

GOVERNMENT CONTROLS DONATED PARK MONUMENT MESSAGE

James C. Kozlowski, J.D., Ph.D.

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In the case of *Pleasant Grove City v. Summum*, 172 L. Ed. 2d 853 (U.S. 2/25/2009), the question before the Supreme Court of the United States was "whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected."

FACTS

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

Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM" and be similar in size and nature to the Ten Commandments monument.

The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

The Summum church incorporates elements of Gnostic Christianity. Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments.

In May 2005, Summum's president again wrote to the mayor asking to erect a monument, but the letter did not describe the monument, its historical significance, or Summum's connection to the community. The city council rejected this request.

In 2005, Summum filed this action against the City and various local officials, asserting, among other claims, that the City had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. Summum sought a preliminary injunction directing the City to permit Summum to erect its monument in Pioneer Park.

After the federal district court denied Summum's request, Summum appealed. Noting that public parks have traditionally been regarded as public forums, the federal appeals court held that the City could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means. The Supreme Court of the United States granted the City's petition to review this decision.

GOVERNMENT SPEECH

As noted by the Supreme Court, "[n]o prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park." On appeal, the City argued that precedents that govern this situation "are pertinent cases "concerning government speech." Summum, however, urged the Court to adopt the holding of the appeals court, i.e., "the applicable cases are those that analyze private speech in a public forum."

In addressing this issue, the Court had to determine whether the City was engaging in its "own expressive conduct" or "providing a forum for private speech" under the circumstances of this particular case. In so doing, the Court noted that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." Accordingly, the Court found the Free Speech Clause "had no application" if government officials were engaging in their own expressive conduct."

The Government's own speech is exempt from First Amendment scrutiny. Government is not restrained by the First Amendment from controlling its own expression. A government entity has the right to "speak for itself." It is entitled to say what it wishes. It is the very business of government to favor and disfavor points of view.

Further, the Court noted that "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."

Where the government controls the message, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources; a government entity may regulate the content of what is or is not expressed when it enlists private entities to convey its own message.

On the other hand, the Court acknowledged that "government does not have a free hand to regulate private speech on government property." On the contrary, the Court recognized that "the public retain strong free speech rights when they venture into public streets and parks" which have "immemorially been held in trust for the use of the public... for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In such "traditional public fora," like public parks, the Court found "government entities are strictly limited in their ability to regulate private speech."

Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited.

In the opinion of the Court, the "forum doctrine" is appropriately applied by courts "in situations in which government-owned property, like public parks, are "capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." In contrast, the Court found "public parks can accommodate only a limited number of permanent monuments." Moreover, in the opinion of the Court, it was "hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression." As a result, the Court held that traditional public forum analysis under the Free Speech Clause did not apply to a city's decision to reject a certain privately donated monument for a city park.

The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And 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...

If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought.

In the opinion of the Court, "[p]ermanent monuments displayed on public property typically represent government speech." As noted by the Court, "[g]overnments have long used monuments to speak to the public." Moreover, the Court found governments have not maintained "viewpoint neutrality" in constructing a monument on public land. On the contrary, the Court found government design monuments as a "means of expression" to "convey some thought or instill some feeling in those who see the structure."

SELECTIVE RECEPTIVITY

Further, the Court found "privately financed and donated monuments that the government accepts and displays to the public on government land" similarly "speak for the government." With respect to such privately financed or donated monuments, the Court found the "general government practice" has been "one of selective receptivity." In accepting privately funded or donated monument, the Court noted that governments have generally exercised "editorial control" through "prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals."

[C]ities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture.

As a result, the Court found accepted monuments constituted "government speech" because such monuments "are meant to convey and have the effect of conveying a government message."

Applying these principles to the facts of the case, the Court found it was "clear that the monuments in Pleasant Grove's Pioneer Park represent government speech." Specifically, the Court found the City had decided which privately donated monuments to accept and display in Pioneer Park. Further, there was no indication that "the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors." On the contrary, the Court found that "the City has effectively controlled the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection.

The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of Summum's concern; and the City has now expressly set forth the criteria it will use in making future selections.

As a result, the Court held that "the City's decision to accept certain privately donated monuments while rejecting Summum's is best viewed as a form of government speech... not subject to the Free Speech Clause." The Court, therefore, reversed the decision of the federal appeals court which had held that the City could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means.