No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIAN M. BARNARD
UTAH CIVIL RIGHTS & LIBERTIES FOUNDATION, INC.
214 East 500 South St.
Salt Lake City, Utah
84111-3204

MARTIN S. LEDERMAN
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001

WALTER DELLINGER
PAMELA HARRIS
(*Counsel of Record*)
SHANNON PAZUR
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondent

QUESTION PRESENTED

Petitioner Pleasant Grove City owns and operates a city park that contains numerous permanent displays donated by private parties. Among them is a monument donated by the Fraternal Order of Eagles, with an engraved depiction of the Ten Commandments. The City historically has treated the Eagles monument as private speech, and took no pre-litigation steps to adopt that speech as its own. Instead, the City adopted a formal access policy establishing the criteria under which any private citizen may provide its own monument for display.

Based on these facts, the Tenth Circuit held that the Eagles monument is part of a traditional public forum, and that the City is barred under the Free Speech Clause of the First Amendment from discriminating among private speakers absent a compelling reason. The question presented is:

Whether the Tenth Circuit erred in reaching the narrow and fact-specific conclusion that where the government takes no pre-litigation steps to adopt as its own the speech contained on a donated monument, displayed in a city park pursuant to a formal access policy for such monuments, the monument remains private speech for purposes of the Free Speech Clause.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES
(continued)

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This is an unusual case. Pleasant Grove City accepted a privately-donated Ten Commandments monument for display in its public park, along with other privately-donated displays. Though Tenth Circuit law made clear that the City could adopt the speech on the monument as its own, making it "government speech" for Free Speech Clause purposes, the City declined to do so. Instead, it formalized an access policy, establishing official criteria under which other private parties might display their own monuments in the park. Pursuant to those criteria, the City displays permanent monuments in its park not in order to convey the government's own speech, and not because the City approves the message (such as the Ten Commandments) on those monuments, but for other reasons, including that the private donor of the speech is said to have strong ties to the community.

Because the narrow and fact-specific decision below – a decision on a motion for a preliminary injunction – turns on the City's own treatment of the Ten Commandments monument as private speech, it does not implicate, and would not give this Court a chance to address, any broader issues concerning the line between government and private speech under the Free Speech Clause. Likewise, because the court held only that the government may not discriminate among private speakers in a traditional public forum, the decision does not raise any broader issues concerning forum analysis. Nor does it conflict with any decision of another court of appeals, for the simple reason that the other federal circuits have yet to

address the uncommon factual situation presented here. There is no reason for this Court to grant certiorari.

STATEMENT OF THE CASE

A. Legal Background

Petitioners argued this case below on the theory that the City's park constituted a "nonpublic," rather than a "public," forum for *private* speech. *See infra*, at 7-8. But it has now switched gears, arguing here that this case actually is about the predicate question of whether the relevant speech – the Ten Commandments monument – is in fact private at all, or is instead the City's own speech. Pet. 1-3. Because that question was not squarely presented to it, the court below had no occasion to address it in any depth. The court was, however, writing against the backdrop of Tenth Circuit precedent regarding the line between private and government speech. Because that precedent necessarily informed the reasoning of the court – and is the subject of petitioners' current challenge, *see* Pet. 18-19 (objecting to entire line of Tenth Circuit cases) – we describe it briefly here.

The Tenth Circuit, borrowing from the Eighth, applies a context-specific, four-factor test to determine whether the government is speaking when it permits a privately-donated display on government property. In some cases, according to the Tenth Circuit, despite the private origins of the speech, the government acts in a way that effectively adopts the speech as its own, making it "governmental" for purposes of the Free Speech Clause and allowing the government to draw content- and viewpoint-based

distinctions among displays. *See Wells v. City & County of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001); *Summum v. City of Ogden*, 297 F.3d 995, 1005 (10th Cir. 2002) (considering whether City has "effectively adopt[ed] the speech" of a donated monument). In other cases, the government's relationship to the speech is such that the speech remains private and the government is left with less latitude to make content- or viewpoint-based distinctions or, as here, to discriminate among speakers. *Id.*

The leading case in the Tenth Circuit is *Wells*, in which the court of appeals considered whether a "Happy Holidays" sign listing private sponsors of a holiday display, owned and displayed by the government, constituted private or government speech. Adopting the Eighth Circuit's analysis, the court considered (1) whether the "central purpose" of the display was to promote the views of the government or the private party; (2) which party "exercise[d] editorial control" over the content of the display; (3) which party was the "literal speaker"; and (4) which party bore "ultimate responsibility" for the contents of the display. *Wells*, 257 F.3d at 1141 (citing *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000)). Under the facts of that case, the court determined that the government was the relevant speaker.

A year later, in *Ogden*, the court considered the status of another Ten Commandments monument, also donated by the Eagles, this time installed on the lawn of a city's municipal building. 297 F.3d at 997. The court rejected the city's claim that the monument was government speech, finding that three of the *Wells* factors pointed instead to private speech:

the "central purpose" of the monument was to advance the views of the Eagles, rather than those of the city; the city maintained no editorial control over the content of the monument, which was donated as a "completed project"; and the Eagles were the "literal speaker," as they "composed the speech" on the monument without city input. *Id.* at 1004-05. Importantly, the court made clear that even in light of those factors, the city still had the option of adopting the monument speech as its own and making it government speech for purposes of First Amendment analysis – in which case it could be much more discriminating. The problem, the court held, was that the city did not adopt the speech as its own – by way of City Council resolution – until four months *after* the commencement of litigation. *Id.* at 1005-06.

The decision below does not address the *Wells* framework expressly because the City never raised the issue. Nevertheless, the court of appeals acted in accord with this well-established and reasonable context-specific manner of determining when a government adopts private speech as its own, and properly premised its decision on the fact that the City had not adopted as its own the content of the Ten Commandments monument.

B. Factual Background

Petitioner Pleasant Grove City ("the City") is a municipality in Utah County, Utah, that is home to Pioneer Park. Pet. 4. That city park contains a number of monuments and other permanent displays, among them a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971, just two years after the Eagles established a

local chapter in Pleasant Grove. Pet. App. 2a. The City accepted the monument without taking any steps to adopt the Eagles' speech – i.e., a particular version of the Ten Commandments – as its own.

Summum is a corporate sole and church founded in 1975 and headquartered in Salt Lake City, Utah. In September 2003, Summum sent a letter to the City requesting permission to erect a monument that would display the Seven Aphorisms of Summum in Pioneer Park. Pet. App. 2a. Summum made clear that its monument would be "similar in size and nature to the Ten Commandments monument already present in the park." *Id.* Two months later, the City denied Summum's request, stating that the proposed monument did not satisfy the City's criteria for permanent displays on public property. *Id.* The letter advised Summum that all such displays must "directly relate to the history of Pleasant Grove" or be "donated by groups with long-standing ties to the Pleasant Grove community." *Id.* 2a-3a.

In August 2004, subsequent to Summum's request, the City adopted a formal policy establishing the criteria for acceptance of permanent displays on all public property in Pleasant Grove. Under the "Criteria for Placement," the City will permanently display a privately-donated monument if *either*: (1) the donated item itself has "historical relevance to the community," *or* (2) the donor is "an established Pleasant Grove civic organization with strong ties to the community" or has a "historical connection with Pleasant Grove City." *See id.* 1h-4h; *see also* Pet. 6. In other words, it is sufficient that the speaker – rather than the speech – be acceptable to the City, and the City largely defended display of the Eagles

monument (and rejection of the Summum monument) on that basis. *See* Br. of Appellees 21-23. Put differently, a monument displayed under the policy need not express or advance any particular government message.[1]

The City maintains that it applied its policy consistently on an informal basis long before it was formally adopted, and that the policy provided the basis for the City's acceptance of the Eagles' Ten Commandments monument and all other structures in the park, as well as rejection of the proposed Summum monument. Other than arguing at the very last stages of this litigation that its ownership of the monument makes it the speaker for doctrinal purposes, the City has never asserted that it agrees with, or wishes to publicly express, the contents of the Ten Commandments monument.

C. Proceedings Below

1. On July 29, 2005, Summum filed suit against the City and various current and former City officials in the U.S. District Court for the District of Utah under 42 U.S.C. § 1983 and the Utah Constitution. The complaint asserted violations of Summum's rights under the Free Speech Clause of the First Amendment to the United States Constitution, and the Free Speech and Establishment Clauses of the Utah Constitution. Compl. 8-9. Summum

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[1] Indeed, though the first prong of the policy appears to screen for historical relevance, broadly (and vaguely) defined, even under that prong the City does not purport to scrutinize the particular message that would be conveyed by the item in question.

sought damages and injunctive and declaratory relief. *Id.* 10-11.

Summum moved for partial summary judgment and for a preliminary injunction directing the City to permit Summum to install its monument. Summum argued that under the federal Free Speech Clause the City had "created a public forum for the display of permanent monuments." *See* Mem. in Support of Mot. for Partial S.J. & Mot. for Prelim. Inj. at 3. The City countered that the Eagles monument was part of a nonpublic forum, and that its access policy survived scrutiny because it was reasonable and viewpoint-neutral. *See* Defs.' Resp. to Pl.'s Mot. for TRO & Prelim. Inj. at 6. The City did not argue that the Eagles monument constituted government speech – a decision that allowed it to avoid the Establishment Clause questions that would be raised by a government Ten Commandments display. Rather, all parties agreed that there was a private speech forum of some kind; the only dispute was as to the *nature* of that forum.

The district court denied the motions, holding that summary judgment was precluded because there was a genuine factual dispute concerning the adoption and implementation of the City's policy. Pet. App. 2b-3b. For the same reason, the court said, it could not find that Summum had established a likelihood that it would prevail on the merits, and refused to issue a preliminary injunction. *Id.* 3b.

2. Summum appealed to the Tenth Circuit from the district court's denial of its motion for a preliminary injunction, arguing once again that the City had "created a public forum for the display of per-

manent monuments," and that its rejection of Summum's monument therefore violated the Free Speech Clause. Br. of Appellant 18. In response, the City continued to assume that there was a forum of some sort, but maintained that it had "created [a] nonpublic forum" for private speech. *See, e.g.*, Br. of Appellees 11. The City again failed to press the argument that the monument contained the City's own speech.[2]

In the decision below, the Tenth Circuit reversed the district court, holding that Summum had satisfied the criteria for issuance of a preliminary injunction, including establishing a likelihood that it would prevail on the merits. Writing for the panel, Chief Judge Tacha found that the relevant forum consisted

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[2] The City's brief suggested only in a footnote that the monument might properly be viewed as government speech, relying not on the *Wells* test, which it did not even acknowledge, but only on this Court's decision in the Establishment Clause case *Van Orden v. Perry*, 545 U.S. 677 (2005). Br. of Appellees 16 n.3. *Van Orden* had involved a "virtually identical" Ten Commandments monument donated by the Eagles, and the City asserted that the Court must have "viewed the monument as government speech, for it is understood that only government speech can violate the Establishment Clause." *Id.* That is incorrect for reasons we explain *infra* at 26-27.

The City now argues – in an apparent effort to excuse its failure to fully brief this issue before the panel – that there was "binding Tenth Circuit precedent" dictating that the monument was private speech. *See* Pet. 7. That argument is belied not only by the intensely fact-specific nature of Tenth Circuit precedent on this question, which gives municipalities the option of adopting donated monuments as their own speech, *see supra* at 4, but also by the City's assertion before the panel that *Van Orden* superseded any contrary Tenth Circuit precedent. In light of that position, the City cannot justify its failure to fully brief the issue before the panel.

of the "permanent monuments in the city park," Pet. App. 9a, and that this was a "traditional public forum," *id.* 10a. As the court explained, "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 that forum." *Id.* 12a. As a result, the City's exclusion of the Summum monument was subject to strict scrutiny, under which subject-matter- and speaker-based restrictions are "presumptively invalid," and survive only if they are "'necessary to serve a compelling state interest and [are] narrowly drawn to achieve that end.'" *Id.* 13a (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The City had conceded that its policy was content-based. But having misjudged the applicable standard, it had not argued that its "interest in promoting its history" was a compelling interest, *id.* 15a, nor had it established that its policy was "necessary" and "narrowly drawn" to achieve that interest," *id.* 16a. The City's other stated interests in aesthetic and safety issues could have been advanced by non-discriminatory regulations addressed to the "time, manner, or place of speech in the park" – such as "ban[ning] all permanent displays of an expressive nature by private individuals." *Id.* 17a-18a.

In a footnote of its own, the court rejected the City's footnoted suggestion that under *Van Orden* the Eagles monument was appropriately viewed as conveying government speech. Pet. App. 3a-4a n.2. As the court explained, the fact that *Van Orden* applied the Establishment Clause to a similar monument did not resolve the separate question of

whether the monument displayed government or private speech, because "the Establishment Clause prohibits governmental endorsement of religion, which can occur in the absence of direct governmental speech." *Id.*

The City sought rehearing en banc, arguing that both the panel decision and the Tenth Circuit's prior decision in *Ogden* wrongly held that "once a municipality accepts a monument donated by a private party, the city opens a forum (be it public or nonpublic) for private speech," rendering "viewpoint discrimination . . . constitutionally impermissible." Appellees' Pet. for Rehearing En Banc 2-3. For the first time, the City argued that the court's critical error was in concluding that the donated monument remained private speech. *Id.* 3-5. In the City's view, the fact that the monument was owned by the City was alone sufficient to render the monument government speech instead of private speech, meaning there was no forum for private speech at all.

After consolidating the petition with the separate petition pending in *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007), the Tenth Circuit denied rehearing with three judges dissenting. Two judges – Judges McConnell and Gorsuch – agreed with petitioners that the Eagles monument constituted government speech. They reasoned that the monuments were not part of public fora because the cities had not, "by word or deed, invite[d] private citizens to erect monuments of their own choosing in these parks." Pet. App. 11f. Thus, "[i]t follows that any messages conveyed by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expres-

sion." *Id.* 12f. The dissent attempted to distinguish *Wells* on the basis that the ownership of the display in that case was "in doubt," *id.* 14f; the court in *Wells* specifically explained, however, that the city "owns each component part of the display," 257 F.3d at 1139.

In a separate and narrower dissent, Judge Lucero specifically "agree[d] with the panel that these monuments do not constitute government speech," emphasizing that the government had no input into the design or message of the monuments. *Id.* 3f-4f. However, he disagreed on the precise nature of the forum for private speech that had been opened, concluding that the forum was more appropriately viewed not as a public forum but as a limited public forum in which government restrictions may be content-based but must be viewpoint-neutral. *Id.* 5f, 8f. In this case, he found, "[t]here are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora." *Id.* 9f.

Judge Tacha issued a response to the dissents to "emphasize that these cases do not raise novel or unsettled questions regarding government speech" or "suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium." *Id.* 18f. If the cities wanted to regulate permanent displays of *private* speech, they could enact reasonable and content-neutral time, place, and manner restrictions, such as a ban on all such displays. *Id.* 19f. Absent such regulations, and having already accepted monuments from other speakers, the cities were required to treat all private

speakers equally. *Id.* 20f n.1 ("Because the cities had already permitted the permanent display of a private message, the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally *discriminate* among private speakers in a public forum.").

Judge Tacha rejected the argument that the monuments constituted government speech simply because they were owned by the cities. Under this Court's precedents, Judge Tacha explained, the government speech inquiry turns principally on whether "the message is a government-crafted message," not simply on who owns the item conveying the message. *Id.* 22f. Making the inquiry turn on "government acceptance of the physical medium of speech, not the message" would be "an unprecedented, and dangerous, extension of the government speech doctrine." *Id.* 20f. Judge Tacha also cogently explained the distinction between the speaker inquiry under the Free Speech Clause and the endorsement test under the Establishment Clause. *Id.* 23f-26f. Under the Free Speech Clause, whether the speech is that of the government or of the private party dramatically alters the doctrinal framework. By contrast, "[i]f the government displays a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own," because even the display of private speech may convey a message of government sponsorship. *Id.* 23f-24f.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' rhetoric, the decision below does not warrant this Court's review. In holding that Summum was entitled to a preliminary injunction, the Tenth Circuit did not depart from this Court's Free Speech jurisprudence, but rather applied those precedents to very unusual facts. The result is a narrow decision that does even raise, much less decide, the broad questions presented in the petition, and therefore creates no conflict with decisions in other circuits. Simply put, certiorari is both premature and wholly unnecessary. The petition should be denied.

I. THE NARROW AND FACT-SPECIFIC DECISION BELOW DOES NOT IMPLICATE THE BROAD QUESTIONS POSED IN THE PETITION.

Petitioners portray the decision below (and the decision in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), on which it relies) as announcing a broad new rule of First Amendment jurisprudence: Any government entity that displays a privately-donated, permanent structure on public property has thereby opened a public forum for private speech, and must then take all comers (and monuments) on equal terms. *See* Pet. 1-3. But the Tenth Circuit has not adopted such a sweeping or counterintuitive doctrine.

In truth, the decision below is narrow, turning as it does on very unusual facts. This is a rare case in which a governmental body has formally adopted a written policy establishing criteria under which it will display privately-donated monuments in a pub-

lic park. It is also a case in which the local government declined, at least prior to litigation, to adopt as its own the speech displayed on the privately-donated monument in question. Indeed, the City defended its acceptance of the Ten Commandments monument largely on the basis of the identity of the speaker, not the message on the monument. *See* Br. of Appellees 21-23. The court below simply held that under those circumstances, donated monuments were part of a traditional public forum in the classic setting for such a forum – a public park. And when the government then discriminates against other speakers by refusing to display their monuments in that traditional public forum, it violates the Free Speech Clause of the First Amendment unless it can satisfy strict scrutiny. Far from the radical and far-reaching decision described by petitioners, the decision below is in fact narrow and limited in scope.

1. Perhaps most critically, the decision turns on the government's own treatment of the speech in question as private speech. Petitioners' overwrought claims notwithstanding, Tenth Circuit law makes clear that the mere fact that a monument displayed by the government is privately donated does not make the monument private speech. On the contrary, the government is free to adopt that speech as its own, making it governmental speech for Free Speech Clause purposes. *See supra* at 3-4; *Ogden*, 297 F.3d at 1004-06 (analyzing whether city has "effectively adopt[ed] the speech" on a privately-donated monument as its own). The decision below simply holds that because the City did not avail itself of that opportunity, the Ten Commandments monument remains private speech.

Here, the City historically has treated permanent displays on public property as private speech. According to the City, it has long maintained an informal access policy that establishes the criteria pursuant to which private speakers may donate permanent monuments for display on city property – a policy that was formalized after the City received Summum's proposal.[3] Under that policy, the City may accept and display a monument solely because a private donor has longstanding ties with the City, regardless of the content of the donated display. *See supra* at 5-6; Pet. App. 3h. The government cannot be said to have adopted speech as its own when it approves its display solely by reference to the identity of its donor, and in disregard of its actual content.

Indeed, consistent with its policy, the City has in fact done nothing to adopt the speech on the Ten Commandments monument as its own. It has not installed a sign at the site of the monument announcing that it reflects the City's views, nor has the City Council so declared in any other fashion. *Cf. Ogden*, 297 F.3d at 1006 (Council resolution adopting Ten Commandments monument as city's own

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[3] The court below expressed concern that the recent adoption of the policy served as a subterfuge to mask the City's content-based denial of Summum's monument. *See* Pet. App. 20a ("We do note, however, that the record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history. In the 'absence of express standards,' such as a written policy, city officials are more likely to use post hoc rationalizations to justify their decisions; this kind of 'unbridled discretion' can result in content or viewpoint discrimination.").

speech).[4] Indeed, the only affirmative step the City has taken to adopt the monument's speech as its own is its eleventh-hour litigation strategy in this case.

As this case was litigated in the district court and before the Tenth Circuit panel, the parties agreed that there is a private speech forum for monuments in Pioneer Park; the only point of disagreement was over the precise nature of that forum, with the City maintaining that the forum is nonpublic, rather than public, so that certain content- and speaker-based distinctions might be permissible. *See supra* at 7-8. Thus, its briefing in this litigation – like the City's policy – focused on the identity of proposed speakers, emphasizing prior donors' connections to Pleasant Grove and Summum's lack of such ties,[5] without any

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[4] Because of the religious content of the speech in question here – and the City's rejection of Summum's monument – the City's embrace of the Ten Commandments as its own speech would have raised difficult Establishment Clause questions, most obviously under the fundamental Establishment Clause bar on denominational discrimination. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). As a practical matter, outside the particular (and particularly difficult) context of religious expression, there is no reason that governmental entities cannot adopt privately-donated monuments as their own speech when they approve of the content of those monuments, as contemplated by Tenth Circuit case law. Thus, the effects of the decision below are likely to be limited to cases involving religious displays.

[5] Indeed, the briefing below made it painfully clear that the City did not want to provide a forum for this particular speaker. *See, e.g.*, Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial S.J. 8 ("Unlike the Eagles, the Summum organization has no discernible connection, past or present, with Pleasant Grove. Summum has no church or other meeting place in Pleasant Grove. It has no members who live in Pleasant Grove. It has no historical connection with the place. The group is simply not

suggestion that the City adopted the content of the speech on the monuments it erected. It was not until it filed its petition for rehearing en banc that the City changed tactics and argued that the Eagles monument constitutes government speech. *See supra* at 10. But here, just as in *Ogden*, "the City . . . is unable to point to any *pre-litigation* evidence of the City's explicit adoption of the speech of the Ten Commandments Monument." 297 F.3d at 1006 (emphasis added). In light of the City's litigation-driven shift in positions, the Tenth Circuit was rightly concerned that its new argument amounted to no more than a "post-hoc rationalization to justify [its] decision[]." Pet. App. 19a n.9.

2. The decision is limited in a second respect, as well: It applies only to privately-donated and unsolicited displays. *Ogden*'s holding that the Eagles monument in that case remained private speech turned largely on the fact that the city played no role in shaping the message contained on the monument, but rather received the monument as a "completed product." 297 F.3d at 1004. The decision below contains no discussion on this point because the City failed to raise it. But it is clear that neither the *Ogden* holding nor the decision below would apply in a case where a state or municipality purchases or commissions a display, and is much more likely to play an active role in determining the message of the display. The holding of the court of appeals also expressly excludes from its coverage scenarios in which

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on a par with the Fraternal Order of Eagles Pleasant Grove Aerie #3372 – not in the constitutional sense; not in common sense.").

the government acts as "an educator, librarian, broadcaster, and patron of the arts." *See* Pet. App. 21f; *see also id.* at 13a n.1.

3. Finally, even as so limited, the decision below applies *only* to public parks and other public spaces that have historically been treated as traditional public fora, not to all public property. *See* Pet. App. 8a-13a. As other Tenth Circuit decisions have shown, the analysis is far different when private monuments are placed on the lawns of municipal buildings or courthouses. Those spaces have been deemed nonpublic or limited public fora, in which government decisions are subject to review only for reasonableness and viewpoint-neutrality. *See Ogden*, 297 F.3d at 1002; *Summum v. Callaghan*, 130 F.3d 906, 919 (10th Cir. 1997). *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995) (Establishment Clause challenge; although message of government sponsorship may arise where a government building and its immediate curtilage are involved, it is not necessarily so with respect to those places which by long tradition or by government fiat have been devoted to assembly and debate, . . . [particularly] streets and parks which have immemorially been held in trust for the use of the public") (O'Connor, J., concurring in part and concurring in the judgment) (alteration in original) (internal quotation marks omitted). The rule is quite different in a traditional public forum such as a park. In such a forum – most paradigmatically a speaker's corner – the state may not engage in the sort of speaker-based preferences at issue here (i.e., discriminating in favor of speakers with "strong ties" to the city). *See, e.g., Cornelius v. NAACP Legal Def.*

& Educ. Fund, Inc., 483 U.S. 788, 808 (1985). *See also* Pet. App. 14a n.6. Whether speaker-based preferences might be permissible in a nonpublic forum, however, is a different question altogether. *See, e.g.*, *Perry Educ. Ass'n*, 460 U.S. at 49; *cf. Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983). Because the decision below involved only the display of monuments in a city park, an undisputed a traditional public forum, it does not govern displays on other types of public property.

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Contrary to petitioners' claims, the decision below does not broadly hold that there is a constitutional right to erect structures on public property. *Cf.* Pet. 23. The city park was not a blank slate on which Summum sought to impose an unprecedented and unanticipated form of speech. To the contrary, the City had already accepted like monuments, and had virtually invited additional displays by adopting its access policy. And the City had declined to take the invitation extended by Tenth Circuit case law and adopt the speech on those displays as its own. Thus, the only question presented and decided here was whether the government may display certain private-speech structures in a traditional public forum while discriminating against the display of other structures in that same traditional public forum. *See* Pet. App. 20f n.1. That the Tenth Circuit answered that question in the negative is neither novel nor controversial. *Id.* at 18f.

II. THE PRELIMINARY POSTURE OF THIS CASE MAKES IT A POOR VEHICLE FOR REVIEW.

The early stage of litigation at which the decision below was rendered makes this case a poor candidate for this Court's review. The decision below arises not from a final judgment, but from the district court's denial of a preliminary injunction and remand for further proceedings. All that has been determined at this stage is that Summum is *likely* to prevail on the merits. Pet. App. 20a. The Court's usual practice is not to intervene during such an early stage of litigation, *see* Robert L. Stern, et al., Supreme Court Practice § 4.18 (9th ed. 2007), and there is no reason to break from that practice here.

The Tenth Circuit's ruling certainly suggests that respondent is on solid ground with respect to the merits of its arguments. But there remains at least a possibility that the City ultimately could prevail under the Tenth Circuit's precedents. Although proceedings have been stayed pending resolution of this petition, discovery continued during the appeal to the Tenth Circuit, and the parties filed cross-motions for summary judgment. On remand, perhaps following additional discovery, either party might prevail on grounds that do not implicate the constitutional questions posed in the petition.

On the one hand, it is conceivable that the City might prove that it did, in fact, adopt the Eagles' speech as its own under the *Wells* test. That factual question was not developed below, and neither party briefed or argued the issue before the district court or the Tenth Circuit panel. Alternatively, now that

the Tenth Circuit has established that the forum in question is a traditional public forum, the City might be able to prove that its rejection of the Summum monument survives the applicable strict-scrutiny standard. *See* Pet. App. 15a ("Because Pleasant Grove argued below that the relevant forum is nonpublic in nature, it did not assert a compelling interest that would justify excluding Summum's monument.").

On the other hand, Summum, too, could prevail on remand on grounds that do not implicate the questions presented in the petition. The district court might find – as the Tenth Circuit hinted, *id.* 19a n.9 – that the City engaged in viewpoint discrimination when it rejected the Summum proposal, which is prohibited under the Free Speech Clause whether the forum at issue is a public forum (as the Tenth Circuit held below) or a nonpublic forum (as the City argued below). That result would remove from the case the issue of whether the City park is properly viewed as a public or nonpublic forum – a major portion of the petition, *see, e.g.*, Pet. i (question 2), 22-24, and the only issue fully briefed and argued below.

Summum also could prevail on its state law Establishment Clause challenge. Though Summum did not raise a federal Establishment Clause challenge to the City's decision to display the Ten Commandments monument but not the proposed Summum monument, it did challenge that decision under the Utah Constitution's Establishment Clause – which, as Utah courts have made clear, is not coterminous with its federal counterpart. *Cf. Soc'y of Separationists v. Whitehead*, 870 P.2d 916, 940

(Utah 1993) ("The federal rulings set the floor for federal constitutional protections which we must respect in interpreting the scope of our own constitution's provisions. But the federal courts have . . . only a cryptic sentence to interpret; we have paragraphs that are expressed in clearer terms and that are given even more vivid meaning by our unique and relatively recent history."); *Snyder v. Murray City Corp.*, 73 P.3d 325, 333 n.4 (Utah 2003); *see also* James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, And Utah Constitutional Law*, 60 Alb. L. Rev. 1515, 1548 (1997) ("The need to disavow the control that the Church of Jesus Christ of Latter Day Saints exercised over Utah's political system led, in part, to the drafting of constitutional clauses that exceed the provisions found within the constitutions of other states and the United States Constitution in specificity and definitiveness."). Indeed, Summum has already moved for summary judgment on this separate ground in the district court, and resolution of this claim in favor of Summum would moot the federal Free Speech claim that is the subject of the petition.

In short, this controversy could be resolved without reference to the questions presented in the petition. Certiorari would therefore be premature even if the questions presented had been litigated and actually decided below.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

A. There Is No Conflict Concerning Whether Privately-Donated Monuments Erected In Public Parks Without Any Clear Statement Of Government Sponsorship Constitute Government Speech For Purposes Of The Free Speech Clause.

In petitioners' view, the court below held that "monuments in city parks are not government speech but instead are the private speech of the original donors," Pet. 18, and this holding is in conflict with decisions of other circuits recognizing that "government-owned and government-controlled displays are government speech, not private speech," *id.* 19. Petitioners are wrong on both counts. As shown above, the Tenth Circuit has not established a blanket rule that privately-donated monuments in city parks necessarily constitute private speech; instead, it issued a narrow and fact-bound decision responding to the specific and unusual circumstances before it. Nor has any other circuit approved the bright-line rule petitioners seek here: that government-owned monuments displayed on public property *always* constitute government speech. *Cf. id.* 19, 21. In short, courts have adopted neither of petitioners' "conflicting" rules.

In fact, as numerous courts have held – including the Tenth Circuit, as explicated in *Wells*, *Ogden*, and the opinions below – the test for determining whether speech is governmental is always context-specific, requiring analysis of a number of factors.

Far from creating conflict, this contextual test is *common* in other circuits. *See Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000); *Ariz. Life Coalition, Inc. v. Stanton*, -- F.3d --, 2008 U.S. App. LEXIS 1795 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002). *See also Choose Life of Mo., Inc. v. Vincent*, 2008 U.S. Dist. LEXIS 6524, at *12 (W.D. Mo. Jan. 23, 2008) (noting that "the four-factor test has been adopted by many courts"). None of the cases cited by petitioners is to the contrary, and none creates a conflict with the decision below.

1. Several of the decisions cited by petitioners turn critically on one factor decidedly absent here: that the government was acting in its capacity as "patron of the arts." The Tenth Circuit expressly *excluded* such cases from the ambit of its holding.[6] As

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[6] As the panel below explained,

> We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See* . . . *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments "are a consequence of the nature of arts funding"). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron.

Pet. App. 13a n.4; *see also id.* at 21f (J. Tacha) ("[T]here is 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 pa-

a result, the "patron of the arts" cases cited by petitioners simply are not in any tension with the decision below.

Thus, *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005), which held that public-forum analysis does not apply when the government solicits art from private parties, has no bearing here. The *Gittens* court relied expressly on this Court's separate treatment of decisions made in the government's role as a patron of the arts. The court noted Chief Justice Rehnquist's statement, writing for a plurality, 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 29 (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 204-05 (2003)). As an arts patron, the government must inevitably make content-based decisions, because it "must 'make esthetic judgments.'" *Id.* (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998)). That is precisely the same analysis – complete with the same cited authority – that the Tenth Circuit adopted below in holding that its decision would *not* extend to cases involving the government as "patron of the arts." *See supra* n. 5; Pet. App. 13a n.4, 21f. Similarly, *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1051 (2d Cir. 1988), evaluating the First Amendment status of a sculpture commissioned by the government, relied

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tron of the arts). . . . In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park.").

upon the fact that the government there was acting as a "patron of the arts"; the court warned against "unwarranted restrictions on its freedom to decide what to do with art it has purchased."

Here, by contrast, and as expressly recognized by the court below, petitioners have never argued that the City was acting as a "patron of the arts." Pet. App. 21f ("the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts"); *id.* 13a n.4 ("The city in the case before us is not, however, acting in its capacity as . . . arts patron."). In contrast to the cases petitioners cite, the City here was not purporting to make fine aesthetic distinctions. Neither *Gittens* nor *Serra* conflicts with the decision below.

2. The other cases cited by petitioners all involve Establishment Clause claims, not Free Speech claims, and are distinguishable on that basis alone. *See* Pet. 20-21. As Chief Judge Tacha explained, the question of government endorsement of a religious message under the Establishment Clause is entirely distinct from the question of whether speech is governmental under the Free Speech Clause. *See* Pet. App. 23f-27f. "[A] state's display of a monument is not necessarily state speech; if the government *displays* a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own." *Id.* 23f. Thus, while governmental acceptance and display of a monument with religious content may "constitute state action violating the Establishment Clause," it does not "automatically turn[] the message that monument conveys into state speech." *Id.* at 23f-24f. *Cf.*

County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989) (county's preferential placement of crèche on courthouse Grand Staircase violated Establishment Clause even where crèche itself was privately owned and was displayed with a sign disclosing its private ownership).

But even if Establishment Clause cases were relevant to the government speech question actually presented here, petitioners' remaining cases still would not be in conflict with the decision below. In *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir. 1997), for example, the court addressed whether a government display of a crèche in front of City Hall – the "visible seat of government power" – violated the Establishment Clause. *Id.* at 1446. But that display, unlike the Eagles monument here, was expressly adopted by the government as its own speech, accompanied by a sign that "proudly proclaimed that the display was sponsored by Jersey City." *Id.* Thus, the *Schundler* court had no occasion to address the question presented by the facts of this case and Tenth Circuit law: whether the speech on a privately-donated monument remains private when the government *declines* to adopt that speech as its own.

Likewise, there is no conflict with *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005), which analyzed an Establishment Clause claim seeking removal of another Ten Commandments monument donated by the Eagles. Indeed, petitioners' citation of this Eighth Circuit decision is particularly inapt, given that the Tenth Circuit ex-

pressly borrowed its *Wells* test from that circuit.[7] Far from creating a conflict, it is clear that the Eighth Circuit *agrees* with the court below that: (1) different analyses are required in the context of Establishment Clause and Free Speech Clause claims; and (2) a contextual evaluation of the government speech question is appropriate in the latter scenario, rather than the rigid test proposed by petitioners. The same kind of multi-factor and context-specific analysis was adopted by the court in *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), which rejected a "formalistic standard" in favor of "look[ing] to a number of factors" and the "varying factual backgrounds of government actions" to determine whether a government has endorsed private speech for Establishment Clause purposes. *Id.* at 491-92, 494.

In short, none of the cases cited by petitioners holds, "squarely" or otherwise, that all objects "owned and displayed by the government on government property are government speech," *cf.* Pet. at 20 (internal quotations omitted), and none creates any conflict with Tenth Circuit precedent.

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[7] *Compare* Pet. 21 ("Decisions in the Seventh and Eighth Circuits likewise acknowledge that, in cases involving expressive displays, the identity of the speaker is coincident with the party currently owning and controlling the display, not the creator or previous owner.") *with Knights of the Ku Klux Klan*, 203 F.3d at 1093-94 (crafting contextual test for identifying the speaker subsequently adopted by the Tenth Circuit in *Wells*).

B. There Is No Conflict Concerning Whether The Government Can Engage In Content-Based Discrimination Among Speakers In A Public Forum.

Petitioners also argue that the decision below conflicts with decisions in other circuits "rejecting the notion that there is a First Amendment right to erect monuments or similar displays" on government property. Pet. 23. But here again, petitioners' purported conflict rests on a bald mischaracterization of the Tenth Circuit's decision in this case.

The Tenth Circuit did not, of course, hold that private parties have some free-standing constitutional right to erect the displays of their choice on public property. Rather, it held only that once a city opens a traditional public forum for a particular form of private speech – here, the display of monuments – it may not discriminate among speakers based on the content of their speech. *See* Pet. App. 20f n.1 ("Because the cities had already permitted the permanent display of a private message, *the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally discriminate among private speakers in a public forum.*" (emphasis added)).

None of the decisions cited by petitioners is to the contrary. Rather, as petitioners' own citations and quotations reveal, those cases merely recite the entirely unremarkable proposition that there is no unfettered constitutional right to erect unattended structures on public property. *See* Pet. 23-24. None of those cases involved property that had otherwise

been opened to private structures – as was the case here – and none involved a claim that the government had discriminated based on content in denying certain private parties the same right to display their messages as was granted other private parties. *See Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989) (no private right to display menorah in park where city "had not created a forum in [park] open to the unattended, solitary display of religious symbols"); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) (no private right to display menorah in airport where "record [was] clear that the City ha[d] prohibited all groups from erecting structures in the airport public areas"); *Tucker v. City of Fairfield*, 398 F.3d 457, 452 (6th Cir. 2005) (relying on *Graff v. City of Chicago*, 986 F.2d 1055 (7th Cir. 1993) and *Lubavitch* for proposition that courts generally refuse to grant First Amendment right to erect permanent displays on public property).[8]

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[8] Nor is there any inconsistency on this point between the decision below and this Court's cases. Petitioners cite *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1994), but that case is inapposite. *Taxpayers for Vincent* held only that the government could ban a particular method of communication it deemed a nuisance – the posting of fliers on crosswires supporting utility poles. *Id.* at 810. It did not hold or even suggest that once the government permits one party a particular kind of access to a traditional public forum, it may discriminate based on content in awarding other parties the same access.

IV. NO PARADE OF HORRIBLES WILL RESULT FROM THE TENTH CIRCUIT'S DECISION.

Petitioners speculate that a plague of offensive monuments will clutter public spaces throughout the country if the Tenth Circuit's decision is permitted to stand. Pet. 27-29. Rhetoric aside, however, there is no merit to petitioners' bleak predictions.

Most obviously, government bodies always have the option of avoiding petitioners' parade of horribles simply by banning display of *all* privately-donated permanent structures, as a reasonable time, place or manner restriction. This Court has expressly suggested that option, *see Pinette*, 515 U.S. at 761, as did the court below, Pet. App. 18a.

But a government need not go that far. As already explained, the decision below has narrow application. It reaches only privately-donated permanent structures that are offered for display in public parks, when the government has already accepted other structures for display, has always treated those displays as private speech, and does nothing to adopt that speech as its own. *See supra*, Part I. Thus, all any governmental body must do to eliminate any ambiguity as to the status of privately-donated items is to treat them as government speech *before* litigation is initiated. This could easily be accomplished through formal resolutions by the governing body approving of the content of the monument, *see Ogden*, 297 F.3d at 1006 (city council resolution adopting speech as own), or by the installation of signs making clear that the donated items reflect the views of the government, *see Schundler*, 104 F.3d

at 1446 (display accompanied by sign stating that it was sponsored by government). In the Establishment Clause context, seven Justices agreed that the posting of signs could effectively disclaim government endorsement of the religious messages contained on public displays. *See Pinette*, 515 U.S. at 769 (plurality); *id.* at 776 (concurrence). Such measures could likewise be used to make clear that it is the government that is speaking, and not a private party.[9]

Thus, it is not true that "a city cannot accept a monument posthumously honoring a war hero without also being prepared to accept a monument that lampoons that same hero." Pet. 1. To the contrary, a city need only make clear, *prior* to the commencement of litigation, that it adopts the speech of the donated item as its own expression.[10] The only thing

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[9] This straightforward adoption of a privately-donated monument as government speech might of course raise Establishment Clause issues with respect to religious displays – particularly where the government engages in denominational discrimination. But that is a function of well-settled Establishment Clause principles, not some problem in Free Speech Clause jurisprudence that requires this Court's attention. It is not the purpose of the First Amendment to ensure that governmental entities remain free to disclaim speech as purely private when it suits their Establishment Clause needs while simultaneously avoiding the rules that generally govern the regulation of private speech.

[10] The concerns raised by veterans' groups amici, *see* Br. Amici Curiae of the American Legion, et al., are thus easily addressed by pre-litigation conduct by the government that adopts the monuments' speech as its own. Indeed, as the amici themselves note, there is reason to believe that veterans memorials would in any event be deemed government speech under the Tenth Circuit's test. In stark contrast to the facts of this case,

it may *not* do is engage in litigation games by treating donated items as private speech for decades, adopting a formal policy governing the acceptance and display of such items, and then arguing they constitute government speech only when another private party seeks equal access to a traditional public forum.

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they assert that "government officials are very involved in the development and design of the [veterans] memorials, and must approve the dimensions, design and content of the memorial," *id.* at 15 – a factor that would weigh heavily toward a finding of governmental speech under the Tenth Circuit's *Wells* test. *See supra* at 3-4 (whether government maintains "editorial control" over monument highly relevant to government-speech determination). Moreover, monuments actually commissioned *by the government* are not subject to the decision below – and indeed are not subject to forum analysis at all – for the reasons already explained.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN M. BARNARD
UTAH CIVIL RIGHTS & LIBERTIES FOUNDATION, INC.
214 East 500 South St.
Salt Lake City, Utah
84111-3204

WALTER DELLINGER
PAMELA HARRIS
(*Counsel of Record*)
SHANNON PAZUR
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

MARTIN S. LEDERMAN
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Counsel for Respondent

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