No. 07-665

In The
Supreme Court of the United States

PLEASANT GROVE CITY, et al.,

Petitioners,

v.

SUMMUM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE CITIES OF CASPER, WYOMING; CITY OF NORMAN, OKLAHOMA; CITY OF INDIANAPOLIS, INDIANA; CITY OF OGDEN, UTAH; CITY OF LAWTON, OKLAHOMA; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; CITY OF PROVO, UTAH; CITY OF BISMARCK, NORTH DAKOTA; AND CITY OF COLORADO SPRINGS, COLORADO IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

The amici adopt the questions as presented by the Petitioners.

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INTEREST OF THE AMICI[1]

The amici curiae request that this Court reverse the decision below because each amicus confronts the unnecessary and undesirable results that follow from the Tenth Circuit's over-extension of this Court's public forum doctrine. As a result of the decision below, each amici will be forced to choose between removing works it has accepted and displayed to promote its lawful governmental objectives or allowing its public places to serve as the forum for display of works by private citizens without regard for whether those works promote the common good. The amici respectfully submit that this Court's precedent does not support the rule laid down by the Tenth Circuit, which results in a finding that any placement of private works by a governmental body either yields control of public spaces to private citizens or makes every citizen an iconoclast with power to require removal of all such works from public spaces under pain of burdensome litigation.

Casper, Wyoming, provides the starkest example of the egregious consequences of the decision below. It is a city of approximately fifty thousand located in the Rocky Mountains in the middle of the State of

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[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Wyoming. The city accepted a Ten Commandments monument donated by the Fraternal Order of Eagles in 1965. It is also the birthplace and resting-place of Matthew K. Shepard. In a way that neither this Court nor the City of Caspar could ever have imagined, these two simple facts have converged to make Casper Wyoming a perfect example of the egregious harm resulting from the decision below.

The Casper City Council dedicated an Historical Monument Plaza on July 16, 2007. The plaza consists of stone monuments depicting the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the United States Constitution, the Bill of Rights, and the Ten Commandments, along with plaques describing the historical significance of these documents. The city controls the plaza and determines what monuments may be placed there. But the City's Monument Plaza includes a Ten Commandments monument donated to the city by the Fraternal Order of Eagles in 1965.

When the city's plan to create its Historic Monument Park was announced, Fred Phelps, pastor of the Westboro Baptist Church, demanded the right, under the Tenth Circuit's decision in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), to place a Matthew Shepard Monument in City Park.

The so-called Shepard Monument would read as follows:

> MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God's Warning 'thou

> shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22.

The city refused Pastor Phelp's request.

Now the city has to confront the horrific possibility that its decision to incorporate the Ten Commandments monument donated by the Eagles into the City's Historic Monument Plaza means that it must also allow Pastor Phelps to add his Matthew Shepard Monument. The city dreads that prospect for reasons any person who values civility can easily understand.

The cities of Ogden, and Provo, Utah, starkly illustrate the real range of choice created by the decision below. Like Casper, both Ogden and Provo accepted a Ten Commandments monument from the Fraternal Order of the Eagles. When Summum sued Ogden to force placement of its monument, the city resisted – until the Tenth Circuit informed the city it had created a public forum and must allow placement of Summum's monument in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). Confronted with the implications of the Tenth Circuit's decision, Ogden removed the work and "closed" the "forum" it was said to have opened. After the Tenth Circuit's decision, Provo decided to give its monument away rather than relinquishing control of its public spaces.

The other amici all fear that they will be forced to wrestle with the problems confronted by Casper, Ogden, and Provo – and believe they should not be required to do so. Norman, Oklahoma, is a city of

approximately 111,000, located in the heart of the state just south of Oklahoma City. This summer it begins construction of its Cleveland County Veteran's Memorial, to honor the service and sacrifice of veterans who have served our country from World War I to the present. The memorial is being built with private funds but will be located in a city park. Norman also has an art program through which it displays art throughout the city. Norman does not believe it should be forced to open its parks and public spaces to displays by private citizens simply because it takes private funds to build a veteran's memorial or decides to enrich community life by placing private works in its public spaces.

Indianapolis, Indiana, is a city of approximately 800,000 and is the state capital of Indiana. Aside from hundreds of other fixed displays, such as the Indiana War Memorial and the memorial to Martin Luther King, Jr., Indianapolis has approximately 150 miles of greenways and interconnected trails. These trails are designed to promote commuting, exercise, and alternative means of transportation throughout Indianapolis and Marion County.

Several of these trails connect to cultural district, with one predominate link, the "Cultural Trail."[2] The Cultural Trail combines a means of alternative transportation with a focus on art representative of the

[2] More information on the Cultural Trail, including the existing fixed displays, can be found at http://www.indyculturaltrail. info/.

Indianapolis' cultural mosaic displayed along the trail. The fixed-display art is submitted for review and approval to the Arts Council of Indianapolis – a not-for-profit organization funded predominantly by public city, county or state monies – before placement. The first fix displays have been erected within the walk or in close proximity to the pathway, and the displays have no message.

Affirming the Tenth Circuit presents Indianapolis with a Hobson's choice: 1) choosing a certain number for each public fora leaving certain groups and their messages without a venue, resulting in a disparate impact on certain messages and inviting litigation; or 2) removing all displays throughout Indianapolis. What was an innocent attempt to encourage message-free art now could become a trail that merely invites litigation at every turn.

Indianapolis does not believe it should be forced to recognize each public place where a fixed display currently resides as public fora for fixed displays. Legitimate public safety and aesthetic concerns are undermined by the Tenth Circuit's holding. Under the Tenth Circuit's approach, Indianapolis has inadvertently created hundreds of forums for private speech on public property. Such an absurd result would leave Indianapolis but one choice: remove all displays throughout Indianapolis. The City respectfully submits that it should not be forced to this choice.

The City of Lawton, Oklahoma, also appears to urge reversal of the decision below. Lawton is the home of Fort Sill, at one time the home of the famous Seventh Calvary, now the United States Army Training Facility for the Field Artillery, including most recently, the Air Defense Artillery. The city has over 108 public parks, many of them containing memorials, to those who have served our country in the United States Military. Many of these memorials were donated to the city by private groups. The city does not believe that its decision to accept these monuments and display them in furtherance of its legitimate government purpose – to inspire patriotism and gratitude for military service – should require it to open its public spaces to displays expressing the views of private citizens.

The Metropolitan Government of Nashville and Davidson County, Tennessee, and the cities of Bismarck, North Dakota, and Colorado Springs, Colorado, join the brief for the same reasons of the other amici. Taken together they fear the adverse consequences that the decision below will have on their ability to accept and display artwork or monuments that promote the civil life of their communities. Like the other amici, they urge this Court to reverse the decision below so that they will not have to confront demands for placement of private works in their public spaces or stripping their public spaces of such works in order to retain control over public property.

REASONS FOR GRANTING THE PETITION

As an initial matter, the amici curiae state their agreement with the Petitioners before the Court as well as the dissenters below insofar as they argue that neither precedent nor common sense recommend the conclusion that public parks are traditional public forums for the purpose of private speech communicated by means of a *permanent display*. The dissenters below fully explain why this Court's decisions do not support the notion that traditional public forums have traditionally been forums for *private* speech communicated by means of *permanent* display. The Petitioners highlight the way in which this ahistorical assertion conflicts with sister-circuits that have rejected this unwarranted extension of public forum doctrine as well as the farfetched notion that *governmental* display of monuments donated by private parties can be realistically characterized as *private* speech.

The amici write to emphasize a distinct but related way in which the decision below is inconsistent with the decisions of this Court. More specifically, the amici write to make explicit the way in which the decision below relied upon the two erroneous conclusions noted above, to justify a third "ultimate conclusion," *i.e.*, the conclusion that the *government's* acceptance and display of works donated by *private* parties, requires the finding that the government has created a forum for *permanent* display by *private* citizens.

In this way, the decision below creates what amounts to an imputed intent to *expand* a traditional public forum to include *permanent display by private citizens* based on nothing more than the decision by a governmental body to accept and display a work donated by a private citizen. Such a finding of governmental intent based on nothing more than the display of works donated by private parties is wholly inconsistent with legal principles that this Court has developed to determine when action by government officials is sufficient to support a finding that the government has intentionally opened a public forum. And such an extension of this Court's decisions is plainly undesirable because it undercuts the ability of government to engage in speech that is designed to serve a community's needs or aspirations. Worse still, the decision below virtually guarantees that public officials will be saddled with burdensome litigation as they try to discern the anything but clear line between governmental speech by means of its display, unintentional creation of a public forum for private speech, and impermissible governmental "endorsement" of private religious speech in public forums said to violate the Establishment Clause. For all these reasons, the amici request that the decision below be reversed and that this Court make plain that the display of works by governmental bodies is governmental speech.

I. The Decision Below Represents An Unthinking Over-Extension Of This Court's Forum Doctrine That Has Highly Undesirable Consequences For Civic Life.

Traditional public fora *have not been traditionally regarded as fora for permanent speech by private citizens*. Thus, it is clear that the decision below represents an extension of this Court's precedent – an implicit finding that the Petitioners intended to *expand* traditional public forums to make them serve as forums for *permanent* speech by private citizens. Precisely because the decision below really turns on this implicit finding of intent to expand a traditional public forum, it is plain that the most relevant precedent from this Court is provided by cases concerning the kind of government action that *designates* public property that is *a nontraditional forum* as a public forum nonetheless. As demonstrated below, this Court's decisions have uniformly emphasized that an intent to create a forum should only be found where the undisputed facts provide clear evidence of such intent. Because there is no basis for such a finding of intent to open (or, in this case, expand) a forum here, it is clear that the decision below arises from an unjustified extension of this Court's prior decisions that should be rejected.

Early on, this Court rejected the claims that public property was necessarily a forum for even *temporary* speech by *private* citizens, recognizing that "were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military

compounds and other facilities would immediately become Hyde Parks open to every would-be pamphleteer and politician. This the constitution does not require." *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 435 U.S. 114, 130 n. 6 (1981).

In the same vein, this Court has noted that "forum analysis is not completed merely by identifying the property at issue. Rather, in defining the forum we have focused on the *access sought by the speaker*." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 801 (1985). Emphasizing that "government does not create a public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse," the Court refused to find that the Combined Federal Campaign was a public forum, even though the campaign had been opened to a variety of speakers, because "the Court has examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id*. at 803 (relying on numerous cases where the *government's control of access* to the forum had led the Court to negate claims for *access*) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Greer v. Spock*, 424 U.S. 828 (1976); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)).

Likewise, in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), this Court rejected a claim that a student newspaper was a public forum, even though students were allowed to express a great

many views therein. In so doing it stated that "[i]f the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. . . ." *Id*. at 267. Relying on evidence of ongoing government control over the student newspaper, the Court found that the evidence that students had some ability to express their views could not support a finding that the school had created a public forum in the school newspaper.

Similarly in *Arkansas Educ. Tele. v. Forbes*, 523 U.S. 666, 672-73 (1998), this Court declined to find that public television was a public forum. In so doing, the Court reasoned that "[h]aving first arisen in the context of streets and parks, the public forum should not be extended in a mechanical way to the very different context of public television." But once the superficial (and ahistorical) view of traditional public forums advanced by the decision below is set aside, it is clear that the Tenth Circuit's claim that traditional public forums are forums for *permanent speech by private citizens* rests largely on just such a mechanical extension of traditional public forum doctrine.

The decision below points to nothing that might suggest that government relinquished control over placement of *permanent* displays in either of the parks at issue here. This brings into focus the heart of the decision below – an implicit finding of a government *intent to expand a traditional forum* to make it one for *permanent speech by private citizens* based on nothing more than the *government's* display of a *work* donated by a private party.

The amici respectfully submit that this Court has never found an intent to create (in this case, *expand*) a forum based on such slim indicia. Indeed, such a finding is directly at odds with this Court's longstanding approach whereby the "government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Such a finding is also at odds with experience, for there is no question that governmental entities have always exercised control over *permanent* display in public parks and other public spaces.

The opinion written separately by Judge Tacha in response to the dissenters below demonstrates the importance of the forum determination (and related over-extension) of this Court's precedent – emphasized here. In her response to the dissenting opinions, Judge Tacha first cites decisions concerning the placement of *private property* in a public forum. *See* 499 F.3d 1170, 1178 (10th Cir. 2007) (opinion by Tacha, J.), (*citing City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (dealing with news racks), and *Capitol Square Review & Advisory Board. v. Pinette*, 515 U.S. 753 (1995) (cross owned by private organization). She then relies on cases *rejecting* claims that *private* parties required to support government speech are being forced to engage in *private* speech that agrees with the government (on the theory that regulatory exactions used to support *government* speech amount to coerced *private* speech). *Id.* at 1180 (*citing Johanns*

v. Livestock Marketing Ass'n, 544 U.S. 550 (2005)). Based on these cases, and this Court's "focus on whether the message is the government's own," Judge Tacha asserts that a "city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the message to the political process, a result that would shield government from First Amendment scrutiny and democratic accountability." *Id.* at 1180.

Judge Tacha's arguments are not supported by the precedent cited, do not withstand scrutiny, and amount to a dangerous extension of this Court's precedent. None of the cases cited by Judge Tacha require a finding that a traditional public forum is a forum for *permanent* display (speech) by *private* citizens. None of the cases relied upon by Judge Tacha require a finding that the *government's* display of works donated by private parties must, by operation of law, be deemed *private* (as opposed to government) speech. The claim that the *government's* display of a work donated by private parties must be considered *private* speech simply begs the question – why would anyone reach that conclusion? And Judge Tacha's rationale for the extension of precedent (*i.e.*, the notion that if governmental display of works donated by private citizens is treated as government speech, the matter is somehow exempted from the political process) simply defies reason; given that elected officials make these decisions, how can those

decisions be regarded as exempt from the political process?

Judge Tacha offers a telling illustration in support of the decision below. She seeks to justify the decision on the grounds that treating governmental display of works donated by private parties as government speech must be wrong because this would mean that each book placed in a public library would become government speech (*e.g., The Great Gatsby*). *See Summum v. Pleasant Grove City*, 499 F.3d at 1179. Here it suffices to say that the result Judge Tacha believes compelled by this Court's precedent is, in fact, directly contrary to the commonsense approach taken by this Court, which has reached its conclusions based on a realistic appraisal of the totality of the circumstances, something Judge Tacha acknowledges in her own opinion when referring to "a different line of cases recognizing the government's ability to make content-based judgments when it acts in particular roles (*e.g.*, educator, librarian, broadcaster, and patron of the arts)." *Id*. at 1179-80 & n. 2. The amici respectfully suggest that the decision below is critically flawed precisely because it fails to engage in a realistic appraisal of the situation presented by the *government's* acceptance and *display* of works donated by private parties. As a result, it fails to acknowledge that the *government's* display of works donated by private parties simply represents another way in which *government speaks*; such display is not – and never has been – regarded as a way in which

government demonstrates an intent to open a public forum.

The predicaments faced by the amici demonstrate the intolerable consequences that flow from the decision below. Casper's predicament is the most egregious. The city endeavors to promote civic virtue by directing attention to fundamental sources of our national heritage. Now it faces the very real prospect of being forced to display a monument condemning one of its inhabitants to Hell simply because the city accepted a monument in 1965 that has been incorporated into a display designed by the City to serve a legitimate civic purpose.

The fate of Ogden and Provo demonstrate the real range of choice available to public bodies who have accepted and displayed private works. Faced with the choice of opening its public spaces to permanent display by anyone, Ogden fought and lost (and removed the monument); Provo learned its lesson and gave its Ten Commandments monuments away. Thus, the range of possible choices is painfully clear – be prepared to make every man the master of public property or make every man an iconoclast under pain of litigation.

And the impact of that Hobson's choice affronts common sense just as it subverts the ability of public officials to promote the common good. There is no reason that the people of Lawton should be required to place pacifist works around Fort Sill, the people of Norman forced to esteem draft-dodgers along with

veterans, or the people of Indianapolis forced to yield their cultural trial to pieces that offend their community, simply because they accepted some private works and chose to display them in public spaces.

The amici respectfully submit that the undesirable consequences they fear are not required by this Supreme Court's decisions. Quite the contrary, those consequences follow only from an ahistorical view of public fora and an unthinking extension of this Court's precedent. The decision below leaves this Court no choice but to make plain the limits that common sense places upon its prior decisions. The amici urge this Court to seize this opportunity before the consequences of the decision below begin to be suffered by their cities and others as well.

II. The Legal Uncertainty Created By The Decision Below Will Result In Burdensome Litigation As Government Officials Try To Draw The Line Between Government Speech, Private Religious Speech, And Government "Endorsement" Of Religion.

By disregarding the obvious fact that the government's display of monuments donated by private parties is governmental speech – not creation of a forum for speech by private citizens – the decision below creates legal uncertainty that exposes municipalities to the burdens of litigation as they try to promote the common good. As the petitioners make plain, the decision below needlessly requires governmental officials to eschew donations of private works,

and to strip their public spaces of such works, or risk litigation about whether other private parties have a right to display their chosen message on public property. As the situation confronted by each of the amici illustrate, the consequences such a rule has for civic life are significant and negative. The uncertainty created by the multi-factor test employed below is a prescription for litigation as each of these cities seeks to ensure that its decision to accept and display works does not expose it to demands for access to public property for the purpose of display by private parties.

Worse still, the uncertainty and risk of litigation arising from the principle underlying the decision below is greatly compounded in cases where the display at issue has a religious dimension. Under the multi-factor test employed by the court below, governmental officials will have to make judgments concerning whether acceptance and display of a given work will be deemed to create a forum for private speech, including religious speech, or whether the display will be deemed government speech and, perhaps, an endorsement of religion.[3]

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[3] The amici respectfully submit that the respondent's claim that the governmental actors can easily avoid doubt by formally "adopting" a monument, see Respondent's Brief In Opposition To Petition For A Writ Of Certiorari, at pp. 31-33, is wholly insupportable given the overall uncertainty of case law in this area. *See e.g., Van Orden v. Perry*, 545 U.S. 677 (2005) (allowing Ten Commandments monument in connection with other monuments of historic significance based in part on noncontroversial

(Continued on following page)

The decision below and dissents from the denial of rehearing *en banc* point to these difficulties. The panel opinion recognized that the petitioner's display of the Ten Commandments was virtually identical to that approved by this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), but rejected application of *Van Orden* based on its finding that display of the donated monument created a forum for private speech. *Summum*, 483 F.3d at 1048 n. 2. In contrast, two judges dissenting from the decision to deny rehearing *en banc* recognized that once the display is seen as government speech, *Van Orden* controls and the display is lawful. *See Summum*, 499 F.3d at 1175-76 (opinion by McConnell, J. joined by Gorsuch, J.).

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nature of display for extended period); *cf. McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (striking down display of Ten Commandments included in display of other documents of historic significance based on finding that governmental purpose was to emphasize and celebrate the religious dimension of the Ten Commandments); *see also*, *O'Connor v. Washburn University*, 416 F.3d 1216, 1224 (10th Cir. 2005) (rejecting claim that vulgar depiction of Catholic Bishop violated establishment provision of first amendment and noting that "[i]n any case, the Supreme Court's recent opinions establish that an examination of the government actor's purpose and the particular context of the display remain relevant considerations under the Establishment Clause.") (*citing McCreary and Van Orden*); *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1241 (10th Cir. 2005) (remanding challenge to Pleasant Grove's inclusion of Ten Commandments in Pioneer Park "[g]iven the myriad factual considerations dictated by the court in Van Orden and McCreary. . . .").

The City of Casper, Wyoming, has experienced the burdens created by such legal uncertainty first-hand. As noted earlier, the City accepted a Ten Commandments monument donated by the Fraternal Order of the Eagles in 1965. In this regard, Casper was no different than other cities that accepted the monuments donated by the Eagles as part of a nationwide effort to inspire young men to live by a moral code. The stand-alone monument was placed in City Park.

Almost forty years later, in September of 2003, the City of Casper received a letter from the Freedom from Religion Foundation, located in Madison, Wisconsin. The foundation demanded that the city remove the Ten Commandments monument from City Park, and it threatened litigation if the city did not comply with the demand.

While the City of Casper tried to address the litigation threat leveled by the Freedom from Religion Foundation, it was forced to contend with another threat of litigation from Pastor Fred Phelps. More specifically, on October 2, 2003, the city received a letter from the Westboro Baptist Church asserting a right to place a Matthew Shepard Monument in the plaza in light of the Tenth Circuit's decision in *Summum v. City of Odgen*, 297 F.3d 995 (10th Cir. 2002). The Matthew Shepard Monument tendered by Phelps would state as follows:

> MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God's Warning 'thou

> shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22.

Following a City Council meeting, a letter was sent to Pastor Fred Phelps, advising him that the City Council had voted to remove the Ten Commandments monument from City Park, and to deny his request to place his monument in the park, or on any other city – owned property. The Westboro Baptist Church requested reconsideration of the council vote, stating that it was their goal to avoid litigation in the matter.

On November 14, 2003, the Ten Commandments monument was removed by the City on a temporary basis from City Park, pending approval of preliminary plans by the City Council to build a Historical Monument Plaza which would include the Ten Commandments monument. On June 1, 2004, Pastor Phelps sent a letter noting the city's plan to create the Historical Monument Plaza, and claiming that he would then have the right to install his Matthew Shepard Monument in the plaza.

In March, 2005, the City Council decided to await the decision in *Van Orden* before proceeding further. Following the Supreme Court's decision in *Van Orden*, the Casper City Council elected to construct the Historical Monument Plaza, which consists of stone monuments depicting the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the United States Constitution, the Bill of Rights, and the Ten Commandments, all historic

documents which provided the foundation of our law, along with plaques describing the historical significance of these documents.

On the very day Casper's Historical Monument Plaza was dedicated, the city received a letter from Pastor Fred Phelps stating that his church had the right to place the Matthew Shepard Monument with the other monuments in this display. The City informed Pastor Fred Phelps that it was denying his request because the monument reflected his personal religious beliefs regarding Matthew Shepard, and it lacked any historical significance or connection to the founding of our Country that would qualify it for placement in Casper's Historical Monument Plaza. The city also informed Pastor Phelps that in its opinion it could not place his Matthew Shepard Monument on city property without violating the Establishment Clause of the First Amendment given the strictly religious character of the monument.[4]

From the above, it is clear that the City of Casper is faced with "lose-lose" dilemma as a result of the Tenth Circuit's perplexing *Summum* decisions. Even

[4] The City of Casper believes it should not be forced to install the Matthew Shepard Monument as required by the *Summum* decisions simply because it accepted and chose to display other monuments on its Historical Monument Plaza. That monument has *no* historical significance by virtue of any connection to the founding of our nation; it is *strictly* religious in character and expresses a private religious opinion of a pastor and a church that has no meaningful relationship with the City of Casper.

as the city endeavors to follow this Court's decision in *Van Orden*, it confronts the prospect of litigation under the *Summum* decisions for refusing to put a private religious monument in its public plaza. And even if the City did accept the loathsome monument in an effort to comply with the decision below, it would be forced to run the risk that it would be found to have violated the Establishment Clause because it "endorsed" the religious views of Pastor Phelps by placing his monument in the plaza.

The panel decision embraces the dilemma the City of Casper has wrestled with for five years now, regarding it as a necessary result of this Court's precedent, without a word about the burden such litigation places on governmental bodies and ultimately taxpayers. *See Summum*, 483 F.3d at 1048 n. 2 (noting the "Establishment Clause prohibits governmental endorsement of religion, which can occur in the absence of direct governmental speech."); *see also Summum*, 499 F.3d at 1180–82 (noting that government "endorsement" or "sponsoring" of speech may be state action that violates the Establishment Clause even if the action in question is not properly characterized as government speech). For the reasons given above, the amici believe that the Tenth Circuit's reading of precedent is plainly mistaken because none of this Court's decisions require a finding that the government's acceptance and display of donated works displayed by public officials creates a public forum. More fundamentally, the City of Casper respectfully submits that the "lose-lose" litigation

dilemma it has wrestled with for five years as a result of the Tenth Circuit's *Summum* decisions conclusively removes any doubt that the decision below is fundamentally flawed and must be reversed.

CONCLUSION

The decision below creates a public forum for *permanent* speech by *private* citizens based on nothing more than the *government's* display of works donated by private citizens on public property. That result is an unwarranted and undesirable extension of this Supreme Court's decisions which have always required clear indicia of an intent to create a forum. The realistic approach recommended by this Court's precedent yields the commonsense conclusion that when public officials decide to accept and display works donated by private parties, the resulting display is properly characterized as government speech. The amici also respectfully submit that nothing in this Court's decisions forces government officials who decide to display such works to yield control of public property to every man who wishes to place a piece or make every man an iconoclast under pain of endless litigation. For these reasons, the amici respectfully request that this Supreme Court reverse the decision below.

Respectfully submitted,

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