No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,

Petitioners,

vs.

SUMMUM, a corporate and sole church,

Respondent.

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

Brief of Amici Curiae, Alliance Defense Fund and Family Research Council, Supporting Petitioners

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INTEREST OF AMICI IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent hundreds of thousands of Americans who have a right to religious expression in public forums. Its allies include more than 1,100 attorneys and numerous public interest law firms. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 1,000 cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

FAMILY RESEARCH COUNCIL is a nonprofit research and educational corporation headquartered in Washington, D.C. It exists to affirm and promote the traditional family and the Judeo-Christian principles upon which this country is built. Family Research Council provides resources and guidance for citizens concerned about national policy as it relates to cultural morality.

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[1]All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. No portion of this brief was authored by counsel for a party, and no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners have identified several glaring errors in the constitutional analysis of the court below. If not reversed, Amici are particularly concerned that at least two of those errors could have far-reaching, negative implications.

First, the court's mistaken classification of the monument displays of Pleasant Grove City as private rather than government speech sets forth an "equal access"/"all-or-nothing" rule for donated public monuments that could jeopardize the integrity and survival of war memorials and other historic markers throughout the Tenth Circuit and beyond, and erode the government's ability to choose and express its preferred messages on public land. Second, the Tenth Circuit's use of a flawed forum analysis sets a precedent that will confuse future cases. The court incorrectly determined that a forum for private speech was created here, and then fumbled its forum review by emphasizing the *physical property* of the park at issue, rather than the *access being sought* by the Respondent.

The scope of this brief is limited to three important points regarding public fora: 1) When a private party donates an historical monument to the government, mere acceptance of that item does not–and for practical purposes cannot–create a public forum for private speech. 2) A forum for public display of private monuments *can* be created, but only by intentional and purposeful government action. 3) Once a forum *is* created, the government cannot manipulate it to exclude religious speech.

Two judges who urged en banc review of this case described the panel's decision as "incorrect as a matter

of doctrine and troublesome as a matter of practice."[2] Amici agree and thus join Petitioners in urging the Court to reverse the decision below.

ARGUMENT

In this case, the only party engaging in speech was the government of Pleasant Grove City. Petitioners have shown that the subject area, the municipality's Pioneer Park, is dedicated to structures, monuments and memorials "that either portray the Mormon pioneer-era heritage of Pleasant Grove, or are contributions of local [longstanding] civic groups, or both." Pet. Brf. at 3, 6. It is a place designated by city policy for historical preservation. *Id.* And it is not unlike other historical sites throughout America, where a local government owns and fully controls all of the items that it selects for public display. Through such displays, the government communicates its chosen messages.

Respondent argued here that Pioneer Park should be open for *his* chosen message, too. He demanded acceptance and display of *his* selected monument on a theory that the park is a traditional public forum, or alternatively, a designated public forum, for such private speech. The Tenth Circuit oversimplified its review of Respondent's claims. Applying the general rule that all city parks are quintessential public fora, the court jumped instinctively into strict scrutiny analysis. Regarding this as a case about government restriction upon private speech, the court held that Pleasant Grove had no right to refuse display of Respondent's monument.

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[2] *Summum v. Pleasant Grove City,* 499 F.3d 1170, 1178 (10th Cir. 2007) (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc).

The court of appeals' primary error was failing to see that **no forum for private speech existed** with regard to Pleasant Grove's monuments display. Because the display itself is exclusively a form of government speech, and no other forum for private speech/monuments was intended or created here, the Respondent had no right to impose his display on Pleasant Grove. This Court should reverse the Tenth Circuit's decision.

I. MERE GOVERNMENT ACCEPTANCE OF THE DONATION OF AN HISTORICAL MONUMENT FROM A PRIVATE PARTY DOES NOT CREATE A PUBLIC FORUM FOR PRIVATE SPEECH .

As succinctly stated by two dissenting members of the court below, "[J]ust because [] cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing." *Pleasant Grove City,* 499 F.3d at 1177 (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc). It is crucial that the dissent's premise be affirmed by this Court. Otherwise, chaotic cluttering of countless public areas could certainly follow.

A. The Tenth Circuit's Public Forum Analysis was Unnecessary, Wrongly Focused, and Led to a Faulty Conclusion.

The panel was confused about which type of speech was at issue. Forum analysis was unnecessary here, because the Petitioners' monuments should have been classified as **government speech**. The court instead mistakenly viewed this as a case about **private speech**

because of the geographical location of the dispute. The court found that Pioneer Park is, like other city parks, a traditional public forum, and logically concluded, "[T]he city cannot close or otherwise limit a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action." *Summum v. Pleasant Grove City,* 483 F.3d 1044, 1050-51 (10th Cir. 2007) (citations omitted).

That is true, and the grounds of Pioneer Park are indeed traditional public fora. *However*, there are two important reasons why that status should not have determined the outcome of this case.

First, with regard to traditional public fora, the panel below failed to note the obvious point that unattended, free-standing, permanent displays of private parties are not generally permitted in such areas. Judge McConnell's dissent rightly observes: "By tradition and precedent, city parks-as 'traditional public forums'-must be open to speeches, demonstrations, and other forms of transitory expression. But 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." *Pleasant Grove City,* 499 F.3d at 1175 (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc).

This distinction is no impediment to Respondent Summum's First Amendment rights. Like any other citizen, Respondent is always welcome to openly share his views on the grounds at Pioneer Park through personal communication, literature distribution, temporary placards, or a soapbox. He can rove the grounds to proselytize and share his "Seven Aphorisms" as often as he desires. But, unless the local government consents, he has no right to commandeer public

property to *permanently* memorialize his message. No citizen does.

The second, and most important reason, why Pioneer Park's status as a traditional public forum is irrelevant in this case is because *the park's grounds are not the issue*. Assuming *arguendo* that forum analysis was necessary in this case– and Amici maintain it was *not*– the proper forum for that analysis should have been the City's internal selection process for its monument displays, rather than the real estate on which the monuments rest. Forum analysis "focuse[s] on the access sought by the speaker," rather than simply the tangible "government property at issue." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (concluding that a charity fundraising drive and its attendant literature was the relevant forum to be analyzed, instead of the federal workplace in which the fundraising activity was conducted).

By emphasizing the physical property of Pioneer Park rather than the access being sought by the Respondent, the court of appeals got off track. Its misplaced analysis led the court to the erroneous conclusion that Pleasant Grove officials were unlawfully denying the Respondent access to a traditional forum for private speech. However, since there can be no argument that the internal, decision-making process of local government officials is a traditional public forum, the Tenth Circuit's opinion cannot be sustained unless it could be determined that those local officials somehow opened–or designated–a forum for the admission of private speech.

B. A Designated Public Forum Cannot be Created Inadvertently.

The problem for the Respondent here is that there is no such thing as an *accidental* designated public forum. The very idea is oxymoronic. Instead, as this Court explained in *Cornelius,* "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by **intentionally** opening a nontraditional forum for public discourse." *Id.* at 802 (emphasis added).

The Tenth Circuit's previous ruling in *Summum v. City of Ogden,* 297 F.3d 995 (10th Cir. 2002), contradicts this well established principle, but nevertheless served as a basis for the panel's ruling below. The panel implied that even if Pleasant Grove's monuments were not being displayed in a traditional public forum like Pioneer Park, the court's decision would be the same in light of *City of Ogden. See Pleasant Grove City,* 483 F.3d at 1048, n.2. Since the Petitioners had years earlier accepted for display a Ten Commandments monument donation from the Fraternal Order of Eagles, the panel suggested that in that moment a public forum for private speech (via permanent monuments) was created by the municipality–even if it was **unintentional**.

The panel was bound by *City of Ogden* and its conclusion that a government's acceptance and display of a donated item always remains the private speech of the donor. *Id.* **Thus, under the Tenth Circuit's rule, the mere acceptance of the donation automatically and unwittingly designates a new forum for private speech.**

If left unchecked, this aberrant reasoning could lead to unsightly clutter and absurd consequences. As noted by the dissent below: "A city that accepted the donation

of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument-or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag." *Pleasant Grove City*, 499 F.3d at 1175 (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc). It may not end there. What would prevent a local chapter of the Skinheads from gaining access for display of their Nazi flag next to the VFW memorial? Could not the local strip club erect in the public park a nearly-obscene statue celebrating sexually oriented businesses? Why not a monument to Al-Qaeda next to the Declaration of Independence replica at city hall?

The right way to prevent such madness is for this Court to reverse the Tenth Circuit and affirm its own logical doctrine regarding the government's accountability for, and responsible control and designation of, public fora.

II. GOVERNMENTS CAN CREATE A FORUM FOR PRIVATE MONUMENTS TO BE DISPLAYED ON PUBLIC PROPERTY, BUT ONLY BY CLEAR POLICY AND PRACTICE.

There is of course no doubt that the government has the *ability* to open a public forum for private, unattended monuments, if it decides to do so. But such a forum cannot be created by accident or mere happenstance. Instead, the designation of a "monument forum" by the government must be deliberate and intentional. In the present case, Pleasant Grove City's officials did just the opposite.

A. A Forum for Private Monuments Can Only Be Created by Purposeful Action.

This Court has acknowledged that governmental bodies can designate specific fora for temporary public display of privately donated items. For instance, in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the State of Ohio opened its 10-acre statehouse plaza in Columbus for display of private monuments. *Id.* at 757. Importantly, state law specified the property's availability for broad public use and varieties of speech, provided for an official application form, and established content-neutral criteria to obtain the Review and Advisory Board's approval. *Id.* at 757-58. "Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years." *Id.* at 766. This status was "publicly announced" and the site was historically "open to all on equal terms." *Id.* at 770. Because free-standing, unattended, private displays were consistently approved and allowed by the Board, and "there was no policy against them," [*Id.* at 758 (citing to district court's finding)], the state was required to permit a private party to erect its unattended Latin cross display during the Christmas season. These circumstances are very different than the facts at issue in Pleasant Grove, where no monument forum has ever been opened for public access.

As with temporary displays, a government can similarly open a **permanent** monument display opportunity for private speakers in what is otherwise a non-public forum. But this too can be done only by the government's express intention. Other federal courts have recognized the creation of designated and/or limited public fora in circumstances where local officials

announce a forum and then invite the speech of all interested persons.

For example, in *Kiesinger v. Mexico Academy and Cent. School*, 427 F. Supp. 2d 182 (N.D. N.Y. 2006), the court affirmed that a limited public forum was created when school officials *advertised* and *invited* members of the community to purchase and place private messages on memorial bricks that would be installed in a new front walkway. *Id.* at 191. Since the forum was deliberately opened, "viewpoint discriminatory censorship" of the private speech was prohibited, and bricks "referr[ing] to Jesus and offer[ing] a specific religious viewpoint on God, an otherwise permissible subject," could not be excluded from the forum. *Id.* at 194-95.

The same conclusion was reached in *Demmon v. Loudon County Public Schools,* 342 F. Supp. 2d 474 (E.D. Va. 2004), when a high school fund-raising project sold memorial bricks for the school's "walkway of fame." The circumstances showed that the walkway was clearly a limited or designated public forum for private speech, and thus removal of bricks decorated with Latin crosses, while allowing bricks with secular symbols, amounted to viewpoint discrimination. *Id.* at 482.

The intention of the state actor is ascertained primarily by review of its policy and practice. *Cornelius,* 473 U.S. at 802. For example, in *Widmar v. Vincent,* 454 U.S. 263, 267 (1981), the Court found that a state university's express policy of opening meeting facilities for use of student groups created a public forum. In *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n.,* 429 U.S. 167, 174, n.6 (1976), a state statute provided for open school board meetings, and thus affirmatively created a forum for citizen participation and speech. In *Southeastern Promotions,*

Ltd. v. Conrad, 420 U.S. 546, 555 (1975), a municipal auditorium and theater were specifically designed and expressly dedicated for the public's use and access. Without such purposeful action, no forum is created.

B. No "Monuments Forum" Was Created in This Case.

In contrast to the cases cited above, where public fora were clearly intended and designated, Pleasant Grove's city officials never opened a forum for private expression in its monuments display at Pioneer Park. Instead, that park's display was specifically designed and dedicated to portray the Mormon pioneer-era heritage of the city and historic contributions of longstanding, local civic groups. Pet. Brf. at 3.

Rather than announcing some open invitation for the public display of artwork or memorabilia of any and all parties, the city utilized a careful and deliberate review process for which objects it would select for placement in its park. *Id.* at 4. This review and selection process involved at least three meticulous steps and three different departments of local officials (from the Historical Commission to the park management authority to the city council). *Id.* In 2004, the city codified this long-established practice by adopting a written policy specifying its process and legitimate selection criteria for the monuments display. *Id.* at 6. Importantly, the city has always maintained full ownership and control of each item selected for exhibition. *Id.* at 5.

Nothing here indicates an express intention, a policy, or a practice to create a "monuments forum" for the entry of all citizens. Further, it matters not that this Court has in previous cases sometimes "also examined the nature of the property and its

compatibility with expressive activity to discern the government's intent." *Cornelius,* 473 U.S. at 802. Again, this evaluation should have been about the access being sought to the monuments display, rather than the physical grounds of Pioneer Park. Accordingly, the nature of the Mormon pioneer-era heritage/historical display remains limited and specific, and not compatible in any way with the infinite variety of messages and topics that would be required additions in a typical public forum.

There are many logical reasons why this Court's doctrine requires deliberate and purposeful government action to open a public forum in an arena that is otherwise controlled by the government. As summarized by the Petitioners, "accepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny." Pet. Brf. at 2. Unless this Court corrects the Tenth Circuit's error below, that important principle could be in jeopardy.

III. GOVERNMENT OFFICIALS ARE NOT PERMITTED TO MANIPULATE PUBLIC FORA TO EXCLUDE RELIGIOUS SPEECH.

Because confusion with regard to the place of religious speech in public fora is unfortunately so common, Amici aver that the Court's decision herein should include a note of reminder that gerrymandering to exclude private religious expression is unlawful. In traditional public fora, and in other fora that is opened for private speech, government officials are not allowed to treat religious speech as "a First Amendment orphan." *Pinette*, 515 U.S. at 760 (*citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar,* 454

U.S. 263 (1981); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

In *Pinette,* because the State of Ohio deliberately opened its statehouse plaza as a public forum for display of free-standing, private monuments, the contribution of a Latin cross could not be refused. *Id.*, 515 U.S. at 757, 760. In *Lamb's Chapel,* because a school district maintained a policy of allowing after-hours use of school facilities, its open forum could not be denied to a church group for religious use. *Id.,* 508 U.S. at 393-94. In light of a similar policy allowing community use of school facilities in *Good News Club v. Milford Central Schools*, 533 U.S. 98, 112 (2001), an after-hours Christian club for students could not be excluded from the school building. In *Rosenberger v. Rector & Visitors of the Univ. Of Va.,* 515 U.S. 819, 834 (1995), once the University offered to pay for the outside printing costs of student publications, "on behalf of private speakers who convey their own messages, the University may not silence the expression of selected [Christian editorial] viewpoints."

In short, government exclusion of religious speech from a forum otherwise opened for broad access is not permitted by the First Amendment. In the present case, because there was no forum created, there was no opportunity for such viewpoint discrimination. But this Court's opinion should point out that ***IF*** Pleasant Grove *had* opened a designated forum for private displays in Pioneer Park, city officials could not have excluded the Ten Commandments monument donation, the "Seven Aphorisms" of Respondent Summum, nor any other submission on the basis of religion or religious viewpoint. As this Court has stated, "a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760.

CONCLUSION

In this case, the Tenth Circuit has blurred the clear distinction between government and private speech, and made a mess of its recent public fora analysis. To correct these errors, this Court should reverse the judgment below.

Respectfully Submitted,

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