No. 17-60

In the Supreme Court of the United States

CITY OF BLOOMFIELD, NEW MEXICO,
Petitioner,

v.

JANE FELIX, B.N. COONE,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. What standard should be used to evaluate Establishment Clause challenges to passive displays such as monuments?

2. Do litigants have standing to challenge a monument on Establishment Clause grounds simply because they are offended by it?

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INTEREST OF *AMICUS CURIAE*[1]

The International Conference of Evangelical Chaplain Endorsers (ICECE) is a group of independent, evangelical, Christian churches and organizations that endorse chaplains to the military and other organizations requiring chaplains.[2] ICECE members provide chaplains who adhere to the historic orthodox Christian doctrines in order to provide religious ministry to those of like faith and facilitate the free exercise of religion for all military personnel and dependents. ICECE chaplains teach, preach and counsel from a Biblical understanding, in accord with God's Word. By so doing, they engage in private religious speech in a unique government setting.

ICECE was organized specifically to identify, define, and address issues important to Christian evangelical

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties were given timely notice and consented to the filing of this brief as required by Supreme Court Rule 37.2(a).

[2] Endorsement is the process by which a religious organization recognized by the Department of Defense (DOD) certifies that its clergy or religious leader satisfies education, training, and experience requirements and is qualified to: (1) provide religious ministry to the organization's members serving in the military, (2) facilitate the religious free exercise of other military personnel, dependents, and other authorized DOD personnel, and (3) care for all service personnel. *See* U.S. DEP'T OF DEFENSE, INSTRUCTION 1304.28, GUIDANCE FOR THE APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS (June 11, 2004) (describing endorsement process and criteria).

military chaplains and the military personnel they represent. ICECE's most important issue is the protection and advancement of religious liberty for chaplains and all military personnel.

ICECE faces unique constitutional concerns, issues, and challenges that necessarily arise because of the dual roles played by its chaplains as representatives of their Christian churches and as commissioned military officers subject to the rules, regulations, and discipline of the Armed Forces. *See In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004). The chaplain's unique role as a denominational representative in a government environment has not always been understood, and ICECE members regularly report issues with prayer and religious speech.

The issues in this case are important to ICECE. The Tenth Circuit's decision ignores well-established Free Speech and Establishment Clause precedent and redefines the historic meanings of private speech and the forum doctrine. This has profound ramifications to ICECE chaplains and those they represent.

SUMMARY OF THE ARGUMENT

This Court has resisted taking a categorical approach to government speech, but that is exactly what the Tenth Circuit did in this case. Interpreting *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), as a "command" to treat all permanent monuments as government speech, the Tenth Circuit held that a Ten Commandments monument funded and maintained by private citizens nonetheless qualified as government speech. The court's decision ignored this Court's statement that forum analysis may properly apply to

monuments under certain circumstances. Those circumstances are present here, where the city government expressly and intentionally created a limited public forum for private citizens to speak through the medium of monuments addressing the history and heritage of law and government. The Ten Commandments monument at issue here satisfied those requirements: it was funded and presented by private citizens and includes a disclaimer that the message communicated is that of the donors, not the City. As such, it qualifies as private speech and does not raise any Establishment Clause concerns.

The Tenth Circuit's holding not only flouts this Court's Free Speech and Establishment Clause precedent, but it also needlessly threatens cherished monuments located throughout the country that honor this Nation's veterans. As Justice Souter recognized in *Summum*, there are countless headstones in hundreds of veterans cemeteries nationwide. Many of those headstones are engraved with religious symbols as permitted by the Department of Veteran Affairs. Left unaddressed, the Tenth Circuit's decision would treat each of these markers as government speech subject to the Establishment Clause. This Court should grant certiorari to confirm a common-sense jurisprudence that would treat these headstones—and the Ten Commandments monument in this case—for what they are: declarations by private speakers that do not violate the Establishment Clause.

ARGUMENT

I. The Tenth Circuit contravened this Court's government speech and Establishment Clause precedent.

The Tenth Circuit held that the Ten Commandments monument displayed in front of the City Hall in Bloomfield, New Mexico constituted government speech that violated the Establishment Clause. *Felix v. City of Bloomfield*, 841 F.3d 848, 851 (10th Cir. 2016). But the court's government speech holding is based on a fundamental misreading of this Court's decision in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). This Court did not "command" a categorical treatment of all permanent monuments as government speech. *Cf. Felix*, 841 F.3d at 861. In fact, it left open the possibility that the forum doctrine would apply under certain circumstances. *Summum*, 555 U.S. at 480. Application of that doctrine here demonstrates that the Ten Commandments monument qualifies as private speech in a limited public forum. As such, there is no basis for finding an Establishment Clause violation under this Court's jurisprudence.

A. There is no basis for the Tenth Circuit's categorical treatment of monuments as government speech.

The Tenth Circuit erroneously held that the Ten Commandments monument at issue in this case qualified as government speech simply because it was a "permanent" monument. *Felix*, 841 F.3d at 855. Nothing in this Court's precedent supports that result.

Instead, this Court has recognized that, while permanent monuments on public property "typically

represent government speech," there are also "circumstances in which the forum doctrine might properly be applied to a permanent monument." *Summum*, 555 U.S. at 470, 480. In other words, not every permanent monument qualifies as government speech. *See Walker v. Tex. Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2258-59 (2015) (Alito, J., dissenting) (describing specific characteristics of the monuments at issue in *Summum* that "rendered [the] public monuments government speech").

As Justice Souter recognized in his concurring opinion in *Summum*, "there are circumstances in which government maintenance of monuments does not look like government speech at all." *Summum*, 555 U.S. at 487 (Souter, J., concurring). This fact requires courts "to forgo any categorical rule at this point." *Id*. Or, as Justice Breyer emphasized in his concurring opinion, courts should avoid turning free speech doctrine into "a jurisprudence of labels." *Id*. at 484 (Breyer, J., concurring).

The Tenth Circuit, however, did precisely that, basing its government speech holding entirely on the decision to label the Ten Commandments monument as "permanent." *Felix*, 841 F.3d at 855. Thus, the court paid no heed to the facts surrounding the monument's creation, the intent underlying the donation and approval of the monument, or anything else that might suggest circumstances justifying application of the forum doctrine. *See Summum*, 555 U.S. at 480, 487. Instead, the court analyzed the size and weight of the monument, its material composition, and the method

by which it was installed.[3] *Felix*, 841 F.3d at 855. Surely these are not the factors on which First Amendment rights turn.

B. The monument at issue here qualifies as private speech in a limited public forum.

Focused on granite, steel, and concrete, the Tenth Circuit missed the key questions in this case: the purpose of the City's monument policy and the identity of the speaker. The answers to these questions—that the City opened a limited public forum for *private* speech—are case-dispositive.

First, the Bloomfield City Hall lawn is a limited public forum under this Court's jurisprudence. A limited public forum is created when the government designates "a place or channel of communication . . . for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985). Purpose and intent are crucial to public forum analysis: the government "does not create a public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse." *Id*.

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[3] The Tenth Circuit's premise fails for the independent reason that the Ten Commandments monument at issue here is not permanent. Regardless of its size, the monument may only be displayed for a ten-year period. App. 272a. At that point, the monument will be removed unless both: (1) the donor reapplies for display and (2) the City Council reapproves the monument. App. 272a. The Tenth Circuit stated that the City "has no plans to remove the Monument," *Felix*, 841 F.3d at 855, but this misreads the relevant policy, which sets a default position of *removal* after ten years unless the two conditions are met. App. 272a.

That is exactly what the City did here. With the targeted purpose of commemorating "the history and heritage of its law and government," the City opened "the lawn surrounding City Hall" as a "limited public forum" for the display of monuments related to individuals, events, or documents associated with "the development of the law and government of the City, State, or the United States." App. 263a-265a, 268a-270a. The City expressly opened the forum to any viewpoint on this subject matter. App. 267a, 272a; *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations").

Second, the only speakers participating in the City's limited public forum are private speakers. The City's policy expressly requires all monuments to include a statement "explaining that the message communicated by the monument is that of the donor, not the City of Bloomfield." App. 266a, 271a. All four monuments currently displayed on the lawn—the Ten Commandments, the Declaration of Independence, the Gettysburg Address, and the Bill of Rights—include this disclaimer. App. 95a-96a, 110a. In addition, a sign on the lawn explains that it is "a public forum where local citizens can display monuments" containing "statements from private citizens." App. 94a-95a. Monuments are not funded, accepted, owned, or maintained by the City. App. 103a-104a. Instead, they are merely approved for display for a ten-year period, at which point the donor may seek display for an additional ten-year period, or not. App. 104a, 272a.

These facts, which the Tenth Circuit largely ignored, demonstrate why this Court's holding in *Summum* should not apply here. In *Summum*, the city disavowed opening a forum, designed and built some of the monuments in its park, and accepted most of the monuments for ownership. 555 U.S. at 472-73. Having disavowed forum analysis and operated as the primary speaker, the city in *Summum* was held to have engaged in government speech. There was no need for forum analysis. Here, by contrast, the circumstances of the case illustrate that forum analysis properly applies—and that the lawn was opened as a limited public forum for the expression of private speech. *See id*. at 480.

C. Private speech in a limited public forum does not violate the Establishment Clause.

As private speech in a public forum, the Ten Commandments monument does not violate the Establishment Clause for at least two independent reasons. First, the Establishment Clause focuses on government, not private, actors. *See County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590-94 (1989). There is a "critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,'" and, as private speech, the Ten Commandments monument falls on the protected side of the line. *Rosenberger*, 515 U.S. at 841 (quoting *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

Second, as this Court has repeatedly held, creation of a limited public forum open to all speakers does not violate the Establishment Clause. *See, e.g., Rosenberger*, 515 U.S. at 845-46; *Mergens*, 496 U.S. at 248; *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981). In fact, this Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839.

The City's monument policy is just such a program. Like the University of Virginia in *Rosenberger*, the City of Bloomfield has "taken pains to" maintain its neutrality and "disassociate itself from the private speech involved in this case." *Id*. at 841. As discussed above, the City's policy permits monuments related to the "history and heritage of its law and government" while expressly forbidding evaluation of proposed monuments based on their viewpoint. App. 263a, 267a-268a, 272a. As a result, private speakers have provided monuments addressing the heritage of the law from both religious (Ten Commandments) and secular (Bill of Rights) perspectives. App. 93a-94a, 110a. Additionally, as required by the City, all of the monuments, including the Ten Commandments monument, display a disclaimer emphasizing that the monuments' messages are those of the donors, not the City. App. 95a-96a, 110a. Finally, there is a separate sign on the lawn making the same point. App. 94a-95a.

The Tenth Circuit nonetheless detected a hole in these carefully calibrated disclaimers, pouncing on a phrase in the sign on the lawn to conclude that the City

might in fact be taking sides. *Felix*, 841 F.3d at 861 ("Any message contained on a monument does not necessarily reflect the opinions of the City. . . ."). Contrary to the Tenth Circuit's conclusion, however, the inclusion of the "not necessarily" language in the sign is required to preserve the City's viewpoint neutrality. Having opened up a limited public forum, the City cannot approve or disapprove any of the messages that are delivered relating to the forum's purpose, including those with a religious viewpoint. *See, e.g.*, *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 107 (2001). At the same time, the City undoubtedly agrees with certain of the messages expressed by the monuments, including the equality of all people and prohibitions against crimes such as murder and theft. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal. . . ."); President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (the Founders established "a new nation . . . dedicated to the proposition that all men are created equal"); *Exodus* 20:13, 15 (prohibiting murder and theft). In any event, the language of the sign does not alter the fact that the Establishment Clause does not apply.

II. The Tenth Circuit's needlessly overbroad ruling threatens cherished monuments nationwide.

The Tenth Circuit's sweeping proclamation that "permanent monuments are government speech, regardless of whether a private party sponsored them," resonates far beyond Bloomfield, New Mexico. *Felix*, 841 F.3d at 855. If left uncorrected by this Court, the

Tenth Circuit's holding could throw into "the Establishment Clause fire" cherished monuments like the headstones honoring our veterans in countless national and state veterans cemeteries. *Summum*, 550 U.S. at 482 (Scalia, J., concurring).

Both the Federal Government and the States own and operate cemeteries[4] that "honor[] Veterans and their families with final resting places in national shrines and with lasting tributes that commemorate their service and sacrifice to our Nation." A Sacred Trust: The Story of the National Cemetery Administration, https://www.cem.va.gov/sacred.asp (last visited Aug. 9, 2017). These "lasting tributes" include a Government-provided headstone or marker available without charge to any veteran buried anywhere in the world. Headstones, Markers and Medallions, https://www.cem.va.gov/cem/hmm/index.asp (last visited Aug. 9, 2017).

The Government strictly limits the messages that may be communicated on these headstones. *See* DEP'T OF VETERANS AFFAIRS, FORM 40-1330, CLAIM FOR STANDARD GOVERNMENT HEADSTONE OR MARKER (2014). Among the very few symbols allowed, however, are religious emblems representing "the sincerely held

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[4] The Federal Government, through the Department of Veterans Affairs, operates 135 national cemeteries along with 33 soldiers' lots and monument sites, throughout the country. National Cemetery Listing, https://www.cem.va.gov/cems/ allnational.asp (last visited Aug. 9, 2017). Dozens more cemeteries are owned and operated by state and territorial governments. State Cemetery Listing, https://www.cem.va.gov/ cems/allstate.asp (last visited Aug. 9, 2017).

belief of the decedent . . . during his or her life."[5] Available Emblems of Belief for Placement on Government Headstones and Markers, https://www.cem.va.gov/cem/hmm/emblems.asp (last visited Aug. 9, 2017). There are currently 65 religious emblems available, representing a wide variety of religious beliefs, such as various Christian denominations, Judaism, Islam, Druidry, Wicca, Humanism, and Atheism. *Id*. The Government also provides a process for those whose beliefs are not currently represented to request a new emblem. *Id*.

Under the Tenth Circuit's erroneous categorical analysis, however, these headstones and markers would constitute government speech subject to an Establishment Clause challenge: the Federal and State governments have placed permanent monuments with religious messages on their property. *See Felix*, 841 F.3d at 855. The unintended reach of the Tenth Circuit's holding directly contradicts Justice Souter's recognition that some monuments, such as "[s]ectarian identifications on markers in Arlington Cemetery," just do not "look like government speech at all." *Summum*, 550 U.S. at 487.

The better course has already been laid out by this Court. There are "circumstances in which the forum doctrine might properly be applied to a permanent

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[5] Only three other symbols are permitted—and all relate to military service. Available Emblems of Belief for Placement on Government Headstones and Markers, https://www.cem.va.gov/cem/hmm/emblems.asp (last visited Aug. 9, 2017) (Medal of Honor, Civil War Union Shield, and Civil War Confederate Southern Cross of Honor).

monument." *Id*. at 480. The forum doctrine allows courts to assess situations like these for what they really are: private citizens engaging in speech on property intentionally opened by the government according to limited, viewpoint-neutral guidelines. Under this clear-eyed approach to the question, the Ten Commandments monument in Bloomfield—and the millions of veteran headstones and markers throughout the country—should stay right where they are.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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