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 *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, NATIONAL CLERGY COUNCIL, AND FAITH AND ACTION IN THE NATION'S CAPITAL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

1. Whether the Tenth Circuit Court of Appeals erred in ruling that Pleasant Grove City violated the Free Speech Clause of the First Amendment by refusing a Summum request to display a "Seven Aphorisms" monument in the city's park.

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Foundation for Moral Law

Amicus curiae Foundation for Moral Law[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that the concept of free speech has been warped by the courts to include types of expression never intended to be protected by the First Amendment. Only the original understanding of the First Amendment's Free Speech Clause will yield a

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[1] *Amici curiae* Foundation for Moral Law, National Clergy Council, and Faith and Action in the Nation's Capital file this brief with consent from both Petitioners and Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici's* intention to file this brief. Counsel for *amici* authored this brief in its entirety. No person or entity—other than *amici*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

proper result in this case and others like it, and the need for constitutional fidelity drives the Foundation's legal advocacy.

National Clergy Council

Amicus curiae National Clergy Council (NCC) is a network of church leaders from Catholic, Evangelical, Orthodox and Protestant traditions. The NCC uses their voices, pens and pulpits to address the critical issues of the day and bring to them a proper perspective, informed by the Word of God and classical Christian moral instruction.

The NCC has a vested interest in religious liberty issues and has filed previous *amicus* briefs in cases involving the public acknowledgment of God. The NCC believes that the original meaning of the First Amendment's guarantee of free speech has been distorted by the courts. NCC is interested in the present case because the ruling of the court below jeopardizes the right of municipalities to determine for themselves whether they wish to display expressions of religious faith free from threats of nullification or intimidation.

Faith and Action in the Nation's Capital

Amicus curiae Faith and Action in the Nation's Capital (FAA) is a non-profit Christian ministry whose mission is to bring the truths of sacred scripture to bear on the hearts and minds of our nation's public policy makers. Through a variety of media, FAA confronts government leaders with the powerful claims of the Gospel and with reminders of the prominent role the Bible played in the creation of our nation and its laws.

Faith and Action has an interest in this case because one of its core values is the vital role public acknowledgments of God have played throughout American history. FAA believes that the Ten Commandments formed the basic tenets of our free society and calls on public servants to heed our founders' warning that the magnificent system of governance they created cannot work without the durable bedrock of Biblical morality. Consequently, FAA does not believe the First Amendment's Free Speech Clause should be twisted to suggest that communities have no say in the values they publicly articulate and deem essential to their preservation.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation. Properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. This entails placing the text in its historical context. It is especially important to carry out this method of interpretation where the Free Speech Clause is concerned because the right to "the freedom of speech, or of the press" is so central to proper governance under the Constitution.

The Free Speech Clause refers to "*the* freedom of speech" because it addresses a particular right to express a particular kind of speech. This Court has expanded the right to include notions never intended to receive constitutional protection, to the detriment of its own jurisprudence and the country at large. The Free Speech Clause simply protects a right to speak and write on political subjects. Recovering this original understanding of the clause in this case will

solve the problem with which Petitioner is rightfully concerned and provide much-needed anchoring for an area of law that long ago drifted into chaotic waters.

The court of appeals below ignored the original understanding of the Free Speech Clause and consequently incorrectly concluded that the clause requires Pleasant Grove City to accept the "Seven Aphorisms" monument after it accepted the Ten Commandments monument. This Court should reverse the confused and dangerous decision of the court below.

ARGUMENT

> *"As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech . . . ."*

Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF PLEASANT GROVE CITY'S DECISION NOT TO ALLOW THE DISPLAY OF THE SUMMUM "SEVEN APHORISMS" MONUMENT IN THE CITY PARK SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FREE SPEECH CLAUSE.

In order to correctly handle the conundrum this case presents regarding monuments on public property in the context of the Free Speech Clause of the First Amendment, it behooves this Court to avoid the seemingly innumerable tests and categories it has invented to decide free speech cases. The opinions

below readily illustrate the mess of free speech jurisprudence, as the district court and members of the Tenth Circuit Court of Appeals offered no less than four different ways of arriving at a result under this Court's "forum analysis" test for speech on government property. *See Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007); *Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007). Indeed, as the Tenth Circuit explained in a previous case involving a "Seven Aphorisms" monument, to determine the constitutionality of speech on government property a court goes through at least three steps: (1) Whether the speech falls into the category of protected speech; (2) The relevant forum in which the speech takes place; and (3) the relevant standard of Free Speech Clause review. *See Summum v. City of Ogden*, 297 F.3d 995, 1001-02 (10th Cir. 2002). The Tenth Circuit emphasized that making these determinations requires a "nuanced approach," which is to say, it is anything but clear how these tests should be applied to the particular facts of a case. *Id.* at 1001.

But these steps of analysis do not even scratch the surface of the free speech universe, as there are also tests for classifying speech as obscene,[2] fighting words,[3] or imminent lawless action,[4] for viewpoint

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[2] *See*, *e.g.*, *United States v. Williams*, 128 S. Ct. 1830 (2008); *Roth v. United States*, 354 U.S. 476 (1957).

[3] *See*, *e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[4] *See*, *e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

discrimination,[5] coerced expression,[6] symbolic speech,[7] and free speech in public employment.[8] With so many "nuance[s]," it is certainly not surprising that the judges of the Tenth Circuit were torn over how to decide this case, or that other circuits have arrived at different conclusions in cases involving requests for displays on public property. *See, e.g.*, *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (rejecting a suit to compel display of a menorah in a public park); *Lubavitch Chabad House v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990) (rejecting a suit to compel display of a menorah in an airport).

There is a simpler, more responsible method of arriving at the correct conclusion in this case and all cases potentially implicating the right of free speech, a method espoused by none other than James Madison—the man affectionately known as "the father of the Constitution" and who introduced in Congress the first draft of what became the Bill of Rights. Madison once wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from *the text itself*." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in 3 *Letters and*

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[5] *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

[6] *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[7] *See, e.g.*, *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989); *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

[8] *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ. of Will County, Ill.*, 391 U.S. 563 (1968).

Other Writings of James Madison, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, but especially with a written constitution. "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Supreme Court Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

It is important to pay attention to the *nuances of the text* because, as the great Chief Justice John Marshall once observed, "In a solemn instrument, as is a constitution, words are well weighed and considered before they are adopted. A remarkable diversity of

expression is not used, unless it be designed to manifest a difference of intention." John Marshall, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), *reprinted in* 5 *The Founders' Constitution* 138 (Phillip Kurland & Ralph Lerner eds., 1987). Once upon a time, this Court agreed with the necessity of emphasizing the text in constitutional interpretation. "In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The present case cries out for the Court to again study and heed the original understanding of the Free Speech Clause. Such study reveals free speech to be a cherished yet specific tool of our constitutional republic. Returning to the historic understanding of "the freedom of speech, or of the press" at the time the amendment was debated and adopted reinforces the substance of the original right, fulfills the essence of the judicial oath,[9] and reveals that this is not, in fact, as close a case as it first appears to be.

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[9] *See* U.S. Const. art. VI, para. 3. As Chief Justice Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of courts . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id*. at 179-80.

II. THE HISTORY BEHIND THE FREE SPEECH CLAUSE REVEALS A HEALTHY AMERICAN FEAR OF GOVERNMENT TYRANNY AND THE NEED TO HOLD PUBLIC OFFICIALS ACCOUNTABLE THROUGH THE FREE EXCHANGE OF POLITICAL INFORMATION.

A. The genesis of "the freedom of speech" in America

"Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. Those words trace their lineage to America's primary legal parent: England. The English Bill of Rights of 1689 provided, in pertinent part: "That *the freedom of speech*, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of parliament." English Bill of Rights § 9 (Dec. 16, 1689), *reprinted in* 2 *The Founders' Constitution*, at 319 (emphasis added). American government copied this idea in the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ." Articles of Confederation, art. V, para. 5 (1781), *reprinted in* 2 *The Founders' Constitution*, at 323. The Constitution continued the tradition: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const., art. I, § 6, cl. 1.

From these speech and debate clauses grew the core concept of "*the* freedom of speech": the freedom concerned speech about legislative issues. "The very word *parliament* emphasized the centrality of legislative speech and debate—a parliament (from the

French *parler*) is a speaking spot, a place where people parley." Akhil Reed Amar, *The Bill of Rights* 25 (1998). The right's expansion beyond the walls of Congress and state legislatures to the citizenry at large had more to do with the nature of the American political system than with any change in the substantive nature of the right.

The right's broader application began in the Puritan Massachusetts Bay Colony, an unsurprising development considering the democratic style of its town governments. The Massachusetts Body of Liberties protected the right of

> [e]very man whether Inhabitant or foreigner, free or not free . . . to come to any public Court, Council, or Town meeting, and either *by speech or writing* to move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, Bill or information . . . .

Massachusetts Body of Liberties, para. 12 (1641), *reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 94 (Neil H. Cogan ed., 1997) (emphasis added). Note that ownership of the right was expanded while maintaining its emphasis on legislative issues. The people's involvement in the government made it imperative to be able to speak and write freely concerning government affairs.

The focus of the right soon shifted from speech to a broader method of communicating political ideas: the printed word. The First Continental Congress sang the praises of "the freedom of the press" in *An Appeal to the Inhabitants of Quebec*, stating that its prime importance consisted in "its diffusion of liberal sentiments on the administration of Government, its

ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs." First Continental Congress, *An Appeal to the Inhabitants of Quebec* (1774), *reprinted in* 1 *American Political Writings During the Founding Era 1765-1805* 233-34 (Charles S. Hyneman & Donald S. Lutz eds., 1983). In emphasizing the value of a free press in policing the conduct of public officials, the Continental Congress raised what would be a constant theme for defenders of a free press in America.[10]

Several original state constitutions picked up on the theme and strengthened it. The Virginia Declaration of Rights, a major influence on Madison's proposed bill of rights for the federal constitution, proclaimed that "the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments." Virginia Declaration of

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[10] As Irving Brant noted, the theme arose directly from colonial observation of the British treatment of the press:

> As it was, Americans identified *re*pression with *op*pression, and recognized the British government as the instrument of both. . . . [T]he spectacle of freedom of opinion suppressed in England was always in sight, and the sight of it not only stirred sympathy, but carried a warning that linked freedom of speech, press and assembly with the rights whose infringement was carrying the people of the colonies toward independence. The actual evils in England were potential American evils that merged with the revolutionary grievances of American and built unwritten bills of rights in the minds of the people.

Irving Brant, *The Bill of Rights: Its Origins and Meaning* 193 (1965).

Rights, § 12 (1776). The language clearly indicates that the right to freedom of speech and press exists to combat government tyranny. The Massachusetts Constitution heightened the right's importance even more, declaring: "The Liberty of the Press is *essential* to the security of freedom in a State, it ought not, therefore, to be restrained in this Commonwealth." Massachusetts Constitution, art. XVI (1780) (emphasis added); *see also* New Hampshire Constitution, Part I, art. XXII (1783) ("The Liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.").[11]

The Vermont Constitution combined speech and press for the first time, explaining that "the People have a Right to Freedom of Speech, and of writing and publishing their Sentiments; therefore the Freedom of the Press ought not to be restrained." Vermont Constitution, chap. 1, cl. 14 (1777). This formulation of the right illustrates that the founding generation understood the concept of "the press" differently than we do today. "When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a

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[11] The phrase "essential to the security of freedom in a State" recalls the language in the Second Amendment to the United States Constitution which talks about a citizen militia being "necessary to the security of a free state . . . ." U.S. Const. amend. II. It is no exaggeration to say that, like the right to keep and bear arms, the founding generation understood the right to the freedom of speech and of the press to be a powerful weapon against government tyranny.

fee."[12] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (citing Bernard Bailyn & J. Hench, *The Press & the American Revolution* (1980); Leonard Levy, *Emergence of a Free Press* (1985); Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967)). This view of the press as the voice of the people—heightened by the fact that much of the written political discourse in the founding era occurred via anonymous authorship and the ubiquitous use of pen names—underscored the link between the right and the preservation of republican government.

B. The right to "the freedom of speech" in the debate on the Constitution

During the debate over the ratification of the Constitution, a common charge from those who came against the proposed new government was that it would dominate the state governments through the force of its power and be capable of tyrannizing the people. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 648 (1989) (explaining that during the founding era there existed "a well-justified concern about political corruption and consequent government tyranny"). Anti-Federalists repeatedly noted that the Constitution lacked a bill of rights to protect the people from government overreaching, with the absence of any provision regarding free speech and press drawing much of the Anti-Federalist ire.

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[12] Interestingly, this view of "the press" simply as the people publishing ideas rather than as the corporate media may be returning with the Internet and the mass of e-mail and web pages the technology has produced.

For example, an anonymous writer calling himself "An Officer of the Late Army" responded to a speech by James Wilson defending the Constitution by observing that "Congress being possessed of these immense powers, the liberties of the states and of the people are not secured by a bill or Declaration of Rights." "An Officer of the Late Army," *Independent Gazetteer* (Nov. 6, 1787), *reprinted in* 1 *The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles, and Letters During the Struggle Over Ratification* 98 (Bernard Bailyn ed., 1993). One of his specific concerns was that "[t]he liberty of the press is not secured, and the powers of congress are fully adequate to its destruction." George Bryan, writing as "An Old Whig" to his fellow citizens in Pennsylvania, explained this fear in more detail:

> Congress will be the great and only medium of communication from one state to another. . . . The cause of liberty, if it be not forgotten, will be forgotten forever.—Even the press which has so long been employed in the cause of liberty, and to which perhaps the greatest part of the liberty which exists in the world is owing at this moment, the press may possibly be restrained of its freedom, and children may possible not be suffered to enjoy this most invaluable blessing of *a free communication of each other's sentiments on political subjects*—Such at least appear to be some men's fears, and I cannot find in the proposed constitution any thing expressly calculated to obviate these fears; so that they may or may not be realized according to the principles and dispositions of the men who may happen to govern us hereafter.

"An Old Whig" I, *Independent Gazetteer* (Oct. 12, 1787), *reprinted in* 1 *The Debate on the Constitution*, at 124 (emphasis added). The Anti-Federalists deemed unmolested speaking and writing on political subjects to be indispensable to restraining the power of the federal government.

The Federalists did not disagree with this notion, but took the view that a bill of rights was unnecessary because the Constitution granted Congress only enumerated powers, and power over speech and press (as those terms were understood) was not listed among them. Alexander Hamilton addressed the issue head-on in *Federalist 84*, asking, "[W]hy declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" *The Federalist No. 84* (Alexander Hamilton), at 445 (George W. Carey & James McClellan eds., 2001). Federalists even attempted to argue that the right could not be sufficiently defined and so it should not be listed in the Constitution. Noah Webster, under the pen name "America," contended,

> [W]hat is this liberty of the Press? Is it an unlimited license to publish *anything* and *every thing* with impunity? If so, the author and printer of any treatise, however obscene and blasphemous, will be screened from punishment. . . . Would not that indefinite expression, *the liberty of the Press*, extend to the justification of every *possible publication*?

Noah Webster, "Reply to the Pennsylvania Minority: 'America,'" *Daily Advertiser* (Dec. 31, 1787), *reprinted in* 1 *The Debate on the Constitution*, at 555-56.

But the people resoundingly rejected the notion that the right was insufficiently defined or that adequate protection already existed in the Constitution for this right and others. The people felt that such a right was too vital for republican government be left to implication.[13] As a result, several of the state ratifying conventions sent proposals to Congress that included suggested language for protecting free speech and the press. Many of these proposals copied state constitution themes and language, believing those phrases to be well-understood while stressing that the right was even more important at the federal level because of

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[13] Thomas Jefferson expressed the people's thoughts on the subject with his usual eloquence:

> The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. *The basis of our governments being the opinion of the people, the very first object should be to keep that right*; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

Thomas Jefferson, Letter to Edward Carrington (Jan. 16, 1787), *reprinted in* 5 *The Founders' Constitution*, at 122 (emphasis added).

the federal government's youth and distance from the direct influence of the people.

Like the Vermont Constitution, the proposal of the minority in the Pennsylvania Ratifying Convention grouped speech and writing under "the freedom of the press": "[T]he people have a right to the freedom of speech, of writing, and of publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States." Proposal of the Minority of the Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in The Complete Bill of Rights*, at 93. The Maryland Ratifying Convention's proposed wording employed similar language, but it explicated in more detail the kind of speech and writing deserving protection: "[T]he people have a right to freedom of speech, of writing and publishing their sentiments, and therefore . . . the freedom of the press ought not be restrained, and the printing presses ought to be free *to examine the proceedings of government, and the conduct of its officers*." Maryland Ratifying Convention Proposal (April 29, 1788), *reprinted in* 2 *The Debate on the Constitution*, at 555. The Virginia Ratifying Convention agreed that speaking and writing could fall under the same heading of "the freedom of the press," but emphasized yet again the right's importance in maintaining a free republican government: "That the people have a right to freedom of speech, and of writing and publishing their Sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated." Virginia Ratifying Convention Proposal (June 27, 1788), *reprinted in The Complete Bill of Rights*, at 93; *see also*, North Carolina Ratifying

Convention Proposal (August 1, 1788), *reprinted in The Complete Bill of Rights*, at 93.

C. Drafting the Free Speech Clause

This background of English and colonial history, state constitutional provisions, Anti-Federalist angst, and suggestions from state ratifying conventions shaped both James Madison's proposal for a free speech provision in the Constitution and the debate which produced the final wording of the First Amendment's Free Speech Clause.[14] Madison hoped that his proposals would "render [the Constitution] as acceptable to the whole of the people of the United States, as it has been found acceptable to a majority of them," so he was well aware of the document's perceived shortcomings. J. Madison, Speech on the floor of the House of Representatives regarding Amendments to the Constitution (June 8, 1789), *reprinted in* 5 *The Founders' Constitution*, at 24. He viewed the amendments as a chance to prove that supporters of the Constitution "were as sincerely devoted to liberty and Republican Government" as those who opposed the document's ratification. *Id*. The Free Speech Clause existed to promote these two pillars of American government: liberty and republicanism. The people's right to freely

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[14] Indeed, after Madison introduced his proposed amendments, Fisher Ames recounted to a friend, "Mr. Madison has introduced his long expected Amendments. They are the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers—all the articles of Conventions—and the small talk of their debates. It contains a Bill of Rights . . . ." Fisher Ames, Letter to Thomas Dwight (June 11, 1789), *reprinted in The Complete Bill of Rights*, at 117.

communicate and disseminate information about political issues enabled the people to hold public officials accountable for their actions, preventing overreaching by government, which thereby preserved liberty.

Madison's free speech proposal provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." *Id.* at 25. Careful examination of the distinguished Virginia congressman's proposal reveals it to be heavily influenced by the free press provision in the Virginia Declaration of Rights and the proposal of the Virginia Ratifying Convention. In comparison to those provisions, Madison strengthened the wording so that the provision would provide protection of the right rather than serve as a mere declaratory statement, while he maintained the focus on the people's liberty vis-à-vis the government.[15]

Georgia Congressman James Jackson immediately responded to Madison's proposals with skepticism. In particular, he questioned the need for an amendment regarding free speech because

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[15] Notably, Madison wanted to insert this amendment—as well as his versions of what became the Second, Third, Fourth, Fifth, Sixth, and Eighth amendments—"in article I, Section 9, between clauses 3 and 4" of the Constitution, that is, immediately after the guarantee of the writ of habeas corpus and the prohibitions on bills of attainder and *ex post facto* laws. *Id.* at 25. These represent the few individual rights provisions in the body of the Constitution. *See* U.S. Const. art. I, § 9. Madison believed that his free speech proposal was similar enough in kind to these individual rights provisions to propose listing it with them.

> [t]here is no power given to congress to regulate this subject as they can commerce, or peace, or war. Has any transactions taken place to make us suppose such an amendment necessary? An honorable gentleman, a member of this house, has been attacked in the public newspapers, on account of sentiments delivered on this floor. Have congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, altho' the constitution provides that a member shall not be questioned in any place for any speech or debate in the house? No, these things are suffered to public view, and held up to the inspection of the world. These are principles which will always prevail; I am not afraid, nor are other members I believe, our conduct should meet the severest scrutiny.

James Jackson, Debate in the House of Representatives on the Proposed Bill of Rights (June 8, 1789), *reprinted in The Complete Bill of Rights*, at 96-97.

Jackson's response reinforces the common understanding at the time concerning free speech. First, he repeated the standard Federalist argument that amendments were not necessary because the enumerated powers of Congress do not provide for any power over "the freedom of speech, or of the press." Such an argument means either that Congress literally could not pass any laws on any kind of speech, or that "the freedom of speech" had a specific, limited meaning. Second, Jackson tied "the freedom of speech" directly to its antecedent in the Constitution, the Speech and Debate Clause. Third, Jackson clearly

understood this freedom to concern the conduct of public officials.

After the initial debate, the House submitted Madison's proposals to a committee. The committee reworked the free speech provision as follows: "The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed." House of Representatives Committee of Eleven Report (July 28, 1789), *reprinted in The Complete Bill of Rights*, at 84. By combining the freedom of speech and press with the rights of assembly and petitioning the government, the committee emphasized the political nature of the right to "the freedom of speech, and of the press."

A subsequent motion in the Senate altered the text to read: "That Congress shall make no law, abridging the freedom of speech, or of the press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances." Motion in the United States Senate (Sept. 4, 1789), *reprinted in The Complete Bill of Rights*, at 86. The addition of "Congress" as the subject of the amendment constituted a subtle yet profound change in the amendment. It strengthened the prohibitions and made Congress the party responsible for violations of these rights and redress of grievances against the federal government. It represented still another indication that the freedom of speech concerned discussion of legislative acts and the behavior of public officials. It illustrated that the primary reason for the Bill of Rights was the people's fear of a tyrannical federal government.

Interpretation of the Free Speech Clause often overlooks the fact that it was meant primarily to be a tool against government oppression of the people. Madison observed in *Federalist 51* that, "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part." *The Federalist No. 51*, at 270 (James Madison). In modern free speech jurisprudence, judges erroneously focus on the second part of Madison's diagnosis—oppression of a minority by the majority—while ignoring the first, and what was for the founding generation the foremost, problem—oppression of the people by the government. "To begin to see this, we need only reflect on the amendment's first word. *Congress* was restrained, but not state legislatures. Yet, as Madison's *Federalist No. 10* reminds us, the danger of majority oppression of minorities . . . was far greater at the state than at the national level." Amar, *The Bill of Rights*, at 21. This inversion of principles has created judicial conundrums (like the present case) concerning how far free speech protection extends which the courts were never supposed to decide.

On September 9, 1789, the Senate voted to join the religion clauses with the speech, press, assembly, and petition clauses to form one amendment: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of Religion; or abridging the freedom of Speech, or the press, or the right of the People peaceably to assemble, and to petition the government for the redress of grievances." Further Senate Consideration on Motion to amend article the third (Sept. 9, 1789), *reprinted in*

The Complete Bill of Rights, at 86. The wording of the Free Speech Clause remained unchanged until the amendment's approval by Congress on September 25, 1789. *See The Complete Bill of Rights*, at 92.

D. Contemporaneous legal commentary

Though debates about the meaning of the Free Speech Clause arose after its adoption, those debates did not call into question the kind of speech protected by "the freedom of speech, or of the press." Instead, debate swirled around whether the amendment simply enacted the common law version of the freedom of the press, which required that there be "no previous restraints on publications," or provided protection after publication as well, including protection for libel and slander.[16] Nearly everyone assumed that protected speech concerned the discussion of political issues.

In discussing the libel issue, the most famous former publisher in America, Benjamin Franklin, remarked that,

> If by the Liberty of the Press were understood merely *the liberty of discussing the propriety of public measures and political opinions*, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming

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[16] *See, e.g.,* William Blackstone, 5 *Commentaries on the Laws of England* 150-53 (U. Chi. Facsimile Ed. 1979) (1765); James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in* 5 *The Founders' Constitution*, at 122; St. George Tucker, *View of the Constitution of the United States with Other Selected Writings* 37 (Liberty Fund Ed. 1999) (1803).

> one another, I, for my part, own myself willing to part with my Share of it . . . .

Benjamin Franklin, *An Account of the Supremest Court of the Judicature in Pennsylvania, viz., The Court of the Press* (Sept. 12, 1789), *reprinted in* 5 *The Founders' Constitution*, at 130 (emphasis added). Noted constitutional law scholar of the era St. George Tucker wrote in an essay accompanying his American edition of *Blackstone's Commentaries* that, "Every individual, certainly, has a right to speak, or publish, his *sentiments on the measures of government*: to do this without restraint, control, or fear of punishment for so doing, is that which constitutes the genuine freedom of the press." St. George Tucker, "Of the Right of Conscience; and of the Freedom of Speech and of the Press," in *View of the Constitution of the United States with Other Selected Writings* 393 (Liberty Fund ed. 1999) (1803) (emphasis added).

In 1804, Alexander Hamilton argued as an attorney in a case concerning what constituted the freedom of the press. His argument confirmed both the common understanding of the right and its importance to free republican government: "The liberty of the press consists in publishing, with impunity, truth, with good motives, and for justifiable ends, though *reflecting on government, magistracy, or individuals*. . . . [T]he allowance of this right is essential to the preservation of a free government; the disallowance of it fatal." Alexander Hamilton, quoted in *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804), *reprinted in* 5 *The Founders' Constitution*, at 162. Renowned Pennsylvania attorney William Rawle confirmed this notion of the meaning and importance of "the freedom of speech" in his treatise on

constitutional law: "The foundation of a free government begins to be undermined when *freedom of speech on political subjects* is restrained; it is destroyed when freedom of speech is wholly denied." William Rawle, *A View of the Constitution of the United States* 119 (1825) (emphasis added).

In his famous *Commentaries on the Constitution*, Justice Story echoed these pronouncements:

> No one can doubt the importance, in a free government, of *a right to canvass the acts of public men, and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy, and plans of the government*. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious, discussion must be encouraged.

Joseph Story, 3 *Commentaries on the Constitution* § 1882 (1833), *reprinted in* 5 *The Founders' Constitution*, at 182 (emphasis added). Over half a century later, Judge Thomas Cooley in his *Constitutional Limitations* wrote that in ratifying the free speech and free press clauses, the founding generation intended to prevent "not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general *discussion of public matters* as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." Thomas Cooley 2 *A Treatise on Constitutional Limitations* 604 (7th ed. 1903) (emphasis added). Yet again the right was tied directly to preventing government oppression and

aiding the people's involvement in the republican government.

E. The Sedition Act debate

While legislative history and contemporaneous legal commentaries provide extensive evidence of the purpose and meaning of the free speech and free press clauses, a political firestorm which arose a mere seven years after the ratification of the Bill of Rights provided the first test of its boundaries. Enacted in 1798 by the Federalist-controlled Congress and signed into law by President John Adams, the Sedition Act of 1798 permitted fines or imprisonment "if any person shall write, print, utter, or publish . . . any false, scandalous and malicious writing" against members of Congress or the President or "bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Sedition Act (July 14, 1798), *reprinted in* 1 *Documents of American History to 1898* 177-78 (Henry S. Commanger ed., 1973). The debate that ensued over the constitutionality of the act demonstrated that the Free Speech Clause concerned a right to freely discuss legislative issues and the behavior of public officials regarding those issues.

James Madison succinctly summarized the constitutional problem with the Sedition Act in the Virginia Resolutions, stating that it exercised

> a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto,—a power which, more than any other, ought to produce universal alarm, because it is *leveled against the right of*

> *freely examining public characters and measures, and of free communication among the people thereon*, which has ever been justly deemed the only effectual guardian of every other right.

J. Madison, *The Virginia Resolutions* (Dec. 21, 1798), *reprinted in* 5 *The Founders' Constitution*, at 136 (emphasis added). Given the historical discussion above, it is obvious that this passage references the free speech and free press clauses, and that there was no question in Madison's mind or by the understanding of the Virginia Assembly that those clauses existed to protect the right of the people to discuss "public characters and measures." In his report on the Virginia Resolutions, Madison provided further explication of the point:

> [I]t is manifestly impossible to punish the intent to bring those who administer the Government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; because those who engage in such discussions must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved.

J. Madison, Report on the Virginia Resolutions (Jan. 1820), *reprinted in* 5 *The Founders' Constitution*, at 145.

Proponents of the Sedition Act responded to the Virginia and Kentucky Resolutions by relying on the previously mentioned common law rule of "no previous restraint" on the freedom of the press. They argued that because the Sedition Act did not require a license to print material against members of Congress or the President, it did not violate the First Amendment.

Madison answered this argument by contending that the First Amendment expanded the right of free speech beyond the common law understanding. He explained that this expansion followed from the differences between the English and American systems of government.

> In the British Government the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. . . . In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws.
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> . . . .
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> The nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. In the latter, it is a maxim that the King, an hereditary, not a responsible magistrate, can do no wrong, and the Legislature, which in two-thirds of its composition is also hereditary, not responsible, can do what it pleases. In the United States the executive magistrates are not held to be infallible, nor the Legislatures to be omnipotent;

> and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?
>
> . . . .
>
> In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands.

Id. at 142.

Whether the First Amendment adopted merely the common law scope of free speech and free press or something larger is immaterial to the issue in this case, but Madison's explanation for the purpose the right serves in this country is extraordinarily relevant to the proper meaning of the right. The Virginia Resolutions proclaimed that free speech "has ever been justly deemed the only effectual guardian of every other right" because it polices the actions of the people's representatives in government. As Madison so carefully explained, the Constitution did not create a monarchy, a unitary executive or legislative government, or a government in which the actions of any government officials are deemed unchallengeable or infallible. Public servants are electable and accountable to "the People," who "possess absolute sovereignty." Consequently, the right to "canvass[] the merits and measures of public men" and communicate those findings to others is essential to sustaining free

republican government. This is the right protected by "the freedom of speech, or of the press."[17]

III. THE FREE SPEECH CLAUSE DOES NOT REQUIRE PLEASANT GROVE CITY TO DISPLAY THE SUMMUM "SEVEN APHORISMS" MONUMENT IN THE CITY PARK BECAUSE THE MONUMENT DOES NOT CONSTITUTE POLITICAL SPEECH.

The foregoing history demonstrates that "the freedom of speech, or of the press" protects the discussion of public measures and public men. In the past, this Court has agreed with that conclusion:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v Alabama, 384 U.S. 214, 218-219 (1966); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

Preserving the free discussion of governmental affairs is not just "a major purpose" of the Free Speech

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[17] This Court expressed agreement with this understanding when it commented that there is "a broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

Clause; it is its *only* purpose. The freedom to speak on any subject, including one's religious beliefs, may seem desirable in a free society, [18] but it is not a right protected under the Free Speech Clause. The speech protected by that clause relates to government action with the goal of keeping the government's powers within the boundaries defined by the Constitution. It is speech that enables the people in a republican government to vote in an intelligent manner on public measures and their representatives in office. Other kinds of speech certainly have value in a free society, but they do not fall under the protection of the Free Speech Clause.

The mistake this Court has made lies with expanding the right beyond its intended scope, thereby requiring multiple layers of analysis to categorize various kinds of speech as worthy or unworthy of protection based on a seemingly endless litany of criteria. Holding to the original meaning of the Free Speech Clause simplifies the analysis while maintaining rigorous protection for speech that is truly essential to republican government.

This case involves Pleasant Grove City's refusal to permit the erection of a monument containing the "Seven Aphorisms" of Summum. The aphorisms purport to be "principles underlying Creation and all of nature." *The Aphorisms of Summum and the Ten Commandments*, http://www.summum.us/philosophy/

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[18] Such a broad right, however, raises the inevitable problem this Court has encountered in determining where to draw the lines between protected and unprotected speech since virtually everyone grants that there must be *some* limits on speech in a *civil* society.

tencommandments.shtml (last visited June 18, 2008). The content of this monument has absolutely no relation to public measures or the behavior of public officials related to those measures. It does not communicate any information about the actions of federal, state, or local officials pertaining to proposals, policies, ordinances, laws, and the like. It does not aid the people in holding public officials accountable for their public actions which affect the rights of the people. Therefore, the speech expressed on the monument is not protected by "the freedom of speech, or of the press" embodied in the First Amendment.

Because the monument does not embody the kind of speech protected by the First Amendment's Free Speech Clause, Pleasant Grove City is not constrained by this portion of the Constitution in choosing whether to accept or reject the monument for public display. This conclusion makes no judgment on the general ability of Respondents to spread their message or the wisdom of Pleasant Grove's decision not to accept the monument. It simply follows the language of the First Amendment as it was originally understood at the time of its adoption. Expanding the concept of "the freedom of speech" beyond this meaning takes the Court outside its sworn authority under the Constitution and into a thicket from which no logical or coherent rule is bound to emerge.

CONCLUSION

For the reasons stated, this Honorable Court should reverse the decision of the Tenth Circuit Court of Appeals and affirm that Pleasant Grove's decision to refuse the erection of the Summum "Seven Aphorisms" monument in a public park does not implicate the Free Speech Clause of the First Amendment.

Respectfully submitted,

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