No. _____

IN THE

Supreme Court of the United States

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

v.

SUMMUM, a corporate sole and church,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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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
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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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

This Court should grant review.

DECISIONS BELOW

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

JURISDICTION

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

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

CONSTITUTIONAL PROVISIONS AND POLICY

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

STATEMENT OF THE CASE

1. Jurisdiction in District Court

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

2. Facts Material to Consideration of the Questions

a. Pioneer Park

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

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

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

b. Summum's Proposed Monument

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

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

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

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

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

3. Course of Proceedings

a. District Court

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

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

amendment").

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

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

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

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

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

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

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

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

b. Tenth Circuit Panel

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

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

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

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

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

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

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

donated by the Fraternal Order of Eagles and placed by the city on public property as the private speech of the Eagles rather than that of the city." App. 3a n.2. Hence, the panel treated this as a case about private speech in a forum, not government speech. *Id.*

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

c. Tenth Circuit En Banc Petition and Denial

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

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

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

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

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

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

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

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

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

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

> of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests. . . . This means that Central Park in New York, which contains the privately donated Alice in Wonderland statu[]e, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

App. 10f.

> A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

App. 11f.

Judge McConnell explained that the traditional public forum status of a park does **not** mean that "city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." App. 11f. Noting that the city did not "invite private citizens to erect monuments of their own choosing in these parks," Judge McConnell reasoned that "[i]t follows that any messages conveyed

by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expression." App. 11f-12f. Indeed, because the city "owned" and "exercised total 'control' over the monuments," Judge McConnell explained, the city "could have removed them, destroyed them, modified them, remade them, or . . . sold them at any time." App. 14f.

"Once we recognize that the monuments constitute government speech," Judge McConnell continued, "it becomes clear that the panel's forum analysis is misguided." App.15f. "The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as . . . the Establishment Clause," Judge McConnell observed. *Id.* "[J]ust because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing." App. 16f.

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

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

> The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

Id.

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

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

d. Tenth Circuit Mandate Stayed

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

REASONS FOR GRANTING THE WRIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1049 (emphasis added).

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

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

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

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

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

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

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

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

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

"[t]here is no private constitutional right to erect a permanent structure on public property"); *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) (discussing governing law in addressing display of large inflatable display by union: "Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved").

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

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

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

A. Nature of Forum

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

which Summum seeks access") (emphasis added). That rationale is wholly incompatible with this Court's precedents.

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

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

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

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

B. Identity of Speaker

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

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

certain expressive works); *cf. Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality) ("[N]othing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools") (emphasis omitted); *id.* at 889 (Burger, C.J., joined by Powell, Rehnquist, & O'Connor, JJ., dissenting) (schools "ought not to be made the slavish courier of the material of third parties").

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

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

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

The string of *Summum* cases themselves, *see supra* pp. 18-19, illustrates that the threat of equal-access-

for-private-monuments litigation is very real. Nor is this phenomenon exclusive to Summum. Already the notorious Rev. Fred Phelps has sought the erection of anti-homosexual monuments under the same theory. *See* Associated Press, *Minister: City must allow anti-gay monument in park* (Oct. 16, 2003) (www.first amendmentcenter.org/news.aspx?id=12082) (Phelps pressed Casper, Wyoming to accept and display anti-Matthew Shepard monument, relying upon Tenth Circuit's *Summum* decisions); John Morgan, *City dedicates historic plaza*, Jackson Hole Star Tribune (July 16, 2007) (www.jacksonholestartrib.com/articles/2007/07/16/news/casper4e32f677cbf04e3587253190020f943.txt) (noting Ten Commandments monument in Casper was removed in November 2003 after Phelps's demand but has returned as part of a "new historic monument plaza"); John Morgan, *Phelps wants anti-gay monument*, Casper Star Tribune (July 17, 2007) (www.casperstartribune.net/articles/2007/07/17news/casper/88d8fdf4b4e017548725731b00006a13.txt) (Phelps has renewed his push for anti-Shepard monument) (The proposed Casper monument appears at www.godhatesfags.com/main/shepard_monument.html.)

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

ID=s1452867) (Phelps proposal of anti-Shepard monument in Boise).

As the dissenters lamented below, the "panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them." App. 9f (Lucero, J., dissenting). *Accord* App. 10f (McConnell, J., dissenting) ("Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter").

CONCLUSION

This Court should grant review.

Respectfully submitted,

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November 20, 2007

APPENDIX A

No. 06-4057

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant,
v.
PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator, Defendants-Appellees.

April 17, 2007, Filed

Before TACHA, Chief Circuit Judge, EBEL, Circuit Judge, and KANE,* District Judge.

* Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

TACHA, Chief Circuit Judge.

The Plaintiff-Appellant Summum, a religious organization, filed suit under 42 U.S.C. § 1983 for violation of its First Amendment rights against the Defendants-Appellees, the City of Pleasant Grove, its

mayor, city administrator, and city council members. Summum appeals the District Court's denial of its request for a preliminary injunction. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and reverse the District Court's decision.

BACKGROUND

A city park in Pleasant Grove, Utah, contains a number of buildings, artifacts, and permanent displays, many of which relate to or commemorate Pleasant Grove's pioneer history. For example, the park contains one of Pleasant Grove's first granaries, its first city hall, and its first fire department building. For purposes of this appeal, the most important structure is a Ten Commandments monument, donated by the Fraternal Order of Eagles in 1971, two years after it established a local chapter in Pleasant Grove.

In September 2003, Summum, a religious organization with headquarters in Salt Lake City, Utah, sent the mayor of Pleasant Grove a letter requesting permission to erect a monument containing the Seven Aphorisms of Summum in the city park. In its letter, Summum stated that its monument would be similar in size and nature to the Ten Commandments monument already present in the park. Approximately two months after Summum made its request, the mayor sent Summum written notification that the city had denied its request because the proposed monument did not meet the city's criteria for permanent displays in the park. According to the letter, all permanent displays in this particular park must "directly relate to the history of Pleasant Grove"

or be "donated by groups with long-standing ties to the Pleasant Grove community."[1] The following year, in August 2004, the city passed a resolution codifying and expanding upon its alleged policy for evaluating requests for permanent displays in the park. The resolution contains a number of factors the city council must consider in deciding whether a proposed display meets a historical relevance requirement. In May 2005, Summum renewed its request, sending the mayor another letter with substantially the same language as the first letter.

When the city did not respond to its second request, Summum filed suit in federal district court seeking declaratory and injunctive relief, as well as monetary damages, for Pleasant Grove's violation of Summum's free speech rights under the U.S. Constitution and for the city's violation of the Utah Constitution's free expression and establishment provisions. Summum contends that the city violated its rights by excluding its monument while allowing other permanent monuments of an expressive nature (e.g., the Ten Commandments) to be displayed in the park.[2]

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[1]Although Summum claims it did not receive this letter, the organization's president acknowledged that he had read the notice of the city's denial in the newspaper. (Applt. App. at 59)

[2]The Ten Commandments monument clearly constitutes protected speech. *Summum v. Callaghan,* 130 F.3d 906, 913-14 (10th Cir. 1997) ("[P]rivate religious speech . . . is as fully protected under the Free Speech Clause as secular private expression." (quotations omitted)). In addition, 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. *See Summum v. City of Ogden,* 297 F.3d 995, 1006 (10th

In an oral ruling on various motions, the District Court denied Summum's request for a preliminary injunction requiring the city to permit the display of Summum's monument in the park. Summum subsequently appealed this decision, arguing that the District Court abused its discretion in denying the injunction based on Summum's First Amendment claim.[3]

DISCUSSION

I. Preliminary Injunction Standard

We review a district court's decision to deny a motion for a preliminary injunction for abuse of discretion, which we have characterized as "an

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Cir. 2002); *Callaghan,* 130 F.3d at 913. Pleasant Grove argues that the Supreme Court's recent decision in *Van Orden v. Perry,* 545 U.S. 677 (2005), requires this Court to treat the Ten Commandments monument as governmental speech. In *Van Orden*, the Supreme Court held that the Establishment Clause was not violated by the display of a similar Ten Commandments monument on the Texas State Capitol grounds. Pleasant Grove contends that the Supreme Court would not have applied an Establishment Clause analysis in *Van Orden* unless the Court considered the Ten Commandments monument to be governmental speech. But this argument is without merit because the Establishment Clause prohibits governmental endorsement of religion, which can occur in the absence of direct governmental speech. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in judgment).

[3]Summum does not argue on appeal that it is entitled to a preliminary injunction based on its claims under the Utah Constitution and has therefore waived this issue. *State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979, 984 n.7 (10th Cir. 1994).

arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Schrier v. Univ. of Colorado,* 427 F.3d 1253, 1258 (10th Cir. 2005) (quotations omitted). "A district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings." *Wyandotte Nation v. Sebelius,* 443 F.3d 1247, 1252 (10th Cir. 2006). In reviewing the district court's decision, "[w]e examine the . . . court's underlying factual findings for clear error, and its legal determinations *de novo*." *Davis v. Mineta,* 302 F.3d 1104, 1111 (10th Cir. 2002).

To prevail on a motion for a preliminary injunction in the district court, a moving party must establish that:

> (1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Schrier, 427 F.3d at 1258 (quotations omitted) (alterations in original). But because a preliminary injunction is an extraordinary remedy and is intended "merely to preserve the relative positions of the parties until a trial on the merits can be held," we have held that the moving party must meet a heightened standard when requesting one of three types of historically disfavored injunctions. *Id.* at 1258-59 (quotations omitted).

The three types of disfavored injunctions are "(1) preliminary injunctions that alter the status quo; (2)

mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft,* 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded*, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418 (2006). When a preliminary injunction falls into one of these categories, it "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* A district court may not grant a preliminary injunction unless the moving party "make[s] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id.* at 976.

In this case, the preliminary injunction clearly falls within two categories of disfavored injunctions: it alters the status quo and is mandatory. An injunction alters the status quo when it changes the "last peaceable uncontested status existing between the parties before the dispute developed." *Schrier,* 427 F.3d at 1260 (quotations omitted). The last uncontested status between Summum and Pleasant Grove was one of no relationship between the two parties. Because Summum's monument is not currently displayed in a Pleasant Grove city park, an injunction ordering Pleasant Grove to permit the display of Summum's monument clearly changes the status quo. In addition, by requiring the city to make arrangements for the display of Summum's monument, an injunction would mandate that the city act and would require the district court to supervise the city's actions to ensure it abides by the injunction. Because an injunction would

"affirmatively require" Pleasant Grove "to act in a particular way" and would require ongoing court supervision, it is a mandatory injunction. *See id.* at 1261 (quotations and alterations omitted). Because the injunction falls into two disfavored categories, Summum must have made "a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms" to prevail on its motion at the district court level. *O Centro,* 389 F.3d at 976.

Based on the record, we cannot discern whether the District Court applied this heightened standard. In its oral ruling, the court simply noted that it denied Summum's motion because it failed to establish a substantial likelihood of success on the merits. The court did not analyze the other three factors or explicitly state that it applied a heightened standard to Summum's request. But even if the District Court concluded that Summum could not prevail using the lesser standard, it certainly would reach the same conclusion under the heightened standard. Although the "failure of the district court to apply the correct standard" to a request for a preliminary injunction "amounts to an abuse of discretion," *id.* at 982 n.5, any abuse in this case was in Summum's favor. We therefore assume that the District Court applied the heightened standard and review the court's legal conclusions and findings of fact for abuse of discretion.

II. Preliminary Injunction Analysis

In its oral ruling on Summum's motion for a preliminary injunction, the District Court indicated that Summum would not prevail on the merits if

Pleasant Grove proved it had a well-established policy for evaluating proposed monuments that was reasonable and viewpoint neutral. After finding that the facts regarding the city's policy (or lack thereof) were in dispute, the court concluded that Summum had not established a substantial likelihood of success on the merits. It therefore denied Summum's motion without addressing the other three factors required for issuance of a preliminary injunction.

As we explain below, the District Court abused its discretion by analyzing Summum's First Amendment claim under the incorrect legal standard. But rather than remanding to the District Court for the appropriate analysis, we find the record sufficiently developed to allow us to determine whether Summum has met its burden under the four factors necessary to prevail on its motion. *See Schrier,* 427 F.3d at 1261 (evaluating a request for an injunction on the merits when the district court applied the wrong legal standard); *Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1075-76 (10th Cir. 2001) (evaluating a request for an injunction on the merits when district court incorrectly applied legal test for restrictions on commercial speech).

A. Substantial Likelihood of Success on the Merits

1. Identifying the nature of the relevant forum

To determine the appropriate First Amendment standard under which to review the city's denial of Summum's request, the reviewing court must engage in a "forum analysis." The characterization of the forum at issue is crucial because "the extent to which

the Government can control access depends on the nature of the relevant forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 800 (1985). In identifying the relevant forum, the court looks at both "(1) the government property to which access is sought and (2) the type of access sought." *Summum v. City of Ogden,* 297 F.3d 995, 1001 (10th Cir. 2002). In this case, Summum seeks to display its monument among other monuments in Pleasant Grove's city park. The permanent monuments in the city park therefore make up the relevant forum. *See id.* at 1002 (identifying the relevant forum as "permanent monuments on the lawn of the . . . municipal building").

Having identified the relevant forum, the reviewing court must also determine whether the forum is public or nonpublic in nature. In general, the forum will fall into one of three categories:

> (1) a traditional public forum (e.g., parks and streets), (2) a designated public forum (i.e., the government voluntarily transforms a nonpublic forum into a traditional public forum, thereby bestowing all the free speech rights associated with the traditional public forum, albeit on a potentially temporary basis, onto that now 'designated public forum'), or (3) a nonpublic forum (i.e., the government retains the right to curtail speech so long as those curtailments are viewpoint neutral and reasonable for the maintenance of the forum's particular official uses).

Id. In the case before us, the District Court indicated that the applicable analysis is whether Pleasant

Grove's policy is reasonable and viewpoint neutral. The court therefore analyzed the city's actions using the standard associated with a nonpublic forum.

The city park is, however, a traditional public forum. Indeed, the Supreme Court has characterized streets and parks as "quintessential public forums," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983), because people have traditionally gathered in these places to exchange ideas and engage in public debate:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Id. (quoting *Hague v. CIO,* 307 U.S. 496, 515 (1939). Because the park is a public forum, the city's restrictions on speech are subject to strict scrutiny. *Id.*; *see also Cornelius,* 473 U.S. at 800 ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); *International Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672, 678 (1992) (indicating that such restrictions are subject to the "highest scrutiny").

Moreover, the city cannot close or otherwise limit

a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action. *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 678 (1998); *see also First Unitarian Church v. Salt Lake City Corp.,* 308 F.3d 1114, 1124 (10th Cir. 2002) ("The government cannot simply declare the First Amendment status of [a traditional public forum] regardless of its nature and its public use."). In short, the nature of the forum in this case is public. *See Eagon v. City of Elk City,* 72 F.3d 1480, 1486-87 (10th Cir. 1996) (rejecting argument that park is a nonpublic forum); *see also United States v.* Grace, 461 U.S. 171, 177 (1983) ("'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"); *Frisby v. Schultz,* 487 U.S. 474, 481 (1988) (noting that *all* public streets are traditional public forums regardless of their particular character).

Pleasant Grove contends that our decisions in *City of Ogden* and *Summum v. Callaghan,* 30 F.3d 906 (10th Cir. 1997), support its argument that the monuments and other structures in the city park constitute a nonpublic forum. But in both *City of Ogden* and *Callaghan*, the property at issue could not be characterized -- by tradition or government designation -- as a public forum. *City of Ogden,* 297 F.3d at 1002 (holding that permanent monuments on the grounds of a municipal building were a nonpublic forum because property was "not by tradition or designation a forum for public communication" (quotations omitted)); *Callaghan,* 130 F.3d at 916-17 (holding that courthouse lawn was a nonpublic forum).

Conversely, in the present case, the property is a park, the kind of property which has "immemorially been held in trust for the use of the public." *Hague,* 307 U.S. at 515. In this way, the present case more closely resembles the facts in *Eagon*. In *Eagon*, individuals sued Elk City for violation of their free speech rights after the city excluded their display from "Christmas in the Park," an annual event during which individuals and groups were allowed to erect displays in Ackley Park. 72 F.3d at 1483. In conducting our forum analysis, we characterized the relevant forum as "Ackley Park during the 'Christmas in the Park' event" and held that the forum was a traditional public forum, in which "content-based restrictions on speech are valid only if necessary to serve a compelling state interest and if narrowly drawn to achieve that end." *Id.* at 1487. Similarly, the fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum. *See Cornelius,* 473 U.S. at 802 ("Having identified the forum . . . we must decide whether it is nonpublic or public in nature.").

By applying the standard associated with a nonpublic forum, the District Court committed an error of law. In a nonpublic forum, content-based restrictions on speech are permissible as long as they do not discriminate on the basis of the speaker's viewpoint and are reasonable. *Perry Educ. Ass'n,* 460 U.S. at 49; *see also Cornelius,* 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."). But in a public

forum, content-based restrictions are presumptively invalid. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992); *see also Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."). In order for a content-based restriction to survive strict scrutiny, the government must "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educ. Ass'n, 460 U.S. at 45. As we explain below, Pleasant Grove has failed to justify its restriction on speech under this standard.[4]

2. Application of strict scrutiny to content-based restrictions in a traditional public forum

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[4]We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs have broad discretion to consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 673 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."); *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 585, (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments "are a consequence of the nature of arts funding"). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron. Because the Supreme Court has not extended the reasoning of these cases to the context we consider today, we conclude that the case is best resolved through the application of established forum principles.

Pleasant Grove concedes that its restriction on speech in the park is content based.[5] By requiring that monuments meet the city's historical relevance criteria, the city excludes monuments on the basis of subject matter and the speaker's identity.[6] Because the city's restrictions are content based, they may not be analyzed under the less exacting intermediate scrutiny applied to content-neutral restrictions regulating the time, place, or manner of expression in public forums. *Id.*

We must therefore determine whether Pleasant Grove has demonstrated that application of its historical relevance criteria will, "more likely than not, be justified by the asserted compelling interests." *Gonzales,* 126 S. Ct. at 1219; *see also Ashcroft v. Am. Civil Liberties Union,* 542 U.S. 656, 665 (2004). ("When

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[5]In its brief, Pleasant Grove acknowledged that it evaluates proposed monuments based on their content: "[T]he City merely restricts permanent monuments based on either the content of the monument (i.e., the historical relevance to the City) or the identity of the donor (i.e., one with ties to the community). Such criteria, while certainly content-based, are reasonable and completely neutral with regard to viewpoint . . . ." App. Br. at 23.

[6]In addition to exclusions based on viewpoint or subject matter, exclusions based on the speaker's identity trigger strict scrutiny when the forum at issue is public. *See Cornelius,* 473 U.S. at 808 (noting that exclusion of speech from a public forum requires "a finding of strict incompatibility between the nature of the speech or the identity of the speaker" and the forum's function); *see also Mosley,* 408 U.S. at 96 ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression."); *Eagon,* 72 F.3d at 1487 (subjecting to strict scrutiny the city's denial to partisan groups of the same opportunity to speak as non-partisan groups in a traditional public forum).

plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute."); *Pac. Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1231 (10th Cir. 2005) ("A municipality has the burden of justifying its regulation [of speech] even on a motion to enjoin enforcement of an ordinance."). Even though the injunction in this case is disfavored and Summum's request is therefore analyzed under a heightened standard, in the context of a First Amendment challenge, Pleasant Grove bears the burden of establishing that its content-based restriction on speech will "more likely than not" survive strict scrutiny. *See Ashcroft,* 542 U.S. at 666 ("As the Government bears the burden of proof on the ultimate question of [the restriction's] constitutionality, [the moving party] must be deemed likely to prevail unless the Government has shown that [the moving party's] proposed less restrictive alternatives are less effective than [the restriction]."); *Leavitt,* 256 F.3d at 1072-73 (placing the burden on the government to justify its speech restrictions in a preliminary injunction hearing).

Because Pleasant Grove argued below that the relevant forum is nonpublic in nature, it did not assert a compelling interest that would justify excluding Summum's monument. The only interest Pleasant Grove asserted is an interest in promoting its history. The city's failure to offer any reason why this interest is compelling is sufficient for Summum to meet its burden in demonstrating a substantial likelihood of success on the merits. *See Pac. Frontier,* 414 F.3d at 1235 (affirming district court's conclusion that city failed to meet its burden in justifying its regulation at

preliminary injunction stage); *see also S.O.C., Inc. v. County of Clark,* 152 F.3d 1136, 1146 (9th Cir. 1998) (finding that plaintiff had established substantial likelihood of success on the merits when county did not offer any reason why its interests were compelling).[7]

But even if we assume that Pleasant Grove's stated interest is compelling, the city has also failed to establish that the content-based exclusion of Summum's monument is "necessary, and narrowly drawn," to serve the city's interest in promoting its history. *See Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753 (1995). As the Supreme Court has explained, defining a governmental interest this narrowly (i.e., the promotion of the city's history in this particular park) turns the *effect* of the regulation into the governmental interest. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 120 (1991) (explaining that "this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly

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[7]Pleasant Grove's reliance on our decision in *City of Ogden* is misplaced. The city argues that our decision supports its use of historical relevance criteria to limit speech in this context. In *City of Ogden*, however, we simply noted that we were *not* deciding that a city "may never maintain a *nonpublic* forum to which access is controlled based upon 'historical relevance' to the given community." 297 F.3d at 1006 (emphasis added). In other words, we left open the question whether a city could limit access to a nonpublic forum based on historical relevance. More important, we did not express any opinion about the use of historical relevance criteria to justify content-based discrimination in a public forum. A content-based restriction permissible in a nonpublic forum will not necessarily survive the strict scrutiny applied to a restriction in a public forum.

tailored").

Furthermore, the city may not use content-based restrictions to advance a particular ideology. *See Wooley v. Maynard,* 430 U.S. 705, 717 (1977) (holding that state's interest in promoting "appreciation of history, state pride, and individualism" was not ideologically neutral and therefore not compelling enough to outweigh an individual's free speech rights). The city may further its interest in promoting its own history by a number of means, but not by restricting access to a public forum traditionally committed to public debate and the free exchange of ideas. *ISKCON,* 505 U.S. at 700 (Kennedy, J., concurring in judgment) (stating that government may not "assert broad control over speech or expressive activities" in a public forum, but "must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status").

In addition to the city's stated interest in promoting its history, the 2004 city resolution governing monuments in the park contains aesthetic and safety justifications for the speech restriction.[8]

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[8]The resolution contains the following preamble:

> WHEREAS, there is a limited amount of park space within the city; and
> WHEREAS, there are aesthetic issues surrounding the placement of permanent objects in parks and other public areas; and
> WHEREAS, the City wishes to preserve its public open space; and
> WHEREAS, permanent structures, displays, permanent signs and monuments, decrease the available open space and the visual perception of open space, and
> WHEREAS, there are also safety issues surrounding the

Cities have substantial interests in the aesthetic appearance of their property. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507-08 (1981). To further these interests, Pleasant Grove may pass a reasonable content-neutral resolution regulating the time, manner, or place of speech in the park. For example, it could ban all permanent displays of an expressive nature by private individuals. *Pinette,* 515 U.S. at 761 (noting a "ban on all unattended displays" as a possible content-neutral restriction in a traditional public forum); *see also Ward v. Rock Against Racism,* 491 U.S. 781, 792, 796 (holding that city's regulation of sound levels in park was a content-neutral and narrowly tailored means of serving city's interest in the peaceful character of park and privacy of residential area).

Here, however, the city has furthered its objectives by passing a content-based resolution, which excludes all speech that does not meet its historical relevance criteria; the resolution is therefore subject to strict scrutiny. We need not decide whether the city's interests in aesthetics and safety are compelling because the resolution is not narrowly tailored to achieve its stated interests. The city has not offered any reason why monuments with its preferred historical content will preserve park space and reduce safety hazards more effectively than monuments containing other content. *See Solantic, LLC v. City of*

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placement of permanent objects in parks and public areas such as sight obstructions, and line of sight availability; and WHEREAS, the City wishes to insure the placement of permanent objects on public property does not create safety hazards. (Applt. App. at 55)

Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (holding city's sign code unconstitutional because not narrowly tailored to serve "the general purposes of aesthetics and traffic safety"); *see also City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994) (noting that, by allowing content-based exemptions, the government "may diminish the credibility of [its] rationale for restricting speech in the first place"). Rather, the distinction between monuments with particular historical content and monuments lacking this content "bears no relationship *whatsoever*" to the resolution's stated interests in aesthetics and safety. *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 424 (1993) (finding that ban on commercial newsracks lacked reasonable fit with city's interests in aesthetics and safety); *see also Riley v. National Federation of Blind, Inc.,* 487 U.S. 781, 792 (1988) (holding state's "generalized interest" was "insufficiently related" to its chosen means). The city may not burden speech that does not present the danger the regulation seeks to address: "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 265 (1986). Summum's monument is similar in size, material, and appearance to the Ten Commandments monument already displayed in the park. The city's exclusion of the monument based on its content cannot be justified by an interest in aesthetics or safety.[9]

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[9]Because Pleasant Grove's restriction on monuments in the park is not necessary or narrowly drawn to serve a compelling

Because Pleasant Grove has not demonstrated that application of its historical relevance criteria is more likely than not to be justified by its stated interests, we conclude that Summum has established a substantial likelihood of success on the merits and proceed to a determination of whether Summum has satisfied its burden under the remaining three factors necessary for a preliminary injunction.

B. Irreparable Injury

The second factor we must consider in determining whether Summum is entitled to a preliminary injunction is whether Summum will suffer irreparable harm if denied an injunction. Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

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interest, we need not decide whether the city's 2004 resolution purportedly codifying its unwritten policy is a post hoc facade for content-based discrimination. *See City of Ogden,* 297 F.3d at 1006-09 (analyzing whether city's historical relevance justification was well-established policy or a post hoc facade for viewpoint discrimination); *Cornelius,* 473 U.S. at 812-13 (remanding for factual inquiry into whether government's stated reasons for restricting speech were motivated by a desire to suppress certain viewpoints). We do note, however, that the record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history. In the "absence of express standards," such as a written policy, city officials are more likely to use post hoc rationalizations to justify their decisions; this kind of "unbridled discretion" can result in content or viewpoint discrimination. *Callaghan,* 130 F.3d at 920 (quotations omitted).

Elrod v. Burns, 427 U.S. 347, 373 (1976), *quoted in Pac. Frontier,* 414 F.3d at 1235, *and Heideman v. South Salt Lake City,* 348 F.3d 1182, 1190 (10th Cir. 2003). For this reason, we have assumed irreparable injury when plaintiffs are deprived of their commercial speech rights, *e.g.*, *Pac. Frontier,* 414 F.3d at 1235; *Utah Licensed Beverage Ass'n,* 256 F.3d at 1076, even though restrictions on commercial speech are subject to intermediate scrutiny, not strict scrutiny as in the case before us, *see Utah Licensed Beverage Ass'n,* 256 F.3d at 1066. If we can assume irreparable harm in the context of commercial speech, we can surely assume irreparable harm when the government deprives an individual of speech in a traditional public forum subject to the highest scrutiny. *See Heideman,* 348 F.3d at 1190 (noting that determination of irreparable harm requires consideration of "the specific character of the First Amendment claim"). Given the character of the deprivation in this case (i.e., exclusion from a traditional public forum), we hold that Summum has established it will suffer irreparable harm if the injunction is denied.

C. Balance of Harms

Next, we consider whether the First Amendment injury to Summum outweighs any prospective injury to Pleasant Grove in the event the injunction is granted. Pleasant Grove argues that it will suffer substantial harm because, if Summum is allowed to display its monument, the city will be inundated with requests from other individuals and the park will be flooded with monuments. But the city's *potential* harm must be weighed against Summum's *actual* First Amendment

injury. *O Centro,* 389 F.3d at 1009 (Seymour, J., concurring in part and dissenting in part) ("Thus, the balance is between actual irreparable harm to plaintiff and potential harm to the government which does not even rise to the level of a preponderance of the evidence."); *see also ISKCON,* 505 U.S. at 701 (Kennedy, J., concurring in judgment) ("The First Amendment is often inconvenient. . . . Inconvenience does not [however] absolve the government of its obligation to tolerate speech."). The record contains no evidence to support Pleasant Grove's contention that an injunction in this case will prompt an endless number of applications for permanent displays in the park. The city's speculative harm cannot outweigh a First Amendment injury, especially because Summum has established a substantial likelihood of success on the merits. *See O Centro,* 389 F.3d at 1010 (Seymour, J., concurring in part and dissenting in part); *Pac. Frontier,* 414 F.3d at 1236-37; *see also Wyandotte Nation,* 443 F.3d at 1256 (holding that plaintiff made strong showing regarding the balance of harms under the heightened standard for a mandatory injunction in part because plaintiff had substantial likelihood of success on the merits). We therefore hold that Summum has made a strong showing with regard to the balance of harms.

D. Public Interest

Lastly, we consider whether granting the injunction would be contrary to the public interest. We have held that preliminary injunctions which further plaintiffs' free speech rights are not adverse to the public interest. *Pac. Frontier,* 414 F.3d at 1237

("Vindicating First Amendment freedoms is clearly in the public interest."); *Utah Licensed Beverage Ass'n,* 256 F.3d at 1076 ("Because we have held that Utah's challenged statutes . . . unconstitutionally limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest."); *ACLU v. Johnson,* 194 F.3d 1149, 1163 (10th Cir. 1999) (holding that a preliminary injunction was not contrary to the public interest because "it will protect the free expression of the millions of Internet users both within and outside of the State of New Mexico" (quotations omitted)); *Elam Constr., Inc. v. Reg'l Transp. Dist.,* 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest also favors plaintiffs' assertion of their First Amendment rights."). Because an injunction requiring the city to permit the display of Summum's monument will further free speech rights, the injunction is clearly in the public interest.

CONCLUSION

We hold that Summum has met its burden under all four factors necessary for a preliminary injunction and has made the strong showing required under the heightened standard for disfavored injunctions. We therefore REVERSE the District Court's order denying Summum's motion and REMAND with instructions to grant the preliminary injunction in Summum's favor. In addition, the District Court may conduct further proceedings consistent with this opinion. We DENY as moot Summum's motion to expedite this appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Summum, a Corporate Sole and Church, Plaintiff,	)	
vs.	)	CASE NO.
	)	2:05-CV-638DB
PLEASANT GROVE CITY, a municipal corporation, et al., Defendants.	)	

BEFORE THE HONORABLE DEE BENSON

February 1, 2006

Motion Hearing

[26]
THE COURT : * * *

I was inclined to take this under advisement, but I think to get it moving, and I do think that there is some value in that, I'm going to deny the motion for partial summary judgment at the present time. Mr. Manion has persuaded me that if I take the facts in the light most favorable to the defendant, as I must for purposes of summary judgment analysis, there is enough to survive the motion, in my view. I am

accepting the declaration of Frank Mills to the extent that the motion to strike portions is before me, and apparently it is and that motion is denied.

I think a sufficient foundation was laid when Mr. Mills declared that he has spent his entire life in Pleasant Grove, and as a life long resident has been a part of the city government for most of the past 35 years, and he says that he is familiar with the city's practices regarding accepting donations and displaying them on city property.

I'm especially persuaded by the fact that for eight years, from 1972 to 1980, Mr. Mills was a city councilman and was the public works director from '84 to 2000. He has been [27] the city's administrator since 1998 to the present time. With that experience, he says in paragraph seven, and this is somewhat conclusory, but I think he has laid enough foundation for me to accept it as evidence. It would need to be subjected to cross-examination, of course, to see how credible it is, but he does say, quote, it has been a practice of the City of Pleasant Grove for decades to accept for display only artifacts, historic buildings, monuments, plaques, et cetera, which have some historical significance to our community or were donated by individuals or organizations with well established Pleasant Grove connections.

That needs to be explored further, including whether it is true that viewpoints containing donations were accepted simply because they were well established with Pleasant Grove connections, but on the face of it it is enough for me to at least recognize that there is a genuine issue of material fact with respect to the question which was set forth in the City of Ogden case, which is binding precedent on me,

which recognizes that historical relevance may be a factor that allows a city to have restrictions on monuments going up on public property.

I am inclined at this point to at least find that there is a factual dispute about whether this is public or non-public property, with an inclination at the present time, based on the City of Ogden case, to find that it is non-public property. But if this record can be made by the defendants [28] that the historical significance criteria is well established, then based on that precedent in the Tenth Circuit there may be a case made by the defendants that it was both reasonable and viewpoint neutral. If they make that case, then they prevail. If they don't, then the plaintiff prevails. I am not obviously ruling for either side. I'm only recognizing at this point in time that the facts are in dispute and until there is a trial, I guess before me, or unless there are some additional submissions by way of summary judgment, which I'm not precluding, but I am not anticipating either, I guess we'll have to await that day.

That takes care of, that discussion that I have just made, takes care of the pending motion for preliminary injunctive relief as well and for the same reasons. It is not clear and it has not been established that there is a substantial likelihood of success on the merits for the plaintiff, and especially because, as I understand it, the only thing that the plaintiff is seeking by way of preliminary injunctive relief at the present time is the entitlement to put up Summum's monument in the city park. That would be premature at this point given the Court's ruling on partial summary judgment.

I'm accepting both declarations and overruling the motion to exclude them. I'm denying the motion for

partial summary judgment and denying the pending motion for preliminary [29] injunctive relief. I'm not ruling on the motion with regard to the service of process. That is not ripe.

With respect to the motion for judgment on the pleadings regarding the affirmative defenses, I don't know if you wanted to argue that today, but I could give a written opinion on that if you would like. I don't know that I need further oral argument. I don't know how much it advances the ball in any event, and it is extra work, but I will be glad to do a written opinion, or I will hear you out today if you want that.

* * *

MR. BARNARD: I think our arguments are in the writings, the papers we submitted.

THE COURT: I do too. That is why I can do it in writing.

MR. MANION: I agree with Mr. Barnard on that, Your Honor.

THE COURT: Okay. Some of them will be gone, I'm telling you now, and some of them will remain. I don't think, for what it's worth, think it is going to alter the course of this litigation in any way that is significant.

* * *

APPENDIX C

SUMMUM VS. PLEASANT GROVE CITY,
Case No. 2:05-CV-638DB
United States District Court, District of Utah,
Central Division
Docket Report

02/02/2006

Minute Entry for proceedings held before Judge Dee Benson: Cnsl present. After arguments were heard and discussion held, Crt ruled: denying 9 Motion for Partial Summary Judgment, denying 10 Motion for TRO, denying 10 Motion for Preliminary Injunction, taking under advisement 13 Motion for Judgment on the Pleadings, denying 23 Motion to Strike. Court will file an order/opinion on the motion for judgment on the pleadings. Motion Hearing held on 2/2/2006 re 10 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Summum,, 9 MOTION for Partial Summary Judgment filed by Summum,, 13 MOTION for Judgment on the Pleadings filed by Summum,, 23 MOTION to Strike filed by Summum,. Attorney for Plaintiff: Brian Barnard, Attorney for Defendant Francis Mannion and Geoffrey Surtees. (Court Reporter Ed Young.) (reb,) (Entered: 02/02/2006)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

SUMMUM,

Plaintiff,

vs.

PLEASANT GROVE City, et al.,

Case No. 2:05cv00638

Defendants

Judge Dee Benson

ORDER

This case arises from a dispute concerning a Ten Commandments monolith located in a Pleasant Grove park. Summum petitioned Pleasant Grove to allow it to erect a monument embodying its Seven Aphorisms in the same park. Pleasant Grove denied the request and Summum sued. Summum now moves for judgment on the pleadings with respect to Pleasant Grove's affirmative defenses. For the reasons set forth below, the motion is granted in part and denied in part.

ANALYSIS

"A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss under rule 12(b)(6)." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000); *see also Mock v. T.G. & Y. Stores Co.,* 971 F.2d 522, 528 (10th Cir. 1992). Dismissal under Rule 12(b)(6) is proper "only when it appears that the plaintiff can prove no set facts in support of the claims that would entitle the plaintiff to relief." *See Id.* (Citations omitted). Well-pleaded allegations in the complaint are accepted as true and construed in the light most favorable to the non-moving party. *See Id.* (Citations omitted).

Summum moves for judgment on the pleadings with respect to Pleasant Grove's first through eighth and tenth through twelfth affirmative defenses. Pleasant Grove's first three affirmative defenses concern stating a claim, subject matter jurisdiction, and standing. Because Summum must state a claim and have both subject matter jurisdiction and standing in order to proceed, the Court will consider each in turn.

Dismissal for failure to state a claim "[s]hould not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sutton v Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (Citations omitted). The present action is similar to *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997). In *Callaghan*, Summum brought a § 1983 action based on Salt Lake County's refusal to allow Summum to erect a monolith displaying its

tenets on the county courthouse's front lawn. The Tenth Circuit ruled, "We conclude that Summum's amended complaint sufficiently alleges that a limited public forum has been created and that the County engaged in viewpoint discrimination in violation of Summum's free speech rights." *Id*., at 919. As it did in *Callagham*, Summum has sufficiently alleged that Pleasant Grove engaged in viewpoint discrimination in violation of the Constitution. For this reason, the Court finds that Summum has met the requirements for stating a claim.

District courts have original jurisdiction over civil actions bought "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution." *See* 28 U.S.C. § 1343(a)(3) (1948). Summum has claimed a violation of the First Amendment of the United States Constitution. This constitutes a civil action bought to redress a violation of a right under the Constitution, therefore, this Court's jurisdiction is proper.

In order to establish standing, a plaintiff must meet three requirements.:

> First, the Plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly . . . traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the Court. Third, it

> must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision.

Initiative and Referendum Institute v. Walker, 161 F.Supp.2d 1307, 1309-10 (D. Utah 2001) (Citations omitted). In the present case, Summum has suffered an injury in fact. It was not allowed to erect its desired monument. This injury is actual and concrete. Pleasant Grove acknowledges that it denied Summum's request. A decision in Summum's favor would redress the injury. This Court finds that Summum has met the requirements for standing. Because Summum has stated a claim and met the requirements for subject matter jurisdiction and standing, its motion for judgment on the pleadings for these defenses is granted.

Pleasant Grove's fourth through eighth and tenth through twelfth affirmative defenses raise substantive defenses to Summum's complaint and the extent of potential recovery. Pleasant Grove argues that the park is a nonpublic forum and decisions concerning the erection of monuments are based on historical relevance. In *City of Ogden*, the Tenth Circuit expressly stated that historical relevance may be a valid criteria for deciding which monuments may be erected on nonpublic fora. *See Summum v City of Ogden*, 297 F.3d at 1006-7. The Court stated, "We do not conclude that a municipality may never maintain a nonpublic forum to which access is controlled based upon historical relevance to the given community. *Id*. In the present case, Pleasant Grove argues that the park is a nonpublic forum and that it denied Summum's request based on the criterion of historical relevance. It has advanced a set of facts, including

sworn testimony and a resolution establishing criteria for the erection of monuments, supporting its argument. Pleasant Grove's argument supports its fourth through eighth and tenth through twelfth affirmative defenses. For this reason plaintiff is not entitled to judgment on the pleadings with respect to those affirmative defenses.

CONCLUSION

Summum has standing, jurisdiction, and has properly stated a claim; therefore, judgment on the pleadings is GRANTED as to Pleasant Grove's first, second and third affirmative defenses. Summum, however, has failed to establish that Pleasant Grove cannot in any way support its fourth through eighth and tenth through twelfth affirmative defenses. For this reason, judgment on the pleadings for those defenses is DENIED.

IT IS SO ORDERED.

DATED this 9th day of February, 2006.

/s/_____
Dee Benson
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church,

Plaintiff - Appellant/
Cross-Appellee,

v. No. 06-4057

DUCHESNE CITY, a governmental entity, et al.,

Defendants - Appellees/
Cross-Appellants.

SUMMUM, a corporate sole and church,

Plaintiff - Appellant,

v. Nos. 05-4152, 05-4168, 05-4272 & 05-4282

PLEASANT GROVE CITY, municipal corporation, et al.,

Defendants - Appellees.

ORDER
Filed September 5, 2007

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **KANE**,* District Judge.

This matter is before the court on the Defendants' motions to stay the issuance of the mandates in the above captioned appeals. The motions are granted

Entered for the Court,

/s/_____
ELISABETH A. SHUMAKER
Clerk

*Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

APPENDIX F

No. 06-4057, Nos. 05-4162, 05-4168, 05-4272 & 05-4282

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant,

v.

PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator, Defendants-Appellees.

and

SUMMUM, a corporate sole and church, Plaintiff-Appellant/Cross-Appellee,

v.

DUCHESNE CITY, a governmental entity; CLINTON PARK, Mayor of Duchesne City; YORDYS NELSON; NANCY WAGER; PAUL TANNER; DARWIN MCKEE; JEANNIE MECHAM, city

council members, Defendants-Appellees-Cross-Appellants.

August 24, 2007, Filed

ORDER

Before TACHA, Chief Judge, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

These matters are before the court on two separate petitions for rehearing, both with en banc suggestions, filed by the appellees. The petitions were filed separately and correspond to the two opinions issued in these appeals on April 17, 2007.

The requests for panel rehearing are denied by the original panel which decided these cases.

The en banc petitions were transmitted to all of the judges of the court who are in regular active service. A poll was requested. Through an equally divided vote, the decisions of the panel will stand. *See* Fed. R. App. P. 35(a); 10th Cir. R. 35.5 (noting that a majority of the active judges of the court may order rehearing en banc). Accordingly, the en banc requests are denied. Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch and Holmes would grant rehearing en banc. Judges Lucero and McConnell have filed dissents to the denial. They are attached and incorporated in this order. Judge Gorsuch has joined in Judge McConnell's dissent. Judge Tacha, writing separately, has responded. That response is also incorporated in this order.

LUCERO, J., dissenting from denial of rehearing en banc.

Because the panel's opinion will leave our circuit unnecessarily entangled in future review of time, place, and manner restrictions, and because in my judgment the panel's opinion incorrectly decides the question of the nature of the forum involved in cases of this type, I respectfully dissent from the denial of rehearing en banc. Conceptually, it is important to distinguish between transitory and permanent speech. As I see it, not unlike most public parks in America in which permanent monuments have been placed, the cases before us involve limited public fora. In limited public fora, local governments may make content-based determinations about what monuments to allow in such space, but may not discriminate as to viewpoint.

As an initial matter, I agree with the panel that these monuments do not constitute government speech. Under the *Wells* framework, the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact. *Wells v. City & County of Denver*, 257 F.3d 1132, 1141-43 (10th Cir. 2001) (holding sign was government speech where the city had "complete control over the sign's construction, message, and placement"; the city "built, paid for, and erected the sign"; and corporate sponsors did not "exercise[] any editorial control over its design or content."). In these cases, the private parties conceived the message and design of the monuments without any government input, thus the speech must be considered private. *See Summum v. City of Ogden*, 297 F.3d 995, 1004-06 (10th Cir. 2002) (holding monument was not

government speech where Fraternal Order of Eagles "designed, produced, and donated the Ten Commandments Monument"; central purpose of monument was "to promote the views and agenda of the Eagles rather than the City of Ogden"; "Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product"; and city only claimed to adopt views of monument "post hoc"). It follows that these cases necessarily implicate government regulation of private speech.[1]

Whether government regulation of private speech violates the First Amendment depends on context. Courts engage in forum analysis to determine whether the speaker acts in a traditional public forum, a designated public forum, or a nonpublic forum, and it is in this analysis that I differ with the panel. In identifying the type of forum involved, we first consider the government property at issue and the type of access sought. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *City of Ogden*, 297 F.3d at 1001. Only after the type of forum is identified do we ask whether it is public or nonpublic in nature. Because the government property involved in these cases consists of the city parks, and the access sought is the installation of permanent monuments, the panel correctly concludes that the relevant forum consists of permanent monuments in the city parks. *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007); *Summum v. Duchesne City*, 482

[1]Although the monument involves a religious message, these cases properly consider the question of free speech, not establishment of religion.

F.3d 1263, 1269 n.1 (10th Cir. 2007). In the next step of the forum analysis, however, the panel asserts that the relevant forum is the entire park, regardless of the type of access sought. *Pleasant Grove*, 483 F.3d at 1050; *Duchesne*, 482 F.3d at 1269. The panel's claim that access "is relevant in defining the forum, but . . . does not determine the *nature* of that forum," *id.* at 1269 n.1, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum. *See Cornelius*, 473 U.S. at 801. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, a case which the panel cites, the Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora. 460 U.S. 37, 49 (1983). *Perry* also held that a court may make conceptual distinctions in defining the forum, even if there are no physical barriers. *See Cornelius*, 473 U.S. at 801 ("*Perry* . . . examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an 'internal mail system' lacks a physical situs.") (citation omitted). As in *Perry* and *Cornelius*, Summum seeks access to a particular means of communication, but the nature of the forum necessarily hinges both on the method of communication and on the location.

The panel gives great weight to the conception that city parks are "quintessential public forums," *see Perry*, 460 U.S. at 45, but in my view, permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public. In *Perry,* the Court noted that parks are "places which by *long*

tradition or by government fiat have been devoted to *assembly and debate*," and "which have *immemorially* been held in trust for the use of the public, and, *time out of mind*, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quotation omitted) (emphasis added). As *Perry* indicates, our modern concept of the park as a public forum derives from a well-established common law right to assemble and speak one's mind in the commons. This right, however, does not extend to the type of displays at issue here, and one would be hard pressed to find a "long tradition" of allowing people to permanently occupy public space with any manner of monuments. In short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues of Balto the Husky or the sword-wielding King Jagiello, to note two of the more popular attractions in New York City's Central Park.

I recognize that there is some disagreement among our sister circuits on this point, but courts consistently have given special consideration to the issue of displays installed on public land. In *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993), the Seventh Circuit held that "[t]here is no private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." (quotation and citation omitted). The Second Circuit in *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), determined that the city "had not created a forum in

City Hall Park open to the unattended, solitary display of religious symbols." By stating that the City of Burlington must affirmatively open the public park for this kind of use, the Second Circuit recognized that such physical occupation of park space does not fall within the scope of the traditional public forum, but rather the government must assent to such access before a forum is created. By contrast, the Ninth Circuit has held that "[n]o affirmative government action is required to open a traditional public forum to a specific type of expressive activity." *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993). *Kreisner* acknowledged, however, that the government might close the park with respect to large unattended displays, but held that the plaintiff had failed to meet his burden of proof on this point. *Id.* This is to say, that even the *Kreisner* court has recognized that it is not a foregone conclusion that parks are traditional public fora for all uses, particularly for the installation of permanent displays.

In my view a park is not a traditional public forum insofar as the placement of monuments is concerned, but that still leaves the question of whether it is a designated public forum or a nonpublic forum. Although there is a disagreement among our sister circuits regarding the categorization of limited public fora, this circuit and recent Supreme Court opinions have treated limited public fora as a species of nonpublic fora. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (in a limited public forum, the state may restrict speech but many not discriminate on the basis of viewpoint (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius,* 473 U.S. at 806)); *City*

of Ogden, 297 F.3d at 1002 n.4 ("A 'limited public forum' is a subset of the nonpublic forum classification."); *Callaghan*, 130 F.3d at 914 ("In more recent cases . . . the Court has used the term 'limited public forum' to describe a type of nonpublic forum"); *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 382 n.3 (4th Cir. 2006) (surveying conflicting views among the circuits). In the present cases, the city governments have not allowed the kind of "general access" or "indiscriminate use" of park property that is a hallmark of a designated public forum. *Summum v. Callaghan*, 130 F.3d 906, 915 n.13 (10th Cir. 1997) (*citing Cornelius*, 473 U.S. at 803; *Perry*, 460 U.S. at 47). Instead, they have "create[d] a channel for a specific or limited type of expression where one did not previously exist," *Child Evangelism Fellowship*, 457 F.3d at 382, and have thus established limited public fora. As discussed *supra*, the right to install permanent monuments did not previously exist in these parks, and in these cases the cities have allowed only "selective access to some speakers or some types of speech in a nonpublic forum." *Callaghan*, 130 F.3d at 916. Here, the cities have permitted a few monuments to be erected for specific purposes -- in the case of Pleasant Grove, to memorialize the city's history, and in the case of Duchesne, to honor service groups. Having created limited public fora, the cities may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks.[2] *Cornelius*, 473 U.S. at 806.

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[2]By contrast, when the government itself speaks, it may discriminate as to both content and viewpoint. *Rosenberger*, 515

There are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora, and the need for further briefing and argument on this point is one reason why en banc proceedings are necessary. More importantly, however, the panel has given an unnatural reading to the traditional public forum doctrine, and binds the hands of local governments as they shape the permanent character of their public spaces. Although these governments may enact time, place, and manner restrictions that will give them some control over monuments in their parks, they now must proceed on the basis of the panel's faulty legal reasoning. More troubling is that such restrictions will undoubtedly be challenged in court and reviewed under a strict scrutiny standard. 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.

U.S. at 833.

McCONNELL, J., joined by GORSUCH, J., dissenting from denial of rehearing en banc.

These opinions hold 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. *See Summum v. Duchesne City*, 482 F.3d 1263, 1274 (10th Cir. 2007) (a "constitutional right exists to erect a permanent structure on public property . . . when the government allows some groups to erect permanent displays, but denies other groups the same privilege"); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1054 (10th Cir. 2007) (the city "could ban all permanent displays of an expressive nature by private individuals" but may not exclude a monument based on its content unless the restriction serves "compelling" interests and is "narrowly tailored to achieve its stated interests"). This means that Central Park in New York, which contains the privately donated Alice in Wonderland statute, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

Significantly, the religious nature of the donated

monuments is not relevant to the free speech question (though it would be to an Establishment Clause challenge). These cases happen to involve Ten Commandments monuments, but it could work the other way. 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.

With all due respect to the panel, this conclusion is unsupported by Supreme Court precedent. None of the cases cited supports this proposition. By tradition and precedent, city parks -- as "traditional public forums" -- must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties. By their policies or actions, governments may create designated public forums with respect to fixed monuments, but -- contrary to these opinions -- the mere status of the property as a park does not make it so.

It is plain that the cities in these cases did not create designated public forums for the erection of permanent monuments in their parks. In the *Duchesne* case, the Ten Commandments monument is apparently the only fixed monument in the park. In *Pleasant Grove*, the other permanent structures and monuments "relate to or commemorate Pleasant Grove's pioneer history." 483 F.3d at 1047. In neither case did the city, by word or deed, invite private citizens to erect monuments of their own choosing in these parks. It

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.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech. *Id.* at 692 (calling the monument "Texas' display"). Various courts of appeals have reached the same conclusion on similar facts. *ACLU Nebraska Foundation v. City of Plattsmouth,* 419 F.3d 772, 778, 774 (8th Cir. 2005) (Eagles monument "installed . . . by the City" and counted as "City's display"); *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (Eagles monument belonged to the state); *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (donated Eagles monument constituted state speech in violation of the Establishment Clause); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001) (city's acceptance of donated Ten Commandments monument constituted state action in violation of the Establishment Clause); *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (city's display of Ten Commandments monument was state action violating Establishment Clause). *See also Modrovich v. Allegheny County*, 385 F.3d 397, 399-400 (3d Cir. 2004) (bronze plaque of Ten Commandments donated by private party and affixed to courthouse wall constituted government speech).

Our own leading precedent on government speech

confirms these holdings.[1] *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001), involved a temporary holiday display, which was on municipal property and co-sponsored by the city and private businesses; the display included a large sign on city property thanking private donors for their contributions to the city's holiday display. The Court concluded that the message conveyed by this sign was government speech. The city, we reasoned, chose to erect the sign for its own purposes, the city controlled the content of the sign, and it determined when, where, and how the sign would be displayed. 257 F.3d at 1141-42. *Wells* employed a four-part analysis derived from the Eight Circuit's *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), which involved the asserted right of the Missouri KKK to sponsor a segment of All Things Considered on National Public Radio.[2] In both *Wells*

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[1]To the extent *Summum v. Callaghan,* 130 F.3d 906 (10th Cir. 1997), and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), teach the contrary, they should be overruled.

[2]The factors were:

> (1) that "the central purpose of the enhanced underwriting program is not to promote the views of the donors;" (2) that the station exercised editorial control over the content of acknowledgment scripts; (3) that the literal speaker was a KWMU employee, not a Klan representative; and (4) that ultimate responsibility for the contents of the broadcast rested with KWMU, not with the Klan.

Wells, 257 F.3d at 1141 (quoting *Knights of the Ku Klux Klan,* 203

and *Knights,* the governmental or private character of the speech was in doubt because "ownership" could not be clearly established. Did the holiday decor belong to the city or to the private donors in *Wells*? Did the sponsorship message written by the KKK belong to that organization or to the public employee who broadcast it statewide on a state radio station?

The instant cases are easier than *Wells*, because ownership of the "speech" in these cases is clear: the Ten Commandments monument in *Duchesne* was donated by the Cole family to the City of Duchesne, and the Ten Commandments monument in *Pleasant Grove* was donated by the Fraternal Order or Eagles to the City of Pleasant Grove. At the relevant time, the cities owned the monuments, maintained them, and had full control over them. But even if ownership were not clear, the second and fourth prongs of the *Wells* test would nonetheless be dispositive: The cities exercised total "control" over the monuments, 257 F.3d at 1141, and they bore "ultimate responsibility" for the monuments' contents and upkeep. Indeed, because the cities owned the monuments, they could have removed them, destroyed them, modified them, remade them, or (following state law procedures for disposition of public property) sold them at any time. Indeed, the City of Duchesne attempted to do just that -- sell the monument along with the plot of land on which it sits. See 482 F.3d at 1266-67.[3] *Cf. Serra v. U.S. General*

F.3d at 1093-94).

[3]Indeed, the panel held that Duchesne's attempted sale of the monument is controlled by state law governing the disposition of "public property." *Duchesne*, 482 F.3d at 1272.

Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork).

The only difference from *Wells* is that in the *Summum* cases, the cities did not design these monuments. The cities, however, accepted the statues, treated them as public property, and displayed them for their own purposes on public land. The cities were under no obligation to accept the statues, and could have objected to their content. When they accepted donation of the monuments and displayed them on public land, the cities embraced the messages as their own. Similarly, Duchesne and Pleasant Grove controlled the placement of the statues, just as in *Wells* Denver bore "ultimate responsibility for the content of the display." 257 F.3d at 1142.

Once we recognize that the monuments constitute government speech, it becomes clear that the panel's forum analysis is misguided. Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government's "own speech . . . is controlled by different principles." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). Specifically, "when the State is the speaker, it may make content-based choices." *Id.* at 833. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991). The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause -- and need not alter its speech to accommodate the views of private parties. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) ("Simply

because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist.") In other words, just 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.

Other circuits have reached this conclusion in similar cases. *See Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."); *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc) ("even in a public forum there is no constitutional right to erect a structure"); *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("We are not cognizant of . . . any private constitutional right to erect a structure on private property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.").

This does not mean that the Ten Commandments monuments in Duchesne and Pleasant Grove are immune to First Amendment challenge. Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause, as applied to the States through the Fourteenth Amendment. Their validity would depend on details of their context and history, in accordance with the Supreme Court's recent decisions in *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005). We have no occasion here to speculate on the outcome of any such litigation.

The panels' decisions in these cases, however, are incorrect as a matter of doctrine and troublesome as a matter of practice. I realize that en banc proceedings are a major investment of time and judicial resources, and that we cannot en banc every case that errs. But the error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decisions should be corrected.

TACHA, J., response to dissent from denial of rehearing en banc.

Throughout my judicial career, I have been loath to write separately because I firmly believe that an intermediate court of appeals should speak with as much clarity and consensus as possible. I reluctantly take the unprecedented step of responding to the dissents from the denial of rehearing en banc because, left unanswered, the dissents could lead a reader to conclude that these cases present unresolved issues that are properly raised and appropriately addressed on these facts. In particular, I write to emphasize that these cases do not raise novel or unsettled questions regarding government speech. Nor do the panel decisions suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium. Rather, the decisions follow well-established First Amendment precedent requiring that cities regulate private speech in public forums equally.

Because the opinions contain clear discussions of the legal authority on which they rely, I need not respond at length to the allegation that they are unsupported by Supreme Court precedent. I need only say that the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction, so crucial to the reasoning of both dissents, lacks the support of both precedent and logic. If a city allows a private message to be heard in a public park, why would the permanent nature of the expression limit the First Amendment scrutiny we apply?

As Supreme Court precedent makes clear, the type

of speech does not, and should not, determine the nature of the forum. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that city's restriction on *permanent* commercial newsracks on *public sidewalks* (a public forum) was an impermissible content-based restriction on speech). If a city wishes to regulate the number of permanent private displays in a public forum, it may do so through reasonable content-neutral regulations governing the time, manner, or place of such speech. *See id.* at 429-30 ("It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral."); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (noting that a reasonable content-neutral ban on all unattended private displays in public forum would likely be constitutional, but a regulation based on content must be "necessary, and narrowly drawn, to serve a compelling state interest").[1]

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[1]Contrary to Judge Lucero's dissent, the description of the forum as "permanent monuments in a city park" does not change the nature of the forum from a traditional public forum to some kind of limited or nonpublic forum. To focus solely on the monuments (i.e., the form of speech) and ignore the underlying property would be a distortion of Supreme Court precedent, as explained above. Furthermore, the conclusion that permanent speech is more limited than transitory speech defies logic. Like temporary signs and demonstrations, permanent displays most certainly encompass the government property; indeed, permanent monuments are physically attached to and always present on the property. Unlike the speaker in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), who sought access to teachers' mailboxes, Summum did not seek access to "a forum within the confines of the government property," *Cornelius v.*

Judge McConnell's dissent would have us ignore these well-established forum principles when the government does not "by word or deed" create a designated public forum for permanent private expression. Dissent at 3. In this view, if the government has not created a designated public forum, its acceptance alone turns private speech into government speech. More important, under this approach, government acceptance of the physical *medium* of speech, not the message, is sufficient. This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985); rather, it sought permanent access to the physical property itself. Thus, although the relevant forum in these cases is "permanent monuments in a city park," the access sought is not the kind of limited access that allows for a more narrow definition of the forum. This is true even if we accept the view that a speaker does not have a constitutional right to erect a permanent display in a public forum. Because the cities had already permitted the permanent display of a private message, the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally *discriminate* among private speakers in a public forum.

Although a public school is engaging in speech activity when it selects the text, its ability to do so is based on a different line of Supreme Court 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). We note this distinction in both opinions. *Summum v. Pleasant Grove City,* 483 F.3d 1044, 1052 n.4 (10th Cir. 2007); *Summum v. Duchesne City,* 482 F.3d 1263, 1269 n.2 (10th Cir. 2007).[2] In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park. We cannot, however, extend the reasoning of these Supreme Court decisions to allow the government to make content-based decisions concerning *all* permanent private speech in a public forum. As the panel decisions explain, the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts.

In short, the government does not speak just

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[2]We cite the following Supreme Court cases in both opinions: *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs may consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) (recognizing that broadcasters must "exercise substantial editorial discretion in the selection and presentation of their programming"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may consider content in awarding grants as such judgments "are a consequence of the nature of arts funding"). *See Pleasant Grove City*, 483 F.3d at 1052 n.4; *Duchesne City*, 482 F.3d at 1269 n.2.

because it owns the physical object that conveys the speech. Instead, as the Supreme Court has explained, 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. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560 (2005) (holding that beef advertising campaign constituted government speech because the "message set out in the beef promotions is from beginning to end the message established by the Federal Government"). The four-factor approach to government speech that we adopted in *Wells v. City and County of Denver*, 257 F.3d 1132, 1140-42 (10th Cir. 2001), reflects the Supreme Court's focus on whether the message is the government's own. But contrary to Judge McConnell's dissent, we said nothing in *Wells* that suggests our government speech inquiry turns on the ownership of the physical medium conveying the speech at issue.[3] Indeed, the second *Wells* factor cited by the dissent is not about controlling the physical medium of the speech, but about controlling the *content* of that speech. *See id.* at 1142 (finding that the city exercised editorial control over the content of the speech). 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

[3]Moreover, contrary to Judge McConnell's dissent, *see* Dissent at 4, the city's ownership of the holiday display in *Wells* was clearly established. *Wells*, 257 F.3d at 1139 (noting that, as a factual matter, "Denver owns each component part of the display").

private message as its own without subjecting the message to the political process, a result that would shield the government from First Amendment scrutiny and democratic accountability.

This is in fact the result that Judge McConnell's dissent advocates, and it is most apparent in the dissent's equation of government endorsement in the Establishment Clause context with government speech under the Free Speech Clause. Citing *Van Orden v. Perry*, 545 U.S. 677 (2005), the dissent emphasizes that the Supreme Court has characterized a Ten Commandments monument under analogous circumstances as a "state display" for purposes of the Establishment Clause. *See id.* at 692 (holding that "Texas' display of this monument" did not violate the Establishment Clause). The simplest response to this observation is that a state's display of a monument is not necessarily state speech; if the government *displays* a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own. *See Pleasant Grove City,* 483 F.3d at 1047 n.2 (explaining that the government may violate the Establishment Clause without directly speaking). *Van Orden* and the circuit cases cited by the dissent stand for the simple proposition that a city's acceptance and display of a privately donated monument with religious content may constitute state *action* violating the Establishment Clause. But none of these cases supports the proposition that, when the state acts to accept a monument, it automatically turns the

message that monument conveys into state speech.[4]

On a broader note, because the Establishment and Free Speech Clauses serve different purposes, discussions of state action in Establishment Clause cases are not germane to a determination of when the government speaks for purposes of the Free Speech Clause. Indeed, the Supreme Court has analyzed government speech differently in the context of free speech, recognizing the differing theoretical justifications underlying the Establishment and Free Speech Clauses. In the Establishment Clause context, government speech favoring or disfavoring religion is a concern because of the effect it may have on individual members of the political community: "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Indeed, in deciding that a student-led "invocation" permitted by school policy could "not properly [be] characterized as 'private speech'" under the Establishment Clause, the Supreme Court focused explicitly on the message that government *sponsorship* sends members of the community: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the

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[4]In fact, one case cited in Judge McConnell's dissent contains language specifically rejecting this proposition. *Modrovich v. Allegheny County*, 385 F.3d 397, 410-11 (3d Cir. 2004) ("The fact that government buildings continue to preserve artifacts of [the country's religious] history does not mean that they necessarily support or endorse the particular messages contained in those artifacts.").

audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quotation omitted). In other words, the government's sponsorship of religion sends an impermissible "ancillary message" that renders the speech not entirely private.

The same concerns do not underpin the Free Speech Clause. Although individuals may constitutionally challenge government sponsorship or endorsement of religion, they generally have no constitutional right to challenge government speech under the Free Speech Clause. In the free speech context, the fact that government speech is exempt from constitutional challenge is justified because it is subject to the political process:

> The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."

Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). That is, the latitude that government speech enjoys in the free speech context is justified by the "*political safeguards*" in the democratic process that set government speech

"apart from private messages." *Johanns*, 544 U.S. at 563 (emphasis added). Thus, its immunity from constitutional challenge under the Free Speech Clause does not depend on whether the "reasonable observer," familiar to Establishment Clause jurisprudence, would perceive the government as speaking.

Rather, if citizens object to the government's message, they may elect new representatives who "later could espouse some different or contrary position." *Southworth*, 529 U.S. at 235. But in order for citizens to be able to hold the government accountable for its speech, the government must speak subject to "traditional political controls [that] ensure responsible government action." *Id.* at 229; *see also Johanns*, 544 U.S. at 560-64 (concluding that promotional program was subject to adequate safeguards because its message was prescribed by federal law and the government supervised and controlled the program and the contents of its message). The speech in these cases was not subject to political safeguards; the facts simply do not implicate government speech because the cities exercised no control over the content of the messages.

Thus, in the context of the Free Speech Clause, we cannot extend the government speech doctrine any further. To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own. Moreover, because the Establishment Clause would apply only to religious expression, an expanded government speech doctrine would effectively remove the government's regulation of permanent non-religious speech from all First Amendment scrutiny. Such an approach is clearly

contrary to established First Amendment principles. *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 795-96 (4th Cir. 2004) ("The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."). Because this approach to government speech is unsupported by Supreme Court precedent and the purposes of the First Amendment, this Court may not consider it. And because the relevant law and its application are clear, en banc consideration is inappropriate.

APPENDIX G

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

APPENDIX H

RESOLUTION NO. 2004-019

A POLICY GOVERNING PLACEMENT OF PLAQUES, STRUCTURES, DISPLAYS, PERMANENT SIGNS AND MONUMENTS IN CITY PARKS AND ON PUBLIC PROPERTY.

WHEREAS, there is a limited amount of park space within the city; and

WHEREAS, there are aesthetic issues surrounding the placement of permanent objects in parks and other public areas; and

WHEREAS, the City wishes to preserve its public open space; and

WHEREAS, permanent structures, displays, permanent signs and monuments, decrease the available open space and the visual perception of open space, and

WHEREAS, there are also safety issues surrounding the placement of permanent objects in parks and public areas such as sight obstructions, and line of sight availability; and

WHEREAS, the City wishes to insure that placement of permanent objects on public property does not create safety hazards.

Therefore, the City desires to adopt a policy

regarding placement of plaques, structures, displays, permanent signs and monuments on public property.

I. Process for Placement of Permanent Objects on Public Property.

1. Prior to any permanent object such as plaques, structures, displays, signs, and monuments being placed on public property approval must be obtained from the City Council.

2. Requests for placement or offers of donation shall be made through the Director of Leisure Services. A brief description of the proposed item including the item's dimensions, along with any available photographs, drawings artist's renderings, etc. and a description of the proposed placement location should be submitted with the request.

3. The Director shall then submit the request to the City Council for their consideration and acceptance or denial.

II. Criteria for Placement.

The City Council shall consider the following criteria before accepting offers to place any plaque, structure, display, permanent sign, or monument in a public park or on public property in the City of Pleasant Grove.

1. The item must directly relate to the history of Pleasant Grove and have historical relevance to

the community. Factors to be considered in making this determination include, but are not limited to:

(A) It is at least fifty ("50") years old

(B) It is directly associated with events of historic significance in the community.

(C) It commemorates some significant event in the City's history .

(D) It is closely associated with the lives of persons who were of historic importance to the community.

(E) It exhibits significant methods of construction of materials that were used within the historic period

(F) It is associated with events that have made a significant contribution to the broad patterns of history of the City, State, or the United States.

(G) It embodies distinctive characteristics of a type, period, or method of construction or it represents the work of a master, or possesses high artistic value or represents a significant and distinguishable entity whose components may lack individual distinction.

(H) It has yielded or may be likely to yield information important in prehistory, or history (i.e., archeological finds).

2. It is being donated by an established Pleasant Grove civic organization with strong ties to the community, or

3. The donors have a historical connection with Pleasant Grove City; and

4. Placement does not create any safety hazards; and

5. It is not obscene.

III. Additional Considerations.

___If the item meets the above-listed criteria, then the Council shall consider the proposed location of the item and evaluate the aesthetics of the proposed placement, the effect said placement will have on the remaining open space on the public property, any safety issues, and any other visual or practical effects of locating the item on the proposed site. Based upon the factors listed, the council shall make the final determination as to whether the item shall be accepted and where the item shall be placed.

IV. The provisions of this Resolution shall take effect immediately.

APPROVED AND ADOPTED BY THE CITY COUNCIL OF PLEASANT GROVE, UTAH, this 3rd day of August, 2004.

/s/_____
Jim A. Danklef, Mayor

[Pleasant Grove City, Utah
Corporate Seal]

[Attestation]

APPENDIX I

Examples of Government Properties within the Tenth Circuit with Donated Permanent Displays

Each entry is indexed in SIRIS, the Smithsonian Institution Research Information System, and may be searched and reviewed online using the SIRIS Control Number provided. The SIRIS search page is found at http://siris-collections.si.edu/search/.

I. Replica Statues of Liberty and The Boy Scouts of America's "Strengthen the Arm of Liberty" Project[1]

– *Colorado Locations*

City Hall, Colorado Springs
SIRIS No. CO000057

Lakeside Park, Loveland
SIRIS No. CO000374

County Courthouse, Sterling
SIRIS No. CO000354

County Courthouse, Trinidad
SIRIS No. CO000375

– *Kansas Locations*

Fike Park, Colby
SIRIS No. KS000301

County Courthouse, Eldorado

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[1]For a brief history of the BSA 40th Anniversary Project that resulted in purchases of replica Statues of Liberty (sometimes called the "Little Sisters of Liberty") by Boy Scout Troops and their supporters, donation of these replicas to government bodies, and their placement on display in communities around the Nation, *see* www.americanprofile.com/article/3455.html.

SIRIS No. KS000238
County Courthouse, Garden City
SIRIS No. KS000395
Courthouse Square, Garnett
SIRIS No. KS000402
Roadside Park, Harlan
SIRIS No. KS000302
Public Library, Hays
SIRIS No. KS000156
Intersection of Penn & Locust, Independence
SIRIS No. KS000323
City Park, La Crosse
SIRIS No. KS000396
City Hall grounds, Leavenworth
SIRIS No. KS000247
519 N. Kansas, Liberal
SIRIS No. KS000300
Gateway Park, Pratt
SIRIS No. KS000265
Lincoln Park, Russell
SIRIS No. KS000397
Oakdale Park, Salina
SIRIS No. KS000401
City Park Square, St. John
SIRIS No. KS000324
County Courthouse, Troy
SIRIS No. KS000399
County Courthouse, Washington
SIRIS No. KS000303
– *Oklahoma Locations*
City Park, Cushing
SIRIS No. OK000143
North Blvd. at 2nd Street, Edmond
SIRIS No. OK000142

County Courthouse, Enid
SIRIS No. OK000104
County Courthouse, Miami
SIRIS No. OK000039
Spaulding Park, Muskogee
SIRIS No. OK000049
County Courthouse, Oklahoma City
SIRIS No. OK000147
County Courthouse, Wewoka
SIRIS No. OK000144
County Courthouse, Enid
SIRIS No. OK000273
– *Wyoming Location*
County Courthouse, Torrington
SIRIS No. WY000055

II. "Spirit of the American Doughboy" Statues[2]
– *Utah Locations*
Intersection of Main and Center Streets, Beaver
SIRIS No. UT000176
10 N. Main Street, Mt. Pleasant
SIRIS No. 47260115
Price Street Peace Garden, Price
SIRIS No. UT000119
East Main Street, Vernal
SIRIS No. 47260116
– *Wyoming Location*
Bunning Park, Rock Springs
SIRIS No. 47260134

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[2]For a brief discussion of the Spirit of the American Doughboy statue replicas, *see* http://members.tripod.com/doughboy_lamp/earlspages/index.html.

III. Daughters of the American Revolution and Statues of the Madonna of the Trail[3]

– *Colorado Location*

Colorado Welcome Center, Lamar
SIRIS No. CO000373

– *Kansas Location*

Madonna Park, Council Grove
SIRIS No. KS000403

– *New Mexico Location*

McClellan Park, Albuquerque
SIRIS No. NM000042

IV: Displays on Federal Properties

– *Colorado Locations*

Sculpture, Pegasus, Arnold Hall, United States Air Force Academy, Colorado Springs
SIRIS No. CO000402

Sculpture, Tuskegee Airman, Cadet Honor Court, United States Air Force Academy, Colorado Springs
SIRIS No. CO000061

WWI Overseas Flyer Monument, Cadet Honor Court, United States Air Force Academy, Colorado Springs
SIRIS No. CO000086

Sculpture, War Memorial, Cadet Air Gardens, United States Air Force Academy, Colorado Springs
SIRIS No. CO000400

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[3]For brief discussions of the Daughters of the American Revolution and the Madonna of the Trail Monuments, *see* www.route40.net/history/madonnas/introduction.shtml and www.stjohnks.net/santafetrail/research/madonna-of-the-trail.html and www.alphabicycle.com/AL/index.html.

Sculpture, Henry Arnold, Traffic Circle, United States Air Force Academy, Colorado Springs
SIRIS No. CO000442
Sculpture, Gen. Mitchell, Cadet Air Gardens, United States Air Force Academy, Colorado Springs
SIRIS No. CO000085
Sculpture, Orville Wright, Fairchild Hall, United States Air Force Academy, Colorado Springs
SIRIS No. CO000568
Sculpture, Wilbur Wright, Fairchild Hall, United States Air Force Academy, Colorado Springs
SIRIS No. CO000569
Sculpture, Iron Mike, Post Headquarters, Ft. Carson
SIRIS No. CO000576

– *Kansas Locations*

William White Memorial, U.S. Post Office, Eldorado
SIRIS No. KS000647
Sculpture, The Letter, Churchill Army Reserve Center, Lawrence
SIRIS No. KS000515
Sculpture, Old Trooper, Cavalry Parade Field, Ft. Riley
SIRIS No. 76000615

– *New Mexico Location*

Kit Carson Memorial, U.S. Courthouse, Santa Fe
SIRIS No. NM000120

– *Oklahoma Location*

Sculpture, The Fighting Doughboy, Veterans Affairs Medical Center, Muskogee
SIRIS No. 47260092

V: Miscellaneous Displays

– *Colorado Location*

Statue, General Nathaniel Lyon, County Courthouse, Boulder
SIRIS No. CO000130

– *Kansas Locations*

Sculpture, John Brown, John Brown Memorial State Park, Osawatomie
SIRIS No. KS000523

Statue, WWI Doughboy, 4th and Leonard Streets, Onaga
SIRIS No. KS000626

– *New Mexico Locations*

Sculpture, The Hand of Friendship, La Luz de Amistad Park, Albuquerque
SIRIS No. NM000050,

Monument, Decalogue, County Courthouse, Albuquerque
SIRIS No. NM000053

Sculpture, Memorial Triangle, Monroe and Railroad Street, Clayton
SIRIS No. NM000417

Persian Gulf War Monument, Veterans' Park, Deming
SIRIS No. NM000474

L. Bradford Prince Memorial, Ft. Marcez State Monument, Santa Fe
SIRIS No. NM000365

Sculpture, The Sentinel, Fort Selden State Monument, Radium Springs
SIRIS No. NM000513

– *Oklahoma Locations*

Statue, The Critic, Shepler Park, Lawton

SIRIS No. OK000165
Sculpture, Crossing the Red, County Courthouse, Altus
SIRIS No. OK000168
Statue of WWI Doughboy, Public Library, 120 W. Main Street, Enid
SIRIS No. OK000196
Statue, Will Rogers, Will Rogers Park, Oklahoma City
SIRIS No. OK000121
Statue, Pioneer Woman, Pioneer Woman State Museum, Ponca City
SIRIS No. 76009570
– *Utah Locations*
Sculpture, Victory, City Park, Springville
SIRIS No. UT000067
Sculpture, Pioneer Mother, S. Main Street, Springville
SIRIS No. 76005764
Sculpture, Constitution and Flag, City/County Building, Salt Lake City
SIRIS No. UT000109
– *Wyoming Locations*
Statue, Robert Burns, City Park, Cheyenne
SIRIS No. WY000023
Sculpture, Albany County War Memorial, 6th Street and Ivinson Avenues, Laramie
SIRIS No. WY000087
Sculpture, Uintah County War Memorial, County Courthouse, Evanston
SIRIS No. WY000090
Sculpture, The Fountainhead, City Hall, Casper
SIRIS No. WY000069