No. 07-665

IN THE

Morris Tyler Moot Court of Appeals at Yale

Fall 2008 Term

PLEASANT GROVE CITY, et al.,
Petitioners

v.

SUMMUM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

Brief for the Petitioners

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Questions Presented

Most cities maintain parks and other open spaces for their citizens to use and enjoy. In many cases, these spaces include improvements such as structures, displays, and monuments. Two questions are presented for this Court's consideration:

1. Whether a city's policy of refusing to erect specific government-owned displays that are inconsistent with the message of the government property where the displays would be erected constitutes government, rather than private, speech.

2. Whether the Tenth Circuit erred in holding that a municipal park is a public forum under the First Amendment for the erection of permanent, unattended displays proposed by private parties.

Parties to the Brief

Pleasant Grove City, a municipal corporation
Jim Danklef, Mayor of Pleasant Grove City
Mark Atwood, Pleasant Grove City Councilman
Cindy Boyd, Pleasant Grove City Councilwoman
Mike Daniels, Pleasant Grove City Councilman
Darold McDade, Pleasant Grove City Councilman
Jeff Wilson, Pleasant Grove City Councilman
Carol Harmer, former Pleasant Grove City Councilwoman
G. Keith Corry, former Pleasant Grove City Councilman
Frank Mills, Pleasant Grove City Administrator

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Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 483 F.3d 1044 (10th Cir. 2007). The Tenth Circuit's order denying rehearing en banc is published at 499 F.3d 1170 (10th Cir. 2007). The oral opinion of the United States District Court for the District of Utah is not reported.

Statement of Jurisdiction

The district court (Kimball, J.) had subject matter jurisdiction under 28 U.S.C. § 1343 (civil rights recovery). The district court denied Respondent's motion for a preliminary injunction on February 2, 2006. Respondent filed notice of appeal, and the Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291. The Court of Appeals entered judgment on April 17, 2007. The Petitioners motion for rehearing en banc was denied on August 24, 2007. A

timely petition for a writ of certiorari was filed on November 20, 2007. Certiorari was granted on March 31, 2008. 128 S.Ct. 1737 (2007). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statement of the Case

I. FACTUAL BACKGROUND

Petitioner Pleasant Grove City ("City") is a municipality located in Utah. Within its historic district, the City maintains a 2.5 acre park called Pioneer Park for the free use and enjoyment of the public. JA 98-99. The City has by tradition elected to display a number of buildings, plaques, monuments, and trees, in Pioneer Park, all which serve to commemorate the City's pioneer history. JA 102. The objects currently displayed within the park all either directly relate to the history of the City or were donated by people or organizations with longstanding ties to the community. *Id.* For instance, Pioneer Park contains both "Old Bell School," the oldest known school building still standing in Utah, and the original Pleasant Grove Town Hall. JA 99-100; 133-35. The park also contains a Ten Commandments monument donated by the Fraternal Order of the Eagles (FOE), a fraternal, social service organization that has provided invaluable civic service to the City for over thirty-five years. JA 61.

Respondent Summum seeks to have a monument to the church's Seven Aphorisms[1] displayed in Pioneer Park, despite the fact that this monument is unrelated to the City's history

[1] The Seven Aphorisms monument would be inscribed with the following language and the seven "principles of knowing Creation":

> Creation manifests when balance is perfected between the opposites. By applying higher Law against lower laws, the Creation becomes divine."-Summum;

and Respondent has no connection to the City's community. Summum is a religious organization and corporation, formed in 1975 and headquartered in Salt Lake City, Utah. JA 13. In addition to promoting religious or spiritual ideas, since 1994 Summum has engaged in a litigation strategy that seeks to have its Seven Aphorisms monument installed on government properties containing monuments of the Ten Commandments. Summum has brought several lawsuits against cities that have refused to erect monuments of the Seven Aphorisms and continues to solicit financial support for this purpose.[2]

Summum has targeted the City because Pioneer Park contains the Ten Commandments monument donated by the FOE. Summum maintains that it has a First Amendment right to erect permanent, unattended structures on public properties. It does not claim to have any particularized ties to the Pleasant Grove community or to its history. In contrast, the FOE's ties

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> The grand principle of creation "nothing and possibility come in and out of bond infinite times in a finite moment."-Summum;
>
> "The Principles of knowing Creation are Seven; those who know these possess the Magic Key to whose touch all locked doors open to Creation."-Summum;
>
> 1) The principle of psychokinesis: "Summum is mind, thought: the universe is a mental creation."-Summum;
> 2) The principle of correspondence: "As above, so below; as below, so above."-Summum;
> 3) The principle of vibration: "Nothing rests; everything moves; everything vibrates."-Summum;
> 4) The principle of opposition: "Everything is dual; everything has an opposing point; everything has its pair of opposites; like and unlike are the same; opposites are identical in nature, but different in degree; extremes bond; all truths are but partial truths; all paradoxes may be reconciled."-Summum
> 5) The principle of rhythm: "Everything flows out and in; everything has its season; all things rise and fall; the pendulum swing manifests in everything; the measure of the swing to the right is the measure of the swing to the left; rhythm compensates."-Summum;
> 6) The principle of cause and effect: "Every cause has its effect; every effect has its cause; everything happens according to law; chance is just a name for law not comprehended; there are many fields of causation but nothing escapes the law."-Summum;
> 7) The principle of gender: "Gender is in everything; everything has its masculine and feminine principle; gender manifests on all levels."-Summum.

[2] See *Summum v. Pleasant Grove*, 483 F.3d 1044 (10th Cir. 2007) (the present case); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) (upholding Summum's free speech challenge to Callaghan's rejection of their monument); *Summum v. Duchesne City*, 340 F.Supp.2d 1223 (D.Utah 2004) (rejecting Summum's free speech challenge to Duchesne's rejection of their monument), *rev'd Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007); *Summum v. City of Ogden*, 152 F.Supp.2d 1286 (D.Utah 2001) (rejecting Summum's challenge to the city's refusal to accept their monument, and rejecting free speech, establishment, and free exercise challenges to the city's Ten Commandments monument), *aff'd in part, rev'd in part Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002) (affirming the denial of the establishment and free exercise challenges, but reversing the district court's free speech ruling).

to the City are well established. The organization was founded in 1898 and has local chapters throughout the United States. JA 93. The local Pleasant Grove chapter began in 1968, and established its meeting hall in the City in 1969. JA 94. Since that time, the Eagles of Pleasant Grove have committed thousands of hours of community service and played a significant role in the community.[3] JA 94-96.

In 1971, the FOE donated the Ten Commandments monument to the City.[4] JA 97. The monument bears the inscription, "Presented to the City of Pleasant Grove." JA 145. It was unveiled at a ceremony held in Utah in connection with the 61st FOE convention that took place that year. *Id.* The then mayor of Pleasant Grove and the County Commissioner accepted the monument on behalf of Pleasant Grove from the FOE president. During the ceremony, the mayor said that he felt the monument "would serve to remind citizens of their pioneer heritage in the founding of the state." JA 103. Thereafter, the monument was placed in Pioneer Park and has since been maintained by the City. JA 97.

In September 2003, over thirty years after the City placed the Ten Commandments monument in Pioneer Park, Summum sent a letter to the current mayor of the City requesting permission to erect a permanent monument containing its Seven Aphorisms in the park as part of its broader litigation strategy. JA 16, 57. Summum sent a second letter with substantially the same language dated twelve days after the initial letter. JA 17, 59. Approximately two months later, the mayor sent Summum written notification that the City had denied Summum's request. JA 28, 61. In the letter, the mayor informed Summum that Summum's proposed monument did

[3] The Eagles of Pleasant Grove have served the City in a variety of capacities. For instance, the Eagles have raised money to supply active military personnel with phonecards, to provide for the needy during the holiday season, to fund scholarships at the local state college, Utah Valley State College, to support individuals with special needs, and to donate to a number of charities. The Eagles of Pleasant Grove also sponsor several local community events and charity drives each year. JA 94-96.

[4] Throughout the 1950's and 1960's similar monuments had been donated to cities across the country as part of FOE's Youth Guidance Project. JA 96. The purpose of the Ten Commandments monuments was to serve as an example of a set of rules of conduct guiding civilized societies. JA 97.

not meet the City's traditional criteria for permanent displays in Pioneer Park. JA 61. By tradition, all permanent displays in Pioneer Park must "directly relate to the history of Pleasant Grove" or have been "donated by groups with longstanding ties to the Pleasant Grove community."[5] *Id.* Respondent claims the church did not receive this letter, but admits that it read the notice of the City's denial in the newspaper. JA 59.

The following year, having received Summum's request, the City saw fit to put into writing its decades-old policy regarding the display of privately donated monuments in Pioneer Park (the "Park Policy"). Accordingly, on August 3, 2004, the City Council approved and adopted Resolution No. 2004-019, Pet. App. 1h, which codified the criteria that the City has used to select monuments proposed for permanent display in Pioneer Park. JA 25-26. In 2005, the year following the passage of the resolution, Summum sent a third letter again requesting that the Seven Aphorisms monument be permanently installed in Pioneer Park. The third letter contained much the same language as the initial two and failed to state whether the Seven Aphorisms met the criteria codified in Resolution 2004-019. JA 53, 63. The City, having already informed Summum that its request had been denied, did not respond to Summum's 2005 letter.

II. PROCEDURAL BACKGROUND

Summum filed suit in federal district court seeking declaratory and injunctive relief, in addition to monetary damages, for the City's alleged violation of Summum's free speech rights under the First Amendment of the United States Constitution.[6] Summum claimed that the City

[5] The district court rejected Summum's attempts to portray the Park Policy as a post hoc justification for the rejection of the monument Summum wants the City to erect. 483 F.3d. at 1049 ("After finding that the facts regarding the city's policy (or lack thereof) were in dispute, the [district] court concluded that Summum had not established a substantial likelihood of success on the merits."). The court of appeals did not disturb this factual finding, instead holding that the district court applied the incorrect legal standard. 483 F.3d at 1055 n.9 ("[W]e need not decide whether the city's 2004 resolution purportedly codifying its unwritten policy is a post hoc facade for content-based discrimination.")

[6] In its complaint, Summum also alleged that the City violated the Utah Constitution's free expression and establishment provisions. JA 19-21.

violated its First Amendment rights by excluding its permanent monument while allowing the Ten Commandments, and other monuments of an allegedly expressive nature, to be displayed.

The district court denied Summum's motion for a preliminary injunction. In an oral ruling, the court noted that Summum could not prevail on the merits if the City proved it had a well-established policy for evaluating proposed monuments that was reasonable and viewpoint neutral. *Summum v. Pleasant Grove*, 483 F.3d 1044, 1049 (10th Cir. 2007). The district court found that the facts regarding the city's policy were in dispute and thus concluded that Summum had not established a substantial likelihood of success on the merits. *Id.* Summum appealed.

On appeal, the Tenth Circuit held that the district court incorrectly examined the Park Policy under the requirements for nonpublic fora, and reversed. *Id.* at 1050. The Tenth Circuit reasoned that Pioneer Park was a public forum for the erection of monuments and thus, the City's policy should have been examined under strict scrutiny. Applying this standard, the circuit court found that the City had failed to assert a compelling state interest that would justify excluding Summum's proposed monument and granted Summum's motion for a preliminary injunction. *Id.* at 1053.

The Tenth Circuit denied the City's petition for a rehearing en banc, *Summum v. Pleasant Grove*, 499 F.3d 1170 (10th Cir. 2007). Judge McConnell and Judge Lucero separately dissented. Judge McConnell disagreed with the panel's ruling on the grounds that "any messages conveyed by the monuments" that the City has chosen to display are "government speech." *Id.* at 1175. Thus, viewpoint and content neutrality are not required. *Id.* at 1177. Judge Lucero argued that the Tenth Circuit panel erred in finding that Pioneer Park was a public forum for the erection of permanent monuments because "permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public." *Id.* at 1173.

After the Tenth Circuit denied the City's petition for rehearing en banc, the City filed a petition for writ of certiorari. This Court granted the writ on March 31, 2008. 128 S.Ct. 1737 (2007).

Summary of the Argument

Governments exist in large part to provide for the common good, and this includes preserving public spaces for the use and enjoyment of all. This case arose out of Summum's attempts to erode a city government's ability to control and provide for that civic good. Summum now argues for a boundless ability of private citizens to insert themselves into government management decisions, thereby threatening effective government functioning.

Summum asks this Court to hold that every citizen has a right to erect a monument on government property, and that this right is triggered by a city's mere choice to display other monuments on that property. The First Amendment, however, does not demand that cities either leave their parks barren or otherwise open them to the inevitable clutter that would result from the rule Summum asks this Court to announce. Indeed, the First Amendment contains two important protections which allow governments to maintain this necessary control. The City need not provide a compelling interest to reject particular park displays because (1) the Park Policy and park displays constitute government speech and (2) the park monuments are not subject to public forum requirements. Each protection is independently sufficient to justify the City's actions and mandates reversal of the opinion below.

1. The First Amendment does not give citizens the right to control the messages the government itself speaks. Control of this message is essential for governments to effectuate public policy and to function effectively. Pleasant Grove's Park Policy conveys just such a message about the importance of the City's historical roots, and the government speech doctrine therefore protects its actions. Summum argues that this Court should instead focus on other

speech inherent in particular displays. This Court should reject that approach because it divorces the displays from their context, context which even Summum considers critical. However, even this speech is attributable to Pleasant Grove, and the government speech doctrine still protects the City's actions under this analysis.

Every commonly applied test for government speech—the ownership test, the *Wells* factors test, and the reasonable observer test—confirms that this doctrine protects the City's actions. The City owns both the park and every display in the park, firmly establishing the City as the source of those displays' speech. Because this ownership pervades both the Park Policy and the individual monuments, the speech meets both prongs of the ownership test, independent of which speech this Court analyzes. Moreover, the ownership test provides a bright-line rule that allows cities to erect public monuments without fear of losing control over their ability to preserve public spaces for the use and enjoyment of all.

Where ownership is less clear, the *Wells* factors, which several courts of appeals examine, can provide additional guidance. Though the ownership test's clear result renders this analysis unnecessary, the *Wells* factors also show that the government speech doctrine protects the City's actions. The City's goal of promoting its historical roots, the City's editorial control over the park's displays, its role as the literal speaker, and its ultimate responsibility for the park displays confirm that this speech is government, not private speech.

Finally, a reasonable observer would attribute the speech inherent in the Park Policy to the City, thereby satisfying the final commonly applied test. A reasonable observer would also attribute speech on any of the individual displays to the City, precisely because of the City's control and ownership. In cases where the ownership picture is less clear, the other factors some courts consider provide additional guidance for determining a reasonable observer's views.

Because these factors also indicate that the City is the source of the Pioneer Park speech, the reasonable observer test is thus doubly satisfied.

2. The First Amendment does not provide citizens with full access to public parks for any and all uses. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, this Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to government property. 460 U.S. 37 (1983). Regulation of speech activity in a public forum, governmental property that has been traditionally open to the public for expressive activity, is examined under strict scrutiny. *Id.* at 45. Regulation of speech in a designated public forum, property that the government has expressly dedicated to speech activity, is examined under the same standard. *Id.* However, regulation of speech activity in a nonpublic forum, where the government has not dedicated the forum to First Amendment activity is examined only for viewpoint neutrality and reasonableness. *Id.* at 46.

The Tenth Circuit erred in its application of the public forum framework and reached the erroneous conclusion that Pioneer Park is a public forum for the erection of permanent displays. Thus, it examined the City's rejection of Summum's proposed monument under an incorrect legal standard. This Court has classified public parks as public fora for transitory speech, such as debate and the discussion of public questions, because traditionally public parks have been open to the public for this type of speech. *See Perry Educ. Ass'n*, 460 U.S. at 45. Permanent, unattended displays, however, do not fall within the set of uses for which parks have traditionally been held open to the public.

The circuit court never reached this key distinction because it failed to examine the property, Pioneer Park, with reference to the specific nature of the access sought, the erection of a monument, in accordance with Supreme Court precedents. The circuit court defined the forum

as "permanent monuments in a public park." However, it then reverted back to considering the entire park as a geographical space for the purposes of classification, reasoning that Pioneer Park was a public forum for Respondent's desired use because parks have been previously classified as traditional public fora. This approach defies logic—if the forum as identified is to be disregarded in the analysis, identifying of the nature of the access sought serves no purpose. Moreover, this approach undermines the purpose of the public forum doctrine, which serves to balance the interest of the government in preserving public property for its intended use with the interests of those wishing to use it for expressive purposes. Under the circuit court's holding, the clutter of permanent structures would severely curtail the public use and enjoyment of public parks, and the government would be powerless to intervene.

Applying the public forum doctrine correctly, Pioneer Park is a nonpublic forum for the erection of permanent, unattended displays and the Park Policy should be examined for reasonableness and viewpoint neutrality. Alternatively, this Court could hold that the public forum doctrine is incompatible with the City's role as manager of the appearance of public parks because the City must be able to exercise broad discretion when selecting permanent displays in order to perform this job to the public's satisfaction. In either case, the Park Policy is constitutional because it does not discriminate against Summum on the basis of viewpoint – the City denied Summum's request because the Seven Aphorisms monument meets neither of the criteria required of monuments displayed in Pioneer Park.

Argument

I. THE PRELIMINARY INJUNCTION SHOULD BE VACATED BECAUSE PRIVATE CITIZENS CANNOT FORCE THE GOVERNMENT TO ARTICULATE A PARTICULAR MESSAGE.

The First Amendment does not provide Respondent with the rights the church claims it does. Specifically, the First Amendment does not require that the government always maintain

viewpoint neutrality. When the government itself speaks, it may constitutionally advocate one view over another, and thus even if the City does discriminate based on viewpoint, its actions are constitutional.[7] Both the speech inherent in the Park Policy's application and the speech inherent in particular park displays constitute government, not private speech. As a result, even assuming, arguendo, that the Park Policy is not viewpoint neutral, the preliminary injunction should be vacated.

A. Citizens Have No First Amendment Right to Control the Messages Articulated by the Government.

To function effectively, governments must be able to articulate clear positions on particular issues. The act of passing a criminal statute represents a firm government stance opposing particular acts. Civil regulations proclaim a government's desire to encourage particular behaviors, or to discourage other behaviors. Legislative resolutions similarly announce the government's view on issues of public importance. All these acts of government speech are critical to a well-functioning democracy.

Because of the government's manifest need to articulate clear positions on pressing issues of public concern, courts have long recognized a citizen's inability to force the government to articulate a message of the citizen's choosing. The government "is entitled to say what it wishes[,] . . . [and] it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). While the First Amendment protects an individual's right to speak, it does not protect his right to force the government to speak his message for him. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (recognizing that governments may discriminate in the views they choose to fund and promote).

[7] The City maintains that the Park Policy is viewpoint neutral, however. *See infra* Section II.B.1.

The Court has recognized the strong check that the democratic process places on government speech. "When the government speaks, . . . it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Thus, the privileged position of government speech presents little danger to the public, and this speech does not implicate traditional First Amendment concerns.

Although the opinion below relegates to a footnote the question of whether the park speech constitutes government speech, this crucial issue provides sufficient basis to decide this case. "Simply because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist." *Summum v. Pleasant Grove*, 499 F.3d 1170, 1177 (McConnell, J., dissenting). Summum asks this Court to force the city to accept a particular monument, and to display it prominently on government property. The First Amendment provides Respondent no such right.

B. Because the City Rejected the Proposed Monument as Inconsistent with the Park Policy, the Government Speech Analysis Should Focus on the Park Policy, Not the Speech On Any Particular Display.

Prior to the question of whether the speech in this case constitutes government speech, however, is the question of which speech this Court must analyze. Respondent, along with the opinion below,[8] focuses entirely on the monument Summum wants the City to erect. This

[8] The opinion below relies entirely on a prior decision, *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), in holding that the Pleasant Grove monuments constitute private rather than government speech. *See* 483 F.3d at 1047 n.2. This was error. *Ogden* addressed an Establishment Clause challenge to a particular inscription on one monument placed outside the city's municipal building. First, *Ogden* focused on a single inscription, while here the relevant speech includes all the park's displays. *See infra* Section I.B. Second, Pleasant Grove accepted the Ten Commandments monument because it was consistent with the park's goals, not out of a desire to endorse the commandments themselves. This well-established policy impacts each of the government speech tests in ways not present in *Ogden*. *See infra* Section I.C. Third, the *Ogden* court was severely critical of Ogden's "post-hoc" attempts to "adopt" the monument's speech, concerns not present in this case, given Pleasant Grove's declaration of its policy from the outset. *See supra* note 6. Finally, to the extent *Ogden* is not distinguishable, it should be overruled. *See*

approach is flawed for two reasons. First, it ignores the actual issue in dispute, whether the City must add the proposed monument to the park. Second, this approach divorces the proposed and existing monuments from their surrounding context, contrary to this Court's precedents. Therefore, the proper analysis focuses on the speech inherent in the Park Policy, not the speech inherent in any particular monument.

The Park Policy is the central focus of this dispute. Respondent claims that the government improperly discriminates based on viewpoint in selecting monuments to place in Pioneer Park. Thus, it is Pleasant Grove's Park Policy that is at issue in this case, not the speech inherent in any particular park display. *See PETA v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) ("[T]he government speaks through its selection of which books to put on the shelves and which books to exclude."). The City objected to the proposed monument, not because of its particular inscription, but because the monument would not fit within the park's context and policy. Similarly, the City accepted other monuments not because of any agreement with speech inherent in them, but because they were consistent with the Park Policy's goals. In displaying particular items that are consistent with this policy, Pleasant Grove announces to its citizens: "This display is historically significant." Thus, to determine whether such speech constitutes government speech, this Court should analyze these statements, implicit in the acceptance or rejection of any display, rather than any additional speech present in a particular display.

Respondent's approach also errs in removing the proposed monument from its context, context that is of the utmost importance. *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005) (rejecting an approach that "would cut context out of the enquiry"); *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) ("[I]n all constitutional cases . . . [judgments] must take account of

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Summum v. Pleasant Grove, 499 F.3d 1170, 1176 n.1 (McConnell, J., dissenting) (calling for *Ogden* to be overruled and collecting cases with which *Ogden* conflicts).

context."). Summum's own litigating position reinforces the importance of context: Summum demands not that the city erect a monument *somewhere*, but that the City do so in this particular park. It thus seeks to have government convey a particular message, a message that a display's location in the park announces. This further shows that the proper speech for this Court to analyze is the speech inherent in Pleasant Grove's Park Policy, not the speech of a single monument, divorced from its context.

C. The City's Park Policy and Displays Constitute Government Speech Under Each of the Commonly Applied Tests.

The government speech doctrine protects the City's actions. Although this Court has not announced an explicit test for distinguishing private and government speech, this case presents a straightforward example of government speech, satisfying each of the commonly applied tests for determining when the government is speaking. Moreover, the challenged speech satisfies these tests to a greater degree than previous cases where this Court found the government to be the speaker. Finally, these conclusions hold both when analyzing the Pleasant Grove Park Policy and when analyzing speech inherent in any particular display within the park.

This Court explicitly distinguished between government and private speech in the recent cases of *Santa Fe Indep. Sch. Dist. v. Doe* and *Johanns v. Livestock Mktg. Ass'n*. *See* 530 U.S. 290, 302 (2000) ("[W]e are not persuaded that the pregame invocations should be regarded as 'private speech.'"); 544 U.S. 550, 562 (2005) (rejecting the argument "that the beef program does not qualify as 'government speech'"). While neither case announced an explicit test, the Court considered several factors in each case that further reinforce the conclusion that the Pioneer Park Policy and displays are government speech.

In *Santa Fe*, the school district permitted students to elect one student body member to deliver an invocation prior to athletic events. The Court ultimately held that this speech was

"government speech" and thus violated the Establishment Clause, after considering several aspects of the speech. First, the Court looked to the original source of the speech, noting "[t]hese invocations are authorized by a government policy." 530 U.S. at 302. Second, the Court looked to the ownership of the property where the speech occurred. *Id.* (noting the invocations "take place on government property at government-sponsored school-related events"). Third, the Court examined whether the government, "evince[s] either by policy or by practice, any intent to open the [pregame ceremony] to indiscriminate use." *Id.* at 303 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)). On balance, the Court held that these factors indicated that the speech was government speech, rather than private speech.

The Court considered similar factors in *Johanns*, in determining whether advertisements the government created on behalf of the beef industry were government speech. In that case, the Court first considered whether the speech's content "is effectively controlled by a nongovernmental entity." 544 U.S. at 560. The Court also found relevant the party to whom the speech was attributed. *Id.* at 566. In its analysis the Court further held *irrelevant* (1) the source of the speech's funding, and (2) whether the government acknowledges that it is the source of the speech. *Id.* at 562, 564 n.7. After considering these factors, the Court held that the beef advertising program constituted government speech.

Lower courts, struggling to apply these precedents, have developed varying methods of analysis. To determine whether particular speech is attributable to the government, some courts focus on ownership, examining whether the government owns or controls (1) the methods of speech and (2) the property where the speech occurs. *See, e.g.*, *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). In contrast, the Fourth, Eighth, Ninth, and Tenth Circuits apply the *Wells* test, a four-factor balancing test. *See Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 968

(9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000). Finally, the Seventh Circuit has rejected these factors in favor of a third approach, asking only: "Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Choose Life Ill., Inc. v. White*, No. 07-1349, 2008 WL 4821759 (7th Cir. Nov. 7, 2008).

Underlying each of these tests is the fundamental policy justification for the government speech doctrine: when speaking directly, the government may discriminate among various viewpoints because it remains constrained by the democratic process. *See supra* Section I.A. Thus, the "ownership" test makes sense because when the government owns both the property and method of speech, voters can check the government's ability to use those possessions. The *Wells* factors can be interpreted to similarly estimate the government's control over a message, and hence the democratic process's ability to provide a check on the government's speech. The reasonable observer test examines whether the rational voter would believe he *can* check that speech; if an observer believes the speech is private, it is outside his control.

The speech inherent in the Pleasant Grove Park Policy and displays is well-constrained by the democratic process. The city council, a democratic body, crafted the Park Policy, and the city maintains control over the park. Indeed, had the city not maintained this control, Summum could have simply erected the proposed monument itself, rather than bringing suit. Because the park displays fit comfortably within the goals of the government speech doctrine, each test unsurprisingly provides the same result: the Pleasant Grove park displays are government, not private, speech.

1. Because the City owns both the monuments and the park in which they are erected, the City displays constitute government speech.

"Possession is nine-tenths of the law," according to the proverb. While this saying's general applicability may be subject to debate, ownership has played a determinative role in this Court's analysis of government speech cases. Thus, the Sixth Circuit's ownership test finds strong justification both in this Court's precedents and in their underlying principle: speech made on government property by government speakers is quintessentially government speech. *Bredesen*, 441 F.3d 370. Other cases may present more difficult line-drawing exercises, but when, as here, the government both owns the location of the speech and controls the method of speech, courts should categorize it as government speech.[9]

Ownership and attribution of speech are intuitively connected. "Even on private property, signs and symbols are generally understood to express the owner's views." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 (1995) (Stevens, J., dissenting). At a minimum, a sign or symbol that remains on a particular property is assumed to do so with the owner's consent. When the owner also possesses the sign itself, it is trivial to attribute the message to a particular speaker, the owner.

This Court's holdings bear out this principle unwaveringly. In each case where the government owned both the property where speech was displayed and the actual method of speech, the Court held such speech to be government speech. In each case where the government owned neither the property nor the method of speech, the Court held the speech was private. Those cases satisfying only one ownership prong present predictably mixed results.

[9] The ownership test analysis applies independent of whether the Court considers the relevant speech to be Pleasant Grove's Park Policy, or the inscription on the monument Summum wishes the City to erect. In both cases, the City owns both the property (the park), and the method of speech (the Park Policy and all the park displays or just the single monument).

a. Government ownership of property and method

The Court directly confronted government ownership of both property and method of speech in *McCreary County v. ACLU*, 545 U.S. 844 (2005), a case closely analogous to this one. In *McCreary*, the Court addressed an Establishment Clause challenge to a Ten Commandments display within the county courthouse. The county owned both the display and the courthouse, and the Court thus quickly moved to analyze the nature and purpose of the display to determine its constitutionality given that the display constituted government speech. *See also County of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (A private group's donation of a crèche for display in front of the capitol was a "form of government speech.") (Kennedy, J., concurring in judgment).

The Court has reached similar conclusions in other recent cases. When a government employee wrote a memo for his government office, the Court concluded this was government speech, and thus normal First Amendment protections did not apply. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). When the government displayed particular messages during government purchased television advertisement time, this too was government speech. *Johanns*, 544 U.S. 550. And when a state government attempted to display the Ten Commandments on the capitol grounds, Establishment Clause concerns arose precisely because this was government speech. *Van Orden v. Perry*, 545 U.S. 677 (2005).[10] The pattern is simple: when the government owns both the method of speech and the property where the speech occurs, this Court always holds that the speech is government speech.

[10] While Judge Tacha dismisses *Van Orden* claiming it did not reach the issue of government speech, 499 F.3d at 1180-81, this argument is factually incorrect. As Judge McConnell observed, the *Van Orden* Court only reached the Establishment Clause question because the Ten Commandments there were a government display. *See* 545 U.S. at 682 (noting "the State's acceptance of the monument"); Id. at 686 (referring to the "monument that Texas has erected").

b. Government ownership of neither property nor method

In contrast, when the government owns neither the method of speech nor the property where the speech occurs, this Court has never found the government to be the speaker. In *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court examined Congressional funding of legal services programs targeting those that could not afford legal advice. The Court struck down limitations on the litigation and lobbying efforts these organizations could perform. The attorneys were private citizens, and their lobbying and litigation efforts represented privately held views. In striking down these limitations, the Court held that "the LSC program was designed to facilitate private speech, not to promote a governmental message." *See also Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (rejecting the argument that the Bar's non-governmental political activities were government speech, when the bar was not a government agency).

c. Mixed ownership

The unwavering relationship between ownership and attribution of speech allows courts to resolve many cases easily. Situations where ownership is less clear obviously present more difficult decisions and, indeed, this Court has reached mixed results in those cases. While "an *individual's* contribution to a *government-created* forum was not government speech" in the student prayer context, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (emphasis added), an individual doctor's statements in a government-funded clinic do constitute government speech. *Rust v. Sullivan*, 500 U.S. 173 (1991). *Compare also Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 61 n.4 (2006) (government military recruiters' speech on private campuses "is clearly Government speech") *with Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (government funding of student newspaper does not convert newspaper's speech into government speech). These cases within the middle of the ownership spectrum admittedly present difficult determinations.

d. Pleasant Grove's park and displays

The facts of this case, however, admit of a simple result. Summum does not dispute that the City owns the park where Summum wishes the City to erect a monument. JA 15. Additionally, the Park Policy is undeniably the City's speech. Respondent also concedes that the City owns the current park displays, and would own the Seven Aphorisms monument as well. *See* JA 57-58 (acknowledging that the Ten Commandments monument was "donated" and that the proposed monument "would be erected under the same conditions, rules, etc."); JA 63-64 (same). These facts trigger the bright-line ownership rule inherent in the Court's precedents. Because Pleasant Grove owns both the property where the speech will be displayed, Pioneer Park, and the method by which the speech will be announced, the Park Policy or the displays, the government speech doctrine applies.

2. The structures in Pioneer Park are government speech under the *Wells* factors.

Prior to *Johanns*, several lower courts developed the four factor-test first employed in *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000). This test distinguishes government speech from private speech through a balancing of four factors:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech . . . .

Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008). The Tenth Circuit adopted these factors in *Wells v. City of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001). While the lower courts disagree over whether these factors are compatible with this Court's recent ruling in *Johanns*, *see, e.g.*, *Bredesen*, 441 F.3d 370, the Pioneer Park Policy and displays also satisfy this test for government speech.

a. The central purpose of the program in which the speech occurs.

Whether particular speech is government speech depends heavily on the context in which the speech occurs. Thus in *Santa Fe*, the Court observed that the speech was "authorized by a government policy." 530 U.S. Similarly in *Johanns*, the speech derived from "a federal policy of promoting the marketing and consumption of 'beef and beef products.'" 544 U.S. at 553. When speech occurs as a direct result of an explicit government policy, it is more likely to be government rather than private speech.

Like in *Santa Fe* and *Johanns*, the speech in question here traces to a particular government policy. The City, aiming to educate its citizens about the City's history, has devoted a plot of land to displaying various monuments and structures of historical significance. With each display, the City announces: "This exhibit has historical relevance." This policy of privileging and displaying items with historic significance to the City is the direct source and "central purpose" of the program in which the speech occurs.

Respondent, along with the opinion below, incorrectly tries to separate one particular display within the park, Pleasant Grove's Ten Commandments monument, from the other displays. While Petitioners contend this approach is incorrect, *see supra* Section I.B, the Ten Commandments monument alone also satisfies this prong. The monument was accepted because the Eagles have longstanding ties to the community. The monument's central purpose is to thank this organization for its service to the community. *See* JA 193 (explaining that acceptance of monuments is a "way to recognize those people or organizations" who have contributed to the community). While the *Ogden* opinion argued that the monument's central purpose was to convey the ideas of the Eagles, this approach removes the government's ability to ever adopt private speech. Furthermore, the *Ogden* court was not confronted with a monument placed among other park displays, distinguishing its analysis from this case. While the monument may

have constituted private speech prior to the city's taking possession, the City's acceptance and display of the monument converted its purpose to the city's own. Because the central purpose of the Park Policy and of the monuments individually is an explicit government policy, this factor weighs heavily in favor of a finding of government speech.

b. Editorial control.

Pleasant Grove maintains strict editorial control over the permanent speech inherent in the park's displays. Indeed, it is precisely because Pleasant Grove exercises this editorial control that Summum initiated this suit. The City Council announced the particular statements it wished to express through the park, and donations are accepted or declined based on that policy. Because the city has explicitly determined the park's message, the government's editorial control is clear.

The City's editorial control is apparent even under Respondent's theory of the case, divorcing the speech from its context. Although Respondent argues that the Fraternal Order of Eagles maintained editorial control over the message inscribed on the Ten Commandments monument, the fact that the city accepted this donation, while denying Summum's request, also demonstrates that the speech is "is effectively controlled by" Pleasant Grove. *Johanns*, 544 U.S. at 560. As in *Johanns*, this final right of refusal is sufficient to satisfy the editorial prong. *Id.* at 560-61 (finding government speech where the government "does not write ad copy" but "exercises final approval authority" over the ads). Under either analysis, therefore, the second *Wells* prong also weighs in favor of a holding of government speech.

c. The "literal speaker."

The City is also the "literal speaker" of the park's speech. Indeed, this litigation arose only because the city objected to Summum's attempts to force the city to cloud its message. The city displays items of historic relevance to further its explicit goal of promoting appreciation of

the city's history. The city declares of each monument "This is of historic significance," and encourages the viewer to reflect on that significance.

Respondent, however, would have this Court declare that the speakers of each display remain the items' previous owners. Even considering the displays removed from their context, however, the government remains the literal speaker, having adopted the displays' speech as its own. *See Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008) ("'[G]overnment speech' can include not only the words of government officials but also compilation of the speech of third parties by government entities.") (Kavanaugh, J., concurring). To be sure, when the items were in the donee's possession, their messages were private speech. Respondent, though, offers no principled line delineating when or how a government can purge the taint of the previous private ownership. Thus accepting any donated item, for instance President Lincoln's log cabin, requires the government to create a First Amendment protected area surrounding that item. The Constitution does not place such a high price on government acceptance of private donations. The more appropriate conclusion is that, in accepting a private donation, the government becomes the literal speaker when it chooses to display the donation.

d. The bearer of "ultimate responsibility" for the speech.

The final prong of the *Wells* test most strongly demonstrates that the park's displays constitute government speech. The *Ogden* opinion, adopted by the court below, concedes that because "the City could have sold, re-gifted, modified, or even destroyed any of the displays, the City may be charged with ultimate responsibility for the content of the [displays]." 297 F.3d at 1005. When examining the park's displays in context, it is all the more apparent that the city bears ultimate responsibility for the speech. Under either approach, therefore, the park displays satisfy this final prong.

* * * * *

The *Wells* factors underscore the conclusion that this case does not present the more difficult line-drawing situation other fact patterns might. Applying the *Wells* factors to the City's declaration, inherent in each display, that "This is historically significant." demonstrates that the Park Policy's speech is government speech. Even accepting Respondent's desire to divorce the monument Summum wishes the City to erect from the context in which Summum wishes the City to erect it, the *Wells* factors still all suggest that this speech is government speech.

Though each factor points to the government as the speaker, the *Wells* factors are meant to be a balancing test. The unanimous result of each factor's analysis makes this an easy case. Even if several of the factors suggested the speech was private, however, this would not be enough to overturn the overall conclusion of government speech. In *Johanns*, this Court concluded that the beef advertisements were government speech, even though (1) the purpose of the program was to promote a private industry; (2) the government did not create the content of the message; and (3) the government received assistance from private organizations in creating the message. 544 U.S. at 560-62. Because Pleasant Grove's displays satisfy the *Wells* factors more fully than the *Johanns* advertisements, the conclusion that the government is the speaker in this case is inescapable.

3. A reasonable observer would attribute the speech inherent in the park's displays to the government, making it government speech.

The Pleasant Grove park speech also constitutes government speech under the "reasonable observer" test that other lower courts apply.[11] This test examines: "Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Choose Life Ill., Inc. v. White*, No. 07-1349, 2008 WL 4821759 (7th Cir. Nov. 7, 2008).

[11] The "reasonable observer" test is originally drawn from the Establishment Clause context. Despite this source, it is important to note that no Establishment Clause questions are before the Court. Pleasant Grove did not decline Summum's request on Establishment Clause grounds, and the constitutionality of Pleasant Grove's current Ten Commandments monument is well-established. *See Van Orden v. Perry*, 545 U.S. 677 (2005).

Such an observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866. In light of Pleasant Grove's explicit policy governing the inclusion of displays in the park, a reasonable observer would consider the government the speaker of the speech inherent in those displays. While the Respondent claims this Court should examine the inscriptions on particular monuments, a reasonable observer would also view that speech as attributable to the government. These displays explicitly acknowledge that they are property of Pleasant Grove, not private groups. JA 145 (noting the Ten Commandments monument inscription which reads "Presented to the City of Pleasant Grove"); JA 158 (same).

The "reasonable observer" test, though lacking in specificity, provides a satisfactory way to harmonize the other tests lower courts apply. When speech meets both prongs of the ownership test, a reasonable observer would conclude the government to be the speaker. When ownership is less clear, the four-factor balancing test provides additional information to aid courts in determining how a reasonable observer would interpret the speech in question. Applying the harmonized test yields the same results as the previous tests: the government speech doctrine protects Pleasant Grove's actions.

As previously discussed, *supra* Section I.C.1, the ownership test is satisfied regardless of whether the Court focuses on the inscription on particular monuments or the park's displays in their complete context. "Even on private property, signs and symbols are generally understood to express the owner's views." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 (1995) (Stevens, J., dissenting). A reasonable observer, applying this principle, would therefore attribute all of the park's displays to the city. Thus, the harmonized reasonable observer test does not even reach the question of the *Wells* factors in this case. *See* 499 F.3d at 1076 ("The instant

cases are easier than *Wells*, because ownership of the 'speech' in these cases is clear.") (McConnell, J., dissenting). While those factors are only necessary in addressing the more difficult cases of mixed ownership, the factors also suggest a reasonable observer would view the city as the speaker. *See supra* Section I.C.2. The Pioneer Park displays satisfy both halves of the "reasonable observer" test just as they satisfied the other commonly applied tests. The City's actions are therefore protected by the government speech doctrine.

II. THE PRELIMINARY INJUNCTION SHOULD BE VACATED BECAUSE THE TENTH CIRCUIT ERRONEOUSLY CLASSIFIED PIONEER PARK AS A TRADITIONAL PUBLIC FORUM FOR THE ERECTION OF PERMANENT, UNATTENDED DISPLAYS.

A. The Tenth Circuit Erred in Its Forum Analysis by Holding That Public Parks Are Traditional Public Fora for Any and All Uses.

The public forum doctrine requires that courts first identify the relevant forum with reference to the nature of the access sought and secondly determine whether the access sought is compatible with the property's traditional uses. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801-03 (1985). The circuit court did not complete this second step, though it is critical to the analysis. Having disregarded the nature of the access sought in its public forum analysis, the circuit court failed to examine the traditional and historical differences between parks as appropriate fora for transitory speech as opposed to permanent speech. It then erroneously concluded that Pioneer Park was a traditional public forum for *any* use.

1. The Tenth Circuit departed from this Court's precedents by failing to examine whether the nature of the access sought by Summum is compatible with the purpose of public parks.

"Although . . . as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue." *Cornelius,* 473 U.S. at 801. Rather, in defining the forum, this Court has "focused on the access sought by the speaker,"

id., in order to properly determine whether that access is compatible with the forum's traditional uses. In *Cornelius*, legal defense funds alleged that their First Amendment rights had been violated when they were excluded from participation in the Combined Federal Campaign ("CFC"), a charity aimed at federal employees. Participating organizations submitted short statements to be included in the CFC newsletter that was disseminated to federal employees in the federal work place. Because the legal defense funds sought access specifically to the CFC newsletter and did not claim a general right to engage in face-to-face solicitation in the federal workplace, this Court defined the relevant forum for First Amendment purposes as the CFC newsletter. *Id.* at 801.

Only where speakers seek general access to a public property does the relevant forum for First Amendment purposes encompass the entire property. *Cornelius*, 473 U.S. at 801. *See, e.g.*, *Greer v. Spock*, 424 U.S. 824 (1976) (defining the forum as the entire military base where speakers sought entry to the base in order to distribute pamphlets and engage in face-to-face solicitation); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (defining the forum as the entire airport terminal where speakers sought access to distribute literature in person).

In contrast, in cases where speakers seek access to a particular, more constant means of communication, this Court has defined the relevant forum in reference to the access sought. For instance, "[i]n *Lehman*, where petitioner sought to compel the city to permit political advertising on city-owned buses, the Court treated the advertising spaces on the buses as the forum." *Cornelius*, 473 U.S. at 801 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (plurality opinion)). This is so even where the relevant forum for First Amendment purposes is not a tangible property. In *Perry Education Ass'n v. Perry Local Educators' Ass'n,* this Court

defined the forum as a school's internal mail system and the teachers' mailboxes, 460 U.S. 37, 47 (1983), and in *Cornelius*, this Court defined the forum as the CFC newsletter, notwithstanding that an internal mail system and a newsletter "lack a physical situs." *Cornelius*, 473 U.S. at 801.

Here, as in *Cornelius, Perry Education Ass'n,* and *Lehman*, Respondent seeks a particular type of access to government property—access for the purpose of erecting a permanent monument that will thereafter be continuously displayed and maintained by the City. In defining the relevant forum, the Tenth Circuit recognized that courts look to "the government property to which access is sought *and* the type of access sought." *Summon v. Pleasant Grove*, 483 F.3d 1044, 1051 (10th Cir. 2007) (emphasis added). Although the circuit court initially identified the relevant forum as "permanent monuments in the city park," *id.*, the court improperly applied the second prong of the forum analysis by failing to retain the nature of the access sought for the purposes of analysis. Rather, it shifted its focus to the park as a geographical space. Having abandoned any consideration of the type of access sought, the circuit court did not consider whether the erection of unattended, permanent displays fell within the traditional uses of Pioneer Park. In doing so, the Tenth Circuit departed from this Court's forum analysis.

In reaching the conclusion that the relevant forum was public, the Tenth Circuit noted only that a "city park is . . . a traditional public forum." *Id.* at 1050. This analysis, or lack thereof, would demand that all public streets, parks, and sidewalks be classified as public fora, regardless of location and regardless of the type of access sought. This Court has explicitly rejected this reasoning and held that a public sidewalk located outside the entrance to a post office was not a public forum. *United States v. Kokinda*, 497 U.S. 720, 728 (1983) (Although "[t]he dissent would designate all sidewalks open to the public as public fora[,] . . . . [t]hat . . . is not our settled doctrine."). As this Court recognized, "the location and *purpose* of a publicly owned sidewalk is

critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 782 (citing *United States v. Grace*, 461 U.S. 171, 178 (1983)) (emphasis added). The postal sidewalk was constructed "solely to provide for the passage of individuals engaged in postal business," *Kokinda,* 497 U.S. at 727, a purpose incompatible with a public forum.

2. The Park's permanent monuments are not a public forum because the unrestricted erection of permanent, unattended displays by private citizens is incompatible with the traditional uses of the park.

Because the designation of a forum as public depends on whether it has traditionally been used as a place for expressive activity, *see Perry Educ. Ass'n,* 460 U.S. at 47, conceptually it is necessary to distinguish among types of speech that fall within the traditional uses of the public property under consideration and those that do not. "The mere physical characteristics of the property cannot dictate the forum analysis." *United States v. Kokinda*, 497 U.S. 720, 727 (1995). Justice Roberts' famous dictum in *Hague v. Comm. for Indus. Org*.[12] notes that streets and parks are particularly appropriate places for expressive activities because they have traditionally "been used for the purpose of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. 496, 515 (1939).

While parks have traditionally been viewed as appropriate places for the expression of ideas, they are not now nor have they ever been understood as a place for the unrestricted erection of permanent monuments. Rather, Justice Roberts' statement reflects the traditional understanding of parks as a place for the expression of ideas through transitory or otherwise nonpermanent speech. Implicit in his statement is the notion that streets and parks are "fora for speech because, and to the extent that, they have been viewed in our history, and are contemporaneously understood in our culture, as obvious and natural places to which citizens

[12] Most scholars trace the origin of the phrase, the public forum, to Justice Roberts' dictum. *See*, *e.g.*, Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1721 (1987). Justice Roberts argued that parks are streets are public fora whose use "may be regulated in the interest of all . . . but . . . must not, in the guise of regulation, be abridged or denied." *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

resort for the expression of their ideas." Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. Cin. L. Rev. 739, 746 (1991). It is the historical and ongoing understanding of parks as a place for free assembly and debate that explains their status in First Amendment theory – not their geographical location and physical space. *See id.* at 746.

Under the public forum doctrine, transitory speech is distinct from permanent speech because the latter does not typically fall within the traditional uses of public spaces devoted to free speech and assembly. This Court's analysis concerning the right of private groups to erect unattended displays on government property is consistent with this understanding. In *Capitol Square Review & Advisory Bd. v. Pinette,* this Court considered whether the denial of the Ohio Ku Klux Klan's ("KKK") permit to erect a cross in a public square during the holiday season violated the group's First Amendment rights. 515 U.S. 753 (1995) (plurality opinion). The Court examined the history of the square and whether unattended displays fell within its traditional uses, before reaching the conclusion that the square was a public forum for the erection of unattended religious displays.

The Court in *Pinette* did not conclude, as a matter of course, that because the square was a traditional public forum generally open to the public for expressive activity, the Ku Klux Klan had the right to erect an unattended display. Rather, the Court found that the square had traditionally been open to type of access sought by the Ku Klux Klan. The expression of the organization "was made on government property that had been opened to the public for speech, and permission was requested through the *same application process* and on the *same terms* required of other private groups." *Id*. at 763 (emphasis added). In contrast, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court held that the "Grand Staircase" of the Allegheny County Courthouse was not a public forum for the purpose of displaying an

unattended crèche because "[t]he Grant Staircase [did] not appear to be the kind of location to which all were free to place their displays." *Id.* at 560 n. 50.

Pioneer Park, like most public parks in the United States, has not traditionally been open to the type of access sought by Respondent and is therefore not a traditional public forum for that use. Unlike the case in *Pinette*, there is no established application process by which a private party may seek to have a monument installed in Pioneer Park that would suggest otherwise. Indeed, the understanding of parks as lands "held in trust for the use of the public," *Hague*, 307 U.S. at 515, is incompatible with a First Amendment right of private citizens to permanently occupy a portion of that land. *See Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 458 (1892) (holding that common law prevented the government from alienating the public right to lands held in trust for private use); *Cf. Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 779 (1988) (White, J., dissenting) (There is no "First Amendment right in newspaper publishers to cordon off a portion of the sidewalk in an effort to increase the circulation of their papers.") (internal citations omitted).

3. The Tenth Circuit's approach undermines the purpose of the public forum doctrine.

Applied correctly, the public forum doctrine serves as a "means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interests of those wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800. It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . ." *United States v. Kokinda,* 497 U.S. 720, 725 (1990) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)) (internal quotation marks omitted).

Accordingly, this Court has considered whether First Amendment activity infringes upon the government's managerial role in classifying forums as either public or nonpublic. *See Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion). In *Lehman*, this Court identified the car card space used for advertising in a city's mass transit system as a nonpublic forum. In upholding a ban on political advertisements in this space, this Court noted that a "city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles." *Id*. at 304; s*ee also Greer v. Spock*, 424 U.S. 828, 838 (1976) (describing the incompatibility of government's duty to maintain military bases to train soldiers with the designation of a military base as a public forum for distributing political literature and making political speeches). If courts were to interfere with the government's managerial duties by classifying all properties to which the public had free access as public fora, serious dangers could arise:

> In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would be pamphleteer and politician. This the Constitution does not require.

Id. at 304.

It must be remembered that the government has a managerial duty to maintain even Hyde Park for its intended use. Justice Roberts' allusion to the public trust doctrine in *Hague v. CIO*, *see supra* Section II.A.2, reflects the understanding that the government has an obligation to maintain public parks, so that they can be used by the public for general enjoyment, as well as for assembly and debate. The application of the public forum analysis then may not permit the public's use to be sacrificed to private interests. However, without the ability to examine whether

the access sought falls within the traditional uses of the government property and to discriminate along those lines, officials are powerless to perform their managerial duty to preserve parks for public use.

Thus, courts must distinguish between permanent and transitory speech in the public forum analysis—the right to engage in transitory speech is compatible with the purpose of public parks as a place for assembly, discussion, and debate. The right to engage in permanent speech is not. A speech or a leaflet has very little if any lasting impact on the physical environment beyond the actual speaker's presence in that environment. But a permanent, unattended display forever occupies a portion of the landscape for one private speaker's use and may actually inhibit public access to park space. While most people view Washington Mall as an appropriate forum for the 1963 March on Washington and other political speech rallies, few would think there is a First Amendment right to express oneself by installing a statue of Robert E. Lee next to that of Abraham Lincoln.

Although the Tenth Circuit's public forum analysis incorrectly treated all types of speech the same, other circuit courts have recognized the need to distinguish between First Amendment rights to engage in permanent or semi-permanent speech as opposed to transitory speech. *See, e.g.*, *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will."); *Kaplan v. Burlington,* 891 F.2d 1024, 1026 (2d Cir. 1989) (While "[t]here has been a limited history of religious activities in the Park . . . . none of these activities involved the use of the Park for as lengthy a period as that at issue here."); *PETA v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005) ("[T]he authorities in charge of a city park must make content-

neutral and viewpoint-neutral decisions when passing on applications for demonstrations in the park . . . . [b]ut those First Amendment constraints do not apply when the same authorities . . . install[] sculptures in the park.") (internal citations omitted).

The distinction between transitory and permanent speech may only be made when the forum is analyzed with reference to the nature of the access sought. It is in fact impossible to apply the doctrine with any level of consistency without reference to the nature of the access sought. The mere categorization of geographical spaces as nonpublic or public fora leaves courts and public officials alike with no standard by which to classify the majority of government properties.

B. Because Pioneer Park Is Not a Public Forum for the Erection of Permanent, Unattended Displays, the City's Refusal To Display Summum's Proposed Monument Did Not Violate Summum's First Amendment Rights.

Under the public forum analysis, Pioneer Park is a nonpublic forum for the erection of permanent, unattended displays. Historically, the public has not had access to the Park for the erection of monuments, nor has the City opened this forum to private parties by policy or tradition. Thus, the Park Policy must be examined for reasonableness and viewpoint neutrality. Alternatively, this Court could hold that the public forum analysis is incompatible with the government's role in managing the appearance of public spaces. Under either approach, the City has not violated Summum's First Amendment rights.

1. Under the public forum analysis, the City's refusal was constitutional as a reasonable and viewpoint neutral restriction on speech in a nonpublic forum.

Should this Court decide that the forum analysis is applicable, Pioneer Park is a nonpublic forum[13] for the erection of permanent, unattended displays, as there is no tradition of

[13] The City's Park Policy restricts access to those meeting certain viewpoint neutral criteria, just as the government restricted access to the CFC newsletter in *Cornelius v. NAACP* and to the school's internal mail system in *Perry Education Ass'n. v. Perry Local Educators Ass'n* to groups meeting certain criteria. In each of these cases, this Court held that the forum was *nonpublic*. However, Judge Lucero classified Pioneer Park as a *limited public* forum, noting that the Tenth Circuit "and recent Supreme Court opinions have treated limited public fora as a species of

private parties erecting permanent displays in the Park at will. *See supra* Section II.A.2. In a nonpublic forum, restrictions on speech can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Cornelius v. NAACP*, 473 U.S. 788, 806 (1983); *see also Good News Club v. Milford Cent. Sch.,* 533 U.S. 98*,* 106 (2001). A viewpoint neutral restriction may not be an effort to suppress expression merely because public officials oppose the particular speaker's view. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n. 7 (1981)).

The City restricts permanent monuments based on either the subject matter of the monument (i.e., the historical relevance to the City) or the identity of the donor (i.e., one with ties to the community).[14] These criteria make no distinction based on the viewpoint of the speaker. Summum is headquartered in Salt Lake City—the corporation has neither ties to the City nor connections with the City's history. In contrast, all other monuments displayed in the Park meet one or both of these criteria. *See* JA 99 – 102. The City's rejection of Summum's request to erect a monument was based on the fact that Summum did not meet the criteria for privately donated monuments—any other proposed monument that did not meet the criteria would be treated in the same manner.

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nonpublic fora." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1174 (Lucero J. dissenting) (2007) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)). Regardless of which term is applied, the standard of review is the same – whether the forum is classified as nonpublic or limited public, restrictions on speech must be reasonable and viewpoint neutral. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("[W]e have observed a distinction between . . . content discrimination, which may be permissible if it preserves the purposes of [a] limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

[14] Content discrimination refers to government imposed restrictions on speech related to an *entire subject area*. In contrast, viewpoint-discrimination refers to government imposed restrictions on speech by *particular speakers*. *Perry Educ. Ass'n*, 460 U.S. at 59. Viewpoint discriminatory regulations target "the specific motivating ideology or the opinion or the perspective of the speaker." *Id*,. at 46.

2. This City has not transformed Pioneer Park into a designated public forum by allowing some privately donated monuments to be displayed.

The fact that the City has allowed privately donated monuments meeting the requisite criteria to be displayed has not transformed Pioneer Park into a designated public forum for the erection of monuments, in which restrictions on speech would be analyzed under strict scrutiny. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). To create a designated forum, the government must intend to make the property "generally available," *Widmar v. Vincent*, 454 U.S. 263, 264 (1981), to a class of speakers. The government does not create a public forum by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. *Perry Educ. Ass'n,* 460 U.S. at 46.

In *Perry Education Ass'n*, the Court held a school district's internal mail system was nonpublic forum and not a designated public forum. Although selected speakers were able to gain access to it, "the school board policy did not grant general access to the school mail system." *Cornelius*, 454 U.S., at 267 (citing *Perry Educ. Ass'n*, 460 U.S. at 45). Rather, "[t]he practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted." *Id.* Similarly, in *Cornelius*, the Court held that the CFC charity drive was not a designated public forum because "[t]he Government's consistent policy ha[d] been to limit participation in the CFC to 'appropriate' [i.e., charitable rather than political] voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) (citing *Cornelius*, 473 U.S. at 804).

Here, the city allowed a limited, defined class to erect monuments in Pioneer Park. Just as in *Perry Education Ass'n* and in *Cornelius*, members of the class must seek permission from the City Council before access to the park for the erection of monuments is permitted. Thus, the City

has taken no action to make Pioneer Park generally available to the public for the erection of permanent, unattended displays.

3. Alternatively, the public forum doctrine is inapplicable and thus the City has broad discretion to select monuments for display in Pioneer Park.

In several analogous contexts, this Court has refused to apply the public forum doctrine and held that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. In *United States v. American Library Ass'n*, this Court examined whether Congress could condition funding to libraries on their implementation of internet filter software. 539 U.S. 194 (2003) (plurality opinion). Writing for a plurality, Chief Justice Rehnquist stated that "forum analysis and heightened judicial scrutiny are incompatible" with the government's role as patron of the arts, television broadcaster, and librarian. *Id.* at 204-05. As a television broadcaster, the government must "exercise . . . journalistic discretion," *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); as an arts patron, the government must "make esthetic judgments," *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998); and as a librarian, the government must "have broad discretion to decide what material to provide to [its] patrons." *Am. Library Ass'n*, 539 U.S. at 204.

The reasons supporting broad government discretion in these contexts apply to the government's role in selecting and displaying permanent monuments in public spaces. As the manager of the City's public spaces, the government must make judgments about safety, esthetics, and the preservation of history in order to properly perform that job. The role that the City plays in selecting monuments to display permanently in Pioneer Park, located in the City's historic district, is analogous to the role that the government would play in maintaining a history museum in a publicly owned building. In the museum case, there would be no persuasive First Amendment argument that the government could not engage in content-based, and even

viewpoint, discrimination. *Cf. PETA v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005). In each context, the City must weigh many of the same considerations. Thus, this Court could hold that forum analysis is incompatible with the government's role as a manager of the City's public spaces and grant the same level of discretion.

C. The Tenth Circuit's Holding Will Create Havoc by Requiring That Cities Either Accept All Privately Donated Monuments or Remove All Monuments From Parks.

According to the Tenth Circuit's reasoning, cities wishing to limit the number of monuments in public parks have few options. Although Summum targets cities with Ten Commandments monuments displayed on public property, the allegedly religious message of the Ten Commandments is irrelevant to the public forum analysis. If Pioneer Park is a public forum for the erection of permanent, unattended displays, it must be open to all permanent, unattended displays, religious or otherwise. Judge McConnell noted in his dissent from the denial of rehearing en banc that this case happened to involve a Ten Commandments monument, but it could work the other way. Under the panel's ruling, "[a] city that accepted the donation of a statue honoring a local hero could be forced . . . to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting). The Seventh Circuit, in rejecting the existence of a First Amendment right to erect structures in public parks at will, aptly noted that if such a right existed, "our traditional public for[a], such as our public parks, would be cluttered with all manner of structures." *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir.1990).

The Tenth Circuit observed that since "[c]ities have substantial interests in the aesthetic appearance of their property . . . . Pleasant Grove may pass a reasonable content-neutral resolution regulation the time, manner, or place of speech in the park." *See Summum v. Pleasant*

Grove, 483 F.3d 1044, 1054 (10th Cir. 2007). By this reasoning, a city that has some privately donated monuments in its parks could limit additional monuments based on content neutral criteria such as size, shape, and color. But most cities have already accepted privately donated monuments of various sizes and shapes on a wide variety of subject matters. In New York City's Central Park, for instance, "virtually all monuments on public property are paid for through private contributions." *See* New York City Dep't of Parks & Recreation, Guidelines for Donating Works of Art to Parks (Sept. 1999), *available at* http://www.nycgovparks.org/sub_things_to_do/attractions/public_art/art_guidelines/pa_donation_guidlines.html. Thus, a content-neutral time, place, and manner restriction on the erection of permanent, unattended displays in parks first requires that cities strip their landscapes of their current monuments and start from square zero. Alternatively, a city "could ban all permanent displays of an expressive nature by private individuals." *Id.* This too would require that cities deconstruct the majority of monuments currently standing in public parks.

Any city attempting to exercise some level of control over the esthetics or subject matter of permanent displays would be subjected to strict scrutiny. Policies restricting the placement of monuments to certain content areas would have to be "narrowly tailored" to serve a "compelling state interest." *Perry Educ. Assn. v Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). This standard of scrutiny would open cities attempting to employ any content-based restriction to a flood of litigation. Even were courts to hold that cities had a compelling interest in preserving space to reduce safety hazards or promoting the esthetic appearance of parks, cities would be hard pressed to prove that any exclusion was narrowly tailored to serve such interests. "Esthetic judgments," often may appear to be arbitrary. *PETA v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) (citing *Nat'l Endowment for*

the Arts v. Finley, 524 U.S. 569, 586 (1998)). The level of subjectivity inherent in judging such interests as esthetics and safety would allow virtually any private party whose monument was denied to proceed with a claim against the City.

Conclusion

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Tenth Circuit and vacate the preliminary injunction.

Respectfully submitted,

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