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No. 21-015

SUBJECT: Constitutionality of LB 670 – Authorization of Roadway Memorial Signs

REQUESTED BY: Senator Dave Murman
Nebraska Legislature

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INTRODUCTION

On March 2, 2021, you requested our opinion on the constitutionality of LB 670. That bill authorizes relatives of individuals killed on Nebraska roadways to apply to the Nebraska Department of Transportation (the Department) for roadway memorial signs commemorating their lost loved ones. Those signs display a safety message and a commemorative message about the deceased, including, at the request of the relative, an emblem of belief.

Your request includes two specific questions. First, you ask whether "the provision allowing a qualified relative the option to request . . . an emblem of belief . . . violate[s] the Establishment Clause of the First Amendment to the U.S. Constitution." We conclude that it does not. Second, you ask whether the Department would violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution if it denies a requested emblem of belief based on the criteria in LB 670. We likewise determine that it would not.

ANALYSIS

LB 670 authorizes the placement of memorial signs on Nebraska roadways "to raise public awareness about highway safety and the dangers of impaired driving and to afford families an opportunity to memorialize family victims." LB 670, § 4(1). Any "qualified relative" of a person killed on the roadways may request one of these memorial signs. *Id.* They do so by filling out a Department-created form and paying "a fee of seventy-five dollars." *Id.*

The signs are "erected by or at the direction of the Department . . . and maintained within the right-of-way at appropriate distances from roadways of the state primary system, but not within any municipality," and they are placed "as close to the location requested by a qualified relative as practicable." LB 670, § 5(1). Each sign will contain two messages: (1) "a safety message"; and (2) a message "memorializ[ing] and commemorat[ing] the deceased." *Id.* at § 5(2)(a). For the safety message, each sign will "[c]ontain one of the following messages: 'Please Drive Safely'; 'Seat Belts Save Lives'; 'Don't Drink and Drive'; 'Don't Text and Drive'; or 'Don't Drive Impaired.'" *Id.* at § 5(2)(d). And for the commemorative message, each sign will "[c]ontain the words 'In Memory of' and the name . . . of the deceased" and "an emblem of belief" if requested by "the qualified relative." *Id.* at § 5(2)(c).

An emblem of belief is "an emblem that represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent." LB 670, § 5(2)(c). "In the absence of evidence to the contrary, the department will accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual." *Id.* Although the "religion or belief system represented by an emblem need not be associated with or endorsed by a church, group, or organized denomination," the emblem cannot be a "social, cultural, ethnic, civic, fraternal, trade, commercial, political, professional, or military emblem[]." *Id.* Nor will the Department "accept any emblem that would have an adverse impact on the dignity and solemnity of the sign honoring the deceased person, including, but not limited to, emblems that contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature and emblems that display coarse or abusive language or images." *Id.* All the requirements outlined in this paragraph mirror the requirements prescribed in a U.S. Department of Veterans Affairs' regulation defining the emblems of belief that may be placed on government-issued cemetery headstones or markers. *See* 38 C.F.R. § 38.632(b)(2). If the State "determines that [a] proposed emblem does not meet the criteria," it will allow the applicant to either omit "the part of the emblem that is problematic," if feasible, or choose "a different emblem." LB 670, § 5(2)(c).

An emblem of belief included on the list that the Department of Veterans Affairs has approved for government-issued headstones and markers "is presumed to meet the criteria" established in LB 670. LB 670, § 5(2)(c) (as amended). That list currently contains over 75 different emblems. *See* Available Emblems of Belief for Placement on

Government Headstones and Markers, U.S. Dep't of Veterans Affairs, https://www.cem.va.gov/cem/hmm/emblems.asp. Among them are Judaism's Star of David, the Buddhist Wheel of Righteousness, the Muslim Crescent and Star, Hindu imagery, and various emblems (such as Latin crosses) associated with different Christian denominations. *Id.* Also included are the Atheist symbol, the American Humanist Association's emblem, the Wiccan Pentacle, the Hammer of Thor, a Landing Eagle, a Sandhill Crane, and Druid imagery. *Id.*

Each memorial sign will be "blue with white lettering" that is "legible from the roadway." LB 670, § 5(2)(b). It will be "posted for five years," after which, if the relative does not file another application asking for the sign to remain "for an additional five years," "the sign shall be removed." *Id.* at § 5(2)(e). When the sign is removed, the relative has "the option of retaining the sign before the department discards or recycles it." *Id.*

For the reasons explained below, LB 670's authorization of these signs does not violate the Constitution.

1. The option to request an emblem of belief does not violate the Establishment Clause of the U.S. Constitution.

The Establishment Clause of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. While the text applies this prohibition only against Congress, the U.S. Supreme Court has long held that the Establishment Clause also restricts state governments. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947).

Allowing relatives to select an emblem of belief for their loved ones' memorial sign poses no Establishment Clause problem for two reasons. First, the Establishment Clause does not apply to the speech of a private individual, and a court would likely conclude that the emblem of belief on a memorial sign is the speech of the honored individual and her family instead of the government. Second, even if the emblem of belief is the government's speech, allowing relatives to select one does not violate the Establishment Clause because it is consistent with our national tradition of recognizing religion's importance in the lives of many Americans and does not impermissibly endorse religion.

A. The Establishment Clause does not apply because the emblem of belief is the expression of the honored individual and her family rather than the government.

The Establishment Clause applies only to government speech—not the expression of private individuals. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009) ("[G]overnment speech must comport with the Establishment Clause."); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (plurality opinion) ("By its terms [the Establishment] Clause applies only to the words and acts of *government*.") (emphasis in original)). As the U.S. Supreme Court has explained, "there is a crucial 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." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of J. O'Connor) (emphasis in original)).

Here, the emblem of belief on each memorial sign is either government speech or private speech within a government-created forum. If the former, then the Establishment Clause must be considered, but if the latter, the Clause is not violated. As we explain below, it is likely that a court would view the emblem of belief as private speech within a government-created forum and thus conclude that the Establishment Clause does not apply.

Numerous U.S. Supreme Court justices have already recognized that religious symbols on individual memorials are the private speech of the deceased instead of the government. For example, in 2019, the late Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, wrote that the "privately selected religious symbols on individual graves" located on government land "are best understood as the private speech of each veteran." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2112 (2019) (Ginsburg, J., joined by Sotomayor, J., dissenting) (quoting Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 Case W. Res. L. Rev. 1211, 1242 (2011)). Justice David Souter similarly acknowledged that religious symbols on gravestone "markers in Arlington Cemetery," which are selected by the fallen soldier's family, do "not look like government speech at all." *Summum*, 555 U.S. at 487 (Souter, J., concurring).

The U.S. Supreme Court has established factors for distinguishing government speech from private speech. Those factors ask whether (1) governments have historically used that speech "to convey state messages," (2) the speech is "closely identified in the public mind" with the government, and (3) the government has "direct control over the messages conveyed." *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (discussing *Summum* and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015)). As applied here, those factors demonstrate that the emblems of belief at issue here are private (not government) speech.

First, governments have not historically used emblems of belief on individualized memorials to convey state messages. The closest historical analogues to LB 670's emblems of belief are the religious symbols placed on the headstones of fallen soldiers in military cemeteries. But the government has not included those emblems to communicate its own messages; rather, it does so, as many U.S. Supreme Court justices have recognized, to "sho[w] respect for[] the individual honoree's faith and beliefs." *Am. Legion*, 139 S. Ct. at 2112 (Ginsburg, J., dissenting) (quoting *Salazar v. Buono*, 559 U.S. 700, 748 n.8 (2010) (Stevens, J., dissenting)).

Second, emblems of belief on individualized memorials located on public land are not closely identified in the public mind with the government. Those emblems appear next to the name of the deceased individuals, and the public commonly understands that

the family of those individuals selects them. That imagery is thus "linked to . . . the individual honoree[]" rather than the government. *Am. Legion*, 139 S. Ct. at 2112 (Ginsburg, J., dissenting) (quoting *Salazar*, 559 U.S. at 748 n.8 (Stevens, J., dissenting)).

Third, even though the Department maintains ultimate approval authority over the emblem, the U.S. Supreme Court has made clear that such approval alone is not sufficient to transform private speech into government speech. In *Matal*, the federal government argued that trademarks are government speech because the federal government registers—and thereby approves—each one submitted. 137 S. Ct. at 1757-60. But the Court determined that such approval was not enough to make all trademarks government speech. If it were, then the approving governmental entity, which accepts so many different messages, is "babbling . . . incoherently" and "expressing contradictory views." *Id.* at 1758. To illustrate the point in this context, emblems of beliefs available under LB 670 include religious symbols tied to Judaism, Christianity, Islam, Buddhism, Hinduism, and Wicca, to name a few. But it is unreasonable to suggest that the State is simultaneously speaking all these varying messages about religion. Thus, the mere fact that the Department approves the emblems of belief does not transform the privately selected images into the government's speech. As the Court in *Matal* said, "private speech [cannot] be passed off as government speech by simply affixing a government seal of approval." *Id.*

The U.S. Supreme Court's decision in *Summum* further confirms that the emblem of belief on each memorial sign is private speech. Although the Court there held that permanent monuments on public land are typically government speech, it recognized that there are "circumstances in which the forum doctrine" that protects private speech "might properly be applied to a permanent monument." *Summum*, 555 U.S. at 480. In particular, the Court said that monuments on which citizens "meeting some . . . criterion[] could place the name of a person to be honored or some other private message" are likely a form of private speech subject to forum analysis. *Id.* That is precisely what LB 670 creates by allowing relatives of people killed on Nebraska roadways to place the name of their loved ones and their emblem of belief on a memorial sign. Thus, these emblems are private (not government) speech.

Because your request asks specifically whether including the emblem of belief violates the Establishment Clause, our foregoing analysis has focused on whether the emblem is government or private speech. This opinion expresses no view on whether other aspects of the memorial sign—such as the five available safety messages ("Please Drive Safely," "Seat Belts Save Lives," "Don't Drink and Drive," "Don't Text and Drive," or "Don't Drive Impaired")—qualify as government speech.

B. Allowing relatives to select an emblem of belief is consistent with our national tradition of recognizing religion's importance in the lives of many Americans and does not impermissibly endorse religion.

Even if the emblem of belief is government speech, allowing relatives to select an emblem does not violate the Establishment Clause. The U.S. Supreme Court and other

federal appellate courts have been unclear about what test applies to Establishment Clause challenges to religious symbols on public land. In some cases, courts have applied the so-called *Lemon* test as modified by Justice Sandra Day O'Connor's endorsement inquiry. *E.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (establishing the three *Lemon* factors); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1117-18 (10th Cir. 2010) (applying the *Lemon* test when resolving an Establishment Clause challenge to cross-shaped roadside memorials). But in other cases, the U.S. Supreme Court and the U.S. Court of Appeals for the Eighth Circuit sitting en banc have applied a historical analysis. *E.g.*, *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (explaining that "the *Lemon* test" is "not useful in dealing with the sort of passive monument" at issue and that the Court's analysis instead was "driven both by the nature of the monument and by our Nation's history"); *ACLU Nebraska Found. v. City of Plattsmouth*, Neb., 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc) ("[W]e do not apply the *Lemon* test.").

The U.S. Supreme Court most recently discussed the appropriate test for these kinds of cases in its 2019 decision in *American Legion*. That case involved a challenge to a large cross-shaped World War I memorial that had been on public land since the 1920s. A majority of the Justices voted to uphold the memorial, but their reasoning was not uniform. The four-Justice plurality explained that "the *Lemon* test presents particularly daunting problems in cases . . . that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." *Am. Legion*, 139 S. Ct. at 2081. Instead of *Lemon*, the plurality opted for an "approach that focuse[d] on the particular" kind of monument or practice at issue "and look[ed] to history for guidance." *Id.* at 2087. Other Justices would have gone further by explicitly overruling *Lemon*. *See id.* at 2097 (Thomas, J., concurring) (preferring to "overrule the *Lemon* test in all contexts"); *id.* at 2101-02 (Gorsuch, J., concurring) (calling *Lemon* "a misadventure" and expressing the view that it is "now shelved").

Some have questioned whether *American Legion*'s historical analysis is limited to cases challenging monuments that have stood for a long time or whether it extends to all monument cases. Opting for the broader reading, Justice Gorsuch said that the "message for our lower court colleagues seems unmistakable: Whether a monument . . . is old or new," apply the historical analysis rather than *Lemon*. *Id.* at 2102. Notably, many federal circuit courts since *American Legion* agree that *Lemon* no longer applies to public display cases. *E.g.*, *Woodring v. Jackson Cty., Indiana*, 986 F.3d 979, 995 (7th Cir. 2021) ("*American Legion* requires us to analyze the County's [display] under the historical approach" because "at least six Justices rejected *Lemon* in cases that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations" and "a majority of the Justices" endorsed "the historical approach") (quotation marks omitted); *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1322 (11th Cir. 2020) ("*American Legion* . . . jettisoned *Lemon* . . . at least for cases involving religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies—in favor of an approach that focuses on the particular issue at hand and looks to history for guidance.") (quotation marks omitted); *id.* at 1326 ("*American*

Legion's clearest message is this: *Lemon* is dead. Well, sort of. It's dead, that is, at least with respect to cases involving religious displays and monuments"); *Freedom From Religion Found., Inc. v. Cty. of Lehigh*, 933 F.3d 275, 281 (3rd Cir. 2019) ("*American Legion* confirms that *Lemon* does not apply to religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies.") (quotation marks omitted).

Given this consensus after *American Legion*, it is likely that a court would apply the historical analysis, rather than the *Lemon* test, when reviewing LB 670's roadside memorials. But we need not definitively decide which test applies because allowing relatives to select an emblem of belief for the memorial signs passes constitutional muster under either approach.

Starting with the historical analysis, it "is driven both by the nature of the monument and by our Nation's history." *Van Orden*, 545 U.S. at 686 (plurality opinion). Courts "focus[] on the particular" kind of public display at issue "and look[] to history for guidance." *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion). That historical inquiry uncovers an "unbroken" tradition of "official acknowledgment by . . . government of the role of religion in American life." *Van Orden*, 545 U.S. at 686 (plurality opinion) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). Accordingly, "categories of monuments . . . with a longstanding history" are "constitutional" when they follow in the American "tradition" of recognizing "the important role that religion plays in the lives of many Americans." *Am. Legion*, 139 S. Ct. at 2089 (plurality opinion).

Americans have a long tradition of placing religious symbols on individualized memorials found on public land. The foremost example is the federal government's venerable practice of permitting the families of deceased veterans to mark their gravesites with religious imagery. Since World War I, the federal government has allowed "a religious emblem" to be included "on government headstones." History of Government Furnished Headstones and Markers, U.S. Dep't of Veterans Affairs, https://www.cem.va.gov/history/hmhist.asp. Initially, "[t]he choice of emblem was limited to the Latin Cross for the Christian faith and the Star of David for the Jewish faith." *Id.*; *see also Salazar*, 559 U.S. at 726 (Alito, J., concurring) (noting that "the graves of soldiers who perished in [World War I] were marked with either a white cross or a white Star of David"). Now, the approved emblems have expanded to include more than 75 images.

The emblems of belief on the memorial signs authorized by LB 670 are akin to this tradition of religious imagery on government-issued headstones. Both involve individualized memorials on public property bearing privately chosen religious emblems. Since LB 670 is consistent with our nation's long tradition of publicly acknowledging religion on government property, including on individual memorials, the memorials authorized by LB 670 do not violate the Establishment Clause under the historical analysis.

The conclusion is the same under the *Lemon* test, which imposes three requirements on governments. "First, the statute must have a secular legislative purpose." *Lemon*, 403 U.S. at 612. "[S]econd, its principal or primary effect must be one that neither

advances nor inhibits religion." *Id.* Third, "the statute must not foster an excessive government entanglement with religion." *Id.* at 613 (quotation marks omitted); *see also Cunningham v. Lutjeharms*, 231 Neb. 756, 760, 437 N.W.2d 806, 810 (1989) (reciting and applying the *Lemon* test). Justice O'Connor slightly altered that test for challenges to displays on public land, and her approach eventually gained widespread acceptance. According to her, "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion," and "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

Permitting relatives to select an emblem of belief for the memorial signs satisfies the three *Lemon* factors. First, LB 670 undeniably has secular legislative purposes. The bill explicitly recognizes that the purposes of the memorial signs are "[1] to raise public awareness about highway safety and the dangers of impaired driving and [2] to afford families an opportunity to memorialize family victims." LB 670, § 4(1). Choosing an emblem of belief is an integral part of family members commemorating their loved ones. These twin purposes—"promot[ing] safety on the State's highways" and "honor[ing] fallen [motorists]"—are undoubtedly legitimate "secular" purposes. *Davenport*, 637 F.3d at 1118.

Second, the effect of allowing an emblem of belief does not convey a message of endorsement for any specific religion or for religion in general. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). But LB 670 does not do this because the available emblems of belief are associated with diverse religions, including but not limited to Judaism, Christianity, Islam, Buddhism, Hinduism, and Wicca. Nor does LB 670 prefer "religion to irreligion." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). The emblem of belief "need not be associated with or endorsed by a church, group, or organized denomination," nor connected with religion at all. LB 670, § 5(2)(c). It may instead represent "a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent." *Id.* Indeed, many of the available emblems include nonreligious images, such as the American Humanist Association's symbol, the Hammer of Thor, a Landing Eagle, and a Sandhill Crane. Because options are available for the religious and irreligious alike, LB 670 simply does not endorse religion.

That the emblems are chosen by the honored individual's relatives further demonstrates that the government is not endorsing religion. The U.S. Supreme Court has consistently rejected Establishment Clause challenges when the alleged endorsement of religion arises from "the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Here, a private person—the relative who applies for the memorial sign—selects the emblem of belief. Such privately chosen symbols, as Justice Ginsberg explained, "sho[w] respect for[] the individual honoree's faith and beliefs" but "do not suggest governmental endorsement of

those faith and beliefs." *Am. Legion*, 139 S. Ct. at 2112 (Ginsburg, J., dissenting). "The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm." *Salazar*, 559 U.S. at 718 (Kennedy, J., joined by Roberts, C.J., and Alito, J.). The Establishment Clause "leaves room to accommodate divergent values within a constitutionally permissible framework." *Id.* at 719.

Third, LB 670 does not excessively entangle the government with religion. When approving a requested emblem of belief, the Department does not interact with any religious organizations. Nor does it decide whether the "religion or belief system represented by an emblem" is "associated with or endorsed by a church, group, or organized denomination." LB 670, § 5(2)(c). Instead, the Department determines whether the requested emblem "represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent." *Id.* And in so doing, the Department will generally "accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual." *Id.* Because the Department does not interact with religious organizations or evaluate the correctness or value of any religious belief, LB 670 does not impermissibly intermingle the State in religious affairs.

Over ten years ago, the U.S. Court of Appeals for the Tenth Circuit applied the *Lemon* test and concluded that twelve-foot-tall cross-shaped roadside memorials commemorating fallen Utah state troopers violated the Establishment Clause because "the cross memorials would convey to a reasonable observer that the state . . . is endorsing Christianity." *Davenport*, 637 F.3d at 1121. That case, however, is not persuasive when analyzing LB 670. Most importantly, it was decided long before *American Legion*, and thus its use of the *Lemon* test is suspect. But even under *Lemon*, the outcome there does not dictate the outcome here because those memorials were different from LB 670's memorial signs in at least three critical ways. First, the memorials in *Davenport* took the shape of a religious symbol (the cross), yet LB 670's memorials are the shape of a standard road sign. *See id.* at 1120 (noting that the Utah memorials were in the shape of "a Latin cross"). Second, all the Utah memorials featured religious symbolism associated with only one religion (Christianity), but here, LB 670 authorizes a vast array of diverse religious and nonreligious emblems. *See id.* at 1121 (observing that "all of the fallen [Utah] troopers are memorialized with a Christian symbol"). Third, the trooper memorials displayed the logo of the Utah Highway Patrol—a governmental agency—yet no state logo is found on LB 670's memorial signs. *See id.* (stating that the Utah memorials "conspicuously bear[] the imprimatur of a state entity"). For these reasons, even if the Utah cross memorials conveyed endorsement of Christianity, the very different memorial signs authorized by LB 670 do not impermissibly endorse religion.

In sum, whether a court applies the historical analysis or the *Lemon* test, LB 670's roadside memorials do not violate the Establishment Clause.

2. Denying an emblem of belief that does not meet LB 670's requirements would not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution forbids a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. In essence, this is a directive "that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

"The general rule is that legislation is presumed to be valid and will be sustained" under the Equal Protection Clause "if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. A more demanding level of scrutiny is warranted only if the statute "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam) (footnotes omitted). Neither of those conditions is present here.

To begin with, LB 670's criteria for emblems of belief do not discriminate against a suspect class. While "religion" is an "inherently suspect distinction[]," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), LB 670 does not distinguish based on religion. The bill permits both (1) emblems of belief connected to religion and (2) emblems of belief related to "a sincerely held belief system" that is not religious but is "functionally equivalent to a religious belief system in the life of the decedent." LB 670, § 5(2)(c). Because LB 670 allows both religious and nonreligious emblems, it does not discriminate based on religion.

Nor does LB 670 infringe a fundamental right. The only potentially relevant fundamental right is freedom of expression protected by the Free Speech Clause of the First Amendment to the U.S. Constitution. *See* U.S. Const. amend. I (forbidding governments from "abridging the freedom of speech"). As explained above, LB 670's authorization of emblems of belief on the memorial signs creates a forum for private individuals to engage in expression. To determine whether the bill's parameters for those emblems violates the Free Speech Clause, it is first necessary to decide what type of speech forum LB 670 creates.

The U.S. Supreme Court has recognized three different kinds of forums for speech: (1) a traditional public forum; (2) a designated public forum; and (3) a nonpublic forum. A traditional public forum is a place, like a sidewalk or park, that has historically "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). A designated public forum is a location, such as a public school's "meeting facilities" or a "municipal theater," *id.*, that "has not traditionally been regarded as a public forum" but "is intentionally opened up for that purpose." *Summum*, 555 U.S. at 469. And a nonpublic forum is "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id.* at 470.

LB 670 creates a nonpublic forum. Government-created signs in public rights of way, unlike sidewalks or parks, are not places that have historically been used for private expression. Nor does LB 670 intentionally open memorial signs or rights of way for the widespread discussion of public questions. Rather, the government-created forum is limited to use by certain individuals (relatives of people killed on Nebraska roadways) and dedicated solely to certain subjects (safety and commemorative messages). That is a quintessential nonpublic forum.

In a nonpublic forum, the government may impose restrictions on speech that "reserve the forum for its intended purposes." *Perry Educ. Ass'n*, 460 U.S. at 46; *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) (excluding certain content is "permissible if it preserves the purposes of that limited forum"). "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry Educ. Ass'n*, 460 U.S. at 49. It is well established that speech restrictions in a nonpublic forum are constitutional so long as they are (1) "reasonable in light of the purpose which the forum at issue serves," *id.* at 49, and (2) "viewpoint neutral." *Summum*, 555 U.S. at 470.

LB 670's two main criteria for emblems of belief satisfy these requirements. The first criterion requires that the emblem represent a religion or "a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent." LB 670, § 5(2)(c). This limitation is reasonable in light of the forum's commemorative purpose. Death and the commemoration of death are closely tied to religion, religious beliefs, and other deeply held beliefs that are functionally equivalent to religion. It is thus sensible to restrict emblems of belief in this way. To be sure, LB 670 could have been drafted to allow applicants to choose "social, cultural, ethnic, civic, fraternal, trade, commercial, political, professional, or military emblems." *Id.* But it is not unreasonable for the legislature to exclude such symbols, perhaps worrying that some might lessen or detract from the solemn commemorative message that the memorial sign is supposed to convey. Moreover, restricting emblems to images associated with religion or a functionally equivalent belief system is viewpoint neutral. It identifies a permissible subject matter and allows varying views on those topics. This is a classic example of a content-based but viewpoint-neutral standard that is permitted in a nonpublic forum.

LB 670's second key criterion for emblems of belief prohibits imagery "that would have an adverse impact on the dignity and solemnity of the sign honoring the deceased person, including, but not limited to, emblems that contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature and emblems that display coarse or abusive language or images." LB 670, § 5(2)(c). This too is directly related to the commemorative purpose of the sign. Emblems that harm the "dignity" of the deceased's memorial surely undercut the commemorative purpose of the forum. Therefore, it is reasonable for the government to exclude such images. Furthermore, this requirement excludes content in a viewpoint neutral manner. It does not matter if a "sexual," "coarse," or "abusive" image expresses a pro-religious or an anti-religious message—if it would undermine the dignity of the

memorial, it is not permitted. The Free Speech Clause does not forbid such a modest effort to preserve the dignity of solemn memorials posted on the roadside for the public to see.

Since LB 670 does not infringe on a fundamental right or discriminate against a suspect class, any claim under the Equal Protection Clause would be subject to rational-basis review. *City of Cleburne*, 473 U.S. at 439. For all the reasons that the bill's restrictions are reasonable under the Free Speech Clause as discussed above, it easily withstands rational-basis review under the Equal Protection Clause. *See Perry Educ. Ass'n*, 460 U.S. at 54 ("We have rejected this contention [of impermissible content-based discrimination] when cast as a First Amendment argument, and it fares no better in equal protection garb."); *OSU Student All. v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012) (observing that the "equal protection claims rise and fall with the First Amendment claims" and that the U.S. Supreme Court "has noted that one analysis will often control both claims").

For these reasons, we conclude that the Department would not violate the Equal Protection Clause by denying an emblem of belief based on the criteria in LB 670.

CONCLUSION

Based on the information currently available to us, we conclude that LB 670 is constitutional. Allowing the deceased's relatives to choose from a diverse array of religious and nonreligious emblems of belief does not violate the Establishment Clause. And denying an emblem of belief that fails to conform to the prescribed criteria does not violate the Equal Protection Clause.

Very truly yours,

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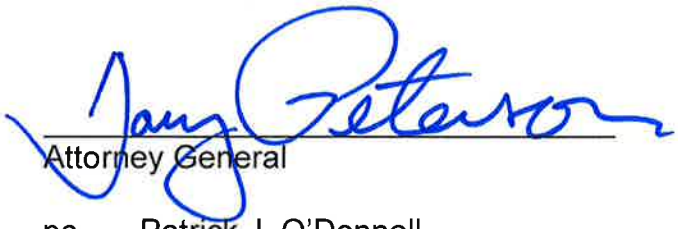
Approved by:



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pc Patrick J. O'Donnell
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