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 OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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June 19, 2008

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INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the Tenth Circuit panel should be reversed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of two New York Times bestsellers, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics* and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

SUMMARY OF ARGUMENT

The Tenth Circuit panel analyzed this case as a simple matter of private speech in a traditional public forum. We urge the Court to reject this mechanical approach and craft a ruling that protects the editorial discretion of the city without stifling private expression.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten (10) days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

This Court has an opportunity to sharpen the line between government and private speech, and to fashion an approach to clear the fog in future cases. Pleasant Grove City has sponsored an exhibit of permanent monuments to make a statement about its history. The city is the "speaker" even though some individual structures are engraved with private speech. The religious content in some of that speech does not disturb the conclusion, because the city may permissibly acknowledge the role of religion in local history.

Analysis of the forum is not as straightforward as the Tenth Circuit panel presumes. In certain contexts, this Court has found that forum analysis is inapplicable. Pioneer Park's historical display is more like a government museum or library than a traditional public forum for assembly and debate. The exhibit shares some characteristics with a limited public forum, because the city has limited the content to historically relevant structures or donations from persons with close ties to the community. But the city has not intentionally opened any type of forum for private speech, nor has it hindered such expression.

A decision in favor of the city will maximize protection for both public and private expression. The park exhibit, like many similar displays throughout the country, disseminates a government-sponsored message. People may still visit the park to freely exchange ideas through oral and written communications. But if the city is forced to either ban *all* permanent monuments in the park or accept *every* proposed donation, the result will either be a chilling of expression or an array of clutter. Neither choice

promotes the free expression guaranteed by the First Amendment.

I. THE CITY IS SPEAKING ABOUT ITS LOCAL HISTORY. A DECISION IN FAVOR OF THE CITY POSES NO THREAT TO PRIVATE SPEECH.

The Tenth Circuit analyzed this case as a simple matter of private speech in a traditional public form. But it is not that simple. Pleasant Grove is entitled to display a message about its history, but private speech is embedded in its expression. This Court can and should craft a ruling in favor of the city that will not stifle private expression. Pleasant Grove owns, controls, and maintains the permanent structures used to craft its message about local history. City officials, like museum curators or public librarians, exercise editorial discretion in approving additions to the display, according to well-established policies and procedures. The city has not extended an invitation to private speakers so as to create a forum for private expression.

The line between public and private expression is sometimes blurred but it must be drawn. Private speech on public property is protected by the First Amendment, so courts must identify the forum and assess the reasons for exclusion. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 797 (1985). Public speech is governed by an entirely different set of rules. *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 834 (1995).

Even the Tenth Circuit judges who would have granted a rehearing disagree about the nature of the speech. Judge Lucero labels the monuments private speech because private donors determine the content prior to the city's acceptance. *Summum v. Pleasant Grove City,* 499 F.3d 1170, 1172 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc). Judge McConnell regards them as government speech because the city did not invite private citizens to erect structures on government land. *Id*. at 1175-76 (McConnell, J., dissenting from denial of rehearing en banc). This Court is faced with the delicate task of untangling the web before proceeding to classify the forum, if indeed there *is* a forum.

A. The Four-Factor Test Developed By Circuit Courts Weighs In Favor Of Pleasant Grove City At Every Point.

This case does not require a balancing test. It is not a close call. However, the test used by several circuit courts is a helpful analytic tool to sharpen the line between public and private speech. Moreover, Respondent's Br. in Opp. to Cert. notes the Tenth Circuit's reliance on this test to analyze government speech. When applied correctly to *Pleasant Grove*, the presence of government speech is evident.

Some courts suggest that it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 244-45 (4th Cir. 2002);

Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004). The Fourth Circuit struck down South Carolina's "Choose Life" license plate scheme as "cloaked advocacy" that lacked accountability to the electoral process--holding that the plates were a mixture of government and private speech. *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d at 795-796. The same court invalidated a logo restriction on special plates authorized in Virginia, finding an impermissible restraint of private speech. *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, supra,* 305 F.3d 241. These and other circuit cases have met the speech classification challenge using a four-factor test from the Eighth Circuit. *See Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000). More recently, the Ninth Circuit adopted this test, finding it consistent with *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). *Arizona Life Coalition, Inc. v. Stanton,* 515 F.3d 956, 965 (9th Cir. 2007). The Sixth Circuit, however, criticized the district court for using this "pre-*Johanns*" test based on Fourth Circuit precedent. *Am. Civil Liberties Union of Tenn. v. Bredesen,* 441 F.3d 370, 372 (6th Cir. 2006). A careful reading of *Johanns* reveals it to be in harmony with the four-factor test. The opinion does not expressly reference it but all the elements are present.

The gap between Judges Lucero and McConnell can be understood by examining all four factors rather than limiting the analysis to only one of them. Every one of these factors overwhelmingly supports the city.

1. The Purpose Of The Pioneer Park Display Is To Commemorate The History Of The City--Not To Facilitate The Free Exchange Of Ideas.

Governments institute programs for many purposes--to raise revenue, allocate funding, regulate conduct, promote its policies, and disseminate messages. Government must speak in order to conduct business and accomplish its purposes. There is a delicate and increasingly complex relationship between government and private speech. Discerning the government's purpose helps to identify the speaker and apply free speech principles.

When government acts as regulator or raises revenue, the First Amendment restrains its ability to limit private speech. The Ninth Circuit found that raising revenue was the purpose of Arizona's special license plate program. The state was facilitating private speech rather than publishing a message of its own, so it could not engage in viewpoint discrimination. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 996.

Sometimes government disseminates its own message. The purpose of the beef promotions in *Johanns* was to publicize a message established by the federal government. *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 560-561. Government may send an indirect message of support through selective funding. *Rust v. Sullivan,* 500 U.S. 173 (1991). Governments may even enter the arena of public debate. Private speakers retain the right to disagree

but cannot compel the government to sponsor a competing viewpoint:

> Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a *First Amendment* right not to express agreement. For instance, government can distribute pins that say "Register and Vote".... Citizens clearly have the *First Amendment* right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute "Don't Vote" pins....
>
> *Am. Civil Liberties Union of Tenn. v. Bredesen, supra,* 441 F.3d at 379

Some courts caution that government should clearly identify itself as the speaker. The Fourth Circuit invalidated South Carolina's "Choose Life" license plate program as "cloaked advocacy," finding the speech had a mixed chararcter. The government was promoting a message, but its identity was obscured by the use of private speakers and their vehicles. *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d 786. Similarly, dissenting justices in *Johanns* expressed concern that the government maintain political accountability by identifying itself with the content so readers would understand the source of the message. *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 571-572 (Souter, J., dissenting).

This first prong should not be viewed in isolation from analysis of the forum. When government

establishes a program to encourage an exchange of diverse private viewpoints, it creates a forum for private expression and contrary views may not be suppressed. However, forum analysis may be inappropriate where such intent is lacking. The Eight Circuit held that brief messages from sponsors and announcements of their names on a public radio station constituted government speech. The court reasoned that "the central purpose of the enhanced underwriting program is not to promote the views of the donors." *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, *supra*, 203 F.3d at 1093-94.

The Tenth Circuit has applied *Knights* and reached different results on the purpose prong. In an earlier Summum case, the court concluded that a Ten Commandments monument represented the private speech of the Eagles group that donated it to promote a moral code for youth. The monument was not displayed to promote the views of the city. *Summum v. City of Ogden,* 297 F.3d 995, 1004 (10th Cir. 2002). But in another case, the Tenth Circuit considered Denver's decision to erect an annual holiday display with a brief message and concluded that "the sign is there to thank the sponsors and the citizens for their support of the cost of the display." The "thank you" message was city speech. *Wells v. City & County of Denver,* 257 F.3d 1132, 1141 (10th Cir. 2001).

Pleasant Grove City did not invite its citizens to exchange their ideas by erecting permanent monuments, nor has it advocated one side of a volatile public controversy. It created an exhibit using government-owned structures to disseminate a

message about the city's pioneer-era history. As the Tenth Circuit explained in *Wells*:

> Upon consideration, we conclude that the City of Denver is entitled to present a holiday message to its citizens without incurring a constitutional obligation to incorporate the message of any private party with something to say. "Simply because the government opens its mouth to speak does not give every outside individual or group a *First Amendment* right to play ventriloquist." *Downs v. Los Angeles Unified School District,* 228 F.3d 1003, 1013 (9th Cir. 2000).

Wells v. City & County of Denver, supra, 257 F.3d at 1143

2. The City Exercises <u>Editorial Discretion</u> In Selecting Items To Display, Based On Historical Relevance And The Speaker's Ties To The Community.

Government control over content is one key to identifying the speaker. In *Johanns*, the Secretary of Agriculture held final authority to approve every word used in the beef promotional campaign that this Court found to be government speech. *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 561. The public radio station in *Knights* exercised editorial control over the content of scripts acknowledging its sponsors, so the speech was attributed to government. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., supra*, 203 F.3d at 1093-94. The Ninth Circuit ruled that school bulletin boards were government speech

even though individual employees posted messages on them, because the school maintained editorial control over content. *Downs v. Los Angeles Unified School District, supra,* 228 F.3d at 1011. But the same court found this factor weighted toward private speech in Arizona's specialized license plate program. The state exercised de minimus editorial control over design and none over the message. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 966.

Editorial control should not be considered in a vacuum. Such a truncated approach may yield erroneous results. The Sixth Circuit used *Johanns* to conclude that a "Choose Life" license plate was Tennessee's own message because the state had to approve every word on the plates--regardless of whether the government explicitly credited itself as the speaker, and even though a private organization participated in designing the logotype. *Am. Civil Liberties Union of Tenn. v. Bredesen, supra,* 441 F.3d at 375, 377. This conclusion places the Sixth Circuit in tension with other license plate cases that consider a broader range of factors. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, supra,* 288 F.3d 610; *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d 786; *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d 956; *Choose Life of Missouri, Inc. v. Vincent*, 2008 U.S. Dist. LEXIS 6524 (W.D. Mo. January 23, 2008). Some courts find private speech where a government entity accepts the donation of a monument with the donor's completed message intact. In *Ogden*, for example, the Tenth Circuit observed that the city received a completed Ten Commandments statue from the Eagles and exercised no control over its content. *Summum v. City of Ogden, supra,* 297

F.3d at 1004; see also *Summum v. Callaghan,* 130 F.3d 906, 913-914 (10th Cir. 1997) (presupposing a similar structure to be private religious speech).

Pleasant Grove City exercises discretion in its selection of structures to display, based on historical relevance and/or the donor's ties to the community. The city does not inscribe the words on the monument, but does choose whether to accept or reject a particular item based on these criteria. The collection displayed in Pioneer Park, as a whole, conveys a message from the city government about its history. The park exhibit is analogous to a government museum or library, where government employees select artifacts or books for the collection. Museums do not adopt the individual text engraved on every artifact. Public libraries do not endorse the words of every book. In both cases, there is no forum for private expression even though some selections contain private speech.

3. The City Is The Literal Speaker As Compiler Of The Display, Although The Private Donor Crafted The Message On The Monument.

The *Johanns* concurrence observed that if the government's pro-beef messages could be attributed to private individuals or organizations, there would be a valid as-applied challenge. *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 564-565 (Thomas, J., concurring). The concurrence implicitly acknowledged the importance of identifying the literal speaker. The dissent objected that no one reading the ads would realize that the message, "funded by America's Beef Producer's," is actually from the federal

government. *Id*. at 577. This objection seemed rooted in the obscurity of the literal speaker's identity.

The license plate cases illustrate how private speech interests are implicated when a message is literally broadcast by private individuals. The state owns the plates, but they are attached to private vehicles. This third factor is somewhat mixed--government ownership coupled with private possession--but the close association with private speakers weighs in favor of protecting private speech. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 966-967.

In a case similar to the one at bar, the Tenth Circuit found a Ten Commandments monument to be private speech because the donor composed the speech and no municipal employee was the literal speaker. *Summum v. City of Ogden, supra,* 297 F.3d at 1004. In *Knights*, the literal speaker was an employee of the public radio station, not a representative of the private entity seeking air time. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., supra*, 203 F.3d at 1091.

But this "literal speaker" factor must not be taken too literally. In a critical sense Pleasant Grove City *is* the speaker. The amalgamation of monuments, while containing private expression, is a collective "whole." The city is not parroting the words engraved on individual monuments, but through the completed exhibit says: "This is our pioneer-era history." Forced intrusion of the Summum monument would distort that message. The display is analogous to a collective work recognized by federal copyright law, wherein the

pre-existing materials of several authors are assembled and collected such that the resulting whole is an original work of authorship. *See* 17 U.S.C. § 201(c). In such a collection, as in Pioneer Park, the individual contributors speak but the compiler expresses a separate and distinct message. In the context of public radio or television, a compilation of third party speech has been deemed a "communicative act of the government." *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., supra*, 203 F.3d at 1094, n. 9; *Arkansas Educational Television Commission v. Forbes,* 523 U.S. 666, 674 (1998). Here, too, the city communicates its message by assembling the works of third parties.

4. The City Has Assumed <u>Ultimate Responsibility</u> By Accepting The Donation And Using The Monument To Craft A Government-Sponsored Message.

This Court has provided a coherent example of ultimate responsibility:

> *The Beef Promotion and Research Act of 1985 (Beef Act or Act), 99 Stat. 1597*, announces a federal policy of promoting the marketing and consumption of "beef and beef products," using funds raised by an assessment on cattle sales and importation. *7 U.S.C. § 2901(b)*. The statute directs the Secretary of Agriculture to implement this policy....
>
> *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 553

The government's message here was required by federal law, and a governmental agency was directed to broadcast it.

Where tangible property is used to transmit a message, ownership of that property is an important consideration. Formal transfer of legal title may constitute a transfer of imputed expression. *Freedom From Religion Fdn. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). Personalized license plate cases suggest that private speech interests may be implicated even when the government holds legal title. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, supra,* 288 F.3d at 621; *Wooley v. Maynard,* 430 U.S. 705, 717 (1977). The Ninth Circuit found no indication that Arizona intended to adopt the message of each special organization plate as its own. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 968. Individuals mount government-owned plates on their personal vehicles and choose personalized messages as a means of private expression. The state holds title but the individual has possession and displays the message.

The license plate cases are readily distinguished from *Pleasant Grove*. When a monument is donated to a city, the government assumes legal title, possession, and control. Pleasant Grove City assumes ultimate responsibility for a monument in Pioneer Park when officials determine that a particular statue meets the "historical relevance" criteria and the donation is accepted. After acquiring title, the city may sell, donate, modify, move, or destroy the structure and is responsible for its maintenance. *Summum v. City of Ogden, supra,* 297 F.3d at 1005. The city need not

adopt every word engraved on every monument as its own, but each item displayed contributes to the overall message concerning local pioneer history.

B. This Is Not An Establishment Clause Case Merely Because Religious Artifacts Are Displayed. The Government's Intent Is To Visually Describe The City's History, Not To Prescribe Religious Doctrine.

The public-private speech dichotomy is particularly critical where religious expression is involved:

> "There is a crucial difference between *government* speech endorsing religion, which the *Establishment Clause* forbids, and *private* speech endorsing religion, which the Free Speech and *Free Exercise Clause* protects."
>
> *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 250 (1990)

There is no Establishment Clause challenge before this Court. However, the issue lurks in the background. Pioneer Park displays both the Ten Commandments and a Mormon religious artifact (the Nauvoo Temple Stone), but refuses the proposed Summum monument based on its lack of historical relevance. Under the Tenth Circuit's criteria for government speech--actual adoption of the words on the monument--a challenge to the two religious displays is possible. But if the text is purely private speech, Pleasant Grove may be forced to accept the Summum monument.

Some of Judge McConnell's citations highlight this concern: *Adland v. Russ,* 307 F.3d 471 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir. 2001); *Books v. City of Elkhart,* 235 F.3d 292 (7th Cir. 2000). *Summum v. Pleasant Grove City, supra*, 499 F.3d at 1176 (McConnell, J., dissenting from denial of rehearing en banc). These cases all held that privately donated monuments containing religious text constituted government speech, and went on to find Establishment Clause violations on that basis.

The key to this conundrum lies in examining governmental intent. Some religious monuments displayed on public property pass constitutional muster. There is an Establishment Clause violation when government "speaks" to promote or endorse a particular religious viewpoint but not when a passive display acknowledges the role of religion in American history:

> "The fact that government buildings continue to preserve artifacts of [the country's religious] history does not mean that they necessarily support or endorse the particular messages contained in those artifacts."
>
> *Modrovich v. Allegheny County,* 385 F.3d 397, 410-11 (3d Cir. 2004)

This Court upheld the display of a Ten Commandments monument on the grounds of the Texas state capitol, a 22-acre area containing seventeen monuments and twenty-one historical markers described by a state legislative resolution as

commemorating the "people, ideals, and events that compose Texan identity." *Van Orden v. Perry,* 545 U.S. 677, 681 (2005). This context--an exhibit honoring local history--is remarkably similar to the Pioneer Park display. The Decalogue has religious significance but has also played a significant role in America's heritage that governments may acknowledge through a passive display on public property. *Id*. at 690-692; *see also ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005).

Similarly, government may display art with religious content in an exhibit. A university's exhibition of a statue titled "Holier Than Thou," offensive to the Catholic plaintiffs who sued to have it removed, did not violate the Establishment Clause. The university exercised editorial discretion in the selection of artwork and had no improper religious motivation. *O'Connor v. Washburn Univ*., 416 F.3d 1216 (10th Cir. 2004). In the same way, Pleasant Grove City may display historically relevant items that acknowledge the role of religion in local history.

II. FORUM ANALYSIS IS INAPPLICABLE. THE CITY HAS CRAFTED A GOVERNMENT MESSAGE THAT NEITHER FACILITATES NOR ABRIDGES PRIVATE SPEECH.

Pioneer Park officials may exercise editorial discretion without opening a forum for private expression. The city's policy--to display permanent monuments based on historical relevance or ties to the community--does not abridge free speech rights or cut off any existing channels of communication. Citizens may continue to visit the park for assembly, debate,

and similar activities traditionally associated with public parks.

A. The Park Exhibit Is Analogous To A Government Museum Or Library. The City Is Entitled To Exercise Editorial Discretion In Selecting Items For Display.

Governments have authority to make a variety of decisions about the use of public assets and resources without necessarily opening the floodgates to every person seeking to exercise a constitutional right. The government may selectively fund activities in the public interest, determining the contents and limitations of a program it creates and manages. *Rust v. Sullivan, supra,* 500 U.S. 173 (regulations limited ability of Title X recipients to engage in abortion-related activities); *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d at 796. It can make decisions about the use of its own land that incidentally burden free exercise rights. *Lyng v. v. Northwest Indian Cemetery Protective Ass'n et al.*, 485 U.S. 439 (1988) (roads constructed by U.S. Forest Service on land considered sacred by three Indian tribes).

In some contexts, the government plays a unique editorial role that does not lend itself to the traditional forum analysis where private speakers seek access to public property. Court have recognized and extended this doctrine in recent years. The government may act as patron of the arts, making aesthetic judgments in selecting projects to fund. *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569 (1998). This is true even where public sidewalks and parks are used for a government-sponsored exhibit. *PETA v. Gittens*, 414

F.3d 23 (D.C. Cir. 2005) (animal artwork). A losing Presidential candidate could not reasonably assert a right to present his own float in the Inaugural Parade. *Id*. at 30. Public television broadcasters are entitled to exercise journalistic discretion. *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666 (1998). Public librarians enjoy broad discretion in making collection decisions. *United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194, 205 (2003). Public schools, similarly, make content-based decisions about curriculum. *Rosenberger v. Rector & Visitors of the Univ. of Va., supra,* 515 U.S. at 833.

In all of these situations, a substantial amount of protected private speech is excluded from government funding, sponsorship, or display without violating the First Amendment or even creating a forum that implicates free speech rights. The Tenth Circuit acknowledges this principle but would not extend it beyond the specific situations recognized by this Court--public television, libraries, and the arts. *Summum v. City of Duchesne,* 482 F.3d 1263, 1269 (10th Cir. 2007); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052, n.4 (10th Cir. 2007). This short-sighted, mechanical approach fails to appreciate the variety of analogous situations.

The Pioneer Park exhibit is similar to a government museum. *See PETA v. Gittens, supra*, 414 F.3d at 29; *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d at 795. A museum curator may select items consistent with the museum's theme without creating a forum for private speech or an obligation to display every proposed donation. The city council is analogous to the museum curators, librarians, public

school officials, and public television broadcasters who select appropriate materials for government-sponsored activities. Private expression is embedded in some of those materials. The government does not adopt all such speech as its own words, nor does it create a forum requiring acceptance of every artifact, monument, book, or other article proposed by a private speaker. Forum analysis is inappropriate in this context.

Moreover, public libraries, museums, television, schools, and similar activities easily pass the Eighth Circuit's four-factor test discussed in Section I. There is a benefit to the public, but the purpose is not to facilitate private speech. Government exercises editorial discretion. Government agents or physical displays are the literal speaker. Government has ultimate responsibility for content, property, financing, and maintenance.

B. Park Visitors Remain Free To Engage In Expressive Activities Traditionally Associated With A Public Forum.

Even in a traditional public forum, no person has an unrestricted right to erect a permanent structure. The use of portable, temporary, non-obstructive props may be entitled to First Amendment rights on public property. *Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005) (balloons used one or two hours in a union protest). But objects that are permanent or not easily moved do not qualify for similar protection. *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (no right to erect newsstands on a public sidewalk); *Lubavitch Chabad House v. City of Chicago*, 917 F.2d 341 (7th

Cir. 1990) (no right to display freestanding Chanukah menorah in public area of airport).

The city does not abridge free speech rights through its restrictions on permanent monuments in Pioneer Park. In *Finley*, Justice Scalia observed that "those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute [requiring the NEA to consider decency in its funding decisions]." *Nat'l Endowment for the Arts v. Finley, supra,* 524 U.S. at 595. Similarly, Summum followers remain free to meet in municipal parks for assembly, debate, and the free exchange of ideas. They can pass out fliers, speak to people, and freely disseminate their ideas. They can erect monuments on their own property in full public view. What they cannot do is inject their structure into a city-sponsored historical exhibit.

III. THERE IS NO FORUM--PUBLIC OR LIMITED--MERELY BECAUSE OF SURFACE SIMILARITIES.

Pioneer Park's exhibit bears some resemblance to a forum for private expression, but the similarities are illusory. Its setting in a public park does not automatically render it a traditional or designated public forum, and while it shares certain features with limited public fora--topic and speaker restrictions--the government's purpose for the display rules out even this classification.

A. Even If There Were A Forum, It Would Be Limited To "Permanent Structures In Pioneer Park"--Not The Entire Park.

Identification of the relevant forum requires consideration of both the government property to which access is sought and the type of access sought. *Summum v. City of Ogden, supra,* 297 F.3d at 1001; *see Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., supra,* 473 U.S. at 800-02. The Tenth Circuit gives lip service to this principle, even proclaiming that "the permanent monuments in the city park therefore make up the relevant forum," but then brushes it aside and aborts the analysis. *Summum v. Pleasant Grove City*, *supra*, 483 F.3d at 1050.

1. The Analysis Begins--But Does Not End--With The Observation That The Property Is A Public Park.

Free speech cases have considered a variety of government properties, including parks, municipal buildings, county courthouse grounds, and sidewalks. The property at issue here is a municipal park. The Tenth Circuit panel goes no further than reciting basic black letter law, dismissing the District Court's nonpublic forum analysis: "The city park is, however, a traditional public forum." *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1050. But the location and nature of the property is only one of two factors to be examined. The panel disregards the second factor and thereby short-circuits the forum analysis that follows. As Judge Lucero pointed out:

> The panel's claim that access "is relevant in defining the forum, but . . . does not determine the nature of that forum," *id. at 1269 n.1*, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum.
>
> *Summum v. Pleasant Grove City, supra*, 499 F.3d at 1172 (Lucero, J., dissenting from denial of rehearing en banc))

2. Summum Seeks Access To Erect A Permanent Monument, Not To Engage In Assembly Or Debate.

In the past, the Tenth Circuit has noted the distinction between transitory speech and permanent structures on public property:

> Here, the government property at issue is the lawn of the Ogden City municipal building. The access sought is not merely to converse or post temporary signs on the lawn, but the right to place permanent monuments on the lawn: hence the relevant forum is "permanent monuments on the lawn of the Ogden City municipal building."
>
> *Summum v. City of Ogden, supra,* 297 F.3d at 1002

Somehow that distinction was lost in the shuffle. In *Ogden*, the property at issue was a municipal building rather than a park, so the court continued the analysis and concluded there was a limited forum for the

erection of permanent structures. Since the city had not provided evidence of a pre-litigation policy to exclude the proposed Summum monument based on its lack of historical relevance, the court ruled against it. *Summum v. City of Ogden, supra,* 297 F.3d at 1006.

Apparently, in the Tenth Circuit, no sort of limited forum can ever be created within the confines of a public park. But this Court has advised that a more thorough analysis is required when limited access is sought by a speaker:

> When speakers seek general access to public property, the forum encompasses that property.... In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.
>
> *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., supra,* 473 U.S. at 801

Examples abound: *Perry Local Educators' Assn. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983) (a public school's internal mail system and teachers' mailboxes); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (advertising spaces on city-owned buses); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, supra,* 288 F.3d at 625 (Virginia's special license plate program); *Air Line Pilots Ass'n, Int'l v. Dept. of Aviation of Chicago,* 45 F.3d 1144, 1151-52 (7th Cir. 1995) (airport display cases rather than the airport itself); *Texas v. Knights of the Ku Klux Klan,* 58 F.3d 1075, 1078 (5th Cir. 1995) (Adopt-A-Highway

Program program as a whole rather than the State's highways or a particular sign).

The tailored *Cornelius* approach is exactly what is needed here. The access Summum followers seek is not general access to the park for assembly and debate, but limited access to erect a permanent monument. The Tenth Circuit opinion is fatally flawed from the outset in failing to make this critical distinction.

B. Pioneer Park's Historical Display Is Neither A Traditional Nor A Designated Public Forum.

The Tenth Circuit decision hinges on the assumption that the park is a public forum--period. That presupposition is critical, because Summum's asserted right to display its monument in Pioneer Park depends on whether the applicable forum is public or instead is reserved for specific official uses. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 761 (1995).

1. The Park Is A Traditional Public Forum For Assembly And Debate, But Not For The Erection Of Permanent Structures.

The city must allow assembly and debate in its streets and parks, which "by long tradition or by government fiat have been devoted to assembly and debate." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., supra,* 473 U.S. at 802; *Hague v. CIO*, 307 U.S. 496, 515 (1939). But the constitution does not

require it to open an unrestricted forum for permanent structures:

> Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.
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> *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., supra,* 473 U.S. at 799-800

The decision below fails to distinguish the transitory expression traditionally associated with public fora--speech, assembly, handbills--from the erection of permanent structures. The difference is monumental. Traditional public fora are defined not only in terms of the type of property--streets, parks, sidewalks--but also on the type of access sought:

> 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.

> *Summum v. Pleasant Grove City, supra*, 499 F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc) (emphasis added)

The Tenth Circuit justifies its conclusion by stating that:

> The city may further its interest in promoting its own history by a number of means, but not by restricting access to a public forum traditionally committed to public debate and the free exchange of ideas.
>
> *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1054

The court relies on a statement from Justice Kennedy's concurring opinion in *International Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992), that government may not "assert broad control over speech or expressive activities" in a public forum unless it alters the objective physical character or uses of the property and bears the costs. *Id*. at 700 (Kennedy, J., concurring). The court goes on to suggest that the city could simply ban all permanent monuments as a reasonable time-place-manner restriction. *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1054.

But the city has not asserted the sort of broad control over expression that is prohibited in a public forum. Prior to setting up its historical exhibit, private speakers were not at liberty to construct permanent monuments in Pioneer Park. They have not acquired that right merely because the city has chosen to set up a display to highlight local history.

Oral communication and distribution of literature is not equivalent to more permanent means of expression that is not the hallmark of a traditional public forum. For example, private speakers are not necessarily entitled to post signs on public property where the prohibition does not curtail their existing freedom to speak:

> While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places...a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. [citations] The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.
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> *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)

This Court found reliance on the public forum doctrine to be misplaced in this case, because there was no traditional right to access utility poles for communication comparable to that recognized for public streets and parks. *Id*. at 814. Although Pleasant Grove's exhibit is in a city park, there is no traditional right to erect structures comparable to the right to speak, assemble, and hand out literature.

2. The City Has Not Granted Open Access To Pioneer Park For The Erection Of Permanent Structures.

In a factually similar Summum case, the Tenth Circuit explained that:

> ... the City asserts that no constitutional right exists to erect a permanent structure on public property. We do not need to address that proposition in its most general application, however, because in any event it does not apply when the government allows some groups to erect permanent displays, but denies other groups the same privilege.... ("*First Amendment* jurisprudence certainly does mandate that if the government opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations . . . .")
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> *Summum v. Duchesne City, supra,* 482 F.3d at 1274

But Pleasant Grove City has not opened Pioneer Park to "some groups" to erect permanent structures as a means of private expression. Its purpose in creating the exhibit was to communicate a government-sponsored message commemorating local history, not to establish an open forum for private speakers. The city has not allowed the "general access" or "indiscriminate use" that characterizes a designated public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra,* 460 U.S. at 47. Officials have not created a designated public forum for

expressive activity that bind it to the standards applicable to a traditional public forum.

3. If The City Is Forced Into An All-Or-Nothing Position, There Would Either Be An "Array Of Clutter" Or An Unnecessary Chilling Of Expression. Neither Alternative Is Acceptable.

When this Court decided *Forbes*, it was mindful of the threatened "cacophony" that could result if all political candidates had to be provided air time. Moreover, the Court commented on the desirability of encouraging private expression to the fullest extent feasible:

> The *Cornelius* distinction between general and selective access furthers *First Amendment* interests. By recognizing the distinction, **we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all**. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.
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> *Ark. Educ. Television Comm'n v. Forbes, supra,* 523 U.S. at 680 (emphasis added)

The *Forbes* "cacophony" is analogous to the probable "influx of clutter" if Pleasant Grove is required to accept any and all donations for Pioneer Park. *Summum v. Pleasant Grove City, supra*, 499 F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc). Ironically, while a decision in favor of Summum appears to protect free speech, it would actually chill a substantial amount of expression by foreclosing government-sponsored messages that in no way infringe the traditional rights of private speakers.

C. The Park Exhibit Is Not A Limited Public Forum In Spite Of Some Shared Characteristics.

If Pleasant Grove had extended an invitation to private speakers using its established criteria, there would be a classic limited forum based on characteristics established by this Court and acknowledged in the Tenth Circuit:

> The government may limit speech in a nonpublic forum to reserve the forum for the specific official uses to which it is lawfully dedicated.... When the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum, it creates a "limited public forum." See *Rosenberger, supra,* 515 U.S. at 829-30; *Lamb's Chapel v. Center Moriches*

Union Free Sch. Dist., 508 U.S. 384, 390-92 (1993).

Summum v. Callaghan, supra, 130 F.3d at 916

Pleasant Grove's objective criteria appear to fit the limited public forum mold. Officials consider content (historical relevance) and the type of speaker (those with close ties to the community). However, these criteria were instituted to define the city's own message, not to create an opportunity for private expression.

1. Forum Analysis Must Consider <u>All</u> The Facts And Circumstances.

Even if there were a forum, the analysis is not always straightforward. Sometimes a forum has spatial boundaries or time limitations within a larger area. Pioneer Park's exhibit does not encompass the entire park property, nor does it interfere with the oral and written communications historically associated with public fora. The Tenth Circuit mechanically assumes that a public park must always constitute a traditional public forum, regardless of the mode of expression or limitations as to time or space. The panel distinguishes earlier Tenth Circuit decisions in *City of Ogden* and *Callaghan* because the properties involved there--a municipal building and courthouse lawn--were not the kind of property which has "immemorially been held in trust for the use of the public." *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1051, citing *Hague v. CIO, supra*, 307 U.S. at 515. The court reasoned that the particular means of communication--display of monuments--was relevant

to defining the forum but not its classification as public or nonpublic. *Id*. at 1051.

The Tenth Circuit made a similar analytical error in *Eagon v. City of Elk City,* 72 F.3d 1480 (10th Cir. 1996). Individuals sued Elk City for violating their free speech rights after officials excluded their display from "Christmas in the Park," an annual event during which individuals and groups were permitted to erect displays in Ackley Park. The court defined the forum as "Ackley Park during the 'Christmas in the Park' event," but erroneously classified it as a public forum. *Id*. at 1487. Although the forum encompassed the entire park and invited general participation, it was limited to a particular time frame and content--displays related to the holiday season. The rejected display, "Merry Christmas from the Beckham County Teenage Republican Club," fit the criteria but was excluded due to its partisan nature. The Tenth Circuit could have ruled in favor of the plaintiff club by finding impermissible viewpoint discrimination in a limited public forum, rather than ignoring the forum parameters altogether.

Although streets, parks, and sidewalks have historically been recognized as traditional public fora, the particular type of government property is not always conclusive. Public sidewalks are normally public fora, but in *United States v. Kokinda,* 497 U.S. 720 (1990), this Court concluded that the sidewalk in front of a post office was a nonpublic forum and upheld postal regulations banning solicitation on the sidewalk. It is crucial to look at all the facts and circumstances, including the mode of expression, to classify the appropriate forum.

2. A Limited Public Forum Could Be Created To Commemorate Local History, But The Pioneer Park Exhibit Is Solely A City-Sponsored Message.

A previous Tenth Circuit decision left open the possibility that a city might create a limited public forum based on historical relevance:

> We do not conclude that a municipality may never maintain a nonpublic forum to which access is controlled based upon "historical relevance" to the given community. Rather, we conclude only that, here, the City of Ogden failed to employ adequate safeguards to ensure that the "historical relevance" criterion did not devolve into a mere post hoc facade for viewpoint discrimination.
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> *Summum v. City of Ogden, supra,* 297 F.3d at 1006

Ogden was unable to show evidence of a policy that it would allow it to display the Ten Commandments monument but reject the Summum's Seven Principles monument. The lack of such a policy resulted in an unreasonable risk of viewpoint discrimination. *Id*. at 1009.

Unlike Ogden, Pleasant Grove does have an established policy that officials have followed for many years. The Tenth Circuit panel acknowledges the *Ogden* holding but rejects its applicability solely because the historical display is in a city park:

> In *City of Ogden*, however, we simply noted that we were *not* deciding that a city "may never maintain a *nonpublic* forum to which access is controlled based upon 'historical relevance' to the given community." *297 F.3d at 1006* (emphasis added). In other words, we left open the question whether a city could limit access to a nonpublic forum based on historical relevance. More important, we did not express any opinion about the use of historical relevance criteria to justify content-based discrimination in a public forum.
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> *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1053

The Tenth Circuit acknowledges the potential for a limited public forum to commemorate local history but assumes that a public park could never be the physical setting for such a forum. That conclusion bypasses the nature of the access sought. Moreover, Pleasant Grove is acting as actual sponsor of the message about its history. The city has not invited speakers to set up privately owned displays concerning that topic.

3. Pleasant Grove Has Not Engaged In Viewpoint Discrimination Against Summum.

As the "speaker," Pleasant Grove City may favor certain speech on the basis of viewpoint. But even if this Court were to classify the park exhibit as a limited forum for private speech, there is no apparent viewpoint discrimination that would preclude officials from rejecting the Summum monument. The Pioneer

Park display is descriptive of the city's history, not prescriptive. Summum's monument is excluded because it is not describe any aspect of city history. The display includes two religious structures, the Ten Commandments and an ancient Mormon artifact from a religious temple. Both are relevant to the city's visual description of local history. The city makes no claim to prescribe religious doctrine or to endorse Judaism, Christianity, or Mormonism. Its passive display--like the one in *Van Orden*--acknowledges the role of religion in city history.

CONCLUSION

The Foundation for Free Expression urges this Court to find that the Pioneer Park historical display is the speech of Pleasant Grove City. The city has sponsored a descriptive message about its history without adopting the individual language contained on every display item. Moreover, its exhibition of historically relevant artifacts containing religious texts does not constitute government endorsement of any particular religion.

Respectfully Submitted,

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