

No. 17-60

In the Supreme Court of the United States

CITY OF BLOOMFIELD, NEW MEXICO,
Petitioner,

v.

JANE FELIX, *et al.*,
Respondents.

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

**BRIEF AMICUS CURIAE OF CHAPLAIN ALLIANCE
FOR RELIGIOUS LIBERTY IN SUPPORT
OF PETITION FOR CERTIORARI**

ROBINS KAPLAN LLP

Charles M. Cannizzaro
David B. Shemano
2049 Century Park East,
Suite 3400
Los Angeles, CA 90067

Michael A. Kolcun
399 Park Avenue,
Suite 3600
New York, NY 10022

Eric J. Magnuson
Counsel of Record
800 LaSalle Avenue
2800 LaSalle Plaza
Minneapolis, MN 55402
(612) 349-8500
emagnuson@robinskaplan.com

Counsel for Amicus Curiae
Chaplain Alliance for Religious Liberty

Becker Gallagher • Cincinnati, OH • Washington, D.C. • 800.890.5001

Table of Contents

Table of Authorities ii

Interest of the *Amicus Curiae* 1

Summary of the Argument 2

Argument 3

I. The Decalogue Monument on Bloomfield’s Lawn
Is Not Government Speech 3

 A. The City Did Not Control the Message 4

 B. The Monument Is Temporary 5

II. The Decalogue Monument Is a Valid Display
under the Free Speech Clause 6

 A. The City Established a Limited Forum 6

 B. The Ten Commandments Monument
 Conformed to the Limited Forum 7

 C. The Tenth Circuit Requires Bloomfield to
 Impose Viewpoint Restrictions 10

Conclusion 14

Table of Authorities

CASES

<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	13
<i>CLS v. Martinez</i> , 561 U.S. 661 (2010)	6
<i>Capitol Square Review & Advisory Bd. v. Pinette</i> , 515 U.S. 753 (1995)	<i>passim</i>
<i>Felix v. City of Bloomfield</i> , 841 F.3d 848 (10th Cir. 2016)	7, 10, 12
<i>Freethought Soc’y v. Chester Cnty.</i> , 334 F.3d 247 (3d Cir. 2003)	7
<i>Good News Club v. Milford Cent. Sch.</i> , 533 U.S. 98 (2001)	6
<i>Green v. Haskell Cnty. Bd. of Comm’rs</i> , 574 F.3d 1235 (10th Cir. 2009)	12, 13
<i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993)	<i>passim</i>
<i>Locke v. Davey</i> , 540 U.S. 712 (2004)	11
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	8
<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978)	11
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	8

Pleasant Grove City v. Summum,
 555 U.S. 460 (2009) 2, 3, 4, 5, 14

Trinity Lutheran Church of Columbia, Inc. v. Comer,
 137 S. Ct. 2012 (2017) 11

Van Orden v. Perry,
 545 U.S. 677 (2005) 7, 8

CONSTITUTION

U.S. Const. amend. I 2, 8, 11, 13

RULES

Sup. Ct. R. 37 1

Sup. Ct. R. 37.2 1

OTHER AUTHORITIES

12 Hening, Statutes of Virginia (1823) 8

Isaiah 33:22 (NIV) 8

Thomas Paine, *The Age of Reason Being an Investigation of True and Fabulous Theology* (Cambridge University Press 2013) (1794) 10

Precious Rasheeda Muhammed, *Muslims & the Making of America* (Muslim Public Affairs Council 2013), <https://www.mpac.org/assets/docs/publications/MPAC--Muslims-and-the-Making-of-America.pdf> 9

Interest of the *Amicus Curiae*

Pursuant to Rule 37 of the Supreme Court Rules, the Chaplain Alliance for Religious Liberty (the “Chaplain Alliance”) respectfully submits this amicus brief in support of Petitioner.¹ The Chaplain Alliance is an association of over 25 endorsing agencies dedicated to certifying chaplains in the military, veterans’ affairs, prisons, and other government entities. As a prerequisite to accepting a chaplain for service, the United States and other government entities require a chaplain to be “endorsed” by a religious organization to serve as an official representative of his or her faith group.

The Chaplain Alliance has submitted *amicus curiae* briefs before to this Court in support of religious expression in cases such as *Town of Greece v. Galloway et al.*, No. 12-696, and *Sterling v. United States*, No. 16-814. The Chaplain Alliance has an interest in this case because it raises important Constitutional questions on the freedom of religious expression guaranteed to all chaplains and those whom they serve. Specifically, the Chaplain Alliance is concerned about this case’s impact on the ability of everyday Americans to use religious symbols like crosses, Stars of David, and crescent moons on government grave markers as a tribute to loved ones who gave their lives in combat on behalf of freedom.

¹ Pursuant to Rule 37.2, all Parties received timely notice of *amicus curiae*’s intent to file this brief and have consented thereto. Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any Party authored this brief in whole or in part. Other than *amicus curiae*, its members, and its counsel, no person made a monetary contribution to fund the preparation or submission of this brief.

Summary of the Argument

The United States Court of Appeals for the Tenth Circuit erred in concluding that a privately-maintained and temporary monument of the Ten Commandments on city property constituted government speech. Instead, the City of Bloomfield provided a limited public forum for private expression in the form of monuments depicting the history and heritage of the city's law and government. App. 269a. The Tenth Circuit's decision misapplied *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). It also requires Bloomfield to deny use of the lawn in front of City Hall purely because of the religious viewpoint of the sponsors of the Ten Commandments monument, in violation of the Free Speech Clause of the First Amendment and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993).

A quick review of the Tenth Circuit opinion shows it failed to engage in a full analysis of how *Summum* applies to the specific facts of this case. App. 12a-13a. The Tenth Circuit did not address how the private maintenance of the monument, the city's specific adoption of a limited public forum policy, or the placement of two notices affected the *Summum* government speech analysis in any way. The opinion also incorrectly held the monument was a permanent structure, even though the city's amended forum policy limited its display to a 10-year period.

In contrast to *Summum*, Bloomfield created a limited public forum for private speech. The city set up reasonable and viewpoint-neutral restrictions that limited speech to the subject of, among other things, “documents that have influenced the development of the law and government of the City, State, or the United States.” App 270a. The Ten Commandments monument pertains to the subjects allowed in the city’s limited public forum because of the Decalogue’s influence on this Nation’s secular laws, and its symbolism with respect to the importance of religious liberty and tolerance enshrined in the Constitution.

The Tenth Circuit’s ruling, however, imposes special disabilities on religious expression, placing it on an unequal footing with secular speech. The ruling also constitutes a viewpoint-based restriction subject to strict scrutiny. The city’s interest in avoiding endorsement of Judeo-Christian beliefs does not create a compelling interest under the circumstances to justify viewpoint-based restrictions because an open forum does not confer state approval of religious expression. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-63 (1995).

Argument

I. The Decalogue Monument on Bloomfield’s Lawn Is Not Government Speech

The Tenth Circuit opinion gave *Summum* a broader application than that suggested by the reasoning or facts of the case. *Summum* did not hold that all permanent monuments on government property constitute government speech. Instead, *Summum* adopted a more fact-based approach.

A. The City Did Not Control the Message

The *Summum* opinion noted that Pleasant Grove City effectively controlled the messages sent by the monuments because it exercised final approval over their selection. 555 U.S. at 473. The city also took over ownership and management of the Ten Commandments, and all rights possessed by the monument's donor were relinquished. *Id.* at 473-74. Bloomfield, however, never exercised control over the monuments other than considering place and manner restrictions and ensuring they met the criteria of the limited public forum. App. 268a-272a. Similarly, Bloomfield never adopted the message conveyed by the Decalogue monument because it does not own the monument or use any city resources to maintain it. App. 159a-160a. As a result, unlike *Summum*, there is no presumption the monuments are conveying a government-endorsed message.

The *Summum* Court also reasoned that the plaintiff-respondent never claimed the city opened up the park for whatever monuments might be offered by private donors. 555 U.S. at 472-73. By contrast, Bloomfield did open up its memorial lawn for private speakers to place temporary monuments as part of a limited public forum. App. 268a-272a. *Summum* even contemplates the circumstances in which the forum analysis would apply to the placement of permanent monuments. 555 U.S. at 480. For example, it would apply if a town created a monument on which all of its residents could place the name of a person to be honored or some other private message. *Id.*

In light of multiple statements that the memorial lawn reflects private speech, there can lastly be no confusion that the message of each monument is not government-endorsed expression. The city's forum policy requires that all monuments contain a statement that the message communicated by the monument is that of the donor. App. 271a. The Ten Commandments monument indeed explains that it is presented to the people by private citizens. App. 149a. There is additionally a second notice on the memorial lawn explaining "[a]ny message contained on a monument does not necessarily reflect the opinion of the City, but are statements from private citizens." App. 151a. Bloomfield thus did not control the message of monuments in front of City Hall.

B. The Monument Is Temporary

Summum's application is further limited to the display of permanent monuments on government property. Temporary displays, like those on the memorial lawn in Bloomfield, are more appropriately analyzed under *Lamb's Chapel* and *Pinette*.

The Bloomfield limited public forum policy originally contemplated that permanent monuments would be placed on the lawn in front of City Hall. App. 153a. The preamble to the first policy expressly refers to "permanent structures" and "the placement of permanent objects on the City Hall lawn." *Id.* However, the second policy now in effect deleted the references to permanent objects and only allows display on the City Hall lawn for 10 years. *Id.* The donor then must submit a request to extend the time for display for another 10 years. *Id.*

The temporary nature of the monuments on the memorial lawn indicates that private speech is at issue. The Tenth Circuit thus erred in applying the government speech doctrine to the Decalogue monument and should have analyzed it under the forum analysis of *Lamb's Chapel* and *Pinette*.

II. The Decalogue Monument Is a Valid Display under the Free Speech Clause

Bloomfield opened up its lawn to private speech in a limited public forum. Governmental entities establish a limited public forum by opening up property limited to use by certain groups or dedicated solely to discussion of certain subjects. *CLS v. Martinez*, 561 U.S. 661, 679 n.11 (2010). In such a forum, the government may impose reasonable restrictions in light of the purpose served by the forum and must not discriminate against speech on the basis of viewpoint. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

A. The City Established a Limited Forum

Bloomfield successfully opened up its property to private speech and dedicated it solely to the discussion of the history and heritage of the city's law and government. App. 269a. Several factors were also delineated to determine if speech conformed to the limited nature of the public forum. App. 269a-270a. Private groups could place monuments relating to individuals, events, or documents associated with the development of the law and government of the city, state, or the United States. App. 270a.

In light of the location of the forum in front of City Hall, it was reasonable to limit the subject matter to topics involving law and government. If a monument met the limited public forum criteria, Bloomfield was limited to considering the following as part of the monument's approval: (1) the proposed placement; (2) the effect said placement will have on the remaining open space on the City Hall lawn, (3) any safety issues, and (4) any other visual or practical effects of locating the item on the proposed site. App. 271a-272a. These considerations are viewpoint-neutral place and manner restrictions. Monuments of the Declaration of Independence, the Gettysburg Address, and the Bill of Rights were also added to the lawn. App. 161a-163a; *Felix v. City of Bloomfield*, 841 F.3d 848, 853 (10th Cir. 2016).

B. The Ten Commandments Monument Conformed to the Limited Forum

Not only have the parties stipulated to the fact that the Ten Commandments have shaped the law and government of the United States, App. 159a, but our Nation's leaders have repeatedly affirmed the instrumental role of the Decalogue in the genesis and development of American government. This Court noted instances when the executive and legislative branches have acknowledged the historical role of the Ten Commandments. *Van Orden v. Perry*, 545 U.S. 677, 689-90 (2005). Numerous American Presidents have further referenced the Decalogue as a foundational legal document. *Freethought Soc'y v. Chester Cnty.*, 334 F.3d 247, 268 (3d Cir. 2003) (quoting Presidents John Adams and Harry Truman).

This Court has acknowledged that references to the role played by the Ten Commandments in our heritage are common across America. *Van Orden*, 545 U.S. at 688. In fact, the very chamber of this Court is decorated by the great lawgiver Moses with the Ten Commandments. *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984). The source of inspiration for each branch of government may even be found in the Decalogue's symbolism of America's Judeo-Christian tradition. *Isaiah 33:22* (NIV) ("For the LORD is our judge, the LORD is our lawgiver, the LORD is our king").

The Ten Commandments and Judeo-Christian symbols are not designed to be coercive, but they instead denote the source of our freedoms and evoke inclusivity and religious tolerance. The Declaration of Independence invokes the authority of a monotheistic Creator as the source of our unalienable rights, yet neither that document nor the Gettysburg Address, with a similar reference to God, offend Respondents. App. 82a. Thomas Jefferson's Bill for Establishing Religious Freedom, which inspired the adoption of the First Amendment, also explains "the Holy author of our religion, who being Lord both of body and mind, yet chose not to . . . propagate it by coercions on either, as was in his Almighty power to do." *McGowan v. Maryland*, 366 U.S. 420, 493 (1961) (quoting 12 Hening, Statutes of Virginia (1823), 84-86). It is this anti-coercive tradition that is being evoked by the Decalogue monument with its statement that recognizes "THE SIGNIFICANCE OF THESE LAWS IN OUR NATION'S HISTORY." App. 96a; *McGowan*, 366 U.S. at 462 (Frankfurter, J., concurring) (reasoning state prohibitions of murder and theft reinforce commands of the Decalogue).

As the briefs filed by *amici* Jews for Religious Liberty and the Center for Islam and Religious Freedom will undoubtedly point out, the case here does not turn upon the Judeo-Christian nature of the Ten Commandments. Instead, because the erection of a monument is private speech in a limited public forum, the issue is freedom of expression for all views whether they be religious or non-religious, whether they be of a majority or minority religion, or whether they be mainstream or fundamentalist. As will be explained in the next section, this Court has held in cases like *Pinette* and *Lamb's Chapel* that singling out religious speech for exclusion in a traditional or limited public forum is a violation of the Free Speech Clause as a form of viewpoint discrimination, and permitting use of government property for private religious expression under an open access policy is not incompatible with the Establishment Clause.

Neither Bloomfield nor this Court need accept the Judeo-Christian view of American tradition. The Constitution only requires the government to accept that this speech validly conforms to the contours of Bloomfield's limited public forum. The forum does not exclude other speakers because a Muslim resident could raise funds to erect a monument paying tribute to Malcolm X's contributions to racial equality in the United States or noting Ben Franklin's invocation of the Prophet Muhammad in advocating for the humane treatment of Native Americans. Precious Rasheeda Muhammed, *Muslims & the Making of America* 11 (Muslim Public Affairs Council 2013), <https://www.mpac.org/assets/docs/publications/MPAC--Muslims-and-the-Making-of-America.pdf>. A Wiccan or atheist could also raise funds to place a monument with

a passage from Thomas Paine's tribute to Deism, *The Age of Reason*, for the principle that God plays no role in human affairs and America's Judeo-Christian tradition should have no influence on law and government. Thomas Paine, *The Age of Reason Being an Investigation of True and Fabulous Theology* 106-07 (Cambridge University Press 2013) (1794) ("I have shewn [sic] in all the foregoing part of this work, that the Bible and Testament are impositions and forgeries;").

C. The Tenth Circuit Requires Bloomfield to Impose Viewpoint Restrictions

The Tenth Circuit downplayed the significance of the limited public forum. It relied heavily on the religious motivation of the monument's sponsor in fundraising exclusively in local churches and installing the monument with a decidedly religious dedication ceremony. *Felix*, 841 F.3d at 858-59. The Tenth Circuit further reasoned that two active city council members donated to the monument's construction through their church, and non-adherents could not muster the finances necessary to erect an opposing monument of equal grandeur. *Id.* at 860-61.

Although part of the Establishment Clause analysis, this reasoning evidences an imposition of viewpoint-related restrictions with no compelling justification. This Court has noted its precedent establishes that private religious speech is as fully protected under the Free Speech Clause as secular private expression. *Pinette*, 515 U.S. at 760. The Tenth Circuit's focus on private religious motivation in funding and dedicating the monument improperly uses the Establishment Clause "as a sword to justify repression of religion [and] its adherents from any aspect of public life." *McDaniel v.*

Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Similar to the “play in the joints” between the Establishment Clause and the Free Exercise Clause noted by this Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)), there is also a tension between the Establishment Clause and the Free Speech Clause of the First Amendment because a government entity cannot single out religious speech for exclusion on government property.

In *Lamb’s Chapel*, this Court held that a school district violated the Free Speech Clause when it excluded the screening of a religious film series about child rearing on school property because it had created a limited public forum for social and civic purposes. 508 U.S. at 393-94; see also *Pinette*, 515 U.S. at 758-61 (holding a state’s exclusion of a cross presented by a private group for placement on the capital grounds constituted a viewpoint restriction). The reasoning behind *Lamb’s Chapel* was that the series pertained to a subject otherwise permissible under the forum policy and its exhibition was denied solely because it dealt with the subject from a religious standpoint. 508 U.S. at 394. It did not matter that the religious exclusion would be applied in the same way to all uses of school property for religious purposes. *Id.* at 393. It also did not matter that the school district viewed the group as a radical church that sought use of the property for the purpose of proselytizing. *Id.* at 395-96. Similarly, the Decalogue monument relates to permissible subject matter under Bloomfield’s limited public forum policy, and denial of its placement would be based solely because the display dealt with a subject pertaining to religion.

The Court in *Lamb's Chapel* further rejected the district's proffered justification for the religious exclusion on the basis that permitting religious use of its property would violate the Establishment Clause. *Id.* at 395. According to the Court, there was no realistic danger that the community would think that the district was endorsing religion, and any benefit to religion was no more than incidental. *Id.* In *Pinette*, the Court espoused similar reasoning in a traditional public forum case, explaining there was no violation of the Establishment Clause because the forum was open to a broad spectrum of groups and would provide only an incidental benefit to religion. 515 U.S. 762-63. As in *Lamb's Chapel*, there was no danger of confusion in Bloomfield that the monument was private speech because of the multiple notices on the lawn indicating otherwise. Similar to *Pinette*, the Bloomfield forum was open to any and all groups, and the benefit to religion was no more than incidental.

The Tenth Circuit indirectly posited that this case is different from *Lamb's Chapel* and *Pinette* because two active council members donated to the construction through their church, and non-adherents could not muster the finances to erect a monument of equal grandeur. *Felix*, 841 F.3d at 860-61. This view of the Establishment Clause improperly relies on the motivations of private citizens and puts an erroneous emphasis on community size. *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1240-43 (10th Cir. 2009) (Kelly, J., dissenting). The council members donated to the construction as private citizens, and even if a reasonable observer was aware of it, that observer would not make the logical leap that the government shared in the council members' religious motivations as private

citizens. *Id.* at 1240. There is also no presumption that the speech of small-town commissioners is an official statement on behalf of the government. *Id.* at 1241.

Further, the First Amendment does not allow Bloomfield to restrict the speech of some people to enhance the relative voice of others. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). An exclusion of religious speech based on the inability of Wiccans to finance a monument of equal grandeur impermissibly abridges expression because of another person's inability to engage in the public discussion. *Id.* at 49. That type of exclusion leads to an untenable result because the Establishment Clause would mean one thing in a small town like Bloomfield and something different in a place like New York City. *Green*, 574 F.3d at 1241 (Kelly, J., dissenting). The First Amendment and law in general need to be uniform and predictable. The Bloomfield forum policy would also allow a Wiccan in Bloomfield to donate with others across the country to erect a monument of even grander size. App. 164a.

The Tenth Circuit's opinion requires the City of Bloomfield to impose viewpoint restrictions with no compelling justification under strict scrutiny. Private religious speech should not have a diminished status under the Free Speech Clause, and this Court should correct the Tenth Circuit's error in this regard.

Conclusion

Amicus Curiae Chaplain Alliance for Religious Liberty respectfully urges this Court to clarify the reach of *Summum* and provide guidance on private expression in a limited public forum with temporary monuments. Review is not only warranted by the Circuit conflict identified by Petitioner, Pet. at 14-23, but the Tenth Circuit in the Establishment Clause context also relied improperly on the motivations of private citizens and placed an erroneous emphasis on community size.

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ROBINS KAPLAN LLP

Charles M. Cannizzaro	Eric J. Magnuson
David B. Shemano	<i>Counsel of Record</i>
2049 Century Park East,	800 LaSalle Avenue
Suite 3400	2800 LaSalle Plaza
Los Angeles, CA 90067	Minneapolis, MN 55402
	(612) 349-8500
Michael A. Kolcun	emagnuson@
399 Park Avenue,	robinskaplan.com
Suite 3600	
New York, NY 10022	

Counsel for Amicus Curiae
Chaplain Alliance for Religious Liberty