No. 25-107

In the Supreme Court of the United States

LEAH GILLIAM,

Petitioner,

v.

DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, ET AL.,

Respondents.

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

Brief of *Amici Curiae* Simon Tam and Institute for Free Speech in Support of Petitioner

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Interest of the *Amici Curiae*[1]

Simon Tam was the respondent in *Matal* v. *Tam*, 582 U.S. 218 (2017), and has a longstanding interest in free expression. He is the author of *Slanted: How an Asian American Troublemaker Took on the Supreme Court* (2019).

The Institute for Free Speech (IFS) is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, petition, and press. Along with performing scholarly and educational work, IFS represents individuals and organizations and files amicus briefs in cases raising important First Amendment questions. IFS is interested in ensuring that government speech doctrine is properly cabined, and does not encroach on private speakers' ability to speak within government-operated programs.

Summary of Argument

The government operates a vast array of programs and controls a vast amount of property. First Amendment law recognizes that the freedom of speech must often include the freedom to speak within those programs and on that property—for instance, the freedom to choose one's own trademarks, free of government viewpoint discrimination; the freedom to create one's musical works, and to get copyright protection for

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have received notice of the planned filing at least 10 days before the deadline.

them regardless of their subject matter; the freedom to speak in traditional, designated, and limited public fora; and more.

To be sure, the government is also entitled to speak itself, and when it speaks it is entitled to choose its own speech. But to maintain broad protection for non-governmental speakers, the government speech doctrine must be properly limited.

Yet the split among decisions below, outlined in the petition, shows that this Court's precedents on this important question are not sufficiently clear. In particular, courts are sharply split on whether the government's power to decide which license plate *designs* to allow on its license plates entails the power to decide which *personalized license plate texts* it will allow.

On the merits of this particular question, history—which also influences reasonable public perception—should be the guide. But beyond that, this Court should intercede to resolve the question one way or the other, and set a precedent that would better define the private speech / government speech line for the many other contexts in which it arises.

Argument

I. The government speech doctrine should be read narrowly—and defined precisely—to prevent undue restriction of nongovernment speech

As *Matal* v. *Tam* noted,

> [W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. 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.

582 U.S. 218, 235 (2017).

This is so in part because modern government is so large. It operates a vast range of programs that promote people's and organizations' speech: the trademark system involved in *Matal*; the copyright system; grants given to student groups (see, e.g., *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995)); the charitable tax exemption system (*id.* at 834); and more. It likewise operates a vast range of property on which people and organizations are free to speak—traditional public fora such as streets and parks, designated or limited public fora such as university classrooms open to student groups, and more.

If the government could label such private speech "government speech" simply because it is conducted within a government program or on government property, our free speech rights—including our rights to express ourselves on political, religious, and social questions—would be sharply diminished. *See, e.g.*, Pet. 28-29 (giving examples of rejected license plates that featured political, religious, and social speech, including "NOGOD," "8THEIST," "BGAY," "CHURCH1," "EPA SUKS," and "NOVACS"); Marybeth Herald, *Licensed to Speak: The Case of Vanity Plates*, 72 U. Colo. L. Rev. 595, 601 (2001) (likewise as to, for instance, "GVT SUX" and "H8DCYF," with the DCYF apparently referring to New Hampshire's Division of Children,

Youth, and Family). And if the line between private speech and government speech is not sufficiently clearly defined, lower courts and government officials will consistently be confused—as has been happening throughout the country with regard to personalized license plate programs. This Court should step in to clarify this important area of the law.

II. History provides the key here to distinguishing government speech from private speech, and vanity plate programs have historically involved private speech

In determining whether a particular program involves government or private speech, the key is often the history of whose message the program has generally conveyed. This Court should reinforce and illustrate that principle in this case.

This Court stressed this history in *Matal*. Monuments in public parks are government speech, the Court recognized, even when the government accepts privately supplied monuments: "Governments have used monuments to speak to the public since ancient times . . . ." 582 U.S. at 238; *see also Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 471 (2009) (stressing the practice related to monuments "throughout our Nation's history"). But trademarks are private speech, in large part because "Trademarks have not traditionally been used to convey a Government message." 582 U.S. at 238.

Likewise, the majority in *Walker* v. *Sons of Confederate Veterans*, 576 U.S. 200, 210-11 (2015), concluded that license plate designs had a history of being used for government expression. This Court noted that license plates had long included graphics or text

representing some point of state pride, such as Arizona's 1917 "depiction of the head of a Hereford steer," Idaho's 1928 "Idaho Potatoes," and South Carolina's "The Iodine Products State," or some other message, such as Florida's "Keep Florida Green." *Id.* at 211.

But the *Walker* Court noted that these messages were present "insofar as license plates have conveyed more than state names and vehicle identification numbers." *Id.* at 210-11. The "vehicle identification numbers" supplied purely identifying information, not any sort of "messages from the States." *Id.* at 211.

The *Walker* dissenters disagreed with the majority in their interpretation of the history of license plate designs. But they did agree about the importance of history, and their opinion "begin[s] with history." *Id.* at 229 (Alito, J., dissenting).

The other factors identified by *Walker* and *Matal* usually run in parallel with the history factor. As *Matal* noted, quoting *Walker*, "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.'" 582 U.S. at 238.

But while the *Walker* majority concluded that this conjunctive test ("manufactured and owned by the State, generally designed by the State, and serve as a form of 'government ID'") was satisfied as to the plate designs, it is not satisfied as to the vanity plate program in this case, because the only messages on the license plate tags are exclusively designed by owners. As with the trademark program in *Matal*, "there is no evidence that the public associates the contents of [vanity plates] with the . . . Government," *id.*, because

members of the public are well aware that vanity plates have always been tools for them to express themselves, not for the government to express itself.

The Court in *Matal* also made clear that, while speech can be government speech when the government "maintain[s] direct control over the messages" within the program, 582 U.S. at 238, that control is not present merely because the government reserves the right to exclude some messages: After all, in *Matal* itself the government excluded supposedly derogatory trademarks (such as "The Slants"). Likewise, while the messages within license plate designs are still largely and visibly directly controlled by states—since most cars still display the lower-cost state-provided design—any comprehensible messages within the license plate tags are supplied by the drivers.

To be sure, sometimes the government may open a program to private speech despite a history of the program being used for government speech: Boston's unusual system of flying nearly every flag it was asked to fly, discussed in *Shurtleff* v. *City of Boston*, 596 U.S. 243, 254-55 (2022), is an example. But when, as in *Matal* and as in this case, a program has long been a tool for private speech, it should be governed by the protections that the First Amendment offers to private speech.

States have long used license plate designs to convey some ideas. They may be political ideas embodied in the state motto (e.g., New Hampshire's "Live Free or Die"). They may be expressions of pride in some feature of state history (e.g., North Carolina's "First in Freedom") or some characteristic state product (e.g., Idaho's "Famous Potatoes" or Wisconsin's "America's

Dairyland"). They may be a combination of messages (e.g., Tennessee's "The Volunteer State" and the optional "In God We Trust").

Over time, states started to allow drivers to choose among various designs, which likewise often captured a range of state-approved ideas. And eventually, states allowed groups to choose their own designs as well. Because of this history, the Supreme Court held in *Walker* that such designs were generally government speech. Drivers who see a mix of license plate designs on the roads may still see those designs—which are mostly the default government-created design—as a form of government speech, conveying predominantly the government's ideas.

But *Walker* itself concluded only that, "*insofar as license plates have conveyed more than state names and vehicle identification numbers*, they long have communicated messages from the States." *Id.* at 210-11 (emphasis added). *Walker* was thus distinguishing the plate designs, which were historically "messages from the States," from the license plate numbers,[2] which were *not* such state messages. And indeed license plate numbers had not been used by states to convey any messages. They conveyed only an arbitrary set of letters and digits, made up solely to provide a unique identifier.

When vanity plates emerged, they for the first time allowed the expression of something meaningful through the license plate number—and that

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[2] This brief will follow the common practice of referring to these as "numbers," *see, e.g.*, *State* v. *Albright*, 564 S.W. 3d 809, 812 (Tenn. 2018), even though they are alphanumeric.

something was messages from the drivers, not "messages from the States." That is why they are called "personalized plates," or for that matter "vanity plates"—a reference to the driver's own vanity, in the sense of the driver's desire's desire to express himself or herself, and obviously not to any vanity on the government's part.

Passersby who see cars that have license plates containing, say, 7GVS439, LHG127, and SLANTS, will not likely think, "That is the state conveying the messages 7GVS439 and LHG127, and the state (or even the state plus the driver) conveying the message SLANTS." Rather, they will likely think, "Those are two license plates with no message, and one with the message SLANTS."

In this respect, vanity license plate numbers are much like the trademarks at issue in *Matal*. Everyone seeing the band name *The Slants* would view it as the trademark owner's speech marking and distinguishing the owner's product, and not as the government's speech. Likewise, everyone seeing the license plate with the message SLANTS would view it as the car owner's speech marking and distinguishing the owner's car, and not as the government's speech.

Yet under the government's view, if Mr. Tam applied for a SLANTS plate, the government could treat that plate as government speech, and reject it on the theory that it "may carry connotations offensive to good taste and decency." Tenn. Code Ann. § 55-4-210(d)(2). That was the argument that this Court rejected in *Matal*, which involved the same private message communicated by the same person. Yet the court below erred in accepting such an argument in this

case, in concluding that the vanity license plate program involved government speech.

Conclusion

Walker, the Court unanimously held in *Matal*, "likely marks the outer bounds of the government-speech doctrine." 582 U.S. at 238. Whether this Court is inclined to overrule, modify, or preserve *Walker*, this case offers an excellent vehicle to clarify those bounds.

Respectfully submitted,

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