

No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, *et al.*,
Petitioners,
v.
SUMMUM,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF OF *AMICUS CURIAE* BOY SCOUTS OF
AMERICA IN SUPPORT OF NEITHER PARTY**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
ARGUMENT	5
THIS CASE SHOULD BE RESOLVED WITHOUT COMPROMISING FIRST AMENDMENT PROTECTIONS IN GOVERNMENT FORUMS	5
A. This Case Presents A Question Limited To The Display Of Government-Owned Monuments In Public Parks	5
B. The First Amendment Protects Expression In A Wide Variety Of Forums	7
C. Boy Scouts Faces Discrimination In Government Forums	10
1. Pending Cases	10
2. Concluded Cases	12
CONCLUSION	14

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Adderly v. Florida</i> , 385 U.S. 39 (1966)	6
<i>Barnes-Wallace v. Boy Scouts of America</i> , 275 F. Supp. 2d 1259 (S.D. Cal. 2003)	10
<i>Barnes-Wallace v. Boy Scouts of America</i> , 471 F.3d 1038 (9th Cir. 2006)	11
<i>Barnes-Wallace v. Boy Scouts of America</i> , ___ F.3d ___, Nos. 04-55732 & 04-56167, 2008 WL 2415079, 2008 U.S. App. LEXIS 12422 (9th Cir. June 11, 2008)	2, 10, 11
<i>Berner v. Delahanty</i> , 129 F.3d 20 (1st Cir. 1997), <i>cert. denied</i> , 523 U.S. 1023 (1998)	8
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	<i>passim</i>
<i>Boy Scouts of America v. Till</i> , 136 F. Supp. 2d 1295 (S.D. Fla. 2001)	2, 3, 13
<i>Boy Scouts of America v. Wyman</i> , 335 F.3d 80 (2d Cir. 2003), <i>cert. denied</i> , 541 U.S. 903 (2004)	2, 3, 8, 13
<i>Brown v. California Department of Transportation</i> , 321 F.3d 1217 (9th Cir. 2003)	8

Cited Authorities

	<i>Page</i>
<i>Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu</i> , 455 F.3d 910 (9th Cir. 2006), <i>cert. denied</i> , 127 S. Ct. 730 (2006)	9
<i>Cornelius v. NAACP Legal Defense & Education Fund</i> , 473 U.S. 788 (1985)	7, 8
<i>Cradle of Liberty Council, Boy Scouts of America v. Philadelphia</i> , No. 08-CV-02429-RB (E.D. Pa. filed May 23, 2008)	2-3, 11-12
<i>Cuffley v. Mickes</i> , 208 F.3d 702 (8th Cir. 2000), <i>cert. denied</i> , 532 U.S. 903 (2001)	8
<i>Curran v. Mount Diablo Council of the Boy Scouts of America</i> , 952 P.2d 218 (Cal. 1998) . . .	2
<i>DiLoreto v. Downey Unified School District</i> , 196 F.3d 958 (9th Cir. 1999), <i>cert. denied</i> , 529 U.S. 1067 (2000)	9
<i>Estiverne v. Louisiana State Bar Ass'n</i> , 863 F.2d 371 (5th Cir. 1989)	9
<i>Evans v. Berkeley</i> , 129 P.3d 394 (Cal.), <i>cert. denied</i> , 127 S. Ct. 434 (2006)	2, 3, 12
<i>Good News Club v. Milford Central School</i> , 533 U.S. 98 (2001)	7

Cited Authorities

	<i>Page</i>
<i>Hague v. Committee for Industrial Organization</i> , 307 U.S. 496 (1939)	6
<i>Huminski v. Corsones</i> , 396 F.3d 53 (2d Cir. 2005)	8
<i>Lamb’s Chapel v. Center Moriches Union Free School District</i> , 508 U.S. 384 (1993)	7-8
<i>Make The Road by Walking, Inc. v. Turner</i> , 378 F.3d 133 (2d Cir. 2004)	9
<i>Metro Display Advertising, Inc. v. Victorville</i> , 143 F.3d 1191 (9th Cir. 1998)	9
<i>Randall v. Orange County Council, Boy Scouts of America</i> , 952 P.2d 261 (Cal. 1998)	1
<i>Robb v. Hungerbeeler</i> , 370 F.3d 735 (8th Cir. 2004), <i>cert. denied</i> , 543 U.S. 1054 (2005)	8
<i>Rosenberger v. Rector & Visitors of University of Virginia</i> , 515 U.S. 819 (1995)	7
<i>Sammartano v. First Judicial District Court</i> , 303 F.3d 959 (9th Cir. 2002)	8
<i>Sefick v. Gardner</i> , 164 F.3d 370 (7th Cir. 1998), <i>cert. denied</i> , 527 U.S. 1035 (1999)	8

Cited Authorities

	<i>Page</i>
<i>Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles</i> , 288 F.3d 610 (4th Cir. 2002) . . .	8
<i>Sumnum v. Pleasant Grove City</i> , 483 F.3d 1044 (10th Cir. 2007)	6
<i>United States v. Gilbert</i> , 920 F.2d 878 (11th Cir. 1991)	8
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	6
<i>Welsh v. Boy Scouts of America</i> , 993 F.2d 1267 (7th Cir.), cert. denied, 510 U.S. 1012 (1993) . . .	1
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	8
<i>Winkler v. Gates</i> , 481 F.3d 977 (7th Cir. 2007) ..	2
 LEGISLATION	
Support Our Scouts Act of 2005. Pub. L. No. 109-148, § 8126, 119 Stat. 2728, 2730 (2005)	3-4
20 U.S.C. § 7905 (2008)	4
42 U.S.C. § 5309(e)(2) (2008)	4
151 Cong. Rec. S2853 (daily ed. Mar. 16, 2005) . . .	3
151 Cong. Rec. S8603 (daily ed. July 21, 2005) . . .	3

Cited Authorities

Page

PUBLICATIONS

Stephen M. Bainbridge, <i>Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act</i> , 21 J.C. & U.L. 369 (1994)	7
Erez Reuveni, Note, <i>On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations</i> , 86 B.U. L. Rev. 109 (2006)	2
Joseph A. Slobodzian, <i>Boy Scouts Sue City in Building Dispute</i> , Philadelphia Inquirer, May 28, 2008	12

INTEREST OF THE *AMICUS CURIAE* *

Boy Scouts of America (“Boy Scouts”) is “a private, not-for-profit organization engaged in instilling its system of values in young people.” *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). Three million youth members and one million adult leaders are active in the traditional programs of Cub Scouting, Boy Scouting, and Venturing.

All Boy Scouts and their adult leaders agree to follow the Scout Oath and Law,¹ which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one’s “duty to God” and to be “morally straight.” *Id.* In adhering to these values, Boy Scouts does not accept as members atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261, 264-65 (Cal. 1998), or avowed

* The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

1. The Scout Oath states that “On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, / mentally awake, and morally straight.” *Dale*, 530 U.S. at 649. The Scout Law provides that a Scout is “Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent.” *Id.*

homosexuals, *see Dale*, 530 U.S. at 653-54; *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 224-25 (Cal. 1998).

Since this Court confirmed Boy Scouts' First Amendment rights eight years ago, Boy Scouts has been defending itself against attacks by persons who seek to exclude Boy Scouts from participation in government programs and attacks from government entities themselves. *E.g.*, *Barnes-Wallace v. Boy Scouts of America*, ___ F.3d ___, Nos. 04-55732 & 04-56167, 2008 WL 2415079, 2008 U.S. App. LEXIS 12422 (9th Cir. June 11, 2008); *Cradle of Liberty Council, Boy Scouts of America v. Philadelphia*, No. 08-CV-02429-RB (E.D. Pa. filed May 23, 2008); *Winkler v. Gates*, 481 F.3d 977 (7th Cir. 2007); *Evans v. Berkeley*, 129 P.3d 394 (Cal.), *cert. denied*, 127 S. Ct. 434 (2006); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001). *See generally* Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. Rev. 109, 114-20 (2006).

In most of these cases, Boy Scouts participates in a government forum or program with many other community organizations. In *Barnes-Wallace*, the City of San Diego leases 123 properties to nonprofits for nominal rent, and Boy Scouts leases two of these properties for a campground and an aquatic center open to all youth. In *Cradle of Liberty*, the City of Philadelphia leases approximately 100 properties to community organizations, including 14 youth organizations, and Boy

Scouts holds one lease for a Scout and Learning for Life² headquarters. In *Evans*, the Sea Scouts were one of several nonprofit organizations that had received free berth space in the City of Berkeley's marina. In *Wyman*, Boy Scouts was one of 900 organizations listed in the state employee charitable campaign. In *Till*, Boy Scouts was one of dozens of community organizations that used meeting space in the public schools. In all of these cases, Boy Scouts was singled out for different treatment from other organizations because of its views.

These cases represent the increasing challenge faced by Boy Scouts and other groups with traditional moral or religious values because of their interactions with government. *Dale* may have protected Boy Scouts from challenges to membership, but activists and governments themselves have launched attacks to exclude Boy Scouts from government facilities and programs open to a variety of other groups because of Scouting values.

In response to challenges to Boy Scouts' participation in government forums,³ Congress enacted the Support Our Scouts Act of 2005. Pub. L. No. 109-

2. Learning for Life is a non-membership character-building organization affiliated with Boy Scouts of America that is open to all who wish to participate.

3. See 151 Cong. Rec. S8603 (daily ed. July 21, 2005) (In response to Boy Scouts' "relationships with government at all levels" being targeted, the Act, "makes clear that the Congress regards the Boy Scouts to be a youth organization that should be treated the same as other national youth organizations.") (statement of Sen. Frist); see also 151 Cong. Rec. S2853 (daily ed. Mar. 16, 2005) (statement of Sen. Frist).

148, § 8126, 119 Stat. 2728, 2730 (2005). Among other objectives, the Act prohibits state or local governments that receive federal Community Development Block Grant (“CDBG”) funds from discriminating against Boy Scouts in government forums or denying Boy Scouts access to forums equal to that provided other groups. *See* 42 U.S.C. § 5309(e)(2) (2008). The Act was modeled after the Boy Scouts of America Equal Access Act, which was intended to address the similar problem of schools denying Boy Scouts access to facilities and meeting space. *See* 20 U.S.C. § 7905 (2008). Although this legislation has helped deter some from excluding Boy Scouts, legislation has by no means extinguished the attacks.

The First Amendment prohibition on viewpoint discrimination in any government forum — whether public, limited, or nonpublic — protects Boy Scouts and numerous other organizations from being singled out and excluded from the public domain. Any resolution of this dispute that extends beyond the donated, government-owned permanent monument at issue here and any attempt to limit the forum analysis could have profoundly detrimental effects on many organizations that are protected by this Court’s government forum jurisprudence.

ARGUMENT**THIS CASE SHOULD BE RESOLVED WITHOUT
COMPROMISING FIRST AMENDMENT
PROTECTIONS IN GOVERNMENT FORUMS**

The resolution of this case should not encroach on the jurisprudence that protects numerous organizations in government forums. This case presents a question limited to a city's decision to display certain donated monuments as passive, permanent fixtures in public parks. The question whether the government, rather than any private party, speaks when government displays permanent monuments that it owns need not affect this Court's well-established precedents prohibiting the government from discriminating against private organizations in government forums for private speech. Boy Scouts participates in many such forums and would be harmed by a decision extending beyond the unique facts here.

**A. This Case Presents A Question Limited To The
Display Of Government-Owned Monuments In
Public Parks**

The parties agree that this case is limited to a permanent monument that has been donated to a municipality intended by the donor for display in a public park. Petitioners refer to a "monument donated by a private party" to a municipality for "permanent display." (Pet. at 1.) Respondents describe the display as a "privately-donated" "permanent" structure. (Resp. at 1.) The Tenth Circuit likewise focuses on the donated permanent monument at the heart of this

dispute. *Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1047 (10th Cir. 2007). As a result, the decision should be limited to permanent, government-owned monuments.

Boy Scouts recognizes that “[t]he Government, ‘no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.’” *United States v. Grace*, 461 U.S. 171, 178 (1983) (quoting *Adderly v. Florida*, 385 U.S. 39, 47 (1966)). This Court has “regularly rejected the assertion that people who wish ‘to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.’” *Id.* at 177-78 (quoting *Adderly*, 385 U.S. at 47-48).

The parties will thoroughly address the merits of the particular dispute: whether the government is speaking when it displays permanent monuments it owns, even if attributed to a donor. Boy Scouts submits this brief out of concern for the potential effects beyond the monument at issue here. In particular, care must be taken to avoid blanket conclusions about public parks, the quintessential traditional public forum for speech, *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-16 (1939), and the numerous other government forums — including school meeting rooms, government charitable campaigns, and other property — in which private expression is protected.

B. The First Amendment Protects Expression In A Wide Variety Of Forums

In recent years, an ever-increasing number of state and local laws have expanded to cover more protected categories. Government officials of all kinds — state officers, public university officials, and school boards — have been excluding religious and other groups from access to facilities and programs on account of their religious or moral values and their efforts to maintain their distinctive identities. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994). As a result, there have been increasing challenges to organizations with traditional values in the public domain.

This Court and the Courts of Appeals have recognized a wide variety of government forums. Participants in these forums are protected under the First Amendment against government viewpoint discrimination. *See, e.g., Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 801 (1985). The myriad forums include:

- **Student publications.** *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995).
- **School meeting rooms.** *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001); *Lamb's Chapel v. Center Moriches Union Free*

School District, 508 U.S. 384, 393-94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

- **Courthouses and their grounds.** *Huminski v. Corsones*, 396 F.3d 53, 90-92 (2d Cir. 2005); *Sammartano v. First Judicial District Court*, 303 F.3d 959, 966 (9th Cir. 2002); *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999); *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997), *cert. denied*, 523 U.S. 1023 (1998); *United States v. Gilbert*, 920 F.2d 878, 884 (11th Cir. 1991).
- **Charitable campaigns.** *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 801 (1985); *but see Boy Scouts of America v. Wyman*, 335 F.3d 80, 95 n.8 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004).
- **Highway overpass fences.** *Brown v. California Department of Transportation*, 321 F.3d 1217, 1221-25 (9th Cir. 2003).
- **Vanity license plates.** *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002).
- **Adopt-a-highway programs.** *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005); *Cuffley v. Mickes*, 208 F.3d 702, 712 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001).

- **Aerial advertisements.** *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910, 919-20 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 730 (2006).
- **Welfare office waiting rooms.** *Make The Road by Walking, Inc. v. Turner*, 378 F.3d 133, 145 (2d Cir. 2004).
- **State bar journals.** *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 381 (5th Cir. 1989).
- **Bus shelter advertising space.** *Metro Display Advertising, Inc. v. Victorville*, 143 F.3d 1191, 1195-96 (9th Cir. 1998).
- **Fence around high school baseball park.** *DiLoreto v. Downey Unified School District*, 196 F.3d 958, 967 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000).

As a result of a well-developed web of government forum jurisprudence, participants in these forums have an expectation that their expression will be protected from viewpoint discrimination by the government. Regardless of the outcome, the resolution of this case involving a municipality's display of a permanent monument it owns should not encroach on the jurisprudence that protects numerous organizations and individuals in these and innumerable other government forums.

C. Boy Scouts Faces Discrimination In Government Forums

Boy Scouts participates in many government forums across the country. The primary examples are where governments have a practice or policy of leasing property to numerous community organizations so that they might engage in expressive activity and, in some circumstances, provide benefits to the rest of the community. The campground or aquatic center in San Diego, the berth space in the marina in Berkeley, the school in Broward County, and the park building in Philadelphia all provide opportunities to engage in expressive activity with the aim of instilling the values of the Scout Oath and Law. The other organizations that lease space in these cities also use properties for their expressive association. All are government forums.

Following this Court's decision in *Dale*, Boy Scouts has been actively defending its ability to participate in government forums across the country, with mixed results. Several of the cases have concluded, but two are currently pending before federal courts.

1. Pending Cases

For the past eight years, Boy Scouts has been defending two leases in San Diego. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1263 (S.D. Cal. 2003), *certifying questions*, ___ F.3d ___, Nos. 04-55732 & 04-56167, 2008 WL 2415079, *2-*3, 2008 U.S. App. LEXIS 12422, *6-*9 (9th Cir. June 11, 2008). Boy Scouts developed on City parkland and operated at no cost to the City of San Diego a campground and an

aquatic center open to all San Diego youth groups. Notwithstanding that the City has similar nominal-rent leases of City land with over 100 nonprofits — including churches — the district court revoked Boy Scouts’ leases under the Establishment Clause and rejected Boy Scouts’ viewpoint discrimination defense. On December 18, 2006, the Ninth Circuit certified several questions of California state law to the California Supreme Court, *Barnes-Wallace v. Boy Scouts of America*, 471 F.3d 1038 (9th Cir. 2006), and Boy Scouts petitioned for rehearing. On June 11, 2008, the Ninth Circuit granted rehearing — by correcting factual misstatements and changing the theory of Article III standing — but again certified the same questions to the California Supreme Court. *See* 2008 WL 2415079, *1, 2008 U.S. App. LEXIS 12422, *2-*3. One of the three judges filed a concurring opinion, in which she compared Boy Scouts’ values with the “Jim Crow South.” 2008 WL 2415079, *11, 2008 U.S. App. LEXIS 12422, *35-*36. The dissenting judge criticized the comparison of the lesbian and agnostic plaintiffs who have “full, open, and totally nondiscriminatory access” to the facilities managed by Boy Scouts with “the treatment of black people in the Jim Crow South” as “obscene.” 2008 WL 2415079, *17 n.27, 2008 U.S. App. LEXIS 12422, *56 n.27.

Last month, Boy Scouts sued the City of Philadelphia to protect its rights in a long-standing dispute. *Cradle of Liberty Council, Boy Scouts of America v. Philadelphia*, No. 08-CV-02429-RB (E.D. Pa. filed May 23, 2008). In Philadelphia, over 75 community organizations have \$1-a-year leases from the City, including Boy Scouts and several religious groups. In 2003, the City threatened Boy Scouts with eviction

because of its constitutionally-protected membership requirements. The City gave Scouts an ultimatum of changing its internal membership policies, paying punitive rent, or vacating the building that Boy Scouts constructed at its expense in 1930 on City property. See Joseph A. Slobodzian, *Boy Scouts Sue City in Building Dispute*, Philadelphia Inquirer, May 28, 2008 at B01. Boy Scouts had to sue the City to protect its ability to participate in the forum established by the City.

2. Concluded Cases

In *Evans v. Berkeley*, 129 P.3d 394 (Cal.), *cert. denied*, 127 S. Ct. 434 (2006), the City of Berkeley has a program of allowing free berthing space in the City marina to nonprofits engaged in projects beneficial to the community. The Berkeley Sea Scouts, which includes many disadvantaged youth, had been granted free berthing space for 60 years. Other groups enjoying free space include a club providing a women's sailing clinic, an association of disabled sailors, and an organization operating a youth program. The City applied the marina's nondiscrimination ordinance only to Boy Scouts' policy with respect to open homosexuals, even though the ordinance also covers sex, age, and disability discrimination. The California Supreme Court rejected the Berkeley Sea Scouts' First Amendment challenge to the City's exclusion. As a result, Boy Scouts is excluded from the forum.

In *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004), the State of Connecticut excluded Boy Scouts from a charitable campaign in which 900 groups of all different kinds participate solely because of Boy Scouts' constitutionally-protected views and leadership policies. Boy Scout councils had participated in the campaign for 30 years. The Second Circuit recognized that the Boy Scouts' policies were "constitutionally protected" but nonetheless upheld the notion that Boy Scouts should "pay[] a price" for "exercising its First Amendment rights." *Id.* at 95 n.8. As a result, Boy Scouts is excluded from the forum.

In *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001), Boy Scout groups in Broward County had been permitted to make use of public school facilities after-hours for many years. But, after *Dale*, "the School Board . . . concluded that *the Scouts are ineligible to rent and lease school facilities like any other private group* because the Scouts' membership policies" violated the School Board's anti-discrimination policy. *Id.* at 1297 (emphasis added). The district court entered a preliminary injunction against the school board. The injunction was later converted to a permanent injunction on consent.

CONCLUSION

For the foregoing reasons, the resolution of this case should not extend beyond the city-owned permanent monument at issue here.

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