No. 07-665

IN THE
Supreme Court of the United States

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

Petitioners,

v.

SUMMUM,

Respondent.

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

BRIEF AMICI CURIAE OF THE JEWISH SOCIAL POLICY ACTION NETWORK, THE JEWISH COUNCIL FOR PUBLIC AFFAIRS AND THE JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

INTEREST OF AMICI[1]

The Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, even an atheist and an American. JSPAN believes that the gift of church/state separation bestowed on us by the Founding Fathers is essential to all our fundamental freedoms and that therefore great care must be taken that there be no erosion of the separation of church and state principles embodied in the Establishment Clause. JSPAN has filed *amicus curiae* briefs in Establishment Clause cases regularly since it was formed in 2003, and members of JSPAN's Church/State Policy Center have done so in scores of such cases over the past 50 years.

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 14 national and 127 local Jewish

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and to the concept of separation of church and state as an essential bulwark for religious freedom in the United States.

The Jewish Alliance for Law and Social Action (JALSA) is a progressive voice within the Jewish community, working on issues of social and economic justice, civil rights, and constitutional liberties. JALSA seeks to end discrimination based on race, ethnicity, gender, sexual orientation, and religion through passage of legislation, court cases, and social action. Members of JALSA have contributed extensively to *amici* briefs in state and federal courts in freedom of religious worship and religious establishment cases, including cases on religious accommodation, prayer in schools, and government entanglement cases.

SUMMARY OF ARGUMENT

Without so much as a nod in the direction of the Establishment Clause, the Tenth Circuit ordered a city to place an arguably religious monument in a public park. For two generations this Court has recognized the neutrality principle, supported by the entire Court in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), that government may not "aid one religion, aid all religions, or prefer one religion over another." The Tenth Circuit's decision is at odds with this Court's long-

standing practice of analyzing under the Establishment Clause the display of monuments on government property to determine whether they constitute either the government's speech or speech bearing government's imprimatur. By wrongly characterizing as "private speech" an earlier monument acquired by the city and then displayed by it in the park, and by wrongly characterizing the park as a "public forum for the display of monuments," the Tenth Circuit's decision undermines the settled neutrality principle of Establishment Clause jurisprudence.

To ensure that the commands of the Establishment Clause continue to be rigorously observed, we ask this Court to reverse the Tenth Circuit's decision. This Court should also make clear that any time a monument with religious content is displayed on government property, the message it conveys must be closely scrutinized under the Establishment Clause to ensure that it is not a message of government advancement of religion or promotion of a specific religion.

ARGUMENT

I. THE TENTH CIRCUIT'S ERRONEOUS PUBLIC FORUM RULING

The Tenth Circuit erroneously concluded that Pleasant Grove's decision to permanently display the Ten Commandments monument in a public park created a public forum for private parties to permanently display other monuments. This conclusion finds no support in the Court's public forum jurisprudence.

This Court has recognized that public parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). But it has never indicated that people have a right to express themselves by permanently and exclusively occupying land that is not theirs. Judge McConnell rightfully noted in his dissent to the Tenth Circuit's denial of a rehearing that while public parks must be open to transitory expression, "neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007).

The Tenth Circuit's characterization of parks as public forums for the erection of permanent monuments has unsettling implications. It implies, for example, that if a city displays a Holocaust memorial in a park, it can be compelled to allow a display glorifying the Nazis.

Public parks are often forums for people to express unpopular and dissenting views, including religious views, but they are not traditionally forums in which governments invite the public to express its views through the erection of permanent fixtures, and Pleasant Grove surely did not do so.[2] The Tenth Circuit's

[2] By contrast, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) involved a display in a traditional or designated public forum, publicly announced and open to all on equal terms.

conclusion that Pleasant Grove did so here by implication, i.e. by its mere acceptance and display of the Ten Commandments monument, violates this Court's teaching in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and its progeny.

II. THE TENTH CIRCUIT'S ERRONEOUS PRIVATE SPEECH RULING

The Tenth Circuit also erroneously concluded that the Ten Commandments monument donated to Pleasant Grove by the Fraternal Order of Eagles ("Eagles") remained the private speech of the Eagles. This defies logic and common sense. It is not private speech for the obvious reason that the Eagles no longer own the monument.[3] Moreover, the continued display of the Eagles' monument has involved and will involve governmental action at several critical steps which distinguishes it from private speech occurring on public property. First, Pleasant Grove made the initial decision to accept the monument and to display it. Second, as the owner of the monument, the government now has the discretionary power to alter its content, to place it somewhere else or even remove it from public display.

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[3] Once gifted to the city and accepted by it, the monument was no longer the donor's monument and therefore could no longer be the donor's speech. *See Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048-49 (2d Cir. 1988) ("In this case the speaker is the United States Government. . . . Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to the GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work.")

This is nothing like a decision to allow private parties to express their personal views in a public forum for here the government has at all times exercised complete control over the content of speech being permanently displayed on its property. Presumably that is also why both the majority and minority of this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), having concluded that the Ten Commandments monument donated to the State of Texas was the *state's* display, analyzed the case not pursuant to Free Speech principles but in accordance with their respective views of what the Establishment Clause requires.

Contrary to the Tenth Circuit's reasoning, the Ten Commandments monument in this case – owned by the city and placed on ground owned by the city –has nothing in common with private speech occurring in a traditional public forum. In effect, the Tenth Circuit equated display of the monument with a rally by a group of people in a public park. The speech of autonomous demonstrators on the city's property is "private speech" occurring in a true public forum. Not so in the case *sub judice*. The city, having accepted the gift of the monument, at all times thereafter exercised complete control over the "speech" permanently occupying its premises.

III. THE TENTH CIRCUIT'S DECISION THREATENS TO UNDERMINE THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

While the Tenth Circuit's decision was based on an erroneous free speech analysis and must therefore be reversed, it is also a fact that the Tenth Circuit panel, supported by three other en banc judges, ordered that the city *must* place an arguably religious monument on public property, and did so without any consideration whatever of the Establishment Clause implications of that Order. Such a result has disquieting implications for Establishment Clause jurisprudence.

The panel did not explain why it ignored the Establishment Clause implications of its Order. Apparently because of its mistaken belief that both monuments constituted "private speech in a public forum" the panel concluded that, religious or not, the City's rights regarding the monuments were limited to time, place and manner restrictions. But in this case that result would be flatly at odds with longstanding Supreme Court authority that religious monuments must always be subject to rigorous Establishment Clause scrutiny whenever government exercises control over the monuments being displayed.

In that regard, it matters not whether the government has exercised its control by selecting the speech being displayed, or whether the displays were always owned by the government, *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (crèche purchased by city); *McCreary v. ACLU*, 545 U.S. 844, 851-53 (2005) (display

created by county governments), or whether government designated a private party to create a display, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 579, 587 (1989) (county permitted the Holy Name Society to display a crèche in county courthouse and city placed a menorah owned by Chabad at entrance to government building), or whether, as here, the display was donated to the government, *Van Orden v. Perry*, 545 U.S. 677 (2005) (Breyer, J., concurring) (Ten Commandments monument donated by Fraternal Order of Eagles). This Court has gone beyond simple ownership issues and routinely analyzed under the Establishment Clause speech by non-governmental actors when it occurs on government property under circumstances implicating the government's possible imprimatur, either when government controls access to the forum or the contents of the message. *See, e.g., Santa Fe ISD v. Doe*, 530 U.S. 290 (2000) (student-led prayer at high school football game where school officials closely controlled access to the forum); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation ceremony where school officials controlled the program). All the various ways of exerting control require close Establishment Clause scrutiny over the display of monuments with religious content on public property.

The Tenth Circuit, however, would apply an entirely different Establishment Clause analysis to a religious monument donated by a private party to the government. As already noted, it would treat these monuments as "private speech" whose content government may not control even *after* a transfer of ownership and control of the monument has been

completed. This novel approach, however, cannot immunize these monuments from Establishment Clause review. To the contrary, it merely provides one more reason why ignoring the change in ownership is profoundly wrong, viz., that the perverse result of doing so is that the city ends up with *two* religious permanent displays on its property, neither one of which has undergone *any* Establishment Clause scrutiny.

An earlier Tenth Circuit decision concerning a Summum attempt to have one of its monuments displayed exemplifies how the Tenth Circuit's approach threatens to water down the rigor of this Court's Establishment Clause jurisprudence. *Summum v. Ogden*, 297 F.3d 995 (10th Cir. 2002). In that case, too, the City of Ogden had displayed a Ten Commandments monument donated to it by the Fraternal Order of the Eagles. As in the present case, the Tenth Circuit concluded that the city's refusal to also display the Summum monument constituted unlawful viewpoint discrimination against Summum's speech. But most importantly for present purposes, unlike Pleasant Grove the City of Ogden defended on the ground that displaying the Summum monument in a public park would violate the Establishment Clause. The Tenth Circuit rejected that defense, characterized the donated religious monuments – as here – as private speech, and concluded that reasonable observers would not likely perceive the monuments as bearing the government's imprimatur. *Ogden*, 297 F.3d at 1011.

Concededly, a government could choose to create a public forum for the erection of permanent displays. In that case, the displays might fairly be characterized as

private speech and the question would be whether reasonable observers would perceive any religious displays as bearing the government's imprimatur. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). But even in such a context, permanent displays might very well be perceived as bearing the government's imprimatur and thus be in violation of the Establishment Clause. For while private speech occurring briefly in a public forum – say a two hour rally in a park by a religious group – is unlikely to be viewed as bearing the government's imprimatur, private speech that is left for long stretches of time or is permanently placed on government property is much more likely to be understood as bearing government's implied endorsement.

Even when government has created a true public forum, "publicly announced and open to all on equal terms," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Scalia, J.), the Establishment Clause will be implicated if reasonable observers would not be able to understand that the speech is truly private and in no way bears the government's endorsement.

To forestall the confusion likely to be sown in the lower federal courts by the Tenth Circuit's decision, we urge the Court to issue an opinion instructing the lower courts that they should never mandate or authorize the erection or display on government property of a monument with religious content without a rigorous Establishment Clause analysis. Such an analysis is required regardless of whether the monument is owned, erected or maintained by the government or by a private party.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed with instructions to dismiss the complaint. If, however, further proceedings are required, the trial court should be instructed to develop a full record upon which Establishment Clause issues can be evaluated.

Respectfully submitted,

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