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 Tennessee Supreme Court

JOINT BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit dedicated to defending the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended the First Amendment rights of individuals through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. *E.g.*, Br. *Amicus Curiae* FIRE Supp. Pet'rs in No. 22-555 & Resp'ts in No. 22-277, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024); Br. *Amicus Curiae* FIRE Supp. Pet'rs, *Free Speech Coal. v. Paxton*, 145 S. Ct. 2291 (2025). In lawsuits across the United States, FIRE works to vindicate First Amendment rights without regard to the speakers' views. *See, e.g.*, *Villarreal v. City of Laredo, Texas*, 94 F.4th 374 (5th Cir.), *cert. granted, judgment vacated sub nom. Villarreal v. Alaniz*, 145 S. Ct. 368 (2024). FIRE is strongly opposed to efforts to expand the government-speech doctrine to limit individuals' speech when it is facilitated by the State, as Tennessee does when it invites members of the public to share their own messages through personalized license plates. *E.g.*, Br. *Amicus Curiae* FIRE Supp. Pet'rs, *Penguin Random House, LLC v. Robbins*, No. 25-1819 (8th Cir. Aug. 1, 2025).

The First Amendment Lawyers Association (FALA) is a nonpartisan, nonprofit bar association comprised of attorneys throughout the United States and elsewhere whose practices emphasize defense of

[1] All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

Freedom of Speech and of the Press, and which advocates against all forms of government censorship. Since its founding, its members have been involved in many of the nation's landmark free expression cases, including cases before this Court. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act argued by FALA member and former president H. Louis Sirkin); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act argued by FALA member and former president Robert Corn-Revere). In addition, FALA has a tradition of submitting *amicus* briefs to the Court on issues pertaining to the First Amendment. *See, e.g.*, Br. *Amicus Curiae* FALA Supp. Resp't, *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *United States v. 12,200-ft Reels of Super 8mm Film,* 409 U.S. 909 (1972) (order granting FALA's motion to submit *amicus* brief).

SUMMARY OF ARGUMENT

This Court has warned that the government-speech doctrine is "susceptible to dangerous misuse." *Matal v. Tam*, 582 U.S. 218, 235 (2017). The attractiveness of a get-out-of-constitutional-scrutiny-free card is difficult for government officials to resist. Too frequently—and successfully more often than should be—States invoke the government-speech doctrine whenever they facilitate private speech, because when the doctrine applies, government regulation of the speech avoids any constitutional scrutiny.

Personalized license plates are a frequent example of this, and the instant case presents an opportunity to resolve a burgeoning split of authority addressing

whether personalized license plates convey the government's own speech. In deciding that license plate *designs* are government speech, the Court expressly left open the question of whether personalized plates—that is, the unique combination of alphanumeric characters specifically chosen and paid for by a vehicle's owner, in lieu of the random assignation of such by the State—are government speech. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 204 (2015). But it later indicated that decision on plate designs (as opposed to personalized plates) represents the doctrine's "outer bounds." *Matal*, 582 U.S. at 243.

And it should have been. States, drivers, and the public all understand that so-called vanity plates—numbering in the millions—deliver a message chosen by the vehicle's owner, not the government. States like Tennessee foster that public understanding, encouraging drivers to share "your own unique message" through personalized plates.[2] And members of the public understand that governments "do not endorse everything they fail to censor"—a proposition that is "not complicated." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

Still, the government-speech doctrine is catnip for government officials, who have a strong incentive to push its boundaries because it frees them from any burden under the First Amendment. And multiple courts have now answered *Walker*'s open question by

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[2] *Personalized Plates*, Tenn. Arts Comm'n https://tnspecialtyplates.org/personalized-plates [perma.cc/P425-WU76] (describing vanity plates as a way to share "your own unique message").

deeming personalized plates government speech. The decision of the Tennessee Supreme Court is the most prominent of these, blessing a state law requiring motorists' personalized plates to conform to officials' subjective expectations of "good taste."

The Tennessee Supreme Court's decision below is an outlier—for now. By rewarding the State's misuse of the government-speech doctrine to impose its own conception of "good taste" upon the speech of its citizens, the Tennessee Supreme Court encourages more states to try the same. If allowed to stand, the decision will cause constitutional injuries reaching beyond the bumpers of vehicles registered in Tennessee.

As *amicus* FIRE's research shows, subjective limitations on speech inexorably lead to inconsistent censorship and arbitrary decisions. That censorship will occur in contexts far removed from the four corners of license plates. A good deal of speech involves some facilitation by government actors, which is why the Court has warned that the government-speech doctrine is inappropriate when it is unclear whether the government intends to "transmit [its] *own* message." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022) (emphasis added). That's because the "boundary between government speech and private expression can blur" when government invites members of the public to contribute their own messages. *Id.*

This Court should grant certiorari to resolve the conflicting decisions by lower courts on the question of whether personalized plates are government speech,

and to reiterate that the government-speech doctrine does not reach all speech governments facilitate.

ARGUMENT

When officials claim the authority to regulate speech based on their own subjective evaluations of "taste" and "decency," they invite arbitrary decisions and viewpoint discrimination. Tennessee does exactly that, conditioning personalized license plates on their conformity with officials' "taste." The Tennessee Supreme Court blessed that policy by accepting the State's argument that it is regulating only its *own* speech.

But the government-speech doctrine does not apply when, as here, the government facilitates others' messages. Personalized license plates have long been promoted, used, and understood as speech *by the vehicle's owner* that the government accommodates as a means of generating revenue. Because the government's own speech is not subject to First Amendment scrutiny at all, application of the government-speech doctrine to speech facilitated by the government subjects a broad range of private speech to arbitrary and viewpoint-discriminatory censorship. Worse, because the government frequently facilitates speech by others, creeping expansion of the doctrine will lead to censorship of speech wholly unrelated to personalized plates. This Court's review is therefore necessary to resolve disagreement among the courts about the application of the government-speech doctrine to personalized plates, and to halt the doctrine's creep into other government-facilitated private speech.

I. Personalized License Plates Convey Individuals' Messages, Not the Government's Message.

Tennessee encourages its residents to share "your own unique message" through personalized plates but regulates their messages for conformity with "good taste and decency."[3] To avoid First Amendment scrutiny, Tennessee claims this is merely *self*-censoring state-issued license plates that convey the government's own speech. Not so.

A. States, including Tennessee, foster the public's understanding that personalized plates convey drivers' messages.

Personalized plates are ubiquitous. A 2007 state-by-state survey found that some 9.3 million vehicles bore personalized plates.[4] Just as that number has undoubtedly increased in the ensuing seventeen years, so too has the public understanding that vanity plates bear the expression of the vehicle's owner, not the state behind the plate.

That public understanding is fostered by the states. Tennessee encourages drivers to share "your own unique message" through personalized plates.[5]

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[3] *Personalized Plates*, Tenn. Arts Comm'n, *supra* n.2 (describing vanity plates as a way to share "your own unique message"); Tenn. Code Ann. § 55-4-210(d)(2) (prohibiting messages "that may carry connotations offensive to good taste and decency").

[4] *Va. Drivers Vainest of Them All with Their Plates*, Associated Press (Nov. 11, 2007), https://nbcnews.to/3wY4MYd [perma.cc/WM78-Y3WS].

[5] *Personalized Plates*, Tenn. Arts Comm'n, *supra* n.2. This characterization demonstrates that "a reasonable and fully

Arizona encourages residents to "express yourself" through personalized plates.[6] And North Carolina's application form puts it bluntly: "Isn't it time you made a name for yourself? Now's your chance to join thousands … and show the world what you think, who you are or almost anything else[.]"[7] These invitations recognize what is plain to any reasonable observer: Personalized plates convey the vehicle owner's message, not the government's.

B. Both before and after *Walker*, courts correctly concluded personalized plates are private speech, not government speech.

Given the public understanding that personalized plates represent an individual's speech, it is no surprise that courts have broadly rejected the application of the government-speech doctrine.

This Court has not directly addressed the question of whether individual, personalized messages on license plates are private speech or government speech. In holding that license plate *background* designs were government speech, the Court expressly declined to reach the question. *Walker*, 576 U.S. at 204. Just two years later, this Court cautioned that its holding in *Walker* "likely marks the outer bounds of the government-speech doctrine," sharing a reluctance

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informed observer would understand the expression" to be that of the driver, not the state. *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring).

[6] *Plate Selections Detail*, Ariz. Dep't of Transp., https://bit.ly/azplates [perma.cc/X8RZ-ABYU].

[7] Personalized Plate Form, N.C. Div. of Motor Vehicles, *available at* https://bit.ly/ncplatesform [perma.cc/K2TD-4XNP].

to "convert[]" private speech into government speech through regulation. *Matal*, 582 U.S. at 238–39.

Most courts addressing the issue—before and after *Walker*—correctly held that personalized plates were private speech in a nonpublic forum, if not a designated or limited public forum. *See, e.g.*, *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (sharing "skepticism" that personalized plates are nonpublic fora, as "a personalized plate is not so very different from a bumper sticker that expresses a social or political message"); *Montenegro v. N.H. Div. of Motor Vehicles*, 93 A.3d 290, 294–95 (N.H. 2014) (evaluating personalized plates as private speech on government property and declining to reach forum classification because "offensive to good taste" was facially unconstitutional even in nonpublic fora); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) (rejecting application of the government-speech doctrine to personalized plates and distinguishing *Walker*); *Kotler v. Webb*, No. CV-19-2682, 2019 WL 4635168, at *5–8 (C.D. Cal. Aug. 29, 2019) (surveying cases post–*Walker*).

The majority view appropriately rejects the notion that personalized license plates are government speech. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467. However, private speech "is not transformed into government speech simply because it occurs on government property." *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 823–24 (W.D. Mich. 2014). Nor does pervasive regulation of speech—even where the state acts as a gatekeeper before conferring a government

benefit, as was the case with trademarks—transmogrify private speech into government speech. *Matal*, 582 U.S. at 235–36; *see also Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004) (holding that adopt-a-highway signs, although "state owned," were private speech as "an adopter speaks *through* the signs by choosing to undertake the program's obligations in exchange for the signs' announcement to the community" (emphasis added)).

As the majority of courts recognize, if a state adopted the message of each personalized plate as its own, it would adopt competing and contradictory messages, reducing the state to "babbling prodigiously and incoherently." *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1232–33 (E.D. Ky. 2019) (quoting *Matal*, 582 U.S. at 236). These prescient holdings have since been reinforced by this Court's recent decision in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

C. *Shurtleff* further narrows the government-speech doctrine, reinforcing the importance of public awareness of the message's origin.

Shurtleff provided doctrinal clarification where the "boundary between government speech and private expression" may "blur" due to the government facilitating speech by private speakers. *Id.* at 252. In such cases, as with *Shurtleff*'s flags displayed outside of city hall, courts must conduct a threshold "holistic inquiry" into whether the government "intends to speak for itself or to regulate" others' expression when it "invites" speech from private citizens. *Id.*

At its core, *Shurtleff* recognizes the public's ability to identify a message's speaker. In *Shurtleff*, this Court acknowledged the government-speech doctrine does not apply when it is unclear the government intends to "transmit [its] *own* message" through a speaker, as opposed to inviting other "speakers' views[.]" *Id*. (emphasis added). As Justice Alito put it, government speech requires a "purposeful communication of a governmentally determined message[.]" *Id.* at 268 (Alito, J., concurring in the judgment). Just because the government participates in speech or facilitates it does not make it *the* speaker. And, importantly, the government's refusal or failure to censor speech does not mean it endorses that speech. *Mergens*, 496 U.S. at 250.

Because members of the public use vanity plates to express their own views—thanks, in part, to states' promotion of personalized plates as a means for self-expression—the public reasonably understands vanity plates to be private, not government, speech.

D. The Tennessee Supreme Court's decision sharpens a division among lower courts on the scope of the government-speech doctrine.

A growing number of courts have trudged beyond the outer bounds of the government-speech doctrine by expanding *Walker* to reach personalized plates.

Chief among these is the Indiana Supreme Court's decision in *Vawter*, holding vanity plates to be government speech. *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015). The once-outlier decision in *Vawter* largely proved

unpersuasive to courts confronting arguments that vanity plates are government speech. *See, e.g.*, *Carroll*, 494 F. Supp. 3d. at 167 (rejecting the reasoning in *Vawter* as "wholly unpersuasive").

That is because central to *Vawter*'s infirmity is its underappreciation for the public's understanding of *who* is speaking through personalized plates. "On a basic level, what it comes down to is that 'a reasonable observer would perceive the plate's message' as the driver's rather than the state's." *Kotler*, 2019 WL 4635168, at *8 (citation omitted).

And that's why the Maryland Court of Appeals rejected *Vawter*, recognizing "vanity plates represent more than an extension ... of the government speech found on regular license plates ...." *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 328 (Md. 2016). Personalized plates do not represent the message of the government, and observers of personalized plates "understand reasonably that the messages come" not from the government, but "from [the] vehicle owners." *Id.* The public's understanding that vanity plates represent a *driver's* speech was also important in *Hart*, which distinguished personalized messages from license plate designs and disagreed with the argument that personalized plates "have been closely identified in the public mind with the state." *Hart*, 422 F. Supp. at 1232.

However, a now-growing number of courts have been persuaded by *Vawter*, notwithstanding this Court's subsequent warnings in *Matal* and *Shurtleff* about the government-speech doctrine's limitations. For example, a district court in Hawai'i followed *Vawter* without addressing *Shurtleff*'s directive that

courts conduct a "holistic inquiry" into *who* is speaking. *Odquina v. City & County of Honolulu*, No. 22-cv-407, 2022 WL 16715714, at *11 (D. Haw. Nov. 4, 2022), *aff'd on other grounds*, No. 22-16844, 2023 WL 4234232 (9th Cir. June 28, 2023).

Tennessee became the second State to adopt *Vawter*'s flawed reasoning, amplifying the split of authority on the matter. The Tennessee Supreme Court likewise missed the lessons of *Shurtleff* and *Matal*. Instead of asking whom the public perceives as the speaker, it myopically elevated how a license plate's alphanumeric characters serve the State's function of uniquely identifying vehicles—ignoring, for personalized plates, *who* picks the characters and thus who the public understands to be speaking.

But the question is not whether the government has assisted in communicating something. Instead, it is whether the public views *the ultimate* message—here, the intentionally selected alphanumeric combination chosen by the owner of a vanity plate—as private or government speech. A viewer may understand a license plate to have an identifying function for the government and yet still recognize that the car's owner—not the government—conceived, chose, and communicates through the personalized plate.

The Tennessee Supreme Court's reasoning assumes that because the State *also* uses license plates to communicate something (*i.e.*, the unique identification of a vehicle), the vehicle owner's speech is subsumed into the State's. App. 29a–30a. But that is precisely the error Justice Alito warned against if courts relied too heavily on a "factorized approach" and

"artificially separate[d] the question whether the government is speaking from whether the government is facilitating or regulating private speech." *Shurtleff*, 596 U.S. at 266 (Alito, J., concurring in the judgment).

Moreover, while the alphanumeric combination on all license plates serves a valuable government "purpose," App. 23a, that function is secondary to the message the motorist expresses. That personalized plates, like ordinary license plates, must use a unique combination of letters and numbers to express their message hardly suggests the ultimate message is merely "incidental" to their function as identifiers. App. 25a.

The decisions below and in *Vawter* represent a growing danger to freedom of expression, particularly as governments increasingly become involved in facilitating others' speech. Those decisions expanding the terrain of the government-speech doctrine will have consequences far beyond license plates.

E. Because governments frequently facilitate private speech, an expansive government-speech doctrine will threaten speech elsewhere.

Although *Walker* likely represents the "outer bounds" of the government-speech doctrine, *Matal*, 582 U.S. at 238, government officials have a strong incentive to push its boundaries: Once applied, the doctrine frees governments of any First Amendment burden. But expanding the doctrine will threaten speech in a broad variety of contexts because governments facilitate a great deal of speech.

Take public libraries, for example. They facilitate speech by providing curated collections of books and hosting community events. In battles over the content of library books, States have taken the position that every book in their public libraries is government speech,[8] and Florida has urged that its officials may remove books based on the party affiliation of their authors.[9]

Or consider public universities. Student organizations—often using their institution's name, as do the "College Republicans at the University of Tennessee, Knoxville"—host speakers or otherwise express themselves, often by using fees collected by the institution, often in venues bearing the university's name. But that does not buy universities greater constitutional leeway to censor student groups by claiming the speech is attributable to the institution. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841–42 (1995).

Yet university administrators press on. Campus officials have sought to advance the government-speech doctrine as a vehicle to suppress unpopular campus groups or speakers. *E.g.,* Florida now claims it may prohibit university faculty members from

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[8] *See, e.g., Little v. Llano County*, 138 F.4th 834, 837–38 (5th Cir. 2025), *app. to extend time to file pet. for writ of certiorari granted*, 25A116 (U.S. July 28, 2025).

[9] Br. for State of Fla. as Amicus Curiae Supporting Def., *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, No. 3:23-cv-10385 (N.D. Fla. Aug. 22, 2023), ECF No. 31-1 at 3–4; Douglas Soule, *Judge Hears Florida's Argument that School Book Bans Are Protected Government Speech*, Tallahassee Democrat (Dec. 7, 2023), https://bit.ly/floridagovtspeech [perma.cc/P9MX-PTYQ].

promoting banned ideas, as faculty are "simply the State's mouthpieces."[10]

Officials have frequently pushed to expand the government-speech doctrine when the state facilitates speech. Government facilitates speech, for example, when it provides intellectual property regimes, such as when the federal government registers trademarks—which it has (unsuccessfully) claimed are a form of government speech.[11] And it facilitates speech when it sponsors art exhibits, museums, theaters, concerts, debates, and so on.

While some instances of such entanglements may correctly be described as the government's speech because it intends to endorse speech by selecting it, the central question is *who* is speaking. Otherwise, expansion of the government-speech doctrine that removes the First Amendment from the equation will empower censorship unencumbered by constitutional limits.

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[10] *Pernell v. Fla. Bd. of Govs. of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1233–34 (N.D. Fla. 2022) (rejecting government-speech argument), Nos. 22-13992 & 22-13994 (11th Cir. argued June 14, 2024). Yet this Court has long recognized individual faculty are understood to speak for themselves as part of "that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

[11] *Matal*, 582 U.S. at 233–39.

II. Regulating Speech for "Good Taste and Decency" Leads to Arbitrary Decisions and Viewpoint Discrimination.

The natural result of allowing the State to lay claim to a private speaker's message on the grounds that it, too, intended to say something, is freewheeling censorship. The subjective "good taste and decency" standard chosen by Tennessee is particularly pernicious, requiring the public to confirm their speech to subjective state standards. *See, e.g.*, *Montenegro*, 93 A.3d at 297–98 ("offensive to good taste" standard "was not susceptible of objective definition," allowing officials to censor plates based on their "subjective idea of what is 'good taste'").

That wide authority, recognized as a danger to speech in any other context, results in absurd, abusive, and petty applications that the First Amendment prohibits. This Court's review is necessary to avoid such outcomes.

A. When State authorities police private expression for conformity with officials' subjective "taste," arbitrary censorship follows.

Tennessee's "good taste and decency" standard, unbounded by the First Amendment under the government-speech doctrine, bestows upon officials the unfettered power to limit any speech they subjectively deem offensive. As a result, Tennessee's standard cannot meet even the least-restrictive scrutiny applied in *nonpublic* forums, which requires that regulations be "reasonable" and "viewpoint

neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

The First Amendment, at its core, recognizes that government officials are inherently incapable of making "principled distinctions" about whether speech is sufficiently inoffensive to be permitted. *Cohen v. California*, 403 U.S. 15, 25 (1971). Left to their own determinations about what is subjectively offensive or inoffensive, officials will institute their own, viewpoint-driven judgments. To prevent the risk of viewpoint-discrimination inherent in subjective evaluations, decisions to exclude an individual's speech must be governed by "some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 16 (2018).

States may not grant officials unfettered discretion to determine whether speech is permissible, even in a nonpublic forum. *See, e.g.*, *id.* at 21–22; *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987) (striking down airport's requirement that speech be "airport related" because it confers "virtually unrestrained power" on authorities (citation omitted)); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (striking down baseball stadium's arbitrary requirement that banners be in "good taste"). Yet a standard premised on "good taste" is hopelessly vague because it "fail[s] to provide explicit standards guiding [its] enforcement," thereby "impermissibly delegat[ing]" evaluation of speech to authorities "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *United Food & Com. Workers Union, Loc. 1099 v. Sw.*

Ohio Reg'l Transit Auth., 163 F.3d 341, 359 (6th Cir. 1998) (quoting, in part, *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)); *see also Coleman v. Ann Arbor Transp. Auth.*, 904 F. Supp. 2d 670, 691 (E.D. Mich. 2012) (holding *United Food* is "conclusive" on the question of whether a "good taste" regulation was impermissibly vague).

And when officials claim they are simply acting to prevent offense to others (whether real, imagined, or feared), they are laundering viewpoint discrimination into the analysis. Even if regulators could apply a policy prohibiting offensive speech with any consistency, "evenhandedly" prohibiting disparagement is still viewpoint discrimination. *Matal*, 582 U.S. at 243. Such an interest in tilting public discourse is not legitimate. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 579–80 (2011). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit [expression] simply because society finds [it] offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Accordingly, listeners' anticipated reaction to speech is neither a viewpoint- nor content-neutral basis for regulation. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (security fees imposed due to expected hecklers were not content-neutral).

FIRE's research demonstrates the inconsistent censorship that flows when officials are empowered to limit speech based on their own "taste." Speech popular with State officials survives their scrutiny, but officials eager to avoid conflict are quick to respond to complaints through censorship. It is, after all, easier

to deny or rescind a plate based on a complaint, no matter how frivolous, than to expend institutional resources defending freedom of expression as a social value and an important right.

This means only popular expression—or speakers able to marshal support for their speech—survives state scrutiny. As a result, political speech, where the First Amendment's protection is "at its zenith," *Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 186–87 (1999), lives or dies based on its popularity. That result is antithetical to the First Amendment's counter-majoritarian purpose. *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017) (Pryor, J., concurring) (noting the First Amendment is a "counter-majoritarian bulwark against tyranny").

For example, Nathan Kirk, an Alabama gun store owner, paid $700 for a plate depicting the Gadsden flag and two acronyms deriding President Biden:[12]

[12] Sarah Whites-Koditschek, *Alabama Man Gets to Keep 'Let's Go Brandon' Plate, State Even Apologizes*, AL.com (Mar. 15, 2022), https://bit.ly/3s85z2N [perma.cc/AQ7E-WQZJ].

Kirk later received a letter demanding its return due to "objectionable language … offensive to the peace and dignity of the State of Alabama." That "language" was the letter "F" in the latter acronym, commonly understood to mean "Fuck Joe Biden" (Kirk said he intended it to mean "Forget Joe Biden"). The State's dignity was apparently *not* imperiled by the leading acronym ("LGB," or "Let's Go Brandon"), *itself* a phrase with origins in the words "Fuck Joe Biden."[13] Yet after conservative media rallied around Kirk's plate, the Alabama retreated and *apologized* to Kirk.[14]

But what about when a complaint catches the attention of politicians? In 2021, a journalist shared a photo of a plate she found amusing: "ACAB"—an anti-police acronym ("All Cops Are Bastards"):[15]

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[13] *Let's Go Brandon: NASCAR Driver Brandon Brown Caught in Unwinnable Culture War*, Associated Press (Feb. 19, 2022), https://bit.ly/41tBqNz [perma.cc/2JK6-KTQP].

[14] Those who do not attract media attention to their cause get less mileage. While Kirk can parade his "LGBFJB" plate down interstates in North Dakota, its own residents cannot: North Dakota, too, bans "LETSGOBR," "L3TSGOB," and "FJB2020." Notice of Denial, N.D. Dep't of Transp. (Jan. 21, 2022), *available at* https://bit.ly/northdakotalgb; Notice of Denial, N.D. Dep't of Transp. (Feb. 2, 2022), *available at* https://bit.ly/northdakotafjb.

[15] Violet Ikonomova (@violetikon), Twitter (June 19, 2021, 10:29 AM), https://bit.ly/michiganacabplate.

When another Twitter user alerted Michigan's Secretary of State to the tweet, the state launched an official investigation into the four letters.[16] It ultimately revoked the plate under a prohibition against language "used to disparage or promote or condone hate or violence directed at any type of business, group or persons"—in other words, a ban on hate speech of the sort this Court has rejected. *See Matal*, 582 U.S. at 246–47 ("the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"). The revocation showed how restrictions on "hate speech" are inevitably repurposed to protect the powerful—here, a class of government officials[17]—from offense.

Political speech often provokes public anger, and standards premised on "good taste" invite viewpoint discrimination. Because they are subjective, they are malleable. They provide an easy way for an official to

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[16] Email from Dawn VanAken, Dir., Off. of Bus. & Internal Svcs., Mich. Dep't of State, to James Fackler, Mich. Dep't of State (June 22, 2021, 8:14 AM), *available at* https://bit.ly/acab-plate [perma.cc/VLL7-ZVK4]. Like Nathan Kirk's "Forget Joe Biden" defense, the "ACAB" plate owner sought refuge from censorship by invoking a coded reference, arguing to state officials that the plate *really* meant "All Cats Are Beautiful"—a tongue-in-cheek variation on the acronym. *See* email from Amanda Bauer, Manager, Renewal by Mail, Mich. Dep't of State, to Doug Novak, Mich. Dep't of State (July 21, 2021, 4:02 PM) ("I will contest this claim and I would like to speak with somebody of what offense may be caused by a vanity plate to freely exclaim my love for cats"), *available at* https://bit.ly/love-for-cats [perma.cc/Q7YH-XSEV].

[17] In our constitutional system, police officers in particular are expected to be capable of a "higher degree of restraint than the average citizen" when facing public criticism. *Houston v. Hill*, 482 U.S. 451, 462 (1987) (cleaned up).

mollify complaints from the public or to advance the official's personal views. Michigan's revocation of the "ACAB" plate, flowing from public objection to its message, is one example: It is doubtful the state would have taken the same course in response to a plate reading "BLULINE" or promoting other pro-law enforcement messages. In *Montenegro*, for example, officials (unconstitutionally) denied an anti-police message on viewpoint-discriminatory grounds by deeming it "offensive to good taste" while approving pro-government messages. *Montenegro*, 93 A.3d at 292–93 (state refused "COPSLIE" plate but issued "GR8GOVT"). And in New York, prohibitions on "patently offensive" plates led state officials to refuse a plate offering support for Second Amendment rights ("PRO NRA").[18]

Even police officers are not immune from censorship. A retired NYPD sergeant learned that the hard way when New York revoked his post-9/11 plate—"GETOSAMA"—on the basis that it was "derogatory to a particular ethnic group." (After successfully suing over the plate, he swapped it for "GOTOSAMA" a day after Osama bin Laden's death.)[19]

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[18] Eugene Volokh, *"PRO NRA" License Plate*, Volokh Conspiracy (Aug. 18, 2003), https://bit.ly/volokhnraplate [perma.cc/5R26-3GBD].

[19] *New York Man Trades GETOSAMA License Plate for GOTOSAMA*, Reuters (May 4, 2011), https://bit.ly/45PyIDq [perma.cc/5RTH-5VEU].

B. Limits on personalized plates invite both viewpoint discrimination of religious and political speech, and arbitrary enforcement, with absurd results.

Vague standards on personalized plates also lead to arbitrary and discriminatory application, including to speech concerning religious beliefs and personal identity, and result in absurd regulatory decisions.

For example, when New Jersey banned plates "offensive to good taste and decency," it prohibited plates expressing atheistic views ("8THEIST" and "ATHE1ST") but permitted registration of plates identifying the driver's theistic beliefs (*e.g.*, "BAPTIST"). *Morgan*, 2015 U.S. Dist. LEXIS 61877 at *3, n.2, *19. Vermont, too, prohibited plates exhibiting a religious view (like "PRAY," "ONEGOD," "SEEKGOD," and "PSALM48"), but permitted those expressing secular philosophical views (like "CARP DM" and "LIVFREE"). *Byrne v. Rutledge*, 623 F.3d 46, 56–57 (2d Cir. 2010). New Mexico, for its part, prohibits plates with the words "MUSLIM" or "CATHOLIC."[20] And officials in Kentucky allowed "GODLVS" and "TRYGOD" on license plates, but refused a retiree's "IMGOD" request.[21] In Oregon,

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[20] Spreadsheet of New Mexico's "Restricted Words," *available at* https://bit.ly/newmexicoplates [perma.cc/5HZ7-JSA5].

[21] Sarah Ladd & Andrew Wolfson, *'TRYGOD' Is OK, 'IMGOD' No Way: Vanity Plate Rules and Free Speech Butt Heads*, Louisville Courier J. (Jan. 8, 2020), https://bit.ly/louisvillegodplates [perma.cc/T8JT-C4PS].

positive religious messages receive approvals while those negative toward a religious group face denial.[22]

These arbitrary restrictions also burden expression on sexual orientation. Oklahoma, for instance, prohibited an LGBTQ student from using the words "IM GAY," deeming the message "offensive to the general public," but permitted plates reading "STR8FAN" and "STR8SXI" ("straight sexy").[23]

Standards of "decency" inevitably lead to absurd results. As one official put it, identifying what's offensive is "kind of a moving target."[24] Sometimes a personalized plate's once-inoffensive message is deemed offensive because the world changes around it. For example, Michigan revoked a plate reading "JAN 6TH" in the summer of 2021, on the belief it "describe[s] illegal activities" or "promote[s] or condone[s] violence,"[25] even though the plate's issuance predated the events at the U.S. Capitol by some three years. Far from being a clairvoyant supporter of political violence, its registrant explained

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[22] Amanda Arden, *Oregon DMV Denied These Custom License Plates in 2021*, KOIN (Jan. 14, 2022), https://bit.ly/koinplates [perma.cc/2WPU-V9ME].

[23] Kirsten McIntyre, *Norman Man Sues Tax Commission over 'IM GAY' License Tag*, News 9 (Feb. 15, 2010), https://bit.ly/3Sb52aU [perma.cc/2ZG6-9VDW].

[24] Bill Bowden, *Thousands of Personalized Plates — from ARSE to ZHIT — Are Banned in Arkansas*, Ark. Democrat Gazette (Feb. 6, 2022), https://bit.ly/4ciP6Pi [perma.cc/ 2PEC-RXZE].

[25] Letter from Renewal by Mail, Mich. Dep't of State (July 9, 2021), *available at* https://bit.ly/3TbWsKC [perma.cc/353J-VXHP].

that the date recognized "an instrumental day to my sobriety." Michigan cancelled the plate anyway.[26]

Some restrictions on personalized plates are absurd on their face. Take, for example, New Mexico's inexplicable prohibition on the word "CANADIAN." In neighboring Colorado, a vegan's love of tofu ran afoul of license plate censors, who feared that someone may "misread" the plate "ILVETOFU" by adding two letters to the end, in their mind.[27] (Tennessee followed suit when a PETA member sought the same plate.[28]) And in North Dakota, authorities denied an application for a plate about the Mafia—the word "OMERTA," referencing the "code of silence"—out of concern it might encourage unlawful activity by others.[29] One might query whether a sincere effort to promote the Mafia's code of silence would involve advertising via license plate.

What leads state officials to conclude that some words are offensive and others are not? If their own subjective sense is inconclusive, many officials turn—by policy—to online sources like the Urban Dictionary to see whether members of the public have flagged a word or phrase as carrying offensive connotations. As Nevada's Supreme Court has held, these user-

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[26] Email from Amanda Bauer, Manager, Renewal by Mail, Mich. Dep't of State (Aug. 10, 2021, 11:46 AM), *available at* https://bit.ly/3EHZgdY [perma.cc/2R9A-6TX3].

[27] *Colo. Rejects 'ILVTOFU' License Plate*, UPI (Apr. 8, 2009), https://bit.ly/tofuplate [perma.cc/LAD6-9UJS].

[28] David Lohr, *Tennessee Says 'F-U' to Tofu-Loving PETA Member over 'Obscene' License Plate*, Huffington Post (Dec. 6, 2017), https://bit.ly/tofuplate2 [perma.cc/3BDN-LUGR].

[29] Notice of Denial, N.D. Dep't of Transp. (Feb. 25, 2022), *available at* https://bit.ly/omertaplate [perma.cc/4HZV-RJ8U].

submitted definitions "can be personal to the user and do not always reflect generally accepted definitions for words." *Nev. Dep't of Motor Vehicles v. Junge*, 281 P.3d 1221 (Nev. 2009).[30] Crowdsourcing definitions does not establish even a veneer of objectivity in ascertaining what is "offensive" but merely applies idiosyncratic and hypersensitive definitions to "cleanse" public discourse.

CONCLUSION

Tennessee is not obligated to establish a personalized plate program. Having chosen to do so, it could have established objective criteria to accommodate its interests while avoiding arbitrary and inconsistent application. But Tennessee cannot simply suppress any speech a passing motorist might find offensive. The First Amendment provides a time-honored remedy for those who encounter speech—whether on a license plate, bumper sticker, or shirt—that they believe objectionable: They may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen*, 403 U.S. at 21.

Whether vanity plates are government speech is a question the Court left open, and lower courts have reached differing conclusions, to the detriment of free speech. In resolving that question now, this Court can make clear that government facilitation of speech is

[30] The Nevada Supreme Court's unpublished opinion is available at https://bit.ly/nvscplates.

not a license to censor it. This Court should grant the petition for a writ of certiorari.

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