No. 07-665

In The
Supreme Court of the United States

PLEASANT GROVE CITY, JIM DANKLEF, MARK ATWOOD, CINDY BOYD, MIKE DANIELS, DAROLD McDADE, JEFF WILSON, CAROL HARMER, G. KEITH CORRY, and FRANK MILLS,

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, THIRTEEN OTHER STATES AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Did the Tenth Circuit err 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. Did the Tenth Circuit err 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. Did the Tenth Circuit err 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 AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF AMICI

The States' interest is clear—preserving the sovereign authority of the States and their political subdivisions to engage in *government* speech. If it is inevitable that government will "adopt and pursue programs" that "are contrary to the profound beliefs and sincere convictions of some of its citizens," it is equally "inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. of Wisconsin Sys. v. Southworth,* 529 U.S. 217, 229 (2000). When the government speaks, "different principles" control. *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 834 (1995). Government speech takes many forms including advocacy of its own policies, *Rust v. Sullivan,* 500 U.S. 173, 194 (1991), determinations of excellence, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998), and a public library's "traditional role in identifying suitable and worthwhile material," *United States v. American Library Ass'n, Inc*., 539 U.S. 194, 208 (2003).

Although most government speech will involve the expenditure of public funds, there are instances when government speaks by accepting a donation of personal, real, or intellectual property from private interests and then using that property to perpetuate government's message. The use of property for government expression is constitutionally indistinguishable from the use of public funds

for government expression. If government can spend money to purchase newspaper and radio advertisements saying "immunize your child," government can accept a donation of a privately financed billboard that says, "immunize your child." Moreover, having advocated the message of childhood immunization, government can refuse the donation of a billboard that says, "immunization is a government conspiracy."

SUMMARY OF ARGUMENT

The States' argument is simple and straightforward. First, this Court should adopt a bright-line rule—when government accepts a donation of property, any resulting speech is government speech. If government wishes to accept a donation of property and disavow the resulting expression, it may do so in a clear and unambiguous manner.

Second, the lower court's alternative that when government accepts a donation of property, any resulting speech is private speech—has sweeping implications. Initially, the decision below undermines the States' ability to engage in government speech and does not promote private speech. Moreover, the alternative rule has implications far beyond the public parks. Even if this Court does not accept the States' proposed bright-line rule, it should reject the Tenth Circuit's result.

ARGUMENT

I. THIS COURT SHOULD ADOPT A BRIGHT-LINE RULE—WHEN GOVERNMENT ACCEPTS A DONATION OF PROPERTY, ANY RESULTING SPEECH IS GOVERNMENT SPEECH.

There is a constitutional distinction between private speech that utilizes government resources and government speech. *Finley*, 524 U.S. at 586. If government makes its property or funds available for private expression, the First Amendment prohibits viewpoint discrimination. *See Rosenberger,* 515 U.S. at 837 (public funds for student groups); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 394 (1993) (use of a publicly owned auditorium).[1] In contrast, the expenditure of public funds for government speech generally does not implicate the First Amendment. *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 559 (2005). "Simply because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist." *Downs v. Los Angeles Unified Sch. Dist.,* 228 F.3d 1003, 1013 (9th Cir. 2000). To suggest otherwise "would render numerous Government programs constitutionally suspect." *Rust,* 500 U.S. at 194. "Consequently, the Government may advance or restrict its own speech

[1] *Cf. Hannegan v. Esquire, Inc.,* 327 U.S. 146, 148 n.1 (1946) (second-class mailing privileges available to all newspapers and other periodicals).

in a manner that would clearly be forbidden were it regulating the speech of a private citizen."[2] *Serra v. United States Gen. Servs. Admin.,* 847 F.2d 1045, 1048 (2nd Cir. 1988).

This Court should adopt a bright-line rule—when government accepts a donation of real, personal, or intellectual property, any resulting speech is government speech. *See ACLU Nebraska Found. v. City of Plattsmouth,* 419 F.3d 772, 774, 778 (8th Cir. 2005) (en banc) (implicitly assuming that a city's acceptance of a privately donated monument in public park resulted in government speech). In addition to providing clear guidance and certainty for governments at all levels, such a result is consistent with the jurisprudence of most Circuits that have addressed the issue.

When property is transferred from a private party to the government, "the effect of formal transfer of legal title to property [is] a transfer of imputed expression." *Freedom from Religion Found. v. City of Marshfield,* 203 F.3d 487, 491 (7th Cir. 2000). If a work of art "is entirely owned by the Government and is displayed on Government property," "the speaker is the . . . Government." *Serra,* 847 F.2d at 1049.

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[2] *See also Wooley v. Maynard,* 430 U.S. 705, 717 (1977) (State may express official view of state history, but may not force individuals to do so); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO,* 413 U.S. 548, 566 (1973) (Act forbidding federal employees from engaging in political activity does not violate First Amendment).

Similarly, a religious display "owned and displayed by the city government on city government property" is "government speech." *ACLU of New Jersey v. Schundler,* 104 F.3d 1435, 1444 (3rd Cir. 1997). "There is no private constitutional right to erect a structure on public property." *Graff v. City of Chicago,* 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc). "If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." *Lubavitch Chabad House, Inc. v. City of Chicago,* 917 F.2d 341, 347 (7th Cir. 1990). "Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved." *Tucker v. City of Fairfield,* 398 F.3d 457, 462 (6th Cir. 2005). "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA v. Gittens,* 414 F.3d 23, 29 (D.C. Cir. 2005). In sum, when government chooses to accept some donations, but to reject others, it is engaging in government speech. *Id.* at 28-29.

To be sure, there may be instances where government wishes to accept the donation of private property, but does not wish to engage in government speech or desires to create a limited public forum. For example, as part of the construction of a walkway or a building, government may wish to invite the public to "donate" bricks or tiles that convey the speech of the donor rather than the government. In such a situation, government may clearly and

unambiguously state that it is allowing private individuals to speak and is not adopting the message conveyed by the donated property. However, in the absence of clear and unambiguous disavowal of the resulting expression, the acceptance of a donation of property should be regarded as government speech.[3]

II. THE LOWER COURT'S ALTERNATIVE RULE—GOVERNMENT'S ACCEPTANCE OF DONATED PROPERTY RESULTS IN PRIVATE SPEECH—HAS SWEEPING IMPLICATIONS

The lower court's alternative rule—government's acceptance of donated property results in private expression—has sweeping implications.[4] Thus, even if this Court does not accept the States' proposed bright-line rule, it should reject the Tenth Circuit's reasoning.

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[3] In some instances, government's acceptance of donated property and the resulting speech may raise Establishment Clause concerns. *See Van Orden v. Perry*, 545 U.S. 677, 681-82 (2005) (State's acceptance of monument inscribed with the Ten Commandments). However, in those instances, the issue is whether government's message violates the Constitution, not whether the message is that of the government or the private donor.

[4] Presumably, the same rationale would apply if the donor sold the property to the government for less than fair market value. Thus, the lower court's alternative rule cannot be avoided by selling the property for some nominal amount.

A. The Lower Court's Alternative Rule Undermines Government Speech and Does Not Promote Private Speech.

Adopting the lower court's alternative rule effectively abolishes a particular form of government speech—accepting a donation of property and then using that property to convey government's message. Although government may still pursue other modes of communication, closing one mode of communication makes government expression more difficult. Government speech is undermined.

Furthermore, while government speech is inhibited by the alternative rule, there is no reason to believe that private speech will be expanded. As a practical matter, government will respond to the decision by refusing to accept donations of property. Moreover, faced with a choice of allowing all monuments in public parks or allowing none, many—if not most—governments will opt for none. Thus, the long-term effect of the decision may well be to inhibit private speech. Surely, the Constitution does not require a result that inhibits government speech while simultaneously not promoting—and possibly undermining—private speech.

B. The Alternative Effectively Prohibits Government From Using Public Parks to Convey a Particular Message.

As a practical matter, the alternative rule forbids government from using public parks to convey a

particular message. Under the lower court's reasoning, if donated property is erected in a public park, that park is transformed into a public forum where other private parties may erect donated property with expressive attributes. George Washington must stand near Benedict Arnold. Union Generals must be accompanied by their Confederate counterparts. A Holocaust Memorial must be alongside a monument to the Ottoman Empire's Armenian Genocide or the British atrocities during the Boer War, or, for that matter, a monument to honor Adolf Hitler.

Moreover, nothing in the lower court's opinion limits its rationale to public parks. Its logic extends to any governmental decision that involves the acceptance of property where some form of expression results. Most obviously, the decision applies to government's decisions regarding the contents and décor of government buildings. Since Virginia's Pocahontas State Office Building[5] contains a privately funded "Wall of Honor" commemorating those Virginians who have died in the War on Terror, should a protest group provide it, the building must also include a "Wall of Shame" protesting the War or celebrating the supposed virtues of the Terrorists.[6] Although South Dakota's Capitol Rotunda contains

[5] Virginia names its State Office Buildings after prominent Virginians, including Jefferson, Madison, and Monroe.

[6] For a description of the "Wall of Honor," see http://www.vaag.com/PRESS_RELEASES/NewsArchive/052407_Wall.html.

privately donated sculptures of Wisdom, Vision, Courage, and Integrity, the lower court would mandate inclusion of other sculptures honoring Folly, Stupidity, Cowardice, and Dishonesty.[7]

Less obviously, the mandate extends to all decisions where government accepts property and some sort of expression results. Thus, if a public museum accepts a donation of a painting, it must accept all donations of paintings—even if it regards a painting as inferior art, distasteful, or simply inappropriate for the museum's overall purpose. Similarly, if a public university library accepts a donation of a book, it must accept all donations of books. *Cf. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (libraries have broad discretion in determining what books to add to their collections). Conceivably, acceptance of a private party donation of laboratory equipment, computers, or curricular materials means that government may never refuse a donation. In time, government will be overwhelmed with mediocre art, unwanted books, and useless equipment. The only way for government to avoid becoming overwhelmed by useless donations is to refuse all donations of art and books.

[7] For information and images of the sculptures, see http://www.state.sd.us/state/capitol/capitol/tour/bronze.htm.

CONCLUSION

For the reasons stated above, in the Brief of the Petitioners, and in the other amici briefs supporting the Petitioners, the judgment of the United States Court of Appeals for the Tenth Circuit should be **REVERSED**.

Respectfully submitted,

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