the *Callaghan* court performed no speech ownership analysis; it simply stated that the Ten Commandments monument represented private speech expressing the views of its donors.<sup>120</sup>

Five years later in *Ogden*, the Tenth Circuit used the *Wells* four-factor test to characterize the ownership of the speech in question.<sup>121</sup> After applying the test, the *Ogden* court concluded Ogden's Ten Commandments monument represented the

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current displays constitute governmental or private speech. *See Wells v. City & County of Denver*, 257 F.3d 1132, 1139 (10th Cir. 2001). The Tenth Circuit focused on the privately-donated Ten Commandments monument displayed in Pioneer Park, as the facts surrounding this donation were the most developed. *See Pleasant Grove I*, 483 F.3d at 1047–48.

<sup>115</sup> *Pleasant Grove I*, 483 F.3d at 1047 n.2. Both cases dealt with a similar Ten Commandments monument placed on government property and Summum seeking to remove the Ten Commandments or display its own monument on the same property. *Summum v. Ogden*, 297 F.3d 995, 999 (10th Cir. 2002) (Ten Commandments on municipal building grounds); *Summum v. Callaghan*, 130 F.3d 906, 909–10 (10th Cir. 1997) (Ten Commandments on county courthouse lawn).

<sup>116</sup> *Summum v. Pleasant Grove City (Pleasant Grove II)*, 499 F.3d 1170, 1176, 1176 n.1 (10th Cir. 2007) (McConnell, J., dissenting); *see infra* notes 119–34 and accompanying text (demonstrating *Callaghan*'s lack of analysis and *Ogden*'s misapplication of the *Wells* test); *see also Ogden*, 297 F.3d at 1000 n.3 (explaining the Tenth Circuit's precedent with respect to one municipality's display of a similar Ten Commandments monument does not control the constitutionality of another municipality's display).

<sup>117</sup> 257 F.3d at 1140–42.

<sup>118</sup> *Id.*; *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000).

<sup>119</sup> *See Pleasant Grove II*, 499 F.3d at 1176. *See generally Wells*, 257 F.3d 1132; *Callaghan*, 130 F.3d 906.

<sup>120</sup> *See Callaghan*, 130 F.3d at 919 n.19 (“[T]he monolith is private speech expressing the views of the Eagles and not speech the County itself has uttered in furtherance of official government business.”); *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (rejecting an earlier holding because the previous court did not analyze the issue in question).

<sup>121</sup> *Ogden*, 297 F.3d at 1004–05.

speech of its donors rather than that of the city.<sup>122</sup> However, a thorough analysis of these factors demonstrates the speech in question constitutes governmental, not private speech.<sup>123</sup>

### *Misapplying the Wells Factors in Ogden*

In discussing the first factor, the *Ogden* court focused on the actual text of the Ten Commandments monument.<sup>124</sup> The first factor, however, looks to the central purpose of the *program in which the speech is located*, not the purpose of the speech content.<sup>125</sup> As the *Ogden* court noted, the court should look to the *Knights* decision for clarification in applying the four factors.<sup>126</sup> In *Knights*, this factor did not turn on the donor's purpose for its donation, but on the government's purpose for accepting and recognizing the donation.<sup>127</sup> Similarly, the *Ogden* court should have focused on the city's purpose for the acceptance and display of permanent monuments and historical markers on the municipal grounds, not merely the purpose of the text inscribed on one such monument.<sup>128</sup>

Similarly, the Tenth Circuit focused on the text of the Ten Commandments monument in its analysis of the third factor, the identity of the literal speaker.<sup>129</sup> The

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<sup>122</sup> *Id.* at 1006.

<sup>123</sup> *Pleasant Grove II*, 499 F.3d at 1176–77 (McConnell, J., dissenting).

<sup>124</sup> *Ogden*, 297 F.3d at 1004.

<sup>125</sup> Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 633 (2008); e.g., *Wells*, 257 F.3d at 1141 (“the central purpose of the . . . program”) (quoting *Knights*, 203 F.3d at 1093); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 923 (10th Cir. 2002) (“the ‘central purpose’ of the project”); *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008) (“the central ‘purpose’ of the program in which the speech in question occurs”) (quoting *Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dept. of Motor Vehicles*, 288 F.3d 610, 618–19 (4th Cir. 2002)).

<sup>126</sup> *Ogden*, 297 F.3d at 1005 n.5.

<sup>127</sup> *Knights*, 203 F.3d at 1093 (considering the central purpose of the “enhanced underwriting program” and not the donor's desire to promote the Ku Klux Klan). In *Knights*, a state-owned radio station accepted donations and in return, would make announcements using the donors’ “logograms, slogan, and product summaries.” *Id.* at 1094 n.9. The Ku Klux Klan (KKK) tried to make a donation in order to receive on-air recognition. *Id.* at 1089. The state denied acceptance, and the KKK sued for a free speech violation. *Id.* at 1089–90. While discussing the first factor, the *Knights* court explained the central purpose of the program was “not to promote the views of the donors, but to acknowledge” the donors for their actions. *Id.* at 1093.

<sup>128</sup> Brief of Amicus Curiae International Municipal Lawyers Ass’n in Support of Petitioners at 19, *Pleasant Grove City, Utah v. Summum (Pleasant Grove III)*, 128 S. Ct. 1737 (2008) (No. 07-7665), 2008 WL 2550618 [hereinafter Int’l Brief] (“[T]he essential question is not what the donors of a monument had in mind, but rather, what was the city's purpose in agreeing to display the monument.”); see *Knights*, 203 F.3d at 1093 (analyzing the overall purpose of the aggregate decisions to accept or reject funds). In *Wells*, only one display existed; therefore, the court did not need to distinguish between the actual speech and the program in which the speech was located. See *Wells*, 257 F.3d at 1141–42.

<sup>129</sup> *Ogden*, 297 F.3d at 1004.

Eagles did speak by selecting the text and look of the monument they donated.<sup>130</sup> However, the government was the literal speaker in question, as it selected and displayed several monuments on the municipal grounds; the Ten Commandments merely constituted a portion of that overall speech.<sup>131</sup> The United States Supreme Court has, on multiple occasions, recognized that a compilation of speech of third parties qualifies, in itself, as a form of speech.<sup>132</sup> The display of monuments on the municipal grounds in question constitutes such a compilation, which makes the Ogden city government the literal speaker.<sup>133</sup> The *Ogden* court's misapplication of two *Wells* factors resulted in a holding that the Ten Commandments monument constituted private speech.<sup>134</sup>

### *Applying the Four Factors to Pleasant Grove*

The *Pleasant Grove I* court relied on the *Ogden* court's misapplication of the factors instead of applying the *Wells* test itself.<sup>135</sup> As such, the United States Court of Appeals for the Tenth Circuit should have conducted a proper application of the *Wells* factors to the facts of *Pleasant Grove I*.<sup>136</sup>

The first *Wells* factor that should have been applied is the central purpose of the program in which the questioned speech occurs.<sup>137</sup> Pleasant Grove maintained Pioneer Park and its displays with the goal of promoting the city's pioneer heritage.<sup>138</sup> The city carried out its purpose by accepting only permanent monuments

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<sup>130</sup> *Id.*

<sup>131</sup> See *Knights*, 203 F.3d at 1093–94 (recognizing the government was the literal speaker by selecting which donations it would accept and deny); Corbin, *supra* note 125, at 633 (“Here, the government acts less like an author or host and more like an editor or moderator exercising control over the agenda.”).

<sup>132</sup> *E.g.*, Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 674 (1998) (“Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.”) (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 570 (1995) (“[A] speaker does not forfeit constitutional protection simply by combining multifarious voices . . . or by failing to generate, as an original matter, each item featured in the communication.”)).

<sup>133</sup> Corbin, *supra* note 125, at 629–30 (“In such cases, the literal speaker might be considered the one who owns the sign or the property on which the message is displayed.”).

<sup>134</sup> Int’l Brief, *supra* note 128, at 19; see *Ogden*, 297 F.3d at 1004–05.

<sup>135</sup> See *Pleasant Grove II*, 499 F.3d at 1176–77 (McConnell, J., dissenting) (advocating overruling of *Ogden* and reapplying the four-factor *Wells* test).

<sup>136</sup> See *id.*; Brief of the Foundation for Free Expression as Amicus Curiae Supporting Petitioner at 11, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-7665), 2008 WL 2511783 [hereinafter Found. Brief] (“When applied correctly to *Pleasant Grove*, the presence of government speech is evident.”).

<sup>137</sup> *Wells*, 257 F.3d at 1141.

<sup>138</sup> Brief of Appellee at 3, *Pleasant Grove I*, 483 F.3d 1044 (No. 06-4057), 2006 U.S. 10th Cir. Briefs LEXIS 524.

directly relating to the history of Pleasant Grove or donated by groups with long-standing ties to the community.<sup>139</sup> These requirements advance the city's central purpose for maintaining Pioneer Park, the promotion of its history.<sup>140</sup> This factor weighs in favor of governmental speech.<sup>141</sup>

The second factor of the *Wells* test is the amount of editorial control over the content of the speech.<sup>142</sup> Little question exists as to the result of this factor; Pleasant Grove asserted no control over the content of the Ten Commandments monument.<sup>143</sup> This factor weighs in favor of the speech being private.<sup>144</sup>

The third *Wells* factor focuses on the identity of the literal speaker.<sup>145</sup> Here, Pleasant Grove is the literal speaker, as it selected and displayed the historical monuments and artifacts at Pioneer Park.<sup>146</sup> Each monument and artifact indeed had its own message, but the government became the literal speaker when it selected and combined them all into the single collection promoting its history.<sup>147</sup>

In the final factor, the court should have assessed who bore ultimate responsibility for the content of the speech.<sup>148</sup> Little doubt exists that Pleasant Grove held responsibility; once the Eagles turned the Ten Commandments

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<sup>139</sup> *Pleasant Grove I*, 483 F.3d at 1047.

<sup>140</sup> Int'l Brief, *supra* note 128, at 19; *see Van Orden v. Perry*, 545 U.S. 677, 681, 691 (2005) (recognizing Texas' legitimate purpose of promoting "its political and legal history" by displaying Ten Commandments among other monuments and markers celebrating the "people, ideals, and events that compose Texan identity").

<sup>141</sup> Int'l Brief, *supra* note 128, at 19.

<sup>142</sup> *Wells*, 257 F.3d at 1141. The factors of the *Wells* test that focus on content of the speech could focus instead on the content of one of Pleasant Grove's other privately-donated monuments, e.g., the September Eleven firefighters, but the facts surrounding the Ten Commandments monument are more developed in the record. *See Pleasant Grove I*, 483 F.3d at 1047–48.

<sup>143</sup> *Pleasant Grove II*, 499 F.3d at 1180 (Tacha, C.J., responding to dissents); *Ogden*, 297 F.3d at 1004. *But see* Found. Brief, *supra* note 136, at 11 (arguing Pleasant Grove exercises editorial control over the content by choosing whether to accept or reject items based on their content).

<sup>144</sup> *See Ogden*, 297 F.3d at 1004–05. *But see* Found. Brief, *supra* note 136, at 11 (arguing this factor weighs in favor of government speech).

<sup>145</sup> *Wells*, 257 F.3d at 1141.

<sup>146</sup> Int'l Brief, *supra* note 128, at 12; *see Knights*, 203 F.3d at 1094 n.9 (recognizing announcements primarily identified the individual sponsors, but noting the selection and dissemination of the collateral speech makes the government the literal speaker).

<sup>147</sup> Found. Brief, *supra* note 136, at 12 ("The amalgamation of monuments, while containing private expression, is a collective 'whole.' The city is not parroting the words engraved on individual monuments, but through the completed exhibit says: "This is our pioneer-era history.").

<sup>148</sup> *Wells*, 257 F.3d at 1142.

monument over to the city, all property rights transferred with it.<sup>149</sup> At that point, the city could have done whatever it wanted with the monument.<sup>150</sup>

Therefore, a close analysis of the *Wells* test demonstrates at least three of the four factors weigh in favor of governmental speech.<sup>151</sup> If the panel had conducted this analysis, it would have concluded the Ten Commandments monument constitutes governmental speech.<sup>152</sup> Doing so would have negated the panel's need for the forum analysis, as the First Amendment allows government entities to speak, including or excluding any speech it sees fit, subject to other constitutional provisions.<sup>153</sup>

### *Free Speech Forum Analysis*

Because the Tenth Circuit did conclude the privately-donated monuments on display at Pioneer Park constitute the private speech of its donors, it then engaged in a forum analysis to determine the degree to which the government could deny public access.<sup>154</sup> In conducting the forum analysis, the courts consider both the government property at issue and the type of access sought.<sup>155</sup> In determining the relevant forum, the Tenth Circuit correctly identified the “permanent monuments in the city park” as the relevant forum.<sup>156</sup>

<sup>149</sup> *Pleasant Grove II*, 499 F.3d at 1177 (McConnell, J., dissenting).

<sup>150</sup> *Id.*; see *Ogden*, 297 F.3d at 1005 (“After the City acquired title to the Monument, however, presumably the City could have sold, re-gifted, modified, or even destroyed the Monument at will.”).

<sup>151</sup> See *supra* notes 137–50 and accompanying text; cf. Found. Brief, *supra* note 136, at 4–15 (arguing all four factors weigh in favor of governmental speech). But see Corbin, *supra* note 125, at 628 (arguing the United States Supreme Court should create a third category, “mixed speech,” which exists when not all factors point exclusively to government or private speech).

<sup>152</sup> *Pleasant Grove II*, 499 F.3d at 1176–77 (McConnell, J., dissenting); Tebbe, *supra* note 25, at 1334 (“And Judge McConnell, dissenting from the denial of rehearing en banc, argued powerfully that the existing displays constituted government speech, from which the city could excluded [sic] Summum.”).

<sup>153</sup> *Pleasant Grove II*, 499 F.3d at 1177 (McConnell, J., dissenting) (citing *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) (“Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.”)); see *infra* notes 194–95 and accompanying text (discussing restrictions on government speech).

<sup>154</sup> *Pleasant Grove I*, 483 F.3d at 1050.

<sup>155</sup> *Id.* The type of access refers to the type of speech an individual wishes to communicate on the property, e.g., leaflet, concert, or permanent monument. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). The general public's access to view or hear the speech is not relevant to this analysis. See *id.*

<sup>156</sup> *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting) (“Because the government property involved in [*Pleasant Grove I*] consists of the city park[], and the access sought is the installation of permanent monuments, the panel correctly concluded that the relevant forum consists of permanent monuments in the city park[]”).

Once a court identifies the relevant forum, it then determines into which of the three *Perry* categories it falls.<sup>157</sup> At this crucial point in the analysis, the court took a misstep.<sup>158</sup> After identifying the forum as the “permanent monuments in the city park,” the court prescribed the entire city park as the forum to be classified.<sup>159</sup>

The Tenth Circuit asserted it could identify the narrower forum in step one (permanent monuments in the city park) and classify the broader forum in step two (the entire city park).<sup>160</sup> However, the forum identified in the first step *is the same forum* to be classified in the second step of the analysis.<sup>161</sup> Identifying the forum in step one of the analysis and classifying a broader forum in step two leads to an illogical conclusion; i.e., the public has a right to erect permanent monuments in all public parks.<sup>162</sup>

The court, then, should have categorized the “permanent monuments in the city park.”<sup>163</sup> Traditional public fora consist of places which have forever been used by the public for speech, discussion, and assembly.<sup>164</sup> The public has used

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<sup>157</sup> *Pleasant Grove I*, 483 F.3d at 1050.

<sup>158</sup> *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting).

<sup>159</sup> *Id.* By re-characterizing the forum as the entire city park in the second step, the Tenth Circuit easily classified it as a traditional public forum, as the United States Supreme Court has characterized public streets and parks as quintessential public fora. *Id.*; see *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>160</sup> *Pleasant Grove I*, 483 F.3d at 1051 (“[T]he fact that Sumnum seeks access to particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum.”) (citing *Cornelius*, 473 U.S. at 802 (“Having identified the forum . . . we must decide whether it is nonpublic or public in nature.”)).

<sup>161</sup> See, e.g., *Cornelius*, 473 U.S. at 801, 805 (identifying the forum as “CFC [a charity drive] and its attendant literature” and classifying it instead of the federal workplace in which the charity drive was held); *Perry*, 460 U.S. at 46–47 (identifying the forum as “internal mail system” and classifying it instead of the public school in which the mail system was located); *Ogden*, 297 F.3d at 1002 (identifying the forum as “permanent monuments on the lawn of the Ogden City municipal building” and classifying it instead of the municipal grounds on which the monuments stood).

<sup>162</sup> *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting) (“In [*Perry*], a case which the panel cites, the [United States] Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora.”); *Cornelius*, 473 U.S. at 801 (“[F]orum analysis is not completed merely by identifying the government property at issue.”); see *Graff v. City of Chi.*, 9 F.3d 1309, 1314 (7th Cir. 1993) (“[N]o person has a constitutional right to erect or maintain a structure on the public way. . . . ‘If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.’”) (quoting *Lubavitch Chabad House, Inc. v. Chi.*, 917 F.2d 341, 347 (7th Cir. 1990)).

<sup>163</sup> *Pleasant Grove II*, 499 F.3d at 1173 (Lucero, J., dissenting).

<sup>164</sup> *Perry*, 460 U.S. at 45.

parks as such for longer than can be remembered—but for speech, concerts, and protests—not for erecting permanent monuments.<sup>165</sup> The monuments in the park, therefore, do not constitute a traditional public forum.<sup>166</sup>

Because parks do not constitute traditional public fora for the display of permanent monuments, the court should have determined if Pioneer Park represents a designated public forum or a nonpublic forum for the display of permanent monuments.<sup>167</sup> Public property remains a nonpublic forum if the government does not allow free speech access on the property.<sup>168</sup> A nonpublic forum will become a designated public forum when the government intentionally opens a nonpublic forum for public speech.<sup>169</sup>

A complication arises, however, when the government allows some, but not all, speech on a piece of public property.<sup>170</sup> How the government opens the forum determines which of the two forum types it maintains.<sup>171</sup> When the government makes the forum generally available to the public, it creates a designated forum.<sup>172</sup> If, however, the government only allows selective access for some individuals, as opposed to general access for the public, the forum remains nonpublic (characterized as a limited public forum).<sup>173</sup>

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<sup>165</sup> *Lubavitch Chabad*, 917 F.2d 341, 347 (7th Cir. 1990) (“Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.”); *Tucker v. City of Fairfield, Ohio*, 398 F.3d 457, 462 (6th Cir. 2005) (“Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved.”); *Pleasant Grove II*, 499 F.3d at 1173 (Lucero, J., dissenting) (“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 . . .”).

<sup>166</sup> *Pleasant Grove II*, 499 F.3d at 1175 (McConnell, J., dissenting) (“[N]either the logic nor the language of these [United States] Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties.”).

<sup>167</sup> *Id.* at 1173 (Lucero, J., dissenting).

<sup>168</sup> *Cornelius*, 473 U.S. at 802.

<sup>169</sup> *Id.*

<sup>170</sup> *Forbes*, 523 U.S. at 679.

<sup>171</sup> *Id.*

<sup>172</sup> *Perry*, 460 U.S. at 45; *e.g.*, *Eagon v. City of Elk City*, 72 F.3d 1480 (10th Cir. 1996) (granting plaintiff access for temporary display in park open to the public for such displays during “Christmas in the Park” event).

<sup>173</sup> *Forbes*, 523 U.S. at 679; *see supra* notes 69–73 and accompanying text (explaining that selective access creates a limited public forum, a subset of nonpublic fora).

Pleasant Grove did not grant access to the general public to its park for erection of permanent monuments.<sup>174</sup> Instead, Pleasant Grove had a system in place that permitted certain individuals meeting certain specifications to propose privately-donated displays.<sup>175</sup> Pleasant Grove required all permanent displays in Pioneer Park pertain to the community's history or be donated by groups with long-standing community ties.<sup>176</sup> If a proposal met those specifications and the city council determined that such an addition would be agreeable to the city, then the individual could donate, and the city would accept, the permanent monument.<sup>177</sup> Furthermore, the city has only accepted a handful of these privately-donated monuments in sixty years, which illustrates selective access.<sup>178</sup>

Therefore, if the court must conduct a forum analysis, the City of Pleasant Grove opened Pioneer Park for selective access to individual speakers, which created a limited public forum.<sup>179</sup> As the United States Supreme Court has treated limited public fora as nonpublic, the court should have then determined whether it considered the exclusions reasonable and viewpoint-neutral.<sup>180</sup> In denying Summum's motion for a preliminary injunction, the district court applied this test and decided Pleasant Grove's policy met the standard.<sup>181</sup>

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<sup>174</sup> *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting).

<sup>175</sup> *Pleasant Grove I*, 483 F.3d at 1047.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*; see *Perry*, 460 U.S. at 47 (concluding when principals grant limited access to school mailboxes by their own discretion, the nonpublic forum is not transformed into a designated public forum).

<sup>178</sup> *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting); Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2008 WL 2521267 [hereinafter U.S. Brief] (recognizing the city only accepted eleven privately-donated displays during the park's sixty-year existence).

<sup>179</sup> See *supra* notes 114–53 and accompanying text (arguing the speech in question constitutes government speech, which removes the need for a forum analysis); *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting) (recognizing Pleasant Grove opened the park for selective access, creating a limited public forum). *But see* Dolan, *supra* note 73, at 111–18 (arguing limited public fora where government has a subjective expressive purpose and makes selective choices should instead be classified as “special public purpose” fora and should be treated as government speech).

<sup>180</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001); see *supra* notes 69–73 and accompanying text (demonstrating courts treat limited public fora as nonpublic fora).

<sup>181</sup> *Pleasant Grove I*, 483 F.3d at 1050. However, Judge Lucero recognized the trial court may have erred in this regard and urged for arguments on this issue. *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting).

*Implications of the United States Court of Appeals for Tenth Circuit Decision*

The Tenth Circuit's decision focused on the Ten Commandments displayed in Pleasant Grove, Utah.<sup>182</sup> The result of this decision, however, put governments at all levels in a difficult position.<sup>183</sup> By classifying monuments in a city park as a traditional public forum, the Tenth Circuit gave governments two choices: (1) allow permanent monuments inside the park (including any created by the government and any and all created by individuals), or (2) allow no monuments of any kind.<sup>184</sup>

For example, the Tenth Circuit's holding in *Pleasant Grove I* forced the City of Casper, Wyoming into this troubling dichotomy.<sup>185</sup> The city government owns a city park, the Historical Monument Plaza, which houses several monuments and plaques, some privately-funded, recognizing the history of the city, state, and nation.<sup>186</sup> Fred Phelps, the Kansas pastor of the Westboro Baptist Church, began pressuring the city to erect a monument in the park condemning Matthew Shepard, a Casper native killed in 1998.<sup>187</sup> Under the Tenth Circuit's holding, Casper will have to remove all monuments from the park (which would destroy the park's purpose) or allow Pastor Phelps (and any other person who so wishes) to place his monument on the property.<sup>188</sup>

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<sup>182</sup> *Pleasant Grove II*, 499 F.3d at 1175 (McConnell, J., dissenting).

<sup>183</sup> *Id.* at 1174 (Lucero, J., dissenting).

<sup>184</sup> *Id.* at 1175 (McConnell, J., dissenting). It should be noted, however, that the second option only remains available if a court considers the exclusion of all monuments narrowly tailored to serve a compelling government interest. *Perry*, 460 U.S. at 45; see *Lopez*, *supra* note 79, at 219–20 (arguing a blanket ban on permanent monuments would constitute a justifiable time, place, and manner restriction that is narrowly drawn to satisfy a compelling state interest).

<sup>185</sup> Brief Amicus Curiae of the Cities of Casper, Wyoming et al. in Support of the Petition at 1, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2007 WL 4618401 [hereinafter Casper Brief].

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 2–3. In 1998, two men met Matthew Shepard, a gay University of Wyoming student, and lured him from a bar, tied him to a split-rail fence, bludgeoned him in the head with a pistol, and left him to die in the Wyoming cold. CNN – Suspect Pleads Guilty in Beating Death of Gay College Student (Apr. 5, 1999), <http://www.cnn.com/US/9904/05/gay.attack.trail.02/> (last visited Nov. 17, 2008) [hereinafter CNN]; Matthew Shepard Foundation: Matthew's Life, [http://www.matthewshepard.org/site/PageServer?pagename=mat\\_Matthews\\_Life](http://www.matthewshepard.org/site/PageServer?pagename=mat_Matthews_Life) (last visited Nov. 17, 2008) [hereinafter Foundation]. Matthew Shepard was born in Casper, Wyoming, where his family held his funeral. Foundation. Pastor Fred Phelps began his involvement with Matthew Shepard and the City of Casper when he organized an anti-gay protest outside Shepard's funeral. CNN.

<sup>188</sup> Casper Brief, *supra* note 185, at 13.

Pleasant Grove and Casper represent just the beginning.<sup>189</sup> The Tenth Circuit's decision would effectively impact all governmental entities—from small towns to the federal government.<sup>190</sup> Allow one monument, allow them all.<sup>191</sup>

### *Implications of the United States Supreme Court Decision*

After hearing arguments on appeal in *Pleasant Grove III*, the United States Supreme Court should reverse the United States Court of Appeals for the Tenth Circuit.<sup>192</sup> The Court should conclude that selection and denial of privately-donated monuments amounts to an act of government speech.<sup>193</sup> This would allow governments to make aesthetic and content-based decisions when beautifying their properties.<sup>194</sup> Individual citizens could challenge choices the government makes via the democratic process or through other constitutional provisions.<sup>195</sup>

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<sup>189</sup> *Id.* The City of Santa Fé faces a broader type of harm than Casper:

La Villa Real de la Santa Fé de San Francisco de Asis (Santa Fé) was founded in 1610 and is world-renowned for its long history and its eponymous trail, railroad, and architectural style. Santa Fé celebrates these glories with permanent monuments and sculptures in its parks. Many of the monuments and works of art were donated by private parties, accepted by the City, and proudly displayed in its public spaces for the reason just described. The decision below, if allowed to stand, will force the City to choose between denuding its public spaces of artwork reflecting its history and culture or allowing those public spaces to be inundated with hundreds of permanent displays furthering private expression.

*Id.* at 4.

<sup>190</sup> *Id.* at 1; Brief of the Commonwealth of Virginia et al. as Amici Curiae in Support of the Petitioners at 1, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2008 WL 2550616 [hereinafter Va. Brief] (arguing for fourteen states and Puerto Rico that the United States Supreme Court reverse the lower decision and allow state governments to control their properties); U.S. Brief, *supra* note 178, at 1–2 (“National parklands contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, a great deal of the public sculpture in Washington, D.C., and all but one of the 1324 monuments, markers, tablets, and plaques on display at Vicksburg National Military Park.”).

<sup>191</sup> *Pleasant Grove II*, 499 F.3d at 1175 (McConnell, J., dissenting) (“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.”); Lorenz, *supra* note 4, at 650.

<sup>192</sup> Va. Brief, *supra* note 190, at 1; U.S. Brief, *supra* note 178, at 10.

<sup>193</sup> Va. Brief, *supra* note 190, at 4. Regardless of the conclusion of this decision, an acceptance, clarification, or rejection of the four-factor test as applied by several circuits will provide guidance to courts and practitioners alike. See *Ariz. Life*, 515 F.3d at 965, *cert. denied*, No. 07-1366, 2008 WL 1926739 (Oct. 6, 2008) (looking for guidance from the United States Supreme Court on the four-factor test).

<sup>194</sup> U.S. Brief, *supra* note 178, at 11 (“[A government] ‘may legitimately’ seek ‘to communicate to others an official view as to proper appreciation of history, state pride, and individualism.’”) (quoting *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)); Brief of Amici Curiae American Humanist Ass’n et al. in Support of Neither Party at 7, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2008 WL 2511782.

<sup>195</sup> U.S. Brief, *supra* note 178, at 12 (“If the citizenry objects’ to what its government chooses to say, ‘newly elected officials later could espouse some different or contrary position.’”) (quoting

If the Court holds otherwise, it should classify a public park as a nonpublic forum for the display of permanent monuments, or, if the government allows selective access, a limited public forum.<sup>196</sup> This holding would allow governments at all levels to make content-based decisions, but still force them to follow a standard of reasonableness and viewpoint neutrality.<sup>197</sup> Cities like Pleasant Grove and Casper could set standards for private displays, e.g., requiring a historical significance.<sup>198</sup> Government officials would still be prohibited from making arbitrary decisions, and individuals could still challenge exclusions in the court system.<sup>199</sup>

### CONCLUSION

In deciding *Sumnum v. Pleasant Grove City*, the Tenth Circuit sitting in panel made two crucial errors.<sup>200</sup> First, it relied on a previous Tenth Circuit decision which incorrectly applied the *Wells* four-factor test to determine the display in question constitutes private, rather than government speech.<sup>201</sup> After doing so, the panel conducted a forum analysis, in which it incorrectly classified monuments in a park as a traditional public forum instead of a nonpublic forum, subjecting the city's actions to stricter scrutiny than necessary.<sup>202</sup> The court should have characterized Pioneer Park as a limited public forum and applied the lesser standard of reasonableness and viewpoint neutrality to Pleasant Grove's exclusion of Sumnum's proposed monument.<sup>203</sup> Instead, the court held all public parks

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Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)). Moreover, Professor Norton explained numerous other protections the United States affords citizens when dealing with governmental speech:

[Government speech] may still, for example, contravene the Constitution's Establishment or Equal Protection Clauses if it endorses religion or furthers racial discrimination . . . [and] may in some settings violate constitutional constraints like the Guarantee Clause or statutory limitations like state and federal laws prohibiting the use of government resources for campaign speech.

Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 600 (2008) (footnotes omitted).

<sup>196</sup> Lorenz, *supra* note 4, at 649.

<sup>197</sup> *Callaghan*, 130 F.3d at 916.

<sup>198</sup> *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting).

<sup>199</sup> *Id.*

<sup>200</sup> See *supra* notes 114–99 and accompanying text.

<sup>201</sup> See *supra* notes 114–53 and accompanying text.

<sup>202</sup> See *supra* notes 154–73 and accompanying text.

<sup>203</sup> See *supra* notes 174–81 and accompanying text.

open for cluttering by any and all individuals wishing to add their own permanent monuments.<sup>204</sup> The United States Supreme Court, therefore, should reverse the Tenth Circuit and allow governments to reasonably control the look of their public properties.<sup>205</sup>

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<sup>204</sup> See *supra* notes 182–91 and accompanying text.

<sup>205</sup> See *supra* notes 192–99 and accompanying text.