Pleasant Grove City v. Summum: The Supreme Court's First Look at Municipal Government Speech

—by Mary Jean Dolan—

In *Pleasant Grove City v. Summum*, the United States Supreme Court unanimously held that a city's display of privately-donated, permanent monuments in a public park is government speech and, thus, is not subject to Free Speech Clause scrutiny.[1] The Court reversed the U.S. Court of Appeals for the Tenth Circuit's application of public forum analysis and its injunction requiring installation of Summum's rejected monument. The outcome was predictable due to the private sector's ubiquitous role in monument creation, and the vast impracticalities of a content-neutral monument rule.[2] The Court's broad reasoning, however, gives municipal attorneys a helpful precedent on this new doctrine.

This case is highly significant because it is the Supreme Court's first "government speech" case that (1) does not involve a government-funded program, and (2) analyzes local governments' increasing partnerships with the private sector on projects that involve expression. Also, IMLA had a leadership role in the case. On the facts, its membership survey provided the Court with critical, unique information on monument practices around the country.[3] On the law, the Court adopted a novel argument, made in IMLA's *amicus* brief and related law review articles, that government speech includes not only specific written policies (e.g., "recycle now") but, also, broad, thematic "municipal identity" messages.[4] This article analyzes the decision's rationales, gives practical advice on its scope and municipal policies, and evaluates its likely impact on future Establishment Clause challenges.

Background

Pioneer Park in Pleasant Grove City contains some 15 historical buildings and permanent artifacts, many showcasing the City's history, and most donated by private persons or groups. The Park includes a Ten Commandments monument: donated by the local Fraternal Order of Eagles in 1971, the City Council had voted to accept and display it in the Park.[5]

Summum is a religious organization, founded in 1975 and headquartered in Salt Lake City, approximately 35 miles from Pleasant Grove. In 2003, Summum's President wrote to the Mayor, requesting permission to erect, in the Park, a stone monument of Summum's Seven Aphorisms, similar in size and appearance to the Ten Commandment monument.[6] The City denied the request in a letter stating that all permanent displays in Pioneer Park either "directly relate to the history of Pleasant Grove" or "were donated by groups with long-standing ties" to the community. The next year, the City Council passed a resolution which codified this stated past practice, and added procedures and additional criteria, including safety and esthetics.[7] In 2005, Summum sued, claiming that the City's exclusion of its monument, while displaying other permanent monuments, violated the federal Free Speech Clause. After the district court declined to require installation of its monument, Summum appealed.[8]

The Tenth Circuit decided for Summum and required the City to erect the Seven Aphorisms monument.[9] The court reasoned that, because a public park was a traditional public forum, the strict scrutiny test applied to the City's content-based rejection of Summum's request. Showcasing local history and culture was not a compelling reason, nor was that criteria related to stronger state interests, including safety.[10] Subsequently, there were two opinions dissenting from the denial of the petition for rehearing *en banc*.[11] Noting that forum analysis looks to the type of access sought – here, the installation of a permanent monument – Judge Lucero asserted that limited public forum analysis should apply. Finding the City's criteria to be "reasonable content limitations," Judge Lucero advised remand to evaluate whether their application was "viewpoint-neutral."[12] Judge McConnell then argued that monuments were government speech, based primarily on city ownership and control of such structures.[13]

The Government Speech Doctrine: An Overview

The impact of a finding of "government speech" is dramatic: it eliminates the requirement of viewpoint neutrality. The starting point is that governments must express points of view on many topics as a necessary part of governing: it is what they are elected to do. The new government speech doctrine extends this truism to contexts involving claims by excluded, restricted, or compelled private speakers. To begin analysis in *Summum*, Justice Alito declared: "A government entity may exercise this same freedom to express its own views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[14]

Before *Summum*, the Court's few government speech cases involved clear and specific government policies.[15] In the leading precedent, *Johanns v. Livestock Mktg. Ass'n*, the Court dismissed a compelled-speech claim based on a mandatory check-off tax on beef producers.[16] Analyzing an ad campaign created by an entity which included a large contingent of private industry representatives, the Court found "government speech" based on (i) the government's stated policy to increase beef consumption, and (ii) its prior review of all ad content. An earlier case, *Rust v. Sullivan*, upheld a restriction on abortion counseling in federally-funded health clinics, done to further the Administration's pro-life policy.[17]

In a related doctrine, which is sometimes conflated with government speech, the Court's "speech selection" cases have recognized that, in some contexts,

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government's role necessarily requires discretion in choosing among private speakers. "Content neutrality" is neither possible nor required when a government entity functions as an arts patron (*Nat'l Endowment of the Arts v. Finley*[18]), public television broadcaster (*Ark. Educ. Tel. Comm'n v. Forbes*[19]), or library (*U.S. v. Am. Library Ass'n*[20]). This line of cases is grounded in judgmental necessity, although the extent to which it allows governments to express policy viewpoints through speech selection remains uncertain.[21] For example, there certainly would be First Amendment implications if a library were to exclude all books sympathetic to a socialist or communist perspective. In contrast, under *Summum*, a city which displays an Iraq War memorial is permitted to reject proposals for monuments depicting Saddam Hussein, or the war's civilian casualties.[22]

In *Summum*, the Court held (similarly to IMLA's arguments) that *Johanns* could be applied to broad, thematic identity messages and, also, that the logistical obstacles noted in the *Finley* line of cases precluded forum analysis here.[23] In argument, the City emphasized the "speech selection" cases, asserting that the City's role as "curator" of the Park did not include adopting the content of any particular monument (including the Ten Commandments) as its own speech.[24] As discussed below, the Court's holding – that monuments are the government's own speech – triggers more intricate interactions with the Establishment Clause.

The Court's Rationale

Justice Alito, writing for the Court, did not lay out any clear-cut test for government speech. ˆThe decision's many aspects can be summarized most usefully, however, as three main principles: (1) governments intend to convey *some* message when displaying privately-donated monuments in public parks; (2) viewers attribute such monuments' expression to the government; and (3) finding government speech in this context does little or no harm to First Amendment values.[25]

The finding of governmental expressive intent rested on a number of factors. To start, monuments are an inherently expressive context, which is bolstered

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by a long tradition of governments using monuments "to speak to the public."[26] Accordingly, the Court concluded that, regardless of whether a government commissions a monument, or displays a privately-financed or initiated monument, "it does so because it wishes to convey some thought or instill some feeling in those who see the structure."[27] Second, a government must affirmatively decide whether to accept a donated monument and install it in a public park. In doing so, it generally exercises selectivity, because property owners (including governments) are unlikely to permit installation on their property of "permanent monuments that convey a message with which they do not wish to be associated."[28] Third, even when private donors created the monument, the Court held that the linchpin of government speech was present because "the City 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." [29] Most significantly, the Court found government speech because the "City ha[d] selected those monuments that it want[ed] to display for the purpose of presenting the image of the City that it wishe[d] to project to all who frequent the Park…."[30]

Further, this decision fits comfortably within the political accountability rationale underlying the government speech doctrine: "persons who observe donated monuments routinely – and reasonably – interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker."[31] Justice Alito recognized as legitimate Summum's concern that the government speech doctrine could be used "as a subterfuge for favoring certain private speakers over others based on viewpoint,"[32] but found no such risk in this context. Summum, in an effort to turn up the Establishment Clause heat, had argued for a requirement that the City "formally adopt" the message of its privately-donated monuments, including the Ten Commandments. The Court held, instead, that the City's actions – taking ownership and putting the monument on permanent display in a park linked to the City's identity – "provided a more dramatic form of adoption. . . unmistakably signifying to all Park visitors that the City intend[ed] the monument to speak on its behalf."[33]

Finally, a finding of government speech in the park monument context presented no serious risk to First Amendment values (one reason for the unusual 9-0 outcome). Most importantly, there were no allegations that the City had ever tried to restrict free speech rights in Pioneer Park. Summum members and others remained able to give speeches, distribute leaflets, and assemble around the disputed monuments.[34] In addition, Justice Alito wrote, if forum analysis were applied, the result would be "'less speech, not more.'"[35] If courts required viewpoint neutrality in monument selection, then "[e]very jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought."[36] Faced with that dilemma, most cities would refuse all monument donations. In broad language sure to be relied on by government attorneys, he concluded 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."[37]

Selection Criteria and Forum Confusion

In addition to making the affirmative case for why monuments convey governmental messages, *Summum* also discussed the line between government speech and forum analysis. The decision continues the collapse of First Amendment doctrinal categories, including by blurring any distinction between "designated," "limited," and "nonpublic" forums. At one point, Justice Alito grouped together cases from all three categories in support of the proposition that the forum doctrine had been applied only where "government-owned property or a government program was capable

of accommodating a large number of public speakers without defeating the essential function of the land or the program."[38] Numbers alone, however, do not mark the dividing line. Indeed, this statement was directly contrasted with the ruling in *U.S. v. Am. Library Ass'n*, where the government program at issue was a library and where forum analysis was deemed inapplicable to the thousands of decisions made regarding the selection of private speech in the form of books.[39] Finally, the demise of any meaningful distinction between "content" and "viewpoint" appears complete in *Summum*, which uses the terms interchangeably.[40]

Further demonstrating the conceptual overlaps, in finding government speech, Justice Alito mentioned, approvingly, that Pleasant Grove City "has now expressly set forth criteria for future selections."[41] Pleasant Grove's criteria (a local history subject-matter or a local donor), however, resemble typical "content limitations" for a limited public forum, a category in which viewpoint discrimination is prohibited. Moreover, the decision made no response to Summum's challenges regarding the *post hoc* nature, or the discriminatory application, of these criteria. Promulgating such rules would seem to do little to advance the argument that donated monuments are government speech. As a practical matter, however, doing so is likely advisable post-*Summum*, especially given Justice Breyer's concurrence. He approved allowing the City to choose monuments "according to criteria reasonably related to one or more of [a public park's] legitimate ends," which include "recreational, historical, educational, aesthetic, and other civic interests."[42]

Guidance in Policy Drafting

For those drafting a written policy for donated monuments, the opinion offers ample guidance. For example, written guidelines should give city decision-makers sole discretion to decide whether a proposal is "appropriate for the place in question, taking into account. . . esthetics, history and local culture," and consistent with "the image of the City that it wishes to project to all who frequent the Park."[43] In addition, a policy should set forth broad, legitimate goals for public parks: this could include concepts such as "welcoming to all ages and cultures" and one "respectful of diversity among users." In light of the infrequency of privately-initiated monument proposals, however, enacting a formal selection policy likely will remain unusual.[44] A municipality which refuses a proffered monument for legitimate reasons, despite the absence of any written criteria, however, also has a good basis to rely on *Summum*, especially given the Court's focus on the expressive purpose and broadly-construed content control.

Drawing the Line in Other Contexts

The *Summum* decision provides several examples of limits on the scope of its rationale. Privately-donated *temporary* exhibits are not as likely to be government speech, at least in contexts where the local government has a practice of allowing temporary displays and the site can accommodate many of them.[45] Moreover, where open participation is invited, even permanent monuments can fall outside the decision's scope. The Court provided the example of a town monument on which all residents could place the name of a person to be honored or some other private message.[46] Similarly, IMLA members have described ongoing park programs in which individuals may contribute benches or trees with memorial plaques, or place messages on bricks.[47] In such cases, one advisable course to avoid offensive speech on government projects is to develop objective, neutral criteria, such as limiting memorial messages to names and dates.

At the same time, the decision's many broad statements clearly move the government speech doctrine beyond its "selective government funding" origins, and provide support for similar treatment of other types of public/private expressive partnerships. In particular, the Court's clear adoption of the "municipal identity message" as a constitutionally-recognized form of government speech opens the door for new applications. This is especially helpful for municipalities, given the growing need for leveraging of public resources, and the consequently increasing number of partnerships. As described above, the touchstones of a finding of government speech include whether the context is inherently expressive; whether the municipality exercises content control and selectivity; and whether viewers would attribute to the municipality any express or implicit messages sent by the purportedly private speech. Thus, some potential contexts for new applications of government speech include government website hyperlinks, promotional streetlight pole banners, and co-sponsored public special events.[48] In contrast, claims of equal access to public meeting space are fairly unlikely to come within *Summum*'s ambit.

Establishment Clause Implications and Ambiguous Messages

The clearest limit on government speech is the Establishment Clause,[49] which hovered over the analysis of the *Pleasant Grove City v. Summum* Free Speech Clause litigation. Summum brought this suit, along with several prior attempts to remove public Ten Commandments displays, based on its religious belief that the Seven Aphorisms are a superior God-given code.[50] The Court's decision determined that the City was the speaker, and not the Eagles or any other private monument donors. The questions now are whether the label of "government speech" adds anything to the Establishment Clause analysis of the "government-controlled message" expressed by Pioneer Park's Ten Commandments monument, or whether it will impact future litigation over religious monuments in government-owned parks.

Only two Justices, Scalia and Thomas, had expressly stated that *Summum*'s holding created no Establishment Clause risk for Pleasant Grove[51] based on *Van Orden v. Perry*, where the Court upheld a virtually identical Ten Commandments monument (also donated by the Eagles) and situated on the Texas Capitol grounds.[52] There, the plurality looked to the monument's historical meaning, while Justice Breyer's controlling concurrence in *Van Orden* also looked to the secular aspects of its message.[53] As Justice Scalia pointed out in *Summum*, nothing in the *Van Orden*

decision suggested that it was based on a finding of private speech.[54]

On the other hand, oral argument in *Summum* sizzled with questions over the double-edged sword facing Pleasant Grove City, starting with the opening question by Chief Justice Roberts.[55] Also, commentators have had mixed reactions to the impact of *Summum* on the Establishment Clause, and interest group litigators view the holding as an invitation for change.[56] As the departing Justice Souter correctly observed: "The interaction between the 'government speech doctrine' and Establishment Clause principles has not . . . begun to be worked out. This case shows that it may not be easy to work out."[57]

Justice Alito's decision for the Court did not expressly address the Establishment Clause, but all positions will find some useful points within its layered statements about the content of monuments' messages. Those defending municipalities can rely on the Court's emphasis that any monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."[58] This could be read as laying the groundwork for a more *Van Orden*-type focus on religious symbols' secular messages. At the same time, the opinion frequently employed the language of the endorsement test. (As a reminder, the "endorsement test" asks whether a reasonable observer, viewing a challenged religious symbol in context, would perceive it as a government endorsement of religion.[59]) Justice Alito relied, in part, on a similar type of analysis in finding that the government was the speaker when it displayed donated monuments in its parks.[60] Additionally, the majority opinion acknowledged that the message conveyed by a monument could change over time. As religious pluralism and cultural diversity increase, and as the "culture wars" add new meanings to old monument displays, judicial resolution of the constitutionality of religious monuments may change.[61] For now, however, the fate of the endorsement test, and the impact of *Summum* on such challenges, remain unpredictable.

This is of rather immediate interest because next Term, the Court will hear arguments in *Salazar v. Buono*, an Establishment Clause challenge to a WWI memorial cross now located on a tiny parcel of privately-owned land, situated within the vast, federally-owned Mojave desert.[62] The lawsuit was filed after the government denied a request to erect a Buddhist shrine nearby. After the U.S. Court of Appeals for the Ninth Circuit found an Establishment Clause violation, Congress transferred a small parcel containing the cross to the Veterans of Foreign Wars. If the case gets beyond a threshold issue of standing, *Salazar* may decide the fate of the endorsement test. Also, *Summum*'s companion case, *Duchesne City v. Summum*, which similarly involved a "spot sale" of the land on which a Ten Commandments monument was located for the purpose of preserving that monument, has been remanded.[63]

Conclusion

For now, municipalities with existing religious monuments should adopt a wait-and-see approach, and it would be wise to hold off decisions on any new religious monument proposals. Some municipalities now display monuments, arguably religious, which have specific, local, historical meanings. Most of these monuments – at least those like a common example, a statue of a town's missionary founders – present little reason for concern.

In closing, *Pleasant Grove City v. Summum* is an important step forward for municipal counsel in navigating the confusing labyrinth of forum analysis, government speech, a municipality's valuable efforts to build community, and the ever-present competing claims of citizens over limited public space and facilities.

Notes

1. Pleasant Grove City v. Summum, 129 S.Ct. 1125 (2009).
2. Mary Jean Dolan, *Pleasant Grove City v. Summum: 9-0 Decision Makes Sense*, The National Law Journal, Mar. 23, 2009, http://www.law.com/jsp/nlj/supreme_court.jsp.
3. Marci A. Hamilton, *Pleasant Grove City v. Summum: The Supreme Court's Puzzling, Fascinating New Free Speech Decision*, FINDLAW, Mar. 5, 2009, http://writ.news.findlaw.com/hamilton/20090305.html ("[T]he case was carried to a large degree by the effective *amicus* briefs filed by [IMLA, NYC] and the American Legion. . . . [T]he opinion is driven by the facts that they put on the table.").
4. Brief *Amicus Curiae* of the International Municipal Lawyers Association on Behalf of Petitioners, Pleasant Grove City v. Summum, 2008 WL 2550618 (U.S., June 23, 2008) ["IMLA Brief"]; Mary Jean Dolan, *Why Donated Monuments are Government Speech*, 58 Cath. U.L. Rev. 7 (Fall 2008) ["Dolan 2008"]; Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 Hastings Const. L.Q. 71 (Winter 2004) ["Dolan 2004"].
5. 129 S.Ct. at 1129.
6. *Id.* at 1129-30.
7. *Id.* at 1130.
8. *Id.*
9. Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007).
10. *Id.* at 1050-52, 1054.
11. Summum v. Pleasant Grove City, 499 F.3d 1170 (10th Cir. 2008).
12. *Id.* at 1172-73.
13. *Id.* at 1175-76.
14. Pleasant Grove City v. Summum, 129 S. Ct. at 1131 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005)).
15. This claim focuses on the precedent most applicable here. Note that in two very distinguishable contexts, some have characterized other precedent as encompassing broad notions of "government speech." *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (government employer's managerial control over public employees' speech); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (school administration's control over students' speech).
16. 544 U.S. 550 (2005).
17. Rust v. Sullivan, 500 U.S. 173 (1991). Both cases have been heavily criticized, *Rust* for silencing important speech, and *Johanns* and *Rust* for the lack of transparency as to the government's role. *See* Dolan 2008, *supra* note 4, at 44 nn. 212-213, collecting articles.
18. 524 U.S. 569 (1998).
19. 523 U.S. 666 (1998).
20. 539 U.S. 194 (2003).

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21. *See Finley*, 524 U.S. at 587 (suggesting a different outcome if government "leveraged its power to award subsidies based on subjective criteria into a penalty on disfavored viewpoints").
22. 129 S. Ct. at 1138.
23. IMLA Brief at 10, 12-16; 129 S. Ct. at 1133-34, 1137-38.
24. Reply Brief for Petitioners, Pleasant Grove City v. Summum, 2008 WL 4264486 (U.S. 2008); Oral Argument Transcript at 65.
25. Note that the myriad points made in the *Summum* decision can, and will, be interpreted in alternative formulas. While I believe this summary provides the most useful guidance, in full disclosure, this characterization of the Court's reasoning mirrors my earlier arguments. *Compare* Dolan 2008, *supra* note 4, at 9, n.11.
26. 129 S. Ct. at 1133.
27. *Id.*
28. *Id.* at 1134.
29. *Id.* (quoting *Johanns*, 544 U.S. at 560-61). Note that Justice Alito also quoted the IMLA survey's documentation of municipalities' editorial control through "'prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals.'" *Id.* at 1133 (quoting IMLA Brief at 21). This ambiguous reference to the value of future selection criteria is discussed below.
30. *Id.* at 1134.
31. *Id.* at 1133.
32. *Id.* at 1134.
33. *Id.* Note that ownership of the structures is not an essential criterion for government speech, however: Justice Alito pointed out that Pleasant Grove City owned most, but not all, of the Park displays. *Id.*
34. *Id.* at 1135.
35. *Id.* at 1137 (quoting *Ark. Educ. Tel. Comm'n v. Forbes*, 523 U.S. 666, 681 (1998)).
36. *Id.* at 1138.
37. *Id.*
38. *Id.* at 1137 (citing *Perry Ed. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983) (school mail system a "nonpublic forum"), *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (university student activities fund a "limited public forum") and *Widmar v. Vincent*, 454 U.S. 263 (1981) (university facilities made generally available for student activities deemed a "designated public forum")). *See* Dolan 2004, *supra* note 4, at 77-78 (discussing ongoing terminology debate).
39. *Id.* Of note, *Summum* clearly applies to another of the amici, New York City, which has some 1,200 monuments in Central Park, and a detailed monument selection policy addressing hundreds of proposals annually.
40. *Id.* at 1137-38 (rejecting use of "content-neutral" monuments rule because "viewpoint neutrality" is unfeasible). *See* Dolan 2004, *supra* note 4, at 89 (discussing *Good News Club v. v. Milford Central Sch.*, 508 U.S. 384 (1993). *Summum* completes the blurring process begun in earlier "equal access" cases, which prohibited excluding religious speech, but framed their holdings as protecting speech that was within the forum's *content* limitations, but expressing a religious *viewpoint*.
41. 129 S. Ct. at 1134.
42. *Id.* at 1141 (Breyer, J., concurring).
43. *Id.* at 1134.
44. *See* IMLA Brief App.
45. 129 S. Ct. at 1138.
46. *Id.*
47. Dolan 2008, *supra* note 4, at 40, 40 n.186.
48. *See* Dolan 2004, *supra* note 4, for extended arguments, pre-*Summum*, for extending government speech doctrine to those three increasingly common situations.
49. *See Summum*, 129 S.Ct. at 1132 (Alito, J.); *id.* at 1139 (Stevens, J., concurring). *But see id.* at 1142 (Souter, J., concurring in the judgment) ("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… Whether that view turns out to be sound is more than I can say at this point"). My opinion on these puzzling musings is that they represent Justice Souter's views on the dangers of this expanding doctrine and what some will try to make of it, and that they are not his own interpretation of the Establishment Clause. Given his departure from the Court, his meaning here may remain a mystery.
50. *See* http://www.summum.us/philosophy/tencommandments.shtml (last visited June 5, 2009). *See, e.g.*, Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002).
51. 129 S. Ct. at 1139-40 (Scalia, J., concurring).
52. *Id.* (citing *Van Orden v. Perry*, 545 U.S. 677 (2005) (opinion of Rehnquist, C.J., and opinion of Breyer, J., concurring in the judgment).
53. *Id.*
54. In addition to the possible impact of the *Summum* decision, of course, commentators are speculating over the effect of the new members of the Court – Chief Justice Roberts, Justice Alito, and now, Justice Souter's replacement.
55. Oral Argument Transcript, p. 4: "Mr. Sekulow, you're really just picking your poison, aren't you? I mean, the more you say that the monument is government speech to get out of the Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause. . . ." For the highlights of the oral argument, *see* Mary Jean Dolan, *Issues and Implications: The Summum Oral Argument*, Nov. 14, 2008, First Amendment Law Prof Blog, http://lawprofessors.typepad.com/firstamendment/2008/11/summum-argument.html.
56. *See, e.g.*, Michael Dorf, Dorf On Law, Mar. 02, 2009, http://michaeldorf.org/2009_03_01_archive.html (on the impact of *Summum*, he concluded that only two justices, Scalia and Thomas, "argued that if the Establishment Clause issue were squarely before the Court it would change nothing," while four justices, Breyer, Ginsburg, Souter and Stevens, argued that "it would potentially change the analysis"); Calvin Massey, Post on The Faculty Lounge, Feb. 26, 2009, http://www.thefacultylounge.org/2009/02/thoughts-on-pleasant-city-v-summum-.html ("[T]he effect of the decision is to increase the

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significance of the endorsement test for determining when governmental display of religious imagery or text violates the Establishment Clause."). *See also* http://www.americanhumanist.org/news/details/2009-02-in-wake-of-summum-humanists-will-target-ten-commandments-monuments (Feb. 25, 2009) ("In the wake of today's U.S. Supreme Court ruling in *Pleasant Grove City v. Summum*, 07-665, the American Humanist Association announced it has been given just what it needs to pursue the removal of Ten Commandments monuments on public property all over America").

57. 129 S. Ct 1125, 1141 (2009) (Souter, J., concurring in the judgment).

58. *Id.* at 1135.

59. *See, e.g.*, Allegheny v. ACLU, 492 U.S. 573 (1989). The parameters of the test, and whether it still can command a majority of the Court in any context, are subject to ongoing debate.

60. 129 S. Ct. at 1133 (noting that viewers reasonably interpret park monuments as conveying some message from the government). *Compare id.* at 1142 (Souter, J., concurring in the judgment) (concluding that the "best approach" is to use the identical "endorsement test," assuming a "reasonable and fully informed observer," to determine both whether the challenged expression is "government speech" and whether it violates the Establishment Clause by sending a message that the government is endorsing religion).

61. Dolan 2008, *supra* note 4, at 50-51 (asserting the fact that monuments' meanings change over time as one reason that *Van Orden* may not continue to resolve such cases after *Summum*).

62. Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008), *cert. granted*, Salazar v. Buono, 129 S.Ct. 1313 (U.S. Feb. 23, 2009) (No. 08-472).

63. Duchesne City v. Summum, 482 F.3d 1263 (10th Cir. 2007), *cert.granted*, 129 S. Ct. 1523 (U.S. Mar. 02, 2009). The Supreme Court vacated judgment and remanded the case to Tenth Circuit for further consideration in light of *Pleasant Grove City v. Summum*. **ML**

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20. *Id.*

21. City of Commerce City v. State, 40 P.3d 1273 (Colo. 2002) (*en banc*); State v. Kuhlman, 729 N.W.2d 577 (Minn. 2007).

22. Mendenhall v. Akron, 881 N.E.2d 255 (Ohio 2008); City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008).

23. *City of Commerce City*, 40 P.3d 1273.

24. *Id.* at 1276-77.

25. Senate Bill 97-36, codified as Colo. Rev. Stat. Ann. § 42-4-110.5 (West 2001).

26. *City of Commerce City*, 40 P.3d at 1278-79.

27. *Id.* at 1279.

28. *Id.* at 1277-78.

29. *Id.* at 1284.

30. *Id.*

31. *Id.* at 1285.

32. 729 N.W.2d 577 (Minn. 2007).

33. *Id.* at 580.

34. *Id.* at 582-83.

35. *Id.* at 583-84.

36. *Id.* at 584.

37. 881 N.E.2d 255 (Ohio 2008).

38. *Id.* at 262.

39. *Id.* at 262-63.

40. *Id.* at 263.

41. *Id.*

42. *Id.* at 264.

43. *Id.*

44. *Id.*

45. *Id.*

46. 755 N.W.2d 533 (Iowa 2008).

47. *Id.* at 541.

48. *Id.*

49. *Id.* at 541-42.

50. *Id.* at 542.

51. *Id.* at 542-43.

52. *Id.* at 543.

53. Rhoden v. City of Davenport, 757 N.W.2d 239, 241 (Iowa 2008).

54. Summary Notice of Class Action Settlement at 1, *Shapira v. City of Minneapolis*, U.S. Dist. Court Case No. 06-CV-02190-MJD_SRN (D. Minn. Dec. 30, 2008).

55. Shapira v. City of Minneapolis, U.S. Dist. Court Case No. 06-CV-02190-MJD_SRN.

56. *See* Order for Final Judgment and Approval of Remuneration to Class Representatives, Award of Attorney Fees and Litigation Costs and Expenses at 7, *Shapira v. City of Minneapolis*, U.S. Dist. Court Case No. 06-CV-02190-MJD_SRN (D. Minn. 2009).

57. S. 59, 2009 Leg., Reg. Sess. (Ala. 2009).

58. H.R. 439, 2009 Leg., Reg. Sess. (Fla. 2009).

59. S. 2004, 2009 Leg., Reg. Sess. (Fla. 2009).

60. Robin Miller, *Automated Traffic Enforcement Systems*, 26 A.L.R. 6th 179, §§ 2, 4-7. (2007).

61. *Id.*; *see also* Idris v. City of Chicago, 552 F.3d 564 (7th Cir. 2009).

62. Sevin v. Parish of Jefferson, No. 08-802, 2009 WL 1402332 (E.D. La. May 14, 2009).

63. Jane Prendergast, *Voters Ban Traffic-Light Cameras*, Cincinnati Enquirer (Nov. 05, 2008) at http://news.cincinnati.com/article/20081105/NEWS0106/811050418/1168/NEWS.

64. *See* theNewspaper.com, *Ohio: Anti-Camera Voter Referendum Push Expands* (Nov. 08, 2008) at http://www.thenewspaper.com/news/25/2590.asp.

65. *Voters Ban Traffic-Light Cameras*, *supra,* n. 63.

66. City of Sulphur, La., City Council Minutes (Sept. 8, 2008) at http://www.sulphur.org/minutes/2008%20Minutes/Minutes090808.pdf.

67. *See* theNewspaper.com, *Louisiana City to Vote on Banning Speed Cameras* (Mar. 26, 2009) at http://www.thenewspaper.com/news/27/2728.asp.

68. *See* the Newspaper.com, *Louisiana: Public Slams Traffic Cameras in Referendum* (Apr. 5, 2009) at http://www.thenewspaper.com/news/27/2738.asp.

69. COAST Candidates PAC, *Red Light Cameras Retreat Throughout Ohio* (Apr. 07, 2009) at http://coast-usa.blogspot.com/2009/04/red-light-cameras-retreat-throughout.html.

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71. H.R. 1568, 2009 Leg., Reg. Sess. (Miss. 2009).

72. H.R. 531, 61st Leg., Reg. Sess. (Mont. 2009).

73. H.R. 480, 2009 Leg. Reg. Sess. (La.