

No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, *et al.*,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

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

**BRIEF OF *AMICUS CURIAE* INTERNATIONAL
MUNICIPAL LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICUS*¹

The International Municipal Lawyers Association (IMLA), previously known as the National Institute

¹ Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this *amicus curiae* brief by filing consents to all *amicus* briefs with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, the *amicus* states that no counsel for a party has authored this brief, in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

of Municipal Law Officers, is a non-profit, professional organization of over 2500 local government attorneys, most of whom serve as corporate counsel for municipalities in the United States. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the development of municipal law, including by advocating the nationwide views of local government on legal issues. IMLA has appeared as a friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA submits this brief to provide the Court with broad and detailed information about how municipalities interact with monuments in their public parks. The organization has surveyed its membership on their lived experience with municipal acceptance and display of privately-donated monuments, including selection procedures, content control, ownership, public participation, and counter-speech. Appendixes A-D sets forth the procedures used, the questions asked, and summaries of the responses. They provide vivid illustrations of municipal governments' expression of local culture through privately-donated monuments in city parks. This *amicus* brief explains the importance to its members of this Court's recognition that municipal display of all monuments, including those originated or funded by private donors, be recognized as government speech.

SUMMARY OF THE ARGUMENT

When a municipality accepts, owns, and installs a monument in a public park, that monument is

government speech, regardless of who originally conceived or funded the project. This conclusion flows from the two types of government speech recognized by this Court: discretionary speech selection and expressive government policy. Municipalities edit the physical landscape and convey broad themes of local character through their decisions on placing monuments on public lands. Citizens participate in all aspects of the process and hold their local government responsible for its decisions.

In addition, municipal monument display is government speech under the four-factor test developed in the Circuits. The Municipal Practice Examples gathered by IMLA show that (1) municipalities' central purpose in accepting and displaying monuments is community expression; (2) city governments frequently exercise editorial control through requiring prior submission, design input, modification of words and images, and legislative approval of specific content, and they retain ongoing editorial discretion; (3) municipalities become the literal speaker upon accepting and installing a monument in a park, and the public recognizes this; and (4) ultimate responsibility for the monuments rests with municipalities, based on their ownership and control.

If the display of privately-donated monuments in municipal parks automatically creates a public forum for monuments, city residents lose. Their representatives lose all ability to shape municipal green space to reflect local tastes, values, and culture. Public forum analysis leaves cities with nothing but the crowd control tools suitable for public assemblies. The choice is to accept all offerings on a first-in-time or quota basis, or shut down the unintentional "forum," uprooting longtime landmarks. The Municipal Prac-

tice Examples document the rich array of community expression that is at risk unless such monuments are recognized as government speech.

Limited public forum analysis does not provide an alternative; it is unworkable in this context and contrary to government's expressive purpose. Where proposed criteria are inherently subjective, such as "relates to local history," any choice of which version of history to commemorate in permanent monuments necessarily includes viewpoint. In addition, the sporadic occurrence of large monument installations, which frequently spans multiple administrations and even generations, clashes with the doctrinal assumptions of the limited public forum.

Recognizing that government expresses its own viewpoint in monument selection, however, does not mean that there are no limits on what a government may say through permanent monuments in public parks. Indeed, one benefit to recognizing such monuments as government speech is that – in contrast to private speakers in a public forum – government is both (i) more likely to self-regulate by appealing to the broad spectrum of its relevant community and (ii) subject to some restraints. The Establishment Clause constrains all government speech. There are also well-grounded constitutional arguments for limits on government action based solely on animus.

Finally, recognizing government speech here is particularly appealing because this is not a context where there is any possibility of government's expression silencing, or even negatively impacting, private speech. As the Municipal Practice Examples document, the public forum context (parks) means that private speech – including speech contrary to the monuments' express or implied messages – is allowed.

As it turns out, government speech symbolized by monuments actually provides a focal point for large-scale private speech, such as anti-war protests. In sum, allowing municipalities to accept donated monuments that reflect community values is an important, well-grounded and logical next step in developing the line between government speech and forum analysis.

ARGUMENT

I. IMLA'S MUNICIPAL PRACTICE EXAMPLES SHOW THAT APPLYING PUBLIC FORUM DOCTRINE TO DONATED MONUMENTS WILL INTERFERE WITH EXPRESSION OF LOCAL CULTURE

City parks are open to all for a broad range of public uses, including public assembly. These valued green spaces, including any permanent monuments located there, are owned and maintained by public entities. No reasonable person would assert the right to bring in a bull-dozer, dig up the earth, and erect a large stone monument on his own initiative, without first inquiring as to the procedures and seeking governmental approval. Where monuments do exist in city parks – whether war memorials, testaments to bygone leaders, commemorations of current heroes or issues, or large abstract sculptures – it is because the city's government has agreed to their installation.²

Consequently, the nature and content of all monuments in city parks communicate messages about the particular community. Regardless of the original

² This brief will use the terms “city” and “municipality” throughout, but its analysis applies equally where the park land is owned by park districts and any other form of local government, such as villages.

source, monuments indicate what the city, through its elected representatives, has valued in terms of heroes, history, and culture. See SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 90 (Duke Univ. Press 1998)(noting that “it is not at all unusual for private individuals or groups to finance monuments,” such as many found throughout New York City’s Central Park, and that “their display in a particular setting [conveys] the state’s special imprimatur for the message contained within the monument”).

The Municipal Practice Examples (MPE) collected by IMLA (described further in Appendixes A-D) offer this Court a broad set of illustrations of the uniquely local character of many privately-donated monuments; a few samples are described here. Some statues reflect a type of individual admired by the community (e.g., Walter Reuther, international labor organizer, born in the city (Wheeling, West Virginia, #27), John A. Roebling, founder of Roebling Steel, the town’s main business (#10), Robert Ridgway, author, artist, scientist, founder of Bird Haven (Olney, Illinois, #139)). Others document a particular slice or version of local history (e.g., Pony Express monument (Benicia, California, #115), statue of Fathers Dominguez and Escalante, first European explorers of area, and monument to city’s large Icelandic population (Spanish Fork, Utah, #188), local Native American Chief Niwot and mining history statue (Boulder, Colorado, #197), Hartford Circus fire memorial (Hartford, Connecticut, #198)). And some monument decisions express specific ways to honor our nation’s conflicts (e.g., Hmong-American Vietnam War Memorial (Sheboygan, Wisconsin, #28), monuments to local war heroes (Fredricksburg, Texas, #78), and a large bronze statue displaying the word

“peace” in many world languages (Fayetteville, Arkansas, #211)).³

The Tenth Circuit erred by drawing an artificial distinction between “private” and “public” monuments because, as the MPE and other examples show, that is not how municipalities operate. Instead, the two sectors often blend roles in a seamless partnership. Under the court’s approach, if a city commissions and pays for a statue, that may be government speech, but the same statue donated through a private organization’s initiative is private speech. *See Sumnum v. Pleasant Grove City*, 499 F.3d 1170, 1180 (10th Cir. 2007)(Tacha, J.)(response to dissent from denial of rehearing *en banc*).

Narrative responses from the MPE tell a different story. For example, in Kansas City, Missouri (#117), “[o]ften the projects. . . result from informal discussions among the leaders of the community and representatives of the City. It is often hard to determine who made the ‘first move.’” And, “[w]e make every effort to work with community groups who propose appropriate fountains, artwork, or other similar items. We are almost never made a ‘take it or leave it’ offer. . . .” Similarly, in Cedar City, Utah (#60), where the city has “accepted private money” for statues of the City’s founders and “to construct memorials for soldiers in Iraq, Korea, and Vietnam,” the respondent commented that “there has been a cooperative effort between the Mayor’s Office and private citizens groups.”

Two publicized examples of specific donations give more detail. First, even commissioned public monu-

³ Additional examples of monuments reflecting specific local issues and viewpoints are found in App. D.

ments often are funded through private donations, and large benefactors participate in selecting the content and creator of the monuments. For example, the City of Chicago's unique Crown Fountain, opened 2004 in the new Millennium Park, was funded by the Crown family. Following an invited competition, the private patron, City officials, and a public-private planning committee together selected its creator, Spanish sculptor Jaume Plensa, a leading contemporary artist. The new landmark consists of two 50' high towers that display changing video images of photographed faces, book-ending a water-filled area used for play and interaction. The donors and City personnel worked together over a several-year period on the implementation details, including previewing a mock-up of the structure and providing input and limitations on the content displayed. TIMOTHY GUILFOYLE, *MILLENNIUM PARK: CREATING A CHICAGO LANDMARK* (Univ. of Chicago Press 2006); http://www.millenniumpark.org/artandarchitecture/crown_fountain.html.⁴

Second, when a private donor presents an existing monument as a proposed gift to a municipality, its display on public land requires a governmental decision and, often, the use of public funds. For example, in Lake Geneva, Wisconsin, a resort town close to Chicago, philanthropist Richard Driehaus donated a grand neoclassical fountain, a replica of one installed in New York's Central Park in 1873. Originally purchased for his own estate, Mr. Driehaus offered the fountain as a town centerpiece, stating that it celebrates Lake Geneva's illustrious past and historic

⁴ Note: This information was confirmed by telephone conversation with Ed Uhlir, Project Director of Millennium Park, June 17, 2008.

lake-front estates. The city council approved acceptance of the gift and committed \$40,000 for its installation in a central location. *Fund-raiser will help enhance area*, <http://www.lakegenevanews.net>, June 24, 2004.

These counterpoints also show how monuments convey thematic government messages, even where the donations are public art, rather than text or an historical figure. The Crown Fountain successfully sends its intended message: Chicago is cutting-edge, a world-class city, a leader in the arts. The Driehaus Fountain, in contrast, expresses a quieter message of privilege and embracing history. If Lake Geneva had been offered a large contemporary monument to anchor the traditional town, or if the Crown family had proposed a Gilded Age monument for Chicago's Millennium Park, such donations likely would have been declined as inconsistent with the municipalities' identities.

If a city's display of a single donated monument, from any era, inadvertently transforms a park into a public forum for the installation of private monuments, then the community loses all voice in fashioning its permanent landmarks. When regulating speech in a public forum, cities constitutionally may employ only content-neutral regulations. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, that would include safety regulations, such as those used for other types of private structures on the public way (*see, e.g.*, CITY OF CHICAGO, IL., MUN. CODE, § 10-28-750 *et seq.* (newsracks), § 10-28-800 *et seq.* (advertising benches)) and allocation rules used to distribute public space resources. For example, there is a limit to the number and location of large-scale public gatherings in municipal parks;

this Court has approved permit systems that assign such space to permit-applicants on a first-in-time basis. *Thomas v. Chicago Park District*, 534 U.S. 316, 318 (2002)(citing CHICAGO PARK DIST. CODE, ch. VII, §§ C.3.a(1), C.5.a).

As a practical matter, application of these rules, designed for public forums, would mean that city governments would be forced to accept and install all structurally-sound private monuments. Open park space is limited and highly-prized. To require a content-neutral, “first-come, first displayed,” private monument policy – or no private monuments at all – would permanently destroy a valuable, longstanding form of government speech.

II. MUNICIPAL DISPLAY OF DONATED MONUMENTS IN PARKS IS GOVERNMENT SPEECH

The Tenth Circuit took an unduly restrictive view of this Court’s government speech rulings when it refused to apply them to Pleasant Grove’s monument, stating that the City was not acting as “librarian, television broadcaster, or arts patron.” *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052 n.4 (10th Cir. 2007). Government’s role as the creator of beautiful, welcoming public parks actually makes an even stronger case for government speech because, as described below, it encompasses this Court’s two lines of cases. Municipal decisions on proposed monument donations both (1) involve the curator/editor roles and (2) convey broad policy messages. *See generally* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71 (Winter 2004)(applying the developing doctrine to

analogous public-private expressive partnerships). In addition, monument display satisfies the four-factor government speech test developed by the federal circuits.

A. These Monuments Fit Within Both Types of Government Speech Recognized By This Court And Satisfy The Doctrine’s Rationale

1. *The Speech Selection Is Inherently Discretionary*

A municipal decision to accept and display a privately-donated monument in a public park fits well within this Court’s “speech selection” cases. Where a government’s choice of which private speech to include in a public project is necessarily content-based and subjective, it has been allowed to express preferences between speakers. *Nat’l Endowment of the Arts v. Finley*, 524 U.S. 569 (1998)(in selecting recipients of federal arts funding based on “artistic merit,” viewpoint neutrality not required and government permitted to consider decency and values compatibility); *Ark. Educ. Television Comm’n. v. Forbes*, 523 U.S. 666 (1998)(public broadcasters generally have substantial editorial discretion in selecting which private speech to include; selection and presentation process is government speech).

A city’s decision to display a privately-donated monument includes features of both *Finley* and *Forbes*. As in *Finley*, monuments are a form of public art; they include representative statues, textual messages, and abstract sculptures with potent images. As in *Forbes*, agreeing to install a monument means allocating a portion of a limited public good – there, air time; here, open space – to a particular piece of

originally private speech. When exercising their park management function, municipalities balance many interests, editing the physical space, with an eye toward creating beauty and maximizing the public's enjoyment, consistent with the character of the town. Municipal policies that guide decisions on proposed monument donations, as referenced in the MPE responses, recognize the importance of preserving open space in making this choice. *E.g.*, CITY OF PORTLAND, OR., POLICIES AND RULES, ARB-PRK-3.01 ("Accepting Gifts and Memorials"), *available at* www.portlandonline.com.

2. Monuments Convey the Communities' Broad Substantive Messages

A decision on monument display also is covered by the second line of Supreme Court government speech cases: where government promulgates a substantive policy message. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005)(promoting beef consumption through advertisements funded by beef producers' tax was not unconstitutional compelled speech); *Rust v. Sullivan*, 500 U.S. 173 (1991)(promoting pro-life policy through selective funding of family planning clinics allowed).

All monuments convey ideas and values, whether stated explicitly or as broad themes.⁵ The Municipal Practice Examples illustrate how governments' decisions regarding whose lives to honor in this way, and how they should be portrayed, express community

⁵ For a thorough treatise on governments' policy expressions through war monuments, *see* JAMES M. MAYO, WAR MEMORIALS AS POLITICAL LANDSCAPE (Prager Pub. 1988)(discussing symbolic messages from the perspective of an architecture and urban design professor).

ideals at the time of installation. For example, Tucson, Arizona (#235) displays a statue of Pancho Villa, a Mexican revolutionary leader who advocated for agrarian reform and the poor. Some, however, have objected to the message sent by this monument, as he is viewed by them as a violent bandit. Also, a monument's message can change over time due to cultural shifts. In Longview, Washington (#92), some now question the accuracy of a statue's portrayal of Sacajawea, the Shoshone woman who acted as a guide for Lewis and Clark.

Placement of a new monument can transform a values message sent by earlier installations. This happened in 1996, when a large bronze sculpture of tennis great Arthur Ashe joined the existing statues of five Confederate leaders on Richmond, Virginia's well-known "Monument Avenue." After several years of debate over this proposed location, which incorporated the long-standing debate over the meaning of Confederate symbols,⁶ the final democratic decision was that such placement of a memorial to this modern-day Richmond hero sent a positive message of transcendence and opportunity.⁷ A private organi-

⁶ For a summary of that debate, *see, e.g.*, J. MICHAEL MARTINEZ, WILLIAM D. RICHARDSON, RON MCNINCH-SU, EDS., *CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH* (U. Fla. Press 2000)(collecting multi-disciplinary essays, some against preserving symbols of racial oppression and some for preserving Southern history).

⁷ *Race-tinged Furor Stalls Arthur Ashe Memorial*, www.nytimes.com, July 9, 1995. *See* LEVINSON, *supra*, at 115-19. Even more controversial was a new Abraham Lincoln monument, initiated by the U.S. Historical Society, a Richmond-based organization; the Richmond City Council passed a resolution calling the statue a "symbol of unity and reconciliation" and approved a public contribution of up to \$45,000 toward the

zation, the “Virginia Heroes,” spearheaded the fundraising for the Ashe monument and presented the project to Richmond’s City Council. *See* <http://www.cvco.org/arts/psculpt/ashe>.

This Court has made clear that a government’s broad policy message may involve private entities and still remain government speech, so long as it retains overall control. *Johanns*, 544 U.S. at 561. There, the respondent beef producers argued that tax-funded television ads (“Beef – It’s What’s For Dinner”) were not government speech because their content was controlled by a nongovernmental entity, comprised of 50% cattle producers appointed by the Secretary of Agriculture, and 50% other industry members. *Id.* at 551. Despite a large creative role by private citizens, the *Johanns* majority concluded: “The message of the promotional campaigns is effectively controlled by the Federal Government itself.” *Id.* at 560. There were two critical features. First, “the government sets the overall message to be communicated,” based on a statutory federal policy of promoting beef consumption. *Id.* at 553 (citing 7 U.S.C. § 2901(b)). Second, the Secretary had final approval authority over all advertisements, which was demonstrated by: (1) prior review of ad copy by Department officials; (2) rejection or rewriting of some proposals by the Department; and (3) participation by Department personnel in open meetings at which proposals were developed. *Id.* at 561 (citations omitted).

granite plaza at its location on nearby federal park land. Jeremy Redmon and Lindsay Kastner, *Lincoln Statue Unveiled*, TIMES-DISPATCH, April 6, 2003, available at <http://www.stat.alum.org/lincolnstatue.html>.

Based on 112 examples detailed in Appendix D, municipalities around the country exercise content control over monuments through procedures that are remarkably similar to those outlined in *Johanns*. First, while less frequent because of the occasional nature of monument donation, some cities have applicable written policies setting criteria for donations of public art, park improvements, or monuments. (*E.g.*, St. Petersburg, Florida (#162)(new ordinance requires legislative consideration and approval of historical significance of any proposed monument.) Second, many municipalities require prior submission of words and graphics before any government decision on accepting a monument, and many require design input. (*E.g.*, Newport News, Virginia (#79) (written policy regarding proposed monuments for military-related actions requires city review and approval of text detailing actions of honorees prior to approval of monument.) Even without a specific policy requiring prior submission, however, the installation process itself offers city personnel at least a last-minute chance to see the monument before it is erected, and are thus to refuse any content that undermines the municipality's overall character message. Third, some questionnaire respondents provided specific examples of times where a city required modification of words or images prior to display. (*E.g.*, Tucson, Arizona (#232)(“wording is sometimes modified to be sensitive to a large audience. In the case of a monument (The Mormon Battalion), [the] artist was asked to reconsider physical traits that appeared to lack sensitivity to a diverse population.”)

Fourth, and perhaps most significantly, the vast majority of municipalities represented in the MPE require legislative acceptance of any privately donated monument. Thus, for these municipalities,

open meetings are required, and the specifics of the proposed monument are discussed publicly before approval by elected representatives. Given that the type of monument at issue usually conveys its symbolic content well – e.g., a monument to the Hmong role in the Vietnam War, or to local Chief Niwot – legislative approval is in almost all cases the practical equivalent of a requirement for prior submission and approval of each monument’s overall message. For monuments without explicit messages, an “overall message” can be found in municipalities’ promotional statements, which summarize the administration’s essential vision of the community.⁸

3. IMLA’S Examples Demonstrate Political Accountability in this Context

Municipal display of private monuments handily complies with the underlying rationale for allowing government speech in the face of differing views. “When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.” *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000), *quoted in Johanns*, 544 U.S. at 574 (Souter, J., dissenting). Here, as discussed above, the elements emphasized by the *Johanns* majority, 544 U.S. at 564, are satis-

⁸ *E.g.*, compare Village of Hinsdale, Illinois Home Page, <http://www.villageofhinsdale.org> (home page describing municipality as one of “natural beauty, hometown charm, and a friendly community atmosphere”) with Village of Oak Park, Illinois Home Page, http://www.oak-park-us/Village_Background/Village_Background.html (web page describes municipality as “known for its architectural heritage and diverse population,” followed by details on diversity).

fied based on city council involvement and administration control.⁹

Also, the donated monument context does not implicate the *Johanns* dissent's "ventriloquism" concerns. See 544 U.S. at 576 (Souter, J., dissenting)(few Americans would be aware that the government was behind advertisements with the tag line, "Paid for by the beef producers"). Unlike line items in a complex budget, monuments displayed in city parks cannot be hidden from public view. There is no need for a "sunshine law" to expose monuments to political commentary. (See, e.g., The Freedom of Information Act, 5 U.S.C. § 5521.) Moreover, when a private organization's monument is permanently installed on public land, people naturally expect that the municipality is involved and has granted prior, express permission. See, e.g., *Graf v. City of Chicago*, 9 F.3d 1309, 1313 (7th Cir. 1993)(citing CITY OF CHICAGO MUN. CODE § 10-28-040)(discussing a typical ordinance generally prohibiting erection of structures or stationary objects on any public ground).

The Municipal Practice Examples again underscore the practical realities. As shown in Appendix C, when citizens find a monument offensive, they turn to their municipal government for redress. The letters, public protests, and lawsuits show that citizens believe that the government – and *not* the original private donor – is responsible for the objectionable state of affairs. Sometimes the municipality

⁹ Indeed, accountability is enhanced here by virtue of the closer connection between citizens and their local government, as compared with federal, or even state, governments. Compare *Hinrichs v. Speaker of the House of Reps. of the Ind. Gen. Assembly*, 506 F.3d 584, 592-93 (7th Cir. 2007)(noting distinction in Establishment Clause taxpayer standing context).

responds (e.g., Moorhead, Minnesota (#32)(in response to complaint, changed wording on private-donor-initiated “Norwegian Stave Church” display to make tone more historic and less religious), and sometimes it does not (e.g., Neenah, Wisconsin (#26)(“Playing in the Rain” fountain was opposed by neighbors, but “city leaders stuck with the decision to place the fountain in the downtown park,” and it is now a “beloved landmark”), but the municipal officials always are held politically accountable.

B. These Monuments Satisfy The Appellate Courts’ Four-Factor Government Speech Test

In applying the relatively new government speech doctrine to expressive contexts other than government-funded programs, the appellate courts have developed a four-factor test. *See, e.g., Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008)(message on specialty license plate was primarily private speech and thus created a limited public forum); *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001)(sign listing corporate sponsors of city’s holiday display was government speech, not forum; no First Amendment obligation to allow other private speech); *Knights of the KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (constitutional for public radio station to reject KKK as sponsor, and thus exclude it from broadcast acknowledgement of sponsors). The four factors are: (1) the central purpose of the challenged speech; (2) the municipality’s degree of editorial control; (3) the identity of the literal speaker; and (4) whether “ultimate responsibility” for the content rested with the municipality. *E.g., Stanton*, 515 F.3d at 964; *Wells*, 257 F.3d at 1140-42.

Municipal display of donated monuments meets this test, which has been most fully developed in a recent series of cases involving specialty license plates. The Tenth Circuit erred, in an earlier case, when it applied the four factors and concluded that a similar monument and context was the Eagles' private speech. *See Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). This Part II.B. focuses primarily on explaining why the *Ogden* reasoning was based on a faulty understanding of the practical context.

1. Their Central Purpose Is Municipal Expression

The central purpose of a municipality in accepting and displaying a privately-donated monument is universally expressive. As documented above, municipalities seek to enhance the park's aesthetics and to express a message, whether symbolic or literal, general or specific. The Tenth Circuit in *Ogden* made two critical errors: 1) it focused on the monument's avowed purpose, to advance the views of the Eagles that the Ten Commandments provide a moral code for youth, and 2) it rejected a municipal expressive purpose because the then-mayor "had no idea as to the meaning of parts of the Monument, particularly the Phoenician letters." 297 F.3d at 1004.

First, the essential question is not what the *donors* of a monument had in mind, but rather, what was the *city's* purpose in agreeing to display the monument. If, for example, at that time, Pleasant Grove's city council agreed with the Eagles' idea that the monument would provide a positive influence on youth, then that is the government's expressive purpose in its display.

Second, the Tenth Circuit's assumptions about city government are incorrect: it would not be common for a mayor, or even a planning commissioner, to be familiar with every symbol on a particular monument, or every theme the sculptor intended. For example, although scores of City of Chicago employees worked on all stages of the 6-year, \$475,000,000 Millennium Park project, and the Mayor was very involved in the public art selection process, neither he nor many others would know specifically that the videos displayed on the Crown Fountain are from a "broad social spectrum" of 1,000 Chicago citizens, let alone that the faces are "a reference to the traditional use of gargoyles in fountains, where faces of mythological beings were sculpted with open mouths to allow water, a symbol of life, to flow out." See http://www.millenniumpark.org/artandarchitecture/crown_fountain.html. That practical reality does not change the administration's expressive purpose: showcasing the City as bold, modern and world-class.

Finally, a city's display of donated monuments fits this factor more closely than did the other contexts analyzed by the federal circuit courts. Because states sell specialty license plates for an additional fee, the majority of courts have characterized the state's central purpose as revenue-raising. *E.g.*, *Stanton*, 515 F.3d at 966; *Choose Life v. White*, 2007 WL 178455 (N.D. Ill. Jan. 19, 2007). *But see ACLU v. Bresden*, 441 F.3d 370 (6th Cir. 2006)(where legislature affirmatively voted to create specialty plate for given cause, found primary purpose was government speech); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004)(found purpose mixed; held a forum). Here, the municipalities' expressive purpose is not diluted in this way. Also, the two lead cases both held the first factor satisfied by a very limited

government expressive purpose, thanking sponsors. *Wells*, 257 F.3d at 1141-42; *Univ. Mo.*, 203 F.3d at 1093. Surely this means that, not only are “thank the donor” plaques on monuments government speech, but so too, are the far grander messages in donated veterans’ memorials and monuments of town founders.

2. Municipalities Exercise Editorial Control

As described above, municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals. (See Part II. A.2. and Appendix D.) In *Ogden*, the Tenth Circuit held this second factor was not met because the Eagles’ monument was donated as a finished product. 297 F.3d at 1004. The relevant inquiry, however, is whether the government has the right to edit speech created by a private organization, not whether such editing was needed in a particular instance. See *Johanns*, 544 U.S. at 562.

Even if Pleasant Grove originally accepted the Eagles’ monument without participating in its design and composition, municipal ownership of monuments encompasses an ongoing right to editorial control. If, for example, a city determined that one prominent symbol on an existing monument was now widely viewed as a sign for a satanic cult or warring gang, that city likely would exercise its editorial control, by modifying the statue, if possible, or removing it. Nor is this scenario far-fetched. One commentator writes of a four-sided monument in Santa Fe, New Mexico which describes fallen heroes from various conflicts, using the language of the applicable era. On one

side, the word “savage” has been carved out, unofficially. In addition, a plaque has been added that attempts to explain and excuse the use of the terms “savage” and “rebel” and expresses hope for changed attitudes. Robert Lipkin, *Down with Flags, Statues, and Monuments: Cultural Memory in a Deliberative Democracy*, 7 UNIV. CHI. L. SCH. ROUNDTABLE 239, 262-63 (2000). See also LEVINSON, *supra* (giving additional examples of governmental editing jobs on existing monuments). In the permanent monument context, editorial control is not necessarily fixed at one point in time.

Moreover, even if the monument was mass-produced and arrived sight unseen, a municipality could exercise editorial control over the plaque acknowledging the private donor. Imagine a sign that read, “Donated by the Eagles to Assist Metropolis in its Mission to Promulgate the Word of the One True God.” Any municipal lawyer would advise her client of the unconstitutionality of such language, and the municipality likely would require a modified message as a condition of its display. Compare *Univ. Mo.*, 203 F.3d at 1094 (second factor met where public radio staff composed, reviewed and edited sponsor acknowledgements to ensure compliance with federal and station guidelines).

3. Municipalities Are The Literal Speakers

A municipality becomes the “literal speaker” upon the transfer of a monument’s ownership. While the Tenth Circuit acknowledged this in *Ogden*, it hesitated to declare this third factor satisfied because the Eagles had composed the speech. 297 F.3d at 1005. Under *Johanns*, however, a message may be gov-

ernment speech even where the exact words are composed by private persons. 544 U.S. at 560.

Under the most analogous case law on this factor, the specialty license plate cases, Pleasant Grove satisfies the third factor. The majority view holds that the individual vehicle owner is the literal speaker. This is based on his intentional display of the government-manufactured values message and on public perception that the message display is purposeful. *Stanton*, 515 F.3d at 967 (collecting cases); *Choose Life*, 2007 WL 178455 at *6 (“[T]he specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty license plate imprinted with the phrase “Choose Life” would doubt that the owner of that vehicle holds a pro-life viewpoint.”). Compare *Wooley v. Maynard*, 430 U.S. 705 (1977) (because any message on a license plate is connected to the owner or driver of the vehicle, requiring all residents to display the state’s motto on their cars’ license plates held unconstitutional compelled speech). Presenting the converse situation, here, a municipality intentionally displays a message created by a private individual, in circumstances where the public perception is that municipalities are responsible for any messages conveyed by monuments located in municipal parks.

4. Municipalities Have “Ultimate Responsibility”

Municipalities have “ultimate responsibility” for the content of monuments they display. *Ogden*, 297 F.3d at 1005 (holding this fourth factor satisfied because “[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”). In the Municipal Practice Examples, the majority of respondents with personal knowledge answered that the municipalities they represent have legal ownership and physical control of the donated monuments. (*See App. C.*)

Even in the absence of clear government ownership, this factor also is demonstrated by municipalities’ legal responsibility for monuments in their parks. *See Wells*, 257 F.3d at 1142 (“this litigation is itself an indication that the City bears the ultimate responsibility for the content of the display”); *Univ. Mo.*, 203 F.3d at 1094 (noting radio station’s ultimate responsibility for all broadcasts, including sponsor acknowledgments, because station was subject to legal sanctions for failure to comply with its statutory legal obligations).

Regarding donated monuments, anyone who alleges some harm caused to them by a statue in a park, whether physical, emotional, or constitutional, will sue the municipality. It is highly unlikely that anyone would take legal action against the original donor of the statue, even if their contribution is acknowledged by a donor plaque. *See LEVINSON, supra*, at 33 (noting, but not citing, a *New York Times* report that “at least one lawsuit has been filed, in Franklin, Tennessee, seeking not only removal of a statue of a Confederate soldier that towers over the town square but also \$44 million in damages”). Once a monument is accepted and displayed in a public park, it becomes the government’s speech, and the government speech paradigm should apply.

III. APPLYING THE GOVERNMENT SPEECH PARADIGM HERE PROVIDES FUNCTIONAL LIMITS ON MUNICIPAL DECISIONS AND HAS A POSITIVE IMPACT ON THE SPEECH MARKET

A. Limited Public Forum Analysis Is Unworkable Here Because Any Appropriate Content Limitations Are Subjective And Necessarily Include Viewpoint

Categorizing a city's display of privately-donated monuments as creating a limited public forum is a bad alternative. First, limited public forum analysis is unworkable here because any accumulation of privately donated monuments occurs over a long period of time, encompassing numerous administrations and evolving cultural norms. Second, appropriate types of content limitations, such as "relates to local history and culture," are subjective, and thus inherently reflect the decision makers' viewpoints; that violates the limited public forum test. Municipalities rightly want to create a positive, welcoming atmosphere in public parks, and doing so requires the discretion to decline divisive monuments.¹⁰

First, the limited public forum test does not fit occasional donations. Where government invites private speakers to use public property in a way not

¹⁰ Examples of standards directed towards that end from the MPE include the following limitations on donated monuments: Kalispell, Montana (#54)("engender respect, address community-wide concerns"); Missoula, Montana (#98)("all installations must be approved for content, political/public acceptability and legality as well as derogatory language or images); South Portland, Maine (#228)("suitable public purpose related to location and no endorsement of political or religious viewpoints").

generally open to the public, it may set reasonable content limitations, as long as they are viewpoint neutral. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). Many municipalities do not have a written policy, or an established practice, regarding the types of donated monuments they accept because this is neither a regular occurrence, nor one the administration has invited. When courts find no established content limitations within an alleged “limited” public forum, they apply strict scrutiny. *See, e.g., Christ’s Bride Ministries v. Southeastern Penn. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998). In a context where years may go by between proposals for a new monument in a town, the ill fit of this type of analysis is easy to see.

Second, applying the limited public forum test, courts regularly have rejected attempts to screen out hate groups, advocates of discrimination, public controversy, and sectarian religious speech. *See Dolan, supra*, 31 HASTINGS CONST. L.Q. at 72-99 (and collected cases).¹¹ Most compelling here are the cases where states have been forced to include the KKK in the Adopt-a-Highway program, in which government signs posted by the side of the road thank the listed organization for its work in keeping that stretch of highway clean. *E.g., Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). *See also Nat’l Abortion Rights Fed’n v. Metro. Atlanta Rapid Transit Auth.*, 112 F.Supp. 2d 1320 (N.D. Ga. 2000)(holding unconstitutional a

¹¹ This *amicus* brief uses the term “limited public forum” throughout to mean a context where the *Perry* “reasonable content limitations/no viewpoint discrimination” test applies. There continues to be controversy in the courts about terminology, and whether a “nonpublic forum” is equivalent. *Id.* at 77 n.27 (collecting cases); *Ogden*, 297 F.3d at 1002.

transit advertising policy excluding “controversial” ads, despite attempt at detailed, objective definition, on grounds that governmental discretion in a limited public forum gives administrators too much room for viewpoint discrimination).

The limited public forum doctrine does not provide a shield against monuments that are harmful to the community or its spirit. Already, Fred Phelps has proffered anti-homosexual monuments to cities within the Tenth Circuit. Boise, Idaho (#67/#229) has removed its pre-existing Ten Commandments monument in order to refuse this spiteful symbol without legal risk. It also implemented a policy against “inflammatory or discriminatory” monuments. On a less clear note, one Missouri town (#30/#192) explained that it “rejected [a] plaque to commemorate [the] illegal hangings by [a] mob of three black men in [the] early nineteen hundreds in the public square,” on the grounds that the “language was inciting and not necessarily accurate.” Especially given that the town allowed a plaque for the “first recorded gunfight west of [the] Mississippi,” involving “Wild Bill Hickock,” the distinction looks more like viewpoint discrimination, allowing some acts of local history and not others. Yet one evokes a colorful past that vacationing families enjoy play-acting, and the other a painful chapter that causes division among residents even today. Going back to the municipal function of shaping public parks as welcoming spaces with inspiring symbols, that decision may be a sound use of discretion.

Two cases show why the government speech paradigm is preferable to limited public forum analysis in expressive contexts, such as park monuments. The first, *Putnam Pit, Inc. v. City of Cookeville*, 76 F.

App'x. 607 (6th Cir. 2003)(*Putnam II*), shows the illogic of stretching limited public forum analysis to its breaking point, in an expressive context where only government speech will do.

Putnam is one of the few cases involving a municipal web-site and whether adding hyperlinks to private web pages creates a forum. There, a non-resident, Mr. Davidian, became obsessed with an unsolved murder in Cookeville and started a website describing the City's alleged corruption. After denying his request to add his website to the City's "local links" web page, the City adopted a policy that hyperlinks must not only relate to City services, attractions and officials, but also must promote the City's tourism and economic welfare. *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000)(*Putnam I*). Davidian then added a tourism page to his website, which included information about health department restaurant investigations, and also claimed that his scrutiny of the City promoted its long-term welfare.

In *Putnam I*, the Sixth Circuit reversed summary judgment for the City because the discretionary standard and its application suggested viewpoint discrimination, which violates the limited public forum test. 221 F.3d at 845-46. In *Putnam II*, however, the court upheld the jury's finding that because Davidian's website was critical of the City and its officials, it was outside the content limitation of "promoting" the City; thus, they did not reach the issue of viewpoint discrimination. 76 F. App'x. at 613. Categorizing speech that promotes the government as a "content limitation" – and saying that excluding speech that criticizes the government is not "viewpoint discrimination" – turns these concepts

inside out and cannot be relied on as sound legal counsel for municipalities.

In the other, the D.C. Circuit upheld a city's rejection of PETA's entry in a temporary sidewalk sculpture display called "Party Animals." *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005). PETA argued, and the district court agreed, that because the City had accepted other sculptures that were outside the stated criterion, "festive," including 9/11 tributes, rejection of its "suffering circus elephant" was viewpoint discrimination. *Id.* at 27. The appellate court held that the sculptures displayed were government speech instead, within the *Forbes/Finley* model, because the municipal decision-makers retained the right to approve designs and reject anything they considered inappropriate. *Id.* at 30.

When city officials are assessing a monument proposal from a private donor organization, they are making complex, irreducible value judgments. For example, the idea of honoring Upton Sinclair, a celebrated muckraker, may be appealing to later generations who are benefiting from different injustices, but thought destabilizing in his time. One city may memorialize its slain local soldier with large, realistic weapons in hand, while another location creates a kneeling soldier, head bowed. And what is "historical" to one person, is "religious" to another. Only the government speech doctrine allows municipalities to shape and edit their public landscapes through monument displays that correspond with local community values and tastes.

B. RECOGNIZING MONUMENT DISPLAY AS GOVERNMENT SPEECH IS GOOD POLICY

1. Counter-Speech In Parks Shows That Private Speech Thrives When Municipalities Make Monument Decisions

The location of the challenged monument actually cuts in favor of finding government speech. Precisely because it is situated in a public forum, there is ample opportunity for speech activities, including counter-speech. In city parks, there is no reason for concern that a relatively small amount of government speech, in the form of monuments of various pedigrees, will crowd out or dominate the on-site private speech.

The MPE confirms this fact and more, for municipal park locations across the country. As it turns out, in some instances, the very existence of the donated monument has a positive impact on private speech: it serves as a focal point for protests and rallies. For example, in Kalispell, Montana (#54), a private donor group recently sought and obtained the city council's permission to place "a large bronze statue depicting an American soldier kneeling," in the city's "most highly visible park." The respondent stated: "Since the monument was installed, the area has been used for rallies both for and against the war in Iraq." And in Boise, Idaho (#67/#229), there are frequently human rights and other rallies around the Anne Frank Memorial. *See also* Appendix C.

Similarly, the Summums retain the opportunity to spread their message in Pleasant Grove's parks, through traditional public forum speech activities,

such as organized gatherings and literature distribution. They, too, may use the challenged monument as a stimulus for counter-speech. The First Amendment, however, does not require the City to spare them this effort by letting them leave a permanent stone text at that location. *Compare United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205, 214, 218 (2003) (Kennedy, J., concurring) (Breyer, J., concurring) (while plurality relied on government speech rationale to uphold federal requirement that libraries install internet pornography filters; Justices Kennedy and Breyer concurred because, given that adults are able to ask libraries to turn off filter, their speech rights are minimally impaired).

2. Constitutional and Political Limits on Government Speech Protect Community Members

Finally, government speech is not unlimited. The Establishment Clause, of course, provides the clearest constitutional constraint. The Ten Commandments monument at issue in this case appears to share a physical and historical context that is analogous to that upheld by this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), but the Establishment Clause is not an issue presently before the Court. Whether express recognition of the monument as government speech creates an additional analytic step, or makes no difference, is a question for another day.

Also, other limitations have been identified, given the government speech doctrine's potential to affect First Amendment protections. Examples include proposed limitations on partisan government speech that seeks to perpetuate an administration and on viewpoint-based speech aimed at retaliating for a

private speaker's exercise of freedom of speech. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1106-10 (E.D. Cal. 2003)(giving a thorough, succinct judicial overview of potential limitations on government speech). See also Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (Jan. 2000)(expressing concerns over "ventriloquism" and coercion, and collecting articles proposing limits on doctrine); James Foreman, Jr., *Driving Dixie Down: Removing the Southern Flag from Southern Capitols*, 101 YALE L.J. 505 (1991)(asserting that racist government speech violates the First Amendment and, under some circumstances, the Equal Protection Clause of the Fourteenth Amendment).

Most significantly, municipalities may be constitutionally prohibited from accepting and displaying hate monuments. In two cases, this Court has recognized that for government to act based solely on animus for a disfavored group is not a legitimate government function. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional a state statute criminalizing a sex act only for homosexuals); *Romer v. Evans*, 517 U.S. 620 (1996)(striking down a Colorado constitutional amendment that restricted state and local laws and regulations from protecting homosexuals from discrimination). See Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L.REV. 1273, 1282-83 (2006-07)(reading *Romer* and *Lawrence* as "support[ing] the conclusion that the gratuitous disparagement of homosexuals is unconstitutional"); Steven Goldberg, *Beyond Coercion: Justice Kennedy's Aversion to Animus*, 8 U. PA. J. CONST. L. 801, 807 (2006)(arguing that municipal display on courthouse wall of private organization's plaque condemning gays could be unconstitutional).

This last potential constitutional restraint on government speech mirrors an important policy reason for extending the doctrine here, to municipalities' display of privately-donated monuments. In most if not all cases, city governments are motivated by good will, or at least political accountability, to permit installation of public monuments only where they are respectful of all citizens. Labeling such park monuments a public forum removes all municipal discretion to create beautiful, welcoming public green space in America's cities.

CONCLUSION

This Court should recognize privately-donated monuments installed in government-owned parks as government speech, so that elected representatives can create open space that builds community and reflects local values, history and culture. The International Municipal Lawyers Association, *amicus curiae* on behalf of the Petitioners, respectfully requests this Court to reverse the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A**Municipal Practice Examples—IMLA’s
Questionnaire Process**

Within the brief time frame available, IMLA undertook to collect from its approximately 2500 members, and to provide the Court, examples of municipal practice regarding privately-donated monuments displayed in parks. These members are attorneys who represent municipalities, both as government employees and outside counsel. The tool used was an online service, www.surveymonkey.com. IMLA’s Counsel of Record drafted a questionnaire seeking information on facts relevant to the legal questions in this case. IMLA sent an email to all its members, asking them to open a hyperlink to the “survey monkey” page and complete the questions. A copy of the questionnaire used is set forth in Appendix B. The cover email was identical to the text in the “Instructions and Purposes” section of the questionnaire.

Note that the questionnaire responses likely were not affected by significant bias for several reasons. First, although the questionnaire indicated that responses would help IMLA in this *amicus* brief, under existing case law, it is not clear what types of responses would help or harm municipalities’ legal interests in this case. The “non-applicable” responses, described below, also indicate this uncertainty. Second, many responses appeared contrary to how the respondent perceived the client’s interests. For example, a number of narrative responses indicated that the respondents believed municipal legal positions are enhanced by having in place a written policy, but few indicated that their clients had such a policy. Finally, most respondents appear

to be general municipal law practitioners, rather than First Amendment or appellate specialists.

Between April 24th and May 15th, 2008, IMLA received a total of 238 responses. (Note that the original deadline, based on the original *amicus* brief due date, was April 30th, and the bulk of the responses were received within that initial time frame.) Of the 238 total responses, 117 were deemed responsive and used for examples and analysis in these Appendixes and the brief.

Of the 238 total responses, 88 gave no response to the substantive questions, but only completed all or part of the optional first question, which requested name, municipality, and contact information. Counsel of Record's assistant sent a follow-up email to these non-respondents (N/R), asking which of a list of potential reasons for not completing any of Questions Nos. 2-16 applied to them. Of the 20 who replied, 16 reported that the municipalities they represent do not display privately-donated monuments, 2 did not have the requested information, 1 had technical difficulties, and 1 was filing a brief in the case.

In addition, of the 238 total responses, 16 responses were excluded from IMLA's legal analysis for this brief because they were not relevant enough to the legal questions presented in this case (N/A). Three represented municipalities in Canada, and 13 provided responses related to speech activities other than privately-donated, permanent monuments in parks (e.g., temporary banners or murals on a government building). Substantive responses were excluded from the set of "117 Applicable Responses" (summarized in Appendixes C and D) solely because of the reasons stated in this paragraph.

Finally, of the 238 total responses, 16 were duplicates, i.e., they self-identified as representing municipalities for which there were one or more other responses. Note that most of those were N/R, but they are accounted for here in this separate category. Some of them contained additional narrative information. In those cases, all narrative information was used, but only one set of multiple-choice answers was counted per municipality. There were no identified inconsistencies.

The complete results of the questionnaire are maintained at both The John Marshall Law School, Chicago, Illinois, office of Counsel of Record, and at IMLA, 7910 Woodmont Avenue, Suite 1440, Bethesda, Maryland, 20814. In addition, these materials can be lodged with the Court upon request. These complete results consist of: (1) the full set of responses (2-3 pp. from each of the 238 respondents, including the N/R and the N/A responses, automatically generated by survey.monkey.com); (2) survey.monkey.com automatically-generated summaries of all narrative answers listed by question number (and not listed or cross-referenced by respondent number); (3) a survey.monkey.com automatically-generated report summarizing all 238 responses, using percents and bar graphs (not presented in this Appendix because those numbers included the N/A responses); and (4) an Excel spread sheet compiled by an assistant to Counsel of Record, which lists all responses to each question for the “117 Applicable Responses” in a user-friendly presentation; (5) a list identifying the N/R responses, and the reasons given, if any; (6) a list identifying the N/A responses and the reasons; and (7) a list of duplicates.

APPENDIX B



**INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION**

IMLA Survey

Instructions and Purpose:

We are asking all IMLA members to respond quickly to a brief online survey. Doing so will assist IMLA in representing municipal interests by filing an amicus brief in *Pleasant Grove v. Summum*, a case in which the United States Supreme Court recently granted cert. At issue is whether municipal display of a privately-donated monument in a public park is government speech or creates a public forum for private display of monuments. There are only sixteen short questions to this survey. Please reply as soon as possible.

Questionnaire Directions:

- If you represent more than one municipality, please choose one on which to base your answers, giving preference to the one on which you have the most information relevant here.
- Please complete only those questions regarding which you have personal knowledge or other reliable evidence. **You do not need to answer all questions to provide helpful information.**
- Please provide narrative information where available and responsive.

- For every question, **please check all that apply.**
- The term “monument” as used herein means a permanent fixed structure that must be erected or installed, and which conveys or tends to convey some communicative message.
- The term “private person” as used herein includes organizations.
- The term “municipality” as used herein includes affiliated governmental or quasi-governmental agencies, such as park districts and public building commissions.

1. Optional Information:

Municipality Represented: _____

Population of Municipality: _____

Your name: _____

Position Held: _____

Email: _____

SURVEY PART I

Please answer the following questions if, to your knowledge, the municipality you represent has been offered, accepted or rejected any monument(s) by/ from a private person during a time period of which you have knowledge. *If there is more than one monument of which you are aware, please use the text box to explain further, including any differences in answers.*

2. Type of monument(s) (check all that apply):

memorial other historical local cultural

public art any religious aspect other

please describe: _____

6a

3a. What were the circumstances (check all that apply)?

private donor initiated private donor responded to municipal request for proposals (RFP)

other (specify)

3b. What action was taken by the municipality?

accepted rejected please describe:

4. Identify the municipal decision-maker(s) regarding acceptance/rejection and display of the monument(s)? (check all that apply)

planning or cultural department personnel

municipal executive (i.e., mayor)

legislative body (i.e., city council) public-private committee other

please describe: _____

5. Did the city employ any content-related criteria (e.g., local historical significance) in determining acceptance/rejection/placement of the monument(s)? yes no don't know

6. If you answered "yes" to question 5, were such criteria set forth in any of the following (check all that apply):

written policy request for proposal

ordinance regulation contract

established practice other please

describe: _____

7. Did the municipality exercise any control over the message, wording, or appearance of the monument(s)? yes no don't know

7a

8. If you answered “yes” to question 7, was that control demonstrated by (check all that apply):
- prior submission of proposed words and images
 - modification of wording design input
 - other please describe: _____

SURVEY PART II

The following questions apply to all monuments displayed in municipal parks, which were or appear to have been donated, in whole or in part, by private persons, including both those described in Part I of this Questionnaire, and those installed in an earlier time period.

9. Does the municipality own the monument(s)?
 yes no some, but not all don't know
10. If you answered “yes” or “some, but not all” to questions 9, is that ownership shown by:
 contract deed ordinance other please describe: _____
11. Does the municipality have a right to control the monument(s), including, but not limited to, the right to: move remove dispose don't know please describe: _____
12. Does the municipality maintain (i.e., clean and repair, as needed) the monuments?
 yes no don't know
13. In the area(s) adjacent to the monument(s), is the public permitted to engage in speech-related activities (check all that apply):
 yes no don't know.
 speech assembly protest distribution of leaflets/other communicative material
 other (please explain): _____

8a

14. If you answered “yes” to question 13, are you aware of such activities taking place from time to time? ___ yes ___ no
15. Are you aware of any instances where members of the public engaged in any of the above-described speech-related activities in the area(s) adjacent to the monument(s) where the content of the speech was in some manner *related to the monument(s)* or its implied or stated message(s)? ___ yes ___ no
If yes, please describe, including approximate time period and outcomes: _____
16. Are you aware of any instances of expressed public opposition to the existence or location of a monument, whether proposed, new, or previously-existing? ___ yes ___ no
If yes, please describe, including approximate time periods and outcomes: _____

THE SURVEY IS NOW FINISHED. THANK YOU FOR YOUR INPUT.

APPENDIX C

IMLA Questionnaire Summary
(of the 117 Applicable Responses)**■ Respondent Identified Municipality and Gave Contact Information (Question #1):**Identified: **104**Unknown: **13****■ Type of Monument (Question #2)**Memorial: **76**Other Historical: **55**Local: **22**Cultural: **28**Public Art: **65**Any Religious Aspect: **14**Other: **8****(Note:** many respondents checked several)**■ Circumstances of Donation (Question #3a):**Private Donor Initiated (PDI): **71**Multiple Responses Including Private Donor Initiated: **101**Private Donor Responded (“PDR”) to Municipality’s Request (PDR only): **6**Other: **7** (Other responses clarify that municipalities have privately donated monument(s))NR: **1** (same)**(Note:** many respondents checked several)**(Note:** NR = “no response”—question left blank)**■ Monument Accepted or Rejected (Question #3b):**Accepted monument(s): **102**Rejected monument: **3**

#77 (Unknown)—monument rejected due to religious nature

10a

#182 (New Smyrna Beach, Fla.), #234 (Fargo, North Dakota)—no reason given

Accepted some & rejected others: **10**

#26 (Neenah, Wisconsin)—three bust display of twin cities' founders rejected by other city due to a neighbor's objection

#28 (Sheboygan, Wisconsin)—original location of the Hmong-American Vietnam Memorial rejected by city council, monument later approved in a new location

#29 (Ann Arbor, Michigan)—sculpture rejected after no suitable location found

#30/#192 (Missouri)—plaque to commemorate the hanging of three black men in town square in early nineteenth hundreds rejected as “inciting and not necessarily accurate”

#67/#229 (Boise, Idaho)—recently rejected anti-homosexual monument from Fred Phelps

#115 (Benicia, California)—rejected monument to deceased children as “too religious”

#135 (Winnetka, Illinois)—rejected public artwork—no reason given

#198 (Hartford, Connecticut)—rejected a Puerto Rican family statue—no reason given

#203 (Durango, Colorado)—no specifics given

#207 (Independence, Missouri) —no specifics given

NR: **2**

■ **Municipal Decision Makers (Question #4)**

Requires Legislative Action: **93**

Public or Cultural Department Personnel: **29**

Public-Private Committee: **22**

Requires Executive Action: **39**

Other: **17**

(**Note:** many respondents checked several)

■ **Content-Related Criteria (Questions ##5-6):**

Responded that municipality uses content-related criteria: **57**

Written Policy: **16**

Established Practice: **21**

Other: **20**

Responded that municipality does not use content-related criteria: **41**

(*But see* Appendix D, compiling relevant responses for **112** municipalities, listed by municipality, and showing that content control often displayed through answers to other questions)

Don't Know: **16**

NR: **3**

■ **Control over the Message, Wording or Appearance (Questions ##7-8)**

Responded that municipality exercises control over the message, wording or appearance: **65**

Design Input: **43**

Prior Submission: **34**

Modification of Words: **8** (*see* App. D for detail)

(Note: some respondents checked several)

Responded that municipality does not exercise control over message etc.: **38**

(*But see* Appendix D, compiling relevant responses for **112** municipalities, listed by municipality, and showing that content control often displayed through answers to other questions)

Don't Know: **11**

NR: **3**

■ **Municipal Ownership of Monument**

(Questions ##9-10):

Municipality owns monument(s): **69**

Municipality owns some, but not all,
monuments(s): **22**

Municipality does not own monument(s): **6**

NR: **15**

Don't know: **5**

■ **Municipality Controls Monument (Question #11):**

Right to controls monument(s) (e.g.,
move/remove/dispose): **68**

Don't know: **3**

NR: **46**

(Note: based on the wording of Question #11,
“NR” here may, but does not necessarily, mean
municipality does not have right to control
monument(s))

■ **Municipality Maintains Monument (Question #12)**

Yes: **76**

No: **15**

Don't know: **12**

NR: **14**

■ **Speech Activities Permitted Around the Monument (Questions ## 13-14)**

Allowed: **102**

Aware of such activities taking place: **69**

Not Allowed: **3**

NR: **12**

■ **Speech Related to Monument & Occurring Around the Monument (Question #15)**

Aware of such monument-related speech activities around monument: **32**

Not aware of such activities: **67**

Don't Know: **1**

NR: **17**

■ **Public Opposition to the Existence or Location of Monument (Question #16):**

Opposition to the monument: **24**

(Please see summary of Question #3b for following four where monuments rejected: #26, #28, #30, #67)

- #13 (Newton, Kansas)—opposition to cost
- #32 (Moorhead, Minnesota)—person complained re wording on monument—city met with person and worked out a compromise
- #56 (Madison, Wisconsin)—opposition to monument re gay rights—city proceeded
- #59 (Eau Claire, Wisconsin)—ACLU questioned monument with religious connotation
- #63 (Idaho Falls, Idaho)—one letter from an individual questioning Ten Commandments monument
- #73 (Bozeman, Montana)—no details given
- #86 (Portland, Oregon)—location
- #92 (Longview, Washington)—monument questioned re accuracy
- #93 (Arlington, Texas)—area churches requested removal of Stonehenge monument
- #98 (Missoula, Montana)—veterans group opposed a police monument close to the veterans monument
- #102 (Marana, Arizona)—opposition to public art's unprofessional look

14a

#142 (Unknown)—lawsuits re cross monument
#166 (Yuma, Arizona)—complaint re Ten
Commandments monument
#174 (Charlottesville, Virginia)—concerns that
interactive First Amendment monument could
encourage vulgarity or inflammatory messages
#199 (Troy, Michigan)—location
#204 (Eagle, Idaho)—location
#205 (Carlsbad, California)—city sued over
public artwork display
#221 (Ogden, Utah)—lawsuit re Ten
Commandments monument
#227 (Pendleton, Oregon)—complaints re
proposed monument, proceeded
#232/#235/ #237 (Tucson, Arizona)—Pancho
Villa monument opposed by some citizens as
honoring villain, not hero

APPENDIX D**Summary of Sources of Municipalities' Content and Editing Control of Privately-Donated Monuments**

NOTE: This Appendix D shows that of the 117 Applicable Responses, 112 of them indicate that the municipality exercised some form of content control over selection and display of donated monuments in city parks. Content control is shown by one or more of the following three responses: (1) Question No. 4 (re: municipal decision maker), combined with a narrative response to Question No. 2 (re: type of monument where given); (2) Questions Nos. 5-6 re "content-related criteria," such as in written policies; and (3) Questions Nos. 7-8 re: editing control, such as prior submission, design input, or modification of words. (See also explanation in Amicus Brief, II.A.2.)

<u>Municipality</u>	<u>Demonstrated Content Control</u>
1. Albion, Michigan (#141)	Legislative decision on monument to industry / requires prior submission
2. Ann Arbor, Michigan (#29)	Legislative decision on artwork and sculpture / requires prior submission
3. Arlington, Texas (#93)	Legislative decision on Stonehenge Monument / required modification of words
4. Baldwin Park, California (#130)	Legislative decision on public art displays honoring individuals who have died in Iraq / written policy / requires prior submission and design input

5. Beaverton, Oregon (#119) Executive decision on monument and public art displays / written policy
6. Bellingham, Washington (#216) Executive decision on veteran's memorial / required design input
7. Beloit, Wisconsin (#5) Legislative & Executive decision on monument of Civil War Cannon and various public art pieces / monuments required to have "local historical significance"
8. Benicia, California (#115) Legislative decision on Pony Express monument, Civil War monument, and children's memorial / established practice
9. Boise, Idaho (#67 & 229) Legislative & Executive decision on religious monument / written policy and ordinance
10. Boulder County, Colorado (#197) Legislative decision on monuments / written policy / requires prior submission
11. Carlsbad, California (#205) Legislative decision on monument and public art displays / written policy
12. Centerville, Ohio (#72) Legislative decision on sculptures and public art displays / requires prior submission

17a

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|--|---|
| 13. Charlotte,
North Carolina
(#228) | Legislative decision on
Holocaust memorial and other
statues / content review for
artistic “value” and
appropriateness / required
design input |
| 14. Charlottesville,
Virginia (#174) | Legislative decision on
Vietnam Memorial and
monument to the First
Amendment / required design
input |
| 15. Cleveland, Ohio
(#172 & 210) | Legislative & Executive
decision on monuments and
sculptures / required design
input where hearings were
held to review the work |
| 16. Durango,
Colorado (#203) | Legislative decision on
Vietnam and Korean War
memorial and public art
displays / written policy and
established practice |
| 17. Eau Claire,
Wisconsin (#59) | Legislative decision on Angel of
Hope monument / request for
proposals and established
practice / requires prior
submission and design input |
| 18. Fairborn, Ohio
(#21) | Legislative decision on
monument/ required design
input |

18a

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|-----------------------------------|---|
| 19. Franklin, Pennsylvania (#201) | Legislative decision on war memorials and other monuments / established practice / requires prior submission |
| 20. Fredericksburg, Texas (#78) | Legislative decision on monument to local war heroes / requires prior submission and design input |
| 21. Gainesville, Florida (#113) | Legislative decision on monument and public art displays / request for proposals and contract / required design input |
| 22. Glendale, California (#109) | Legislative decision on Vietnam War memorial / required design input |
| 23. Greenhorn, Oregon (#238) | Legislative decision on monuments / written policy / required design input |
| 24. Hartford, Connecticut (#198) | Legislative & Executive decision on MLK statue, Puerto Rican Family statue, and memorial to fireman who have died on the job / required design input and prior submission |
| 25. Hood River, Oregon (#128) | Legislative decision on Sister City Memorial / required design input |

19a

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| 26. Idaho Falls, Idaho (#63) | Legislative & Executive decision on Ten Commandments monument / “historical” criteria required |
| 27. Independence, Missouri (#207) | Established practice / requires prior submission and design input |
| 28. Jacksonville, Arkansas (#220) | Legislative & Executive decision on monuments / required design input and prior submission |
| 29. Kalispell, Montana (#54) | Legislative decision on bronze statue of American Soldier kneeling / established practice required “high standards for presentation” / required design input |
| 30. Kansas City, Missouri (#117) | Legislative decision on fountain, Cancer Survivors Memorial, and Hispanic culture monument / established practice and ordinance / required design input |
| 31. Lakeville, Minnesota (#19) | Legislative decision on Veteran’s memorial / established practice / required design input |
| 32. Layton City, Utah (#108) | Legislative & Executive decision on World War II monument / requires prior submission |

20a

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|--|---|
| 33. Lexington,
South Carolina
(#213) | Legislative decision on cultural displays / required design input |
| 34. Longview,
Washington (#92) | Legislative decision on war memorial, Sacagawea Monument, totem poles, and Virgin Mary statue / regulations and established practice / requires prior submission, modification of words, and design input |
| 35. Madison,
Wisconsin (#56) | Legislative & Executive decision on historical and public art displays / request for proposals / required design input |
| 36. Marana,
Arizona (#102) | Legislative & Executive decision on monuments and public art displays / established practice of “historical” content / requires prior submission |
| 37. Missoula,
Montana (#98) | Legislative & Executive decision on public art display and war monuments / written policy, request for proposals, an ordinance, and established practice / requires prior submission, modification of words, and design input |
| 38. Moline, Illinois
(#40) | Legislative decision on monuments and public art / requires prior submission and design input |

21a

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| 39. Moorhead,
Minnesota (#32) | Legislative decision on Viking ship monument and Norwegian Stave Church / required modification of words after acceptance to make content of message “less religious” |
| 40. Nashville,
Tennessee (#85) | Legislative & Executive decision on monument and public art displays / written policy, request for proposals, and ordinance / requires prior submission and design input |
| 41. Neenah,
Wisconsin (#26) | Legislative & Executive decision on bust display of founders of the City / required modification of words and design input |
| 42. New Smyrna
Beach, Florida
(#182) | Legislative decision on Peace Pole / had advice of counsel / requires prior submission |
| 43. Newport News,
Virginia (#79) | Legislative decision on monument and public art displays / written policy of “seven criteria” / requires prior submission |
| 44. Newton, Kansas
(#13) | Legislative decision on public art / required design input |
| 45. Norfolk,
Nebraska (#8) | Legislative & Executive decision on World War II monument / requires prior submission and design input |

22a

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|-------------------------------|---|
| 46. Normal, Illinois (#88) | City manager approves historical and public art displays / requires prior submission |
| 47. Ogden, Utah (#221) | Legislative decision on monuments and public art displays / written policy, ordinance, and regulations / requires prior submission, modification of words, and design input |
| 48. Oxnard, California (#125) | Executive decision on monuments and public art displays / written policy and ordinance |
| 49. Palestine, Texas (#150) | Legislative decision on railroad caboos monument / established practice and criteria requiring “historical significance” |
| 50. Pendleton, Oregon (#227) | Legislative decision on public art displays / required design input |
| 51. Peoria, Arizona (#123) | Executive decision on farm equipment monument / required design input |
| 52. Pocatello, Idaho (#175) | Legislative decision on monument and public art memorial to Native Americans / required modification of words |

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| 53. Port Huron, Michigan (#71) | Legislative decision on historical plaques / requires prior submission and design input |
| 54. Portland, Oregon (#86) | Legislative decision on Oregon Holocaust Memorial, Oregon Vietnam Veteran's Memorial, Japanese-American Historical Plaza, and Portland Police Memorial / written policy / requires prior submission and design input |
| 55. Portsmouth, New Hampshire (#80) | Legislative & Executive decision on monuments and public art displays / required "historical significance" |
| 56. Richfield, Minnesota (#1) | Legislative decision on monument / requires prior submission |
| 57. San Ramon, California (#104) | Legislative & Executive decision on monument and public art / request for proposals, ordinance, and regulations / required design input |
| 58. Sedona, Arizona (#76) | Legislative decision on sculptures of Western heritage / established practice / requires prior submission and design input |
| 59. Skokie, Illinois (#118) | Legislative & Executive decision on monument and public art / established practice |

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|---------------------------------------|--|
| 60. South Portland, Maine (#52) | Legislative decision on historical marker and World War II monument / established practice / requires prior submission and design input |
| 61. Springfield, Missouri (#30 & 192) | Legislative decision on historical monument / requires prior submission |
| 62. St. Petersburg, Florida (#162) | Executive decision on monument and public art displays / ordinance and criteria giving preference to “historical significance” / required design input |
| 63. Troy, Michigan (#199) | Legislative decision on monuments and public art / written policy and established practice / requires prior submission and design input |
| 64. Tucson, Arizona (#232; 235 & 237) | Executive decision on war monuments and statues of historical figures / written policy, regulations, and established practice / requires prior submission, modification of words, and design input |
| 65. Tulsa, Oklahoma (#11) | Legislative & Executive decision on monuments / establish practice / requires prior submission |
| 66. Upper Arlington, Ohio (#14) | Written policy for acceptance of cultural and public art displays
Executive decision on |

25a

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|--------------------------------------|---|
| 67. Waverly,
Tennessee (#170) | monument / required design
input |
| 68. Wheeling, West
Virginia (#27) | Executive decision on Veteran's
sculpture / ordinance and a
requirement of local historical
or military background /
requires prior submission |
| 69. Winnetka,
Illinois (#135) | Legislative decision on war
memorial and MLK memorial /
criteria of "historical
significance" / required design
input |
| 70. Yuma, Arizona
(#166) | Established practice of
"national heritage plan" /
required design input |
| 71. Respondent #34 | Legislative decision on "horse
sculptures" / established
practice / requires prior
submission |
| 72. Respondent #66 | Written policy / requires prior
submission |
| 73. Respondent
#142 | Legislative decision on
monuments / criteria of no
obscenity |
| 74. Respondent
#149 | Legislative decision on
confederate monument and
public art / request for
proposals and ordinance /
required design input where
art commission reviews |

75. Respondent #167	Legislative decision / public discussion on Veteran's memorial / required design input
76. Respondent #215	Legislative decision on monuments and public art displays / established practice

Municipalities' Content Control of Privately-Donated Monuments by Legislative and/or Executive Decision(s) Only

<u>Municipality</u>	<u>Demonstrated Content Control</u>
1. Atlanta, Georgia (#33)	Executive decision on gift to celebrate 1996 Olympics
2. Bozeman, Montana (#73)	Legislative decision on Ten Commandments monument
3. Cedar City, Utah (#60)	Executive decision on statues for soldiers
4. Cibolo, Texas (#138)	Legislative decision on statue of former City manager
5. Coeur D'Alene, Idaho (#106)	Legislative decision on monuments and public art displays
6. Colorado Springs, Colorado (#137)	Legislative decision on monuments and public art displays
7. Concord, North Carolina (#20)	Legislative & Executive decision on Peace Pole donation
8. Delaware, Ohio (#209)	Legislative decision on monument to police killed in the line of duty

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|------------------------------------|---|
| 9. Des Moines, Iowa (#69) | Legislative decision on public art display |
| 10. Duluth, Minnesota (#101) | Legislative decision on monuments and public art display |
| 10. Eagle, Idaho (#204) | Legislative decision on Angel Monument to children who have died |
| 11. Fargo, North Dakota (#234) | Legislative decision on Ten Commandments monument |
| 12. Fayetteville, Arkansas (#211) | Legislative & Executive decision on peace fountain |
| 13. Gallup, New Mexico (#165) | Legislative & Executive decision on monument for Bataan Death March |
| 14. Huntsville, Texas (#183) | Legislative decision on public art display |
| 15. Ketchikan, Arkansas (#176) | Legislative decision on monument and public art displays |
| 16. Kettering, Ohio (#185) | Legislative & Executive decision on monument and public art to lives lost in 9/11 |
| 17. Kimball, Nebraska (#164) | Legislative & Executive decision on monument |
| 18. Lowell, Arkansas (#223) | Executive decision on antique fire truck monument |
| 19. Norton Shores, Michigan (#144) | Legislative decision on monument artwork |

28a

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|-----------------------------------|--|
| 20. Olney, Illinois (#139) | Legislative decision on monument and historical display |
| 21. Provo, Utah (#225) | Legislative & Executive decision on Ten Commandments monument and war memorials |
| 22. Rockford, Illinois (#44) | Legislative decision on “Millennium Fountain” |
| 23. San Antonio, Texas (#129) | Legislative decision on public art displays and statues of famous Texans |
| 24. Sheboygan, Wisconsin (#28) | Legislative decision on “Hmong-American Vietnam War Memorial |
| 25. South Bend, Indiana (#218) | Executive decision on memorial to workers who have died on the job and children who have died violently |
| 26. Spanish Fork, Utah (#188) | Legislative decision on monument to Fathers Dominguez and Escalante and a monument to the Icelandic population of the City |
| 27. Springfield, Ohio (#153) | Legislative & Executive decision on monument and public art displays |
| 28. Swartz Creek, Michigan (#148) | Legislative decision on war memorial |
| 29. Warner Robins, Georgia (#133) | Legislative decision on historical displays |

29a

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| 30. Washington
County, Utah
(#112) | Planning department decision
on monument |
| 31. Respondent #10 | Legislative & Executive
decision on statue of John A.
Roebing |
| 32. Respondent #47 | Legislative & Executive
decision on monument |
| 33. Respondent #57 | Legislative decision on
historical display |
| 34. Respondent #61 | Legislative & Executive
decision on monuments and
public art |
| 35. Respondent #70 | Legislative decision on
monuments, historical, and
public art displays |
| 36. Respondent #77 | Executive decision on
monument |