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Summum v. Pleasant Grove City: The Tenth Circuit Binds the Hands of Local Governments as They Shape the Permanent Character of Their Public Spaces

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SUMMUM V. PLEASANT GROVE CITY: THE TENTH CIRCUIT "BINDS THE HANDS OF LOCAL GOVERNMENTS AS THEY SHAPE THE PERMANENT CHARACTER OF THEIR PUBLIC SPACES"[1]

INTRODUCTION

In *Summum v. Pleasant Grove City*,[2] the Tenth Circuit held that a content-based regulation on permanent monuments in a public park must satisfy strict scrutiny in order to survive a Free Speech challenge.[3] In so ruling, the Tenth Circuit held that permanent monuments in public parks are traditional public forums.[4] However, while parks are traditional public forums because they "have immemorially been . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[5] they are not traditional public forums "insofar as the placement of monuments is concerned."[6] In finding that the appropriate forum in *Pleasant Grove City* was a traditionally public one, the Tenth Circuit incorrectly focused on the government property at issue without considering how the "particular channel of communication" to which access was sought affected the nature of that property.[7] Had the Tenth Circuit done this, it would have found that a display of monuments in a public park is a limited public forum and therefore, a content-based regulation need only satisfy a reasonableness test to survive a Free Speech challenge.[8]

The precedent set in *Summum v. Pleasant Grove City* takes away the government's ability to control what monuments it allows in public parks. By ruling public parks are traditional public forums irrespective of the particular channel of communication sought, the Tenth Circuit leaves the government with an all-or-nothing choice when it comes to placing monuments in public parks. The government must either prohibit all monuments or allow all monuments unconditionally. This choice is really no choice at all when one recognizes that the government would be foolish to open a public park to any monument knowing that it has no ability to deny other monuments.

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1. Summum v. Pleasant Grove City, 499 F.3d 1170, 1174 (Lucero, J., dissenting).
2. 483 F.3d 1044 (10th Cir. 2007).
3. *Id.* at 1051-52.
4. *Id.* at 1050 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
5. *Perry*, 460 U.S. at 45.
6. *Summum*, 499 F.3d at 1173 (Lucero, J., dissenting).
7. Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788, 801 (1985).
8. *Id.* at 806.

Underlying *Summum v. Pleasant Grove City* is the Tenth Circuit's inability to recognize a distinction between temporary and permanent speech when defining a forum. While temporary speech (e.g., protests, lectures, and demonstrations) occurs for a few hours, a few days, or maybe even a few weeks, permanent speech (i.e., monuments) occurs from the moment it starts for so long as the forum exists. Because of this, government must have the ability to limit permanent speech in any forum if for no other reason than for preserving property. As such, any forum in which there is permanent speech will have to be a limited public forum with regards to all other permanent speech. Unfortunately, the Tenth Circuit failed to recognize this speech distinction and need for a limiting factor in *Summum v. Pleasant Grove City* and decided that a display of monuments in a public park was a traditional public forum merely because a public park is treated as a traditional public forum with regards to temporary speech. This failure risks parks becoming so cluttered with monuments that they become little more than glorified junkyards bursting at the seems.

Part I of this comment discusses traditional public forums, designated public forums, limited public forums, and nonpublic forums. Part II discusses *Summum v. Pleasant Grove City* as well as the history and cases before it. Part III discusses cases from the Ninth, Second, and Seventh Circuits, all of which recognize that monuments should be considered separate from temporary speech when defining their forum. Part IV analyzes the Tenth Circuit's decision in *Summum v. Pleasant Grove City* and argues that a display of permanent monuments in a public park is a limited public forum. Finally, this comment concludes by recommending guidelines to ensure that a content-based regulation in a limited public forum satisfies the reasonableness test.

I. BACKGROUND[9]

Within the First Amendment, the Free Speech Clause states that "Congress shall make no law . . . abridging the freedom of speech."[10] Whether speech relates to open political discussion, the marketplace of ideas, individual expression, tolerance, or other activities, the right is a fundamental one protected by the Constitution.[11] As such, the Free

9. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1123-44 (Aspen Publishers, 3rd ed. 2006); Seth D. Rogers, *A Forum by Any Other Name . . . Would Be Just as Confusing: The Tenth Circuit Dismisses Intent from the Public Forum.* First Unitarian Church v. Salt Lake City Corp., *308 F.3d 1114 (10th Cir. 2002)*, 4 WYO. L. REV. 753, 762-71 (2004); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987).

10. U.S. CONST. amend. I.

11. CHEMERINSKY, *supra* note 9, at 925-30.

Speech Clause prohibits government from censoring speech "because of its message, its ideas, its subject matter or its content."[12]

However, "speech often requires a place for it to occur."[13] Most people do not have access to television, radio, or newspapers to broadcast their message. Rather, they rely on access to government property to assemble and communicate their message.[14] But, the Supreme Court holds that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[15] Instead, certain government properties are allocated as forums for speech. The Supreme Court holds that there are four types of government property: traditional public forums, designated public forums, limited public forums, and nonpublic forums.[16] The Court further holds that the constitutionality of a regulation of speech depends on the forum and the nature of the government's action.[17]

A. Traditional Public Forum

A traditional public forum is government property that is open to all speech activities.[18] In other words, traditional public forums exist, have always existed, and will always exist for the directed purpose of Free Speech activities. Streets and parks are examples of traditional public forums. One of the earliest cases discussing Free Speech and a traditional public forum was *Hague v. CIO.*[19] In *Hague*, a labor organization challenged a city law that prevented the organization from holding meetings in public places.[20] Ruling in favor of the labor organization, the Court held that "such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[21] This concept has been reiterated time and again,[22] most notably in *Perry Educational Association v. Perry Local Educators' As-*

12. Police Dep't of Chicago v. Moseley, 408 U.S. 92, 95-96 (1972). There are obvious exceptions to the type of speech that is protected. For example, speech intended to incite or intimidate is not protected under the Free Speech Clause. *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (holding Free Speech does not permit advocacy directed to incite imminent lawless action that is likely to incite such action); *see also* Virginia v. Black, 538 U.S. 343, 367-68 (2003) (holding cross burning done with intent to intimidate was not protected under Free Speech Clause).

13. CHEMERINSKY, *supra* note 9, at 1123.

14. *Id.*

15. United States Postal Serv. v. Council of Greenburgh Civil Ass'ns, 453 U.S. 114, 129 (1981).

16. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

17. CHEMERINSKY, *supra* note 9, at 1127.

18. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 667 (1998); Rogers, *supra* note 9, at 762.

19. 307 U.S. 496 (1939).

20. *Id.* at 500-01.

21. *Id.* at 515; *see also* Schneider v. New Jersey, 308 U.S. 147, 165 (1939) (holding as unconstitutional an ordinance prohibiting the distribution of leaflets on public sidewalks).

22. *See* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Kunz v. New York, 340 U.S. 290, 293-94 (1951); Schneider v. State, 308 U.S. 147, 163 (1939).

sociation,[23] when the Court characterized streets and parks as "quintessential public forums" because they are places "which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[24]

Because a traditional public forum exists for the purpose of acting as a venue for demonstrations, rallies, and other speech activities, the Court looks unfavorably at any government regulation prohibiting speech in a traditional public forum.[25] The Supreme Court holds that government may enforce a content-based regulation in a traditional public forum only when its reasons for doing so meet strict scrutiny.[26]

A government regulation is content-based when it discriminates as to either viewpoint or subject matter.[27] Viewpoint discrimination occurs when the government regulates speech based on "the ideology of the message."[28] Subject matter discrimination occurs when the government regulates speech based on the topic of the speech.[29] Once the Court finds that a regulation is content-based, the regulation must satisfy strict scrutiny to be upheld.[30] In order to meet strict scrutiny, the government must prove that the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[31] The Supreme Court has never found a content-based regulation on Free Speech to satisfy strict scrutiny.[32] For example, in *Schneider v. State of New Jersey*,[33] the Supreme Court declared unconstitutional a city ordinance that prohibited the distribution of leaflets on public property.[34] The Court held that the city's interest in reducing litter and preserving the aesthetic value of its

23. 460 U.S. 37 (1983).

24. *Id.* at 46-47 (holding that internal school mailing system was a limited public forum). Although the Court in *Perry* did not deal with a traditional public forum, it is considered the Court's leading authority discussing all three forums.

25. CHEMERINSKY, *supra* note 9, at 1126.

26. *Perry*, 460 U.S. at 45-46.

27. CHEMERINSKY, *supra* note 9, at 932-33.

28. *Id.* at 934; *see* Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L. J. 1209, 1220 (1993); *see, e.g.*, Boos v. Berry, 485 U.S. 312, 317 (1988) (declaring unconstitutional a District of Columbia regulation prohibiting the display of signs criticizing foreign countries within 500 feet of any embassy). Here, the Court held that the regulation was viewpoint discrimination because it drew a distinction between what you could and could not say about foreign governments.

29. Sabrin, *supra* note 28, at 1217; *see, e.g.*, Carey v. Brown, 447 U.S. 455, 461-62 (1980) (declaring unconstitutional a Chicago regulation prohibiting all picketing in residential neighborhoods unless the picketing involved a labor dispute). Here, the Court reasoned that the regulation was subject matter discrimination because it allowed speech so long as the topic concerned labor and employment, but not otherwise.

30. *Perry*, 460 U.S. at 45-46.

31. *Id.* at 45.

32. The Court has some times found seemingly content-based regulations to be content-neutral. *See* Hill v. Colorado, 530 U.S. 703, 724 (2000) (upholding regulation on protests outside abortion clinics as content-neutral); *see also* Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986) (upholding zoning ordinance that prohibited adult movie theatres as content-neutral).

33. 308 U.S. 147 (1939).

34. *Id.* at 163.

streets was not sufficiently compelling to prohibit "a person rightfully on a public street from handing literature to one willing to receive it."[35]

B. Nonpublic Forum

A nonpublic forum is government property that is closed to all speech activities.[36] For example, in *Adderly v. Florida*,[37] the Supreme Court held that the government could prohibit protesting outside of jails and prisons.[38] In upholding the convictions of protestors outside a jail who refused to disperse, the Court declared that, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use which it is lawfully dedicated."[39] Similarly, in *Greer v. Spock*,[40] the Court held that a military base was a nonpublic forum even though areas inside the base, such as walkways and parks, were open for public use because "it is the business of a military installation . . . to train soldiers, not to provide a public forum."[41]

C. Designated Public Forum and Limited Public Forum

The Supreme Court has made it clear that the government can take a nonpublic forum and turn it into a public forum.[42] When the government affirmatively acts in a way in which it opens nonpublic property for speech activities, it creates either a designated public forum or a limited public forum.[43]

It is important to distinguish a traditional public forum from a designated public forum and a limited public forum. A traditional public forum exists for all speech activities notwithstanding any government act while a designated public forum and a limited public forum only exist after the government has taken some kind of affirmative act allowing speech activities.[44] In other words, whereas a traditional public forum is always open for speech activities, if the government does not take an affirmative action to create a designated public forum or a limited public forum, that property remains a nonpublic forum closed to all speech activities.

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35. *Id.* at 162.
36. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
37. 385 U.S. 39 (1966).
38. *Id.* at 47-48; *see* CHEMERINSKY, *supra* note 9, at 1139 (discussing nonpublic forum).
39. *Adderly*, 385 U.S. at 47.
40. 424 U.S. 828 (1976).
41. *Id.* at 838.
42. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788, 806 (1985).
43. *Perry*, 460 U.S. at 46.
44. CHEMERINSKY, *supra* note 9, at 1137-38.

Because the property in a designated public forum and a limited public forum is initially nonpublic, the government may control or limit the kind of speech allowed on this property.[45]

When the government opens nonpublic property to all speech activities it creates a designated public forum.[46] Because a designated public forum is opened for all speech activities, it is treated the same as a traditional public forum, namely, a content-based regulation must satisfy strict scrutiny to be upheld by the Court.[47]

However, when the government only opens nonpublic property to certain speech activities, it creates a limited public forum.[48] Unlike a designated public forum where property is opened to all speech and thereafter all speech must be allowed, property in a limited public forum is opened only to certain speech and thereafter all similar speech must be allowed. However, dissimilar speech may still be prohibited because it was never affirmatively authorized in the first place.

The Supreme Court has held that a content-based regulation in a limited public forum will be upheld so long as it satisfies a reasonableness test.[49] A reasonableness test is met when the regulation is reasonable in light of a government interest and does not discriminate as to viewpoint.[50] In other words, in a limited public forum, the Court allows subject matter discrimination but not viewpoint discrimination.[51] For instance, the Court in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[52] stated that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[53] *Cornelius* is important because it recognizes that when the government opens property for speech activities, that property does not automatically get treated like a traditional public forum where strict scrutiny applies. Rather, the government can impose limits on the type of speech permitted. These limits will be

45. *Perry*, 460 U.S. at 46.
46. *See id.*
47. *Id.*
48. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995); *Perry*, 460 U.S. at 46 n.7.
49. *Perry*, 460 U.S. at 46. While the Supreme Court initially applied strict scrutiny to a content-based restriction in a limited public forum, *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding unconstitutional a policy opening campus facilities to student organizations other than religiously based ones), review of more recent Supreme Court cases shows that the Court now applies a reasonableness test to a Free Speech regulation in a limited public forum. *See also* Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 788, 806 (1985); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001) (holding that denying religious group access to after school activities was viewpoint discrimination).
50. *Good News Club*, 533 U.S. at 106-07.
51. *Cornelius*, 473 U.S. at 809.
52. 473 U.S. 788.
53. *Id.* at 806.

evaluated by the Court under a reasonableness test that allows content discrimination.[54]

However, the Court emphasizes that while content discrimination is permissible in a limited public forum, viewpoint discrimination is not. In *Good News Club v. Milford Central School*,[55] the Court held that a prohibition on speech in a limited public forum was unconstitutional because it did not pass the reasonableness test.[56] Here, a town statute opened its school for use by clubs and organizations that promoted well-being in children.[57] Good News Club, a private Christian organization, sued Milford School alleging that its Free Speech rights had been violated after the club was denied access to the school.[58] Finding in favor of Good News Club, the Court stated that while government may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics,"[59] "the restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum.'"[60] The Court then stated that the school's purported reason for denying Good News Club access to the school—that it did not promote well-being in children—was a façade for viewpoint discrimination and therefore failed the reasonableness test.[61]

II. *SUMMUM V. PLEASANT GROVE CITY*

A. Historical Background and Precursor Cases

In the 1950's and 1960's, the Fraternal Order of Eagles ("Eagles") donated several granite monuments of the Ten Commandments to towns and cities across the United States.[62] The monuments were erected on government property.[63] Thereafter, municipalities that received and erected these monuments faced continued challenges from religious groups, civil liberties organizations, and individuals alike who argued that the monuments violated the United States Constitution's Establishment Clause.[64] Opponents of the Ten Commandments monuments ar-

54. *Id.*
55. 533 U.S. 98 (2001).
56. *Id.* at 107.
57. *Id.* at 108.
58. *Id.* at 103-04.
59. *Id.* at 106 (alteration in original) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).
60. *Id.* at 106-07 (citation omitted) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 788, 806 (1985)).
61. *Id.* at 108-09.
62. Summum v. City of Ogden, 297 F.3d 995, 998 (10th Cir. 2002).
63. Keith T. Peters, Note, *Small Town Establishment of Religion in* ACLU of Nebraska Foundation v. City of Plattsmouth, *419 F.3d 772 (8th Cir. 2005); Eagles Soaring in the Eight Circuit*, 84 NEB. L. REV. 997, 1000; *see also* Books v. City of Elkhart, Indiana 235 F.3d 292, 295-97 (7th Cir. 2000); Summon v. Callaghan, 130 F.3d 906, 909 (10th Cir. 1997).
64. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 682 (2005); McCreary County v. ACLU, 545 U.S. 844, 844 (2005).

gued that the monuments purported to establish a religion or religious form of government, while proponents of the monuments argued that they served a valid secular purpose as a history lesson in the foundation of laws of American government or "in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency."[65]

Anderson v. Salt Lake City Corp.,[66] the first Tenth Circuit case involving a Ten Commandments monument on government property, was an Establishment Clause challenge. In *Anderson*, a group of Utah citizens challenged an Eagles' Ten Commandments monument that had been erected on property outside a courthouse as government promotion of religion.[67] Finding against the citizens, the Tenth Circuit held that the monument did not violate the Establishment Clause because it was primarily secular.[68]

After *Anderson*, Summum, a religious organization based in Utah, tried to erect its own monuments on the same government properties that had erected Ten Commandments monuments.[69] Summum reasoned that because the government had opened properties to the display of religious monuments, and that these monuments were permissible so long as they were primarily secular, there was no reason that a Summum monument should not be allowed onto these properties so long as they were also primarily secular.[70] When requests to erect its monuments were denied, Summum challenged these denials as Free Speech violations.[71]

In *Summum v. Callaghan*,[72] Summum argued that Salt Lake City had violated its Free Speech rights after the city council denied a Summum request to erect one of its monuments next to the aforementioned Eagles' monument.[73] On appeal, the Tenth Circuit found that Salt Lake

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65. *Van Orden*, 545 U.S. at 682; *see also* Peters, *supra* note 63, at 999-1000 (discussing Eagles' Ten Commandments monuments and the Establishment Clause).

66. 475 F.2d 29 (10th Cir. 1973).

67. *Id.* at 30.

68. *Id.* at 33-34 (holding that the Ten Commandments Monument did not violate the Establishment Clause because the monument was primarily secular and religiously passive). *Anderson* has received much criticism but has never been overturned. Because the Tenth Circuit holds that the Eagles' Ten Commandments Monument is primarily secular, I will more often than not refer to it as the Eagles' Monument rather than the Ten Commandments Monument or the Eagles' Ten Commandments Monument. My intention in doing this is to have the reader view the Eagles' Monument as a secular one, as *Anderson* instructs, rather than a religious one, a distinction that is beyond the scope of this comment.

69. *E.g.*, Summum v. City of Ogden, 297 F.3d 995, 997-98 (10th Cir. 2002); Summum v. Callaghan, 130 F.3d 906, 909 (10th Cir. 1997).

70. *See City of Ogden*, 297 F.3d at 999, 1011; *Callaghan*, 130 F.3d at 910.

71. *See City of Ogden*, 297 F.3d at 999; *Callaghan*, 130 F.3d at 910.

72. 130 F.3d 906 (10th Cir. 1997).

73. *Id.* at 909-10. Summum is a religion and philosophy that began in 1975 as a result of Claude "Corky" Nowell's encounter with beings he describes as "Summa Individuals." According to Nowell, these beings presented him with concepts regarding the nature of creation, concepts that have always existed and are continually reintroduced to humankind by advanced beings who work along the pathways of creation. As a result of his experience, Nowell founded Summum in order to share the "gift" he received with others. Summum.us, Welcome to Summum!,

City had created a limited public forum for permanent monuments when it permitted the Eagles' monument on its courthouse lawn.[74] The court further stated that a limited public forum is a type of nonpublic forum and therefore "control over access . . . can be based on subject matter and speaker identity so long as the distinctions . . . are reasonable . . . and are viewpoint neutral."[75]

The Tenth Circuit, however, reversed and remanded the lower court's decision dismissing Summum's complaint, holding that Salt Lake City's denial of the Summum monument may not have been viewpoint neutral.[76] The court held that Salt Lake City's lack of standards for determining access to its forum "made it far too easy for officials to use 'post hoc rationalizations' and 'shifting or illegitimate criteria' to justify their behavior, and thus make it difficult for courts to determine whether an official has engaged in viewpoint discrimination."[77] The court further found that the city's shifting positions for denying Summum's monument–that the courthouse lawn was being reserved for construction of a jail; that the lawn was being preserved for aesthetic values; and that access was only given to monuments with historical significance to the city–indicated a pretext for viewpoint discrimination.[78]

In 2002, a similar challenge arose in *Summum v. City of Ogden*.[79] In *City of Ogden*, Summum requested that the city install a Summum monument next to an Eagles' monument that had already been installed amongst several historical markers on a lawn outside a city municipal building.[80] After the city of Ogden denied this request, Summum sued for violation of its Free Speech rights.[81]

On appeal, the Tenth Circuit stated that determining the relevant forum requires consideration of "(1) the government property to which

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http://www.summum.us/about/welcome.shtml (last visited Feb. 4, 2008). The proposed monument at issue here is a "Seven Aphorisms of Summum" Monument. Summum contends that Moses descended from Mount Sinai with a tablet evoking the Seven Aphorisms in addition to the tablet evoking the Ten Commandments. Summum.us, The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (last visited Feb. 2, 2008). The Seven Aphorisms are: Psychokinesis; Correspondence; Vibration; Opposition; Rhythm; Cause and Effect; and Gender. Summum.us, Seven Summum Principles, http://www.summum.us/philosophy/principles.shtml (last visited Feb. 2, 2008). Summum's proposed monument would display these aphorisms. Summum.us, Help Us to Support Freedom of Speech and Prevent Discrimination, http://www.summum.us/about/freespeech.shtml (last visited Feb. 2, 2008).

74. *Callaghan*, 130 F.3d at 919.

75. *Id.* at 916 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 788, 806 (1985)).

76. *Id.* at 921-22.

77. *Id.* at 920 (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988)).

78. *Id.*

79. 297 F.3d 995 (10th Cir. 2002).

80. *Id.* at 997-98. The Eagles' monument was surrounded by a police officer memorial, a sister city tree and plaque, and various other historical markers. *Id.* at 998.

81. *Id.* at 999.

access is sought and (2) the type of access sought."[82] In *City of Ogden*, the access sought was "not merely to converse or post temporary signs on the lawn, but the right to place permanent monuments on the lawn . . . ."[83] Thus, the Tenth Circuit found, as in *Callaghan*, that the city of Ogden had created a limited public forum for permanent monuments when it permitted the Eagles' monument and other historical markers on municipal grounds.[84]

However, just as it had done in *Callaghan*, the Tenth Circuit reversed and remanded the case back to the lower court, holding that the city of Ogden's denial of Summum's monument may not have been viewpoint neutral.[85] The Tenth Circuit stated that while the city of Ogden's criterion for allowing access to its municipal grounds–allowing only those monuments that had historical relevance to the city–may have been acceptable, "Ogden failed to employ adequate safeguards to ensure that the 'historical relevance' criterion did not devolve into a . . . façade for viewpoint discrimination."[86] The court further stated that in order to comply with the Free Speech Clause, a municipality should employ written guidelines or, short of this, a well-established practice for determining which monuments to erect on municipal grounds.[87] The court concluded that because the city of Ogden had no written guidelines and there was scant evidence of an established practice of a "historical relevance criterion," there was insufficient support to convince the Tenth Circuit that there was not impropriety in Ogden's decision to reject Summum's monument.[88]

In both *Callaghan* and *City of Ogden,* the Tenth Circuit acknowledged that it will apply a reasonableness test to a content-based regulation on Free Speech in a limited public forum, but it also stressed that it will pay close attention to anything that may be a façade for viewpoint discrimination.[89] In *Callaghan*, the Tenth Circuit was suspicious of viewpoint discrimination because the government had no established criteria for determining what kinds of monuments were allowed in the forum.[90] In *City of Ogden*, the Tenth Circuit was suspicious of viewpoint discrimination because the government's criteria for determining what kinds of monuments were allowed in the forum—that they be historically relevant to the city—appeared to have been created after the government

82. *Id.* at 1001-02 (citing Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 788, 800-02 (1985)).
83. *Id.* at 1002.
84. *Id.*
85. *Id.* at 999, 1012.
86. *Id.* at 1006.
87. *Id.* at 1007.
88. *Id.* at 1008-09.
89. *Id.* at 1002-03, 1006; Summum v. Callaghan, 130 F.3d 906, 914, 920 (10th Cir. 1997) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 811 (1985)).
90. *Callaghan*, 130 F.3d at 920.

had already denied Summum's monument rather than criteria already in place prior to the denial of Summum's monument.[91]

Callaghan and *City of Ogden* are important because they create a balancing test when it comes to the placement of monuments on government property. This balancing test allows the government to put limitations on the kinds of monuments allowed on nonpublic property so long as the government implements specific guidelines or safeguards to prevent viewpoint discrimination. These guidelines are to be followed anytime a person or group requests that a monument be erected on government property.

But, both *Callaghan* and *City of Ogden* were cases that involved nonpublic forums that had been turned into limited public forums by the government. In *Summum v. Pleasant Grove City*,[92] the Tenth Circuit dealt with the placement of monuments in a traditional public forum.

B. Summum v. Pleasant Grove City*: Facts and Procedural History*

In September 2003, Summum sent the mayor of Pleasant Grove City a letter requesting permission to erect a monument containing the Seven Aphorisms[93] of Summum in Pleasant Grove City's Pioneer Park.[94] In its letter, Summum stated that its monument would be similar in size and nature to the Eagles' monument already in Pioneer Park.[95] The Mayor of Pleasant Grove City denied Summum's request, stating that all permanent displays in its park must "directly relate to the history of Pleasant Grove" or be "donated by groups with long-standing ties to the Pleasant Grove community."[96] Pleasant Grove City codified this requirement after Summum's request.[97]

In 2005, Summum renewed its request to install its monument in Pioneer Park.[98] When the city failed to respond to its request, Summum sued Pleasant Grove City for violation of Summum's First Amendment rights, and sought declaratory and injunctive relief, installation of Summum's monument in Pioneer Park, and monetary damages.[99] In its com-

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91. *City of Ogden*, 297 F.3d at 1006-08.

92. 483 F.3d 1044 (10th Cir. 2007).

93. *See supra* note 73.

94. *Pleasant Grove*, 483 F.3d at 1047.

95. *Id.*

96. *Id.* (internal quotation marks omitted). Beside the Eagles' Monument, other structures in Pioneer Park are: the Old School Bell; the Log Cabin; the Well; the Granary; the Nauvoo Temple Stone; the Town Hall; the Winter Stable; the Gazebo; the Fire Shed; the 9/11 Monument; the Ginko Tree; and the Old Mill Stone. Brief of Appellees at 5-7, *Summum v. Pleasant Grove City*, 483 F.3d 1044 (No. 06-4057).

97. *Pleasant Grove*, 483 F.3d at 1047.

98. *Id.*

99. *Id.* Summum filed its suit in Utah District Court under 42 U.S.C. § 1983: Civil Action for Deprivation of Rights. 42 U.S.C.A. § 1983 (2008); *Pleasant Grove*, 483 F.3d at 1046-47. Summum also filed suit for violation of Utah's constitutional free expression and establishment provisions. *Id.* at 1047. Summum subsequently dropped these allegations. *Id.* at 1248 n.3.

plaint, Summum contended that its Free Speech rights were violated when its monument was excluded from Pioneer Park while other monuments were allowed access.[100]

At the preliminary injunction hearing, "the District Court indicated that Summum would not prevail on the merits if Pleasant Grove proved it had a well-established policy for evaluating proposed monuments that was reasonable and viewpoint neutral."[101] The Utah District Court then denied Summum's preliminary injunction request, holding that because "the facts regarding the city's policy . . . were in dispute . . . Summum had not established a substantial likelihood of success on the merits."[102]

C. Judge Tacha's Majority Decision

On appeal, the Tenth Circuit, in a 2-1 vote, reversed the district court's preliminary injunction denial.[103]

The Tenth Circuit found that the display of monuments in Pioneer Park was a traditional public forum.[104] The Tenth Circuit stated, "[T[he Supreme Court has characterized streets and parks as 'quintessential public forums' because people have traditionally gathered in these places to exchange ideas and engage in public debate."[105] The Tenth Circuit further noted, "[T]he fact that Summum seeks access to . . . the display of a monument . . . is relevant in defining the forum, but it does not determine the *nature* of the forum."[106] The Tenth Circuit then distinguished Pioneer Park from the property in *Callaghan* and *City of Ogden*, stating that the property in both *Callaghan* and *City of Ogden* "was not by tradition or designation a forum for public communication," while the property in Pleasant Grove City was.[107] After this, the Tenth Circuit concluded that, because Pioneer Park was a public park and a public park is open to all speech activities despite an affirmative government act, all speech activities within Pioneer Park had to be treated with regard to a traditional public forum irrespective of the use for which access was sought.[108]

The Tenth Circuit stated that the Utah District Court erred when it found that the forum in *Pleasant Grove City* was a nonpublic one.[109] Because Pioneer Park is a public park, and public parks are always tradi-

100. *Id.* at 1047.
101. *Id.*
102. *Id.*
103. *Id.* at 1057.
104. *Id.* at 1050.
105. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citation omitted)).
106. *Id.* at 1051 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985)).
107. *Id.* (quoting Summum v. City of Ogden, 297 F.3d 995, 1002 (10th Cir. 2002) (internal quotation marks omitted)).
108. *See id.* at 1050-52.
109. *Id.* at 1051.

tional public forums, the Utah District Court should have found that Pioneer Park was a traditional public forum.[110]

Moreover, because Pioneer Park was not a nonpublic forum that had been turned into a limited public forum but rather a traditional public forum, the Utah District Court should have applied strict scrutiny to Pleasant Grove City's denial of Summum's monument instead of a reasonableness test.[111] As such, Pleasant Grove City's denial of Summum's monument should only have been upheld if it was "necessary to serve a compelling state interest and the exclusion [was] narrowly drawn to achieve that interest," rather than being upheld so long as it satisfied a reasonable government interest and did not discriminate as to viewpoint.[112] Had the Utah District Court used this strict scrutiny test instead of a reasonableness test, it would have found that Pleasant Grove City's purported reasons for denying Summum's monument–that it did not "directly relat[e] to the history of Pleasant Grove" or wasn't "donated by groups with long-standing ties to the Pleasant Grove community"—did not satisfy strict scrutiny.[113]

Because the Utah District Court failed to find the display of monuments in Pioneer Park to be a traditional public forum, it erred in failing to apply strict scrutiny to Pleasant Grove City's denial of Summum's monument.[114] Had the Utah District Court applied strict scrutiny to Pleasant Grove City's denial of Summum's monument instead of a reasonableness test, it would have found that Summum's Free Speech rights had been violated.[115] This failure led the district court to deny Summum's preliminary injunction request when it should have granted it.[116] As such, the Tenth Circuit reversed and remanded the Utah District Court decision with instructions to grant injunctive relief.[117] Rehearing en banc was subsequently denied.[118]

110. *Id.* at 1050.
111. *Id.* at 1051, 1054.
112. *Id.* at 1051 (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)).
113. *Id.* at 1047, 1051-52.
114. *Id.* at 1051-52.
115. *See id.* at 1057.
116. *Id.* at 1049.
117. *Id.* at 1057.
118. Summum v. Pleasant Grove City, 499 F.3d 1170, 1170 (10th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3289 (U.S. Nov. 20, 2007) (No. 07-665).

D. Judge Lucero's Dissent[119]

In his dissent, Judge Lucero argued that a public park is not a traditional public forum for permanent speech just because it is a traditional public forum for temporary speech.[120]

Judge Lucero stated that the majority gave too much weight to the "conception that city parks are 'quintessential public forums.'"[121] And, while public parks are traditional public forums, they are only traditional public forums in the sense that they derive from "a well established common law right to assemble and speak one's mind in the commons."[122] Thus, because "permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public,"[123] "a park is not a traditional forum insofar as the placement of monuments is concerned."[124]

Judge Lucero argued that in identifying the forum, the court must look at the access sought as well as the property.[125] He stated that "[t]he panel's claim that access 'is relevant in defining the forum, but . . . does not determine the *nature* of that forum,' confuses the forum analysis."[126] "Only by defining the forum with reference to the access sought can a court determine the nature of that forum."[127] Judge Lucero then argued that the majority in *Pleasant Grove City* mistakenly looked only at the property when defining the forum when it instead should have first looked at the access sought and then looked at the property when defining the forum.[128] Therefore, instead of finding that Summum sought access to permanent speech within a public park, the Tenth Circuit majority found that Summum sought access *only* to a public park.[129]

Judge Lucero argued that the display of monuments in Pioneer Park is a limited public forum.[130] He noted that Pleasant Grove City had allowed "a few monuments to be erected for specific purposes" where that

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119. Judge McConnell and Judge Gorsuch also dissented from denial en banc for reasons concerning the Establishment Clause. *Id.* at 1174-75 (McConnell, J., dissenting). For purposes of this discussion, their dissent will be omitted.

120. *Id.* at 1173 (Lucero, J. dissenting).

121. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)) (Lucero, J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1172 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985)) (Lucero, J., dissenting).

126. *Id.* (quoting Summum v. Duchesne City, 482 F.3d 1263, 1269 n.1 (10th Cir. 2007)) (Lucero, J., dissenting).

127. *Id.* (citing *Cornelius*, 473 U.S. at 801) (Lucero, J., dissenting).

128. *See id.* (citing *Cornelius*, 473 U.S. at 800); Summum v. City of Ogden, 297 F.3d 995, 1001 (10th Cir. 2002) (Lucero, J., dissenting).

129. *Summum*, 499 F.3d at 1172-73 (citing Summum v. Pleasant Grove City, 483 F.3d 1044, 1050 (10th Cir. 2007)); *Duchesne*, 482 F.3d at 1269 (Lucero, J., dissenting).

130. *Summum*, 499 F.3d at 1171 (Lucero, J., dissenting).

right did not previously exist.[131] He further noted that, with regard to the display of monuments, Pleasant Grove City had not "allowed the kind of general access or indiscriminate use of park property that is a hallmark of a designated public forum."[132] Instead, Pleasant Grove City had "created a channel for a specific limited type of expression" that distinguished a limited public forum.[133] Having created a limited public forum for permanent monuments that relate to the history of Pleasant Grove City, the government "may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in [Pioneer Park]."[134]

Judge Lucero's argument that the Tenth Circuit majority failed to look at the access sought when defining the forum in *Pleasant Grove City* is correct. His argument that the Tenth Circuit majority would have found that the display of monuments in Pioneer Park was a limited public forum had the majority looked at the access sought when defining the forum is also correct. In fact, Judge Lucero's entire argument seems to be correct with one minor exception.

Judge Lucero's argument is somewhat confusing because he seemed to indicate that the appropriate property in *Pleasant Grove City* is the display of monuments within Pioneer Park rather than Pioneer Park altogether. Judge Lucero stated that the majority is incorrect when it "asserts that the relevant forum is the entire park, regardless of the type of access sought."[135] This is correct. Then, to show that the relevant forum is not Pioneer Park but rather the display of monuments within Pioneer Park, Judge Lucero cited *Perry* as an example where "the Supreme Court first narrowed the forum to the mail delivery system within a school, and only then . . . consider[ed] the nature of this forum."[136] While *Perry* is correct, Judge Lucero's use of *Perry* may not be correct.

The problem with citing *Perry* here is that it makes Judge Lucero's argument seem as if it involves map drawing rather than distinguishing between temporary and permanent speech. By citing *Perry*, Judge Lucero alludes that the display of monuments in Pioneer Park is its own self-contained property within Pioneer Park. The problem with this is that if the display of monuments in Pioneer Park is its own self-contained property, then the government may only place monuments within this

131. *Id.* at 1174 (Lucero, J., dissenting).
132. *Id.* (quoting Summum v. Callaghan, 130 F.3d 906, 915 n.13 (10th Cir. 1997) (Lucero, J., dissenting)).
133. *Id.* (quoting Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs., 457 F.3d 376, 382 n.3 (4th Cir. 2006) (Lucero, J., dissenting)).
134. *Id.* (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985) (Lucero, J., dissenting) (footnote omitted)).
135. *Id.* at 1172.
136. *Id.*

self-contained property and not in other places of the park.[137] This raises a concern because the government should be permitted to scatter monuments throughout the entire park rather than only in subsections of the park. If, in fact, Judge Lucero is trying to argue that the display of monuments in Pioneer Park is a subsection of Pioneer Park, his argument is missing the main issue in *Pleasant Grove City*.

The main issue in *Pleasant Grove City* is the importance of distinguishing between temporary and permanent speech, not the importance of sectioning off different parts of a traditional public forum in order to make a limited public forum subsection. The Ninth, Second, and Seventh Circuits appropriately recognize this importance.

III. OTHER CIRCUIT DECISIONS DISCUSSING STRUCTURES ON GOVERNMENT PROPERTY

The Ninth, Second, and Seventh Circuits all draw distinctions between temporary and permanent speech by discussing whether the government must affirmatively open a traditional public forum to structures.[138] Moreover, by drawing distinctions between temporary and permanent speech, the Ninth, Second, and Seventh Circuit conclude that permanent speech is not a traditional public forum.

In *Kreiser v. City of San Diego*,[139] the Ninth Circuit stated that "[n]o affirmative action is required to open a traditional public forum to a specific type of expressive activity."[140] By stating this, the Ninth Circuit rejected petitioner's argument that Balboa Park was not a traditional forum for "large unattended displays."[141] While this finding does not support the government's ability to limit monuments in public parks, the Ninth Circuit did indicate in *Kreiser* that the City of San Diego may have been able to close Balboa Park to "large unattended displays," but had failed to provide sufficient evidence that it had done so.[142]

This finding supports the government's ability to limit monuments in public parks because it draws a distinction between temporary and permanent speech. According to the Ninth Circuit, while the government could never close a public park to a demonstration, it may be able to close a park to a monument. In other words, while the government could

137. Judge Lucero does argue that a court can make "conceptual distinctions" when defining a forum. *Id.* This statement indicates that Judge Lucero may be trying to distinguish between temporary and permanent speech rather than advocating map drawing.

138. *See generally* Kreisner v. City of San Diego, 1 F.3d 775 (9th Cir. 1993); Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989); Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341 (7th Cir. 1990).

139. *Kreisner*, 1 F.3d at 775.

140. *Id.* at 784 (holding that religious displays in City Park did not violate the Establishment Clause).

141. *Id.*

142. *Id.*

not prohibit an anti-war rally in a public park, the government could prohibit the erection of an anti-war monument in a public park provided that the government was able to show that its reasons for doing so were legitimate. The reason behind this distinction between a demonstration and a monument is the impracticality of allowing all monuments in a public park.

The Second Circuit holds that where permanent speech is concerned, the forum can only be either a designated public forum or a limited public forum.[143] In *Kaplan v. City of Burlington*,[144] the Second Circuit held that the government must affirmatively open its public parks to permanent speech.[145] Here, the Second Circuit found that City Hall Park was "indisputably a traditional public forum."[146] However, it then found that the City of Burlington "had not created a forum in City Hall Park open to the unattended, solitary display of religious symbols."[147] By finding it necessary to affirmatively open property that is a traditional public forum to monuments, the Second Circuit emphasized that there is no implicitly held tradition of permanent speech being permitted in public parks. In other words, because the government must act before permanent speech is allowed on any property, permanent speech cannot be a traditional public forum. Rather, permanent speech must either be a designated public forum or a limited public forum.

The Seventh Circuit holds that the Free Speech Clause does not provide a constitutional right to erect a structure in a traditional public forum.[148] In *Lubavitch Chabad House, Inc. v. City of Chicago*,[149] Lubavitch, a Jewish religious organization, sued the city of Chicago for violating its Free Speech rights after the city refused to erect a menorah in O'Hare International Airport during the holiday season.[150] Upholding the district court's dismissal of the Lubavitch complaint, the Seventh Circuit held that the Free Speech Clause does not guarantee the right to erect a structure on public property.[151] The Seventh Circuit continued:

> We are not cognizant of . . . any private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures. Public parks are certainly quintessential public forums where Free Speech is protected, but the Constitution neither provides,

143. *Kaplan*, 891 F.2d at 1031.
144. *Id.*
145. *Id.* at 1031 (holding that placement of a menorah in City Hall Park violated the Establishment Clause).
146. *Id.* at 1029.
147. *Id.*
148. *See generally* Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993); Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341 (7th Cir. 1990).
149. *Lubavitch*, 917 F.2d at 341.
150. *Id.* at 342-43.
151. *Id.* at 347.

> nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.[152]

In other words, the Seventh Circuit held that there is no Free Speech right to erect a monument on government property.[153] Because there is no Free Speech right to erect a monument on government property, the government's refusal to erect a monument cannot be a Free Speech rights violation.

The Seventh Circuit's holding in *Lubavitch* coupled with the Ninth Circuit's holding in *Kreiser* and the Second Circuit's holding in *Kaplan* reveal that three other Circuits have not found permanent speech to be a traditional public forum when that permanent speech is on property that is otherwise considered a traditional public forum. Instead, the Seventh, Second and Ninth Circuits hold that permanent speech can be a limited public forum no matter what kind of property the permanent speech sits on. As such, the government may refuse to place a monument on any property so long as the reasons for doing so are reasonable and viewpoint neutral.

IV. ANALYSIS

The Tenth Circuit failed to distinguish between temporary and permanent speech in *Pleasant Grove City*. Because it failed to make this distinction, it erroneously found that the display of monuments in Pioneer Park was a traditional public forum rather than a limited public forum. As such, the Tenth Circuit incorrectly applied strict scrutiny to Summum's monument denial when it should have applied a reasonableness test. This, in turn, created a debilitating precedent that takes away the government's ability to control what monuments it allows in its public parks.

A. The Type of Access Sought and Its Impact on Defining the Forum

The Supreme Court has held that a forum is not merely defined by the government property at issue but also by "the particular channel of communication" to which access is sought.[154] Moreover, the Tenth Circuit recognized in *City of Ogden* that determining the relevant forum requires consideration of "(1) the government property to which access is sought and (2) the type of access sought."[155] In other words, one type of speech activity may be a different forum from another type of speech

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152. *Id.*

153. The Seventh Circuit reaffirmed this holding in *Graff v. City of Chicago* when it held that the Free Speech Clause did not give someone the right to erect a newsstand on a public sidewalk. *Graff*, 9 F.3d at 1314.

154. Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 801 (1985).

155. Summum v. City of Ogden, 297 F.3d 995, 1001 (10th Cir. 2002) (citing *Cornelius*, 473 U.S. at 800-02).

activity on the same property. *Cornelius* and *Perry* illustrate this distinction.

In *Cornelius*, the Supreme Court found that the relevant forum was nonpublic rather than public.[156] The petitioners argued that the relevant forum was public because they sought access to the federal workplace.[157] However, the Court found that, although the relevant property was the federal workplace and the federal workplace was indeed a public forum, the petitioners had initiated their complaint because they wanted access to the Combined Federal Campaign (CFC) charity drive.[158] The Court therefore limited its focus to the CFC charity drive rather than the federal workplace as a whole and found that the drive had been affirmatively created by the government and the "Government's consistent policy . . . to limit participation" made it a nonpublic forum.[159]

In *Pleasant Grove City* the Tenth Circuit *should* have found that the relevant forum was nonpublic rather than public. Similar to *Cornelius*, Summum initiated its complaint because it wanted access to the display of monuments in Pioneer Park.[160] Had the Tenth Circuit limited its focus to the display of monuments in Pioneer Park rather than Pioneer Park as a whole, it would have found that the government had affirmatively created the display and access therein was limited.

In *Perry*, the Supreme Court likewise found that the relevant forum was nonpublic rather than public.[161] In *Perry*, the respondent, a labor union, initiated its complaint because it wanted access to a school's mailing system so that it could solicit teachers.[162] The Supreme Court found that the system had been affirmatively created by the school and that access was only available to school personnel and the Teachers' Union.[163]

Moreover, the Court found that the school's past acts granting mailing access to the Cub Scouts, YMCA, and parochial schools, only extended the constitutional right of access to other "entities of similar character."[164] Thus, while the mail facilities might be a forum open to the Girl Scouts, local boys' club, and other similar organizations, "they would not as a consequence be open to an organization . . . concerned with the terms and conditions of teacher employment."[165]

156. *Cornelius*, 473 U.S. at 806.
157. *Id.* at 800-01.
158. *Id.* at 793.
159. *Id.* at 804.
160. Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 (10th Cir. 2007).
161. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-48 (1983).
162. *Id.* at 41.
163. *Id.* at 39-41 (distinguishing Teachers' Union from Respondent).
164. *Id.* at 48.
165. *Id.*

In *Pleasant Grove City*, the government had only opened the display of monuments in Pioneer Park to those monuments that "directly related to the history of Pleasant Grove" or to monuments that were "donated by groups with long-standing ties to the Pleasant Grove community."[166] Thus, the display of monuments was open to other historical monuments or groups with ties to Pleasant Grove. The display was not, however, open to Summum's monument, which did not relate to the history of Pleasant Grove. Nor was it open to Summum, an organization with few, if any, ties to the Pleasant Grove Community.

B. The Importance of Summum v. Pleasant Grove City

Summum v. Pleasant Grove City is important because it forces the government to either allow all monuments in its public parks or allow none at all. This effectively denies the government from shaping the permanent character of its parks.

As a threshold issue, Pleasant Grove City may have been engaging in viewpoint discrimination when it denied Summum's monument. The facts of *Pleasant Grove City* indicate that the government did not codify its criteria[167] for determining whether monuments were permitted in the display of monuments in Pioneer Park until after Summum had made its request to erect a monument in Pioneer Park. This indicates that the Tenth Circuit probably believed that Pleasant Grove City's reasons for denying Summum's monument were just a façade for viewpoint discrimination.[168] And perhaps because the Tenth Circuit believed that Pleasant Grove City had engaged in viewpoint discrimination and more importantly believed that the Utah District Court had erred by not recognizing this viewpoint discrimination, the Tenth Circuit wanted to create an ironclad rule that would take the factfinding powers out of the hands of lower courts when presiding over these kinds of issues. After all, *Summum v. Pleasant Grove City* was the third consecutive case where the Tenth Circuit was forced to reverse a lower court decision that had failed to find viewpoint discrimination where there was sufficient evidence to make such a finding.[169]

Unfortunately, the Tenth Circuit went too far with its rule to combat viewpoint discrimination. In *Summum v. Pleasant Grove City*, the Tenth Circuit held that whenever a public park is the property at issue, the fo-

166. 483 F.3d 1044, 1047 (10th Cir. 2007) (internal quotation marks omitted).

167. Monuments need to have historical significance to the community or be donated by someone with longstanding ties to Pleasant Grove City. *Id.*

168. Moreover, a companion case, *Summum v. Duchesne City*, 482 F.3d 1263 (2007), appeared to be obvious viewpoint discrimination even though the district court upheld the government's action (finding possibility of viewpoint discrimination where a plot of land upon which Eagles' monument sat in public park had been sold to a private party). *Id.* at 1273.

169. The previously two obviously being *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) and *Summum v. City of Ogden*, 297 F.3d 997 (10th Cir. 2002).

rum must be a traditional public forum, irrespective of the particular channel of communication sought.[170] As such, the government's denial of a request for access to any speech activity in a public park is only appropriate when it meets strict scrutiny.[171] Because strict scrutiny is an almost impossible level of scrutiny to satisfy, the government's denial of a request for access to any speech activity in a public park will almost never be appropriate.

While this rule is good for most speech, it is inappropriate for permanent speech, such as monuments, because permanent speech does not have a long tradition of access in a public park and it unduly burdens park property.

CONCLUSION

Following the Tenth Circuit's approach, all of our public parks will be cluttered with monuments or void of all monuments. This all or nothing approach does not give the government flexibility to distinguish its public parks by choosing which monuments to place in them. Similarly, this all or nothing approach effectively denies an individual or group from having a monument erected in a public park because the government will be hesitant to do so knowing that, by erecting one monument, it will be opening the door to all monuments.

The real issue that concerned the Tenth Circuit in *Summum v. Pleasant Grove City*, and should concern the Tenth Circuit, is viewpoint discrimination. But, instead of *Pleasant Grove City*'s all or nothing approach to permanent speech, the Tenth Circuit should apply a balancing test. The balancing test would look at the government's denial of a request to access permanent speech in a public park to make sure there is no viewpoint discrimination while at the same time allowing the government to establish criteria regarding which monuments will be allowed in its public parks.

City of Ogden discusses this balancing test. There, the Tenth Circuit stated that in order to comply with the Free Speech Clause, a municipality should employ written guidelines or a well-established practice for determining which monuments to erect on government property.[172] Moreover, in *City of Ogden*, the Tenth Circuit stated that these guidelines had to be well established and in place before the government denied a request to place a monument in a public park or the denial will be considered a façade for viewpoint discrimination. This balancing test is a more specifically enumerated reasonableness test and should give the

170. *Pleasant Grove*, 483 F.3d at 1050.
171. *Id.*
172. *City of Ogden*, 297 F.3d at 1007.

government the ability to control the monuments it allows in its public parks while at the same time preventing viewpoint discrimination.

In sum, temporary speech must be distinguished from permanent speech. While temporary speech in a public park should be treated as a traditional public forum, permanent speech in a public park should be treated as a limited public forum. While a content-based regulation on temporary speech in a public park must satisfy a strict scrutiny test, a content-based regulation on permanent speech in a public park need only satisfy the reasonableness test in *City of Ogden*. A reasonableness test is satisfied where the government's reasons for denying access to the forum are reasonable and viewpoint neutral. Further, a denial will not be considered viewpoint neutral where the government has not employed written guidelines or well-established practices for determining access to government property prior to a request for access to the government property.[173]

The Tenth Circuit should reconsider its holding in *Summum v. Pleasant Grove City* to allow for a content-based regulation of permanent speech in a public park so long as the regulation satisfies the *City of Ogden* reasonableness test.

Keenan Lorenz[*]

173. Of course, just because these guidelines are created does not mean that a court must find that the government's denial was viewpoint neutral.

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