No. 25-_____

In the
Supreme Court of the United States

LEAH GILLIAM,

Petitioner,

v.

DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, AND JONATHAN SKRMETTI, TENNESSEE ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari to the Tennessee Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the messages paid for and chosen by car owners on personalized license plates—commonly known as "vanity" plates—are government speech.

RELATED PROCEEDINGS

Tennessee Supreme Court: *Gilliam* v. *Gerregano*, No. M2022-00083-SC-R11-CV (Feb. 26, 2025)

Tennessee Court of Appeals: *Gilliam* v. *Gerregano*, No. M2022-0083-COA-R3-CV (June 1, 2023)

Tennessee Chancery Court, Twentieth Judicial District, Davidson County: *Gilliam* v. *Gerregano*, No. 21-606-III (Jan. 18, 2022)

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The opinion of the Tennessee Supreme Court will be published at __ S.W.3d __ (Tenn. 2025), is available at 2025 WL 617603, and is reprinted at App.1a. The opinion of the Tennessee Court of Appeals is not published but is available at 2023 WL 3749982 and reprinted at App.38a.

JURISDICTION

The Tennessee Supreme Court entered its judgment on February 26, 2025. On May 15, 2025, Justice Kavanaugh extended the filing deadline for this petition to July 26, 2025. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part:

Congress shall make no law … abridging the freedom of speech.

Tennessee Code § 55-4-210(d) provides:

(1) The commissioner shall not issue any license plate commemorating any practice which is contrary to the public policy of the state, nor shall the commissioner issue any license plate to any entity whose goals and objectives are contrary to the public policy of Tennessee.

(2) The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading.

Tennessee Code § 55-5-117(a) provides:

> The department is authorized to suspend or revoke the registration of a vehicle or a certificate of title, certificate of registration, or registration plate, or any nonresident or other permit in any of the following events:
>
> (1) When the department is satisfied that the registration or that the certificate, plate, or permit was fraudulently or erroneously issued …

The full text of section 55-4-210 of the Tennessee Code is reproduced as Appendix D.

INTRODUCTION

In exchange for a fee, the State of Tennessee invites motorists to choose a combination of three to seven personalized letters and numbers to display on a car's license plate instead of a random, state-generated combination. The State promotes this personalized license-plate program by advertising on a state website that participants can create their "own unique message." App.9a. But officials retain unbridled discretion to censor those messages. And they do so in viewpoint-based ways.

Nearly every state has a program like Tennessee's. And as one would expect, government discretion has resulted in a dizzying array of censorship. Arizona allows "JESUSNM" but prohibits "JESUSRX" and "NOGOD." Vermont banned "JN36TN," a reference to John 3:16. Ohio banned a plate that was critical of President Biden: "LET'S GO B" (a reference to the "Let's Go Brandon" chant); Texas revoked a plate that was critical of President Trump: "JAIL 45." In Michigan, college football fans cannot request a plate that says "OSUSUCKS."

The question presented is not whether a state can prohibit profane, sexualized, or vulgar personalized license plates. With parameters that adequately cabin officials' discretion, a state undoubtedly can. Rather, "the single issue presented by this appeal is whether the alphanumeric characters on Tennessee's personalized license plates are government speech" or speech of the car owner who created and paid for it. App.12a. Because if a personalized license plate is private speech, Tennessee's unbridled discretion to censor violates the First Amendment.

The question presented has deeply divided lower courts. To answer it, the Tennessee Supreme Court below attempted to reconcile this Court's government-speech decisions in *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009), *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), *Matal* v. *Tam*, 582 U.S. 218 (2017), and *Shurtleff* v. *City of Boston*, 596 U.S. 243 (2022). Applying *Shurtleff*'s and *Walker*'s three-part "holistic inquiry," *Shurtleff*, 596 U.S. at 252, the court declared personalized plates government speech. In so holding, the court aligned itself with the Indiana Supreme Court and the United States District Court for the District of Hawaii. App.36a.

But the Tennessee Supreme Court "acknowledge[d] that most of the courts that have considered whether personalized license plates are government speech after *Walker* have reached a contrary conclusion." App.34a. Specifically, the court identified the Maryland Supreme Court and federal district-court decisions from Delaware, Rhode Island, Kentucky, and two separate districts in California. *Ibid.* Pre-*Walker*, the court could have added the Oregon Supreme Court, a Michigan federal district court, and a Virginia state trial court. And if the Tennessee Supreme Court had also considered courts that assume messages on personalized plates are private speech, or treat such messages as though they are, it could have added the Second Circuit, the Eighth Circuit, the New Hampshire Supreme Court, the Vermont Supreme Court, and federal district courts in New Jersey and Virginia, too. The Tennessee Supreme Court simply "disagree[d] with those courts." App34a.

This Court should grant review for several reasons. To begin, the Court should resolve the lower-court split, which is mature, deep, and intractable. Indeed, when given the opportunity to join the lower-court majority, the Tennessee Supreme Court instead joined the minority. And no matter which side of that split has it right, it cannot be the case that whether personalized plates are government speech depends on the state where the car is registered.

In addition, the decision below is egregiously wrong. At its essence, government speech occurs when the government purposefully expresses a government message through those authorized to speak on its behalf. When a car owner pays a special fee to create and express her "own unique message," the public reasonably perceives that expression as the car owner's, not the government's.

Finally, the question presented is important. Every state has personalized license plates. And the rationale advanced by the Tennessee Supreme Court and the courts it followed would erroneously classify other common forms of speech as government speech, too. When courts mistakenly misclassify private speech as public speech, though, officials can use the government-speech doctrine "as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum*, 555 U.S. at 473. The result, as Justice Alito presciently warned on behalf of the Court in *Tam*, is that the government-speech doctrine becomes "susceptible to dangerous misuse." 582 U.S. at 235. Decisive intervention now is warranted.

The Court should grant certiorari and reverse.

STATEMENT

I. Regulatory background

Tennessee, like other states, allows car owners to create a personalized license plate. App.4a. For a fee, motorists may select three to seven letters or numbers that express a message that the car owner would like others to see on their car. *Id.* at 4a–5a; Tenn. Code Ann. § 55-4-201(6). As explained on Tennessee's own website advertising its personalized license plate program, "[i]n Tennessee, license plates can be personalized *with your own unique message*." App.9a (emphasis added).

The Department of Revenue reviews applications for personalized plates to ensure that they satisfy statutory requirements. One requirement, of course, is that a plate cannot duplicate an existing plate. Tenn. Code Ann. § 55-4-210(e). In addition, the Department may not issue a plate "commemorating any practice which is contrary to the public policy of the state," App.5a; Tenn. Code Ann. § 55-4-210(d)(1), though the statute does not say what those policies are. Nor may the Department issue a plate containing "any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading." App.5a; Tenn. Code Ann. § 55-4-210(d)(2). The statute contains no guidelines outlining what may be "offensive to good taste and decency," nor does it attempt to cabin in any way officials' discretion to make that call.

Personalized plates are popular in Tennessee. There are approximately 60,000 of them in use. App.6a. Tennesseans use their license plates to express a wide range of messages, including their

religious beliefs ("SEEKGOD," "ALLAH1," "JOHN316"), their political stances ("JOINNRA," "PROTAX," "VOTEGOP"), their family relationships ("GRANDMA," "DADSGIRL," "BIGMOM"), their hobbies ("JOGGER," "2ZOCEAN," "GOFISHN"), their places of origin ("CALIGAL," "CZECH," "ALOHA"), and their favorite sports teams ("GOJETS," "NATSFAN," "GATORS1"). Tr. Ex. 2, Dep. Ex. 6.

To carry out its statutory responsibility to refuse personalized plates that are "offensive to good taste and decency," the Department of Revenue endeavors to reject applications that include profanity, racial and ethnic slurs, and references to sex, violence, and illegal drugs. App.6a. These categories of forbidden plates do not appear in any regulation or official document. They were developed within the Department. *Id.* But in the absence of parameters, it's difficult to know ahead of time what will be verboten.

Banned plates include those for women who like James Bond ("007CHIK"), grumpy car owners ("2 CRABY"), those who brag about the number of cars they own ("1OF MNY"), slow-moving senior citizens ("AARPSLO"), Star Wars enthusiasts ("C3P0," "SLAVE 1"), lovers of tropical islands ("CAYMENS"), new business owners ("ENTRPNR"), Western tv-show aficionados ("GUNSMOK"), LoveBug enthusiasts ("HERBIEE"), girls from New Zealand ("KIWIGRL"), spoiled children from the Lone Star State ("TX BRAT"), mothers ("MAMMA 1"), notaries public ("NOTARY"), delivery persons ("PARCELS"), and quilters ("QU1LTER"), just to name a few. Tr. Ex. 2, Dep. Ex. 7.

The Department's control of these messages is hardly robust. It has approved many plates that include references to sex and profanity, including "SHTUNOT," "BUTNKD," "694FUN," "BIGSEXI," "69BEAST," and "69PONY." Tr. Ex. 2, Dep. Ex. 6.

When the Department belatedly determines that it has issued a personalized plate that offends good taste or decency, it can rescind the plate. *Id.* at 7a; Tenn. Code Ann. § 55-5-117(a)(1). This case began with one such rescinded plate—the one issued to Petitioner Leah Gilliam.

II. Facts

Leah Gilliam is an avid video gamer and an astronomy buff. App.7a, 41a n.2. In 2010, she applied for the personalized plate "69PWNDU," a message that, while perhaps incomprehensible to most, was understandable to people who share her interests. *Id.* at 7a. "69" was a reference to the 1969 moon landing. *Id.* "PWND," as Gilliam explained in her application for the plate, is an expression familiar in the video gaming community that means to be defeated or dominated. *Id.* at 7a–8a.[1]

The Department of Revenue approved Gilliam's application and issued her requested plate. App.8a. She displayed the plate on her car for the next eleven years, during which the Department received no complaints about it. *Id.*

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[1] Online gamers use the expression "pwned" to express that they've dominated or defeated someone, i.e., to "own" then. *pwn*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/pwn.

In 2021, the Department's chief of staff, Justin Moorhead, received a text message on his cellphone that included a photograph of Gilliam's plate. App.8a The text message said, with obvious sarcasm: "If I could take a moment of personal privilege and acknowledge the tireless work that Justin does for his department[.] I commend you sir[.]" *Id.* at 42a. Moorhead responded, "Hahah thank you for your citizen[']s report[.]" *Id.* Soon after, the Department revoked Gilliam's personalized plate on the asserted basis that it was offensive to good taste and decency, violating Tenn. Code. Ann. § 55-4-210(d)(2). App.8a.

III. Proceedings

Gilliam filed this lawsuit. She alleged that section 55-4-210(d)(2) is inconsistent with the First Amendment because it authorizes the Department of Revenue to discriminate on the basis of viewpoint. App.8a–9a.

The Tennessee Chancery Court entered judgment for the state. *Id.* at 81a–128a. At a bench trial, Gilliam introduced (along with other evidence) the results of a poll conducted by an experienced pollster. As common sense would predict, 87% of Tennesseans consider a personalized license plate to be a message of the vehicle owner, not a message of the state. *Id.* at 114a-115a. Only 4% said they think a personalized plate is the government's speech, while 9% were not sure. *Id.* at 29a. The Chancery Court nevertheless held that personalized plates are government speech, not private speech, so the First Amendment does not restrict the state's power to discriminate based on viewpoint. *Id.* at 84a–85a.

The Tennessee Court of Appeals reversed. App.38a–80a. The Court of Appeals concluded that personalized license plates are private speech, not government speech. *Id.* at 64a. The Court of Appeals observed that the question has been addressed by several other courts, and that while some courts have held that personalized plates are government speech, most have held that they are private speech. *Id.* at 62a–63a.

The Court of Appeals reached its conclusion by considering the three holistic factors enumerated in *Shurtleff*, 596 U.S. 243, and *Walker*, 576 U.S. 200. App.64a–76a. The court's thorough analysis determined that (1) vehicle owners have historically used personalized license plates to convey their own messages, not the government's message, *id.* at 64a–68a; (2) the public perceives vehicle owners, not the state, to be speaking through personalized plates, *id.* at 68a–73a; and (3) while state employees screen applications for personalized plates, the state does not exercise enough control over the messages on the plates to render them government speech, *id.* at 73a–75a.

The Tennessee Supreme Court reversed. App.1a–37a. Like the Court of Appeals, the Tennessee Supreme Court considered the three holistic factors set forth in *Shurtleff* and *Walker*. But the Tennessee Supreme Court held that each factor weighed in favor of finding that personalized plates are government speech, not private speech, using logic that was the converse of the Court of Appeals.

First, the Tennessee Supreme Court reasoned that, historically, "the alphanumeric combinations on personalized license plates are Tennessee's way of communicating identifying information about the vehicle to law enforcement and the public." App.25a. While car owners also use their personalized plates to convey their own messages, the court acknowledged, "[a]ny incidental benefit to vehicle owners who choose personalized plates to express their own message does not refute this distinct government purpose." *Id.*

Second, the Tennessee Supreme Court determined that the public perceives personalized plates as government speech. App.26a. The court reasoned that personalized plates could not be distinguished from the specialty license plate designs that *Walker* found to be government speech. *Id.* at 26a–28a. And the court placed little weight on the survey results indicating that 87% of Tennesseans think personalized plates represent the speech of the car owner. The court thought the survey might have been "biased" because the poll began by telling participants that personalized license plates "can be personalized with your own unique message," *id.* at 29a—even though that phrasing came directly from the State's own website advertising the program to car owners who wanted to participate in it, App.9a. The court also thought the survey was methodologically flawed because it failed to give participants an option to respond that personalized plates are both government speech *and* private speech. *Id.* at 29a–30a.

Third, the Tennessee Supreme Court determined that "the level of control the Department exercises over Tennessee's personalized license plates is materially similar to the level of control Texas

exercised over its specialty plates" in *Walker*. App.31a. The court reasoned that because the Department is prohibited by statute from issuing plates that are offensive or that commemorate any practice contrary to the policy of the state, the state exercises enough control over personalized plates for the plates to be government speech. *Id.* at 32a-33a.

Putting the pieces together, the Tennessee Supreme Court concluded that "[t]he personalized plates here in question are similar enough to the specialty plates in *Walker* to call for the same result." App.33a (internal quotation marks omitted).

The court candidly conceded that "most of the courts that have considered whether personalized license plates are government speech after *Walker* have reached a contrary conclusion." App.34a. But the Tennessee Supreme Court "disagree[d] with those courts for two primary reasons. First, those courts failed to appreciate that the alphanumeric combinations on license plates are the government's way of communicating identifying information about the vehicle." *Id.* And second, "they departed from *Walker* with respect to the control factor based on immaterial distinctions." *Id.* at 35a.

REASONS FOR GRANTING THE WRIT

An important legal principle is at stake here. If the messages on personalized license plates are government speech, then those messages are exempt from the First Amendment. That means a state can allow personalized plates that support one political party but prohibit others. And because program participation is not coerced but voluntary, a state could presumably allow plates that espouse Christianity but no other religions, or vice versa. This Court in *Tam* declared that the specialty plates at issue in *Walker* "likely mark[ ] the outer bounds of the government speech doctrine." 582 U.S. at 238. Yet the Tennessee Supreme Court has now pushed well past that boundary.

Many lower courts have addressed the question presented. Most, including two state supreme courts, have correctly held that the messages on personalized license plates are private speech, not government speech. A raft of others assume that personalized plates are the car owner's speech or treat such plates as though they are. But a few, again including two state supreme courts, have held to the contrary. It is time for this Court to resolve the issue.

The decision below is demonstrably wrong. There is no history of the government adopting personalized-plate messages as its own messages, like the public monuments in *Summum*. The public perceives personalized-plate messages as belonging to the car owner. Otherwise, the public would be forced to conclude that the government is nonsensical in its messaging. And as countless examples illustrate, government control of these messages is haphazard.

In sum, personalized plates express messages that have been created—and paid for—by a car's owner, not by a person with authority to communicate a government message. The government does not endorse the message a car owner intends to communicate. And a state that issues a personalized plate—as opposed to a specialty plate—does not use its approval "to choose how to present itself and its constituency." Contra *Walker*, 576 U.S. at 213.

Accordingly, the Court should grant the petition, reverse, and hold that the messages on personalized license plates are not government speech. They are the private speech of car owners.

I. The lower courts are hopelessly divided over whether the messages on personalized license plates are government speech.

Most of the lower courts that have addressed the question presented have concluded that the messages on personalized license plates are the speech of the car owners, not the speech of the government. *E.g.*, *Mitchell* v. *Md. Motor Vehicle Admin.*, 148 A.3d 319, 325-27 (Md. 2016); *Higgins* v. *Driver & Motor Vehicle Servs. Branch*, 72 P.3d 628, 632 (Or. 2003); *Overington* v. *Fisher*, 733 F. Supp. 3d 339, 343-47 (D. Del. 2024); *Carroll* v. *Craddock*, 494 F. Supp. 3d 158, 165-66 (D.R.I. 2020); *Ogilvie* v. *Gordon*, 2020 WL 10963944, *2-*5 (N.D. Cal. 2020); *Kotler* v. *Webb*, 2019 WL 4635168, *3-*8 (C.D. Cal. 2019); *Hart* v. *Thomas*, 422 F. Supp. 3d 1227, 1231-34 (E.D. Ky. 2019); *Matwyuk* v. *Johnson*, 22 F. Supp. 3d 812, 822-24 (W.D. Mich. 2014); *Bujno* v. *Commonwealth of Va., Dep't of Motor Vehicles*, 2012 WL 10638166, *4-*5 (Va. Cir. Ct. 2012).

Some courts assume that the messages on personalized plates are private speech. *E.g.*, *Montenegro* v. *N.H. Div. of Motor Vehicles*, 93 A.3d 290, 294 (N.H. 2014). Others treat the messages on personalized plates as private speech without addressing whether they are instead government speech. *E.g.*, *Byrne* v. *Rutledge*, 623 F.3d 46, 53-61 (2d Cir. 2010); *Perry* v. *McDonald*, 280 F.3d 159, 166-73 (2d Cir. 2001); *Lewis* v. *Wilson*, 253 F.3d 1077, 1079-82 (8th Cir. 2001); *Martin* v. *State, Agency of Transp. Dep't of Motor Vehicles*, 819 A.2d 742, 746-49 (Vt. 2003); *Morgan* v. *Martinez*, 2015 WL 2233214, *8-*9 (D.N.J. 2015); *Dimmick* v. *Quigley*, 1998 WL 34077216, *3-*6 (N.D. Cal. 1998); *Pruitt* v. *Wilder*, 840 F. Supp. 414, 417-18 (E.D. Va. 1994).

These cases employ similar reasoning. First, "although license plates in general function historically as government IDs for vehicles, vanity plates display additionally a personalized message with intrinsic meaning … that is independent of mere identification and specific to the owner." *Mitchell*, 148 A.3d at 326 (citation modified). That makes personalized plates very different than the specialty plates deemed government speech in *Walker*. As the Maryland Court of Appeals (the court that is now called the Maryland Supreme Court) explained:

> The unique, personalized messages communicated via vanity plates contrast with the generic, depersonalized speech conveyed by a specialty plate. … Unlike the license plate slogans that States use to urge action, to promote tourism, and to tout local industries, vanity plates are personal to the vehicle owner, and are perceived as such.

Id. (citation modified); accord, *e.g.*, *Overington*, 733 F. Supp. 3d at 345-46; *Carroll*, 494 F. Supp. 3d at 165-66; *Ogilvie*, 2020 WL 10963944 at *3; *Kotler*, 2019 WL 4635168 at *6-*7; *Hart*, 422 F. Supp. 3d at 1232.

Second, the public perceives the message on a personalized license plate as the speech of the car owner, not speech on behalf of the government. "[T]he personal nature of a vanity plate message makes it unlikely that members of the public, upon seeing the vanity plate, will think the message comes from the State," the Maryland high court observed. *Mitchell*, 148 A.3d at 326. "Unlike the specialty plates at issue in *Walker*, vanity plates bear unique, personalized, user-created messages that cannot be attributed reasonably to the government." *Id.* at 326-27; accord, *e.g.*, *Overington*, 733 F. Supp. 3d at 346; *Ogilvie*, 2020 WL 10963944 at *3–*4; *Kotler*, 2019 WL 4635168 at *7; *Hart*, 422 F. Supp. 3d at 1232.

Finally, the state's "statutory and regulatory authority to deny or rescind a vanity plate based on the content of its message does not rise to the level of such tight control that the personalized messages become government speech." *Mitchell*, 148 A.3d at 327 (citations and internal quotation marks omitted); accord, *e.g.*, *Overington*, 733 F. Supp. 3d at 346; *Ogilvie*, 2020 WL 10963944 at *4–*5; *Kotler*, 2019 WL 4635168 at *7; *Hart*, 422 F. Supp. 3d at 1232-33. In *Walker*, Texas "had 'sole control' over the content of a specialty plate." *Mitchell*, 148 A.3d at 327. But with personalized plates, "vehicle owners, not the State, create the proposed messages and apply for them." *Id.* (citation modified).

On the other side of the split, two courts have agreed with the Tennessee Supreme Court that the messages on personalized license plates are government speech. See *Comm'r of the Ind. Bureau of Motor Vehicles* v. *Vawter*, 45 N.E.3d 1200, 1204-07 (Ind. 2015); *Odquina* v. *City and Cty. of Honolulu*, 2024 WL 1885857, *6–*9 (D. Haw. 2024).

The reasoning of these courts resembles that of the Tennessee Supreme Court. First, as a historical matter, "[w]hile the alphanumeric combinations on PLPs [personalized license plates] are individually chosen instead of created by the state, this difference is secondary and does not change the principal function of state-issued license plates as a mode of unique vehicle identification." *Vawter*, 45 N.E.3d at 1205; accord *Odquina*, 2024 WL 1885857, at *7.

Second, as to public perception, "PLP alphanumeric combinations are often closely identified in the public mind with the State." *Id.* (brackets and internal quotation marks omitted). As the Indiana Supreme Court put it, "license plates are, essentially, government IDs and license plate observers routinely—and reasonably—interpret them as conveying some message on the issuer's behalf." *Vawter*, 45 N.E.3d at 1205 (citation modified); accord *Odquina*, 2024 WL 1885857 at *8.

Finally, the state's "direct control" over personalized plates, in its authority to reject and rescind unapproved messages, means that the state "has effectively controlled the messages" on personalized plates. *Vawter*, 45 N.E.3d at 1206; accord *Odquina*, 2024 WL 1885857 at *8–*9.

The courts on both sides of this mature and deep split have recognized their disagreement is caused by their divergent interpretations of this Court's government-speech cases—not by any differences in how states issue personalized license plates. *E.g.*, App.34a-36a (rejecting the majority position); *Mitchell*, 148 A.3d at 328 ("we reject the *Vawter* court's reasoning"); *Carroll*, 494 F. Supp. 3d at 167 ("I reject as wholly unpersuasive the reasoning of *Comm'r of Indiana Bur. of Motor Vehicles* v. *Vawter,* 45 N.E.3d 1200, 1210 (Ind. 2015), an apparent outlier holding vanity plates government speech."); *Hart*, 422 F. Supp. 3d at 1232 ("this Court is not persuaded by the analysis in *Vawter*"); *Odquina*, 2024 WL 1885857 at *9 (explaining that the court "was not persuaded by the rationale" of the cases finding that personalized plates are private speech).

Commentators view the split the same way. *E.g.*, Drew A. Driesen, *Vanity Lawfare: Vanity License Plates and the First Amendment*, 106 Iowa L. Rev. 363, 398-99 (2020) (noting *Mitchell-Vawter* conflict); R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 Ind. L. Rev. 355, 361 (2019) ("Lower courts have disagreed with [sic] whether the *Walker* approach to specialty license plates applies to vanity license plates"); Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 Sup. Ct. Rev. 33, 79 n.167 (2017) (noting *Mitchell-Vawter* conflict); Leslie Gielow Jacobs, *Government Identity Speech Programs: Understanding and Applying the New* Walker *Test*, 44 Pepp. L. Rev. 305, 332 (2017) ("[L]ower courts applying [*Walker*] have come to different conclusions about how to characterize a personalized or 'vanity'

license plate program."); Marybeth Herald, *Licensed to Speak: The Case of Vanity Plates*, 72 U. Colo. L. Rev. 595, 602 (2001) ("lower courts [are] in conflict").

Only this Court can resolve a conflict this deep, mature, and intractable over the meaning of government speech. And intervention is needed promptly given that a car owner's First Amendment speech rights change when she moves states. The same personalized plate that appears on cars in Maryland, Oregon, Delaware, Rhode Island, Kentucky, California, and Michigan can be prohibited in Tennessee, Indiana, and Hawaii. Certiorari is warranted.

II. The decision below is wrong.

This Court should also review the decision below because it's wrong. Personalized-plate messages are private speech, not government speech.

To distinguish government speech from private speech, the Court currently conducts "a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Shurtleff*, 596 U.S. at 252. While the Court's review "is driven by a case's context rather than the rote application of rigid factors," three factors have been especially prominent: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.*; accord *Tam*, 582 U.S. at 237–39; *Walker*, 576 U.S. at 210-13; *Summum*, 555 U.S. at 470–72.

Each of those three factors points to the conclusion that the messages on personalized license plates are private speech, not government speech.

First, the messages on personalized plates have historically been crafted by car owners to express their own point of view. They have never been composed by the government to express the government's view. In this respect, the messages on personalized plates resemble trademarks (an example of private speech), which are chosen by private parties—not the government—to identify their own products and are then submitted to the government for registration. Cf. *Tam*, 582 U.S. at 236. "[I]t is far-fetched to suggest that the content" of particular personalized plates conveys a government message. *Id.* At the same time, the private messages on personalized plates are quite different from monuments in public parks—an example where the government is adopting private speech and claiming it as its own speech. *Summum*, 555 U.S. at 470–71.

If the messages on personalized license plates *are* government speech, Tennessee "is babbling prodigiously and incoherently. It is saying many unseemly things." *Tam*, 582 U.S. at 236. Among many other things, Tennessee is apparently proclaiming to its citizens: "IMHIGH," "IMDADDY," "IMFEDUP," "IMBEAST," "IMAMESS," "IM2SLOW," "IM2TALL," "IMABRAT," "IMBROKE," and "IMINLUV." Tr. Ex. 2, Dep. Ex. 6. Of course, by approving these personalized plates, the government of Tennessee is not claiming to be any of these things. These are obviously self-descriptions *by car owners*, not assertions by the State or its officials.

Indeed, if the government of Tennessee, rather than the state's motorists, is speaking the messages that appear on personalized plates, Tennesseans will have some difficult questions for their public officials to answer. Is the State violating the Establishment Clause by announcing that Tennessee is "4CHRIST"? Is the State promoting that its citizens eat fast food ("BIGMAC") and cheesy snacks ("CHEETOS")? Is "ROLLTYD"—the popular cheer for the University of Alabama—a message that the Volunteer State promotes? Tr. Ex. 2, Dep. Ex. 6. Surely not. See State of Tenn., *Proclamation by the Governor: Big Orange Friday* (Sept. 20, 2018).[2] And just as the federal government did not endorse Nike shoes when it approved the trademark registration "Just Do It," *Tam*, 582 U.S. at 236, the government of Tennessee did not endorse Nike shoes when it approved the license plate "JSTDOIT," Tr. Ex. 2, Dep. Ex. 6.

The Tennessee Supreme Court placed great weight on *Walker*, in which this Court held that specialty license plates are government speech. App.22a-23a. But while this case and *Walker* both involve license plates, the similarity ends there. Specialty plates, such as those issued by Texas that the Court considered in *Walker*, are plates with a government-curated slogan in addition to the name of the state. *Walker*, 576 U.S. at 204. Examples from Texas included plates bearing slogans like "Keep Texas Beautiful" and "Fight Terrorism." *Id.* at 205. Unlike the messages on personalized plates, the slogans on specialty plates are chosen by the state to convey its own messages. *Id.* at 210–11.

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[2] https://tnsos.net/publications/proclamations/files/1577.pdf

Second, the public perceives the messages on personalized license plates to be the speech of car owners, not the government's own speech. No one seeing the personalized plate message "IMHIGH" would think this is an official proclamation of Tennessee. The plate saying "IMINLUV" would not prompt anyone to wonder "with whom is Tennessee in love? Kentucky?" These are messages from car owners, Tr. Ex. 2, Dep. Ex. 6, not Tennessee. In this respect, personalized plates are again like trademarks, which the public perceives as speech by the trademark holder, not by the government of the United States. *Tam*, 582 U.S. at 238.

In the trial court, Petitioner Gilliam introduced the results of a survey of 200 randomly selected Tennessee adults who were asked whether the message on a personalized plate represents the speech of the government or the speech of the person who chose the plate. App.28a-29a. Unsurprisingly, 87% of the respondents opined that the message represented the speech of the person who chose the plate, compared with only 4% who thought it was the government's speech, and 9% who were unsure. *Id.* at 30a. Polls don't get much more lopsided.

The lower court rejected this survey because the poll began by saying personalized license plates "can be personalized with your own unique message." App.29a. But that phrase came from the State's own website. App.9a. The court also criticized the poll because it did not allow a respondent to answer car owner *and* government speech. App.29a. But *Shurtleff* asks whether the public would likely perceive speech as that of "the government *or* a private person." 596 U.S. at 244 (emphasis added).

More important, no poll was necessary; it merely confirms what is obvious to anyone: personalized plates bear an enormous variety of clever, silly, and incomprehensible messages involving personal expression. They are not the State's own speech.

Here too, the lower court relied woodenly on *Walker*. App.30a-31a. In *Walker*, this Court concluded that the public perceives the slogans on specialty plates as government speech. 576 U.S. at 212–13. But there is a world of difference between slogans on specialty plates—which the public knows are chosen by the government—and messages on personalized plates, which the public knows are chosen by car owners.

The court below stressed that license plates are manufactured and owned by the state. App.30a. But loads of private speech takes place on government-owned property. The flags in *Shurtleff* were on government property; they were still private speech. *Shurtleff*, 596 U.S. at 258. The government maintains and publishes the Principal Register, the primary repository of trademarks; the trademarks listed in the register are private speech. *Tam*, 582 U.S. at 239. The speech at issue in *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985), was published in government-printed literature and distributed by government employees, to other government employees, in government workplaces, during government working hours; the Court treated the messages as private speech. *Id.* at 797–99.

Third, the messages on personalized license plates are primarily shaped and controlled by car owners, not by the government. The government does not dream up new messages to place on personalized plates or edit applications for personalized plates. The government's only role is to ensure that plates satisfy statutory criteria, such as prohibiting duplicate plates or, within constitutional guidelines, screening out profanities and other offensive terms.

In this respect, personalized plates are indistinguishable from trademarks. Trademarks, too, are chosen by applicants and screened by the government to ensure compliance with statutory criteria. *Tam*, 582 U.S. at 235-36.

Once again, the Tennessee Supreme Court relied on *Walker* to hold that the government controls the messages on personalized license plates. App.31a-32a. And again, the lower court's mistake was to treat specialty plates—which *are* controlled by the government—as if they were identical to the messages on personalized plates, which are *not* controlled by the government. In Texas's specialty plate program, for instance, by statute the state had "sole control over the design, typeface, color, and alphanumeric pattern for all license plates." *Walker*, 576 U.S. at 213. States have no such control over the messages that car owners choose to express in their personalized plates.

Tennessee's role when regulating personalized plates is also unlike the editorial control that government officials exercised in *Summum*. There, the city selectively displayed privately donated monuments in a public park. Through this selectivity, the city "effectively controlled the messages sent by the

monuments" by choosing the ones "it wants to display for the purpose of presenting the image of the City that it wishes to project." *Summum*, 555 U.S. at 473 (citation modified). In other words, the city was adopting the messages on certain monuments and expressing them as its own. States do nothing of the kind with personalized plates. Car owners, not the state, control the messages because the state is not expressing a message at all.

In sum, each of the three factors the Court has considered in its government speech cases indicates that personalized license plates are private speech, not government speech. *Walker* "likely marks the outer bounds of the government-speech doctrine." *Tam*, 582 U.S. at 238. In *Walker*, the Court specifically noted that it was not addressing whether personalized plates are government speech. *Walker*, 576 U.S. at 204. The messages on personalized plates are fundamentally different from the state-selected designs in *Walker*.

In *Shurtleff*, Justice Alito, joined by Justices Thomas and Gorsuch, proposed an alternative method of distinguishing private speech from government speech. 596 U.S. at 261 (Alito, J., concurring in the judgment). Under Justice Alito's method, the Court would not consider a list of "factors" but would instead address "the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression." *Id.* at 262. In Justice Alito's view, "government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech." *Id.* at 267.

The messages on personalized license plates are private speech under Justice Alito's method, too. The State's only involvement in personalized plates is to regulate the private expression of car owners—by denying applications that fail to satisfy statutory criteria. The State does not purposefully express any message of its own (and here, conceded that the message was "Ms. Gilliam's own unique message," not the government's message[,]" Tr. Ex. 1 at 28:5–15). No government employees are authorized to speak on the state's behalf. And by refusing to authorize certain messages that private individuals would like to put on their personalized plates, the government *does* rely on means that abridge private speech.

Again, the personalized plates at issue here contrast starkly with the *Walker* specialty plates. There, Texas's "enacted statutes authorizing, for example, plates that say 'Keep Texas Beautiful' and 'Mothers Against Drunk Driving,' plates that 'honor' the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words 'Fight Terrorism.'" *Walker*, 576 U.S. at 205 (quoting Tex. Transp. Code Ann. §§ 504.602, 504.608, 504.626, 504.647). So at least some of Texas's specialty plates—and it is hard to imagine how an objective observer could know which ones—not only featured state-created messages; those messages were codified into state public policy through "enacted statutes." *Id.* There's nothing like that here.

In sum, under either the standard articulated in the *Shurtleff* majority or that in Justice Alito's *Shurtleff* concurrence, the messages on personalized license plates are private speech. They are not Tennessee's speech.

III. This case presents an important question and is an ideal vehicle to resolve it.

As noted in Section I, the question presented has already arisen in California, Delaware, Hawaii, Indiana, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, and Virginia. But it can—and will—arise in many others, because nearly every state allows motorists to put their own messages on personalized plates, and those states screen applications.[3]

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[3] *See* Ala. Admin. Code § 810-5-1-.234; Alaska Stat. § 28.10.181(c); Ariz. Stat. § 28-2406; Ark. Code § 27-14-1009; Cal. Veh. Code §§ 5103, 5105; Colo. Stat. § 42-3-211; Conn. Stat. § 14-49(s); Del. Code tit. 21, § 2121(h); D.C. Mun. Regs. tit. 18, § 423; Fla. Stat. § 320.0805; Ga. Comp. R. & Regs. § 560-10-22-.02; Haw. Stat. § 249-9.1; Idaho Code § 49-409; 625 Ill. Stat. § 5/3-405.2; Ind. Code § 9-18.5-2-4; Iowa Admin. Code § 761-401.6(321); Kan. Stat. § 8-132; Ky. Stat. § 186.174; La. Stat. § 47:463.2; 29 Me. Stat. § 453; Md. Transp. Code § 13-613; Mass. Laws ch. 90, § 2; Mich. Laws § 257.803b; Minn. Stat. § 168.12(2a); Miss. Code § 27-19-48; Mo. Stat. § 301.144; Mont. Code § 61-3-405; Neb. Stat. § 60-3,118; Nev. Stat. § 482.3667; N.H. Code Admin. R. Saf-C § 513.62; N.J. Admin. Code § 13:20–34.3(b); N.M. Admin. Code § 18.19.3.62; N.Y. Comp. Codes R. & Regs tit. 15, § 16.5(a); N.C. Stat. § 20-79.4; N.D. Code § 39-04-10.3; Ohio Bureau of Motor Vehicles, *Specialized Plates*, https://bmvonline.dps.ohio.gov/bmvonline/oplates/specialized plates/1; Okla. Admin. Code § 260:135-7-149; Or. Admin. R. § 735-046-0010; 75 Pa. Stat. § 1341; S.C. Code § 56-3-2010; S.D. Laws § 32-5-89.2; Tex. Admin. Code § 217.27(d); Utah Code § 41-1a-411; Vt. Stat. tit. 23, § 304(d); Va. Dep't of Motor Vehicles, *Personalized License Plate Guidelines and Restrictions*, https://www.dmv.virginia.gov/vehicles/license-plates/personalized-policy; Wash. Code § 46.18.275; W. Va. Dep't of Motor Vehicles, *Personalized Plate Ordering Information*, https://transportation.wv.gov/DMV/Vehicle-Services/License-Plates/Pages/Ordering-Info.aspx; Wis. Stat. § 341.145;

Moreover, there is nothing to be gained from further percolation. The lower courts are intractably split, and everything that can be said has been said. Lower courts simply apply this Court's government-speech test to indistinguishable facts and reach different results. Full stop.

As a result, states engage in a staggering amount of discretionary censorship. In Arizona, a driver can obtain a personalized plate that says "JESUSNM" but not "NOGOD" or "BGAY." Jim Small, *Why can you praise Jesus on your license plate, but not celebrate being gay?*, News From The States (Mar. 20, 2025), https://www.newsfromthestates.com/article/why-can-you-praise-jesus-your-license-plate-not-celebrate-being-gay. "IH8EVR1" is fine, but not "OMGIH8U." *Ibid.*

Michigan car owners cannot display "ARIZONA." Jessica Shepherd, *These seemingly innocent vanity plates are banned in Michigan*, MLive (Aug. 29, 2017), https://www.mlive.com/entertainment/2017/08/vanity_license_plates_you_cant.html. "CHURCH1" is also off limits. *Ibid.*

Wyo. Dep't of Transp., *Prestige Plates*, https://www.dot.state.wy.us/home/titles_plates_registration/specialty_plates/Prestige_Plates.html.

Rhode Island suspended the issuance of personalized license plates after the District Court granted a preliminary injunction in *Carroll* v. *Craddock*, 494 F.Supp.3d 158 (D.R.I. 2020), because the State's rejection of an application for a personalized plate was likely to infringe the First Amendment. The State is formulating new standards. State of R.I., *Vanity Plates*, https://www.ri.gov/DMV/vanity/.

Bizarrely, Michigan even bans personalized plates for products that the State itself advertises. Jarrett Skorup, *Michigan's arbitrary process for banning license plates: Government prohibits words for products it advertises*, CapCon (May 6, 2024), https://www.michigancapitolconfidential.com/commentary/michigans-arbitrary-process-for-banning-license-plates.

Pennsylvania car owners cannot criticize federal environmental agency officials by displaying "EPA SUKS," or try to be humorously ironic with a plate that says "NO PLATE." George Stockburger, *PennDOT bans 300+ vulgar vanity license plates: Here are some of them*, WHTM (Jan. 22, 2025), https://www.yahoo.com/news/penndot-bans-300-more-vulgar-181407916.html.

Georgia bans Covid-themed plates: "NoMASK," "NoVACS," "CoVID19," "COVID," "CoVID," "2CoVID, and "KoVID19." Thomas Wheatley, *Here are Georgia's most … interesting rejected vanity license plates*, Axios Atlanta (Jan. 13, 2022), https://www.axios.com/local/atlanta/2022/01/13/georgia-rejected-vanity-license-plates.

Indiana prohibited religious plates; conversely, New Jersey banned "8THEIST." ADF, *Indiana's 'In God We Trust' plate in, Indiana woman's 'GOD' plate out* (Nov. 18, 2018), https://adflegal.org/press-release/indianas-god-we-trust-plate-indiana-womans-god-plate-out/; *NJ shouldn't pass judgment on religious license plates*, nj.com (Apr. 18, 2014), https://www.nj.com/opinion/2014/04/nj_shouldnt_pass_judgment_on_religious_license_plates_editorial.html.

One could spend hours researching the absurd viewpoint-based censorship that nearly every state engages in when evaluating personalized license plates. But the principle at stake—how to distinguish government speech from private speech—is far more important than how to categorize personalized-plate speech. Under the rationale adopted by the court below, business names, copyrights, patents, birth certificates, and real estate conveyances all qualify as government speech.

Like messages on license plates, these are all forms of expression submitted to the government for administrative processing—not for editorial adoption. But if all such submissions are government speech, the government would gain the power to discriminate on the basis of viewpoint in approving or rejecting each of them.

This case illustrates vividly Justice Alito's warning in *Tam* that the government-speech doctrine "is susceptible to dangerous misuse. If private speech can be passed off as government speech simply by affixing a government seal of approval, government officials can silence or muffle the expression of disfavored viewpoints." 582 U.S. at 235. When courts are too quick to attribute speech to the government, they hand the government a powerful tool of suppression. See *Shurtleff*, 596 U.S. at 262 (Alito, J., concurring in the judgment) ("[C]ourts must be very careful when a government claims that speech by one or more private speakers is actually government speech. When that occurs, it can be difficult to tell whether the government is using the doctrine as a subterfuge for favoring certain private speakers over others based on viewpoint.") (citation modified).

This case is a perfect vehicle for resolving the question presented. The only issue addressed by the lower courts was whether the messages on personalized plates are government speech. The lower courts wrote at great length on both sides of the issue. Most cases involving this question would be messier "vehicles," because in many cases, the lower court finds that personalized plates are private speech and then goes on to decide whether the rejection of a plate violates the First Amendment. See*, e.g.*, *Mitchell*, 148 A.3d at 336-39. If such a case came to this Court, the substantive First Amendment issue would be an alternative ground for decision. This complication is absent from this case, which presents the government speech question as cleanly as could be.

To be clear, a state can keep profanities and vulgarities off personalized plates by drafting a statute that complies with the First Amendment. *E.g., Mitchell*, 148 A.3d at 337 ("[I]t is reasonable, therefore, for Maryland to prohibit "profanities, epithets, or obscenities[.]"). Leah Gilliam filed this suit because, in her view, Tennessee's statute does not comply with the First Amendment; instead, the law regulates private speech based on whether the government considers it "offensive to good taste and decency." But see *Tam*, 582 U.S. at 220 ("That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint."). Yet the Tennessee Supreme Court did not hold the State responsible for its patently unconstitutional regulatory scheme because that court concluded the messages on personalized plates are the speech of the government rather than the speech of the car owner. This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Supreme Court of Tennessee,
at Nashville

Leah GILLIAM
v.
David GERREGANO, Commissioner of the Tennessee Department of Revenue et al.
No. M2022-00083-SC-R11-CV

April 3, 2024 Session Heard at Memphis[1]
FILED February 26, 2025

Appeal by Permission from the Court of Appeals, Chancery Court for Davidson County, Special Panel, No. 21-606-III, Ellen Hobbs Lyle, Chancellor; Doug Jenkins, Chancellor; and Mary L. Wagner, Judge

Jonathan Skrmetti, Attorney General and Reporter; J. Matthew Rice, Solicitor General; and Joshua D. Minchin, Office of the Solicitor General Honors Fellow, for the appellants, the Commissioner of the Tennessee Department of Revenue and the Tennessee Attorney General and Reporter.

Daniel A. Horwitz, Lindsay Smith, Melissa K. Dix, Shannon C. Kerr, and David Hudson, Jr., Nashville, Tennessee, for the appellee, Leah Gilliam.

Lee Davis, Chattanooga, Tennessee, and Adam Steinbaugh, Philadelphia, Pennsylvania, for the amicus curiae, Foundation for Individual Rights and Expression.

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[1] We heard argument in this case at the Cecil C. Humphreys School of Law at the University of Memphis.

Edward M. Bearman, Memphis, Tennessee, and Clyde F. DeWitt III and Cathy E. Crosson, Las Vegas, Nevada, for the amicus curiae, First Amendment Lawyers Association.

Sarah L. Martin, Nashville, Tennessee, and Eugene Volokh, Los Angeles, California, for the amicus curiae, Simon Tam.

Sarah K. Campbell, J., delivered the opinion of the Court, in which Holly Kirby, C.J., and Jeffrey S. Bivins, Roger A. Page, and Dwight E. Tarwater, JJ., joined.

Sarah K. Campbell, J.

For over a decade, Leah Gilliam's vehicle displayed a personalized license plate that read "69PWNDU." The State eventually revoked the plate after deeming the message offensive. Gilliam sued state officials, alleging that Tennessee's personalized license plate program discriminates based on viewpoint in violation of the First Amendment. The State argues that the First Amendment's prohibition of viewpoint discrimination does not apply to the alphanumeric characters on Tennessee's personalized license plates because they are government speech. In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the United States Supreme Court held that Texas's specialty license plate designs were government speech. 576 U.S. 200, 213, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015). Although personalized alphanumeric combinations differ from specialty plate designs in some respects, a faithful application of *Walker*'s reasoning compels the conclusion that they are government speech too. We reverse the

Court of Appeals' contrary holding and reinstate the trial court's judgment in favor of the State.

I.

A.

Tennessee residents must register their motor vehicles with the State before operating them on Tennessee's roads. Tenn. Code Ann. § 55-4-101(a)(1) (2024). This registration requirement has existed for more than a century. *See* Act of April 4, 1905, ch. 173, § 1, 1905 Tenn. Pub. Acts 371, 371. For just as long, Tennessee has required motor vehicles to display a license plate containing a unique registration code. *See id.* § 2; Tenn. Code Ann. § 55-4-103(b)(1) (2024). At first, the State assigned each vehicle a registration number but did not issue standard plates; it instead mandated that vehicle owners supply their own. *See* Act of April 4, 1905, ch. 173, § 2, 1905 Tenn. Pub. Acts 371, 371–72; James K. Fox, *License Plates of the United States* 95 (1994). Those plates were either homemade or storebought and "made of every imaginable material, including metal, leather, wood[,] and porcelain." Fox, *supra*, at 95. Perhaps because of the wide variation in homemade license plates, the State began issuing standard license plates in 1915. *Id.*; *see also* Act of January 27, 1915, ch. 8, § 3, 1915 Tenn. Pub. Acts 14, 15.

From 1915 until 1998, each license plate contained the word "Tennessee" or the abbreviation "Tenn." along with a state-generated unique number or alphanumeric combination that identified the vehicle. Fox, *supra*, at 94. At various times, plates also featured the county name, the shape of the State, the state seal, a tri-star design, the words "Volunteer

State" or "TNvacation.com," or the national motto "In God We Trust." *See id.*; Tenn. Code Ann. § 55-4-103(b)(1), (b)(5)(A); Caroline Sutton, *New Tennessee License Plate Design Revealed*, News Channel 5 Nashville (Oct. 5, 2021, 9:06 PM), https://perma.cc/P8KK-UZWD.

In 1998, Tennessee began offering specialty plate designs and personalized plates in addition to standard license plates. *See* Act of May 1, 1998, ch. 1063, § 1, 1998 Tenn. Pub. Acts 965, 965–1006 (codified as amended in scattered sections of Tenn. Code. Ann. §§ 55-4-201 to -299 (2024)). Personalized plates—also called vanity plates—allow drivers to choose a specific alphanumeric combination to display on their license plate instead of a state-generated combination. *See* Tenn. Code Ann. §§ 55-4-201, -202, -203, -210, -214 (2024); Tenn. Comp. R. & Regs. 1320-08-01-.02 (2006).

Whether randomly generated or personally selected, the alphanumeric combination on a license plate must be unique; it cannot duplicate one the State has already issued. Tenn. Code Ann. § 55-4-103(b) ("Registration plates shall bear individual distinctive alphanumerical characters not to exceed a combination of seven (7) as determined by the commissioner."); *id.* § 55-4-210(e) ("Registration numbers for license plates issued pursuant to [Tennessee's personalized license plate program] shall not conflict with or duplicate the registration numbers for any existing ... motor vehicle registration plate ...."). Each combination must contain seven or fewer alphanumeric characters. *Id.* §§ 55-4-103(b)(1), -201(6), -205. The license plate containing the combination must be "attached on the rear of the vehicle" and "clearly

visible" at all times. *Id.* § 55-4-110(a)– (c)(1). And the plate and distinct combination must "be of sufficient size to be readable from a distance of one hundred feet." *Id.* § 55-4-103(c).

To obtain a personalized plate, a vehicle owner must complete an application and pay an additional $35 fee. *Id.* § 55-4-202. The applicant may request up to three alphanumeric combinations, ranked in order of preference. The Commissioner of the Department of Revenue has statutory authority to approve or deny any proposed combination. *Id.* § 55-4-210(d)(1)–(2). The application states in bold that "Tennessee reserves the right to refuse to issue objectionable combinations." The Commissioner is statutorily prohibited from issuing "any license plate commemorating any practice which is contrary to the public policy of the state" or "any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading." *Id.* § 55-4-210(d)(1)–(2).

Tennessee's Department of Revenue reviews all applications for personalized plates, and a personalized plate may not be issued without the Department's approval. *Id.* § 55-4-210(a); Tenn. Comp. R. & Regs. 1320-08-01-.02. Employees in the Department's Inventory and Specialized Application Unit complete the first level of review. A five-person team evaluates eighty to one hundred applications per day to determine whether the proposed alphanumeric combinations comply with statutory requirements. That evaluation includes determining whether the combination is "offensive to good taste and decency." Since its inception, the Inventory Unit has rejected nearly one thousand requested combinations on that

basis. Tennessee currently has around sixty thousand active personalized plates.

To facilitate the review of personalized plate applications, the Department identified several objectionable categories including profanity, violence, sex, illegal substances, derogatory slang terms, and racial or ethnic slurs. These categories do not appear in the Department's regulations, however, or in any handbook or other official document. When reviewing applications, the Inventory Unit also consults the Urban Dictionary and an internal document called the "Objectionable Table" that lists thousands of configurations previously deemed objectionable. That table includes references to profanity (e.g., "FUCOFF"); violence (e.g., "MURDER"); sexual activity (e.g., "ORGY"); illegal substances (e.g., "KOCAINE"); and racial or ethnic groups (e.g., "NOJEWS"). The Department also has a general policy of rejecting configurations with the sequence "69" because of that number's sexual connotation, unless the number refers to the vehicle's model year.

If the reviewing member of the Inventory Unit determines that the requested combination is not prohibited and the application satisfies all other requirements, the application is approved. If the reviewer does not recommend approval, the application "moves up the chain" for further review.

But the review process is far from perfect. Examples abound of personalized plates approved by the Inventory Unit that should have been deemed objectionable under the Department's review criteria. As a sampling, the Department approved plates containing the combinations "SHTUNOT," "BUTNKD," "694FUN," "BIGSEXI," "69BEAST," and "69PONY."

In those situations, the Department has authority to rescind the erroneously issued plates. Tenn. Code Ann. § 55-5-117(a)(1) (2024). When the Department considers revocation, the combination at issue is reviewed by the Department's Commissioner and legal counsel. If a plate is revoked, the vehicle owner must return the plate to the Department. *Id.* § 55-5-119(a) (2024). The owner may then request a different combination or be refunded the personalized plate application fee.

Personalized plates are issued "for the applicant's use only on the authorized motor vehicle." *Id.* § 55-4-212(a)(9). If the vehicle owner transfers title to the vehicle, he or she must "surrender the plate to the [D]epartment through the county clerk" or apply to transfer the plate to another vehicle. *Id.* § 55-4-212(a)(9)–(10).

B.

In December 2010, Leah Gilliam applied for a personalized plate. She requested three different alphanumeric combinations, in order of preference: (1) 69PWNDU, (2) PWNDU69, (3) IPWNDU. In a section of the application that allows the applicant to explain the significance of the characters selected, Gilliam wrote: "PWND=vid gaming term[.] The first one is my google phone number." Gilliam later claimed that she is an "astronomy buff" and that "69" was a reference to the year of the moon landing. The parties agree, however, that "69" often has a sexual connotation. As Gilliam noted in her application, "PWND" is an expression that originated in the gaming community; it means to be owned or domi-

nated. *pwned*, Urban Dictionary, https://perma.cc/XKQ4-J9PP.

Even though Gilliam's requested alphanumeric combination included the number "69," the Inventory Unit approved her application and issued a plate that read "69PWNDU." Gilliam displayed the plate on her vehicle for the next eleven years. During those eleven years, the Department received no complaints about the plate.

In May 2021, the Department of Revenue's Director of Personnel, Justin Moorhead, received a text on his personal cell phone alerting him to Gilliam's license plate. Moorhead brought the plate to the attention of the Inventory Unit. The Department reviewed the plate and determined that it should be revoked because it referred to sexual domination.

Later that month, the Department informed Gilliam via letter that it was revoking her personalized plate. The letter explained that the Department had deemed her plate offensive in violation of Tennessee Code Annotated section 55-4-210(d)(2). It also notified Gilliam that she could either apply for a different personalized plate or receive a standard plate instead.

C.

The next month, Gilliam requested an administrative hearing regarding the revocation. About two weeks later, she sued the Commissioner of the Department of Revenue and the Tennessee Attorney General in Davidson County Chancery Court. Her complaint alleged that section 210(d)(2) is facially unconstitutional because it discriminates based on viewpoint in violation of the First Amendment to the

United States Constitution and is void for vagueness. She also challenged the Department's summary revocation process under the federal Due Process Clause. Gilliam sought injunctive and declaratory relief as well as nominal damages.

Because Gilliam's complaint involved a constitutional challenge to a state law, it was referred to a three-judge panel under Tennessee Code Annotated section 20-18-101 (2021). The panel held a bench trial in December 2021. Four witnesses testified at trial: George S. Scoville, III, a Tennessean with a personalized license plate; Alan Secrest, an expert witness in polling and polling methodology; Demetria Hudson, the Department's Vehicle Services Assistant Director and the State's designee under Tennessee Rule of Civil Procedure 30.02(6); and Tammi Moyers, manager of the Inventory Unit.

Scoville testified that he considers the message conveyed by his personalized plate to be his own, not the government's. Secrest discussed a survey he conducted of two hundred Tennesseans, the results of which indicated that eighty-seven percent of those surveyed consider the alphanumeric combination on a personalized license plate to be the vehicle owner's speech. Hudson testified, among other things, that Gilliam's alphanumeric combination conveyed Gilliam's message, not the government's. Moyers described the Department's process for reviewing applications. Gilliam also introduced into evidence a Tennessee government website stating that, "[i]n Tennessee, license plates can be personalized with your own unique message."

The panel rejected Gilliam's constitutional claims and entered judgment for the state defendants. As

relevant here, the panel concluded that section 210(d)(2) does not violate the First Amendment because the alphanumeric combinations on personalized license plates are government speech that does not implicate the First Amendment's prohibition of viewpoint discrimination. To reach that conclusion, the panel examined the same factors as the United States Supreme Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*: (1) the history of the medium's use to convey state messages, (2) whether the expression is "closely identified in the public mind" with the State, and (3) whether the State maintains "direct control over the messages conveyed." 576 U.S. 200, 209–13, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015).

The panel first concluded that both license plates generally and personalized plates specifically have been used to convey state messages. Next, the panel determined that "a viewer of a personalized plate in Tennessee associates the plate with the State of Tennessee ... because ... each Tennessee license plate is a government article serving the government purposes of vehicle registration and identification." Finally, the panel concluded that Tennessee maintains "direct control over the messages conveyed on all of its license plates" because it "must approve every personalized plate" and has authority to revoke any plates issued erroneously.

The Court of Appeals reversed. *Gilliam v. Gerregano*, No. M2022-00083-COA-R3-CV, 2023 WL 3749982 (Tenn. Ct. App. June 1, 2023), *perm. app. granted*, (Tenn. Nov. 21, 2023). The court concluded that the first and second *Walker* factors tilted toward private speech, while the third factor was neutral.

Id. at *11–14. The court focused its historical analysis on the personalized license plate program rather than license plates or alphanumeric combinations more generally. *Id.* at *11–12. Based on that analysis, the court concluded that Tennessee had not historically conveyed state messages through personalized license plate numbers. *Id.* It rejected the State's argument that personalized plates had been used to convey messages of identification. *Id.* at *11. In concluding that the second factor suggested that personalized plates are private speech, the court placed significant weight on Scoville's testimony and the poll that Secrest performed. *Id.* at *12. As for control, the court acknowledged the Department's authority to approve personalized plate applications and revoke erroneously issued plates. But it was troubled by the Department's inconsistent regulation. *Id.* at *14.

We granted the state defendants' application for permission to appeal. That application raised a single issue: whether alphanumeric registration characters on personalized license plates are government speech.

II.

We review issues of constitutional law de novo, without affording the trial court's legal conclusions any presumption of correctness. *E.g.*, *Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020); *Bredesen v. Tenn. Jud. Selection Comm'n*, 214 S.W.3d 419, 424 (Tenn. 2007); *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). When a case was tried by a judge instead of a jury, we presume the trial court's factual findings are correct unless the evidence preponder-

ates otherwise. Tenn. R. App. P. 13(d); *King v. Anderson Cnty.*, 419 S.W.3d 232, 245 (Tenn. 2013).

We presume that acts of the legislature are constitutional, *Gallaher*, 104 S.W.3d at 459, and "indulge every presumption and resolve every doubt in favor of constitutionality," *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (quoting *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996)). To prevail on a facial constitutional challenge, a plaintiff "must establish that no set of circumstances exist[s] under which the [law] would be valid." *Id.* at 390 (quoting *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)).

III.

The single issue presented by this appeal is whether the alphanumeric characters on Tennessee's personalized license plates are government speech. Gilliam challenged the State's vanity license plate program under the federal Constitution, so we are bound by United States Supreme Court precedent in resolving that issue. *See Lavon v. State*, 586 S.W.2d 112, 114 (Tenn. 1979).[2] We begin by examining that Court's government speech precedents before applying them to the facts before us.

A.

The First Amendment to the United States Constitution prohibits the government from "abridging

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[2] Because Gilliam did not assert any claims under the Tennessee Constitution, we have no occasion to consider whether the government speech analysis would be different under state constitutional free speech protections.

the freedom of speech." U.S. Const. amend. I. Among other things, that means that the government may not regulate speech in a manner that discriminates based on the viewpoint the speech expresses. *See Iancu v. Brunetti*, 588 U.S. 388, 393, 139 S.Ct. 2294, 204 L.Ed.2d 714 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (describing viewpoint discrimination as an "egregious form of content discrimination" that is "presumptively unconstitutional").

But the First Amendment does not constrain the government when it is speaking for itself. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005). Were the rule otherwise, it would be difficult for the government to function. The government must adopt and convey particular viewpoints to achieve its policy goals. *See, e.g.*, *Matal v. Tam*, 582 U.S. 218, 234, 137 S.Ct. 1744, 198 L.Ed.2d 366 (2017); *Walker*, 576 U.S. at 207–08, 135 S.Ct. 2239; *Summum*, 555 U.S. at 468, 129 S.Ct. 1125. If the public disagrees with those viewpoints, its remedy lies in the political process, not the First Amendment. *See, e.g.*, *Summum*, 555 U.S. at 468–69, 129 S.Ct. 1125.

Sometimes, the government "receives assistance from private sources" when it "deliver[s] a government-controlled message." *Id.* at 468, 129 S.Ct. 1125. When private speakers are involved, it can be "difficult to tell whether a government entity is speaking

on its own behalf or is providing a forum for private speech." *Id.* at 470, 129 S.Ct. 1125; *see also Shurtleff v. City of Boston*, 596 U.S. 243, 252, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) ("The boundary between government speech and private expression can blur when ... a government invites the people to participate in a program."). The line between government speech and private speech must be drawn carefully because "the government-speech doctrine ... is susceptible to dangerous misuse." *Tam*, 582 U.S. at 235, 137 S.Ct. 1744. "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id.*

In the past two decades, the United States Supreme Court has attempted to draw the line between government speech and private speech in four different cases. In the first two—*Summum* and *Walker*—the Court agreed with the government that the speech at issue was government speech. In the more recent two—*Tam* and *Shurtleff*—the Court rejected the government-speech argument.

In *Summum*, the Court considered whether a city's display of monuments in a public park was government speech. 555 U.S. at 464, 129 S.Ct. 1125. Eleven of the fifteen monuments displayed in the park had been donated by private groups. *Id.* The Court unanimously concluded that the monuments comprising the display were government speech. First, the Court explained that "[g]overnments have long used monuments to speak to the public." *Id.* at 470, 129 S.Ct. 1125. And "privately financed and donated monuments that the government accepts and displays to the public on government land," *id.* at

470–71, 129 S.Ct. 1125, speak for the government in the same way, even if they convey a meaning different from the one intended by the monument's donor or creator, *id.* at 476, 129 S.Ct. 1125. Second, the Court noted that "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." *Id.* at 471, 129 S.Ct. 1125. Third, the Court found that the city had "'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *Id.* at 473, 129 S.Ct. 1125 (quoting *Johanns*, 544 U.S. at 560–61, 125 S.Ct. 2055).

A few years later, in *Walker*, the Court considered whether Texas's specialty license plate designs were government speech. 576 U.S. at 203–04, 135 S.Ct. 2239. For an additional fee, Texas allowed vehicle owners to bypass the standard license plate design and instead "choose from an assortment of specialty license plates." *Id.* at 204, 135 S.Ct. 2239. Some of the designs were specifically authorized by Texas's legislature, while others were created at the request of private individuals or organizations. *Id.* at 205, 135 S.Ct. 2239.[3]

Relying heavily on the analysis in *Summum*, a majority of the Court concluded that Texas's specialty plate designs are government speech. *Id.* at 210, 135 S.Ct. 2239. Turning first to history, the Court reasoned that, "insofar as license plates have con-

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[3] Texas also had a personalized license plate program similar to Tennessee's that allowed a vehicle owner to request a particular alphanumeric combination, but only the specialty license plate designs were at issue in *Walker,* 576 U.S. at 204, 135 S.Ct. 2239.

veyed more than state names and vehicle identification numbers, they long have communicated messages from the States." *Id.* at 210–11, 135 S.Ct. 2239. For example, States "ha[d] used license plate slogans to urge action, to promote tourism, and to tout local industries." *Id.* at 211, 135 S.Ct. 2239. The Court pointed to several such slogans that Texas had used in the past "to communicate through its license plate designs." *Id.*

Next, the Court concluded that Texas's plate designs "are often closely identified in the public mind with the [State]." *Id.* at 212, 135 S.Ct. 2239 (alteration in original) (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. 1125). The Court noted that "[e]ach Texas license plate is a government article serving the governmental purposes of vehicle registration and identification" and that Texas "owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations." *Id.* at 212, 135 S.Ct. 2239. The Court equated license plates to "government IDs" and reasoned that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message." *Id.* Otherwise, that individual "could simply display the message ... in larger letters on a bumper sticker right next to the plate." *Id.*

Finally, the Court found that "Texas maintains direct control over the messages conveyed on its specialty plates" because it has "final approval authority" over the designs and had "actively exercised this authority" by "reject[ing] at least a dozen proposed designs." *Id.* at 213, 135 S.Ct. 2239. The Court underscored that the involvement of private parties "in

the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Id.* at 217, 135 S.Ct. 2239. It also made clear that the "holding in *Summum* was not dependent on the precise number of monuments found within the park," that "Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own," and that "the existence of government profit alone is insufficient to trigger forum analysis." *Id.* at 217–18, 135 S.Ct. 2239.

Justice Alito dissented in *Walker* in an opinion joined by Chief Justice Roberts and Justices Scalia and Kennedy. *Id.* at 221–36, 135 S.Ct. 2239 (Alito, J., dissenting). The dissent accused the majority of "badly misunderstand[ing] *Summum*." *Id.* at 227, 135 S.Ct. 2239. The dissent agreed that state mottos and other state-created slogans that promote state programs "can be considered government speech." *Id.* at 230, 135 S.Ct. 2239.[4] In the dissent's view, however, "plates that are essentially commissioned by private entities ... and that express a message chosen by those entities are very different—and quite new." *Id.* The dissent did not believe Texas had exercised "the 'selective receptivity' present in *Summum*." *Id.* at 231, 135 S.Ct. 2239. Rather than "approve only those proposed plates that convey

[4] The dissent noted that "all license plates unquestionably contain *some* government speech," including "the name of the State and the numbers and/or letters identifying the vehicle." *Id.* at 222, 135 S.Ct. 2239. It is unclear whether the dissent intended this reference to include personalized alphanumeric combinations in addition to randomly generated combinations.

messages that the State supports," Texas had "proclaim[ed] that it is open to all private messages—except those ... that would offend some who viewed them." *Id.* at 232, 135 S.Ct. 2239. The dissent found it implausible that a reasonable observer would think "the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars." *Id.* at 221–22, 135 S.Ct. 2239. For example, the dissent questioned whether a plate that read "Rather be Golfing" would really prompt an observer to conclude that it is the State's official policy that it is better to golf than to work. *Id.* at 222, 135 S.Ct. 2239. The dissent further distinguished *Summum* by pointing out that, while a "park can accommodate only so many permanent monuments," the number of specialty license plate designs is limited only by "the number of registered vehicles." *Id.* at 232–33, 135 S.Ct. 2239. Moreover, while the private monuments at issue in *Summum* were donated, vehicle owners who wish to obtain a specialty plate "must pay an increased annual registration fee." *Id.* at 233, 135 S.Ct. 2239. According to the dissent, Texas was effectively selling "space available on millions of little mobile billboards ... to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable." *Id.*

Tam involved a First Amendment challenge to a statutory provision that allowed the federal government to deny an application for trademark registration if the trademark at issue was disparaging. 582 U.S. at 223, 137 S.Ct. 1744 (citing 15 U.S.C. § 1052(a)). The government maintained that regis-

tered trademarks are government speech and that the government therefore may discriminate based on viewpoint in deciding whether to register a trademark. *Id.* at 233–34, 137 S.Ct. 1744. The Court rejected that argument. *Id.* at 236, 137 S.Ct. 1744. Calling the government's argument "far-fetched," the Court noted that "[n]one of [the Court's] government speech cases even remotely supports the idea that registered trademarks are government speech." *Id.* at 236–37, 137 S.Ct. 1744. The government did not create the trademarks or edit marks submitted for registration, and it could not reject a mark for any reason other than its disparaging viewpoint. *Id.* at 235, 137 S.Ct. 1744. After a mark was registered, moreover, it was difficult for the government to remove it. *Id.* at 236, 137 S.Ct. 1744. Registration did not "constitute approval of a mark," and it was "unlikely that more than a tiny fraction of the public ha[d] any idea what federal registration of a trademark means." *Id.* at 237, 137 S.Ct. 1744. "If the federal registration of a trademark makes the mark government speech," the Court reasoned, then "the Federal Government is babbling prodigiously and incoherently." *Id.* at 236, 137 S.Ct. 1744.

The federal government relied on *Walker* in pressing its argument that registered trademarks are government speech, but the Court found that trademarks implicated none of the factors that were present in *Walker*. *Id.* at 238, 137 S.Ct. 1744. Moreover, the Court said that *Walker* "likely marks the outer bounds of the government-speech doctrine" and cautioned that "we must exercise great caution before extending our government-speech precedents." *Id.* at 235, 238, 137 S.Ct. 1744. Holding that registered

trademarks are government speech, the Court warned, "would constitute a huge and dangerous extension of the government-speech doctrine" that could lead to "other systems of government registration," such as copyright registration, being "characterized in the same way." *Id.* at 239, 137 S.Ct. 1744.

Finally, in *Shurtleff*, the Court considered whether Boston's practice of allowing private parties to hoist flags on one of the flagpoles on City Hall Plaza was government speech. 596 U.S. at 247–48, 142 S.Ct. 1583. To answer that question, the Court "conduct[ed] a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Id.* at 252, 142 S.Ct. 1583. Although the Court emphasized that this review should be "driven by a case's context rather than the rote application of rigid factors," it ultimately examined the same sorts of evidence that had guided its analysis in past cases: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.*

The Court concluded that the "general history" of flag flying favored Boston because flags "have long conveyed important messages about government." *Id.* at 253–54, 142 S.Ct. 1583. But the "details" of the specific flag-flying program at issue made it questionable whether the public would perceive flags raised by private groups as expressing a government message. *Id.* at 255–56, 142 S.Ct. 1583. The Court noted that these flags "were raised in connection with ceremonies at the flagpoles' base and remained aloft during the events." *Id.* at 255, 142 S.Ct. 1583.

Thus, "even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for" the flags raised by private groups. *Id.* The "most salient feature" of the case was Boston's failure to exercise any "control over the flags' content and meaning." *Id.* at 256–57, 142 S.Ct. 1583. Although the city approved requests to hold events on City Hall Plaza, it "told the public that it sought 'to accommodate all applicants,' " and the city employee who reviewed the applications testified that he had "never requested to review a flag" or "requested changes to a flag in connection with approval." *Id.* Indeed, that employee did not "even see flags before the events." *Id.* at 257, 142 S.Ct. 1583. The city "approv[ed] flag raisings, without exception" and had "no record of denying a request until" the plaintiff sought to fly a Christian flag. *Id.*

B.

We follow *Shurtleff*'s approach and evaluate whether the alphanumeric combinations on Tennessee's personalized license plates are government speech by considering the following factors: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." 596 U.S. at 252, 142 S.Ct. 1583. We remain mindful, however, that the government speech inquiry is "holistic" and should be "driven by a case's context." *Id.* The ultimate question this inquiry is designed to answer is "whether the government intends to speak for itself or to regulate private expression." *Id.*

1.

First, we consider history. The parties dispute the level of generality at which we should conduct our historical inquiry. The State points us to Tennessee's historical use of registration numbers generally, while Gilliam urges us to focus on the details of Tennessee's personalized plate program. In *Walker*, the Court examined generally whether, "insofar as license plates have conveyed more than state names and vehicle identification numbers," they had "communicated messages from the States." 576 U.S. at 210–11, 135 S.Ct. 2239. The Court also discussed Texas's license plates—it noted that Texas had "communicate[d] through its license plate designs" and gave as examples slogans and emblems that appeared on its general-issue plates as well as legislatively authorized specialty plate designs. *Id.* at 211–12, 135 S.Ct. 2239. In *Shurtleff*, the Court looked to the "general history" of "flag flying, particularly at the seat of government." 596 U.S. at 253, 142 S.Ct. 1583. But it also considered "the details of *this* flag-flying program." *Id.* at 255, 142 S.Ct. 1583. Given our obligation to conduct a "holistic" government speech analysis, *id.* at 252, 142 S.Ct. 1583, we consider both the general history of alphanumeric combinations on license plates and the specific history of Tennessee's personalized plate program.

"License plates originated solely as a means of identifying vehicles." *Walker*, 576 U.S. at 223, 135 S.Ct. 2239 (Alito, J., dissenting). States began requiring automobiles to display registration numbers on license plates in the early twentieth century. *Id.*; *see generally* Fox*, supra*, 10–111. In 1905, Tennessee began requiring vehicle owners to register their cars

with the State and to display the registration number assigned to them in a "conspicuous manner at both the front and rear of such automobile." Act of April 4, 1905, ch. 173, §§ 1–2, 1905 Tenn. Pub. Acts 371, 371–72. Today, vehicle owners are still required to display a distinct registration number on their license plates in a "clearly visible" manner. Tenn. Code Ann. §§ 55-4-110(b), -210(e). The registration number communicates to law enforcement and members of the public that the number can be used to identify the vehicle. *E.g.*, *Walker*, 576 U.S. at 212, 135 S.Ct. 2239 (majority opinion) ("Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification."); *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006) ("The very purpose of a license plate number ... is to provide identifying information to law enforcement officials and others.").

Gilliam argues that this display of identifying information is not government speech; in her view, the government speaks only if it communicates "messages or ideas." But even "dry information, devoid of advocacy, political relevance, or artistic expression"—such as technical scientific information, instructions, and recipes—constitutes speech. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446–47 (2d Cir. 2001); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (explaining that purely factual information about "who is producing and selling what product, for what reason, and at what price" is protected speech); *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (explaining that "[i]nstructions, do-it-yourself

manuals, [and] recipes" are all "speech"). The randomly generated alphanumeric combinations on Tennessee's license plates are the government's medium for communicating identifying information about the vehicle. The general history of Tennessee's registration numbers thus favors the State.

What about the specific history of Tennessee's personalized plate program? As Gilliam notes, that program has been around for only twenty-six years. But throughout that time, the alphanumeric combinations on Tennessee's personalized plates—like the combinations on Tennessee's general-issue plates—have communicated identifying information about the vehicles on which they are displayed. These personalized combinations must be distinct from other combinations already issued. *See* Tenn. Code Ann. § 55-4-210(e). And the plate containing the personalized combination must be "clearly visible" and "readable from a distance of one hundred feet." *Id.* §§ 55-4-103(c), -110(b); *see also id.* § 55-4-110(a), (c)(1).

According to Gilliam, Tennessee's personalized alphanumeric combinations could not possibly convey messages from the government because the State told applicants that personalized plates would contain their "own unique message." Different speakers, however, may convey different things through the same medium of speech. In *Summum*, for example, the Court explained that "the thoughts or sentiments expressed by a government entity that accepts and displays ... an object may be quite different from those of either its creator or its donor." 555 U.S. at 476, 129 S.Ct. 1125. A vehicle owner may request the combination "YOLO" to express something about her life philosophy. But when the Department ap-

proves that personalized plate, it uses the combination to communicate something different—that the vehicle may be identified using that unique combination of characters. And because the State communicates something with that combination too, it reviews applications to ensure that the combination is neither offensive nor contrary to the State's public policy.

The Eleventh Circuit's decision in *Mech v. School Board of Palm Beach County* is instructive in this regard. 806 F.3d 1070 (11th Cir. 2015). That case concerned a school district's program that allowed schools to "hang banners on their fences to recognize the sponsors of school programs." *Id.* at 1072. The banners included the business's name, phone number, web address, and logo. *Id.* at 1073. They "use[d] a uniform size, color, and font" and "include[d] a message thanking the sponsor." *Id.* at 1072. In concluding that the banners were government speech, the Eleventh Circuit explained that the government used the banners as a "way of saying 'thank you.' " *Id.* at 1077. "The fact that the sponsors may receive an incidental benefit from the [banners]—in the form of publicity and good will—[did] not refute" the distinct governmental purpose of the banners. *Id.* (quoting *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1142 (10th Cir. 2001)).

Here, the alphanumeric combinations on personalized license plates are Tennessee's way of communicating identifying information about the vehicle to law enforcement and the public. Any incidental benefit to vehicle owners who choose personalized plates to express their own message does not refute this distinct government purpose.

In sum, both the general history of registration numbers on license plates and the specific history of Tennessee's personalized plates cut in favor of the State.

2.

We next consider the public's perception about who is speaking. The State argues that *Walker*'s reasoning about the public perception of license plates applies equally here. Gilliam disagrees and argues that the record in this case compels a different conclusion. We agree with the State.

Walker held that the public was likely to perceive Texas's specialty plate designs as government speech because "Texas license plates are, essentially, government IDs," and individuals who observe designs on IDs reasonably perceive them as conveying a message on behalf of the government issuer. 576 U.S. at 212, 135 S.Ct. 2239. That reasoning applies equally to Tennessee's personalized license plates. They are "government article[s]," *id.*, that drivers are statutorily required to display on their vehicles and that must be returned to the government when revoked or no longer in use, *see* Tenn. Code Ann. §§ 55-4-212(a)(9), 55-5-119(a). As in *Walker*, "a person who displays a message on a [personalized Tennessee] license plate likely intends to convey to the public that the State has endorsed that message." 576 U.S. at 212, 135 S.Ct. 2239. Otherwise, a bumper sticker would suffice. *Id.*

Gilliam attempts to distinguish *Walker* by pointing out that at least some of Texas's specialty plate designs were state-created, whereas here no personalized plate combinations are state-created. True

enough. But the Supreme Court's analysis of public perception in *Walker* did not turn on that feature of Texas's program. To the contrary, *Walker* focused on the "governmental nature of the plates" themselves, not the governmental nature of the specialty designs on the plates. *Id.*

Gilliam also notes that Texas owned its specialty plate designs, including those proposed by private parties. *Walker* did mention Texas's ownership of the designs in evaluating how the public would perceive the specialty plates. *Id.* But that was only one of a laundry list of characteristics the Court considered. The crux of *Walker*'s analysis was its conclusion that license plates are, "essentially, government IDs." *Id.* Tennessee's personalized license plates share enough of the prominent features of Texas's specialty plates to warrant the same conclusion here. Although there is no evidence that Tennessee owns the alphanumeric combinations on personalized plates, Tennessee requires vehicle owners to surrender their personalized plates when they are no longer in use. *See* Tenn. Code Ann. § 55-4-212(a)(9). This surrender requirement confirms that personalized plates are "government article[s]" and not primarily a vehicle for individual expression. *Walker*, 576 U.S. at 212, 135 S.Ct. 2239.

Gilliam also invokes common sense in arguing that the public attributes personalized alphanumeric combinations to the driver rather than the State. That argument is not without force. But the dissenting opinion in *Walker* made the same appeal to common sense, to no avail. 576 U.S. at 221–22, 135 S.Ct. 2239 (Alito, J., dissenting). The dissent argued that it was highly unlikely that a member of the

public would "assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents" upon seeing Texas license plates bearing the names of "Texas's out-of-state competitors." *Id.* at 222, 135 S.Ct. 2239. Nevertheless, the *Walker* majority concluded that the public-perception factor weighed in the State's favor based on other reasons. *Id.* at 212–13, 135 S.Ct. 2239 (majority opinion). And those other reasons apply equally here.

Finally, Gilliam argues that record differences require us to reach a different conclusion than *Walker*. Gilliam points to four pieces of evidence to support that argument: (1) Hudson's testimony as the Department's Rule 30.02(6) witness that Gilliam's personalized plate conveys "Ms. Gilliam's message, not the government's message"; (2) a state website stating that "[i]n Tennessee, license plates can be personalized with your own unique message"; (3) Scoville's testimony that his personalized plate conveys his own message, not the government's; and (4) the results of Secrest's survey regarding public perception.

None of this evidence materially distinguishes this case from *Walker*. At best for Gilliam, this evidence confirms the common-sense intuition that the public will attribute the alphanumeric combination on a personalized plate at least in part to the vehicle owner. The same argument was made in *Walker*, but it did not carry the day. *See* 576 U.S. at 221–22, 135 S.Ct. 2239 (Alito, J., dissenting).

Moreover, we are reluctant to place significant weight on Secrest's survey because methodological flaws limit its probative value. Secrest asked two

hundred randomly selected Tennessee adults the following questions:

> [1] As you may know, in Tennessee, license plates can be personalized with your own unique message. You can choose the letters or numbers yourself and submit an application for that personalized plate for the State of Tennessee, which may approve or deny it. Please tell me if you have ever applied for a personalized plate for yourself.
>
> [2] When you see a personalized license plate that contains a combination of letters and numbers chosen by the car's owner, which of the following statements comes closer to your point of view? Statement A: The message featured on a personalized license plate represents the speech or views of the government or Statement B: The message featured on a personalized license plate represents the speech or views of the person who chose it.

Of those surveyed, eighty-seven percent responded that the message represents the speech or views of the person who chose it. Only four percent said the message is the government's speech, and nine percent were not sure. But survey participants were told in the first question that Tennessee's personalized license plates "can be personalized with your own unique message." That question may have biased the responses to the second question by predisposing participants to believe that the message expressed the views of the vehicle owner. And participants were presented with only two potential responses to the second question—personalized license plates are either government speech or the personal

speech of the vehicle owner. Participants were not permitted to respond that personalized plates represent both government speech *and* personal speech.

More importantly, the survey does little to undercut *Walker*'s analysis regarding public perception. As explained, that analysis rested largely on the governmental nature of Texas's license plates and the fact that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message." *Walker*, 576 U.S. at 212, 135 S.Ct. 2239. Even if the public understands Tennessee's personalized license plates to represent the speech of the vehicle owner, that does not preclude a conclusion that the plates also convey "government agreement with the message displayed." *Id.* at 213, 135 S.Ct. 2239.

The fact that the alphanumeric combinations at issue here appear on government-issued license plates, moreover, distinguishes this case from *Tam*. As the Court explained in *Tam*, *Walker*'s conclusion that "license plates 'are often closely identified in the public mind' with the State" stemmed from the fact that "they are manufactured and owned by the State, generally designed by the State, and serve as a form of 'government ID.' " *Tam*, 582 U.S. at 238, 137 S.Ct. 1744 (quoting *Walker*, 576 U.S. at 212, 135 S.Ct. 2239). None of those factors were present in *Tam*. To the contrary, it was "unlikely that more than a tiny fraction of the public ha[d] any idea what federal registration of a trademark means." *Id.* at 237, 137 S.Ct. 1744. By contrast, nearly all those factors are present here.

Because we see no sound reason to reach a conclusion different from *Walker* regarding public perception, this factor also favors the State.

3.

Finally, we consider the extent to which the State has actively shaped or controlled expression through personalized plates. The State again argues that *Walker*'s analysis is controlling. Gilliam calls the State's position "nonsensical" and argues that "the Department's control over personalized plate messages" is loose at best.

We agree with the State that the level of control the Department exercises over Tennessee's personalized license plates is materially similar to the level of control Texas exercised over its specialty plates. *Walker* noted that Texas was required to approve specialty plate design proposals before they could appear on a Texas plate and that Texas had actively exercised that authority by rejecting "at least a dozen proposed designs." 576 U.S. at 213, 135 S.Ct. 2239. The Department likewise has statutory authority to approve or deny applications for personalized plates and has actively exercised that authority by rejecting nearly one thousand requested combinations. Although the Department makes mistakes in its review process, it retains the authority to revoke personalized plates that are erroneously issued. *See* Tenn. Code Ann. § 55-5-117(a)(1).

Gilliam counters that the Department's "lax" process for reviewing applications has led to "wildly inconsistent results" that refute any notion that the State is carefully curating its message. But the dissenting opinion in *Walker* made a similar argument,

noting that "Texas [did] not take care to approve only those proposed plates that convey messages that the State supports." 576 U.S. at 232, 135 S.Ct. 2239 (Alito, J., dissenting). That was not enough to persuade the majority that Texas failed to exercise sufficient control over its specialty license plates.

Further, the level of control exerted over personalized license plates here is significantly greater than that exerted over the trademarks in *Tam* or the flags in *Shurtleff*. In *Tam*, trademark examiners could reject trademarks that were disparaging, but they did not "inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register." 582 U.S. at 235, 137 S.Ct. 1744. Here, the Department is statutorily prohibited from issuing "any license plate commemorating any practice which is contrary to the public policy of the state." Tenn. Code Ann. § 55-4-210(d)(1). And the Department has identified profanity, violence, sex, illegal substances, derogatory slang terms, and racial or ethnic slurs as objectionable categories.

The problem for Boston in *Shurtleff* was that it did not actively control the content of privately raised flags "at all." 596 U.S. at 256, 142 S.Ct. 1583. Its practice was to "approve flag raisings, without exception." *Id.* at 257, 142 S.Ct. 1583. It had "no written policies or clear internal guidance" regarding "what flags groups could fly and what those flags would communicate." *Id.* The city employee who handled applications did not "even see flags before the events," and the city "ha[d] no record of denying a request until Shurtleff's." *Id.* To be sure, the De-

partment's process for reviewing personalized plate applications has room for improvement. But even the imperfect process currently employed is a far cry from the complete lack of control that existed in *Shurtleff*.

Accordingly, the control factor also favors the State.

C.

Applying the three factors that the United States Supreme Court has traditionally employed in its government speech precedents, we conclude that personalized alphanumeric combinations on Tennessee's license plates are government speech. *Walker* necessarily looms large in our analysis. We are mindful that *Walker* "likely marks the outer bounds of the government-speech doctrine" and that we must "exercise great caution before extending [the Court's] government-speech precedents." *Tam*, 582 U.S. at 235, 238, 137 S.Ct. 1744. But we are not at liberty to overrule *Walker* or to distinguish it based on immaterial factual differences. The personalized plates "here in question are similar enough" to the specialty plates in *Walker* "to call for the same result." *Walker*, 576 U.S. at 213, 135 S.Ct. 2239 (concluding that "the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result").

At bottom, most of the arguments that Gilliam and her amici raise are attacks on *Walker* itself. Those arguments would be more properly directed to the United States Supreme Court, which is the only court with authority to overrule or abrogate that precedent. Our job is to faithfully apply *Walker*'s

reasoning to the facts of this case. *See, e.g.*, Bryan A. Garner et al., *The Law of Judicial Precedent* 27 (2016) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)). For the reasons explained above, the differences between Tennessee's personalized license plates and Texas's specialty licenses are not sufficiently material to cut us loose from that binding precedent.

We acknowledge that most of the courts that have considered whether personalized license plates are government speech after *Walker* have reached a contrary conclusion. *See Mitchell v. Md. Motor Vehicle Admin.*, 450 Md. 282, 148 A.3d 319, 325 (2016), *as corrected on reconsideration* (Dec. 6, 2016); *Overington v. Fisher*, 733 F. Supp. 3d 339, 343 (D. Del. 2024); *Ogilvie v. Gordon*, No. 20-cv-01707, 2020 WL 10963944, at *5 (N.D. Cal. July 8, 2020); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019); *Kotler v. Webb*, No. CV 19-2682, 2019 WL 4635168, at *8 (C.D. Cal. Aug. 29, 2019).

We disagree with those courts for two primary reasons. First, they failed to appreciate that the alphanumeric combinations on license plates are the government's way of communicating identifying information about the vehicle. *See, e.g.*, *Mitchell*, 148 A.3d at 326 (concluding that the history factor favored the plaintiff because "the State has not used vanity plates to communicate any message at all"); *Kotler*, 2019 WL 4635168, at *6 (concluding there was no "history of states using the *customized* registration number configurations to speak"); *Hart*, 422 F. Supp. 3d at 1232 (concluding that "license plate *numbers*, separate and distinct from license plate *de-*

signs, have [not] historically been used to communicate messages from the State").

Second, they departed from *Walker* with respect to the control factor based on immaterial distinctions. In *Mitchell*, for example, Maryland's high court concluded that the State did not actively control the message on personalized plates even though it exercised final approval authority. 148 A.3d at 327. The court distinguished *Walker* on the ground that "Texas ... had 'sole control' over the content of a specialty plate," whereas vehicle owners create the message on personalized plates. *Id.* But even in Texas's specialty plate program, private entities could submit draft designs for plates. *Walker*, 576 U.S. at 205, 135 S.Ct. 2239. It was Texas's "final approval authority" over the designs that persuaded the Court in *Walker* that Texas maintained control over the messages on specialty plates. *Id.* at 213, 135 S.Ct. 2239. And in *Kotler*, a federal district court concluded that California lacked effective control over its personalized plates notwithstanding that California had final approval authority; it did so based largely on the sheer number of personalized plates approved in California. *Kotler*, 2019 WL 4635168, at *7 (noting that California had approved hundreds of thousands of personalized plates). *Walker*, however, rejected the notion that the government speech analysis depends on "the precise number" of messages at issue. 576 U.S. at 217, 135 S.Ct. 2239. Texas "allow[ed] many more license plate designs than the city in *Summum* allowed monuments." *Id.* But "Texas's desire to communicate numerous messages d[id] not mean that the messages conveyed [were] not Texas's own." *Id.* Still other courts erroneously concluded that the

State's control over personalized plates was more akin to the level of control exerted in *Tam* than in *Walker*. *See Overington*, 733 F. Supp. 3d at 346; *Ogilvie*, 2020 WL 10963944, at *5. In reality, the facts in these cases were much more similar to *Walker*.

Other courts have concluded, after *Walker*, that personalized plates are government speech. *See Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1204–05 (Ind. 2015); *Odquina v. City & Cnty. of Honolulu*, No. 22-cv-407, 2022 WL 16715714, at *9 (D. Haw. Nov. 4, 2022), *aff'd on other grounds*, No. 22-16844, 2023 WL 4234232 (9th Cir. June 28, 2023). Like us, those courts found that "alphanumeric combinations provide identifiers for public, law enforcement, and administrative purposes" and therefore have historically been used to convey government speech. *Vawter*, 45 N.E.3d at 1204; *Odquina*, 2022 WL 16715714, at *9 (concluding that the "[a]lphanumerics on Hawai'i's license plates ... enable members of the public, law enforcement, and administrative officers to identify vehicles"). Also like us, those courts found that the government exerted effective control over personalized license plates because it had final approval authority and actively exercised that authority by reviewing and, at times, rejecting requested combinations. *Vawter*, 45 N.E.3d at 1206; *Odquina*, 2022 WL 16715714, at *10–11.

We find the reasoning of *Vawter* and *Odquina* persuasive and agree with those courts that the alphanumeric combinations on personalized license plates constitute government speech under *Walker*.

CONCLUSION

Under a faithful application of *Walker* and other applicable United States Supreme Court precedents, the alphanumeric combinations on Tennessee's personalized license plates are government speech. The Court of Appeals erred by holding otherwise. We therefore reverse that decision and reinstate the trial court's judgment in favor of the State.

APPENDIX B

Court of Appeals of Tennessee,
at Nashville

Leah GILLIAM
v.
David GERREGANO, Commissioner of the Tennessee Department of Revenue et al.

No. M2022-00083-COA-R3-CV
February 8, 2023 Session
FILED June 1, 2023

Appeal from the Chancery Court for Davidson County, Special Panel, No. 21-606-III, Ellen Hobbs Lyle, Chancellor; Doug Jenkins, Chancellor; and Mary L. Wagner, Judge

Daniel A. Horwitz, Lindsay Smith, Melissa K. Dix, and David Hudson, Jr., Nashville, Tennessee, for the appellant, Leah Gilliam.

Jonathan Skrmetti, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; J. Matthew Rice, Special Assistant to the Solicitor General; and Travis J. Royer, Office of the Solicitor General Honors Fellow, for the appellees, the State Attorney General and Reporter and the Tennessee Department of Revenue.

Edd Peyton, Memphis, Tennessee, and Adam Steinbaugh, Philadelphia, Pennsylvania, for the Amicus Curiae, Foundation for Individual Rights and Expression.

Kristi M. Davis, J., delivered the opinion of the Court, in which Frank G. Clement Jr., P.J., M.S., and W. Neal McBrayer, J., joined.

Kristi M. Davis, J.

Citizens of Tennessee may apply to the Tennessee Department of Revenue (the "Department") for license plates featuring unique, personalized messages. Tennessee Code Annotated section 55-4-210(d)(2) provides that "[t]he commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading." After her personalized plate featuring the message "69PWNDU" was revoked by the Department, Leah Gilliam ("Plaintiff") filed suit against David Gerregano (the "Commissioner"), commissioner of the Department, as well as the then-Attorney General and Reporter. Plaintiff alleged various constitutional violations including violations of her First Amendment right to Free Speech. The Department and the State of Tennessee (together, the "State") responded, asserting, *inter alia*, that the First Amendment does not apply to personalized plate configurations because they are government speech. The lower court, a special three judge panel sitting in Davidson County, agreed with the State. Plaintiff appeals, and we reverse, holding that the personalized alphanumeric configurations on vanity license plates are private, not government, speech. We affirm, however, the panel's decision not to assess discovery sanctions against the State. Plaintiff's other constitutional claims are pretermitted and must be evaluated on remand because the panel did not consider any issues other than gov-

ernment speech. This case is remanded for proceedings consistent with this opinion.

Background

In 1998, the Tennessee General Assembly formalized Tennessee's personalized license plate program allowing Tennessee drivers to receive a customized license plate with their own message, instead of receiving a randomly assigned standard license plate. *See* Tenn. Code Ann. § 55-4-210 (2021); 1998 Tenn. Pub. Acts ch. 1063, § 1.

Plates with customized alphanumeric messages are commonly referred to as "vanity plates." Interested drivers send an application to the Department with their proposed combination of three to seven alphanumeric characters. The application goes to the Department's five-person "Inventory Unit" team to confirm that the configuration (1) is not already in use and (2) under Tennessee Code Annotated section 55-4-210(d)(2), does not "carry connotations offensive to good taste and decency or that are misleading." The statute does not define "good taste and decency," and there is no written Department policy explaining "good taste and decency." However, Department employees understand the statute as barring configurations alluding to several categories: profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs. The record establishes, however, that vanity plates alluding to such topics slip through the cracks and are issued to drivers.[1] The Department is entitled to rescind "er-

[1] For example, the record establishes that the following vanity plates, among others, have been issued by the Department:

roneously issued" vanity plates. Tenn. Code Ann. § 55-5-117(a)(1).

To comply with its internal interpretation of "offensive to good taste and decency," the Department uses a number of resources in determining whether a requested vanity plate should be denied. These resources include Urban Dictionary and the "Objectionable Table," which is a lengthy list of previously denied configurations that the Department deems offensive to good taste and decency. Assuming the configuration is not already taken, if the reviewing Inventory Unit employee determines the configuration is not prohibited, the reviewing employee approves the application. Conversely, if the employee perceives the configuration as offensive, the application is referred to a supervisor.

In December of 2010, Plaintiff submitted a vanity license plate application requesting the following proposed configurations in order of her preference: (1) 69PWNDU, (2) PWNDU69, or (3) IPWNDU. The parties agree that the sequence "69" sometimes alludes to a sexual activity. Read aloud, "PWND" pronounces the slang word "pwned" (a misspelling of "owned"), which is common in video gaming communities and, essentially, means "to dominate."[2] Nevertheless, the Inventory Unit approved Plaintiff's application, and the Department issued her a license plate reading "69PWNDU" on January 31, 2011.

BUTNAKD; BIGRACK; TOPLS69; WYTRASH; 88POWER; ARYANSH; and CONFDRC.

[2] Plaintiff maintains in her brief that she is an "astronomy buff" and avid gamer. She posits that "69" refers to the year 1969 and the first moon landing.

Plaintiff displayed this license plate on her car for the next decade.

On May 7, 2021, the Department's then-Chief of Staff, Justin Moorhead, received a text message on his personal cell phone containing a picture of Plaintiff's license plate. The message stated: "If I could take a moment of personal privilege and acknowledge the tireless work that Justin does for his department[.] I commend you sir[.]" Mr. Moorhead responded: "Hahah thank you for your citizen[']s report[.]" Thereafter, Mr. Moorhead brought Plaintiff's license plate to the attention of the Inventory Unit. The Department reviewed the plate, determined it was erroneously issued to Plaintiff, and revoked it. The Department mailed Plaintiff a letter dated May 25, 2021, informing her the Department revoked her license plate and to contact Ms. Tammy Moyers at the Inventory Unit to request a replacement license plate. The letter also provided that Plaintiff would be unable to renew her vehicle registration until her plate was returned.

On June 28, 2021, Plaintiff filed the instant case in the Chancery Court for Davidson County (the "trial court"), naming the Commissioner in both his official and individual capacities as a defendant. Plaintiff also named the then-Tennessee Attorney General and Reporter, Herbert H. Slatery III, in his official capacity with regard to Plaintiff's requests for declaratory relief, as a defendant. Plaintiff claimed that Tennessee Code Annotated section 55-4-210(d)(2) was facially unconstitutional because it discriminated on the basis of content and viewpoint, and asked that the statute's enforcement be permanently enjoined. Plaintiff averred that the statute

violated her First and Fourteenth Amendment rights and that she "suffer[ed] injury and damages that are subject to redress under 42 U.S.C. § 1983." Plaintiff also claimed that section 55-4-210(d)(2) was unconstitutionally vague and that the Department's "summary, pre-hearing revocation[ ] violat[ed] [Plaintiff's] constitutional right to due process." As relief, Plaintiff asked the court for a temporary and permanent injunction on revocation of her license plate, a final judgment declaring section 55-4-210(d)(2) facially unconstitutional, damages in the amount of $1.00 per day that she was forbidden from displaying her vanity plate, and reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1983.

The case was referred to a special three judge panel (the "panel") on July 23, 2021.[3] The State answered the complaint on August 2, 2021. It claimed, *inter alia*, that vanity plate messages amount to government speech, meaning the messages are outside the scope of the First Amendment. It also argued that even if the vanity plates are not government speech, the license plates are a nonpublic fo-

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[3] Tennessee Code Annotated section 20-18-101 provides:

> (a) A civil action in which the complaint meets each of the following criteria must be heard and determined by a three-judge panel pursuant to this chapter:
>
> (1) Challenges the constitutionality of:
>
> (A) A state statute, including a statute that apportions or redistricts state legislative or congressional districts;
>
> * * *
>
> (2) Includes a claim for declaratory judgment or injunctive relief; and
>
> (3) Is brought against the state, a state department or agency, or a state official acting in their official capacity.

Tenn. Code Ann. § 20-18-101 (2021).

rum subject to certain government restrictions. The Department also asserted that Commissioner Gerregano had qualified immunity from the suit.

Leading up to the hearing on Plaintiff's request for a temporary injunction, the parties proceeded with discovery, which became contentious. On July 9, 2021, Plaintiff sent the State requests for production of documents, including, *inter alia*, a request for complaints regarding Plaintiff's personalized license plate received by the Department. The Department did not disclose Mr. Moorhead's text messages and responded that "the [Plaintiff] may infer that there were no written complaints regarding her plate from non-parties to the litigation."

Plaintiff's counsel deposed the Department's appointed representative, Demetria Michelle Hudson, for the first time on August 12, 2021. Ms. Hudson is the assistant director of vehicle services at the Department and was designated by the Department to give a deposition pursuant to Tenn. R. Civ. P. 30.02(6).[4] During this deposition, Plaintiff's counsel questioned Ms. Hudson at length regarding the Department's vanity plate approval process and standards. At one point, Plaintiff's counsel asked Ms.

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[4] Pursuant to this rule,

> [a] party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

Tenn. R. Civ. P. 30.02(6).

Hudson a series of questions about specific vanity plates that previously had been approved by the Department:

> Q. What about I69, can you tell me if that should be approved?
>
> MR. PORCELLO: Objection to the form. You can answer.
>
> THE WITNESS: No.
>
> BY MR. HORWITZ:
>
> Q. Can you tell me if 69 -- or, sorry, if PONY69 should be approved?
>
> MR. PORCELLO: Objection to the form. You can answer.
>
> THE WITNESS: No.

This line of questioning continued for several iterations, Ms. Hudson each time responding "No." Following the deposition, Ms. Hudson furnished an errata sheet correcting her answers to these questions, indicating that the answer should have been "No, it should not be approved." Plaintiff later filed a "Motion to Strike [Ms. Hudson's] Non-Compliant Errata Sheet," claiming that the new answers were supplied by the Department's counsel. Plaintiff also filed a motion to exclude a declaration made by Ms. Hudson and attached to one of the Department's pleadings, claiming that it was not sworn and was directly contradictory to Ms. Hudson's deposition testimony. On August 25, 2021, the panel entered an order providing that it would not rule on Plaintiff's motions, but rather that the parties would argue the motions at the hearing for the temporary injunction, which was held on August 27, 2021.

Following the August hearing, the panel entered an order on September 2, 2021, denying Plaintiff's request for a temporary injunction. In pertinent part, the order provides:

> After considering the oral argument of Counsel, the evidence of record, and applying the law and conferring, the Panel ORDERS that the Plaintiff's application for a temporary injunction is denied. The Panel finds and concludes that the Plaintiff's license plate is government, not private, speech, and therefore the Department is not barred by the Free Speech Clause of the First Amendment to the U.S. Constitution from determining the content of the Plaintiff's license plate, particularly based on the evidence in the temporary injunction record of this case that use of the numbers "69" on Tennessee license plates is routinely disallowed and revoked by the Department because of the widely recognized sexual connotation to a viewer.
>
> In addition, with respect to the Plaintiff's Motion in Limine to Exclude the Declaration of [Ms.] Hudson and Plaintiff's Motion to Strike [Ms.] Hudson's Non-Compliant Errata Sheet, filed August 24, 2021, it is ORDERED that those motions are denied. The Panel overrules exclusion of the [Ms.] Hudson Declaration, as urged in the Plaintiff's motion in limine, because the Panel finds the oversight of omission of Tennessee Civil Procedure Rule 72 has been cured with the filing of a Supplemental Declaration. In addition the Panel concludes the Declaration does not contradict Ms. Hudson's depo-

> sition testimony upon application of the Department's explanation that approval and use of license plates similar to the Plaintiff's are a mistake. Finally the Court finds Ms. Hudson has knowledge not only of her personal observations but those reported to her by Department employees or in Department records based upon her authority as Assistant Director. The Panel also overrules the Plaintiff's motion for exclusion of the errata sheet to Ms. Hudson's deposition. Tennessee Civil Procedure Rule 30.05 allows not only changes to form but also substance.

In determining that the alphanumeric configuration on vanity license plates constitutes government speech, the panel relied heavily on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). It reasoned that inasmuch as the vanity plates are government speech, forum analysis was unnecessary because the First Amendment does not apply. Plaintiff asked the panel's permission to appeal the interlocutory ruling, specifically the issue of government speech, but the panel denied this request.

The parties' discovery dispute continued. Based on the issues with Ms. Hudson's errata sheet, Plaintiff sought to re-depose her. The panel agreed, noting in an order entered October 5, 2021 that "the [Department] opened the door with the changes made on the errata sheet to Ms. Hudson's deposition." Consequently, Ms. Hudson was deposed a second time on December 3, 2021. On December 5, 2021, Plaintiff filed a Motion for Discovery Sanctions. First, Plaintiff claimed that Ms. Hudson was a "woefully unpre-

pared 30.02(6) witness" because she could not testify adequately about the Department's affirmative defenses. For example, when asked about whose speech was on Plaintiff's vanity plate, Ms. Hudson agreed that it was Plaintiff's own unique message, not the government's message. Plaintiff also asserted that in Ms. Hudson's second deposition, she contradicted the errata sheet furnished following the first deposition. Specifically, at the second deposition, Plaintiff's counsel again asked Ms. Hudson a series of questions about whether certain configurations should be approved, given that on the errata sheet, Ms. Hudson was able to say that certain configurations should be denied. Upon being presented with the same task in the second deposition, however, Ms. Hudson maintained that she could not answer such questions without the "tools" used by the Department to screen vanity plate applications. Based on this development, Plaintiff maintained in her motion for discovery sanctions that "[i]n an effort to undo case-dispositive admissions, Ms. Hudson-after consultation with Defendants' counsel-submitted a fraudulent errata sheet that she [later] admitted is not accurate." Plaintiff asked the panel to hold Ms. Hudson to her original deposition testimony. Finally, Plaintiff argued in her motion that the Department should be sanctioned for failing to disclose the Justin Moorhead texts from May of 2021, which the Department eventually had sent to Plaintiff's counsel on November 17, 2021.[5] According to Plaintiff, the

[5] Plaintiff averred in her motion that disclosing the text messages so close to the end of discovery was an attempt to "prevent [Plaintiff] from deposing the Department's Chief of Staff regarding the matter."

Department "concealed critical and material evidence, then lied about the reason they had done so."

Naturally, the Department filed a response to the motion for sanctions. The Department claimed that the discovery discrepancies were inadvertent and that Plaintiff's counsel asked Ms. Hudson for legal conclusions throughout both of her depositions. Regarding the Justin Moorhead texts, the Department averred that it disclosed the texts as soon as it became of aware of them and did so without any prompting or request by Plaintiff. Along with its response, the Department filed a declaration by Tammie Moyers, the Manager of the Inventory Unit. This declaration explained how the Department obtained the Justin Moorhead texts, noting that Mr. Moorhead first made an oral statement about Plaintiff's vanity plate to the Inventory Unit in May of 2021. Ms. Moyers maintained that the Department became aware of the text messages "during the course of trial preparations" and came to possess same on November 17, 2021, the same day counsel for the Department sent them to Plaintiff's counsel.

On December 7, 2021, the panel entered an order ruling on the discovery issues and other pending pretrial motions. Most pertinent to the issues on appeal, the panel denied Plaintiff's request for discovery sanctions:

> [Plaintiff's motion] is denied because it is not clear from the pretrial record that the Defendants submitted a fraudulent errata sheet and concealed critical and material evidence and then "lied about the reason why they had done so," as asserted by the Plaintiff for pretrial exclusion of a defense by the Defendants. The De-

> fendants have asserted competing explanations. It will take a trial with the Panel viewing witnesses and making credibility determinations to decide whether wrongful intentional conduct by the Defendants transpired. The Panel therefore cannot rule on this pretrial.

The bench trial was held December 8 and 9, 2021. The panel heard testimony from Ms. Hudson and Ms. Moyers. The panel also heard from Plaintiff's expert witness, Alan Secrest, who testified about a poll he conducted on Tennessee citizens. The results of the poll established that eighty-seven percent of people surveyed believe vanity plates display the respective driver's unique message, as opposed to a government message.

The panel took the case under advisement and entered a final order on January 18, 2022. The panel held that the alphanumeric configurations on vanity license plates are government speech because they convey government agreement with the message displayed. Further, license plates are "government mandated, government controlled, and government issued IDs that have traditionally been used as a medium for government speech." Inasmuch as the message on the plate amounts to government speech, the panel concluded that the "Free Speech Clause ... does not regulate government speech[,]" and thus "[t]he constitutional rights the Plaintiff claims in her complaint to have been violated are not triggered or implicated[.]" Finally, although it recognized that the analysis was unnecessary, the panel "for completeness" found that Commissioner Gerregano is entitled to qualified immunity.

Plaintiff timely appealed to this Court.

Issues

Plaintiff raises the following issues on appeal, which are taken verbatim from her appellate brief:

1. Whether the trial court erred by concluding that personalized plates are government speech.

2. Whether Tenn. Code Ann. § 55-4-210(d)(2) unconstitutionally discriminates on the basis of both content and viewpoint in violation of the First and Fourteenth Amendments.

3. Whether Tenn. Code Ann. § 55-4-210(d)(2) is unconstitutionally vague in violation of the Fourteenth Amendment.

4. Whether, as applied to Plaintiff, Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate Plaintiff's Fourteenth Amendment right to procedural due process.

5. Whether the trial court erred by failing to accord any weight to the case-dispositive admissions from the Department's Tenn. R. Civ. P. 30.02(6) depositions.

6. Whether the trial court erred by failing to assess discovery sanctions.

7. Whether the trial court erred by granting the Defendant Commissioner qualified immunity regarding Plaintiff's damages claim.

8. Whether Plaintiff is entitled to her attorney's fees and costs incurred both in the trial court and on appeal.

Discussion

Standard of review

> In a non-jury case such as this one, appellate courts review the trial court's factual findings de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). We review the trial court's resolution of questions of law de novo, with no presumption of correctness.

Kelly v. Kelly, 445 S.W.3d 685, 691–92 (Tenn. 2014). Further,

> "[w]hen analyzing the constitutionality of a statute, [the appellate courts] review the issue *de novo* with no presumption of correctness to the lower court's legal conclusions." [*Hughes v.*] *Tenn. Bd. of Prob. and Parole*, 514 S.W.3d [707, 712 (Tenn. 2017)] (citing *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009)).

Fisher v. Hargett, 604 S.W.3d 381, 395 (Tenn. 2020).

Government versus private speech

The first issue Plaintiff raises is whether the panel erred in concluding that vanity license plate messages constitute government speech.

The distinction between government and private speech is imperative because "when the government speaks for itself, the First Amendment does not demand airtime for all views." *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1587 (2022). Stated differently, "'the Free Speech Clause does not regulate

government speech.'" *Matal v. Tam*, 582 U.S. 218, 234 (2017) (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009)). While the First Amendment "'forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,' ... imposing a requirement of viewpoint-neutrality on government speech would be paralyzing." *Matal*, 582 U.S. at 234 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)). Indeed, " '[i]t is not easy to imagine how government could function if it lacked the freedom' to select the messages it wishes to convey." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) (quoting *Summum*, 555 U.S. at 468); *see also Matal*, 582 U.S. at 234 ("When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.").

While "essential[,]" the government speech doctrine is also "susceptible to dangerous misuse." *Matal*, 582 U.S. at 235. As Justice Alito aptly noted in writing for the *Matal* majority,

> [i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

Id. "[C]ourts must be very careful when a government claims that speech by one or more private speakers is actually government speech." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring). "When that occurs, it can be difficult to tell whether the govern-

ment is using the doctrine 'as a subterfuge for favoring certain private speakers over others based on viewpoint[.]'" *Id.* (quoting *Summum*, 555 U.S. at 473).

Distinguishing government and private speech is "not always clear[,]" *Shurtleff*, 142 S. Ct. at 1587, and "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech[.]" *Summum*, 555 U.S. at 470. The line may "blur[,]" for example, when "a government invites the people to participate in a program." *Shurtleff*, 142 S. Ct. at 1589. In *Shurtleff*, the Supreme Court articulated a test for differentiating government and private speech in such situations:

> [W]e conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. *See Walker*, 576 U.S. at 209–214.

Id. at 1589–90.

In the present case, the panel relied primarily on two cases, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), and *Commissioner of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015), in concluding that vanity

license plate messages are government speech. On appeal, the parties dispute the interpretation of these two cases and several others. Insofar as the parties agree that *Walker* and several other government speech cases bear heavily here, a discussion of that line of cases is helpful.

We begin with *Pleasant Grove City, Utah v. Summum* because *Walker*, the case primarily relied on by the panel, was decided in large part based on *Summum*. At issue in *Summum* were privately funded and donated monuments placed in a park. Summum, a religious organization, sought to have a monument honoring the "Seven Aphorisms of SUMMUM" erected in a large public park in Utah. *Summum*, 555 U.S. at 465. At the time, the park contained several monuments, many of which had been "donated by private groups or individuals." *Id.* at 464. Summum's proposed stone monument was "similar in size and nature to the Ten Commandments" monument already on display in the park. *Id.* at 465. The city denied Summum's request, and Summum filed suit, asserting that the city had violated the Free Speech Clause of the First Amendment. When Summum was denied a preliminary injunction in the district court, it appealed to the Tenth Circuit, which reversed. The Supreme Court granted certiorari and reversed the Tenth Circuit, reasoning that the monuments are government speech not subject to the strictures of the First Amendment.

First, the Court noted that the private funding of the monuments did not alter the analysis because the government may "express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."

Id. at 468. Second, the Court expounded on the public's traditional understanding of monuments, noting that "[a] monument, by definition, is a structure that is designed as a means of expression.... [T]hroughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." *Id.* at 470, 471. Further, "[c]ity parks ... commonly play an important role in defining the identity that a city projects to its own residents and to the outside world[,]" *id.* at 472, and "the City [at issue had] effectively controlled the messages sent by the monuments in the [p]ark by exercising final approval authority over their selection." *Id.* at 473 (quotations and citation omitted). Finally, the Court also noted that spatial issues affected its analysis–"public parks can accommodate only a limited number of permanent monuments." *Id.* at 478.

Several years later, the Court decided *Walker*, which dealt with specialty license plate designs. Historically, the State of Texas "offer[ed] automobile owners a choice between ordinary and specialty license plates." 576 U.S. at 203. Under the program, groups could "propose a plate design, comprising a slogan, a graphic, or (most commonly) both." *Id.* The specialty plates were subject to approval by the Texas Department of Motor Vehicles Board ("DMVB"). In 2009, the Texas chapter of the Sons of Confederate Veterans ("SCV") applied for a specially designed license plate featuring, *inter alia*, "a square Confederate battle flag framed by the words 'Sons of Confederate Veterans 1896.'" *Id.* at 206. This began a dispute with the DMVB, who refused to issue the specialty plates, resulting in a lawsuit by SCV

against the DMVB and its chairman. SCV maintained that the DMVB violated the Free Speech Clause of the First Amendment through illegal viewpoint discrimination, but the district court sided with the DMVB. "A divided panel of the Court of Appeals for the Fifth Circuit reversed[,]" holding that "Texas's specialty license plate designs are private speech and that the [DMVB], in refusing to approve SCV's design, engaged in constitutionally forbidden viewpoint discrimination." *Id.* at 206–07.

On appeal, the Supreme Court reversed, finding that the specialty license plates were government speech and that the DMVB did not violate the First Amendment in rejecting SCV's proposed design. Relying heavily on *Summum*, the *Walker* Court again rejected the notion that the involvement of private parties in the design proved dispositive. Comparing the specialty plate designs to monuments, the Court also explained that "the history of license plates shows that ... they long have communicated messages from the States." *Id.* at 210–11. For example, the Texas legislature previously had approved specialty plate designs with messages such as "Read to Succeed" and "Texans Conquer Cancer." *Id.* at 212. Further, the Court reasoned that insofar as license plates are required and issued by the State, "Texas license plate designs 'are often closely identified in the public mind with the [State].'" *Id.* (quoting *Summum*, 555 U.S. at 472). Accordingly, "Texas license plates are, essentially, government IDs." *Id.*

Third, the Court noted that "Texas maintains direct control over the messages conveyed on its specialty plates[,]" and the DMVB had "actively exercised this authority." *Id.* at 213. Ultimately, the

Court concluded that because the specialty plate designs are presented "on government-mandated, government-controlled, and government-issued IDs that have been traditionally used as a medium for government speech," they too constitute government speech. *Id.* at 214. Nonetheless, and important to the case at bar, the *Walker* Court expressly noted that the opinion dealt exclusively with specialty license plate designs, and not with "the personalization program[,]" or, vanity plates. *Id.* at 204.

While Justice Alito wrote the majority opinion in *Summum*, concluding that privately funded monuments placed in public parks are government speech, he dissented in *Walker*. Justice Alito reasoned that the *Walker* Court "badly misunderstands *Summum*[,]" *id.* at 227, inasmuch as "[t]he history of messages on license plates is quite different" from that of monuments, which have always been used to express a government message. *Id.* at 230. Justice Alito further explained:

> The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. This is dangerous reasoning. There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and government blessing (or condemnation) of private speech.

Id. at 232 (internal citation omitted). What Justice Alito primarily took issue with, however, was the all-or-nothing approach used by the majority. Specifically, he argued that "[w]hile all license plates unquestionably contain *some* government speech ... the

State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages." *Id.* at 222–23. Regulating such messages in the manner Texas did, Justice Alito posits, "is blatant viewpoint discrimination." *Id.* at 223.

Government speech reared its head again, albeit in a slightly different context, in *Matal v. Tam*, 582 U.S. 218 (2017). There, the Supreme Court considered whether a disparagement clause in the Lanham Act, prohibiting the registration of trademarks disparaging any persons, living or dead, was invalid under the First Amendment. In that case, an Asian music group wanted to register its trademark as "The Slants," purportedly to "reclaim the term and drain its denigrating force" as to Asians. 582 U.S. at 223. The federal Patent and Trademark Office (the "PTO") denied the band's application based on the disparagement clause. When the case made its way to the Supreme Court, the majority rejected the government's argument that registered trademarks are government speech and found the disparagement clause facially invalid under the First Amendment. Justice Alito, again writing for the majority, noted first the PTO's lack of involvement in creating the marks. *See id.* at 235 ("The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the [disparagement clause], an examiner may not reject a mark based on the viewpoint that it appears to express."). The Court described the government's government speech argument as "far-fetched":

> If the federal registration of a trademark makes the mark government speech, the Fed-

> eral Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

Id. at 236 (footnote and citations to brief omitted). Distinguishing the marks from the monuments at issue in *Summum*, the Court explained that "[t]rademarks have not traditionally been used to convey a [g]overnment message[,]" and "there is no evidence that the public associates the contents of trademarks with the Federal Government." *Id.* at 238.

The Court also distinguished *Matal* from *Walker*, noting that the latter "likely marks the outer bounds of the government-speech doctrine." *Id.* at 238. Moreover, trademarks are different from Texas' specially designed license plates because

> license plates have long been used by the States to convey state messages. Second, license plates are often closely identified in the public mind with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of government ID. Third, Texas maintained direct control over the messages conveyed on its specialty plates. As explained above, none of these factors are present in this case.

Id. at 238 (cleaned up). Ultimately, "[t]rademarks are private, not government, speech." *Id.* at 239.

Finally, in 2022, the Supreme Court again addressed government versus private speech in

Shurtleff v. City of Boston, Mass., mentioned *supra.* There, a Christian organization called Camp Constitution sought to erect a flag with its logo outside of Boston's city hall. This was not unusual–"since at least 2005, the city has allowed groups to hold flag-raising ceremonies on [the city hall] plaza." *Id.* at 1588. These events typically lasted "a couple of hours." *Id.* When Camp Constitution sought permission to hold its event and fly its flag, the commissioner of Boston's Property Management Department denied the request. Camp Constitution and its director, Harold Shurtleff, sued the city and the commissioner, arguing that the denial of the flag raising violated, among other things, the Free Speech Clause of the First Amendment. The district court held that flying a private organization's flag from the city's flag pole was government speech, and the First Circuit affirmed.

The Supreme Court determined, pursuant to the factor test noted *supra*, that the city's flag-raising program was not government speech. Applying the first factor, the Court explained that the contents of flags, as well as their "presence and position[,] have long conveyed important messages about government." *Id.* at 1590. The Court then noted, however, that "[w]hile this history favors Boston, it is only our starting point." *Id.* at 1591. Turning to the second factor, public perception, "circumstantial evidence [did] not tip the scale." *Id.* In that case, because the city often flew private groups' flags along with the United States and Massachusetts flags, the Court reasoned that passersby might not necessarily associate the flags with the government. In *Shurtleff*, then, "evidence of the public's perception [did] not

resolve whether Boston conveyed a city message with these flags." *Id.*

Rather, *Shurtleff*'s analysis rises and falls on the third factor–"the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent." *Id.* at 1592. Here, the Court distinguished the case before it from *Walker*, noting that Boston 1) never previously requested changes to a flag-raising ceremony before approval; 2) never previously saw the flags before the events; 3) approved flag raisings without exception; 4) had no record of another denial of a flag raising; and 5) held no "written policies or clear internal guidance" regarding which groups could participate in the flag-raising events. *Id.* Boston's "lack of meaningful involvement in the selection of flags or the crafting of their messages [led the Court] to classify the flag raisings as private, not government, speech[.]" *Id.* at 1593.

In the wake of *Walker*, several lower courts have considered the question squarely before us, namely, whether the foregoing cases establish that vanity license plate messages are government speech. Courts concluding in the affirmative are in the minority. *See, e.g.*, *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015) (extending *Walker* and concluding that personalized vanity license plate messages are government speech); *Odquina v. City and Cnty. of Honolulu*, No. 22-cv-407-DKW-RT, 2022 WL 16715714, at *9 (D. Haw. Nov. 4, 2022) (applying *Vawter* to conclude that vanity plates are government speech, noting that "*Walker*'s three-part test is as substantively relevant to personalized alphanumerics as it was to plate design"). However, a

majority of lower courts ruling on the issue has held that *Walker* does not extend to vanity license plate messages, with some holding that the personalized alphanumeric configurations on such plates are private speech in a nonpublic forum. *See, e.g.*, *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) ("*Walker* itself insisted that its holding on government speech did not extend beyond those specialty plates and it took pains not to express an opinion on vanity plates .... They are not government speech and *Walker* has no applicability here."); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) (quoting *Matal*, 582 U.S. at 238 ("*Walker* 'likely marks the outer bounds of the government-speech doctrine' .... Consequently, this Court finds that vanity plates are private speech.")); *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165, 172 (2015), *aff'd*, 148 A.3d 319 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016) (vanity license plates do not constitute government speech, but "the State of Maryland did not intend to create a public forum of any type by enacting vanity plate legislation"); *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019) (agreeing with *Mitchell* and noting that "it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates").

Several of the opinions in this majority criticize *Vawter* and characterize the opinion as an outlier. *See Carroll*, 494 F. Supp. 3d at 167 ("I reject as wholly unpersuasive the reasoning of [*Vawter*], an apparent outlier[.]"); *Hart*, 422 F. Supp. 3d at 1232 ("[T]he *Vawter* court and the Defendant fail to address important differences between the specialized licenses

plates at issue in *Walker*, and the vanity plates at issue here."); *Mitchell*, 126 A.3d at 187 ("The problem with [*Vawter*'s] reasoning is that vanity plate messages that do not appear to be coming from the government are the rule, not the exception.").

Against this backdrop, we return to the case at bar. Having reviewed the record and above-cited authorities at length, we conclude that the panel below erred in categorizing alphanumeric configurations on vanity license plates as government speech.

Applying the *Shurtleff* factors, we look first to the history of the expression at issue. The State argues that license plates have long been used by the States to convey state messages and that "States have conveyed messages through both registration numbers on license plates and license plates more generally." The message that the State contends it is sending through vanity plates is not one necessarily dependent upon the alphanumeric configuration. Rather, the State posits that the message is simply one of identification. That is, regardless of the alphanumeric configuration, the "government message" is that the vehicle is lawfully registered with the State. On the other hand, Plaintiff claims that there is no evidence the State has ever used vanity license plates to communicate with the public. To this, the State avers that our analysis should focus on "the medium of expression, not the history of a 'program' related to the medium."

The State's argument does not hold water. The State wants to focus on the medium, but what is at issue here, specifically, is the alphanumeric configuration as opposed to the background of a specialized plate, the sticker communicating the month registra-

tion expires, or the state the plate belongs to. Vanity plates (that is, the use of personalized alphanumeric configurations chosen by the public) did not come into existence until 1998, and since then they communicate what the individual driver, not the government, chooses.

The State relies on *Walker* for the proposition that license plates have long been used to convey state messages. The State's reading of *Walker* is overbroad, however. In *Walker*, the Supreme Court expressly clarified early in the opinion that it was not addressing vanity license plates. 576 U.S. at 204 (emphasis added) ("Here we are concerned *only* with the second category of plates, namely specialty license plates, *not with the personalization program*."). As we understand the discussion of license plates following that caveat, then, it pertains to the history of license plate designs and slogans. Indeed, later in the opinion the Court extrapolated that "States have used license plate slogans to urge action, to promote tourism, and to tout local industries." *Id.* at 211. None of this addresses the alphanumeric configurations at issue with vanity plates. Moreover, and perhaps most importantly, only two years after the Court decided *Walker*, it clarified that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal*, 582 U.S. at 238.

Nonetheless, the State posits that we are required to consider the history of license plates generally:

Plaintiff claims that "Defendants failed to introduce any evidence that *personalized plate messages* have ever been used to convey a governmental message," focusing on the fact that "Tennessee's *personalized plate program* is a mere twenty-four years

old." (emphases added) (citing *Kotler v. Webb*, 2019 WL 4635168, at *6 (C.D. Cal. Aug. 29, 2019)). But the first factor focuses on the history of the medium of expression, not the history of a "program" related to the medium. *Shurtleff* did not focus on Boston's program for flag-raising ceremonies (which had only been in place since 2005); it analyzed "the history of flag flying, particularly at the seat of government." 142 S Ct. at 1588, 1590. Similarly, *Summum* looked generally at the "use[ ]" of "monuments to speak to the public," 555 U.S. at 470, and *Walker* focused on "the history of license plates," 576 U.S. 210.

Respectfully, we do not understand *Walker* to impose this requirement. *Walker* contains a detailed history of the Texas specialization program at issue, specifically pointing out that Texas oft uses specialty designs to promote certain messages, such as "Read to Succeed" and "Houston Livestock Show and Rodeo." While it is true that the Court examines the general history of the medium at issue, this is not to say that the particular program in question is ignored entirely. *See Shurtleff*, 142 S. Ct. at 1591 ("While this history favors Boston, it is only our starting point.... [W]e must examine the details of *this* flag-flying program."). Disregarding the history of the program at issue would also contravene the High Court's directive to conduct a "holistic inquiry ... driven by [the] case's context rather than the rote application of rigid factors." *Id.* at 1589.

Finally, we are unpersuaded by the State's position that it historically has communicated an "ID" message through the alphanumeric configurations on license plates. If this were true, the message on the vanity plates would be inapposite, and the State

would have no incentive to regulate said messages. Stated differently, to the extent the unique alpha-numeric configuration serves *only t*o identify a vehicle as lawfully registered, then it is unclear why the State has an interest in the phonetic message.

The Maryland Court of Special Appeals aptly addressed the "government ID" argument urged here:

> The registration number on a vanity plate is an identifier, as all license plate registration numbers are, but it is more than that. The combination of characters the vehicle owner selects creates a personalized message with intrinsic meaning (sometimes clear, sometimes abstruse) that is independent of mere identification and specific to the owner. Because it is the registration number that is being personalized, and registration numbers must be unique, the message on a vanity plate necessarily will be one-of-a-kind. Indeed, vanity plate messages are more "one-of-a-kind" than bumper stickers. At any given time, there may be multiple Maryland vehicles displaying a particular bumper sticker, but there only will be one Maryland vehicle displaying a particular vanity plate message.

Mitchell, 126 A.3d at 184. We further find persuasive the *Mitchell* court's reasoning that "historically, vehicle owners have used vanity plates to communicate their own personal messages and the State has not used vanity plates to communicate any message at all." *Id.* at 185. Notwithstanding the State's position that we are not to analyze the history of vanity plates specifically, the record before us contains no evidence that the State has ever used vanity license

plates to communicate government messages through the alphanumeric configurations. *See Shurtleff*, 142 S. Ct. at 1591 ("[W]e must examine the details of *this* flag-flying program."). While license plates as a whole undoubtedly contain some government speech, the alphanumeric configuration does not; both private and government speech can exist on government property.

That said, the State is correct that *Walker* provides "the history of license plates shows that ... they long have communicated messages from the States." 576 U.S. at 210–11. However, even assuming arguendo that the general history of license plates points to government speech, this factor does not carry the day. Indeed, our analysis "is not mechanical; it is driven by a case's context." *Shurtleff*, 142 S. Ct. at 1589. And other factors weigh more heavily under the circumstances of this case than the broad history of license plates. *See id.* at 1591 ("While [history] favors Boston, it is only our starting point."). For example, "whether the public would tend to view the speech at issue as the government's" militates in Plaintiff's favor here. *Id.*

Plaintiff correctly points out that no evidence in the record establishes that the public likely perceives the State to be speaking through vanity license plates, nor do we believe the State really wants to be perceived as the author of the various vanity plate messages. On the other hand, Plaintiff offered expert testimony at trial establishing that when two-hundred Tennesseans were polled, eighty-seven percent of them associated vanity plate messages with the driver of the respective vehicle as opposed to the

State.[6] Plaintiff also offered the testimony of George Scoville, a Tennessean who previously had obtained a vanity plate bearing the message "GSSIII." Mr. Scoville, the third of his name, testified that he obtained the vanity plate after his grandfather, George S. Scoville the first, passed away. The plate is Mr. Scoville's "way to just sort of honor [his grandfather] and sort of follow his practice of using his initials on his license plate of his vehicle." While not dispositive, the evidence proffered by Plaintiff at trial lends itself to the finding that members of the public perceive vanity license plate messages to be that of the vehicle driver. In addressing this factor, the *Shurtleff* Court discussed the scene that "[o]n an ordinary day, a passerby on Cambridge Street sees" outside Boston's City Hall. *Id.* In the context of this case, what Tennesseans see on an ordinary day are unique, personalized messages, albeit on government property, affixed to privately owned vehicles. We are unpersuaded that citizens, upon viewing

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[6] The polling expert, Alan Secrest, testified as follows about the poll:

> A. "When you see a personalized license plate that contains a combination of letters and numbers chosen by the car's owner, which of the following statements comes closer to your point of view? Statement A: The message featured on a personalized license plate represents the speech or views of the government or Statement B: The message featured on a personalized license plate represents the speech or views of the person who chose it"?
>
> Q. What were the results of that question in your poll?
>
> A. Almost unanimous. 87 percent chose Statement B, that is, that a personalized plate represents the speech or views of the person who chose it. Just 4 percent indicated it represented the speech or views of the government and 9 percent were not sure.

messages such as BIGRACK, TOPLS69, and WYTRASH, affixed to personal vehicles believe that the State is conveying a message to the public.[7]

Instead of offering evidence tending to establish the public's perception about vanity license plates, the State again relies on *Walker* and *Summum*:

> The same type of independent expression existed in *Walker* and *Summum*, but that did not transform government speech into private speech as a legal matter. Rather, the Supreme Court explicitly recognized that expression can be governmental speech *even if* a private party attempts to convey a different message through the same expression. *Summum,* 555 U.S. at 476 ("[T]he thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor."). Just as the monuments in *Summum* communicated government messages despite the different communicative intent of their donors, Tennessee's personalized license plates communicate messages from the State no matter what else the driver might intend to express.
>
> * * *
>
> [A]s a general matter, license plates are "closely identified in the public mind with the [State]." *Walker*, 576 U.S. at 212; *see also Matal*, 137 S.

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[7] In contrast to Plaintiff's proof, the only witnesses offered by the State were two Department employees. And the record shows that one of those witnesses, Ms. Hudson, gave inconsistent testimony throughout the pendency of this case regarding the Department's position on the source of the speech at issue.

> Ct. at 1760. The registration numbers on license plates "do not cease to be government speech simply because some observers may fail to recognize that [the] alphanumeric combinations are government issued and approved speech in every instance." *Vawter*, 45 N.E.3d at 1206.

We have already addressed the reasons why the State's heavy reliance on *Walker* (and thus *Vawter*) is misplaced--we review government speech cases for unique context, *Shurtleff*, 142 S. Ct. at 1589, and the mode of speech at issue here was not before the Court in *Walker* or *Summum*. Inasmuch as "we must exercise great caution before extending [ ] government-speech precedents[,]" *Matal*, 582 U.S. at 235, we cannot rubber-stamp the State's argument as the next natural iteration of the government speech doctrine. *See Summum*, 555 U.S. at 473 (acknowledging the "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint"). To that point, we understand *Matal* as rejecting, at least in part, the State's position that *Walker* and *Summum* may be extended beyond the circumstances at issue in those cases. To reiterate, in *Matal* the government argued that registering privately designed trademarks with the federal government amounted to government speech. In that case too, the government relied heavily on *Walker* and *Summum* and the Court rejected its position:

> Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if

> the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way.

582 U.S. at 239. The *Matal* Court also noted that, within the particular context of that case, "there is no evidence that the public associates the contents of trademarks with the Federal Government." *Id.* at 238. The same is true here, and we are unpersuaded by the State's position that *Walker* must be read broadly to mean that all information on any license plate is closely attributed to the State in the mind of the general public. While some license plate components are undeniably government speech—and the public view them as such (for example the month and expiration year)—others are personalized messages chosen by the taxpayer as a form of self-expression, and the public recognizes that as well.

Moreover, Plaintiff points out in her brief that many lower courts have soundly rejected the proposition that the public widely associates vanity license plate messages with the State. *See Kotler*, 2019 WL 4635168, at *7 ("[I]t strains believability to argue that viewers perceive the government as speaking through personalized vanity plates."); *Mitchell*, 126 A.3d at 185 ("The personal nature of a vanity plate message makes it unlikely that members of the public, upon seeing the vanity plate, will think the message comes from the State."). The State responds that Plaintiff "jettison[s] the holdings of *Summum* and *Walker* for non-binding district court cases (and arguments raised in dissent) simply because she prefers their outcome." We disagree. The idea that the public perceives messages on vanity license plates as

government speech is unsupported, this was not the holding of *Walker* or *Summum*, and the cases cited by Plaintiff address the issue squarely before this Court. The public perception factor militates against government speech.

Third, we look at the extent to which the State "has actively shaped or controlled the expression." *Shurtleff*, 142 S. Ct. at 1590. On the record before us, we cannot say that this factor militates heavily in favor of one side or the other. On one hand, our General Assembly has passed a statute allowing the Department to regulate vanity license plate messages. Citizens must apply to the Department and pay a fee in order to obtain same. Before the plate is issued, the Inventory Unit reviews the proposed configuration and consults several resources. In the event of confusion over whether the plate should be issued, the Unit consults a supervisor. The record contains a lengthy list of requested configurations that previously have been denied, suggesting the Department is, at times, heavy-handed in its regulatory authority. Further, as occurred here, the Department is authorized by statute to revoke plates it determines were issued in error. These circumstances are distinguishable from those in *Shurtleff*, in which the Court determined that the flag raising outside Boston City Hall was not government speech because Boston had a "come-one-come-all attitude—except, that is, for Camp Constitution's religious flag[.]" 142 S. Ct. at 1592–93.

Although the statutory framework allows the Department to approve or deny vanity license plate messages, the record establishes that in reality, the Department's oversight has been inconsistent. *See*

id. at 1592 ("[I]t is Boston's control over the flags' content and meaning that here is key[.]"). Plaintiff displayed the vanity plate at issue for a decade before the Department revoked it. Had an acquaintance of Mr. Moorhead not photographed the plate and texted the photo to Mr. Moorhead, it is unknown whether the plate would have been revoked at all. Further, the Department has no written policies about how to screen vanity plate applications for "good taste and decency." Rather, the record shows that the approval process depends largely upon the judgment of the particular Inventory Unit team member reviewing the application that particular day. The Department employees who testified at trial maintained that certain categories of messages are outright banned. Both Department witnesses testified that sexual activity, including the number sixty-nine, is one of these categories. Nonetheless, Plaintiff presented proof that there are numerous vanity license plates in circulation alluding to sexual activity. The members of the Inventory Unit team who testified at trial were unable to clarify these discrepancies, other than that the Unit is very busy. Primarily, the Department's witnesses mechanically maintained that vanity plate messages are government speech, while at the same time acknowledging that the plates display the driver's unique, personal message.

The State's control over the vanity license plate program is not as lax as the city's was in *Shurtleff*; indeed, in that case, the Court concluded that Boston did not control the message at issue "at all," and this factor was "the most salient feature" of that case. *Id.* at 1592. Nonetheless, the Department's actions also

cannot be fairly characterized as "actively" shaping or controlling the messages at issue. *Id.* at 1590. *Matal* is instructive here, because in that case the Court determined that trademarks are not government speech, despite the fact that there was a statutory framework in place to exclude or later revoke certain trademarks. 582 U.S. at 235–36. The PTO approved and registered all kinds of different marks without considering viewpoint, and it only rejected marks it deemed offensive. *Id.* The level of control exercised by the Department here is not comparable to the specially curated monuments at issue in *Summum* or specially designed license plates in *Walker*. Under all of these circumstances, we conclude that this factor does not significantly weigh in favor of or against either party.

Based on our holistic inquiry of this case, we conclude that the panel erred in determining that the alphanumeric configurations, distinct from license plates as a whole, are government speech. First, and contrary to the State's contentions, the Supreme Court has never addressed this specific question. Second, there is no evidence, and it "strains believability" that the public perceives messages on vanity plates as government messaging. *Kotler*, 2019 WL 4635168, at *7. Finally, notwithstanding the statutory framework for vanity license plate approval, the Department's shaping and control over vanity plate messaging has been inconsistent, at best.

Lastly, we have considered all of the foregoing against the backdrop of the Supreme Court's repeated warnings about the liberal expansion of the government speech doctrine. While "[t]he boundary between government speech and private expression

can blur[,]" *Shurtleff*, 142 S. Ct. at 1589, it has not done so here. The government speech doctrine is "susceptible to dangerous misuse" that we must guard against. *Matal*, 582 U.S. at 235. Messages on personalized vanity license plates are private, not government, speech. We reverse the panel as to this issue.

The parties dispute, in the alternative, whether vanity license plates are a nonpublic forum, and Plaintiff asserts that several of her constitutional rights were violated by the Department revoking her personalized license plate. In light of its conclusion that the plates are government speech, the panel below did not reach any of these issues. Nor did the panel reach the constitutionality of Tennessee Code Annotated section 55-4-210(d)(2). Consequently, in light of our decision that the panel erred regarding the government speech question, we deem it prudent to remand this case back to the panel for consideration of Plaintiff's constitutional claims, including her claim for attorney's fees pursuant to 42 U.S.C. § 1983, and challenges to Tennessee Code Annotated sections 55-4-210, 55-5-117, and 55-5-119.

The panel did address however, out of an abundance of caution, Commissioner Gerregano's qualified immunity defense. The panel reasoned that it was

> reasonable for the Commissioner to believe based on the state of the law at the time—especially *Walker* and *Vawter*—that personalized license plates are government speech and that revocation thus does not implicate First Amendment free-speech protections. Moreover, it was reasonable for the Commissioner to be-

> lieve based on the state of the law at the time—especially *Perry v. McDonald* and *Vawter*—that due process does not require a hearing before revoking a personalized license plate. For these reasons, even if the revocation of Plaintiff's personalized license plate were a constitutional violation, the Commissioner would be shielded from Plaintiff's claim for damages by the qualified immunity doctrine.

In the context of the panel's decision that vanity license plate messages are government speech, its conclusion about qualified immunity is well-reasoned. Nonetheless, per this Court's decision, the panel will have to re-evaluate Plaintiff's claims in an entirely different framework, to-wit, the strictures of the First Amendment and forum analysis. Under these circumstances, we deem it prudent to vacate the panel's decision regarding the Commissioner's qualified immunity defense and allow the panel the opportunity to revisit this issue under the appropriate framework.

Discovery Sanctions

The remaining issues raised on appeal deal with the discovery dispute detailed *supra.* Because these issues have nothing to do with government speech, the First Amendment, or Plaintiff's remaining claims, we will resolve Plaintiff's discovery issue on appeal.

To recap, Plaintiff filed a motion for discovery sanctions against the State on December 5, 2021, after Plaintiff deposed Department employee Ms. Hudson for the second time. As relevant, Plaintiff claimed that Ms. Hudson was unprepared at both

depositions and furnished a "fraudulent" errata sheet following the first deposition. Rather than impose sanctions, the panel determined that the issue was one of credibility that it would address at trial. In its final order, the panel found as follows:

> Plaintiff's Motion for Discovery Sanctions, filed December 5, 2021 and renewed at trial—Denied. As to the testimony of Director Hudson: her first deposition, her second deposition and her testimony at trial, the Panel places no weight on the testimony—for or against either party—because the testimony was confused, contradictory and in some areas uninformed. Nevertheless, having observed Director Hudson's demeanor and credibility from her in person testimony at trial, the Panel finds she was not fabricating, obfuscating or prevaricating. The inferences the Panel draws are that she is not knowledgeable about the legal doctrines of constitutional law of private and government speech, and she also does not know the details of the personalized license plate process outside of the specific work she does. In addition she was clearly intimidated by the questions posed by Plaintiff's Counsel. Moreover, considering Ms. Hudson's title of Assistant Director, it was not irrational or duplicitous for Defendants' Counsel to designate Ms. Hudson as a 30.02(6) representative. Further, it is not prejudicial to the Plaintiff that the Panel is not considering any part of Ms. Hudson's testimony, including parts damaging to the Defendants, because Ms. Hudson's testimony in some respect is cumulative of Ms. Moyers and of the Defendants' re-

> sponses to discovery, admitted as trial exhibits. Also the State website description of the configuration on personalized license plates, characterized as a damaging Defendants' admission by the Plaintiff, was admitted into evidence as a part of Trial Exhibit 1. The Panel therefore concludes that the Plaintiff has failed to demonstrate circumstances warranting an award of sanctions.

On appeal, Plaintiff claims that the panel erred by "failing to accord any weight to the case-dispositive admissions" from Ms. Hudson's deposition testimony, and "by failing to assess discovery sanctions."

First, we take no issue with the panel's decision to treat the discrepancies in Ms. Hudson's testimony as a credibility issue. Plaintiff's counsel had ample opportunity to and did cross examine Ms. Hudson about the inconsistencies in her testimony, resulting in the panel giving her testimony no weight. The panel was well within its authority to do so, as "the weight, faith, and credit to be given witnesses' testimony lies in the first instance with the trial court." *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007) (citing *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991)).

Further, while Ms. Hudson was deposed as a Tenn. R. Civ. P. 30.02(6) witness, Plaintiff cites no Tennessee cases, nor has our research revealed any, providing that the panel had to assess her credibility differently in light of that posture. Nor are we persuaded by Plaintiff's assertion that the panel should have treated Ms. Hudson's first deposition as binding as opposed to simply treating it as a credibility problem. Plaintiff is correct, and the panel aptly not-

ed, that Ms. Hudson's testimony throughout this case has been confused and contradictory. Nonetheless, we also agree with the panel that at many points, Ms. Hudson was asked for legal conclusions by Plaintiff's counsel.

Under all of the circumstances, the panel handled this issue appropriately. Trial courts have broad discretion over when and how to impose discovery sanctions. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004). "Such a discretionary decision will be set aside on appeal only when 'the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence.'" *Id.* (quoting *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999)). No abuse of discretion occurred here, and we affirm the panel's decision not to assess discovery sanctions.

Conclusion

The order of the Special Panel sitting in the Chancery Court for Davidson County is reversed in part, vacated in part, and affirmed in part. The case is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed to the State Attorney General and Reporter and the Tennessee Department of Revenue.

APPENDIX C

E-FILED 1/18/2022 12:31 PM
CLERK & MASTER
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IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT,
DAVIDSON COUNTY

LEAH GILLIAM, Plaintiff,
vs.
DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, and HERBERT H. SLATERY III, TENNESSEE ATTORNEY GENERAL,
Defendants.

No. 21-606-III
Chancellor Ellen Hobbs Lyle (Chief Judge)
Chancellor Doug Jenkins
Judge Mary Wagner

FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM DECEMBER 8-9, 2021 BENCH TRIAL; AND FINAL ORDER DISMISSING CASE WITH PREJUDICE

This lawsuit concerns the revocation of the Plaintiff's personalized license plate by the Tennessee Department of Revenue (the "Department"), who regulates such matters. The license plate contained the configuration, "69PWNDU." Determining that the plate could be a reference to sexual activity and dom-

ination, the Department revoked the Plaintiff's license plate under the authority of Tennessee Code Annotated section 55-4-210(d)(2). That section authorizes the Commissioner to refuse personalized license plate configurations that "may carry connotations offensive to good taste and decency." This lawsuit was then filed challenging the constitutionality of section 55-4-210(d)(2).[1]

Located in Part 2 "Special License Plates" of Title 55 of the Tennessee Code, "Motor and Other Vehicles," section 55-4-210(d)(2) is a statute pertaining to authorization and issuance of personalized license plates, also known as "vanity" license plates. The statute provides as follows (subsection (a) is also quoted for context).

> 55-4-210. Authorization; issuance by department.
>
> (a) The department is authorized to administratively issue personalized plates to qualified applicants; provided, that the minimum issuance requirements of § 55-4-202(b)(3) and all other requirements of this part are met.
>
> * * *
>
> **(d)(2) The commissioner shall refuse to issue any combination of letters, numbers**

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[1] The Plaintiff is also challenging the revocation of the license plate in an administrative proceeding under the Uniform Administrative Procedures Act as provided in Tennessee Code Annotated section 55-5-119(c). The lawsuit filed in the above captioned matter is a separate constitutional challenge to the revocation of the Plaintiff's personalized license plate pursuant to *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008) holding that facial constitutional challenges are to be decided by a court as opposed to the administrative agency.

> **or positions that may carry connotations offensive to good taste and decency or that are misleading** [emphasis added].

The Plaintiff's *Verified Complaint*, filed June 28, 2021, asserts that the Plaintiff's revoked personalized plate constituted private speech protected by the First Amendment to the U.S. Constitution and that Tennessee Code Annotated section 55-4-210(d)(2) regulating that speech violates the First Amendment and should be declared unconstitutional in three respects:

> — Count V(1) Violation of the First and Fourteenth Amendments (Content—and Viewpoint—Discrimination);
>
> — Count V(2) Violation of the Fourteenth Amendment (Unconstitutional Vagueness); and
>
> — Count V(3) Violation of the Fourteenth Amendment (Due Process).

In particular the Plaintiff asserts that because section 55-4-210(d)(2) is government regulation of private speech in a manner that is not viewpoint neutral and discriminates based upon viewpoint, strict scrutiny must be applied in analyzing the statute. The relief the *Verified Complaint* seeks is a declaratory judgment under Tennessee Code Annotated sections 29-14-102 and 106, 1-3-121, and 42 U.S.C. section 1983, a permanent injunction under Tennessee Civil Procedure Rule 65; and recovery of damages, costs and attorneys' fees.

The Defendants' position is that the Panel never reaches an analysis of the three constitutional violations asserted by the Plaintiff because those three

protections only apply to private speech. The Defendant's position is that the Plaintiff's revoked license plate constituted government speech which generally is not subject to the Free Speech Clause. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* ("*Walker*"), 576 U.S. 200, 201 (2015). Accordingly, the Plaintiff's three alleged constitutional violations (viewpoint discrimination, unconstitutional vagueness, and due process) are not implicated because the speech in issue is government speech. Alternatively, the Defendants assert that even when courts have found that personalized license plates are not government speech, they nevertheless consistently have determined that the plates are nonpublic forums. As to the Defendant Commissioner, the Defendants assert the defense that he is entitled to qualified immunity.

On December 8 and 9, 2021, a bench trial was conducted before the Three-Judge Panel ("Panel") assigned to the case.[2] Four witnesses testified in the following sequence: George S. Scoville, III—owner of a personalized license plate; Alan Secrest—expert witness in polling and polling methodology; Demetria Michelle Hudson (by deposition and in person)—Assistant Director of Vehicle Services for the Tennessee Department of Revenue and Defendants' Rule 30.02(6) designee; and Tammi Moyers—Vehicle Services Division Manager over the Inventory and Specialized Application Unit, reporting directly to Ms.

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[2] Pursuant to Tennessee Code Annotated section 20-18-101 the constitutional challenge made in this case was assigned by the Tennessee Supreme Court to a Three Judge Panel drawn from the three Grand Divisions of the State.

Hudson. Nineteen exhibits were admitted into evidence. At the conclusion of the trial, the Panel took the matter under advisement.

After considering the oral argument of Counsel, the evidence, and studying and applying the law and conferring, the Panel finds and concludes that the Plaintiff's license plate is government, not private, speech, and therefore the Department is not barred on constitutional grounds by the First Amendment to the U.S. Constitution from revoking issuance of the "69PWNDU" license plate. Because the speech in issue is government speech the Plaintiff's three causes of action: content and viewpoint discrimination, unconstitutional vagueness and due process are not implicated and must be dismissed. It is therefore ORDERED that the Plaintiff's *Verified Complaint* is dismissed with prejudice, and court costs are taxed to the Plaintiff.

In addition, with respect to motions filed pretrial but held in abeyance by the Panel until the conclusion of the trial, the Panel's rulings are as follows.

— *Plaintiff's Motion to Revise this Court's Clearly Erroneous "Conclu[sion] Because of the Denial of Certiorari by the United States Supreme Court*", filed December 4, 2021—The revision sought by the Plaintiff is to page 20 of the September 2, 2021 *Memorandum and Order Denying the Plaintiff's Application for a Temporary Injunction* wherein the Panel stated that one reason it concluded the specialty plate context of *Walker* was not a material distinction for this case was, "because of the denial of certiorari by the United States Supreme Court of the *Commission of Indiana Bureau of Motor*

Vehicles v. Vawter, 45 N.E.3d 1200 (Ind. 2015) case where the *Walker* three-part test was applied by an Indiana court to a personalized license plate." The Panel **GRANTS** the revision to the limited extent that the Panel acknowledges that a denial of certiorari by the United States Supreme Court of the case of *Commission of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015) is not a barometer/indicator of the U.S. Supreme Court's approval of the *Vawter* Court's determination that the content on Indiana's personalized plates constitutes government speech, but that the revision does not preclude the Panel from considering *Vawter* as persuasive authority, and the revision does not change the ultimate outcome herein that the speech in issue is government speech. The Panel acknowledges the admonition from Justice Frankfurter that no inferences may be drawn from a denial of certiorari. *See State of Maryland v. Baltimore Radio Show, Inc, et al*, 70 S.Ct. 252, at 255: " . . . this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." The Panel understands the admonition; however, the citation in the temporary injunction ruling to the U.S. Supreme Court's denial of certiorari was not the sole basis for the outcome in that proceeding or herein. *See infra* at 19-36. The Panel sees no impediment in Justice Frankfurter's

admonition to considering the reasoning of the *Vawter* Court as persuasive authority, so long as it is based on the circumstances and reasoning of the case (which is so) rather than the denial of certiorari by the United States Supreme Court.

— *Plaintiff's Motion for Discovery Sanctions*, filed December 5, 2021 and renewed at trial— **Denied.** As to the testimony of Director Hudson: her first deposition, her second deposition and her testimony at trial, the Panel places no weight on the testimony—for or against either party—because the testimony was confused, contradictory and in some areas uninformed. Nevertheless, having observed Director Hudson's demeanor and credibility from her in person testimony at trial, the Panel finds she was not fabricating, obfuscating or prevaricating. The inferences the Panel draws are that she is not knowledgeable about the legal doctrines of constitutional law of private and government speech, and she also does not know the details of the personalized license plate process outside of the specific work she does. In addition she was clearly intimidated by the questions posed by Plaintiff's Counsel. Moreover, considering Ms. Hudson's title of Assistant Director, it was not irrational or duplicitous for Defendants' Counsel to designate Ms. Hudson as a 30.02(6) representative. Further, it is not prejudicial to the Plaintiff that the Panel is not considering any part of Ms. Hudson's testimony, including parts damaging to the Defendants, because Ms. Hudson's testimony in some respect is cumula-

tive of Ms. Moyers and of the Defendants' responses to discovery, admitted as trial exhibits. Also the State website description of the configuration on personalized license plates, characterized as a damaging Defendants' admission by the Plaintiff, was admitted into evidence as a part of Trial Exhibit 1. The Panel therefore concludes that the Plaintiff has failed to demonstrate circumstances warranting an award of sanctions.

— *Defendants' Objections to Certain Questions in Ms. Hudson's Deposition*—**Denied as moot**. Having placed no weight on the testimony of Ms. Hudson, it is unnecessary for the Panel to rule on the numerous objections made by Defendants to the deposition testimony of Ms. Hudson.

The findings of fact and conclusions of law on which the above rulings are based are as follows.

Findings of Fact and Conclusions of Law

Tennessee's Personalized License Plate Process

As a condition precedent to operating a motor vehicle in the State of Tennessee, the vehicle must be registered in accordance with the requirements of Tennessee Code Annotated sections 55-4-101 *et seq*. Part of that process is that a motor vehicle is required to have registration plates for its operation. TENN. CODE ANN. § 55-4-101(a)(1). Part 2, of Chapter 4 "Registration and Licensing of Motor Vehicles," of Title 55 provides for "Special License Plates." This includes the issuance of a "Personalized Plate" defined as:

> (6) "Personalized plate" or "personalized license plate" means the class of cultural motor vehicle registration plates that features on each individual plate not less than three (3) nor more than seven (7) identifying numbers, letters, positions or a combination thereof for a passenger motor vehicle, recreational vehicle or truck of one-half or three-quarter-ton rating or, if authorized, not less than three (3) nor more than six (6) identifying numbers, letters, positions or a combination thereof for a motorcycle, as requested by the owner or lessee of the vehicle to which that plate is assigned.

To obtain a personalized license plate a vehicle owner completes an application to select alphanumeric combinations to be displayed on their license plate. Vehicle owners may submit up to three ranked choices for their preferred alphanumeric combination, subject to the approval of the Department. TENN. CODE ANN. § 55-4-210(c)(1) and (d)(2); TENN. COMP. R. & REGS. 1320-08-01-.02. The proposed combinations must be unique[3] and cannot include offensive or misleading content. TENN. CODE ANN. § 55-4-210(d)–(e). A personalized license plate must be approved by the Department before it can be displayed. TENN. CODE ANN. § 55-4-210; TENN. COMP. R. & REGS. 1320-08-01-.02. The Department must approve every personal license plate. TENN. CODE ANN. § 55-4-210; *see also* TENN. COMP. R. &

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[3] Personalized license plates "shall not conflict with or duplicate the registration numbers for any existing passenger, recreational, commercial, trailer or motor vehicle registration plates that are presently issued pursuant to statute, resolution, executive order, or custom." Tenn. Code Ann. § 55-4-210(e).

REGS. 1320-08-01-.02. As stated in Exhibit 2 to Trial Exhibit 1, the applicant requests the Department to approve a configuration of numbers and/or letters to be displayed on types of license plates designed by the State:

> In Tennessee, license plates can be personalized with your own unique message. For the regular Tennessee plate, you can have up to seven (7) characters in either any alpha/numero combination. The number of characters varies on Specialty License Plates, check the plate description for details. The online application, available at personalizedplates.revenue.tn.gov allows residents to select from more than 100 types of Tennessee license plates that are available to personalize. After selecting their plate design, customers then type in the desired configuration on their plate. They will know immediately if the configuration is available, based on a red or green box that will appear around the plate.

The application to obtain a personalized plate (Trial Exhibit 18) provides in bold, "Tennessee reserves the right to refuse to issue objectionable combinations."

At trial the Defendants presented the testimony of Tammi Moyers who testified to the process the State uses to review personalized license plates for compliance with the good taste and decency requirements of section 55-4-210(d)(2). Ms. Moyers is employed by the Department of Revenue as the Vehicle Services Division Manager over the Inventory and Specialized Applications Unit. Part of her job is to review applications for personalized plates. She reports directly to Demetria Michelle Hudson, the Vehicle

Services Assistant Director in the Department of Revenue who served as the Defendants' Tennessee Civil Procedure Rule 30.02(6) designee in this case for depositions and during the trial.

Ms. Moyers' testimony established that she is part of a five-person team which reviews the compliance of personalized plate applications with the statutory requirement that configurations issued by the Department shall not carry connotations offensive to good taste and decency, and shall otherwise comply with the requirements set forth in Tennessee Code Annotated section 55-4-210. If the reviewer does not recommend approval, the issue "moves up the chain" to the Assistant Director (Ms. Hudson) and Directors of the Division to also review it. If a configuration is reviewed for revocation, it is subject to review by the Department's legal counsel and the Commissioner.

Ms. Moyers' testimony established that in implementing Tennessee Code Annotated section 55-4-210(d)(2), management in the Department of Revenue has designated categories for the Inventory Unit to use in reviewing personalized plate applications for configurations that contain, allude to, or are audibly similar to any word or phrase with one or more of the following associations: profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs. These categories are not contained in a handbook or regulation. These categories have been identified by management in the Department for the reviewers to use. Ms. Moyers' testimony established that the Inventory Unit utilizes various resources to assist in its evaluation of personalized plate applications, including a table of configurations (the "Objectionable Table") (Trial

Exhibit 15). This is a collection of configurations that have previously been determined to carry connotations offensive to good taste and decency as prohibited by Tennessee Code Annotated section 55-4-210(d). Also Urban Dictionary is used.

Ms. Moyers' testimony established that it is the policy of the Department to reject configurations that include the sequence "69," because of its association with a sexual activity, unless "69" references a 1969 vehicle.

The historical context of personalized license plates in Tennessee[4] is that the State began issuing plates in 1915. In the century that followed, those plates were updated and changed several times. Tennessee case law establishes the facts that graphics were first used on Tennessee license plates in 1927, when the plate included a large, embossed outline of the shape of the State. Beginning in 1936, and continuing through 1956, Tennessee issued license plates that were shaped like the State. In 1977, Tennessee added the slogan "The Volunteer State" to its license plates. In 1989, Tennessee in-

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[4] These Tennessee historical facts are established in the work of James K. Fox, License Plates of the United States: A Pictorial History 1903–to the Present, pp. 94-95 (Interstate Directory Publ'g Co. 1997). Both the *Walker* and *Vawter* decisions relied on this publication. *Walker*, 576 U.S. at 211; *Vawter*, 45 N.E.3d at 1204-05. From these cases, the Panel takes judicial notice of these facts, which are "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). If, however, such facts are determined not to be admissible, they are not dispositive. There are many more facts the Panel relies upon for the application of *Walker* to this case.

corporated a three-star design taken from the Tennessee flag on its license plates. Tennessee's current standard passenger plate includes the name of the State, the slogan "The Volunteer State," and an image of green mountains used as the backdrop for the plate. In 1998, Tennessee significantly expanded its specialty-license plate program and began issuing cultural license plates, including collegiate license plates and personalized license plates. *See* 1998 Tenn. Pub. Acts., ch. 1063.

Plaintiff's Personalized Plate

Ms. Moyers' testimony and Trial Exhibits 18 and 19 established that on December 13, 2010, the Plaintiff applied for a personalized plate for a vehicle previously owned by or leased to her, which included the following requested plate configurations in order of the Plaintiff s preference: (1) 69PWNDU; (2) PWNDU69; and (3) IPWNDU. In the portion of the application requesting information about any special significance of the configuration, Plaintiff wrote "PWND=vid gaming term The first one is my google phone number." The application form contained the reservation in bold, "Tennessee reserves the right to refuse to issue objectionable combinations." Even though the requested content of the license plate contained "69," it was approved. On January 31, 2011, the Department issued a personalized license plate to Plaintiff with her first choice configuration, "69PWNDU." The Plaintiff has displayed the plate on her car for eleven years.

In May of 2021, the Director of Personnel of the Department, Justin Moorehead, received a text on his personal cell phone alerting Mr. Moorehead in a

joking manner about the Plaintiff's license plate. Thereafter, during a Zoom meeting on other Department issues, Mr. Moorehead identified to Ms. Hudson and some members of the Inventory Unit the Plaintiff's plate. Mr. Moorehead is not involved in the personalized license plate review process and was not involved in the review of the Plaintiff's plate that resulted in revocation. Ms. Moyers contacted the Department's legal staff. They and the Commissioner determined that the Plaintiff's plate should be revoked because it could be interpreted as a reference to sexual domination.

On May 25, 2021, the Department revoked the registration plate issued to Plaintiff with the following notification:

> **Re: Personalized License Plate 69PWNDU**
>
> Dear Leah,
>
> The Tennessee Department of Revenue (the "Department") is writing this letter to notify you that the above-referenced personalized plate has been deemed offensive. Pursuant to Tenn. Code Ann. § 55-5-117(a)(1) (2012) and Tenn. Code Ann. § 55-4-210(d)(2) (2012), the Department may revoke a personalized registration plate that has been deemed offensive to good taste or decency. Therefore, the Department hereby revokes the above-referenced plate.
>
> You may apply for a different personalized plate or request a regular, non-personalized plate to replace the revoked plate. The law requires you to immediately return the revoked plate. Tenn. Code Ann. § 55-5-119(a) (2012). . . .

> You will be unable to renew your vehicle registration until this plate has been returned.
>
> * * *

Trial Exhibit 20.

Ms. Moyers' testimony established that upon revocation, a vehicle owner may select another plate or be refunded the $35.00 application fee. Ms. Moyers' testimony established that the Plaintiff requested neither upon her plate being revoked.

The testimony of Ms. Moyers established that the Department has received no complaints by anyone that they were offended by the Plaintiff's plate during its continuous display for eleven years.

After the May 25, 2021 Department's revocation of the Plaintiff's personalized plate, the Plaintiff requested a hearing under the Uniform Administrative Procedures Act and Tennessee Code Annotated section 55-5-119(c) to challenge the revocation, and a contested case is proceeding. The Plaintiff also filed this lawsuit on June 28, 2021, challenging the facial constitutionality of Tennessee Code Annotated section 55-4-210(d)(2).

Law Cited by Counsel

In connection with the Plaintiff's June 28, 2021 *Application for Temporary Injunction*, the Panel thoroughly identified and analyzed the cases relied upon by each side. The legal authorities cited by Counsel have not changed. The Panel therefore repeats herein its summary and analysis of each side's legal authority.

As noted, the Plaintiff starts with a different premise than the Defendants. The Plaintiff's prem-

ise is that the configuration on her revoked license plate constituted private speech protected by the First Amendment to the U.S. Constitution. From that premise, the Plaintiff cites to California, Kentucky, Michigan, Rhode Island and New Hampshire federal and state court cases that have held prohibitions on personalized license plate configurations that carry connotations offensive to good taste and decency are facially unconstitutional as constituting viewpoint discrimination, and as overbroad and void for vagueness. The Plaintiff's citations include the following:

— Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment at 8, *Ogilvie v. Gordon*, No. 4:20-cv-01707-JST (N.D. Cal. Nov. 24, 2020), ECF No. 54 ("the Court holds that California's prohibition on personalized license plate configurations 'that may carry connotations offensive to good taste and decency' constitutes viewpoint discrimination under *Tam* and *Brunetti*.");

— *Carroll v. Craddock*, 494 F. Supp. 3d 158, 170 (D.R.I. 2020) ("the Court finds that Mr. Carroll has satisfied the criteria for issuance of a preliminary injunction on his claims that the R.I.G.L. § 31-3-17.1 is unconstitutional both as applied in this case and on its face as overbroad and void for vagueness.");

— *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168 (C.D. Cal. Aug. 29, 2019);

— *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001);

— *Hart v. Thomas*, 422 F. Supp. 3d 1227 (E.D. Ky. 2019);

— *Montenegro v. New Hampshire Div. of Motor Vehicles*, 166 N.H. 215, 225, 93 A.3d 290, 298 (2014) ("We conclude that the restriction in Saf–C 514.61(c)(3) prohibiting vanity registration plates that are 'offensive to good taste' on its face 'authorizes or even encourages arbitrary and discriminatory enforcement,' *see MacElman*, 154 N.H. at 307, 910 A.2d 1267, and is, therefore, unconstitutionally vague."); and

— *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 826 (W.D. Mich. 2014) ("the 'offensive to good taste and decency' language grants the decisionmaker undue discretion, thereby allowing for arbitrary application.").

With respect to content-based viewpoint discrimination, the Plaintiff cites to case law that strict scrutiny applies and that such speech is presumptively unconstitutional, including the following citations:

— *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.");

— *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989);

— Mary Beth Herald, *Licensed To Speak: The Case of Vanity Plates*, 72 Col. L. Rev. 595, 637

(2001) ("Offensiveness is in the eye of the beholder and is inherently viewpoint based.");

— *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); and

— *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Plaintiff argues that regardless of the type of forum involved, viewpoint discrimination triggers strict scrutiny citing *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting) ("while many cases turn on which type of 'forum' is implicated, the important point here is that viewpoint discrimination is impermissible in them all.") (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001)).

The Plaintiff asserts that application of strict scrutiny requires the Defendants to demonstrate that Tennessee Code Annotated section 55-4-210(d)(2) is "narrowly tailored to serve compelling state interests," citing *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("Both content- and viewpoint-based discrimination are subject to strict scrutiny." (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 2534 (2014))).

With respect to her due process claim, the Plaintiff's argument is that she has been subjected to a summary, prehearing suspension of her specialized plate. Under these circumstances, the Plaintiff cites to United States Supreme Court law that three fac-

tors must be examined to determine if the prehearing deprivation comports with due process:

> "three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Dixon v. Love, 431 U.S. 105, 112–13 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "[I]t is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See, e.g., Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 15 (1st Cir. 2012) ("the Supreme Court noted in *Citizens United* that the suppression of political speech harms not only the speaker, but also the public to whom the speech would be directed[.]"). *See also Citizens United*, 558 U.S. at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."). Summarily revoking a vanity plate on a pre-hearing basis also is not akin to, for instance, ensuring "the prompt removal of a safety hazard." *Dixon*, 431 U.S. at 114.

The law the Defendants primarily rely upon is *Walker v. Texas Div., Sons of Confederate Veterans,*

Inc., 576 U.S. 200 (2015) in support of their premise that a Tennessee personalized license plate is government property and its alphanumeric configurations constitute government speech that is not regulated by the First Amendment. In *Walker* the Supreme Court upheld Texas's specialty license plate program under the government speech doctrine. *See* 576 U.S. at 219–20.

The Defendants additionally rely upon *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) and *Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2015). *Summum* preceded *Walker* and is referred to in *Walker* as precedent. *Vawter* is a decision by the Supreme Court of Indiana that came after *Walker*. The *Vawter* court applied the *Walker* decision concerning specialized license plates to the personalized plates in issue in Indiana and determined that the personalized plates were government speech.

The significance of *Walker, Summum* and *Vawter* is that if they are applied to this lawsuit with the result that the speech in issue is government speech, the Plaintiff's revoked license plate is not protected by the Free Speech Clause, and the Plaintiff's claims of First Amendment violations of viewpoint discrimination, vagueness and due process are not triggered.

Alternatively, the Defendants assert that even when courts have found that personalized license plates are not government speech, they have nevertheless consistently determined that the plates are nonpublic forums, citing *See, e.g.*, *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) ("[L]license plates, when made available for private

expression, are a nonpublic forum."); *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 336 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016) ("Vanity plates are . . . a nonpublic forum, which 'exists where the government is acting as a proprietor, managing its internal operations." (cleaned up)); *Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001) ("[A] Vermont vanity plate is a nonpublic forum."). *Cf. Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008) ("We conclude that specialty license plates are a forum of the nonpublic variety.")

In reply, the Plaintiff asserts that *Walker* is distinguishable because it concerned specialty plates that were limited to a selection of designs prepared by the State.[5] The Plaintiff argues *Walker* itself emphasized this distinction, quoting the case as follows:

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[5] Personalized plates contain content created by the vehicle owner. Specialty plates have content/designs related to a category designated by the government. For example, Tennessee Code Annotated section 55-4-201 defines these terms as follows:

(6) "Personalized plate" or "personalized license plate" means the class of cultural motor vehicle registration plates that features on each individual plate not less than three (3) nor more than seven (7) identifying numbers, letters, positions or a combination thereof for a passenger motor vehicle, recreational vehicle or truck of one-half or three-quarter-ton rating or, if authorized, not less than three (3) nor more than six (6) identifying numbers, letters, positions or a combination thereof for a motorcycle, as requested by the owner or lessee of the vehicle to which that plate is assigned;

* * *

(8) "Special purpose plate" or "special purpose license plate" means all other motor vehicle registration plates issued pursuant to this part, including antique motor vehicle, dealer, disabled, emergency, firefighter pursuant to § 55-4-224, general assembly, government service, judiciary, national guard, OEM

> Finally, Texas law provides for personalized plates (also known as vanity plates). 43 Tex. Admin. Code § 217.45(c)(7) (2015). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as "BOB" or "TEXPL8." Here **we are concerned only with** the second category of plates, namely **specialty license plates, not with the personalization program.**

Walker, 555 U.S. at 204 (emphases added).

Further, the Plaintiff argues that the U.S. Supreme Court itself stated in a later case, *Matal v. Tam*, 137 S. Ct. 1744 (2017), that *Walker* is limited to the facts of specialized plates. The Plaintiff cites to the U.S. Supreme Court's advice in *Matal* that courts should exercise "great caution" before extending the government speech doctrine further. "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents." The Plaintiff also

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headquarters company, sheriff, special event, boat transport, United States house of representatives, United States judge and United States senate plates; and

(9) "Specialty earmarked plate" or "specialty earmarked license plate" means a motor vehicle registration plate authorized by statute prior to July 1, 1998, and enumerated in § 55-4-203(c)(6), which statute earmarks the funds produced from the sale of that plate to be allocated to a specific organization, state agency or fund, or other entity to fulfill a specific purpose or to accomplish a specific goal. TENN. CODE ANN. § 55-4-201 (West).

quotes the statement in *Matal*, that "*Walker* . . . likely marks the outer bounds of the government-speech doctrine." *Id*. at 1760. The Plaintiff additionally cites to the U.S. District Court case of *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) that used the *Matal* dicta to conclude personalized license plates are private speech, "In light of the foregoing, *Walker* 'likely marks the outer bounds of the government-speech doctrine.' *Matal*, 137 S. Ct. at 1760. Consequently, this Court finds that vanity plates are private speech."

The Plaintiff also disputes application of *Walker* to this case based upon the negative treatment of the Indiana Supreme Court case, *Vawter*, cited by the Defendants, in particular the following:

— *Carroll v. Craddock*, 494 F. Supp. 3d 158, 167 (D. Rhode Island 2020) ("I reject as wholly unpersuasive the reasoning of *Comm'r of Indiana Bur. of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1210 (Ind. 2015), an apparent outlier holding vanity plates government speech in ostensible reliance on *Walker*.");

— *Mitchell v. Maryland Motor Veh. Admin.*, 450 Md. 282, 296 (Md. App. 2016) ("we reject the *Vawter* court's reasoning because vanity plates represent more than an extension by degree of the government speech found on regular license plates and specialty plates. Vanity plates are, instead, fundamentally different in kind from the aforementioned plate formats.");

— *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019) ("Setting aside the fact that the *Walker* court was specifically 'not [concerned] with the personalization program,' this

Court is not persuaded by the analysis in *Vawter*. *Walker*, 135 S. Ct. at 2244. Both the *Vawter* court and the Defendant fail to address important differences between the specialized licenses plates at issue in *Walker*, and the vanity plates at issue here.");

— *Mitchell v. Maryland Motor Veh. Admin.*, 225 Md. App. (Court of Special Appeals 2015) at 566–67 ("The problem with [*Vawter*'s] reasoning is that vanity plate messages that do not appear to be coming from the government are the rule, not the exception.").[6]

The thrust of these cases is that *Walker's* analysis of specialty plates distinguishes it from the issue of personalized plates because with the latter the registration number is not only an identifier but—more than that—a personalized message with intrinsic meaning independent of the government and specific to the owner, and is perceived as such by the viewer. "Unlike the messages on specialty plates, which . . . are not one-of-a-kind and usually are displayed on a

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[6] The Plaintiff also cites to the following post-*Walker* cases that rejected the *Vawter* analysis but were not explicitly critical of *Vawter*:

— *Ogilvie v. Gordon*, No. 4:20-cv-01707-JST, 2020 WL 10963944 *3 (N.D. Cal. Nov. 24, 2020), ECF No. 54 ("the alphanumeric combinations on California's environmental license plates are not government speech.").

— *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019) ("the Court thinks it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates . . . . Thus, the Court is inclined to conclude that California does not exert the type of direct control over the driver-created messages that would convert those messages into government speech.").

retooled plate design that bears graphics of emblems and slogans for an organization, the messages on vanity plates are not official-looking." *Mitchell*, 225 Md. App. at 563. "Specialty plates do not bear unique personalized messages." *Id*. at 562.

Panel's Analysis

Summum and *Walker*

In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 465, 129 S. Ct. 1125, 1131 172 L. Ed. 2d 853 (2009), in issue were monuments placed in a public park. Pleasant Grove City had previously accepted certain monuments that were designed or built by donating private entities including a Ten Commandments monument. 555 U.S. at 472-73. Summum, a religious organization, requested permission to erect a monument in the park setting forth its religious tenents. *Id*. at 465-66. The City denied this request. "The religious organization argued that the Free Speech Clause required the city to display the organization's proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments." *Walker v. Texas Div., Sons of Confederal Veterans, Inc*., 576 U.S. 200, 209 (2015). The *Summum* Court rejected the organization's argument, holding,

> that the city had not "provid[ed] a forum for private speech" with respect to monuments. *Summum*, 555 U.S., at 470, 129 S.Ct. 1125. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engage[d] in expressive conduct." *Id*., at 476, 129 S.Ct. 1125. The speech

> at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause." *Id*., at 464, 129 S.Ct. 1125.

Walker, 576 U.S. at 209. The *Summum* Court based its decision upon three factors: (1) history of the government's use of the medium to speak to the public; (2) observers of the medium appreciate/associate the content with the government; and (3) the government maintains direct control over the content.

Thereafter, in *Walker* the Sons of Confederate Veterans applied for a specialty license plate by submitting an application, including a draft of their proposed specialty plate. *Id*. at 205-06. It was their own unique design. Texas rejected the application. The *Walker* Court held the license plate to be government speech despite the fact that it was designed in whole by the Sons of Confederate Veterans and not the State. *Id*. at 217. The way that the *Walker* Court determined that government speech, not private speech, was at issue with the Texas specialized plates was by applying the three factors examined in *Summum*.

As to the first factor of the government's historical use of the medium to convey its message, the facts the *Walker* Court identified as dispositive included that Texas had put "state" speech on its license plates for decades, such as the Lone Star emblem or a small silhouette of the state or the word "Centennial."

In examining the second factor of association by the viewer of the message with the government, the facts identified by the *Walker* Court were,

> Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. See § 504.943. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. See § 504.002(3). And Texas dictates the manner in which drivers may dispose of unused plates. See § 504.901(c). See also § 504.008(g) (requiring that vehicle owners return unused specialty plates to the State).

Id. at 212. The *Walker* Court stated that Texas license plates are, essentially, government IDs. And issuers of ID typically do not permit placement on their IDs of messages with which they do not wish to be associated.

In examining the third factor of direct government control of the message, the facts the *Walker* Court identified were,

> Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." § 504.005. The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. 43 Tex. Admin.

> Code §§ 217.45(i)(7)-(8), 217.52(b). And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Reply Brief 10; Tr. of Oral Arg. 49–51. Accordingly, like the city government in *Summum*, Texas "has 'effectively controlled' the messages [conveyed] by exercising 'final approval authority' over their selection." 555 U.S., at 473, 129 S.Ct. 1125 (quoting *Johanns*, 544 U.S., at 560–561, 125 S.Ct. 2055).
>
> This final approval authority allows Texas to choose how to present itself and its constituency.

Id. at 213.

Explaining how the specialized license plates constituted government speech, the *Walker* Court reasoned that the plates were not a designated public forum, a limited public forum, a nonpublic forum or a forum for private speech. In so concluding the following facts were identified by the *Walker* Court.

> Texas's policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. . . . Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for

government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas's specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–679, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas's specialty license plate designs "are meant to convey and have the effect of conveying a government message." *Summum*, 555 U.S., at 472, 129 S.Ct. 1125. They "constitute government speech." *Ibid.*

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider. In *Summum*, private entities "financed and donated monuments that the government accept[ed] and display[ed] to the public." *Id.*, at 470–471, 129

S.Ct. 1125. Here, similarly, private parties propose designs that Texas may accept and display on its license plates. In this case, as in *Summum*, the "government entity may exercise [its] freedom to express its views" even "when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.*, at 468, 129 S.Ct. 1125. And in this case, as in *Summum*, forum analysis is inapposite. *See id.*, at 480, 129 S.Ct. 1125.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park. Indeed, we indicated that the permanent displays in New York City's Central Park also constitute government speech. *See id.*, at 471–472, 129 S.Ct. 1125. And an *amicus* brief had informed us that there were, at the time, 52 such displays. See Brief for City of New York in *Pleasant Grove City v. Summum*, O.T. 2008, No. 07–665, p. 2. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own.

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide

> governments the opportunity to profit from speech, see, *e.g., Lehman v. Shaker Heights*, 418 U.S. 298, 299, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (plurality opinion), the existence of government profit alone is insufficient to trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

Id. at 216-218.

Application of Summum / Walker Factors

The evidence in the trial of this case establishes that the same facts on which the *Walker* Court concluded the Texas specialized license plates were government speech are present in this case of personalized plates.

The governmental nature of the plates is clear from their face: Tennessee license plates are designed, and issued by the State and display "Tennessee" prominently at the top of every plate. *See* TENN. CODE ANN. § 55-4-103(b). As testified by Ms. Moyers, Tennessee requires motor vehicle owners to display license plates and to obtain them from the Department of Revenue or a county clerk acting on the Department's behalf. TENN. CODE ANN. § 55-4-101. Consistent with the requirements stated in Tennessee Code Annotated section 55-4-101, only the

State of Tennessee can make, produce and approve the plate. TENN. CODE ANN. § 55-4-103(b). Tennessee owns the license plates.

Also like historical facts identified in *Walker* about Texas' license plates, the evidence in this case is that the State began issuing plates in 1915. In the century that followed, those plates were updated and changed several times. Tennessee case law establishes the facts that graphics were first used on Tennessee license plates in 1927, when the plate included a large, embossed outline of the shape of the State. Beginning in 1936, and continuing through 1956, Tennessee issued license plates that were shaped like the State. In 1977, Tennessee added the slogan "The Volunteer State" to its license plates. In 1989, Tennessee incorporated a three-star design taken from the Tennessee flag on its license plates. Tennessee's current standard passenger plate includes the name of the State, the slogan "The Volunteer State," and an image of green mountains used as the backdrop for the plate. In 1998, Tennessee significantly expanded its specialty-license plate program and began issuing cultural license plates, including collegiate license plates and personalized license plates. *See* 1998 Tenn. Pub. Acts., ch. 1063.

Additionally, like the Texas process of approving the design of a specialty plate, Exhibit 2 to Trial Exhibit 1 establishes that the license plate used for personalized configurations is one of 100 designs created by the State of Tennessee. A personalized plate applicant chooses one of the 100 plate designs and then creates and applies for a configuration to be placed on the plate. *See* Trial Exhibit 18. Ms. Moyers' testimony established that Tennessee has

implemented an approval process consisting of a five-member review team with further review by an Assistant Director and Director with use of resources such as the Objectionability Table and the Urban Dictionary. Thus, the configuration requested by the applicant for a personalized plate must be approved by the State to be displayed on a medium/property it owns, produces and uses for vehicle identification. The creation of the configurations by applicants for a Tennessee personalized plate that has to be approved by the State is very similar to the specialized plate design created by the Confederate Veterans in *Walker* that had to be approved by the State of Texas.

Further, like the Texas specialized plate, a viewer of a personalized plate in Tennessee associates the plate with the State of Tennessee. That is because the evidence established facts, like those in *Walker*, that each Tennessee license plate is a government article serving the government purposes of vehicle registration and identification.

Additionally, Tennessee maintains direct control over the messages conveyed on all of its license plates. Personalized license plates are not granted as a matter of course upon the payment of an application fee. The Department of Revenue must approve every personalized plate. *See* TENN. CODE ANN. § 55-4-210; *See also* TENN. COMP. R. & REGS. 1320-08-01-.02. The Department has the authority to revoke any personalized plates that are approved in error. TENN. CODE ANN. § 55-5-117. While Tennessee does allow vehicle owners to have some role in selecting the unique alphanumeric combination for their plates, this does not diminish the fact that

the plates and their messages are government speech controlled and issued by the State.

The foregoing are the same facts identified in *Walker*, derived from *Summum*, that the U.S. Supreme Court concluded constituted government speech.

To detract from the foregoing facts, the Plaintiff presented the testimony of George Scoville, Alan Secrest, the deposition of Ms. Hudson, and a website maintained by the State of Tennessee (Trial Exhibit 1: Deposition of Ms. Hudson, Exhibit 2) to prove that the public/viewer does not consider the configuration on the personalized plate to be the message or speech of the State of Tennessee, but instead to be the private speech of the vehicle owner. The Panel finds that the evidence submitted by the Plaintiff establishes the following.

— George Scoville applied and was approved for a personalized Tennessee license plate bearing his grandfather's plate configuration that include initials he shares with his father and grandfather but his separate roman numeral. Mr. Scoville testified he considers the message to be his own. He does not consider the message to be the government's message. On cross-examination he acknowledged the plate is also a specialty plate issued by the State with a Predators logo. This he also considers as content conveying his private message that he is a Predators' fan.

— Alan Secrest is a highly recognized, experienced pollster. A poll he conducted established by a dispositive 87% that Tennesseans across the state consider the configurations on a per-

sonalized plate to be the message of the vehicle owner and not the message of the State of Tennessee.

— Director Hudson testified several times over the course of two depositions that the content on a personalized plate is the vehicle owner's own unique message in the context of being asked if a State of Tennessee website says that.

— A State of Tennessee website (Exhibit 2 to Trial Exhibit 1) describes the personalized license plate program as "In Tennessee, license plates can be personalized with your own unique message. For the regular Tennessee plate, you can have up to seven (7) characters in either any alpha/numero combination."

The Panel finds that the foregoing evidence presented by the Plaintiff is not weighty because it does not accurately address the *Walker* factors. As identified above, the actual facts the *Walker* Court found to be dispositive were not the subjective response of a viewer. The Plaintiff's evidence is the argument made by Justice Alito in his dissent in *Walker* at 221, that a license plate is government speech only if an observer concludes that the content asserted in the personalized plate is the government making that assertion.

The *Walker* and *Summum* Courts reasoned that it matters not who initially designs the speech. "The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Walker*, 576 U.S. at 217; *see also Sum-*

mum, 555 U.S. at 468. In both *Walker* and *Summum*, the individuals claiming a violation of their free speech rights had initially designed the speech.

It does not matter that the State's message may be different than that of the designers. Both *Summum* and *Walker* addressed this issue. "[T]he thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor." *Summum*, 555 U.S. at 476. As explained by the 6th Circuit, "when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes." *ACLU v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006).

Finally, it matters not who pays for the speech. In *Summum*, the monuments at issue were designed, built and paid for by the private entities that donated them. The *Summum* Court held that the fact that the monuments were privately financed did not affect its finding of government speech. *Summum*, 555 U.S. at 470-71. The *Walker* Court addressed the fact that owners of specialty plates pay an additional fee for such a plate. *Walker*, 576 U.S. at 218. This fact did not alter the Court's finding of government speech. *Id.*

The Plaintiff also presented numerous examples throughout the trial of configurations on personalized plates containing sexual, vulgar, offensive and indecent connotations that made it through the State approval process and are currently displayed on license plates throughout Tennessee. From this evidence, the Plaintiff argues that the third factor of

the *Walker/Summum* factors—government control—has not been established.

To the contrary, the Panel accredits the testimony of Ms. Moyers that mistakes are made in the process of reviewing personalized plate applications. Her testimony is supported by the evidence that five reviewers have 80 to 100 applications a day to review, and there are presently 60,000 active personalized plates.

The Panel therefore concludes that the evidence presented by the Plaintiffs is not weighty because *Walker* takes into account that the content on the plate conveys government agreement with the message displayed or approval by the government that the license plate is allowed to display the content. *Walker*, in accordance with *Summum*, rejected the requirement that the subjective opinion of the viewer be controlling. In *Summum*, the Supreme Court recognized that the speech is designed by private parties and then approved by the state, and still held it to be government speech. In addition, mistakes in approval do not rebut the facts of government control found above.

Dicta on Scope of Walker

In addition to the evidence at trial, there are other reasons the Panel concludes the *Walker* factors apply to this case and that the speech in issue is government speech.

Walker is the most recent United States Supreme Court decision which analyzes a First Amendment challenge to content on a license plate. Although *Walker* dealt with a specialized, not personalized, license plate as in this case, the Panel does not con-

clude *Walker* is inapplicable as argued by the Plaintiff. The Panel concludes that the Court's statement in *Walker* that, "Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program," does not mean the conclusion in *Walker* that the speech in relation to specialized plates is government speech can not extend to personalized plates. The Panel concludes that the foregoing statement in *Walker* is provided to be clear that the Court was not issuing an advisory decision on personalized plates. The Panel is not persuaded by the Plaintiff's argument that the Supreme Court's statement in *Matal v. Tam,* 137 S. Ct. 1744 (2017) limited *Walker* to the realm of specialty plates not to be extended to personalized plates. That is because *Matal* acknowledges that its factual context "is vastly different from . . . even the specialty license plates in *Walker*." *Id*. at 1760. The subject matter of *Matal*—trademarks—that Court observed, "have not traditionally been used to convey a Government message . . . . And there is no evidence that the public associates the contents of trademarks with the Federal Government." *Id*.

The Panel's conclusion is that: this case is more like *Walker* than *Matal* because in issue is a license plate which, unlike a trademark, has been traditionally and is presently used to convey a government message, and the distinction between a specialized plate and personalized plate does not change this analysis.

In addition, buttressing the application of *Walker's* finding of government speech to the personalized license plates herein is that such an outcome is not

unprecedented. In *Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2015) the Indiana Supreme Court, applying *Walker*, held that the personalized license plates in *Vawter* constituted government speech. *Vawter* is persuasive because of its similarities to this case. That is, the Indiana statute, like Tennessee, authorizes revocation of a personalized plate for connotations offensive to good taste and decency. Like Tennessee, Indiana has a committee within the Bureau of Vehicle Administration that decides the revocation issues. That committee, like Tennessee, is guided by a compilation of disqualifying alphanumeric combinations. The *Vawter* Court's application of the factors identified in *Walker* is similar to the above analysis of the Panel, quoting pertinent portions of *Vawter* as follows.

> *a. Indiana's Historical Use of License Plates*
>
> * * *
>
> Originally, Indiana license plates served only as a unique identifier. But over time, Indiana included first words, then graphics, then eventually specialty designs and personalized plates. This history shows that Indiana often communicates through its license plates and has expanded how it does so. Furthermore, the plaintiffs' distinguishing features are fully compatible with government speech. "The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message...." *Walker*, 135 S.Ct. at 2251, 192 L.Ed.2d at 287. And, PLPs are no more unique than public park monuments, which "typically represent government speech." *Pleasant Grove City, Utah v.*

Summum, 555 U.S. 460, 470, 129 S.Ct. 1125, 1132, 172 L.Ed.2d 853, 863 (2009).

b. Identification of PLP Alphanumeric Combinations in the Public Mind with the State

* * *

The plaintiffs argue that this second factor supports PLPs as government speech "only if it can be believed that a person who observes, for example, a personalized license plate of 'BIGGSXY' or 'FOXYLDY' or 'BLKJEW'9 will conclude that it is the State of Indiana that is making this assertion." Appellee's Supp. Br. at 4. The *Walker* dissent so argues, 135 S.Ct. at 2255, 192 L.Ed.2d at 291 (Alito, J., dissenting), but the majority instead held that all of Texas' specialty plates are government speech. *Id*. at 2253. PLPs do not cease to be government speech simply because some observers may fail to recognize that PLP alphanumeric combinations are government issued and approved speech in every instance. Instead, PLPs "are *often* closely identified in the public mind with the [State]." *Id*. at 2248, 284 (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. at 1133, 172 L.Ed.2d at 864) (emphasis added) (alteration in original). As in *Walker*, a few exceptions do not undermine the conclusion that PLPs are government speech. [footnote omitted] Rather, a PLP "is a government article serving the governmental purposes of vehicle registration and identification." *Id*. at 2248, 284. The alphanumeric combination, regardless of its content,

> is government speech specifically identifying a single vehicle. [footnote omitted]
>
> *c. Indiana's Control over PLP Alphanumeric Combinations*
>
> * * *
>
> But under Walker, the BMV's final approval authority establishes effective control regardless of any set list of limits. 135 S.Ct. at 2249, 192 L.Ed.2d at 284–85. The final BMV approval authority is established both in the statute defining PLPs and in the statute challenged here. Ind.Code §§ 9–13– 2–125, 9–18–15–4. The BMV applied its authority by creating an internal policy guide, establishing a PLP Committee, and allowing that Committee to approve or reject plates for any reason—whether listed in the policy guide or not. Because the BMV has final approval authority by statute, and exercises effective control, we reject the plaintiffs' argument.

Id. at 1204-1207.

Plaintiff's Counsel is highly critical of *Vawter*. During oral argument Plaintiff's Counsel argued that *Vawter* is an outlier, and that the majority of courts have not followed *Vawter's* outcome that personalized license plates constitute government speech.

Detracting from Plaintiff's criticism of *Vawter* is that some of the cases cited by the Plaintiff predate the 2015 issuance of *Walker*: *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001); *Montengegro v. New Hampshire Div. of Motor Vehicles,* 166 N.H. 215, 225, 93 A.3d 290, 298 (2014); *Matwyuk v. Johnson*,

22 F. Supp. 3d 812, 826 (W.D. Mich. 2014); *Higgins v. Driver & Motor Vehicle Servs. Branch*, 335 Or. 481, 488 72 P.3d 628, 632 (2003); *Bujno v. Commonwealth, Dep't of Motor Vehicles*, 86 Va. Cir. 32 (2012); *Miller v City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010). That is significant, because it is *Walker* that applied the three-factor test from *Summum* park memorials to license plates. The elimination of Plaintiff's case authority predating *Walker* leaves cases in California, Rhode Island, Kentucky and Maryland critical of and/or contrary to *Vawter*—cases in just four states.

Further, this case is distinguishable from the Kentucky case cited by Plaintiff's Counsel, *Hart v. Thomas*, 422 F. Supp.3d 1227 (E.D. KY 2019). In finding that the vanity plates were not government speech, the *Hart* Court relied on the explicit language in the Kentucky statute. As *Hart* explained, the statute itself described the vanity plates as "personalized letters or numbers significant *to the applicant*." (Emphasis original) (*Hart*, 422 F.Supp.3d at 1232) (quoting K.R.S. § 186.174(1). The Tennessee statute at issue is more akin to the statute in *Vawter*. The Ind. Code § 9-13-2-125, at issue in *Vawter*, describes Indiana's personalized license plate program as a "combination of letter or numbers, or both, requested by the owner or the lessee of the vehicle and approved by the bureau." Ind. Code § 9-13-2-125. Similarly to Indiana, Tennessee's statutes require approval by the State. Tennessee Code Annotated section 55-4-210(d)(2) provides: "The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are

misleading." Additionally, Tennessee Code Annotated section 55-4-210(d)(1) provides: "The commissioner shall not issue any license plate commemorating any practice which is contrary to the public policy of the state . . ." These two statutes indicate an intent for the personalized plates to represent speech of the State of Tennessee much more so than the Indiana statute in *Hart*.

Qualified Immunity

Lastly, there is the defense of qualified immunity asserted on behalf of the Commissioner of Revenue. The above determination by the Panel, that no constitutional rights have been violated because in issue is government speech, pretermits the qualified immunity defense. Nevertheless for completeness, the Panel shall address the defense.

The Defendants' position is that "This Panel should dismiss Plaintiff's damages claim against the Tennessee Commissioner of Revenue in his individual capacity because he is protected by qualified immunity." *Defendants' Trial Brief*, Dec. 2, 2021, at 25. The Panel agrees. As explained in the *Defendants' Trial Brief* at pages 24-25, the doctrine of qualified immunity precludes personal liability of a government official under certain circumstances.

> Courts generally provide "government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "[W]hether an official protected by qualified

> immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639 (internal citations omitted). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. It follows that "public officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *King v. Betts*, 354 S.W.3d 691, 715 (Tenn. 2011) (cleaned up) (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)).

The Panel adopts the Defendants' analysis that this defense, shielding the Defendant Commissioner of Revenue from personal liability, applies to this case.

> Here, the Commissioner of Revenue did not transgress any bright lines by revoking Plaintiff's personalized license plate on a pre-hearing basis. Indeed, as shown above and as this Panel concluded in its temporaryinjunction decision, the Commissioner did not violate any constitutional right at all since Tennessee's personalized plates are government speech and thus outside the First Amendment's protections. *See generally* Order Den. Mot. for Temp. Inj., *Gilliam v. Gerregano*, No. 21-606-III (Davidson Ch. Ct. Sept. 2, 2021)
>
> But even if the revocation of Plaintiff's plate did violate a constitutional right, the right was not clearly established at the time. A plaintiff

"seeking to establish that their constitutional right is clearly established must support their claim with cases involving circumstances fairly similar to their own." *King*, 354 S.W.3d at 715. And while that plaintiff "need not find 'a case on all fours,' the contours of their asserted right 'must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates the right.'" *Id.* (citations omitted). Plaintiff cannot make that showing here. Neither the Tennessee Supreme Court nor the Tennessee Court of Appeals have ever held that a pre-hearing revocation of a personalized license plate violates any constitutional right. And while Plaintiff points to some out-of-jurisdiction cases standing for that proposition, Defendants have identified cases in which courts have reached opposite conclusions.

It was thus reasonable for the Commissioner to believe based on the state of the law at the time—especially *Walker* and *Vawter*—that personalized license plates are government speech and that revocation thus does not implicate First Amendment free-speech protections. Moreover, it was reasonable for the Commissioner to believe based on the state of the law at the time—especially *Perry v. McDonald* and *Vawter*—that due process does not require a hearing before revoking a personalized license plate. For these reasons, even if the revocation of Plaintiff's personalized license plate were a constitutional violation, the Commissioner would be shielded from Plaintiff's claim for damages by the qualified immunity doctrine.

Defendants' Trial Brief at 25-26.

Conclusion

As reasoned by the United States Supreme Court, "Indeed, a person who displays a message on a license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because license plate designs convey government agreement with the message displayed." *Walker*, 576 U.S. at 212-13. As further reasoned in *Walker*, license plates are essentially government IDs. They are "government mandated, government controlled, and government issued IDs that have traditionally been used as a medium for government speech." *Walker*, 576 U.S. at 214. Additionally, persuasive on this point is the reasoning in *Vawter* that the unique combination of numbers and letters that actually identify a vehicle are even more government IDs than the specialty plates in *Walker*. *See Vawter*, 45 N.E.3d at 1205, FN 7.

Applying this reasoning to this case, the Panel concludes that content on the Plaintiff's license plate conveys that the State of Tennessee has consented to and approved display of that content. Thus that even though the configuration, i.e. the numbers and letters, of a personalized plate are selected by the motor vehicle owner, the government context and identity on the license place is so clearly a part of what the viewer sees and perceives that the content on the plate is government speech.

The effect of the foregoing findings and conclusions of law that the speech in issue in this case is government speech is that the "Free Speech Clause . . . does not regulate government speech" and the government is not required to maintain viewpoint neutrality on its own speech. *Summum*, 555 U.S. at 467. The constitutional rights the Plaintiff claims in her complaint to have been violated are not triggered or implicated because the speech in issue is government, not private, speech, and therefore those constitutional claims must be dismissed as well as the Plaintiff's claims to recover damages, attorney's fees and expenses.

s/ Doug Jenkins
CHANCELLOR DOUG JENKINS

s/ Mary Wagner
JUDGE MARY WAGNER

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHIEF JUDGE

cc by U.S. Mail, fax, or efiling as applicable to:
Daniel A. Horwitz
Lindsay B. Smith
David L. Hudson, Jr.
R. Mitchell Porcello
Steven H. Hart
Matthew D. Cloutier

Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson January 18, 2022
Deputy Clerk
Chancery Court

APPENDIX D

Tennessee Code § 55-4-210

§ 55-4-210. Authorization and issuance by department

(a) The department is authorized to administratively issue personalized plates to qualified applicants; provided, that the minimum issuance requirements of § 55-4-202(b)(3) and all other requirements of this part are met.

(b) The department is additionally authorized to administratively issue collegiate plates, as defined in § 55-4-201, that have a special reference to or identification or information on a two-year or four-year college or university located within Tennessee or a four-year college or university located outside Tennessee to qualified applicants; provided, that the minimum issuance requirements of § 55-4-202(b)(3) and all other requirements of this part are met for each classification of collegiate plates.

(c)

(1) All cultural, specialty earmarked and new specialty earmarked plates, including personalized and collegiate plates, may be issued for private passenger automobiles, recreational vehicles and trucks of one-half or three-quarter-ton rating, unless specifically prohibited by § 55-4-214.

(2) Personalized and collegiate plates may also be issued for motorcycles, provided the minimum issuance requirements of § 55-4-202(b)(3) are met.

(d)

(1) The commissioner shall not issue any license plate commemorating any practice which is contrary to the public policy of the state, nor shall the commissioner issue any license plate to any entity whose goals and objectives are contrary to the public policy of Tennessee.

(2) The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading.

(e) Registration numbers for license plates issued pursuant to this part shall not conflict with or duplicate the registration numbers for any existing passenger, recreational, commercial, trailer or motor vehicle registration plates that are presently issued pursuant to statute, resolution, executive order, or custom.

(f)

(1) The department is authorized to design, issue, and renew, or to authorize a designee to issue and renew, off-highway vehicle plates for the following vehicles registered by residents of this state:

(A) Class I off-highway vehicles; and

(B) Class II off-highway vehicles.

(2) The department is authorized to design and authorize a designee to issue and renew off-highway vehicle temporary permits in lieu of plates for off-highway vehicles registered by nonresidents. An off-highway vehicle temporary permit is valid for thirty (30) days.

(3) The department is authorized to contract with county clerks and with private vendors for the is-

suance and renewal of off-highway vehicle plates and off-highway temporary permits.

(g) The department of revenue shall design, in consultation with a representative of the University of Tennessee Southern, a University of Tennessee Southern collegiate plate to be administratively issued in accordance with this section.