Case No. 06-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUMMUM,
Plaintiff/Appellant,

vs.

PLEASANT GROVE CITY, a municipal corporation; et al.,
Defendants/Appellees.

DEFENDANTS/APPELLEES' PETITION FOR REHEARING EN BANC

Appeal From a Denial of a Motion For Preliminary Injunction
The United States District Court for the District of Utah
Hon. Dee Benson, Judge Presiding Trial Court
Case No. 02:05-CV-0638 DB

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I.
FED. R. APP. P. 35(b)(1) STATEMENT

Pursuant to Fed. R. App. P. 35(b), defendants/appellees respectfully petition the Court for a rehearing en banc of the panel's April 17, 2007 decision.

Pursuant to Fed. R. App. P. 35(b)(1)(A), the undersigned express a belief, based on reasoned and professional judgment, that the panel's April 17, 2007 decision directly conflicts with the Supreme Court's decisions in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-64 (2005); *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995); and with this Court's decision in *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001).

Pursuant to Fed. R. App. P. 35(b)(1)(B), the undersigned express a belief, based on reasoned and professional judgment, that the panel's April 17, 2007 decision is a matter of exceptional importance and directly conflicts with *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993); *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341 (7th Cir. 1990); *Tucker v. City of Fairfield,* 398 F.3d 457 (6th Cir. 2005); and *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).

En banc consideration, therefore, is necessary to secure or maintain uniformity of this Court's decisions. Fed. R. App. P. 35(a)(1); 10th Cir. R. 35.1(A).

II.
INTRODUCTION

In 1886, the United States government accepted from the people of France a donation of a 151-foot tall colossal statue called "Liberty Enlightening the World."

Since that time, the government has displayed this Statue of Liberty in a traditional public forum in New York Harbor. *See United States v. Sued*, 143 F. Supp. 2d 346 (S.D.N.Y. 2001) (recognizing Liberty Island National Park as a traditional public forum). For years, demonstrators with messages to deliver have assembled, handed out literature and otherwise expressed themselves at the site subject to certain regulations of the time, place and manner of their expression. *Id.* at 348-50. But it probably never occurred to any such demonstrators that they enjoyed a constitutional right to insist that the government allow them to erect their own 151-foot tall statue or monument setting forth an alternative message to that conveyed by Lady Liberty. Under the flawed private speech jurisprudence of the panel in this case, derived in turn from a prior panel decision, there exists no principled basis upon which the government could turn down for permanent display on Liberty Island a donation of a "Statue of Tyranny," or, perhaps, a new copper colossus bearing the message "Pay No Attention to the Lady With the Torch — the Golden Door is Now Closed!"

The panel in this case ruled that, once a municipality accepts a monument donated by a private party, the city opens a forum (be it public or nonpublic) for private speech.[1] In so ruling, the panel dutifully followed an earlier panel opinion, *Summum v. Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002), which held that city monuments with private origins are private speech. While the panel in this case cannot be faulted for following a prior panel, which it was bound to do, the

[1] A copy of the panel's decision is attached to this petition, pursuant to 10th Cir. R. 35.2(B), and the decision will be cited herein as "Slip op. at [page number]."

problem is that the prior panel decision in *Ogden* is wrong on the fundamental issue of private-vs.-government speech. Not only is *Ogden* wrong, it generates mischief, as the present panel decision illustrates. For once a forum is opened, viewpoint discrimination is constitutionally impermissible, even in a nonpublic forum. *Good News Club v. Milford Central Sch. Dist*., 533 U.S. 98, 107-12 (2001); *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-30 (1995); *Lamb's Chapel v. Center Moriches Sch. Dist*., 508 U.S. 384, 392-94 (1993). Under the court's reasoning in *Ogden* and the present case, that means a city cannot accept a monument with a flattering portrayal of a civil rights hero without also accepting a monument that lampoons that same hero. A city cannot accept a Holocaust Memorial without being forced to accept another that denies the Holocaust or praises its perpetrators. And so forth.[2] These are the natural consequences of this flawed constitutional approach.

The problem is that *Ogden*, and thus the present panel decision, stumbled out of the starting gate. When the government allows private speakers to *use* its property, this is still private speech subject to forum analysis. But when, as here and in *Ogden*, the government *acquires* something from a private party, whether

[2] This is no mere fanciful speculation. In Casper, Wyoming, a notorious Kansas anti-gay agitator, brandishing this Court's *Ogden* decision, insisted on his right to erect in a city park, containing an Eagles Decalogue monument, his own monument denouncing a gay University of Wyoming student beaten to death by thugs. *See* "Minister: City must allow anti-gay monument in park," Associated Press, October 16, 2003, at www.firstamendmentcenter.org/%5Cnews.aspx?id=12082, last visited April 26, 2007. Interpreting *Ogden* as the panel did in the present case, the Casper City Council voted to remove the Eagles monument from the park. *See* "Council Votes to Move Ten Commandments From Park," New York Times, October 30, 2003.

by purchase or donation, 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.

Thus, when an artist persuades a government official to accept ownership of one of the artist's oil paintings to decorate a municipal lobby or hallway, that painting becomes a government display, regardless of its private source. (And the official or his successor can discard or alter the painting, absent some valid contractual limitation.) This is entirely different from, say, a temporary display of schoolchildren's posters in a government hallway, which remains the children's private speech.

Likewise, when a city museum acquires a work of art, it is the city that thenceforth makes the display (the message being, this is a piece of art we find aesthetically attractive, historically significant, etc.), not the creator of the work, who no longer owns or controls the piece. No competing artist can insist, with the force of a constitutional right, on "My turn!"

And when a municipality decides to accept, and thus adopt as its own, a monument for display in a park (as here), on a city building's lawn (as in *Ogden*), or wherever, it is now the municipality's display (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. And no other private donors can insist that the government accept their additional monuments so that they can be speakers, too.

This Court should grant en banc review to overrule *Ogden* on the issue of government-vs.-private speech. Once *Ogden* is disapproved, disposition of the present case is straightforward: there is no forum for private speech in the government's choice of monuments to display, and the government is free to adopt the content or viewpoint it desires in such monuments. *Wells v. City and County of Denver*, 257 F.3d 1132, 1139 (10th Cir. 2001). Unlike in private speech cases, accepting a Ten Commandments monument as the government's own display does not require accepting an anti-Decalogue monument ("Thou shalt disregard the Sabbath," etc.) in the name of viewpoint neutrality. Nor does accepting a monument require that a government park be turned into a cluttered junkyard of monuments contributed by all comers.

This Court should grant rehearing en banc.

III.
REASONS FOR GRANTING THE PETITION FOR REHEARING EN BANC

A.
Both the Panel Decision and *Summum v. Ogden* Misconstrue the Nature of the Forum at Issue in Cases Involving Permanent Monuments on Public Lands Based on an Erroneous Understanding of Government Speech.

The panel decision, relying on *Summum v. Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002), held that the "Ten Commandments monument donated by the Fraternal Order of Eagles and placed by the city on public property [is] the private speech of the Eagles rather than that of the city." Slip op. at 4 n.2. *See also id.* (citing *Ogden*, 297 F.3d at 1006) ("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"). *Ogden*, however, like the panel decision, is incorrect on the issue of government-vs.-private speech and should be overruled on this issue by this Court en banc.

Summum's cases against the City of Ogden and Pleasant Grove both involve a request by Summum to erect its "seven aphorisms" or "principles" on public land: a municipal lawn in *Ogden* and a park in Pleasant Grove. In both these cases, Summum premised its right to erect its monument on public land on the fact that each city displayed a monument of the Ten Commandments donated by the Fraternal Order of Eagles ("Eagles").[3]

While both *Ogden* and the panel here recognized that the monuments were *donated* to the cities by a private entity, and thus became city property, both *Ogden* and the panel here nevertheless held that each monument remains the private expression of the Eagles.

These decisions are incorrect and constitute serious anomalies in federal case law. It is a straightforward matter of property law that once the government takes possession of an item donated to it by a private party, the government becomes its sole owner and is free to do with the item as it pleases: place it,

[3] In *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), it is unclear whether Eagles, who were "informally permitted" to erect the Ten Commandments monument on the city-county grounds, donated the monument to the government or retained possession of it. *Anderson v. Salt Lake City Corp*., 475 F.2d 29, 30 (10th Cir. 1973) (describing the very Ten Commandments monument in *Callaghan*).

remove it, alter it, destroy it.[4] (This is in complete contrast with private speech, which the government cannot remove, alter, or destroy without satisfying some level of constitutional scrutiny.) Accordingly, in both Ogden and Pleasant Grove, once the city accepted the Ten Commandments monument from the Eagles, the monument became the sole property of the cities. To hold that the speech is nonetheless that of the donor, the Eagles, conflicts with well-settled First Amendment law.

In *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993), for example, a group of individuals challenged the display of a large crucifix in a public park under the Establishment Clause. The 18-feet-tall crucifix, a memorial to the heroic deeds of servicemen who gave their life in battle, was donated to the township by the Knights of Columbus and was erected by the Knights in the park in 1955. *Id.* at 1414-15. In addressing the plaintiffs' Establishment Clause claim, the Seventh Circuit characterized the crucifix as "permanent government speech," *id*. at 1423 — even though the Knights erected the monument themselves and even though no public funds were spent on the crucifix (because it was donated), *id*. at 1416.

[4] The *Ogden* court recognized as much: "[a]fter the City acquired title to the Monument . . . presumably the City could have sold, re-gifted, modified, or even destroyed the Monument at will." *Id.* at 1005.

The same holds true here: once Ogden and Pleasant Grove accepted and displayed the donated monuments, they were no longer private speech for First Amendment purposes.[5]

In deciding whether the Ten Commandments monument in *Ogden* was the private speech of the Eagles, as Summum maintained, or the speech of the city, as Ogden City maintained, the *Ogden* court looked to various factors set forth in *Wells v. City and County of Denver*, 257 F.3d 1132, 1140-42 (10th Cir. 2001). In so doing, the *Ogden* court unnecessarily complicated the analysis. *Wells* involved a holiday display co-sponsored by the municipality and private entities, 257 F.3d at 1137; hence, deciding whether the display was government or private speech required a more extensive analysis. In contrast, in *Ogden*, as here, the government acquired the monument and no private role remained.

Once the city accepted the Eagles' donation, the city exercised complete and final authority over its contents. In theory, the city could have sandblasted whatever commandments it wished to remove. It could have added further text and inscriptions. It could have removed the monument altogether.

The situation is analogous to that of a public school system that acquires a textbook or a curriculum from a private entity. (Whether the acquisition is by purchase or donation is irrelevant.) If the acquisition is unrestricted (as opposed to, say, contractual limitations on use or alteration), the school is then free to use,

[5] That the Decalogue monument becomes a government display does not mean there is an Establishment Clause violation. *See*, *e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding government's display of Decalogue monument on capitol grounds). Indeed, Summum does not even press an Establishment Clause claim here.

alter, or discard the text or curriculum as it sees fit. The speaker thenceforth is the school, not the supplier of the materials. Were the law otherwise, the acquisition of, say, a pro-diversity curriculum would require acceptance of a comparable anti-diversity curriculum, as well. Donation of a curriculum simply does not create a "forum" for private speech.

Also illustrative is *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). In that case, the Sixth Circuit addressed the issue of whether Tennessee's "Choose Life" specialty license plates constituted government speech and whether the state's reliance on private volunteers to express this policy created a forum for speech requiring viewpoint neutrality. The *Bredesen* court relied upon the Supreme Court's recent decision in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-64 (2005) (holding, *inter alia*, that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes). The Sixth Circuit held that the "Choose Life" license plate was indeed government speech, despite the facts that "(1) Tennessee produces over one hundred specialty plates in support of diverse groups, ideologies, activities, and colleges; (2) a private anti-abortion group, New Life, collaborates with the State to produce the 'Choose Life' plate; and (3) vehicles are associated with their owners, creating the impression that a 'Choose Life' license plate attached to a vehicle represents the vehicle owner's viewpoint." 441 F.3d at 376. Recognizing that the state wielded *ultimate control and authority* over the contents of the specialty plate, the court held that "[s]o long as Tennessee sets the overall message and approves its details,

the message must be attributed to Tennessee for First Amendment purposes." *Id.* at 377 (citing *Johanns*, 544 U.S. at 560-61). Compared with the complexities of *Bredesen*, the present case represents *a fortiori* an open-and-shut case of a government display.[6]

B.
Ogden and the Panel Decision Lead to Theoretical and Practical Absurdities on the Issue of Government-vs.-Private Speech.

Failure to make the crucial distinction between private speech and a government display, as *Ogden* and the panel decision fail to do, yields absurd, unforeseen results, both in case law and the real world. For example, should *Ogden* and the panel decision remain the law, any city which has ever received a donation of a memorial from the VFW, for example, and displayed the monument in a public park, must now, as a constitutional obligation, permit other groups, organizations, and individuals to erect and display comparable private, permanent monuments donated by such persons.

In particular, all of the many states, counties, and cities which display a Decalogue monument donated by the Eagles must now, according to the logic of *Ogden* and the panel decision, permit private groups to erect comparable private permanent monuments on their public lands. *See Van Orden v. Perry*, 545 U.S. 677 (2005); *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995); *ACLU of Ohio Found. v. Bd. of Comm'rs*, 444 F. Supp. 2d 805

[6] Of course, the government's message need not be identical to that of the donor. For example, Alexander Calder may be making some particular artistic statement through one of his sculptures. The city that displays the sculpture, by contrast, is probably just saying, "We like how this looks," or "Hey, we have a Calder."

(W.D. Ohio 2006); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Card v. City of Everett*, 386 F. Supp. 2d 1171 (W.D. Wash. 2005).[7]

The only way the government could close the forum, and prevent its parks from being cluttered with monuments, would be to remove every donated monument it has ever erected. Cities should not be forced to make such an absurd choice. Cities should be able to display in their parks whatever items in their possession they choose to display without having to allow their parks to become a veritable dumping ground for private, permanent monuments.

Notably, the pernicious consequences of the *Ogden*/Pleasant Grove panels' decisions are not limited to traditional public fora like parks. Even in *nonpublic* fora, the government may not discriminate on the basis of viewpoint. *See supra* page 3 (citing cases). Thus, *any* acquisition of private message-bearing items — artwork, monuments, textbooks — for use on government property would come with a constitutional obligation to allow the corresponding anti-viewpoint, or a satirical viewpoint, conveyed in a comparable medium. *See supra* pp. 1-4, 8-9 (listing examples). *Ogden,* therefore, is not just erroneous, it will continue generating erroneous results (as in the present case) until corrected.

[7] In each of these cases, the Eagles donated their Ten Commandments monument to the state or local government, which accepted and placed the monument on public land.

C.
The Government Has the Right to Speak its own Content and Viewpoint-Based Message Without Having to Afford Private Parties a Forum With a Different Message.

The law is well-settled that when the government speaks, it is free to say what it wants, in both content and viewpoint. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the State is the speaker, it may make content-based choices."); *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"). *Accord Wells*, 257 F.3d at 1139. Moreover, when the government chooses to speak it does not have to provide a forum for persons or groups who wish to offer another viewpoint. *See Wells*, 257 F.3d at 1143 (quoting *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 individual or group a First Amendment right to play ventriloquist")). As the Sixth Circuit recently opined in the "Choose Life" license plate case:

> Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a First Amendment right not to express agreement. For instance, government can distribute pins that say "Register and Vote," issue postage stamps during World War II that say "Win the War," and sell license plates that say "Spay or Neuter your Pets." Citizens clearly have the First Amendment right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute "Don't Vote" pins, to issue postage stamps in 1942 that say "Stop the War," or to sell license plates that say "Spaying or Neutering your Pet is Cruel."

Bredesen, 441 F.3d at 379.

Accordingly, when Ogden City and Pleasant Grove City choose to place permanent monuments on their public land, this does not mean that these lands become traditional or nonpublic fora for the erection of private, permanent monuments.

As every item and monument in Pleasant Grove's Pioneer Park is owned by the City of Pleasant Grove, and thus are displays solely of Pleasant Grove, Summum has no First Amendment right to erect and install a privately owned, permanent, unattended monument. As the Seventh Circuit has observed, in a case cited by the panel in *Summum v. Duchesne*, slip op. at 19, No. 05-4162 (10th Cir. April 17, 2007):

> We are not cognizant of, nor has the appellant appraised us 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. Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.

Lubavitch Chabad House, Inc. v. Chicago, 917 F.2d 341, 347 (7th Cir. 1990). *Accord Wells*, 257 F.3d at 1147-49. *See also Tucker v. City of Fairfield,* 398 F.3d 457, 462 (6th Cir. 2005) ("[c]ourts 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) (holding that "no person has a constitutional right to erect or maintain a structure on the public way").

While the Seventh Circuit recognized in *Lubavitch*, 917 F.2d at 347, that "First Amendment jurisprudence certainly does mandate that if the government

opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations," all items and monuments in Pioneer Park are displayed by the city. Indeed, nothing in the record before the Pleasant Grove panel indicates that any private group has ever been permitted to erect a privately owned, unattended "communicative structure" in Pioneer Park.

For the foregoing reasons, this Court should overrule *Ogden* on the government speech issue. The monuments in these cases are not the expression of the Eagles, but displays by the government. Hence, there is no forum for private speech, and Summum's claim to "equal access" in this case must fail.

IV.
CONCLUSION

This Court should grant rehearing en banc, and upon en banc reconsideration, overrule its decision in *Summum v. Ogden* and affirm, in the present case, the denial of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one true and correct copy of the foregoing petition and attachment were caused to be sent on May 1, 2007, by United States Mail, first-class postage pre-paid, to counsel for plaintiffs, Brian M. Barnard, Utah Legal Clinic, 214 East 500 South, Salt Lake City, Utah 84111-3204.

I also certify that the original and eighteen true and correct copies of the foregoing petition and attachment were caused to be sent on May 1, 2007, by Federal Express next business day delivery to the Office of the Clerk, United States Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257. On the same date, an identical copy of the foregoing petition was digitally submitted, along with a copy of the attachment in scanned PDF format, to the Clerk of Court via electronic mail to esubmission@ca10.uscourts.gov and to plaintiff's counsel, Brian Barnard, via electronic mail to ulcr2d2c3po@utahlegalclinic.com.

I further certify that no required privacy redactions had to be made to the documents, that every document submitted in digital form and in scanned PDF format is an exact copy of the written document filed with the Clerk of Court, and that the digital and scanned submissions have been scanned for viruses with Symantec Antivirus, Version 9.0.0.338, last updated on April 27, 2007, and, according to the program, are free of viruses.

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