PLEASANT GROVE V. SUMMUM AND THE ESTABLISHMENT CLAUSE:

GIVING WITH ONE HAND, TAKING WITH THE OTHER?

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I am going to talk today about last Term's decision in *Pleasant Grove City, Utah v. Summum*,[1] a case I litigated in the Supreme Court. *Summum* has the distinction of being a case that could have put me on any one of today's three panels: *Summum* was argued as a Free Speech Clause case, and raised difficult issues regarding both government speech and public forum doctrine. But as was widely recognized, including by the Court itself,[2] the case also had very significant Establishment Clause implications. For today, I will leave the Free Speech Clause analysis to others, and focus on what *Summum* means for the Establishment Clause, and in particular, for the status of religious monuments and displays under the Establishment Clause.

The *Summum* case, as some of you may recall, involved a public park in Pleasant Grove City, Utah, that housed a number of monuments donated for display by private citizens or groups, including a Ten Commandments monument donated by the Fraternal Order of Eagles ("the Eagles"). The litigation began when the Summum, a small religious sect based in Utah, asked for permission to donate and display its own monument, similar in size and appearance to the Ten Commandments monument but engraved with Summum's distinctive religious tenets. The City denied the request, on the grounds that City

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1. 129 S. Ct. 1125 (2009).

2. *Id.* at 1139–40 (Scalia, J., concurring); *id.* at 1141 (Souter, J., concurring).

policy allowed only for monuments that "directly relate" to town history.[3] In the courts below, the parties vigorously disputed whether such a policy actually existed before Summum arrived on the scene or whether this was merely a "post hoc facade" for anti-Summum discrimination, a possibility the Tenth Circuit expressly recognized.[4] But as the case came to the Supreme Court, the question was sharpened to whether, as the Tenth Circuit had held, the Free Speech Clause barred the City from imposing a concededly content-based "historical significance" restriction on privately-donated monuments in a public park.[5]

A unanimous Supreme Court held that the City's restriction did not violate the Free Speech Clause. Speaking now as Summum's Supreme Court counsel, I can say that this came as a disappointment but not a surprise. Judge McConnell, dissenting from denial of rehearing en banc in the Tenth Circuit, raised some very practical concerns about applying standard public-forum analysis to permanent monuments, as opposed to other forms of speech.[6] While we thought those concerns were much overstated, we anticipated that the Supreme Court might share them. So as a matter of pure litigation strategy, while we believed we were entitled to a win under existing Free Speech law, we also were fighting with one eye on how best to lose the case, if lose it we must. And on that score—and watch now as I transform what might look like a 9-0 defeat into a major victory—we actually were very successful.

That is because the Supreme Court did not hold, as urged in part by the City and some of its supporters, that the Free Speech Clause allows the government to exercise content-based "editorial discretion" in regulating private speech in the form of monuments.[7] Instead, the Court took a different approach: It held that the Ten

3. 129 S. Ct. at 1130.

4. Summum v. Pleasant Grove, 483 F.3d 1044, 1055 n.9 (10th Cir. 2007).

5. 129 S. Ct. at 1129–30.

6. Summum v. Pleasant Grove, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting) (concerned that "if [city managers] allow one private party to donate a monument or other permanent structure . . . they must allow everyone else to do the same, with no discretion as to content—unless their reasons for refusal rise to the level of 'compelling' interests . . . . [Requiring them to] either remove the . . . memorials or brace themselves for an influx of clutter.").

7. *See* Brief for Petitioners at 8–9, Pleasant Grove v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665); Brief for the United States as Amicus Curiae Supporting Petitioners at 29, *Pleasant Grove*, 129 S. Ct. 1125 (No. 07-665); *see also* Summum v. Pleasant Grove, 499 F.3d 1170, 1171–74 (Lucero, J., dissenting).

Commandments monument (along with the other monuments in the park) constituted "government speech," not private speech, and was thus immune from the standard Free Speech Clause bar on content- and viewpoint-based discrimination. As the Court explained, drawing on prior cases, "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[8]

But the Establishment Clause, of course, works in reverse; under the Establishment Clause, it is *private* speech that goes unregulated and *government* speech that is restricted. And that is the twist in *Summum*, and the second-best result that we were advocating: at the same time the Court shut the door on Free Speech Clause challenges to preferential displays of the Ten Commandments, it seemed to make those displays more vulnerable to Establishment Clause challenge by placing them firmly in the government-speech category.

In the remainder of this essay, I will discuss whether and how *Summum*'s approach to the government speech issue is likely to affect Establishment Clause analysis of the Ten Commandments and other religious displays. There are, as noted above, some straightforward ways in which *Summum* should make it easier for plaintiffs to challenge religious monuments. But a word of caution is in order, too. As was clear from oral argument, the Justices were well aware of the interplay between Free Speech and Establishment Clause principles in *Summum*, and just as capable as the advocates of thinking strategically about the Establishment Clause implications of their holding.[9] So it should come as no surprise that both Justice Alito in his opinion for the Court, and Justice Scalia in his separate concurrence, attempt

8. *Pleasant Grove*, 129 S. Ct. at 1131.

9. *See, e.g.*, Transcript of Oral Argument at 4, *Pleasant Grove*, 129 S. Ct. 1125 (No. 07-665) (Chief Justice Roberts to Pleasant Grove counsel: "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 first, free speech—the Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause."); *id.* at 47 (Justice Scalia to Summum counsel: "You will say just the opposite when you come back here to challenge the Ten Commandments on—on Establishment Clause grounds. You will say something like this: Anybody who comes into this park and seeing this monument owned by the Government, on Government land, will think that the Government is endorsing this message. That's what you will say now."); *see generally* Posting of Lyle Denniston to SCOTUSBLOG, *Pondering the "Tyranny of Labels,"* http://www.scotusblog.com/wp/analysis-pondering-the-tyranny-of-labels/ (Nov. 12, 2008, 15.24 EST) ("Though Sekulow tried repeatedly to show that the Establishment Clause had never been a part of the case, the Justices maintained a continuing interest in whether that Clause [the Establishment Clause] would emerge, sooner or later, as a serious complication for governments that accept identifiably religious artifacts and endorse — implicitly if not explicitly—their message.").

what is from their perspective a kind of damage control: subtly (in Justice Alito's case) or not so subtly (in Justice Scalia's) suggesting alternative Establishment Clause defenses for religious displays. Finally, what the Court gives indirectly it also can take away without much fanfare, and the Court has before it this Term an Establishment Clause case, *Salazar v. Buono*,[10] that could substantially undermine the Establishment Clause "victory" won in *Summum*.

I. HOW *SUMMUM* HELPS ESTABLISHMENT CLAUSE PLAINTIFFS

The Court held in *Summum* that permanent monuments displayed on public property constitute "government speech," rendering ordinary Free Speech Clause rules inapplicable. Both prongs of that characterization—the "government" and the "speech"—should provide significant assistance to plaintiffs challenging religious displays under the Establishment Clause.

First and most obviously, *Summum* makes clear that the message expressed by any public monument is properly attributable to the government. And that is crucial, because the Establishment Clause reaches only governmental, and not private, religious expression or endorsement. Before *Summum*, Establishment Clause challengers sometimes struggled to show the requisite governmental character of a religious monument when, as is often the case, the monument was designed and created by a private party like the Eagles or the Veterans of Foreign Wars (VFW). Lower courts felt obliged to scour records for evidence of formal connections between the government and such monuments.[11] And even when courts were able to satisfy themselves that privately-donated monuments were sufficiently "governmental" to trigger Establishment Clause review, they tended to be far less amenable to Establishment Clause challenges in cases where private parties were largely responsible for the monuments in question.

Summum changes all of that. The monument at issue in *Sum-*

10. 129 S.Ct. 1313 (2009).

11. *See, e.g.*, Card v. City of Everett, 520 F.3d 1009, 1020 (9th Cir. 2008) (emphasizing that "[t]his monument bears a prominent inscription showing that it was donated to the City by a private organization . . . serv[ing] to send a message to viewers that, while the monument sits on public land, it did not sprout from the minds of City officials and was not funded from City coffers"); Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784, 791 (10th Cir. 2009) (using "photographs of commissioners standing beside the Monument" to show link between government and privately-donated monument); Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 1223 (S.D. Cal. 2008) (government owner of property on which monument sits "had no part in designing or financing" monument).

mum was of the kind most likely to raise questions about government attribution: the monument was conceived of and created by the Eagles, a private group, and donated to the City in completed form, without any government input. The monument included not only the Ten Commandments, but also various embellishments associated with the Eagles, as well as a prominent and express acknowledgment that the monument was "presented" by the Eagles. Nevertheless, the Court characterized the Eagles monument as "government speech," declaring confidently that "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf."[12] No formal government action adopting the monument as its own was necessary; rather, the Court explained, the very fact of a permanent monument on government property "unmistakably signif[ies] to all" that the government "intends the monument to speak on its behalf."[13] After *Summum*, there can no longer be any doubt that a monument on public land transmits a distinctively *governmental* message.

Summum also subtly but importantly clarifies the communicative impact of monuments—the "speech" prong of the "government speech" label. Before *Summum*, courts sometimes rejected Establishment Clause challenges to religious monuments in part because they viewed such monuments as inherently "passive."[14] Indeed, when the Supreme Court established its most recent framework for analyzing religious monuments in *Van Orden v. Perry*,[15] it suggested that the traditional *Lemon* test[16] was unduly harsh as applied to passive monuments that, in contrast to the disfavored use of the Ten Commandments in elementary schools, did not aggressively proselytize so much as invite voluntary and subdued introspection. Following that logic, courts applying *Van Orden* often inquire whether challenged monuments transmit messages only through a kind of passive osmo-

12. Pleasant Grove v. Summum, 129 S. Ct. 1125, 1133 (2009).

13. *Id.* at 1134.

14. *See, e.g.*, *Trunk*, 568 F. Supp. 2d at 1218 (secular purpose inquiry more lenient in "context of passive monuments").

15. 545 U.S. 677, 686 (2005) (plurality opinion) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."); *id.* at 691 ("The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day.").

16. Lemon v. Kurtzman, 403 U.S. 602 (1971).

sis, as opposed to more confrontational indoctrination. Some conclude that any religious message conveyed by a passive monument is accidental and attenuated, more a product of random encounter between monument and meandering observer than government plan or policy. [17]

That approach is unsustainable after *Summum*. In characterizing monuments as government speech, the Court reasoned that when a city accepts and displays a privately-donated monument, it does so in order to "convey some thought or instill some feeling in those who see the structure."[18] Monuments are not merely passive objects, intended to fade into the background of public parks; rather, they "play an important role" in "defining" and "project[ing]" a city's very identity to its own citizens and to the outside world.[19] In my view, the *Summum* Court was correct when it understood monuments as part of a purposeful government project of self-definition, designed to actively convey a message about who and what a community is all about. But right or wrong, that conception of how monuments "speak" is now the official view of the Supreme Court, and it is fundamentally at odds with the "passive monument" theory[20] used in previous cases to sustain religious monuments against Establishment Clause challenges.

II. HOW *SUMMUM* COULD HURT ESTABLISHMENT CLAUSE PLAINTIFFS

As shown above, *Summum* significantly limits the government's defenses when monuments are challenged under the Establishment Clause. After *Summum*, the question is no longer whether a monument on public land actively conveys a government message; it does. The only remaining question is whether that message is impermissibly religious in content. With alternative paths to Establishment Clause validity closed, some of the Justices writing in *Summum* began to lay down their markers on that ultimate question, suggesting new or expanded lines of defense for the government.

Justice Scalia, in a concurrence joined by Justice Thomas, jumps right to the Establishment Clause bottom line: the City "ought not

17. *See, e.g.*, *Trunk*, 568 F. Supp. 2d at 1224 (comparing challenged monument to "other more confrontational displays which were meant to indoctrinate").

18. Pleasant Grove v. Summum, 129 S. Ct. 1125, 1133 (2009).

19. *Id.* at 1134.

20. *Van Orden*, 545 U.S. at 686 (plurality opinion upholding "passive monument" inscribed with the Ten Commandments).

fear" Establishment Clause liability because the Ten Commandments monument, though government speech, conveys a "permissible secular message."[21] For this proposition, Justice Scalia relies on the aforementioned *Van Orden v. Perry*[22] decision, a 2005 case in which the Court upheld against Establishment Clause challenge a nearly identical Ten Commandments monument, also donated by the Eagles, displayed on public land surrounding the Texas State Capitol. For Justice Scalia, it is enough to sustain the Ten Commandments monument that it has a "historical meaning" in addition to its religious meaning.[23] But acknowledging that *Van Orden* rests on narrower and more fact-specific grounds than that—indeed, on the same day the Court decided *Van Orden*, it also invalidated a Ten Commandments display in a county courthouse in *McCreary v. ACLU*[24]—Justice Scalia compares the Pleasant Grove monument to the *Van Orden* monument and finds them constitutionally indistinguishable. He reasons that both are displayed in parks that contain many other monuments as well; both were donated to the government as part of the Eagles' effort to combat juvenile delinquency; and both had been standing for many years before they were challenged.[25] In other words, for Justice Scalia, Pleasant Grove's Ten Commandments monument is just *Van Orden* all over again.

But the cases are not, in fact, on all fours. If and when an Establishment Clause challenge is brought to the Ten Commandments monument in Pleasant Grove, it will raise a question neither posed nor decided by *Van Orden*: whether a government displaying a Ten Commandments monument may refuse to display other religious monuments proposed by denominations that do not adhere to the Ten Commandments. To be sure, *any* display of the Ten Commandments is inherently discriminatory in some sense. Many well-established and populous religious denominations, as well as smaller sects like the Summum, do not recognize the Ten Commandments as a sacred text. Christian and Jewish followers recognize slightly but importantly different versions, so that the precise choice of language on a Ten Commandments monument necessarily reflects the religious

21. *Pleasant Grove*, 129 S. Ct. at 1139, 1140 (Scalia, J., concurring) (citing *Van Orden*, 545 U.S. at 701–03 (Breyer, J., concurring)).

22. 545 U.S. 677 (2005).

23. *Pleasant Grove*, 129 S. Ct. at 1140 (Scalia, J., concurring).

24. 545 U.S. 844 (2005).

25. *Pleasant Grove*, 129 S. Ct. at 1140 (Scalia, J., concurring).

views of some but not all adherents.[26] Nevertheless, I think there is an important distinction between the mere display of a Ten Commandments monument and the denial of a request by another religious group for "equal access" for its own religious message. At a minimum, the rejection of Summum's proposed monument makes the element of denominational preference more salient, especially given that the monument would have reflected Summum's alternative account of the same Exodus narrative that underlies the Ten Commandments.

All of this matters because, as the Court has held repeatedly, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another."[27] That principle of "non-preferentialism" is a bedrock of Establishment Clause jurisprudence, accepted even by those who generally argue for more accommodation of religion in public life. Indeed, even Justices who reject the *Lemon* test or the endorsement standard as unduly restrictive of government interaction with religion generally stop short of questioning the bar on government discrimination as between sects.[28] But that is precisely the principle directly implicated when the government displays a monument to one sect's religious beliefs and rejects the competing monument of a different sect. And once that principle is in play, resort to a "historical relevance" defense, as in both *Van Orden* and the *Summum* case, only makes matters worse. Now the message is not just that non-adherents to the majority de-

26. *See Van Orden*, 545 U.S. at 717–18 & n.16 (Stevens, J., dissenting).

27. Larson v. Valente, 456 U.S. 228, 244 (1982).

28. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("[Though] nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion," the Clause does prohibit government from "asserting a preference for one religious denomination or sect over others."). The very significant exception is Justice Scalia's recent and rather startling dissenting opinion in *McCreary v. ACLU*, 545 U.S. 844, 893 (2005), taking the position that the government should be free to prefer those specific religious beliefs that are held by a large majority of its citizens. On that ground, Justice Scalia would have upheld the display of the Ten Commandments, which in his view reflected the religious commitments of the vast majority of religious believers; the minority of believers who do not adhere to the Ten Commandments or to monotheism, along with all non-believers, are simply not entitled to equal regard. "The Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devote atheists." *Id.* *See* Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 276 n.3 (2007) (discussing Justice Scalia's opinion and describing it as "[s]urely one of the most remarkable judicial declarations in contemporary Establishment Clause jurisprudence," confirming "that Justice Scalia is willing to say out loud what most judges dare only to think") (internal quotation omitted).

nomination are political and cultural outsiders; it is that they *always have been* outsiders. And in a community that devotes its most prominent collective speech—its public monuments—to its own history, history becomes the touchstone of community identity, and historical outsiders can never define themselves in.

So when Justice Scalia declares it virtually self-evident that *Van Orden* resolves the Establishment Clause question in *Summum*, his argument should be understood as the aggressive doctrinal push it really is. What Justice Scalia is saying is that the added element in *Summum*—the express denial of "equal time" for a different sect's religious views—makes no difference to the Establishment Clause equation. That is a question unaddressed by *Van Orden*, and its answer is, at a minimum, highly contestable. But Justice Scalia's position would indeed allow cities like Pleasant Grove to "safely exhale" by substantially expanding the *Van Orden* defense and relieving them of Establishment Clause liability that might otherwise be created by *Summum*'s government speech holding. [29]

Justice Alito, writing for the majority in *Summum*, appears to suggest a different defense to new *Summum*-based Establishment Clause liability. Unlike Justice Scalia, Justice Alito does not address the matter directly. Indeed, the majority opinion barely mentions the Establishment Clause at all as the relevant language purports to address Summum's Free Speech claim. But Justice Alito's approach garnered eight votes, not two (all but Justice Souter joined the opinion in full), so it may prove far more significant in future Establishment Clause cases.

Under Justice Alito's opinion, it may be easier for Establishment Clause plaintiffs to show government speech, but it will be more difficult to show that the speech conveys an impermissible religious message—because it will be more difficult to show the existence of any particular message at all. In a sharp departure from traditional Free Speech Clause analysis, Justice Alito appears to join up with the literary deconstructionists who populate college English departments, arguing that the messages conveyed by monuments are radically indeterminate and devoid of objective content. Just as beauty is in the eye of the beholder, it seems, the message conveyed by a monument depends on the observer, and what any given observer reads into the monument. This is the part of Justice Alito's opinion that quotes the

29. *Pleasant Grove*, 129 S. Ct. at 1140 (Scalia, J., concurring).

lyrics of John Lennon's "Imagine" in full.[30] And while the point is not entirely clear, this reader, at least, takes it to be an effort to illustrate Justice Alito's insight that any particular monument may give rise to multiple, even contradictory, meanings, depending on the contexts in which both monument and reader are situated; and that all of those meanings are equally valid, with no special privilege given to the meaning actually intended by the creator or displayer of the monument.[31]

Again, this is standard fare, though hotly debated, in faculty dining rooms around the country. But it is big news for Free Speech Clause law, which has depended fairly critically, at least so far, on the premise that we can at least try to identify the objective meaning of speech—to say, for instance, that certain speech is political, or commercial, or expresses a viewpoint. Those are thought to be stable and meaningful categories. Establishment Clause law, of course, already expressly recognizes the importance of context in applying the endorsement standard. But the endorsement standard as we know it today also presupposes an objectively "reasonable observer" who can ascertain objectively reasonable meaning,[32] and assumes that that meaning will be inflected, at the very least, by the intent of the speaker.[33] *Summum* appears to go much further, suggesting that a monument's message is completely dependent on the subjective understandings of a multiplicity of historically and socially situated observers. And if that is so, then it obviously becomes much harder to show that a monument conveys a distinctly and impermissibly religious message.

Now, this portion of the *Summum* opinion is reasoning, not holding. But it would be a mistake to underestimate the importance of that reasoning. For one thing, Justice Alito's new Establishment

30. *Pleasant Grove*, 129 S. Ct. at 1135 n.2.

31. *Id.* at 1136.

32. *See, e.g.*, Capitol Square v. Pinette, 515 U.S. 753, 778–82 (1995) (O'Connor, J., concurring in part).

33. *See, e.g.*, *Wallace*, 472 U.S. at 78 (O'Connor, J., concurring) (given religious purpose behind the moment-of-silence law, it is "likely that the message actually conveyed to objective observers . . . is approval of the child who selects prayer"); *McCreary*, 545 U.S. at 866 n.14 ("[W]here one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another . . . . [A] purpose to promote a particular faith certainly will have the effect of causing viewers to understand the government is taking sides.").

Clause defense is remarkably broad. Unlike Justice Scalia's defense, which turns on the purported historical meaning and widespread acceptance of the Ten Commandments in particular, Justice Alito's theory of the radical indeterminacy of meaning would presumably apply to all religious displays—crosses, crucifixes, and the like—no matter how vividly sectarian their content. Indeed, the federal government already has applied Justice Alito's logic to a Latin cross, the predominant and exclusive symbol of Christianity, in its brief in *Salazar v. Buono*.[34] In that case, which I will discuss more fully below, the Solicitor General quotes from *Summum* to argue, albeit somewhat tentatively, that even a cross cannot be said to have an impermissible religious meaning, because it "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."[35]

Whether Justice Alito's *Summum* reasoning "has legs"—whether it proves important in resolving future Establishment Clause challenges—remains to be seen. That the Solicitor General already has advanced Justice Alito's theory certainly suggests that the message has been received, loud and clear, and we probably can expect other government defendants to follow suit in their Establishment Clause litigation. Whether they succeed, of course, is a different matter, and it is easy to discount *Summum*'s significance by pointing out that the Justices who joined the *Summum* opinion are unlikely to feel themselves bound by Justice Alito's foray into deconstructionism. But Justice Scalia, at least, seems ready to join with Justice Alito, angrily insisting at oral argument in *Salazar v. Buono* that it is "outrageous" to read into a Latin cross a specifically Christian meaning.[36] And lower courts, where the issue will be joined first, may well see *Summum*'s reasoning, as wielded by the Solicitor General in *Salazar v. Buono* and reflected by Justice Scalia's already infamous contribution to oral argument in that case,[37] as an invitation to hold that even the

34. Brief for the Petitioners at 38–39, Salazar v. Buono, 130 S. Ct. 1803 (2010) (U.S. argued Oct. 7, 2009) (No. 08-472).

35. *Id.* at 39.

36. Transcript of Oral Argument at 39, Salazar v. Buono, 130 S. Ct. 1803 (2010) (U.S. argued Oct. 7, 2009) (No. 08-472).

37. *See, e.g.*, Adam Liptak, *Religion Largely Absent in Argument About Cross*, N.Y. TIMES, Oct. 8, 2009, at A16 (describing "heated exchange" between Justice Scalia and advocate Peter J. Eliasberg about "the meaning of a cross in the context of a war memorial"); Robert Barnes, *Court Wades Shallowly into Church and State*, WASH. POST, Oct. 8, 2009, at A04 (describing the "testy exchange"); Posting of Erin Miller to SCOTUSBLOG, *Thursday*

most religiously symbolic monuments lack any objective and legally cognizable religious meaning.

III. IS *SALAZAR V. BUONO* THE GOVERNMENT'S ULTIMATE TRUMP CARD?

As we have seen, *Summum* facilitates Establishment Clause challenges to certain monuments by declaring them government speech, but also suggests the possibility of two new or expanded defenses to ultimate Establishment Clause liability.[38] There is, however, one other potential limit on *Summum*-created Establishment Clause exposure embedded within that decision: *Summum*'s government-speech holding applies by terms only to monuments displayed on *public* land.[39] In the context of the *Summum* case itself, which arose in a public park,[40] that condition seemed obvious and non-controversial. But its real significance will be tested by *Salazar v. Buono*, and, depending on how that case is decided, it could end up providing the government with the only defense it needs to post-*Summum* Establishment Clause challenges.

At issue in *Salazar v. Buono*, as noted above, is a Latin cross, between five and eight feet tall, erected by the VFW in the 1930s as a memorial to fallen service members, and displayed for decades on federal land in California's Mojave National Preserve.[41] When the National Park Service denied a request to erect a Buddhist shrine near the cross and announced it would remove the cross instead, controversy and litigation ensued.[42] Congress prohibited the use of federal funds to remove the cross and then designated the cross a national memorial.[43] A federal district court[44] and the Ninth Circuit, [45] for their part, declared the government's display of the cross an Estab-

Round-up, http://www.scotusblog.com/wp/thursday-round-up-4/ (Oct. 8th, 2009, 9:09 EST) (noting that articles about the *Salazar* oral argument published in the *New York Times*, *Washington Post*, *Wall Street Journal*, *USA Today*, *Christian Science Monitor*, and *Los Angeles Times* all recounted this specific exchange).

38. *See supra* Part II.

39. *See, e.g.*, *Pleasant Grove*, 129 S. Ct. at 1132 ("Permanent monuments on public property typically represent government speech.").

40. *Id.* at 1129.

41. Buono v. Kempthorne, 527 F.3d 758, 768–69 (9th Cir. 2007).

42. Buono v. Norton, 212 F. Supp. 2d 1202, 1204 (C.D. Cal. 2002).

43. *Kempthorne*, 527 F.3d at 769–71.

44. *Norton*, 212 F. Supp. 2d at 1217.

45. *Kempthorne*, 527 F.3d at 783.

lishment Clause violation and enjoined further display. And finally, Congress acted to transfer the property on which the cross sits—specifically, the one acre immediately beneath the cross—to the VFW in exchange for a land parcel of equal value, and thus to "cure" the Establishment Clause violation.[46]

Buono is exactly the kind of case in which *Summum*'s government-speech holding should work to the advantage of the Establishment Clause plaintiff. Prior to *Summum*, there was a real question (litigated in the early stages of the *Buono* case) as to whether the government could be charged with responsibility for a cross privately created and erected by the VFW; after *Summum*, that issue is resolved, in the challenger's favor, by the rule that any monument on public land speaks for the government.[47] But it may not be that simple, because *Buono* raises the question of whether and under what circumstances the government can effectively undo that rule, avoiding liability for a religious monument simply by transferring title to the land on which the monument sits.

As a doctrinal matter, a holding that the proposed land transfer in *Buono* is sufficient to break the connection between government and monument (now national memorial) would dramatically narrow *Summum*'s government speech principle. The Court in *Summum* rested on the premise that any reasonable observer would understand a monument in a public park to speak for the government.[48] And given the facts in *Buono* —the transfer of a single acre of land in the midst of a national preserve, the designation of the cross as a national memorial, the retention by the government of a reversionary interest in the land should the VFW cease to maintain the cross (according to the plaintiff's reading) or the memorial (according to the government's)—any reasonable observer of that monument surely would understand that it *continues* to speak for the government, regardless of the formality of a title transfer.[49] A ruling that the cross nevertheless constitutes private speech would substantially undercut *Summum*'s emphatic declaration that monuments in public parks are and should be attributed to the government for First Amendment purposes.

And as a practical matter, of course, a government victory in

46. *Id.* at 771.

47. *See supra* notes 18–20 and accompanying text.

48. *Pleasant Grove*, 129 S. Ct. at 1133.

49. *See Kempthorne*, 527 F.3d at 783.

Buono would render *Summum*'s government speech holding far less helpful to Establishment Clause plaintiffs. In either some or all cases, depending on how broadly the Court writes, the government could circumvent *Summum*'s government speech rule simply by finding a private party willing to purchase or otherwise take title to a religious monument or the land directly beneath it. In an area crucially concerned with the messages conveyed by government action, requiring the government to divest itself of title in a religious monument is not a wholly empty formality. But it is much less than *Summum* seemed to promise.

Oral argument in the *Buono* case gave no clear indication of how the Court would rule, principally because Justice Kennedy gave no clear indication of how he would vote.[50] It is safe to assume, however, that the Justices appreciate the connection between that case and their earlier holding in *Summum*. If they are prepared to live with the balance they struck in *Summum*—ruling out Free Speech challenges to preferential displays of privately-donated monuments but leaving those monuments susceptible to Establishment Clause challenge—then they should be reluctant to broadly endorse the curative effects of a title transfer in *Buono*. But if they are looking for ways to cabin the pro-Establishment Clause effect of their Free Speech ruling in *Summum*, then *Buono* may present an irresistible opportunity.

50. *See, e.g.*, Joan Biskupic, *Justices Appear Divided over Cross on Park Land*, USA TODAY, Oct. 8, 2009, http://www.usatoday.com/news/washington/judicial/2009-10-07-cross_N.htm ("Justice Anthony Kennedy, who is often a deciding vote in closely fought ideological cases, did not tip his hand Wednesday except to suggest in questions that he believed the legal question in *Salazar v. Buono* to be limited."); Robert Barnes, *Court Wades Shallowly into Church and State*, WASH. POST, Oct. 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/07/AR2009100700171_2.html?hpid=moreheadlines&sid=ST2009100703851 ("Justice Anthony M. Kennedy, who often casts the deciding vote, said little during the argument.").