

August 24, 2007

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church,

Plaintiff - Appellant,

v.

PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator,

Defendants - Appellees.

and

SUMMUM, a corporate sole and church,

Plaintiff - Appellant/
Cross - Appellee,

v.

DUCHESNE CITY, a governmental entity; CLINTON PARK, Mayor of Duchesne City; YORDYS NELSON; NANCY WAGER; PAUL TANNER; DARWIN MCKEE; JEANNIE MECHAM, city council members,

No. 06-4057
(D.C. No. 2:05-CV-638-DB)

Nos. 05-4162, 05-4168,
05-4272 & 05-4282
(D.C. No. 2:03-CV-1049-DB)
(D. Utah)

Defendants - Appellees/
Cross - Appellants.

ORDER

Before **TACHA**, Chief Judge, **KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, TYMKOVICH, GORSUCH**, and **HOLMES**, Circuit Judges.

These matters are before the court on two separate petitions for rehearing, both with en banc suggestions, filed by the appellees. The petitions were filed separately and correspond to the two opinions issued in these appeals on April 17, 2007.

The requests for panel rehearing are denied by the original panel which decided these cases.

The en banc petitions were transmitted to all of the judges of the court who are in regular active service. A poll was requested. Through an equally divided vote, the decisions of the panel will stand. *See* Fed. R. App. P. 35(a); 10th Cir. R. 35.5 (noting that a majority of the active judges of the court may order rehearing en banc). Accordingly, the en banc requests are denied. Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch and Holmes would grant rehearing en banc. Judges Lucero and McConnell have filed dissents to the denial. They are attached and incorporated in this order. Judge Gorsuch has joined in Judge McConnell's dissent. Judge Tacha, writing separately, has

responded. That response is also incorporated in this order.

Entered for the Court

ELISABETH A. SHUMAKER
Clerk of Court

Sumnum v. Duchesne City, Nos. 05-4162, 05-4168, 05-4272, & 05-4282
Sumnum v. Pleasant Grove City, No. 06-4057

LUCERO, J., dissenting from denial of rehearing en banc.

Because the panel's opinion will leave our circuit unnecessarily entangled in future review of time, place, and manner restrictions, and because in my judgment the panel's opinion incorrectly decides the question of the nature of the forum involved in cases of this type, I respectfully dissent from the denial of rehearing en banc. Conceptually, it is important to distinguish between transitory and permanent speech. As I see it, not unlike most public parks in America in which permanent monuments have been placed, the cases before us involve limited public fora. In limited public fora, local governments may make content-based determinations about what monuments to allow in such space, but may not discriminate as to viewpoint.

As an initial matter, I agree with the panel that these monuments do not constitute government speech. Under the Wells framework, the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact. Wells v. City & County of Denver, 257 F.3d 1132, 1141-43 (10th Cir. 2001) (holding sign was government speech where the city had "complete control over the sign's construction, message, and placement"; the city "built, paid for, and erected the sign"; and corporate sponsors did not "exercise[] any editorial control over its design or content."). In these cases, the private parties conceived the message and design of the monuments without any government input, thus the speech must be considered private. See Sumnum v. City of Ogden, 297 F.3d 995, 1004-06 (10th Cir. 2002) (holding monument was not government speech where Fraternal Order of Eagles "designed,

produced, and donated the Ten Commandments Monument”; central purpose of monument was “to promote the views and agenda of the Eagles rather than the City of Ogden”; “Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product”; and city only claimed to adopt views of monument “post hoc”). It follows that these cases necessarily implicate government regulation of private speech.¹

Whether government regulation of private speech violates the First Amendment depends on context. Courts engage in forum analysis to determine whether the speaker acts in a traditional public forum, a designated public forum, or a nonpublic forum, and it is in this analysis that I differ with the panel. In identifying the type of forum involved, we first consider the government property at issue and the type of access sought.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); City of Ogden, 297 F.3d at 1001. Only after the type of forum is identified do we ask whether it is public or nonpublic in nature. Because the government property involved in these cases consists of the city parks, and the access sought is the installation of permanent monuments, the panel correctly concludes that the relevant forum consists of permanent monuments in the city parks. See Summum v. Pleasant Grove City, 483 F.3d 1044, 1050 (10th Cir. 2007); Summum v. Duchesne City, 482 F.3d 1263, 1269 n.1 (10th Cir. 2007). In the next step of the forum analysis, however, the panel asserts that the relevant forum is the entire park, regardless of the type of access sought. Pleasant Grove, 483 F.3d at

¹ Although the monument involves a religious message, these cases properly consider the question of free speech, not establishment of religion.

1050; Duchesne, 482 F.3d at 1269. The panel’s claim that access “is relevant in defining the forum, but . . . does not determine the nature of that forum,” id. at 1269 n.1, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum. See Cornelius, 473 U.S. at 801. In Perry Education Ass’n v. Perry Local Educators’ Ass’n, a case which the panel cites, the Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora. 460 U.S. 37, 49 (1983). Perry also held that a court may make conceptual distinctions in defining the forum, even if there are no physical barriers. See Cornelius, 473 U.S. at 801 (“Perry . . . examined the access sought by the speaker and defined the forum as a school’s internal mail system and the teachers’ mailboxes, notwithstanding that an ‘internal mail system’ lacks a physical situs.”) (citation omitted). As in Perry and Cornelius, Sumnum seeks access to a particular means of communication, but the nature of the forum necessarily hinges both on the method of communication and on the location.

The panel gives great weight to the conception that city parks are “quintessential public forums,” see Perry, 460 U.S. at 45, but in my view, permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public. In Perry, the Court noted that parks are “places which by long tradition or by government fiat have been devoted to assembly and debate,” and “which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes

of assembly, communicating thoughts between citizens, and discussing public questions.” Id. (quotation omitted) (emphasis added). As Perry indicates, our modern concept of the park as a public forum derives from a well-established common law right to assemble and speak one’s mind in the commons. This right, however, does not extend to the type of displays at issue here, and one would be hard pressed to find a “long tradition” of allowing people to permanently occupy public space with any manner of monuments. In short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues of Balto the Husky or the sword-wielding King Jagiello, to note two of the more popular attractions in New York City’s Central Park.

I recognize that there is some disagreement among our sister circuits on this point, but courts consistently have given special consideration to the issue of displays installed on public land. In Graff v. City of Chicago, 9 F.3d 1309, 1314 (7th Cir. 1993), the Seventh Circuit held that “[t]here is no private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.” (quotation and citation omitted). The Second Circuit in Kaplan v. City of Burlington, 891 F.2d 1024, 1029 (2d Cir. 1989), determined that the city “had not created a forum in City Hall Park open to the unattended, solitary display of religious symbols.” By stating that the City of Burlington must affirmatively open the public park for this kind of use, the Second Circuit

recognized that such physical occupation of park space does not fall within the scope of the traditional public forum, but rather the government must assent to such access before a forum is created. By contrast, the Ninth Circuit has held that “[n]o affirmative government action is required to open a traditional public forum to a specific type of expressive activity.” Kreisner v. City of San Diego, 1 F.3d 775, 785 (9th Cir. 1993). Kreisner acknowledged, however, that the government might close the park with respect to large unattended displays, but held that the plaintiff had failed to meet his burden of proof on this point. Id. This is to say, that even the Kreisner court has recognized that it is not a foregone conclusion that parks are traditional public fora for all uses, particularly for the installation of permanent displays.

In my view a park is not a traditional public forum insofar as the placement of monuments is concerned, but that still leaves the question of whether it is a designated public forum or a nonpublic forum. Although there is a disagreement among our sister circuits regarding the categorization of limited public fora, this circuit and recent Supreme Court opinions have treated limited public fora as a species of nonpublic fora. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-107 (2001) (in a limited public forum, the state may restrict speech but may not discriminate on the basis of viewpoint (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Cornelius, 473 U.S. at 806)); City of Ogden, 297 F.3d at 1002 n.4 (“A ‘limited public forum’ is a subset of the nonpublic forum classification.”); Callaghan, 130 F.3d at 914 (“In more recent cases . . . the Court has used the term ‘limited public forum’ to

describe a type of nonpublic forum”); see also Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs., 457 F.3d 376, 382 n.3 (4th Cir. 2006) (surveying conflicting views among the circuits). In the present cases, the city governments have not allowed the kind of “general access” or “indiscriminate use” of park property that is a hallmark of a designated public forum. Summum v. Callaghan, 130 F.3d 906, 915 n.13 (10th Cir. 1997) (citing Cornelius, 473 U.S. at 803; Perry, 460 U.S. at 47). Instead, they have “create[d] a channel for a specific or limited type of expression where one did not previously exist,” Child Evangelism Fellowship, 457 F.3d at 382, and have thus established limited public fora. As discussed supra, the right to install permanent monuments did not previously exist in these parks, and in these cases the cities have allowed only “selective access to some speakers or some types of speech in a nonpublic forum.” Callaghan, 130 F.3d at 916. Here, the cities have permitted a few monuments to be erected for specific purposes – in the case of Pleasant Grove, to memorialize the city’s history, and in the case of Duchesne, to honor service groups. Having created limited public fora, the cities may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks.² Cornelius, 473 U.S. at 806.

There are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora, and the need for further briefing and argument on this point is one reason why en banc proceedings are necessary. More importantly, however, the panel has given an unnatural reading to the

² By contrast, when the government itself speaks, it may discriminate as to both content and viewpoint. Rosenberger, 515 U.S. at 833.

traditional public forum doctrine, and binds the hands of local governments as they shape the permanent character of their public spaces. Although these governments may enact time, place, and manner restrictions that will give them some control over monuments in their parks, they now must proceed on the basis of the panel's faulty legal reasoning. More troubling is that such restrictions will undoubtedly be challenged in court and reviewed under a strict scrutiny standard. The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

Nos. 05-4162, 05-4168, 05-4272, 05-4282, *Summum v. Duchesne City*

No. 06-4057, *Summum v. Pleasant Grove City*

McCONNELL, J., joined by **GORSUCH, J.**, dissenting from denial of rehearing en banc.

These opinions hold that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, 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. *See Summum v. Duchesne City*, 482 F.3d 1263, 1274 (10th Cir. 2007) (a “constitutional right exists to erect a permanent structure on public property . . . when the government allows some groups to erect permanent displays, but denies other groups the same privilege”); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1054 (10th Cir. 2007) (the city “could ban all permanent displays of an expressive nature by private individuals” but may not exclude a monument based on its content unless the restriction serves “compelling” interests and is “narrowly tailored to achieve its stated interests”). This means that Central Park in New York, which contains the privately donated Alice in Wonderland statue, must now allow other persons to erect *Summum*’s “Seven Aphorisms,” or whatever else they choose (short of offending a policy that narrowly serves a “compelling” governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace

themselves for an influx of clutter.

Significantly, the religious nature of the donated monuments is not relevant to the free speech question (though it would be to an Establishment Clause challenge). These cases happen to involve Ten Commandments monuments, but it could work the other way. A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

With all due respect to the panel, this conclusion is unsupported by Supreme Court precedent. None of the cases cited supports this proposition. By tradition and precedent, city parks—as “traditional public forums”—must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties. By their policies or actions, governments may create designated public forums with respect to fixed monuments, but—contrary to these opinions—the mere status of the property as a park does not make it so.

It is plain that the cities in these cases did not create designated public forums for the erection of permanent monuments in their parks. In the *Duchesne* case, the Ten Commandments monument is apparently the only fixed monument in the park. In *Pleasant Grove*, the other permanent structures and monuments “relate to or

commemorate Pleasant Grove’s pioneer history.” 483 F.3d at 1047. In neither case did the city, by word or deed, invite private citizens to erect monuments of their own choosing in these parks. It follows that any messages conveyed by the monuments they have chosen to display are “government speech,” and there is no “public forum” for uninhibited private expression.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech. *Id.* at 692 (calling the monument “Texas’ display”). Various courts of appeals have reached the same conclusion on similar facts. *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 778, 774 (8th Cir. 2005) (Eagles monument “installed . . . by the City” and counted as “City’s display”); *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (Eagles monument belonged to the state); *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (donated Eagles monument constituted state speech in violation of the Establishment Clause); *Indiana Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 770 (7th Cir. 2001) (city’s acceptance of donated Ten Commandments monument constituted state action in violation of the Establishment Clause); *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (city’s display of Ten Commandments monument was state action violating Establishment Clause). *See also Modrovich v. Allegheny County*, 385 F.3d 397, 399–400 (3d Cir. 2004)

(bronze plaque of Ten Commandments donated by private party and affixed to courthouse wall constituted government speech).

Our own leading precedent on government speech confirms these holdings.¹ *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001), involved a temporary holiday display, which was on municipal property and co-sponsored by the city and private businesses; the display included a large sign on city property thanking private donors for their contributions to the city's holiday display. The Court concluded that the message conveyed by this sign was government speech. The city, we reasoned, chose to erect the sign for its own purposes, the city controlled the content of the sign, and it determined when, where, and how the sign would be displayed. 257 F.3d at 1141–42. *Wells* employed a four-part analysis derived from the Eight Circuit's *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), which involved the asserted right of the Missouri KKK to sponsor a segment of All Things Considered on National Public Radio.² In both *Wells* and *Knights*, the governmental or private character of the speech was in doubt because "ownership" could not be clearly established. Did the

¹ To the extent *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), teach the contrary, they should be overruled.

² The factors were: (1) that "the central purpose of the enhanced underwriting program is not to promote the views of the donors;" (2) that the station exercised editorial control over the content of acknowledgment scripts; (3) that the literal speaker was a KWMU employee, not a Klan representative; and (4) that ultimate responsibility for the contents of the broadcast rested with KWMU, not with the Klan. *Wells*, 257 F.3d at 1141 (quoting *Knights of the Ku Klux Klan*, 203 F.3d at 1093–94).

holiday decor belong to the city or to the private donors in *Wells*? Did the sponsorship message written by the KKK belong to that organization or to the public employee who broadcast it statewide on a state radio station?

The instant cases are easier than *Wells*, because ownership of the “speech” in these cases is clear: the Ten Commandments monument in *Duchesne* was donated by the Cole family to the City of Duchesne, and the Ten Commandments monument in *Pleasant Grove* was donated by the Fraternal Order of Eagles to the City of Pleasant Grove. At the relevant time, the cities owned the monuments, maintained them, and had full control over them. But even if ownership were not clear, the second and fourth prongs of the *Wells* test would nonetheless be dispositive: The cities exercised total “control” over the monuments, 257 F.3d at 1141, and they bore “ultimate responsibility” for the monuments’ contents and upkeep. Indeed, because the cities owned the monuments, they could have removed them, destroyed them, modified them, remade them, or (following state law procedures for disposition of public property) sold them at any time. Indeed, the City of Duchesne attempted to do just that—sell the monument along with the plot of land on which it sits. See 482 F.3d at 1266–67.³ *Cf. Serra v. U.S. General Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork).

The only difference from *Wells* is that in the *Summum* cases, the cities did not

³ Indeed, the panel held that Duchesne’s attempted sale of the monument is controlled by state law governing the disposition of “public property.” *Duchesne*, 482 F.3d at 1272.

design these monuments. The cities, however, accepted the statues, treated them as public property, and displayed them for their own purposes on public land. The cities were under no obligation to accept the statues, and could have objected to their content. When they accepted donation of the monuments and displayed them on public land, the cities embraced the messages as their own. Similarly, Duchesne and Pleasant Grove controlled the placement of the statues, just as in *Wells* Denver bore “ultimate responsibility for the content of the display.” 257 F.3d at 1142.

Once we recognize that the monuments constitute government speech, it becomes clear that the panel’s forum analysis is misguided. Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government’s “own speech . . . is controlled by different principles.” *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). Specifically, “when the State is the speaker, it may make content-based choices.” *Id.* at 833. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991). The government may adopt whatever message it chooses—subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause—and need not alter its speech to accommodate the views of private parties. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) (“Simply because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist.”) In other words, just because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing.

Other circuits have reached this conclusion in similar cases. *See Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) (“Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved.”); *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc) (“even in a public forum there is no constitutional right to erect a structure”); *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) (“We are not cognizant of . . . any private constitutional right to erect a structure on private property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.”).

This does not mean that the Ten Commandments monuments in Duchesne and Pleasant Grove are immune to First Amendment challenge. Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause, as applied to the States through the Fourteenth Amendment. Their validity would depend on details of their context and history, in accordance with the Supreme Court’s recent decisions in *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005). We have no occasion here to speculate on the outcome of any such litigation.

The panels’ decisions in these cases, however, are incorrect as a matter of doctrine and troublesome as a matter of practice. I realize that en banc proceedings are a major investment of time and judicial resources, and that we cannot en banc every case that errs. But the error in this case is sufficiently fundamental and the consequences sufficiently

disruptive that the panel decisions should be corrected.

Nos. 05-4162, 05-4168, 05-4272, 05-4282, *Summum v. Duchesne City*

No. 06-4057, *Summum v. Pleasant Grove City*

TACHA, J., response to dissent from denial of rehearing en banc.

Throughout my judicial career, I have been loath to write separately because I firmly believe that an intermediate court of appeals should speak with as much clarity and consensus as possible. I reluctantly take the unprecedented step of responding to the dissents from the denial of rehearing en banc because, left unanswered, the dissents could lead a reader to conclude that these cases present unresolved issues that are properly raised and appropriately addressed on these facts. In particular, I write to emphasize that these cases do not raise novel or unsettled questions regarding government speech. Nor do the panel decisions suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium. Rather, the decisions follow well-established First Amendment precedent requiring that cities regulate private speech in public forums equally.

Because the opinions contain clear discussions of the legal authority on which they rely, I need not respond at length to the allegation that they are unsupported by Supreme Court precedent. I need only say that the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction, so crucial to the reasoning of both dissents, lacks the support of both precedent and logic. If a city allows a private message to be heard in a public park, why would the permanent nature of the expression limit the First Amendment scrutiny we

apply?

As Supreme Court precedent makes clear, the type of speech does not, and should not, determine the nature of the forum. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that city’s restriction on *permanent* commercial newsracks on *public sidewalks* (a public forum) was an impermissible content-based restriction on speech). If a city wishes to regulate the number of permanent private displays in a public forum, it may do so through reasonable content-neutral regulations governing the time, manner, or place of such speech. *See id.* at 429–30 (“It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral.”); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (noting that a reasonable content-neutral ban on all unattended private displays in public forum would likely be constitutional, but a regulation based on content must be “necessary, and narrowly drawn, to serve a compelling state interest”).¹

¹Contrary to Judge Lucero’s dissent, the description of the forum as “permanent monuments in a city park” does not change the nature of the forum from a traditional public forum to some kind of limited or nonpublic forum. To focus solely on the monuments (i.e., the form of speech) and ignore the underlying property would be a distortion of Supreme Court precedent, as explained above. Furthermore, the conclusion that permanent speech is more limited than transitory speech defies logic. Like temporary signs and demonstrations, permanent displays most certainly encompass the government property; indeed, permanent monuments are physically attached to and always present on the property. Unlike the speaker in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983), who sought access to teachers’ mailboxes, Summum did not seek access to “a forum within the confines of the government property,” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); rather, it sought permanent access to the physical property itself. Thus, although the relevant forum in

Judge McConnell’s dissent would have us ignore these well-established forum principles when the government does not “by word or deed” create a designated public forum for permanent private expression. Dissent at 3. In this view, if the government has not created a designated public forum, its acceptance alone turns private speech into government speech. More important, under this approach, government acceptance of the physical *medium* of speech, not the message, is sufficient. This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

Although a public school is engaging in speech activity when it selects the text, its ability to do so is based on a different line of Supreme Court cases recognizing the government’s ability to make content-based judgments when it acts in particular roles (e.g., educator, librarian, broadcaster, and patron of the arts). We note this distinction in both opinions. *Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1052 n.4 (10th Cir.

these cases is “permanent monuments in a city park,” the access sought is not the kind of limited access that allows for a more narrow definition of the forum. This is true even if we accept the view that a speaker does not have a constitutional right to erect a permanent display in a public forum. Because the cities had already permitted the permanent display of a private message, the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally *discriminate* among private speakers in a public forum.

2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269 n.2 (10th Cir. 2007).² In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park. We cannot, however, extend the reasoning of these Supreme Court decisions to allow the government to make content-based decisions concerning *all* permanent private speech in a public forum. As the panel decisions explain, the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts.

In short, the government does not speak just because it owns the physical object that conveys the speech. Instead, as the Supreme Court has explained, the appropriate inquiry is whether the government controls the content of the speech at issue, that is, whether the message is a government-crafted message. *See, e.g., Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 560 (2005) (holding that beef advertising campaign constituted government speech because the “message set out in the beef promotions is from beginning to end the message established by the Federal Government”). The four-factor approach to government speech that we adopted in *Wells v. City and County of*

²We cite the following Supreme Court cases in both opinions: *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs may consider content in making collection decisions); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (recognizing that broadcasters must “exercise substantial editorial discretion in the selection and presentation of their programming”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may consider content in awarding grants as such judgments “are a consequence of the nature of arts funding”). *See Pleasant Grove City*, 483 F.3d at 1052 n.4; *Duchesne City*, 482 F.3d at 1269 n.2.

Denver, 257 F.3d 1132, 1140–42 (10th Cir. 2001), reflects the Supreme Court’s focus on whether the message is the government’s own. But contrary to Judge McConnell’s dissent, we said nothing in *Wells* that suggests our government speech inquiry turns on the ownership of the physical medium conveying the speech at issue.³ Indeed, the second *Wells* factor cited by the dissent is not about controlling the physical medium of the speech, but about controlling the *content* of that speech. *See id.* at 1142 (finding that the city exercised editorial control over the content of the speech). A city’s control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the message to the political process, a result that would shield the government from First Amendment scrutiny and democratic accountability.

This is in fact the result that Judge McConnell’s dissent advocates, and it is most apparent in the dissent’s equation of government endorsement in the Establishment Clause context with government speech under the Free Speech Clause. Citing *Van Orden v. Perry*, 545 U.S. 677 (2005), the dissent emphasizes that the Supreme Court has characterized a Ten Commandments monument under analogous circumstances as a “state display” for purposes of the Establishment Clause. *See id.* at 692 (holding that “Texas’ display of this monument” did not violate the Establishment Clause). The

³Moreover, contrary to Judge McConnell’s dissent, *see* Dissent at 4, the city’s ownership of the holiday display in *Wells* was clearly established. *Wells*, 257 F.3d at 1139 (noting that, as a factual matter, “Denver owns each component part of the display”).

simplest response to this observation is that a state's display of a monument is not necessarily state speech; if the government *displays* a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own. *See Pleasant Grove City*, 483 F.3d at 1047 n.2 (explaining that the government may violate the Establishment Clause without directly speaking). *Van Orden* and the circuit cases cited by the dissent stand for the simple proposition that a city's acceptance and display of a privately donated monument with religious content may constitute state *action* violating the Establishment Clause. But none of these cases supports the proposition that, when the state acts to accept a monument, it automatically turns the message that monument conveys into state speech.⁴

On a broader note, because the Establishment and Free Speech Clauses serve different purposes, discussions of state action in Establishment Clause cases are not germane to a determination of when the government speaks for purposes of the Free Speech Clause. Indeed, the Supreme Court has analyzed government speech differently in the context of free speech, recognizing the differing theoretical justifications underlying the Establishment and Free Speech Clauses. In the Establishment Clause context, government speech favoring or disfavoring religion is a concern because of the

⁴In fact, one case cited in Judge McConnell's dissent contains language specifically rejecting this proposition. *Modrovich v. Allegheny County*, 385 F.3d 397, 410–11 (3d Cir. 2004) ("The fact that government buildings continue to preserve artifacts of [the country's religious] history does not mean that they necessarily support or endorse the particular messages contained in those artifacts.").

effect it may have on individual members of the political community: “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring). Indeed, in deciding that a student-led “invocation” permitted by school policy could “not properly [be] characterized as ‘private speech’” under the Establishment Clause, the Supreme Court focused explicitly on the message that government *sponsorship* sends members of the community: “School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quotation omitted). In other words, the government’s sponsorship of religion sends an impermissible “ancillary message” that renders the speech not entirely private.

The same concerns do not underpin the Free Speech Clause. Although individuals may constitutionally challenge government sponsorship or endorsement of religion, they generally have no constitutional right to challenge government speech under the Free Speech Clause. In the free speech context, the fact that government speech is exempt from constitutional challenge is justified because it is subject to the political process:

The latitude which may exist for restrictions on speech where the

government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."

Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). That is, the latitude that government speech enjoys in the free speech context is justified by the "*political safeguards*" in the democratic process that set government speech "apart from private messages." *Johanns*, 544 U.S. at 563 (emphasis added). Thus, its immunity from constitutional challenge under the Free Speech Clause does not depend on whether the "reasonable observer," familiar to Establishment Clause jurisprudence, would perceive the government as speaking.

Rather, if citizens object to the government's message, they may elect new representatives who "later could espouse some different or contrary position." *Southworth*, 529 U.S. at 235. But in order for citizens to be able to hold the government accountable for its speech, the government must speak subject to "traditional political controls [that] ensure responsible government action." *Id.* at 229; *see also Johanns*, 544 U.S. at 560–64 (concluding that promotional program was subject to adequate safeguards because its message was prescribed by federal law and the government supervised and controlled the program and the contents of its message). The speech in these cases was not subject to political safeguards; the facts simply do not implicate government speech because the cities exercised no control over the content of the messages.

Thus, in the context of the Free Speech Clause, we cannot extend the government speech doctrine any further. To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own. Moreover, because the Establishment Clause would apply only to religious expression, an expanded government speech doctrine would effectively remove the government's regulation of permanent non-religious speech from all First Amendment scrutiny. Such an approach is clearly contrary to established First Amendment principles. *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 795–96 (4th Cir. 2004) (“The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.”). Because this approach to government speech is unsupported by Supreme Court precedent and the purposes of the First Amendment, this Court may not consider it. And because the relevant law and its application are clear, en banc consideration is inappropriate.

PUBLISH

April 17, 2007

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

SUMMUM, a corporate sole and church,

Plaintiff - Appellant,

v.

PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator,

Defendants - Appellees.

No. 06-4057

**APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D. Ct. No. 2:05-CV-638-DB)**

Brian M. Barnard, Utah Legal Clinic, Salt Lake City, Utah, appearing for Appellant.

Francis J. Manion, American Center for Law & Justice, New Hope, Kentucky (Edward L. White, III, Thomas More Law Center, Ann Arbor, Michigan, Jay Alan Sekulow, American Center for Law & Justice, Washington, DC, and Geoffrey R. Surtees, American Center for Law & Justice, New Hope, Kentucky, with him on the brief), appearing for Appellees.

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **KANE**,* District Judge.

TACHA, Chief Circuit Judge.

The Plaintiff-Appellant Summum, a religious organization, filed suit under 42 U.S.C. § 1983 for violation of its First Amendment rights against the Defendants-Appellees, the City of Pleasant Grove, its mayor, city administrator, and city council members. Summum appeals the District Court's denial of its request for a preliminary injunction. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and reverse the District Court's decision.

BACKGROUND

A city park in Pleasant Grove, Utah, contains a number of buildings, artifacts, and permanent displays, many of which relate to or commemorate Pleasant Grove's pioneer history. For example, the park contains one of Pleasant Grove's first granaries, its first city hall, and its first fire department building. For purposes of this appeal, the most important structure is a Ten Commandments monument, donated by the Fraternal Order of Eagles in 1971, two years after it established a local chapter in Pleasant Grove.

In September 2003, Summum, a religious organization with headquarters in Salt Lake City, Utah, sent the mayor of Pleasant Grove a letter requesting permission to erect

*Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

a monument containing the Seven Aphorisms of Summum in the city park. In its letter, Summum stated that its monument would be similar in size and nature to the Ten Commandments monument already present in the park. Approximately two months after Summum made its request, the mayor sent Summum written notification that the city had denied its request because the proposed monument did not meet the city's criteria for permanent displays in the park. According to the letter, all permanent displays in this particular park must "directly relate to the history of Pleasant Grove" or be "donated by groups with long-standing ties to the Pleasant Grove community."¹ The following year, in August 2004, the city passed a resolution codifying and expanding upon its alleged policy for evaluating requests for permanent displays in the park. The resolution contains a number of factors the city council must consider in deciding whether a proposed display meets a historical relevance requirement. In May 2005, Summum renewed its request, sending the mayor another letter with substantially the same language as the first letter.

When the city did not respond to its second request, Summum filed suit in federal district court seeking declaratory and injunctive relief, as well as monetary damages, for Pleasant Grove's violation of Summum's free speech rights under the U.S. Constitution and for the city's violation of the Utah Constitution's free expression and establishment provisions. Summum contends that the city violated its rights by excluding its monument while allowing other permanent monuments of an expressive nature (e.g., the Ten

¹Although Summum claims it did not receive this letter, the organization's president acknowledged that he had read the notice of the city's denial in the newspaper. (Applt. App. at 59)

Commandments) to be displayed in the park.² In an oral ruling on various motions, the District Court denied Summum’s request for a preliminary injunction requiring the city to permit the display of Summum’s monument in the park. Summum subsequently appealed this decision, arguing that the District Court abused its discretion in denying the injunction based on Summum’s First Amendment claim.³

DISCUSSION

I. Preliminary Injunction Standard

We review a district court’s decision to deny a motion for a preliminary injunction for abuse of discretion, which we have characterized as “an arbitrary, capricious,

²The Ten Commandments monument clearly constitutes protected speech. *Summum v. Callaghan*, 130 F.3d 906, 913–14 (10th Cir. 1997) (“[P]rivate religious speech . . . is as fully protected under the Free Speech Clause as secular private expression.” (quotations omitted)). In addition, we have previously characterized a Ten Commandments monument donated by the Fraternal Order of Eagles and placed by the city on public property as the private speech of the Eagles rather than that of the city. *See Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002); *Callaghan*, 130 F.3d at 913. Pleasant Grove argues that the Supreme Court’s recent decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), requires this Court to treat the Ten Commandments monument as governmental speech. In *Van Orden*, the Supreme Court held that the Establishment Clause was not violated by the display of a similar Ten Commandments monument on the Texas State Capitol grounds. Pleasant Grove contends that the Supreme Court would not have applied an Establishment Clause analysis in *Van Orden* unless the Court considered the Ten Commandments monument to be governmental speech. But this argument is without merit because the Establishment Clause prohibits governmental *endorsement* of religion, which can occur in the absence of direct governmental speech. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 774 (1995) (O’Connor, J., concurring in part and concurring in judgment).

³Summum does not argue on appeal that it is entitled to a preliminary injunction based on its claims under the Utah Constitution and has therefore waived this issue. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

whimsical, or manifestly unreasonable judgment.” *Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quotations omitted). “A district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings.” *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006). In reviewing the district court’s decision, “[w]e examine the . . . court’s underlying factual findings for clear error, and its legal determinations *de novo*.” *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002).

To prevail on a motion for a preliminary injunction in the district court, a moving party must establish that:

- (1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Schrier, 427 F.3d at 1258 (quotations omitted) (alterations in original). But because a preliminary injunction is an extraordinary remedy and is intended “merely to preserve the relative positions of the parties until a trial on the merits can be held,” we have held that the moving party must meet a heightened standard when requesting one of three types of historically disfavored injunctions. *Id.* at 1258–59 (quotations omitted).

The three types of disfavored injunctions are “(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the

merits.” *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff’d and remanded*, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211 (2006). When a preliminary injunction falls into one of these categories, it “must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” *Id.* A district court may not grant a preliminary injunction unless the moving party “make[s] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms.” *Id.* at 976.

In this case, the preliminary injunction clearly falls within two categories of disfavored injunctions: it alters the status quo and is mandatory. An injunction alters the status quo when it changes the “last peaceable uncontested status existing between the parties before the dispute developed.” *Schrier*, 427 F.3d at 1260 (quotations omitted). The last uncontested status between Summum and Pleasant Grove was one of no relationship between the two parties. Because Summum’s monument is not currently displayed in a Pleasant Grove city park, an injunction ordering Pleasant Grove to permit the display of Summum’s monument clearly changes the status quo. In addition, by requiring the city to make arrangements for the display of Summum’s monument, an injunction would mandate that the city act and would require the district court to supervise the city’s actions to ensure it abides by the injunction. Because an injunction would “affirmatively require” Pleasant Grove “to act in a particular way” and would

require ongoing court supervision, it is a mandatory injunction. *See id.* at 1261 (quotations and alterations omitted). Because the injunction falls into two disfavored categories, Summum must have made “a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms” to prevail on its motion at the district court level. *O Centro*, 389 F.3d at 976.

Based on the record, we cannot discern whether the District Court applied this heightened standard. In its oral ruling, the court simply noted that it denied Summum’s motion because it failed to establish a substantial likelihood of success on the merits. The court did not analyze the other three factors or explicitly state that it applied a heightened standard to Summum’s request. But even if the District Court concluded that Summum could not prevail using the lesser standard, it certainly would reach the same conclusion under the heightened standard. Although the “failure of the district court to apply the correct standard” to a request for a preliminary injunction “amounts to an abuse of discretion,” *id.* at 982 n.5, any abuse in this case was in Summum’s favor. We therefore assume that the District Court applied the heightened standard and review the court’s legal conclusions and findings of fact for abuse of discretion.

II. Preliminary Injunction Analysis

In its oral ruling on Summum’s motion for a preliminary injunction, the District Court indicated that Summum would not prevail on the merits if Pleasant Grove proved it had a well-established policy for evaluating proposed monuments that was reasonable and viewpoint neutral. After finding that the facts regarding the city’s policy (or lack thereof)

were in dispute, the court concluded that Summum had not established a substantial likelihood of success on the merits. It therefore denied Summum’s motion without addressing the other three factors required for issuance of a preliminary injunction.

As we explain below, the District Court abused its discretion by analyzing Summum’s First Amendment claim under the incorrect legal standard. But rather than remanding to the District Court for the appropriate analysis, we find the record sufficiently developed to allow us to determine whether Summum has met its burden under the four factors necessary to prevail on its motion. *See Schrier*, 427 F.3d at 1261 (evaluating a request for an injunction on the merits when the district court applied the wrong legal standard); *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1075–76 (10th Cir. 2001) (evaluating a request for an injunction on the merits when district court incorrectly applied legal test for restrictions on commercial speech).

A. Substantial Likelihood of Success on the Merits

1. Identifying the nature of the relevant forum

To determine the appropriate First Amendment standard under which to review the city’s denial of Summum’s request, the reviewing court must engage in a “forum analysis.” The characterization of the forum at issue is crucial because “the extent to which the Government can control access depends on the nature of the relevant forum.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). In identifying the relevant forum, the court looks at both “(1) the government property to which access is sought and (2) the type of access sought.” *Summum v. City of Ogden*, 297

F.3d 995, 1001 (10th Cir. 2002). In this case, Summum seeks to display its monument among other monuments in Pleasant Grove’s city park. The permanent monuments in the city park therefore make up the relevant forum. *See id.* at 1002 (identifying the relevant forum as “permanent monuments on the lawn of the . . . municipal building”).

Having identified the relevant forum, the reviewing court must also determine whether the forum is public or nonpublic in nature. In general, the forum will fall into one of three categories:

(1) a traditional public forum (e.g., parks and streets), (2) a designated public forum (i.e., the government voluntarily transforms a nonpublic forum into a traditional public forum, thereby bestowing all the free speech rights associated with the traditional public forum, albeit on a potentially temporary basis, onto that now ‘designated public forum’), or (3) a nonpublic forum (i.e., the government retains the right to curtail speech so long as those curtailments are viewpoint neutral and reasonable for the maintenance of the forum’s particular official uses).

Id. In the case before us, the District Court indicated that the applicable analysis is whether Pleasant Grove’s policy is reasonable and viewpoint neutral. The court therefore analyzed the city’s actions using the standard associated with a nonpublic forum.

The city park is, however, a traditional public forum. Indeed, the Supreme Court has characterized streets and parks as “quintessential public forums,” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983), because people have traditionally gathered in these places to exchange ideas and engage in public debate:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which “have immemorially been held in trust for the use of the public, and,

time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Id. (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Because the park is a public forum, the city’s restrictions on speech are subject to strict scrutiny. *Id.*; *see also Cornelius*, 473 U.S. at 800 (“Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee (ISKCON)*, 505 U.S. 672, 678 (1992) (indicating that such restrictions are subject to the “highest scrutiny”).

Moreover, the city cannot close or otherwise limit a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998); *see also First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002) (“The government cannot simply declare the First Amendment status of [a traditional public forum] regardless of its nature and its public use.”). In short, the nature of the forum in this case is public. *See Eagon v. City of Elk City*, 72 F.3d 1480, 1486–87 (10th Cir. 1996) (rejecting argument that park is a nonpublic forum); *see also United States v. Grace*, 461 U.S. 171, 177 (1983) (“[P]ublic places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’”); *Frisby v. Schultz*, 487 U.S.

474, 481 (1988) (noting that *all* public streets are traditional public forums regardless of their particular character).

Pleasant Grove contends that our decisions in *City of Ogden* and *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), support its argument that the monuments and other structures in the city park constitute a nonpublic forum. But in both *City of Ogden* and *Callaghan*, the property at issue could not be characterized—by tradition or government designation—as a public forum. *City of Ogden*, 297 F.3d at 1002 (holding that permanent monuments on the grounds of a municipal building were a nonpublic forum because property was “not by tradition or designation a forum for public communication” (quotations omitted)); *Callaghan*, 130 F.3d at 916–17 (holding that courthouse lawn was a nonpublic forum). Conversely, in the present case, the property is a park, the kind of property which has “immemorially been held in trust for the use of the public.” *Hague*, 307 U.S. at 515. In this way, the present case more closely resembles the facts in *Eagon*. In *Eagon*, individuals sued Elk City for violation of their free speech rights after the city excluded their display from “Christmas in the Park,” an annual event during which individuals and groups were allowed to erect displays in Ackley Park. 72 F.3d at 1483. In conducting our forum analysis, we characterized the relevant forum as “Ackley Park during the ‘Christmas in the Park’ event” and held that the forum was a traditional public forum, in which “content-based restrictions on speech are valid only if necessary to serve a compelling state interest and if narrowly drawn to achieve that end.” *Id.* at 1487. Similarly, the fact that Summum seeks access to a particular means of

communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum. *See Cornelius*, 473 U.S. at 802 (“Having identified the forum . . . we must decide whether it is nonpublic or public in nature.”).

By applying the standard associated with a nonpublic forum, the District Court committed an error of law. In a nonpublic forum, content-based restrictions on speech are permissible as long as they do not discriminate on the basis of the speaker’s viewpoint and are reasonable. *Perry Educ. Ass’n*, 460 U.S. at 49; *see also Cornelius*, 473 U.S. at 806 (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”). But in a public forum, content-based restrictions are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (“Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.”). In order for a content-based restriction to survive strict scrutiny, the government must “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Ass’n*, 460 U.S. at 45. As we explain below, Pleasant Grove has failed to justify its restriction on speech under this standard.⁴

⁴We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs have broad discretion to consider content

2. Application of strict scrutiny to content-based restrictions in a traditional public forum

Pleasant Grove concedes that its restriction on speech in the park is content based.⁵ By requiring that monuments meet the city’s historical relevance criteria, the city excludes monuments on the basis of subject matter and the speaker’s identity.⁶ Because the city’s restrictions are content based, they may not be analyzed under the less exacting intermediate scrutiny applied to content-neutral restrictions regulating the time, place, or

in making collection decisions); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (“Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments “are a consequence of the nature of arts funding”). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron. Because the Supreme Court has not extended the reasoning of these cases to the context we consider today, we conclude that the case is best resolved through the application of established forum principles.

⁵In its brief, Pleasant Grove acknowledged that it evaluates proposed monuments based on their content: “[T]he City merely restricts permanent monuments based on either the content of the monument (i.e., the historical relevance to the City) or the identity of the donor (i.e., one with ties to the community). Such criteria, while certainly content-based, are reasonable and completely neutral with regard to viewpoint” App. Br. at 23.

⁶In addition to exclusions based on viewpoint or subject matter, exclusions based on the speaker’s identity trigger strict scrutiny when the forum at issue is public. *See Cornelius*, 473 U.S. at 808 (noting that exclusion of speech from a public forum requires “a finding of strict incompatibility between the nature of the speech or the identity of the speaker” and the forum’s function); *see also Mosley*, 408 U.S. at 96 (“[W]e have frequently condemned . . . discrimination among different users of the same medium for expression.”); *Eagon*, 72 F.3d at 1487 (subjecting to strict scrutiny the city’s denial to partisan groups of the same opportunity to speak as non-partisan groups in a traditional public forum).

manner of expression in public forums. *Id.*

We must therefore determine whether Pleasant Grove has demonstrated that application of its historical relevance criteria will, “more likely than not, be justified by the asserted compelling interests.” *Gonzales*, 126 S. Ct. at 1219; *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004) (“When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.”); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005) (“A municipality has the burden of justifying its regulation [of speech] even on a motion to enjoin enforcement of an ordinance.”). Even though the injunction in this case is disfavored and Summum’s request is therefore analyzed under a heightened standard, in the context of a First Amendment challenge, Pleasant Grove bears the burden of establishing that its content-based restriction on speech will “more likely than not” survive strict scrutiny. *See Ashcroft*, 542 U.S. at 666 (“As the Government bears the burden of proof on the ultimate question of [the restriction’s] constitutionality, [the moving party] must be deemed likely to prevail unless the Government has shown that [the moving party’s] proposed less restrictive alternatives are less effective than [the restriction].”); *Leavitt*, 256 F.3d at 1072–73 (placing the burden on the government to justify its speech restrictions in a preliminary injunction hearing).

Because Pleasant Grove argued below that the relevant forum is nonpublic in nature, it did not assert a compelling interest that would justify excluding Summum’s

monument. The only interest Pleasant Grove asserted is an interest in promoting its history. The city's failure to offer any reason why this interest is compelling is sufficient for Summum to meet its burden in demonstrating a substantial likelihood of success on the merits. *See Pac. Frontier*, 414 F.3d at 1235 (affirming district court's conclusion that city failed to meet its burden in justifying its regulation at preliminary injunction stage); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1146 (9th Cir. 1998) (finding that plaintiff had established substantial likelihood of success on the merits when county did not offer any reason why its interests were compelling).⁷

But even if we assume that Pleasant Grove's stated interest is compelling, the city has also failed to establish that the content-based exclusion of Summum's monument is "necessary, and narrowly drawn," to serve the city's interest in promoting its history. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). As the Supreme Court has explained, defining a governmental interest this narrowly (i.e., the promotion of the city's history in this particular park) turns the *effect* of the regulation into the governmental interest. *See Simon & Schuster, Inc. v. Members of N.Y. State*

⁷Pleasant Grove's reliance on our decision in *City of Ogden* is misplaced. The city argues that our decision supports its use of historical relevance criteria to limit speech in this context. In *City of Ogden*, however, we simply noted that we were *not* deciding that a city "may never maintain a *nonpublic* forum to which access is controlled based upon 'historical relevance' to the given community." 297 F.3d at 1006 (emphasis added). In other words, we left open the question whether a city could limit access to a nonpublic forum based on historical relevance. More important, we did not express any opinion about the use of historical relevance criteria to justify content-based discrimination in a public forum. A content-based restriction permissible in a nonpublic forum will not necessarily survive the strict scrutiny applied to a restriction in a public forum.

Crime Victims Bd., 502 U.S. 105, 120 (1991) (explaining that “this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored”).

Furthermore, the city may not use content-based restrictions to advance a particular ideology. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that state’s interest in promoting “appreciation of history, state pride, and individualism” was not ideologically neutral and therefore not compelling enough to outweigh an individual’s free speech rights). The city may further its interest in promoting its own history by a number of means, but not by restricting access to a public forum traditionally committed to public debate and the free exchange of ideas. *ISKCON*, 505 U.S. at 700 (Kennedy, J., concurring in judgment) (stating that government may not “assert broad control over speech or expressive activities” in a public forum, but “must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property’s forum status”).

In addition to the city’s stated interest in promoting its history, the 2004 city resolution governing monuments in the park contains aesthetic and safety justifications for the speech restriction.⁸ Cities have substantial interests in the aesthetic appearance of

⁸The resolution contains the following preamble:
WHEREAS, there is a limited amount of park space within the city; and
WHEREAS, there are aesthetic issues surrounding the placement of permanent objects in parks and other public areas; and
WHEREAS, the City wishes to preserve its public open space; and
WHEREAS, permanent structures, displays, permanent signs and monuments, decrease the available open space and the visual perception of

their property. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981). To further these interests, Pleasant Grove may pass a reasonable content-neutral resolution regulating the time, manner, or place of speech in the park. For example, it could ban all permanent displays of an expressive nature by private individuals. *Pinette*, 515 U.S. at 761 (noting a “ban on all unattended displays” as a possible content-neutral restriction in a traditional public forum); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 792, 796 (holding that city’s regulation of sound levels in park was a content-neutral and narrowly tailored means of serving city’s interest in the peaceful character of park and privacy of residential area).

Here, however, the city has furthered its objectives by passing a content-based resolution, which excludes all speech that does not meet its historical relevance criteria; the resolution is therefore subject to strict scrutiny. We need not decide whether the city’s interests in aesthetics and safety are compelling because the resolution is not narrowly tailored to achieve its stated interests. The city has not offered any reason why monuments with its preferred historical content will preserve park space and reduce safety hazards more effectively than monuments containing other content. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (holding city’s sign

open space, and

WHEREAS, there are also safety issues surrounding the placement of permanent objects in parks and public areas such as sight obstructions, and line of sight availability; and

WHEREAS, the City wishes to insure the placement of permanent objects on public property does not create safety hazards. (Applt. App. at 55)

code unconstitutional because not narrowly tailored to serve “the general purposes of aesthetics and traffic safety”); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (noting that, by allowing content-based exemptions, the government “may diminish the credibility of [its] rationale for restricting speech in the first place”).

Rather, the distinction between monuments with particular historical content and monuments lacking this content “bears no relationship *whatsoever*” to the resolution’s stated interests in aesthetics and safety. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (finding that ban on commercial newsracks lacked reasonable fit with city’s interests in aesthetics and safety); *see also Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 792 (1988) (holding state’s “generalized interest” was “insufficiently related” to its chosen means). The city may not burden speech that does not present the danger the regulation seeks to address: “Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.” *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). Summum’s monument is similar in size, material, and appearance to the Ten Commandments monument already displayed in the park. The city’s exclusion of the monument based on its content cannot be justified by an interest in aesthetics or safety.⁹

⁹Because Pleasant Grove’s restriction on monuments in the park is not necessary or narrowly drawn to serve a compelling interest, we need not decide whether the city’s 2004 resolution purportedly codifying its unwritten policy is a post hoc facade for content-based discrimination. *See City of Ogden*, 297 F.3d at 1006–09 (analyzing whether city’s historical relevance justification was well-established policy or a post hoc

Because Pleasant Grove has not demonstrated that application of its historical relevance criteria is more likely than not to be justified by its stated interests, we conclude that Summum has established a substantial likelihood of success on the merits and proceed to a determination of whether Summum has satisfied its burden under the remaining three factors necessary for a preliminary injunction.

B. Irreparable Injury

The second factor we must consider in determining whether Summum is entitled to a preliminary injunction is whether Summum will suffer irreparable harm if denied an injunction. Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976), *quoted in Pac. Frontier*, 414 F.3d at 1235, and *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003). For this reason, we have assumed irreparable injury when plaintiffs are deprived of their commercial speech rights, *e.g., Pac. Frontier*, 414 F.3d at 1235; *Utah Licensed Beverage Ass’n*, 256 F.3d at 1076, even though restrictions on commercial speech are subject to intermediate scrutiny, not

facade for viewpoint discrimination); *Cornelius*, 473 U.S. at 812–13 (remanding for factual inquiry into whether government’s stated reasons for restricting speech were motivated by a desire to suppress certain viewpoints). We do note, however, that the record contains little support for a well-established policy or practice of approving monuments that promote the city’s pioneer history. In the “absence of express standards,” such as a written policy, city officials are more likely to use post hoc rationalizations to justify their decisions; this kind of “unbridled discretion” can result in content or viewpoint discrimination. *Callaghan*, 130 F.3d at 920 (quotations omitted).

strict scrutiny as in the case before us, *see Utah Licensed Beverage Ass'n*, 256 F.3d at 1066. If we can assume irreparable harm in the context of commercial speech, we can surely assume irreparable harm when the government deprives an individual of speech in a traditional public forum subject to the highest scrutiny. *See Heideman*, 348 F.3d at 1190 (noting that determination of irreparable harm requires consideration of “the specific character of the First Amendment claim”). Given the character of the deprivation in this case (i.e., exclusion from a traditional public forum), we hold that Summum has established it will suffer irreparable harm if the injunction is denied.

C. Balance of Harms

Next, we consider whether the First Amendment injury to Summum outweighs any prospective injury to Pleasant Grove in the event the injunction is granted. Pleasant Grove argues that it will suffer substantial harm because, if Summum is allowed to display its monument, the city will be inundated with requests from other individuals and the park will be flooded with monuments. But the city’s *potential* harm must be weighed against Summum’s *actual* First Amendment injury. *O Centro*, 389 F.3d at 1009 (Seymour, J., concurring in part and dissenting in part) (“Thus, the balance is between actual irreparable harm to plaintiff and potential harm to the government which does not even rise to the level of a preponderance of the evidence.”); *see also ISKCON*, 505 U.S. at 701 (Kennedy, J., concurring in judgment) (“The First Amendment is often inconvenient. . . . Inconvenience does not [however] absolve the government of its obligation to tolerate speech.”). The record contains no evidence to support Pleasant Grove’s

contention that an injunction in this case will prompt an endless number of applications for permanent displays in the park. The city’s speculative harm cannot outweigh a First Amendment injury, especially because Summum has established a substantial likelihood of success on the merits. *See O Centro*, 389 F.3d at 1010 (Seymour, J., concurring in part and dissenting in part); *Pac. Frontier*, 414 F.3d at 1236–37; *see also Wyandotte Nation*, 443 F.3d at 1256 (holding that plaintiff made strong showing regarding the balance of harms under the heightened standard for a mandatory injunction in part because plaintiff had substantial likelihood of success on the merits). We therefore hold that Summum has made a strong showing with regard to the balance of harms.

D. Public Interest

Lastly, we consider whether granting the injunction would be contrary to the public interest. We have held that preliminary injunctions which further plaintiffs’ free speech rights are not adverse to the public interest. *Pac. Frontier*, 414 F.3d at 1237 (“Vindicating First Amendment freedoms is clearly in the public interest.”); *Utah Licensed Beverage Ass’n*, 256 F.3d at 1076 (“Because we have held that Utah’s challenged statutes . . . unconstitutionally limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest.”); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (holding that a preliminary injunction was not contrary to the public interest because “it will protect the free expression of the millions of Internet users both within and outside of the State of New Mexico” (quotations omitted)); *Elam Constr., Inc. v. Reg’l Transp. Dist.*, 129 F.3d

1343, 1347 (10th Cir. 1997) (“The public interest also favors plaintiffs’ assertion of their First Amendment rights.”). Because an injunction requiring the city to permit the display of Summum’s monument will further free speech rights, the injunction is clearly in the public interest.

CONCLUSION

We hold that Summum has met its burden under all four factors necessary for a preliminary injunction and has made the strong showing required under the heightened standard for disfavored injunctions. We therefore REVERSE the District Court’s order denying Summum’s motion and REMAND with instructions to grant the preliminary injunction in Summum’s favor. In addition, the District Court may conduct further proceedings consistent with this opinion. We DENY as moot Summum’s motion to expedite this appeal.

PUBLISH

April 17, 2007

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

SUMMUM, a corporate sole and church,

Plaintiff - Appellant/
Cross - Appellee,

v.

DUCHESNE CITY, a governmental
entity; CLINTON PARK, Mayor of
Duchesne City; YORDYS NELSON;
NANCY WAGER; PAUL TANNER;
DARWIN MCKEE; JEANNIE
MECHAM, city council members,

Defendants - Appellees/
Cross - Appellants.

Nos. 05-4162, 05-4168,
05-4272 & 05-4282

**APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D. Ct. No. 2:03-CV-1049-DB)**

Brian M. Barnard (James L. Harris, with him on the briefs), Utah Legal Clinic, Salt Lake City, Utah, appearing for Appellant.

Francis J. Manion, American Center for Law & Justice, New Hope, Kentucky (Geoffrey R. Surtees, American Center for Law & Justice, New Hope, Kentucky, Edward L. White, III, Thomas More Law Center, Ann Arbor, Michigan, and Cindy Barton-Coombs, Duchesne City Attorney, Roosevelt, Utah, with him on the briefs), appearing for Appellees.

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **KANE**,* District Judge.

TACHA, Chief Circuit Judge.

Summum, a religious organization, filed suit under 42 U.S.C. § 1983 against Duchesne City, its mayor, and its city council members (collectively “City”) for alleged violations of Summum’s First Amendment free speech rights. Summum appeals the District Court’s entry of summary judgment in favor of the City with respect to Summum’s request for prospective injunctive relief from alleged ongoing violations of its free speech rights. The City cross-appeals the District Court’s entry of summary judgment in favor of Summum with respect to Summum’s request for declaratory relief and nominal damages for the City’s past violations of its free speech rights. In addition, the City cross-appeals the District Court’s denial of its motion for summary judgment based on lack of standing, and both parties appeal the District Court’s order awarding Summum attorneys’ fees. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part, reverse in part, and remand.

I. BACKGROUND

This dispute arises from Summum’s request to erect a monument of the Seven Aphorisms of Summum in a city park in Duchesne City, Utah. In September 2003, Summum sent a letter to the mayor of Duchesne City asking the City to transfer a small

*Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

(10' x 11') plot of land in Roy Park to Summum for the display of its monument. Summum requested a plot of land (rather than simply seeking permission to erect its monument on public property) because, in August, the mayor had transferred a 10' x 11' plot of land in Roy Park containing a Ten Commandments monument to the Duchesne Lions Club. At the time of the transfer, the Ten Commandments monument had been displayed in Roy Park for nearly twenty-five years. In an attempt to remove the monument from public property, the mayor transferred the land to the Lions Club by quitclaim deed. The contract for the transaction cites the club's work in cleaning and beautifying the city as consideration for the transfer. Summum, in its request for a similar land transfer, asked that the City grant it the same access to public property that the City had granted the Lions Club. The City responded by letter, notifying Summum that it would grant Summum a similarly sized plot of land in Roy Park if the organization contributed the same amount of service to the City as the Lions Club had contributed.

Construing the City's response as a denial of its request for a plot of land in Roy Park, Summum filed suit under 42 U.S.C. § 1983 in federal district court, alleging violations of its free speech rights under the First Amendment. It also alleged the City violated its rights under the Utah Constitution's Free Expression and Establishment Clauses. It sought declaratory and injunctive relief, as well as monetary damages. Both parties moved for summary judgment. At a hearing on the motions, the District Court expressed reservations about the City's land transfer to the Lions Club. In particular, it questioned whether the sale was supported by adequate consideration and was an

arm's-length transaction (the mayor of the City was also president of the Lions Club). The court also noted that the City had not erected any fences, signs, or other indications of its disassociation from the plot of land and monument. After the court encouraged the parties to seek other solutions to the problem, the Lions Club transferred the plot of land back to the City by quitclaim deed, and the City sold the plot to the daughters of Irvin Cole, in whose honor the monument was originally donated. The Cole daughters paid \$250 for the property, which they are free to use and dispose of as they wish. In addition, a white-picket fence approximately four feet high currently encircles the property, and a sign states that the City does not own the property. The City notified the District Court of the changed circumstances.

Summum argued that the City's sale of the property to the Cole daughters did not cure the violation of Summum's free speech rights. But in response to both parties' motions for summary judgment, the District Court entered an order in favor of the City, finding that the second sale ended the City's association with the Ten Commandments monument. The court concluded that because the monument was now private speech on private property, Summum was not entitled to injunctive relief facilitating the display of its monument in the park. In a subsequent order, the District Court concluded that prior to the sale of the plot to the Cole daughters, the City was violating Summum's free speech rights; it therefore granted Summum's motion for declaratory relief and awarded it nominal damages of \$20. Summum now appeals the District Court's denial of its request for injunctive relief. The City cross-appeals the District Court's decision regarding

declaratory relief and damages, as well as the court's denial of the City's motion for summary judgment based on lack of standing. In addition, both parties appeal the District Court's order awarding attorneys' fees to Summum as a prevailing party under 42 U.S.C. § 1988.

II. DISCUSSION

A. Standing

Before we reach the merits of Summum's First Amendment claim, we first address the City's contention that Summum lacks standing to bring this claim. Our review of this legal question is *de novo*. *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006).

To ensure that an Article III case or controversy exists, a party asserting federal jurisdiction must establish three elements to have standing to bring a claim. *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1155 (10th Cir. 2006); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1255 (10th Cir. 2004). First, the party must establish an injury-in-fact by showing "an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Utah Animal Rights Coal.*, 371 F.3d at 1255 (quotations omitted). Second, the party must demonstrate causation by "showing that the injury is fairly trace[able] to the challenged action of the defendant, rather than some third party not before the court." *Id.* (alteration in original) (quotations omitted). And third, the party must establish redressability by showing "that it is likely that a favorable court decision will redress the injury to the plaintiff." *Id.* (quotations omitted).

Summum claims that its First Amendment rights were violated when the City denied its request to erect a permanent monument in the park while allowing others to do so. The City maintains, however, that it removed the Ten Commandments monument from the park by selling the underlying property and that, consequently, a forum for permanent displays no longer exists in the park. Thus, the City argues, Summum has failed to establish an injury-in-fact. But the efficacy of the City's closure of the park as a forum for permanent displays is a matter of debate. And as we have cautioned, "we must not confuse standing with the merits." *Id.* at 1256; *see also Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) ("For purposes of the standing inquiry, the question is not whether the alleged injury rises to the level of a constitutional violation. That is the issue on the merits."). If Summum is correct that the Ten Commandments monument is part of a public forum to which it was denied access, it may have suffered a deprivation of its free speech rights, which would clearly be an injury-in-fact caused by the City's actions and redressable by a favorable court decision. We therefore conclude that Summum has standing to bring its First Amendment claim.

B. First Amendment Claim

We review a district court's grant of summary judgment de novo, applying the same standard the district court applied. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1120 (10th Cir. 2002); *see also Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004) ("On cross-motions for summary judgment, our review of the summary judgment record is de novo and we must view the inferences to be

drawn from affidavits, attached exhibits and depositions in the light most favorable to the party that did not prevail . . .”). Summary judgment is proper only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In addition, because the case before us involves First Amendment interests, “we have an obligation to conduct an independent review of the record and to examine constitutional facts and conclusions of law de novo.” *First Unitarian Church*, 308 F.3d at 1120.

1. Principles of Forum Analysis

According to Summum, because the City has permitted a private party to erect a monument in a public forum, but denied Summum’s request to do the same, it has violated Summum’s free speech rights. In other words, Summum claims that the City has denied it access to a public forum on the same terms it has granted to others. Hence, Summum’s claim depends on whether the Ten Commandments monument continues to be part of the forum to which Summum seeks access (i.e., permanent displays in Roy Park), even though the City claims to have transferred the small plot of land containing the monument—first to the Lions Club and then to the Cole daughters.

Before turning to the question of whether the Ten Commandments monument remains part of the park, we note that the park, in general, is a traditional public forum, and it is this physical setting that defines the character of the forum to which Summum seeks access. Streets and parks are “quintessential public forums,” as they “have immemorially been held in trust for the use of the public, and, time out of mind, have

been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).¹ The characterization of the forum at issue is crucial because “the extent to which the Government can control access depends on the nature of the relevant forum.” *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). In public forums, content-based exclusions (e.g., excluding Summum’s Seven Aphorisms while allowing the Ten Commandments) are subject to strict scrutiny and will survive “only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.” *Id.* Alternatively, the government “may impose reasonable, content-neutral time, place, and manner restrictions” on speech in public forums (e.g., excluding all permanent displays). *Capitol Square Review and Advisory Bd. v. Pinette*,

¹The City argues that the relevant forum is nonpublic in nature according to our decisions in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), and *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997). But in both *City of Ogden* and *Callaghan*, the property at issue could not be characterized—by tradition or government designation—as a public forum. *City of Ogden*, 297 F.3d at 1002 (holding that permanent monuments on the grounds of a municipal building were a nonpublic forum); *Callaghan*, 130 F.3d at 916-17 (holding that monuments on a courthouse lawn were a nonpublic forum). Conversely, in the present case, the property is a park, the kind of property which has “immemorially been held in trust for the use of the public.” *Hague*, 307 U.S. at 515. The fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum. See *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (“Having identified the forum . . . we must decide whether it is nonpublic or public in nature.”); see also *Summum v. Pleasant Grove City*, – F.3d – (10th Cir. 2007) (holding that “permanent monuments in the city park” are a public forum).

515 U.S. 753, 761 (1995).²

The difficult question in this case is whether the small plot of land with the Ten Commandments monument remains part of a public forum (i.e., the city park) despite the City's efforts to sell it to a private party. As a general matter, "[a] government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its public forum status." *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999) (finding that the city had sufficiently altered former public street so that it was no longer a traditional public forum). Hence, a city's sale of public property may cause it to lose its public forum status. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1255 (10th Cir. 2005) (rejecting the argument that "a public forum may never be sold to a private entity, or that if it is sold, it remains a public forum"); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) ("In some sense the government always retains authority to

²We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs have broad discretion to consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments "are a consequence of the nature of arts funding"). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron. Because the Supreme Court has not extended the reasoning of these cases to the context we consider today, we conclude that the case is best resolved through the application of established forum principles.

close a public forum, by selling the property, changing its physical character, or changing its principal use.”). But a sale of property is not conclusive. Indeed, a First Amendment forum analysis may apply even when the government does not own the property at issue: “forum analysis does not require the existence of government property at all.” *First Unitarian Church*, 308 F.3d at 1122; *see also Marsh v. State of Alabama*, 326 U.S. 501, 509 (1946) (holding that the First Amendment was violated when a corporate-owned municipality restricted individual’s speech); *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 452–53 (6th Cir. 2004) (holding that privately owned sidewalk surrounding privately owned park was a public forum). Thus, even assuming the property with the Ten Commandments monument is privately owned, it may nevertheless continue to be part of the public forum and therefore subject to the strictures of the First Amendment. *See First Unitarian Church*, 308 F.3d at 1131 (holding that the city’s easement over private property was a public forum).

In determining whether private property retains its status as part of a public forum, the inquiry centers on the objective, physical characteristics of the property. *Utah Gospel Mission*, 425 F.3d at 1256; *First Unitarian Church*, 308 F.3d at 1124; *see also United Church of Christ*, 383 F.3d at 452 (holding that privately owned sidewalk was public forum because it resembled public sidewalk and “blend[ed] into the urban grid”); *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001) (holding that privately owned sidewalk was a traditional public forum because it was “seamlessly connected to public sidewalks at either end and intended for

general public use”). That is, a city’s intentions and efforts to remove the plot of land by transferring it to private owners do not dictate the property’s status. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998); *see also First Unitarian Church*, 308 F.3d at 1124 (“The government cannot simply declare the First Amendment status of property regardless of its nature or its public use.”). In addition to examining the objective, physical characteristics of private property, we have also asked whether the city is “inextricably intertwined with the ongoing operations” of the private owner or property and whether the property continues to serve the same primary function as it did before the transfer. *Utah Gospel Mission*, 425 F.3d at 1256–58; *see also First Unitarian Church*, 308 F.3d at 1128 (finding the fact that easement served same purpose as public sidewalk “a persuasive indication that the easement is a traditional public forum”).

The District Court did not conduct a forum analysis to determine whether the plot of land with the Ten Commandments monument remained part of the public forum (i.e., the park) despite its sale to a private party. Instead, the court analogized the present case to the facts in *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), which involved an Establishment Clause challenge to a statue of Christ in a city park. In an effort to distance itself from religious speech, the city sold the plot of land containing the statue to a private entity. The Seventh Circuit held that the city failed to take sufficient measures to end its endorsement of religion: the “physical state of the park” was such that “a reasonable person [could] conclude that the government, rather than a private entity, *endorses* religion.” *Id.* at 495 (emphasis added).

But a determination of whether the government is endorsing religion is not the same as a determination of whether speech is occurring in a public forum. The Seventh Circuit recognized this distinction in *Marshfield* when it acknowledged that, in remedying its Establishment Clause violation, the city should be mindful of the property's inclusion in a public forum: "because our holding limits private speech in a public forum, any remedy must be narrowly tailored to avoid an Establishment Clause violation." *Id.* at 497. In other words, the court recognized that a remedy ending the city's endorsement of religion would not necessarily remove the statue from the public forum, and as part of a public forum, the statue was protected speech under the Free Speech Clause of the First Amendment. To be sure, measures a city takes to differentiate private property from a public forum might affect both the private property's status as a public forum, as well as any perceived endorsement of religion, *see id.*, but the inquiry is not identical. A surrounding fence and disclaimer may be sufficient to disassociate the City from private speech for purposes of the Establishment Clause, but these measures do not necessarily remove a small parcel of property from a public forum. The District Court therefore erred in relying on *Marshfield* to support its conclusion that the sign and fence surrounding the plot of land "removed" the plot from the public forum.

In addition to its reliance on *Marshfield*, the District Court's analysis is flawed in another respect. The first step in determining whether private property is nevertheless part of a public forum should be to resolve conclusively whether the property at issue is in fact privately owned. Because the District Court analyzed the property's status under the

Establishment Clause, rather than the Free Speech Clause, it did not focus on the City's transfer of the property to the Lions Club and, later, to the Cole daughters. Instead, the District Court assumed that both sales were valid. For Establishment Clause purposes, the property's status as private or public may not significantly affect the relevant inquiry into whether a reasonable person could conclude that the government is endorsing religion. In the context of free speech, however, whether the property is private or public significantly affects the analysis of the property's forum status. If the land transfers in this case are invalid, the Ten Commandments monument is located on public property in a city park and is therefore clearly located within a public forum. Alternatively, if the City's transfers are valid, the reviewing court must determine whether the plot of land with the monument continues to be part of a public forum despite its private ownership (and the City's efforts to disassociate itself from the monument). To apply the latter analysis without first determining the validity of the land transfers could run afoul of the fundamental principle that courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 192 (2003) (quotations omitted); *see also United States v. Cusumano*, 83 F.3d 1247, 1250–51 (10th Cir. 1996) (noting that the federal courts will not resolve a constitutional question until it is unavoidable).

The District Court should therefore have analyzed the transfers for compliance with state law, rather than assuming that both sales were valid. We therefore conduct an independent review of the record to determine whether each transfer is valid under state

law. We conclude that the transfer to the Lions Club was invalid, but find the record insufficiently developed to determine whether the sale to the Cole daughters is valid and therefore remand to the District Court so that it may conduct an analysis consistent with this opinion.

2. State Law Governing the City's Transfer of Public Property

Under state law, a city's legislative body has the power to dispose of public property "for the benefit of the municipality." Utah Code Ann. § 10-8-2(1)(a)(iii). The Utah Supreme Court has interpreted this statutory provision to require that municipalities sell or otherwise dispose of public property "in good faith and for an adequate consideration." *Sears v. Ogden City*, 533 P.2d 118, 119 (Utah 1975) (holding that a city may not dispose of its property by gift), *aff'd on rehearing*, 537 P.2d 1029. The court has also held that "adequate consideration" requires the receipt of a "present benefit that reflects the fair market value" of the property. *Mun. Bldg. Auth. of Iron County v. Lowder*, 711 P.2d 273, 282 (Utah 1985); *see also Salt Lake County Comm'n v. Salt Lake County Attorney*, 985 P.2d 899, 910 (Utah 1999) (holding that adequate consideration requires a specific benefit stated in "present market value terms"). Hence, a "future" benefit will not supply adequate consideration for a city's transfer of property, "nor will a benefit that is of uncertain value." *Price Dev. Co., L.P. v. Orem City*, 995 P.2d 1237, 1247 (Utah 2000). Furthermore, Utah case law suggests that a city's disposal of park property is subject to additional limitations: "[P]roperty such as streets, alleys, parks, public buildings, and the like, although the title is in the city . . . is held in trust for strictly

corporate purposes, and, as a general rule, cannot be sold or disposed of so long as it is being used for the purposes for which it was acquired.” *McDonald v. Price*, 146 P. 550, 551 (Utah 1915).

In addition to these substantive requirements, the Utah Supreme Court has held that a city’s transfer of public property must be supported by documentation demonstrating the fairness of the transfer:

[W]hen a legislative body enters into a transaction where public money or property is given in exchange for something, the good faith legislative judgment that the net exchange is for fair market value flowing to the entity needs to be supported by documentation within the legislative record of an independent determination of the value of the exchange.

Price Dev. Co., 995 P.2d at 1249. Such documentation attaches a presumption of validity to the transaction, the strength of which is “in direct proportion to the thoroughness of the evaluation of the transaction entered into and to the independence and skill of the evaluators.” *Id.*

a. Transfer of the Plot to the Lions Club

The transfer from Duchesne City to the Lions Club by quitclaim deed in August 2003 was clearly invalid under state law. As an initial matter, no presumption of validity attaches to the transaction because no documentation exists demonstrating the transaction’s fairness. The City contends, however, that the properly executed and recorded quitclaim deed creates a presumption of validity. The City is correct that, under Utah law, recorded documents governing title to real property do create certain

presumptions, Utah Code Ann. §§ 57-1-13; 57-4a-4, including the presumption that “any necessary consideration was given,” *id.* § 57-4a-4(1)(e). But this more general statute must be interpreted in conjunction with the specific statutes and case law governing transfers of real property by municipalities. And, as noted above, a municipality’s transfer of public property enjoys a presumption of validity only when supported by underlying documentation of the “independent determination of the value of the exchange.” *Price Dev. Co.*, 995 P.2d at 1249.

Moreover, the presumption of a valid transaction may be rebutted by clear and convincing evidence of the transfer’s invalidity. *Gold Oil Land Dev. Corp. v. Davis*, 611 P.2d 711, 712 (Utah 1980). In this case, the record contains clear and convincing evidence that the City’s transfer to the Lions Club was invalid. The deed purported to transfer the parcel of property from the City to the Lions Club in return for \$10 and “other considerations.” The contract for sale of the property states that the transfer is “in exchange for consideration of work for the cleaning and beautification of Duchesne City.” Neither document supports a conclusion that the consideration is a specific, present benefit reflecting fair market value. In addition, the same person represented entities on both sides of the transaction; Clinton Park signed the contract on behalf of the City, in his capacity as mayor, and on behalf of the Lions Club, in his capacity as president of the local chapter. This fact raises considerable doubt that the transfer was made in “good faith.” *See, e.g.*, Utah Code Ann. § 70A-1-201(19) (“‘Good faith’ means honesty in fact in the conduct or transaction concerned.”). Because the sale to the Lions

Club was not made “in good faith and for an adequate consideration,” *Sears*, 533 P.2d at 119, it is invalid under state law.

Because the sale to the Lions Club was invalid, the plot of land with the Ten Commandments monument remained part of a public forum. The next question is whether the City’s reasons for prohibiting Summum’s speech satisfy the appropriate First Amendment standard. The City concedes it excluded Summum’s speech based on its subject matter and the speaker’s identity. In addition to exclusions based on viewpoint or subject matter, exclusions based on the speaker’s identity trigger strict scrutiny when the forum at issue is public. *See Cornelius*, 473 U.S. at 808 (noting that exclusion of speech from a public forum requires “a finding of strict incompatibility between the nature of the speech or the identity of the speaker” and the forum’s function); *see also Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (“[W]e have frequently condemned . . . discrimination among different users of the same medium for expression.”). To survive strict scrutiny, the City must demonstrate that “the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.” *Cornelius*, 473 U.S. at 800.

The City does not assert any compelling interest for this restriction.³ Rather, the

³In its letter denying Summum’s request, the City indicated it would grant Summum the same access as the Lions Club once Summum contributed the same number of service hours to the City. While we doubt the sincerity of the City’s stated reason (and therefore its motive) in excluding Summum’s speech, the City’s denial based on lack of community service confers too much discretion on city officials to exclude speech from a public forum. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770–72 (1988). The City provided no specific guidelines for determining when a speaker has engaged in

City asserts that no constitutional right exists to erect a permanent structure on public property. We do not need to address that proposition in its most general application, however, because in any event it does not apply when the government allows some groups to erect permanent displays, but denies other groups the same privilege. Indeed, the cases cited by the City acknowledge this distinction. *See, e.g., Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) (“First Amendment jurisprudence certainly does mandate that if the government opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations”); *see also Summum v. Pleasant Grove City*, – F.3d – (10th Cir. 2007) (holding that a content-based exclusion of a permanent display in a public park violated the First Amendment). Indeed, we have held that similar restrictions on speech may violate the First Amendment even under the less exacting standard of review applied to speech restrictions in nonpublic forums.⁴ *Summum v. City of Ogden*, 297 F.3d 995, 1011 (10th Cir. 2002); *Summum v. Callaghan*, 130 F.3d 906,

the quantity and quality of community service sufficient to gain access to the park. This kind of “unbridled discretion” is clearly unconstitutional. *Id.* at 770 (“The doctrine [forbidding unbridled discretion] requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.”)

⁴Moreover, because the Ten Commandments monument remained part of a public forum, we need not address the City’s argument that the display of Summum’s monument (and no other) would have caused the City to violate the Establishment Clause. But we note that, when a forum for private speech exists, we have rejected the Establishment Clause defense. *Callaghan*, 130 F.3d at 921; *see also City of Ogden*, 297 F.3d at 1011 (recommending that the city post a disclaimer if it is concerned that reasonable observers would interpret monument as a governmental endorsement of religion).

921 (10th Cir. 1997). Viewing the relevant, undisputed facts in the light most favorable to the City, we therefore conclude that Summum’s free speech rights were violated prior to the property’s transfer to the Cole daughters and affirm the District Court’s grant of summary judgment in favor of Summum on this issue.⁵

b. Transfer of the Plot to the Cole Daughters

Summum’s request for prospective injunctive relief depends, in part, on the validity of the City’s transfer of the property to the Cole daughters. After Clinton Park, in his capacity as president of the Lions Club, transferred the property back to the City, the city council passed ordinances governing the disposition of real property owned by the City and vacating the 10’ x 11’ parcel of property with the Ten Commandments monument. The council also passed a resolution authorizing the mayor to transfer the property to the Cole daughters. In July 2004, Clinton Park, as mayor, signed a quitclaim deed transferring the property to the Cole daughters for \$250 “and other considerations.”

⁵The City argues that the District Court should not have granted Summum’s request for declaratory relief because it had already granted the City’s motion for summary judgment on Summum’s entire First Amendment claim. But in its order, the court found that the City’s sale to the Cole daughters cured any First Amendment violation and denied Summum’s request for *prospective* relief in the form of an injunction. The court specifically noted that the order did not settle Summum’s claims for money damages and attorneys’ fees. This first judgment did not therefore preclude the court’s subsequent entry of declaratory judgment and damages in favor of Summum for the period prior to the City’s second attempt to transfer the property. Furthermore, although declaratory relief is typically prospective, “we consider declaratory relief retrospective to the extent that it is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred,” *PeTA v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002), even though it is “superfluous [in this case] in light of the damages claim,” *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997).

The value of the exchange is apparently based on a Duchesne County tax appraisal, which lists the Duchesne Lions Club as the owner. This alone is not enough to determine whether the sale was in good faith and for adequate consideration under state law. The record lacks any supporting documentation “of an independent determination of the value of the exchange,” *Price Dev. Co.*, 995 P.2d at 1249, or “a detailed showing of the benefits to be obtained” from the transfer, *Salt Lake County Comm’n*, 985 P.2d at 910. The county tax appraisal does not contain this detailed showing, as it is not intended to evaluate the City’s transfer of the property to a private owner. Moreover, the record contains no discussion of whether the City could dispose of park property when the property’s purpose had not changed. *See McDonald*, 146 P. at 551 (noting general rule that property “held in trust for strictly corporate purposes” may not “be sold or disposed of so long as it is being used for the purposes for which it was acquired”).

The District Court simply assumed the sale was valid based on the City’s assertions and did not conduct an analysis of the transfer under state law. But based on our review of the record, a genuine issue of material fact exists concerning the validity of the City’s transfer. We therefore reverse the District Court’s grant of summary judgment in favor of the City on Summum’s claim for injunctive relief. Because a determination of the sale’s validity is important to a determination of the property’s forum status, the District Court must first decide whether the sale meets the requirements of state law. Once this issue is decided, the court may then decide the constitutional issue of the property’s forum status, applying an analysis consistent with this opinion. In addition,

even if the District Court determines on remand that the land upon which the Ten Commandments monument rests is no longer part of the traditional public forum of Roy Park, Summum may still be entitled to prospective injunctive relief entitling it to place its monument on other locations that remain in the traditional public forum of Roy Park, unless the court determines that the City's ordinance purporting to close all of Roy Park to permanent displays is a valid time, place, or manner restriction under the analysis articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989).

C. State Law Claims

Summum also claims that the District Court erred in dismissing its state law claims. In resolving the parties' motions for summary judgment the District Court did not explicitly address Summum's state law claims. Accordingly, we assume that it declined to exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1367(c). See *Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1155 n.6 (10th Cir. 2001) (assuming district court declined supplemental jurisdiction when it did not address state law claims in its order of dismissal). We review a district court's decision regarding supplemental jurisdiction for abuse of discretion. *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1213 (10th Cir. 2006). In general, when federal claims are disposed of prior to trial, the district court may decline to exercise supplemental jurisdiction over state law claims and allow the plaintiff to assert those claims in state

court.⁶ *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995); *see also* 28 U.S.C. § 1367(c)(3) (“[A] district court[] may decline to exercise supplemental jurisdiction” over state law claims if it “has dismissed all claims over which it has original jurisdiction.”). But because we remand Summum’s federal claim for prospective injunctive relief, the District Court should reconsider whether to exercise supplemental jurisdiction over Summum’s state law claims. *See Baca v. Sklar*, 398 F.3d 1210, 1222 n.4 (10th Cir. 2005) (directing the district court to reconsider its decision to decline supplemental jurisdiction after remanding a federal claim).

D. Attorneys’ Fees

Both parties appeal the District Court’s order awarding Summum one percent (\$694.40) of the amount requested in attorneys’ fees. Summum argues that it is entitled to a larger fee award, while the City argues that the court should not have awarded Summum any attorneys’ fees. Because we reverse the District Court’s grant of summary judgment in favor of the City with respect to injunctive relief, we vacate its order awarding attorneys’ fees. The District Court may recalculate attorneys’ fees after it determines whether Summum is entitled to injunctive relief in light of the foregoing discussion.

⁶In fact, in *Snyder v. Murray City Corp.*, we *reversed* a district court’s decision to exercise supplemental jurisdiction over claims involving Utah’s Free Exercise and Establishment Clauses when the court had resolved the federal claims prior to trial. *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1354–55 (10th Cir. 1997) (noting that the complex nature of the law interpreting Utah’s religion clauses supported dismissal of state claims), *vacated in part on rehearing en banc*, 159 F.3d 1227 (10th Cir. 1998).

We caution, however, that to reach the conclusion that a plaintiff’s victory is merely technical or de minimis—justifying only a low fee award or no award at all—the court must first apply the factors from Justice O’Connor’s concurrence in *Farrar v. Hobby*, 506 U.S. 103, 116–22 (1992).⁷ In this case, the District Court characterized the City’s violation of Summum’s rights as “technical” before it applied the O’Connor factors because it had only awarded Summum nominal damages. But “[n]ominal relief does not necessarily a nominal victory make.” *Farrar*, 506 U.S. at 121. Accordingly, on remand, the court should apply the three O’Connor factors *before* deciding that the victory is technical and that the only reasonable fee is therefore a low fee or no fee at all. *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1230 n.3 (10th Cir. 2001); *see also Lippoldt*, 468 F.3d at 1223–24 (holding that the district court abused its discretion in finding that plaintiffs achieved only technical success without considering all the *Farrar* factors).

III. CONCLUSION

We AFFIRM the District Court’s grant of summary judgment in favor of Summum with respect to declaratory relief and nominal damages, but we REVERSE its grant of summary judgment in favor of Duchesne City with respect to Summum’s request for injunctive relief. In addition, we VACATE the District Court’s order awarding Summum attorneys’ fees and REMAND for further proceedings consistent with this opinion.

⁷These three factors are: “(1) the difference between the amount recovered and the damages sought; (2) the significance of the legal issue on which the plaintiff claims to have prevailed; and (3) the accomplishment of some public goal other than occupying the time and energy of counsel, court, and client.” *Lippoldt*, 468 F.3d at 1222 (quotations omitted).