No. 10-1297

In the Supreme Court of the United States

LANCE DAVENPORT, ET AL., PETITIONERS

v.

AMERICAN ATHEISTS, INC., ET AL.

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

BRIEF FOR MOTHERS AGAINST DRUNK DRIVING AS AMICUS CURIAE SUPPORTING PETITIONERS

JOHN ANSBACH
MOTHERS AGAINST DRUNK DRIVING
511 E. John Carpenter Freeway, Suite 700
Irving, TX 75062
(469) 420-4517

JAMES C. HO
Counsel of Record
DANIEL L. GEYSER
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
jho@gibsondunn.com
(214) 698-3264

QUESTION PRESENTED

In its decision below, the Tenth Circuit held the government responsible for private religious speech—in the form of a private association's roadside memorials honoring fallen state troopers—notwithstanding that the government itself had specifically disclaimed the message as its own.

In challenging that decision, the petition presents a related series of important questions about the core meaning of the Establishment Clause. These questions reflect widespread confusion that has split the circuits, sparked longstanding jurisprudential divisions on this Court, and left government officials without any clear guidance on an issue—how to treat private religious expression on state property—that recurs with great frequency in a variety of contexts in virtually every state in the union. Mothers Against Drunk Driving, participating as amicus curiae, will focus its attention on the following aspect of the questions presented:

Whether, consistent with the Establishment Clause, a private association, engaging in purely private speech in accordance with its own genuine and independent views, may place a cross along a public highway (with government permission) as part of a private memorial to honor fallen state troopers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution:

In the Supreme Court of the United States

No. 10-1297

LANCE DAVENPORT, ET AL., PETITIONERS

v.

AMERICAN ATHEISTS, INC., ET AL.

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

BRIEF FOR MOTHERS AGAINST DRUNK DRIVING AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Mothers Against Drunk Driving (MADD) was founded in May 1980. Its mission is to stop drunk driving, support the victims of the violent crime, and prevent underage drinking. In pursuit of those objectives, MADD participates actively in public and

[1] Pursuant to this Court's Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than MADD or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of MADD's intent to file this brief, and consented to it; letters reflecting that consent have been filed with the Clerk of Court pursuant to this Court's Rule 37.2(a).

private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related highway tragedies. MADD is one of the largest victim-services organizations in the United States. In 2009, for example, MADD served more than 57,000 victims and survivors of drunk-driving incidents.

As one component of its overall strategy, MADD's National Board of Directors adopted a policy supporting the use of roadside memorials. This policy recognizes the fact that behind every drunk-driving statistic is a person whose life was full of family and friends. The use of roadside memorials supported by MADD honors and remembers those killed or injured in a drunk-driving crash.

In accordance with this effort, MADD seeks approval to use land near public roads to erect memorials at the site of fatal (and non-fatal) crashes in the form of white crosses and other symbols. MADD constructs such memorials only at the request of family members. These memorials assist victims in an important part of the healing process, and also provide a poignant visual reminder to other drivers that too many lives are lost every year on our roadways.

MADD does not have any religious affiliation of any kind. Its use of crosses (and other symbols) is not designed to convey any religious message. On the contrary, these symbols are intended to unmistakably communicate that an unnecessary fatality or injury occurred at a given point along the roadway. To the extent a family member selects a symbol with personal religious significance, MADD firmly believes in the importance of supporting the wishes of victims to express themselves, according to their own

beliefs, to overcome the profound grief associated with losing a loved one—or having a loved one injured—in an alcohol- or drug-related crash.

The decision below, if allowed to stand, threatens to interfere with MADD's nationwide efforts to reduce the incidence of drunk driving. Roadside memorials are an effective reminder of the tragic consequences of drunk driving. There is a substantial risk that public officials will refuse access to public roads in the future to avoid any potential for a litigant to misperceive a decision authorizing a memorial as a decision endorsing the victim's private expression. The disposition below also frustrates the effort to provide victims a personal outlet to express their feelings of grief, honor, and remembrance. To the extent the government, under the Tenth Circuit's rubric, authorizes any future roadside memorials, it will necessarily be forced to engage in (otherwise forbidden) viewpoint discrimination—foreclosing the wishes of any person to express his or her grief by invoking a religious symbol. MADD accordingly has a distinct interest in the correct disposition of these issues.

DISCUSSION

Mothers Against Drunk Driving has several things in common with the Utah Highway Patrol Association. Both are private, non-profit organizations. Both seek permission to erect roadside memorials to honor the memory of innocent crime victims and to soothe their families. Neither are affiliated with any religion or religious organization.

Due to these similarities, MADD has profound concerns with the ruling of the Tenth Circuit invalidating the Utah roadside memorial program. As de-

tailed in the petition, which MADD supports, the Tenth Circuit erred because, taken in proper context, the roadside memorials are secular, not religious, in nature. Moreover, MADD believes the Tenth Circuit erred for an additional reason. The court below wrongly attributed the purely private speech of the Utah Highway Patrol Association to the State of Utah, and found that the program violated the Establishment Clause on that basis. In doing so, the Tenth Circuit effectively invited state officials to violate one clause of the First Amendment (Free Speech) in an unneeded attempt to preserve another (Establishment). Because this decision conflicts with the consistent holdings of this Court and leaves government officials in an impossible position, the Court should grant the petition.

A. The lower court erred in failing to recognize the critical role of private choice: there are no legitimate Establishment Clause concerns where a program is completely neutral with respect to religion, and any religious message is attributable exclusively to a private actor. This is why this Court, in the past, has authorized religious groups to use school buildings after-hours on equal terms with other groups (see, *e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001)), and why parents are permitted to use public vouchers for religious schools (see, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002)). Any connection between religion and state action, state property, or state funds is the sole and exclusive result of private choice. And no reasonable observer (even under the *Lemon* standard) would attribute to the government any speech or expression crafted exclusively by a private party. The conclusion thus follows inexorably from the premise: if

there is no link between the government and religion, there is no establishment of religion.

The Tenth Circuit found these principles inapplicable by declaring everything at issue "government speech" (Pet. App. 39-43), but the court was plainly mistaken. Its holding was premised on a demonstrable misreading of *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), as dictating that *all* monuments permanently affixed to public land must necessarily express a government message. But that was hardly *Summum*'s holding. The Court did not announce any kind of inflexible or categorical rule sweeping in all private displays found on government property. Each situation turns unsurprisingly on context—and a situation where the government *adopts* private expression (as the government said it did in *Summum*) is plainly distinct from a situation where the government *disavows* private expression (as the government explicitly did in this case).

B. If one thing is emphatically clear, it is that the law in this area is emphatically not—at least as misapplied by a handful of circuits. And the lack of clarity in this particular context poses an acute problem for government officials. The present uncertainty invites officials to violate one clause (free speech) in an attempt to preserve another (establishment). The circuit conflict identified in the petition—reflecting a disagreement even over which underlying *standard* to apply—itself presents a compelling case for a grant. But the tension between the First Amendment's competing clauses—and the danger of engaging in forbidden viewpoint discrimination to avoid (an imagined) establishment violation—alone justifies the urgent call for review.

C. This case serves as a suitable vehicle for resolving this important and recurring issue. There is no dispute that the program at issue had a secular purpose. And it is undisputed that the private party, not the government, dictated the composition of the memorial and any corresponding message it conveyed. If that private action broke the circuit between government and religion, the decision below was wrong; the government is not responsible for everything a private party happens to say on public land. This question accordingly presents an ideal opportunity to apply this Court's private-choice jurisprudence to this important and recurring situation. The petition should be granted.

A. By Refusing To Account For Free Speech And The Essential Role Of Private Choice, The Court Of Appeals' Decision Conflicts With The Decisions Of This Court

The decision of the court below squarely conflicts with a foundational rule of First Amendment analysis: for constitutional purposes, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech * * * Clause[] protect[s]." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Ed.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). The failure to attribute private messages to private speakers not only caused the court to identify a non-existent establishment problem, but the court also thrust a free-speech problem of its own making on the government. These errors warrant review.

1. The fundamental error in the disposition below was its failure to ascribe any legal significance to private choice. No one disputes that the association devised the memorial and its accompanying symbolism on its own. Pet. App. 32-33, 67-68. And no one doubts that the government did not push the association in any direction, or that its efforts to preserve the association's independent choices were some kind of sham. Pet. App. 48-49, 68-71. The message here, plainly and unequivocally, was shaped exclusively by the private association, in accordance with the wishes of the family members of fallen troopers. Pet. App. 33-34, 67-68. The government's limited involvement in the program was religion-neutral.

That alone should have directed the court to adopt precisely the *opposite* outcome it reached below: "programs of true private choice," in which government connection to religion occurs "only as a result of the genuine and independent choices of private individuals," do not present any concern at all under the Establishment Clause. *Zelman*, 536 U.S. at 649; see also *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."). Indeed, this Court has declared the factor of "true private choice" as "*sufficient* for the program to survive scrutiny under the Establishment Clause." *Zelman*, 536 U.S. at 650 (emphasis added).

This follows for a straightforward reason: "[u]nder our Establishment Clause precedent, the link between government * * * and religio[n] * * * is broken by the independent and private choice of recipients." *Locke* v. *Davey*, 540 U.S. 712, 719 (2004);

see also *Zelman*, 536 U.S. at 652 ("Because the program ensured that parents were the ones to select a religious school * * * , the circuit between government and religion was broken, and the Establishment Clause was not implicated."); *Mueller* v. *Allen*, 463 U.S. 388, 399 (1983). If private influence is exclusively responsible for injecting any religious message into public life, then there is no basis for accusing the *government* of establishing religion: "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652. The government "benefit" here, of course, was limited to granting authority to use public property (and a public insignia) on a private memorial. Pet. App. 31-32, 74. If the cross had any religious symbolism at all, it had *private* religious symbolism; the Establishment Clause, however, is concerned only with government action. See, *e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 809 (2000) (plurality opinion).

Even under *Lemon*'s "reasonable observer" standard, see *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), there was no basis for attributing any religious influence to the government. The reasonable observer is not limited to what is apparent from only a glance at the expressive activity in question. Quite the contrary, that observer "must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring in part and concurring in judgment); see also *Zelman*, 536 U.S. at 655 (same). That observer is even

charged with background knowledge of "'the text, legislative history, and implementation of the [relevant] statute.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308; cf. *Cheek* v. *United States*, 498 U.S. 192, 199 (1991) (because "the law is definite and knowable, the common law presumed that every person knew the law"). As applied here, the multitude of factors cut sharply against any finding of perceived endorsement: the private origination of the project; the private design; the private funds used to construct the memorials; the private funds (and private aid) used to maintain the memorials; and so on. See, *e.g.,* Pet. App. 31-34, 67-72. And lest there were any doubt about the government's role, the government explicitly and emphatically declared that its support did not extend to directing the use of any particular symbol, and indeed disclaimed any responsibility for the expressive elements at all. Pet. App. 34; see also *Utah Hwy. Patrol Ass'n*, v. *Am. Atheists, Inc.*, No. 10-1276 (pet. filed April 15, 2011), Pet. App. 109-111. In short, the government "has taken pains to disassociate itself from the private speech involved in this case," and so the "apparent concern" that any religious message "would be attributed to the [government] is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Rosenberger*, 515 U.S. at 841-842; see also *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

True neutrality eliminates the possibility of any reasonable perception of endorsement. If the government is truly neutral with respect to religion, as it was here, only purely private action can inject a religious message into the mix. Under these circum-

stances, the government itself establishes nothing. Quite the contrary, the government preserves the core constitutional value of respecting private speech and private choice with respect to viewpoint and religion. In the same way that no "reasonable observer" attributes to the government any religious message in a privately run university paper (*Rosenberger*, 515 U.S. at 841-842) or a privately directed community theater (*Lamb's Chapel*, 508 U.S. at 395), no reasonable observer, aware of the limited nature of Utah's involvement, would understand a private memorial as an attempt to foster a state religion.

2. The court of appeals' error is not limited to its improper expansion of the scope of the Establishment Clause. It also extends to an improper (and corresponding) retraction of the association's free-speech rights.

It is well settled under this Court's precedent that "speech discussing otherwise permissible subjects cannot be excluded from a limited [or non-]public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 112; see also *Rosenberger*, 515 U.S. at 830; *Lamb's Chapel*, 508 U.S. at 392-393; *Perry Edu. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). Yet that is precisely what the Tenth Circuit commanded in this case. It identified no problem at all with Utah authorizing a private, *non-religious* memorial for fallen troopers. It only identified a problem if that private memorial conveyed a *religious* perspective. But imagine if Utah itself had imposed the identical viewpoint-based restriction—any memorial is fine so long as it does not include a cross. Suffice it to say that this might still be a First

Amendment case—just under the *Free Speech Clause* and with the association as the *plaintiff*.

By not restricting the speaker's message, the government is not frustrating a constitutional ideal captured in the Establishment Clause, but *furthering* the free-speech interests of the family and friends of fallen officers. Nothing in the Establishment Clause suggests that the government is responsible for removing religion from *private* messages. See, *e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment) ("the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious"); see also *Salazar* v. *Buono*, 130 S. Ct. 1803, 1818 (2010) (opinion of Kennedy, J.). And, indeed, doing so "risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 845-846; see also *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment). Where, as here, any state involvement is admittedly secular and the program indisputably neutral, a private choice of a religious symbol (at least as perceived by some) does not undercut the neutrality of the government's approach; quite the contrary, that neutrality is required to respect the free-speech interests of the participants in the government's program.

3. The court of appeals nevertheless held that the private symbol was attributable to the government as "government speech" (Pet. App. 39-42), but the court was wrong—and, indeed, it improperly extended *Summum* far beyond its natural scope. The Court there did not craft an inflexible and categorical rule ascribing to the government every iota of any expres-

sive activity affixed via a monument on public land—even where the government dislikes the speech or outright rejects it. On the contrary, the case stands for the unremarkable proposition that the government may adopt private messages as its own *when it so wishes*. See, *e.g.*, *Summum*, 129 S. Ct. at 1132-1133; see also *Johanns* v. *Livestock Mkg. Ass'n*, 544 U.S. 550, 562 (2005). That proposition, however, does nothing to foreclose the mirror-image principle going the other way: there is no "government speech" when the government explicitly *disclaims* the speech. See, *e.g.*, *Bd. of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000) (finding no government speech when the government "disclaimed that the speech is its own"); *Mergens*, 496 U.S. at 251 (noting the power of a disclaimer). Because the government did disclaim the private speech here—and did so twice, in fact, Pet. App. 6, 34; No. 10-1276, Pet. App. 109-111—the court was wrong to force the private association's words back into the government's mouth.

Nor, for that matter, was the court below necessarily correct that Utah would indeed reject any memorial that failed to employ the cross as a symbol. Pet. App. 33-34 n.2. This statement constitutes nothing more than a hypothetical response to a hypothetical situation—given that no family had ever requested that the association use any symbol *besides* a cross, see Pet. App. 15, 87 n.6. In any event, the court also was a bit quick both to ascribe to Utah the unconstitutional motive to engage in impermissible viewpoint discrimination (see, *e.g.*, *Rosenberger*, 515 U.S. at 830), and to violate the plain and unambiguous command of state law—which explicitly and deliberately places no restriction whatsoever on the

form of the symbol used in any roadside memorial, see Pet. App. 6, 34; No. 10-1276, Pet. App. 109-111.

B. There Is An Urgent Need For Review Due To The Confusion Regarding What The Establishment Clause Allows And The Free Speech Clause Forbids

The Court has repeatedly acknowledged the deep confusion in this jurisprudential field and the special need for "certainty" in the area—a longstanding result of the tension between the First Amendment's competing clauses. *E.g.*, *Zelman*, 536 U.S. at 658 (internal quotation marks omitted). The decision below accordingly leaves state and local officials in an entirely predictable, and yet utterly impossible, situation: "Policymakers would find themselves in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other. * * * If the State guessed wrong in one direction, it would be guilty of an Establishment Clause violation; if in the other, it would be liable for suppressing free exercise or free speech * * * ." *Pinette*, 515 U.S. at 767-768 (plurality opinion). The practical result, of course, is the elimination of otherwise effective and meaningful programs to avoid possible unconstitutionality in either direction.

The decision below, moreover, threatens not only this one particular program in Utah. It also threatens any effort by any private group wishing to erect any memorial on state land that some observer might perceive, correctly or not, to convey a religious viewpoint. In order to avoid the elimination of these programs by default, the petition should be granted.

C. This Is An Ideal Vehicle For Resolving This Important And Recurring Issue

This case, finally, presents a clean vehicle for establishing a workable principle for the substantial subset of cases involving private choice: where a private party exclusively is responsible for the inclusion of any religious (or perceptibly religious) message, the Court should hold, as it has held before, that no reasonable observer would attribute the private message to the government. Given the undisputed record regarding (i) the critical facts (read: who is responsible for what, and who is *not* responsible for what) and (ii) the neutral governmental purpose, private choice offers an outcome-determinative answer to the questions presented. This petition therefore represents an appropriate vehicle for resolving these issues.

* * * * *

In suggesting that these programs are constitutional, MADD does not discount the sincere and genuine beliefs of those members of the community who suffer true offense at these symbols. Those views are legitimate personal beliefs—ranking with equal importance to the conflicting views of others in the community—and they accordingly are entitled to respect. See, *e.g.*, *Newdow* v. *Roberts*, 603 F.3d 1002, 1016 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment) ("In our constitutional tradition, all citizens are equally American, no matter what God they worship or if they worship no god at all. * * * Plaintiffs' beliefs and sincere objections warrant our respect."). But the fundamental principle undergirding each Clause of the First Amendment—Free Speech *and* Establishment—is one of personal liber-

ty and private choice. The freedom of victims to express grief and gratitude (in their own personal way) for lost loved ones is no less fundamental in our scheme of ordered liberty than the wishes of some individuals not to witness these private tributes. The balance struck in the Constitution is one of tolerance—and the rights of private individuals to speak is not sacrificed, under the Establishment Clause, to the preferences of others not to listen. See, *e.g.*, *Rosenberger*, 515 U.S. at 845-846; *Cohen* v. *California*, 403 U.S. 15, 26 (1971).

Because the memorials at issue here, much like MADD's roadside memorials elsewhere, are erected in accordance with a religion-neutral program reflecting true private choice, no reasonable observer would attribute the private party's viewpoint to the government. The program consequently passes muster under the Establishment Clause, and the court below erred in concluding otherwise. The decision warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN ANSBACH
MOTHERS AGAINST DRUNK DRIVING
511 E. John Carpenter Freeway, Suite 700
Irving, TX 75062
(469) 420-4517

JAMES C. HO
Counsel of Record
DANIEL L. GEYSER
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
jho@gibsondunn.com
(214) 698-3264

MAY 2011