No. ____

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, ET AL.,
Petitioners,

v.

SUMMUM, **a corporate sole and church**,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

THOMAS P. MONAGHAN
FRANCIS J. MANION
EDWARD L. WHITE III
GEOFFREY R. SURTEES
JOHN P. TUSKEY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 226-2489

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

Attorneys for the Petitioners

QUESTIONS PRESENTED

Petitioner Pleasant Grove City owns and displays a number of monuments, memorials, and other objects in a municipal park. Respondent Summum sued in federal court, contending that because the city had accepted monuments donated by local civic groups, the First Amendment compels the city to accept and display Summum's "Seven Aphorisms" monument as well. The district court denied Summum's request for a preliminary injunction, but a panel of the Tenth Circuit reversed, holding that the city must immediately erect and display Summum's monument. The Tenth Circuit then denied the city's petition for rehearing en banc by an equally divided, 6-6 vote. The questions presented are:

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?
2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?
3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

PARTIES

In addition to petitioner Pleasant Grove City, the following parties were defendants-appellees in the Tenth Circuit and are petitioners here:

Jim Danklef, Mayor

Mark Atwood, Cindy Boyd, Mike Daniels, Darold McDade, and Jeff Wilson, City Council Members

Carol Harmer and G. Keith Corry, former City Council Members

Frank Mills, City Administrator

Respondent Summum was the plaintiff-appellant in the Tenth Circuit.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

DECISIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND POLICY 4

STATEMENT OF THE CASE 4
1. Jurisdiction in District Court 4
2. Facts Material to Consideration of the Questions 4
   a. Pioneer Park 4
   b. Summum's Proposed Monument 5
3. Course of Proceedings 7
   a. District Court 7
   b. Tenth Circuit Panel 9
   c. Tenth Circuit En Banc Petition and Denial 11
   d. Tenth Circuit Mandate Stayed 16

REASONS FOR GRANTING THE WRIT 16

I. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, SIXTH, SEVENTH, EIGHTH, AND D.C. CIRCUITS 17
A. The Tenth Circuit's Holding, that Monuments in City Parks Are Not Government Speech But Instead Are the Private Speech of the Original Donors of the Monuments, Conflicts with Decisions of the Second, Third, Seventh, Eighth, and D.C. Circuits. 18
B. The Tenth Circuit's Holding that a City Park Is a "Public Forum" for Monuments Conflicts with Decisions in the Second, Sixth, and Seventh Circuits. 22

II. THE DECISION OF THE TENTH CIRCUIT DISTORTS THIS COURT'S FREE-SPEECH JURISPRUDENCE. 24
A. Nature of Forum 24
B. Identity of Speaker 26

III. THE TENTH CIRCUIT'S DECISION CREATES ENORMOUS PRACTICAL PROBLEMS. 27

CONCLUSION 29

APPENDICES

A. Opinion of the U.S. Court of Appeals for the Tenth Circuit (April 17, 2007) (panel decision) 1a

B. Transcript of Oral Decision of U.S. District Court for the District of Utah (Feb. 1, 2006) (denying preliminary injunction and partial summary judgment) 1b

C. Minute Entry for Oral Decision of U.S. District Court for the District of Utah (Feb. 2, 2006) (regarding oral orders of Feb. 1, 2006) 1c

D. Order of U.S. District Court for the District of Utah (Feb. 9, 2006) (granting, in part, judgment on the pleadings) 1d

E. Order of the U.S. Court of Appeals for the Tenth Circuit (Sept. 5, 2007) (staying mandate) 1e

F. Order of the U.S. Court of Appeals for the Tenth Circuit (Aug. 24, 2007) (denying rehearing and rehearing en banc) 1f

G. U.S. Const. amends. I, XIV 1g

H. Policy of Pleasant Grove City (adopted Aug. 3, 2004) (governing placement of monuments etc.) 1h

I. Examples of Government Properties within the Tenth Circuit with Donated Permanent Displays 1i

TABLE OF AUTHORITIES

I. Cases — Page No.

ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772 (8th Cir. 2005) 21
ACLU v. Schundler, 104 F.3d 1435 (3d Cir.), *cert. denied*, 520 U.S. 1265 (1997) 20
Board of Educ. v. Mergens, 496 U.S. 226 (1990) . . 18
Board of Educ. v. Pico, 457 U.S. 853 (1982) . . 26, 27
Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 18, 20, 25
Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 1, 24
Freedom From Religion Found. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000) 21
Gonzales v. Raich, 545 U.S. 1 (2005) 17
Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 22
Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) 23
Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) 18
Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989) 23
Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 1
Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2000) 18
Lubavitch Chabad House v. City of Chicago, 917 F.2d 341 (7th Cir. 1990) 23
McCreary County v. ACLU, 545 U.S. 844 (2005) . . 17
Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) . . 25

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 26
Perry Educ. Ass'n v. Perry Local Educators'
Ass'n, 460 U.S. 37 (1983) 22
PETA v. *Gittens*, 414 F.3d 23
(D.C. Cir. 2005) 2, 19, 20
Rosenberger v. Rector of Univ. of Va.,
515 U.S. 819 (1995) 18
Rust v. Sullivan, 500 U.S. 173 (1991) 18
Schneider v. State, 308 U.S. 147 (1939) 25
Serra v. United States Gen. Servs. Admin.,
847 F.2d 1045 (2d Cir. 1988) 20, 21
In re Smith, 10 F.3d 723 (10th Cir. 1993) 11
Summum v. Callaghan, 130 F.3d 906
(10th Cir. 1997) 18
Summum v. City of Ogden, 297 F.3d 995
(10th Cir. 2002) 7, 9, 11, 12, 18
Summum v. Duchesne City,
482 F.3d 1263 (10th Cir. 2007) 12, 18, 24
Tucker v. City of Fairfield, 398 F.3d 457
(6th Cir. 2005) 24
United States v. American Library Ass'n,
539 U.S. 194 (2003) 26
United States v. Austin, 426 F.3d 1266
(10th Cir. 2005) 12

II. Constitutions and Statutes
U.S. Const. amend. I . . . . . 4, *passim*
U.S. Const. amend. XIV 4
28 U.S.C. § 1254 (1) 4
28 U.S.C. § 1343 4
28 U.S.C. § 1367 4
42 U.S.C. § 1983 4

III. Other Authorities

Associated Press, *Boise: No anti-gay monument*, Spokesman-Review (Dec. 9, 2003) (www.spokesmanreview.com/pf.asp?date=20903&ID=s1452867) 28

Associated Press, *Minister: City must allow anti-gay monument in park* (Oct. 16, 2003) (www.firstamendmentcenter.org/news.aspx?id=12082) 28

Judy Keen, *Fight over Thou Shalts won't wilt*, USA Today (Sept. 7, 2007) (www.usatoday.com/printedition/news/20070709/a_commandments09.art.htm) 28

John Morgan, *City dedicates historic plaza*, Jackson Hole Star Tribune (July 16, 2007) (www.jacksonholestartrib.com/articles/2007/07/16/news/casper4e32f677cbf04e3587253190020f943.txt) 28

John Morgan, *Phelps wants anti-gay monument*, Casper Star Tribune (July 17, 2007) www.casperstartribune.net/articles/2007/07/17news/casper/88d8fdf4b4e017548725731b00006a13.txt) 28

INTRODUCTION

The court below ruled that, once a city accepts and permanently displays a monument donated by a private party, the city creates a forum for permanent monuments and must then accept other monuments donated by private parties for permanent display. The decision below conflicts with decisions in the Second, Third, Sixth, Seventh, Eighth, and D.C. Circuits. Moreover, the Tenth Circuit's ruling creates enormous practical problems. Once a forum for **private** speech is opened, viewpoint discrimination is constitutionally impermissible, even in a nonpublic forum. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). Effectively, a city cannot accept a monument posthumously honoring a war hero without also being prepared to accept a monument that lampoons that same hero. Nor may a city accept a display that positively portrays Native American culture unless it is prepared to accept another that disparages that culture.

In short, under the Tenth Circuit's ruling, every state or local government that displays a memorial originally donated by a private entity "must either remove the . . . memorials or brace themselves for an influx of clutter." App.10f (McConnell, J., dissenting from denial of rehearing en banc).

The analytical misstep in the decision below occurred at the starting gate. When private speakers have the right to use government property to speak, there is a speech forum. But when, as here, the donor cedes and the government accepts **ownership and control** of something from a private party, that

"something" is no longer private property. It becomes **government** property. And if it is a message-bearing "something," any communication thenceforth is **government speech**, not private speech. No "forum" for private speech is created.

Thus, when an artist donates a sculpture for the decoration of a municipal lobby or plaza, that sculpture becomes a **government** display, regardless of its private source. The government can thereafter move, discard, warehouse, or replace the sculpture. This is entirely different from, say, a temporary display of schoolchildren's posters in a government hallway, which may open a temporary forum for the children's private speech.

Likewise, when a city museum acquires a work of art, it is the city that speaks (the message being, this is a piece of art we find aesthetically attractive, historically significant, etc.); the creator of the work no longer controls the display. No forum has been created, and no competing artist can insist, with the force of a constitutional right, on "My turn!"

And when a municipality takes ownership and control of a monument and chooses to display it in a park, as here, it is now the municipality that speaks (the message being, we think this monument reflects our history, or sends a valuable message, or will attract tourists, etc.). The private donor can boast of its contribution, to be sure, but the donor is no longer the speaker. No other private donors can insist that the government accept their additional monuments so that they can be speakers, too. Or, as the D.C. Circuit put it, "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA*

v. *Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

Disposition of the present case is therefore straightforward: there is no forum for private speech in the government's choice of what monuments permanently to display, and the government is free to adopt the content or viewpoint it desires in selecting such monuments. Unlike in private speech cases, accepting a monument for permanent display as the government's own property does not require accepting other monuments in the name of content- or viewpoint-neutrality. Nor does the government's acceptance of a donated monument require that a government park be turned into a cluttered junkyard of monuments contributed by all comers.

In short, accepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny.

This Court should grant review.

DECISIONS BELOW

All decisions in this case to date are entitled *Summum v. Pleasant Grove City*. The panel opinion of the Tenth Circuit appears at 483 F.3d 1044 (10th Cir. 2007). App. A. The opinions accompanying the denial of rehearing and rehearing en banc appear at 499 F.3d 1170 (10th Cir. 2007). App. F. The decision of the district court denying (*inter alia*) Summum's motion for a preliminary injunction is unreported. App. B.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit issued its panel decision on April 17, 2007, and denied a timely petition for rehearing en banc on August 24,

2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The text of the First and Fourteenth Amendments to the U.S. Constitution are set forth in Appendix G. The current city policy governing the placement of monuments is set forth in Appendix H.

STATEMENT OF THE CASE

1. Jurisdiction in District Court

The complaint in this case invoked 42 U.S.C. § 1983, and the district court had jurisdiction under 28 U.S.C. § 1343. The complaint also raised pendent state claims, invoking jurisdiction under 28 U.S.C. § 1367. The pendent state claims are not before this Court in the current posture of the case.

2. Facts Material to Consideration of the Questions

a. Pioneer Park

Petitioner Pleasant Grove City is a municipality in Utah County, Utah. One of the municipal parks in Pleasant Grove is Pioneer Park. That park contains a variety of buildings, monuments, plaques, and memorials that either portray the Mormon pioneer-era heritage of Pleasant Grove, or are contributions of local civic groups, or both. The various objects in Pioneer Park include:

- Old Bell School (oldest known school building in Utah)
- First City Hall (original Pleasant Grove Town Hall)
- Pioneer Winter Corral (historic winter sheepfold)
- First Fire Station (facade of city's first fire station with plaque)
- Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois)
- Pioneer Log Cabin (replica, built in 1930)
- Pioneer Water Well (donated by Lions Club in 1946)
- Pioneer Granary (built in 1874, donated by Nelson family)
- Ten Commandments Monument (donated by Fraternal Order of Eagles in 1971)
- September 11 Monument (project of local Boy Scouts)
- Pioneer Flour Mill Stone (used in first flour mill in town, donated by Joe Davis)

The city owns and controls all of the items permanently displayed in Pioneer Park. It is undisputed that the city, through its city council, has the power to determine which monuments, plaques, or memorials will be permanently displayed on city park property. Respondent Summum does not assert that any private party has the authority to erect permanent displays on city property.

b. Summum's Proposed Monument

Respondent Summum is a self-described "corporate sole and a church," founded in 1975, with its headquarters in Salt Lake City, Utah. In 2003, and

again in 2005, Summum, through its president Summum Ra, wrote to respondent Jim Danklef, mayor of Pleasant Grove, requesting permission to erect a monument in Pioneer Park. The Summum monument would contain the "Seven Aphorisms of Summum." Summum specifically requested that its Seven Aphorisms monument be "placed near the Ten Commandments monument . . . under the same conditions, rules, etc. under which the Eagles' [Ten Commandments] monument was and is permitted" in the park. Ex. A. to Cplt.

The city denied these requests. In a letter dated November 19, 2003, the Mayor explained that the objects on display in Pioneer Park either "directly relate to the history of Pleasant Grove" or "were donated by groups with long-standing ties to the Pleasant Grove community" which "have made valuable civic contributions to our city for many years." The Mayor explained to Summum that "your group does not meet either of our criteria." Ex. 1 to Deft. Pleasant Grove City's Answer to Cplt.

In 2004, Pleasant Grove adopted, by resolution, a policy governing (*inter alia*) placement of permanent displays in city parks. App. H. This policy set forth both the process and the criteria for such placements. The written criteria reiterated the factors of historical relevance or donation by a civic group with strong community ties. The policy also directed the city council to consider such factors as aesthetics, clutter, and safety. The council was authorized to make the final determination on such placements.

Summum does not contend that it meets either criterion for placement of its monument, i.e., historical relevance or established community ties.

3. Course of Proceedings

a. District Court

Respondent Summum filed suit in the U.S. District Court for the District of Utah on July 29, 2005, against petitioners Pleasant Grove City and its mayor, city administrator, current city council members, and two former city council members. Summum alleged that the city's denial of Summum's request to erect its Seven Aphorisms monument in Pioneer Park violated the "free expression provision" of the First Amendment. Cplt. at 8. Summum did **not** make any claim under the Free Exercise or Establishment Clauses of the First Amendment. Summum sought damages (voluntarily capped at $20), declaratory relief, and an injunction ordering that the city "immediately allow plaintiff SUMMUM to erect its monument." *Id.* at 11-12.

Summum focused its complaint upon the fact that the city had accepted for permanent display a Ten Commandments monument donated by the Fraternal Order of Eagles (Eagles). Under binding Tenth Circuit precedent, a municipality's display of such a donated monument remains, despite municipal ownership and control, the private speech of the donor (here, the Eagles), thereby creating a speech forum. *See Summum v. City of Ogden*, 297 F.3d 995, 1003-06 (10th Cir. 2002). This precedent, which conflicts with the law in other circuits, *infra* § I, enabled Summum to assert a species of an "equal access" free speech claim. *See* Cplt. at 8, ¶ 28 ("refusal to provide SUMMUM access to a forum similar to that provided to the Eagles violates the free expression provision of the first

amendment").

After the city and the mayor filed answers, Summum filed three motions, seeking (1) partial summary judgment, (2) temporary injunctive relief (*viz.*, a temporary restraining order and a preliminary injunction allowing Summum to "immediately erect a monument comparable to the Ten Commandments monument in the relevant city parks"), and (3) judgment on the pleadings (as to certain affirmative defenses).

The city opposed the motions and filed declarations from respondent Frank Mills, city administrator, and Terry Carlson, former head of the local Eagles branch. Summum subsequently filed the deposition transcripts of respondents Mills and Mayor James Danklef.

Relying exclusively upon the free speech guarantee of the federal First Amendment, Summum contended that the city "has created a public forum for the display of permanent monuments." Reply in Support of TRO & Prel. Inj. (Doc. 20) at 3; *see also* Mem. in Support of Partial Sum. Judg. & Prel. Inj. (Doc. 12) at 3-4.

In response, the city argued that even under binding Tenth Circuit precedent, the relevant "forum" was at most "a nonpublic forum." Deft. Resp. to Mot. for TRO & Prel. Inj. (Doc. 16) at 6, 7. In such a nonpublic forum, the city contended, it was legitimate for the city to refuse permanently to erect unsolicited monuments that lacked both historical relevance to the community and a connection to an established local civic group. *Id.* at 6-8.

The district court held a hearing on February 1, 2006. At that hearing the court orally denied Summum's motions for partial summary judgment and for interim injunctive relief. App. B. The court held

that there was at least a genuine issue of material fact as to the city's implementation of a "historical relevance" criterion for monument placement, thus precluding summary judgment. App. 2b-3b. Therefore, the court further ruled, Summum had not established a likelihood of success on the merits, and it would be "premature" to order the city to allow the erection of Summum's Seven Aphorisms monument. App. 3b-4b.

The court subsequently issued a written order granting in part and denying in part Summum's motion for judgment on the pleadings regarding certain affirmative defenses. App. D.

On February 22, 2006, Summum filed a notice of appeal from the denial of its motion for a preliminary injunction.

b. Tenth Circuit Panel

On appeal, Summum again relied exclusively upon the Free Speech Clause of the First Amendment. Aplt. Br. at 17-25. Summum argued that Pioneer Park is a "public forum for the display of permanent monuments," *id.* at 18, either because the park, as a public park, is a traditional public forum, *id.* at 18-19, or because by accepting and displaying a September 11 monument and the Eagles' Ten Commandments monument, the city had created a "designated public forum," *id.* at 19-21. Summum contended, *id.* at 34, that the case was controlled by circuit precedent, specifically *Summum v. City of Ogden,* 297 F.3d 995 (10th Cir. 2002).

The city, acknowledging Tenth Circuit precedent binding on the panel, Aplee Br. at 14, argued that the "forum" at issue was at most "nonpublic," *id.* at 16. The

city went on to note, however, that the city's display of monuments was more properly characterized as **government** speech, not **private** speech, and that consequently **no "forum"** for such expressive monuments existed in the first place. *Id.* at 16 n.3. In any event, the city argued, the city's policy of accepting only monuments either with historical relevance to the community or when donated by groups with strong local ties passed constitutional muster. The city added that Summum's legal theory would convert Pioneer Park into a "veritable dumping ground" for monuments. *Id.* at 26.

In a decision issued on April 17, 2007, a panel of the Tenth Circuit reversed and remanded with instructions to grant a preliminary injunction allowing Summum to erect its Seven Aphorisms monument in Pioneer Park. App. A.

The panel held that because the injunction Summum requested would alter the status quo and would be mandatory, App. 6a, Summum was required to make "a strong showing" as to its likelihood of success on the merits, App. 7a (internal quotation marks and citation omitted). The panel concluded that Summum had made such a strong showing.[1]

The panel observed that "we have previously characterized a Ten Commandments monument

---

[1]Because Summum was appealing the denial of a preliminary injunction, the Tenth Circuit also addressed the other equitable factors governing such relief. A proper showing on those factors, while necessary to Summum's appeal, is not sufficient for Summum to obtain such relief. If this Court agrees that Summum has not shown a likelihood of success on the merits, Summum's appeal would fail without any need to address the remaining factors, namely, the balance of equities and the public interest.

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." App. 3a n.2. Hence, the panel treated this as a case about private speech in a forum, not government speech. *Id.*

The panel ruled that "the nature of the forum in this case is public," App. 11a, because a "city park" is "a traditional public forum," App. 10a. Therefore, the panel reasoned, "the city's restrictions on speech are subject to strict scrutiny." *Id.* Holding that the city's "historical relevance" criterion for determining which monuments or memorials to install was "content based," App. 14a, the panel concluded that the city's refusal to erect Summum's Seven Aphorisms monument likely failed strict scrutiny both for want of a compelling interest, App. 15a, and for want of narrow tailoring, App. 16a.[2]

c. Tenth Circuit En Banc Petition and Denial

The city petitioned for rehearing en banc. Noting that the Tenth Circuit panel had been obligated to follow previous circuit precedent[3] (specifically, the

---

[2]The panel noted that the city still had the option to "ban all permanent displays of an expressive nature by private individuals." App.18a. But under Tenth Circuit precedent, **any** donated monuments can be deemed speech by private individuals. *See* App. 3a n.2; *Ogden*, 297 F.3d at 1003-06. Hence, this "option" is tantamount to saying a city must either refuse and remove all donated monuments from city parks, or else accept and display monuments from all comers.

[3]"We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)

Ogden decision) holding that a monument donated to a city remains the private speech of the donor, not the speech of the city, the city in this case urged the Tenth Circuit to grant en banc review and overrule *Ogden*. The city contended that, because it owned and controlled the monuments erected in its park, the display of such monuments was **government** speech that created no forum for **private** speech. Moreover, the city pointed out that the panel decision would have all manner of untoward consequences, by establishing an "equal access" rule for permanent monuments.

On August 24, 2007, the Tenth Circuit denied en banc rehearing by an equally divided 6-6 vote.[4] App. F.[5] Two judges wrote dissenting opinions, while the author of the original panel decision wrote a response to the dissents.

Judge McConnell, joined by Judge Gorsuch, faulted the panel's legal reasoning and lamented the harmful consequences of the panel decision for government-run parks:

> [The panel] hold[s] that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection

---

(per curiam) (and cases cited). *Accord United States v. Austin*, 426 F.3d 1266, 1278 n.4 (10th Cir. 2005) (and cases cited).

[4]Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes voted for rehearing en banc. Chief Judge Tacha and Judges Kelly, Henry, Briscoe, Murphy, and Hartz voted to deny en banc review.

[5]The denial of rehearing in this case was consolidated with the denial of rehearing in a similar case, *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007).

> 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. . . . This means that Central Park in New York, which contains the privately donated Alice in Wonderland statu[]e, 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.

App. 10f.

> 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.

App. 11f.

Judge McConnell explained that the traditional public forum status of a park does **not** mean that "city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." App. 11f. Noting that the city did not "invite private citizens to erect monuments of their own choosing in these parks," Judge McConnell reasoned that "[i]t 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." App. 11f-12f. Indeed, because the city "owned" and "exercised total 'control' over the monuments," Judge McConnell explained, the city "could have removed them, destroyed them, modified them, remade them, or . . . sold them at any time." App. 14f.

"Once we recognize that the monuments constitute government speech," Judge McConnell continued, "it becomes clear that the panel's forum analysis is misguided." App.15f. "The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as . . . the Establishment Clause," Judge McConnell observed. *Id.* "[J]ust 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." App. 16f.

Judge McConnell concluded that the panel decision is "incorrect as a matter of doctrine and troublesome as a matter of practice." App. 17f. "[T]he error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decision[] should be corrected." *Id.*

Judge Lucero, in a separate dissent, explained that a park, while a traditional public forum for many purposes, is **not** a public forum for the placement of monuments. App. 5f-7f. Judge Lucero protested that the original panel "has given an unnatural reading to the traditional public forum doctrine [which] binds the hands of local governments as they shape the permanent character of their public spaces." App. 9f. He concluded:

> 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.

Id.

Chief Judge Tacha, author of the original panel decision, took the "unprecedented step of responding to the dissents" in her own separate opinion. App. 18f. She rejected the significance of any distinction between "transitory and permanent expression" (e.g., leaflets vs. monuments) "for purposes of forum analysis," *id.*; nor, for her, did the "type of speech" (e.g., leaflets vs. monuments) matter, App. 18f-19f. Indeed, Chief Judge Tacha insisted, "the only question properly before the panel" was whether the city "could constitutionally **discriminate**" against other private speakers. App. 19f n.1 (emphasis in original). She specifically rejected the contention that this was a "government speech" case: "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." App. 22f. Here, because the city had not itself prescribed the messages on the Ten Commandments monument, the city's selection, ownership, and control of this and other monuments did not suffice, in her view, to make the city the speaker in the selection and placement of permanent monuments. App. 20f-22f. Finally, Chief Judge Tacha voiced concern at the prospect that a government could adopt a message on a monument without any political

accountability. App. 23f, 25f-27f. She did not explain, however, why the city council in this case (or any other case) would not be as politically accountable for its votes on monument placement as it would be for any other votes.

d. Tenth Circuit Mandate Stayed

On August 29, 2007, the city moved to stay the Tenth Circuit's mandate pending a petition for a writ of certiorari. On September 5, 2007, the Tenth Circuit panel stayed its mandate. App. E. (Proceedings in the district court have also been stayed. *See* Order of May 2, 2007 (Doc. 257).)

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision in this case conflicts with the decisions of other circuits, badly distorts this Court's First Amendment jurisprudence, and will impose severe practical burdens on government entities until overturned by this Court.

The decision below creates two circuit splits on important First Amendment free speech issues. *Infra* § I. First, the Tenth Circuit held that a donated monument which is owned, controlled, and displayed by a municipality remains the **private** speech of the original donor, not **government** speech (as other circuits hold). Second, the Tenth Circuit held that the placement of donated monuments in a government-owned park creates a **"public forum" for monuments,** while other circuits hold instead that the government retains authority to select which structures, if any, to display.

The decision below also terribly confuses this Court's public forum and government speech doctrines. *Infra* § II. Nowhere has this Court suggested that private entities have a First Amendment right to insist that a government erect and display the permanent monument which that private group chooses. To the contrary, this Court's precedents point strongly in the opposite direction.

Finally, the decision below threatens to wreak havoc upon governments at every level and their ability to control the permanent physical occupation of government land. *Infra* § III. Given the ubiquity of governmental bodies displaying donated monuments on public property, *see e.g.*, App. I -- from the Statue of Liberty on down -- a host of federal, state, and local government bodies are now sitting targets for demands that they grant "equal access" to whatever comparable monuments a given group wishes to have installed, be it Summum's Seven Aphorisms, an atheist group's Monument to Freethought, or Rev. Fred Phelps's denunciations of homosexual persons.

This Court should grant review and reverse the Tenth Circuit's decision.[6]

I. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, SIXTH, SEVENTH, EIGHTH, AND D.C. CIRCUITS.

---

[6]That the current appeal is at the preliminary injunction stage, of course, poses no obstacle to review on certiorari. *E.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 856-57 (2005); *Gonzales v. Raich*, 545 U.S. 1, 8 (2005).

A. The Tenth Circuit's Holding, that Monuments in City Parks Are Not Government Speech But Instead Are the Private Speech of the Original Donors of the Monuments, Conflicts with Decisions of the Second, Third, Seventh, Eighth, and D.C. Circuits.

This Court's jurisprudence recognizes a crucial distinction between **government** speech and **private** speech for First Amendment purposes. *See, e.g., Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 559 (2005) (compelled speech); *Board of Educ. v. Mergens,* 496 U.S. 226, 250 (1990) (plurality) (Establishment Clause); *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 765-66 (1995) (plurality) (same). In particular, when the government restricts **private** speech, an array of constitutional free speech protections come into play. By contrast, when the **government** speaks, it generally can select the precise message or messages it wishes to deliver. *See generally Rust v. Sullivan,* 500 U.S. 173, 194 (1991); *Rosenberger v. Rector of Univ. of Va.,* 515 U.S. 819, 833 (1995); *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541-42 (2000).

The decision below reflects the rule in the Tenth Circuit that, when a city accepts and erects for permanent display a monument donated by a private entity, that monument remains the **donor's** private speech despite the government's ownership and control of the monument. *See* App. 3a n.2; *Summum v. City of Ogden,* 297 F.3d 995, 1003-06 (10th Cir. 2002); *Summum v. Callaghan,* 130 F.3d 906, 919 & n.19 (10th Cir. 1997); *Summum v. Duchesne City,* 482 F.3d 1263,

1269, 1273-74 (10th Cir. 2007). As a consequence, in the Tenth Circuit, a city's decision **not** to erect a private entity's proposed monument triggers First Amendment scrutiny. App. 10a.

The Second, Third, Seventh, Eighth, and D.C. Circuits, by contrast, recognize that government-owned and government-controlled displays are **government** speech, not private speech.

In *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005), the District of Columbia's Commission on the Arts and the Humanities administered an art project entitled "Party Animals," in which private artists were invited to submit designs for painting and decorating sculptures of donkeys and elephants for display in parks, on sidewalks, and in other prominent locations in Washington, D.C. *Id.* at 25. The District's Commission retained ownership of the sculptures, *id.*, and selected which proposed designs would be used, *id.* at 25-26. The group People for the Ethical Treatment of Animals (PETA) submitted several proposed designs, which contained messages condemning animal cruelty. *Id.* at 26. When the Commission refused PETA's proposals, PETA sued, alleging content- and viewpoint-discrimination in violation of the First Amendment. The D.C. Circuit rejected PETA's claim, holding that the selection of the sculptures in question was **government speech**:

> In the case before us, **the Commission spoke** when it determined which elephant and donkey models to include in the exhibition and which not to include. In using its editorial discretion in the selection and presentation of the elephants and donkeys, the Commission thus engaged in speech activity; compilation of the speech of third parties

> is a communicative act. . . .
>
> . . . .
>
> . . . We believe that public forum principles are out of place in the context of this case. . . . [T]hose First Amendment constraints do not apply when the same authorities engage in **government speech by installing sculptures in the park. If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee.**

Id. at 28-29 (emphasis added; internal quotation marks and citations omitted).

In *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir.), *cert. denied*, 520 U.S. 1265 (1997), the Third Circuit reviewed the constitutionality of a Christmas crèche display. The court recognized that, in the *Capitol Square* case, the Justices of this Court had divided on the question whether the "endorsement test" under the Establishment Clause properly applies to **private** speech. *See ACLU v. Schundler*, 104 F.3d at 1443-44. Importantly, the Third Circuit then held:

> We need not reach the question . . . whether the endorsement test should be limited in application to **government speech,** because the religious symbols at issue here are **owned and displayed by the city government on city government property.**

Id. at 1444 (emphasis added). In other words, the Third Circuit squarely held that objects "owned and displayed" by the government on government property are "government speech." *Id.*

In *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988), a sculptor contested the

decision of the federal General Services Administration (GSA) to remove his sculpture from a government plaza. The sculptor, Richard Serra, asserted a violation of his free speech rights under the First Amendment, but the Second Circuit disagreed:

> In this case, **the speaker is the United States Government. [The sculpture] is entirely owned by the Government and is displayed on Government property**. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA . . . . Nothing GSA has done limits the right of any private citizen to say what he pleases, nor has Serra been prevented from making any sculpture or displaying those that he has not sold. Rather, the Government's action in this case is limited to an exercise of discretion with respect to the display of its own property. . . . [N]othing GSA has done here encroaches in any way on Serra's or any other individual's right to communicate.

Id. at 1049 (emphasis added).

Decisions in the Seventh and Eighth Circuits likewise acknowledge that, in cases involving expressive displays, the identity of the speaker is coincident with the party currently owning and controlling the display, not the creator or previous owner. *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005) (en banc) (analyzing "Plattsmouth's display" of donated Eagles Ten Commandments monument in city park with respect to "limits to government displays"); *Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (Establishment Clause challenge to donated statue of Jesus Christ: in light of the

"difference in the way we treat private speech and public speech" being "critical" to constitutional analysis, "we recognize the effect of formal transfer of legal title to property as a transfer of imputed expression").

The Tenth Circuit's decision in this case thus squarely conflicts with the decisions of at least five other circuits on the foundational First Amendment issue of government speech, necessitating review by this Court.

B. The Tenth Circuit's Holding that a City Park Is a "Public Forum" for Monuments Conflicts with Decisions in the Second, Sixth, and Seventh Circuits.

This Court's Free Speech Clause jurisprudence subjects restrictions on private speech to differing levels of scrutiny depending on the nature of the "speech forum" involved. In particular, this Court distinguishes between "public fora" (whether "traditional" in nature, like sidewalks and parks, or instead "designated" by the government's opening a venue for private speech), where content-based limitations trigger strict scrutiny, and "nonpublic fora," where restrictions can be content-based so long as they are reasonable and viewpoint-neutral. *See generally Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

The Tenth Circuit held that "[t]he permanent monuments in the city park . . . make up the relevant forum," App. 9a, and that "the nature of the forum in this case is public," App. 11a, because a "city park" is

"a traditional public forum," App. 10a. Hence, in the Tenth Circuit, private parties have a free speech right to erect **monuments**; a city's refusal of any request to erect a privately proffered monument triggers "strict scrutiny," *id.*, unless the city bans "all permanent displays" of nongovernmental provenance, App.18a.

Every other circuit to address the issue, by contrast, rejects the notion that there is a First Amendment right to erect monuments or similar displays in government parks, sidewalks, or other property. *See, e.g., Kaplan v. City of Burlington,* 891 F.2d 1024, 1029 (2d Cir. 1989) (rejecting suit to compel display of menorah in park: though city's park "is indisputably a traditional public forum," city "had not created a forum . . . open to [an] unattended, solitary display" where "no permit had been issued" for any private party to erect an "unattended display"); *Lubavitch Chabad House v. City of Chicago,* 917 F.2d 341, 347 (7th Cir. 1990) (rejecting suit to compel display of menorah in airport: "We are not cognizant of . . . any 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");[7] *Graff v. City of Chicago,* 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc) (no right to erect permanent newsstand on sidewalk: "[t]here is no private constitutional right to erect a

---

[7]The *Lubavitch* court acknowledged that a different result could follow if the government "opens a public forum to allow some groups to erect communicative structures," 417 F.3d at 347. In the present case, however, it is undisputed that the city, through its council, retains exclusive authority to decide what structures to erect and display. *See* Plff's Stmt. of Undisputed Facts (Doc. 11) at 3, ¶ 6. No private party has the authority to erect a display.

permanent structure on public property"); *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) (discussing governing law in addressing display of large inflatable display by union: "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").

The Tenth Circuit's decision in this case thus conflicts with decisions in at least three other circuits on yet another important First Amendment issue, necessitating this Court's review.

II. THE DECISION OF THE TENTH CIRCUIT DISTORTS THIS COURT'S FREE-SPEECH JURISPRUDENCE.

The Tenth Circuit's decision in this case rests upon premises that this Court has squarely rejected.

A. Nature of Forum

This Court has repeatedly explained that the relevant forum in a free speech case must be identified according to the nature of "the access sought by the speaker," not "merely by identifying the government property at issue." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). The Tenth Circuit nevertheless held that, just because the city's monuments were in a public park, traditional public forum analysis applies. App. 10a. *See also Summum v. Duchesne City*, 482 F.3d at 1269 ("it is this **physical setting** that defines the character of the forum to which Summum seeks access") (emphasis added). That

rationale is wholly incompatible with this Court's precedents.

A structure does not become a public forum just because it is situated on public forum property. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the speakers posted fliers on the "horizontal crosswires supporting utility poles" along public streets and sidewalks. *Id.* at 802. This Court held that the speakers' "reliance on the public forum doctrine is misplaced." *Id.* at 814. Rather than ignore the difference between **distributing** fliers and **posting** fliers, this Court explained that the challengers "fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks." *Id.* Notably, this Court held that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." *Id.* (internal quotation marks and citation omitted).

In short, just because certain property is a public forum for some kinds of communication (leafletting, speaking) does not mean it is a public forum for other kinds of communication (posting fliers, littering leaflets, erecting monuments). *See id.* at 809-10; *Schneider v. State*, 308 U.S. 147, 160-61 (1939). *See also Capitol Square*, 515 U.S at 761 (suggesting "a ban on all unattended [private] displays" as a permissible restriction even in a traditional public forum); *id.* at 802-04 (Stevens, J., dissenting) (agreeing that "a State may impose a ban on all private unattended displays" in a public forum: "The Court has never held that a private party has a right to have an unattended object

in a public forum," as such placements "create[] a far greater intrusion on government property [compared with speaking, handbilling,etc.] and interfere[] with the government's ability to differentiate its own message").

Thus, under this Court's case law, the forum -- if any -- in this case would not be the park itself, but rather the management and selection of permanent displays in city parks. Private parties have **no** access to such management and selection -- all private parties can do is make offers of donations or volunteer their opinions -- hence, there is **no** speech forum here at all (and certainly no "public forum").

B. Identity of Speaker

The Tenth Circuit held that a monument donated to and then accepted and controlled by a city somehow remains the speech of the private donor, not the city. Such a notion is inconsistent with this Court's precedents.

Time and again this Court has held that when the government is speaking, the government is entitled to define and control the message; there is no obligation of content- or viewpoint-neutrality. *See supra* § I(A). Moreover, the **selection** of material for governmental display is itself the exercise of governmental authority, not private expression. *See United States v. American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality) (noting library's "traditional role in identifying suitable and worthwhile material"); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998) (noting government agency's role in selecting certain expressive works); *cf. Board of Educ. v. Pico*, 457 U.S.

853, 871 (1982) (plurality) ("[N]othing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools") (emphasis omitted); *id.* at 889 (Burger, C.J., joined by Powell, Rehnquist, & O'Connor, JJ., dissenting) (schools "ought not to be made the slavish courier of the material of third parties").

It follows that a city's selection of which items to display in a park -- like its selection of decorations for government buildings -- is government speech, and no private entity can claim a "me too!" right of access for its own preferred displays.

III. THE TENTH CIRCUIT'S DECISION CREATES ENORMOUS PRACTICAL PROBLEMS.

The Tenth Circuit's decision creates a right of "equal access" for the erection of permanent monuments. Every federal, state, or local governmental body in the Tenth Circuit's jurisdiction is now open to lawsuits insisting upon the permanent display of a private entity's preferred monument alongside any other monument that was originally donated by a private entity. This is a matter of considerable concern: donated monuments are ubiquitous on governmental property. *See* App. I (listing examples of donated monuments in parks and other government-owned properties within the Tenth Circuit).

The string of *Summum* cases themselves, *see supra* pp. 18-19, illustrates that the threat of equal-access-for-private-monuments litigation is very real. Nor is this phenomenon exclusive to Summum. Already the

notorious Rev. Fred Phelps has sought the erection of anti-homosexual monuments under the same theory. *See* Associated Press, *Minister: City must allow anti-gay monument in park* (Oct. 16, 2003) (www.first amendmentcenter.org/news.aspx?id=12082) (Phelps pressed Casper, Wyoming to accept and display anti-Matthew Shepard monument, relying upon Tenth Circuit's *Summum* decisions); John Morgan, *City dedicates historic plaza*, Jackson Hole Star Tribune (July 16, 2007) (www.jacksonholestartrib.com/articles/2007/07/16/news/casper4e32f677cbf04e3587253190020f943.txt) (noting Ten Commandments monument in Casper was removed in November 2003 after Phelps's demand but has returned as part of a "new historic monument plaza"); John Morgan, *Phelps wants anti-gay monument*, Casper Star Tribune (July 17, 2007) (www.casperstartribune.net/articles/2007/07/17news/casper/88d8fdf4b4e017548725731b00006a13.txt) (Phelps has renewed his push for anti-Shepard monument) (The proposed Casper monument appears at www.godhatesfags.com/main/shepard_monument.html.)

The theory the Tenth Circuit endorsed in this case is also being pressed within the Eighth and Ninth Circuits. *See* Judy Keen, *Fight over Thou Shalts won't wilt*, USA Today (Sept. 7, 2007) (www.usatoday.com/printedition/news/20070709/a_commandments09.art.htm) (Red River Freethinkers in Fargo, North Dakota, want their own monument to "balance the Ten Commandments"). *See also* Associated Press, *Boise: No anti-gay monument*, Spokesman-Review (Dec. 9, 2003) (www.spokesmanreview.com/pf.asp?date=20903&ID=s1452867) (Phelps proposal of anti-Shepard monument in Boise).

As the dissenters lamented below, the "panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them." App. 9f (Lucero, J., dissenting). *Accord* App. 10f (McConnell, J., dissenting) ("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").

CONCLUSION

This Court should grant review.

Respectfully submitted,

THOMAS P. MONAGHAN
FRANCIS J. MANION
EDWARD L. WHITE III
GEOFFREY R. SURTEES
JOHN P. TUSKEY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 226-2489

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

November 20, 2007