

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PLEASANT GROVE CITY, UTAH, :

4 ET AL., :

5 Petitioners :

6 v. : No. 07-665

7 SUMMUM. :

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9 Washington, D.C.

10 Wednesday, November 12, 2008

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:13 a.m.

15 APPEARANCES:

16 JAY A. SEKULOW, ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 DARYL JOSEFFER, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Petitioners.

22 PAMELA HARRIS, ESQ., Washington, D.C.; on behalf of the
23 Respondent.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 07-665, Pleasant Grove City
5 v. Summum.

6 Mr. Sekulow.

7 ORAL ARGUMENT OF JAY A. SEKULOW

8 ON BEHALF OF THE PETITIONERS

9 MR. SEKULOW: Mr. Chief Justice, and may it
10 please the Court:

11 The Tenth Circuit erred when it held that
12 the First Amendment Free Speech Clause forces Pleasant
13 Grove City to accept and erect on its property a private
14 party's donated, unattended, permanent monument.

15 The decision suffers from two constitutional
16 defects: First, the court's conclusion that a donated
17 Ten Commandments monument constitutes private speech
18 rather than Government speech is wrong. Here each of
19 the monuments on display in Pioneer Park have been
20 selected by the Government, are owned by the Government,
21 controlled by the Government, and are displayed on
22 Government property. When the Government is speaking,
23 it is free from the traditional free speech constraints
24 of the First Amendment.

25 Second, the court compounded its error by

1 further concluding that Pioneer Park is a traditional
2 public forum for the erection of permanent, unattended
3 monuments by private parties.

4 CHIEF JUSTICE ROBERTS: Mr. Sekulow, you're
5 really just picking your poison, aren't you? I mean,
6 the more you say that the monument is Government speech
7 to get out of the first, free speech -- the Free Speech
8 Clause, the more it seems to me you're walking into a
9 trap under the Establishment Clause. If it's Government
10 speech, it may not present a free speech problem, but
11 what is the Government doing speaking -- supporting the
12 Ten Commandments?

13 MR. SEKULOW: Well, the Ten Commandments
14 here was displayed in Pioneer Park, as the mayor said,
15 Mayor Cook, in 1971, to show the pioneer heritage of the
16 community. This was a community of pioneers on a quest
17 for religious liberty. That's why this town was
18 established. There is no Establishment Clause claim,
19 Mr. Chief Justice, here. It would be inconsistent with
20 the relief that the Respondents are really seeking.

21 JUSTICE KENNEDY: Well --

22 MR. SEKULOW: And I think that -- yes,
23 Justice Kennedy.

24 JUSTICE KENNEDY: And I don't want to
25 interrupt your answer to the Chief Justice because I

1 think it's critical, critical to your argument. As a
2 procedural matter, I thought that the Establishment
3 Clause issue was raised in the initial complaint. Are
4 you taking the position it's now waived or something?

5 MR. SEKULOW: Well, there was no Federal
6 Establishment Clause complaint at all. There was a
7 State --

8 JUSTICE KENNEDY: It was under the State?

9 MR. SEKULOW: It was under the State of
10 Utah's Establishment Clause. It was raised in the
11 complaint. It was not the basis upon which the
12 injunction was sought, and the Tenth Circuit noted that
13 it was waived.

14 JUSTICE KENNEDY: If you prevail, the action
15 should be dismissed, as far as you're concerned?

16 MR. SEKULOW: Yes.

17 JUSTICE KENNEDY: All right.

18 MR. SEKULOW: Just let me --

19 JUSTICE KENNEDY: Then getting back to the
20 Chief Justice's point, it does seem to me that if you
21 say it's Government speech that in later cases,
22 including the case of the existing monument, you're
23 going to say it's Government speech and you have an
24 Establishment Clause problem. I don't know if -- I'm
25 not saying it would necessarily be resolved one way or

1 the other, but it certainly raises --

2 MR. SEKULOW: Well, I think from an --

3 JUSTICE KENNEDY: -- an Establishment Clause
4 problem.

5 MR. SEKULOW: If there was an Establishment
6 Clause claim, Justice Kennedy, which is not here, Van
7 Orden forecloses it. This monument is very similar to
8 what was at play in Van Orden. And here the city stated
9 the reason that they accepted and erected this monument,
10 accepted the donation from the Fraternal Order of
11 Eagles, was to show something and to represent their
12 pioneer heritage, but --

13 JUSTICE SCALIA: I suppose it depends on
14 what the Government speech consists of, what it is the
15 Government is saying about the Ten Commandments. If the
16 Government is saying the Ten Commandments are the word
17 of God that's one thing, and if the Government is saying
18 the Ten Commandments are an important part of our
19 national heritage, that's something else.

20 MR. SEKULOW: That's -- and precisely,
21 Justice Scalia, that's exactly what Mayor Cook in fact,
22 at the unveiling ceremony, stated that this will serve
23 to remind citizens of their pioneer heritage and the
24 founding of --

25 JUSTICE KENNEDY: Do you have to --

1 MR. SEKULOW: -- their community --

2 JUSTICE KENNEDY: Did the NEA -- Finley v.
3 NEA, the Court didn't treat that as Government speech.

4 MR. SEKULOW: Right.

5 JUSTICE KENNEDY: Or am I -- is that the --

6 MR. SEKULOW: No. You're correct. Those
7 were speech selection cases. It think it clearly --
8 that the actions here of the Government, of the City
9 Council, falls neatly within Forbes, Finley, and the
10 plurality in American Library Association. The
11 Government --

12 JUSTICE GINSBURG: Before we get -- before
13 we get away from the Government, the Establishment
14 Clause, you said, well, Van Orden answered that, but did
15 it? Because you don't have here a 40-year history of
16 this monument being there, and nobody seems to be
17 troubled by it.

18 MR. SEKULOW: There is a 36-year history
19 here. This monument has been on display since 1971. So
20 this monument has been there a long time, and --

21 JUSTICE SCALIA: I think 38 is the cut-off
22 point.

23 MR. SEKULOW: Is that the cut-off?

24 (Laughter.)

25 MR. SEKULOW: Perhaps I miscounted. It may

1 be 38.

2 CHIEF JUSTICE ROBERTS: Mr. Sekulow --

3 MR. SEKULOW: Yes, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: -- when you come
5 upon this, if somebody comes upon this monument in the
6 park, how are they supposed to tell whether it's
7 Government speech or private speech?

8 MR. SEKULOW: Well, of course the face of
9 it, Mr. Chief Justice, states on the face of the
10 monument that it's presented to Pleasant Grove City in
11 Utah County by the Fraternal Order of Eagles. As far as
12 a Government speech as far as ownership and control goes
13 under a Johannis analysis, different from Finley and
14 Forbes and that context, here the Government exercised
15 control. After all, they allowed it, accepted it, and
16 allowed it to be erected on their property. Under Utah
17 law, all right, title, and interest to that property
18 transferred.

19 But I would say with regard to the
20 endorsement, if you will, or the Establishment Clause
21 issue, really the context here, as this Court has
22 consistently stated within the Establishment Clause
23 cases matter -- this Court has a depiction of Moses
24 holding the Ten Commandment in the frieze of the
25 courtroom with the words written in Hebrew. That's not

1 an endorsement of the religion or of the commandments.
2 It's representative of the history.

3 JUSTICE GINSBURG: In the context of all
4 other lawgivers. This is a stand-alone Ten Commandments
5 and you don't see, I don't think, anywhere "I am the
6 Lord thy God." That's not shown.

7 MR. SEKULOW: No, the words on the Court's
8 frieze are "steal," "murder," "adultery" in Hebrew.

9 JUSTICE GINSBURG: Yes.

10 MR. SEKULOW: Very different in that
11 context. But as far as the actual language of what's
12 going on within the park itself, Justice Ginsburg, this
13 is not a monument standing alone. There are 15 other
14 displays in this Pioneer Park. It's called --

15 JUSTICE SCALIA: Is this a challenge to the
16 Ten Commandments monument?

17 MR. SEKULOW: It's not. This is not an
18 Establishment Clause case.

19 JUSTICE SCALIA: I thought this case did not
20 involve an Establishment Clause challenge. Why are we
21 --

22 MR. SEKULOW: There is no Establishment
23 Clause. It's not a basis upon which the injunction was
24 sought, and the Tenth Circuit specifically held it was
25 waived.

1 JUSTICE SOUTER: Mr. Sekulow, can I just
2 ask: At what point in the litigation did you first
3 raise the Government speech argument?

4 MR. SEKULOW: At the Tenth Circuit. The
5 Tenth Circuit, the existing law in the Tenth Circuit in
6 the Summum line of cases mandated a private speech
7 determination, even if the speech was controlled or
8 known by the Government, if it originated with a third
9 party. As soon as we were before -- and under Tenth
10 Circuit rules that's binding, of course, on the district
11 court and on the panel.

12 But even in the panel brief, we raise the
13 issue of Government speech and the Court addressed it
14 both as to -- and, Justice Kennedy, going back to your
15 point -- both as to Government speech and to the speech
16 selection cases of Forbes, Finley, and American Library
17 Association. And I think that those cases as well point
18 to what's at issue here. Governments in the business of
19 governing and determining the parks and the landscape of
20 the parks make these kind of decisions.

21 JUSTICE SOUTER: Isn't the tough -- isn't
22 the tough issue here not so much whether there is
23 Government speech. I will assume and I do indeed assume
24 that there is. Isn't the tough issue here the claim
25 that there is -- is in fact a mixture, that it is both

1 Government and private. And the argument for its
2 continuing to be private speech I take it is simply the
3 Eagles identification with the presentation and their
4 espousal of what the monument says. How -- how do you
5 think we ought to deal with the mixture issue.

6 MR. SEKULOW: Well, I think the fact that it
7 originated, that the monument originated by the Eagles
8 as a third party, doesn't in any way take away from the
9 fact that in this particular case, and in most cases
10 involving donated monuments, which, as the United States
11 would point to, most of the monuments in parks are
12 donated by or originated with third parties --

13 JUSTICE SOUTER: They probably are, but most
14 of them -- and you correct me if I'm wrong here. But I
15 don't suppose that most of them -- most of them contain
16 as part of -- in a prominent place in the monument
17 itself contain the statement that, you know, this is the
18 gift of or the position of or what-not of X, Y or Z,
19 whereas this monument does.

20 MR. SEKULOW: Most of them, Justice Souter,
21 do actually have statements. In fact, a perfect example
22 would be at Gettysburg National Military Park a number
23 of those monuments, most of them, are donated by or
24 originated by third parties. They'll often say "Donated
25 by," for instance, "the Father Corby --

1 JUSTICE SOUTER: We may have more cases
2 coming.

3 MR. SEKULOW: I hope not.

4 JUSTICE SOUTER: But tell me, what is the
5 criterion that we should use to decide what the
6 significance of the private identification is?

7 MR. SEKULOW: I think the key should be, as
8 this Court alluded to in Johanns, the issue of control,
9 who controls the message ultimately here. And the fact
10 is the Statue of Liberty originated by the
11 Franco-American Union -- was originated by a third
12 party. The United States by resolution accepted it. At
13 that point title transfer.

14 JUSTICE GINSBURG: If that -- if we accept
15 that there is Government speech, I think Justice
16 Souter's question is isn't this really the Government
17 endorsement of the Eagles' message? I mean, the Eagles
18 are all over this monument, their symbol of the eagle,
19 and the Eagles want it to be known that this is their
20 monument. Indeed, I think in Van Orden wasn't the -- in
21 the district court there, wasn't the statement, well,
22 this -- Texas did this in recognition of the good work
23 that the Eagles do in preventing -- - help try to
24 prevent juvenile delinquency.

25 MR. SEKULOW: Right. And I think that

1 actually points to why that once it's controlled and
2 owned by the Government the fact that it originated in
3 the third party, Justice Ginsburg, changes the equation
4 for ownership and control to the Government.

5 JUSTICE SOUTER: Well, if it does, it
6 changes it, as I understand your answer, by eliminating
7 the private aspect of the speech. So that your real
8 answer to me is it's not a mixture.

9 MR. SEKULOW: It's not.

10 JUSTICE SOUTER: And there ceases to be a
11 mixture the moment the Government accepts it.

12 MR. SEKULOW: Once -- right, title, and
13 interest vest under Utah law in the Pleasant Grove City
14 upon acceptance and at that point it is owned and
15 controlled by the city. And the fact that it was
16 originally created -- and Justice Ginsburg, you're
17 correct, the district court and also the court of
18 appeals in Van Orden stated that it was originated as a
19 moral guidance for youth. That was the reason that the
20 Fraternal Order of Eagles developed. The State of Texas
21 said: We're going to honor the Eagles. That was their
22 reason, as well as showing the role of the Ten
23 Commandments and the rule of law. And then the Third --
24 excuse me, Justice Stevens.

25 JUSTICE STEVENS: Can I ask you question

1 that's kind of in the background of the case?

2 MR. SEKULOW: Sure.

3 JUSTICE STEVENS: Assume you didn't have the
4 policy that you do have, but it was perfectly clear that
5 the city decided not to put up this monument because it
6 disagreed with the message of the monument. Whether you
7 call it Government speech or private speech, would that
8 be permissible?

9 MR. SEKULOW: It wouldn't be a First
10 Amendment free speech claim. It might raise an
11 establishment clause, an equal protection kind of clause
12 analysis case, but not under the basis upon which
13 Respondents have sought here. I think that's important
14 to point out. The basis upon which they sought access,
15 in you will, is a species of an equal access claim. But
16 of course our position is the Government hasn't
17 established anything by accepting the monument.

18 JUSTICE KENNEDY: But, Justice Stevens's
19 question is important, maybe not for your case but for
20 other cases. We are deciding this for other cases to
21 arise, and why isn't he correct that if you don't like
22 the message then that raises a content-based claim?

23 MR. SEKULOW: Because if the Government is
24 speaking, if it's the Government's message, they're of
25 course allowed to engage in content-based statements.

1 The Statute of Liberty was a statement of liberty
2 enlightening the world. I could give a list of
3 monuments that do that.

4 JUSTICE KENNEDY: I understand that.

5 MR. SEKULOW: That's what they did.

6 JUSTICE KENNEDY: But it doesn't seem to me
7 that you have to make the Government speech argument for
8 you to make the argument that you just made.

9 MR. SEKULOW: No, not necessarily, because
10 even under the speech selection cases -- I mean, that's
11 correct -- Governments make determinations of what they
12 are going to put in their parks to communicate a
13 message. That's very different from a situation I think
14 where the Tenth Circuit panel was incorrect and
15 Respondents are incorrect: They confuse the issue of
16 the Government actually creating a forum or a venue for
17 speech -- and a perfect example of that would be here,
18 with ownership and control vesting in the city. Very
19 different in that situation than the typical equal
20 access case, where the Government merely opens up its
21 facilities for a variety of viewpoints, Justice Stevens,
22 and then cannot engage in content-based or
23 viewpoint-based --

24 JUSTICE SOUTER: So the city, in effect, if
25 the city says, we are going to have a designated

1 ten-acre field in which anybody can put up a monument,
2 but you can't because we don't like your message,
3 there's a First Amendment problem. But if the city
4 hides the ball in effect and says in effect, we'll --
5 we'll let monuments be placed on -- we will accept
6 monuments from people who want to place them on our
7 property if the monuments have some kind of an arguable
8 historical connection or a connection with people with
9 long association with the community, as long as they
10 have that sort of criterion in mind then they can select
11 any way they want to?

12 MR. SEKULOW: Justice Souter, there is a
13 fundamental difference between opening up a forum,
14 taking acres of a park and saying everybody gets to go
15 in, and another situation where the Government is
16 clearly controlling it not for a subversive reason. And
17 I think the evidence in these cases, in these series of
18 cases, pointing to Justice Kennedy's concern about what
19 does it mean for future cases, here it is
20 uncontroverted: The basis upon which the preliminary
21 injunction ultimately was issued by the Tenth Circuit
22 disregarded or at least cast doubt on the declaration of
23 the park administrator, who had been involved in city
24 government since 1972, who stated -- and it can be found
25 on pages 102 through 104 of the joint appendix -- that

1 it's been the practice of Pleasant Grove City for three
2 decades to accept displays only in their particular case
3 related to the history of the community, its pioneer
4 history. -

5 JUSTICE SCALIA: It goes to the same thing,
6 doesn't it? I mean, whether it's the Government stating
7 the message or whether it's the Government creating a
8 limited public forum for the presentation of only those
9 messages that it thinks are important, it comes to the
10 same thing, doesn't it?

11 MR. SEKULOW: Well, it depends on -- if it's
12 a limited public forum, certainly limited public forums
13 can be based on subject matter and speaker identity.
14 This Court said that, said that consistently, *Cornelius*
15 and *Perry*. So in that context, and now that limited
16 public forum appears to be more of a non-public forum
17 type of analysis, certainly. Even in the designated
18 public forum, it could be limited in that regard.

19 I think that points to the confusion of what
20 took place here. The Court in our view conflated those
21 two issues, the issue of forum and Government speech.
22 And while they're both separate basis upon which we
23 believe the Tenth Circuit opinion could be reversed and
24 vacate the issuance of the injunction, the reality is
25 that in this particular case once title passed and

1 control vested in Pleasant Grove City they were the
2 owner and effectively controlled. And, Mr. Chief
3 Justice, that does not mean that they violate the
4 Establishment Clause simply because they own and control
5 a monument.

6 JUSTICE STEVENS: Let me ask you a question
7 to make sure I understand your position. It would have
8 been permissible for the city to say, our park it filled
9 with monuments and we are only going to let those in who
10 convey messages that we agree with?

11 MR. SEKULOW: If the policy is --

12 JUSTICE STEVENS: If that's a policy.

13 MR. SEKULOW: If the policy is that we're
14 only going -- that the Government's controlling those
15 messages, it's not individual private expression, of
16 course. If it's individual private -- if the
17 Government, on the other hand, were to say --

18 JUSTICE STEVENS: But really, in this case
19 sort of the debate as to whether the policy
20 justifications for the monument are a sham are not are
21 really irrelevant?

22 MR. SEKULOW: From a legal standpoint on
23 Government speech, it's irrelevant. On the factual --

24 JUSTICE STEVENS: Even if it's a Government
25 forum for private speech, I think it's the same thing.

1 You're defining -- you define the forum to include only
2 those -- the forum is putting up monuments. You just
3 put up those monuments that agree with the message.

4 JUSTICE KENNEDY: And the same question
5 Justice Stevens had, just to tack onto his question
6 here, your answer was: Oh, well, the Government owns
7 it. Suppose the Government says: We will accept
8 ownership only if we agree with the message. That just
9 puts his question. I think the ownership argument is --
10 is not an answer to the Justice's question.

11 MR. SEKULOW: It's not ownership, Justice
12 Kennedy, in and of itself. Ownership is an indicator, a
13 factor for control, but it is control of the message.
14 When the Government implanted that monument donated by
15 the Fraternal Order of Eagles, they were sending a
16 message. It was not a message of "I am the lord thy
17 God" --

18 JUSTICE SOUTER: Nothing could be a more
19 obvious control of the message than the criterion that
20 says we will decide in -- in determining to accept it or
21 not, we will decide on the basis of whether we agree
22 with the message. That is control with a vengeance.

23 MR. SEKULOW: The difference is -- the
24 difference between each of those cases and the case here
25 is the Fraternal Order of Eagles surrendered control of

1 their message and their speech. In the typical equal
2 access case, Justice Stevens, they do not.

3 JUSTICE SOUTER: Well, they -- they do in
4 the example Justice Kennedy just raised and the example
5 that I just raised. The Eagles come along say: Here's
6 the monument; take it; it's all yours.

7 MR. SEKULOW: Which happened here.

8 JUSTICE SOUTER: And the -- the Government
9 says: Okay, we'll take the Eagles monument. We will
10 not on identical terms take the Summum monument because
11 we disagree with the message. At the point they make
12 the decision they don't own anything. What they are
13 doing is controlling, in your words, and they are
14 controlling on the basis of agreement with the message.
15 Why isn't that a First Amendment violation?

16 MR. SEKULOW: It's not a First Amendment
17 violation because the Government takes ownership and
18 control at the time it's displayed, and there is no
19 dispute at the time it's displayed that the Government
20 is conveying a message.

21 JUSTICE SOUTER: But we've got -- we've got
22 to shut our eyes to the period prior to the moment title
23 passes.

24 MR. SEKULOW: Absolutely not, because
25 discovery in this case proves the fact that this has

1 been a policy in existence for three decades. And the
2 fact of the matter is under that analysis --

3 JUSTICE SOUTER: Does that mean if we engage
4 in viewpoint discrimination for three decades, we are
5 home free?

6 MR. SEKULOW: If the Government is the
7 speaker, they are certainly entitled to do that. If
8 they are not, that would be a very different scenario.

9 JUSTICE SOUTER: It wouldn't be a speaker on
10 your view until it takes control of the monument.

11 MR. SEKULOW: But the Government -- the
12 speech selection itself is an independent basis under
13 Forbes, Finley, and American Library Association to
14 bring these kind of --

15 JUSTICE SOUTER: But those are cases in
16 which, to begin with, the Government is engaging in -- a
17 process of, in effect, sponsoring speech. And here we
18 -- we have not, I think, reached the point in which the
19 public park is to be analogized either with a
20 publication or a magazine or -- or grants to -- to the
21 arts.

22 MR. SEKULOW: I think, when it comes to the
23 issue of selecting monuments for its park, it's very
24 similar to a museum curator or the arts.

25 Mr. Chief Justice, I'd like to reserve the

1 remainder of my time.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Sekulow.

4 Mr. Joseffer.

5 ORAL ARGUMENT OF DARYL JOSEFFER

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE,

8 SUPPORTING THE PETITIONERS

9 MR. JOSEFFER: Mr. Chief Justice, and may it
10 please the Court:

11 Of course the Government can select the
12 content and viewpoint of monuments on the National Mall
13 and in other public parks across the country. The
14 Vietnam Veterans Memorial did not open us up to a Viet
15 Cong memorial. When the Martin Luther King Memorial is
16 completed on the mall, it will not have to be offset by
17 a monument to the man who shot Dr. King.

18 JUSTICE ALITO: Can't there be a situation
19 where the Government does create a monument that is a --
20 a limited public forum? Let's take the example that you
21 just gave, the Vietnam War Memorial. I presume the
22 Government could not refuse to have the names of certain
23 deceased soldiers on that monument because it disagreed
24 with certain ideas that they had espoused at one point
25 or another.

1 MR. JOSEFFER: Well, if -- when it is
2 Government speech -- for example, we can have a -- a
3 Washington Monument and a Jefferson Memorial without an
4 Adams one. I mean, we do get to decide who we want to
5 memorialize on the mall because it's Government speech.

6 But there are also -- there are two legal
7 theories here. The first is that this is Government
8 speech. The second is that this -- even if it was
9 private speech, this would be one of those unusual
10 contexts like public broadcasting, museums, libraries,
11 where normal forum principles do not apply because the
12 Government is acting as a curator and value judgments
13 are, therefore, both inevitable and appropriate.

14 JUSTICE SOUTER: What's the answer to
15 Justice Alito's question?

16 MR. JOSEFFER: I mean, if we wanted --

17 JUSTICE STEVENS: Well, supposing the
18 Government in the Vietnam Memorial decided not to put up
19 the names of any homosexual soldiers. Would that be
20 permissible?

21 MR. JOSEFFER: Yes. When the -- when the
22 Government is speaking, it can choose who to memorialize
23 and who not --

24 JUSTICE BREYER: That seems to be the
25 problem here. And what I have in this is the -- the

1 problem I have is that we seem to be applying these
2 subcategories in a very absolute way. Why can't we call
3 this what it is -- it's a mixture of private speech with
4 Government decisionmaking -- and ask the question, as we
5 do in election cases, is the restriction proportionate
6 to a legitimate objective? I know how you're going to
7 answer that question. You're going to say: Of course,
8 it is.

9 But what's interesting me is, are we bound
10 in these cases to apply what I think of as an artificial
11 kind of conceptual framework or are we free to ask what
12 seems to me to be at the heart of the matter? The
13 answer to Justice Stevens's hypothetically is: Of
14 course the Government can't do that because it's
15 disproportionate.

16 JUSTICE STEVENS: I didn't get the answer.
17 Did you --

18 MR. JOSEFFER: Yes, the Government can
19 choose to memorialize who it wants on the mall. When
20 the Government is -- now, to be clear, that's under the
21 Free Speech Clause.

22 JUSTICE BREYER: So what is the answer to
23 the -- what is the answer to Justice Stevens's
24 hypothetical? What is the answer to the homosexual
25 hypothetical? What is the answer?

1 MR. JOSEFFER: The only question --

2 JUSTICE BREYER: Because that tests the
3 theory.

4 MR. JOSEFFER: Well, as a matter of the Free
5 Speech Clause, there are no limits on the Government's
6 ability to speak freely. Under the Equal Protection
7 Clause, the Establishment Clause, perhaps the Due
8 Process Clause, there might be thought to be independent
9 checks on the Government's speech. But the Free Speech
10 Clause, whatever else it does, does not prevent the
11 Government from speaking freely.

12 JUSTICE SCALIA: It seems to me the
13 Government could disfavor homosexuality just as it could
14 disfavor abortion, just as it can disfavor a number of
15 other things that in -- in many States people are free
16 to do. The Government can disfavor all of it, can't it?

17 MR. JOSEFFER: The Government would be
18 powerless to do anything if it cannot first formulate
19 and then express its own viewpoints.

20 JUSTICE ALITO: Why is that the answer to
21 the -- the question? Why isn't the answer to the
22 question that monuments generally are not -- the
23 erection of monuments generally are not a forum? There
24 is a fundamental difference between the speaker's corner
25 in the park where anybody can speak and a permanent

1 monument that takes up space, presumably limited public
2 space.

3 And if you have the unusual situation where
4 you are have a monument that is really analogous to a
5 forum, then the forum analysis would be applicable. But
6 to apply it to something like the Washington Monument or
7 the Jefferson Memorial is ridiculous.

8 MR. JOSEFFER: When the -- when the
9 Government -- and this is a point I started on earlier.
10 When the Government is acting as a curator as in the
11 museum context, normal forum principles do not apply.

12 In Forbes, for example, this Court held that
13 when the Government acts as a public broadcaster it
14 normally can engage in viewpoint discrimination outside
15 of an exception for candidate debates. And the -- and
16 the same point applies here to monuments, I think, for a
17 combination of three reasons.

18 First, the Government has an overwhelming
19 interest as a property owner in not being saddled with
20 structures it does not want; second, the limits on the
21 availability of public space you refer to; and, third,
22 the Government's sovereign interest in using monuments
23 on its own property to tell its own story, as the
24 Federal Government has done here on the Mall.

25 It's similar to, for example, a sculpture

1 garden or -- and -- a sculpture garden where the
2 Government can choose what sculptures to put in the
3 sculpture garden without necessarily having some
4 overriding theme or overriding reason.

5 If I could give two examples of that, in
6 Meridian Hill Park here in Northwest D.C., between 15th
7 and 16th streets, the Government chose to accept and
8 place a variety of privately donated structures that
9 have no evident connection to one another. They cover
10 people as diverse as Joan of Arc, President Buchanan --

11 JUSTICE BREYER: But suppose they only
12 accept Democrats who are sculptors, and they reject all
13 the Republicans?

14 MR. JOSEFFER: Right. As a matter of policy
15 --

16 JUSTICE BREYER: Now, what in the First
17 Amendment -- are you saying the First Amendment would
18 not stop that?

19 MR. JOSEFFER: The Free Speech Clause on its
20 own force does not prevent the Government from speaking
21 freely. But as a matter of rational basis review under
22 the Fifth and Fourteenth Amendments, It is hard to see
23 how the Government would have a legitimate governmental
24 interest in pure partisan activity.

25 But the Free Speech Clause, what it does is

1 that it -- it limits the extent to which the Government
2 can regulate other people's speech.

3 JUSTICE KENNEDY: Well, under the Equal
4 Protection Clause would -- if you wrote an Equal
5 Protection Clause opinion, you would end up saying it's
6 content-based. That's the First Amendment.

7 MR. JOSEFFER: If it's Government speech,
8 though --

9 JUSTICE KENNEDY: I -- I don't think that
10 can you avoid the hard part by saying, oh, other
11 amendments of the Constitution might apply. The heart
12 of the question is whether the Government may
13 discriminate based on content, and that's a First
14 Amendment question.

15 MR. JOSEFFER: But when the Government is
16 speaking or when the Government is acting as a curator
17 as with a museum or a sculpture garden or a library or
18 here, the Government is absolutely entitled to make both
19 content and viewpoint-based distinctions. Otherwise,
20 you get the absurd result --

21 JUSTICE SCALIA: It's not only absolutely
22 entitled, it has to do so. It -- it has no choice, does
23 it?

24 MR. JOSEFFER: Right. If we -- if we
25 couldn't formulate and express viewpoints, I would be

1 here today in support of neither party. And the
2 Government, frankly, would be prevented from doing much
3 of anything.

4 JUSTICE SCALIA: You can't run a museum if
5 you have to accept everything, right?

6 MR. JOSEFFER: Yes. Now, yes -- I mean --
7 yes, if it's just the simple point that we can do
8 content and viewpoint discrimination in this context.
9 And Forbes recognized that when the Government -- even
10 if it's private speech, Forbes recognizes that as a
11 curator we can do this. An example, though, of the
12 question --

13 JUSTICE KENNEDY: Does the law always
14 require us to adopt an all-or-nothing position? Aren't
15 there some extreme cases indicated by the hypothetical
16 where the First Amendment does enter in? Do we have to
17 decide this case that it's all or nothing?

18 MR. JOSEFFER: Of course, the Court could
19 put limits on its holding if it so desired.

20 But if I could address the, sort of the
21 hybrid speech which seems to worry some people. The
22 Vietnam Veterans Memorial is a great example. People
23 are permitted there to put private objects next to the
24 wall. That's clearly authorized speech. It's
25 authorized public speech. But at the end of the day,

1 the Government comes around, takes it away, puts the
2 nonperishable objects in a Government warehouse, and
3 then decides which of them to display in the
4 Smithsonian's American History Museum.

5 So what starts off as public speech -- or as
6 private speech, clearly becomes Government speech when
7 the Government assumes control over it. It's the same
8 as the Government putting a painting --

9 JUSTICE SOUTER: It would be -- the
10 trouble --

11 MR. JOSEFFER: -- in a Government museum.

12 JUSTICE SOUTER: I see your point, but the
13 trouble with that as an argument here is the private
14 part of the speech is just as much chiseled in stone as
15 the public part. So it's not going to go away at the
16 end of the day, and there isn't any way that the
17 Government in effect can engage in the gesture of saying
18 all private speech is treated the same way, whatever way
19 that might be. So we've got a -- we've got a -- we've
20 got a more difficult problem here.

21 MR. JOSEFFER: But if the Government -- take
22 a museum. The Government could choose or not choose to
23 put, say, a Gilbert Stuart painting that has a favorable
24 portrayal of a former president on display. The
25 Government didn't paint it. It has Gilbert Stuart's

1 name all over it. But when the Government chooses to
2 put that in a -- in a display, it's the Government that
3 is speaking, and the Government, therefore, has an
4 absolute right to decide its own speech. That should
5 become --

6 JUSTICE SOUTER: What you are, in effect,
7 saying -- and this may be -- I don't mean I think this
8 is necessarily the wrong answer -- but you're, in
9 effect, saying, yes, you can find instances of
10 Government speech in which there is clearly a -- a
11 private identification consistent with it, but the only
12 appropriate analysis is the analysis for government
13 speech. You can't have it both ways, you've got to pick
14 one or the other; and it is -- it is the Government
15 aspect which controls the First Amendment purposes.
16 That, I take it, is your answer?

17 MR. JOSEFFER: Yes. And when we are talking
18 about physical objects that constitute the speech,
19 that's oftentimes the case in museums, sculpture
20 gardens, parks across the country. So, frankly, there
21 is -- there is nothing even unusual about it. And the
22 reason is that all the free speech clause does --

23 JUSTICE SOUTER: There is nothing unusual
24 about it, but we haven't had this kind of a challenge
25 before. So, I -- I guess it still rests on you to say

1 why should we submerge the private part to the
2 Government part. There may be a very good reason, but I
3 want to know what your reason is.

4 MR. JOSEFFER: It's simply that once the
5 Government is speaking, it is the one -- it turns on
6 control, right? So once the Government takes control of
7 something, says this is our speech, then it's the
8 Government speaking. And here, I mean, it does --

9 JUSTICE SCALIA: Well, maybe they can't do
10 it in museums, either. I mean, yes, we've been doing
11 this for a couple of hundred years, but maybe we've been
12 wrong all along and maybe the Government can't run
13 museums. It's possible, right? It's a brave new world.

14 MR. JOSEFFER: And frankly, public parks are
15 no less absurd, because we've been doing it in public
16 parks for probably at least as long as well. And in
17 fact, there are thousands of privately donated monuments
18 and sculptures in public parks across the country, and I
19 suspect a great many of them don't have some formal
20 disclaimer on them saying "I am the United States and I
21 approve this message." That's not the way that
22 Government speech has ever been thought to work.

23 The question, though, with Government speech
24 turning on control, this is the easy case because we
25 have a physical object that Government has both legal

1 and physical custody over. It chooses to display it,
2 and then it can do whatever it wants with it. It can
3 move it, modify it, destroy it, drop it to the bottom of
4 the ocean, sell it on eBay. So you'll never get a
5 better example of control, which this Court held in
6 *Johanns* is the touchstone for Government speech that's
7 not subject to the free speech clause.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Ms. Harris.

11 ORAL ARGUMENT OF PAMELA HARRIS
12 ON BEHALF OF THE RESPONDENT

13 MS. HARRIS: Mr. Chief Justice, may it
14 please the Court:

15 The city here gave the Eagles access to its
16 public park for s display about the Ten Commandments and
17 it denied Summun access for a display about the tenets
18 of its faith. That's a violation of the core free
19 speech principle that the Government may not favor one
20 message over another in a public forum. The Eagles
21 display here is not Government speech. The city had
22 nothing to do with the Ten Commandments Monument.

23 JUSTICE SCALIA: You say in a public forum.
24 I mean, that sort of begs the question. I mean, that --
25 that encapsulates your -- your -- encapsulates your

1 answer. Has the -- has the city allowed anybody to put
2 up a monument there willy-nilly?

3 I mean, a public forum, as you know, we can
4 have praise in the park, we can have protest. Anybody
5 can do it, so long as you get a license and you're not
6 interfering with some other group. That's a public
7 forum. Has this city said anybody can put up a monument
8 in this park?

9 MS. HARRIS: Justice Scalia, there is a very
10 serious factual question in this case about whether the
11 city ever had a bona fide selection policy for this
12 park. But putting that to one side for a moment, a
13 public park is a public forum. A monument in a park may
14 be a mode of communication for that forum --

15 JUSTICE SCALIA: It's a public forum for
16 some things. Is it a public forum for everything? It
17 may be a public forum for processions, for parades. But
18 it is a public -- is it a public forum for anybody
19 constructing a monument?

20 MS. HARRIS: If you look at the question
21 that way, Justice Scalia, it might be said that a public
22 park is not a forum for sound trucks, it's not a forum
23 for sleep-ins, it's not a forum for news racks.

24 What that means is that there is no
25 unfettered right to engage in those forms of

1 communication. But if the Government allows it all --

2 JUSTICE KENNEDY: Those are time, place, and
3 manner regulations, with which we are all familiar. But
4 my concern is that this -- this case is an example of
5 the tyrannies -- of the tyranny of labels. Because it's
6 a public forum, as Justice Scalia indicated, for
7 parades, for protests, which are limited temporally,
8 it -- it -- it just seems wooden and rigid to say to all
9 of a sudden say, well, it's a public forum for something
10 that will last 30 years for which there is only limited
11 space. It just doesn't make common sense.

12 MS. HARRIS: And that is exactly why,
13 Justice Kennedy, the city, any city, is permitted to
14 make a decision that it will close its public parks to
15 all unattended displays. The Court said that in
16 Pinette. It said that earlier in Vincent. But Because
17 there --

18 CHIEF JUSTICE ROBERTS: How far do you push
19 that? I mean, what about the hypotheticals on the other
20 side? I mean, you have a Statue of Liberty; do we have
21 to have a statue of despotism? Or do we have to put any
22 president who wants to be on Mount Rushmore? How do you
23 answer those?

24 MS. HARRIS: Of course not, is how I answer
25 that, Mr. Chief Justice.

1 Any city has available to it two very
2 straightforward options for dealing with this question
3 if by some happenstance they do have a monument on
4 public land that is not now a Government monument. The
5 first thing they can do is adopt any existing monuments
6 as Government speech converts them.

7 JUSTICE SOUTER: How do they do that? What
8 is the -- you mentioned that frequently in your brief,
9 and I'm not sure what formality you have in mind when
10 you say adopt.

11 MS. HARRIS: Governments can do it different
12 ways, Justice Souter. The way the national Government
13 does it under the Antiquities Act of 1906 is they
14 formally designate pre-existing structures as a monument
15 of the United States or a memorial of the United States.

16 And that, by the way, Mr. Chief Justice, is
17 the response to the Statue of Liberty problem. In 1924
18 it was so designated.

19 CHIEF JUSTICE ROBERTS: So, it's frozen into
20 time. Everything up until now is okay, but anything
21 going forward is not?

22 MS. HARRIS: I'm not sure I understand.

23 CHIEF JUSTICE ROBERTS: Well, I thought you
24 said the Government can accept what's there and say
25 that's our speech. But you're challenging the ability

1 to do that going forward.

2 MS. HARRIS: No. No, Your Honor. If the
3 Government accepts what's there -- what is there now and
4 says that's ours, then they can say we are not taking --
5 we have closed this forum to private speech, these parks
6 are available only to Governmental displays.

7 JUSTICE SCALIA: The other side says that
8 some of these monuments, especially in the Civil War
9 battlegrounds, do indeed show who the donors are.

10 MS. HARRIS: I'm sorry?

11 JUSTICE SCALIA: What -- Mr. Sekulow says
12 that some of these monuments, notably those in the Civil
13 War battlefields, do show who the donors are.

14 Now is that Government speech or private
15 speech?

16 MS. HARRIS: It depends if they were
17 privately formulated and handed off to the Government as
18 a completed object, they are only Government speech if
19 the Government has since then converted them --

20 JUSTICE SCALIA: So they have to go?

21 MS. HARRIS: -- by adopting them. They
22 don't have to go.

23 JUSTICE SCALIA: Now that the Government
24 converted them, it passes a law saying, what, we -- we
25 adopt this?

1 MS. HARRIS: That has happened.

2 JUSTICE SCALIA: Isn't it enough that the
3 Government accepts ownership of it and places it on the
4 Government's property? Isn't that a manifestation of
5 the Government's adoption of it?

6 MS. HARRIS: Let me answer both of your
7 questions, Justice Scalia. The way it does that even if
8 they -- even if a monument makes clear that it was
9 privately formulated, a Government can still adopt it as
10 its own speech. It can put --

11 JUSTICE SOUTER: So this case -- your claim
12 would disappear if this town in Utah had passed an
13 ordinance saying we adopt the Ten Commandments Monument?

14 MS. HARRIS: It would, Justice Souter. We
15 would no longer have an equal access right going
16 forward --

17 JUSTICE SOUTER: But that's -- I mean, if
18 that's all that's involved here, we're engaging in kind
19 of a -- almost a silly exercise in formality.

20 MS. HARRIS: Absolutely not, Justice Souter.
21 And the reason we know it's not a formality is because
22 the city here refuses to do it. If it were just a
23 formality, they would check the box. They won't do
24 it --

25 JUSTICE SOUTER: If we tell them you have

1 got to take the monument down if they don't do it, don't
2 you think they are going to pass that pretty quick?

3 MS. HARRIS: I don't think they are, Justice
4 Souter. And I think it would be partly a concern about
5 establishment clause exposure, which we already heard
6 about today.

7 I think that there are substantive reasons
8 why they might not want to adopt one version of the Ten
9 Commandments as the city's own speech. As it happens,
10 the version of the Ten Commandments on the Eagles
11 monument isn't even the Mormon version of the Ten
12 Commandments. That might raise sensitivities in this
13 town. And whenever the Government adopts one version of
14 the exodus account, that is not legally sensitive but
15 politically sensitive as well.

16 JUSTICE SCALIA: It depends on what you mean
17 by adopting one version. If it's adopting the version
18 by saying these Ten Commandments are the word of God,
19 that's one thing. If it's adopting it by just saying
20 this is a version of the Ten Commandments that has had a
21 very significant place in the history of the American
22 people.

23 MS. HARRIS: I think that those are --

24 JUSTICE SCALIA: I wouldn't care what
25 version it was if that's all they're doing.

1 MS. HARRIS: Those are very different --

2 JUSTICE SCALIA: Nor would the Mormons in
3 Utah, I think.

4 MS. HARRIS: Well, those are very different
5 for establishment clause purposes, Justice Scalia. But
6 the only way the Government can be adopting anything in
7 this context is by saying through the act of selection
8 we have adopted it. And the problem with that is that
9 the Government is not allowed to select which private
10 speech it wishes to present to the public in a public
11 park.

12 It can do that. It can do that in museums.
13 It can do it in libraries. It can do it --

14 JUSTICE ALITO: Let me give you this
15 example. Just by chance yesterday I was taking a walk
16 in a little neighborhood park , and I saw that there was
17 a monument -- a small monument, donated, and it says
18 right on there donated by a private neighborhood
19 association to commemorate a number of people who were
20 killed in the 9-11 attack on the Pentagon. And now if I
21 searched the town records or the county record and I
22 don't find any resolution saying they adopted this
23 monument as their monument, does that mean that if I
24 would like to put up a monument in the park to
25 commemorate loved ones who died, or people who I

1 respect, I have a First Amendment right to do that?

2 MS. HARRIS: No, Your Honor, and really for
3 three separate reasons. First of the all, it may be
4 that the Government -- even privately donated monuments
5 often involve a great deal of Government involvement at
6 the front end, when they are created. Government often
7 works in partnership with private donors to create the
8 content of that monument.

9 JUSTICE ALITO: Well what if the situation
10 is a neighborhood association prepared this; they said
11 we'd like to display it in the park; and the county or
12 the town says fine, go ahead and do it?

13 MS. HARRIS: Even under those more usual
14 circumstances there would be two things the city could
15 do to keep you out of their park. As I said, they could
16 adopt the monument that is there. The other thing any
17 city can do is adopt some kind of a content-neutral ban,
18 or a content-neutral limit, on the number of private
19 displays it wants to have in its park.

20 JUSTICE SCALIA: Ms. Harris, we -- we need a
21 clear rule here. We -- we can't expect the courts or
22 the cities for that matter to investigate in every case
23 what the degree of the Government's involvement in
24 the -- and what is the degree, 50 percent, 45 percent,
25 36 years? I mean, we are going to make up a percentage?

1 That's -- that's not the way threshold constitutional
2 questions ought to be resolved or resolvable. We need a
3 clear rule that the cities can rely on.

4 MS. HARRIS: I agree that we need a clear
5 rule, and if clarity is important here the easiest way
6 for the Government to make clear that it has adopted a
7 privately formulated message as its own is to adopt it
8 clearly and publicly. It can put up a plaque; it can
9 designate it a city monument.

10 JUSTICE SCALIA: Is there an historical
11 basis for that, or you just made it up? You think it
12 would be a good idea? I mean, if that had been the
13 practice over the past 200 years for all of these
14 monuments that -- that, you know, are strewn across the
15 landscape, then I'd say yes, that's probably what the
16 difference is.

17 But I'm not aware that there is any such --
18 such requirement and any such practice on the part of
19 Government. You're -- you're creating a new world.

20 MS. HARRIS: I --

21 JUSTICE SCALIA: It may be a very nice world
22 but it happens not to be the world under which our
23 Constitution has subjected this country.

24 MS. HARRIS: If this is uncommon, that is
25 because usually the Government does reserve monuments

1 for governmental speech, monuments that it helps to
2 create or monuments that it is happy to endorse after
3 the fact. If this case is unusual, it's because
4 Pleasant Grove has done an unusual thing here by
5 allowing a private party to erect a permanent monument
6 in its park, even though it is not willing to endorse
7 the content of that monument.

8 And I do want to say that although clear
9 rules are necessary, whatever the particular details of
10 how a monument came to be on public land, there are
11 these two clear safe harbors for any city facing that
12 problem. Adopt it now or enact a content-neutral limit
13 on the number of monuments in the park; and we think the
14 city could do that on a going-forward basis. It could
15 say we have room -- for aesthetic reasons, for space
16 constraint reasons, We would like --

17 JUSTICE SCALIA: So that's all right, the
18 first 95 monuments, whoever -- whoever put them up,
19 okay? It's a monument to chocolate chip cookies or
20 whatever else, is that it? First 95?

21 MS. HARRIS: Sure. A city could say we
22 think --

23 JUSTICE SCALIA: This is a practical
24 solution to the problem?

25 MS. HARRIS: Absolutely, because any city

1 confronting this problem now can look at its park and
2 say we have four monuments --

3 JUSTICE KENNEDY: You're saying the last
4 generation had much more freedom than the present one?

5 MS. HARRIS: I'm saying that as long as it
6 does it on a content-neutral basis, because it is
7 genuinely concerned about aesthetics, space constraints,
8 clutter in its parks, a city can enact a ban or a limit
9 on the number of displays; and if that has the effect of
10 grandfathering in existing displays --

11 JUSTICE GINSBURG: Can we go back to -- your
12 basic premise is this is a public forum, in any and all
13 instances; and we do have, certainly in the speech area,
14 demonstration area, from time immemorial public parks
15 have been places where people can speak their minds.
16 But I don't know of any tradition that says people can
17 come to the park with monuments and put them up if they
18 will, so long as they meet the equivalent of time, place
19 and manner.

20 So you're making an assumption that from
21 time immemorial, monuments, just like speeches, can be
22 presented by anyone who wants to.

23 MS. HARRIS: No, Justice Ginsburg.
24 Monuments are different from speeches and because
25 monuments are different, the Court has held that unlike

1 oratory, a city can decide to close its parks entirely
2 to all private unattended displays. It could not say,
3 "We've heard enough speeches; no more speeches." It can
4 say no private --

5 JUSTICE SOUTER: If that -- it that is so,
6 what is the point of using the public forum analysis at
7 all?

8 MS. HARRIS: Because here the city has not
9 done that. The city has not closed -- it has not made
10 the decision that it will bar all private unattended
11 displays.

12 JUSTICE SOUTER: That -- that may mean that
13 you have the foundation for a -- a speech discrimination
14 argument --

15 MS. HARRIS: That --

16 JUSTICE SOUTER: -- but that would not be
17 the answer if we were dealing with a -- a traditional
18 public forum in -- in the sense that the Court's cases
19 have used the term.

20 MS. HARRIS: Oh, I think --

21 JUSTICE SOUTER: So it seems to me that your
22 use of public forum is just by kind of remote analogy
23 here, and I -- I'm not sure that it's helping you or
24 would help us if we used it as criterion for decision.

25 MS. HARRIS: Oh, I think it may be helpful,

1 Justice Souter, because once we know that we are talking
2 about a public forum, we know that access cannot be
3 limited on a content basis.

4 JUSTICE KENNEDY: Well, your -- you can
5 stick with it as long as you want; that's what the --
6 the Tenth Circuit did, but suppose that we were to say
7 that we were unconvinced by the comparison between
8 speeches and parades on the one hand and monuments on
9 the other, so we did not apply the public forum analogy.
10 Would that be the end of your case?

11 MS. HARRIS: Oh, no, Justice Kennedy. Even
12 outside a public forum, in any context -- even in a
13 museum or library -- in any context in which the
14 Government is regulating private speech, it may not act
15 in a way that is designed to suppress one particularly
16 disfavored message or view; and we think that's what
17 happened here. As I said earlier --

18 CHIEF JUSTICE ROBERTS: Well, but it does
19 all the time. The -- you don't get equal time -- the
20 cigarette companies don't get equal time because the
21 Government says the Surgeon General has determined it is
22 bad for your health. It always suppresses alternative
23 viewpoints.

24 MS. HARRIS: When the Government is speaking
25 for itself, then the Government does have a right to

1 prefer certain viewpoints over others, but here the city
2 has consistently refused to adopt the content of this
3 monument as its own, and it is still disclaiming
4 endorsement of that monument. The city here -- the
5 justification for that Government speech exception is
6 that sometimes, as the United States has said, the
7 Government is entitled to speak in its own voice to
8 promote its own messages, its own policies. But it says
9 it's not doing that here.

10 JUSTICE SCALIA: You will say just the
11 opposite when you come back here to challenge the Ten
12 Commandments monument on -- on Establishment Clause
13 grounds. You will say something like this: Anybody who
14 comes into this park and seeing this monument owned by
15 the Government, on Government land, will think that the
16 Government is endorsing this message.

17 That's what you will say now.

18 MS. HARRIS: Um --

19 JUSTICE SCALIA: Now why would it be true
20 there, but it's not true here? Would anybody think that
21 on public land owned by the Government the Government
22 disagrees with this message?

23 MS. HARRIS: Justice Scalia, for one thing,
24 if this case were being litigated under the
25 Establishment Clause, it wouldn't be critical whether

1 the monument were actually Government speech, because
2 the Establishment Clause can be implicated by the
3 Government's interaction with private speech as well.
4 That said, I do not think it's the case that anybody who
5 came across this monument would know that the Government
6 is speaking.

7 The monument says it is presented by the
8 Eagles. It has the Eagles emblem. The mayor himself
9 testified in his deposition that he thought the monument
10 was owned by the city, because it's the Eagles and not
11 the -- I'm sorry; was owned by the Eagles, because it is
12 the Eagles and not the city that maintains that
13 monument.

14 I think there is a very real question about
15 what people would think here and if those perceptions
16 are important the easy way to clarify it is for the city
17 to step up and adopt the monument as Government speech,
18 which it won't do here.

19 JUSTICE ALITO: Isn't merely allowing the
20 monument to be built on public property sufficient
21 acceptance? If somebody came up to you and said I'd
22 like to put up a monument in your front yard, and you
23 said sure go ahead, do that, aren't you accepting
24 that -- whatever the monument says, in a sense?

25 MS. HARRIS: Your Honor, my front yard is

1 different from a public park, and that matters because
2 when all the Government has done is said sure, go ahead,
3 put your monument in our park, that's all the Government
4 ever does when it administers access to a public forum.
5 If it's doing it on a content basis, that's a problem.
6 The Government --

7 JUSTICE SOUTER: No, but it doesn't -- it
8 doesn't have to do that, say, for time place and manner
9 restrictions for access to a public forum if it really
10 is a public forum. There is something more involved
11 here.

12 This is closer to the case of the individual
13 who says sure, put the McCain sign on -- on my lawn. No
14 one is going to doubt that the person whose house is
15 there is in favor of McCain; and -- and it seems to me
16 we are in the same situation with the monument in the
17 city.

18 MS. HARRIS: Again, I think because it's a
19 public park and because public forums are always used
20 for the expression of -- of ideas that the Government
21 does not necessarily agree with --

22 JUSTICE SOUTER: Sure, but when you get the
23 monument --

24 MS. HARRIS: -- the perceptions will not be
25 clear.

1 JUSTICE SOUTER: We do not -- there is no
2 pervasive understanding or non-pervasive one, I would
3 have thought, in the United States that anyone who wants
4 to display a message in granite in a public park can put
5 it there. No one assumes that. Everyone assumes that,
6 if the granite monument is there, the city or whatever
7 has said, yes, we approve it, put it there.

8 MS. HARRIS: The city in this case --
9 everybody may assume that, and they would be right. The
10 city in this case did say, yes, we approve that monument
11 and not that one. So you can put yours up, and you
12 can't. That doesn't solve the First Amendment problem.
13 That is the First Amendment problem that the Government
14 --

15 JUSTICE SOUTER: It may create the First
16 Amendment problem, but it seems to me, going back to
17 Justice Alito's question, that the City's decision is a
18 clear adoption of the monument.

19 MS. HARRIS: If all we have, I think,
20 Justice Souter, is that the city has permitted one
21 private speaker to erect a monument, there is no
22 constitutional or judicially manageable line between
23 that and just the ordinary thing the Government always
24 does when it grants preferred access to a public forum,
25 which is to say you're in, you're out. If that's enough

1 for adoption, then there are no more First Amendment
2 violations through lack of equal access.

3 JUSTICE SOUTER: Yes, but even on your own
4 criterion, if the city passes a resolution saying we
5 adopt this, you're still -- you're going to be faced
6 with precisely the content discrimination problem that
7 you're arguing about here.

8 MS. HARRIS: But because it's adopted it as
9 its own message, then we think the Government is
10 speaking. And when the Government is speaking, as the
11 United States, said it is entitled to make content and
12 viewpoint distinctions, but in order to do that, it has
13 to step up and speak itself. That's the justification
14 for the Government speech doctrine.

15 JUSTICE SOUTER: You're basically just
16 arguing for a clear statement rule. I mean, Justice
17 Alito's question, my analogies are suggestive of the
18 fact that there is an affirmative Government act of some
19 indication of approval when it says, yes, you can put
20 the monument here. And what you're arguing for is,
21 well, we want a clearer statement, we want it to say,
22 yes, we really adopt it, it's ours from the heart. And
23 that seems to be the difference between your position
24 and the -- and the position that acceptance of the
25 monument is enough.

1 MS. HARRIS: I would formulate it only
2 slightly differently, which is not so much a clear
3 statement but that those are really two different
4 things, approving it for access and adopting the message
5 as the Government's own. And that the differences --

6 JUSTICE SOUTER: Well, you can --

7 MS. HARRIS: -- that would --

8 JUSTICE SOUTER: You can make that
9 distinction. There's no -- I understand the distinction
10 you're making, but because I don't see that that's a
11 distinction that a reasonable member of the public would
12 understand to be implied by the -- or at least to be --
13 to be raised by the placement of the monument, I don't
14 know why it's a distinction that should be significant
15 for First Amendment purposes.

16 MS. HARRIS: If what matters is the public
17 perception, then, yes, we do think that to clarify an
18 unclear situation like this, where have you a monument
19 that says it's presented by the Eagles, it has the
20 Eagles emblem, the Eagles are continuing to maintain it
21 in the park, and that's a fact we should assume a
22 reasonable observer would know, then, yes, be clear.
23 The Government -- there's one way to clarify that, and
24 that's for the Government to adopt it.

25 JUSTICE ALITO: And when Government adopts

1 it, can it at that time specify what it understands the
2 statement to be?

3 MS. HARRIS: I think it can, Justice Alito.
4 It can adopt -- now the Government is speaking, now this
5 is the Government's own message, and it can tailor its
6 adoption to make clear what message it's adopting.

7 And in answer to some of Justice Scalia's
8 questions, I think the Government here could put up a
9 plaque in front of the Eagles' monument that says
10 "Monument of the City of Pleasant Grove and dedicated to
11 the role that the Ten Commandments play in secular law."
12 It can do that.

13 JUSTICE SCALIA: Suppose the resolution of
14 adoption by the City Council just says, "The City
15 Council agrees that this monument of the Eagle
16 Association expresses an idea worthy of the public's
17 attention."

18 MS. HARRIS: I think the --

19 JUSTICE SCALIA: Is that enough?

20 MS. HARRIS: No. I think that the ordinance
21 -- or the ordinance has to do one more thing, which is
22 to -- which is to say, "This is a monument of the City
23 of Pleasant Grove, we adopt the content of the
24 monument," not just "we approve it." "We are giving it
25 preferential access, and here is why."

1 JUSTICE SOUTER: You want a signing
2 statement as well as a signature?

3 (Laughter.)

4 MS. HARRIS: Like that.

5 CHIEF JUSTICE ROBERTS: Does it depend on --
6 given the focus on public perception, does it depend on
7 the content of the speech? In other words, if you came
8 across a monument and it said, "The Eagles are a lot
9 better than every other organization, you should give
10 money to the Eagles," someone is going to walk by that
11 and say, "Well, that's probably not the City, that's
12 probably the Eagles." But the Eagles, you know, for all
13 the good they do, did not come up with the Ten
14 Commandments, and somebody is going to look at that and
15 say, "That's probably the City." They are not going to
16 look at that and immediately say, "That's what the
17 Eagles believe."

18 MS. HARRIS: Well, I think it's actually
19 trickier than that, more complicated than that, Your
20 Honor. Again, given this monument, I think there will
21 be questions about whether this is the speech of the
22 Eagles. And I actually think that, given all the legal
23 sensitivities around a Ten Commandments monument, your
24 average citizen, when they see a religious monument in a
25 park, may well think that may be private speech because

1 the Government usually can't endorse or at least
2 sometimes can't endorse religious speech. So I actually
3 think these questions are very complicated.

4 And, again, if you want to be clear about
5 who's speaking, there's an easy way to do that, which is
6 for the Government straightforwardly and clearly to
7 adopt this speech as its own.

8 JUSTICE SCALIA: What if it's just a statue
9 of George Washington? What kind of a resolution does
10 the city council adopt? "We endorse everything George
11 Washington ever said"?

12 MS. HARRIS: No. No. Again, and in my
13 answer to Justice Alito, they can adopt any resolution
14 they want so long as they adopt that statue as a --

15 JUSTICE SCALIA: Well, if --

16 MS. HARRIS: -- city memorial.

17 JUSTICE SCALIA: That's right, and I think
18 they would adopt a resolution that says, "We think
19 George Washington is worthy of respect and emulation on
20 the part of our citizens."

21 MS. HARRIS: And so long as that is --

22 JUSTICE SCALIA: If it could say that, why
23 couldn't it say the same thing about the Ten
24 Commandments? "We think the Ten Commandments are worthy
25 of respect and" -- and I wouldn't say "emulation"; I

1 would say "respect and reverence by our citizens."

2 MS. HARRIS: So long as --

3 JUSTICE SCALIA: Would that be enough?

4 MS. HARRIS: So long as it is preceded by a
5 statement that the city actually adopts the memorial as
6 its own, that this is --

7 JUSTICE SCALIA: I don't know what that
8 means.

9 MS. HARRIS: -- a Pleasant Grove memorial or
10 a Pleasant Grove monument.

11 JUSTICE SCALIA: It has acquired the
12 memorial. The City has acquired property in this
13 memorial and has agreed for this memorial to be placed
14 in the city park. Period. "We believe that the Ten
15 Commandments which are embodied in this memorial are
16 worthy of respect by the citizens of Pleasant Grove" --
17 is that enough?

18 MS. HARRIS: It may be that if the
19 Government goes on long enough, it will have connoted
20 what is very important here, which is that it is
21 prepared to adopt the content of that monument as its
22 own.

23 JUSTICE SCALIA: I don't know what that
24 means. You keep saying it, and I don't know what it
25 means.

1 MS. HARRIS: It means --

2 JUSTICE SCALIA: I would have thought
3 adopting what I said shows that it is adopting the
4 content of the monument insofar as the monument says the
5 Ten Commandments should be respected by the citizens of
6 Pleasant Grove. Is that enough?

7 MS. HARRIS: If the City says --

8 JUSTICE SCALIA: Or it has to say, "We
9 believe in the Ten Commandments"?

10 MS. HARRIS: No. No. I understand your
11 question, Justice Scalia. If the City says what you
12 just said, "We are adopting this monument insofar" and
13 however it wants to finish that sentence, that is fine.

14 JUSTICE SCALIA: You don't think that's
15 fairly implied by the mere fact that it is there in
16 Pleasant Grove's park and that Pleasant Grove City
17 Council has allowed it to be constructed there? Don't
18 you think that's implicit?

19 MS. HARRIS: No, I don't, Your Honor. I
20 think that all that implies is that Pleasant Grove has
21 decided this speech is worthy of display in this public
22 park based on its content. And that is the decision the
23 City can't make. If it were just a formality, if it
24 were simple, and it's all the same, who cares?, then I
25 think that Pleasant Grove would be here saying something

1 different, which is, "We adopt. We adopt. We'll check
2 that box." There are substantive reasons why it doesn't
3 -- it may be a fine line --

4 JUSTICE SCALIA: Maybe the City doesn't know
5 --

6 MS. HARRIS: -- but the City doesn't want to
7 cross it.

8 JUSTICE SCALIA: -- know what you mean by
9 "We adopt," just as I don't know what you mean by "We
10 adopt."

11 MS. HARRIS: Well, whether or not the City
12 knows what we mean, what we know from the City's brief
13 is that what it's saying is -- and this is on page 33 of
14 its brief -- the Government speech here is only in the
15 act of selection. Selection. It's not about the
16 content of that monument. That's not enough to make a
17 Government speech, and the City is not permitted to
18 speak through selection, and --

19 JUSTICE BREYER: What do we do -- is this
20 monument suspiciously similar to the one in Texas? And
21 so if the history is the same, you would know that there
22 was -- a big element of this was Cecile B. DeMille
23 trying to promote his movie, The Ten Commandments. So
24 he gave money to the Eagles, and the Eagles put Ten
25 Commandments all over because it would be good for the

1 morality of people, and also it would help promote the
2 movie. All right? Is that true -- is that the actual
3 description here?

4 MS. HARRIS: This is part of the same Eagles
5 project --

6 JUSTICE BREYER: Okay.

7 MS. HARRIS: -- that was --

8 JUSTICE BREYER: So -- so if that's the
9 history of it, what does that mean? I mean, where do we
10 go with that? Then this is in fact partly an attempt to
11 promote morality, partly an attempt to be civic, partly
12 an attempt to promote a movie. So, what do we do with
13 that?

14 MS. HARRIS: It's all a private message, and
15 it may be a private message that has many different
16 elements, but nothing about that suggests Government
17 speech. And even if all the Government is doing in its
18 public part is promoting one version of the Cecile
19 DeMille movie, it can't do that on a content basis.

20 JUSTICE BREYER: Why not? Why not? Why --
21 suppose that there -- there are certain messages that
22 private people had like "eat vitamins" --

23 MS. HARRIS: Uh-huh.

24 JUSTICE BREYER: -- and so they say -- you
25 know, whatever those are; and then somebody comes along

1 with a totally different content, "ride the roller
2 coaster," and they say this part of the park is designed
3 to get healthy children, not put children at risk. So
4 therefore we like messages to eat vitamins, and we don't
5 want messages, "ride the roller coaster." This is all
6 private. It's the -- you know -- now what?

7 MS. HARRIS: The problem is that it's a
8 public park, and content --

9 JUSTICE BREYER: So in other words, they --
10 the --

11 MS. HARRIS: Eating vitamins and roller
12 coasters are not --

13 JUSTICE BREYER: They can't do either.

14 MS. HARRIS: No.

15 JUSTICE BREYER: Is there any case that says
16 -- can they have playgrounds in the park?

17 MS. HARRIS: They can have playgrounds, yes.

18 JUSTICE BREYER: Okay, so we have right in
19 the playground, we have "eat vitamins," "eat your --
20 clean up all your -- all the food in your plate," "don't
21 throw food at your brother," okay?

22 So -- I mean --

23 MS. HARRIS: Those are private messages.

24 JUSTICE BREYER: Yes, all private.

25 MS. HARRIS: Uh-huh. Okay.

1 JUSTICE BREYER: Because there are various
2 groups that feel that's important; the city says yes, it
3 is; and we don't want things like pull the dog's tail,
4 or --

5 (Laughter.)

6 JUSTICE BREYER: -- whatever. So -- so
7 what's wrong with that? Where does the First Amendment
8 forbid that? You promote -- they want in this corner,
9 promoting in the playground good things that they like
10 and not bad ones. Where does it permit it? What's the
11 case that says that the Government couldn't do that?

12 MS. HARRIS: It's all the cases that say the
13 Government can't do it.

14 JUSTICE BREYER: Give one and I'll read it.
15 Give me three; I'll read them.

16 MS. HARRIS: I'll give you Pinette. The
17 Government can't make content based decisions in a
18 public forum. And there is not a limit --

19 JUSTICE BREYER: But the children's
20 playground isn't the public forum.

21 MS. HARRIS: Oh, but the Government -- a
22 public park is a public forum. If the Government wants
23 to set aside part of that park -- change the physical
24 characteristics, change the principal use and bear the
25 attendant cost, it can definitely do that. That is in

1 fact the answer to the sculpture garden; that's what
2 happened there. The Government waived part of what it
3 been a public forum; it put up fences; it changed the
4 principal use; it limited the public access. It is no
5 longer a park. It is now a museum.

6 I'm sorry. I misunderstood. The Government
7 can --

8 JUSTICE BREYER: I see where you're going.
9 Thank you.

10 MS. HARRIS: Okay.

11 JUSTICE GINSBURG: Are you taking this line
12 because you say if the city council votes for it, then
13 the voters can know those people voted to put up the Ten
14 Commandments; we don't like that; so we are going to
15 vote them out? Is that -- what underlies this notion
16 that it isn't good enough for them to approve the
17 placement of the monument, but it has to be some kind of
18 formal declaration?

19 MS. HARRIS: What underlies it is that the
20 Government speech -- the Government speech doctrine is
21 an exception to normal First Amendment, and very
22 important First Amendment constraints. And what
23 underlies the distinction is that that exception is
24 justified only when the Government is speaking for
25 itself. The Government needs to be able to promote its

1 own messages, its own ideas. But if it's not doing
2 that, if it's disclaiming the content of the monument,
3 saying those are not our own ideas, those are not our
4 own messages, then there is just no justification for
5 allowing it to prefer one form of private speech over
6 another. The justification for allowing that exception
7 is missing.

8 JUSTICE SOUTER: But it's not disclaiming it
9 here. The Government isn't disclaiming it. And the
10 difference it seems to me between you and your friends
11 on the other side is you want this clear statement. You
12 want a statement -- for example if you took Justice
13 Scalia's statement, that would satisfy you, and it would
14 also be the poison pill in the Establishment Clause.
15 Isn't that what's -- I mean, that's okay with me. I
16 don't see that as an illegitimate object. I was a Van
17 Orden dissenter -- I mean, but isn't that what is
18 driving this?

19 MS. HARRIS: Well, I do think that the --
20 the city is a bit on the horns of a dilemma because it
21 wants to have it both ways. It wants to be able to say
22 this speech is governmental for purposes of blocking
23 equal access rights; but not so governmental at that
24 it's a big Establishment Clause problem. So yes, I
25 think there is a dilemma here for the city.

1 Thank you, Your Honors.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.
3 Mr. Sekulow, you have two minutes remaining.

4 REBUTTAL ARGUMENT OF JAY A. SEKULOW
5 ON BEHALF OF THE PETITIONERS

6 MR. SEKULOW: Thank you, Mr. Chief Justice.

7 With regard to the hypothetical about the
8 Senator McCain or President-elect Obama signs, there is
9 another factor that's important here; and that is those
10 signs are created by those -- usually by the campaigns.
11 So the fact that it's created by a third party doesn't
12 in any way diminish the speech aspect of an individual
13 who has put that sign in their home. Also with regard
14 to the adopt the monument, governments don't adopt
15 monuments; they adopt resolutions that accept monuments.
16 That's the way it worked here; that's the way it works
17 in most municipalities. That's this -- the trigger of
18 allowing the monument to be displayed. Here there are
19 two. The city -- it was approached and made a formal
20 acceptance, and it was noted later in their minutes as
21 well, so in two different places.

22 With regard to the adoption of the speech
23 problem, Justice Alito, under the hypothetical or -- not
24 hypothetical, the factual situation that you talk about,
25 under the Tenth Circuit's theory, the case, in

1 Respondent's theory of the case, al-Qaeda sympathizers
2 could come in and say we want to erect a monument
3 praising the value of the terrorists, and unless there's
4 a compelling governmental interest, there would be no
5 basis on which to deny it. That's why the whole public
6 forum analysis on this, in our view is absolutely
7 incorrect.

8 And finally on the adopt a speech, there are
9 monuments and memorials that incorporate a variety of
10 message, including Holocaust memorials, and they will
11 often have in place Nazi-era propaganda, the signs from
12 the Nazis that were designed to draw hatred towards
13 Jews; and they will incorporate those into the monuments
14 and the displays. They are not adopting the message of
15 the Nazis; they are showing the history of what took
16 place during an era. That's very, very different.

17 The Statute of Liberty, which was donated to
18 the United States, was from the Franco-American Union, a
19 private organization. The United States -- and it's
20 found in the appendix to our reply brief -- specifically
21 accepted the monument, authorized the president to
22 accept and they erected the pedestal. All privately
23 funded in that regard, and it was originated by a third
24 party. The Government was speaking when they erected
25 that monument; the fact that the Antiquities Act came

1 into play, which just means you cannot harm those
2 monuments, it's no different than Pioneer Park, which is
3 a national historic treasure.

4 And last point, Mr. Chief Justice, if I may,
5 is the reliance on Pinette is misplaced because as this
6 Court said, Pinette is an Establishment Clause case, and
7 the reliance here by the Respondent has been on the Free
8 Speech Clause. We think the Tenth Circuit is wrong,
9 both under the Government speech analysis and under the
10 forum approach, and for that reason should be vacated.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 11:14 a.m., the case in the
15 above-entitled matter was submitted.)

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