

In the
Supreme Court of the United States

LEAH GILLIAM,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT SUMMARY

Respondent’s brief confirms three things. First, the Tennessee Supreme Court misread *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015), so badly that only this Court can correct the error. Second, the split of authority is real, deep, and ready for resolution. And third, Tennessee’s position threatens free speech far beyond vanity plates. The petition should be granted.

ARGUMENT

I. Under *Walker*, personalized license plates are not government speech.

This case is superficially like *Walker* in that both involve license plates. Opp.1. But there is a constitutional difference between a plate where a state maintains “sole control over the ... alphanumeric pattern[,]” *Walker*, 576 U.S. at 213, and one that displays a message paid for and created by the vehicle owner, Pet.6–7. *Walker* was supposed to “mark[] the outer bounds of the government-speech doctrine[,]” *Matal v. Tam*, 582 U.S. 218, 238 (2017); yet the Tennessee Supreme Court sprinted far beyond that sensible line.

The State’s core argument is that vanity plates serve as a vehicle ID and thus must be government speech, no matter how personal. Opp.1–2, 22–26. That’s wrong. Gilliam was using the personalized, character-combination portion of the license plate to “express [her] *own* views[,]” not Tennessee’s. *Shurtleff v. City of Boston*, 596 U.S. 243, 248 (2022) (emphasis added). That’s no different than using a city flagpole to do the same. *Id.*

The State’s reasoning also would improperly transform profoundly personal speech included on government documents—like the name printed on a birth certificate—into the government’s speech. Cf. Tenn. Op. Att’y Gen. No. 16-38, 2016 WL 5539680, n.5 (Sept. 21, 2016) (“While one could conceivably argue that information listed on a birth certificate also constitutes ‘government speech,’ we do not think that the State of Tennessee intends to convey or in fact conveys any message by recording a child’s name on a birth certificate. Instead, to the extent a child’s name is expressive in nature, it is the expression of the parents, not of the State.”).

Tennessee’s mistake is to conflate Gilliam’s message with a different one: “Identify this vehicle by these alphanumeric characters.” Opp.1. But if that were the only message that Gilliam’s plate communicated, there would be no reason for Tennessee to censor it. As the Tennessee Court of Appeals put it, “to the extent the unique alphanumeric configuration serves *only* to identify a vehicle as lawful registered, then it is unclear why the State has an interest in the phonetic message.” Pet.App.67a.

The fact that Gilliam’s expression is concurrent with the government’s use of the property does not render the First Amendment irrelevant. When a school allows students to use its property for after-school functions, the school would surely find those activities secondary to the school’s use of the facilities. But having opened a forum for expression, the school still must abide by First Amendment rules. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001). So too here.

Further, when “inextricably intertwined” forms of speech are truly at issue, this Court has suggested that courts should apply the “test for fully protected expression.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“[W]here, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.”). It has also instructed that “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.” *F.E.C. v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474 (2007); see also *id.* at n.7 (“[I]n a debatable case, the tie is resolved in favor of protecting speech.”). The State’s dual message theory—that the existence of any government message on a license plate transforms Ms. Gilliam’s speech into its own—fails accordingly.

With that threshold mistake exposed, *Walker*’s holistic inquiry confirms that the personalized message Gilliam created and paid for is her speech, not the State’s. *Contra* Opp.20–22. Start with history. For 26 years, the State has been inviting vehicle owners to create their “own unique message[.]” Pet.App.9a. There is no evidence in the record that the State has ever used alphanumeric combinations to express *its* message. “Indeed, vanity plate messages are more ‘one-of-a-kind’ than bumper stickers[.]” since only one car at a time can display the vanity plate’s message. *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165, 184 (Md. Ct. Spec. App. 2015). *Walker* did not express an opinion on this issue. 576 U.S. at 204.

Next, public perception. Gilliam’s poll demonstrated that Tennesseans perceived a personalized license plate to be a message of the vehicle owner by a nearly 22:1 margin. Pet.9. But no poll was necessary. There is “*no evidence* in the record establish[ing] that the public likely perceives the State to be speaking through vanity license plates[.]” Pet.App.68a (emphasis added). “[W]hat Tennesseans see on an ordinary day are unique, personalized messages, albeit on government property, affixed to privately owned vehicles.” Pet.App.69a.

Finally, government control. “Although the statutory framework allows the Department to approve or deny vanity license plate messages, the record established that in reality, the Department’s oversight has been inconsistent.” Pet.App.73a. “[T]he Department has no written policies about how to screen vanity plate applications for ‘good taste and decency.’” Pet.App.74a. And “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.” *Ibid.* While not as lax as the City of Boston’s control in *Shurtleff*, the Department is not “‘actively’ shaping or controlling the messages.” Pet.App.74a–75a (quoting *Shurtleff*, 599 U.S. at 252). “The level of control exercised by the Department here is not comparable to the specialty curated monuments at issue in [*Pleasant Grove City* v.] *Summum*[, 555 U.S. 460 (2009)] or specially designed license plates in *Walker*.” Pet.App.75a.

In sum, it is unnecessary to “reimagine the government speech doctrine” in this case for the Court to rule for Gilliam. Contra Opp.21.

II. The lower courts are hopelessly divided and perpetuating injury.

Tennessee does not dispute the plethora of decisions reaching opposite conclusions on the question presented. Pet.17–19. Instead, Tennessee says it is a shallow split with shallow reasoning. Opp.12–17. The State is wrong on both counts.

Taking the points in reverse order, lower courts have spilled pages of ink in their analyses—including here. Compare Pet.App.38a–80a (unanimous Tennessee Ct of Appeals opinion analyzing *Shurtleff*'s holistic factors and concluding this is private speech) with Pet.App.1a–37a (unanimous Tennessee Supreme Court opinion conducting the same analysis and concluding this is government speech). And many courts have “explained why” a personalized license plate expresses the message of the person who paid for and created it. Contra Opp.15. *E.g.*, *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 326 (Md. 2016) (“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.”); *Overington v. Fisher*, 733 F. Supp. 3d 339, 345–46 (D. Del. 2024) (“Unlike in *Walker*, where state governments have historically used the design of license plates to communicate messages, Delaware has not historically used the text of vanity license plate numbers to communicate messages. To the extent the individual registration number configurations broadcast any message at all, it is only because the state has allowed individual drivers to pick some combination of letters and numbers that carries significance to the driver.”) (quotation omitted).

Most of these cases eschew the position that personalized license plates convey *no* government speech. Contra Opp.15–16. Instead, they accept the invitation to apply this Court’s three-factor, holistic test in the blurry speech zone “when, as here a government invites the people to participate in a program.” *Shurtleff*, 596 U.S. at 252.

Perhaps what Tennessee is looking for is a more traditional forum analysis. If that’s the criticism, it applies equally to *Shurtleff*, which merely applies the three-factor, holistic test and stops. But see *Shurtleff*, 596 U.S. at 272 (Alito, J., concurring) ([W]hen “the government has intentionally opened a nontraditional forum for public discourse, a court may immediately infer that private-party expression in the forum is not government speech. There is no need to consider history, public perception, or control in the abstract.”) (citation modified).

But if that’s what Tennessee wants, it will find that analysis in many vanity-plate opinions as well. Compare, e.g., *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) (“Because vanity plates are private speech protected by the First Amendment, forum analysis applies. ... A license plate is government property upon which Kentucky has allowed some limited private expression in the form of vanity plates. Therefore, this Court finds that license plates, when made available for private expression, are a nonpublic forum.”), *Byrne v. Rutledge*, 623 F.3d 46, 54 (2d Cir. 2010) (same), and *Mitchell*, 148 A.3d at 326 (same), with *Comm’r of the Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1208 (Ind. 2015) (personalized license plates are *not* limited public fora, designated public fora, or nonpublic fora).

Moving to the State's first point, this is not a shallow split. In addition to the 2–2 split among state supreme courts, Opp.12, federal district courts overwhelmingly reject Tennessee's position, Pet.14–15. Tennessee says not enough federal circuits have spoken. Opp.13. That's because states nearly always lose and don't appeal because the messages on personalized plates are so obviously private speech. The only cases appealed are the small minority in which the state wins, so a plethora of circuit opinions is unlikely.

And district courts matter. They issue injunctions. They shape the law. And the practical effect of the split is that motorists enjoy First Amendment protection for their personalized-plate messages in California, Delaware, Kentucky, Maryland, Michigan, New Hampshire, Oregon, Rhode Island, Vermont, Virginia, and the entirety of the Second and Eighth Circuits. Pet.14–15. Motorists in the rest of the country do not. And it's irrelevant which side has it right; either half the country is being deprived of its constitutional rights or half of state governments are being denied the right to censor vanity plates. Regardless, the ongoing harm is immense and further percolation will not meaningfully add to the debate.

Tennessee deems irrelevant the multiple courts that "assume" personalized plates are private speech under this Court's precedents, Pet.15, declaring that those cases "mean[] absolutely nothing." Opp.14. Wrong. Courts assume propositions when they're obvious. That's why many courts assume personalized plates are private speech, not government speech. More important, these decisions are still binding precedent with binding injunctions that—in Tennessee's view—handcuff officials from censoring freely.

This intractable split has practical consequences. In states that follow the Tennessee Supreme Court’s rule, “[s]peech popular with State officials survives their scrutiny, but officials eager to avoid conflict are quick to respond to complaints through censorship.” FIRE & First Am. Lawyers Assoc. Br. 18–22 (discussing examples). And the volume of censorship is staggering. New Jersey banned “8THEIST” and “ATHE1ST” but allowed “BAPTIST.” *Id.* at 23. Vermont prohibited “PRAY” and “SEEKGOD” but allowed “LIVFREE.” *Id.* Kentucky allowed “TRY-GOD” but censored “IMGOD.” *Id.* The examples write themselves. Pet.28–29. These aren’t mere hypotheticals, either; they’re real messages. And whether they’re constitutional depends on which state issued the plate.

Finally, Tennessee urges the Court to wait for one of two more pending cases, one being litigated by the ACLU (*Whately v. Lackey*, 785 F Supp. 3d 149 (W.D. Va. 2025), appeal docketed, No. 25-1751 (4th Cir. July 2, 2025), the other by the Wisconsin Institute for Law & Liberty (*M.J. Nichols Co. v. Thompson*, No. 24-cv-566 (W.D. Wis. Filed Aug. 12, 2024)). But the Wisconsin institute supports this Court’s review *now* “to resolve lower court confusion and refine the [government-speech] doctrine with a more narrow and principled approach.” Wis. Inst. for Law & Liberty and The Buckeye Inst. Br. 12–13. And that makes sense. Until this Court steps in, lower courts will continue to struggle, reach conflicting outcomes, and waste party, government, and judicial resources. *Id.* at 12. Waiting accomplishes nothing except ensuring that the impingement of individual freedoms—or the rights of state governments—endures.

III. Tennessee’s position threatens free speech far beyond vanity plates.

Tennessee’s theory doesn’t stop at license plates. If the government speaks whenever it conveys identifying information through alphanumeric characters, the government speaks through:

- **Trademark registrations.** The government issues certificates displaying trademarks. Those trademarks convey identifying information about goods. So under Tennessee’s theory, “Just Do It” is government speech. But *Tam* held otherwise. 582 U.S. at 235–36; *Simon Tam & Inst. for Free Speech Br. 2–4*.
- **Business names.** The government issues licenses displaying business names. Those names convey identifying information about businesses. So “Smith’s Tavern” is government speech.
- **Social media handles.** Some states require disclosure of social media handles for certain licenses. So “@ResistFascism” is government speech, too.

Tennessee insists the Tennessee Supreme Court’s holding is narrow. Opp.18–19. But the opinion’s reasoning certainly is not. Once the government can censor expression merely because it appears on a government ID, the First Amendment becomes an empty promise.

IV. This case is an ideal vehicle.

Walker is no barrier to this Court fixing the doctrinal problems created by the decisions on Tennessee’s side of the split.

As noted, while this case also involves license plates, Opp.17, *Walker* did not resolve the question presented here. 576 U.S. at 204. And the Court’s logic in *Walker*, *Shurtleff*, *Tam*, and *Summum* confirms that personalized messages created and paid for on vanity plates are private speech. Pet.19–26; Am. Ctr. for Law & Justice Br. 3–13.

The fact that the Court can use this case as a vehicle to clarify the government-speech doctrine is a feature, not a bug. Contra Opp.20 n.1. After all, it seems readily apparent that the government-speech doctrine should not apply when, as here, “the government is ... merely facilitating private speech’ and is not ‘actually expressing its own views[.]’” Protect the First Found. Br. 12 (quoting *Shurtleff*, 596 U.S. at 263, 266 (Alito, J., concurring)). And Tennessee conceded below that Gilliam’s personalized plate was her “own unique message,” not “the government’s message.” Tr. Ex. 1 at 28:5–15.

Finally, the only issue the lower courts addressed here is whether messages on personalized plates are government speech. In many cases, a court that holds personalized plates are private speech goes on to decide whether a plate’s rejection violates the First Amendment. *E.g.*, *Mitchell*, 148 A.3d at 336–39. In such a case, the substantive First Amendment issue would be an alternative ground for decision. This case does not present that complication.

A ruling for Gilliam in this case will not result in racial slurs on personalized license plates. Contra Opp.35. As the petition made clear—repeatedly—a state can prohibit profane, sexualized, or vulgar personalized license plates. Pet.3, 31.

The problem is that states currently use vague rules—or no guidelines at all—to deny vanity-plate applications based on viewpoint. That’s the natural result of regulatory schemes that lack objective criteria and confer unbridled discretion. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (prior restraints require objective, narrow, and definite standards). A rule banning racial slurs on license plates would be viewpoint-neutral and easy to implement in a non-discretionary way. The same goes for whatever else a state doesn’t want to see on license plates. *Tam* has not forced the PTO to register racial slurs as trademarks, because it now prohibits such words in a viewpoint-neutral way, unlike before.

* * *

As Simon Tam puts it, “[p]assersby 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.’” Simon Tam & Inst. for Free Speech Br. 8. “Rather, they will likely think, ‘Those are two license plates with no message, and one with the message SLANTS.’” *Id.* That common-sense reasoning best comports with this Court’s precedents and how the public perceives personalized license plates.

“Whether vanity plates are government speech is a question the Court left open, to the detriment of free speech.” FIRE & First Am. Lawyers Assoc. Br. 26. “In resolving that question now, this Court can make clear that government facilitation of speech is not a license to censor it.” *Id.* at 26–27.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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