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 FOR AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor.

2. Whether the Tenth Circuit erred by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties.

3. Whether the Tenth Circuit erred by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Texas, Virginia and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing citizens whose First Amendment rights have been violated.

Liberty Counsel believes there is a significant difference between government and private speech. Denial of the government's right to speak without inviting private parties to speak as well, especially in a permanent way, such as the inclusion of a permanent monument sought by Respondent, significantly undermines the distinction between government and private speech. It is critically important that the government's right to speak and endorse only those messages with which it agrees not be sacrificed or undermined by equating private and government speech.

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[1] Liberty Counsel files this brief with the consent of all parties. Both Petitioner and Respondent have a consent letter on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae or its counsel made a monetary contribution to the preparation and submission of this brief.

Liberty Counsel does not endorse the idea that the government should be able to place prior restraints on private speech by permitting some private speech and not other private speech. However, Liberty Counsel supports governments' rights to create and adopt a message without being required to allow every private party that disagrees with that message to speak, especially when such private speech is permanent. Liberty Counsel is extremely concerned about the effects this case could have in stifling government speech, opening traditionally nonpublic fora to private speech and adversely affecting the esthetics of traditional public fora. Liberty Counsel, therefore, seeks to ensure that this Court has the information necessary to review this case in the broader context.

SUMMARY OF ARGUMENT

This case does not implicate the First Amendment. It is about the government's right to speak without inviting the multitudes into the same forum to counter the government's message. The implications of this case are far reaching, and affirming the decision of the Tenth Circuit will rescind cases regarding everything from the law of tax and property, as they relate to gifts, to Free Speech and Establishment Clause issues.

The displays and monuments are owned by Pleasant Grove City. Once the displays and monuments

were donated to the City and the City accepted them, the displays were no longer the property of private citizens or organizations. The City could remove, modify, remake, or sell the displays as it pleased. The speech emanating from the displays is therefore manifestly government speech, not private speech.

Pleasant Grove's mere acceptance of privately donated displays did not cause the City to establish a public forum for a cacophony of competing and conflicting private messages. In the absence of a public forum for permanent private displays, private persons may not force the government to accept their monuments.

The Tenth Circuit did not give due weight to the distinction between temporary and permanent displays. The difference between a temporary and a permanent display is significant. Permanent displays carry the indicia of government speech. Here the displays and monuments in Pioneer Park are permanent, not temporary. It is inconceivable that Pleasant Grove City would have created a forum for permanent private speech. Under the facts of this case, the displays are government speech. Therefore, the First Amendment is not implicated and Summum cannot contend that the City must be forced to accept its display.

The Tenth Circuit's decision contorts the First Amendment and turns this Court's precedent on its head. If the Tenth Circuit's decision is not reversed, every time the government accepts ownership of a

donated or discounted display and erects that display, the government will be required to open its parks as a dumping ground for private displays. The result is absurd. If the government is forced to accept a flood of conflicting messages every time it displays its own donated or discounted display, the government will become mute. The Statute of Liberty would need to make room for the Statue of Tyranny or perhaps a statue of Stalin or Hitler.

While this case has profound implications, and, if not properly decided could wreck the First Amendment, the resolution is quite simple. The displays and monuments are owned by Pleasant Grove City, and thus the speech is government speech, not private speech. There is no public forum for permanent displays by private persons. Thus, a private speaker may not force the government to accept its display where the government did not open a public forum for such displays.

This Court should reverse the decision of the Tenth Circuit and uphold this Court's longstanding precedent.

ARGUMENT

I. THE GOVERNMENT IS THE OWNER OF THE MONUMENTS IN THE PARK AND IS THEREFORE ALSO THE SPEAKER OF ANY MESSAGES THE MONUMENTS CONVEY.

Pleasant Grove City procured ownership of a number of displays and monuments through donations by private parties.[2] The City elected to place the displays and monuments in Pioneer Park, and upon that decision, the gifts were effected. Pleasant Grove City exercised its discretion of whether to accept the donations, where to place the displays, and at all times remained free to remove, destroy, modify, remake, and sell the monuments and displays.[3] These indicia of ownership inevitably lead to the conclusion that the messages conveyed by these displays and monuments belong to the City.

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[2] In Pioneer Park there are 11 displays and monuments. These include: Old Bell School (oldest known school building in Utah); First City Hall (original Pleasant Grove Town Hall); Pioneer Winter Corral (historic winter sheepfold); First Fire Station (facade of city's first fire station with plaque); Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois); Pioneer Log Cabin (replica, built in 1930); Pioneer Water Well (donated by Lions Club in 1946); Pioneer Granary (built in 1874 donated by Nelson family); Ten Commandments Monument (donated by Fraternal Order of Eagles in 1971); September 11 Monument (project of local Boy Scouts); and Pioneer Flour Mill Stone (used in first flour mill in town, donated by Joe Davis).

[3] The words "displays" and "monuments" will be used interchangeably to connote the same objects.

A. The Monuments In The City Park Are Owned By The City Based On The Concept Of Transfer Of Property By Gift.

This Court, in 1994, referred to the common-law principle of a gift as the "bilateral transaction, requiring not only a donor's intent to give, but also a donee's acceptance." *U.S. v. Irvine*, 511 U.S. 224, 239 (1994). In *Irvine,* the beneficiaries of a trust sought a refund of gift taxes and interest paid on what the Internal Revenue Service determined was a gratuitous transfer. *Id.* at 224. In determining that "a remainder interest in a trust is subject to federal gift taxation when the creation of the interest . . . occurred before enactment of the gift tax," this Court analyzed "the transfer of property by gift" under 26 U.S.C.§ 2501(a) (2004), citing the common-law principle of gifts, as stated above, as a bilateral transaction, which once effected, extinguishes the donor's rights to the property. *Irvine,* 511 U.S. at 224, 232.

Here, like in *Irvine*, a bilateral transaction was made. The Fraternal Order of the Eagles intended to give the Ten Commandments monument to Pleasant Grove City, relinquishing all control over and interest in the monument, and the City accepted the gift. However, not only was there an intent to transfer and acceptance, but the actual transfer was effected, meaning the City now has actual possession of the monument. To find that the monuments in Pioneer Park are not government-owned would upset the concept of gifts in tax and property law. Since the City is the owner of the monuments, any messages

conveyed on the monuments are not the speech of the donors, but rather the speech of the current owner, the City.

B. The City's Ownership Of The Monuments Is Evident Based On The City's Control Of The Monuments And The City's Subsequent Ability To Remove, Destroy, Modify, Remake, And Sell The Monuments.

When a City has control over monuments that were donated to the City and have been placed on City property, the City is the owner of those monuments. *Summum v. Pleasant Grove City,* 499 F.3d 1170, 1177 (10th Cir. 2007) (McConnell, J., dissenting) (citing *Serra v. U.S. General Servs. Admin.,* 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork). In this case, the Tenth Circuit erred in failing to recognize the monuments are government owned monuments that convey governmental speech, and subsequently erred in conducting a First Amendment analysis under strict scrutiny. *Summum*, 499 F.3d at 1050.

This rule of law is evident based on *Summum, Serra*, and, additionally, can be inferred from this Court's decision in *Van Orden v. Perry,* 545 U.S. 677 (2005), in which this Court found that the monument on Texas State Capitol grounds did not violate the Establishment Clause of the First Amendment. The

monument in *Van Orden* is very similar to one of the monuments displayed in Pioneer Park, and in fact, the monument in *Van Orden* and one of the monuments in Pioneer Park were both donated by the Fraternal Order of Eagles. *Id.* By conducting an Establishment Clause analysis in *Van Orden*, this Court implied that the government owned the Texas Display and that the message on the display was government speech. It follows that this Court should find that the monuments in Pioneer Park are government-owned and the messages on those monuments are government speech.

The City's control of the displays in the park are not only evident based on the nature of their receipt, being by gift or donation, but also because the City has the ability to sell property donated to the City and gain a profit from that sale. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). *Mercier* is another case with a fact pattern very similar to this case. In *Mercier,* a private organization, the Fraternal Order of Eagles, offered a monument to the City of La Crosse, Wisconsin, which accepted the monument and displayed it on land owned by the City. Later, the display of the monument was challenged, and the City subsequently *sold* the monument and the land under the monument to the Fraternal Order of Eagles. *Id.* at 696-97.

Here, the same organization, the Fraternal Order of Eagles, donated one of the monuments in Pioneer Park. Pleasant Grove City has the same ownership rights as the City of La Crosse in *Mercier,* meaning,

just as easily as Pleasant Grove City accepted the monument donated by the Fraternal Order of Eagles and the message it conveys, the City can remove, modify, remake, or sell that monument and all of the other monuments similarly donated.

Not only does the City own and control these monuments, but the City's control of the monuments points to the conclusion that the messages on the monuments are government speech, because when a government controls speech, the speech becomes government speech. *Johanns v. Livestock Marketing Association, et al.*, 544 U.S. 550, 560 (2005). *Johanns* is a case regarding the funding of advertisements for beef. *Id.* at 550. In *Johanns*, the Respondent, understanding that the government may generally speak to "advocate and defend its own policies," attempted to convince this Court that the beef advertisements, made under the supervision and approval of the federal Government, were not "government speech." *Id.* at 559-60 (quoting *Board of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000)). This Court in *Johanns* declined to address the contention that the government was not the speaker, stating "[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself," and that "the Government's own speech . . . is exempt from First Amendment Scrutiny." *Id.* at 553, 560. This Court determined that because the government controlled the promotional campaigns, which was evident to this Court based upon the Secretary of Agriculture's ability to supervise and

approve the promotional campaigns, the promotional campaigns were government speech. *Id.* at 560.

In this case, the same type of analysis should be conducted regarding the monuments' conveyance of government speech. Here, the City is in control of the monuments. Whether the monuments or artifacts in the public park (City owned property) were initially donated by a local family, the local Boy Scouts, or the Fraternal Order of Eagles, the monuments and artifacts are now under the control of the City, which, accordingly, is now responsible for the up-keep of the displays, as well as the up-keep of the area surrounding them. Therefore, through the City's control of the monuments, the City's ownership of the monuments and the messages inscribed thereon is apparent.

C. The City's Ownership Of The Monuments Is Evident Based On The Nature And Location Of The Displays.

"An unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands."[4] *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753,

[4] Justice Souter's concurrence refers to the Ku Klux Klan's willingness to display a disclaimer on the cross noting its private ownership. However, the plurality, based on the reasonable observer's understanding that it was a common practice for private individuals to erect temporary displays (without private ownership disclaimers) on Capitol Square, held that the Latin cross was permissible without a disclaimer. *Id.* at 753.

786 (1995) (Souter, J., concurring). *Capitol Square* is a case in which the plurality determined it was permissible for the Ku Klux Klan to *temporarily* display a Latin cross on state capitol grounds when the property had been opened to the public for speech, and permission was granted based on the same terms required of other private groups that had previously been granted permission to erect *temporary* displays. *Id.* at 763.

In Pioneer Park, none of the displays or monuments indicate that they are privately owned. In fact, the precedent set in Pleasant Grove City, requires private parties wanting to erect a display to gift their displays to the City, allowing the City to decide whether to accept the display and along with it, any message the display conveys. Pleasant Grove City accepted the displays and monuments in Pioneer Park with the understanding that the City owned the displays and adopted any messages the displays convey. *Id.*

The City accepted the displays and monuments as gifts from private donors, has controlled the displays and monuments, and has taken the responsibility for their up-keep. The displays and monuments stand on City-owned property. They are permanent, meaning the length of time they will be displayed rests solely within the discretion of the City. Just like a statue or a historical sign erected by a city in its park, the displays in Pioneer Park are commonly understood to be government, not private, displays.

Thus, any messages conveyed on the displays and monuments are the speech of Pleasant Grove City.

II. WHEN THE GOVERNMENT SPEAKS IN A FORUM, THAT FORUM IS NOT AUTOMATICALLY OPENED TO PRIVATE SPEECH.

The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated. *Adderley v. State of Florida*, 385 U.S. 39, 47 (1967). In *Adderley*, student demonstrators entered jail grounds, property owned by the public, to hold protests. *Id.* at 39. The demonstrators were asked by the sheriff to disperse, but they did not. The demonstrators were then arrested and subsequently convicted of trespassing. *Id.* This Court held in *Adderley* that "The United States Constitution does not forbid a State to control the use of its own property for its own nondiscriminatory purpose." *Id.* at 48.

Here, as in *Adderley*, Pleasant Grove City uses a portion of Pioneer Park for the specific purpose of displaying City-owned monuments and artifacts that portray the Mormon pioneer-era heritage of Pleasant Grove, the established community tie of local civic groups to the City, or both. Because Summum did not meet the criteria set by the City, the monument was not accepted.

In not allowing Summum, a private party, to erect its private monument in Pioneer Park, the City simply followed a policy enacted to preserve the

property for the nondiscriminatory use to which it is dedicated – to share the history of Pleasant Grove City with park-goers. The display of the historic monuments and artifacts is government speech, and when a government speaks, or conveys a message in its own voice, as Pleasant Grove did here, the government has no obligation to provide an equivalent platform for private speech.

A. Pleasant Grove City Has Not Created A Forum For Permanent Private Displays.

Generally, parks and sidewalks are considered traditional public fora; however, this broad concept does have restrictions. *U.S. v. Kokinda,* 497 U.S. 720 (1990). In *Kokinda*, this Court determined that a sidewalk next to a post office was not a traditional public forum because the sidewalk had not been dedicated to First Amendment activity, and that under such circumstances, regulation is examined only for its reasonableness. *Id.* at 726-27.

Here, as in *Kokinda*, public property has been set aside for a specific purpose. Therefore, though the park is a forum open to temporary speech, Pioneer Park has not been opened for the unattended display of private expression. The displays currently in Pioneer Park serve the purpose of reminding the citizens and visitors of Pleasant Grove City of the history of the City. Hence, though Pioneer Park, like many other parks throughout the United States, is open to the public and individuals' active private

expression, it is not open to the public's *permanent* expression.

On Ellis Island, in New York, rests the Statue of Liberty, donated to the United States by France and dedicated on October 28, 1886.[5] The entrance of Putnam Memorial State Park, in Connecticut, contains an equestrian statue of General Israel Putnam, donated by Anna Hyatt Huntington.[6] The National Mall also contains a variety of displays, including the World War II Memorial and Vietnam Veterans Memorial, both designed by private individuals, and several memorials honoring past presidents.[7] The acceptance of these statues and memorials did not open these public parks for private parties to erect permanent monuments such as a Statue of Tyranny on Ellis Island, former Queen of England, Victoria Mary Adelaide in Putnam Memorial State Park, or statues of Osama Bin Laden or Adolf Hitler in the National Mall. Similarly, Pleasant Grove City's acceptance of the displays in Pioneer Park does not open the park for Summum's display of its Seven Aphorisms.

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[5] Statue of Liberty National Monument: History and Culture, http://www.nps.gov/stli/historyculture (last visited June 17, 2008).

[6] Putnam Memorial State Park, http://en.wikipedia.org/wiki/Putnam_Memorial_State_Park (last visited June 17, 2008).

[7] National Mall and Memorial Parks, http://www.nps.gov/nama (last visited June 17, 2008).

B. In The Absence Of A Public Forum, The Government May Refuse, Adopt, Accept, Or Endorse Private Speech.

In 1959, Ohio adopted a state motto, suggested by a 12 year old Cincinnati boy, James Mastronardo. Not wanting Ohio to be one of only two states without an official motto, James submitted a proposed motto in a contest sponsored by the Ohio legislature.[8] In 1959, "With God, all things are possible" was adopted as the official motto of the State of Ohio. Ohio Rev. Code Ann. § 5.06 (1959). Ohio's adoption of James' suggestion did not compel Ohio to adopt other suggestions.

Twenty-seven legislators and twelve percent of the population opposed the motto. T. Melindah Bush, *The Ohio State Motto Survives the Establishment Clause*, 64 OHIO ST. L. J. 585, 611 (2003). This opposition did not result in a requirement that Ohio accept a motto from one of the twenty-seven legislators or twelve percent of Ohioans who did not agree with the motto. Rather, the State of Ohio was able to both accept private submissions and adopt one proposed motto as its own while rejecting the rest. This is precisely what Pleasant Grove City should be permitted to do under the facts here.

This Court has previously stated that "[o]bliging people to 'use their private property as a 'mobile

[8] "Ohio's State Motto." Ohio History Central. July 1, 2005, http://www.ohiohistorycentral.org/entry.php?rec+1885.

billboard' for the State's ideological message' amounted to impermissible compelled expression." *Johanns v. Livestock Marketing Association,* 544 U.S. 550, 557 (2005) (citing *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (holding the New Hampshire requirement that individuals' license plates displaying the State's motto, "Live Free or Die," amounted to impermissible compelled expression)). *Johanns* held that advertisements promoting beef were government speech, and that therefore the government did not compel private expression. 544 U.S. at 550. However, though recognizing that government speech is not protected by the First Amendment as is private speech, the government, like a private person, should be protected from the type of compelled speech that would require Ohio to adopt an additional motto, or Pleasant Grove City to accept and display monuments that contain messages with which the City does not agree.

This Court should find that Pleasant Grove City has the right to refuse, adopt, accept, and endorse private speech when the government is speaking in a forum that is not open to similar private expression. When a city is forced to adopt a monument or display, the city also adopts any messages on the display or monument, and any liability that is associated with the monument or display; therefore, it should be up to the city to decide whether it wants to adopt that message and any liability that should arise from the government's association with that message.

C. The Tenth Circuit Erred In Failing To Recognize A Distinction Between Permanent And Temporary Speech.

Pioneer Park has not been designated as a forum for the erection of privately-sponsored temporary or permanent stand-alone displays. While some public parks permit privately-sponsored temporary displays, it is inconceivable that a public park would permit privately-sponsored permanent displays. The difference between a temporary and a permanent display is significant. Whether the mode of speech is communicated verbally, through the distribution of leaflets, picket signs, demonstrations, or seasonal or topical displays, private speech universally has one thing in common – it is temporary. Permanent displays carry the indicia of government speech.

Privately-sponsored seasonal or topical displays on public property are categorized as temporary because they, last, exist, or continue for a limited time. Webster's Third New International Dictionary of the English Language Unabridged 2353 (2002). This limited time may consist of a day, a week, or in some cases, a holiday season. If this Court were to follow the Tenth Circuit and allow permanent private monuments that are on display twenty-four hours a day, seven days a week, and three hundred and sixty-five days a year to be displayed on government property, the result would, in effect, redefine the purpose of a traditional public forum, a forum generally used for active communication, rather than for the purpose of dumping large, unattended, private displays.

Additionally, there are two other primary reasons why governments have an interest in banning permanent private displays on public property. First, the permanent private displays may lead to the visual clutter of public places like Pioneer Park, and second, when one individual or entity uses public space in a permanent way, no other individual can use that space to exercise First Amendment rights. *See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 (1984); *Hague v. Committee for Industrial Organization,* 307 U.S. 496 (1939).

1. Permitting permanent private displays on public property will disrupt the esthetics and create clutter in parks throughout the United States.

A City's purpose of eliminating visual clutter by not allowing private persons to display *permanent monuments* is justified and is certainly reasonable. *See Taxpayers for Vincent,* 466 U.S. at 808. In *Taxpayers for Vincent,* an action was brought seeking an injunction against enforcement of an ordinance prohibiting the posting of signs on public property. *Id.* at 789. The ordinance forbade affixing signs to government property, for example, telephone poles, public bridges, drinking fountains, trees, and traffic signs. *Id.* at 792.

Though "the esthetic interest in preventing the kind of litter that may result from the distribution of

leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizen's exercise of that method of expressing his views," this Court distinguished "individual citizens [that] were actively exercising their right to communicate directly with potential recipients of their message ([when] the conduct continued only while the speakers or distributors remained on the scene), [from the placement of] signs throughout an area where they would remain unattended until removed." *Id.* at 808-09.

Here, as in *Taxpayers for Vincent,* this Court must grant the City the opportunity to consider the esthetics of Pioneer Park as the City makes decisions about what types of displays may and may not be permitted on City property. Additionally, the City must be able to consider the interests of each individual, the entire public, in the City-owned property that a private display would consume.

2. Permitting one private individual to put a permanent monument on public property will inevitably inhibit the First Amendment rights of others.

Public fora cannot be opened to the permanent speech of one individual because, by their nature, they are intended to be open to the entire public "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Organization,* 307

U.S. 496, 515 (1939). In a challenge to enjoin Jersey City from interfering with plaintiffs' rights to speak and assemble freely, this Court stated that "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all." *Id.* at 515-16.

Therefore, to determine that private parties have a fundamental right to drop permanent monuments and displays in the backyard of the government would nullify this Court's established precedent. Affirming the holding of the Tenth Circuit would defeat the concept of public fora, and the purpose of public parks, inevitably granting some more access to the parks, and opportunities to speak in them, than others. This is partially because it would be impossible for all private parties of Pleasant Grove City to permanently speak in Pioneer Park, and partially because, in Pleasant Grove and throughout the country, green parks would be replaced with a plethora of monuments conveying a variety of messages. Therefore, this Court should reverse this decision below and find that the messages on the displays in Pioneer Park are not the speech of private individuals, and that private individuals may not place permanent monuments in the City-owned park.

D. When The Government Speaks On Government Property, That Property Is Not Automatically Opened To Private Individuals To Speak.

This Court, in *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37 (1983), "announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property." *U.S. v. Kokinda,* 497 U.S. 720, 726 (1990) (holding that a postal sidewalk was not a traditional public forum). Upholding the Tenth Circuit's decision would undermine the public forum doctrine and create confusion. It simply does not make sense to suggest that whenever the government speaks, private parties were due their turn to speak as well. Public schools and other fora where the government, or agents of the government, generally speak could no longer be closed or controlled if the Tenth Circuit's decision is affirmed. In fact, if this Court finds for Respondent, whenever a teacher cites disapproval of smoking, she will be required to open her classroom to private speakers with opposing messages.

Additionally, fora classified as designated or limited fora would require new classification, because, following the Tenth Circuit's rationale, a government could not open a forum to allow itself to speak, then close the forum. As Petitioner stated in the appeal, everyone would want their turn to speak, and when private individuals want to speak through the government permanently, like Summum here, the

City would be charged with the expense of placing and replacing the monuments. Therefore, this Court should find that private parties should not be permitted to speak whenever and however the government speaks.

E. The Government Has The Right To Preferred Messages.

This Court has illustrated the concept of the government's right to preferred messages by holding that Congress can choose to fund one activity to the exclusion of another. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In *Rust*, individuals challenged a law that did not allow funds allocated for family planning clinics to be dispersed to family planning services that could use the funds "in programs where abortion is a method of family planning." *Id.* at 195.

This Court found that it was permissible for the government to prefer traditional counseling regarding family planning to the exclusion of abortion counseling because counseling on abortion was simply outside of the scope of the project. *Id.* at 194-95. This analysis can also be applied here. The Pioneer Park displays include only monuments and artifacts that portray the Mormon pioneer-era heritage of Pleasant Grove, the established community tie of local civic groups to the City, or both. It is outside of the scope of the project of Pleasant Grove City to incorporate the Seven Aphorisms of Summum, an organization that does not even have a local chapter or office.

Therefore, like in *Rust*, it is permissible for the government to prefer and display messages regarding Pleasant Grove City's history and civic organizations.

Additionally, the Departments of Health of a number of different states have engaged in anti-smoking campaigns.[9] In fact, in Missouri, in 1999, a group called Project ASSIST (American Stop Smoking Intervention Study), which was sponsored by the Missouri Department of Health and the Kansas City Health Department, helped to select anti-smoking messages that were displayed on billboards throughout the state of Missouri.[10] State governments were able to engage in these anti-smoking campaigns because they have a right to preferred messages.

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[9] *See* New York City Department of Health and Mental Hygiene, Bureau of Tobacco Control, available at http://www.nyc.gov/html/doh/html/smoke/smoke1.shtml (last visited June 13, 2008)*; News from the Washington State Department of Health, Tobacco Prevention and Control Program,* Washington State Department of Health, June 27, 2001; Print Media Campaign, Department of Health – State of Hawaii, available at http://hawaii.gov/health/health-lifestyles/tobacco/media/printmedia.htm (last visited June 12, 2008); Press Release, California Department of Health Services, *California Releases New Data and Anti-smoking Ads Targeting Diverse Populations: Ads Break New Ground on Dangers of Drifting Secondhand Smoke in Apartments* (October 2, 2006).

[10] Press Release, Missouri Attorney General Jay Nixon, *Nixon, Anti-smoking Groups and Health Leaders Launch Anti-tobacco Billboard Campaign* (April 7, 1999), available at http://ago.mo.gov/newsreleases/1999/4799.htm.

Were a private party to donate the funds to the Departments of Health for the display of billboards such as those in Missouri, or were a private individual to donate the billboards themselves to the government, the State, upon accepting the funds or billboards, would not then be required to display a pro-smoking message. The same is true in this case, where private parties donated historic and civic displays to the government. Just as would be the case regarding the government's anti-smoking message, acceptance of the displays here, did not cause Pleasant Grove City to be required to accept all monuments and displays, and the City is especially not required to accept monuments and displays that are not relevant to the City's purpose in accepting any monuments.

III. THE CONSEQUENCES OF THIS COURT'S RULING WILL HAVE FAR-REACHING EFFECTS ON FREE SPEECH RIGHTS.

The potential reach of this case goes far beyond a park in Pleasant Grove City, Utah. This Court's decision could dramatically affect the First Amendment. Adoption of Respondent's proposed approach to government speech and permanent private speech in traditional public fora would collapse established concepts of tax and property law and free speech, and create confusion throughout the judicial system and even the State and National Parks Services.

Cities that do not require individuals to have permits to speak in public places could become the dumping ground for permanent private expression, likely causing local governments throughout the country to implement prior restraints and other efforts that would impede temporary speech, speech that would otherwise be protected by the First Amendment.

Government-owned memorials erected for the purpose of honoring soldiers who served faithfully and honorably in war throughout the history of the United States of America could be overshadowed by permanent monuments with opposing messages, honoring the Redcoats, Adolf Hitler and his Nazis, Joseph Stalin, Saddam Hussein, Fidel Castro, or Osama Bin Laden, causing the government to appear to contradict its own message.

If the government would have to allow a cacophony of competing and conflicting private voices every time it spoke through a donated or discounted display which it owned and controlled, then the government would become mute. Government expression would cease. The Tenth Circuit's decision is a recipe for chaos.

The government's acceptance of a monument and its message yields government speech, and when the government speaks in a permanent way on government property, that property is not automatically opened for every private individual to place

a permanent monument on the same government property in the name of free speech.

CONCLUSION

The Tenth Circuit incorrectly decided that when a government accepts a donated monument and places that monument on the property of the government, that the message contained on the monument is not government speech. In the interest of preserving the governments' opportunities to convey important messages to the people they represent, this Court must reverse the decision of the Tenth Circuit.

Respectfully submitted,

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