No. 07-665

In The

Supreme Court of the United States

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

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioners*.

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
Barry C. Hodge
Nathan A. Driscoll
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Sources:

INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are particularly interested in assuring that constitutional case law not be misapplied by forcing local governments to permit the haphazard erection of permanent monuments in city parks.[1]

SUMMARY OF THE ARGUMENT

This Brief makes two arguments not made by the party it supports. Pleasnt Grove argues, and your *Amicus* agrees, that the monuments in the Park are government speech. However, Pleasant Grove also argues that should this Court decide that donated monuments remain the private speech of the donors, the rejection of Summum's monument still passes constitutional muster. *Amicus* agrees with this latter assertion as well. In support of that assertion, Amicus presents the following two arguments. First, your *Amicus* argues that the Tenth Circuit incorrectly considered the Pleasant Grove City Pioneer Park to be a traditional public

---

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk. No counsel for any party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

forum for the purposes of permanent monuments. Second, your *Amicus* argues that Pleasant Grove's decision not to erect the monument was a reasonable decision under a nonpublic forum analysis.

As to the first point, Pioneer Park is not a traditional public forum for the purpose of establishing permanent public monuments. The Tenth Circuit merely applied a "magic words" test by noting that this Court has characterized streets and parks as quintessential public fora. However, this Court has noted that that generalized rule does not always apply and a particularized analysis must be done. In *United States v. Kokinda*, 497 U.S. 720 (1990), this Court considered the question of whether a sidewalk is always a traditional public forum, and a plurality found that it was not. The majority of Circuit Courts of Appeals have continued to apply this analysis following three of this Court's cases.

Furthermore, as Justice Scalia has noted, this Court should not allow "traditional public forum" to become just a conclusory label. Should this Court affirm the Tenth Circuit's analysis, it would be approving a decision which effectively applied a conclusory label to a city park, thus forcing the Pleasant Grove City to display unwanted donated permanent monuments. If it were to do so, a city that allows a parade in its streets could then be forced to place a permanent monument in the middle of Main Street.

As to the second point, Pleasant Grove City has reasonably chosen not to display a proposed monument which would not fit the reasonable

criteria the City has established for permanent monuments. These criteria are "local ties and historical relevance." This Brief shows that while Summum could try to object to the City's second criteria, historical relevance, as pre-textual viewpoint discrimination, such an objection would be incorrect.

There is a significant historical distinction between the Ten Commandments monument, which the City allowed to be erected, and the Seven Aphorisms of Summum monument, which the City does not want erected. Pioneer Park's theme for the vast majority of its monuments and displays is related to the Mormon pioneers who settled the area and founded Pleasant Grove. To many of those pioneers, the Ten Commandments were an essential part of the moral foundation of their daily lives. The Seven Aphorisms are not a part of that history, and hence the City was reasonable to chose to exclude it from Pioneer Park, and the decision was not just a pretext for viewpoint discrimination.

ARGUMENT

Pleasant Grove City argues that the monuments it chooses to erect in its park constitute government speech, not private speech. (Pet'r Br. 20.) Your *Amicus* agrees. However, Pleasant Grove City also argues that even were this Court to disagree and consider donated monuments to continue to be the speech of the donor, the decision not to display Summum's monument would still pass constitutional muster. Your *Amicus* agrees with this

latter assertion as well and respectfully submits two arguments demonstrating why this is true.

I. THE TENTH CIRCUIT INCORRECTLY CONSIDERED THE CITY'S PARK TO BE A TRADITIONAL PUBLIC FORUM BECAUSE IT DID NOT MAKE A PARTICULARIZED INQUIRY INTO THE CIRCUMSTANCES OF THIS CASE.

The Tenth Circuit found that the Pleasant Grove City Pioneer Park, simply because it is a park, *must* be a traditional public forum for all purposes. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007). Having made this determination, the Court remanded the case to the District Court with instruction to grant a preliminary injunction so that Summum would be allowed to erect their monument in the park. *Id.* at 1057. However, as Pleasant Grove City argued, Pioneer Park is neither a traditional public forum for "private, unattended, permanent monuments," (Pet'r Br. 43) nor is it a designated public forum. (*Id.* at 45.) In addition to the reasons argued by Pleasant Grove City, Pioneer Park is not a traditional public forum for the erection of private, unattended permanent monuments under *United States v. Kokinda*, 497 U.S. 720 (1990), and under the principles discussed by Justice Scalia in his concurrence to *Burson v. Freeman*, 504 U.S. 191 (1992).

The problem with the Tenth Circuit's analysis is that it merely quotes this Court's precedent which has "characterized streets and parks as

'quintessential public forum,'" and ends its analysis on this point. *Summum*, 483 F.3d at 1050 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). However, members of this Court have noted two exceptions to this broad principle. First, individual pieces of government property that typically fall within broad classifications as traditional public fora, do not always function as traditional public fora. Second, an individual piece of property may be a traditional public forum at some times, and not others. Each of these exceptions will be examined below.

As to the first exception, in *Kokinda* two political activists were "solicit[ing] contributions, sell[ing] books and subscriptions to the organization's newspaper, and distribut[ing] literature addressing a variety of political issues" on a sidewalk that connected a post office with its parking lot. 497 U.S. at 723. The pair was subsequently charged with, and convicted of, violating a regulation forbidding those activities on Post Office property. *Id.* at 724. The Fourth Circuit held that "[s]idewalks . . . are presumptively public forums" and thus analyzed the regulation under a time, place, and manner analysis for traditional public fora. *United States v. Kokinda*, 866 F.2d 699, 701, 703 (4th Cir. 1989).

However, the *Kokinda* plurality found that the post office sidewalk was not like the "quintessential public sidewalk" it has addressed in *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Rather, the *Kokinda* plurality distinguished between external sidewalks that run along the side of the street and

the Post Office's internal sidewalk which only ran between its parking lot and the building. 497 U.S. 727. Therefore, the plurality criticized the *Kokinda* dissent for relying on *Frisby* to "designate *all* sidewalks open to the public as public fora." *Id.* at 727-28 (emphasis added). The plurality explicitly stated that the dissent's out-of-context reliance on *Frisby* was in conflict with this Court's "settled doctrine." *Id.* at 728. The plurality cited *United States* v. *Grace*, 461 U.S. 171 (1983), and *Greer v. Spock*, 424 U.S. 828 (1976) to show how it had engaged in a particularized analyses of sidewalks in the past. *Kokinda*, 497 U.S. at 728-29. The plurality considered the Postal Service's reasons for banning solicitation and agreed that solicitation would be "inherently disruptive of the Postal Service's business." *Id.* at 731-33.

Thus, having decided that a particularized inquiry was required, the plurality found that the post office sidewalk served the limited purpose of providing access from the post office's parking lot to the building, not the purpose of facilitating free speech and thus was not a traditional public forum. *Id*. at 728. Therefore, the government did not have to permit its property to be used as a typical public forum against its wishes. *Id.* at 736.

Because Kokinda was a plurality decision, it is important to note that Justice Kennedy's opinion, which provided the fifth vote for the judgment, clearly embraced a particularized inquiry approach. *Id*. at 738-39 ("If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and

its customary use by the public may control the case.").

All of the Courts of Appeals have correctly applied a "particularized inquiry" following *Kokinda*, *Grace*, and *Greer*. *Preminger v. Sec'y of VA*, 517 F.3d 1299, 1313 (Fed. Cir. 2008); *Bowman v. White*, 444 F.3d 967, 985 (8th Cir. 2006); *Initiative & Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299, 1313-14 (D.C. Cir. 2005); *Parks v. City of Columbus*, 395 F.3d 643, 648-50 (6th Cir. 2005); *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099-1104 (9th Cir. 2003); *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20-21 (1st Cir. 2002); *Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity v. City Of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 50 (2d Cir. 2002); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1125-26 (10th Cir. 2002); *Vasquez v. Hous. Auth.*, 271 F.3d 198, 203 (5th Cir. 2001); *Warren v. Fairfax County*, 196 F.3d 186, 191-92 (4th Cir. 1999); *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1152 (7th Cir. 1995); *Rappa v. New Castle County*, 18 F.3d 1043, 1071 & n.9 (3d Cir. 1994) (noting that a particularized inquiry was not necessary in the case before it, but acknowledging that such an inquiry would sometimes be required); *Sentinel Comm'ns Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991). [2]

[2] However, sometimes a Court of Appeals may nevertheless apply *Frisby's* generalized rule when it is analyzing an indisputable quintessential traditional public forum, such as an external sidewalk. *See, e.g. Ater v. Armstrong*, 961 F.2d 1224, 1227 (6th Cir. 1992).

Mostly interesting of all the above cases is *First Unitarian Church of Salt Lake City*, 308 F.3d 1125-26. There, the Tenth Circuit realized that a particularized inquiry was required. Yet in the instant case, the Tenth Circuit failed to follow its own binding precedent. *Am. Cas. Co. v. Health Care Indem., Inc.*, 520 F.3d 1131, 1138 (10th Cir. 2008) (noting that one Tenth Circuit panel cannot overturn a decision from another panel.). Rather than engaging in the particularized inquiry required by *First Unitarian Church*, it engaged in a "magic words" analysis: all parks *must always* be a traditional public forum.

In the instant case, the Tenth Circuit should have understood that while Pioneer Park may be a traditional public forum for many purposes, that does not mean that the City can be forced to accept and erect a permanent monument someone may choose to donate. (Pet'r Br. 44.) Just as in *Kokinda*, where the Post Office did not have to permit solicitation on its property solely because it was a sidewalk, so Pleasant Grove City does not have to allow the erection of a permanent monument just because Pioneer Park is a park. Also, just as solicitation would interfere with the Postal Service's intended use of its internal sidewalk (providing ingress and egress), so the forced acceptance and erection of any and every donated monument would interfere with Pleasant Grove City's intention to limit the park's theme. Therefore, this Court, just like the plurality in *Kokinda*, should perform a particularized inquiry and hold that Pioneer Park is not a traditional public forum for the erection of permanent monuments.

The second exception to the general rule governing which governmental properties fall into which category of fora was addressed in Justice Scalia's concurrence in *Burson*, 504 U.S. at 214 (Scalia, J., concurring). He concluded that a restriction on political campaigning within 100 feet of a polling place on election day was reasonable. *Id.* at 216. He concluded this despite that fact that the 100-foot limitation would often encompass both streets and sidewalks. *Id.* at 214. He opined that "[i]f the category of 'traditional public forum' is to be a tool of analysis rather than a conclusory label, it must remain faithful to its name and derive its content from *tradition*." *Id.* (emphasis in original). Justice Scalia went on to reason that "[b]ecause restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [the statute] does not restrict speech in a traditional public forum . . . ." *Id.* Thus, the streets and sidewalks that fell within the 100-foot limit would be traditional public fora on most days, but they would not be traditional public fora on election day.

This principle should be applied not just in the temporal sense, where what is typically a traditional public forum can at times be a nonpublic forum, but also in a contextual sense, where what is typically a traditional public forum for most speech activities is a nonpublic forum for the placement of a permanent monument. In this case, the government property is a city park, which is typically a traditional public forum. However, that does not mean that anyone should be able to donate a permanent monument and force the City to erect it. The streets and

sidewalks in *Burson*, which were generally a traditional public forum, were not such a forum on election day. 504 U.S. at 216. So here, the Park may typically be a traditional public forum, but it is not such a form for the erection of a permanent monument.

The concurrence in *Burson* reasoned that this Court should not allow "traditional public forum" to become a conclusory label. *Id.* at 215 (Scalia, J., concurring). That principle should also apply in this case, especially where the activity involved is not true speech, literature distribution, or even a temporary display; but rather the forced *permanent* display of a monument on government property. Therefore, this Court should eschew a conclusory label, and recognize that sometimes public fora can change with the circumstances.

If this Court were to accept the lower court's analysis, once a plot of government property has been held to be a traditional public forum, it must be considered as such not only for transient, temporary speech activities, but also for the erection of permanent monuments. To follow this logic to its natural conclusion, if a city had allowed a parade in its streets, it could be forced to place a permanent monument in the middle of Main Street.

II. PLEASANT GROVE'S RESTRICTION IS REASONABLE BECAUSE IT IS A VIEWPOINT-NEUTRAL RESTRICTION UNDER THE NONPUBLIC FORUM ANALYSIS.

As noted above, Pioneer Park is not a traditional public forum for permanent monuments. In addition, Pleasant Grove argues in its brief that Pioneer Park is not a designated public forum. (Pet'r Br. 45.) Therefore, under its belief that its donated monument constitutes private speech, Summum's last available argument could be that the City's restriction is not reasonable under the nonpublic forum doctrine. However, the City has adopted two reasonable criteria for deciding which monuments it will erect in its role as administrator of the park. These criteria are "local ties and historical relevance." (*Id.* at 47.) The Park contains a number of historical buildings and monuments related to the City's Mormon pioneer history. (Pet'r Br. 3-5.) As Pleasant Grove City argued, the first criterion is constitutional, as a speaker identity requirement, and the second is also constitutional as being viewpoint neutral. (*Id.* at 48.) However, Summum could object to the latter criterion as a pre-textual requirement, arguing that the Ten Commandments does not fit within Mormon pioneer history. This Part of the Brief will demonstrate why this argument would be incorrect.

A significant distinction between the Ten Commandments and the Seven Aphorisms of Summum is the historical relevance of the Ten Commandments to the Mormon pioneers who

founded Pleasant Grove City. The historical tradition of the meaning of the Ten Commandments to the Mormon pioneers has been shown by the City's expert at the trial court. Most importantly, he noted that the Mormon pioneers "emphasized the Ten Commandments as fundamental precepts for an orderly society." (Expert Report, *Summum v. Pleasant Grove City*, Case No. 02:05-cv-068-DB, 4 (Dist. Utah April 9, 2007) (District Court Docket Entry No. 231, Ex. A.).) As such, it was something they looked to in building their communities, including Pleasant Grove. (*Id*.)

In fact, a number of the early Mormon pioneer leaders[3] are recorded as stating the importance of the Ten Commandments. The civil and religious leader of the Mormon pioneers during the pioneer period, Brigham Young,[4] explicitly instructed the pioneers to "Keep the Ten Commandments," and referred to the Ten Commandments as "the moral code" to which the pioneers kept. (*Id.* at 5-6.) Other Mormon pioneer leaders also exhorted others to follow the Ten Commandments. For instance, Wilford Woodruff said that "'civilized rule' was based upon 'the moral law—the ten commandments.'" (*Id.*) He also instructed the pioneers to "'teach their children these principles in early youth' to provide a

---

[3] While the Expert Report often refers to these men as Apostles, many church officials were also pioneer civil political leaders, including the men quoted above. Klaus J. Hansen, Quest for Empire, 49, 63, 129, 131, 137 (1970).

[4] Brigham Young is a quintessential—but certainly not the only—example of a Mormon leader who held both ecclesiastical and civil office. He was both President of the Mormon Church and first governor of the Territory of Utah. Hansen, *supra* note 2, at 129, 136.

moral foundation." (*Id.* 7.) In fact, one of the pioneer leaders, Heber Kimball, insisted that the Mormon pioneers had a duty to follow the Ten Commandments. (*Id.* at 6). Dr. Brian Cannon, who was utilized as an expert in this case, has said that [i]n trying to establish "civilized rule," or civil government, in Utah, it was natural for the legislature in pioneer Utah to prohibit behavior that was prohibited in the Ten Commandments. The first criminal code for Utah, enacted January 16, 1851, built upon the principles enunciated in the Ten Commandments. (*Id.* at 4-5.)

When the Pleasant Grove Fraternal Order of Eagles offered a monument of the Ten Commandments to the City, the monument fit very well with the theme of the pioneer founders of Pleasant Grove. This fact is clear when considering the other monuments located within the park; these monuments include a number of buildings or structures from the city's founding, artifacts from Mormon history, and other items that related to the Mormon pioneers. (Pet'r Br. 4-5). In fact, Jack Cook, the Mayor of Pleasant Grove City at the time of the dedication of the Ten Commandment monument, stated that "he thought the monument 'would serve to remind citizens of their pioneer heritage in the founding of the state.'" (J.A. 103, ¶10.) As has been shown above, the Ten Commandments were important to the Mormon pioneers, and hence a monument of the Ten Commandments was consistent with the theme of the Park.

The Seven Aphorisms of Summum, unlike the Ten Commandments, have nothing to do with the

Pioneer history of Pleasant Grove. Thus, displaying the latter, while declining to display the former is not a pretext for viewpoint discrimination.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioners' and other *Amici Curiae* briefs, this Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,
this 23rd day of June, 2008

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133