No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, *ET AL.*,

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 FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Free Speech Clause permits a city to deny a private party's request to donate a monument for display in a traditional public forum that contains other privately-donated unattended displays, based on the content or viewpoint of the message conveyed or the identity of the proposed speaker.

2. Whether a privately-donated unattended display in a traditional public forum is government speech when a private party alone originally determines the message and the government does not subsequently adopt the message.

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STATEMENT OF THE CASE

1. Respondent Summum is a § 501(c)(3) tax-exempt religious organization, founded in 1975 and headquartered in Salt Lake City, Utah. JA 13; About Summum, http://www.summum.us/about/ (visited Aug. 15, 2008). "Summum" is derived from Latin and refers to the "sum total of all creation." *See id.* The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which "modifies human perceptions, and transfigures the individual." *See* The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/gnosticism.shtml (visited Aug. 15, 2008).

Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. *Cf. Van Orden v. Perry*, 545 U.S. 677, 717 (2005) (Stevens, J., dissenting) (noting "many distinctive versions of the Decalogue, ascribed to by different religions"). Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. *See* The Aphorisms of Summum and the Ten Commandments,

http://www.summum.us/philosophy/tencommandments.shtml (visited Aug. 15, 2008).[1]

2. Petitioner Pleasant Grove City (the "City") is a municipality in Utah County, Utah, that is home to a city park known as Pioneer Park. Pet. 4; JA 98-99. Operated under the direction of the City's Leisure Services division, JA 137, Pioneer Park, like all public parks, is a "quintessential public forum": the type of government property that has "immemorially been held in trust for the use of the public, and, time out of mind, [used] for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Pet. App. 10a (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

In addition to park benches, trees, and a rose garden, Pioneer Park contains a number of unattended displays. Several are historical artifacts, including a replica log cabin from 1930, a mill stone used in the first flour mill in Pleasant Grove, and the original Pleasant Grove Town Hall. JA 99-102. Other displays are not artifacts, and have no obvious direct connection to the history of Pleasant Grove. Among those displays, for instance, is a "September 11 Monument" created by a local Eagle Scout, with a

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[1] In more common Exodus accounts, by contrast, the first tablets are generally referred to as the Ten Commandments, and the second set is actually described in the Bible as the Ten Commandments. *See, e.g.*, Steven Goldberg, *Bleached Faith: The Tragic Cost When Religion Is Forced Into The Public Square* 9-12 (2008).

picture of firefighters at the World Trade Center site in New York. JA 101.[2]

At least some of the displays in Pioneer Park were created solely by private parties to advance their own communicative objectives, with the government playing no role other than to permit placement in the Park. Most important here is a Ten Commandments monument designed by the Fraternal Order of the Eagles, a private civic group, and donated to the City in 1971, just two years after the Eagles established a local chapter. Pet. App. 2a. This Court already is familiar with the Eagles' distribution to various state and local governments of "over a hundred largely identical monoliths" intended to convey a "code of conduct or standards" to young people. *See Van Orden*, 545 U.S. at 713-14 (Stevens, J., dissenting); *see also id.* at 701 (Breyer, J., concurring). The monument in question here is a part of the Eagles' effort, national in scope, to disseminate a message they hoped would combat juvenile delinquency and "inspire the youth." *See id.* at 714 (Stevens, J., dissenting); *cf. id.* at 712-13 ("When the Ten Commandments monument was donated to the State of Texas in 1961, it was not for the purpose of commemorating a noteworthy event in Texas history … or even denoting the religious beliefs of Texans at that time.").

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[2] Other similar displays include a "Gingko Tree and Plaque" honoring a City Parks and Recreation Director; a "Wishing Well" donated by the Lions Club; and a "Rocky Mountain Maple Tree and Plaque" donated by the Pleasant Grove Youth City Court/Council and 4-H. *Id.* at 100-02.

The Eagles' monument in Pioneer Park contains not only an inscription of one particular version of the Ten Commandments but also (among other embellishments) an eagle with an American flag – the emblem of the Order of the Eagles – and a prominent statement that the display was presented by the Eagles to the City. JA 16; *Anderson v. Salt Lake City Corp.*, 348 F. Supp. 1170, 1172 (D. Utah 1972), *rev'd*, 475 F.2d 29 (10th Cir. 1973).[3] Since donating their monument, the Eagles have remained committed to dissemination of their message, maintaining the monument and taking steps to ensure that their inscription remains visible. *See* JA 144, 158.

3. On September 5, 2003, Summum requested permission to erect a monument in Pioneer Park containing its Seven Aphorisms. In its letter to the City, Summum explained that the proposed monument would be "similar in size and nature" to the Eagles' Ten Commandments monument, and offered to "pay for the cost of creating … and erecting" the monument and to abide by "the same conditions, rules, etc. under which the Eagles' monument was and is permitted and maintained."[4] JA 57-59.

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[3] The Eagles also included on their monument the "All Seeing Eye of God," a Star of David, and the Chi-Rho, symbolizing the first Greek letters of Christ's name. *See id.*

[4] The Seven Aphorisms are customarily identified as "Psychokinesis," "Correspondence," "Vibration," "Opposition," "Rhythm," "Cause and Effect," and "Gender." *See* Seven Summum Principles, http://www.summum.us/philosophy/principles.shtml (visited Aug. 15, 2008) (explaining Aphorisms). A depiction of the proposed monument can be viewed at http://www.summum.us/summum.shtml (visited Aug. 15, 2008).

The City denied Summum's request by letter dated November 19, 2003. The letter relied on a purported City "practice," "established over many decades," limiting "structures, displays, monuments, etc." to those that "meet either or both" of two criteria: they "(1) directly relate to the history of Pleasant Grove, or (2) [are] donated by groups with long-standing ties to the Pleasant Grove community." JA 61-62. The City rejected Summum's proposed display because it did not "meet either of [those] criteria." JA 62.

4. The alleged venerable "practice" cited in the City's letter did not refer to any official or formal policy, as no such policy existed when the City denied Summum's request. Indeed, there is no evidence that the City had ever before rejected such a request. Instead, the prior "practice" of placing objects and displays in Pioneer Park appears to have been an informal one established and driven by a private party, the local Historical Commission. *See* JA 153 (deposition of Mayor Danklef) (prior to 2003, there "was just a policy set up by the Historical Society, by the – those in Pleasant Grove who wanted to preserve anything historical"). As the Tenth Circuit summarized, "the record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history." Pet. App. 20a n.9.

In August 2004, the City for the first time adopted a written policy governing the placement of any "plaque, structure, display, permanent sign, or monument" on public property. Pet. App. 2h. The City's new policy "purportedly codif[ied] its unwritten policy," *id.* at 20a n.9, and like the November

2003 letter, it listed both historical relevance and donor ties to the community as criteria for approval of displays.

But while the November 2003 letter plainly allowed for displays when "either or both" of those criteria were met, JA 62, the written policy is unclear as to the relationship between the two criteria. In its brief, the City reads the policy (like the November letter) as making either criterion a sufficient ground for approval, Petr. Br. 6-7 – so that, for instance, a display of no historical relevance would nevertheless qualify if its donor enjoyed sufficiently long-standing ties to the community. In fact, however, the written policy's first "criteri[on] for placement" states that an item "*must* directly relate to the history of Pleasant Grove" and there is no "or" separating that command from the additional donor-related criteria, Pet. App. 2h-3h (emphasis added) – suggesting that the new policy makes historical relevance a necessary condition for display in all cases. *Cf.* JA 25 (City's Amended Answer) (referring only to historical relevance in describing policy); JA 37 (Mayor Danklef's Amended Answer) (same). Or it may be that every display must now meet *both* the historical relevance *and* donor identity criteria. *See* Br. of American Jewish Committee, et. al., as *Amici Curiae* in Support of Neither Party ("AJC Br.") at 32-33 & n.19.

The written policy also fails to clarify or even to mention the continuing role of the Historical Commission in approving displays for Pioneer Park. On its face, the policy purports to vest all decision-making authority with the City's Director of Leisure and the City Council, and directs applications for displays to the City. Pet. App. 2h. But the City Ad-

ministrator has explained that prospective donees actually must "go through" the Historical Commission, JA 190-91, a purely private organization, JA 139.[5] If Historical Commission members conclude that a proposed display "doesn't fall into the criteria," then "typically they … would not" "forward the request on" to the City Council. JA 191; *see also* Petr. Br. 4. In other words, a display may be rejected unilaterally by the private Commission, when it fails to "forward the request on"; and the City Council generally can approve only those displays that already have met with the private Commission's favor.

5. In May 2005, after the new policy was formalized, Summum submitted another proposal, to which the City failed to respond. Pet. App. 3a. Construing the lack of response as another denial, Summum filed suit in federal district court in Utah. *Id.* Summum claimed that the City violated its free speech rights under the federal Constitution, as well as its rights under the free expression and establishment provisions of the Utah Constitution, when it allowed other expressive displays in Pioneer Park but denied Summum's request to display the Seven Aphorisms. JA 18-20. Summum sought declaratory and injunctive relief and monetary damages, and moved for a preliminary injunction requiring the City to allow

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[5] During this litigation, officials have referred, seemingly interchangeably, to both a "Historical Society," *see*, *e.g.*, JA 139, and a "Historical Commission," *see*, *e.g.*, JA 190-91. Both labels appear to refer to the same group, headed by Mildred Sutch, *see id.*; and both clearly refer to a private organization, *see id.*

display of the Aphorisms. The district court denied Summum's motion for a preliminary injunction.

The United States Court of Appeals for the Tenth Circuit reversed, holding that Summum had demonstrated a likelihood of success on the merits of its First Amendment claim and that the district court had erred in denying Summum a preliminary injunction. Pet. App. 20a, 23a.

The court of appeals began by invoking this Court's "forum analysis," recognizing that the nature of the relevant forum is "crucial" because it determines the extent to which the government may regulate private speech. Pet. App. 8a-9a. Relying on *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), the court concluded that Pioneer Park is "a traditional public forum," and, consequently, that any content- or speaker-based restrictions are "presumptively invalid." Pet. App. 10a, 12a-13a, 14a n.6. The court distinguished this case from those involving public property that does not constitute a traditional public forum (such as the grounds of municipal buildings), where the government has more leeway to regulate speech. *Id.* at 11a-12a. But in the public "streets and parks," the court determined, the government is held to strict scrutiny, and content- and speaker-based distinctions are forbidden unless narrowly tailored to advance compelling state interests. *Id.* at 10a (quoting *Perry*, 460 U.S. at 45), 12a-13a.

Because the City conceded that its exclusion of the Seven Aphorisms from a public park was content- (as well as speaker-) based, the Tenth Circuit went on to consider whether it could survive strict-

scrutiny review. Pet. App. 14a. The court concluded that the only interest asserted by Pleasant Grove – promoting its history – was not sufficiently compelling to justify content-based speech discrimination in a traditional public forum. *Id.* at 15a-16a. But the court also questioned the fit between the City's purported interest and its actual practice. Finding that the "record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history," the court expressly recognized the possibility that the City's 2004 written policy "is a post hoc façade for content-based discrimination." *Id.* at 20a n.9.

6. The Tenth Circuit denied rehearing en banc by an equally divided vote. Pet. App. 2f.[6] Three judges dissented from the denial. Judge McConnell, joined by Judge Gorsuch, argued that the Ten Commandments monument was government speech, primarily on the ground that the City owned and controlled it. *Id.* at 14f. It followed, Judge McConnell explained, that display of the Ten Commandments was not subject to the standard First Amendment bar on content- and viewpoint-discrimination: "Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government's 'own speech … is controlled by different principles.'" *Id.* at 15f (citation omitted).

Judge Lucero also dissented from the denial of rehearing. Unlike Judge McConnell, he believed that the Eagles monument constituted private, not

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[6] The petition for rehearing was consolidated with a separate petition pending in *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007).

government, speech. Pet. App. 3f. But he disagreed with the panel's forum analysis, concluding that the relevant forum was a "limited public forum" in which the City could make "reasonable content-based, but viewpoint-neutral, decisions." *Id.* at 8f. Because of "indications that the cit[y] engaged in impermissible viewpoint discrimination by denying Summum access," Judge Lucero supported further briefing and argument on that factual question. *Id.* at 9f.

Responding to the dissents, Judge Tacha emphasized that there was nothing draconian about the panel decision: The court did not "suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium." Pet. App. 18f. Even in a traditional public forum, the government remains free to impose content-neutral time, place and manner restrictions, including a ban on all private unattended displays. *Id.* at 19f. The one thing the government may not do is what the City did here: having "already permitted the permanent display of a private message … exclude other private speech on the basis of content, that is … *discriminate* among private speakers in a public forum." *Id.* at 20f n.1.

Judge Tacha rejected Judge McConnell's suggestion that the government speaks "just because it owns the physical object that conveys the speech." Pet. App. 21f-22f. Under this Court's precedent, Judge Tacha explained, the hallmark of government speech is not ownership of the mode of expression, but control over the speech's content. *Id.* at 20f. Accordingly, "government acceptance of the physical *medium* of speech, [but] not the message," is insuffi-

cient to turn a privately-created monument into government speech. *Id.* at 20f. The contrary approach endorsed by Judge McConnell and the City, Judge Tacha warned, would effectively immunize government discrimination against private speech from First Amendment regulation, by labeling selective government acceptance of private displays a form of "government speech." *Id.* at 26f; *see also id. at* 22f-23f.

SUMMARY OF ARGUMENT

I. The most basic of First Amendment rules is that in a traditional public forum like a public park, a city may not discriminate among speakers based on the content of their speech or the identity of the speaker. Certainly, the City could not use its "historical relevance" or donor-related criteria to allow the Eagles access to a park "speakers' corner" to proclaim their understanding of the commandments handed down to Moses, while prohibiting Summum from speaking about its own version of those commandments. As *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), makes clear, the same principle applies to the unattended displays at issue here; whatever form private communication takes, content- and speaker-based discrimination are prohibited in a traditional public forum. The City has conceded that the criteria it purportedly used to deny Summum equal access to its park are content- and speaker-based, and that is enough to decide this case.

The City's concession, however, does not tell the whole story. As the Court of Appeals suggested, even the preliminary-injunction record makes clear

that the City's alleged "policy" of approving displays based on historical relevance is a "post hoc façade" for a singular bias against Summum and its message. The City has never denied a single other request to donate a display; only Summum has been barred from the park. And neither the City's earlier informal "practice" nor its current written "policy" can actually explain why that should be so. If the Eagles' Ten Commandments monument is "directly related to the history of Pleasant Grove" because it evokes "religious freedom," as the City awkwardly suggests, then Summum's monument – at least as evocative of the same freedoms – also warrants display.

The City officially approved the Eagles' version of the Mosaic tablets while disapproving Summum's alternative account of the same subject. In fact, the record shows a targeted anti-Summum gerrymander, aimed at suppressing one particularly disfavored religious view. The City has thus transgressed the most fundamental First Amendment boundaries, taking sides in a theological debate by granting preferential access to a traditional public forum.

The City attempts to avoid this result by arguing that the forum in question is not its city park, but rather the particular mode of proposed communication, or *monuments* in the park. That claim is foreclosed by *Pinette*, holding unconstitutional a content-based exclusion of an unattended display from a city square. The Court in *Pinette* did not treat the relevant forum as "unattended displays in the square," as the City would have it; instead, it confirmed that the forum in question remained the real property of the square, and that the square remained a tradi-

tional public forum even as to non-traditional modes of speech like unattended displays. The Court recognized that the government might, as a permissible time, place and manner restriction, ban private unattended displays from its traditional public forums altogether. What it may not do is what the City did here: Award selective access to a particular mode of communication on the basis of content or viewpoint.

II. Contrary to the City's newly-discovered argument, the Eagles' monument is not "government speech" in which the City may engage free from First Amendment constraints. Under this Court's precedent, the defining characteristic of government speech is government control of the message conveyed. That standard is not met here. The City did not control the content of the Ten Commandments monument when it was created; the Eagles did. Nor did the City adopt the message of the Eagles' monument as its own after the donation, through formal resolution or otherwise making clear that the message reflects the government's own views.

Most monuments in traditional public forums do constitute government speech, either because the government actively participates in crafting the message at the front end or because it adopts the message as its own at the back. But where, as here, the government has done neither, it cannot be exempted from First Amendment regulation. To hold otherwise would allow the government to speak without the democratic accountability that justifies the government speech doctrine.

This Court has never suggested that government ownership of a display can substitute for control of

its content. If ownership alone were sufficient to show government speech, then the government could shield itself from the prohibition on content- and viewpoint-discrimination simply by taking title to expressive items before granting preferential access to a forum. Nor has the Court suggested that there is any meaningful difference, for government speech purposes, between so-called "permanent" and non-permanent displays. To the extent that permanent displays raise distinct aesthetic or space-allocation concerns, those issues can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays. But permanence alone does not justify content- or viewpoint-based discrimination among displays.

Finally, the City cannot save its discrimination against Summum's proposed speech by invoking cases in which the government "speaks" by exercising editorial discretion in selecting and compiling private speech it wishes to present to the public. The very essence of the First Amendment is that the government may *not* "edit" private speech for content in a traditional public forum. Cases recognizing a role for the government as speech "editor" are the exception, not the rule, and arise only when the government performs a function that traditionally and by its very nature requires the exercise of discretion and selectivity. Administration of expressive displays in a public park falls well outside that narrow category: Long tradition prohibits, rather than recognizes, a role for governmental editorial discretion, and content-neutral time, place and manner restric-

tions are all that is needed for the government to perform its function.

III. Application of these well-established First Amendment principles will not lead to the parade of horribles posited by the City because most monuments do constitute government speech, exempt from content- and viewpoint-neutrality obligations. The government is typically involved in commissioning and designing the displays, effectively controlling their content; and even when it is not, it still retains the option of adopting that content after the fact. Thus, the government remains free to express its views in the form of an unattended display without allowing room for competing views. All that is required is that the government take responsibility for its own message.

ARGUMENT

I. PETITIONERS VIOLATED THE FREE SPEECH CLAUSE BY EXCLUDING SUMMUM'S SPEECH FROM A TRADITIONAL PUBLIC FORUM OPEN TO OTHER PRIVATE UNATTENDED DISPLAYS.

The Tenth Circuit correctly held that the Free Speech Clause prohibits the City from denying Summum the same access to Pioneer Park afforded the Eagles and other private groups and citizens. The record in this case reveals not only the City's acknowledged content- and speaker-based discrimination but also the most "egregious" of First Amendment violations, viewpoint discrimination, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 827 (1995), all in a "quintes-

sential" public forum: a public park, *Perry*, 460 U.S. at 45. As the Tenth Circuit recognized, that adds up to a very "substantial likelihood" that respondent will prevail on its claim, making the interlocutory relief ordered by the court entirely appropriate.

A. The City Impermissibly Denied Summum Access To Pioneer Park Based On Its Proposed Message.

Summum, like so many speakers before it, sought access to a local park in order to share its deeply-held beliefs with the local citizenry. Through an unattended display, Summum, like the Eagles, hoped to "serve the public good[,] and make the world a better place." JA 57-58 (original Summum request). The First Amendment principles that govern the access of private speakers to public parks – the quintessential traditional public forum – are well-established, and the City plainly contravened them here.

1. The category of "traditional public forum" is limited to its "historic confines," *United States v. American Library Ass'n*, 539 U.S. 194, 205-06 (2003) (plurality opinion) ("*ALA*"), and this Court has been reluctant to extend it beyond the public "streets and parks" expressly identified by *Perry*, 460 U.S. at 45. *See*, *e.g.*, *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (public airport terminal is not traditional public forum). But just as the confines of the traditional public forum are strictly limited, so, too, the "rights of the State to limit expressive activity" in such a forum are "sharply circumscribed." *Perry*, 460 U.S. at 45. Government regulation of speech in a traditional public forum is, across the

board, subject "to the highest scrutiny." *Krishna Consciousness*, 505 U.S. at 678 (internal quotation marks omitted).

First, "[i]t is axiomatic that the government may not regulate speech [in a traditional public forum] based on its substantive content…." *Rosenberger*, 515 U.S. at 828. "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its … subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1965). Accordingly, any content-based speech restriction in a public forum is "presumptively invalid," and can survive only if it satisfies strict scrutiny, meaning that it is "necessary to serve a compelling state interest and … narrowly drawn to achieve that end." Pet. App. 12a-13a; *Perry*, 460 U.S. at 45. The same strict scrutiny governs speaker-based distinctions in a traditional public forum, which also "contradict basic First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000); *see also*, *e.g.*, *Mosley*, 408 U.S. at 96; Pet. App. 14a n.6.

Second, in a traditional public forum (as in any forum), the government is flatly prohibited from regulating speech based on its "specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. Such viewpoint discrimination is an especially "egregious form" of content discrimination: "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id*.

At the same time, even in traditional public forums like parks and streets, the government may impose narrowly tailored and content-neutral time, place and manner restrictions. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding content-neutral restrictions on sound-amplification in public park). In some cases, those restrictions may take the form of a total ban on a particular mode of communication, so long as the ban is content- and viewpoint-neutral. *See*, *e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). Thus, a city may ban all sound trucks from a residential public park, *Kovacs v. Cooper*, 336 U.S. 77 (1949), but it may not ban the use of sound trucks to promote certain messages while allowing others. *Cf. Saia v. New York*, 334 U.S. 558, 562 (1948) (rejecting sound-truck ordinance under which "permit may be denied because some people find the ideas annoying").

In *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), the Court held that those same well-established principles apply when a private speaker seeks access to a traditional public forum to express its views through an unattended display. At issue in *Pinette* was a Ku Klux Klan request to place a cross in a public square opened to other private organizations' unattended expressive displays. The Court concluded that the government violated the Free Speech Clause by denying the Klan access to that traditional public forum based on the religious content of its proposed display. *See id.* at 760-61, 769, 772 (plurality opinion); *id.* at 772 (O'Connor, J., concurring). The Court recognized that the government might enact a content-neutral

ban on *all* private unattended displays in the square. *See id.* at 761; *id.* at 783 (Souter, J., concurring) (agreeing with suggestion of Court and Justice Stevens that state "could ban all unattended private displays in Capitol Square"). What it could not do is regulate "expressive *content*," at least without meeting the strict-scrutiny standard. *Id.* at 761 (emphasis in original).

Thus, despite Pioneer Park's status as a traditional public forum, the City of Pleasant Grove could limit unattended displays to government displays, or it could bar all unattended displays from the Park entirely. But as the Tenth Circuit held, the City cannot, consistent with the Free Speech Clause, impose a content- or speaker-based restriction on unattended displays of private expression in Pioneer Park, unless it can demonstrate that such a restriction is narrowly tailored to further a compelling government interest.

2. The City violated this core First Amendment command when it denied Summum permission to display its Seven Aphorisms. As the court of appeals explained, the City has conceded that the formal criteria it used to disapprove Summum's proposed display were "certainly content-based" and speaker-based: "[T]he City merely restricts permanent monuments based on either the content of the monument … or the identity of the donor." Pet. App. 14a n.5 (quoting City's Tenth Circuit brief); *see also* Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial S.J. 8 ("The [Summum] group is simply not on a par with the Fraternal Order of Eagles Pleasant Grove Aerie ##3372 – not in the constitutional sense; not in common sense."). That is enough to dispose of this

case. The City did not below, Pet. App. 15a, and does not now, assert that its alleged interest in promoting local history is sufficiently "compelling" to justify content- or speaker-based restrictions in a traditional public forum. Absent a compelling interest, the First Amendment prohibits the City from denying Summum equal access to Pioneer Park because of the message Summum wishes to convey.

Indeed, as this Court explained in *Pinette*, "government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760. Certainly, the city could not have allowed the Eagles to come to the park and proclaim, at a "Speaker's Corner," their view of the commandments given to Moses, while prohibiting Summum from doing the same, simply because the City believed the former better reflected the City's history. *See Southworth v. Bd. of Regents*, 307 F.3d 566, 594 (7th Cir. 2002) (First Amendment prohibits placing "historically popular viewpoints … at an advantage compared with newer viewpoints"). Similarly, the City could not use such justifications to permit one group to distribute leaflets in the park containing the Ten Commandments, while prohibiting another from distributing leaflets with the Seven Aphorisms. The same First Amendment principle precludes the City from providing preferential access to the Eagles' unattended display. No matter what form private communication takes, the government may not take sides in a theological debate by granting preferential access to a traditional public forum.

Taking the City at its word, it allowed the Eagles to display its version of Moses' tablets in the park because it deemed the message of that unattended display to "merit acknowledgment," while it prevented Summum from displaying its Seven Aphorisms – an alternative depiction of the Mosaic tables – because that message was not sufficiently "worthy." Petr. Br. 27, 31. Whether the relevant subject matter is defined broadly, as "religious freedoms," JA 144, or more narrowly, as "the Exodus story," it is plain that the Eagles and Summum wish to convey two different points of view on the same subject. The City's ideological preference for the Eagles' view constitutes a core First Amendment violation.

3. In reality, however, petitioners' reliance on "historical relevance" and the 2004 policy is pure pretext, making the constitutional violation still more egregious. Although petitioners and their *amici* argue strenuously that denial of Summum's request was a routine application of regularly and neutrally-employed subject-matter and speaker-based criteria, *see* Petr. Br. 47-48; U.S. Br. 28-31, the record is almost entirely to the contrary, evidencing instead that the City's bias against Summum and its message was the motivating factor behind disapproval of the Summum display.

When the City denied Summum's request, it acted pursuant to no official policy constraining its discretion. It is undisputed that there was no formal policy at the time, and as the Tenth Circuit found, there is also scant record support for any "well-established [] practice of approving monuments" under the City's claimed criteria. Pet. App. 20a n.9. Instead, the record suggests an ad hoc system under

which the Historical Commission, a private party, was given discretion to determine access to Pioneer Park. *See supra* p. 5. There is no evidence of denial of any proposed display before 2003, JA 156, likely because there was no City screening process until the City was compelled to invent one in order to justify its denial of Summum's request. Though it is of course true, as the United States argues, that government officials generally are "presumed to have acted in good faith," U.S. Br. 30, this Court has recognized that in the First Amendment context, unbridled government discretion over access to a forum presents an unacceptable risk of censorship and viewpoint discrimination. *See*, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

The City's 2004 written policy does not cure the problem. First, the timing and surrounding circumstances raise a serious question, recognized by the court below, as to whether the 2004 policy is a "post hoc façade" for discrimination. Pet. App. 20a n.9. The "government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message." *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1153 (7th Cir. 1995). And even today, the policy provides no clear guidance to constrain official discretion. It remains impossible to say with certainty whether a proposed display must meet either, one or both of the historical relevance and donor identity criteria listed in the policy. *See supra* p. 6. Moreover, the City insists that none of the criteria is sufficient to merit display, and that it "retains [an] absolute veto power" that may be exer-

cised for unstated reasons. *See* Petr. Br. 31; Reply to Br. in Opp'n 3-4. The result is that the City is left with virtually "limitless discretion" in deciding how to apply the policy to proposed displays. *Cf. Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951) (condemning "amorphous 'practice'" and "limitless discretion" in awarding park permits).

And in fact, neither the City's claimed pre-2004 "practice" nor its 2004 policy can actually explain why the Eagles' Ten Commandments monument is a permitted display while Summum's proposed monument is not. Petitioners have been unable even to offer a consistent explanation of why the Eagles' monument meets the City's purported criteria, arguing at some points that the monument is not historically relevant but permissible on donor-related grounds, *see* JA 188 ("Ten Commandments plot … doesn't relate to the history, it relates to a service organization"), and at others that the Ten Commandments are, in fact, "directly related" to Pleasant Grove's history, *see* JA 144 ("Ten Commandments are part of [Pleasant Grove's] Mormon heritage because … religious freedoms, that's why the pioneers came west").

The only thing those explanations share is that neither is plausible. When the Eagles donated their display in 1971, they were not an "established Pleasant Grove civic organization with strong ties to the community," Pet. App. 3h; their local chapter was just two years old. Nor is there any credible basis for the assertion that the Eagles' monument would "remind citizens of their pioneer heritage" while the Summum monument would not. Petr. Br. 30 (quoting Mayor Cook). The Commandments on the Ea-

gles' monument are not why Pleasant Grove's "pioneers came west." JA 144. Indeed, the Eagles' monument does not even contain the same version of the Commandments that the Mormons observe.[7] And to the extent the Eagles' display merits placement in Pioneer Park because it evokes "religious freedom," JA 144, then Summum's display – at least as evocative, if not a more potent example, of that same freedom – merits placement, as well. Even the United States appears to recognize the awkward fact that the Eagles' monument is not actually eligible for display under the City's own purported criteria. *See* U.S. Br. 31 (suggesting that City made a "mistake" in permitting the Eagles' monument).

Other displays in the park fare no better. Though the tragic events of September 11th devastated citizens across the nation, for instance, the City has offered no plausible account of how the September 11th memorial in Pioneer Park "directly relate[s] to the history of *Pleasant Grove*." Pet. App.

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[7] *See* Ten Commandments, Additional Information, http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD&locale=0&index=20&sourceId=54a0f73c28d98010VgnVCM1000004d82620a____ (visited Aug. 15, 2008); Br. Amici Curiae The American Jewish Congress, et al., in Supp. of Petr., Van Orden v. Perry, 545 U.S. 677 (2005) (No. 03-1500), 21-22 & App. A (setting forth various versions of the Ten Commandments and describing significant theological differences associated with different treatment of graven images).; Br. *Amici Curiae* The American Jewish Congress, *et al.*, in Supp. of Petr., *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500), App. A (setting forth various versions of the Ten Commandments); *see also id.* at 21-22 (describing significant theological differences associated with different treatment of graven images).

2h (emphasis added). The best it can do is the transparently pretextual suggestion that the monument "directly relates to the history of Pleasant Grove" because firemen lost their lives on September 11th and there are firemen in Pleasant Grove, as well as a historical firehouse in Pioneer Park. JA 140. The City is of course free to honor those who sacrificed their lives to save others on September 11th. *See infra* pp. 33-34. But it may not, in a traditional public forum, privilege a private viewpoint about September 11th over Summum's views by hiding behind facially inapplicable "historical relevance" criteria.

The only plausible explanation is that both the City's 2004 policy and its actual practice were designed specifically to exclude Summum's Aphorisms from Pioneer Park while including all other displays, regardless of their actual fit with the City's ostensible criteria. *See* Pet. App. 19a-20a n.9 (questioning whether policy is "post hoc facade"); *id.* at 9f (Lucero, J., dissenting) (acknowledging "indications that the [City] engaged in impermissible viewpoint discrimination"); *see also* AJC Brief at 33 (describing policy's "all-too-convenient exclusion of Summum and questionable applicability to other monuments"); *supra* p. 3 & n.2 (identifying other displays allowed by the City). That kind of speech gerrymander, "aim[ed] at the suppression of dangerous ideas," has no place in a traditional public forum, nor, indeed, in any context in which the government regulates private speech. *See Regan v. Taxation With Representation*

of Wash., 461 U.S. 540, 548 (1983) (internal quotation marks and citation omitted).[8]

B. The Relevant Forum Is Pioneer Park, Not A Particular Mode Of Expression Within The Park.

Facing, at a minimum, acknowledged content- and speaker-based discrimination impermissible in a traditional public forum, petitioners and their *amici* take aim at the Tenth Circuit's initial identification of the relevant forum. *See* Petr. Br. 41. According to the City, the forum at issue is not its public park, undisputedly a traditional public forum. *See United States v. Grace*, 461 U.S. 171, 177 (1983) ("public places historically associated with … expressive activities, such as … parks, are considered, without more, to be public forums"). Instead, the forum is the specific mode of communication contemplated by Summum: monuments in the park, *see* U.S. Br. 24-25; or, in the City's refinement, government-approved monuments in the park, Petr. Br. 41. *See*

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[8] Because the forum at issue here is a traditional public forum, the City's acknowledged content-based discrimination by itself renders its denial of Summum's request presumptively invalid. But even assuming, *arguendo*, that the relevant forum were a designated or limited public forum, or a nonpublic forum, *see* U.S. Br. 22, Petr. Br. 45-48, the City's bias against Summum's distinct message would violate the First Amendment; that kind of viewpoint suppression is impermissible whatever the nature of the forum. *See*, *e.g.*, *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007). Indeed, even when forum principles do not apply, the government still may not "discriminate invidiously" in regulating private speech in an effort to suppress a disfavored view. *Regan*, 461 U.S. at 548; *infra* pp. 52-53.

also Pet. App. 5f (Lucero, J., dissenting) (nature of forum turns on "method of communication" as well as location).

That argument is foreclosed by *Pinette*. In *Pinette*, the Court considered the same mode of communication at issue here – unattended private displays – and the government's authority to regulate that communication on the basis of content in a public square. On the City's understanding, the relevant forum would be unattended displays in a public square, and because there is no historic right to erect such displays, there would be no traditional public forum barring content-based speech restrictions. But that is not how the Court decided *Pinette*. On the contrary, the Court determined that (1) the relevant forum was the real property of the city square, and (2) despite the non-traditional mode of speech in question, the square remained a traditional public forum. *See* 515 U.S. at 769. In other words, the Court recognized that "a traditional public forum retains its status as a public forum no matter what type of speech is involved." *Comite Pro-Celebracion v. Claypool*, 863 F. Supp. 682, 688 (N.D. Ill. 1994) (considering denial of permit to place monument in public park).[9]

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[9] The United States attempts to avoid the plain import of *Pinette* by arguing that the Court there "did not revisit the lower courts' conclusion that the property in question was a traditional public forum with respect to the unattended displays." U.S. Br. 25 n.14. But the plurality in *Pinette* specifically determined for itself that "Capitol Square is a genuinely public forum," 515 U.S. at 766, and Justice O'Connor's opinion likewise turned on whether "truly private speech [had been] allowed on equal terms in a vigorous public forum," *id.* at 775

Pinette is only the latest in a long line of cases applying the well-established rules governing traditional public forums to non-traditional modes of speech in such forums. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), for instance, the issue was the First Amendment right of protesters to sleep in a public park. The Court did not stop to inquire, as it would under the theory of the City and the United States, whether there is a "long-standing tradition" of private parties sleeping in public parks. *Cf.* U.S. Br. 9. Instead, despite the non-traditional nature of the proposed mode of expression, the Court simply applied the same strict scrutiny it always applies in traditional public forums, insisting that denial of a permit be "justified without reference to the content of the regulated speech … [and] narrowly tailored to serve a significant governmental interest." *Clark*, 468 U.S. at 293. Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29 (1993), the Court invalidated a restriction on unattended commercial newsracks on public sidewalks because it was content-based, again applying the standard associated with the traditional public forum of sidewalks rather than considering the forum status of unattended newsracks on sidewalks. *See also Saia*, 334 U.S. at 562 (same analysis applied to use of sound-truck in traditional public forum). In short, as Judge Tacha ex-

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(O'Connor, J., concurring in judgment). Nor was this mere dicta. The functioning of what the Court found to be a traditional public forum was crucial to its holding that granting equal access to the Klan's unattended cross display would not violate the Establishment Clause. *Id.* at 763-74 (plurality); 775 (O'Connor, J).

plained below, "Supreme Court precedent makes clear [that] the type of speech does not, and should not, determine the nature of the forum." Pet. App. 18f-19f.

That does not mean that speakers have a free-standing right to use non-traditional modes of expression, even in traditional public forums. As the Court recognized in *Pinette*, 515 U.S. at 761, the government may bar all use of at least some non-traditional forms of communication, including the unattended private displays at issue here. But it remains subject to the bar on content discrimination in traditional public forums, and it may not award selective access to a particular mode of communication on the basis of content or viewpoint. *See R.A.V.*, 505 U.S. at 386 ("Fighting words are thus analogous to a noisy sound truck: Each is … a mode of speech … but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed.").

That unexceptional conclusion is not undermined by cases like *Perry* and *Cornelius*, in which the Court has "focused on the access sought by the speaker" in "ascertaining the perimeters of a forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *see* Pet. App. 5f (Lucero, J., dissenting) (citing *Perry* and *Cornelius*); U.S. Br. 24 (same). The Court has taken that approach only in cases in which speakers have sought "limited access" to *non*-traditional forums, *Cornelius*, 473 U.S. at 801, and the Court was asked to *expand* protected speech rights by holding that even where an entire

physical location was not traditionally open to speech, the government had affirmatively allowed a narrow form of access to private speakers. *See id.* ("relevant forum" was CFC campaign and attendant literature because speakers did not claim that workplace generally was public forum for private speech, but sought access only to CFC materials); *Perry*, 460 U.S. at 45 (defining forum in terms of access to internal school mail system that lacked a physical location). Those cases have no application in traditional public forums like public parks and streets, and cannot be used to justify a contraction of speech rights in such forums.

II. THE EAGLES' TEN COMMANDMENTS MONUMENT IS NOT GOVERNMENT SPEECH.

In an eleventh-hour attempt to avoid the well-established principles outlined above, the City now seeks to couch its content- and viewpoint-based discrimination as "government speech" exempt from the First Amendment.[10] Under the rubric of "govern-

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[10] Petitioner's litigation position in this case has been a moving target. At the case's inception, the City assiduously avoided characterizing the Ten Commandments monument as government speech, *see* Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial Summ. J. at 10 (referring to monument as "private religious speech" fully protected under the First Amendment), perhaps in an effort to lessen its exposure under the Establishment Clause. Before the Tenth Circuit panel, the City suggested only in a footnote that the monument might properly be viewed as government speech. Br. of Appellees 16 n.3. It was not until they sought rehearing that petitioners pressed the argument the Ten Commandments monument was government speech. The only consistent element in the City's arguments has been an overriding commitment to keeping the Summum

ment speech," the City and its *amici* actually combine and conflate elements of two distinct kinds of government action: traditional government speech, in which the government crafts its own message; and government as editor of private speech, in which the government "speaks" through its exercise of editorial judgment concerning which private messages it will make available to the public. *See* Petr. Br. 32-33, U.S. Br. 15-16; AJC Br. 16-17 (describing confusion). But however the argument is formulated, it is wrong. The Eagles' Ten Commandment monument is not traditional government speech, and the City did not legitimately act as "editor" of private speech when it permitted the Eagles' and other private displays but disapproved Summum's.

A. The Eagles' Monument Is Not Government Speech Because The Government Does Not Control The Message.

Summum does not dispute that the government is entitled to speak with its own voice, and that, under the right circumstances, it may convey its chosen message free from traditional First Amendment constraints. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). But this Court's precedents make clear that the government speech doctrine applies only when the government controls the message being sent – either by actively participating in the for-

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display out of Pioneer Park. *See Cornelius*, 473 U.S. at 834 n.2, 835 (Stevens, J., dissenting) ("Government has advanced a series of different arguments for the result that it has sought during the course of this controversy," some "so plainly without merit that they actually lend support to an inference of bias").

mulation of the message or by later adopting the message as its own. Only consistent enforcement of that requirement can ensure that the government speech doctrine is confined to its legitimate purpose, promotion of the government's own messages, and not manipulated to allow for what is actually government discrimination against disfavored private speech.

1. Under this Court's precedents, the defining characteristic of government speech is government control of the message conveyed. *See* Pet. App. 22f (Tacha, J.) ("the appropriate inquiry is whether the government controls the content of the speech at issue"). In *Johanns*, for example, the Court evaluated a federal program imposing mandatory assessments against beef-related businesses to fund an advertising campaign promoting beef consumption. In holding that the program constituted government speech, the Court emphasized that the "message" of the program is "effectively controlled by the Federal Government itself." 544 U.S. at 560; *see id.* ("message set out in the beef promotions is from beginning to end the message established" by the government). Indeed, it was "[t]his degree of governmental control over the message" that distinguished *Johanns* from prior cases involving regulation of private speech. *Id.* at 561. In short, where "the government sets the overall message to be communicated," it may speak free of traditional First Amendment controls. *Id.* at 562.

Other government-speech cases similarly turn on government control of the message. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a government program funding family-planning services

that barred doctors from providing abortion counseling. Later decisions have explained *Rust* as a government-speech case, because the government "used private speakers to transmit specific information pertaining to its own program" and to "promote a particular policy of its own." *Rosenberger*, 515 U.S. at 833. In contrast, the Court has refused to apply the government speech doctrine where there is no claim that the government is "responsible for [the] content" of the message, *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000), or there is "no programmatic message" crafted or claimed by the government, *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001).

2. The requirement of government control over the message imposes no obstacle to the government's ability to speak through unattended displays in a traditional public forum. In fact, the vast majority of such displays around the country likely qualify as government speech under that standard. In most cases, as in *Johanns* and *Rust*, the government actively participates in crafting the message from the outset, through a planning or commissioning process that allows it to set and control the message conveyed. *See* Br. of *Amicus Curiae* Int'l Municipal Lawyers Ass'n in Support of Petr. ("IMLA Br.") 7 & App. D (describing "seamless partnership" that typically arises between the government and private parties in the monument proposal and planning process).

The government also may effectively take control of the expressive content of a display *after* the item has been created and presented to the government. As a number of lower courts have recognized, this

might be accomplished through formal resolutions by a governing body adopting the content of a monument, *see Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002) (city council resolution adopting speech as own); by the installation of signs making clear that the donated items reflect the views of the government, *see ACLU v. Schundler*, 104 F.3d 1435, 1446 (3d Cir. 1997) (display accompanied by sign stating that it was sponsored by government); *Pinette*, 515 U.S. at 769 (plurality); *id.* at 776 (concurrence); or by formal designations of objects as national monuments or memorials.[11]

But here, the City did not control the content of the Eagles' monument either before its creation or afterwards. It is beyond dispute that the City played no role in crafting the monument's content at the

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[11] A straightforward adoption as government speech of a privately-donated Ten Commandments monument, in particular, might of course raise Establishment Clause issues – especially where the government engages in denominational discrimination, as it did here. *See infra* pp. 52-53; AJC Br. 19-33. The Tenth Circuit's ruling, conversely, is exactly what is required to avoid an Establishment Clause problem: Granting equal access to a variety of private religious displays in a traditional public forum is unlikely to create any reasonable perception of government endorsement of religion. *See Pinette*, 515 U.S. at 770 (no Establishment Clause violation where religious expression is "purely private" and "occurs in a traditional … public forum, publicly announced and open to all on equal terms"); *see id.* at 775 (O'Connor, J., concurring) (Establishment Clause violation unlikely where "truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly"); *see also Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices").

front end of the process; instead, the monument was presented to the City as a completed work. It was the Eagles, not the City, that developed a national project to use Ten Commandments monuments to disseminate a particular message of the Eagles' devising: that the code of conduct reflected in the Commandments should inspire youth to lead more productive lives. *See supra* p. 3. It was the Eagles, not the City, that added to the Ten Commandments on its monuments various embellishments associated with the Eagles, as well an express acknowledgment that the monuments were "presented" by the Eagles. *See id.*; *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring) (noting same prominent acknowledgment of Eagles, which "distances the State itself" from content of monument). And the Eagles' communicative project has continued over time, as the organization maintains its monument and ensures that its message remains visible to citizens in the park. *See supra* p. 4. In short, the message set out in the Ten Commandments monument was "from beginning to end" the message of the Eagles, and the Eagles alone. *Cf. Johanns*, 544 U.S. at 560.[12]

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[12] Indeed, the United States took that very position in *Van Orden*, relying on the same Tenth Circuit decision petitioners attack here. *See* Br. for the United States as *Amicus Curiae* Supp. Respt. at 28, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500) ("The prominent sign on the monument makes clear that respondents did not choose the script for the monument; the Fraternal Order of Eagles did. *See Summum v. City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002) ('[T]he Eagles are properly considered the "literal speaker" of the speech contained on the Monument.')."). In short, the United States has argued that the Eagles' private control over the message on its Ten Commandments monuments precludes a finding of gov-

Nor did the City adopt the message of the Eagles' monument as its own after the display was presented. The City has never passed a resolution approving of the content of the monument, installed a sign making clear that the monument reflects the views of the City, or taken any other steps to embrace the monument's message as its own. Instead, at various points in this litigation, the City has insisted that it approved the monument for reasons having nothing to do with its content. *See supra* p. 23; JA 188 (Eagles' monument justified only under donor-related criteria). To this day, the City refuses to take responsibility for the monument's message, insisting that its so-called "government speech" consists not of the actual "message inscribed on the [Eagles'] monument," but the act of "selection and display" of that monument. Petr. Br. 32-33.

But the fact that the government retains or exercises approval authority over a display does not mean, as the City and United States suggest, that it controls the content of that display. *See* Petr. Br. 32-33; U.S. Br. 13; *see also* Pet. App. 15f (McConnell, J., dissenting) (City "embraced the message[] as [its] own" by accepting donation of monument). The content may, as here, continue to be wholly controlled by private parties; what the government controls is only whether that privately-formulated message will be displayed. Yet *that* is the same kind of control the government always exercises when it unconstitutionally suppresses or privileges private speech.

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ernment endorsement under the Establishment Clause, but does not preclude the government from claiming the speech as its own under the Free Speech Clause.

If "selection" alone were enough to show control over a privately-crafted message for purposes of the government speech doctrine, then granting preferential access to particular speakers or viewpoints in a public forum would no longer violate the First Amendment: The very act of "selecting" favored content or views for access would constitute government speech, making content- and viewpoint-neutrality rules inapplicable. A school could, for instance, "select" secular speakers for preferential access to its facilities and exclude religious speech, on the theory that it had thereby adopted the message of the secular speakers as its own and immunized itself from Free Speech Clause review. *But see*, *e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (permitting school property to be used to express secular but not religious views constitutes prohibited discrimination among private messages). This Court has never even hinted at such a radical expansion of the government speech doctrine.

3. The broad discretion accorded the government when it conveys its own message is justified by the fact that the government is democratically accountable for that expression. *See*, *e.g.*, *Southworth*, 529 U.S. at 235; *Johanns*, 544 U.S. at 563. As *Johanns* makes clear, that democratic accountability, in turn, depends on government control over the message conveyed. 544 U.S. at 563 (beef advertisements are subject to "more than adequate" "political safeguards" because "the basic message [is] prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations"). Because the City here "exercised no control

over the content of the message[]" conveyed by the Eagles' monument, it is not politically accountable for that message, and hence "political safeguards" that would justify application of the government speech doctrine are absent. *See* Pet. App. 26f (Tacha, J.).

That problem is aggravated by the fact that the City has failed to provide a publicly visible and accountable process for addressing donations of unattended displays. *See Johanns*, 544 U.S. at 563 (relying also on statutory authorization, regulatory control of process, and congressional oversight authority as political safeguards); Leslie Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. Mich. J.L. Reform 35, 57 (2002) ("legitimate and publicly visible political process" for engaging in government speech preserves political accountability). Prior to Summum's request, the City had no written policy or criteria to govern its display of unattended items in Pioneer Park, *supra* p. 5, and even today, the City lacks a stated policy that can actually explain why it has approved or disapproved various displays, *supra* pp. 6, 23-25.

The City has further blurred the lines of political accountability with a wholly unwritten policy that diverts responsibility for selection of displays in Pioneer Park at least partly to the local Historical Commission, a private entity. *See supra* pp. 6-7. As the system appears to work in practice, for instance, the City itself might disclaim all responsibility for rejection of a proposed display, which can be effectuated entirely by the private Commission. *Id.* Democratic accountability is not served by an underground process so opaque that the Mayor of Pleasant

Grove, asked about approval of a particular monument, responded that he "imagin[ed]" that "Mildred Sutch, the Historical Society would have that information." JA 139.

B. Neither Government Ownership Nor The "Permanence" Of The Display Is Sufficient To Convert Private Speech Into Government Speech.

Both the City and its *amici* rely in some measure on the fact that the Eagles' monument, like other Pioneer Park displays, is owned by the City. *See* Petr. Br. 29; U.S. Br. 14 (ownership "underscores" that display constitutes government speech); *see also* Pet. App. 14f (McConnell, J., dissenting) (relying principally on ownership to show government speech). Giving any dispositive weight to ownership cannot be reconciled with this Court's precedents, which apply the government speech doctrine only when the government has control over the message, not the medium, of speech. *See* Pet. App. 20f (Tacha, J.). Allowing First Amendment immunity to turn on the formalism of title would permit manipulation of Free Speech doctrine that would render meaningless many of this Court's decisions.

1. As explained above, this Court has made clear that the defining characteristic of government speech is government control over the message conveyed. *Johanns*, 544 U.S. at 560. Control over message will often go together with ownership of the medium; when, for instance, the government commissions and purchases a statue of its own design, it both controls the content and owns the medium. In

such a case, there is no question but that the government itself is the speaker. But when the two do not go together – when the government owns the medium but does not control the message – then, under this Court's precedents, the expression is not treated as government speech.

Other courts likewise have recognized that government ownership of an expressive item is not enough to establish government speech when the government does not also control the message conveyed. In *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610, 620-21 (4th Cir. 2002), for instance, the Fourth Circuit held that specialty license plates, though formally owned by the government, are nevertheless private speech where the government exercises "little, if any, control" over the messages displayed. *See also Perry v. McDonald*, 280 F.3d 159, 166 (2d Cir. 2001) (treating restriction on vanity plates as "government regulation [] concerning private individuals' speech on government-owned property"). Similar questions have arisen with respect to personalized bricks or tiles on government-owned property. In *Demmon v. Loudoun County Public Schools*, 342 F. Supp. 2d 474 (E.D. Va. 2004), the court treated a school walkway composed of bricks bearing messages engraved by students and families as a limited public forum for private speech, despite the fact that the school maintained ownership and control of the walkway (including the right to remove bricks), *id.* at 477, where the school did not control the content of the messages on the bricks, *id.* at 483. *See also Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 923 (10th Cir. 2002) (treat-

ing tiles painted by students at public high school not as government speech but as student "school-sponsored speech").

Were it otherwise, the government could shield itself from First Amendment content- and viewpoint-discrimination prohibitions simply by taking title to expressive items before granting them preferential access to a forum. In *Pinette*, for instance, the Court held that the state could not refuse to display a Klan cross, because of its content, when it had permitted other private unattended displays in a traditional public forum. 515 U.S. at 770. On petitioners' view, however, the state could have transformed all of the displays in its park into government speech – thus relieving itself of the obligation to remain content- and viewpoint-neutral – simply by making transfer of title a condition of access to the forum. *Cf.* Pet. App. 26f (Tacha, J.) ("To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own.").

Indeed, under petitioners' theory of ownership-as-speech, several of this Court's prior cases could have been resolved differently, and on far simpler grounds. In *Rosenberger*, for instance, the university funded the printing of the student publications, and thus arguably owned the medium of expression. 515 U.S. at 823-825. Yet the Court did not think that fact transformed the publications into government speech. Instead, the Court held that the publications were not government speech because the university did not control their content. *Id.* at 834-35. Put differently, there is no reason to think *Rosenberger should* have been decided differently, and the

university freed from viewpoint-neutrality constraints, if the university had retained ownership rights to its publications. Similarly, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court evaluated a school's decision to delete two pages from the school newspaper under the "school-sponsored" speech doctrine, holding that the school's actions were related to "legitimate pedagogical concerns." *Id*. at 273. Had ownership and control of the physical medium of expression been a decisive factor, the Court could easily have determined that the school paper was government speech for that reason and ended its analysis there.

2. The fact that the ownership in this case is of a "permanent" monument does not change the analysis. The sporadic reliance of petitioners and their *amici* on a distinction between "permanent" and "nonpermanent" displays is neither correct nor helpful. *See*, *e.g.*, Petr. Br. 41 (relevant forum is "city's internal selection and approval process for … permanent, unattended monuments"); U.S. Br. 2 ("no longstanding tradition of private parties erecting permanent monuments in public parks"); *but see* Petr. Br. 24 (referring only to "monuments and other forms of unattended displays").

First, the City's policy for display applies equally to nonpermanent as well as permanent objects. *See* Pet. App. 1h (governing "permanent signs" as well as "plaques, structures, [and] displays"). Second, petitioners offer no criteria for what constitutes a "permanent" monument – and there certainly is no basis for suggesting that the displays in Pioneer Park are "permanent" in the usual sense of the word, given the City's insistence that it can move or remove

them at its discretion. *See* Petr. Br. 33; JA 159; *see also* IMLA Br., App. 12a.

But even assuming the City could identify a meaningful category of "permanent" displays as to which it has applied a discrete policy, there is no reason to treat government ownership of a permanent display differently from ownership of any other display. If a private party determines the content of the message on a display, and the government does not adopt the message afterwards, it is private speech, regardless of whether the display is deemed permanent or non-permanent. This Court's cases have thus never relied on or even recognized a distinction between permanent and non-permanent displays. *See Discovery Network*, 507 U.S. at 417 (regulation of newsracks, described as "permanent, freestanding dispensing devices," subject to standard First Amendment bar on content discrimination); *see also Demmon*, 342 F. Supp. 2d at 487 (treating "permanent" engraved bricks as private speech). Nor is there any basis for extending special discretion to the government in the regulation of permanent displays. To the extent that permanent rather than nonpermanent unattended displays raise unique concerns regarding aesthetics or space allocation, *see* AJC Br. 15, this Court already has given governments the leeway to address those concerns through content-neutral time, place and manner restrictions that include the option of a ban on all unattended private displays. *See Pinette*, 515 U.S. at 761. And to the extent that the government has a distinct interest in establishing permanent displays for government messages, it is free to do that either

by controlling the design of those displays or adopting their messages afterwards.

3. Even assuming, *arguendo*, that the City's ownership of the Eagles' monument was an indicia of government speech, it would not negate the private speech elements associated with the same monument. Whether or not the City is speaking through the monument, it is clear, at a minimum, that the Eagles are: The Eagles designed and donated the monument for their own communicative purposes, and demonstrate a continuing interest in the dissemination of their own message.

Some courts have recognized the possibility that both the government and a private party may engage in speech through the same expressive item. In such cases, the courts have not allowed the presence of a government speaker to obliterate private speakers' entitlement to First Amendment protection. In *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004), for instance, Judge Michael described a state-authorized specialty license plate as a "mixture of private and government speech" in a limited public forum. Because of the private-speech element, he went on to apply the First Amendment standard that customarily governs restrictions on private speech in such a forum, prohibiting the state from engaging in viewpoint discrimination. *Id.* at 797. Similarly, in *Sons of Confederate Veterans*, Judge Luttig treated specialty license plates as government- and private-speech "hybrids," with the private speech element enough to trigger, "at a minimum," the First Amendment prohibition on viewpoint discrimination. 305 F.3d at 245, 247; *see also Robb v. Hungerbeeler*, 370 F.3d

735, 744-45 (8th Cir. 2004) (state Adopt-A-Highway program "entail[ed] some degree of private 'speech' protected by the first amendment" though the program also "involves some state speech that inheres in the signs' design").

Here, given the complete absence of any government control over content, the Eagles' monument remains purely private speech. But even if the City's ownership of the monument were enough to give it a discrete speech interest, there is still a substantial private speech component sufficient to trigger the First Amendment's standard bar on content-, speaker- or viewpoint-based discrimination in a traditional public forum.

C. The City Cannot Evade First Amendment Scrutiny By Labeling Itself An "Editor."

Unable to show that it controlled the content of the Pioneer Park displays as required by the government speech doctrine, the City invokes another line of this Court's cases: cases in which the government permissibly exercises "editorial discretion" in selecting private speech it wishes to present to the public, while rejecting private speech that it does not. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); Petr. Br. 26-34 (citing, *inter alia*, *Forbes* (public television broadcaster); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (government arts grants); *ALA*, 539 U.S at 205-06 (public library)). In the City's view, the very fact that it engages in this form of editing of private speech – "select[ing] permanent displays, conveying the government's chosen theme, for erec-

tion on government land" – brings it within those cases and thus outside the First Amendment bars on content- and viewpoint-based discrimination. *See* Petr. Br. 26-34; *see also* U.S. Br. 15-16, 18-19.

The City has it exactly backwards. Government editing of private speech in a traditional public forum is the definition of a First Amendment violation, not a First Amendment defense. *See* AJC Br. 16-17. Nobody would argue that the government could exercise "editorial control and judgment" over the content of what private persons say on a soapbox in a public park, or what signs they carry, or what handbills they distribute, even if that "selective inclusion and exclusion of speech" is itself communicative. *Cf.* Petr. Br. 26. Nor may the government make an "ultimate editorial judgment" that Summum's display is not "worthy" of approval because it does not conform to the government's "overarching message." *Id.*

1. The Government May Not "Edit" Private Speech In A Traditional Public Forum.

Both the City and the United States begin with the premise that editorial decisions may be "act[s] of speech by the person or entity that does the selecting." U.S. Br. 16; *see* Petr. Br. 32. That is correct, and there is no question but that *private* parties may engage in such editorial "speech" protected by the First Amendment. *See* U.S. Br. 15-16 (citing cases involving private editorial speech, including *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)). But that does not answer the essential predicate question here: whether the *government* may speak in a *traditional*

public forum by "editing" private speech for content. It may not.

As discussed above, *see supra* p. 17, it is a core First Amendment principle that content-based speech restrictions in a traditional public forum are presumptively invalid. It follows that in such a forum, the government may not pick and choose among private speech to ensure conformity with an approved government message. Were it otherwise, foundational First Amendment cases would have to be revisited: The government could, for instance, "edit" private picketing on public streets so that it conformed to an official preference for labor picketing, *cf. Carey v. Brown*, 447 U.S. 455 (1980) (exception to picketing restriction for labor picketing is impermissible content-based speech restriction), or "edit" private speech at student-group meetings so as to promote an "overarching message" of secularism, *cf. Widmar*, 454 U.S. 263 (same as to exclusion of religious speech from student-group forum).

Not surprisingly, then, none of petitioners' government-as-editor decisions concerns a traditional public forum. And none turns on the government's self-justifying declaration that it is acting as "editor." Instead, each arose in a narrow context in which the government was performing a function that by tradition and by its very nature *required* the exercise of broad discretion to select amongst private speech. In *Forbes*, for example, the Court refused to apply public forum principles to a public television broadcaster's programming decisions because "broad rights of access for outside speakers would be antithetical … to the discretion that stations and their editorial staff *must exercise* to fulfill their journalis-

tic purpose and statutory obligations." 523 U.S. at 673 (emphasis added); *id.* at 674 ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."). In its subsequent government-as-editor cases, the Court extended that reasoning to federal arts funding and library collection decisions, finding that those functions likewise require the exercise of editorial discretion. *See Finley*, 524 U.S. at 585 ("Any content-based considerations that may be taken into account in the grant-making process are *a consequence of the nature of arts funding*." (emphasis added)); *ALA*, 539 U.S. at 205 ("[F]orum analysis and heightened judicial scrutiny are incompatible with … the discretion that public libraries *must have to fulfill their traditional missions*. Public library staffs *necessarily consider content* in making collection decisions and enjoy broad discretion in making them." (emphases added)).

Neither tradition nor necessity justifies the exercise of broad editorial discretion with respect to the administration of private expressive displays in a city park. Indeed, the traditional presumption is precisely the opposite: The government need not – indeed, generally may not – engage in content- or viewpoint-based discrimination in a traditional public forum. Nor do the physical space constraints associated with monuments and other unattended displays necessitate editing for content; as in *Pinette*, the government may address those issues through neutral time, place and manner restrictions, including a bar on all private unattended displays. And to the extent that the government wishes to convey its

own message through unattended displays it is completely free to do that, either by controlling the content of the message before it is crafted or adopting it afterwards. Extending the government-as-editor doctrine to cases like this one, in which there is no compelling necessity for the exercise of editorial discretion, would make it all too easy for the government to disguise impermissible content and viewpoint discrimination against private speech as "editing."

Nor, of course, does the mere fact that petitioners have sought to edit private speech in Pioneer Park deprive the park of its status as a traditional public forum. As the court below explained, the City "cannot close or otherwise limit a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action." Pet. App. 11a. In *Grace*, for instance, the Court invalidated a federal law banning expressive conduct on the sidewalk in front of the Supreme Court, a traditional public forum, because "Congress … may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." 461 U.S. at 180 (internal quotation marks and citation omitted); *see also Forbes*, 523 U.S. at 677 (government does not "retain[] the choice of whether to designate its property as a forum for specified classes of speakers" in a traditional public forum).

2. The City Did Not Legitimately Act As An Editor Of Private Speech In Pioneer Park.

As shown above, the First Amendment forbids the City from "editing" private speech in a traditional public forum like Pioneer Park. But even if the City could act as editor, the record amply demonstrates that it did not legitimately do so here. Instead, the City's litigation-driven characterization of its conduct as "editing" is nothing more than a post hoc rationalization for its content- and viewpoint-based discrimination against the message Summum wishes to convey.

a. As the court below found, the City's conduct in this case does not resemble the exercise of government editorial discretion approved in *Forbes*, *Finley*, and *ALA*. *See* Pet. App. 13a n.4 (City was not "acting in its capacity as librarian, television broadcaster, or arts patron"). According to the City, it qualifies as a government "editor" because it engaged in "selective inclusion and exclusion of speech" to convey an "overarching message" in Pioneer Park. Petr. Br. 26. In fact, however, the preliminary injunction record is devoid of evidence that the City actually engaged in "selection" in support of a governmental message.

Put simply, the City engaged in no "selection" of any kind until it "selected out" Summum's proposed monument. There is no evidence that the City has ever, before or after the events of this case, rejected any other proposal for an unattended display in Pioneer Park. JA 156. Instead, the record strongly suggests that rather than screening donation pro-

posals or seeking out items consistent with its purported message, the city passively accepted all comers, rendering its vaunted approval authority largely nugatory. That is not the kind of necessarily discretionary "selection" process the Court approved in cases like *Finley* and *Forbes*. *See Finley*, 524 U.S. at 585 (NEA "den[ies] the majority of the grant applications that it receives"); *Forbes*, 523 U.S. at 674 (broadcasters "must often choose among speakers expressing different viewpoints").

Moreover, the City's claim that its "selection" of items for Pioneer Park was in service of an "overarching message" is so implausible that it suggests a pretextual rationale for what is in reality garden-variety content- and viewpoint-based discrimination. The City cannot even decide how to describe the "overarching message" that unites the disparate displays in Pioneer Park, variously labeling the park as a place to "portray the Mormon pioneer-era heritage of Pleasant Grove," Petr. Br. 3, a place to preserve "anything historical," *id.* (citing JA 153), and even a place for any work that will "enhance" the park, JA 179. And, significantly, under the City's own account of its policy, the Park may be home to *any* display, regardless of subject matter, so long as its donor has longstanding ties with Pleasant Grove. *Supra* pp. 6, 23. The problem with the "message" sent by, *inter alia*, a Gingko tree, a log cabin, and a Ten Commandments monument is not that it is insufficiently "particularized," *cf.* U.S. Br. 16. It is that it is either nonexistent or so diffuse that it imposes no constraints at all on the government's ability to evade standard First Amendment review by invoking "government-as-editor" status.

b. The only real message sent by the City's "selective inclusion and exclusion of speech" in Pioneer Park is that Summum's Seven Aphorisms, and only the Seven Aphorisms, are not welcome there. But that sort of discrimination against a disfavored minority viewpoint is the one form of discretion that the government may *never* exercise. In no speech forum, traditional public forum or otherwise, may the government "suppress expression merely because public officials oppose the speaker's view." *Cornelius*, 473 U.S. at 800. Even outside the speech-forum context, the government may not "discriminate invidiously … in such a way as to aim at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (internal quotation marks and citation omitted). *Cf. Velazquez*, 531 U.S. at 544.

Thus, even where the Court has recognized that tradition or necessity justifies the government's exercise of editorial discretion, it has been careful to denote the First Amendment limitations on that authority. In *Finley*, the Court, citing *Regan*, warned that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case." 524 U.S. at 587. Justice Souter likewise emphasized those limits on editorial discretion in his *ALA* dissent, noting that, although the plurality had affirmed the broad editorial discretion of government librarians generally, it nonetheless "would consider to be illegitimate[] … [decisions to] exclud[e] books because their authors are Democrats or their critiques of organized Christianity are unsympathetic." 539 U.S. at 236 (Souter, J., dissenting). *See also Bd. of Educ. v. Pico*, 457

U.S. 853, 870 (1982) (plurality) (government may not exercise its discretion over the content of school libraries "in a narrowly partisan or political manner").

Petitioners in this case clearly exceeded the bounds of any editorial discretion they may have possessed in selecting displays in Pioneer Park. The record evidence in this case is more than sufficient to show that Pleasant Grove drafted, applied, and defended its application of the 2004 policy in such a manner as to gerrymander for rejection only Summum's Seven Aphorisms. *See supra* p. 25; AJC Brief 31-33. Other than the City's distaste for Summum or its beliefs (or both), there is no way to explain why the Eagles' non-Mormon version of the Ten Commandments is a sufficient representation of Mormon pioneer history or the religious freedom that drew the Mormon pioneers west, but Summum's Aphorisms – an alternative version of the inscription on the tablets given to Moses – are not. On this point, the Free Speech and Establishment Clauses speak with one voice: The City lacks the authority to bless any one version of Moses's trips to Mount Sinai. *See Pinette*, 515 U.S. at 760 (religious speech protected under Free Speech Clause); *ALA*, 539 U.S. at 236 (Souter, J., dissenting) (government cannot edit out "critiques of … Christianity"); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Even if it could act as editor here, the City is not permitted to "edit out" only the disfavored religious beliefs of Summum.

III. THE COURT OF APPEALS' DECISION WILL NOT LEAD TO A PARADE OF HORRIBLES.

The City and its *amici* have spilled much ink fretting about consequences that do not in fact follow from the Tenth Circuit's decision. It simply is not the case that a plague of offensive monuments will clutter public spaces throughout the country – or even the traditional public forums to which the decision below is confined – if the Tenth Circuit's decision is affirmed. That is because most monuments already constitute government speech under the principles we have described, and thus do not implicate the First Amendment's content- and viewpoint-neutrality rules. And where ambiguity remains, government officials may clarify that an existing monument constitutes government speech because it conveys a governmental message.

As explained above, the core requirement of government speech is that its content be controlled by the government. Whether a monument is actually created by government employees or by a private entity "enlist[ed]" to "convey [the government's] own message" does not matter, so long as the government effectively controls the design of the content. *Cf.* Petr. Br. 28; U.S. Br. 17 (discussing commissioned monuments). Similarly, the decision below poses no barrier to the private funding of government monuments. That a monument commissioned by the government and built to government specifications is funded by private donations does not detract from the conclusion that it is government speech. Regardless of the source of funding, the government's content control makes it government speech. *Cf.* U.S.

Br. App. 1a-11a (listing several privately funded monuments). Finally, the mere fact that a monument is privately donated, *see* Petr. Br. 50, does not make it forever private speech if the government effectively controls the content of the monument before the donation or adopts the content as its own after the fact.

It is obviously true that "[s]tatues and commemorative objects displayed … across the country help tell the story of the Nation's history and heritage, and may convey important government messages." U.S. Br. 9. And that is precisely why the government is typically involved at the front end in purchasing, commissioning, and designing and/or approving the design of those displays, effectively controlling and taking responsibility for the content of the displays. As petitioners' *amicus* International Municipal Lawyers Association explains, "municipalities around the country exercise content control over monuments through procedures that are remarkably similar to those outlined in *Johanns*." IMLA Br. at 15; *see also id.* at 7 (describing "seamless partnership" that typically arises between government and private parties in monument planning process).

At the national level, the monuments on the National Mall, highlighted by petitioners and their *amici*, perfectly illustrate why most commemorative displays do constitute government speech. Under the Commemorative Works Act of 1986 ("CWA"), 40 U.S.C. §§ 8901-8909, an elaborate framework governs the proposal, approval, and installation of any statue, monument, or other "structure or landscape feature" in the District of Columbia. *Id.* §§ 8901-

8902. The CWA created the National Capital Memorial Advisory Commission ("NCMAC") to oversee and provide advice on issues related to commemorative works. *Id*. § 8904. Members of the NCMAC include the chairs of the National Capital Planning Commission and the Commission of Fine Arts, the latter of which advises on matters of aesthetics. All told, a 24-step collaborative process must be completed – including the passage of authorizing legislation, submission and approval of site and design proposals, and issuance of a construction permit – in order to erect a memorial in Washington, D.C. *See* Zina L. Watkins, Memorials: Creating National, State and Local Memorials (2008), http://assets.opencrs.com/rpts/RS21080_20080521.pdf (visited Aug. 15, 2008). In short, there is active, pervasive and continual governmental involvement in formulating the messages to be conveyed by these monuments – right down to the facial expression on a Martin Luther King, Jr. statue. *See* Michael E. Ruane, *Architect Requests More Changes to King Statue*, Washington Post, May 19, 2008 at B01.

Federal law also allows for designation of a work as a national monument or memorial, which demonstrates that the government intends to express the message of the work. Under the Antiquities Act of 1906, 16 U.S.C. § 431, the President may designate national monuments like, for instance, the Statue of Liberty, declared a national monument in 1924. *See* Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924). National memorials are authorized by acts of Congress. For example, Congress authorized establishment of the Bakers Creek memorial noted by petitioner and the United States, Petr. Br. 52-53, U.S.

Br. 20, "to commemorate" those who lost their lives in the air crash. *See* Pub. L. No. 109-163, 119 Stat. 3536 (Jan. 6, 2006). Accordingly, display of that memorial would not raise First Amendment questions. *See also* Pub. L. No. 107-226, 116 Stat. 1345 (Sept. 24, 2002) (authorizing memorial to honor passengers of Flight 93 and establishing Flight 93 Advisory Commission to oversee its construction).

To be sure, there may be cases in which a privately-donated monument comes to the government as a finished work. Even then, the government remains free to adopt the content of that monument as its own expression. *See supra* pp. 33-34. Congress may designate existing works as national memorials, as well as provide for new ones. *See* Pub. L. No. 102-41, 105 Stat. 242 (May 8, 1991) (designating preexisting astronauts memorial at the John F. Kennedy Space Center in Florida as "the national memorial to astronauts who die in the line of duty"). Alternatively, any governing body may embrace the content of a preexisting monument through a formal resolution, *see City of Ogden*, 297 F.3d at 1006, or by installing signs making clear that the content of the donated monument reflects the views of the government, *see Schundler*, 104 F.3d at 1446.[13]

In short, it is not true that under the Tenth Circuit's ruling, "a city cannot accept a monument post-

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[13] When the government designates a space as a military park to commemorate a battle, *see* U.S. Br. 1-2, App. A, that space is not a traditional public forum. In such a place, moreover, the government would have broad discretion to select monuments that it views as fulfilling that commemorative purpose. *Cf. Greer v. Spock*, 424 U.S. 828 (1976).

humously honoring a war hero without also being prepared to accept a monument that lampoons that same hero." Petr. Br. 50-51. To the contrary, the government is free to honor the war hero without also lampooning him or her so long as it does so in its own voice, controlling and taking responsibility for the message conveyed and thus subjecting itself to full political accountability.

CONCLUSION

The decision of the Tenth Circuit should be affirmed.

Respectfully submitted,

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