

No. 07-665

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IN THE

**Morris Tyler Moot Court of Appeals at Yale**

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PLEASANT GROVE CITY, et al.,  
*Petitioners,*

v.

SUMMUM, a corporate sole and church,  
*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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## QUESTIONS PRESENTED<sup>1</sup>

Two questions are presented for this Court's consideration:

1. Does a monument designed and constructed by a private group and erected by that group in a municipal park containing other privately donated monuments remain the speech of the private group and not the speech of the government?
2. Is the traditional public forum status of a public park retained if the means through which a private speaker communicates is the erection and permanent display of a monument?

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<sup>1</sup> The petitioners in this action are Pleasant Grove City, a municipal corporation; Jim Danklef, Mayor; Mark Atwood, City Council Member; Cindy Boyd, City Council Member; Mike Daniels, City Council Member; Darold McDade, City Council Member; Jeff Wilson, City Council Member; Carol Harmer, former City Council Member; G. Keith Corry, former City Council Member; and Frank Mills, City Administrator. The respondent is Sumnum, a corporate sole and church.

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## OPINIONS BELOW

The order of the U.S. Court of Appeals for the Tenth Circuit denying rehearing and rehearing en banc is reported at *Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007). The opinion of the Tenth Circuit reversing and remanding the district court's judgment is reported at *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007). The federal District Court for the District of Utah issued an oral opinion in this case. *See id.* at 1048.

## STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Tenth Circuit was entered on April 17, 2007, and petitions for rehearing and rehearing en banc were denied on August 24, 2007. This Court granted certiorari on March 31, 2008. *Pleasant Grove City v. Summum*, 128 S.Ct. 1737 (2008). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (2007).

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

U.S. Const. amend. I.

## STATEMENT OF FACTS

Pleasant Grove City manages a park that contains several monuments donated by private parties. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1047 (10th Cir. 2007) [hereinafter *Summum I*]. The Summum, a religious group, proposed to donate a monument for placement in the park, but Pleasant Grove City rejected this proposal. *Id.* The Summum commenced this action to vindicate their First Amendment rights. *Id.*

### I. THE PARK IN PLEASANT GROVE CITY

Pleasant Grove City manages a city park, known as Pioneer Park, that includes numerous buildings, artifacts, and permanent displays. *Id.* Through its City Council, Pleasant Grove has the power to determine what structures are placed in the park. J.A. at 51. Over the past five decades, Pleasant Grove has accepted numerous donated monuments for the park. *Summum I*, 483 F.3d at 1047; J.A. at 99-100. Approximately sixteen of these structures are mentioned throughout the record. J.A. at 99-102, 138-40, 177-78.

Ten of the park's structures are privately donated monuments. *Id.* at 99-102. Among other items, Pioneer Park contains: a stone from a Mormon temple, donated by a local resident, *id.* at 138; a 9/11 memorial donated by a local Eagle Scout, *id.* at 140; a gingko tree and plaque donated by a local group in memory of another local resident, *id.* at 176; a privately donated rose garden memorial, a rocky mountain maple tree plaque memorial, a wishing well, a log cabin, a mill stone, and a series of park benches, *id.* at 99-102, 120, 177, 178.

Most relevant to this case, the park contains a Ten Commandments monument donated by the Fraternal Order of Eagles. *Summum I*, 483 F.3d at 1047. The Eagles, a national service organization, J.A. at 97, donated the monument in 1971, two years after the foundation of their chapter in Pleasant Grove, as part of a nationwide effort to install Ten Commandments monuments in publicly-visible spaces. *Summum I*, 483 F.3d at 1047; J.A. at 96. The city accepted the monument informally. J.A. at 123.

The Fraternal Order of Eagles placed a dedication on the monument declaring the monument to be “[p]resented to the city of Pleasant Grove and Utah County by Utah State Area Fraternal Order of Eagles.” J.A. at 145. In every other respect, the monument is identical to other monuments donated by the Eagles nationwide. *Anderson v. Salt Lake City*, 475 F.2d 29, 30 (10th Cir. 1973); J.A. at 96. It lists a Christian version of the Ten Commandments, *Anderson v. Salt*

*Lake City*, 348 F.Supp. 1170 (D. Utah 1972), and contains various other symbols, including the Star of David and the Order of Eagles. J.A. at 52.

Several years ago, when the monument fell into “disarray,” the Fraternal Order of Eagles repaired it. J.A. at 144. While the city admittedly owns the monument, J.A. at 14, the Eagles removed the statue from the grounds, resurfaced it, and reinstalled it in its proper place to “make it more appealing for people to look at, more noticeable.” J.A. at 145.

## **II. THE SUMMUM PROPOSAL FOR A MONUMENT**

The Summum proposed to donate a monument similar to the Ten Commandments monument for placement in the park alongside that monument. *Summum I*, 483 F.3d at 1047. Pleasant Grove, however, rejected this proposal. *Id.*

The Summum is a religious group founded in Utah in 1975, six years after the establishment of the Fraternal Order of the Eagles chapter in Pleasant Grove. J.A. at 49. The international headquarters of Summum are located in Salt Lake City, Utah, and members of the organization reside in Utah County, Utah, the location of Pleasant Grove City. *Id.*

The Summum proposed to erect a monument similar in appearance, size and material to the Ten Commandments monument in Pioneer Park. *Summum I*, 483 F.3d at 1047. The monument contains the Seven Aphorisms of Summum, Summum’s guiding philosophy. J.A. at 57. The Summum presented this request to the mayor in writing on September 5, 2003. *Id.* at 57-58. The group volunteered to pay the cost of creating and erecting the monument. *Id.* at 58.

The mayor denied this request two months later, on November 19, 2003. *Id.* at 61-62. The letter specified that the Summum’s monument did not meet the criteria that, though “established over many decades,” were unwritten. *Id.* at 61. The two alleged criteria were that the monument

either “directly relate to the history of Pleasant Grove” or have been “donated by groups with long-standing ties to the Pleasant Grove community.” *Id.*

In August, 2004, the Pleasant Grove city council passed a resolution codifying and expanding upon its unwritten policy for evaluating requests for permanent displays in the park. *Summum I*, 483 F.3d at 1047. In May 2005, the Summum renewed their request under this new policy. *Id.* Pleasant Grove did not respond to this request. *Id.*

### **III. PROCEEDINGS BELOW**

When Pleasant Grove did not respond to the Summum’s second request, the Summum filed suit in federal district court seeking declaratory and injunctive relief, as well as monetary damages, for violation of their free speech rights under the federal and state constitutions. *Id.* After the district court denied their request for a preliminary injunction to permit the display in an oral ruling, *id.* at 1048, a unanimous Tenth Circuit panel reversed and remanded with instructions to grant the preliminary instruction. *Id.* The Tenth Circuit denied rehearing en banc. *Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007) [hereinafter *Summum II*].

In its opinion, the Tenth Circuit noted that the Ten Commandments monument “clearly constitutes protected speech.” *Id.* at 1048 n.2. The court rejected Pleasant Grove’s contention that this Court’s decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), implied, through its application of the Establishment Clause to the Ten Commandments monument at issue in that case, that the monument constituted “government speech.” *Id.* The court found the argument to be “without merit because the Establishment Clause prohibits government *endorsement* of religion, which can occur in the absence of direct governmental speech.” *Id.* (citing *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (O’Connor, J., concurring in part and concurring in the judgment)).

The court further found that the *Summum* had met the strict standard for a preliminary injunction based on the district court's erroneous conclusion that the public park was a nonpublic forum. Instead, the forum, which consisted of "[t]he permanent monuments in the city park," was a traditional public forum because "the Supreme Court has characterized streets and parks as 'quintessential public forums.'" *Id.* at 1050. Finally, the court found that "Pleasant Grove has failed to justify its restriction on speech under this [public fora] standard" because the restriction on speech was content-based, Pleasant Grove lacked a compelling interest for the restriction, and the restriction was not narrowly drawn. *Id.* at 1052-53.

Several judges dissented from the Circuit's denial of rehearing en banc. *Summum II*, 499 F.3d at 1170. Judge Lucero agreed with the unanimous panel that "these monuments do not constitute government speech" because, in order to be government speech, "the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact." *Id.* at 1172. Rather, Judge Lucero dissented from the denial of rehearing on public forum grounds. *Id.* at 1173-74. Judge McConnell also dissented, joined by Judge Gorsuch, on the grounds that the monuments displayed by the city are "government speech" because "there is no 'public forum' for uninhibited private expression," ownership was sufficient to create government speech, and *Van Orden v. Perry* "considered a nearly identical monument." *Id.* at 1175-77.

Judge Tacha took "the unprecedented step of responding to the dissents from the denial of rehearing en banc." *Id.* at 1178. She "emphasize[d] that these cases do not raise novel or unsettled questions regarding government speech." *Id.* She argued that Judge McConnell's "approach is an unprecedented, and dangerous, extension of the government speech doctrine" because "[t]o make government ownership of the physical vehicle for the speech a threshold

question would turn essentially all government-funded speech into government speech,” and “[n]o one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text.” *Id.* at 1179.

Judge Tacha also indicated her approval of the Tenth Circuit’s public forum analysis because “the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis” and “the type of speech does not, and should not determine the nature of the forum.” *Id.* (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)). Finally, she opined that the Establishment Clause analysis differs significantly from Free Speech Clause analysis. *Id.* at 1181.

Pleasant Grove appealed, and this Court granted certiorari. 128 S.Ct. 1737 (2008).

### **SUMMARY OF ARGUMENT**

The Tenth Circuit correctly held that a privately donated monument does not constitute government speech and that Pioneer Park is a traditional public forum. This Court’s precedent, the rationales underlying First Amendment doctrine, the weight of lower court and scholarly authority, as well as other constitutional considerations, support the Tenth Circuit’s ruling.

First, the Tenth Circuit correctly held that a monument donated to a municipality is not government speech because the government neither controlled nor adopted the message. The government does not have a Midas touch regarding speech it contacts, and rightly so, because government speech, while it can distort the marketplace of ideas, is immune from normally stringent First Amendment protections. To qualify as government speech, the government must both control the message and the message must be attributed to the government.

This Court’s government speech precedent, the rationale of the government speech doctrine, and the weight of lower court authority, demonstrates that the government must control

the message of a monument for it to constitute the government's own speech. In particular, this Court in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005), established a stringent control requirement for government speech. Furthermore, both premises of the government speech doctrine – that communication by the government is necessary and that the government is accountable for such communication – require control of the message. In this case, Pleasant Grove did not design, construct, erect, or maintain the donated monument. *Summum I*, 483 F.3d at 1047; J.A. at 96, 145.

Additionally, the weight of authority and the rationale of the government speech doctrine demonstrate that the message must be attributed to the government. In this case, however, Pleasant Grove did not ratify the monument's message as its own upon erection of the monument, J.A. at 123, or at any point since that time, despite the fact that other cities have done so with similar monuments. *Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002). Finally, this Court's Establishment Clause jurisprudence has both explicitly and implicitly held that privately donated monuments do not constitute government speech.

The Tenth Circuit also correctly held that a municipal park is a public forum for the erection and permanent display of monuments proposed by private donors. To determine whether a government restriction of private speech on public land violates the First Amendment, this Court engages in a forum analysis prescribed in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Forum analysis includes identifying the relevant forum and classifying that forum as a traditional public forum, a designated or limited public forum, or a nonpublic forum.

Pleasant Grove City's exclusion of the Summum Seven Aphorisms monument should be evaluated under the principles applicable to traditional public fora. The relevant forum is

Pioneer Park, not the collection of monuments in Pioneer Park. This Court has never identified a forum based on the medium through which an individual speaks, and should not do so here.

Pioneer Park is the quintessential traditional public forum. If, however, this Court identifies the relevant forum as the monuments within Pioneer Park and does not find that this forum is a traditional public forum, the monuments remain a public forum by designation. Since Pleasant Grove City has opened Pioneer Park to the public for the display of privately donated monuments through its policies and past practices, the city may not discriminate against Summum's monument on the basis of its content. Furthermore, recognizing Pioneer Park as a public forum for the erection and permanent display of monuments will not unduly burden the city in its efforts to legitimately regulate private structures on public land, as evidenced by this Court's treatment of private holiday displays in public parks and newsracks on sidewalks. The monuments in Pioneer Park should not be classified as a nonpublic forum as they do not resemble other types of public property that government has reserved for state use.

Finally, regardless of whether this Court classifies Pioneer Park and the monuments within it as a traditional public forum, a limited public forum, or a nonpublic forum, Pleasant Grove City's monument policy—which is both content-based and viewpoint discriminatory—violates the First Amendment.

## ARGUMENT

### **I. THE TENTH CIRCUIT CORRECTLY HELD THAT A MONUMENT DONATED TO A MUNICIPALITY IS NOT GOVERNMENT SPEECH BECAUSE THE GOVERNMENT NEITHER CONTROLLED NOR ADOPTED THE MESSAGE.**

Not everything the government touches is transformed into government speech. For example, a government-funded lawyer does not necessarily speak for the government, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), a government-owned Ten Commandments

monument does not necessarily constitute state endorsement of religion, *Van Orden v. Perry*, 545 U.S. 677 (2005), and a state university’s funding decision does not necessarily constitute government speech. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). These cases evidence that this Court has been careful in declaring expression to be government speech. In fact, this Court has declared expression government speech only twice, *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 562 (2005); *Rust v. Sullivan*, 500 U.S. 173 (1991), despite numerous opportunities. *E.g.*, *Velazquez*, 531 U.S. at 533; *Rosenberger*, 515 U.S. at 819; *Bd. of Regents of the Univ. of Wisc. v. Southworth*, 529 U.S. 217 (2000).

This hesitance is appropriate because government speech, while necessary in some instances for the government to communicate with its constituents, is immune from the normal stringent First Amendment protections of content-neutrality. *Johanns*, 544 U.S. at 560 (noting that government speech “is not susceptible to *First Amendment* challenge”); *Southworth*, 529 U.S. at 235 (“The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.”). The government speech exception, therefore, can have the effect of suppressing speech. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1381 (2001). It can also harm the marketplace of ideas by crowding out voices, Amy Riley Lucas, Comment, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 U.C.L.A. L. Rev. 1971 (2008), or by distorting the public sphere with the authoritative voice of the state. *E.g.*, Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 Hastings L. J. 983, 990 (2005) (relying on social science evidence to argue that “government . . . views appear to be held by more esteemed or authoritative sources than they necessarily are, and more widely accepted than they really are.”).

Ten of the twelve judges on the Tenth Circuit echoed this Court’s hesitance to limit the First Amendment and correctly recognized that the mere fact that the government accepted the donation of a monument does not make that monument government speech. *Summum II*, 483 F.3d at 1044 (denial of rehearing en banc). This Court’s precedent, the rationale of the government speech doctrine, the weight of lower court authority, and this Court’s Establishment Clause jurisprudence all confirm that a donated monument does not become government speech upon its acceptance by a municipality that neither controls nor adopts the monument’s message.

**A. This Court’s government speech precedent, the rationale of the government speech Doctrine, and the weight of lower court authority demonstrate that the government must control the message of a monument for it to constitute the government’s own speech.**

**1. This Court’s precedent demonstrates that government speech only occurs when the government controls the message.**

In *Johanns*, this Court established two criteria for government speech: control of “set[ting] the overall message” and “approval of every word that is disseminated.” 544 U.S. at 562. In that case, beef producers challenged an advertising program organized by a private group appointed by the Secretary of Agriculture and funded by a “checkoff” assessment on beef sales on the grounds that it violated their First Amendment right not to be compelled to fund private speech. *Id.* This Court “rejected [the beef producers’] premise” because the “message of the promotional campaign is effectively controlled by the Federal Government itself.” *Id.* at 560.

This Court’s two reasons for holding that the advertising campaign constituted government speech set a strict control requirement. First, this Court reasoned that “[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government.” *Id.* at 560. Congress “directed the implementation of a ‘coordinated program’ of promotion, ‘including paid advertising,’ *id.* at 560-61 (citing 7 U.S.C. §§ 2901(b), 2902 (13)),

and Congress and the Secretary specified what the promotional campaigns shall and shall not contain. *Id.* at 561 (citing 7 U.S.C. § 2904(4)(B)(i) and 7 CFR § 1260.169(d) (2004)). Second, this Court reasoned that “the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign.” *Id.* at 561. The Department reviewed all promotional messages, rejected and rewrote some of them, and participated in the meetings in which the proposals developed. *Id.*

Two of this Court’s other government speech decisions confirm the importance of control of the message. In *Southworth*, this Court repeatedly argued that government speech doctrine did not apply to a University’s student-group funding decision because the University lacked control over the message of the funded speech. 529 U.S. at 229, 234-35. This Court reasoned that, while “it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies,” the case “does not raise the issue of the government’s right ... to use its own funds to advance a particular message” because “the challenged expression springs from the initiative of the students, who alone give it purpose and content.” *Id.* at 229. Consequently, “the speech is not that of the University or its agents.” *Id.* at 235; see *Rosenberger*, 515 U.S. at 833 (“When the University determines the *content* of the education it provides, it is the University speaking...”) (emphasis added).

Similarly, in *Velazquez*, this Court held that a program through which the government funded lawyers to advocate on behalf of indigent welfare claimants “cannot be classified as government speech even under a generous understanding of that concept” because the government did not control the message delivered by the government-funded lawyer. 531 U.S. at 543. On the contrary, the government-funded lawyer “speaks on the behalf of his or her private,

indigent client.” *Id.* at 542. This case confirms that government control of the message is a necessary condition for expression to constitute government speech.

**2. The rationale underlying the government speech exception to standard First Amendment analysis confirms the control requirement.**

It is black-letter law that the First Amendment protects against government regulation of the content of speech. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message . . .”); Jerome A. Barron & C. Thomas Dienes, *First Amendment Law* 27 (2000). The government speech doctrine is an exception to that general rule. *E.g.*, *Velazquez*, 531 U.S. at 541 (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.”). It is a narrow exception: this Court has found government speech, and thus rejected the applicability of normal First Amendment protections, in only two cases, and in fact situations very different from this case. *Rust*, 500 U.S. at 173 (regarding the funding of a medical program); *Johanns*, 544 U.S. at 550 (regarding a beef advertisement). The exception is premised upon both the necessity of government communication with the citizenry and accountability for these communications. Both conditions presume that the government controls the message of the speech.

This Court has premised government speech doctrine on the necessity of government communication with the citizenry and accountability for such communication to the citizenry. For example, in *Southworth* this Court argued that the government speech exception is necessary for government to communicate its policies to the citizenry. This Court observed that “[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.” 529 U.S. at 229. Consequently, it concluded, “[w]ithin this broader principle it seems inevitable that funds raised by the government will be spent for

speech and other expression to advocate and defend its own policies.” *Id.*; *e.g.*, Helen Norton, *The Measure of Government Speech: Identifying Expression*, 88 B.U. L. Rev. 587 (2008) (“[G]overnment speech facilitates significant First Amendment interests in sharing knowledge and discovering truth by informing the public on a wide range of topics.”).

This Court also has premised the lesser First Amendment protection accorded in the government speech context on the basis of the government’s accountability for such speech. Most recently, in *Johanns*, this Court gave weight to the fact that “the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages.” 544 U.S. at 563. In *Southworth* and *Velazquez*, this Court explained the reason why accountability mitigates the dangers of the government speech exception: “[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy” and “[i]f the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Southworth*, 529 U.S. at 235; *Velazquez*, 531 U.S. at 541-42 (quoting the same passage).

Both of these conditions – the need for communication and the check of accountability – presume control of the speech by the government. It is difficult to claim that the government is communicating a necessary message when the government does not control the content of the speech. *See Johanns*, 544 U.S. at 560-62 (discussing control); *Lucas*, *supra*, at 2008. And when the government does not control the speech, the electorate is unable to hold the government accountable for the speech that is exempted from First Amendment protections. *Johanns*, 544 U.S. at 563. Government officials can plausibly disclaim responsibility for the expression. *E.g.*, Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. Rev. 605, 663 (2008) (arguing that control is critical to accountability).

**3. The weight of lower court authority confirms the importance of government control of the message.**

Numerous circuits have adopted tests for government speech that emphasize the importance of government control of the message. The Eighth Circuit, for example, has derived a four-part test from this Court's jurisprudence that gives significant weight to the question of who controls the message. In *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, the court held that a state-operated radio station could refuse to accept underwriting donations from the KKK in order to avoid having to, as required by law, broadcast an acknowledgement to the KKK because such acknowledgements constituted government speech. 203 F.3d 1085 (8th Cir. 2000). The court reasoned that "the central purpose of the enhanced underwriting program" is to acknowledge the donors, not promote their views, that the radio station "exercises control ... over the form and content of the announcements themselves," that radio station employees read the announcements themselves, and that the radio station is "ultimately responsible" for the content of its broadcast material. *Id.* at 1093-94. The court, in its second factor, therefore, emphasized that the radio station's staff members "compose, edit, and review acknowledgment scripts to insure compliance with both FCC and internal guidelines." *Id.*

The Tenth Circuit also adopted this four-part test, including the emphasis on content control, in *Wells v. City and County of Denver*, 257 F.3d 1132 (2001). In that case, the court held that a holiday display thanking sponsors constituted government speech. The court reasoned that all of the *Knights* factors pointed towards a finding of government speech, especially since "there is no indication that any of the corporate sponsors even knew about the Happy Holidays sign, much less exercised any editorial control over its design or content." *Id.* at 1141-43. The Tenth Circuit followed the *Wells* test in this case. *Sumnum II*, 499 F.3d at 1170; *Sumnum I*, 483 F.3d at 1044. Other circuits have followed similar tests. *Sons of Confederate Veterans, Inc. ex*

*rel. Griffin v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).<sup>1</sup>

**4. In this case, Pleasant Grove did not exercise control over the message.**

In this case, Pleasant Grove failed to exercise control over the message. Unlike in *Johanns*, Pleasant Grove did not “set the overall message” of the permanent displays in the park. 544 U.S. at 562. On the contrary, it accepted donations from at least ten private groups over five decades without a written policy. *Sumnum I*, 483 F.3d at 1047; J.A. at 99-102. These monuments range from memorials honoring individual citizens and historical buildings to items relating to Mormon history and the tragedy of 9/11. J.A. at 99-102.

Similarly, unlike in *Johanns*, Pleasant Grove did not provide “approval of every word that is disseminated.” 544 U.S. at 562. On the contrary, the Fraternal Order of Eagles, as a part of a national campaign, designed, constructed, and erected the entire Ten Commandments monument without any input from Pleasant Grove. *Sumnum I*, 483 F.3d at 1047; J.A. at 96. From the record, it does not appear that Pleasant Grove even considered such a monument until its proposed donation. J.A. at 122. The Fraternal Order of Eagles have continued their control of the message, including its appearance: they recently “resurfaced” the monument to “make it more appealing for people to look at, more noticeable.” J.A. at 145.

To be sure, Pleasant Grove arguably owns the monument, and therefore is in charge of its continued existence. J.A. at 14.<sup>2</sup> This fact, however, is inapposite because ownership of a means of expression is not a sufficient condition to make that expression government speech under this Court’s precedent or the rationale of the government speech doctrine. In *Johanns*, for example,

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<sup>1</sup> One circuit appears to disagree with this test, or at least the application of it to facts similar to those in this case. *See infra* Part I.A.5.

<sup>2</sup> The record is not entirely clear on who possesses title to the monument. *Compare* J.A. at 157-58 (speculating that city may own the monument) *with* J.A. at 145 (chronicling removal of monument by Eagles).

the government clearly owned the advertisements, but this fact alone did not foreclose further analysis as to who controlled the content of the message. 544 U.S. at 560-62. Similarly, if mere ownership transformed expression into government speech, then the Great Gatsby, a standard in high school curricula, would upon purchase by the government become the speech of the government, and not F. Scott Fitzgerald. *Summum II*, 499 F.3d at 1179 (Tacha, J., responding to the dissent from the denial of rehearing en banc).

The insufficiency of ownership is confirmed by the rationales motivating the government speech doctrine. The government speech doctrine depends on the premise that government needs to communicate and is accountable for that communication. *See supra* Part I.A.2. Mere ownership does not guarantee either of these conditions. The government can own expression without putting forth the expression's message as its own as a necessary communication with the citizenry. And ownership of a message does not make officials accountable if they do not endorse the message. In fact, government may own private speech that is placed in a public forum. Making ownership into a sufficient condition for government speech, therefore, undermines traditional forum analysis. *Summum II*, 499 F.3d at 1179 (Tacha, J., responding to the dissent from the denial of rehearing en banc) (noting that the dissent "would have us ignore these well-established forum principles").

**5. Control of the selection of monuments is not sufficient to create government speech under this Court's precedent.**

Control of the decision regarding what monuments to select is not sufficient to give rise to government speech because it is inconsistent with this Court's government speech precedent and conflicts with another line of cases justifying such selection. One circuit has suggested that the decision to select which monuments are accepted for the park itself constitutes sufficient editorial control over the message. *People for the Ethical Treatment of Animals, Inc. v. Gittens*,

414 F.3d 23, 28 (D.C. Cir. 2005) (“In the case before us, the Commission spoke when it determined which elephant and donkey models to include in the exhibition and which not to include.”). This argument, however, is inapplicable for three reasons.

First, this position is inconsistent with past precedent in the government speech line of cases. In *Johanns*, this Court could have rested on the fact that the Secretary ultimately chose which advertisement to run. 544 U.S. at 561. But it inquired further as to whether the Secretary designed the advertisements and approved every word. In other words, selection of messages, even government messages, was not sufficient. *Id.* at 562. Similarly, in *Southworth* and *Rosenberger*, this Court held that there was no government speech, despite the fact that the universities in both cases actively selected which activities to fund. *Southworth*, 529 U.S. at 217; *Rosenberger*, 515 U.S. at 819; *see Velazquez*, 531 U.S. at 533.

To be sure, this Court has exempted government decisions from forum analysis in some situations. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs may consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) (recognizing that broadcasters must “exercise substantial editorial discretion in the selection and presentation of their programming”); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may consider content in awarding grants as such judgments “are a consequence of the nature of arts funding”).

These exemptions, however, are inapplicable to the issue in this case, for two reasons. As an initial matter, this Court has characterized these decisions as regarding sui generis governmental roles, not government speech. *Am. Library Ass'n, Inc.*, 53 U.S. at 194 (omitting mention of government speech doctrine); *Forbes*, 523 U.S. at 666 (same); *Finley*, 524 U.S. at

569 (same); *Summum II*, 499 F.3d at 1179 (Tacha, J., responding to the dissent from the denial of rehearing en banc) (“Although a public school is engaging in speech activity when it selects the text, its ability to do so is based on a different line of Supreme Court cases recognizing the government’s ability to make content-based judgments when it acts in particular roles (e.g., educator, librarian, broadcaster, and patron of the arts.”). These cases, in other words, are not government speech cases.

Second, and relatedly, this Court has only exempted government decisions regarding speech from forum analysis when the government is acting in several particular roles, that of librarian, broadcaster, or patron of the arts. *Am. Library Ass’n, Inc.*, 53 U.S. at 194; *Forbes*, 523 U.S. at 666; *Finley*, 524 U.S. at 569. In fact, *Gittens* is, despite its government speech language, best understood in this manner. 414 F.3d at 23 (chronicling the solicitation for designs for the District of Columbia’s Commission on the Arts and Humanities). But, Pleasant Grove claims none of these roles here. Rather, Pleasant Grove is acting as a speech regulator, deciding what monuments to include in a public park. *Summum II*, 499 F.3d at 1179 (Tacha, J., responding to the dissent from the denial of rehearing en banc) (“As the panel decisions explain, the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts.”); J.A. at 99-102 (accepting various monuments for various reasons). This Court’s jurisprudence does not allow the government-as-speech-regulator to hide behind the First Amendment shield of government speech.

In any event, in this case the facts undermine the applicability of *Gitten*’s suggestion to this case. It is not clear from the record that Pleasant Grove employed any criteria in accepting the monument: there was no coherent method of selection that this circuit assumes. Pleasant

Grove, for example, lacked a written policy until 2004, *Summum I*, 483 F.3d at 1047, and arguably lacked any policy at all prior to that time. J.A. at 160.

**B. Additionally, the weight of authority and the rationale for the government speech doctrine confirm that expression must be attributed to the government to constitute government speech.**

**1. The weight of authority demonstrates that government speech only occurs when the message is attributable to the government.**

In *Johanns*, this Court argued that attribution of the beef advertisement to a private party would undermine the ruling that the advertisement constituted government speech. This Court observed that “this second theory [that “Communications cannot be ‘government speech,’ . . . if they are attributed to someone other than the government”] might (again, we express no view on the point) form the basis for an as-applied challenge [in the compelled speech context].” 544 U.S. at 565. The three-justice dissent prominently emphasized this requirement. 544 U.S. at 578 (Souter, J., dissenting) (“It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message.”). Some lower courts also have emphasized this factor. *Knights of the KKK*, 203 F.3d at 1094 n.9; *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002).

The weight of scholarly commentary confirms the importance of attribution. *E.g.*, Corbin, *supra*, at 605 (arguing that “[w]ho reasonably appears to be a speaker” is a relevant factor); Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1, 49 (2000) (“[C]lear identification of speech as the government's enhances accountability by permitting the citizens to know what positions the government has taken and to reject them, if necessary, at election time.”); Norton, *supra*, at 587 (proposing “that the government speech defense insulates from First Amendment challenge only expression that is governmental in origin both formally (where the government claims the speech as its own when it authorizes the communication) and

functionally (where onlookers understand the speech to be the government's at the time of its delivery)"); Bezanson & Buss, *supra*, at 1384 (“[G]overnment speech should be limited to purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government's message.”); Lee, *supra*, at 990 (arguing for the “transparency principle” in government speech doctrine, that “governments should ensure that recipients of government messages understand the government's responsibility for the speech”).

**2. The rationale underlying the government speech exception confirms that the message must be attributable to the government.**

The government speech exception also presumes attribution of the speech to the government. At the very least, Pleasant Grove must adopt the monument’s message as its own at some point in order for the monument to constitute government speech.

The government speech exception is premised upon the necessity of government communication with the citizenry and the accountability for that communication to the citizenry. *See supra* Part I.A.2. Both of these conditions presume attribution of the speech to the government. Without attribution, that interest is not furthered, especially insofar as surreptitious persuasion is unworthy of respect. *See Johanns*, 544 U.S. at 563. The government does not communicate its policies or its preferences when it does not make the source of the message clear. Corbin, *supra*, at 663; Bezanson & Buss, *supra*, at 1488 (arguing that “government should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government's message”). And accountability is ineffective without attribution. *Johanns*, 544 U.S. at 565 (arguing that accountability exists because attribution is not to a private entity); *id.* at 578 (Souter, J., dissenting). Voters cannot exchange elected officials knowingly if they do not know what those elected officials are communicating. *See* sources cited *supra* Part I.B.1.

**3. The monument in this case is not attributable to the government.**

The presupposition of attribution is not met here because the monument is no more attributable to the government as its own speech than to any other party. In fact, the dedication mentioning the Eagles that appears on the monument itself attributes the speech to the private group, not Pleasant Grove. J.A. at 145 (declaring the monument to be “[p]resented to the city of Pleasant Grove and Utah County by Utah State Area Fraternal Order of Eagles”). The attribution is confused enough that two separate city officials floundered over whether the speech was that of the government or the Eagles. J.A. at 158, 187. Furthermore, the government accepted the monument without any proclamation, J.A. at 123, and has not at any point adopted the monuments’ message as its own, contrary to the practice of other cities. *Sumnum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002) (chronicling that “the City of Ogden’s City Council issued a statement explicitly noting that the City has ‘adopted the inscriptions [of each Monument on the grounds of the Ogden City municipal building] as expressions of the City’”).

**4. Eliminating the attribution requirement undermines First Amendment forum analysis.**

The consequence of omitting the attribution requirement is to allow an end-run around First Amendment protections. Instead of applying forum analysis, Pleasant Grove seeks the protection of government speech doctrine. *Sumnum II*, 499 F.3d at 1179 (Tacha, J., responding to the dissent from the denial of rehearing en banc) (noting that the dissent “would have us ignore these well-established forum principles”). The traditional First Amendment protections fall at the feet of cloaked acceptance of a monument that gradually becomes protected as government speech. Through this argument, government becomes empowered to discriminate based on viewpoint in a way that suppresses ideas. *Bezanson & Buss*, *supra*, at 1381. The contrast with the other government speech cases becomes clearer. While normal First

Amendment public forum analysis does not belong in evaluation of *Johanns*' beef advertisement and *Rust*'s medical program, First Amendment protections should apply when the government accepts a monument for a public park without adopting that message as its own.

**C. This Court's Establishment Clause jurisprudence confirms that acceptance of a monument does not constitute government speech.**

The Establishment Clause forbids improper government endorsement of religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Assuming the speech is religious, government sometimes violates the Establishment Clause when it speaks in its own voice, *e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992), and sometimes violates the Establishment Clause when it supports private speech. *E.g.*, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 600-01 (1989) (“[The Establishment Clause] also prohibits the government’s support and promotion of religious communications by religious organizations.”). Thus, this Court’s cases explicitly holding that donated monuments on public property are private speech, and those cases implicitly holding the same by rejecting Establishment Clause violations, demonstrate that private donations are not government speech.

Several cases have explicitly held that privately donated monuments constitute private expression. In *Capitol Square Review and Advisory Board v. Pinette*, for example, this Court observed that the “religious display in Capitol Square was private expression.” 515 U.S. 753, 760 (1995). This Court went on to hold that the erection of a cross on a state-owned plaza by the KKK did not constitute an endorsement of religion in violation of the Establishment Clause because “[t]he State did not sponsor respondent’s expression.” *Id.* at 661. Similarly, this Court rejected the argument that a sign identifying a donor of a crèche display eliminated the Establishment Clause violation, on the grounds that “[t]he sign simply demonstrates that the

government is endorsing the religious message of that organization, rather than communicating a message of its own. 492 U.S. at 600; *id.* at 614 (noting same distinction for displayed menorah).

This Court’s most recent Establishment Clause case, *Van Orden v. Perry*, 545 U.S. 677 (2005), is implicitly consistent with the view that acceptance of a monument does not make it government speech. That case involved a similar Ten Commandments monument also donated by the Fraternal Order of Eagles, in which this Court held that the display did not violate the Establishment Clause. *Id.* at 681-82. While the Chief Justice argued that the display was an “acknowledgement[] of the role played by the Ten Commandments in our Nation’s heritage,” *id.* at 688, he admitted that the monument “has religious significance.” *Id.* at 690. But, he reasoned twice, the use of the monument here is “a far more passive use of th[at] text[]” than this Court has struck down in past cases. *Id.* at 691; *see id.* at 686. This emphasis on the passivity of the monument indicates a reluctance to identify the monument with Texas. In other words, despite loose phraseology like “Texas’s display” in the opinion, *id.* at 692, to which the dissent in the Tenth Circuit attaches, *Sumnum II*, 499 F.3d at 1176 (McConnell, J., dissenting from denial of rehearing en banc), this Court’s rejection of an Establishment Clause violation evidences a hesitance to determine that the state endorsed, let alone spoke, the monument’s message.

In sum, this Court has both explicitly stated that privately donated monuments do not constitute government speech and implicitly so ruled in its rulings that such monuments do not meet the lower bar of government endorsement.

## **II. THE TENTH CIRCUIT CORRECTLY RULED THAT A MUNICIPAL PARK IS A PUBLIC FORUM FOR THE ERECTION AND PERMANENT DISPLAY OF MONUMENTS PROPOSED BY PRIVATE PARTIES.**

To determine whether a government regulation of speech on public land violates the First Amendment of the United States Constitution, this Court engages in a well-defined forum

analysis. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). First, as articulated in *Cornelius* and applied to the present case, the Court must determine whether the Summum monument is speech protected by the First Amendment. *Id.* at 797. Second, the Court “must identify the nature of the forum.” *Id.* To identify the nature of the forum, the Court must first identify the relevant forum, considering both “the government property at issue” and “the access sought by the speaker.” *Id.* at 801. Next, the Court must classify the relevant forum as a traditional public forum, a limited or designated public forum, or a nonpublic forum. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983). Finally, the Court “must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard.” *Cornelius*, 473 U.S. at 797.

**A. Summum’s monument is protected speech under the First Amendment.**

As an expression of the fundamental tenets of a religious organization, the Summum Seven Aphorisms monument is protected speech under the First Amendment. Religious speech is entitled to the same protections under the Free Speech Clause as speech on any other topic: “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *see also Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981); *Carey v. Brown*, 447 U.S. 455, 461 (1980); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

Neither should the Summum monument be denied First Amendment protection under the Free Speech Clause as a result of the medium through which it is presented – namely, in the form of a monument. Far from protecting only words spoken or printed on paper, the First Amendment protects speech through a wide array of media, including speech on unattended

structures such as signs, *see City of Ladue v. Gilleo*, 512 U.S. 43 (1994), newsracks, *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), billboards, *see Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520 (1982), holiday displays, *see Capitol Square*, 515 U.S. at 760-61 (1995), and even burning crosses. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

**B. The relevant forum is Pleasant Grove’s Pioneer Park.**

The public property to which Summum seeks access is the municipal park in Pleasant Grove City, Utah, known as Pioneer Park. The question before the Court with respect to the issue of forum identification is whether the Court should take a narrow view of the relevant forum, as the Tenth Circuit did below when it identified the relevant forum as “[t]he permanent monuments in the city park.” *Summum I*, 483 F.3d at 1050. At a minimum, the Tenth Circuit was correct in its identification. The precedents of this Court and the majority of the Circuit Courts of Appeals, however, support a broader identification of the forum—the municipal park itself.

The Supreme Court has never based its identification of the relevant forum on the media that carries protected speech. In *Capitol Square*, the Court considered the Capitol Square Review and Advisory Board’s (the Board) denial of the Ku Klux Klan’s application to erect a statue of a cross in the 10-acre plaza surrounding the statehouse in Columbus, Ohio for two and a half weeks during the holiday season. *Capitol Square*, 515 U.S. at 757-58. The record showed that the Board had permitted a variety of unattended holiday displays on Capitol Square, including a state-sponsored Christmas tree and a privately erected menorah that were on the Square at the time the Ku Klux Klan filed its application. *Id.* at 758. Yet the Court did not identify the relevant forum as “unattended holiday displays on Capitol Square.” Instead, the Court upheld the finding of the lower courts, which identified the forum as Capitol Square, and classified the Square as a

traditional public forum. *Id.* at 759, 761. The *Capitol Square* Court’s conclusion was not altered by the physical or temporal characteristics of the display.

To be sure, identifying the government property at issue may not yield the final answer; when a speaker seeks limited access to public property, this Court has “taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.” *Cornelius*, 473 U.S. at 800-01. The forum could be defined metaphysically rather than spatially or geographically. *Rosenberger*, 515 U.S. at 830. The Tenth Circuit has interpreted the Court’s instruction to look to the access sought by the speaker to mean the type of speech, or speech medium. *See Ogden*, 297 F.3d at 1002 (“The access sought is not merely to converse or post temporary signs on the lawn, but the right to place permanent monuments on the lawn: hence the relevant forum is ‘permanent monuments on the lawn of the Ogden City municipal building.’”). In this respect, the Tenth Circuit stands alone among the U.S. Courts of Appeals.

The Tenth Circuit, however, did not take account of the distinctions between the present case and those cases in which this Court identified a forum more limited than the government property to which the speaker sought access. In the latter cases, the forum was limited because the speaker sought access not to the property as a whole, but rather to a distinct and separate forum within that larger forum. In *Cornelius*, nonprofit legal defense funds sought access not to the federal workplace generally contained within federal buildings, but rather to a specific charitable fundraising campaign coordinated and supervised by the federal government. *Cornelius*, 473 U.S. at 800-01. Similarly, in *Perry*, the Perry Local Educators’ Association employees union sought access not to a public school building generally, but rather to the public school district’s internal mail distribution system. The *Perry* Court noted the distinction between the broad forum of the school and the more limited forum of the teachers’ mailboxes. *Perry*, 460

U.S. at 44. In neither case was the access sought defined in terms of the media through which the speaker sought to express himself. Rather, the Court considered whether there existed a narrower forum (physical or not) within the more general forum to which the speaker sought access.

The present case should be further distinguished from *Perry* and *Cornelius*. The separation between the forum within a forum in *Perry*, while metaphysical, was clear. The school district's mail system could be viewed as an entity distinct from the physical buildings through which the mail passed. The present case, however, lacks such clarity of separation. The monuments in Pioneer Park are in no way cordoned off from the rest of the park. *See* J.A. at 162-201. Some of these monuments are historic buildings, while others are marble statues like the Eagles' Ten Commandments monument. It appears that a visitor to the park would have equal access to the areas containing the monuments and to open areas of the park. The only distinguishing characteristics Petitioner can point to separating the monuments from the rest of the park is the speech medium (a structure) and the temporal nature of the speech (permanent expressive displays)—characteristics that have not before been included in a forum's definition.

The majority of U.S. Courts of Appeals that have explicitly applied the forum analysis in cases involving expressive displays in public parks have not distinguished between the park itself and the collection of displays within the park when identifying the relevant forum.<sup>3</sup> In *Kreisner v. City of San Diego*, the Ninth Circuit considered whether a private party could constitutionally erect a religious display in a public park during the Christmas season, and explicitly rejected the argument that the park was “not a public forum for large unattended displays,” instead concluding that Balboa Park was “unquestionably a traditional public forum.” 1 F.3d 775, 783-

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<sup>3</sup> The Court of Appeals for the Second Circuit is the only other court that has suggested that the existence of a separate forum for unattended displays might be necessary within the traditional public forum of the park. *See Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989).

84 (9th Cir. 1993). *Cf. American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379, 384 (9th Cir. 1996) (en banc). The Fourth Circuit, in *Warren v. Fairfax County*, considered the relevant forum for a holiday display on the grassy mall that stretched in front of the Fairfax County Government Center Complex. *Warren v. Fairfax County*, 196 F.3d 186, 188-89 (4th Cir. 1999). The *Warren* court selected the Center Island mall as the relevant forum without mentioning the form that Warren’s speech would take. *Id.* at 189. Similarly, in *Tucker v. City of Fairfield*, where the question before the Sixth Circuit involved a large rat balloon that protesting union members inflated in the public right-of-way during protests, the court analyzed the forum status of the public right-of-way, not some more limited forum within this forum directed at the display of props in aid of protest. *Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005).

Neither should the temporal aspect of Summum’s monument change the identity of the relevant forum: “[T]he Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis.” *Summum II*, 499 F.3d at (Tacha, J., responding to dissent from denial of rehearing en banc). While the type of medium and relative permanence of expressive speech may provide reasons for the government to regulate that speech within the identified forum, these characteristics of the speech should not redefine the forum itself. The Court in *Perry* and *Cornelius* recognized a more limited forum within a traditional forum based on qualities possessed by the fora to which the speaker sought access, not based on the qualities describing the speech itself. To do so here would significantly alter the way the Supreme Court applies its longstanding forum analysis.

**C. Pleasant Grove City’s exclusion of the Summum monument should be evaluated under the principles applicable to traditional public fora.**

Having identified the relevant forum, the Court next classifies the forum as a traditional public forum, a limited or designated public forum, or a nonpublic forum. *Perry*, 460 U.S. at 45.

A traditional public forum exists in “places which by long tradition or government fiat have been devoted to assembly and debate.” *Id.* A limited or designated public forum “consists of public property which the state has opened up for use by the public as a place for expressive activity.” *Id.* Lastly, the government maintains a nonpublic forum for “public property which is not by tradition or designation a forum for public communication.” *Id.* at 46.

**1. Pioneer Park is the quintessential traditional public forum.**

This Court has long held that public parks are “quintessential public forums,” at the “end of the spectrum” deserving the most First Amendment protection. *Perry*, 460 U.S. at 45. Speakers in public parks enjoy this protection because parks

have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

*Hague v. CIO*, 307 U.S. 496, 515-16 (1939); *see also United States v. Grace*, 461 U.S. 171, 177 (1983) (“[P]arks, are considered, without more, to be ‘public forums.’”). This Court has consistently rejected suggestions that its fora classifications are malleable or without meaning:

Our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a ‘cliché’. . . No particularized inquiry into the precise nature of a specific street is necessary; all public streets are . . . properly considered traditional public fora.

*Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) (internal citations omitted). Further, Congress may not destroy the ‘public forum’ status of a park.” *Grace*, 461 U.S. at 180 (citing *United States Postal Service v. Greenburgh Civic Ass’ns*, 453 U.S. 114, 133 (1981)).

**2. Sumnum seeks access to a traditional public forum even if the relevant forum consists of the monuments in Pioneer Park.**

The Tenth Circuit is the only Circuit that has adopted a test for defining the relevant forum that depends on the means of communication.<sup>4</sup> See *Summum I*, 483 F.3d 1044; *Summum v. City of Ogden*, 297 F.3d 995; *Eagon v. City of Elk City*, 72 F.3d 1480 (10th Cir. 1996). Cf. *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993).<sup>5</sup> Even employing this unique interpretation of “access” to the forum to indicate means of communication, however, the court below found Pioneer Park’s monuments to be a traditional public forum.

The Tenth Circuit’s ultimate decision to focus on the traditional public nature of the park to determine its forum status is supported by decisions of this Court. The *Cornelius* Court observed: “the Court will not ignore the special nature and function of the federal workplace in evaluating the limits that may be imposed on an organization’s right to participate in the CFC.” *Cornelius*, 472 U.S. at 801-02. Even where the Court found a separate more limited forum within a broader public forum, it did not ignore the open public nature of the greater forum at hand.

As described above, the separation between the monuments in Pioneer Park and the park itself is intellectual at best. No physical barrier cordons off the many private monuments from the rest of the park.<sup>6</sup> Passersby are free to engage the ideas contained on the monuments as they might any other expression in the park.

America’s public parks abound with permanent, privately donated monuments. Parks in the states comprising the Tenth Circuit alone contain over eighty such donated permanent displays. Cert. Pet. App. I. As America’s public parks have traditionally been held to be public

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<sup>4</sup> The Tenth Circuit found that “the fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the nature of the forum.” *Summum I*, 483 F.3d at 1051.

<sup>5</sup> Where other circuits have privileged the means of communication above the forum in which it is expressed, such as the Seventh Circuit in *Graff*, 9 F.3d at 1314, they have found simply that there was not a right to erect a structure in a public forum (a proposition that could be supported by the adoption of an appropriate content-neutral, time, place or manner restriction with, for example, public safety in mind). However the circuits that have observed first the traditional public nature of the park have not limited their analysis at the forum identification stage by considering the means of communication.

<sup>6</sup> For an explanation of why the monuments in Pioneer Park are private speech, see *supra* Part I.

fora for the use citizens engaged in debate, so too have monuments found a traditional home in our public parks. Monuments are in practice a part of the traditional, expressive, public forum that exists in this nation’s public parks. As such, monuments in a public park should be considered as much a public forum as the rest of the park that surrounds them.

**3. If not a traditional public forum, Pioneer Park’s collection of monuments is a public forum by designation.**

Even if this Court finds that the relevant forum is the collection of monuments within Pioneer Park, and that the collection of monuments does not itself constitute a traditional public forum, this Court should still find that Pleasant Grove City has created a designated or limited public forum for the purpose of displaying privately donated monuments.

Public property that is not a public forum by tradition may become a public forum “by government designation of a place or channel of communication for use by the public at large.” *Cornelius*, 473 U.S. at 802, *citing Perry*, 460 U.S. at 45. The government may create a public forum the use of which is limited to certain groups, such as students groups at a university, *see Widmar v. Vincent*, 454 U.S. 263 (1981), or for the discussion of certain subjects, such as the business of a school board, *see City of Madison Joint School District v. Wisconsin Public Employment Relations Comm’n*, 429 U.S. 167 (1976). In determining whether the government has created a designated or limited public forum, the Court looks to “the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum,” and “the nature of the property and its compatibility with expressive activity to discern the government’s intent.” *Cornelius*, 473 U.S. at 802.

In the present case, Pleasant Grove City has designated Pioneer Park as a public forum for private parties wishing to erect monuments in the park. Pleasant Grove City maintains a

policy (unwritten prior to 2004), which describes when the city will accept monuments. As described by the City Administrator, Pleasant Grove City had a policy of accepting a structure of historical significance, if it was coming from one of the service clubs that had put a lot of service and time in with the city, if it was going to be something to commemorate or remember a local citizen that had provided service for the community, or if there was something that was going to enhance and not take away from the park itself.

J.A. at 179. The City Administrator indicated that public safety and aesthetic concerns were also considered, and that the City Council always had the final say in choosing to accept or reject a private monument. J.A. at 180-81. In 2004, the city passed Resolution No. 2004-019, “A Policy Governing Placement of Plaques, Structures, Displays, Permanent Signs and Monuments in City Parks and on Public Property,” which codified these criteria. Cert. Pet. App. H.

Pleasant Grove City has also created this designated public forum through “its policy of accommodating” private monuments in the past. *See Widmar*, 454 U.S. at 267-68 (referring to the university’s policy of accommodating student group meetings as evidence that the university had created a forum generally open for use by student groups). A number of privately donated monuments and historical relics are currently displayed in Pioneer Park, including historic city buildings that were transferred to locations within the park, a 9/11 monument erected by an Eagle Scout for an Eagle Scout project, J.A. at 174, a ginko tree planted by a local group accompanied by a plaque honoring a retiring community member, J.A. at 176, a gazebo, J.A. at 178, a wishing well donated by the local chapter of the Lions Club, J.A. at 177, and the Ten Commandments monument donated by the Fraternal Order of the Eagles, J.A. at 185.

Both through its policy and its practices, Pleasant Grove City has evidenced its intent to create a designated public forum for private individuals to erect monuments in Pioneer Park. The nature of the property—a public park traditionally held in trust for the public’s use—is highly compatible with expressive activity. Furthermore, the city has not so limited this public forum as

to exclude Summum’s monument. The city accepts monuments from a wide array of private speakers commenting on a wide variety of topics. The city’s acceptance of the Ten Commandments monument is evidence that religious worldviews have not been excluded from the forum. Even the Seventh Circuit supports the conclusion that once “the government opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations.” *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990).

**4. Recognizing Pioneer Park as a public forum for the erection and permanent display of monuments will not unduly burden the city in its efforts to legitimately regulate private structures on public land.**

This Court has recognized that careful balancing must take place when the government’s interests conflict with a speaker’s interests: “The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.” *Hague*, 307 U.S. at 515-16. The Constitution thus permits reasonable, content-neutral time, place and manner restrictions in furtherance of a significant government interest in a public forum, and even content-based restrictions that are narrowly tailored to serve a compelling government interest. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Capitol Square*, 515 U.S. 753.

This constitutional balancing has proven sufficient in a variety of circumstances to address problems that may arise when private parties wish to erect expressive structures in public fora.<sup>7</sup> This Court and several of the Circuits have addressed this issue with respect to private holiday displays on government property. *See Capitol Square*, 515 U.S. at 753; *Kaplan*, 891 F.2d at 1024 (Second Circuit); *Warren*, 196 F.3d at 186 (Fourth Circuit); *Lubavitch*, 917 F.2d at 917

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<sup>7</sup> Although “each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems,” the Court can nevertheless look to cases involving other expressive structural media for guidance. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

(Seventh Circuit), *Kreisner*, 1 F.3d at 775 (Ninth Circuit); *American Jewish Congress*, 90 F.3d at 379 (Ninth Circuit). Each of these courts assessed the nature of the forum before evaluating whether the government had further interest in regulating the speech at issue.<sup>8</sup>

Although this Court has not had to decide whether a complete, content-neutral ban on expressive structures in a traditional public forum would pass constitutional muster, in *Capitol Square*, the Court hinted that “a ban on all unattended displays . . . might be one such” reasonable, content-neutral time, place, and manner restriction.<sup>9</sup> *Capitol Square*, 515 U.S. at 761. *Cf. Schneider v. State*, 308 U.S. 147 (1939) (State’s interest in clean streets insufficient to justify total prohibition against door-to-door leafleting). Alternatively, the adoption of a “first-come, first-served policy . . . [would be] a valid means for regulating the use of a public forum.” *Kriesner*, 1 F.3d at 787 (citing *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640, 649 (1981)). Also proper would be a regulation dictating standards for the size, shape, material, or location of a display. *See Discovery Network, Inc.*, 507 U.S. at 414.

Holiday displays and monuments present the same problems for the government, on a different temporal scale. Holiday displays stand for a matter of weeks; monuments are permanent. Yet the governmental concerns underlying a legitimate desire to regulate are the same—overcrowding of public parks, obstruction of the right-of-way, and aesthetic damage. In the context of holiday displays, this Court has required local governments to use content-neutral regulations to control the unwanted effects of expressive structures. *See, e.g., Capitol Square*, 515 U.S. 753. This same rule should apply to monuments despite their permanent character.

This Court’s treatment of newsracks provides guidance by analogy. *See Plain Dealer*, 486 U.S. at 750; *Discovery Network, Inc.*, 507 U.S. at 410. Although the Court in *Plain Dealer*

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<sup>8</sup> *Cf. Eagon*, 72 F.3d 1480.

<sup>9</sup> The Seventh Circuit has gone further, disclaiming any private constitutional right to erect a structure on public land. *See Graff*, 9 F.3d at 1314.

and *Discovery Network* did not explicitly invoke the phrase “public forum” in describing the First Amendment protections required, the Court’s analysis follows the constitutional requirements applicable to public fora. In both cases, newspaper publishers sought, in violation of local ordinances, to place newsracks for the purpose of dispensing newspapers at various locations on the cities’ sidewalks—a traditional public forum, *see Grace*, 461 U.S. at 177. Although newsracks are a means of dispensing expression and not expression themselves, this Court has analogized the newsrack to a person distributing leaflets. *Plain Dealer*, 486 U.S. at 762. Thus even in a structure that is not itself expression, but aides the dissemination of speech, the First Amendment interest of the speaker is great.<sup>10</sup>

Although the Court in *Plain Dealer* and *Discovery Network* recognized the city’s legitimate interest in regulating publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way, *Discovery Network*, 507 U.S. at 414, the *Plain Dealer* Court wrote, “the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.” *Plain Dealer*, 486 U.S. at 760. In *Discovery Network*, the Court rejected the premise that a strong justification for regulation could overcome strict scrutiny when the regulation is otherwise content-based. *Discovery Network*, 507 U.S. at 429-30.<sup>11</sup>

This Court has also addressed a concern that underlies Petitioner’s desire to regulate monuments in Pioneer Park—the problem caused not by any individual monument, newsrack, or

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<sup>10</sup> Although the Court of Appeals for the Seventh Circuit reached a different conclusion in *Graff v. City of Chicago* regarding newsstands, *Graff* should be distinguished from the present case based on several factors that distinguished the newsstands from the newsracks in *Plain Dealer* and *Discovery Network* (their size, immobility, and the fact newsstands “do not present one viewpoint; rather they supply many and varying editorial opinions.” *Graff*, 9 F.3d at 1315. Monuments are more like newsracks than newsstands. While permanent, they need not be so large as a small store. Like newsracks, monuments represent the speech of one individual or group. Finally, even more than newsracks, the structure of the monument is itself expressive—a stylistic tribute to the subject it honors.

<sup>11</sup> The content-based nature of Cincinnati’s regulation and the lack of “reasonable ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends,” rendered the ordinance unconstitutional. *Discovery Network*, 507 U.S. at 414 (quoting *Bd. of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

holiday display, but rather the trouble these structures pose in the aggregate. As the Court recognized in *Discovery Network*, however, the problem of the aggregate effect of many newsracks cannot justify the discriminatory exclusion from the forum of any one newsrack. *Discovery Network*, 507 U.S. at 425-26. Although speaking about a limited public forum, the *Rosenberger* Court affirmed this premise: “nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination.” *Rosenberger*, 515 U.S. at 835.

The Court’s treatment of cases involving holiday displays and newsracks shows that even within a public forum, cities can enact ordinances that appropriately balance individuals’ First Amendment rights with the government’s legitimate interest in regulating structures to the extent that they threaten public safety or city aesthetics. So too will it be with donated monuments. But amending the Court’s forum analysis to question the medium or content of proposed speech before determining the nature of the relevant forum would set a dangerous precedent that would threaten to undermine the level of speech protection the United States Constitution requires.

##### **5. Nonpublic forum status would be inappropriate in this case.**

The monuments in Pioneer Park are unlike the typical nonpublic forum, and should not be categorized in this manner. Examples of public property that government retains as nonpublic fora include jails and military bases. *See Adderley v. Florida*, 385 U.S. 39 (1966) (no First Amendment right to protest on the grounds of a jail); *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119 (1977) (no right to solicit other inmates on behalf of union); *Greer v. Spock*, 424 U.S. 828 (1976) (government may ban pamphleteering, political meetings from military bases).

Pioneer Park’s monuments should be distinguished from other nonpublic fora in cases that on the surface may appear closer to the case at bar. *See Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (a city transit system’s rental of space in its vehicles for commercial advertising did

not require it to accept partisan political advertising). In *Lehman*, the purpose of the city bus system was to provide transportation, and the purpose of the advertising space inside the busses was to raise money for the city: “Here, we have no open spaces, no meeting hall, park, street corner, or other public thorough-fare. Instead, the city is engaged in commerce.” *Lehman*, 418 U.S. at 303. Unlike the purpose of monuments in city parks, neither purpose in *Lehman* encompassed the expression of ideas. *See also, Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (despite being located on streets or sidewalks, telephone poles and the wires that support them are nonpublic fora). The telephone poles/wires in this case are like the “forum within a forum” described in *Perry* and *Cornelius*—distinct from the larger forum that contains them with a narrow, non-expressive purpose (carrying electricity). Thus for the instant case, the Court’s reasoning in *Taxpayers for Vincent* is inapposite.

**D. Pleasant Grove City’s exclusion of Summum’s monument is an unconstitutional violation of Summum’s First Amendment rights.**

No matter which forum category ultimately best describes Pioneer Park’s monuments, Pleasant Grove City’s monument policy offends Summum’s First Amendment rights.

**1. Pleasant Grove City’s monument policy, as applied to Summum’s monument in a traditional public forum, violates the First Amendment.**

Pleasant Grove City violates Summum’s rights in a traditional public forum because its monument policy is not content-neutral and is not narrowly tailored to achieve a compelling government interest. *See Perry*, 460 U.S. at 45; *Capitol Square*, 515 U.S. at 761; *Carey*, 477 U.S. at 461. Although Pleasant Grove City professes consideration of content-neutral criteria such as public safety and aesthetics when choosing to accept or reject a private monument, Summum’s monument was not rejected on such a content-neutral basis; Summum’s monument, in size,

shape and proposed location, is nearly identical to the Ten Commandments monument that the city has already accepted. *Summum I*, 483 F.3d at 1055.

That Pleasant Grove’s content-based, speech-restrictive policy regarding private monuments in the park does not serve a compelling government interest is evidenced by the fact that the city has already allowed other monuments into the park and “has not offered any reason why monuments with its preferred historical content will preserve park space and reduce safety hazards more effectively than monuments containing other content.” *Summum I*, 483 F.3d at 1054. In this respect, this case resembles *Plain Dealer*, *Discovery Network* and *Metromedia*—when the government regulates an expressive structure based on the content it contains rather than its nonexpressive attributes, it calls into question the asserted compelling nature of its regulation. *See also City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

Finally, the Pleasant Grove City monument policy, even if it were content-neutral, leaves too much discretion in the hands of public officials to pass Constitutional muster. It is the City Council who, having only a very subjective policy to apply, ultimately decides whether or not to allow a private monument into the park. *See Plain Dealer*, 486 U.S. at 750.

**2. Pleasant Grove City’s monument policy, as applied to Summum’s monument in a designated public forum, violates the First Amendment.**

Because, Summum’s monument is part of a class that has been given access to the forum, Summum’s monument enjoys the same constitutional protections in a limited or designated public forum that it does in a traditional public forum. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (citing *Perry*, 460 U.S. at 46). *See also Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92, 96-97 (1972); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 27 (1948). Pleasant Grove City could have limited the collection of monuments in Pioneer Park using a variety of

content-neutral policies designed to further the city’s legitimate interests in public safety and the aesthetics of the park. The city could have banned all private monuments from the park, carefully crafted a policy restricting monuments based on their physical attributes rather than their expressive content, or adopted a first-come, first-served policy for private monuments in the park. All would likely have been constitutional ways to limit the overall number of monuments in Pioneer Park, thus preserving the park’s open spaces. Instead, Pleasant Grove City unconstitutionally discriminated against Summum’s monument based solely on its content.

**3. Pleasant Grove City’s monument policy, as applied to Summum’s monument in a nonpublic forum, violates the First Amendment.**

Finally, Pleasant Grove City violates Summum’s rights even in a nonpublic forum. Although the government may restrict speech in a nonpublic forum based on both subject matter and speaker identity, restrictions must be “reasonable in light of the purpose served by the forum and . . . viewpoint neutral.” *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49). Even in a nonpublic forum, the Constitution does not tolerate regulations that amount to “an effort to suppress expression merely because public officials oppose the speaker’s view.” *Cornelius*, 473 U.S. at 799-800 (citing *Perry*, 460 U.S. at 46).

A regulation that appears viewpoint-neutral but in practice has discriminatory effects may also violate the First Amendment: “The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a façade for viewpoint-based discrimination.” *Cornelius*, 473 U.S. at 811. Similarly, a regulation that has the effect of viewpoint discrimination need not have been enacted with illicit legislative intent to violate the First Amendment. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 117 (1991) (citing *Minneapolis Star & Tribune Co v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 592 (1983)). Summum need show “no evidence of an improper

censorial motive.” *Simon & Schuster*, 502 U.S. at 117 (citing *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)). Finally, a regulation “permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.” *Plain Dealer*, 486 U.S. at 763.

Pleasant Grove City’s exclusion of the Summum monument is unreasonable and viewpoint discriminatory. Pleasant Grove City has already accepted a Ten Commandments monument that, whatever else it means to the people of Pleasant Grove City, espouses a religious worldview. Summum’s monument similarly espouses a religious worldview, differing only in its perspective. Whether Pleasant Grove City intended to favor the Ten Commandments over other religious tenets does not ameliorate the harm in fact caused by the resulting viewpoint discrimination. No matter the forum that this Court ultimately ascribes to Pioneer Park and the monuments it contains, the Pleasant Grove City policy that resulted in the exclusion of Summum’s monument from Pioneer Park violates the First Amendment

### **CONCLUSION**

Pleasant Grove approved the display of a private monument that it neither designed, constructed, erected, nor endorsed. Given Pleasant Grove’s lack of control and adoption of the monument, along with its placement in a public park (a traditional public forum), the monument constitutes private speech in a public forum. The judgment of the Court of Appeals for the Tenth Circuit, therefore, should be affirmed.

Respectfully submitted,

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