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

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

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

3. 129 S. Ct. at 1130.

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

5. 129 S. Ct. at 1129–30.

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

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

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

I. HOW *SUMMUM* HELPS ESTABLISHMENT CLAUSE PLAINTIFFS

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

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

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

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

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

2010]

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

That approach is unsustainable after *Summum*. In characterizing monuments as government speech, the Court reasoned that when a city accepts and displays a privately-donated monument, it does so in order to "convey some thought or instill some feeling in those who see the structure."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46. *Id.* at 771.

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

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

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