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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Tenth Circuit -- over the dissent of six judges, Pet. App. 2f -- has gone badly astray.

In its line of Summum cases[1] -- all four cases brought by the same party, respondent here -- the court below has announced the jarring rule that when a government body accepts and displays a monument donated by a private party, that government body must, absent a compelling interest, accept and display additional monuments (such as Summum's "Seven Aphorisms") on demand, as a matter of First Amendment "equal access." That holding not only severely hampers government management of parks, but also conflicts with decisions in six other circuits. Pet. §§ I, III. As petitioners and three sets of amici before this Court agree, this decision warrants review.

The Tenth Circuit's imposition of **public forum analysis** and **strict scrutiny** upon a government body's **monument selection** process ignores the reality that it is the **government** that speaks through its selection and display of monuments. As **government speech**, this "editorial discretion" in park management simply does not trigger the First

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[1] *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-690 (U.S. Nov. 21, 2007); *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-665 (U.S. Nov. 20, 2007).

Amendment limits that apply to restrictions on **private** speech. Pet. at 1-3, 18-22, 26-27; Amici Br. of Virginia et al. [States Br.] at 1-3.

Respondent Summum concedes that the decision below is "sweeping and counterintuitive," Opp. at 13, and "radical and far-reaching," *id*. at 14, if -- as is true -- petitioners have correctly described it. *See also* Pet. App. 17f (McConnell, J., dissenting) (Tenth Circuit committed "fundamental" and "disruptive" legal error); States' Br. at 2 (Tenth Circuit "ignores . . . fundamental principles"). Summum therefore strains mightily to recharacterize and minimize the decision below. Yet Summum itself ultimately admits that,

> as explained in the *Pleasant Grove* Brief in Opposition, the Tenth Circuit has held . . . that once a governmental entity opens a traditional public forum to some form of private speech -- here, the display of privately-donated monuments -- it may not discriminate against other private speakers who wish to engage in the same form of speech, absent a compelling interest.

Respondent's Br. in Opp. to Cert., *Duchesne City* v. *Summum,* No. 07-690 (U.S. Feb. 25, 2008), at 10 (citing Opp. in *Pleasant Grove)*. That is, Summum concedes that the court below equated "privately-donated monuments" with "private speech" (despite government ownership and control), and that the government's acceptance and display of such donated works forces the government to accept and display any other speaker's proposed

monument, absent a "compelling interest."

This Court should grant review of this "radical and far-reaching" decision.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Summum asserts that Pleasant Grove City accepted the Fraternal Order of Eagles' donation of a monument "without taking any steps to adopt the Eagles' speech . . . as its own." Opp. at 5. But this assertion "fails to acknowledge that the **government's display** of works donated by private parties simply represents another way in which **government speaks**," Br. of Amicus Cities of Casper et al. [Casper Br.] at 12 (emphasis added). The city accepted **ownership and control** of the monument, Pet. at 5, making the monument thenceforth a **government** display, not a private display. As Summum conceded, "the city of Pleasant Grove controls whether or not the Ten Commandments Monument remains in the park." Br. of Appellant at 5 (10th Cir. May 8, 2006). Moreover, upon the city's acceptance of the donated monument in 1971, the mayor, at an unveiling ceremony, declared that the monument "would serve to remind citizens of their pioneer heritage," Decl. of Frank Mills ¶ 10 (Ex. G-1 to Defts' Mem. in Opp. to Plff's Mot. for Partial Summary Jdgmt. (Doc. 19)). Obviously, it was the **display of the message** -- the Ten Commandments inscribed on the monument -- that would "remind" citizens of their heritage.

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. Opp. 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).

Summum has never asserted that the city's denial of its proposed "Seven Aphorisms" monument violated the city's policy. 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 (Doc. 11) at 3-4 (¶¶ 6, 8) (city, through city council, determines placement of monuments on city property).

Summum faults the city for not arguing in the district court or before the Tenth Circuit panel that the placement and display of monuments in its park counts as government speech. Opp. at 2, 7, 8. But as explained in the petition, controlling Tenth Circuit precedent -- the very cases Summum repeatedly insisted were controlling -- foreclosed that argument in the district court and before the panel. Pet. at 7, 9-10, 11 n.3. The city nevertheless **did** raise the

argument before the panel, Pet. at 9-10, and the panel rejected it upon the authority of its prior decisions, Pet. at 10-11. More importantly, once the case reached the stage -- potential en banc consideration -- where the reviewing court would no longer be bound by prior Tenth Circuit panels, the city pressed the government speech argument with vigor, Pet. at 11-12, and all the judges who wrote in response to the rehearing petition addressed the argument on the merits, Pet. App. 3f-4f, 11f-16f, 20f-27f.

ARGUMENT IN REPLY

The Tenth Circuit in this case ruled that once a city accepts and displays in its park a privately donated monument, the city must accept and display other privately donated monuments upon request, absent a compelling interest.

That cannot be right. The Constitution does not empower private parties to force permanent displays into a park, crowding out the available physical space and trumping the government's own vision for the park's decor or theme.

The principal analytical flaw in the decision below was the Tenth Circuit's holding -- reflecting a line of aberrant Tenth Circuit cases[2] -- that a donated monument somehow remains private speech, rather than government speech, despite the government's ownership and control of the monument. Pet. at 3. This crucial misstep led to a

[2] *See supra* note 1; Pet. at 18-19; *id*. at 7, 11 n.2.

startling holding, namely, that the petitioner Pleasant Grove City must either remove all of the city's monuments and memorials that were originally donated, or else erect and display respondent Summum's "Seven Aphorisms" monument (and be prepared to erect and display any additional monuments upon request). Pet. at 11 & n.2.

More broadly, the decision below cements a conflict in the circuits over the government speech doctrine and the applicability of forum analysis to monuments owned, controlled, and displayed by the government. Pet. § I. The decision below also badly distorts this Court's government speech and public forum doctrines. Pet. § II. Further, the decision below creates enormous practical problems, as now any federal, state, or local government body displaying a monument that once was donated (and there are many such instances, *see*, *e.g.*, Pet. App. I) is a sitting target for litigation demanding the erection and display of a host of additional monuments in the name of "equal access." Pet. § III; Casper Br. at 1-5. Summum's attempts to explain away this deeply troublesome ruling lack merit.

I. SUMMUM MANUFACTURES A NOVEL "ADOPTION OF THE INSCRIPTION" REQUIREMENT.

The centerpiece of Summum's attempted recasting of the decision below is a supposed constitutional requirement that, for a government's display of a donated object to be government speech, the government must not only **own, control and display the object**, but **affirmatively "adopt" all**

messages inscribed on the object. *See* Opp. at i, 4-6, 8 n.2, 12, 14-17, 19-20, 27, 31-32. According to Summum, a city "is free to adopt that speech as its own, making it governmental speech for Free Speech Clause purposes," *id*. at 14, but it must do so either by "shaping the message contained on the monument," *id*. at 17, or by expressly and formally "approving of the content of the monument," *id*. at 31. The city's mistake, Summum charges, was that the city has "done nothing to adopt the speech" inscribed on the donated monument. *Id*. at 15.

This novel "express adoption of the inscription" requirement cannot rescue the decision below.[3]

The "adoption of the inscription" requirement Summum proposes 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 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

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[3]The city in fact **did** embrace **display of the message** the monument would convey. *Supra* p. 3. Thus, Summum's argument is not only legally insufficient but also factually misleading.

would not in such cases forfeit the right to select which monuments to display just because it "failed" to "adopt" the particular messages chiseled onto the various objects.

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?

A government's **acquisition and display** of an object is all the "adoption" that is necessary. To require the government to pass a resolution restating the obvious -- "we have chosen to display this monument" -- would be pointless.

Summum's "adoption of the inscription" requirement also does nothing to change the fact that a multitude of government bodies currently displaying donated monuments and memorials are now obligated, under the Tenth Circuit's ruling, to cede control over park displays to the demands of private parties. According to Summum, governments may enact formal resolutions "adopting" any messages engraved upon such objects, hoping thereby to fend off lawsuits demanding that a competing display be erected. But, as illustrated by *Summum v. City of Ogden*, 297 F.3d 995, 1005-06 (10th Cir. 2002), even such a formal "adoption" will not necessarily satisfy the Tenth Circuit.

In short, Summum's attempt to reinvent this case

as merely a failure to "adopt the speech," Opp. at 15, cannot rehabilitate the pernicious ruling below.

II. SUMMUM ATTEMPTS UNSUCCESSFULLY TO MINIMIZE THE DECISION BELOW.

Summum portrays the decision below as a "narrow and fact-specific" decision. Opp. at 13. It is nothing of the kind. The only thing "very unusual" about this case is the law the Tenth Circuit embraced.

This is the fourth in a series of Summum cases. *Supra* note 1. While Summum's legal claim of "equal access for privately donated monuments" may be odd, it is an oddity that has now prevailed in four straight cases in the Tenth Circuit (while it would clearly fail in at least six other circuits, Pet. § I). And the setting for Summum's claim -- city grounds containing a donated monument or memorial -- is so commonplace as to be well-nigh ubiquitous. All the Summum cases require for litigation is a proponent of another monument. Thus far Summum has led the charge. But Rev. Fred Phelps and others are now raising the same banner, Pet. at 27-28, with no end in sight.

Summum suggests this case has "unusual facts" Opp. at 13, because the city did not take the additional step of expressly adopting the inscriptions on the donated monuments. Even aside from the defects in Summum's "adopt-the-inscription" theory, *supra* § I, this is no limitation. Summum offers no reason to believe the present factual scenario is not the norm, rather than the exception.

Summum claims the decision below is "limited"

because it "applies only to privately-donated and unsolicited displays" where the monument is offered as a "completed product." Opp. at 17. This is hardly a limitation, as donated final-product monuments are extremely commonplace. *E.g.*, Pet. App. I. Nor is it at all "clear," Opp. at 17, that the rule of the Summum cases would not logically extend to monuments purchased from private entities. Under the Tenth Circuit's logic, Summum could assert a First Amendment "equal access" right to have the city **purchase** its monument if the city has purchased another private entity's "completed product." Indeed, Summum has already claimed, in the *Duchesne* litigation, a First Amendment right triggered by the **sale** of parkland containing a monument.

Summum submits that the decision below would not limit the government when acting as "an educator" or "patron of the arts." Opp. at 17-18. But if this is so, the point merely highlights the illogic of the Tenth Circuit's reasoning. A city can be choosey when it accepts and displays "educational" items for a park, but not (as here) "historical" items? A city can freely select monuments to adorn an "art" park, but not (as here) a "Pioneer Park"?

Summum insists that the decision below applies "**only** to public parks and other . . . traditional public fora," Opp. at 18 (emphasis in original). That is indeed a very large "only." Furthermore, the Summum rule also subjects **nonpublic** fora to First Amendment forum analysis, as Summum concedes, Opp. at 18. While restrictions in such fora need only be "reasonable" and "viewpoint neutral," *id.*, the view-point-neutrality requirement alone would

compel depiction of Benedict Arnold alongside George Washington, an Armenian Genocide memorial alongside a Holocaust memorial, and a "Wall of Shame" anti-war memorial alongside a "Wall of Honor" veterans memorial. States Br. at 9-10. The problem with the decision below is not just its imposition of strict scrutiny -- though that aggravates the situation -- but rather the core flaw of treating displays selected, owned, and controlled by the government as the speech of private ventriloquists, *cf. Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000).[4]

III. SUMMUM'S OTHER REASONS FOR DENYING REVIEW LACK MERIT.

Summum's other contentions can be addressed briefly.

The fact that this case comes on appeal from a preliminary injunction is no obstacle to review. Pet. at 17 n.6. *See, e.g., New York State Bd. of Elecs. v. Lopez Torres*, 128 S. Ct. 791 (2008) (reviewing judgment on appeal from preliminary injunction).

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[4]Summum speculates that "the effects of the decision below are likely to be limited to cases involving religious displays." Opp. at 16 n.4. But as Judge McConnell noted, "the religious nature of the donated monument is not relevant to the free speech question," Pet. App. 10f-11f (dissent). Summum itself argued below that its right to erect its monument derived, not just from the city's display of the donated Ten Commandments monument, but also from the city's display of a thoroughly secular donated 9/11 Monument. Br. of Appellant at 21 (10th Cir. May 8, 2006). *See* Ex. F to Decl. of Frank Mills, *supra* p. 3 (photo of 9/11 Monument with inscription).

Moreover, the preliminary injunction here would force the city to erect Summum's permanent monument, giving Summum precisely the ultimate relief it seeks.

The Tenth Circuit's aberrant legal analysis is at this point well-defined and, in light of the denial of rehearing en banc, well-entrenched. The off chance that the case would end up turning on some other grounds on remand is no reason to deny review, leaving Tenth Circuit case law in its current disarray and leaving municipalities obligated to yield to all private requests to erect additional monuments -- or face copycat litigation for refusal to do so.

Summum denies the conflict in the circuits, but this denial rests entirely upon the false premises addressed above, that this case is "narrow and fact-bound" and that the key is the absence of a pre-litigation, express "adoption" of the monument inscriptions. Opp. at 13, 23. *See also* Pet. App. 12f (McConnell, J., dissenting) (listing conflicting cases).

Summum also denies the grievous practical implications of the Summum cases for federal, state, and local management of properties containing donated monuments. Opp. at 31-33. But Summum's only argument is that beyond the all-or-none choice the decision below poses, Opp. at 11, 31 (option of banning all permanent displays), 29 (otherwise cannot discriminate among proposed monuments), *see* Amici Br. of Amer. Legion at 6 ("impossible choice"), a city can pursue express, formal, pre-litigation "adoption" of any inscription on the monument. As discussed *supra* § I, this "option" is neither constitutionally required, nor sensible, nor

even a reliable defense under the Tenth Circuit's case law. Government bodies will not even be alerted to this supposedly necessary legal option, as it appears nowhere in the decision below.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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