IN THE UTAH SUPREME COURT
STATE OF UTAH

SUMMUM, a Corporate Sole and Church,
Plaintiff and Appellant,

VS.

PLEASANT GROVE CITY, a municipal Corporation, **BRUCE CALL**, Mayor and Former City Council Member, **JIM DANKLEF**, former Mayor, **MIKE DANIELS**, former Mayor, **LEE JENSEN**, City Council Member, **CINDY BOYD**, City Council Member, **JEFF WILSON**, City Council Member, **VAL DANKLEF**, City Council Member, **KIMBERLY ROBINSON**, City Council Member, **G. KEITH CORRY**, former City Council Member, **MARK ATWOOD**, former City Council Member, **SCOTT DARRINGTON**, City Administrator, and **FRANK MILLS**, former City Administrator,
Defendants and Appellees.

APPEAL NO. 20120717-SC

Appeal from a Judgment of the Fourth District Court
In and For Utah County, State of Utah, Hon. Fred D. Howard

BRIEF OF APPELLEES

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Statement of Jurisdiction

This Court has jurisdiction, under Utah Code Ann. § 78A-3-102(3)(j), to review the district court's decision and order granting Defendants-Appellees' motion for summary judgment, and denying Plaintiff-Appellant's motion for summary judgment, pursuant to Utah Rule of Civil Procedure 56.

Issues Presented For Review

I. Does Article I, § 4 of the Utah Constitution dictate that, by selecting, acquiring, and permanently displaying monuments, memorials, and other items on its property, Pleasant Grove is required to accept ownership of, and permanently display on city property, whatever items that a private individual or group offers to donate (including, but not limited to, an item previously offered by Plaintiff)? The district court held that Article I, § 4 imposes no such requirement. R. 908-11.

II. Does Pleasant Grove's selection, acceptance, and permanent display in Pioneer Park of numerous items that relate to the City's pioneer history, or that were donated by individuals or groups with longstanding ties to the community—such as the City's first town hall, a replica log cabin, and a Ten Commandments monument—constitute "religious worship, exercise, or instruction" for purposes of Article I, § 4? The district court discussed, but did not decide, this question. R. 911-12.

Standard of Review

In *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993), which also involved the review of a district court order deciding summary judgment motions concerning an Article I, § 4 claim, this Court explained:

> When no material facts are in dispute, a challenge to summary judgment presents only conclusions of law for review. We give the district court's legal conclusions no deference.
>
> . . . [T]he burden of showing the unconstitutionality of the practice is on the Separationists [*i.e.*, the plaintiffs]. . . . We therefore restate the burden to be met by one who challenges an enactment on constitutional grounds: The act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality.

Id. at 920-21 (citations omitted).

Preservation of the Issues

The issues raised in the Brief for Appellant, and this brief, were preserved by the parties in their summary judgment motions and supporting memoranda. R. 31-45, 84-92, 395-426, 427-29, 430-50, 740-91, 822-63.

Determinative Constitutional Provisions and Ordinances

Article I, § 4 of the Utah Constitution states:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Utah Rule of Civil Procedure 56 states, in relevant part:

> (a) *For claimant.* -- A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may . . . move for summary judgment upon all or any part thereof.

> (b) *For defending party*. -- A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.
>
> (c) *Motion and proceedings thereon*. -- The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

In addition, the full text of Pleasant Grove Resolution No. 2004-019, which governs the placement of plaques, structures, displays, permanent signs, and monuments in city parks and on public property, appears in the record at R. 544-46.

Statement of the Case

In *Summum v. Pleasant Grove City*, Case No. 2:05-cv-638 (DAK), 2010 U.S. Dist. LEXIS 55024 (D. Utah 2010) (R. 582-89), Plaintiff brought federal free speech, federal Establishment Clause, and Article I, § 4 claims against Defendants (hereafter "the City") in connection with the City's decision not to accept and permanently display Plaintiff's Seven Aphorisms monument in Pioneer Park. In *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009), the United States Supreme Court unanimously rejected Plaintiff's federal free speech claim, holding that "the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." 555 U.S. at 464.

Subsequently, the federal district court granted Defendants' motion for summary judgment on Plaintiff's federal Establishment Clause claim, holding that "it cannot be said that the Pleasant Grove government demonstrated a preference for one religion over another." R. 584. The court declined to exercise supplemental jurisdiction over Plaintiff's Article I, § 4 claim, which Plaintiff re-filed in the instant action. R. 582-84. On June 26, 2012, the district court granted Defendants' motion for summary judgment and denied Plaintiff's motion for summary judgment, R. 906-20, leading to this appeal.

Statement of Facts

The parties agree that "the operative facts of this case are undisputed," R. 919, and that the prior federal litigation "involved the same parties, the same facts and the same issues as the case at bar." R. 179; R. 181.[1]/ Pleasant Grove was founded by Mormon pioneers in 1850 as one of the first communities to which Brigham Young sent people. R. 579, 716. Pioneer Park, also known as Pioneer Heritage Park, is a 2.5 acre public park located in Pleasant Grove's Historic District that was dedicated in 1947. *Pleasant Grove*, 555 U.S. at 464; R. 578-79, 588, 919. "Elementary school children take tours of Pioneer Park to learn about the history of Pleasant Grove and Utah," as it is "along the lines of a

[1]/ Before the district court, the City argued that the issue preclusion doctrine applies such that the court should take the identical, previously decided facts and issues as a starting point and then apply Utah law to them to determine whether Plaintiff has met its high burden of stating a claim. *See Jensen v. Cunningham*, 2011 UT 17, ¶ 49, 250 P.3d 465, 478-79; *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 31, 194 P.3d 956, 965-66; *Buckner v. Kennard*, 2004 UT 78, ¶ 12, 99 P.3d 842, 846-47. The court did not need to expressly rule on this issue because the operative facts it relied upon, and those set forth herein, are undisputed.

museum where people can walk around and get an idea of the history of Pleasant Grove." R. 578.

> Each year during the late summer, the City holds a one-day Heritage Festival that is held on the Saturday closest to the date on which Pleasant Grove was founded. During the Heritage Festival, only displays and activities that deal with pioneer heritage are held in Pioneer Park. For example, a demonstration of pioneer soap making is held only in Pioneer Park so that those who view the demonstration do so in a location that reflects pioneer life.

Id.

Pioneer Park contains fifteen items that are owned and permanently displayed by the City, at least eleven of which were donated in completed form by private parties. 555 U.S. at 464, 472; R. 541, 571-77, 588, 919. "The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park." 555 U.S. at 473. The City Council makes the ultimate decision as to what structures or items the City will take ownership of and permanently display in City parks, including Pioneer Park. R. 483, 487, 497, 501.

> Every item in Pioneer Park has some connection to the settlement, history or cultural life of Pleasant Grove, past and present, or was donated by individuals or groups with longstanding ties to [the] community. It has never been the intent or the practice of the city to allow displays in the park that fail to meet either of these criteria.

R. 571; *see also* R. 577-78.

For example, the Old Bell School was the first school in Pleasant Grove, with sections constructed between 1864 and 1887, and the City's original Town Hall was built in 1886; both buildings are listed on the National Register of Historic Places. R. 505, 575-77. Pioneer Park was built around these two structures. *Id.* Other items on display in

the park include a restored winter sheepfold, the City's first fire station and granary, the City's original train station sign, a replica log cabin, a pioneer era water well, a pioneer flour millstone, a Ten Commandments monument donated by the Fraternal Order of Eagles, and a September 11 monument that thanks local police, fire, emergency medical, and military personnel for their service. R. 495-96, 572-77, 588, 919.

"At the time the Ten Commandments monument was erected in Pioneer Park in 1971, Mayor Cook said he thought the monument 'would serve to remind citizens of their pioneer heritage in the founding of the state.'" R. 586; R. 553, 572. "When the City accepted the monument, the City did not accept it as a religious monument, but as a gift from a local service group and as a monument that expressed principles . . . that governed [the pioneers] in the founding of Utah and of Pleasant Grove." R. 572; *see also* R. 454, 457-58. "The undisputed facts of record in this case show that—whatever the Eagles' intended message—Pleasant Grove has, since the beginning, displayed the monument for reasons of history, not religion." R. 584; R. 572. Over the past several decades, the Eagles have contributed thousands of hours of community service to the Pleasant Grove community and have held numerous fundraisers to support local causes. R. 464-67.

"On two separate occasions in 2003, Summum's president wrote a letter to Pleasant Grove's mayor requesting permission to erect a 'stone monument' which would contain 'the Seven Aphorisms of Summum' and be similar in size and nature to the Ten Commandments display." R. 587; R. 570-71, 918. "Neither of the letters sent by Summum in 2003 sets forth the group's tenets, teachings, beliefs or practices in any way, nor are Summum's beliefs in any way described except for saying that the group's 'Seven

Aphorisms' would be 'complementary,' to the Ten Commandments and that the beliefs are 'based upon teachings that precede the ancient Egyptians.'" R. 587. Plaintiff has admitted that it and its proffered donation have no longstanding ties or historical relevance to Pleasant Grove. R. 586; R. 74-75, 472-75.

"The city's only communication with Summum, a letter dated November 19, 2003, denying the group's request, makes no reference to Summum's religious status nor any of its tenets, teachings, beliefs or practices. The only criteria stated by the city for rejecting Summum's request in 2003 related to the lack of historical relation to Pleasant Grove and the lack of long-standing ties to Pleasant Grove." R. 587; R. 570, 918. Plaintiff has conceded that "[t]he religious nature of SUMMUM's monument and its religious content was not considered by Pleasant Grove City when it rejected SUMMUM's requests." R. 169; R. 479, 482. At the time that City officials declined to accept and permanently display Plaintiff's proffered donation, they were unaware of Plaintiff's religious tenets, teachings, beliefs or practices; "there is no evidence that anyone in Pleasant Grove government had any idea what Summum's religious beliefs were, and thus it cannot be said that the Pleasant Grove government demonstrated a preference for one religion over another." R. 584; *see also* R. 479, 482, 509, 512, 515, 518, 521, 524, 527, 530, 533, 536, 541, 569-70.

"In 2004, Pleasant Grove adopted a written policy setting forth the city's criteria for accepting and displaying donated monuments among other things. This written policy codified the previously unwritten policy of limiting monuments to those that 'either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with

longstanding ties to the Pleasant Grove community.'" R. 587; R. 570, 917-18. "The 2004 policy contains no reference to consideration of a potential donor's religion, religious tenets, teachings, beliefs or practices." R. 586-87; R. 570. The City has never had any rules or criteria for the acceptance and permanent placement of monuments in City parks other than what is set forth in Resolution No, 2004-019. R. 170, 172. Plaintiff has stipulated that "it does not meet the criteria of either Pleasant Grove's pre-2004 unwritten policy [or] its 2004 written policy for accepting monuments." R. 586; R. 472-75.

Summary of Argument

This Court should affirm the district court's decision for three reasons.

First, Article I, § 4 does not give private individuals or groups, such as Plaintiff, an "equal access" right that would require government actors, such as the City, to accept ownership of, and permanently display on public property, any item of their choosing. As the district court correctly noted,

> This is not a situation in which the City has opened up the Park for private entities to erect monuments in expression of their private speech. . . .
>
> Plaintiff has argued discrimination and unequal access to the benefit offered to some by the City. The benefit described by Plaintiff, however, of one group being allowed to erect a monument while another group is denied the same privilege, simply does not exist.

R. 908, 911.

It is abundantly clear that, in this case, it is *the City*, not any private individual or group, that speaks a historical message through its selection, acquisition, and permanent display of items at Pioneer Park. *Pleasant Grove*, 555 U.S. at 470, 472; R. 908-11. This is unsurprising; government actors at all levels routinely craft and convey messages—

through public service ad campaigns, the acceptance and permanent display of statues, monuments, and other items, and other means—and in many instances private actors play some role in the formation or facilitation of such messages. The language and history of Article I, § 4 do not support the notion that Utah government actors cannot speak their own messages without becoming the mouthpieces of private would-be speakers.

Additionally, *Whitehead* and *Snyder v. Murray City Corp*., 2003 UT 13, 73 P.3d 325, set forth a two-part test for cases in which the government provides money or property *to private individuals or groups*, who use that money or property to engage in religious worship, exercise, or instruction. *Snyder*, 2003 UT 13, ¶¶ 19-20, 73 P.3d at 330; *Whitehead*, 870 P.2d at 938. Here, however, no private individual or group has used city money or property, so the non-discrimination and equal access principles of *Whitehead* and *Snyder* are not implicated; a government actor treats everyone the same with respect to the use of public money or property where, as here, no use is given to anyone.

Second, the City's permanent display of various historically relevant items in Pioneer Park, including a Ten Commandments monument, does not constitute religious worship, exercise, or instruction. In *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P.2d 477 (1948), the Court held that Article I, § 4 does not prohibit government actors from accurately portraying Utah history, including the fact that Mormon pioneers played a central role in the founding of the State: "[W]e have a situation in this State that if we are not careful in applying, in our endeavors to uphold the constitutional separation of Church and State, may forever doom this State to silence about its own history for fear it may violate its own constitutional prohibition." 114 Utah at 129, 197 P.2d at 488.

Here, every item that the City owns and permanently displays in Pioneer Park relates to the history of Pleasant Grove or was donated by a group with longstanding community ties. R. 571. The Ten Commandments monument meets these religiously-neutral criteria and, as the federal district court noted, "Pleasant Grove has, since the beginning, displayed the monument for reasons of history, not religion." R. 584; *see also* R. 458, 572, 586, 711; Brief of Appellant at 24. Conversely, Plaintiff has admitted that its offer to donate an item "[did] not meet the criteria of either Pleasant Grove's pre-2004 unwritten policy [or] its 2004 written policy for accepting monuments." R. 586. In other words, unlike all items that the City owns and displays in Pioneer Park, Plaintiff's proffered donation bears no relationship to Pleasant Grove's history or community. As such, its offer was not "similar" or "complementary" to any of the items that the City displays in Pioneer Park, just as an offer to donate an item relating to the history of New Zealand would not be "similar" or "complementary" to an offer to donate an authentic pioneer era wagon for purposes of a Utah history museum.

Third, Plaintiff's reading of Article I, § 4 implicates the principle that "constitutional provisions should be interpreted to avoid absurd results." *State v. Willis*, 2004 UT 93, ¶ 16, 100 P.3d 1218, 1222. Under Plaintiff's view of Article I, § 4, *any* group or individual would be able to force the City to accept ownership of *any* item of its choosing, and also force the City to permanently display that item in Pioneer Park. Similarly, a host of Utah public properties, including State Capitol buildings and grounds, would become dumping grounds for an array of monuments, memorials, paintings, sculptures, and other items that private individuals or groups want the government to

accept and display. Plaintiff has provided no textual, legal, or historical support for this novel view of Article I, § 4.

Argument

I. Article I § 4, *Whitehead*, and *Snyder* do not require government actors to accept ownership of, and permanently display, any and all items of a private individual or group's choosing, as Plaintiff asserts here.

Plaintiff spends much of its brief attempting to apply the *Whitehead-Snyder* test to this case, largely ignoring the fundamental question—central to the district court's decision—of whether that framework ought to be applied to the facts of this case. However, there is a critical distinction between the use of public money or property by private individuals or groups, at issue in *Whitehead* and *Snyder*, and the government's own use of its own money or property, at issue here. This Court should reject Plaintiff's attempt to radically alter the meaning and application of Article I, § 4 such that it would preclude government actors from managing museums, art galleries, war memorials, and similar public displays without being forced to accept and display any and all items of any private individual or group's choosing.

A. The City speaks through its selection, acquisition, and permanent display of monuments, memorials, and other historically relevant items in Pioneer Park, and there is no private use of public money or property here.

As in the prior federal litigation that, as Plaintiff has acknowledged, "involved the same parties, the same facts and the same issues as the case at bar," R. 179, Plaintiff's claim here is founded upon the theory that the City has allowed various private individuals and groups to use Pioneer Park to convey their own private messages through

the permanent display of items, and that the City has discriminated against Plaintiff by not allowing it to speak in a similar manner. This theory is without merit. Nine United States Supreme Court Justices and the district court below considered this very question and unanimously concluded that it is *the City*, not any private individual or group, that speaks through its selection, acquisition, and permanent display of items at Pioneer Park. *Pleasant Grove*, 555 U.S. at 470, 472; R. 908-11. In fact, Plaintiff has conceded that the City's selection and display of items in Pioneer Park constitutes government speech. R. 730, 734, 758-59, 771. Plaintiff has provided no persuasive reason for this Court to reach a contrary conclusion, and that failure is fatal to Plaintiff's claim.

In 2009, the United States Supreme Court considered the very facts and issues presented here, R. 179, including the question of whether the City has allowed private groups to speak on City property through the permanent display of monuments. 555 U.S. at 470, 472, 481. The Court unanimously held that "it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech." *Id.* at 472. The Court stated, "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation." *Id.* at 470. The Court noted that, rather than opening Pioneer Park "for the placement of whatever permanent monuments might be offered by private donors," the City has "effectively controlled the messages sent by the monuments in the Park by exercising final approval authority over their selection." *Id.* at 472-73 (citation omitted).

Additionally, the Court observed that, since "ancient times," governments "have long used monuments to speak to the public," *id.* at 470, and noted that just as "government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land." *Id.* at 470-71. The Court stated that, when the government speaks—as the City has here—it has the right to "speak for itself" and "select the views it wants to express." *Id.* at 467. Furthermore, a governmental body's use of selection criteria to craft its own message is commonplace and perfectly reasonable:

> Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

Id. at 472 (citation omitted).

To put it another way, distributing leaflets or speaking on a soapbox in a public park are markedly, and legally, different categories of action than erecting a permanent monument in a park. *See id.* at 479. Pleasant Grove City parks are open to all groups, including Plaintiff, to engage in these transitory speech activities, but no City park, including Pioneer Park, has been opened up for the indiscriminate placement of permanent, unattended monuments, displays, and objects by private groups. This "is perfectly proper. After all, parks do not serve speech-related interests alone. To the

contrary, cities use park space to further a variety of recreational, historical, educational, esthetic, and other civic interests." *Id.* at 484 (Breyer, J., concurring).

Plaintiff has provided no reason for this Court to reach a contrary conclusion, nor does the language or history of Article I, § 4 suggest the absurd proposition that Utah government actors cannot speak without becoming the mouthpieces of any and all private would-be speakers. Although Utah cases are silent on the contours of government speech, "[a]s Justice Holmes said, '[A] page of history is worth a volume of logic.'" *Whitehead*, 870 P.2d at 921 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). The United States Supreme Court was not the first court to recognize the common sense notion that a *government* display of a *government* owned item on *government* property constitutes *government* speech. *See, e.g.*, *ACLU v. Schundler*, 104 F.3d 1435, 1444 (3d Cir. 1997) ("[O]bjects 'owned and displayed' by the government on government property are "government speech."); *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988) ("In this case, the speaker is the United States Government. [The sculpture] is entirely owned by the Government and is displayed on Government property.").

Indeed, government actors at all levels routinely craft government messages, and in many cases private actors play some role in the formation or facilitation of such messages. The United States Supreme Court has observed that the government may "regulate the content of what is or is not expressed when it is [itself] the speaker *or when it enlists private entities to convey its own message*." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added). For example, since the 1940s, government agencies have worked with the Ad Council, a private, non-profit

organization that produces and distributes public service campaigns, to help formulate and disseminate a particular government message.[2]/ Some of the more recognizable examples of government speech produced by the Ad Council include: the "Buy War Bonds" and "Loose Lips" campaigns during World War II; Smokey Bear and "Only You Can Prevent Forest Fires"; McGruff the Crime Dog and "Take a Bite out of Crime"; and "You can learn a lot from a dummy . . . Buckle your safety belt" and "Friends Don't Let Friends Drive Drunk."[3]/ The involvement of a private entity in the creation of the government's own message does not alter the nature of that message as *government speech*, nor does it entitle other private entities to force the government to speak a different message.

Additionally, governments often receive offers from private individuals and groups to donate various monuments, memorials, artwork, and other items; by necessity, they exercise discretion in deciding which items to accept, reject, display, or discard. Indeed,

> [a] great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States and cities likewise have received thousands of donated monuments. By accepting monuments that are privately funded or donated,

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[2]/ Ad Council, *About Us*, http://www.adcouncil.org/About-Us (last visited June 24, 2013).

[3]/ Ad Council, *The Classics*, http://www.adcouncil.org/Our-Work/The-Classics (last visited June 24, 2013); Ad Council, *The Story of the Ad Council*, http://www.adcouncil.org/About-Us/The-Story-of-the-Ad-Council (last visited June 24, 2013).

> government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.

555 U.S. at 471 (citations omitted). As the Supreme Court noted, however, under Plaintiff's view of the law, "when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (1) declining France's offer or (2) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia)." *Id.* at 479. This cannot be the law under Article I, § 4.

Furthermore, under Utah law, the State Capitol Preservation Board is responsible for soliciting the donation of money and items from private individuals and groups for possible use on the Capitol Hill complex. Utah Code Ann. § 63C-9-501. When the Board accepts a proffered donation, the item becomes "the property of the state and is under the control of the board." *Id.* § (2)(a). The Board is authorized to use funds to "acquire historical and other items to furnish the capitol hill facilities" and to "pay for the repair and maintenance of the capitol hill facilities and capitol hill grounds." Utah Code Ann. § 63C-9-502(4).

In addition, the Board's Art Placement Subcommittee is responsible for reviewing the content, placement, removal, or relocation of existing items and proffered donations that may be placed in the public areas of Capitol Hill—such as paintings, murals, photographs, sculptures, monuments, and memorials—and making recommendations to the Board. Utah Code Ann. §§ 63C-9-701(2), -703(1). The Board's decision to accept

ownership of, decline to accept, place, relocate, or remove monuments, memorials, paintings, or other items on public property is a reasonable exercise of the government's discretion concerning how to decorate its own property; like the City's actions here, the Board's actions do not, in any way, constitute impermissible discrimination against any private individual or group for purposes of Article I, § 4.

B. By its own terms, the *Whitehead-Snyder* test governs the *private* use of public money or property, not *the government's own* speech and conduct.

Whitehead and *Snyder* provide a two-part framework for cases in which the government provides money or property *to private individuals or groups*, who use that money or property to engage in religious worship, exercise, or instruction:

> Use of public money or property that benefits religious worship, exercise, or instruction or any ecclesiastical establishment qualifies as an indirect benefit and survives constitutional scrutiny only if [(1)] the money or property *[is] provided* on a nondiscriminatory basis [and (2)] the public money or property *[is] equally accessible to all*.

Snyder, 2003 UT 13, ¶ 20, 73 P.3d at 330 (quoting *Whitehead*, 870 P.2d at 938) (internal brackets in original) (emphasis added). Where, as here, no private individual or group has been permitted to use public money or property to erect privately owned permanent objects, the non-discrimination and equal access principles are not implicated. In other words, since the City has provided the use of no money or property to any private individual or group, it has treated everyone the same with respect to the use of public money or property.

In *Whitehead*, the Court upheld the Salt Lake City Council's practice of inviting various community leaders to open its meetings with prayer. 870 P.2d at 918. The Court

held that Article I, § 4 did not require the exclusion of religious speakers from public property that has been opened up for use by other speakers (*e.g.*, rallies held at a park, the use of a soapbox outside of city hall). *Id.* at 934. The Court summarized Article 1, § 4's neutrality requirement as follows: "If a city permits groups to use city-owned facilities, that use must be permitted without regard to the belief system of the user. Lutherans or Latter-day Saints who wish to use the facilities must have access on exactly the same terms as the Loyal Order of Moose, the American Atheist Society, or the Libertarian Party." 870 P.2d at 938. The critical language here is "*If a city permits groups to use city-owned facilities.*"

Here, no private individual or group has used city money or property to erect a permanent monument in Pioneer Park; rather, the City itself uses its own property to promote its history. *Whitehead* did not suggest that its forum-specific holdings should be mechanically applied to all situations, even where no private speakers, or private users of public property, are involved. In particular, *Whitehead* did not address the government's selection of monuments, memorials, or other items to display on its property.

Similarly, in *Snyder*, the Court applied the principles stated in *Whitehead* in holding that Murray City violated Article I, § 4 by refusing to allow Snyder to open a council meeting with a prayer, due to the prayer's content, while allowing other individuals to open meetings with a prayer. Once Murray City had provided the opportunity for various private individuals to speak to open the meetings, the city was required to provide that opportunity to all on a neutral, non-discriminatory basis. 2003 UT 13, at ¶¶ 28-30, 73 P.3d at 331-32. By contrast, *Snyder* did not suggest that when the

government uses its own facilities and resources to further a *governmental* end, *private* individuals are entitled to similar access to further their *private* end. Nothing in *Snyder* supports the proposition that when a city, such as Pleasant Grove, displays city-owned monuments on city-owned property, private groups or persons enjoy an unfettered right to force the city to accept ownership of, and permanently display, items of their own choosing.

In sum, a city's practice of allowing individuals to express their own personal thoughts before a council meeting is wholly different from the case at bar. A city's choice to accept ownership of, and permanently display, a donated monument (government speech) is not, as a matter of both law and common sense, equivalent to inviting an array of private citizens to offer prayers before public meetings (private speech).

The district court correctly rejected Plaintiff's attempt to apply the *Whitehead-Snyder* analysis, explaining:

> The difficulty in applying this analysis to the present case, as argued by Defendants, is that there can be no discrimination against private users when there is no private use. The way in which Plaintiff has attempted to apply the constitutional language to the facts of this case is in error. This is not a situation in which the City has opened up the Park for private entities to erect monuments in expression of their private speech. It is also not a situation in which facilities are being offered for social, civic or religious functions. . . . Whatever the criteria employed by the City, the acceptance or rejection of a donation of money or property to the City does not, under any interpretation, fall within the terms of the State Constitution. No constitutional rights are implicated, as no money or property could possibly be construed as benefitting religious worship, exercise or instruction solely by means of such a transaction.

R. 910-11.

Additionally, the district court noted that the remedy sought by Plaintiff—forcing the City to accept ownership of, and permanently display, Plaintiff's proposed monument in Pioneer Park—would be improper:

> Having established what is not occurring in the Park – namely the City's allowance of private use for purposes of conveying private speech – what is occurring in the Park, by means of the Ten Commandments monument, is government speech. . . . That the government's speech, however, as conveyed by the monument, might be violative of the State Establishment Clause based on its content, has not been the argument put forth by Plaintiff. Had it been, the remedy for such a violation, as argued by Defendants, would not have been equal access, but cessation of the violation. Rather, Plaintiff has argued discrimination and unequal access to the benefit offered to some by the City. The benefit described by Plaintiff, however, of one group being allowed to erect a monument while another group is denied the same privilege, simply does not exist.

R. 908-09.

In other words, the City *does not* suggest that, when the government speaks, its actions are immune from review under Article I, § 4 (*see* Brief of Appellant at 21, 26); rather, Plaintiff's brief conflates the question of *who is speaking* with the question of *what they may lawfully say*. When the government speaks, the question is whether it has directly subsidized religious worship, exercise, or instruction. Where, as here, the government's message is historical, artistic, or otherwise secular, Article I, § 4 is not even implicated. Where, however, a government actor improperly engages in religious worship, exercise, or instruction, the proper remedy would be to *require the government to stop doing so*. In either scenario, a private individual or group would not have a right—as Plaintiff seeks here—to force the government to use public money or property to promote whatever religious messages a private individual or group desires.

Thomas v. Daughters of Utah Pioneers has more relevance to this case than *Whitehead* or *Snyder*. There, the Court held that the Utah Constitution does not prohibit government actors from accurately portraying Utah history, including the fact that the Mormon faith played a central role in the founding of the State. *Thomas* had minimal relevance in *Whitehead* and *Snyder* because the government's management of its own property for historical, artistic, or other purposes (as in *Thomas*, and in this case) is a much different situation than the government's opening of its property for the purpose of allowing various private individuals and groups to express their own viewpoints (as in *Snyder* and *Whitehead*). For the same reason, however, *Thomas* bears far greater similarity to this case than *Whitehead* and *Snyder* and, as discussed in the next section, affirms that the City's management of Pioneer Park is fully consistent with Article I, § 4.

In sum, the district court correctly held that Article I, § 4 provides no "equal access" right that would allow private individuals and groups to force Utah government actors to accept ownership of, and permanently display on public property, whatever items those individuals and groups desire. *See* R. 910 ("[T]he Eagles were not being 'allowed' to *do anything* when the City chose to erect that monument. Similarly, because no private entity has ever been allowed to place anything in the park, there was no discrimination in denying Plaintiff's unprecedented request to do so."). This Court should reject Plaintiff's attempt to distort the meaning of Article I, § 4, just as the United States Supreme Court unanimously did with respect to the meaning of the First Amendment's Free Speech Clause.

II. The inclusion of a Ten Commandments monument among other historically relevant items in a secular, historical display does not constitute religious worship, exercise, or instruction under Article I, § 4.

A second, independent reason for rejecting Plaintiff's claim and requested relief—aside from the lack of any private use of public money or property—is the fact that the City has not used public money or property in support of religious worship, exercise, or instruction.[4]/ Plaintiff has acknowledged both that "'a Ten Commandments monument may serve historical, secular purposes,'" R. 914, and that the City accepted the Ten Commandments monument (and displayed it in Pioneer Park) because "1. The Ten Commandments directly relate to the history of Pleasant Grove and have a historical relevance to Pleasant Grove; and, 2. The Eagles are a civic organization with longstanding and strong ties to the Pleasant Grove Community." Brief of Appellant at 24. As discussed herein, Article I, § 4 does not require the exclusion of all items that have some religious connotation from public historical, cultural, or artistic displays throughout Utah.

A. The term "religious worship, exercise, or instruction" does not include historically relevant items displayed for a secular purpose in a secular setting.

As this Court recognized in *Whitehead*, the terms "religious worship, exercise, or instruction" in Article I, § 4 are "relatively narrow constitutional categories." 870 P.2d at

[4]/ Although the district court declined to decide whether the City engaged in religious worship, exercise, or instruction by displaying the Ten Commandments monument alongside other items in Pioneer Park, R. 911-12, this Court may reach that question because it is an application of law to the undisputed facts presented here, which "show that—whatever the Eagles' intended message—Pleasant Grove has, since the beginning, displayed the monument for reasons of history, not religion." R. 584.

932. In interpreting this provision, "the unique history of church-state relations in Utah" is important. *Id.* at 921. The use of "historical and textual evidence . . . . can help in dividing the intent and purpose of the framers, a critical aspect of any constitutional interpretation." *Id.* at 921, n.6.

> [The framers did not] make the state and religion "aliens to each other--hostile, suspicious, and even unfriendly." . . . Such a result is clearly unnecessary to the goals of our state and federal constitutions and . . . is one that would produce consequences unintended by the framers and unheralded by our history. This is a state, after all, that was settled by people with primarily religious motivations. . . . The state that was created by the parties to this struggle plainly was not intended to be hostile to the foundation upon which most of its creators grounded their value systems—religion.

Id. at 939-40.

A scholarly article that the Court relied upon extensively in *Whitehead* explains,

> Utah's constitutional history does not support the suggestion that all expression of religious belief by government should be prevented. In fact, the proceedings of the 1895 Convention were started each day with a prayer. . . . [T]he primary goal that motivated the drafters . . . was to secure the free exercise of religion. The other clauses [of Art. I, § 4] are subsidiary guarantees of free exercise.[5]/

It is unsurprising that a Constitution that begins, "Grateful to Almighty God for life and liberty" would not purport to strip all public recognition of religious aspects of Utah's heritage. Utah Const., Preamble.

Thomas, which Plaintiff all but ignores, sheds much helpful light upon the proper application of Art. I, § 4 to the display of historically relevant artifacts, monuments, and

[5]/ Brad C. Smith, Cmnt., *Be No More Children: An Analysis of Article I, Section 4 of the Utah Constitution*, 1992 Utah L. Rev. 1431, 1459-60; *see also State v. Holm,* 2006 UT 31, at ¶ 34, 137 P.3d 726, 737-38.

other items on public property. Although the Court stated in *Whitehead* that "*Thomas* and our other cases interpreting Article I, Section 4 are quite fact-specific and offer little guidance in formulating a general analytical model for determining whether prayer is religious worship, exercise, or instruction, much less when the forbidden financial support is present," 870 P.2d at 931, *Thomas* certainly retains relevance where, as here, the case involves a government display of historical artifacts and items, rather than the use of public property for prayers offered by private individuals. Indeed, the *Whitehead* Court relied upon *Thomas* in stating, "we do not agree . . . that the framers of the Utah Constitution intended a complete separation between religion and the state, if complete separation means positive hostility as the Separationists seem to contend." *Id.* at 939 (citing *Thomas*, 114 Utah at 128-29, 197 P.2d at 488).

In *Thomas*, the Court considered a challenge to legislation authorizing the building, at public expense, of Salt Lake City's Pioneer Memorial Building. The plaintiffs argued that the law violated Article I, § 4 by subsidizing a museum intended to promote and display historical objects, artifacts, and texts predominantly associated—given the state's Mormon heritage—with one religion. The Court rejected the plaintiff's simplistic approach, which suggested that any text or object with some religious significance necessarily constitutes religious worship, exercise, or instruction. Similarly, the Court's discussion addresses, and refutes, arguments that Plaintiff raises here:

> Religious persecution of a particular faith -- the Mormon -- led to the settlement of this State. . . . *Naturally much of the history they left -- many of the relics they left, will be viewed in the light of that religion as distinguished from others.* . . . Thus we have a situation in this State that if we are not careful in applying, in our endeavors to uphold the constitutional

> separation of Church and State, may forever doom this State to silence about its own history for fear it may violate its own constitutional prohibition. . . . [O]ne of the proposed rooms of this Memorial Building is designated the "Brigham Young" room. . . . That room . . . *would have proselyting value* in and of itself, by reason of historical circumstances we could not now control, unless we held that even the State as a public body could not open it for display for fear of violating the State Constitution.
>
> It would seem fair and just to say that an impartial display of historically valuable exhibits will not lose its impartiality because historically those exhibits were born in an effort of a particular religious faith to survive persecution, *and in and of themselves possess proselyting value to that faith*. . . .
>
> It is very easy to conclude from the religious atmosphere of many of the historical exhibits . . . that the predominant faith will to say the least, receive the greater amount of the benefit from the exhibit. Is this not, however, a coincidence of history rather than a deliberate attempt to further that faith?

114 Utah at 128-30, 197 P.2d at 488-89 (emphasis added).

Similarly, the influence that the Ten Commandments had upon Utah and Pleasant Grove's Mormon pioneers, and upon the foundation and early history of Utah, is a "coincidence of history" that Article I, § 4 does not require to be erased from public acknowledgment. It is a historical fact that the Ten Commandments impacted the foundation of Utah and Pleasant Grove. Professor Brian Cannon, an expert in Utah and Mormon history, has explained that "the Ten Commandments were fundamental precepts of the Mormon pioneers in nineteenth-century, pioneer Utah. . . . They therefore are historically relevant to Utah and to Pleasant Grove City, which was settled by Mormon pioneers." R. 711. He also noted:

> Latter-day Saint leaders in nineteenth-century pioneer Utah emphasized the Ten Commandments as fundamental precepts for an orderly society. . . . In trying to establish "civilized rule," or civil government, in Utah, it was

> natural for the legislature in pioneer Utah to prohibit behavior that was prohibited in the Ten Commandments. The first criminal code for Utah, enacted January 16, 1851 built upon the principles enunciated in the Ten Commandments in prohibiting murder, bearing false witness, profane use of the name of Deity, adultery and theft.

R. 713-14.

Furthermore, the Ten Commandments were discussed at least twice at the Utah Constitutional Convention of 1895. Concerning prohibition, Mr. Farr stated,

> [t]here are ten commandments that prohibit murder, stealing, drunkenness and all manner of vice and crimes, and I tell you, gentlemen, there is a penalty in every one of them and the penalty will be inflicted and we can pass laws to prohibit and will have a right to, but I am opposed to passing any law in this Convention.[6]/

In addition, regarding whether a particular provision was self-executing, Mr. Varian stated,

> the declaration that we have already adopted in the ordinance is not self executing. It amounts to nothing except like one of the ten commandments. It might have the effect of a moral law upon the minds and consciences of those who look upon the Constitution as a guiding instrument for their lives.[7]/

These references are highly relevant, as this Court has often looked to the proceedings of the Constitutional Convention when it interprets the Utah Constitution. *See, e.g.*, *Whitehead*, 870 P.2d at 932; *Cooper v. Utah Light & R.R. Co.*, 35 Utah 570, 586-88, 102 P. 202, 207-08 (1909).

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[6]/ Utah State Legis., *52nd Day, Apr. 24, 1895*, http://le.utah.gov/documents/conconv/52.htm (last visited June 24, 2013).

[7]/ Utah State Legis., *59th Day, May, 1, 1895*, http://le.utah.gov/documents/conconv/59.htm (last visited June 24, 2013).

In addition, as the federal district court concluded in the prior litigation, "Pleasant Grove has, since the beginning, displayed the [Ten Commandments] monument for reasons of history, not religion." R. 584. When "the Ten Commandments monument was erected in Pioneer Park in 1971, Mayor Cook said he thought the monument 'would serve to remind citizens of their pioneer heritage in the founding of the state.'" R. 586. A city councilman who served at the time that the City decided to accept and display the Ten Commandments monument stated that "it was appropriate for the City Council to place the monument in Pioneer Park to illustrate an aspect of the lives of our pioneers." R. 458. In other words, "[w]hen the City accepted the monument, the City did not accept it as a religious monument." R. 572.

Contrary to Plaintiff's suggestion, the Eagles are a fraternal, social service organization, not a religious organization, and offered the Ten Commandments monument for secular reasons. R. 464, 467; *see also State v. Freedom From Religion Found.*, 898 P.2d 1013, 1024 n.16 (Colo. 1995) ("The monument was donated [by the Eagles] as part of the National Youth Guidance Program, whose purpose was secular. . . . [T]he Minnesota juvenile court judge who conceived of this idea . . . stat[ed] that posting the Ten Commandments was 'not to be a religious instruction of any kind.'"). In any event, Plaintiff's attempt to conflate the alleged intent of *the Eagles* when they offered to donate the monument with the purpose of *the City* for accepting and permanently displaying it is misguided.

> [T]he thoughts or sentiments expressed by a government entity that accepts and displays . . . an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and

> placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.

Pleasant Grove, 555 U.S. at 476.

Moreover, while there is no Utah decisional law discussing the nature of Ten Commandments monuments donated by the Eagles, other courts have often analyzed the nature of monuments identical to the one at issue in this case. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005); *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir. 1973)[8]/ (holding that a Ten Commandments monument donated to Salt Lake City by Fraternal Order of Eagles and displayed by the City "is primarily secular, and not religious in character; . . . neither its purpose or effect tends to establish religious belief"); *Freedom From Religion Found.*, 898 P.2d at 1027 (concluding that a Ten Commandments monument donated by the Eagles "does not have the purpose or effect of endorsing religion, nor does it suggest the State's disapproval of any religious or non-religious choices protected by our Federal and State Constitutions").

As the United States Supreme Court has stated, "the Ten Commandments have an undeniable historical meaning" and have played an important role in America's heritage. *Van Orden*, 545 U.S. at 689-90 (plurality). Indeed, the Supreme Court itself has a large "great lawgivers of history" frieze that depicts, among other historical figures, Moses

[8]/ *Superseded, see Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240 n.1 (10th Cir. 2005).

holding the Ten Commandments, Hammurabi receiving his Code from the Babylonian Sun God, and Muhammad holding the Qur'an.[9]/ As Justice Breyer explained,

> [i]n certain contexts, a display of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) — a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

545 U.S. at 701 (Breyer, J., concurring).

The setting of the monument at issue in *Van Orden*—an open, public space containing 17 monuments and 21 historical markers—was also important to Justice Breyer:

> The physical setting of the monument, moreover, suggests little or nothing of the sacred. . . . The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about is origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed. That is to say, the context suggests that the State intended the display's moral message — an illustrative message reflecting the historical "ideals" of Texans — to predominate.

Id. at 702; *see also id.* ("[F]ew individuals . . . are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort . . . to engage in any religious practice.").

Furthermore, at least one Justice of this Court has spoken of the Ten Commandments as emblematic of moral law and a source of secular law. *See Ralph A.*

[9]/ U.S. Supreme Court, *Courtroom Friezes: South and North Walls*, http://www.supremecourt.gov/about/north&southwalls.pdf (last visited June 24, 2013).

Badger & Co. v. Fidelity Bldg. & Loan Ass'n, 94 Utah 97, 126, 75 P.2d 669, 682 (1938) (Wolfe, J., concurring) ("A debtor so actively misleading the creditor to the benefit of the one and the detriment of the other would be violating a most fundamental legal concept and one which reaches back to the moral law crystallized in the Ten Commandments."); *see also State v. Donaldson*, 35 Utah 96, 102, 99 P. 447, 449 (1909) ("To say that the taking of the money, under the circumstances of this case, does not constitute larceny, would be to say that the commandment 'thou shalt not steal' is a delusion, and our statute upon the subject a farce."); *Marshall v. Salt Lake City*, 105 Utah 111, 126, 141 P.2d 704, 711 (1943) (referencing "the rule of the decalogue, 'Thou shalt not'").

As in many areas of law, context is critical here. The district court correctly noted that "[a] portrayal of the Ten Commandments . . . may be an expression of one or many ideas, ranging from artistic to historical, some of which *would* be considered religious, but many of which would not." R. 913. Although Plaintiff attempts to mischaracterize the Ten Commandments monument displayed in Pioneer Park alongside numerous other historically relevant monuments as the "bare" presentation of a religious text, Appellants Brief at 16-19, the monument cannot be divorced from the historical context of Pioneer Park and the surrounding items. Obviously, the City is not literally commanding those who visit Pioneer Park to take or not take various religious actions by including the monument as one part of a larger historical display, just as the United States Supreme Court has not commanded obedience to Hammurabi's Code, the Ten Commandments, or the Qur'an by including them as part of a larger historical display. In this vein, when the *Whitehead* decision quoted two disparaging newspaper articles to illustrate "[t]he vitriolic

and slanderous nature of the public debate between Mormons and non-Mormons," 870 P.2d at 925 & n.20, the Court clearly did not literally "adopt" for itself the articles' "vitriolic and slanderous" message, but rather included that language *for different reasons to make a different point*.

When the government operates a museum, park, or art gallery, *the selection process* is itself the relevant speech. For example, an art gallery does not typically "adopt" the specific message(s) conveyed by works of art but rather states, through its selection process, that the artwork reflects skilled creativity or is representative of a particular genre or timeframe. By accepting items and displaying them in Pioneer Park, the City's message is that *the items and/or their donors directly relate to the City and its history*. This is not a discriminatory, religious, or otherwise impermissible message. Similarly, by declining to accept and display an item on its property, the City *is not, in any way*, commenting on the truth, validity, or value of the item or its donor, but rather is making an aesthetic judgment with the City's unique history in mind.

Whitehead affirmed the importance of context and illustrates the historical nature of the items displayed in Pioneer Park. The Court concluded that, in a secular context, "a performance of 'The Hallelujah Chorus' from Handel's Messiah, Beethoven's Ninth Symphony, or the singing of Christmas carols[,] . . . . the use of the phrase 'In God We Trust' on our money[,] and the reference to God in the 'Pledge of Allegiance'" do not fit within the "relatively narrow constitutional categories" of religious worship, exercise, or instruction. 870 P.2d at 932. The Court explained:

> When a Christmas carol is sung as part of a worship service, it falls within the terms of the Utah Constitution. But when sung apart from a formalized worship service, on or off church property, carols are simply artistic expressions of a predominantly Christian culture. The same is true of any number of other artistic expressions that have occupied center stage in Western European civilization for more than 1500 years.

Id. at 932. This discussion was not mere dicta, but rather was part of the Court's key explanation of what the narrow terms "religious worship, exercise, or instruction" encompass.

The City's display of items in Pioneer Park is akin to an artistic, patriotic, or historical display that, although predominantly secular in nature, includes some reference or imagery that has some religious connotation. Since "Pioneer Park is . . . along the lines of a museum where people can walk around and get an idea of the history of Pleasant Grove," R. 578, it is unsurprising that one of the numerous items displayed in the Park relates to the historical role that the Ten Commandments played in the founding of Utah and Pleasant Grove, just as one may find ample references and images with some religious significance throughout Utah and American history and public property. Similarly, Christmas carols and patriotic songs (such as *The Battle Hymn of the Republic*) often include sectarian religious references, some taken directly from religious texts, but the mere presence of some religious phraseology does not transform a secular performance in a secular setting into religious worship, exercise, or instruction; neither does the inclusion of a Ten Commandments monument for secular reasons among numerous other items of historical relevance—such as the City's display in Pioneer Park and the United States Supreme Court's frieze—constitute religious worship, exercise, or

instruction. The *Whitehead* Court warned against adopting an overzealous interpretation of Article I, § 4 that would classify a broad swath of primarily historical or artistic expression as religious in nature, *id.* at 939-40, and the Court should reject Plaintiff's similarly flawed interpretation here.

B. The City's process for reviewing, accepting, and displaying items on City property does not subsidize religious worship, exercise, or instruction, or use any religiously discriminatory criteria.

The City's decision to decline to accept and permanently display Plaintiff's offered donation did not implicate, let alone violate, Article I, § 4. The City Council reviews offers to donate property to be placed on City property in light of reasonable, secular criteria that further historical, aesthetic, and safety interests. The City's longstanding historical practice became codified as a formal Resolution in 2004. R. 496-97, 547, 571. "This written policy codified the previously unwritten policy of limiting monuments to those that 'either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.'" R. 587; *see also* R. 570-71. As the federal district court noted, "[t]he policy contains no reference to consideration of a potential donor's religion, religious tenets, teachings, beliefs or practices." R. 586-87.

Plaintiff has made several important concessions that illustrate that the City's process for reviewing potential donations, and its decision to decline to accept ownership of Plaintiff's proposed donation, are religiously neutral. First, Plaintiff has acknowledged that the City has never had any rules or criteria for the acceptance and permanent placement of monuments in City parks other than what is set forth in Resolution No,

2004-019. R. 170, 172. Second, Plaintiff has stated that, "[a]t all times pertinent to this action, each individual defendant was acting *pursuant to and in compliance with* the resolutions, rules, regulations, policies, and practices of Pleasant Grove City." R. 25, 179 (emphasis added). In other words, it is undisputed that the *sole criteria* used by the City to assess whether to accept or reject ownership and possession of a proffered donation are the reasonable, religion-neutral criteria set forth in the Resolution, *i.e.*, whether the item relates to the history of Pleasant Grove or is offered by a group with longstanding community ties.

More specifically, *all* of the items that the City owns and permanently displays in Pioneer Park, including the Ten Commandments monument, relate to the history of Pleasant Grove or were offered by a group with longstanding community ties. R. 571. The City decided to accept ownership of the Ten Commandments monument (and display it in Pioneer Park) because "1. The Ten Commandments directly relate to the history of Pleasant Grove and have a historical relevance to Pleasant Grove; and, 2. The Eagles are a civic organization with longstanding and strong ties to the Pleasant Grove Community." Brief of Appellant at 24; *see also* R. 458, 572, 578, 584, 586.

Conversely, although Plaintiff repeatedly characterizes its proposed donation as "similar" or "complementary" to the Ten Commandments monument displayed in Pioneer Park, Brief of Appellant at 2, 5, 8, 10, 11, Plaintiff has admitted that its offer "[did] not meet the criteria of either Pleasant Grove's pre-2004 unwritten policy [or] its 2004 written policy for accepting monuments." R. 586. In other words, Plaintiff and its members lack any historical relationship to the City, and its proposed donation does not

relate to the City's history. R. 472-75. The court below concluded that "the fact that Plaintiff failed to make even a claim of historical relevance within the community was a sound basis for the City's choice not to display the monument in the Park." R. 909. From the City's historical perspective, Plaintiff's offer to donate an item was not "similar" or "complementary" to any of the offers that it decided to accept because Plaintiff's offer did not meet the criteria of the Resolution.

Similarly, Plaintiff has conceded that "[t]he religious nature of SUMMUM's monument and its religious content was not considered by Pleasant Grove City when it rejected SUMMUM's requests." R. 169. As the federal district court held, "there is no evidence that anyone in Pleasant Grove government had any idea what Summum's religious beliefs were." R. 584. "[A]t the time [the City Council members] made their decision to reject Summum's request they were completely ignorant of Summum's religious tenets, teachings, beliefs or practices." R. 586; *see also* R. 479, 482. The court below observed, "[t]his is simply not a case of one private entity receiving a benefit that a different private entity does not enjoy. Even if it were, the criteria used by the City in determining what it would or would not display in its city parks were not tied to the belief systems of the donors of these items." R. 910.

In sum, what Plaintiff truly seeks here is not *equal* treatment but *special* treatment: to force the City to, for the first time in its history, accept ownership of, and permanently display in Pioneer Park, an item that admittedly has *no connection whatsoever* to Pleasant Grove or its history, offered by a group that admittedly lacks longstanding community ties to Pleasant Grove, even though "[i]t has *never been the intent or the practice of the*

city to allow displays in the park that fail to meet either of these criteria." R. 571 (emphasis added). Pioneer Park, which has been dedicated to portraying local history for decades, would become a garbled, eclectic hodgepodge of assorted items, diluting and ultimately destroying the City's historical message. Article I, § 4 does not require or support this absurd result.

III. Plaintiff's novel reading of Article I, § 4 would, if accepted, lead to absurd results and have dramatic, ill-advised repercussions across the State.

Should Plaintiff's argument prevail in this case, *any* group or individual, even one with no historical connection to Pleasant Grove, would be able to force the City to accept ownership of any item of its choosing, and also force the City to permanently display that item in Pioneer Park. Article I, § 4 simply does not, as Plaintiff's arguments suggest, require Utah courts to micromanage countless thousands of discretionary decisions made by state and local government actors to select, accept, reject, arrange, rearrange, alter, remove, and maintain monuments and government displays in public parks.

As this Court has explained, "constitutional provisions should be interpreted to avoid absurd results." *Willis*, 2004 UT 93, ¶ 16, 100 P.3d at 1222; *see also Snyder v. King*, 958 N.E.2d 764, 772 n.3 (Ind. 2011) ("[W]e will not interpret the Constitution to lead to an absurd result unless it undoubtedly requires us to do so."); *Curry v. Pope Cnty. Equalization Bd.*, 2011 Ark. 408, at 10-11, 385 S.W.3d 130, 136 ("Just as we will not interpret statutory provisions so as to reach an absurd result, neither will we interpret a constitutional provision in such a manner."); *Jefferson Cnty. v. Weissman*, 69 So. 3d 827, 841 (Ala. 2011) (Shaw, J., concurring) ("[I]n the construction of [constitutions] . . . we

are, if possible, to give the instrument such construction as will carry out the intention of the framers, and make it reasonable rather than absurd.") (citation and quotation marks omitted). That Article I, § 4 "was among the provisions of the Utah Declaration of Rights that aroused little controversy," *Whitehead*, 870 P.2d at 929, strongly suggests that Plaintiff's arguments—and the controversial, absurd results that acceptance of them would entail—should be rejected.

Article I, § 4 does not, through some form of reverse eminent domain, require Utah state and local government actors to accept ownership of, and permanently display, whatever items that private individuals or groups offer. Under Plaintiff's theory, however, being forced to accept ownership of items, and to forfeit the use of public lands and buildings in order to permanently display them, would only be the beginning for Utah government actors; would-be litigants would stand by to scrutinize every detail of the government's use of its own property. Would Article I, § 4 require the government to regularly rotate the location of permanently displayed items to ensure that one particular item is not given more prominence than another? What if the government failed to promptly repair or replace one damaged item while improving another? Would an Article I, § 4 claim arise if the grass near one monument was better manicured than the grass near another?

If Plaintiff's arguments are accepted, a host of Utah public properties will become dumping grounds for an array of items that private individuals or groups want the government to accept and display. For example, the monuments at the Utah State Capitol include the Mormon Battalion Monument, a 100-foot granite and bronze monument

commemorating 500 Mormon pioneers who joined the United States Army during the Mexican War.[10]/ Plaintiff's theory would require the State to accept and display at the Capitol an assortment of other monuments that groups and individuals may offer.

Similarly, the Capitol building features murals, paintings, and other works of art that relate to Utah history. These include a painting of Father Escalante (a Catholic priest who came to Utah in 1776) holding a large cross and another painting of Brigham Young holding plans for a Mormon Temple at its construction site.[11]/ Under Plaintiff's novel view of the law, Utah is required to accept and display in the Capitol an array of artwork offered by groups and individuals, regardless of whether the items have any connection to Utah history. This would radically transform the role of the State Capitol Preservation Board and its Art Placement Subcommittee from one of exercising historical, artistic, and aesthetic discretion as stewards of public property (as discussed previously) to one of an overwhelmed traffic cop attempting to direct the acceptance and permanent placement of the inevitable deluge of assorted items that various groups and individuals would offer.

Furthermore, under Utah Code Ann. § 11-43-102, local governments are authorized to use their land to maintain memorials to commemorate veterans of the armed forces, firefighters, police officers, and other public servants. This includes the authority to use land "for a memorial that is funded or maintained in part or in full by another public or private entity." *Id.* § 3(d). Moreover, the local government "may

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[10]/ Utah State Capitol, *Monuments*, https://utahstatecapitol.utah.gov/index.php/explorethecapitol/monuments (last visited June 24, 2013).

[11]/ Utah State Capitol, *Art*, https://utahstatecapitol.utah.gov/index.php/explorethecapitol/artinthecapitol (last visited June 24, 2013) (select "View our pendentives photo album").

specify the form, placement, and design of a memorial that is subject to this section." *Id.* § 4. Under Plaintiff's view of Article I, § 4, however, this discretionary authority to decide whether and how to utilize public land for purposes of creating or accepting memorials would be replaced with an obligation to accept and display any and all memorials offered by private individuals, including items that criticize the very public officials that the local government sought to honor.

> If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a donated statue of one heroic dog (Balto, the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic) may be pressed to accept monuments for other dogs who are claimed to be equally worthy of commemoration. The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations.

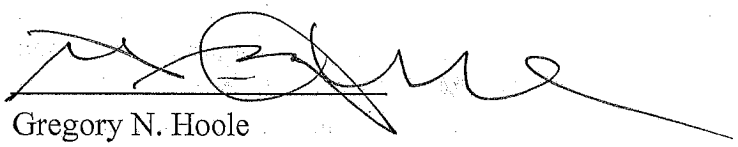
Pleasant Grove, 555 U.S. at 479-80 (citation omitted); *see also NEA v. Finley*, 524 U.S. 569, 611 (1998) (Souter, J., dissenting) ("[I]f the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third."); *PETA v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005) ("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.").

In sum, while the text and history of Article I, § 4, *Whitehead*, and *Snyder*, do not support Plaintiff's position, the absurd consequences that would result from adopting that position further counsel in favor of the City.

Conclusion

Plaintiff has provided no textual, legal, or historical support for its novel view of Article I, § 4, which is simply not implicated here because the City's permanent display of historically relevant items on its property does not involve the use of public money or property by private individuals or groups, nor does it involve religious worship, exercise, or instruction. As such, the district court's decision granting Defendants' Motion for Summary Judgment should be affirmed.[12]/

Dated this 10th day of July, 2013.



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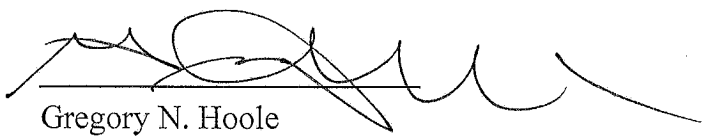
[12]/ The City agrees with Plaintiff that oral argument will be beneficial given the importance of the issues involved in this case.

Certificate of Compliance With Rule 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 11,749 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in size 13 Times New Roman font.

Dated this 10th day of July, 2013.



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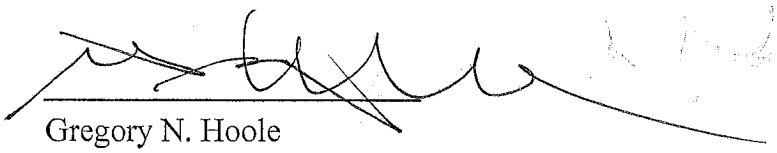
Proof of Service

I hereby certify that on the 10th day of July, 2013, I caused to be mailed, first class, with the United States Postal Service, two (2) true and correct copies of the foregoing Brief of Appellees to:

Stewart Gollan
UTAH LEGAL CLINIC
Cooperating Attorney for Utah
Civil Rights & Liberties Found., Inc..
[redacted]
Attorney for Plaintiff/Appellant



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Counsel for Defendants-Appellees

ADDENDUM

Pleasant Grove Resolution No. 2004-019

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 or 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 the 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.

Jim A. Danklef, Mayor

ATTEST:

Amanda R. Fraughton, CMC
City Recorder