No. 14-144

IN THE
Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,
Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,
Respondents.

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

Brief of *Amicus Curiae* Americans United for Separation of Church and State Supporting Respondents

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INTEREST OF *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C.* Its mission is to protect the rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic governance. Americans United has more than 120,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by this Court and the lower federal courts.

In this case, Americans United is concerned that extending the government speech doctrine to cover the messages found on private, specialty license plates would diminish the right to free expression by unpopular minorities, including religious minorities. Americans United files this brief to ensure that the First Amendment serves its proper role in protecting the expression of minority groups, even those whose beliefs the majority finds offensive.

SUMMARY OF ARGUMENT

For most purposes, Texas treats the messages on specialty license plates as private expression: citizens are permitted to display a variety of messages,

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* Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by Petitioners and Respondents. Pursuant to Supreme Court Rule 37.6, *amicus* states the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund the brief's preparation or submission.

including those promoting private fast-food chains and rival universities from out of state; Texas officials do not pretend that these messages reflect the government's views and do not have to answer to the electorate for supporting the messages' content. Indeed, Texas advertises the chance "to get *your* specialty license plate on the road." Texas Dep't of Motor Vehicles, *Proposing a Specialty License Plate* (2012), *available at* http://tinyurl.com/brochuretx.

But in this case, Texas wants to censor a private message because "many members of the general public find [it] offensive." Pet. App. 69a. In order to escape First Amendment liability for that censorship, Texas must pretend that the message is actually the work of the state—even though nobody would actually understand it as such.

The government-speech doctrine lets the government take ownership of—and responsibility for—its own messages. But the doctrine does not allow the government to escape liability for suppressing private opinions. The private messages on specialty license plates do not become government speech merely because Texas claims the right to censor them; "were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to … silence dissenting ideas." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

For two reasons, the Court should be especially wary of Texas's argument that the speech at issue is its own. First, Texas and several of its supporters have behaved opportunistically when it comes to labeling particular forms of speech as private or governmental. When seeking to enable speech to proceed and avoid liability under the Establishment Clause,

Texas advances a broad definition of private speech, even when the speech at issue reflects ample government involvement. Here, conversely, when it seeks license to *censor* expression, Texas advances a narrow cramped of private speech. If accepted, the state's inconsistent characterization of speech would turn the First Amendment into a moving target that serves to authorize government conduct in all cases.

Second, if the Court were to allow the government to pretend that private speech is actually the work of the state, the government would have dangerous latitude to censor unpopular opinions. Actual government speech is treated as such because the state is politically accountable for its views. But here, Texas is attempting to control messages without any accountability: few if anyone would understand these hundreds of private license-plate messages to reflect an actual government position.

If the state may censor speech that "many members of the general public find … offensive," the result could be especially harmful to religious minorities. Recent events have highlighted that both public officials and members of the public are sometimes offended by minority religious views that are not widely or properly understood. This type of prejudice against religious minorities has already found its way into rejections of vanity plates in other states. Moreover, if the messages on specialty plates actually come from the government, private religious expression—including religious license plates that Texas *has* approved—would be vulnerable to challenge under the Establishment Clause, as could the state's decision to direct proceeds from these plates to religious organizations.

The Court has warned that the government may not arbitrarily reclassify speech for the purpose of censoring it, "lest the First Amendment be reduced to a simple semantic exercise." *Agency for Int'l Development v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (quoting *Legal Serv's Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)). Just as Texas may not censor dissenting voices directly, it may not do so by slapping a "government speech" decal on its citizens' cars.

BACKGROUND

Like many states, Texas has created a specialty license plate program. Pet. App. 4a. Through the program, vehicle owners may opt for one of over 350 license plates containing a message different from the state's standard-issue plate. *Id.* at 14a. Part of the proceeds from each specialty plate goes to the government, and part of the proceeds goes to "the entity which proposed the plate." *Id.* at 56a.

There are three ways for a Texas resident to obtain a specialty license plate. *Id.* at 2a. First, specialty plates may be specifically authorized by the legislature itself. *Id.* Second, "any individual or organization can create a specialty plate through a third-party vendor." *Id.* at 2a–3a. Finally, the Texas Department of Motor Vehicles (DMV) may issue a new specialty plate on its own or "in response to an application from a nonprofit organization." *Id.* at 3a.

In promoting the program, Texas advertises the chance "to get *your* specialty license plate on the road." *Proposing a Specialty License Plate*, *supra* (emphasis added). But the state reserves the right to "refuse to create a new specialty plate if the design might be offensive to any member of the public." Pet. App. 3a.

The Texas branch of Sons of Confederate Veterans applied to the Texas Department of Transportation to create a specialty plate with the name of the organization and an image of a Confederate flag. *Id.* at 3a. After initially approving the license plate, the Department of Transportation reconsidered its vote and then rejected the design. *Id.* at 4a. DMV eventually assumed oversight of the specialty license plate program, and Sons of Confederate Veterans renewed its application; the DMV Board first deadlocked and then later voted to reject the proposed license plate. *Id.* In explaining its final decision, the DMV Board stated that "many members of the general public find the design offensive, and … such comments are reasonable." *Id.* at 5a.

In justifying its decision to reject the proposed license plate on the ground that it is "offensive," Texas now claims that all specialty plates bear the state's message and it has merely "enlist[ed] private motorists to assist the State in conveying" those messages. Pet'r Opening Br. at 2. But even the most creative observer would strain to synthesize the hundreds of privately designed specialty plates into a coherent government view. Specialty license plates promote a vast array of companies, colleges, and causes. They advertise commercial entities such as "Mighty Fine burgers, Freeb!rds burritos, and RE/MAX ("GET IT SOLD WITH RE/MAX")." Pet. App. 60a. And they promote over a dozen out-of-state universities, including University of Alabama, University of Arkansas, Boise State, Florida State University, University of Illinois, Mississippi State, and University of Oklahoma. *See Specialty License Plates*, Texas Department of Motor Vehicles, http://tinyurl.com/platestx (all websites last visited Feb. 16, 2015).

In addition, some specialty plates convey religious messages or promote religious institutions. "[S]everal specialty plates—approved and available to the public—contain references to God, or Christian symbols." Pet. App. 84a. For instance, "the Calvary Hill plate features the legend 'ONE STATE UNDER GOD,' and, with obvious Christian symbolism, a silhouette of three crosses on a small rise." *Id.* at 61a. Other license plates promote religiously affiliated schools, including Brigham Young University, Liberty Christian School, University of Notre Dame, and Jesuit Dallas—"the Jesuit College Preparatory School of Dallas." *Specialty License Plates*, *supra*.

ARGUMENT

I. Texas Has Manipulated the "Government Speech" and "Private Speech" Labels.

Texas argues that specialty license plates constitute government speech rather than private speech. But in similar cases, with even more evidence of government involvement, Texas and its supporters have maintained that the speech at issue was fully private. When it needs to avoid liability under the Establishment Clause, Texas asserts that government-endorsed speech is actually private; when it wants to avoid liability under the Free Speech Clause, Texas insists that private speech is actually its own. In short, Texas appears to classify speech in whatever manner is necessary to evade legal constraint.

A. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court addressed whether a Texas school district's policy authorizing student-led prayer at high-school football games violated the Establishment Clause. *See id.* at 301. The Court concluded that the prayers were not private speech and

that they violated the Establishment Clause. *See id.* at 309–10, 316.

Unlike the speech at issue in this case, the prayers challenged in *Santa Fe* showed many signs of government control. The school district's policy contemplated that "invocations" would be delivered (subject to a student vote), and the invocations were "authorized by a government policy and take place on government property at government-sponsored school-related events." *Id.* at 302. The school district allowed "only one student, the same student for the entire season, to give the invocation." *Id.* at 303. The invocation was "subject to particular regulations that confine the content and topic of the student's message." *Id.* The school district's "policy, by its terms, invite[d] and encourage[d] religious messages." *Id.* at 306. The invocation was delivered to a captive audience assembled for a school event on school property, and was "broadcast over the school's public address system, which remains subject to the control of school officials." *Id.* at 307. And "the pregame ceremony [was] clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot." *Id.* at 307–08.

Nonetheless, Texas argued that the religious messages at these school-sponsored events were private speech, protected by the Free Speech Clause and immune from scrutiny under the Establishment Clause. *See* Brief on the Merits of State of Texas et al. as Amici Curiae Supporting Petitioner, *Santa Fe*, 530 U.S. 290 (No. 99-62). In so doing, Texas advanced arguments which it now rejects. Texas claimed that "[t]he relevant actors are student speakers with no actual or apparent state authority."

Id. at 8. It maintained that "[n]o school official directs the performance of any formal religious exercise." *Id.* And it insisted that "[t]here is no official sanction for the speech, nor is there any endorsement." *Id.* Because labeling the speech "private" would have avoided liability under other constitutional provisions, Texas was willing to embrace a far broader definition of private speech than it offers here.

B. *Schultz v. Medina Valley Independent School District*, No. 11-50486 (5th Cir. June 3, 2011) (order vacating preliminary injunction), was another departure by Texas from the arguments it offers in this case. In *Medina Valley*, the Fifth Circuit examined prayers delivered by students at graduation ceremonies sponsored by a Texas school district. The government's control of the speech was even more apparent than in *Santa Fe*: the school selected only a few students to speak before a captive audience; the prayers were listed as an "invocation" and "benediction" in the graduation program; the prayers were pre-reviewed and pre-approved by school-district officials; and school-district leadership acknowledged in writing that school district graduation ceremonies "are overseen and supported by [the school district's] Board of Trustees." Brief of Appellees at 2–3, 6, 19, 27, 30, *Medina Valley* (No. 11-50486).

Yet again, Texas argued that student graduation prayers were private expression immune from scrutiny under the Establishment Clause and protected fully by the Free Speech Clause. Texas asserted that restrictions on prayers at school-sponsored graduation ceremonies would "threaten[ ] the right of Texas students to freely express their religious beliefs in public settings." Brief of the State of Texas as Amicus Curiae at 1, *Medina Valley* (No. 11-50486). Alt-

hough the school district instructed certain students to deliver "an 'invocation' and 'benediction,'" Texas claimed that these instructions from the government to the students did "nothing to alter the character of the speech—it remains student speech." *Id.* at 10.

Nothing—not the government's handpicking of the speakers; not the government's direction that speakers deliver an "invocation" and "benediction"; not the government's advance review and approval of those remarks; not the government's control over the graduation ceremony; and not the presence of a captive audience at a government event—caused Texas to question whether the prayers at issue were indeed private speech. Insisting that the graduation prayers were private would mean that the state's subdivisions could avoid liability under the First Amendment. Here, because labeling the speech private would subject the state to liability, Texas sings a different tune.

C. In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), Texas again embraced a different, more expansive definition of private speech in order to avoid the risk of liability under the Establishment Clause. In *Town of Greece*, the Court addressed the constitutionality of predominantly Christian prayers before a local town board's meetings. *See id.* at 1815–16. Before each meeting, a chosen leader from a local congregation would give a prayer to solemnize the occasion. *Id.* at 1816. The prayers did not take place in the official "public forum" held later in the meetings, *see id.* at 1846–47 (Kagan, J., dissenting); instead, the government selected a lone speaker to deliver a prayer at each meeting, and the government placed the prayer "at the opening of legislative sessions, where it [was] meant to lend gravity to the occasion and reflect values long part of the Nation's heritage."

Town of Greece, 134 S. Ct. at 1823. The town "invit[ed] ministers to serve as chaplain for the month, and welcom[ed] them to front of the room alongside civic leaders." *Id.* at 1827. Although the parties disputed the extent to which the government could limit content of the prayers, all agreed that prayers could not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

Again, Texas argued that the invocations were private speech, not government speech. Brief of Indiana, Texas, and Twenty-One Additional States as Amici Curiae in Support of the Petitioner at 13, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). Texas was joined in *Town of Greece* by four additional states (Arkansas, Colorado, Indiana, and Ohio) that also support Texas in this case. *Compare id.*, *with* Amicus Brief of Ohio et al. These states argued that the prayers at issue in *Town of Greece* were "citizen speech," Brief of Indiana, Texas, and Twenty-One Additional States as Amici Curiae in Support of the Petitioner at 15, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696), even though the prayers were delivered at the request of local governments and speakers were directed to give an invocation and only an invocation. Fearing liability under the Establishment Clause, Texas and its supporters urged the Court to "reject the assumption that the content of private citizens' prayers before legislative assemblies is attributable exclusively to the government." *Id.* at 13.

D. Other states supporting Texas in this case have been equally opportunistic in their litigating positions—again, insisting that certain speech was private speech even when it reflected far more government sponsorship than the speech at issue here.

In *American Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), the Tenth Circuit held that the Establishment Clause prohibited the state of Utah from displaying prominent memorial crosses placed by a private organization on public land. *See id.* at 1111. Yet several states, including two that support Texas in this case, told the Court of Appeals that the speech at issue was private.

In *Davenport*, a private patrol association received permission from the State of Utah to install several 12-foot-tall white crosses to memorialize fallen police officers. *See id.* at 1111. These crosses were displayed "on public property, including the rights-of-way adjacent to the State's roads, roadside rest areas, and the lawn outside a [Utah Highway Patrol] office in Salt Lake County." *Id.* at 1112. The government "continue[d] to own and control the state land on which some of the memorials are located." *Id.* These were "permanent monuments erected on public land"; no monument had been removed from public land in the over ten years since the program began. *Id.* at 1114, 1116. And the crosses bore the official insignia of the Utah Highway Patrol, a government agency. *See id.* at 1115.

Colorado and New Mexico have joined an *amicus* brief in this case arguing that the specialty license plates in Texas are government speech that is unprotected by the First Amendment. *See* Amicus Br. of Ohio et al. But in *Davenport*, they joined a brief arguing that the challenged memorials—permanent monuments housed on government land and bearing the insignia of a government agency—were private speech. Brief Amici Curiae of the States of Colorado, et al. in Support of Appellees at 3, *Davenport*, 637 F.3d 1095 (No. 08-4061). Unlike in this case, they argued that the speech at issue in *Davenport* should be

free of regulation: "the First Amendment," they claimed, "prohibits Utah from discriminating against them because of their religious (or allegedly religious) viewpoint." *Id.* at 7.

* * *

Time and time again, Texas and its supporters have sought to classify speech not according to its actual character, but rather in a manner that minimizes the government's liability. Texas embraces an expansive definition of private speech when necessary to avoid liability under the Establishment Clause. But when it wants to censor certain viewpoints expressed by certain private speakers, Texas resorts to an equally expansive definition of government speech. There is no principled way to reconcile these positions; when it comes to classifying speech, the rule proposed by Texas is "the government wins."

II. Ruling for the State Would Facilitate Improper Censorship, Including Censorship of Religious Minorities.

If the government could on whim manipulate the classification of speech as governmental or private, the government could selectively employ the doctrine to shield itself from First Amendment scrutiny. The result would boost the government's latitude to impose majority opinions on unpopular minorities, and to hamstring the ability of unpopular minorities—including religious minorities—to participate in public discussion and debate. And because certain plates that Texas has approved convey religious messages, with some of the proceeds funding religious organizations, treating the specialty plates as government speech would raise serious concerns under the Establishment Clause.

A. Because the expression at issue in this case does not look anything like actual government speech, the implicit constraints imposed by the government-speech doctrine are missing from the specialty license plate program. The government-speech doctrine allows the state to avoid the requirements of viewpoint neutrality when the state, rather than a private party, is the speaker. If Texas decided, for example, which donated monuments to display in a state park, that message would be displayed on government property and attributed to the government. *Cf. Pleasant Grove City v. Summum,* 555 U.S. 460, 469–72 (2009). The same would be true if Texas were to direct a focused advocacy campaign promoting a particular industry, in which the legislature has "set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the [government]." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005).

There is an important political constraint, however, on actual government speech. "When the government speaks … to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). But the political process cannot perform this function without a meaningful indication that the speaker is in fact the government. This important check—a clear nexus between the government and its purported message—is absent from the Texas license plate program.

There are over 350 privately designed license plates to choose from. Pet. App. 14a. Any given message appears not on a government building or website, but on "an automobile, which is readily associated with its operator." *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977). If each of these hundreds of private messages were treated as government speech, Texas could have it both ways: it could control the message without owning its contents. And because the state allows all but a few proposed messages, the minority of speakers whose messages are excluded have little chance of rallying others to their cause.

Indeed, there is a good reason for Texas to operate at arms length from many of the specialty plates that it has authorized. Texas officials would pay a steep political price if they expressed the sentiments found on some of the specialty plates. Among other things, Texas has approved specialty plates that promote over a dozen out-of-state universities, including Texas archrival University of Oklahoma. Few Texas officials who wanted to be reelected would dare travel around the state shouting, "Go Sooners!"; it is hard to believe that these officials would deputize private citizens to send the same message on the state's behalf. *Cf.* Brian Ianieri, *Christie Doubles Down on Cheering for the Cowboys*, Press of Atlantic City (Dec. 16), http://tinyurl.com/cowboysnj (New Jersey governor faced "backlash" after appearing on TV rooting for the Dallas Cowboys); *Foul Ball: Coakley Calls Schilling "Another Yankee Fan*," Wall St. J. Wash. Wire (Jan. 16, 2010, 4:12 PM), http://tinyurl.com/yankeesma (Massachusetts gubernatorial candidate committed "gaffe" by referring to Boston Red Sox hero Curt Schilling as "another Yankee fan"). When properly viewed as private speech,

however, the Sooners license plate makes sense: some Oklahoma alumni live in Texas, and they wish to show their school spirit.

Texas, in other words, counts on the public's awareness that these license plates reflect purely private messages. That is why Texas tells the public about its opportunity "to get *your* specialty license plate on the road." *Proposing a Specialty License Plate*, *supra* (emphasis added).

B. If the state could manipulate the government-speech doctrine to allow or exclude messages that "many members of the general public find … offensive," religious minorities and nonbelievers would inevitably suffer the brunt of disfavor. "Offensiveness" is not self-defining, and recent events reinforce that religious minorities often encounter hostile majorities who find their beliefs offensive for no reason other than fear or unfamiliarity. If Texas could censor speech on that basis, unpopular religious minorities would lose the ability to express themselves on equal footing.

For example, forty-three percent of Americans admit to prejudice against Muslims. *See* Gallup, Inc., *Religious Perceptions in America* 4 (2009), *available at* http://tinyurl.com/gallupislam. Unfortunately, some public officials share these views. *See* Reeve Hamilton & Alexa Ura, *Rep to Staff: Ask Muslim Visitors to Pledge Allegiance*, Tex. Trib. (Jan. 29, 2015), http://tinyurl.com/muslimstx (Texas state representative had previously warned that "Muslims cannot be trusted no matter how peaceful they appear"); Jeremy Diamond, *Jindal: Some Muslims Trying to "Colonize" West*, CNN (Jan. 21, 2015), http://tinyurl.com/muslimsjindal. Groundswells of public and official offense have targeted Islamic cul-

tural centers, including one that would have resided a few blocks from the site of the September 11 attacks. *See, e.g.*, Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. Times (Aug. 7, 2010), http://tinyurl.com/mosquesny.

Muslims are not the only ones afflicted by community fear and offense. A Wiccan priest was initially disinvited from giving the invocation at a Huntsville, Alabama city-council meeting because of phone calls from citizens who were "alarmed." Kay Campbell, *No Wiccan Priest for Huntsville City Council Prayer? "Somebody Got the Collywobbles,"* AL.com (June 26, 2014), http://tinyurl.com/alwiccan. Half of Americans find atheism "threatening." James Hamblin, *Bullied for Not Believing in God*, The Atlantic (Sep. 13, 2013), http://tinyurl.com/atheismthreat. A Maryland state legislator recently said that allowing atheists to hold public office would be "offensive" to Christians. Laurie Goodstein, *In Seven States, Atheists Push to End Largely Forgotten Ban*, N.Y. Times (Dec. 6, 2014), http://tinyurl.com/atheismoffice.

Atheists have likewise faced discrimination when applying for license plates. Although the state of New Jersey would allow a vanity license plate bearing the message "BAPTIST," the state refused to issue a plate with the text "8THEIST" because it was deemed "offensive to good taste and decency." Complaint at 5–6, *Morgan v. Martinez*, No. 3:14-cv-02468-JAP-LHG (D. N.J. Apr 17, 2014); *see also* Elizabeth Landers, *Atheist Sues Over New Jersey License Plate Refusal*, CNN (Apr. 20, 2014), http://tinyurl.com/atheistnj. This was not the first time that the state had rejected an atheist message on the ground that it was "offensive." *See* Associated Press, *N.J. To Allow "ATHE1ST" License Plate After*

Worker Labeled It "Offensive," CBS N.Y. (Aug. 29, 2013), http://tinyurl.com/atheistnj2.

Under Texas's understanding of the law, however, the Free Speech Clause would have nothing to say about these situations. If the specialty license plates at issue were deemed government speech, then the state would be able to exclude messages that the majority deems "offensive." The government could use the force of law to censor the messages of political and religious minorities in order to validate community fears and prejudices, and members of these affected minorities would have no recourse under free-speech law.

C. Classifying the specialty license plates as government speech would also present serious concerns under the Establishment Clause. Texas allows several specialty plates with religious symbols or messages, and part of the proceeds from those license plates fund religious institutions. *See* Pet. App. 56a (part of proceeds from a particular specialty plate benefit "the entity which proposed the plate").

As the district court explained, "several specialty plates—approved and available to the public—contain references to God, or Christian symbols." *Id.* at 84a. For instance, "the Calvary Hill plate features the legend 'ONE STATE UNDER GOD,' and, with obvious Christian symbolism, a silhouette of three crosses on a small rise." *Id.* at 61a. Part of the proceeds from that specialty plate goes to Glory Gang, *Specialty License Plates*, *supra*, a religious group that provides at-risk kids with food, clothing, and "Biblical training." *About Us*, Glory Gang, http://tinyurl.com/glorygang. The Brigham Young University plate promotes and funds the school, which "provides education in an atmosphere con-

sistent with the ideals and principles of its sponsor, The Church of Jesus Christ of Latter-day Saints." *BYU Overview*, Brigham Young University, http://tinyurl.com/byufacts. Other plates promote and finance Liberty Christian School, University of Notre Dame, and "Jesuit Dallas"—"the Jesuit College Preparatory School of Dallas." *Specialty License Plates*, *supra.*

If Texas's argument were accepted, then the government—rather than private citizens—would be screening religious messages for "offensiveness," disseminating state-approved religious messages, and directing profits to religious organizations. Because Texas claims the authority to accept messages it deems appropriate and to reject messages it deems offensive, the religious messages and funding could not be said to result from neutral criteria. Under that regime, the plates would likely violate the Establishment Clause, which forbids government aid to religious institutions based on non-neutral grounds. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 813 (2000) (plurality opinion). If, instead, the views on specialty plates are treated as private speech, then any religious messages come from citizens, not the state, and any funding to religious organizations arises from independent, private choice. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

* * *

Texas has created a program for private entities to compose and display private messages on their private vehicles. Once it has done so, Texas cannot reclaim these private messages as government speech in order to justify the censorship of certain private views that it deems offensive. Such an approach would undermine the goals of the Free

Speech Clause and create significant risks for unpopular minorities, including religious minorities against whom prejudice often manifests as "offense."

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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February 17, 2015