

No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioner,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

**BRIEF OF THE CENTER FOR INQUIRY AND THE
COUNCIL FOR SECULAR HUMANISM
AS *AMICI CURIAE*
IN SUPPORT OF NEITHER PARTY**

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INTERESTS OF *AMICI CURIAE*

The Center for Inquiry (“CFI”) is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. The Council for Secular Humanism (“CSH”) is an affiliate of CFI. Through education, research, publishing, social services, and other activities, including litigation, CFI and CSH encourage evidence-based inquiry into science, pseudoscience, religion, and ethics. CFI and CSH believe that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas, and have participated as *amici curiae* in several Establishment Clause cases before this Court. The *amici* have submitted this brief to ensure that in addressing the Free Speech Clause issues presented by this case, the Court remains cognizant of the importance of maintaining the boundaries between Church and State that are an essential part of our free society.¹

¹ The parties have filed with the Clerk blanket consents to the filing of *amici curiae* briefs. No party, counsel for a party, or person other than CFI, CSH, their employees, or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

This case involves permanent free-standing religious monuments on government property. Although the placement of these monuments raises difficult questions under the Establishment Clause of the First Amendment, the parties have framed their dispute here and in the courts below solely in terms of the Free Speech Clause. Further, based on the record before them, the courts have ruled on the basis of the Free Speech Clause alone. *Amici* are concerned that, irrespective of how the Court decides the Free Speech issues, its ruling could be misconstrued as a *sub silentio* holding that the installation of privately donated religious monuments on public grounds does not violate the Establishment Clause. Accordingly, *amici* urge this Court to craft a narrow opinion stating explicitly that it does not reach, and makes no implicit holding with respect to, any undeclared Establishment Clause issues.

ARGUMENT

I. This Case Presents No Justiciable Establishment Clause Issues.

At no point in this litigation has either party raised, or any court decided, whether the Establishment Clause permits a city to place one religion's monument on public grounds while rejecting another's. Where, as here, an issue has not been raised by the parties or addressed by courts below, this Court has always taken care to avoid reaching the issue or expressing an advisory opinion.

This is particularly true in the Establishment Clause context because the adjudication of such questions requires a well-developed factual record regarding the Establishment Clause issues—a record that simply does not exist here.

A. The Parties Have Not Briefed—And The Lower Courts Have Not Ruled On—Any Establishment Clause Issues.

Despite the religious nature of the speech at issue here, neither Pleasant Grove nor Summum has asked this Court to consider what impact, if any, its Establishment Clause jurisprudence might have on the outcome of this case. Those issues are not before this Court now and have never been a part of this case.

Respondent Summum, a corporate sole and church (“Summum” or “the church”), brought this action alleging that the City of Pleasant Grove (“the City”) violated its First Amendment right to free speech by refusing to erect a privately donated monument of Summum’s Seven Aphorisms next to a similarly sized, privately donated monument of the Judaic and Christian Ten Commandments. J.A. 11-23. Although Summum raised additional state law claims, including one premised on the establishment clause of the Utah state constitution, it did not include any claim under the Establishment Clause of the First Amendment in its complaint.

Summum’s omission of a federal Establishment Clause claim was no accident. In its motion for preliminary injunction—the only part of this case

now on appeal—Summum argued that the City had “created a public forum for the display of permanent monuments” within which the City could not discriminate between speakers on the basis of content. Pl. Mem. in Support of Mot. for Partial S.J. & Mot. for Prelim. Inj. at 2-3. Summum could have raised its Utah establishment clause argument in that motion, as it did in its concurrent motion for partial summary judgment. *Id.* at 7. But the church chose instead to focus exclusively on its Free Speech arguments at the preliminary injunction stage, perhaps because violations of the right to Free Speech are presumptively irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003).

Similarly, the City chose not to assert either the Utah or federal Establishment Clauses in defense of its restrictions on Summum’s speech rights. Indeed, in its opposition to Summum’s concurrent motion for partial summary judgment, which is not before this Court on appeal, the City specifically asked the district court not to “wade into an area of *state* constitutional law described by the Tenth Circuit as ‘novel,’ ‘complex,’ and ‘evolving.’” Def. Resp. to Pl. Mot. for Partial S.J. at 9 (emphasis added). And when the City moved for rehearing en banc before the Tenth Circuit, it did so under the government speech doctrine, rather than on any Establishment Clause ground.

Consistent with the claims and defenses raised by the parties, none of the courts to hear or review Summum’s motion for preliminary injunction has

based its decision in whole or in part on the Establishment Clause. At oral argument on Summum’s motion for a preliminary injunction, the District Court asked no questions about the Utah or federal Establishment Clauses, and made no mention of either in its oral order denying preliminary relief. Pet. App. 3b-4b. When the Tenth Circuit panel reversed the District Court and ordered the injunctive relief on which certiorari has been granted, it did so pursuant to public forum analysis under the Free Speech Clause. Pet. App. 8a-20a. In his dissent from the Circuit’s denial of rehearing en banc, Judge McConnell noted that accepting Pleasant Grove’s argument that the Ten Commandments monument constituted government speech “does not mean that the Ten Commandments monuments . . . are immune to First Amendment challenge.” Pet. App. 16f. He added, “Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause We have no occasion here to speculate on the outcome of any such litigation.” *Id.*

B. The Rules And Prudential Doctrines Of This Court Counsel Against Reaching Establishment Clause Issues That Were Not Raised Or Briefed By The Parties.

Where, as here, an issue has not been raised by the parties or addressed by the courts below, this Court has always taken care to avoid reaching the issue or expressing an advisory opinion. Indeed, it would run counter to this Court’s rules and prudential doctrines to address latent Establishment

Clause issues on appeal. Supreme Court Rule 14(a) provides that, “[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court.” Moreover, the questions presented in the petition generally must have been raised below even to be considered on appeal. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (quoting *Duignan*).

Although this case implicates more than one clause of the First Amendment, this Court should adhere to the same prudential doctrine that guided its decision in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) by limiting its constitutional holdings, if any, to the issues on which it granted certiorari. In doing so, it should note explicitly that it expresses no opinion on any other constitutional claim or defense that might otherwise have affected its decision.

In *Pinette*, effectively a mirror image of the case at hand, the Ku Klux Klan sued the Advisory Board of the public plaza surrounding the Ohio state capitol for denying its request to erect a cross in the plaza in December 1993. 515 U.S. at 758-59. Although the Board approved the placement of a Christmas tree and a menorah on the plaza, it argued that permitting the Klan to erect a cross on state grounds would violate the Establishment Clause. *Id.* The United States District Court for the Southern District of Ohio disagreed, ordering the Board to permit the Klan to erect its cross. *Id.* at 759. After the Sixth Circuit affirmed, this Court granted

certiorari to resolve a circuit split on whether the Establishment Clause permits private, unattended religious displays on public grounds. *Id.* In its merits brief, the Klan argued that the Board’s Establishment Clause justification for denying its request was a façade for the Board’s disapproval of the Klan’s political message. *Id.* at 759-60. This Court declined to address the Klan’s Free Speech arguments, however, noting:

Whatever the fact may be, the case was not presented and decided [on Speech grounds]. The record facts before us and the opinions below address only the Establishment Clause issue; that is the question upon which we granted certiorari; and that is the sole question before us to decide.

Id. at 760 (footnote omitted). *Pinette* represents this Court’s regular practice.²

² Just this term, the Court has declined on several occasions to consider issues raised or implied for the first time in the parties’ merits briefs. *See, e.g., Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1407 (2008) (“The parties’ supplemental arguments . . . implicate issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., none of which has been considered previously in this litigation, or could be well addressed for the first time here. We express no opinion on these matters beyond leaving them open for Hall Street to press on remand.”); *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep’t of Revenue*, 128 S. Ct. 1498, 1508 (2008) (expressing no opinion whether Mead and Lexis formed a unitary business, despite trial court’s finding in the negative, because court of appeals had not yet passed on that issue); *Danforth v. Minnesota*, 128 S. Ct. 1029, 1034 n.4 (2008) (“We note at the

Moreover, this Court’s prudential doctrine of avoiding issues not raised below is especially compelling in the Establishment Clause setting because, as the Court has repeatedly recognized, Establishment Clause questions are extremely fact-sensitive. They require careful examination of the challenged practices’ precise characteristics, enactment, history, application, and social context. *See, e.g., Pinette*, 515 U.S. at 778 (O’Connor, J.,

outset that this case does not present [retroactivity] questions Accordingly, we express no opinion on these issues.”). For a sampling of older cases in which this Court reserved judgment on issues not properly raised by the parties, *see Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 430-31 (2002) (“At the outset, we note it is an open question whether FERPA provides private parties, like respondent, with a cause of action enforceable under § 1983. . . . The parties . . . did not contest the § 1983 issue before the Court of Appeals and petitioners did not seek certiorari on the question. We need not resolve the question here as it is our practice ‘to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.’”) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)); *Hudson v. McMillian*, 503 U.S. 1, 12 (1992) (“To the extent that respondents rely on the unauthorized nature of their acts, they make a claim not addressed by the Fifth Circuit, not presented by the question on which we granted certiorari, and, accordingly, not before this Court.”); *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (“The State contends that, even if Officer Nelson’s search violated the Fourth Amendment, the court below should have admitted the evidence thus obtained under the ‘good faith’ exception to the exclusionary rule. That was not the question on which certiorari was granted, and we decline to consider it.”); *Davis v. Passman*, 442 U.S. 228, 249 (1979) (“The Court of Appeals did not consider . . . whether respondent’s conduct was shielded by the Speech or Debate Clause of the Constitution. Accordingly, we do not reach this question.”).

concurring in part and concurring in judgment) (“[T]his question cannot be answered in the abstract, but instead requires courts to examine the history and administration of a particular practice”); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (opinion of Blackmun, J.) (“That inquiry, of necessity, turns upon the context in which the contested object appears”); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (“In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application.”). The latent Establishment Clause questions in this case cannot be answered in the abstract, but rather would require delving deep into the particular facts of the Ten Commandments and Seven Aphorism monuments—facts the parties have not placed into the record because they have framed their dispute exclusively in terms of the Speech Clause.

The procedural history and the reasoning of this Court’s two most recent Ten Commandments decisions further illustrate the problems with issuing any Establishment Clause ruling here. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). In *McCreary County*, the validity under the Establishment Clause of the courthouses’ Ten Commandments displays was the central issue throughout the litigation. The District Court conducted extensive fact-finding; both it and the Sixth Circuit addressed the Establishment Clause merits in their decisions; and all four of the

questions presented in the petition for a writ of certiorari involved the Establishment Clause. *See* Pet. for Writ of Certiorari, at i, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (No. 03-1693), *available at* 2004 WL 1427470. Likewise, this Court’s opinion was highly sensitive to the particular facts presented in the record. The Court described the proceedings below and the various versions of the displays at great length. *See* 545 U.S. at 851-59. It acknowledged that “Establishment Clause doctrine lacks the comfort of categorical absolutes,” *id.* at 859 n.10, and that “under the Establishment Clause detail is key,” *id.* at 867. Finally, the Court’s conclusion that the displays were unconstitutional rested largely on the complicated history of the displays, *see id.* at 868-74, and the fact that two lower courts had already found that they were erected with an illegitimate religious purpose, *see id.* at 871.

Similarly, in *Van Orden*, the sole issue on which certiorari was granted was the constitutionality under the Establishment Clause of a Ten Commandments monument, *see* Pet. for Writ of Certiorari, at i, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500), *available at* 2004 WL 972724, just as this issue was the focus of the district court’s trial and the Fifth Circuit’s decision. The Court again displayed a heightened sensitivity to the challenged monument’s particular characteristics and history. *See* 545 U.S. at 690-91 (plurality opinion) (distinguishing earlier decision that barred posting of Ten Commandments in public schoolrooms). Justice Breyer’s concurrence, in

particular, stressed the difficult and fact-specific nature of many Establishment Clause cases. “[N]o exact formula can dictate a resolution to such fact-intensive cases.” *Id.* at 700 (Breyer, J., concurring in judgment). Justice Breyer concluded that the monument at issue was constitutional only after painstakingly analyzing “[t]he circumstances surrounding the display’s placement on the capitol grounds,” “its physical setting,” and its “40-year history on the Texas state grounds.” *Id.* at 701 (Breyer, J., concurring in judgment).

In contrast to *McCreary County* and *Van Orden*, the parties and courts below did not develop facts relevant to the Establishment Clause inquiry in this case. Given the Establishment Clause’s notorious status as an area of the law where “detail is key,” *McCreary County*, 545 U.S. at 867, and “difficult borderlines cases” abound, *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment), the Court should refrain from deciding any Establishment Clause issues here.

II. A Decision On The Free Speech Issues Could Be Misconstrued As An Implicit Establishment Clause Holding.

Although the difficult Establishment Clause issues raised by this case are not before the Court, a ruling in favor of either party may be misconstrued as tacit approval for the installation of religious monuments on public grounds. To avoid such a misreading of its decision, the Court should state, in clear and unmistakable terms, that it is deciding

only the Free Speech questions presented and that no Establishment Clause implications should be read into its decision.

A. A Decision In Favor Of Petitioner Could Be Misconstrued As An Implicit Holding That The Ten Commandments Monument Does Not Violate The Establishment Clause.

If the Court embraces the City's argument that the Ten Commandments monument constitutes "government speech," the Court should make clear that it does not reach the question of whether the government speech in this case amounts to an endorsement of religion in violation of the Establishment Clause.

The fact that the Free Speech Clause does not require government speech to adhere to viewpoint neutrality does not automatically insulate government speech from challenge under other constitutional provisions. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court separately considered (1) whether the government's funding subsidies constituted government speech for purposes of the First Amendment, and (2) whether those funding subsidies violated substantive due process rights under the Fifth Amendment. *Compare id.* at 192-200 (discussing Free Speech challenge), *with id.* at 201-03 (discussing Fifth Amendment challenge). Similarly, in this case, whether the Ten Commandments monument constitutes government speech for purposes of the Free Speech Clause is analytically distinct from

whether that speech violates the Establishment Clause.

Alternatively, if the Court decides in favor of Petitioner by determining that the Pleasant Grove park is not a public forum, the Court should make clear that it does not reach the question of whether granting preferential access to the Ten Commandments while denying access to the Seven Aphorisms violates the Establishment Clause. Separate and apart from the Free Speech concerns presented by such unequal treatment, “giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause.” *Pinette*, 515 U.S. at 766 (plurality opinion).

The Court should ensure that any decision in favor of Petitioner is narrowly crafted to avoid expressing an opinion, either directly or *sub silentio*, on the constitutionality of Pleasant Grove’s policy under the Establishment Clause.

B. A Decision In Favor Of Respondent Could Be Misconstrued As An Implicit Holding That The Seven Aphorisms Monument Does Not Violate The Establishment Clause.

A loosely-worded decision in favor of Summum might also incorrectly suggest implicit resolution of difficult Establishment Clause questions that deserve full treatment upon full briefing and a full record. The Court should avoid reaching these questions and proceed with “caution” when

“approving the order of a federal judge commanding a State to authorize the placement of freestanding religious symbols in front of the seat of its government.” *Pinette*, 515 U.S. at 815 (Stevens, J., dissenting).

If the Court concludes that the Ten Commandments and Seven Aphorisms monuments are both private speech, the Court should make clear that it does not reach the question of whether these religious displays nevertheless violate the Establishment Clause when permanently erected on public grounds. This Court has “never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 n.13 (2000). Private religious displays can still create an effect of unconstitutional endorsement if they “so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval.” *Pinette*, 515 U.S. at 777 (O’Connor, J., concurring in part and concurring in judgment); *see also id.* at 792 (Souter, J., concurring in part and concurring in judgment) (stating that the government may not “contract out its establishment of religion”).

If the Ten Commandments or the Seven Aphorisms constitute sectarian religious speech, then a policy of equal access may exacerbate the Establishment Clause problems. “[T]he fact that the State has placed its stamp of approval on two different religions instead of one only compounds the constitutional violation.” 515 U.S. at 809 (Stevens,

J., dissenting); *cf. County of Allegheny*, 492 U.S. at 615 (opinion of Blackmun, J.) (“The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.”). The Court should thus make clear that a ruling that allows Summum to place the Seven Aphorisms monument next to the Ten Commandments monument does not foreclose a future Establishment Clause challenge against one or both of those monuments.

CONCLUSION

This case presents no occasion for the Court to depart from its usual practice of deciding only those issues raised in the parties’ briefs and passed on by the courts below. *Amici* therefore urge the Court to consider only the Speech Clause issues on which it granted certiorari and craft a narrow opinion emphasizing that it does not reach, and makes no implicit holding with respect to, any undeclared Establishment Clause issues.

Respectfully submitted,

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