No. 07-665

In The Supreme Court of the United States

PLEASANT GROVE CITY, et al.,

Petitioners,

v.

SUMMUM,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE CITIES OF CASPER, WYOMING, SANTA FÉ, NEW MEXICO, AND OGDEN, UTAH IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

The amici adopt the questions as presented by the Petitioners.

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INTEREST OF THE AMICI[1]

The amici curiae request that this Court grant review and reverse the decision below because each amicus confronts the unnecessary and undesirable results that follow from the Tenth Circuit's over-extension of this Court's public forum doctrine. Each has incorporated works donated by private citizens into their governmental display of work designed to serve the needs and aspirations of their community. As a result of the decision below, each city will now be forced to choose between removing those works the city has accepted and displayed to promote its lawful governmental objectives or allowing public places to serve as the forum for anyone and any permanent message.

Casper, Wyoming, is a city of approximately fifty thousand people, located in the Rocky Mountains in the middle of the State of Wyoming. The decision below places the City of Casper in a terrible dilemma which follows from two facts. The first is that the City accepted a Ten Commandments Monument donated by the Fraternal Order of Eagles in 1965. The second is that Casper is the birthplace and

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

resting-place of Matthew K. Shepard. In a way that neither this Court nor the City of Caspar could ever have imagined, these two simple facts have converged to make Casper Wyoming a perfect example of the harm caused by the decision below.

The Casper City Council dedicated an Historical Monument Plaza on July 16, 2007. The City's Historical Monument Park consists of stone monuments depicting the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the United States Constitution, the Bill of Rights, and the Ten Commandments, along with plaques describing the historical significance of these documents. The City controls the park and determines what monuments may be placed there. But the City's Monument Park includes a Ten Commandments monument donated to the City by the Fraternal Order of Eagles in 1965.

The decisions rendered by the Tenth Circuit in *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) and *Summum v. Duchesne City,* 482 F.3d 1263 (10th Cir. 2007) place the City in terrible position for the following reason. When the City's plan to create its Historic Monument Park was announced, Fred Phelps, pastor of the Westboro Baptist Church, demanded the right, under Tenth Circuit's decision in *Summum v. City of Ogden* 297 F.3d 995 (10th Cir. 2002), to place a Matthew Shepard Monument in City Park.

The so-called Shepard Monument would read as follows:

> MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God's Warning 'thou shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22.

The City refused Pastor Phelp's request.

But now the City confronts a dilemma. Does the fact that the City of Casper incorporated the Ten Commandments Monument donated by the Eagles into the City's Historic Monument Park mean that the City must incorporate Pastor Phelp's so-called Matthew Shepard Monument? The City dreads the answer for reasons any person who values civility can easily understand.

In essence, under the *Summum* decisions, any governmental entity faces either converting its public spaces to graveyards of monuments to whatever cause may be proffered by citizens for any motive (base or noble), or to otherwise remove all such monuments, including war memorials and other commemorative plaques from its public forums at an extreme cost and expense, not to mention the cost of removing engravings from buildings, cornerstones, etc., which literally ingrain our country's heritage and history into our public spaces.

The City of Casper believes it should not be forced to install the Matthew Shepard Monument at the demand of the Westboro Baptist Church because

it chose to accept and display as its own a work donated by another private organization over forty years ago. The City's Monument Park is a display by the people of the City of Casper, acting through their elected representatives; it is not a forum for permanent speech by private parties.

The City of Santa Fé, New Mexico, provides another example of the harm caused by the decision below much broader than the particular (and more egregious) harm suffered by the City of Casper. La Villa Real de la Santa Fé de San Francisco de Asis (Santa Fé) was founded in 1610 and is world-renowned for its long history and its eponymous trail, railroad, and architectural style. Santa Fé celebrates these glories with permanent monuments and sculptures in its parks. Many of the monuments and works of art were donated by private parties, accepted by the City, and proudly displayed in its public spaces for the reason just described. The decision below, if allowed to stand, will force the City to choose between denuding its public spaces of artwork reflecting its history and culture or allowing those public spaces to be inundated with hundreds of permanent displays furthering private expression. The City of Santa Fé believes it should not be forced to choose between stripping its public spaces of art donated by private parties or placing its public spaces at the disposal of private citizens.

The City of Ogden, Utah, shows the adverse impact of the decision below and the prior decisions of the Tenth Circuit in the Summum cases. It too accepted a Ten Commandments monument from the

Fraternal Order of the Eagles. When Summum sued the city arguing that acceptance and display of that monument created a public forum, the Tenth Circuit agreed in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). Confronted with the implications of the Tenth Circuit's decision, *i.e.*, opening its public spaces to permanent monuments placed by any citizen for any reason, the City removed the work.

For these reasons, explained further below, the amici request that the Court grant the petition for certiorari and, in due course, reverse the decision below.

REASONS FOR GRANTING THE PETITION

As an initial matter, the amici curiae state their agreement with the Petitioners before the Court as well as the dissenters below insofar as they argue that neither precedent nor common sense recommend the conclusion that public parks are traditional public forums for the purpose of private speech communicated by means of a *permanent display*. The dissenters below fully explain why this Court's decisions do not support the notion that traditional public forums have traditionally been forums for *private* speech communicated by means of *permanent* display. The Petitioners highlight the way in which this ahistorical assertion conflicts with sister-circuits that have rejected this unwarranted extension of public forum doctrine as well as the farfetched notion that *governmental* display of monuments donated by private

parties can be realistically characterized as *private* speech.

The amici write to emphasize a distinct but related way in which the decision below is inconsistent with the decisions of this Court. More specifically, the amici write to make explicit the way in which the decision below relied upon the two erroneous conclusions noted above, to justify a third "ultimate conclusion," *i.e.*, the conclusion that the *government's* acceptance and display of works donated by *private* parties, requires the finding that the government has created a forum for *permanent* display by *private* citizens.

In this way, the decision below creates what amounts to an imputed intent to *expand* a traditional public forum to include *permanent display by private citizens* based on nothing more than the decision by a governmental body to accept and display a work donated by a private citizen. Such a finding of governmental intent based on nothing more than the display of works donated by private parties is wholly inconsistent with legal principles that this Court has developed to determine when action by government officials is sufficient to support a finding that the government has intentionally opened a public forum. And such an extension of this Court's decisions is plainly undesirable because it undercuts the ability of government to engage in speech that is designed to serve the community's needs or aspirations.

I. The Decision Below Represents An Unthinking Over-Extension Of This Court's Forum Doctrine That Has Highly Undesirable Consequences For Civic Life.

Traditional public fora *have not been traditionally regarded as fora for permanent speech by private citizens*. Thus it is clear that the decision below represents an extension of this Court's precedent – an implicit finding that the Petitioners intended to *expand* traditional public forums to make them serve as forums for *permanent* speech by private citizens. Precisely because the decision below really turns on this implicit finding of intent to expand a traditional public forum, it is plain that the most relevant precedent from this Court is provided by cases concerning the kind of government action that *designates* public property that is *a nontraditional forum* as a public forum nonetheless. As demonstrated below, this Court's decisions have uniformly emphasized that an intent-to-create a forum should only be found where the undisputed facts provide clear evidence of such intent. Because there is no basis for such a finding of intent to open (or, in this case, expand) a forum here, it is clear that the decision below arises from an unjustified extension of this Court's prior decisions that should be rejected.

Early on, this Court rejected the claims that public property was necessarily a forum for even *temporary* speech by *private* citizens recognizing that "were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military

compounds and other facilities would immediately become Hyde Parks open to every would-be pamphleteer and politician. This the constitution does not require." *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 435 U.S. 114, 130 n. 6 (1981).

In the same vein, this Court has noted that "forum analysis is not completed merely by identifying the property at issue. Rather, in defining the forum we have focused on the *access sought by the speaker*." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 801 (1985). Emphasizing that "government does not create a public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse," the Court refused to find that the Combined Federal Campaign was a public forum, even though the campaign had been opened to a variety of speakers, because "the Court has examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id*. at 803 (relying on numerous cases where the *government's control of access* to the forum had led the Court to negate claims for *access*) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Greer v. Spock*, 424 U.S. 828 (1976); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)).

Likewise, in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), this Court rejected a claim that a student newspaper was a public forum, even though students were allowed to express a great

many views therein. In so doing it stated that "[i]f the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. . . ." *Id*. at 267. Relying on evidence of ongoing government control over the student newspaper, the Court found that the evidence that students had some ability to express their views could not support a finding that the school had created a public forum in the school newspaper.

Similarly in *Arkansas Educ. Tele. v. Forbes*, 523 U.S. 666, 672-73 (1998), this Court declined to find that public television was a public forum. In so doing, the Court reasoned that "[h]aving first arisen in the context of streets and parks, the public forum should not be extended in a mechanical way to the very different context of public television." But once the superficial (and ahistorical) view of traditional public forums advanced by the decision below is set aside, it is clear that the Tenth Circuit's claim that traditional public forums are forums for *permanent speech by private citizens*, rests largely on just such a mechanical extension of traditional public forum doctrine.

The decision below points to nothing that might suggest that government relinquished control over placement of *permanent* displays in either of the parks at issue here. This brings into focus the heart of the decision below – an implicit finding of a government *intent to expand a traditional forum* to make it one for *permanent speech by private citizens* based

on nothing more than the *government's* display of a *work* donated by a private party.

The amici respectfully submit that this Court has never found an intent to create (in this case *expand*) a forum based on such slim indicia. Indeed, such a finding is directly at odds with this Court's longstanding approach whereby the "government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Such a finding is also at odds with experience, for there is no question that governmental entities have always exercised control over *permanent* display in public parks and other public spaces.

The opinion written separately by Judge Tacha in response to the dissenters below demonstrates the importance of the forum determination (and related over-extension) of this Court's precedent – emphasized here. In her response to the dissenting opinions, Judge Tacha first cites decisions concerning the placement of *private property* in a public forum. *See* 499 F.3d 1170, 1178 (10th Cir. 2007) (opinion by Tacha, J.), (*citing City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (dealing with news racks), and *Capitol Square Review & Advisory Board. v. Pinette*, 515 U.S. 753 (1995) (cross owned by private organization). She then relies on cases *rejecting* claims that *private* parties required to support government speech are being forced to engage in *private* speech that agrees with the government (on the

theory that regulatory exactions used to support *government* speech amount to coerced *private* speech). *Id.* at 1180 (*citing Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005)). Based on these cases, and this Court's "focus on whether the message is the government's own," Judge Tacha asserts that a "city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the message to the political process, a result that would shield government from First Amendment scrutiny and democratic accountability." *Id.* at 1180.

Judge Tacha's arguments are not supported by the precedent cited, do not withstand scrutiny, and amount to a dangerous extension of this Court's precedent. None of the cases cited by Judge Tacha require a finding that a traditional public forum is a forum for *permanent* display (speech) by *private* citizens. None of the cases relied upon by Judge Tacha require a finding that the *government's* display of works donated by private parties must, by operation of law, be deemed *private* (as opposed to government) speech. The claim that the *government's* display of a work donated by private parties must be considered *private* speech simply begs the question – why would anyone reach that conclusion? And Judge Tacha's rationale for the extension of precedent (*i.e.*, the notion that if governmental display of works donated by private citizens is treated as government speech, the matter is somehow exempted from the political process), simply defies

reason; given that elected officials make these decisions, how can those decisions be regarded as exempt from the political process?

Judge Tacha offers a telling illustration in support of the decision below. She seeks to justify the decision on the grounds that treating governmental display of works donated by private parties as government speech must be wrong because this would mean that each book placed in a public library would become government speech (*e.g., The Great Gatsby*). *See Summum v. Pleasant Grove City*, 499 F.3d at 1179. Here it suffices to say that the result Judge Tacha believes compelled by this Court's precedent is, in fact, directly contrary to the commonsense approach taken by this Court, which has reached its conclusions based on a realistic appraisal of the totality of the circumstances, something Judge Tacha acknowledges in her own opinion when referring to "a different line of cases recognizing the government's ability to make content-based judgments when it acts in particular roles (*e.g.*, educator, librarian, broadcaster, and patron of the arts)." *Id*. at 1179-80 & n. 2. The amici respectfully suggest that decision below is critically flawed precisely because it fails to engage in a realistic appraisal of the situation presented by the *government's* acceptance and *display* of works donated by private parties. As a result, it fails to acknowledge that the *government's* display of works donated by private parties simply represents another way in which *government speaks* rather than a way in which government demonstrates an intent to open a forum.

The predicaments faced by the City of Santa Fé, New Mexico, the City of Casper, Wyoming, and the City of Ogden, Utah, demonstrate the intolerable consequences that flow from the decision below. The people of Santa Fé, acting through their elected representatives, endeavor to celebrate their rich and diverse history by placing representative works of art in public places. Many of those works have been donated by private parties. As a result of the decision below, the city now faces the prospect of being forced to display works upon demand by anyone, regardless of whether elected officials believe that those works enrich the community.

The predicament faced by the City of Casper, Wyoming, is egregious. The city endeavors to promote civic virtue by directing attention to fundamental sources of our national heritage. Now it faces the very real prospect of being forced to display a monument condemning one of its inhabitants to Hell simply because in 1965, the city accepted a monument that has been incorporated into a display designed by the City to serve a legitimate civic purpose.

The City of Ogden, Utah, has already confronted the pernicious consequences of the Tenth Circuit's *Summum* decisions. Faced with the choice of opening its public spaces to permanent display by anyone, the city made what it regarded as the only acceptable choice under the circumstances. It removed the monument donated by the Eagles. But it believes this choice is unnecessary and undesirable.

These undesirable consequences are not required by this Supreme Court's decisions. Quite the contrary, they follow only from an ahistorical view of public fora and an unthinking extension of this Court's precedent. The decision below leaves this Court no choice but to make plain the limits that common sense places upon its prior decisions. The amici urge this Court to seize this opportunity before the consequences of the decision below begin to be suffered by their cities and others as well.

Early on in the development of this Court's forum case-law this Court rejected an "attempt to build a public forum with his own hands." *Perry*, 460 U.S. at 50 n. 9. The decision below represents a similar effort to "build a public forum" for *permanent* speech by *private* citizens based on nothing more than the *government's* display of works donated by private citizens in a traditional public forum. That result is an unwarranted and undesirable extension of this Supreme Court's decisions. For the reasons explained above, the amici respectfully submit that the decision below relies upon evidence and reasoning that is wholly insufficient to find an intent to create a forum for *permanent* speech by *private* citizens. For these reasons (as well as those advanced by the dissenters below and the Petitioners here), the amici respectfully request that this Supreme Court grant the petition for writ of certiorari and, in due course, reverse the decision below.

Respectfully submitted,

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