No. 07-665

In the Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL., PETITIONERS

v.

SUMMUM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Free Speech Clause of the First Amendment to the United States Constitution entitles a private group to insist that a municipality permit it to erect a permanent monument in a city park that currently contains a number of objects donated by other private individuals and groups and accepted by the municipality for display in the park.

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INTEREST OF THE UNITED STATES

This case concerns whether the Free Speech Clause of the First Amendment to the United States Constitution entitles a private group to insist that a municipality permit it to erect a permanent monument in a city park that currently contains a number of objects donated by other private individuals and groups and accepted by the municipality for display in the park. The United States has a substantial interest in the resolution of that question. The National Park Service manages 391 park units, which span more than 84 million acres throughout the United States and its territories. National parklands contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, a great deal of the public sculpture in Washington, D.C.,

and all but one of the 1324 monuments, markers, tablets, and plaques on display at Vicksburg National Military Park. There are also numerous privately donated objects on permanent display on military bases, in government-owned museums, and on other government property. See App., *infra*, 1a-11a. The United States has participated as a party or amicus curiae in prior cases addressing the scope of the government speech doctrine. See *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666 (1998).

STATEMENT

1. Pioneer Park (Park) is a 2.5 acre public park located in the Historic District of petitioner Pleasant Grove City, Utah (the City). J.A. 98-99. Pioneer Park appears to have been established in the 1940s, J.A. 101, and it currently contains 15 permanent displays, J.A. 99-102, at least 11 of which were donated to the City by private individuals and groups.[1] The privately donated displays include a wishing well donated by the Lions Club in 1946; a millstone from the City's first flour mill donated by a local resident in 1967; a Ten Commandments monument donated by the Fraternal Order of Eagles (Eagles) in 1971; park benches donated by the Pleasant Grove Garden Club in 1977; a stone from the original Mormon Temple in Nauvoo, Illinois donated by

[1] A November 14, 2005, declaration by the city administrator states that Pioneer Park "contains" 16 specified displays, including a "First Log Cabin" that was "[d]onated by Joe Spencer in September, 2005." J.A. 99, 102. In depositions taken on November 17, 2005, however, both the city administrator and the City's then-mayor clarified that that log cabin had yet to be placed in the Park. J.A. 134-135, 190.

a City resident in 1978; a historic winter sheepfold donated by a private company in the 1990s; an 1874 granary donated by City residents around 2000; the City's first fire station donated by a local resident upon her death; two separate displays consisting of a tree and a plaque that were donated by the Pleasant Grove City Court/Council and 4-H; and a brick monument commemorating the events of September 11, 2001, that was constructed by a local Eagle Scout and his troop with the support of the Pleasant Grove Firefighters and several local businesses. J.A. 99-102, 167-168, 171, 173-174, 178. The other permanent displays include the oldest known school building still standing in Utah; the original Pleasant Grove Town Hall; a rose garden planted in honor of two longtime City residents; and a log cabin built in 1930. J.A. 99, 101; see J.A. 105-120 (photos of 12 of the 15 permanent displays).

Respondent is a church that was founded in 1975 and is headquartered in Salt Lake City, Utah. J.A. 13. In September 2003, respondent's president wrote two letters to the City's mayor requesting permission to erect in Pioneer Park a "stone monument" that would be "similar in size and nature" to the Ten Commandments monument donated by the Eagles in 1971 and would contain "the Seven Aphorism of SUMMUM." J.A. 57; see J.A. 59. Although the initial letter stated that respondent's faith "is based upon teachings that precede the ancient Egyptians" and that "[t]hose teachings are summarized in our Seven Aphorisms," J.A. 57, neither letter quoted the Aphorisms nor said anything about the content of the proposed monument, J.A. 57-60.[2]

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[2] According to the Tenth Circuit's decision in *Summum* v. *City of Ogden*, 297 F.3d 995 (2002), the Seven Principles Monument at issue in

The City denied respondent's request. J.A. 61-62. In a November 2003 letter explaining the decision, the City's mayor wrote that the City's "practice—established over many decades—has been to limit structures, displays, monuments, etc." in Pioneer Park to items "which either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." *Ibid.*; accord J.A. 102-103.[3]

In August 2004, the Pleasant Grove City Council passed a resolution (2004 resolution) regarding the permanent placement of objects on public lands. Pet. App. 1h-4h. According to a declaration from the city administrator, the 2004 resolution "put in writing [the City's] decades-old policy regarding such donations." J.A. 104. The 2004 resolution states that "approval must be obtained from the City Council" before "any permanent object such as plaques, structures, displays, signs, and monuments [may be] placed on public property." Pet. App. 2h. It provides that "[r]equests for placement or offers of donation" shall be made initially to the Director of Leisure Services (Director), a government official, and should contain "[a] brief description of the proposed item including the item's dimensions, along with any available photographs, drawings[,] artist's renderings, etc. and a description of the proposed placement location." *Ibid.* The Director is to then submit the request to the City Council "for their consideration and acceptance or denial." *Ibid.*

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that case would have included the Principles of "Psychokinesis," "Correspondence," "Vibration," "Opposition," "Rhythm," "Cause and Effect," and "Gender." *Id.* at 998 n.2.

[3] Before the court of appeals, respondent asserted that it did not receive the November 2003 letter. Pet. App. 3a n.1.

The 2004 resolution outlines various criteria that "[t]he City Council shall consider * * * before accepting offers to place" a covered item on public property. Pet. App. 2h. Under those criteria, a proposed display must either "directly relate to the history of Pleasant Grove and have historical relevance to the community," or be donated "by an established Pleasant Grove civic organization with strong ties to the community" or donors who "have a historical connection with Pleasant Grove City." *Id.* at 2h-3h; see *id.* at 3h (identifying eight subfactors concerning historical relevance). The City Council must also determine that the object "does not create any safety hazards" and "is not obscene." *Id.* at 4h. If the object "meets the above-listed criteria," the City Council must also "consider the proposed location of the item and evaluate the aesthetics of the proposed placement, the effect said placement will have on the remaining open space on the public property, any safety issues, and any other visual or practical effects of locating the item on the proposed site." *Ibid.* And "[b]ased upon the factors listed, the [City Council] shall make the final determination as to whether the item shall be accepted and where the item shall be placed." *Ibid*.

In May 2005, respondent's president again wrote to the City's mayor asking permission to erect a monument in Pioneer Park and stating that respondent would assume that its request had been rejected unless it received a response within ten days. J.A. 63-64. As with respondent's previous letters, the May 2005 letter did not describe the proposed monument beyond stating that it "would contain the Seven Aphorisms of SUMMUM and would be complementary in content and appearance to the Ten Commandments monument." J.A. 63. Nor did the letter assert that the proposed monu-

ment would have historical relevance to the City or that respondent had present ties with, or a historical connection to, the community. After evaluating the renewed proposal pursuant to the 2004 resolution, the City Council rejected respondent's request, J.A. 104, and did not respond to respondent's letter, Pet. App. 3a.

2. In July 2005, respondent filed suit against the City and various current and former City officials (collectively, petitioners), alleging that the refusal to permit respondent to install its proposed monument in Pioneer Park violated the Free Speech Clause of the First Amendment to the United States Constitution, as well as the Free Expression and Establishment Clauses of the Utah Constitution. J.A. 18-20. Respondent sought preliminary injunctive relief, relying exclusively on its federal free speech claim and asking the district court to direct petitioners to permit respondent "to immediately erect a monument comparable to the Ten Commandments monument in the relevant city park." C.A. App. 86-87. The district court orally denied respondent's motion for a preliminary injunction, concluding that "[i]t is not clear and it has not been established that there is a substantial likelihood of success on the merits." Pet. App. 3b; see *id.* at 1c (minute order).

3. The court of appeals reversed and remanded with instructions to enter a preliminary injunction. Pet. App. 1a-23a. The court noted that it had "previously characterized a Ten Commandments monument donated by the Fraternal Order of Eagles and placed by [another] city on public property as the private speech of the Eagles rather than that of the city," and it rejected respondent's contention that this Court's subsequent decision in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), required it

"to treat the Ten Commandments monument as government speech." Pet. App. 3a n.2.

The court of appeals next determined that it "must engage in a 'forum analysis'" in assessing the constitutionality of petitioners' actions. Pet. App. 8a. It acknowledged that this Court "has chosen not to apply forum principles in certain contexts" that involve "selecting what private speech to make available to the public," but it concluded that forum analysis was appropriate here because the City was not "acting in its capacity as librarian, television broadcaster, or arts patron." *Id.* at 13a n.4. The court described the relevant forum as "[t]he permanent monuments in [Pioneer Park]," *id.* at 9a, determined that the Park as a whole constituted a traditional public forum, *id.* at 10a-13a, and concluded that the City's content-based criteria for accepting monuments for permanent display were subject to strict scrutiny, *id.* at 13a-14a. The court of appeals further held that the exclusion of respondent's proposed monument was unlikely to satisfy strict scrutiny, *id.* at 15a-16a, and that the remaining factors likewise supported the grant of preliminary injunctive relief, *id.* at 20a-23a.

4. The court of appeals denied rehearing en banc by an equally divided vote. Pet. App. 1f-27f.

a. Judge Lucero filed an opinion dissenting from the denial of rehearing en banc. Pet. App. 3f-9f. He "agree[d] with the panel that the[] monuments [currently in Pioneer Park] do not constitute government speech," *id.* at 3f, but was of the view that "a park is not a traditional public forum insofar as the placement of monuments is concerned," *id.* at 7f, and that the City was thus allowed to make "reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks," *id.* at 8f.

b. Judge McConnell also filed an opinion dissenting from the denial of rehearing en banc, which Judge Gorsuch joined. Pet. App. 10f-17f. In his view, "any messages conveyed by the monuments [in Pioneer Park] are 'government speech,' and there is no 'public forum' for uninhibited private expression." *Id.* at 12f.

c. Chief Judge Tacha, who had authored the panel's opinion, filed a response to the dissents from denial of rehearing en banc. Pet. App. 18f-27f.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the First Amendment's Free Speech Clause entitled respondent to a preliminary injunction compelling the City to permit it to erect its own stone monument in Pioneer Park. As this Court has repeatedly recognized, when the government speaks, it—like any other speaker—is entitled to shape and control its own message. The selection of objects for permanent display on government property, particularly when the objects themselves are owned by the government, constitutes core government speech. That conclusion is not altered by the facts that the City did not direct the original design of the objects currently on display in Pioneer Park, that many of them were donated by private parties, or that the City has not taken specific steps to adopt or disavow all possible messages conveyed by the individual objects. The same could be said of countless displays in government museums, collection decisions by government libraries, and statues and other commemorative objects on battlefields and other parks. Because the Free Speech Clause does not restrict the government's own speech, the conclusion that the selection of objects for permanent display in Pioneer Park—and the message conveyed by their dis-

play—itself constitutes government speech is sufficient to dispose of respondent's free speech claim.

Even if this Court were to conclude that some of the items currently on display in Pioneer Park constitute purely private speech, respondent's free speech claim would still fail. Municipal parks are traditional public fora with respect to speeches, demonstrations, and other acts of private expression that are limited in duration. This Court's decisions make clear, however, that the nature of a forum is determined by the type of access being sought as well as the status of the underlying property. There is (to say the least) no longstanding tradition of private parties erecting permanent monuments in public parks on their own accord. Nor has the City created such an unconventional "forum" by permitting the indiscriminate installation of privately owned or donated objects in Pioneer Park. Accordingly, because Pioneer Park is, at most, a nonpublic forum with respect to the permanent display of privately donated objects, respondent could not succeed on a free speech claim without showing either that the City's selection criteria are unreasonable or that they have been applied in a viewpoint discriminatory manner. The present record does not support either conclusion.

Historical and practical considerations reinforce the conclusion that the decision below cannot stand. Statues and commemorative objects displayed in public places, parklands, and battlefields across the country help tell the story of the Nation's history and heritage, and may convey important government messages. The constitutional rule adopted by the court of appeals would seriously erode the discretion that the government has always enjoyed to shape those messages as it sees fit by determining which monuments or objects to display, and

thus potentially transform the content, character, and solemnity of such displays. For example, under the decision below, a city's display of a privately donated monument to Abraham Lincoln could entitle an individual to insist that the city permit the erection of a monument to Jefferson Davis, or a group could insist that the presence of the memorial in Pioneer Park commemorating the September 11 attacks entitles it to erect a memorial to the terrorists who carried them out. There is no historical precedent for such a counter-intuitive regime, it finds no support in this Court's cases, and our Constitution does not compel it.

ARGUMENT

THE FREE SPEECH CLAUSE DOES NOT ENTITLE RESPONDENT TO ERECT ITS PROPOSED STONE MONUMENT IN PIONEER PARK

Respondent claims that the Free Speech Clause of the First Amendment to the United States Constitution entitles it to insist that the City permit it to erect a permanent monument in Pioneer Park containing the Seven Aphorisms of Summum. Believing that claim had merit, the court of appeals ordered the entry of a preliminary injunction requiring the City to allow respondent to erect its monument. That decision is seriously flawed and should be reversed by this Court.[4]

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[4] Respondent does not contend that the display of the Ten Commandments monument in Pioneer Park violates the federal Establishment Clause, nor does it assert that the City violated either the Establishment Clause or the Free Exercise Clause of the United States Constitution by refusing to accept and display respondent's own proposed stone monument. See J.A. 18-20 (complaint); Pet. 7; Br. in Opp. 21. Instead, the only claim before this Court is based solely on the Free Speech Clause. Pet. i; Br. in Opp. i.

A. The City's Selection Of Objects For Permanent Display In Pioneer Park Is Government Speech And Is Therefore Not Subject To Scrutiny Under The Free Speech Clause

1. The Free Speech Clause limits government interference with private speech; it does not place any limit on the government's own speech. "[S]ome government programs involve, or entirely consist of, advocating a position," *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005), and "[i]t is the very business of government to favor and disfavor points of view," *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). Thus, "when the State is the speaker, * * * it is entitled to say what it wishes," *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995), and it "may legitimately" seek "to communicate to others an official view as to proper appreciation of history, state pride, and individualism," *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977). Accord *Columbia Broad. Sys.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). These principles apply equally when the entirety of a particular communication is formulated and delivered by government officials, see *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 12-13 (1990), as well as when the government relies in whole or in part on "private entities to convey a governmental message," *Rosenberger*, 515 U.S. at 833. See *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 530, 541 (2001); *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U. S. 217, 234-235 (2000); *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U.S. 666, 674-675 (1998); *Rust* v. *Sullivan*, 500 U.S. 173, 194-195 (1991).

The fact that the Free Speech Clause does not limit the government's own speech does not leave those who object to such speech without recourse. "Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents." *Keller*, 496 U.S. at 12. As a result, "[w]hen the government speaks * * * it is, in the end, accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235. "If the citizenry objects" to what its government chooses to say, "newly elected officials later could espouse some different or contrary position." *Ibid.* In addition, like any other government action, acts designed to lend the government's own voice to the marketplace of ideas remain subject to other constitutional constraints. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 572 n.2 (1975) (Rehnquist, J., dissenting).

2. The selection and permanent installation of objects for commemorative purposes in Pioneer Park constitutes core government speech. The display of monuments and commemorative objects is a common method of telling the story of the history or heritage of a place. Indeed, even the simple act of consecrating a place may speak for the ages. Cf. Abraham Lincoln, *Gettysburg Address* (1863). To varying degrees, the display (and assembly) of monuments may likewise convey an important government message. The monuments displayed in Pioneer Park represent the City's own judgment as to what displays appropriately reflect its history and heritage. See pp. 2-3, 5, *supra*.

The land on which Pioneer Park sits is government property, and this Court has recognized the commonsense proposition that an object's display on real property generally constitutes an expressive act by the prop-

erty owner. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994) (signs on residential property); see also *Van Orden* v. *Perry*, 545 U.S. 677, 691 (2005) (plurality opinion) (referring to how "Texas has treated its Capitol grounds monuments"); *id.* at 701 (Breyer, J., concurring in the judgment) (observing that the physical setting of the Ten Commandments monument suggested that the "State itself" intended for the monument's nonreligious aspects to predominate); *id.* at 740 (Souter, J., dissenting) (referring to "the point that the government of Texas is telling everyone who sees the monument") (footnote omitted). Government property is, of course, different from private property in a number of ways, and certain kinds of public property are, either as a result of long tradition or affirmative act by the government, forums for certain kinds of private expression. See pp. 23-24, *infra*. But there is (to say the least) no tradition of granting private parties an unfettered right to erect permanent displays on public parklands across the country, and the City has never done so with respect to the parkland in this case.

Indeed, the City has done far more than merely "confine the content and topic of" messages conveyed by items placed in Pioneer Park. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 303 (2000). Rather, the overall message conveyed by the permanent displays in the Park is "effectively controlled by" the City Council through its exercise of "final approval authority" over the selection and placement of each individual item displayed in the Park. *Johanns*, 544 U.S. at 560-561. The 2004 resolution declares that no object may be permanently affixed to City property unless it is first "accepted" by the City Council pursuant to review criteria established by the Council itself. Pet. App. 4h; see J.A.

51, 90 (stipulation that the Ten Commandments monument was installed with the "specific permission and approval of Pleasant Grove and its governing council").

The City's ownership of all or nearly all of the items currently on permanent display in Pioneer Park underscores that the display constitutes government speech. See J.A. 100-102 (specifically identifying seven items as having been "[d]onated" to the City); J.A. 166 (city administrator stating that the City "owns" the Old Bell School).[5] As the owner of the objects, the City would be entitled to arrange, modify, or remove any of them without regard to the wishes of any previous owners. See *Serra* v. *General Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (concluding that artist had "relinquished his own speech rights in [a] sculpture when he voluntarily sold it to GSA," and thus could not object to its removal from a given location on public property). That continuing exercise of control over the completed display and its constituent parts is entirely incompatible with the notion that the City's purpose in permitting the permanent installation of objects in Pioneer Park was "to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, or "to facilitate private speech," *Velazquez*, 531 U.S. at 542. It would be startling if the First Amendment were construed to compel the government to accept title to property it does not want, or to accept the permanent storage on its land of such a monument or other fixture. Governments, like

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[5] That is not to say that ownership of an object is invariably *necessary* to make its display an act of speech by the party on whose property the display occurs. For example, an agreement to display a sign endorsing a political candidate in one's front yard constitutes speech by the property owner, regardless of whether the sign itself is owned by the candidate's campaign.

private persons, have long been understood to have the freedom not to own, as well as to own, property; to decline, as well as to accept, gifts; and to refuse to have their land permanently encumbered with another's property. The government's exercise of control over what objects will permanently adorn public lands does not "distort" any background principle of property law or widespread social practice. *Id.* at 543. To the contrary, it reflects both.

The fact that the City neither designed nor built most of the objects on display in Pioneer Park—including not only the Ten Commandments monument, but also the wishing well, the millstone, the stone from the Mormon Temple, the winter sheepfold, and the granary, see pp. 2-3, *supra*—does not change the analysis. The government speech at issue does not lie in the physical characteristics of the individual objects on display. It is possible that some of those objects, standing alone and without any context, would convey no discernable message at all. Rather, the City's speech consists of the determination of which objects will—and which objects will not—further the historical and commemorative purpose of Pioneer Park and the City's approval of the message that the permanent installation and display of accepted objects on public land conveys.

To be sure, the City did not design each individual monument or object displayed in Pioneer Park. But a person or entity need not "generate, as an original matter, each item featured in the communication" in order to be regarded as a speaker with protected discretion to convey a desired message. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995). Rather, the decision of which preexisting materials to incorporate into a larger communi-

cation is itself an act of speech by the person or entity that does the selecting. See *e.g.*, *ibid.* ("edited compilation of speech generated by other persons" and "selection of contingents to make a parade"); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994) (cable operator's "exercis[e] [of] editorial discretion over which stations or programs to include in its repertoire" (quoting *Los Angeles* v. *Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)). Accordingly, regardless of whether the permanent display in Pioneer Park "produce[s] a particularized message," each of the individual items reflects an individualized judgment by the City Council of "what merits celebration" in that setting. *Hurley*, 515 U.S. at 574.

For similar reasons, the governmental nature of the permanent display in Pioneer Park is not altered by the fact that most of the individual items were originally donated in their completed form by private parties. See pp. 2-3, *supra*. Throughout our Nation's history, federal, state, and local governments have sought to communicate various ideas and ideals by displaying monuments and other commemorative objects on public parkland. At times, the government itself constructs or purchases the object, such as the Washington Monument, whose construction was completed by the Army Corp of Engineers,[6] or the statue of Ulysses S. Grant that stands in front of the United States Capitol, which was paid for

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[6] See National Park Service, *Washington, D.C.: A National Register of Historic Places Travel Itinerary, Washington Monument* (visited June 23, 2008) <http://www.nps.gov/nr/travel/wash/dc72.htm>. Many of the individual stones that make up the Washington Monument were donated by private groups. See George Olszewsi, *A History of the Washington Monument 1844-1968* 12 (1971).

wholly with funds appropriated by Congress.[7] At other times, the government commissions monuments and other works of art to be created by private parties with private funds, subject to the right of design approval and ultimate acceptance by the government. Examples of such works include the Vietnam Veterans Memorial,[8] and the currently in progress Martin Luther King, Jr. National Memorial in Washington, D.C.[9] See also App., *infra*, 1a-11a. Finally, governmental entities often choose to accept and display objects conceived and created entirely by other parties. The Statue of Liberty, to name one, was a gift to the United States from the government of France,[10] and there are numerous other examples on federal parklands throughout the United States. *Ibid.* But regardless of the identity of the original designer or source of the funds or the object, the government's decision to accept ownership or installation of an object—or its assembly of objects—on public parkland for permanent display invariably constitutes an act of speech by the government.[11]

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[7] See National Park Service, *National Capital Parks: A History, Table IV: Statues, Monuments, and Memorials in National Capital Parks* (last modified July 31, 2003) <http://www.nps.gov/history/history/online_books/nace/adhia4.htm>.

[8] Joint Resolution of July 1, 1980, Pub. L. No. 96-297, 94 Stat. 827.

[9] Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, § 508, 110 Stat. 4157.

[10] See Resolution No. 6, 44th Cong., 2d Sess., 19 Stat. 410 (March 3, 1877) (accepting donation). The Statue's pedestal was financed by private donations. See National Park Service, *Statue of Liberty: History and Culture* (last modified Oct. 5, 2006) <http://www.nps.gov/stli/historyculture/ index.htm>.

[11] A governmental entity could establish a policy under which any private party that wished to do so could construct permanent displays

In a previous decision on which the panel relied, see Pet. App. 3a n.2, the Tenth Circuit reasoned that a Ten Commandments monument that had been placed on the lawn outside a different city's municipal building remained the private speech of the Eagles in part because the city was "unable to point to any pre-litigation evidence of [its] explicit adoption of the speech of the Ten Commandments Monument." *Summum* v. *City of Ogden*, 297 F.3d 995, 1006 (2000). Chief Judge Tacha made a similar argument in her opinion responding to the dissents from the denial of rehearing en banc, asserting that the Ten Commandments monument in Pioneer Park remains private speech because there is no evidence that the City ever specifically adopted "the message" of the speech contained upon it. Pet. App. 20f; accord Br. in Opp. 14-17, 31-33.

That reasoning is seriously flawed. There is no requirement that a person or entity that generates a new work of speech from parts originally created by others expressly endorse or expressly disavow each of the more particularized messages that may be conveyed by the speech's constituent parts. The fact that a public university speaks "[w]hen [it] determines the content of the education it provides," *Rosenberger*, 515 U.S. at 834, does not require that it specifically endorse or condemn every statement made by a member of its faculty or an

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on a given piece of public property. In that situation, where the government's policy is clearly "to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, and where the government takes steps to make clear that the views expressed are *not* those of the government, the resulting speech would likely remain that of the private parties rather than the government. The City in this case, however, has not applied any such policy and, instead, the display at issue constitutes government speech.

invited guest. A publication's editors will often publish the works of columnists with whom they disagree as well as those with whom they agree. The curators of a museum may decide to acquire and display a particular piece because it was created by a particular artist or reflects a particular style or period, notwithstanding the fact that they may find its message obscure or even offensive, just as the creator of an exhibit about the Holocaust may choose to include a piece of Nazi propaganda without endorsing its abhorrent views. But in all of those cases—and in this one—the act of assembling and then displaying or publishing the larger work remains a distinct act of speech by the compiler.

The startling doctrinal and practical consequences of the court of appeals' view that the monuments and other objects on permanent display in Pioneer Park remain solely the speech of their donors underscores how far the court departed from existing jurisprudence. Cf. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965) (stating that "startling innovation[s] * * * should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent"). As explained in more detail below, see pp. 23-24, *infra*, such a conclusion would, at minimum, require the City to refrain from discriminating based on viewpoint in deciding what objects to display. Although that standard is satisfied on the record here, see pp. 28-32, *infra*, its adoption would still be highly problematic for at least two reasons.

First, even a simple prohibition on viewpoint discrimination could have untenable practical consequences. The installation of a privately donated monument honoring those who died in a particular armed conflict waged on behalf of our Nation—of which there are thousands

on federal parklands alone, see App., *infra*, 1a-11a—could require the government to permit the installation of a monument suggesting that the cause in which those particular individuals died was unjust. The decision to accept and display a donated statue honoring a general who fought for the Union in the Civil War—of which there are at least three in Washington, D.C., alone, see *Ibid.*—could require the government likewise to accept and display a privately funded statue honoring a general who fought for the Confederacy. But see *People for the Ethical Treatment of Animals* v. *Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005) (stating that "[i]f the authorities place a stat[ue] of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee").

Second, even if most claims alleging viewpoint discrimination would ultimately fail, the threat of disruptive and time-consuming litigation would predictably deter many government entities from accepting and displaying privately donated objects in the first place. As in *Forbes*, "[t]hese concerns are more than speculative." 523 U.S. at 681. The United States Army, for example, has already delayed deciding whether to accept a privately designed and funded monument honoring 41 American servicemembers killed in a 1943 crash of a B-17 Flying Fortress for permanent display pending the resolution of this litigation.[12] As this Court has recognized, First Amendment values are not well-served by

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[12] See Letter from Keith E. Eastin, Assistant Sec'y, Installation and Env't, Dep't of the Army, to the Hon. Ike Skelton, Chairman, House Comm. on Armed Servs. (Apr. 29, 2008) (App., *infra*, 12a-13a); Trish Choate, *Memorial Delay Disappoints Veterans Group* (May 1, 2008) <http://www.reporternews.com/news/2008/may/01/memorial-delay-disappoints-veterans-group/>.

doctrines that "result in less speech, not more." *Id.* at 680; accord *United States* v. *American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality opinion); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983).

Nor will applying the government speech doctrine in this context have any bearing on rules applicable in a true First Amendment forum. Traditional public forum status, and the rules that apply in one, are determined by reference to history and tradition. See p. 23, *infra*. In *Forbes*, this Court recognized candidate debates as a "narrow exception" to its conclusion that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine," based on a functional assessment of the "design" and "very purpose" of such events. 523 U.S. at 675. And in *Rosenberger*, the Court held that a public university had created a limited public forum with respect to the allocation of certain university funds because the university had "declare[d] that the student groups eligible for [its] support [were] not the University's agents, [were] not subject to its control, and [were] not its responsibility," 515 U.S. at 834-835. There is nothing remotely comparable in the government's selection of monuments for permanent display on the government's own property.[13]

[13] In a variety of contexts, the Court has concluded that the nature of certain government decisions about what examples of private speech to fund or otherwise make available to the public renders any sort of forum analysis inappropriate. See *American Library Ass'n*, 539 U.S. at 205 (plurality opinion) (collection decisions by public libraries); *Finley*, 524 U.S. at 585 (award of government arts grants); *Forbes* , 523 U.S. at 673 (access to public television broadcasts outside the context of candidate debates). Accordingly, even if the Court were to conclude that the selection of privately donated objects for permanent display in a public park does not represent a distinct act of government speech,

For the reasons stated above, the Court should hold that the City engaged in government speech in accepting and displaying on a permanent basis certain privately donated monuments and other objects in Pioneer Park (and in deciding which objects not to accept or display). Accordingly, because the government "is entitled to say what it wishes," *Rosenberger*, 515 U.S. at 833, "to ensure that its message is neither garbled nor distorted," *ibid.*, and, like any other speaker, to decide "what not to say," *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 16 (1986) (plurality opinion), respondent's assertion that it has a constitutional right to erect its own monument in the Park fails as a matter of law.

B. Even If The Objects Currently On Permanent Display In Pioneer Park Constituted Private Speech, Respondent's Free Speech Claim Would Still Fail As A Matter Of Law

Even if some or all of the objects currently on display in Pioneer Park constituted the private speech of their original donors, respondent's free speech claim would still fail. Contrary to the court of appeals' conclusion, the Park is neither a traditional nor a designated public forum with respect to the permanent installation of privately donated objects. Rather, at most, the Park is a nonpublic forum. Accordingly, respondent's First Amendment claim cannot succeed so long as the City's criteria for permitting such displays are reasonable and

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the scarcity of physical space, the need for delicate judgments about whether the permanent installation of a given object is appropriate for a particular setting, and the incongruity of requiring a property owner to accept ownership of or serve as permanent bailee for an object it does not want, will generally preclude a finding that even a public park is any sort of forum for that kind of private speech.

viewpoint neutral. Because respondent has failed to rebut the presumption that City officials acted in good faith in rejecting its proposed monument, the court of appeals erred in directing entry of a preliminary injunction.

1. A private speaker's right to access government property for speech purposes depends on whether the government has created a forum for speech, and if so, what type of forum. "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'" *Forbes*, 523 U.S. at 677 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45). The Court has held that "[t]he government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.'" *Ibid.* (quoting *Cornelius* v. *NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

"Designated public fora, in contrast, are created by purposeful government action." *Forbes*, 523 U.S. at 677. "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Ibid.* (quoting *Cornelius*, 473 U.S. at 802). "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677.

"Other government properties are either nonpublic fora or not fora at all." *Forbes*, 523 U.S. at 677. In a non-public forum, "[t]he government can restrict access * * * 'as long as the restrictions are reasonable and

[are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* at 677-678 (quoting *Cornelius*, 473 U.S. at 800); see *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 106-107 (2001) (describing what the Court has often described as a nonpublic forum as "a limited public forum").

2. Like virtually all public parks, see note 11, *supra*, Pioneer Park is neither a traditional nor a designated public forum with respect to the permanent display of privately donated objects. Contrary to the court of appeals' conclusion, see Pet. App. 12a, a court must consider the type of access sought both in defining the scope *and* in determining the nature of the relevant forum. In *Perry Educational Ass'n,* for example, this Court defined the relevant forum as the ability to send messages through "school mail facilities," 460 U.S. at 46, and then analyzed whether *that* discrete forum—rather than the entire school or even the ability to post items on bulletin boards that may also have been located in the schools' mailrooms—was public or nonpublic in nature, *id.* at 46-49. And in *Cornelius*, the Court defined the relevant forum as the ability to participate in the Combined Federal Campaign (CFC), see 473 U.S. at 800-801, and then inquired whether "the CFC"— rather than the tangible physical property on which it occurs or the federal workplace as a whole—was "nonpublic or public in nature," *id.* at 802; see also *Members of the City Council of L.A.* v. *Vincent*, 466 U.S. 789, 814-815 (1984) (framing inquiry as whether public utility poles constitute traditional public fora rather than asking whether the real property on which a given pole stands constitutes such a forum). Likewise, the relevant question here is whether Pioneer Park is a traditional or designated pub-

lic forum with respect to the permanent display of privately donated objects.[14]

The answer is no. Traditional public fora are spaces that "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). "[I]mplant[ing] a physical structure * * * on public property," though certainly a communicative act, is a far cry from the more dynamic and transitory purposes for which traditional public fora have historically been used, such as "speaking, parading, handbilling, waving a flag, or carrying a banner." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 803-804 (1995) (Stevens, J., dissenting). There is no tradition, much less a "long tradition" (*Perry Educ.*

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[14] There is no conflict between this approach and *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753 (1995), or *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). See Pet. App. 19f (Tacha, C.J., responding to dissent from denial of rehearing en banc). The only question before the Court in *Pinette* was "whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." 515 U.S. at 757. Because the issue was not before it, the Court did not revisit the lower courts' conclusion that the property in question was a traditional public forum with respect to unattended displays, much less decide whether it would properly have been classified as a traditional public forum with respect to the permanent display of privately donated objects. See *id*. at 761. And in *Discovery Network*, the Court did not apply forum analysis at all; rather, the issues involved the proper application of the special standards for regulating commercial speech, see 507 U.S. at 416-428, and whether the City of Cincinnati's ban on the permanent installation of certain newsracks on City sidewalks constituted a valid time, place, or manner restriction, see *id.* at 428-431.

Ass'n, 460 U.S. at 37) of permitting private parties to erect permanent displays of their own choosing on public property—even in public parks. See Pet. App. 6f (Lucero, J., dissenting from denial of rehearing en banc) ("one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments"). Because the Court has cautioned that "[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking," *American Library Ass'n*, 539 U.S. at 206 (plurality opinion); accord *Forbes*, 523 U.S. at 678, Pioneer Park cannot properly be labeled a traditional public forum with respect to the permanent installation and display of such objects.

Nor has Pioneer Park become a designated public forum with respect to the permanent display of privately donated objects. Even if some of the privately donated items currently on display remained the private speech of their donors, "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Forbes*, 523 U.S. at 679; accord *Perry Educ. Ass'n*, 460 U.S. at 47 (concluding that a school district's internal mail system was not a designated public forum simply because the district had allowed "some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use" it).

The City has not made Pioneer Park "generally available" (*Widmar* v. *Vincent*, 454 U.S. 263, 264 (1981)) for permanent private displays, or permitted their "indiscriminate" installation (*Perry Educ. Ass'n*, 460 U.S. at 37). Every proposed display requires the specific approval of the City Council. See Pet. App. 2h; accord

Forbes, 523 U.S. at 679 (stating that there is no designated public forum when otherwise eligible speakers must "as individuals obtain permission to use it" (internal quotation marks and citation omitted)); *Cornelius*, 473 U.S. at 804 (noting that the government "require[d] agencies seeking admission [to the CFC] to obtain permission from federal and local Campaign officials"). Nor is there any "evidence suggesting that the granting of the requisite permission is merely ministerial," *ibid.*; in fact, the record shows that only approximately a dozen such objects have been installed in Pioneer Park over the course of six decades. See pp. 2-3, *supra*. Finally, when it has granted permission to install permanent displays in Pioneer Park, the City has not acted "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. Rather, the City has chosen to accept and display only objects that, in its judgment, are related to the City's pioneer heritage or are offered by a person or group with strong ties to the local community, see J.A. 61-62, 102-104; Pet. App. 1h-4h, and the 2004 resolution makes clear that the City Counsel is not required to accept *any* object for permanent display in the Park. See Pet. App. 4h (stating that the City Council "shall make the final determination as to whether [an] item shall be accepted and where the item shall be placed," and may "evaluate the aesthetics of the proposed placement, the effect said placement will have on the remaining open space on the public property, * * * and any other visual or practical effects of locating the item on the proposed site").

The consequences of declaring that public parks are traditional public fora even with respect to the permanent installation of private monuments—or that a governmental entity creates a generally available desig-

nated public forum by accepting one or more privately donated objects for such display—would be staggering. The federal government alone currently displays an unknown number, but certainly well over a thousand, privately donated statues and other memorials on federal parklands. See App., *infra*, 1a-11a. Under the court of appeals' view, it is difficult to see why a governmental entity would have any choices other than banning all permanent monuments (on the theory that doing so would be a permissible "time, place, or manner" restriction on expression in the park generally) or refraining from making any distinctions based on the status of the donors or the content of any privately donated objects it accepts for permanent display. See Pet. App. 14a n.6 (explaining that, under this Court's decisions, "exclusions based on the speaker's identity trigger strict scrutiny when the forum at issue is public"). Were that so, "[a] city that accepted the donation of a statue honoring a local hero could be forced" not only to accept a monument asserting that the same person was actually a villain, but also "to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag." *Id.* at 11f (McConnell, J., dissenting from the denial of rehearing en banc); see Cities Cert. Amicus Br. 2-3 (explaining that Reverend Fred Phelps has demanded the right to install a so-called "Matthew Shephard Monument" in a city park in Casper, Wyoming, on the ground the park contains a privately donated Ten Commandments monument).

3. For the foregoing reasons, Pioneer Park—if conceivably a forum at all with respect to the permanent installation of monuments, memorials, and other objects, see note 13, *supra*—could be at most a nonpublic forum

with respect to such objects. Accordingly, the court of appeals could not properly direct entry of a preliminary injunction unless respondent has shown that it is likely to prevail on a claim that the City's criteria for selecting objects for permanent display are unreasonable or that its rejection of respondent's proposed monument was based on the viewpoint or viewpoints that such a monument would express. The record in this case does not support such a conclusion.

Control over access to a nonpublic forum may be based on "subject matter and speaker identity" so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Perry Educ. Ass'n*, 460 U.S. at 49. "The [g]overnment's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Given the limited space in Pioneer Park and the commemorative purposes of the objects currently on display there, it was entirely reasonable for the City to limit access for further permanent displays to objects that relate directly to the history of the community or are donated by organizations and individuals with strong community ties. Pet. App. 2h-3h. Cf. 32 C.F.R. 553.22(j)(1) (providing that the United States Army will accept private donations of "[t]ributes" for display in Arlington National Cemetery only from qualifying veterans' organizations). And respondent makes no assertion—and certainly made none at the time it requested approval to erect its monument in Pioneer Park—that its proposed Seven Aphorisms monument would relate to the history of Pleasant Grove City or that it has any relationship with the local community.

The current record likewise cannot support a conclusion that respondent is likely to prevail on a claim that the City's denial of its requests was based on the viewpoints that would be expressed by its proposed monument. To begin with, none of the three letters from respondent's president to the City contained sufficient information to permit a reasonable person to have any idea what viewpoints would or would not be conveyed. See J.A. 57-60, 63-64. The November 2003 letter denying respondent's initial request stated that the City's policy is to limit permanent displays to those that "either (1) directly relate to the history of Pleasant Grove, or (2) [are] donated by groups with long-standing ties to the Pleasant Grove community," J.A. 61, and the only other evidence in the record states that that has been the City's policy for many years, J.A. 104. Respondent has produced no affirmative evidence that the reasons given were pretextual, and government officials are presumed to have acted in good faith absent a showing to the contrary. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306, 329 (2003).

Respondent's claim is not really that its proposed monument satisfies the criteria set forth in the City's November 2003 letter and the 2004 resolution. Rather, respondent appears to assert that the City must have engaged in viewpoint discrimination because (it claims) some of the items currently on display in Pioneer Park do not satisfy the City's publicly announced criteria either. Respondent has made that claim most frequently with regard to the Ten Commandments monument that was donated by the Eagles in 1971, see Br. in Opp. 4-5; J.A. 15-16, 144-146; Resp. C.A. Br. 21-22, but it has made the same suggestion about the September 11 monument as well, see *ibid.*

Respondent's contention is flawed, however, for at least two different reasons. First, the criteria themselves call for an exercise of judgment by the City Council, see Pet. App. 1h-4h, and the record contains explanations by responsible City officials why the various items currently on permanent display *do* satisfy the City's publicly announced standards. J.A. 100, 140-141, 144, 146, 188, 196-197. Respondent may disagree with those explanations, but the decision is not respondent's to make, and the record does not support a finding that the City's explanations are pretextual.

Second, even if respondent could somehow demonstrate that, under the terms of its own policy, the City Council clearly made a mistake when it accepted the Ten Commandments monument from the Eagles in 1971, that still would not demonstrate that the City Council engaged in viewpoint discrimination when it rejected respondent's 2003 and 2005 requests to install its own permanent monument. A conclusion that the 1971 decision automatically *mandated* the acceptance of respondent's proposed monument would amount to a holding that the scope of a government-created forum can be expanded by inadvertence or mistake. Moreover, there is a basic difference between declining an offer for a new object from an entity that has no discernable connection to the local community and unearthing and spiriting away from its longstanding place in public view a gift that was received more than three decades ago by an entity that has made repeated and meaningful civic contributions during the intervening years and gives every indication that it will continue to do so in the future. J.A. 94-97, 103. Cf. *Board of Educ.* v. *Pico*, 457 U.S. 853, 878 n.1 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (acknowledging the difference

between removing a book from a school library's collection and deciding not to acquire the book in the first place).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

District of Columbia:

(1) Statues of Generals throughout D.C. Several of these statues, including those of General James B. McPherson in McPherson Square (1876) and General George H. Thomas in Thomas Circle (1879), were given by private associations, with Congress sometimes providing financial support for the statue's erection or pedestal. A statue of General George S. Meade was donated by the State of Pennsylvania in 1927, and the President and Fellows of Harvard College donated a statue of General Artemas Ward in 1938. National Park Service, *Sculpture in the Parks of the Nation's Capital* 30-31, 46-47, 48-49 (March 1985) (*Sculpture in the Parks*).

(2) Peace Monument (Naval) (1877). Paid for partially by Congress, but mainly by subscriptions from Naval personnel. *Sculpture in the Parks* 36-37.

(3) Statue of President Abraham Lincoln in Lincoln Park (1876). Erected on public grounds by the emancipated citizens of the United States. Congress approved the installation and provided funds for a pedestal. *Sculpture in the Parks* 26-27.

(4) Washington Monument (1885). 192 carved stones inserted into the monument's interior walls were presented by individuals, societies, cities, states, and nations of the world.

<http://www.nps.gov/history/nr/travel/wash/dc72.htm>. A large portion of the monument itself was also paid for by popular subscription. See George J. Olszewski, A History of the Washington Monument (1971).

(5) Statue of President James Garfield at First Street and Maryland Avenue (1887). Congress appropriated a portion of the funds, with the rest subscribed by the Army of the Cumberland. *Sculpture in the Parks* 16-17; <http://www.nps.gov/history/history/online_books/nace/adhia4.htm>(item 13).

(6) Statue and memorial columns in Battleground National Cemetery. Between 1864 and 1914, three different States paid to erect three columns and a statue in honor of persons killed or wounded during, or who took part in, the defense of Washington, D.C. in 1864. *Sculpture in the Parks* 32-33.

(7) Statues of American figures throughout D.C. Many of the statues of prominent Americans on public lands in D.C. were given to the United States by private groups or individuals, with Congress sometimes providing financial support for the foundation. Among them, the Photographic Association of America gave a bust of L.J.M. Daguerre (1897); the Physicians and Surgeons of the United States gave a statue of Dr. Samuel D. Gross (1897); Stilson Hutchins gave a statue of Daniel Webster (1900); the American Homeopathy Association gave a

statue of Dr. Samuel Hahneman (1900); the Knights of Columbus gave a statue of James Cardinal Gibbons (1932); the American Federation of Labor gave a statue of Samuel Gompers (1933); and the Longfellow Memorial Association (1909), the Witherspoon Memorial Association (1909), the Francis Ashbury Memorial Association (1924), and the William Jennings Bryan Association (1924) each gave a statue of its respective namesake. *Sculpture in the Parks* 6-7, 16-17, 18-19, 28-29, 50-51; <http://www.nps.gov/history/history/online_books/nace/adhia4.htm> (items 17, 30, 68).

(8) Stephenson Grand Army Memorial (1909). Given by the Stephenson Grand Army Memorial Association, with Congress funding the pedestal. <http://www.nps.gov/history/history/online_books/nace/adhia4.htm> (item 32).

(9) Statues of non-American historical figures. Washington, D.C. also includes a number of statues of non-American historical figures that have been donated to the United States and are displayed on national parklands, with Congress sometimes providing funding to prepare the site. These include a statue of Polish general Thaddeus Kosciusko given by the Polish American Alliance and Polish-American citizens (1910); a statue of Edmund Burke given by the Sulgrave Institution of Great Britain and America (1922); a statue of Argentinian general José de San Martín (1925); a statue of Italian telegraph inventor Guglielmo Marconi (1941); a sta-

tue of the Uruguayan general Jose Artigas given by the school children of the Republic of Uruguay (1950); and a statue of Mahatma Gandhi (2000). *Sculpture in the Parks* 6-7, 24-25, 28-29, 40-41; <http://www.nps. gov/history/ history/online_books/nace/adhia4.htm> (item 45); <http://www.indianembassy.org/newsite/ gandhimemorial.asp>.

(10) Tidal Basin Cherry Blossom Trees (1912). These trees were donated as a gift of friendship to the United States from the people of Japan. <http://www.nps.gov/nama/planyourvisit/ cherry-blossom-history.htm>.

(11) DuPont Memorial Fountain in Dupont Circle (1921). The fountain was paid for entirely by members of the family of Admiral Samuel Francis DuPont. *Sculpture in the Parks* 12-15.

(12) Statues in Meridian Hill Park. A statue of Dante was given to the United States by Carlo Barsotti in the name of Italian-Americans in New York in 1921; a statue of Joan of Arc was given by the Societe des Femmes de France a New York in 1922; the statue "Serenity" was given by Charles Dearing in 1924; and a statue of President James Buchanan was given by the estate of Harriet Lane Johnston in 1931. All were erected pursuant to public resolutions by Congress. *Sculpture in the Parks* 10-11, 22-23, 41-42; <http://www.nps.gov/history/ history/ online_books/nace/adhia4.htm> (item 58).

(13) The Zero Milestone (1923). This granite shaft on the Ellipse was paid for by the Lee Highway Association to commemorate the starting point of a 1919 motor convoy to San Francisco. *Sculpture in the Parks* 50-51.

(14) Joseph J. Darlington Memorial Fountain in Judiciary Square (1923). Presented as a gift to the City of Washington without expense to the United States. *Sculpture in the Parks* 10-11.

(15) Nuns of the Battlefield Monument (1924). Erected by the Ladies' Auxiliary of the Ancient Order of the Hibernians. *Sculpture in the Parks* 34-35.

(16) First Division Memorial (1924). Erected by the Memorial Association of the First Division of the United States Army without expense to the United States. *Sculpture in the Parks* 14-17.

(17) Cuban Friendship Urn (1928). This monumental urn was presented as a gift to President Calvin Coolidge by the president of Cuba and accepted pursuant to a joint resolution of Congress. *Sculpture in the Parks* 10-11.

(18) Titanic Memorial (1931). Erected by the Women's Titanic Memorial Association without expense to the United States. *Sculpture in the Parks* 46-47.

(19) D.C. World War Memorial (1931). This circular marble temple was erected by the District of

Columbia Memorial Commission without expense to the United States. *Sculpture in the Parks* 12-13.

(20) Original Patentees of the District of Columbia (1936). This granite shaft on the Ellipse was given by the National Society of the Daughters of the American Colonists without expense to the United States. *Sculpture in the Parks* 36-37.

(21) Second Division Memorial (1936). This flaming sword of gold leaf was erected by the Second Division Association as a memorial to its dead without expense to the United States. *Sculpture in the Parks* 42-43.

(22) Arlington Memorial Bridge Equestrian Statues (1951). These four giant statues representing the arts of War and arts of Peace were given to the American people by the people of Italy. *Sculpture in the Parks* 4-5.

(23) Boy Scout Memorial (1964). Boy Scout troops throughout the United States raised the funds to pay for this memorial that sits on the Ellipse. The monument was accepted on behalf of the Nation by Associate Justice Tom Clark, an Eagle Scout. <http://www.nps.gov/whho/planyourvisit/explore-the-southern-trail.htm#CP_JUMP_100807>.

(24) Vietnam Veterans Memorial (1982). Authorized by Joint Resolution of July 1, 1980, Pub. L. No.

96-297, 94 Stat. 827, which provided that neither the United States nor the District of Columbia shall be put to any expense in the memorial's establishment.

(25) National Law Enforcement Officers Memorial (1991). The private, nonprofit National Law Enforcement Officers Memorial Fund established this Judiciary Square monument to law enforcement officers killed in the line of duty. <http://www.nps.gov/archive/ncro/PublicAffairs/ProposedMemorials.htm>.

(26) National Japanese American Memorial to Patriotism (2000). Joint Resolution of October 24, 1992, Pub. L. No. 102-502, 106 Stat. 3273, authorized the Go For Broke National Veterans Association Foundation to establish a memorial to honor Japanese American patriotism in World War II on Federal land without expense to the United States. <http://njamf.com/home/>.

(27) National World War II Memorial (2004). The memorial was funded almost entirely by private contributions. Individuals, corporations, states, school children, veterans groups, and civic organizations contributed more than $197 million for the memorial's construction and ongoing maintenance. <http://www.wwiimemorial.com/default.asp?page=funding.asp&subpage=intro>.

(28) Collections at the National Gallery of Art. In addition to the Gallery's original body of paintings and sculpture that were given by Andrew Mellon, collectors such as Samuel H. Kress, Rush H. Kress, Joseph Widener, Chester Dale, Bernice Chrysler Garbisch, and hundreds of others have donated pieces to the collection. <http://www.nga.gov/ginfo/aboutnga.shtm>.

(29) Collections at the Library of Congress. The Library's collection contains many individual gifts to the United States, including an 1869 gift of books from the emperor of China, five Stradivari violins, two drafts of the Gettysburg Address, and many personal libraries of notable Americans and collectors. <http://www.loc.gov/loc/legacy/colls.html>.

(30) Collections at the Smithsonian Institute. The Hope Diamond was donated by Harry Winston Inc. <http:// mineralsciences.si.edu/hope.htm>. Charles Lindbergh donated his plane, "The Spirit of St. Louis." <http://collections.nasm.si.edu/code/emuseum.asp?profile=objects&quicksearch=A19280021000&newstyle=single>. The Star Spangled Banner was a gift to the Institute from a Baltimore family. <http://americanhistory.si.edu/ssb/6_thestory/fs6.html>.

Georgia: Fort Benning National Infantry Museum. The grounds of Fort Benning's National Infantry Museum contain several monuments to specific infantry divisions that were donated by veterans. There are also at least two monuments that were given by soldiers to memorial-

ize a dog of which the troops had grown fond. <https://www.benning.army.mil/museum/outside_tour/monuments/index.htm>.

Hawaii: Brothers in Valor Memorial. This monument honoring Japanese-American military contributions in World War II was initiated by a university professor and paid for by veterans and the city of Honolulu. It is located on the federal military base of Fort DeRussy. See Gregg K. Kakesako, *A Gathering of Warriors*, Honolulu Star-Bulletin (July 3, 1998) <http://starbulletin.com/98/07/03/news/story1.html>.

Maryland: Antietam National Battlefield. There are 96 monuments at Antietam, most of which were erected by veterans groups. These include monuments to states, individuals, regiments, and even war correspondents. Originally administered by the War Department, the battlefield was transferred to the National Park Service in 1933. <http://www.nps.gov/anti/historyculture/monuments.htm>.

Mississippi: Vicksburg National Military Park. The park contains one of the largest collections of outdoor art in the southeastern United States, with 1,324 monuments, markers, tablets, and plaques created by the most renowned American sculptors of the period. <http://www.nps.gov/archive/vick/visctr/sitebltn/artists/v_artist_lst.htm>. The legislation that established the park gave states, organizations, and individuals the ability to erect monuments, upon approval by the Secretary of War, see An Act to establish a national military park to commemorate the campaign, siege, and defense of Vicksburg, 55th Cong., sess. III, ch. 176, 30 Stat. 841 (1899), and all but one of the 1,324 objects on display were so donated.

New York: Statue of Liberty. Presented to the United States as a gift from the citizens of France, the monument sits entirely on federal land. It was transferred from the War Department to the National Park Service in 1933. <http://www.nps.gov/stli/historyculture/index.htm>.

Pennsylvania:

(1) Gettysburg National Military Park. With more than 1,300 monuments, the Gettysburg battlefield contains the largest collection of outdoor sculpture in the world. Several hundred of the monuments and memorials were donated by veterans groups from both the Union and Confederacy. <http://www.nps.gov/gett/parknews/stone-soldiers.htm>.

(2) POW/MIA Memorial at Tobyhanna Army Depot. The Tobyhanna Veterans Council raised funds to design and build this memorial at this Department of Defense maintenance facility in Coolbaugh, Pennsylvania. <http://www.tobyhanna.army.mil/about/news/POW%20MIA%202.html>.

Tennessee: Shiloh National Military Park. The battlefield includes more than 100 monuments that were given to the national park by states, veterans units, and the Daughters of the Confederacy. <http://www.nps.gov/archive/shil/admhiswar14.htm>.

Virginia:

(1) U.S. Marine Corps Memorial (Iwo Jima Memorial). This monument to the U.S. Marine Corps

was paid for entirely by Marines, former Marines, Marine Corps Reservists, friends of the Marine Corps, and members of the Naval Service. <http://www.nps.gov/archive/gwmp/usmc.htm>.

(2) Monuments at Arlington National Cemetery. Many of the monuments at Arlington were privately donated, including the Confederate Memorial, erected by the Daughters of the Confederacy; the Pan Am Flight 103 Memorial Cairn, given by the people of Scotland; the monument to Admiral Richard Evelyn Byrd, given by the National Geographic Society; and the Spanish-American War Monument, erected by the National Society of Colonial Dames. <http://www.arlingtoncemetery.org/visitor_information/monuments.html>.

(3) The newly-built Marine Corps National Museum in Quantico, Virginia is surrounded by a park that the museum intends to fill with monuments donated by organizations that wish to honor units and fallen comrades. Marine Corps Heritage Foundation, *Sentinel Annual Report* 4 (2005) <http://www.marineheritage.org/Sentinel_Annual2005.pdf>.

Washington: Arrowhead Soldier Monument at Fort Lewis. The nonprofit Arrowhead Soldier and Family Fund erected this memorial to soldiers who died in Iraq. Christian Hill, *Memorial to Stryker Dead Unveiled*, The Olympian (Oct. 11, 2007).

APPENDIX B

[Seal Omitted]

DEPARTMENT OF THE ARMY
ASSISTANT SECRETARY
INSTALLATIONS AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

[Apr. 29, 2008]

The Honorable Ike Skelton
Chairman
House Committee on Armed Services
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter serves as the second interim reply to the Congressionally-directed reporting requirement (Section 1051 of Public Law 110-81) on the possible locations outside of Arlington National Cemetery that would serve as a suitable location for the Bakers Creek Memorial. At this time, the Army has agreed to delay any decision regarding the siting of Bakers Creek Memorial for the following reasons.

On March 31, 2008, the United States Supreme Court granted a petition for a writ of certiorari in the case of *Summum v. Pleasant Grove City,* 483 F.3d 1044 (rehearing denied, 499 F.3d 1170 (10th Cir. 2007). In this case, the lower court ruled that, once a city accepts and

permanently displays a monument donated by a private party, the city creates a public forum and is required to accept other monuments donated by private parties for permanent display. Due to the ramifications that this case may have on the Army's acceptance of Bakers Creek Memorial or any other monument funded by private funds, the Army will await the Supreme Court's decision to assess its options.

Let me assure you that, upon resolution of the Supreme Court case, the Army will proceed quickly and accordingly. Further, the Army will ensure that all Congressional concerns are addressed to the best of our abilities. If you require additional information, please feel free to contact me.

Sincerely,

KEITH E. EASTIN

KEITH E. EASTIN

cc: The Honorable Duncan Hunter
Ranking Member