No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, *ET AL.*,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

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

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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[1]
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.

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[1]Pursuant to S. Ct. R. 35.3, petitioners advise this Court that respondent Mike Daniels has succeeded Jim Danklef as Mayor of Pleasant Grove City. *See* Defendants' Notice of Automatic Substitution of Mayor of Pleasant Grove City in His Official Capacity (D. Utah Dec. 4, 2006) (Doc. 173).

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INTRODUCTION

The court below ruled that, once a city accepts and permanently displays a monument donated to it by a private party, the city creates a forum for permanent monuments and must then accept virtually any other monuments donated by private parties for permanent display. The First Amendment, however, requires no such thing. 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).

As discussed herein, the Tenth Circuit made several crucial errors in constitutional analysis. First, the court below fundamentally misapprehended the distinction between **government speech** and **private speech** in this case. Second, the court below misidentified the relevant "forum." Third, the court erroneously held that city parks are traditional public fora for private, unattended, permanent monuments. Fourth, the lower court erred by holding that a city's acceptance of donated monuments creates a designated public forum for private speech through such monuments.

Only through this succession of missteps could the Tenth Circuit reach the decision it did. This Court should reverse.

Disposition of the present case is 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 theme or message it desires in selecting such monuments. The government's acceptance and display

of one or more donated monuments does not 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 reverse the decision of the Tenth Circuit.

DECISIONS BELOW

All decisions in this case to date are captioned *Summum v. Pleasant Grove City*. The panel opinion of the Tenth Circuit appears at 483 F.3d 1044 (10th Cir. 2007). Pet. App. A. The opinions accompanying the denial of rehearing and rehearing en banc appear at 499 F.3d 1170 (10th Cir. 2007). Pet. App. F. The decision of the district court denying (*inter alia*) Summum's motion for a preliminary injunction is unreported. Pet. 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 granted a timely petition for certiorari on March 31, 2008. 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 Pet. App. G.

The written city policy governing the acceptance and placement of monuments is set forth in Pet. App. 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. It was settled by early Mormon pioneers, Danklef Dep. at 11 (JA 134), and was once the site of a fort, *id.* at 27 (JA 146); Mills Dep. at 28 (JA 180). One of the city 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. *See* Danklef Dep. at 9 (JA 132-33); *see also id.* at 36 (JA 153) (Pioneer Park was designated as the place "to preserve anything historical").

Describing how various objects come to be placed in Pioneer Park, the then-mayor and the city administrator explained that the local Historical Commission would initially review objects for possible

placement in Pioneer Park. Danklef Dep. at 14-15 (JA 136-37); Mills Dep. at 13-14 (JA 169-70). In some cases, the Historical Commission would itself initiate the review; in others, someone would suggest the display to the Historical Commission. Danklef Dep. at 14 (JA 136); Mills Dep. at 13-15 (JA 169-70). If the Historical Commission considered the proposed memorial or monument suitable, it would refer the matter to Leisure Services, the city authority responsible for managing Pioneer Park. Danklef Dep. at 16 (JA 137-38); Mills Dep. at 11, 20, 25-26, 29-30, 41-42 (JA 168, 175, 178-79, 182, 190-91). If the Historical Commission and Leisure Services agreed the object was suitable and worthy of permanent display, the matter would go to the city council for the ultimate decision whether or not to accept the object and place it in Pioneer Park. Danklef Dep. at 16-17, 39-40 (JA 138, 155-56); Mills Dep. at 20, 25-26, 41 (JA 175, 178-79, 190-91). "The city council always had the final say." Mills Dep. at 27 (JA 180).

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, bequeathed to city)
- Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois, donated by John Huntsman)
- 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 Eagle Scout)
- Pioneer Flour Mill Stone (used in first flour mill in town, donated by Joe Davis)

Mills Decl. ¶ 6 (JA 99-102); Mills Dep. at 11-12, 18-19 (JA 168-69, 173-74).

The city owns and controls all of the items permanently displayed in Pioneer Park.[2] 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. *E.g.*, Plaintiff's Statement of Undisputed Facts (Doc. 11) ¶¶ 6, 8 (JA 50-51) (city, through city council, determines placement of monuments on city property). Respondent Summum does not assert that any private party has the authority to erect permanent displays on city property.

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[2] *E.g.*, Danklef Dep. at 44:

Q. If the Eagles [the donors of the Ten Commandments Monument] came to you and said we no longer want to maintain this display, remove it, would they have the right to do that?

A. I don't think so.

Q. So you think that the city controls whether or not that monument stays or remains in the park?

A. They do.

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. JA 13. In 2003, and again in 2005, Summum, through its president Summum Ra, wrote to respondent Jim Danklef, then mayor of Pleasant Grove, requesting permission to erect a monument in Pioneer Park. JA 57-60, 63-64. 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. JA 58.

The city denied Summum's request. 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." JA 61-62.

In 2004, Pleasant Grove adopted, by resolution, a written policy governing (*inter alia*) acceptance and placement of permanent displays in city parks. Pet. App. H. This policy set forth both the process and the criteria for city action. 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.

According to the mayor and the city administrator, the city's prior unwritten criteria were essentially identical to those formalized in the written resolution. *See* Danklef Dep. at 9 (JA 132-33); Mills Dep. at 26, 29 (JA 179, 181).

Summum concedes that, in fact, its monument proposal does not meet the city's criterion of historical relevance or established community ties.[3]

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, 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 (JA 19). Summum did **not** make any claim under the Free Exercise or

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[3]Indeed, Summum has stipulated to this fact. *See* Plaintiff's Stipulation of Fact (Doc. 152) ("admitting [Summum] does not factually meet the City's criteria" of historical relevance or local ties as articulated in the written policy). *See also id.* at 2 ("This Stipulation is binding for all purposes (pre-trial and trial) in this action").

Establishment Clauses of the First Amendment.[4] 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 (JA 22).

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 (JA 98), city administrator, and Terry Carlson (JA 93), former head of the local Eagles branch. Summum subsequently filed (JA 125) 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

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[4]In a different lawsuit, the Society of Separationists, represented by the same trial counsel as Summum, had brought an Establishment Clause challenge to Pleasant Grove's display of the Ten Commandments monument. *See Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005) (remanding in light of *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), and *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005)). That litigation was dismissed, with prejudice, on remand. *See* Order Granting Plaintiffs' Motion for Voluntary Dismissal Under Fed. R. Civ. P. 41(a), *Society of Separationists v. Pleasant Grove City*, No. 2:03-CV-839 BSJ (D. Utah Feb. 15, 2006).

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. [Pl. Mem] (Doc. 12) at 3-4. Summum proffered two alternative First Amendment theories in support of this proposition. First, Summum asserted that the relevant forum "is a public park," which "is a traditional public forum." Pl. Mem. at 3-4. Second, Summum argued that, "[i]n the alternative, the forum herein is a designated public forum." *Id.* at 4. Either way, Summum contended, strict scrutiny would apply to a "content-based" rejection of Summum's proposed monument. *Id.*

In support of its "designated public forum" claim, Summum focused initially upon the fact that the city had accepted for permanent display a Ten Commandments monument donated by the Fraternal Order of Eagles (Eagles).[5] 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

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[5]Summum subsequently broadened its argument, contending on appeal that the City's September 11 monument -- also privately donated to the city -- opened a forum for private monuments as well, Br. for Appellant at 19-21. Thereafter, Summum further expanded its argument, asserting in a satellite lawsuit that a memorial Gingko tree and plaque, donated to honor a former city official (*see* Mills Dep. at 21-22 (JA 176)), was (along with the Ten Commandments and September 11 monuments) likewise an "expressive" monument. *See* Complaint at 5-6, ¶ 14, *Summum v. Atwood*, No. 2:06CV00996 TS (D. Utah filed Nov. 30, 2006). (The *Atwood* case has been consolidated with the present litigation. *See* Mem. Decision and Order Granting Plaintiff's Motion to Consolidate and Consolidating Cases, *Summum v. Atwood*, No. 2:06cv00996 TS (D. Utah Dec. 29, 2006).)

(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 enabled Summum to assert a species of an "equal access" free speech claim. *See* Cplt. at 8, ¶ 28 (JA 19) ("refusal to provide SUMMUM access to a forum similar to that provided to the Eagles violates the free expression provision of the first amendment").

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. Pet. 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. Pet. 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. Pet. 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. Pet. 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. Br. of Appellant 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, Br. of Appellees at 14, again 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. Pet. App. A.

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

The panel observed that "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." Pet. 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," Pet. App. 11a, because a "city park" is "a traditional public forum," Pet. 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

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[6]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.

determining which monuments or memorials to install was "content based," Pet. 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, Pet. App. 15a, and for want of narrow tailoring, Pet. App. 16a.[7]

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[8] (specifically, the *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,

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[7]The panel noted that the city still had the option to "ban all permanent displays of an expressive nature by private individuals." Pet. App.18a. But under Tenth Circuit precedent, **any** donated monuments can be deemed speech by private individuals. *See* Pet. 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.

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

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.[9] Pet. App. F.[10] 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 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

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[9]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.

[10]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), *petition for cert. filed*, No. 07-690 (U.S. Nov. 21, 2007).

> 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.

Pet. 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.

Pet. 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." Pet. 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." Pet. 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." Pet. 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." Pet. 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." Pet. App. 16f.

Judge McConnell concluded that the panel decision is "incorrect as a matter of doctrine and troublesome as a matter of practice." Pet. 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. Pet. 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." Pet. 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. Pet. 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, Pet. 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. Pet. 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." Pet. 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. Pet. 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. Pet. 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 Stay of Mandate

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. Pet. App. E. (Proceedings in the district court have also been stayed. *See* Order (D. Utah May 2, 2007) (Doc. 257) (JA 202).)

SUMMARY OF ARGUMENT

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. Moreover, the Tenth Circuit held that the placement of donated monuments in a government-owned park creates a "public forum" for monuments.

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." Pet. 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 their own message, there is a speech forum. But when, as here, the government selects permanent displays, conveying the government's chosen theme, for erection on government land, the selection of objects for display in that park is **government speech**, not private speech. No "forum" for private speech is thereby created.

The Tenth Circuit also embraced a deeply flawed "forum" analysis in this case. At the outset, the court incorrectly identified the relevant forum as the physical park itself, instead of the city's selection process for displaying monuments in the park. Under this Court's precedents, it is the **access sought**, and not the physical setting, that defines the pertinent forum.

The Tenth Circuit compounded this error by holding that a city park is a traditional public forum for unattended private monuments. Nowhere has this Court suggested that private entities have a First Amendment right to insist that a government erect and display on government property the permanent monument of that group's choosing. To the contrary, this Court's precedents point decisively in the opposite direction.

Nor can Summum find support elsewhere in this Court's forum doctrine for Summum's novel "right to impose a monument upon a city."

The decision below threatens to wreak havoc upon governments at every level in their ability to control the permanent physical occupation of government land. Given the ubiquity of governmental bodies displaying donated monuments on public property, *see e.g.*, Pet. App. I -- from the Statue of Liberty on down -- a host of federal, state, and local government bodies would be, under the Tenth Circuit's logic, sitting targets for demands that they cede piece after piece of government land to forced occupation, by any group, with whatever monuments that group wishes to have installed, be it Summum's Seven Aphorisms, PETA's suffering circus elephant, or Rev. Fred Phelps's denunciations of homosexual persons.

This Court should reverse the Tenth Circuit's decision.

ARGUMENT

The Tenth Circuit in this case reached the extraordinary and unprecedented conclusion that every private party has a First Amendment right to force a municipality to erect in its park the permanent, unattended monument of the private party's choosing, absent a compelling interest to the contrary. This ruling rests upon two deeply flawed premises: first, that a privately donated monument remains private speech despite the government's ownership and control -- and selection for display -- of that monument; and second, that because a city park is a traditional public forum, it is also a public forum for the deposit of private, unattended, permanent monuments. This Court should reverse the judgment below.

I. PLEASANT GROVE'S SELECTION AND DISPLAY OF MONUMENTS IN PIONEER PARK IS GOVERNMENT SPEECH TO WHICH SUMMUM HAS NO FIRST AMENDMENT RIGHT OF ACCESS.

Governmental bodies routinely decide what objects to select to adorn government property. The First Amendment confers no right for private entities to force the government to display the private parties' own preferred objects. The Tenth Circuit ruled to the contrary. This Court should reverse.

The Free Speech Clause of the First Amendment protects against government restriction of private

speakers. By contrast, when the government leaves private speakers alone and speaks for itself, the Free Speech Clause does not apply. This Court's jurisprudence therefore 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 comes 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). "[T]he Government's own speech . . . is exempt from First Amendment scrutiny." *Johanns*, 544 U.S. at 553.

In analyzing Summum's assertion of a Free Speech violation, then, the first question must be whether this case is about **private** speech or **government** speech.

The decision below reflects the erroneous 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, control, and independent decision to display the monument. *See* Pet. 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. Pet. App. 10a.

The Tenth Circuit's analysis is deeply flawed.

A. Pleasant Grove May Speak in Its Own Voice, Free From Any Constitutional Obligation to Incorporate Different Messages or Viewpoints.

The Constitution recognizes that Pleasant Grove can speak in its own voice, without any concomitant constitutional duty to incorporate private speech into its message. Indeed, the general rule is that, when the government speaks, "it is entitled to say what it wishes." *Rosenberger,* 515 U.S. at 833; *see also Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). The only limits to the government's autonomy of expression are those dictated by independent constitutional constraints on specific messages, like the Establishment Clause. *See, e.g.*, *Mergens*, 496 U.S. at 250 (plurality).[11]

Governments at all levels routinely engage in a wide variety of speech that expresses particular viewpoints, from displaying monuments (many of them

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[11]Summum has not raised any federal Establishment Clause challenge in this case. *See supra* note 4 and accompanying text.

donated) like the Statue of Liberty and the Vietnam Veterans Memorial, to posting flyers declaring that "Uncle Sam Wants You" or "Only You Can Prevent Forest Fires," to inveighing against the illegal use of drugs and drunken driving, to promoting the consumption of beef or the conservation of water.

When government conveys such messages in its own voice, as Pleasant Grove has done here, it has no obligation to provide an equivalent platform for private speech. To hold otherwise would wrest control over the message out of the hand of the speaker -- the government -- and into the hands of "any contingent . . . with a message," with the result that what originated as speech of Pleasant Grove would, in the end, "be shaped by all those . . . who wished to join in with some expressive demonstration of their own." *Hurley v. Irish-American GLIB,* 515 U.S. 557, 573 (1995). But the First Amendment does not force government to choose between cacophony or silence. *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 681 (1998); *see id.* at 675 ("the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming"). To the contrary, when the government itself is speaking, it can "ensure that [the government's] message is neither garbled nor distorted." *Rosenberger*, 515 U.S. at 833.

B. Pleasant Grove's Selection of Monuments for Display on Public Land Is a Well-Established Form of Government Speech.

1. Governments commonly speak through displays on their own land.

Governments have selected and controlled the erection of monuments and other forms of unattended displays on public land from time immemorial. *See, e.g.*, Britannica Online Encyclopedia, *Triumphal Arch*, www.britannica.com/EBchecked/topic/606106/triumphal-arch (listing monuments erected by early Roman leaders); *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668, 682 (1896) ("Can it be that the government is without power to preserve the land . . . [and] erect the monuments . . . for the benefit of all the citizens of the country for the present and for the future? . . . It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there . . ."). [12] The process of including and excluding or removing such displays embodies a matrix of complex governmental judgments and policy choices concerning aesthetics, community values and policies, and preserving public land for its intended purposes and public enjoyment. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289-90 & n.1, 296-98

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[12] *See also* Metropolitan Museum of Art, *From Model to Monument: American Public Sculpture, 1865-1915*, www.metmuseum.org/toah/hd/modl/hd_modl. htm ("The earliest commissions for public monuments in the United States date to the late eighteenth century").

(1984) (describing interests governing park management).

A government's selection of monuments for inclusion or placement can reflect an officially designed theme and message related to history (such as the National Mall's collection of monuments to significant developments in American governmental history, *see Friends of the Vietnam Veterans Mem. v. Kennedy*, 116 F.3d 495, 495-96 (D.C. Cir. 1997)), culture, art, or significant events in or contributions to the community. Such a display is a form of government speech, just as a similar display on private land would be private speech. The governmental message embodied in such displays may be an official statement of respect for history and those who made it, the honoring of important individuals or entities in the community, a celebration of culture, or a tribute to the defining significance of events or organizations to a community. Indeed, "[t]hroughout the ages, public sculptures have served as didactic tools, offering moral, patriotic, and cultural instruction." Metropolitan Museum of Art, *supra* note 12; *cf.* S. Levinson, *Written in Stone: Public Monuments in Changing Societies* 87 (1998) ("Public monuments that designate communal heroes or sacred communal events throughout time have been ways by which regimes of all stripes take on a material form and attempt to manufacture a popular consciousness conducive to their survival").

In this case, as its very name reflects, Pioneer Park is dedicated to acknowledging and celebrating the Mormon pioneer heritage, other historic influences, and the local civic groups who over time have helped to develop and define the community. Pet. App. 2a; *see*

also supra p. 3. To that end, Pleasant Grove has chosen to display a number of privately donated monuments that reflect that message, including "one of Pleasant Grove's first granaries, its first city hall, and its first fire department building." Pet. App. 2a. The city will consider displaying monuments offered to it only if they "directly relate to the history of Pleasant Grove and have historical relevance to the community," or if they are "donated by an established Pleasant Grove civic organization with strong ties to the community" or "a historical connection with Pleasant Grove City." Pet. App. 2h-3h. Thus, the city's display of selected monuments in Pioneer Park is a means by which Pleasant Grove expresses the city's chosen theme: recognition of the history, events, and persons who have defined Pleasant Grove's identity as a community.

2. Pleasant Grove properly formulated its message through the selective inclusion of monuments created by others.

a. A compendium of private speech is a distinct form of expression.

Pleasant Grove's chosen theme of community history remains distinctly its own message, even though the city speaks through the compilation of individual displays originally created by others.

This Court has long recognized that the selective inclusion and exclusion of speech -- a process that itself defines an overarching message through the exercise of editorial control and judgment -- is a vital aspect of

government speech, including where **private** speakers were the **original** sources of speech, but the **government** made the **ultimate** editorial judgment.

For example, this Court has noted the role of governmental discretion in "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, . . . a public school prescribing its curriculum," and "a public broadcaster exercis[ing] editorial discretion in the selection and presentation of its programming," *Forbes*, 523 U.S. at 674. Similar observations of this common-sense proposition appear in other cases. *See, e.g., 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); *id.* at 611 (Souter, J., dissenting) ("if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third") (footnote omitted). *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 a slavish courier of the material of third parties"). In each of these situations it is the **government** that is voicing its opinion that the selected items are "worthy" under whatever editorial criteria the government is employing (e.g., "newsworthiness" or "educational value" or "artistic excellence").

That the items the government selects may have private origins does not mean that the private sources are the ones who are speaking through the selection process. For example, while *The Great Gatsby* is admittedly not government speech, Pet. App. 20f, the **selection** of that book for placement on a public library's shelves is **government speech**. F. Scott Fitzgerald (were he still alive) could neither insist on the book's inclusion, nor demand the stocking of multiple copies, nor object to its removal from the shelves to make way for the latest Harry Potter book.

Similarly, this Court has "permitted the government to regulate the content of what is or is not expressed when it is [itself] the speaker **or when it enlists private entities to convey its own message**." *Rosenberger*, 515 U.S. at 833 (emphasis added). For example, since the 1940s, government agencies have utilized the Ad Council, a private, non-profit organization that produces and distributes public service campaigns, to help formulate and disseminate a particular government message. Ad Council, *About Ad Council*, www.adcouncil.org/default.aspx?id=68. Some of the more recognizable examples of government speech produced by the Ad Council include: Rosie the Riveter (Office of War Information, War Manpower Commission); Smokey Bear and "Only You Can Prevent Forest Fires" (USDA Forest Service, National Association of State Foresters); and "You can learn a lot from a dummy . . . Buckle your safety belt" and "Friends Don't Let Friends Drive Drunk" (U.S. Department of Transportation, National Highway Traffic Safety Administration). Ad Council, *Historic Campaigns*, www.adcouncil.org/default.aspx?id=61. That the government has "enlist[ed a] private entit[y]

to convey its own message," *see Rosenberger*, 515 U.S. at 833, does not alter the nature of the message as **government** speech. Where the government "sets the overall message" and "approves every [item]," it "is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources," *Johanns*, 544 U.S. at 562.

The petitioner Pleasant Grove City owns and controls the permanent monuments and memorials displayed in Pioneer Park. That some of these objects bear messages originally inscribed by private parties thus does not derogate from the fact that the placement and display of these **government**-owned, **government**-controlled objects on **government** property represents **government** speech.

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. As the DC Circuit aptly wrote:

> [P]ublic forum principles are out of place . . . when [government] 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 statute of Robert E. Lee.

PETA v. Gittens, 414 F.3d 23, 28-29 (D.C. Cir. 2005) (internal quotation marks and citations omitted).

b. The Tenth Circuit's focus on a particular monument exemplifies that court's flawed approach.

In its ruling, the Tenth Circuit declared that "[f]or purposes of this appeal, the most important structure [in Pioneer Park] is a Ten Commandments monument, donated by the Fraternal Order of Eagles in 1971," Pet. App. 2a. The Tenth Circuit's focus on this monument, however, as an instance of supposedly private speech taking place in Pioneer Park, perfectly exemplifies the Tenth Circuit's erroneous analysis.

Far from passively allowing or permitting the Eagles to display its own monument in Pioneer Park, the record makes it abundantly clear that the city **chose** to accept and display (including where to display), **for its own purposes**, the monument donated by the Eagles: (1) the monument was donated by the Fraternal Order of Eagles to Pleasant Grove City, Carlson Decl. ¶ 15 (JA 97); (2) the monument was accepted by the City, City Minutes of Mar. 1, 1977 (JA 123) (noting that "Mayor Cook stated that a letter be written to the Fraternal Order of Eagles accepting the monolith of 'The Ten Commandments' and stating it would be placed in a prominent place in the Rose Garden Park"); and (3) the monument was erected "with the specific permission and approval of Pleasant Grove and its governing council," Plaintiff's Statement of Undisputed Facts ¶ 10 (JA 51). Moreover, at the public ceremony unveiling the monument in May 1971, Mayor Cook stated he believed it "would serve to remind citizens of their pioneer heritage in the founding of the state." Carlson Decl. ¶ 15 (JA 97); Mills Decl. ¶ 10 (JA 103).

Pleasant Grove's selection of the Ten Commandments monument, like its selection of the other displays in Pioneer Park, reflects an editorial judgment about what aspects of the community's heritage merit acknowledgment, *see* Pet. App. 2h, a message that is no different from the federal government's selection of monuments of national historical significance for inclusion on the National Mall. That governmental message, moreover, is reflected not only in the historic and civic criteria that displays must meet to be considered for display, but more importantly in the City's independent "final determination as to whether the item shall be accepted and where the item shall be placed," Pet. App. 4h. As in *Johanns*, Pleasant Grove not only "oversees" the Park's management and "prescribe[s]" the "basic message" for displays, but also "retains absolute veto power" over the erection of any monument. 544 U.S. at 563. That control ensures that the message of the Park display remains the government's. *Id.* at 560 (finding government speech where "[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself") Indeed, it is the very act of selection -- deciding to include and exclude displays -- that gives shape to Pleasant Grove's message about the influences that were important in its history and community. Were Summum or others entitled to compel the erection of displays that have no connection to the community or its history, Pleasant Grove's message celebrating the community's orgins and influences would be "garbled []or distorted," lost amid the clutter of disjointed and disconnected displays, *Rosenberger*, 515 U.S. at 833.

c. The government's speech is the selection of the material to include, and not necessarily the content of particular items.

The court below got off on the wrong foot when it focused on the **message inscribed** on the monument rather than the **selection and display** of the monument. The latter -- plainly an instance of government speech -- is the proper focus.

This is **not** a case in which the government has erected blank monuments and invited private speakers to inscribe their own message. *Compare Tong v. Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2004) (private persons entitled to purchase message space on blank bricks installed on walkway in government park). Rather, Summum seeks to elbow its way into the municipal authority over park management. The "speech" in question is therefore the **city's display of monuments**.[13]

Summum's, focus upon the particular **inscription** on a monument, *e.g.*, Br. in Opp. to Cert. at 12, 17, 19, as if that inscription exhaustively defined the relevant speech, makes no sense. A government may select monuments for a given park or plaza based upon such criteria as aesthetics, historic significance, or local ties, without necessarily subscribing to the precise messages engraved thereon. For example, a city in

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[13]The relevant "forum" for speech, if any, must be identified by "the access sought by the speaker," *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). Logically, then, the nature of the "speech" in question must likewise be determined by the access sought.

Kansas or West Virginia could accept and display a memorial to abolitionist John Brown, containing excerpts of his writings, without embracing the radical measures endorsed in those writings. Or a city (say, New York in its Central Park) could establish a "diversity" display reflecting the vibrancy of political debate in America; donated monuments would contain positively contradictory inscriptions. The government would not in such cases forfeit the right to select which monuments to display just because the particular messages chiseled onto the various objects might not coincide with the government's own message in selecting the items for display.

Summum fails to appreciate that government speaks by the **selection** of works for display, and not necessarily by embrace of the particular words inscribed thereon. An object may have constituent appeal, or tourism value, or simply be visually attractive to the city authorities wholly apart from any official "agreement" with any inscriptions on the monument. How else to explain such displays as the Alice in Wonderland sculpture in Central Park?

The government's display of monuments (or other objects) on government property, is, to the extent it is speech at all, **government** speech. To be sure, a private entity may **propose** a particular display, and even offer to assume the burden of supplying and erecting the display. But the ultimate judgment call rests with the government.

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.

See, e.g., *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988). 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!"

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 constitutionally relevant speaker. No other private donors can insist that the government accept their additional monuments so that they can be speakers, too.

d. Pleasant Grove's role in displaying monuments on its property fits comfortably into this Court's government speech doctrine.

In concluding that Pleasant Grove was constitutionally obligated to invite Summum (and any other member of the public) to join in its display, the court of appeals stressed (Pet. App. 13a n.4) that Pleasant Grove was not "acting in its capacity as

librarian, television broadcaster, or arts patron." *See also id.* at 21f. That is irrelevant.

There is nothing talismanic about the court of appeals' designated categories. The government was not acting as a librarian, broadcaster, or arts patron in *Johanns* or *Rust* either, but this Court nevertheless held that the federal government was engaged in speech, to which it need not admit contrary views. *See Johanns*, 544 U.S. at 562-67; *Rosenberger*, 515 U.S. at 833; *Rust*, 500 U.S. at 193. That is because the question under the Free Speech Clause turns not on the particular governmental function, but on whether the government is "abridging" private speech by regulating or discriminating against "private speakers who convey their own messages," or whether instead government is simply speaking for itself. *Rosenberger*, 515 U.S. at 834-35. The protection of the Free Speech Clause against abridgement is, after all, fundamentally a right to be left alone in speaking, not a right to affirmative governmental assistance. *See Hurley*, 515 U.S. at 573 (noting that speaker "autonomy" is "the fundamental rule of protection under the First Amendment"); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 14-18 (1986) (forcing private utility to carry the speech of another in the extra space of a billing envelope violates the First Amendment). There certainly is no First Amendment right to "*de facto* beneficial ownership of some rather spacious tracts of public property" to erect permanent monuments. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988); *cf. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (no First Amendment right to sleep in symbolic tents within a national park).

Here, Pleasant Grove has done nothing to regulate or prevent Summum's display of its own monument on its own property or on that of any other willing property owner. Nor has the government limited in any other respect Summum's ability to speak, proselytize, or otherwise inform the public about the Seven Aphorisms. Pleasant Grove simply decided to commemorate the community's history and civic heritage by displaying its own monuments on its own land. That is government speech just as Summum's display of its monument on its land would be Summum's speech. Pleasant Grove's related decision not to permit Summum to force its own message on the government does not change that, because the First Amendment "do[es] not divest the Government of its right to use what is, after all, **its** land." *Lyng*, 485 U.S. at 453 (emphasis added).

3. Pleasant Grove incorporated the private donations into its own speech.

The Tenth Circuit holds that donated monuments owned by a city and erected on its land are not the City's speech, but remain the private speech of the donors, because the City has not created the monuments, but instead has accepted them fully formed from private donors. *See, e.g.*, *Summum v. City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002) ("[T]he City of Ogden maintained no editorial control over the design and creation of the Monument. Rather, the Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product") (cited and followed at Pet. App.

9a, 11a). *See also* Pet. App. 22f (Tacha, J., response to dissent) ("the appropriate inquiry is . . . whether the message is a government-crafted message"). That makes no sense.

First, that rationale defies reality. Gilleo's display of a political campaign sign was her speech, regardless of whether she made it herself or if the campaign crafted the message, Pet. App. 22f, and then donated it to her. *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994). So too, an individual's decision to display a Picasso painting or a Renoir sculpture in a house is the speech of the owner, even though the item's content was designed without the owner's input or control, *see* Pet. App. 22f.

Pleasant Grove's decision to accept the donation of the monument from the Eagles, and to incorporate the monument within a public space containing other historical objects, items, and monuments, is functionally, and legally, no different than a private property owner's exercise of discretion and exclusive choice in decorating his or her private space. As this Court has noted, "[a]t some point, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things, and in such circumstances, the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 n.31 (1984) (internal quotation marks and citation omitted).

The lower court's reasoning also overlooks the budgetary constraints that commonly force governments (small and large) to leave the creation of

public art in the hands of private donors. What is more, if endorsed, the court of appeals' approach would make the government's display of the Statue of Liberty the speech of France, not the United States, entitling others to erect counter-monuments. Likewise, the Vietnam, Korean, World War II, and upcoming Martin Luther King, Jr., monuments in the nation's capital would likely be deemed private speech, not government speech, entitling Summum and everyone else with a monument to occupy their own corner of the National Mall.

Finally, focus on the text of the Ten Commandments monument in isolation ignores the governmental message communicated by the Pioneer Park display as a whole, of which the Ten Commandments monument is just one part. The government speech at issue here is the commemoration of history and civic contributions that is embodied in the composite display in Pioneer Park.

The questions the court of appeals should have asked, instead, are:

> (i) whether Summum had any right to insist that government speech incorporate its message -- the answer to that is, as set forth above, plainly no; or,
>
> (ii) whether private individuals have any First Amendment right to erect unattended displays on public land -- the answer to that is also plainly no. *Infra* § III.

The central premise of Summum's Free Speech claim is that the city is letting private speakers speak through monument placement. The speech in question

is **government** speech, however, so Summum's Free Speech claim must fail.[14]

Summum has **no** likelihood of success on its Free Speech claim; hence, Summum has **no** entitlement to a preliminary injunction ordering the city immediately to allow Summum to erect its proposed monument in Pioneer Park.

II. PIONEER PARK IS NOT A FORUM FOR PRIVATE, PERMANENT MONUMENTS.

The recognition that the selection and display of monuments in Pioneer Park is government speech should end this case: there is no forum for private speech through monuments, and thus Summum can claim no First Amendment right to force the city to erect Summum's proposed monument.

Nevertheless, the Tenth Circuit's aberrant forum analysis requires additional attention. That court treated Summum's proposed monument as a private speaker's attempt to speak, through a permanent, unattended monument, in a public park. Even if the display of every other monument in the park were properly recognized as government speech (as this Court should do), and indeed even if there were no

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[14]Chief Judge Tacha voiced concern that if the government speech doctrine applied to the selection and display of monuments, political accountability might be lacking. Pet. App. 23f, 25f-27f. But as this Court has explained, "when the government speaks, . . . it is, in the end, accountable to the electorate and the political process . . . . If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

other monuments in the park at all, a would-be private speaker would nevertheless have a theoretically independent (albeit meritless) claim to communicate, **as a private speaker**, by depositing a message-bearing monument in the park. To all appearances, Summum has made precisely such a claim in this case. *E.g.*, Pl. Mem., *supra* p. 8, at 3-4 (arguing that Summum's proposed monument is protected private speech in a traditional public forum); Br. of Appellant at 18-19 (same). The Tenth Circuit, in turn, embraced this argument. Pet. App. 9a-11a. It is therefore necessary to explain why, under this Court's forum analysis, this argument must fail.

This Court's Free Speech Clause jurisprudence subjects restrictions on private speech to differing levels of scrutiny depending on whether a "speech forum" exists and, if so, the nature of the 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 deliberately opening a venue for private speech), and "nonpublic fora." In public fora, content-based limitations trigger strict scrutiny, while in nonpublic fora, 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); *Forbes*, 523 U.S. at 677-78.

The Tenth Circuit erred by holding that Summum's federal free speech claim was likely to succeed under this Court's forum analysis.

A. The Tenth Circuit Erred by Holding that Pioneer Park Is the Relevant Forum.

This Court has 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). Here, Summum seeks, not just to put its monument into Pioneer Park, but rather **to have the city allow** Summum to erect this permanent, unattended monument. *See* JA 58 (Summum's letter requesting that Seven Aphorisms monument "be erected under the same conditions, rules, etc. under which the Eagles' monument was and is permitted and maintained"); Cplt. at 11, ¶ 3 (JA 22) (requesting "order that the **defendants** immediately **allow** plaintiff Summum to erect its monument") (emphasis added); Plffs' Statement of Undisputed Facts ¶ 10 (JA 51) (Ten Commandments monument "was erected . . . with the **specific permission and approval** of Pleasant Grove and the government council") (emphasis added). Hence, the relevant "forum," if any, is the city's internal selection and approval process for placing permanent, unattended monuments in Pioneer Park.

The Tenth Circuit erred in this crucial first step of forum analysis. The Tenth Circuit held that "[t]he permanent monuments in the city park . . . make up the relevant forum," Pet. App. 9a, and that "the nature of the forum in this case is public," Pet. App. 11a, because a "city park" is "a traditional public forum," Pet. App. 10a. Hence, the Tenth Circuit conflated the **city's internal process** for selecting which

monuments to display in Pioneer Park, with the **physical park** itself. *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 *Cornelius*.

The physical park is **not** the relevant forum. Rather, the analysis must focus upon the city's process for selecting which monuments to display in its parks, which is no forum for private speech at all. Like choosing where to situate parks in the first place, or choosing what materials to use for street paving, etc., monument placement is a discretionary governmental selection process, not a forum for private speakers to communicate their views.

That the ultimate destination of a monument is a city park is no more dispositive than the fact that the fundraising in *Cornelius* would ultimately take place in government offices. 473 U.S. at 800-01.

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. The Tenth Circuit Erred by Holding that a City Park is a Traditional Public Forum for Private, Unattended, Permanent Displays.

But even if the pertinent forum were Pioneer Park itself (as opposed to the city's monument selection process), the judgment below could not stand. Pioneer Park is not a traditional public forum for the deposit of unattended objects.

To be sure, a public park is presumptively a traditional public forum for personal speech activities like leafletting, carrying signs, and oral utterances. That is because "one who is rightfully [in a place] which the state has left open to the public **carries with him** there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (emphasis added). "**Such use** of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. CIO,* 307 U.S. 496, 515 (1939) (plurality) (emphasis added).

Summum has identified no historic tradition of depositing unapproved, unattended monuments on public parkland. Moreover, stone monuments of the type Summum proposes are not the sort of thing one "carries with him" when using a public street, sidewalk, or park. *See 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:

"This 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").

Furthermore, an expressive activity is not subject to public forum analysis just because the ultimate expression takes place on what is physically a traditional public forum. In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), for example, 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).

Streets, sidewalks, and parks are traditional public fora for **leafletting**, not **littering**, *Schneider,*

and **displaying** signs, not **affixing** them to government property, *Taxpayers for Vincent*. Likewise, such properties are not traditional public fora for **depositing** unattended private monuments, *Capitol Square*.

C. Pioneer Park Is Not a Designated Public Forum for Private, Unattended, Permanent Monuments.

Summum argued below in the alternative that, even if Pioneer Park is not a **traditional** public forum for monuments, the city has created a **designated** public forum by allowing other private parties to install monuments -- in particular the Ten Commandments monument and the September 11 monument. *E.g.*, Br. of Appellant at 19-21. *See also supra* note 5 and accompanying text. This argument fails as well.

Government "does not create a [designated] public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Here, Summum has plainly failed to carry its burden of demonstrating any such opening. As discussed above, the "speech" entailed in the city's acceptance and placement of monuments is **government** speech, *supra* § I, so that activity is no evidence of an opening for private speech. And even if the city had allowed for selective access by a private speaker or two, *see supra* note 5, which it did not, such selective access does not suffice. "A designated public forum is not created when the government allows **selective** access for individual speakers rather than

general access for a class of speakers." *Forbes*, 523 U.S. at 679 (emphasis added).

Summum claims that the city's monument placement **policy** (Pet. App. H) entitles private parties to donate, and compel government display of, additional monuments in city parks. Br. in Opp. to Cert. at i, 5. This is plainly inaccurate. The city's internal policy sets criteria that are **necessary**, but **not** themselves **sufficient**, for acceptance and display of a proposed monument. *See* Pet. App. 2h ("approval must be obtained from the City Council"; requests are submitted "to the City Council for their consideration and acceptance or denial"), 4h ("If the item meets the above-listed criteria, then the Council shall consider the [proposal and] make the final determination as to **whether** the item shall be accepted and **where** the item shall be placed") (emphasis added).

Moreover, Summum has never asserted that the city's denial of its proposed "Seven Aphorisms" monument violated the city's policy. Indeed, Summum has stipulated that its proposal does not meet the policy criteria. *Supra* note 3. Under the policy, private entities can **propose** monuments, but the ultimate **authority** to decide whether a given monument comports with the city's overall vision for the park rests entirely with the city, as Summum has consistently acknowledged. *E.g.*, Plaintiff's Statement of Stipulated Facts ¶¶ 6, 8 (JA 50-51) (city, through city council, determined placement of monuments on city property). Summum specifically conceded, for example, that the Ten Commandments monument was erected "with the specific permission and approval of Pleasant Grove and its government council." *Id.* ¶ 10 (JA 51).

Hence, there is no designated public forum for private unattended monuments here. "[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" *Forbes*, 523 U.S. at 679 (citation omitted). Thus, even under the Tenth Circuit's erroneous "private speech" theory, there was no designated public forum here.

D. The Standards Governing Nonpublic Fora Cannot Salvage Summum's Claim.

Pioneer Park is simply not a forum for private unattended monuments. But even if Pioneer Park were treated as a **nonpublic** forum for such monuments, Summum would fail to show any likelihood of success.

"[T]he government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius*, 473 U.S. at 800 (internal quotation marks and citation omitted). Thus, in a nonpublic forum, restrictions on private speech need only be reasonable and viewpoint-neutral. *Id.; Perry*, 460 U.S. at 46. The criteria the city identified for its selection of monuments in this case easily satisfy that standard.

The city employs two principal considerations as threshold, gatekeeping requirements for proposed monuments: local ties and historic relevance. Summum concededly does not meet either of these criteria, *supra* note 3. Nor can Summum find constitutional fault with these considerations.

"Speaker identity" is a legitimate criterion for access to a **nonpublic** forum, *e.g., Perry*, 460 U.S. at 49, and even for access to a **designated** public forum, *e.g.,Widmar v. Vincent,* 454 U.S. 263 (1981) (student organizations). *See generally Forbes*, 523 U.S. at 680 ("with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers"). Requiring "local ties" is simply an example of a legitimate criterion based upon speaker identity.

Summum makes the rather farfetched claim that to distinguish between "local" and "nonlocal" speakers is a form of viewpoint discrimination. *E.g.*, Br. of Appellant at 24 ("Locals have local viewpoint; outsiders have an outside viewpoint"). But one's residency is no more a viewpoint-based category than is one's status as a student or a non-student, as in *Widmar*.

Historic relevance, the other main criterion, is also a reasonable, viewpoint-neutral consideration for selecting which objects to display in a public park. A municipality can surely select a theme for its decoration of public space. If New Orleans wishes to create a jazz display, Los Angeles a Hollywood display, or Cheyenne a cowboy display in a public park, no one could rightly insist on the inclusion of, say, tributes to cubist artists. Here, Pioneer Park reflects the history of its Mormon pioneer settlers. Summum has failed to show that the decision not to display monuments foreign to that history reflects anything other than the city's effort to stay on topic.

In short, the standards governing nonpublic fora offer no support to Summum.

E. Here There Is No Forum at All for Private, Unattended, Permanent Monuments.

Finally, it bears repeating that here, there is no forum at all for private speech through unattended, permanent monuments.

Not every claim of free speech requires a forum analysis or application of public forum principles. Sometimes, as this Court noted in *Forbes*, 523 U.S. at 679, there is "not a forum at all." In *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), for example, the Court declined to use a forum analysis to evaluate a student's First Amendment claim of viewpoint discrimination because the scholarship program at issue was, in the Court's view, not intended to "encourage a diversity of views from private speakers" and therefore "not a forum for speech." *See also Am. Library Ass'n*, 539 U.S. at 204-05 (plurality) (noting that "forum analysis and heightened judicial scrutiny are incompatible" with the government acting as patron of the arts, television broadcaster, or librarian) (citing *Forbes* and *Finley).*

The decoration of Pioneer Park with unattended monuments and memorials is **exclusively** a channel for the government expression of a theme and vision for the park. Private parties who disagree with placement decisions can seek political recourse, *supra* note 14, but the First Amendment does not give them a license to intrude upon the local government's management of park property.

III. THE TENTH CIRCUIT'S APPROACH WOULD CREATE ENORMOUS PRACTICAL PROBLEMS.

The foregoing legal analysis suffices to resolve this case. Lest anything more be required, this Court need only look to the practical nightmare that would follow from embracing the decision below.

The Tenth Circuit's decision creates for every private entity a right permanently to occupy public land with the unattended object of its choosing -- at least until the land is entirely consumed by monuments. Every federal, state, or local governmental body, under this theory, would be vulnerable 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* Pet. App. I (listing examples of donated monuments in parks and other government-owned properties within the Tenth Circuit alone).

The problem is not just the Tenth Circuit's ruling that a traditional or designated **public forum for monuments** exists here. Rather, the core problem is the court's failure to distinguish between **government** speech (selecting and displaying monuments in a city park) and **private** speech. For once a forum for private speech is opened, viewpoint discrimination is constitutionally impermissible, even in a **nonpublic** forum. *Cornelius*, 473 U.S. at 806; *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.

The string of *Summum* cases themselves, *see supra* pp. 21-22, illustrates that the threat of compulsory-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.firstamendmentcenter.org/news.aspd?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 17, 2007), www.jacksonholestar trib.com/artcom/articles/2007/07/17/news/casper4e 32f677cbf04e35872573190020f943.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.trib.com/ articles/2007/07/19/news/casper/88d8fdf4be01754872 25731b00006a13.txt (Phelps has renewed his push for anti-Shepard monument). (A sketch of the proposed Casper monument appears at http://web.archive.org web/20061207152142/www.god hatesfags.com/fliers/oct 2003/sketch_10-4-2003.pdf.)

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"); *Red River Freethinkers v. City of Fargo*, No. 3:08-cv-00032-RRE-KKK (D.N.D. filed Apr. 18, 2008) (Freethinkers group asserting First Amendment Free Speech right to have their own competing monument erected in same Civic Center Mall where a donated Ten Commandments monument sits). *See also* Associated Press, *Boise: No anti-gay monument*, Spokesman-Review (Dec. 9, 2003), www.spokesmanreview.com/pf.asp?date=120903&ID=s1452867 (Phelps proposal of anti-Shepard monument in Boise).

Indeed, the Tenth Circuit's ruling in this case has sent shockwaves nationally. The United States Army, for example, has temporarily suspended all acceptance of donated monuments:

> In this case [referencing the case at bar], the lower court ruled that, once a city accepts and permanently displays a monument donated by a private party, the city creates a public forum and is required to accept other monuments donated by private parties for permanent display. Due to the ramifications that this case may have on the Army's acceptance of the Bakers Creek Memorial or any other monument funded by private funds, the Army will await the Supreme Court's decision to assess its options.

Letter of Apr. 29, 2008, from Keith E. Eastin, Assistant Secretary, Installations and Environment, Department of the Army, to Hon. Ike Skelton, Chairman, House Committee on Armed Services, U.S. House of Representatives (explaining delay in siting proposed donated memorial). *See also* Trish Choate, *Fringe sect's lawsuit delays monument to fallen WWII soldiers* (May 7, 2008), www.scrippsnews.com/node/32986.

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." Pet. App. 9f (Lucero, J., dissenting). *Accord* Pet. 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 reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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