IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

LEAH GILLIAM, *Plaintiff-Appellant,* *v.* DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, *et al.* *Defendants-Appellees.*	§ § § § § § § § § § §	Court of Appeals Case No: M2022-00083-COA-R3-CV Davidson County Chancery Court Case No.: 21-0606-III

REPLY BRIEF OF APPELLANT LEAH GILLIAM

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III. INTRODUCTION

The Defendants are engaging in rank and hopelessly arbitrary viewpoint discrimination while regulating private speech that the government "accurately" characterizes as conveying a plateholder's "own unique message." *See* Tr. Ex. 1, at Deposition Ex. #2; Tr. Ex. 1 at 7:16–8:1; *id.* at 8:3–5. To make that unconstitutional conduct seem palatable, the Defendants insist that: "The Constitution does not require the State of Tennessee to issue license plates containing indecent or offensive registration numbers. Yet, that is exactly what Plaintiff, Leah Gilliam, argues in this case." *See* Br. of Appellees at 1.

Ms. Gilliam has never "exactly" argued that the constitution requires Tennessee to issue offensive vanity plates, though. *Id.* Instead, Ms. Gilliam has argued that if Tennessee opens a forum for personalized speech on license plates, then it cannot thereafter regulate its citizens' speech in a viewpoint-discriminatory or arbitrary manner. Thus, as Ms. Gilliam noted in closing below:

> Do you have a constitutional right to a vanity plate on its own? No. But when the government opens a forum like it has here, it cannot discriminate on the basis of viewpoint, which is what the government is doing. They have made up their own categories, untethered to the statute, of what is offensive and what is not. Where did these categories come from? Who knows. Somewhere in upper management. [The statute] certainly doesn't say it. There's no regulation on it. This is what the Department decides is offensive, and anything that is not in those categories is not. They are picking and choosing what views are offensive and what are not. And even within these categories, they can't clearly tell you what is prohibited and what is permitted[.]

Trial Tr. at 375:10–25.

This analysis remains correct. Further, no amount of mischaracterization can overcome the evidentiary record in this case, which makes plain that the Defendants' censorship is both viewpoint-based and comically arbitrary. Accordingly, the trial court's judgment should be **REVERSED**.

IV. ARGUMENT

A. THE DEFENDANTS HAVE WAIVED TWO ISSUES THAT THEIR BRIEF PURPORTS TO RAISE.

This Court will "consider an issue waived where it is argued in the brief but not designated as an issue." *See Childress v. Union Realty Co., Ltd.*, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002) (collecting cases). "Under Tennessee law, issues raised for the first time on appeal are waived" as well. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996).

In their briefing, the Defendants purport to raise two issues that either are not identified in their Statement of the Issues, were not presented below, or both. Accordingly, both issues are waived.

First, the Defendants argue that Ms. Hudson's most critical deposition admissions were inadmissible as evidence, because they were "legal conclusions." *See* Br. of Appellees at 23–24. But the Trial Court denied the Defendants' motion on the matter below. *See* R. at 3218 ("*Defendants' Objections to Certain Questions in Ms. Hudson's Depositions*—**Denied as moot.**"). Thereafter, the Defendants failed to appeal that denial or raise any issue regarding it in their Statement of the Issues on appeal. *See* Br. of Appellees at 1. Thus, the issue is waived. *See Childress*, 97 S.W.3d at 578.

Second, the Defendants insist that "[t]he Court should, at minimum, adopt a viewpoint-neutral construction" of the facially viewpoint-based statute challenged in this case. *See* Br. of Appellees at 37. But the Defendants never raised any such claim below, and they have also failed to identify the issue in their Statement of the Issues on appeal. *See id.* at 1. The issue is doubly waived as a result. *See Childress*, 97 S.W.3d at 578; *Black*, 938 S.W.2d at 403.

B. EVERY RELEVANT CONSIDERATION SUPPORTS THE CONCLUSION THAT PERSONALIZED LICENSE PLATES ARE PERSONAL SPEECH.

1. Personalized license plate combinations have not historically conveyed a government message.

With respect to *Walker*'s first factor, the Defendants insist that "registration numbers on license plates have historically conveyed a state message, serving as state-approved 'identifiers for public, law enforcement, and administrative purposes.'" *See* Br. of Appellees at 11. But there is no evidence that Tennessee has ever used *personalized* plate combinations to convey a state message, which is the relevant inquiry.

What the record does demonstrate is that Tennessee's personalized plate program is only twenty-four years old. *See* R. at 3223. And despite the recency of the program, the Defendants were unable to muster any evidence that personalized license plate messages have ever been used to convey a government message. To the contrary, the evidence indicated that Tennessee represents to the public that personalized plates reflect *an applicant's* "own unique message[,]" *see* Tr. Ex. 1, at Deposition Ex. #2, rather than the government's. Under these circumstances, this Court should have little difficulty concluding that personalized license plate

combinations have not historically conveyed a government message. *See id.* *Cf. Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *6 (C.D. Cal. Aug. 29, 2019) ("the Court is unaware of any history of states using the *customized* registration number configurations to speak."); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019) ("the Court disagrees that license plate *numbers*, separate and distinct from license plate *designs*, have historically been used to communicate messages from the State.'") (quoting *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 326 (Md. 2016)); *Ogilvie v. Gordon*, No. 20-CV-01707-JST, 2020 WL 10963944, at *3 (N.D. Cal. July 8, 2020) ("the State has not historically used the alphanumeric combinations on license plates to communicate messages to the public. . . . displaying information is not the equivalent of sending messages."). Accordingly, the first *Walker* factor favors Ms. Gilliam.

Notably, when analyzing this factor in *Shurtleff*, the Supreme Court also looked beyond flag displays generally, analyzing the history of the specific flag flying program at issue there instead. *See Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583, 1591 (2022) ("The question remains whether, on the 20 or so times a year when Boston allowed private groups to raise their own flags, those flags, too, expressed the city's message."). This matters, because although license plates generally—or government-created, randomly-generated license plate combinations generally—may have been used to convey government messages in Tennessee, Tennessee has never purported to convey a government message through applicant-generated, personalized license

plate combinations. *Cf. Mitchell*, 450 Md. at 294 ("'historically, vehicle owners have used vanity plates to communicate their own personal messages and the State has not used vanity plates to communicate any message at all.'") (cleaned up). Good thing, too, because if Tennessee were actually conveying government messages through personalized plates, then Commissioner Gerregano is transmitting official, overtly racist and white supremacist messages to Tennessee's citizens, rather than having passively permitted private citizens to display those messages on their own. *See, e.g.,* Tr. Ex. 2 at Deposition Ex. #6, p. 381 ("COONHTR"); *id.* at 1022 ("88POWER"); *id.* at 1067 ("ARYANSH").

2. Personalized plate messages chosen by individuals are not closely identified with the State—or identified with the State at all.

With respect to *Walker*'s second factor, the Defendants attempt to reframe the inquiry as "whether the message is often associated with the government[.]" *See* Br. of Appellees at 15. This is materially incomplete, though. Instead, the relevant inquiry is "the public's likely perception as to who (the government or a private person) is speaking[.]" *See Shurtleff*, 142 S. Ct. at 1589.

When framed correctly, this question has an easy answer. To begin—like every other personalized plateholder in Tennessee—Ms. Gilliam was, in fact, the one speaking through her personalized plate message, which the government had no role in either creating or displaying. *See* Tr. Ex. 1 at 27:17–28:15 (admitting that no one other than Ms. Gilliam designed her plate combination, and that it was Ms. Gilliam's own unique message, not the government's). The trial record

also establishes that onlookers correctly perceive that an individual plateholder is speaking, too. For instance, the Department's own 30.02(6) witness thought so. *See id.* at 28:5–15. An "[a]lmost unanimous" proportion of the Tennessee public thought so, too. *See* Trial Tr. at 76:24–77:3. So, too, do the government officials who advertise Tennessee's personalized plate program, who "accurately" characterize personalized plates as conveying a plateholder's "own unique message." *See* Tr. Ex. 1, at Deposition Ex. #2; Tr. Ex. 1 at 7:16–8:1; *id.* at 8:3–5. Further still, "common sense dictates that the public attributes any message on [a personalized plate] to the driver." *See Kotler*, 2019 WL 4635168, at *7. *See also Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) ("[T]he combination of letters and numbers in a vanity plate's message makes it apparent that 'the driver is the one speaking,' not the government.") (quoting *Kotler*, 2019 WL 4635168, at *7)); *Ogilvie*, 2020 WL 10963944, at *3.

Thus, the second *Walker* factor favors Ms. Gilliam as well.

3. Tennessee has not controlled the registration numbers on personalized license plates.

As to *Walker*'s third factor—"the extent to which the government has actively shaped or controlled the expression[,]" *see Shurtleff*, 142 S. Ct. at 1590—the Defendants maintain that "Tennessee controls the registration numbers on state-issued license plates." Br. of Appellees at 18. Certainly, that is true of randomly-generated, non-personalized plates, which the State of Tennessee itself creates, and which have no expressive element to speak of. It is also true of specialty plates, which

Tennessee develops for public use and mass display. However, it decidedly is *not* true of personalized plates—the Defendants' hopelessly arbitrary censorship process notwithstanding. *Cf. Kotler*, 2019 WL 4635168, at *7 ("To suggest that the state has somehow meticulously curated the message of each of these plates, or of license plates in general, is nonsensical.").

The Department's utter inability to ensure evenhanded or reliable enforcement of what it claims are its standards is detailed at length in Ms. Gilliam's Principal Brief. *See* Appellant's Principal Br. at 40–43. As such, the Department's routine failure to do what it claims it must to protect "children" from "observ[ing]" forbidden messages, *see* Br. of Appellees at 32, need not be repeated here.[1] Once the provably vast number of purportedly forbidden messages have been approved, the Defendants also admit that "the Department is not out on the streets policing plates to find out if any got through." Tr. Ex. 11 at Excerpt 90:11–12.

Nor is the Defendants' attempt to conflate *Walker*'s materially distinct analysis of *specialty* plate designs—which are selected and approved by the government for mass and non-unique display—with user-developed personalized plate messages persuasive. *Cf. Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 204 (2015) (observing that "**Texas** selects the designs for specialty plates.") (emphasis added). *See also id.* ("we are concerned only with the second

[1] Well, just one more, because this Panel has expressly been called upon to "JUDGE69." *See* Tr. Ex. 2 at Deposition Ex. #6, p. 701.

category of plates, namely specialty license plates, not with the personalization program."). Further, with perhaps the exception of the U.S. Supreme Court, *see Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (holding that *Walker* "likely marks the outer bounds of the government-speech doctrine."), nobody recognizes the importance of this distinction better than the Defendants, who have carefully—arguably dishonestly—omitted the word "specialty" from their quotation of *Walker* for a reason. *Compare* Br. of Appellees at 19 (asserting that: "Like Texas, Tennessee 'maintains direct control over the messages conveyed on its . . . plates.'") (ellipses the Defendants'), *with Walker*, 576 U.S. at 213 ('Texas maintains direct control over the messages conveyed on its **specialty** plates.") (emphasis added).

Put simply: Specialty license plate designs—which are selected by the government and made available for mass display—are meaningfully different from unique, applicant-designed, and *personalized* plate messages. Governments exert substantial control over specialty plates and participate in their design. By contrast, the extent of government control over applicant-designed personalized plate messages is minimal, and—as the evidentiary record in this case demonstrates—it is comically arbitrary. That is how messages like "POOPOO"[2] and approximately a dozen iterations of the term "deez balls" [3] get approved along with myriad other messages that are purportedly prohibited under the Department's standards. *See*, *e.g.,* Trial Ex. 21. It is also how Tennessee ends up with

[2] Trial Tr. at 245:3–9.
[3] *Id.* at 241:11–242:12.

a cornucopia of 69-based personalized plate combinations that it initially approved, then claimed were "mistakes" that should have been prohibited, and then declined to rescind after a four-month review period. *Compare* R. at 630 (crediting Defendants' representation that "approval and use of license plates similar to the Plaintiff's are a mistake."), *with* Tr. Ex. 3 (indicating that only four such plates—"I69, XTC69, 69420, and 42069"—were revoked in the four-month period that followed).

In summary: Personalized, applicant-generated license plate messages are not "'effectively controlled'" in Tennessee. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 473 (2009) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 551 (2005)). Instead, at best, they are controlled so ineffectively and unpredictably that it is "impossible" for the government to predetermine whether a message will be approved or not. *See* Tr. Ex. 4 at 6. Further, it is "nonsensical" to suggest that personalized plate combinations—many of which are indecipherable—are curated by the government, given that "[t]he message of the configuration is only relevant if it may be offensive." *See Kotler*, 2019 WL 4635168, at *7. *Cf. Hart*, 422 F. Supp. 3d at 1233 ("Under the Transportation Cabinet's logic, the Commonwealth is not only contradicting itself, but spewing nonsense.").

Reserving a right to censor messages through regulatory approval does not "transform [private] speech into government speech[,]" either. *See Ogilvie*, 2020 WL 10963944, at *4. *Matal* expressly held as much. *See Matal*, 137 S. Ct. at 1760 ("Holding that the registration of a trademark converts the mark into government speech would constitute a

huge and dangerous extension of the government-speech doctrine."). As a result, *Walker*'s third factor favors Ms. Gilliam, too.

* * *

For all of these reasons, personalized plates are personal speech, and the Defendants cannot hide their statutorily-compelled viewpoint discrimination and arbitrary censorship of personalized plate messages behind the guise of the government speech doctrine.

C. THE DEFENDANTS REGULATE PERSONALIZED PLATE MESSAGES BASED ON VIEWPOINT, AND VIEWPOINT DISCRIMINATION IS FORBIDDEN IN ANY FORUM.

The Defendants next contend that even if personalized license plates constitute private speech, this Court should still uphold the Panel decision because license plates are a nonpublic forum in which content discrimination is permissible. *See* Br. of Appellees at 30–32. Viewpoint discrimination is an "egregious form of content discrimination" that is impermissible in *any* forum, though. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). *See also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting); *Matal*, 137 S. Ct. at 1763 ("When government creates [a limited public] forum, in either a literal or 'metaphysical' sense, some content- and speaker-based restrictions may be allowed [ ]. However, even in such cases, what we have termed 'viewpoint discrimination' is forbidden.") (cleaned up). As a result, the Defendants additionally insist that "Tennessee's offensiveness bar is viewpoint neutral." *See* Br. of Appellees at 32–36.

The Defendants' analysis quickly collapses, given that "Tennessee's

offensiveness bar" quite plainly is *not* "viewpoint neutral." *Compare id.*, *with Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint."). Arguing otherwise, though, the Defendants pretend that "§ 55-4-210(d)(2) is different" because it "does not prohibit specific views; it excludes specific subject matter[.]" *See* Br. of Appellees at 35.

This claim is not even close to accurate. It is true that—based on the Defendants' personal views about what makes a message "offensive"—the Defendants testified that they consider whether a message implicates certain extra-statutory content categories. *See* Tr. Ex. 1 at 33:22–24. *See also* Tr. Ex. 2 at Deposition Ex. #4, ¶ 5 ("profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs."). Several of these extra-statutory content categories inherently reflect viewpoint discrimination, however. For instance, based on the Defendants' professed criteria, messages are either permissible or forbidden based on whether they reference non-violence[4] (as opposed to violence); legal substances[5] (as opposed to illegal substances); non-derogatory (as opposed to derogatory) slang terms[6]; and slurs[7] (as long as they are not racial or ethnic slurs).

Regardless, Tenn. Code Ann. § 55-4-210(d)(2) does not actually regulate content categories. Instead, it restricts personalized plate messages based on whether they contain "connotations offensive to good

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[4] *See, e.g.,* Tr. Ex. 2 at Deposition Ex.# 6, p. 1635 (permitting "LVPEACE").
[5] *See, e.g., id.* at 1175 (permitting "CAFN8ED").
[6] *See, e.g., id.* at 612 (permitting "HOODLUM").
[7] *See, e.g., id.* at 363 (permitting "CHOOCH"); *id.* at 667 (permitting "JAP1").

taste" (rather than bad taste) and "decency" (rather than indecency). *See id.* Thus, separate and apart from depending on an individual bureaucrat's perception of what makes a message "offensive"—a consideration that is impermissible under any circumstances, *see Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (collecting cases)—Tenn. Code Ann. § 55-4-210(d)(2)'s speech restrictions are *facially* viewpoint-based. *See id. Cf. Cohen v. California*, 403 U.S. 15, 25 (1971) ("it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."). Ms. Gilliam also notes that given the clarity of the U.S. Supreme Court's guidance on the matter, no court anywhere appears to have struggled with this determination. *See, e.g., Ogilvie*, 540 F. Supp. 3d at 928; *Carroll*, 494 F. Supp. 3d at 168; *Hart*, 422 F. Supp. 3d at 1234.

The viewpoint-discriminatory nature of the Defendants' censorship is evident as a matter of practice, too. *Compare, e.g.,* Tr. Ex. 2 at Deposition Ex. 6, p. 1764 (approving personalized plate "NODRUGS"), *with* Tr. Ex. 2 at Deposition Ex. 7, p. 2190 (rejecting personalized plate "DRUGS"). *See also* Trial Tr. at 229: 7–8 ("Q. So legal drug references would be permitted? A. I would—I don't know."); *id*. at 230: 2; 6-8 ("Q. What about anti-drug references? . . . A. I don't think it would be offensive. Q. So it would be approved? A. It may be."). *See also id.* at 210:8–13 (indicating that some 69-based personalized plate messages are

permissible but other 69-based personalized plate messages are forbidden). That reality independently dooms the Defendants' position in this appeal. *See, e.g., Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019) ("The facial viewpoint bias in the law results in viewpoint-discriminatory application. . . . Here are some examples.").

Nor is a limiting construction appropriate under these circumstances. For one thing, a claim for a limiting construction was not presented below and is not identified by the Defendants as an issue in this appeal, resulting in waiver. *See supra* at 8–9. For another, adopting a limiting construction that reimagines an explicit viewpoint restriction forbidding "connotations offensive to good taste and decency" as a neutral content restriction that forbids the various extra-statutory content categories that the Defendants believe encompass offensiveness—categories that are, themselves, inherently viewpoint-based, *see supra* at 16–17—would be impermissible. *Brunetti* itself explained why. *See Brunetti*, 139 S. Ct. at 2294 ("even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot."). Tennessee law is in accord. *See, e.g., City of Knoxville v. Ent. Res., LLC*, 166 S.W.3d 650, 658 (Tenn. 2005) ("such a drastic revision by this Court would amount to impermissible judicial legislation"); *In re Swanson*, 2 S.W.3d 180, 187 (Tenn. 1999) ("it is the prerogative of the legislature, and not the courts, to amend statutes.").

D. TENNESSEE'S REVOCATION OF MS. GILLIAM'S PERSONALIZED LICENSE PLATE VIOLATES THE DUE PROCESS CLAUSE.

"[I]t is fundamental that except in emergency situations due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971) (cleaned up). Here—by operation of Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a)—Ms. Gilliam was deprived of her right to display her personalized message on a summary, pre-hearing basis in contravention of that fundamental principle.

Attempting to justify this approach, the Defendants first contend that Ms. Gilliam's interest in displaying her personalized plate message was "minimal." *See* Br. of Appellees at 42. Precedent instructs otherwise, though. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[I]t is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Accordingly, the first *Mathews* factor weighs in Ms. Gilliam's favor.

As to the second *Mathews* factor, the Defendants rely on *Perry v. McDonald*, 280 F.3d 159, 173 (2d Cir. 2001), for the proposition "that it is 'rare' that 'a pre-revocation hearing will reduce the risk of an erroneous deprivation of particular vanity plates.'" *See* Br. of Appellees at 43. Of course, *Perry* turned on a determination that "[i]t will ordinarily be apparent on the face of the vanity plate whether it is offensive . . . to the general public." *See Perry*, 280 F.3d at 174 (cleaned up). But in

Tennessee, at least, the opposite is true. Indeed, the Defendants whine at length about how *unfair* it was to expect the Commissioner's speech censors to be able to "provide definitive conclusions on the permissibility of certain" plate messages while being examined in this case, *see* Br. of Appellees at 47—something that they struggled to do over and over again. *See, e.g.,* Trial Tr. at 229:21–23 (Q. "What about caffeine?" A. "I know it's in coffee, but it's also a drug. I'm not sure."); *id.* at 264:11–13 ("You can't tell me if Mr. Sexy is a sex reference sitting here today?" A. "I'm not sure."); *id.* at 193:1–25 (Q. "if Nancy Reagan wanted a 'Just Say No' license plate, would that be allowed?" . . . . A. "I can't determine that without going through the process."). Accordingly, the second *Mathews* factor weighs in Ms. Gilliam's favor as well.

Finally, as to the third *Mathews* factor: the government's interest in rapidly censoring personalized plate messages is minuscule. The Defendants admit that "the Department is not out on the streets policing plates to find out if any got through[,]" Tr. Ex. 11 at Excerpt 90:11–12, demonstrating the minimal weight that the government itself assigns to its professed interests. Thus, many personalized plate messages—like Ms. Gilliam's—will have been harmlessly displayed for a decade or more before some new bureaucrat makes an offensiveness determination. Further, Tennessee has no meaningful interest in "safeguarding its reputation and disassociating itself from offensive language" on personalized plates, *see* Br. of Appellees at 43 (quoting *Perry*, 280 F.3d at 174), because virtually no sentient person actually associates personalized plate messages with the government. Thus, the final

Mathews factor favors Ms. Gilliam, too.

For all of these reasons, Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate due process as applied.

E. § 55-4-210(d)(2) IS UNCONSTITUTIONALLY VAGUE.

The Defendants argue that Tenn. Code Ann. § 55-4-210(d)(2) cannot be void for vagueness because it is "clear what the [statute] as a whole prohibits[.]" *See* Br. of Appellees at 44. Clear to whom? Certainly not the Department, which repeatedly struggled to make such determinations and maintained that "[i]t is **impossible** for the Department to predetermine specific criteria that will encompass all potentially objectionable configurations that may be submitted in the future[.]" *See* Tr. Ex. 4 at 6 (emphasis added). As noted, the Department's speech censors also could not answer basic questions about how their professed criteria applied even in what should have been easy cases—an expectation that the Defendants now characterize as unfair. *See supra* at 21. This problem is also all the more pronounced given:

1. That the Defendants' witnesses asserted that they were unable to make simple determinations about how the law applied without their "tools[,]" *see* Trial Tr. at 230:11–14; *see also* Tr. Ex. 2 at 51:2–4;

2. That there is no evidence the public has access to those "tools," *see* Tr. Ex. 1 at 32:15–33:10; and

3. That not a single relevant statutory criterion is defined. *See* Trial Tr. at 228:10–24; *see also id.* at 191:11–19.

For all of these reasons, Tenn. Code Ann. § 55-4-210(d)(2) should be declared unconstitutionally vague and enjoined. *See, e.g., Matwyuk v.*

Johnson, 22 F. Supp. 3d 812, 826 (W.D. Mich. 2014) ("the 'offensive to good taste and decency' language grants the decisionmaker undue discretion, thereby allowing for arbitrary application."). *See also Montenegro v. New Hampshire Div. of Motor Vehicles*, 93 A.3d 290, 298 (N.H. 2014); *Carroll*, 494 F. Supp. 3d at 170; *Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001).

F. QUALIFIED IMMUNITY DOES NOT APPLY.

Because qualified immunity shields officials from liability for money damages alone, it does not apply to Ms. Gilliam's claims for declaratory or injunctive relief. *See Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). Further, with respect to Ms. Gilliam's damages claim, § 55-4-210(d)(2)'s facial viewpoint discrimination has been clearly established as unconstitutional since at least 2017. *See Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint."). By contrast, the Defendants' position that they could lawfully enforce § 55-4-210(d)(2)'s viewpoint discrimination because "a law cannot discriminate on the basis of viewpoint," *see* Tr. Ex. 1, at 20:1–12, was never supportable. Accordingly, Defendant Gerregano's qualified immunity defense fails, and Ms. Gilliam should be awarded the dollar per day that she demanded. *See* R. at 12.

G. THE TRIAL COURT SHOULD HAVE CONSIDERED THE DEFENDANTS' 30.02(6) ADMISSIONS AND SANCTIONED THEIR RELENTLESS DISCOVERY MISCONDUCT.

In addition to being unprepared to testify regarding noticed topics, during her first 30.02(6) deposition, Ms. Hudson made several case-breaking admissions—including admitting that she could not say whether the specific personalized plate at issue in this case (and several

similar plates) contravened the Department's professed criteria. *See* Tr. Ex. 1 at 42:16–25. Thereafter, Ms. Hudson modified those admissions through an errata sheet. *See* Tr. Ex. 2 at 44:3–9; *id.* at Deposition Ex. #8. After that, Ms. Hudson admitted that *her errata sheet* was inaccurate, and that she could not determine one way or another whether the personalized plates she had been asked about initially were compliant without referencing her "tools"—tools that she did not have with her during her first deposition. *See* Tr. Ex. 2 at 50:24–51:15.

The gentlest way to describe the Defendants' strategic, counsel-assisted perjury is that the Department's 30.02(6) designee "thoughtfully . . . made changes that were inaccurate[.]" *See* Trial Tr. at 176:14–16. The fact that Ms. Hudson then provided testimony at trial that was 180 degrees different from her testimony from just five days before—paired with the Defendants calling a surprise witness whose identity was strategically withheld in response to an applicable interrogatory[8]—only

[8] The Defendants defend their strategic misconduct related to Ms. Moyers on two grounds. *First*, they claim that she "hardly qualifies as a general member of the public." *See* Br. of Appellee at 57, n.8. But Ms. Moyers herself testified that she was "a member of the public[,]" *see* Trial Tr. at 311:1–2, and she also testified that she "can't speak for the Department," "can't speak for [Defendant] Commissioner Gerregano," and does not "have authority to speak for the Department[.]" Trial Tr. at 226:7–18. *Second*, the Defendants claim that despite failing to identify Ms. Moyers in a responsive Interrogatory, *see* Tr. Ex. 2, at Deposition Ex. 5, p. 2 (Interrogatory #3), their response "clearly encompasse[d] Ms. Moyers[.]" *See* Br. of Appellee at 57, n.8. It unmistakably did not, though; Ms. Moyers's name and address were not disclosed in response to the Interrogatory; and the Department's designee specifically testified that the Defendants both had not identified anyone and had no one to add to the Interrogatory response five day before, *see* Tr. Ex. 2 at 36:9–37:4.

compounds the egregiousness of the misconduct involved.

The Defendants should have been sanctioned for such flagrant discovery abuse and premeditated unfair surprise. Instead, they were rewarded by having every 30.02(6) admission disregarded and having their surprise witness's testimony credited instead. *See* R. at 3218. This was error. Contrary to the Defendants' apparent belief otherwise, furnishing an unprepared Tenn. R. Civ. P. 30.02(6) witness and withholding the identity of a witness in response to an interrogatory are also sanctionable. *See Adkisson v. Jacobs Eng'g Grp., Inc.*, No. 3:13-CV-505-TAV-HBG, 2021 WL 1685955, at *4 (E.D. Tenn. Feb. 3, 2021) (collecting cases explaining why producing an unprepared 30(b)(6) witness is tantamount to failure to appear); Tenn. R. Civ. P. 37.03(1) ("A party who without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 is not permitted, unless such failure is harmless, to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed."). The Attorney General's Office should also know by now that such "inexplicabl[e]" strategic discovery abuse is intolerable. *See Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *8 (Tenn. Ct. App. Dec. 12, 2019). Sanctions should have resulted as a consequence.

V. CONCLUSION

For the foregoing reasons, the trial court's judgment should be **REVERSED**.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief (Sections IV–X) contain 4,972 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2022, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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