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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ABBREVIATIONS KEY

ADF Br.	Brief of Amici Curiae, Alliance Defense Fund and Family Research Council
Casper Br.	Brief Amicus Curiae of the Cities of Casper, Wyoming; et al.
FFE Br.	Brief of the Foundation for Free Expression as Amicus Curiae
IMLA Br.	Brief of Amicus Curiae International Municipal Lawyers Association
JA	Joint Appendix
JSPAN Br.	Brief Amici Curiae of The Jewish Social Policy Action Network, et al.
NLF Br.	Brief Amicus Curiae of the National Legal Foundation
Opp.	Brief in Opposition to Certiorari
Pet.	Petition for Writ of Certiorari
Pet. App.	Appendix to the Petition for Writ of Certiorari
Pet. Br.	Brief for Petitioners
Resp. Br.	Brief for Respondents

States Br.	Brief of the Commonwealth of Virginia, Thirteen Other States and Puerto Rico as Amici Curiae
U.S. Br.	Brief for the United States as Amicus Curiae

INTRODUCTION

Under established First Amendment principles, the errors in the Tenth Circuit's judgment are stark. Respondent Summum makes little effort to defend that decision. Instead, Summum tries to defend its requested preliminary injunction by resorting to novel theories that find support neither in the record, nor in logic, nor in this Court's decisions. Notably, Summum has conceded key points of Pleasant Grove's argument.

The basic question is whether a city gets to decide which permanent, unattended monuments, if any, to install on city property. The answer is "Yes."

> At 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). Governments can therefore design their own parks, including selecting and displaying monuments that best communicate the government's chosen message(s).

Summum has no persuasive argument in response. Indeed, Summum concedes that

- "the government is entitled to speak with its own voice," Resp. Br. at 31;

- when "the government controls the message being sent," the government "may convey its chosen message free from traditional First Amendment constraints," *id.*; and,
- "the government remains free to express its views in the form of an unattended display without allowing room for competing views," *id.* at 15.

Here, it is undisputed that Pleasant Grove City owns and exercises ultimate authority over each of the monuments and other objects on display in Pioneer Park. The city -- not private parties -- decides whether and where to place such objects, and indeed whether to keep or remove them. Pet. Br. at 4-5 & n.2; JA 50-51 (¶¶ 6-10) (city council controls monument placement; city has exclusive ownership of park; "specific permission and approval" of city's "governing council" given for erection of monument). None of this is surprising.

What *is* surprising is that Summum demanded, in a federal lawsuit, a First Amendment right to force the city to erect, on city property, Summum's preferred monument, the "Seven Aphorisms of Summum." JA 11-23, 57-60, 63-64. And what is even *more* surprising is that a panel of the Tenth Circuit embraced Summum's argument. Pet. App. A.

That is why this case is here, and that is why the Tenth Circuit's judgment must be reversed.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE[1]

1. To defend the mandatory preliminary injunction the Tenth Circuit ordered, Summum invokes, for the first time in this litigation, a theory that appears nowhere in the record and was never advanced below. Citing its own website, Summum describes its proposed monument as an "alternative version" of the Mosaic Ten Commandments. Resp. Br. at 53; *see id.* at 1-2. Summum thereby attempts a viewpoint discrimination claim. *Id.* at 12, 21. However, that claim is baseless. Summum cites no evidence that Summum ever explained to city officials what the Seven Aphorisms were, much less that they supposedly presented an alternative version of the Decalogue. Summum itself apparently did not even make this claim on its website until sometime between March and May of 2005, i.e., at least a year and a half *after* the city had rejected Summum's proposal. *See* http://web.archive.org/web/*/http://www.summum.us (compare results when clicking on "Mar. 03, 2005" and "May 26, 2005," each time then clicking on link for "Philosophy"). Not surprisingly, Summum failed to make this argument below and must therefore go outside the record (conveniently, to Summum's current website) to lay its factual predicate. Resp. Br. at 1-2.

Summum's new "alternative depiction" theory illustrates the importance of recognizing a government body's selection of its monument displays as *government* speech. If such displays remained the

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[1]The numbered sections herein correspond to the numbered sections in the Brief for Respondent to which they reply.

donor's private speech, government bodies would face potentially endless claims of "viewpoint discrimination." U.S. Br. at 19-20. Not only would a Ten Commandments display open a city to whatever "alternative" accounts a private party might offer, whether serious or parodic (*see, e.g.*, Mel Brooks's account, available at http://video.google.com [search for "Mel Brooks Ten Commandments"]), but countless other monuments would trigger potential liability for refusal to display "the other side." *See, e.g.*, States Br. at 8-9; Casper Br. at 15-16; ADF Br. at 8; Amer. Legion Br. at 8, 22-23; JSPAN Br. at 4; Liberty Counsel Br. at 14, 25.

2. Summum contends that several of the objects displayed in Pioneer Park do not, in its judgment, fit the historic theme of that park. Resp. Br. at 2-3. Summum quibbles about whether a "Gingko Tree and Plaque" honoring a former park official, a September 11 monument, a "wishing well," a Ten Commandments monument, or a "Rocky Mountain Maple Tree and Plaque" represent departures from the park's theme. *Id*. at 2-4 & n.2. But the city legitimately included these displays. *See, e.g.,* JA 144 (Ten Commandments reflective of motivation for Mormon pioneers' westward migration in search of religious freedom),[2] 174-75, 196 (September 11 monument placed "in conjunction with the placement of the first fire station that we had in town to remember the firemen particularly, and policemen, that were killed and lost their lives in the 9/11 attack"), 101, 176 (Gingko tree as thank-you to former parks director who served for more than 20

[2] *See also* NLF Br. at 12-14 (noting prominent role of Ten Commandments in Mormon pioneer history).

years), 117, 177 (placement of well next to log cabin designed to illustrate pioneer era). Summum's objections amount to no more than second-guessing a city's judgment regarding which permanent fixtures to install in a park. Such a debate is not a matter of constitutional law but rather of property management.

While city parks are not constitutionally required to have themes in the first place, here, as the name of the park indicates, the city clearly has chosen a theme for Pioneer Park.[3] Summum concedes that its proposed monument does not fit into that theme. Pet. Br. at 7 & n.3. Hence, the city properly rejected that monument.

3. Summum acknowledges that it sought city approval to erect its Seven Aphorisms monument "under the same conditions, rules, etc. under which the Eagles' [Ten Commandments] monument was and is permitted and maintained over the years," JA 58 (quoted at Resp. Br. at 4). Those "conditions" included:

- a donation of the monument, JA 97, i.e., unconditional surrender of all rights, title, and interest in the display, *see also* JA 158-59;[4]

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[3]Summum errs when it claims the city played "no role other than to permit placement" of such objects. Resp. Br. at 3. In fact, the city acquired both ownership and, more importantly, control over each such display, and the erection, location, and retention of each display is solely at the direction (and discretion) of the city. Pet. Br. at 5 & n.2. Moreover, the city retains continuing authority to remove the monuments or alter the inscriptions thereon. *Id.*; Pet. App. 14f; IMLA Br. at 21.

[4]*Accord* Amer. Legion Br. App. 1 (letter from Eagles' chief counsel) ("Since the 1950's, when these donations began, each time we have donated a plaque or monument we have surrendered any ownership or control interest we may have had in it. . . . In each case, the donee retained complete ownership and

- official acceptance of the monument, JA 103, 123;
- erection of the display "with the specific permission and approval" of the city, JA 51; and,
- thenceforth, city control over the placement and retention of the monument, JA 158-59.

These "conditions" all point to *government control* over the monument and its display, making such a display *government speech*. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (message "effectively controlled" by government is government speech). Thus, Summum's extraordinary request was tantamount to demanding insertion of the Seven Aphorisms monument into *the city's speech*. There is no such First Amendment right. "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001).

4. Summum erroneously states that, before the city adopted its *written* policy, Pet. App. 1h-4h, the city had *no* policy for displays and monuments. Resp. Br. at 5. This is flatly incorrect. The city had an *unwritten* policy that it had employed for decades. Pet. Br. at 3-4, 6-7; JA 61-62. The subsequent written policy basically codified the unwritten policy. Pet. Br. at 7. Moreover, it would be an odd rule that said a city has to have a detailed formal policy governing monument placement before it can decline unsolicited private offers to

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control of the plaque or monument upon acceptance and delivery. We have no legal claim to any of them").

donate unattended permanent displays. *See* IMLA Br. at 26 ("Many municipalities do not have a written policy, or an established practice, regarding the types of donated monuments they accept because this is neither a regular occurrence nor one the administration has invited"). Parks are not by default dumping grounds for private monuments.[5]

Summum claims to perceive ambiguity in the fine points of the city's internal policy governing monument acceptance and placement. Resp. Br. at 6-7. This is an irrelevant sidelight, for *Summum has already conceded that its proposed display does not meet the city's criteria*. Pet. Br. at 7 & n.3.[6]

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[5]Summum erroneously describes the city's Historical Commission as "a private party," Resp. Br. at 5. In fact, the city created the Historic Preservation Commission as a governmental commission in 1984 (Ord. 1984-11). Members are appointed by the mayor. Pleasant Grove Ord. 2002-5, adopted 2-5-2002, codified at § 2-2C-2. *See also id*. § 2-2C-3(C)(1) (duties of commission include "an advisory role to other officials and departments of government regarding the identification and protection of local historic and archaeological resources"). (Current Pleasant Grove City ordinances are available at http://66.113.195.234/UT/Pleasant%20Grove/index.htm.) The nature of the commission is by no means crucial, however, as government bodies are free to receive advice and recommendations from private entities (such as a bar association or the National Trust for Historic Preservation) as well as from government commissions.

[6]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. Resp. Br. at 30 & n.10. The city rebutted this argument previously. *See* Reply to Opp. at 4-5.

ARGUMENT

The Tenth Circuit has gone badly astray.

"It would be startling if the First Amendment were construed to compel the government to accept title to property it does not want, or to accept the permanent storage on its land of such a monument or other fixture." U.S. Br. at 14. Yet in its line of *Summum* cases[7] -- all four cases brought by the same party, respondent here -- the Tenth Circuit has embraced precisely that "startling" rule, holding that when a government body accepts and displays a monument donated by a private party, the First Amendment requires that government body, absent a compelling interest, to accept and display additional monuments (such as Summum's "Seven Aphorisms") on demand. As petitioners, the United States, numerous states, representatives of municipalities, and multiple other supporting amici before this Court agree, this decision should be reversed.

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. *Cf.* IMLA Br. at 11 ("monuments are a form of public art"). As *government*

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[7] *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), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665).

speech, this "editorial discretion" in park management does not trigger the First Amendment limits that apply to restrictions on *private* speech. Pet. Br. § I; U.S. Br. at 11-22; States Br. at 1-2.

Summum embraces an extreme position. Summum posits that the mere fact that a city park "contains other privately-donated unattended displays" prevents a city from denying, based on the identity of either the donor or the donation, any other private party's "request to donate a monument for display," Resp. Br. at i (Summum's rewrite of Question 1). Summum likewise maintains that "a privately-donated unattended display" in a city park remains private speech, not government speech, despite government ownership and control, whenever the monument was donated as a finished product ("a private party alone originally determines the message" on the monument) and "the government does not subsequently adopt the message" inscribed on the monument. *Id.* (Summum's rewrite of Question 2). Summum embraces a recipe for jurisprudential and practical chaos. *See also* Reply to Opp. at 2.

This Court should reverse the Tenth Circuit's decision.

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.

As explained previously, a city's decision regarding what objects permanently to install on government property reflects the *government's* decision what

message or messages to communicate thereby, and thus is *government* speech. Hence, private parties have no First Amendment right to barge in with their own message. Pet. Br. § I; *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833 (1995) (when government speaks, "it is entitled to say what it wishes").

Summum presses a battery of arguments in an effort to salvage its asserted First Amendment right to force its preferred monument upon the city. These arguments collapse under examination.

A. Summum's Proposed Constitutional Requirement, that Cities Must "Adopt" the Particular Inscriptions on Donated Monuments, Is Neither Sensible Nor Supported by this Court's Cases.

Summum first argues that when a private party donates a monument, a city does not in fact "control" the speech in question -- even though the city accepts, owns, controls, and selects that monument for display -- unless the city takes the additional step of specifically "adopting" any and all inscriptions on the monument. Resp. Br. § II(A).

This contention repeats the same "adoption" argument Summum made in opposition to certiorari, an argument the city has already debunked, *see* Reply to Opp. § I; Pet. Br. at 32-34. To summarize, Summum's argument for an "adoption of the inscription" requirement fails for the following reasons:

- A city may choose to display a monument *without adopting the particular writings*

engraved thereon, as in, for example, (1) a Holocaust display that quotes hateful language from Nazi leaders, not to endorse such language, but rather to hold it up for revilement and as a cautionary lesson, *see* U.S. Br. at 19; (2) a display that quotes positively contradictory messages, not to endorse them, but to show the diversity of public debate, *see, e.g.*, Rene Gutel, *Arizona's Sept. 11 Memorial Called Offensive*, All Things Considered (Dec. 19, 2006) (inscribed messages included "You don't win battles of terrorism with more battles" and "Must bomb back"); or, (3) a monument displayed for reasons having little or nothing to do with the particular content inscribed thereon (like the Rosetta Stone, or a sample page from the Dead Sea Scrolls).

- The *message* a monument conveys *can vary* depending upon the identity of the party displaying it. Thus, a sculptor or painter may wish to make a particular "statement" in a created work; a subsequent owner (be it governmental or private) may display the work to send an entirely different message, such as an aesthetic theme, a welcome to certain art forms, or merely a demonstration of sophisticated taste. Indeed, the "message" may transcend the particular objects on display. *See* FFE Br. at 14-15 ("The city need not adopt every word engraved on every monument as its own, but each item displayed contributes to the *overall message* concerning local pioneer history") (emphasis added). Summum's fixation upon the inscription wholly ignores the fact,

discussed above, that *the message* conveyed by a display *need not coincide with the inscription.* For example, in this case the "message" sent by displaying the Ten Commandments is *not* equal to the inscribed commands. The message of the original donors -- the Fraternal Order of Eagles -- was that the commandments provide a "useful" educational lesson for "young people to understand," JA 96-97. The city, in turn, upon acquiring control of the monument, displayed it to convey a *distinct* message, namely, "'to remind citizens of their pioneer heritage in the founding of the state,'" JA 97 (quoting mayor at unveiling ceremony). Given that "the message" of a monument display is neither fixed nor necessarily coextensive with the inscription, a city's "adoption of the inscription" would in very many cases be positively inaccurate and incompatible with the government's intended message.

- An "adoption of the inscription" requirement runs counter to this Court's jurisprudence. As this Court has recognized, government speech includes selecting and presenting messages that the government does not necessarily itself adopt, as with books in a library, items on display in a museum, speakers with contrary views in a lecture series, and so forth. *Arkansas Educational TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). *See* Pet. Br. at 27; FFE Br. at 11 ("Museums do not adopt the individual text engraved on every artifact. Public libraries do not endorse the words of every book"). In none of these cases does the First Amendment put

> the government to the Hobson's choice of either "adopt[ing] the message . . . as its own," Resp. Br. at 36, or else forfeiting the government speech label and thereby opening itself up to First Amendment liability whenever the government declines to include the work of other private authors, artists, teachers, or lecturers. *Johanns*, 544 U.S. at 562.

B. Summum Identifies No Special Concerns that Warrant an "Adoption of the Inscription" Requirement.

Summum insists that an "adopt the inscription" rule is nevertheless necessary. None of Summum's arguments are persuasive.

1. Finished products

Summum declares an "adoption" requirement to be essential where the item in question is donated "as a completed work." Resp. Br. at 35. But this factual detail does not distinguish a book donated to a library, a work of art donated to a museum, or -- for that matter -- the commonplace situation of a finished monument being donated to a park (*see* Pet. App. I). As already explained, Pet. Br. at 36-38, that a government accepts a finished product does not change the constitutional rules. *Accord* U.S. Br. at 8. Just as a "public library does not . . . collect[] books in order to provide a public forum for the authors of books to speak," *United States v. American Library Ass'n*, 539 U.S. 194, 206 (2003) (plurality), likewise a government-run museum or park does not select items

for display to provide a forum for private speakers.

Summum protests that "what the government controls is only whether that privately-formulated message will be displayed." Resp. Br. at 36. But the government's control of the decision to display its own objects demonstrates precisely that it is the government that is speaking, regardless of whether that object bears a "privately-formulated message" (understanding, as discussed above, that the relevant "message" of the display may change when the display shifts to government hands). Deciding whether to display any given privately-formulated message is exactly what libraries, public television stations, and museums do. *Forbes*, 523 U.S. at 674. Whether the item displayed left private hands as a finished product or as something less complete is irrelevant. *Cf. National Endowment for the Arts v. Finley*, 524 U.S. 569, 611 (1998) (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").

If Summum were correct that the donor's complete surrender of control over an object did not convert the speech to government speech, then the First Amendment would limit not just which donations a city could refuse, but also which already-installed donated monuments a city could remove or relocate. Such a rule would generate no end of mischief.

2. Supposed threat to free speech

Summum opines that recognition of government speech here would sound the death knell for free speech. Resp. Br. at 37. Not so. The ability of a

government body to select private speakers for government panels, or to select privately crafted works for government schools, libraries, and museums, has happily coexisted with free speech for time out of mind. Merely recognizing what has always been the case -- that government managers of park property can decide what unattended, permanent items to install in a park -- cannot suddenly trigger the demise of the First Amendment.

Summum fears that "[a] school could . . . 'select' secular speakers for preferential access to its facilities and exclude religious speech," *id.* But Summum ignores the crucial difference between government owning and controlling speech for its own communicative purposes, as here, and, government facilitating diverse private messages, as in equal access cases. In the typical equal access case, *e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), the private speaker does not surrender control of the message to the school board, but instead avails itself of a forum the government has opened to private users. Here, by contrast, monument donors surrender all control over the monument to the city.

To be sure, a government cannot, Midas-like, magically transform private speech into government speech simply by "selecting" it for approval. But this case -- where a *government* body selects objects for *government* ownership, *government* control, and *government* display on *government* property -- does not even come close to raising such a spectre.

Summum insists that, because Pioneer Park is a traditional public forum, different rules should apply. Resp. Br. at 47-48. But this does not follow. The

rationale for government speech depends not upon the location of the speech, but upon government *control* of its own communication.

Summum professes alarm at the possibility that, under the government speech doctrine, a city could prefer certain speakers or viewpoints even in a public forum. *Id.* at 37. While Summum argumentatively describes this as government control of "access" to a forum, this is in fact merely a description of a government-organized, government-sponsored event. That a government program (e.g., a city museum's traveling sculpture exhibit) is held in a public park does not make it any less of a *government* program.

3. Role of ownership and permanence in analysis

Summum tilts at a straw man when it argues that the key is not government "ownership" or the "permanence" of a display, but rather government "control." *Id.* at 39-45. The city agrees with this proposition (though not with Summum's distorted application of it).[8] Ownership is not a prerequisite. The government speech doctrine equally shelters, for example, a museum's freedom to select what works to display regardless of whether the government owns the objects or merely hosts a private exhibit on loan. *See also* U.S. Br. at 14 n.5. Nor is permanence a

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[8] *See, e.g.*, Pet. Br. at 32 (citing example of permanent, government-owned display which nonetheless was a forum for private speech because the government deliberately opened such a forum, *viz.*, for purchase of private messages on blank memorial bricks). *See generally* Becket Fund Br.

prerequisite, as the museum analogy also illustrates (i.e., rotating the museum's displays does not generate a First Amendment right to horn in).

Nevertheless, ownership and permanence are indicia of government control and thus of government speech. Something the government owns, or leaves standing indefinitely in a public park, or (as here) both, is presumptively a government display. "[A]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., joined by O'Connor & Breyer, JJ., concurring in part and concurring in judgment). *Accord id.* at 785 (reasonable "to presume that an unattended display on government land . . . represents government speech"); *id.* at 804 (Stevens, J., dissenting) ("structures on government property . . . imply state approval of their message").

4. Government as editor

The city previously noted the well-established power of government to speak as "editor," i.e., by selecting or compiling its own speech by drawing from various preexisting expressive items. Examples of such "speech selection," IMLA Br. at 11, include assembling a library's inventory, selecting programming for public television, culling works for display in a museum, and -- as here -- choosing items for display on government properties. *See* Pet. Br. at 24-29; *Forbes*, 523 U.S. at 674.

Summum takes strong issue with this argument, contending that government cannot "edit" *private*

speech, especially in a public forum. Resp. Br. at 45-49. But calling the relevant speech "private" begs the very question at issue. True, a government cannot "edit" the content of the private speech of a private speaker. For example, in *Pinette*, the government could not constitutionally have modified the cross, menorah, or United Way thermometer displays that private parties had erected on the plaza there. Here, by contrast, the city owns and completely controls the items the city erects in Pioneer Park. Certainly, a government can edit *its own* speech, including when that speech is assembled by selecting materials from private sources. Thus, while a government cannot "edit" the messages on picketers' signs, it can most certainly edit which signs it chooses to include in a museum exhibit or a visitors center film. Pet. Br. at 26-29.

Summum concedes that a government may (indeed, must) exercise editorial discretion when it "performs a function that traditionally and by its very nature requires the exercise of discretion and selectivity." Resp. Br. at 14. Deciding what items fit with the city's chosen historic theme for Pioneer Park, like other municipal decisions regarding how to design a public space -- or, for that matter, like deciding what curriculum to use,[9] what books to stock, or what lecturers to invite to a series -- entails precisely such

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[9] *Cf. Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005) (court invoked government speech doctrine to reject viewpoint discrimination claim, under First Amendment, where state board of education had approved various privately published texts for inclusion in public school curriculum but declined to approve plaintiff's science textbook: "when the [state board] . . . selects the textbook with which teachers will teach . . . it is the state speaking, and not the textbook author").

inevitable selectivity. The alternative -- chaos and clutter in government programs and properties -- is not a command of the First Amendment.

5. Quibbling with city's application of its criteria

Summum attacks the government speech doctrine in this case by denying the city's exercise of judgment. Summum says the city was too "passive[]" when it accepted prior displays. Resp. Br. at 51. But this assertion is inaccurate, *supra* note 3, and indeed contradicts Summum's factual stipulations, JA 50-51 (admitting city's "administrative power" over "displays on government property"). Moreover, unless the selection of *any* privately donated monument triggers an obligation to accept and display *all* -- which is apparently Summum's position -- there will always be a "first" rejection. Contrary to Summum's hermeneutic of distrust, Resp. Br. at 50, 52-53, being the first proposal turned down does not imply "distaste" for the speaker, *id*. at 53. *See also supra* p. 3 (no viewpoint bias here). This is especially so in this case, where Summum has conceded that it "does not factually meet" the pertinent threshold criteria for government selection of its proposed monument. Pltf's Stipulation of Fact (Doc. 152) at 2; *see* Pet. Br. at 7 & n.3.

6. Joint speech

Summum raises the conceptual possibility of joint private/government speech. Resp. Br. at 44-45. Certainly such a category can exist, as when an event (say, an anti-child abuse symposium) is cosponsored by

governmental and private entities. But even in cases of joint speech, the government retains control over *its* role in the event. Joint government sponsorship of a "No Smoking" event with a private entity does not give pro-smoking speakers a First Amendment right onto the dais; nor does it compel the government to jointly sponsor a competing event with the tobacco industry. In any event, here there is no cosponsorship or joint expression: the donors of the various displays surrendered control over those objects to the city (as when an art collector surrenders a work to a museum or a publisher surrenders a book to a library).

7. Political accountability

Summum contends that treating government-owned, government-displayed monuments as government speech "would allow the government to speak without the democratic accountability that justifies the government speech doctrine." *Id.* at 13. 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). Here, "the city council always had the final say," JA 180, regarding monument display and placement. City council members were and are politically accountable for their votes on this, as on other matters.

Indeed, political accountability is actually *enhanced* in this context. "Unlike line items in a complex budget, monuments cannot be hidden from public view. There is no need for a 'sunshine law' to

expose monuments to political commentary." IMLA Br. at 17. *See also* JA 103, 123 (public unveiling ceremony and official acceptance letter for monument).

Summum presents no reason not to conclude that a city's decision how to design its own public spaces is exclusively a government prerogative which, to the extent speech is involved, represents government speech. No private party can insist, as a matter of First Amendment law, upon inclusion in the government's message.

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

As explained earlier, the city's selection of monuments to place in Pioneer Park represents no more than government management of its own property to communicate its own message. Any constitutionally relevant speech involved is the government's speech. Hence, no "forum analysis" is necessary. Pet. Br. at 49.

Importantly, the city has in no way restricted Summum's speech. *Accord Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (ban on affixing unattended fliers "does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place"). Summum adherents can leaflet, picket, and orate to the same extent as any other person using the grounds of Pioneer Park. *See also* IMLA Br. at 4. In fact, "government speech symbolized by monuments

actually provides a focal point for large-scale private speech, such as anti-war protests." *Id.* at 5.

Summum can erect the monuments of its choosing on its own property, just as the city erects the monuments of its choosing on its own property. But Summum can no more legally compel the city to erect Summum's monument on city property, than the city could compel Summum to erect any given monument on Summum's property.

The city carefully explained how none of this Court's forum categories would support Summum's asserted right to impose its monument upon the city. Pet. Br. § II. Summum has not responded to this category-by-category analysis, and thus has conceded that, at least absent viewpoint discrimination (which Summum has *not* shown, *supra* p. 3, and which was *not* the basis for the Tenth Circuit's decision), Summum's claim fails under the analysis governing designated public fora, nonpublic fora, and (as here) contexts where there is no speech forum at all.

A. The Park Is Not a Traditional Public Forum for Private, Unattended, Permanent Monuments.

Summum does, however, press its claim under the rubric of free speech in "traditional public fora." Resp. Br. § I. This is curious, as Summum concedes that, "despite Pioneer Park's status as a traditional public forum," the city "could limit unattended displays to government displays," *id.* at 19. That, of course, is precisely what Pleasant Grove has done. The city owns and controls all of the monuments and other objects on display in Pioneer Park. Pet. Br. at 5. Any private item

left unattended in the park would essentially be litter subject to removal. *See* Pleasant Grove Ord. 97-7, adopted 4-15-1997, codified at § 7-2-11 (prohibiting littering in public places).

Summum concedes that a total ban on unattended private displays would represent a constitutionally permissible "manner" restriction on speech even in a traditional public forum. Resp. Br. at 18-19. Since that is all that is at issue here, Summum's First Amendment claim must fail.

The *Pinette* case, which Summum invokes, provides an illustrative counterpoint. In *Pinette*, the government *did*, by policy and practice, open its property to private, unattended, temporary displays. 515 U.S. at 757-58. Here, by contrast, private parties do not have permission to erect monuments on city park grounds. *Cf.* JA 51, 97, 103 (monument only placed after donation to city and with "specific permission and approval" of city council). These facts are not disputed, and they foreclose Summum's claim.

To the extent *Pinette* is relevant, the opinions therein militate in favor of the city, not Summum. The Court made clear that a ban (as here) on all unattended private displays would be constitutional. 515 U.S. at 761 (majority), 783 (concurrence of Justices Souter, O'Connor, & Breyer), 802-04 (dissent). "The fact that [government property] has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays, such as statues, does not disable the State from closing the square to all privately owned, unattended structures." *Id.* at 783-84 (Souter, J., concurring in part and concurring in judgment).

Notably, the concurrence of Justice O'Connor in *Pinette* flagged the important "distinction between speech the government *supports* and speech that it merely *allows* in a place that traditionally has been open to a range of private speakers," *id.* at 782 (O'Connor, J., joined by Souter & Breyer, JJ., concurring in part and concurring in judgment) (emphasis added). Here, the city exclusively erects monuments that it not just "supports," but actually owns and controls. The city does not "allow" a range of -- or even any -- private speakers to put up their own monuments.

The State's allowance of privately erected, privately controlled, unattended displays in *Pinette* thus represented a departure, *on the facts*, from the normal case, not a holding, *on the law*, that all parks are traditional public fora for unattended private displays. Indeed, such a holding would have been flatly inconsistent with the stated approval, by a majority (and arguably by all) of the Justices, of a total ban on such private displays. *See also* IMLA Br. at 3 (recognition of a "public forum for monuments" would be harmful because "[p]ublic forum analysis leaves cities with nothing but the crowd control tools suitable for public assemblies").

Speech in a traditional public forum has always been understood to be transitory speech, i.e., cases where "individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene." *Taxpayers for Vincent*, 466 U.S. at 809. *See also* Pet. Br. at 43. It has never been understood to mean permanent private speech, just as it has never

been understood to mean vandalism, for example, spray painting one's views on government property, even if that property is a city park. No one can seriously suggest that a practice of private citizens affixing two-ton concrete memorials or statues to public park grounds is an activity that is traditionally associated with such public spaces.

B. Summum Has Not Shown a Cognizable Case of Viewpoint Discrimination.

Undaunted, Summum charges the city with viewpoint bias in declining to accept and display a Seven Aphorisms monument. That argument is wrong on both the facts and the law. On the facts, Summum has failed to carry its burden of showing viewpoint discrimination. *Supra* p. 3. Here, the city denied Summum's request because that request -- concededly, Pet. Br. at 7 & n.3 -- did not meet the city's threshold eligibility criteria. And on the law, "viewpoint bias" is not a cognizable basis for challenging a government's formulation of its own message, *Johanns*, 544 U.S. at 553 ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"). Anytime a government body adopts a policy position, it necessarily rejects contrary views. That is not "viewpoint discrimination" under the First Amendment; it is "policy selection" as part of representative democracy. *See generally* James Madison Center Br. at 8-13 (providing examples in which government speech is derived from policy choice to accept private proposals); *id.* at 10 ("If private participation automatically converts government speech into a forum that requires viewpoint neutrality,

the government's ability to advance or support certain public policy goals would be severely undermined"). Those who object to such political judgments have recourse to the ballot box, not the federal courthouse.

Summum protests that a government's selection of one group's proposed monument for display, and not another's, would, for example, "privilege a private viewpoint about September 11th over Summum's views," Resp. Br. 25. The short answer is that a city can choose, for example, to accept and display a 9/11 memorial and not an Al-Qaeda monument praising the terrorists. A city can likewise decline a Seven Aphorisms monument, or any other of an infinite list of possible memorials, good and bad. "[A]ny choice of which version of history to commemorate in permanent monuments necessarily includes viewpoint." IMLA Br. at 4. Or rather, each such decision represents a government policy choice about the message the government wishes to communicate. The First Amendment does not compel a government that takes ownership of one private party's point of view to embrace all others as well. Otherwise a government that chose to honor fallen soldiers would also have to erect donated monuments criticizing those soldiers, and a city that chose to memorialize the Compton's Cafeteria riots[10] would also have to accept and display Rev. Fred Phelps's monument declaring that Matthew Shepard's soul "[e]ntered Hell."[11] Short of Establish-

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[10]*See* Lisa Leff, *As gay pride hits stride, transgendered find more acceptance*, USA Today (June 24, 2006) (plaque installed to commemorate 1966 transgender riot against police).

[11]John Morgan, *Phelps wants anti-gay monument*, Casper Star-Tribune (July 17, 2007); Casper Br. at 2-3 (quoting proposed

ment Clause constraints, which are not at issue here,[12] such government policy choices, regarding what message the government wishes to send, are not the stuff of First Amendment violations.

C. The Access Summum Seeks Is to the City's Monument Selection Process, Which Is Not a Forum for Free Speech.

The city has explained, Pet. Br. at 41-42, that under this Court's precedents, *see Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985), the pertinent forum (if any) would be the city's monument selection process, and not the mere physical property on which the monuments in Pioneer Park ultimately sit. *See also Taxpayers for Vincent*, 466 U.S. at 814 (relevant forum is utility poles, not streets and sidewalks on which they sit).

Summum disagrees, contending that the pertinent forum is the park itself, not the city's monument placement program to which Summum seeks forced access. Resp. Br. at 26-30.

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inscription).

[12]Summum attempts to smuggle an Establishment Clause issue in through the back door in this case. Resp. Br. at 12, 20, 34 n.11, 53. This is at best a distraction. Summum did *not* bring a federal Establishment Clause claim in this case. *See* JA 18-20. This was clearly a conscious, strategic choice. *See* Pet. Br. at 7-8 & n.4 (noting that Summum's trial counsel brought, and then dismissed, an Establishment Clause claim against Pleasant Grove in a separate lawsuit). Summum's argument for a preliminary injunction, both in the district court and on appeal, rested exclusively upon its asserted federal free speech rights, which are all that is before this Court.

Summum's attempt to explain away *Cornelius* is unavailing. Summum cites *Pinette*, but that case is inapposite: private speakers undisputedly had access to the plaza to deposit displays, so the plaza was the only possible forum. Moreover, in neither *Pinette,* nor in the other cases Summum cites, did private speakers seek to have *the government* acquire control of and display the speech. Summum's request is therefore unique.

Ultimately, this debate over the identity of the forum (if any) is academic. Whether the city has properly asserted exclusive authority over its own park management program, as petitioners argue, or has imposed a legitimate "manner" restriction by banning private unattended displays in a public park, using Summum's preferred analysis, the result is the same: Summum has no First Amendment right to impose its monument upon the city park.

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

The city has already explained why the Tenth Circuit's ruling in this case would create -- indeed, has already begun to create -- a practical nightmare for government management of its public spaces. Pet. Br. § III; *see also* Casper Br. at 1-3, 19-23. Summum's only real "answer" is that a city, to escape this nightmare, must formally "adopt" any inscription on any donated monument. As discussed *supra* § I(A), this "option" is neither constitutionally required nor sensible. Moreover, the process whereby the city in this case acquired and decided to display various items on its

park property is by no means atypical. IMLA Br. at 15-16.

In fact, a comparison between Pleasant Grove's acceptance and placement of the Ten Commandments monument donated by the Eagles, and the 1877 Congressional Resolution (Appendix A) accepting the Statue of Liberty, reveals striking similarities as to the manner of acceptance, placement, and purpose of these monuments.

Just as the President of the United States was "authorized and directed to accept" the Statue of Liberty, the monument donated by the Eagles was erected "with the specific permission and approval of Pleasant Grove and its governing council," JA 51, and was "accepted by Mayor Jack Cook and Utah County Commissioner[] Stanley Roberts," JA 103.

Just as Congress directed the President "to designate and set apart for the erection" of the Statue of Liberty "a suitable site upon either Governors or Bedloes Island, in the harbor of New York," the Mayor of Pleasant Grove directed "that a letter be written 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," JA 123.

Just as the "citizens of the French Republic" were to "erect[] at their own cost a colossal bronze statue of 'Liberty enlightening the world,'" the Fraternal Order of Eagles "paid for the creation and installation of [the Ten Commandments] monolith," JA 51.

Just as the completion of the Statue of Liberty was "to be inaugurated with such ceremonies as will serve to testify the gratitude of our people for this expressive and felicitous memorial of the sympathy of the citizens

of our sister Republic," the "unveiling ceremony" of the Ten Commandments monument "took place in connection with the Fraternal Order of Eagles sixty-first convention," where "Mayor Cook said he thought the monument 'would serve to remind the citizens of their pioneer heritage in the founding of the state,'" JA 103.

If Pleasant Grove did not go far enough in demonstrating "government speech" in accepting and placing the Ten Commandments monument in 1971, neither did Congress in accepting the Statue of Liberty in 1877. And if the Statue of Liberty remains private speech, despite government acceptance, placement, and purpose -- the same government acceptance, placement, and purpose found in Pleasant Grove -- then Congress should be prepared to make room for a Statue of Tyranny.

CONCLUSION

This Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

J. Res. 6, 44th Cong. (2d Sess. 1877) ("Joint resolution authorizing the President to designate and set apart a site for the colossal statue of 'Liberty enlightening the world' and to provide for the permanent maintenance and preservation thereof"):

> Whereas, the President has communicated to Congress the information that citizens of the French Republic propose to commemorate the one hundredth anniversary of our independence by erecting at their own cost a colossal bronze statue of "Liberty enlightening the world" upon a pedestal of suitable proportions to be built by private subscription upon one of the islands belonging to the United States in the harbor of New York, and
>
> Whereas it is proper to provide for the care and preservation of this grand monument of art and of the abiding friendship of our ancient ally: Therefore,
>
> *Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be and he is hereby authorized and directed to accept the colossal statue of "Liberty enlightening the world" when presented by citizens of the French Republic, and to designate and set apart for the erection thereof, a suitable site upon either Governors or Bedloes Island, in the harbor of New York; and upon the completion

thereof shall cause the same to be inaugurated with such ceremonies as will serve to testify the gratitude of our people for this expressive and felicitous memorial of the sympathy of the citizens of our sister Republic; and he is hereby authorized to cause suitable regulations to be made for its future maintenance as a beacon, and for the permanent care and preservation thereof as a monument of art, and of the continued good will of the great nation, which aided us in our struggle for freedom.

Approved March 3, 1877.