No. 25-107

In the Supreme Court of the United States

LEAH GILLIAM,
Petitioner

v.

DAVID GERREGANO, ET AL.,
Respondents

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

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024); *McConnell v. FEC*, 540 U.S. 93 (2003); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), as well as amici. The ACLJ specializes in First Amendment litigation and the line between government speech and private speech, the nub of this case. *See, e.g., Summum*, (representing Petitioner); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); (representing Petitioner); *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015) (as amicus).

In *Lambs Chapel*, the ACLJ argued on behalf of Petitioner where, in a unanimous decision, this Court made clear that, even on government-owned property, access to a forum cannot be limited except in a viewpoint neutral manner. *Lamb's Chapel*, 508 U.S. at 392-93. This key holding would be severely undermined by allowing a state to avoid this First Amendment protection by simply casting any speech it desired to regulate as "government speech."

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[1] Counsel of record for the parties received timely notice of the intent to file this brief, S. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Walker*, this Court identified two distinct customizations of a license plate: "specialty license plates," which were a "selection of designs prepared by the State," and "personalized plates (also known as vanity plates)" with which "a vehicle owner may request a particular alphanumeric pattern for use as a plate number." 576 U.S. 200, 204 (2015). *Walker* dealt only with the former; this case addresses the latter. Since *Walker*, this Court has clarified the government speech doctrine: cases like *Shurtleff v. Boston*, 596 U.S. 243 (2022), and *Matal v. Tam*, 582 U.S. 218 (2017), clearly show that ownership of a physical forum or program is not determinative when distinguishing government speech from private expression. Rather *who* is speaking, not where the speech takes place, controls.

Vanity plate messages come from the vehicle's owner, not the state. The Tennessee government "does not dream up these [plate]s, and it does not edit [plate]s submitted for registration." *Matal*, 582 U.S. at 235. The ubiquity of humorous, idiosyncratic, and personal plate numbers shows how "far-fetched" it would be to "suggest that the content … is government speech." *Id.* at 236. Unlike the curated specialty license plate designs at issue in *Walker*, where the State for each proposal "selected which" designs to approve, *Shurtleff*, 596 U.S. at 257; *Summum*, 555 U.S. at 481 ("decision to accept" proposal "is best viewed as a form of government

speech"), vanity plates invite vehicle owners to craft personalized expressions from a virtually infinite range of possibilities, subject only to technical constraints and basic decency standards. This invitation to individual creativity embodies a public forum for private speech, regardless of its presence on a state-owned license plate. When government abandons substantive control over messaging and instead facilitates a platform for personal expression, the resulting speech is of the individual speakers, not the State.

ARGUMENT: THE TEXT OF VANITY LICENSE PLATES IS PRIVATE, NOT GOVERNMENT, SPEECH.

This case presents a straightforward question with a straightforward answer: When the government allows citizens to craft their own unique message on a license plate, whose speech is it? The answer should be obvious: it is the speech of the private authors/creators of the messages. Tennessee opened its vanity plate system to individual expression, invited vehicle owners to speak for themselves, and enabled tens of thousands of individual options to be seen along Tennessee's roads and highways. This is not government speech. Rather, the vanity plates represent private speech in a government-created forum. The First Amendment's protections therefore apply.

I. The Vanity Plate Program Opens a Space for Individual Expression; the Expression of Motorists in that Space is Not Government Speech.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 at 467. Hence, the classification of speech as "government" or "private" can be, and often is, decisive of a First Amendment claim. "But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse." *Matal*, 582 U.S. at 235. As this Court warned,

> 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.

Id.

It is vital, therefore, that the distinction between the two categories be drawn correctly. Mischaracterizing private expression as "government speech" allows for evasion of First Amendment protections and silencing of disfavored viewpoints, undermining the Constitution's protections.

The *Walker* specialty license plate case dealt with a genuine gray area. *See Summum*, 555 U.S. at 470 ("There 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."). *See Matal*, 582 U.S. at 239 ("*Walker*… likely marks the outer bounds of the government-speech doctrine."). Here, however, the case is easy. As in *Shurtleff*, if "we look at the extent to which [the government] actively controlled" the vanity plates "and shaped the messages… [t]he answer, it seems, is not at all." 596 U.S. at 256. "And that is the most salient feature of this case." *Id.*

Unlike in *Walker*, where motorists had a choice among a few designs from a government-approved menu, the vanity license plate program gives full creative freedom to vehicle owners in choosing plate numbering and lettering. When a state foregoes "meaningful involvement in the selection" (*Shurtleff*, 596 U.S. at 58) of vanity plate messages, the license plate numbering becomes a forum for personal expression. Tennessee's attempt to recast this forum as "government speech" impermissibly expands a doctrine that this Court has cautioned against extending. *Matal*, 582 at 235.

This Court's decisions in *Shurtleff* and *Matal* offer a straightforward roadmap. In both cases, private parties had essentially free reign in designing or selecting their messages. *Shurtleff*, 596 U.S. at 257 ("The city's practice was to approve flag raisings, without exception."). *Matal*, 582 U.S. at 235 (government played no role in the composition of the trademarks). In such cases, it is "far-fetched" to

suggest that the resulting message is government speech. *Matal*, 582 U.S. at 236.

Under this Court's government speech cases, the central question is "whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Summum*, 555 U.S. at 470. Sometimes that is not easy. "The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program." *Shurtleff*, 596 U.S. at 252. Hence, "we must examine the details," *id.* at 255, to avoid erroneously lumping both government and private speech under one, ill-fitting, blanket label. For indeed, different agents may be responsible for different components of the program, as this Court recognized expressly in *Shurtleff*. *Id.* at 256 (the government controlled the event's "date and time," "physical premises," and relevant equipment; but the "flags' content and meaning" was controlled by private speakers).

As *Shurtleff* illustrates, there is no necessity to apply a blanket "government" or "private" label to the entirety of a program involving input from both governmental and private actors. A celebrity's speech does not become government speech just because the celebrity delivers that address at the commencement exercises of a state school. The remarks of a business owner or environmental activist do not count as government speech just because they are invited participants in a government-sponsored panel discussion. In all such cases, a court should, as in *Shurtleff*, *examine the component parts* to determine whether the particular content in question is government speech.

To illustrate this approach, consider a public school talent show. Is a student performer's rendition of the song, "Amazing Grace," private speech or government speech (the latter raising Establishment Clause questions)? The best answer to this question is not found by asking the question, "Whose speech is the talent show, the school's or the participants'?" Both are speakers, so any blanket label will not fully correspond to reality. Rather than collapsing together the school's involvement and the student's role, a court should "examine the details," *Shurtleff*, 596 U.S. at 255 – i.e., look atthe constituent parts separately. Thus, the school is the one that chooses to have a talent show; that determines which student grade levels are eligible to participate; that sets the date, time, and length of the program; and that sets the parameters for performance genres (songs? skits? dance?). Each of these decisions is state action – and, if communicative, government speech – subject to whatever constitutional limits might apply. But what about the song itself? It depends. If the school picks the song, then yes, that content is government speech (though the student's manner or style of performing it is not). If the school leaves the choice to the student (albeit subject to limitations on length, decency, defamatory content, and so forth), then the song selected is the student's speech, even though it is situated in the midst of a government program. Separate analysis of the particular components of the program or activity thus trains in upon the identity of the actor making the relevant *content choice*, rather than attempting to make a global judgment about the entire production.

Another example would be a state college

graduation ceremony. The college decides to have the ceremony, when and where to do so, and whether to have an outside speaker. That is all state action (and, to the extent it is expressive, is government speech). If the college officials select a guest speaker (as opposed to letting students pick one, for example), that selection is also government speech. The college may limit the speaker as to length or topic (with the speaker free, of course, to decline the invitation). But when the guest speaker then chooses what words to say, that is private speech, not government speech. To ask, "Is a graduation ceremony government speech?" is therefore to ask the wrong question. Instead, the analysis must focus upon what *part* of the program the government seeks to restrict, and who – the government or a private party – is responsible for formulating that part.

A curated menu of state-sanctioned decorations, the facts presented with specialty plate in *Walker*, was effectively controlled by the State. *Walker*, 576 U.S. at 213. Indeed, *specialty* plates are listed on the Tennessee Department of Revenue website as a literal menu, as opposed to *personalization,* in which vehicle owners submit their proposal.[2] Tennessee has not engaged in any curation of personalized plates with alphanumeric selection. The choice is entirely the vehicle owner's. Tennessee only enforces routine technical constraints and obscenity standards. Just as in *Matal*, 582 U.S. at 235, "[t]he Federal

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[2] *Compare License Plates*, TENNESSEE DEPT. OF REV., https://www.tn.gov/revenue/title-and-registration/license-plates/available-license-plates.html *and Personalized Plates*, TENNESSEE DEPT. OF REV., https://personalized plates.revenue.tn.gov/#/.

Government does not dream up these marks, and it does not edit marks submitted for registration."

Thus, the Tennessee Department of Revenue, like the Patent and Trademark Office in *Matal*, only gives a technical and procedural examination of vanity patterns. This has resulted in over 60,000 personalized Tennessee plates in use. App.6a. Surely Tennessee does not claim that each of these 60,000 messages are their own, messages like "PROTAX," "NATS FAN," or "JOHN316." Tr. Ex. 2, Dep. Ex. 6. As in *Matal*, "If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently." 582 U.S. at 236.

Moreover, if religious messages such as "JOHN316" *were* government speech, an entirely different clause of the First Amendment would be at issue. Tennessee has approved thousands of vanity plates with religious messages. Under the state's theory, each of these messages constitutes state endorsement of religious views. Tennessee cannot square this circle: it cannot claim ownership of religious messages when convenient for avoiding free speech scrutiny, then disclaim responsibility when facing Establishment Clause challenges.

When Boston excluded a religious flag for the first time, with no prior history of curating those flags, this Court found that the city was restricting private speech in a forum. *Shurtleff*, 596 U.S. at 257. When the Patent and Trademark Office excluded "disparaging" marks from registration despite not necessarily condoning the multitudinous other marks, this Court found that Office was restricting private speech in a forum. *Matal*, 582 U.S. at 243. The

same analysis applies here: by offering vanity messaging on plates, the state is not speaking but rather letting the motorists themselves speak their "own unique message", subject only to basic technical constraints. App.9a.[3]

II. The *Summum* Factors Confirm that Vanity Plates Are Private Speech.

Strict analysis of a forum's formal ownership is not dispositive in determining government speech. For instance, in *Walker* this Court relied extensively on three indicia derived from *Summum*: history of the speech; public perception of the speech; control of the message. *Walker*, 576 U.S. at 210-13 (citing *Summum*, 555 U.S. at 470, 472, 473). Run the vanity plates through the *Summum* factors, and the picture becomes clear. History? States have never used random letters and numbers to communicate official messages. Until vanity plates, these combinations were meaningless identifiers. Public perception? No one mistakes "COWBOY" or "MOM4EVR" for state proclamations. Government control? Tennessee does not draft, edit, or select these messages, but merely processes applications and generally rubber-stamps requests. On every measure that matters, vanity plates are private speech.

First, while the history of the specialty designs in *Walker* was associated with state messaging, states

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[3] This is not to say that any screening is inappropriate. Tennessee can and should engage in basic screening of obscene submissions and would not offend the First Amendment by appropriately seeking to forbid profanity or obscenity on specialty or vanity plates. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

have never used the alphanumeric pattern at issue here to speak. They are practical tools of identifying a vehicle and ascertaining its current registration. Apart from vanity patterns, they are essentially random and meaningless. This Court has specifically noted that messages on a vehicle are "readily associated with its operator." *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977).

Second, while the specialty designs discussed in *Walker* are often perceived and intentionally used by the state as state messages promoting tourism, a state's values, or noble causes, the alphanumeric patterns have no such public perception. Since the state has only a processing role, messages celebrating the vehicle's history, the personal beliefs of the vehicle's owner, or wordplay are commonplace. As noted above, it would be absurd for the state to claim that these religious or political messages were their own. Ask any reasonable person on the street: is "PROUD DAD" on a license plate an official Tennessee position? They immediately know these messages come from the car's owner, not the state capitol. Legal doctrine should have no trouble confirming what common sense tells us: these are personal expressions, not government endorsements.

Third, specialty designs are curated by the state. In *Walker*, the Sons of Confederate Veterans conceded that the Texas Department of Motor Vehicles Board had to approve each design and that they regularly rejected designs, 576 U.S. at 213, making the case more similar to *Summum*, where the city had to approve or reject each proposed monument for placement in its parks. Here, the state exercises no such control over each individual alphanumeric

pattern. Unlike specialty plates, which are presented as a complete, finite list of options, vanity patterns are limited only by space and an individual motorist's imagination. The clerical work of checking that submissions meet basic technical requirements does not involve the editorial judgment seen in *Walker*. *See Shurtleff*, 596 U.S. at 258 ("[T]he city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech.").

It therefore makes no sense to extend *Walker*'s assessment of *specialty* plates to the alphanumeric patterns of *vanity* plates. Tennessee would necessarily be claiming ownership over every message that appears on any license plate—transforming "I LUV MOM," "GO VOLS," and "JOHN316," into family policy preferences, sports allegiances, and religious endorsements. *Lex non intendit aliquid absurdum*.

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The court below held that petitioner's claim failed because vanity plate messages are government speech. That was error. This Court should reverse and remand with instructions for the lower court to apply the proper First Amendment standard to this case.

CONCLUSION

This Court should grant review and reverse the decision below.

Respectfully submitted,

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