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 BECKET FUND FOR RELIGIOUS LIBERTY AND ROBERT AND MILDRED TONG IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND ROBERT AND MILDRED TONG IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI*

Amici Robert and Mildred Tong are the prevailing plaintiffs in *Tong* v. *Chicago Park Dist*., 316 F. Supp. 2d 645, 651 (N.D. Ill., 2004), which held that the Chicago Park District's refusal to place a brick, duly purchased by *amici* and bearing a religious message, in a walkway composed of other bricks purchased by

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* Undersigned counsel authored this brief in whole. No person has made a monetary contribution intended to fund the preparation or submission of this brief.

other private parties and bearing a wide assortment of messages, was viewpoint discrimination under the Free Speech Clause of the First Amendment. *Amici* are concerned that the Park District may misunderstand the Court's ruling in this case and think it has the right to selectively censor their brick.

Amicus The Becket Fund for Religious Liberty is a nonpartisan, interfaith public interest law firm dedicated to protecting the free expression of all religious traditions. We represented the Tongs in their lawsuit and regularly represent other individuals and organizations whose rights will be affected by this case in lawsuits across the country.

SUMMARY OF ARGUMENT

This brief makes just one point: that just as a short-term unattended display may be either government speech or private speech, so too a long-term, virtually permanent inscription on public property may be either government speech or private speech. The monument in the present case is surely government speech. The city, after all, is free to do with it as it pleases; it can alter the inscription, move the monument, or take it down altogether, at any time for any reason. It is important to distinguish this type of long-term government speech from the sorts of long-term private speech that occur in religious messages or symbols placed, for example, on headstones in government cemeteries or on bricks or tiles commonly sold by, and placed in walls or walkways of, public schools and libraries for fundraising purposes. These latter sorts of inscriptions are intended to remain in place

indefinitely, if not permanently. Nevertheless, they remain private speech and the government should not be permitted to selectively censor them no matter how long they remain in its power and physical control.

ARGUMENT

Amici file this brief to bring to the Court's attention one straightforward but important point: That while the monument at issue here is indeed government speech, not all long-term expression on public property necessarily is.

Just as an unattended crèche, menorah or cross erected for a limited time may be either government speech, *see, e.g.*, *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), or private speech, *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753 (plurality op.) (1995), so too more permanent sorts of expression erected on public property may be either government or private speech. The monument at issue in this case is a good example of such government speech. Other examples include the various sorts of displays in government museums that the government acquires through purchase or donation.

By contrast, a good example of long-term *private* speech on public property is the religious symbolism on headstones in government cemeteries. The National Cemetery Administration, which is part of the Department of Veterans' Affairs, runs some 119 national cemeteries. *See generally Griffin* v. *Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Circuit

2002). Additionally there are a great many state and municipal cemeteries around the country. *See generally Warner* v. *City of Boca Raton*, 64 F. Supp. 2d 1272, 1290-91 (S.D. Fla. 1999). Though government property, and open to the public, these cemeteries nevertheless provide a forum for the permanent display of private, religious and other speech engraved by family members on the headstones of their deceased.

Other instances of long-term private speech are the commemorative bricks and tiles commonly sold by, and cemented into the walkways and walls of, public schools, libraries, and other institutions as part of their fundraising efforts. See, *e.g.*, *Tong* v. *Chicago Park Dist.* 316 F. Supp. 2d 645 (N.D., Ill., 2004. [1] In that case, *amici* Robert and Mildred Tong participated in a "buy-a-brick" fundraising program operated by the Chicago Park District, which invited participants to "Choose Your Words" and to "Leave Your Mark on Senn Park." 316 F. Supp. 2d at 651.

Many purchasers left a wide variety of "marks" on the park. Bricks purchased under the program featured messages ranging from commercial advertisements to opinions on the purchasers' pets, *e.g.*, "Bootsie Albert Drennan Best Cat Ever!" 316 F. Supp. 2d at 651. The Park District received and installed them all. But when the Tongs purchased a brick that read "Dear Missy, EB & Baby Tong, Jesus is the Cornerstone. Love Mom & Dad," *Id.*, the Park

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[1] *See also Kiesinger* v. *Mexico Academy and Cent. Sch.* 427 F. Supp. 2d 182 (N.D.N.Y, 2006); *Demmon* v. *Loudoun County Pub. Sch.* 324 F. Supp. 2d 474 (E.D.Va., 2004).

District rejected it because it included the name Jesus. The federal district court for the Northern District of Illinois ordered the brick installed in Senn Park, ruling that the Park District's rejection of it amounted to viewpoint discrimination, and noting drily that had *amici's* brick read "Bootsie is the Cornerstone," the Park District would surely have accepted it. 316 F. Supp. 2d at 657.

That ruling is plainly correct. The messages inscribed on the bricks in the Chicago Park District's walkway and those engraved on the headstones in government cemeteries, while on public property and more or less permanent, are nevertheless still private speech.

Emphasizing this distinction between the type of long-term government speech at issue here and long-term private speech is necessary to maintain the ongoing integrity of fora across the country. There is no question that the city in this case is perfectly free, at any time, for any reason, to move the monument, to alter its engraving, or to take it down altogether. See *Summum* v. *Pleasant Grove City*, 499 F.3d 1170, 1176 (McConnell, J., dissenting from denial of rehearing en banc)(10th Circuit 2008). But the government should most certainly *not* be free to change the religious symbol on a cemetery headstone, from say, a Star of David to a Cross. Similarly, a government agency, having solicited message-engraved bricks for its school or library, should not be permitted to sandblast off individual messages that it (or a subsequent administration) may not like. Governments may well be free, at least as a matter of the Free Speech Clause, to close such

fora entirely by tearing up the walkways, breaking down the walls, or even removing all the headstones. What they should not be able to do, however, is to selectively censor the individual messages that those items record. The reason, quite simply, is that the messages on headstones and commemorative bricks remain private speech, and not government's speech, no matter how long the items themselves remain in the government's possession and physical control. Governments may not do with the messages on their headstones and commemorative walkways and walls what the city here is perfectly free to do with its monument—anything, at any time, for any reason.

In sum, *amici* respectfully submit that in deciding this case, this Court should explicitly distinguish long-term government expression on government property from long-term private expression on such property, and emphasize that private speech, whether short-term or long-term, still enjoys the full protection of the Free Speech Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, the ruling of the United States Court of Appeals for the Tenth Circuit should be reversed in such a way that the baby is not thrown out with the bathwater.

Respectfully submitted,

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