No. 07-665

In The Supreme Court of the United States

PLEASANT GROVE CITY,

Petitioner,

v.

SUMMUM,

Respondent.

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

BRIEF AMICI CURIAE OF THE AMERICAN LEGION, VETERANS OF FOREIGN WARS OF THE UNITED STATES, THE MILITARY ORDER OF THE PURPLE HEART, INC., THE NON COMMISSIONED OFFICERS ASSOCIATION OF THE USA, VETERANS OF THE VIETNAM WAR, INC. & THE VETERANS COALITION; AND AMERICAN EX-PRISONERS OF WAR IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Legion – The American Legion is a veterans and community service organization representing over 2.6 million members. The American Legion helps veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first GI Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Tenth Circuit has a detrimental impact on its ability to honor with veterans memorials those who have and do serve our nation's armed forces.

Veterans of Foreign Wars of the United States ("VFW") – The VFW is a veterans service organization representing over 2.3 million members. The VFW was instrumental in establishing the Veterans Administration, creating a GI Bill for the 20th Century and developing the national cemetery

[1] All parties of record consented to the filing of amicus briefs in support of either or neither party. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

system. The VFW also fights for the compensation of Vietnam veterans exposed to Agent Orange and veterans diagnosed with "Gulf War Undiagnosed Illnesses." The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial and the Women in Military Service Memorial. This case is of great concern to the VFW as it threatens the very veterans memorials the VFW helped create and directly threatens the erection of like veterans memorials in the future.

The Military Order of the Purple Heart, Inc. – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is, as well, awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. As its work, the Order conducts welfare, rehabilitation and service work for hospitalized and needy veterans and their families. The Order is greatly concerned with the outcome of this case as it directly affects the future of veterans memorials that honor those who, like themselves, literally shed their blood in this nation's service.

The Non Commissioned Officers Association of the USA ("NCOA") – The NCOA is a veterans service organization established to enhance and maintain the quality of life for enlisted personnel in all branches of the Armed Forces, National Guard and Reserves. It advocates in the federal legislature on issues that affect enlisted personnel and their families. It provides social improvement programs to help enlisted personnel thrive on active duty, on transition to civilian life and throughout retirement. The NCOA also aids often underpaid enlisted personnel in saving money through merchant program discounts. As the vast majority of veterans are or were enlisted personnel, the NCOA is greatly concerned with the adverse effect a court decision that threatens veterans memorials will have on those it serves.

Veterans of the Vietnam War, Inc., & The Veterans Coalition ("VVnW") – The VVnW is an international veterans organization dedicated to assisting U.S. veterans of all wars and all branches of military service through its programs and services. It strives to maintain, improve, preserve and defend the quality of life of all veterans and their families. VVnW provides transitional housing to homeless veterans as they attempt to reintegrate into society, offers psychological and medical care to needy veterans, and works to educate the public about the debilitating effects of Post Traumatic Stress Disorder and Gulf War Syndrome. VVnW opposes any court ruling that threatens veterans memorials. Such rulings only add to the difficulties and struggles

already burdening so many veterans as a result of their military service.

American Ex-Prisoners of War ("AXPOW") – AXPOW is a national service organization that provides aid to American citizens who were captured by an enemy in time of war. It exists to help those captured in time of war deal with the trauma of their capture and confinement. It is composed of and open to all former prisoners of war from any war involving the United States, including all former civil internees, and their families. AXPOW is greatly concerned with the proper resolution of this case as any ruling adverse to the nation's veterans memorials would dishonor its members who literally have been imprisoned in service to this nation and only add to their trauma.

SUMMARY OF THE ARGUMENT

The ruling by the Tenth Circuit poses a danger to the free speech jurisprudence of this Court and is a direct threat to veterans memorials nationwide. The Court should not force upon governments an on-demand stewardship policy for the permanent erection of privately donated, unattended monuments on public grounds.

Failure to reverse would be devastating to our nation's veterans memorials. Any city with a memorial honoring our veterans would now also have to allow a memorial dishonoring them. Cities would face

the chilling ultimatum of refusing to erect any future donated veterans memorial and removing any currently in place to avoid disgrace or "brac[ing] themselves for an influx of clutter" or worse. *Summum v. Pleasant Grove City,* 499 F.3d 1044, 1175 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc). This precise result is, in fact, already occurring. *See, e.g.*, Choate, Trish, *Memorial Delay Disappoints Veterans Group*, ABILENE REPORTER NEWS (May 1, 2008), http://www.reporternews.com/news/2008/may/01/memorial-delay-disappoints-veterans-group/ (U.S. Army fails to erect a monument to fallen WWII veterans due to concern caused by Summum case).

The Court should reverse the judgment of the Tenth Circuit and restore the ability of cities to erect and keep privately donated veterans memorials without being forced to accept other monuments. There are two ways the Court may do so and maintain the integrity of its speech jurisprudence. The permanent erection of privately donated, unattended monuments on public grounds is an obvious exercise of government speech. This finding requires clear limitations and guidelines to prevent future government abuse of private speech but is a solid basis for disposition. Alternatively, the best possible resolution of this case is for the Court simply to hold that there is no forum for the permanent erection of a donated, unattended monument on government property – it is "not a forum at all." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). This would dispose of the questions presented in this case with

no additional analysis required, adhere to and preserve established speech jurisprudence of the Court and protect the nation's veterans memorials from harm.

ARGUMENT

I. The nation's veterans memorials deserve protection.

The ruling of the Tenth Circuit is devastating to veterans memorials. These memorials, erected to honor our veterans and the wars and battles in which they fought, account for a massive number of donated memorials erected in the public square in almost every community nationwide. Under this precedent, should the Court fail to reverse it, any governmental entity, from the smallest municipality to the United States itself, is presented an impossible choice: tear down its memorials donated to honor its veterans, requiring that none be erected in the future, or retain its memorials donated to honor its veterans and, upon donation, accept and erect on the same grounds monuments that dishonor them.

Our veterans memorials have become ingrained in our national identity as deeply as any part of our culture could. When one thinks of Iwo Jima, among the first images that come to mind is that of five Marines and a Navy corpsman, battle weary and ragged, struggling to hoist the Colors atop a craggy, body strewn Mt. Suribachi, an image captured in bronze and black granite in a park in Arlington,

Virginia. Thoughts of Vietnam unwaveringly turn to a long, spare granite wall standing on the National Mall in Washington, D.C., a stark and unyielding roster of those who died in that war. In numerous towns and cities across our nation, World War I is forever tied to their own Spirit of the American Doughboy – life-size sculptures of a lone uniformed soldier of the Great War with arm raised, determinedly striding forward. For many black Americans, reflections on the Civil War bring to mind the African American Civil War Memorial, the only national memorial to the black veterans of the war in which the freedom of an entire people was won.

While varied in form and effect, and erected in commemoration of different people from different eras, these memorials share two things in common: they stand in public parks in honor and remembrance of veterans from their respective wars, and they were donated by private parties for permanent display in the public square.[2]

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[2] The United States Marine Corps Memorial (i.e., the Iwo Jima monument), located in a public park in Arlington, Va., was donated by individual Marines and friends of the Marine Corp. *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial"). The Vietnam Veterans Memorial (i.e., The Wall), erected on the National Mall in Washington, D.C., was donated by contributions from more than 275,000 individuals. *See* The Vietnam Veterans Memorial, http://thewall-usa.com/information.asp. A great number of Doughboys erected in public

(Continued on following page)

Accordingly, the Tenth Circuit's analysis requires that upon donation and alongside the Iwo Jima memorial, a monument to the benevolence of the prison guards of the Bataan Death March be erected, as well as one applauding the contributions of the kamikaze. Upon donation, per the Tenth Circuit, it would be constitutionally required to accept and erect a large bust of Ho Chi Minh, renowned purveyor of democratic principles and human rights, on the National Mall along with the Vietnam Veterans Memorial. Upon donation, the towns across the country with World War I Doughboys must also erect a monument donated to honor the leaders of the Central Powers. And the Tenth Circuit would find that erection of the donated African American Civil War Memorial would, upon request, require upon the same grounds erection of a donated alabaster sculpture of a hooded man in white robes bearing the title of grand dragon.

The destruction and chilling of our veterans memorials is not a viable option, nor is it the law.

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parks across the country were donated to their respective towns by private organizations and civic groups. *See* http://members.tripod.com/doughboy_lamp/earlspages/id63.html (click on Anniston, AL, Birmingham, AL, Ft. Smith, AR, etc.). And the African American Civil War Memorial, erected in a public plaza in the heart of Washington, D.C.'s Shaw neighborhood, was donated through private contributions to the Freedom Foundation of the same name. *See* The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial" and "Historic U Street"); Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

What effect would the court sanctioned destruction of veterans memorials do to the soldier who even now is patrolling the streets of Baghdad with death crouched at every street corner and behind every door? What would it mean to the legless Marine in Walter Reed struggling to make sense of his injuries and put his life back together? What would it mean to the homeless veteran on the streets of Chicago? What effect would it have on the remaining veterans who survived Pearl Harbor and suffer nightmares even now?

Our veterans memorials serve as unchanging reminders of who we are as a nation and where we have been. How else should this be done? In forgotten books gathering dust on the hidden shelves of libraries? In motion pictures once watched and put out of mind? Public memorials are among the most powerful tools of remembrance available to the modern world. Each time we see them, our veterans memorials force us to remember, if only fleetingly and only for an instant, that there were those who held the line, that there were those who answered the call, that there were those who rose to the task at peril of their lives to give themselves to something they deemed worthy of their life. They force us to remember that the security and prosperity of this nation did not come without a price, both high and dear, and that its birth and continued survival has been hard fought and hard won.

Our veterans memorials force us to remember. If we fail to remember, we will forget. And if we forget the men and the women and the struggles and the

virtues our veterans memorials commemorate, we will suffer for it. And what effect will it have in the future when we call on our own to don the uniform once more and go in harm's way? Following each conflict, following each time we called upon our own to serve and often to die, there arose afterward an instinctive need to commemorate that service in a very public and permanent manner. The result unwaveringly has been a lasting memorial of wood or stone or metal erected to honor and remember those who served and those who died. Without appropriate action by this Court, the destruction of tens of thousands of these memorials in every community and every state nationwide will be unleashed.

Amici, therefore, representing millions of veterans nationwide, request this Court secure and protect the future of our nation's veterans memorials by reversing the Tenth Circuit.

II. Monuments owned, controlled and displayed by the government are government speech.

The permanent erection of unattended, donated monuments on government grounds without question is government speech. The precedent of the Court makes this unambiguously clear. *See generally Rust v. Sullivan*, 500 U.S. 173 (1991); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819. Predictably, so do the Courts of Appeals. *See PETA v. Gittens*,

414 F.3d 23, 28-29 (D.C. Cir. 2005); *ACLU v. Schundler*, 104 F.3d 1435, 1444 (3d Cir. 1997), *cert. denied*, 520 U.S. 1265 (1997); *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988). *See also ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005); *Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000).

It is simply not credible, either by precedent or logic, to arrive at a contrary conclusion. When a private group donates a monument to a government, voluntarily surrendering all ownership and control over it, the group retains no interest or right in the monument, be it location, care, message, alteration, future ownership or destruction. All "private" aspects of the monument are gone, severed by operation of donative transfer. This necessarily includes any claim of private speech, as all features of the monument, including display of its message, now belong to a government. And a government, by definition, cannot engage in private speech. The monument sheds all relevant relation to the private sector upon donation to a government.

This becomes even clearer in the present context. Pleasant Grove (the "City"), like many cities, has a theme for its park, an overriding message it wants to convey, and the displays and monuments in the park are erected as part of that larger theme. Pioneer Park, the very name of which heralds its theme, is a memorial to the historical influences on and heritage of the City. Displayed within its bounds is the City's

first city hall and first fire department building. It also contains one of the City's first granaries, and a Ten Commandments monument donated by a civic group with forty year ties to the City.[3] This is not a situation where a government has erected blank monuments for private speakers to fashion their own message. *See Tong v. Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2004). The government has its own theme and message. Inscriptions are often offered to display the history of that item alone, but the monuments and artifacts taken as a whole reflect a government theme, as is the case with the park in Pleasant Grove. This is simply a local government selecting for display in its park monuments consistent with the park's theme and purpose. In other words, this is government speech.

The recognition that the "speech" at issue in this case is government speech is dispositive of the questions presented. The government "may make content-based choices" in what it says and refrains from saying, "regulat[ing] the content of what is or is not expressed." *Rosenberger*, 515 U.S. at 833. Viewpoint

[3] This particular monument was donated by the Fraternal Order of Eagles, who expressly assert "each time we have donated a [Ten Commandments] plaque or monument we have surrendered any ownership or control we may have had in it." Letter from Fraternal Order of Eagles to Liberty Legal Institute, June 19, 2008, attached as an appendix to this brief. The Eagles go on to explain that "the donee retained complete ownership and control of the plaque or monument upon acceptance and delivery. We have no legal claim to any of them." *Id.*

discrimination is not an issue in government speech as the government may engage in viewpoint discrimination "in instances in which the government itself is the speaker." *Velazquez*, 531 U.S. at 541. Thus, forum analysis would be inapplicable, as well. When the government speaks it is free to choose its message, its mode of delivery, and whether its message will be conveyed by a public or private speaker. *See Rust*, 500 U.S. at 194; *Rosenberger*, 515 U.S. at 833; *Velazquez*, 531 U.S. at 541-42.

Government certainly is not required to convey a message it does not wish to convey, nor should it. That is why we have elections. "[W]hen the government speaks, for instance to promote its own policies or advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Velazquez*, 531 U.S. 533, 541-42 (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)) (internal quotation marks omitted). Government speech is regulated not by the judiciary but by the political process, and properly so.

This Court should be careful, however, in describing the boundaries and limitations of government speech in the context of the present case, or private speech rights could be severely curtailed. Absent clear limitations and guidelines, this case could be misused to permit government co-opting of private speech as government speech in order to rob truly private speech of its protection. For example, a city could

open its community center to allow a group to give free seminars on global warming. If another group wanted to give free seminars on the same topics in the same community center, but advocate that global warming is a hoax, a government hostile to those views could simply adopt the seminars of the first group as its own, making them government speech and so closing an otherwise public forum to all disfavored speech. Government must not be allowed to forcibly take over and own truly private speech as a means of stripping it and other private speech of constitutional protection.

Specific limitations and guidelines, however, would do much to neutralize these dangers and ensure the continued vitality of private speech protections. In the present case, narrow construction is a prudent first step, expressly limiting relevant analysis to the specific facts of this case: the permanent erection of privately donated, unattended monuments on public grounds. Likewise, appropriate guidelines for a government to adopt such a monument as its own are the voluntary surrender by the private donor of all ownership and control over the monument accompanied by the government's express retention of ownership and control, to include the burden of all maintenance and repair. The government must not merely own the property upon which private expression occurs, such as the land where a private speaker walks wearing a sandwich board, but must own the actual objects and expressions themselves. The government must own and control all facets of the

monument, the very expression itself, before it becomes government speech.

Narrowly limiting any analysis to the specific context of this case provides an unyielding bulkhead to any future attempt to subvert free speech protections. Requiring the private surrender and government retention of ownership and control provides the critical bases for such a narrow construction, bringing this case in line with the precedent of the Court and providing guidance to the lower courts for future analogous cases. With such limitations and guidelines, the global warming example given earlier of government abuse of the government speech doctrine would not be an issue. The example, obviously, did not involve erecting permanent monuments nor did the private speakers surrender ownership or control of their expression to the government. The decisions concerning what would be expressed were made by the speakers, not the government in a land and monuments committee. These boundaries would ensure the continued vitality both of government speech and private speech and ensure that implementation of the solution is not as damaging as the problem itself.

The government's permanent erection of donated, unattended monuments and displays on public grounds is government speech. This disposes of the case. With the proper limitations and guidelines, this would be a consistent addition to the Court's jurisprudence protecting speech while avoiding future abuses.

III. There is no forum for the erection of permanent monuments on public grounds.

An even clearer and simpler resolution of this case is that there is no forum for the permanent erection of privately donated, unattended monuments on public grounds. Use of forum analysis in this case is unnecessary and inconsistent with the Court's speech jurisprudence. The imposition here of forum analysis could do tremendous damage to speech rights, extending the bounds of forum analysis beyond its intended sphere. *See United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003) ("The public forum principles . . . are out of place in the context of this case.").[4] Forum analysis should not be used in this case because *there is no forum* for the erection of donated permanent monuments on public grounds – it is "not a forum at all." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). This

[4] As is made clear in the analysis that follows, though no forum analysis is appropriate, the only possible forum designation in this case is nonpublic forum. Public forum analysis, in general, and nonpublic forums, in particular, are subject to heavy manipulation, allowing a crafty government entity to discriminate with respect to viewpoint under the guise of speaker identity and subjective reasonableness. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Considering this ease of manipulation, forum analysis in any context should be subjected to the limitations alluded to by the Court in *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 573-74 (1987) (citing Laycock, Douglas, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 48 (1986)).

Court's "cases dealing with speech forums are simply inapplicable." *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004) (citing *Am. Library Ass'n*, 539 U.S. at 205; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985)).

A. There is no history or tradition of private citizens erecting unattended monuments in public parks without government consent.

The existence of a forum is not determined "merely by identifying the government property at issue," but by the particular access to the government property that is sought. *Cornelius*, 473 U.S. at 801. Erection of unattended monuments on government property has certainly not "immemorially been held in trust for the use of the public." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992). "[P]ermanent displays do not fall within the set of uses for which parks have traditionally been held open to the public," and "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments." *Summum*, 499 F.3d at 1173 (Lucero, J., dissenting from denial of rehearing en banc). *See also Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."); *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) ("There is no

private constitutional right to erect a structure on public property."); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("We are not cognizant of . . . any private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures."); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989) (finding permanent physical occupation of park space does not fall within the scope of the traditional public forum).

A contrary view would extend the "doctrines surrounding traditional public forums . . . to situations where such history is lacking," an endeavor consistently rejected by this Court. *Am. Library Ass'n*, 539 U.S. at 206. A contrary view would, as well, transform every public sidewalk, park and street in the nation into fora for the erection of unattended monuments. If, as the Tenth Circuit held, all parks are now traditional fora for the private construction of monuments, it is irrelevant whether there is currently a monument on the property in question. If the property is a traditional public forum and erection of monuments is private speech, then barring obstruction of the property any individual can haul any given monument to his sidewalk, park or street of choice and leave it as a permanent testimony to his constitutionally protected right of private expression. The proverbial floodgates are open. If the Tenth Circuit is not reversed, every traditional forum for speech in the nation must "brace [itself] for an influx of clutter"

or worse. *Summum*, 499 F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc).[5]

Even designation as a non-public forum is inappropriate here. As with any forum analysis, it must pre-suppose that the permanent erection of a donated, unattended structure on public grounds involves an act of private expression, and one, no less, protected by the First Amendment, two assertions for which there is no credible precedent or logic. *See Cornelius*, 473 U.S. at 800 (quoting *Perry*, 460 U.S. at 46) (describing non-public forum analysis as whether restrictions on private expression are reasonable and without intent to suppress a particular viewpoint). Such an erection no more involves private expression than the erection of a donated public swimming pool or erection of a donated annex to city hall. The City has not "silence[d] speakers by expressly threatening censorship of ideas." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (internal quotations omitted). Nor has it "introduce[d] considerations that, in practice, would effectively preclude or punish the expression of particular views." *Finley*, 524 U.S. at 583. All are free to speak at the park (leafleting, carrying signs, oral utterances, etc.) and free to have temporary displays, subject to reasonable time, place

[5] Similarly, the record includes no evidence of government intent or affirmative choice to create a forum for the erection of permanent monuments. *See Am. Library Ass'n*, 539 U.S. at 206; *Cornelius*, 473 U.S. at 802-03; *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45-46 (1983).

and manner restrictions. However, no one has ever had a right to construct unattended permanent memorials on public property. While the park is a forum for *speech*, it is not a forum for the permanent display of donated monuments.

B. The permanent erection of privately donated, unattended monuments on public grounds is not a forum for speech.

This Court has never held that any and every activity involving public property is some species of forum. To the contrary, the Court has on at least three occasions expressly stated precisely the opposite. *See Forbes*, 523 U.S. at 677, 678 (finding that some government property is "not a forum at all"); *Locke*, 540 U.S. at 721 n.3 (finding a public scholarship program is "not a forum for speech"); *Am. Library Ass'n*, 539 U.S. at 205 (finding that "forum analysis" is "incompatible" with some government activities). In keeping with this precedent, permanent erection of donated, unattended monuments in a public park "is not a forum for speech." *Locke*, 540 U.S. at 721 n.3. The displays in the park are there to preserve and display the City's history and heritage, "not to encourage a diversity of views from private speakers." *Locke*, 540 U.S. at 721 n.3 (quoting *Am. Library Ass'n*, 539 U.S. at 206 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995))) (internal quotation marks omitted). It is nothing more than the government performing its "traditional role in identifying suitable and worthwhile"

structures for permanent erection and display in its public parks, structures "that would be of the greatest direct benefit or interest to the community." *Am. Library Ass'n*, 539 U.S. at 204, 208. The City has merely "prevent[ed] the [park] from becoming a battlefield" for permanent displays (an inescapable result of the Court of Appeals' analysis), which would "disrupt the property's intended function." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 52 n.12.[6]

This Court has recognized that a library does not collect books to display on its shelves "to provide a public forum for the authors of the books to speak." *Am. Library Ass'n*, 539 U.S. at 206. In the same way, government decisions on what monuments to erect in a public park no more create a forum for private expression than the erection of any other donated structure in that same park, be it a donated recreation center, pavilion, sidewalk, library, playground or swimming pool. Like the curator of the Smithsonian American Art Museum, who must accept or reject any number of donated pieces for display, a government has the traditional role and authority to accept or

[6] Some might assert that implementation of the selective access doctrine should apply. This would be an improper disposition of this case. As there is no forum for the permanent erection of donated, unattended monuments on public grounds, selective access is not at issue. There is no forum to which access could be selectively granted. Use of the doctrine in this case would be improper and inconsistent with this Court's speech jurisprudence.

reject any and all donated materials for permanent display in its public parks.

The implications of a contrary finding are unacceptable. For example, Battery Park on Manhattan Island, New York, is the current home of The Sphere and eternal flame, memorials to the fallen of September 11, 2001. As a public park it is also a traditional public forum. According to the Tenth Circuit, the people of New York should be required to accept and erect, upon the same ground, a monument donated to extol the virtues of al-Qaida and the vision of its leaders. Likewise the U.S. Soldiers Monument in Shelby, Michigan,[7] the Maryland Soldiers Monument in Baltimore, Maryland,[8] the tens of thousands of veterans memorials donated and erected in the public square of countless towns by The American Legion, Veterans of Foreign Wars, Military Order of The Purple Heart, etc., all are privately donated memorials erected on public grounds that are traditional forums for speech. According to the Tenth Circuit, each of the areas housing these memorials are now public fora in which any donated monument espousing protected speech can and must be displayed regardless of viewpoint. Since most every veterans memorial in the nation is both privately donated and

[7] *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: MI000301; then click "US Soldiers Monument").

[8] *See* The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

erected on public grounds that are traditional public forums for speech, failure to reverse the Tenth Circuit would open the floodgates nationwide for attacks on veterans memorials both by clutter and derogation. Such a result is not required by the First Amendment and is unacceptable.

The best possible resolution of this case is for the Court simply to hold that no forum exists for the permanent erection of a donated, unattended monument on government property – it is "not a forum at all." *Forbes*, 523 U.S. at 678. This finding is simple, narrow, faithful to the precedent of the Court, and prevents an absurd context from polluting the Court's speech jurisprudence. This finding alone, apart from any additional analysis, disposes of the questions presented in this case: if there is no forum, there is no right to private speech. Any further analysis is unnecessary and needlessly risks limiting truly important speech rights. Such a finding would allow the Court to reverse an erroneous decision in the Tenth Circuit, protect veterans memorials nationwide and preserve the integrity of forum analysis and free speech jurisprudence while adhering to established precedent of the Court. It is, again, the best possible resolution of this case.

In the tragically prophetic words of Judge McConnell, "[e]very park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter." *Summum*, 499

F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc). Amici quite literally *are* the VFW, and the American Legion, and the American Ex-Prisoners of War, and multiple other veterans organizations whose very members these memorials were erected to commemorate and honor. The fate of our veterans memorials is in the hands of this Court.

The Court must preserve our veterans memorials, which stand the most to lose in the wake of the Tenth Circuit's ruling. Millions of veterans, represented by amici, implore it to do so. This Court may, without question, choose another course. It has the power to allow the Tenth Circuit's ruling to stand and thus the veterans memorials to fall. But if it does, if after repeated warnings[9] and in the face of certain destruction this Court fails to render our veterans memorials the protection they deserve, this nation will walk that course with heads bowed, not in reverence, but in disgrace, ingratitude and shame.

[9] The American Legion filed an amicus brief in *McCreary County v. ACLU*, 545 U.S. 844 (2005), warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. *See also Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).

CONCLUSION

The Tenth Circuit's ruling in this case is inconsistent with and damaging to this Court's speech jurisprudence. It is, as well, devastating to the nation's veterans memorials. The Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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App. 1

June 19, 2008

Kelly J. Shackelford, Esquire
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RE: Ten Commandments Monuments Program

Dear Mr. Shackelford:

This letter is in response to your questions regarding the status of the thousands of Ten Commandments plaques and monuments the Fraternal Order of Eagles have donated nationwide.

Since the 1950's, when these donations began, each time we have donated a plaque or monument we have surrendered any ownership or control interest we may have had in it. They are a gift to the donee and the country. In each case, the donee retained complete ownership and control of the plaque or monument upon acceptance and delivery. We have no legal claim to any of them.

I hope this answers your questions.

Yours truly,

George A. Miller

GAM/jlr

PC: Grand Aerie Officers