IN THE SUPREME COURT OF TENNESSEE

LEAH GILLIAM, *Plaintiff-Appellee,* *v.* DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, *et al.* *Defendants-Appellants.*	§ § § § § § § § § § §	M2022-00083-SC-R11-CV Court of Appeals Case No: M2022-00083-COA-R3-CV Davidson County Chancery Court Case No.: 21-0606-III

BRIEF OF APPELLEE LEAH GILLIAM

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Dated: March 13, 2024

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Ms. Gilliam's brief uses the following designations:

1. Trial Exhibits ## 1–2 are transcripts of two Tenn. R. Civ. P. 30.02(6) depositions of the Tennessee Department of Revenue's designated representative. They are contained in the record on separate thumb drives. These exhibits are cited as Tr. Ex. [exhibit number] at [page number:line number].

2. Citations to Trial Exhibits ## 3–21 are cited as Tr. Ex. [exhibit number] at [page number].

3. Citations to the Trial Transcript are cited as Trial Tr. at [page number:line number].

4. Citations to the Transcript of the Parties' August 27, 2021 hearing on Ms. Gilliam's application for a temporary injunction are cited as Tr. of Proceedings at [page number:line number].

5. Citations to the Technical Record are abbreviated as R. (Vol. number) at [page number].

IV. APPLICABLE STANDARDS OF REVIEW

1. This Court "review[s] de novo issues of constitutional law." *See State v. Allen*, 259 S.W.3d 671, 681 (Tenn. 2008) (citing *State v. Burns*, 205 S.W.3d 412, 414 (Tenn. 2006)).

2. "This action was tried by the court without a jury, so [this Court] review[s] the trial court's findings of fact de novo upon the record with a presumption of correctness unless the evidence preponderates otherwise." *Rothbauer v. Sheltrown*, No. W2021-00607-COA-R3-JV, 2022 WL 713422, at *1 (Tenn. Ct. App. Mar. 10, 2022) (citing Tenn. R. App. P. 13(d); *Watson v. Watson*, 309 S.W.3d 483, 490 (Tenn. Ct. App. 2009)).

V. INTRODUCTION

The only question presented in this appeal is whether Leah Gilliam's "personalized" license plate message—which she alone created and then continuously displayed on her vehicle without complaint for eleven years—is the government's speech. Nearly every court to consider this issue has concluded that personalized plate messages like Ms. Gilliam's are—as their title suggests—*personal* speech.[1] The Court of Appeals reached the same correct conclusion below.

The State of Tennessee itself (if not its lawyers) shares the view that personalized license plate messages communicate personal speech. The Department of Revenue's own designated Tenn. R. Civ. P. 30.02(6) representative said as much, testifying that Ms. Gilliam's personalized license plate conveys "Ms. Gilliam's own unique message" and "not the government's message[.]" Tr. Ex. 1 at 28:5–15. The State of Tennessee's website advertising its personalized plate program similarly declares that "license plates can be personalized with **your own** unique

[1] *See Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020); *Ogilvie v. Gordon*, 540 F. Supp. 3d 920, 926 (N.D. Cal. 2020); *Bujno v. Commonwealth, Dep't of Motor Vehicles*, No. CL12-1119, 2012 WL 10638166, at *5 (Va. Cir. Nov. 2, 2012); *Montenegro v. New Hampshire Division of Motor Vehicles*, 166 N.H. 215, 219 (2014); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 823–24 (W.D. Mich. 2014); *Mitchell v. Maryland Motor Vehicle Admin.*, 148 A.3d 319, 325 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016); *Mitchell v. Maryland Motor Vehicle Admin.*, 126 A.3d 165, 186 (Md. 2015), *aff'd*, 148 A.3d 319 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016); *Higgins v. Driver & Motor Vehicle Servs. Branch*, 335 Or. 481, 488, 72 P.3d 628, 632 (2003).

message[,]" rather than communicating any governmental message:

Apply and Choose Your Message Online

In Tennessee, license plates can be personalized with your own unique message. For the regular Tennessee plate, you can have up to seven (7) characters in either any alpha/numero combination. The number of characters varies on Specialty License Plates, check the plate descriptions for details.

The online application, available at personalizedplates.revenue.tn.gov, allows residents to select from more than 100 types of Tennessee license plates that are available to personalize. After selecting their plate design, customers then type in their desired configuration on their plate. They will know immediately if the configuration is available, based on a red or green box that will appear around the plate.

Customers can pay the $35 personalized plate application fee online, and later pick up their plate at their local county clerk's office. Additional fees will apply at the county clerk's office when a customer picks up the plate. Specialty plates also require an additional $35 fee.

Personalized Plates Application

See Tr. Ex. 1, at Deposition Ex. #2 (emphasis added).

The Government's website—not to mention the Department's 30.02(6) testimony—is dispositive here. As the U.S. Supreme Court has explained, what a government entity has "told the public" about a program—and the government's corresponding failure "to make clear it wished to speak for itself"—affect the government-speech inquiry. *See Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 256–57 (2022) ("Boston told the public that it sought 'to accommodate all applicants' who wished to hold events at Boston's 'public forums,' including on City Hall Plaza. . . . Boston could easily have done more to make clear it

wished to speak for itself by raising flags."). Thus, what Tennessee told the public about its personalized license plate program—that "[i]n Tennessee, license plates can be personalized with your own unique message[,]" Tr. Ex. 1, at Deposition Ex. #2—matters a great deal.

The Government now attempts to minimize its own website's characterization of Tennessee's personalized plate program in a single footnote that is unburdened by a record citation. *See* Government's Br. at 28 n.2. But the evidence at trial was that: (1) the State's website "accurately characterize[s] the personalized plate program[,]" *see* Tr. Ex. 1 at 7:16–8:1, and (2) the Department of Revenue does not have "any reason to believe that anything on this website is inaccurate[,]" *see id.* at 8:3–5. Thus, the Government is stuck with the admission.

Put another way: all agree that there is government speech involved in this case. The government speech is Tennessee's own website advertising the personal nature of Tennessee's personalized plate program, which encourages applicants to "Apply and Choose **Your** Message[.]" *See* Tr. Ex. 1, at Deposition Ex. #2 (emphasis added). The same website also explicitly disassociates the Government from personalized plate messages and tells the public that a personalized plate message is *a driver's*. *See id.* ("In Tennessee, license plates can be personalized with **your own** unique message.") (emphasis added).

These facts end this case. Even if they didn't, the Government's failure to introduce evidence that Tennessee has ever used its personalized plate program to communicate a government message; the public's likely perception as to who is speaking; and the loosey-goosey

nature of the Government's regulatory efforts would.

Faced with this evidence, by the time this case reached trial, the Defendants were no longer arguing that personalized license plates do not contain personal speech. Instead, the Defendants maintained that they "have not argued that license plates—as a factual matter—contain purely the State's speech[,]" and they admitted that personalized plates "contain some individual speech as a matter of fact[.]" Tr. Ex. 6 at 6. This powerful judicial admission was supported by witness testimony that the entire purpose of applying for a personalized plate is to *disassociate* from a government-provided plate combination and to convey a personal message instead. *See* Trial Tr. (Vol. I) at 47:15–49:5.

What the Government is left with, then, is a claim that private speech on "government IDs" should be treated as government speech because such IDs also convey a "functional" message of identification. As one of this Court's own Justices once explained on behalf of the State of Tennessee, though, this is wrong; in that context, Tennessee neither "intends to convey [n]or in fact conveys any message" whatsoever. *See* 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."). The Government's related claim that "mixed" speech is necessarily governmental fails, too. *See, e.g., Shurtleff*, 596 U.S. at 255–56 (rejecting government-speech defense even though "Boston says

that all (or at least most) of the 50 unique flags it approved reflect particular city-approved values or views" and "the public seems likely to see the flags as conveying some message on the government's behalf.") (cleaned up).

The Government's attempt to narrow the breadth of its outlying argument is similarly unpersuasive. If accepted, the Government's argument could apply equally to everything from names printed on birth certificates to hairstyles depicted on driver's license photos—all of which the Government insists it may regulate for "connotations offensive to good taste and decency" under the guise of the government speech doctrine because such "identifying" information appears on a "government-issued ID."

This is nonsense. Doubly so because the Government's asserted purpose here—identification—bears no connection to its corresponding viewpoint-based censorship of citizen-generated messages. For all of these reasons, the Government is wrong, and the Court of Appeals got it right. Thus, the Court of Appeals' judgment should be **AFFIRMED**.

VI. STATEMENT OF THE CASE

On May 25, 2021, the Tennessee Department of Revenue revoked Appellee Leah Gilliam's personalized license plate because it was "deemed offensive." R. (Vol. 1) at 17. Ms. Gilliam then filed suit in Davidson County Chancery Court against Defendant David Gerregano—the Commissioner of the Tennessee Department of Revenue—and Tennessee's Attorney General. *Id.* at 1–20. Ms. Gilliam's Complaint asserted three causes of action arising from the Government's revocation of her personalized license plate:

1. A violation of the First and Fourteenth Amendments based on Tenn. Code Ann. § 55-4-210(d)(2)'s facially unconstitutional content- and viewpoint-based discrimination, *id.* at 8;

2. A violation of the Fourteenth Amendment based on Tenn. Code Ann. § 55-4-210(d)(2)'s unconstitutional vagueness, *id.* at 8–9; and

3. A violation of the Fourteenth Amendment's guarantee of due process of law based on the summary, pre-hearing revocation of her personalized plate authorized by Tenn. Code Ann. §§ 55-5-117(a)(1) and 55-5-119(a), *id.* at 10–11.

To remedy her constitutional injuries, Ms. Gilliam sought injunctive and declaratory relief; "damages in an amount of $1.00 per day that she was unlawfully forbidden from displaying her constitutionally protected vanity plate[;]" and an award of reasonable costs and attorney's fees. *Id.* at 12. Ms. Gilliam sued Defendant Gerregano "in his official capacity with respect to Plaintiff's claims for injunctive and declaratory relief" and "in his individual capacity with respect to the Plaintiff's claim for damages." *Id.* at 4–5, ¶ 10. Ms. Gilliam also sued the Attorney

General "in his official capacity only regarding the Plaintiff's claims for declaratory relief." *Id.* at 5, ¶ 11. After filing her Complaint, Ms. Gilliam applied for a temporary injunction. *See id.* at 21–22; *id.* at 23–123.

On July 9, 2021, the Defendants filed a request for a special three-judge panel. R. (Vols. 1–2) at 141–74. The presiding judge determined that Ms. Gilliam's Complaint qualified for referral to a three-judge panel based on the new law enabling that referral, R. (Vol. 2) at 176–81, which the General Assembly had just enacted because "Nashville chancellors have ruled against the state in several high-profile cases" and the Government was tired of losing. *See* Andy Sher, *Tenn. Republican lawmakers OK new three-judge panels to consider legal challenges against state*, TIMES FREE PRESS (May 6, 2021), https://www.timesfreepress.com/news/local/story/2021/may/06/tn-republican-lawmakers-ok-new-three-judge-panels/546454/. This Court then appointed a three-judge panel on July 22, 2021. R. (Vol. 2) at 182.

The Defendants answered Ms. Gilliam's Complaint on August 2, 2022. *Id.* at 190–202. Among other defenses raised in their Answer—most of which the Defendants later repudiated or abandoned—the Defendants asserted that: "Tennessee's personalized license plate program involves government speech, which is outside the scope of the First Amendment." *Id.* at 200.

The Parties then engaged in pre-trial discovery. Over the course of two 30.02(6) depositions, the Department's designee testified that she could not explain any of the Defendants' defenses, including its government speech defense. *See* Tr. Ex. 1 at 65:21–25; Tr. Ex. 2 at 44:6–

9 (testifying that she did not have further changes to make to the testimony from her first deposition). On this ground and others—including that the Defendants' designee had submitted a fraudulent errata sheet following her first deposition that she admitted was inaccurate during her second—Ms. Gilliam moved the Panel to issue discovery sanctions. *See* R. (Vol. 6) at 868–90. One of the sanctions that the Plaintiff sought was an order "that the Defendants are precluded from introducing testimony in support of their defenses at trial, because they produced a woefully unprepared 30.02(6) witness who could not testify in support of any of them during either of two depositions[.]" *Id.* at 889. The Defendants responded in opposition, insisting that Ms. Hudson "was adequately prepared." R. (Vol. 22) at 3151. The Panel denied the Plaintiff's motion. *Id.* at 3190.

The trial court held a bench trial on December 8–9, 2021. *See* Trial Trs. (Vol. I–III). Ms. Hudson, among other witnesses, testified at that trial. With respect to the pre-trial 30.02(6) depositions, Ms. Hudson testified—contrary to what defense counsel had just represented—that she had neither prepared for nor been told to prepare for any specific deposition topics. Trial Tr. (Vol. II) at 184:1–16. Ms. Gilliam thus renewed her motion for discovery sanctions based (among other things) on the Defendants having furnished a now admittedly unprepared 30.02(6) witness. *Id.* at 203:11–15.

On January 18, 2022, the Panel issued its *Findings of Fact and Conclusions of Law from December 8–9, 2021 Bench Trial; and Final Order Dismissing Case with Prejudice*. *See* R. (Vol. 22) at 3213–52. The

order denied Ms. Gilliam's renewed motion for discovery sanctions, *see id.* at 3218, and it embraced the Defendants' government speech defense based substantially upon the testimony of surprise witness Tammie Moyers, *see id.* at 3220–25. Ms. Gilliam filed her Notice of Appeal the same day. *See id.* at 3257–59.

The Court of Appeals "reverse[d], holding that the personalized alphanumeric configurations on vanity license plates are private, not government, speech." *Gilliam v. Gerregano*, No. M2022-00083-COA-R3-CV, 2023 WL 3749982, at *1 (Tenn. Ct. App. June 1, 2023). The Government then applied to this Court for review, which this Court granted. This appeal followed.

VII. STATEMENT OF FACTS

A. TENNESSEE'S PERSONALIZED PLATE PROGRAM AND ITS WEBSITE ADVERTISING THAT PERSONALIZED PLATES CONVEY DRIVERS' MESSAGES.

Tennessee began issuing personalized license plates recently—in 1998. R. (Vol. 22) at 3223 (taking judicial notice that "[i]n 1998, Tennessee . . . began issuing . . . personalized license plates."). Despite the recency of the program, the Government mustered no evidence at trial that personalized license plates have ever been used to convey government messages. *See Gilliam*, 2023 WL 3749982, at *12 ("the record before us contains no evidence that the State has ever used vanity license plates to communicate government messages through the alphanumeric configurations."). To the contrary, the evidence showed that—while advertising its personalization program—Tennessee represented to the public that personalized license plates convey a

driver's "own unique message" instead. Tr. Ex. 1, at Deposition Ex. #2.

As for the personalized plate application process: Tennessee maintains a website encouraging applicants to apply for personalized license plates. *See* Tr. Ex. 1, at Deposition Ex. #2. The State's website asks applicants to "Apply and Choose Your Message[.]" *Id.* It also states that: "In Tennessee, license plates can be personalized with your own unique message." *See id.* A screenshot of the website at issue is attached to Ms. Hudson's first deposition (Tr. Ex. 1) at Deposition Exhibit #2, and it appears as follows:

Apply and Choose Your Message Online

In Tennessee, license plates can be personalized with your own unique message. For the regular Tennessee plate, you can have up to seven (7) characters in either any alpha/numero combination. The number of characters varies on Specialty License Plates, check the plate descriptions for details.

The online application, available at personalizedplates.revenue.tn.gov, allows residents to select from more than 100 types of Tennessee license plates that are available to personalize. After selecting their plate design, customers then type in their desired configuration on their plate. They will know immediately if the configuration is available, based on a red or green box that will appear around the plate.

Customers can pay the $35 personalized plate application fee online, and later pick up their plate at their local county clerk's office. Additional fees will apply at the county clerk's office when a customer picks up the plate. Specialty plates also require an additional $35 fee.

Personalized Plates Application

According to the Department, this website "accurately characterize[s] the personalized plate program[.]" Tr. Ex. 1 at 7:16–8:1. The Department also does not have "any reason to believe that anything on this website is inaccurate[.]" *See id.* at 8:3–5.

B. LEAH GILLIAM'S PERSONALIZED PLATE.

Plaintiff Leah Gilliam applied for her personalized license plate on December 13, 2010. R. (Vol. 22) at 3223 (citing Tr. Ex. 18). The Department admitted that nobody "other than Ms. Gilliam designed the combination of letters and numbers on her personalized plate[.]" *See* Tr. Ex. 1 at 27:17–22; *see also id.* at 27:24–28:3. The Department also admitted that Ms. Gilliam's personalized license plate conveys "Ms. Gilliam's own unique message[,]" and "**not the government's message**":

4	BY MR. HORWITZ:	13:24:17
5	Q. That plate conveys Ms. Gilliam's own unique	13:24:17
6	message; is that correct?	13:24:22
7	MR. PORCELLO: Objection to the form.	13:24:23
8	You can answer.	13:24:24
9	THE WITNESS: Yes.	13:24:24
10	BY MR. HORWITZ:	13:24:25
11	Q. And that's Ms. Gilliam's message, not the	13:24:29
12	government's message; is that correct?	13:24:32
13	MR. PORCELLO: Objection to the form.	13:24:33
14	You can answer.	13:24:40
15	THE WITNESS: Yes.	13:24:40

Id. at 28:5–15 (emphasis added). In a second Tenn. R. Civ. P. 30.02(6) deposition taken just five days before the Parties' December 8, 2021 trial, the Department's designated representative confirmed that the Department did not want to change any of the above testimony. Tr. Ex. 2 at 44:3–9. *See also id.* at Deposition Ex. #8.

The Department issued Ms. Gilliam her personalized plate—which

contained the configuration "69PWNDU"—on January 31, 2011. *See* Tr. Ex. 7 at 1, ¶ 1. After being issued her personalized license plate, Ms. Gilliam "displayed the plate on her car for eleven years." R. (Vol. 22) at 3223. Throughout that period, "the Department [] received no complaints by anyone that they were offended by the Plaintiff's plate during its continuous display for eleven years." *Id.* at 3225. Ms. Gilliam's license plate never caused an accident. Tr. Ex. 1 at 11:2–4. No children were harmed by it, either. *Id.* at 11:5–7.

In fact, the only harm that the Defendants had claimed Ms. Gilliam's personalized plate caused—a complaint based on the plate having "offended [one unknown] person[,]" Tr. Ex. 1 at 11:22–12:6—turned out to be fictional. In truth, the person was not unknown; he did not say that the Plaintiff's license plate was offensive; and, in fact, his complaint was "not a complaint at all[.]" Tr. Ex. 2 at 29:1–30:17. What actually happened was that, "[o]n May 7, 2021, the Department's then-Chief of Staff, Justin Moorhead, received a text message on his personal cell phone containing a picture of Plaintiff's license plate." *Gilliam*, 2023 WL 3749982, at *2. Mr. Moorhead's resulting commentary—which Ms. Hudson misrepresented under oath and originally persuaded the Panel to find was a "complaint" about "offensive" connotations—stated as follows: "Hahah thank you for your citizens report." Tr. Ex. 5 at 3.

Notwithstanding its continuous display without complaint for eleven years, the Defendant Commissioner immediately revoked Ms. Gilliam's personalized plate on a "summary" and "prehearing" basis, and he exposed Ms. Gilliam to the immediate threat of criminal liability, a fine, and up to 30 days in jail if she did not comply. Tr. Ex. 1 at 23:6–25.

As grounds, the Department stated by letter that Ms. Gilliam's personalized plate "has been deemed offensive." *See* R. (Vol. 1) at 17; Tr. Ex. 7, at 2, ¶ 2.

C. PERSONALIZED PLATE APPLICATIONS, REVOCATIONS, AND THE GOVERNMENT'S INCOHERENT AND INCONSISTENT PROCESS FOR EVALUATING THEM.

Though it plays no role in developing personalized plate messages, Tennessee reserves vast censorship authority over their approval, stating on applications that: "Tennessee reserves the right to refuse to issue objectionable combinations." Tr. Ex. 18. The Government can also revoke plates after approving them if it is "satisfied" that they have been "erroneously issued[.]" Tenn. Code Ann. § 55-5-117(a)(1).

When assertedly non-compliant applications are approved improperly, though, the Government made clear that it only cares about them if someone complains. As the Government put it: "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. Before 2019, the Department's review process also was "not as strict as it is now." *See* Trial Tr. (Vol. II) at 244:8–24. Thus, a large number of personalized plate messages that are ostensibly prohibited were approved, *see, e.g., id.* at 245:7–9 (Q. "So tell me how 'POOPOO' slips through your process, if that's a mistake?" A. "I don't know."), and the Department does not devote resources to determining "if any got through" improperly before it started screening more strictly. Tr. Ex. 11 at Excerpt 90:11–12.

When deciding whether to approve a requested combination, the Government engages in viewpoint discrimination based on a statutory

requirement that personalized plate messages be screened for "connotations offensive to good taste and decency[.]" Tenn. Code Ann. § 55-4-210(d)(2). Worse: the Government engages in that statutorily-compelled viewpoint discrimination on an inherently subjective basis without defined standards. As both Tammie Moyers and Demetria Hudson—two Department employees—separately admitted at trial, neither "connotations," nor "offensive," nor "good taste," nor "decency" are defined terms, and those who are tasked with implementing them cannot define them. *See* Trial Tr. (Vol. II) at 228:10–24; *id.* at 191:11–19.

As a result, the Government regulates personalized plate messages that may be "offensive" to "good taste" and "decency" without reference to any definitions. *Id.* Untethered to statutory text, the Government has also unilaterally decided that exactly six topics (no more, no less)—"profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs"—are offensive to good taste and decency. R. (Vol. 22) at 3221. Thus, the Government has purported to regulate messages that "contain, allude to, or are audibly similar to any word or phrase with one or more of [those] associations[.]" *Id.* Ask the Government to specify the criteria that it will use to determine whether a personalized plate is objectionable or not, though, and the Government's attorneys will tell you that its criteria apply only "generally" and 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 5–6 (response to Interrogatory No. 7) (emphasis added).

The Department has also approved a vast number of personalized

plate messages that do not track the extra-statutory standards that the Department professes to apply. For example, before Ms. Gilliam's counsel was cut off by the trial court for introducing cumulative evidence on the matter, trial testimony reflected that the Department had approved personalized plates containing all of the following messages:

-"PHKAUF"[2] (audibly similar to "Fuck off"[3]);

-"SHTUNOT"[4] (audibly similar to "shit you not"[5]);

-"OPHXGVN"[6] (audibly similar to "zero fucks given"[7]);

-"3JOH22A"[8] ("asshole" in a rearview mirror[9]);

-"BLZDEEP"[10] (audibly similar to the term "balls deep"[11]);

-"BADSS"[12] (audibly similar to the term "badass"[13]);

-"DEEZBLZ"[14] (audibly similar to the term "deez balls"[15]), as well as several additional iterations of the term "deez nuts[,]" including "DZNUTS," DZNUTTZ," DZNUTZ," and "DZNUTZ2"[16];

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[2] Trial Tr. (Vol. II), at 236:10.
[3] *Id.* at 235:24.
[4] *Id.* at 237:6.
[5] *Id.* at 237:9.
[6] *Id.* at 238:12.
[7] *Id.*
[8] *Id.* at 238:25.
[9] *Id.* at 239:1–3.
[10] *Id.* at 240:6.
[11] *Id.* at 240:13–17.
[12] *Id.* at 240:23.
[13] *Id.* at 240:25.
[14] *Id.* at 241:11.
[15] *Id.* at 241:13.
[16] *Id.* at 241:21–242:12.

-"POOPOO"[17];

-"TIH2TA3"[18] ("eat shit" in a rearview mirror)[19];

-"ASSASIN"[20] (an admittedly "violent" message[21] despite a purported prohibition on violent terms);

-"SUICIDE"[22] (ditto);

-"MAFIA"[23] (ditto);

-"MOBJOB"[24] (ditto);

-"YURNXT"[25] (ditto again);

-"BUTNKD"[26] (audibly similar to "[b]utt-naked"[27]);

-"DRTYGRL"[28] (audibly similar to "[d]irty girl"[29]); and

-"SEXY"[30] (despite a purported prohibition on sex references[31]), as well as "SEXY01," "SEXY5," "SEXYGMA," "SEXYGRL," and "lots of [other] different references to sex explicitly on the personalized plates" that Tennessee has approved,[32] such as "BIGSEXI," "SEXYWMN,"

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[17] *Id.* at 245:3–9.
[18] *Id.* at 245:16.
[19] *Id.* at 246:3–8.
[20] *Id.* at 248:25.
[21] *Id.* at 249:1–2.
[22] *Id.* at 249:18.
[23] *Id.* at 250:13.
[24] *Id.* at 252:17.
[25] *Id.* at 253:13–17.
[26] *Id.* at 254:5.
[27] *Id.* at 254:8.
[28] *Id.* at 254:22.
[29] *Id.* at 254:24.
[30] *Id.* at 255:6.
[31] *Id.* at 255:9–12.
[32] *Id.* at 255:13–256:7.

"SMKNHOT," "SMOKN69," "MRSEXY," "IMCMMIN," and "BIGPMPN."[33]

At this point, the trial court stopped the Plaintiff's questioning about the Department's approval of dozens of additional personalized plate configurations—a small, non-exhaustive sample of approved messages that should have been prohibited under the Department's professed guidelines—because "this appears to be cumulative at this point."[34] Thus, Ms. Gilliam's counsel was cut off before questioning Ms. Moyers about additional approved plates like "'FAP2IT,' which . . . is a very common term for masturbation, and then 'BIGRACK', and then 'BUTSTUF[,]'" and also before addressing other approved personalized plates with terms similar to the Plaintiff's revoked plate, such as "SIXTY9," "694FUN," "69BOSS," "69HOSS," "69PONY," "MAGIC69," "TOPLS69," "PWN," and "PWNDLOL."[35] Ms. Gilliam's counsel was also prohibited from completing his examination of Ms. Moyers about the obviously viewpoint-discriminatory nature of the Defendants' speech regulation. *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")*; compare id.* at p. 2179 and Tr. Ex. 2 at Deposition Ex. 6, p. 104 ("ATFSUKS" prohibited, even though "1GNCTRL" is allowed); *compare* Tr. Ex. 2 at Deposition Ex. 6, p. 1993 *with* Tr. Ex. 2 at Deposition Ex. 7, p. 2187 ("SEEKGOD" and countless other God-promoting plates permitted, but "SATAN90"

[33] *Id.* at 257:10–265:12.
[34] *Id.* at 265:17–18.
[35] *Id.* at 268:4–274:10.

forbidden). Plaintiff's counsel was cut off before he could address further messages in the Department's record of approved personalized plates—including explicitly racist messages, *see, e.g.* Tr. Ex. 2 at Deposition Ex. 6, p. 381 ("COONHTR"), and explicitly white supremacist messages, *see, e.g.*, *id.* at 1022 ("88POWER"); *id.* at 1067 ("ARYANSH")—despite the Department's purported prohibition on racist configurations, too.[36]

As grounds for limiting the Plaintiff's questioning, the trial court stated: "We get your point." *See* Trial Tr. (Vol. II) at 275:7–10 ("We get your point. We get your point. And for the record we understand it's not exhaustive, but you've made a paper exhibit out of the ones you've picked out, so thank you."). The point, of course, was that the Department exerts minimal control over the messages contained on approved personalized plates; that it acts arbitrarily and irrationally when approving personalized plate messages; and that it haphazardly enforces standards that are nowhere near as clear or robust as the Department—including Ms. Moyers—had claimed. Indeed, as the Department's 30.02(6) designee, Ms. Hudson testified that she could not even determine whether *the specific personalized plate at issue in this litigation*—"69PWNDU"—should be approved based on the Department's professed criteria. *See* Tr. Ex. 1 at 42:16–25. In response to basic questions about various personalized plate messages that should clearly have been disallowed under the Government's professed standards, Ms. Moyers also testified repeatedly that she could not determine one way or another

[36] If these were actually Commissioner Gerregano's messages, such explicitly racist messages would presumably give rise to some form of civil rights liability or a claim of a hostile work environment.

whether they should be approved. *See, e.g.*, Trial Tr. (Vol. II) 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."); *id.* 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.").

Further, even many personalized plate messages that the Government initially persuaded the Panel to find were "mistakes" turned out not to be. For example, despite the criteria that the Department professed to apply neutrally and coherently to support its revocation of Ms. Gilliam's personalized license plate based on the numerical combination "69," *see* R. (Vol. 2) at 229–30, discovery revealed that the Department approved each of the following personalized plates, all of which included the number "69" for overtly sexual purposes: "69420," "42069," "694FUN," "69BEAST," "69BOSS," "69HOSS," "69PONY," "AFINE69," "BAD69," "I69," "PONY69," "QUEEN69," "SMOKN69," "TOPLS69," and "X69." *See* Tr. Ex. 1 at 49:17–51:13, *id*. at 53:13–23.

Confronted with these combinations, the Government convinced the Panel that they had been issued by "mistake." *See* R. (Vol. 5) at 630 (crediting Defendants' representation that "approval and use of license plates similar to the Plaintiff's are a mistake."). By the time of trial four

months later, though, only four of them were revoked; the rest of the "mistakes" remained permitted and turned out not to have been mistakes at all. *See* Tr. Ex. 3 (demonstrating that only "I69, XTC69, 69420, and 42069" were revoked in the four-month period that followed).

D. PUBLIC PERCEPTION OF PERSONALIZED PLATE MESSAGES.

Using the same language contained on the Government's own website about Tennessee's personalized plate program, Alan Secrest—a "highly recognized, experienced pollster"—"established by a dispositive 87% that Tennesseans across the state consider the configurations on a personalized plate to be the message of the vehicle owner and not the message of the State of Tennessee." R. (Vol. 22) at 3241. At trial, Mr. Secrest was qualified without objection as an expert who was permitted to "provide the panel expert testimony in his field, which is polling." Trial Tr. (Vol. I) at 68:24–69:11. Mr. Secrest testified at trial that the results of his poll were:

> Almost unanimous. 87 percent chose Statement B, that is, that a personalized plate represents the speech or views of the person who chose it. Just 4 percent indicated it represented the speech or views of the government and 9 percent were not sure."

Id. at 76:24–77:3.

Within the poll question's 5.5-point margin of error—a margin that made room for the possibility that *nobody* associates personalized plate messages with the speech or views of the government—the results of Mr. Secrest's poll were accurate to a reasonable degree of statistical certainty. *See id.* at 79:17–80:14. Further, according to Mr. Secrest, the poll's result was:

> [A]bout as conclusive a finding as one ever sees in rigorously applied survey research. It's an overwhelming response light years beyond the margin of error, and virtually no one, just 4 percent, perceive the message featured on a personalized license plate as representing the speech or views of the government.

Id. at 78:5–11.

The reliability of Mr. Secrest's poll—and the fact that "virtually no one" associates personalized license plates with government speech, *see id.*—was confirmed by the Defendants' discovery responses. In particular, other than the trial court's three judges, the Defendants acknowledged through an interrogatory response that they could not identify a single member of the public who held the view that any personalized plate in Tennessee reflects the government's speech or message. *See* Tr. Ex. 2, at Deposition Ex. #5, p. 2 (Interrogatory #3). The Defendants also acknowledged that they "have likewise not conducted a poll or otherwise tracked whether members of the public have expressed the belief that Tennessee personalized license plates convey a private message." *Id.*

Given the foregoing, by the time this case reached trial, the Government was no longer even arguing that personalized license plates do not contain personal speech as a factual matter. Instead, the Defendants clarified that they "have not argued that license plates—as a factual matter—contain purely the State's speech[,]" and they conceded that personalized plates "contain some individual speech as a matter of fact[.]" Tr. Ex. 6 at 6.

Trial testimony supported this concession. For example, as trial

witness George S. Scoville III—a personalized plate owner who applied for his personalized plate to honor his late grandfather, *see* Trial Tr. (Vol. I) at 47:15–22—explained, he considered the message on his personalized plate to be his own, in large part because he created it and "the government didn't choose it" for him. *Id.* at 47:23–48:21. Indeed, Mr. Scoville noted that he had originally been provided "a license plate with a letter and number combination that had been chosen for [him] by the government[.]" *Id.* at 48:22–49:1. Preferring instead to convey a non-governmental message that reflected his own speech, though, Mr. Scoville testified that it was "fair to say the purpose for applying for a personalized plate was to *disassociate* from the government's message and convey [his] own[.]" *Id.* at 49:2–49:5 (emphasis added).

The Defendants asserted a contrary view through the testimony of surprise witness Tammie Moyers. Ms. Moyers vigorously contested the position that the Department's designated representative had taken across the Department's two 30.02(6) depositions. Unlike the Department's designated 30.02(6) witness, though, Ms. Moyers conceded 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. (Vol. II), at 226:7–18.

Ms. Moyers also agreed that she was "a member of the public." *See* Trial Tr. (Vol. III), at 311:2. Ms. Moyers, however, was not identified by the Defendants in the aforementioned interrogatory response, which required the Defendants to "identify by name and address each and every member of the public known to the Defendants who has stated or indicated a belief that any personalized plate in Tennessee reflects the

government's message." Tr. Ex. 2, at Deposition Ex. 5, p. 2 (Interrogatory #3). Just five days before the Parties' trial, the Defendants had also testified through their designated 30.02(6) representative that they did not have any names to add to that interrogatory response. *See* Tr. Ex. 2 at 36:9–37:4. Ms. Moyers admitted during her trial testimony that she had informed the Defendants during pre-trial preparation that she "believed that personalized plates in Tennessee reflect the government's speech or message," though, *see* Trial Tr. (Vol. III), at 313:14–21—a clear indication that the Defendants' failure to identify her in response to the relevant interrogatory was strategic and willful.

As a surprise, undisclosed trial witness, Ms. Moyers advanced the view that personalized plates convey the government's message. During cross-examination, though, she conceded that it only "looks like" that. Trial Tr. (Vol. II), at 247:18–23. Despite the way it "looks," though, *see id.*, Ms. Moyers agreed that, *in reality*: (1) the messages that are conveyed on personalized plates are neither the Department's nor the Defendant Commissioner's messages, and (2) the Commissioner does not approve of them. Trial Tr. (Vol. II), at 248:3–13.

By the end of Ms. Moyers' testimony, it became clear to everyone in the courtroom—including to the Panel itself, *see* Trial Tr. (Vol. III), at 310:4–5 ("CHANCELLOR JENKINS: Counsel, we get your point. Keep moving.")—that Ms. Moyers had been coached just a little *too* strongly to advocate the position that personalized plates are government speech. *See id.* at 307:5–309:23. Thus, Ms. Moyers was forced to admit that her rigid testimony that personalized license plates contain "purely the

government's speech" conflicted *with the Government's own position at trial,* which conceded that personalized plates *do* contain personal speech. *Compare id.* at 307:21–24 (Q. "Ma'am, is it your position that personalized plates, as a factual matter, contain purely the government's speech?" A. "Yes."), *with* Tr. Ex. 6 at 6 (Defendants' judicial admission that: "Defendants have not argued that license plates—as a factual matter—contain purely the State's speech. . . . [T]he plates contain some individual speech as a matter of fact[.]").

E. THE TRIAL COURT'S RULING.

Following trial, the trial court issued an order evidencing that it did not, in fact, "get [the Plaintiff's] point" at all. Trial Tr. (Vol. II) at 275:7–10. Instead, notwithstanding that Ms. Gilliam's counsel had been able "to find hundreds of plates that conflict with [Ms. Moyers'] claims that certain categories are prohibited" in a list of approved license plates that was provided to Ms. Gilliam just "six days" before trial, *see id.* at 243:22–25, the trial court "accredit[ed] the testimony of Ms. Moyers" along the way to finding that the Government exerts sufficient "control" over personalized plate messages to convert the messages into the government's own speech. R. (Vol. 22) at 3243.

The trial court also "place[d] no weight on" the Department's 30.02(6) deposition admissions, concluding that "the testimony was confused, contradictory and in some areas uninformed[,]" and concluding further that the Department's designee "was clearly intimidated by the

questions posed by Plaintiff's Counsel."[37] R. (Vol. 22) at 3218. Thus, the Panel held that it "is not considering any part of Ms. Hudson's testimony, including parts damaging to the Defendants," *id.*, and it claimed that doing so was "not prejudicial to the Plaintiff[.]" *Id.* Ms. Gilliam's appeal followed, and the Court of Appeals reversed.

VIII. ARGUMENT

Nobody in this case disputes that the government may speak for itself and that "the Government's own speech . . . is exempt from First Amendment scrutiny." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). As the U.S. Supreme Court has observed, communicating governmental messages is necessary for government to "function." *See Matal v. Tam*, 582 U.S. 218, 234 (2017) (cleaned up). Government speech accordingly enables the government to communicate its policies and ideas to the electorate, and it enables the electorate to hold the government accountable in response. *See Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

With the above considerations in mind, both Parties maintain that

[37] This finding is unsupportable in at least one material respect. Specifically, with respect to her fraudulent errata sheet, Ms. Hudson testified that she completed it weeks after her deposition, in her office, without Plaintiff's counsel present, and then "thoughtfully . . . made changes that were inaccurate[.]" *See* Trial Tr. (Vol. II) at 176:4–16.

there is government speech in this case. For her part, Ms. Gilliam asserts that Tennessee's government spoke to its citizens when it created and displayed a website advertising Tennessee's personalized plate program. *See* Tr. Ex. 1, at Deposition Ex. #2. That website encourages drivers to "Apply and Choose Your Message[.]" *Id.* It also expressly *disassociates* the government from personalized plate messages and informs the public that a personalized plate message is *the driver's*. *See id.* ("In Tennessee, license plates can be personalized with **your own** unique message.") (emphasis added). Thus, the Parties agree that government speech is involved here.

The Parties disagree, however, about whether the citizen-created, unique, personalized messages displayed on Tennessee's personalized license plates are government speech. As noted above, the Government's own website advertising Tennessee's personalized plate program disassociates the Government from the resulting citizen-created messages. *Id.* Further, though the Government attempts (without a corresponding citation) to minimize the effect of its website now, *see* Government's Br. at 28 n.2, the trial record reflects the Government's admission that the State's website accurately characterizes its program. *See* Tr. Ex. 1 at 7:16–8:5. Even so, the Government maintains that it may regulate citizen-created personalized plate messages for "offensive[ness]," for "good taste," and for "decency" by reserving a right to disapprove them. *See* Tenn. Code Ann. § 55-4-210(d)(2).

That is not an exercise in "government speech," though. Instead, it is straightforward viewpoint-based censorship. *See Matal*, 582 U.S. at

235 ("If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."). Thus, the Court of Appeals correctly determined that personalized plates are personal speech, and its judgment should be affirmed.

A. EACH OF THE *WALKER* FACTORS SUPPORTS THE CONCLUSION THAT PERSONALIZED PLATES ARE NOT GOVERNMENT SPEECH.

To determine whether the government is speaking, the U.S. Supreme Court has explained that courts must "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *See Shurtleff*, 596 U.S. at 252. This review "is not mechanical; it is driven by a case's context rather than the rote application of rigid factors." *Id.* To facilitate the necessary review, courts consider "several types of evidence to guide the analysis, including: [1] the history of the expression at issue; [2] the public's likely perception as to who (the government or a private person) is speaking; and [3] the extent to which the government has actively shaped or controlled the expression." *Id.* (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–14 (2015)). Here, all three non-dispositive factors favor Ms. Gilliam.

1. **The Government introduced no evidence that personalized plate messages have ever been used to convey a governmental message.**

As to "the history of the expression at issue[,]" *id.*—the Government introduced no evidence that Tennessee's personalized license plates have ever been used to convey government messages. *See Gilliam*, 2023 WL

3749982, at *12 ("the record before us contains no evidence that the State has ever used vanity license plates to communicate government messages through the alphanumeric configurations."). This is not the Defendants' fault, of course. Because the entire purpose of a personalized plate is to *disassociate* from a random, government-generated combination and convey a personal message instead, *see* Trial Tr. (Vol. I) at 47:15–49:5, other governmental defendants have similarly failed to muster such evidence under the same circumstances. *See* ***Kotler*, 2019 WL 4635168 at *6** ("the Court is unaware of any history of states using the *customized* registration number configurations to speak."); ***Hart*, 422 F. Supp. 3d at 1232** ("the Court disagrees that license plate *numbers*, separate and distinct from license plate *designs*, have historically been used to communicate messages from the State."); ***Ogilvie*, 2020 WL 10963944 at *3** ("the State has not historically used the alphanumeric combinations on license plates to communicate messages to the public."); ***Mitchell*, 148 A.3d at 326** ("'So, 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. 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.'") (quoting *Mitchell*, 126 A.3d at 185 (in turn quoting *Walker*, 576 U.S. at 211)).

Further, Tennessee's personalized plate program is merely twenty-six years old. *See* R. (Vol. 22) at 3223 (taking judicial notice that "[i]n 1998, Tennessee . . . began issuing . . . personalized license plates.").

Thus, one can safely assume that evidence that the personalization program was used to express government messages—if it existed—has not been lost to history. Rather than being unknown, though, the evidence showed that—in implementing Tennessee's personalization program—Tennessee has explicitly communicated to the public that Tennessee's personalized license plates convey *drivers'* messages. *See* Tr. Ex. 1, at Deposition Ex. #2. As a result, the first non-dispositive *Walker* factor favors Ms. Gilliam, not only because the Government failed to introduce evidence that is has ever used the personalization program to speak, but also because what Tennessee "told the public" about its program—and its corresponding failure "to make clear it wished to speak for itself"—affects the inquiry. *See Shurtleff*, 596 U.S. at 256–57 ("Boston told the public that it sought 'to accommodate all applicants' who wished to hold events at Boston's 'public forums,' including on City Hall Plaza. . . . Boston could easily have done more to make clear it wished to speak for itself by raising flags."); *see also Mech v. Sch. Bd. of Palm Beach Cnty., Fla.*, 806 F.3d 1070, 1078 (11th Cir. 2015) (emphasizing a school's written policy stating that: "'[I]t is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity . . . ."); *Flores v. Bennett*, 635 F. Supp. 3d 1020, 1032–33 (E.D. Cal. 2022), *aff'd*, No. 22-16762, 2023 WL 4946605 (9th Cir. Aug. 3, 2023) ("the AR 5550 defines the purpose of the bulletin boards as for 'student material' and for 'student use,' clarifying that these messages should not be construed as that of the College.").

Contending otherwise, the Government responds that "[t]he State has historically conveyed an identifying message through registration numbers." Government's Br. at 20. That is not evidence that Tennessee has conveyed messages through its *personalization* program, though. *Kotler*, 2019 WL 4635168, at *6; *Hart*, 422 F. Supp. 3d at 1232 (quoting *Mitchell*, 148 A.3d at 326); *Ogilvie*, 2020 WL 10963944, at *3. And when evaluating the history of the expression involved, this Court does not only consider general history, but "must examine the details of *this* [challenged] program." *Shurtleff*, 596 U.S. at 255.

Moreover, the mere fact that registration numbers may have a governmental *use* does not mean they convey a governmental *message*. *See Ogilvie*, 2020 WL 10963944, at *3 ("displaying information is not the equivalent of sending messages."). Certainly, there is no governmental "expression" involved in license plate registration numbers, as the Government wrongly asserts. *See* Government's Br. at 27 (claiming that "the history of government expression through license plate registration numbers is overwhelming."). Thus, Tennessee's requirement that drivers display a unique license plate registration number is merely a "government registration scheme"—not a means of communicating governmental messages or ideas. *Cf. Matal*, 582 U.S. at 241 ("Trademark registration is not the only government registration scheme. . . . State governments and their subdivisions register the title to real property and security interests; they issue driver's licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits."); *see also In re Tam*, 808 F.3d 1321, 1348 (Fed. Cir. 2015), *as corrected* (Feb.

11, 2016), *aff'd sub nom. Matal v. Tam*, 582 U.S. 218 ("The PTO's processing of trademark registrations no more transforms private speech into government speech than when the government . . . grants medical, hunting, fishing, or drivers licenses, or records property titles, birth certificates, or articles of incorporation. To conclude otherwise would transform every act of government registration into one of government speech and thus allow rampant viewpoint discrimination.").

Put another way: only personalized plate combinations communicate actual messages, which is why the Government is so enthusiastic about trying to censor the messages it doesn't like. *See Hart*, 422 F. Supp. 3d at 1232 ("[V]anity plates convey a 'personalized message with intrinsic meaning (sometimes clear, sometimes abstruse) that is independent of mere identification and specific to the owner.'") (quoting *Mitchell*, 148 A.3d at 326).

By contrast, the Government's asserted "identifying" message in requiring citizens to display license plate numbers is not "an act of communication" at all; instead, it merely "discloses." *Cf. Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126–27 (2011) ("[T]he act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication."). As a result, this Court should reject the Government's unwarranted insistence that "the State of Tennessee intends to convey or in fact conveys" a *message* through license plate requirements, which function to enable

identification alone. *Cf.* Tenn. Op. Att'y Gen. No. 16-38, 2016 WL 5539680, n.5 ("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."). Thus, just as a requirement that parents record a child's name on a birth certificate—a "government-issued ID"—does not transform a child's name into the government's speech, neither does the mere fact that license plates are used to identify cars transform personalized plate owners' own unique messages into the government's. *See id.; see also Shurtleff*, 596 U.S. at 256 ("it is Boston's control over the flags' content *and meaning* that here is key[.]") (emphasis added).

The Government's contrary arguments are unpersuasive. First, the Government faults the Court of Appeals for what it characterizes as its "narrow focus on the history of the personalized plate *program* rather than the history of the *medium of expression*—license plate registration numbers[.]" Government's Br. at 26. But the Court of Appeals *did* consider the history of the medium; it was just "unpersuaded by the State's position that it historically has communicated an 'ID' message through the alphanumeric configurations on license plates," given that what the Government characterizes as a "message" is not a message at all. *Gilliam*, 2023 WL 3749982, at *11–12; *cf. Ogilvie*, 2020 WL 10963944, at *3 ("displaying information is not the equivalent of sending messages."). As the Court of Appeals noted, the Government's insistence

that only the history of license plates generally should be considered—rather than the history of Tennessee's *personalization* program—also contravenes *Shurtleff's* instruction that a medium's general history "'is only [a] starting point'" and that courts "'must examine the details of'" the specific program at issue as well. *Id.* at *11 (quoting *Shurtleff*, 596 U.S. at 255);[38] *see also Walker*, 576 U.S. at 212 (addressing license plates' general history *and also* noting, in case about specialty plate designs, that "the Texas Legislature has specifically authorized specialty plate designs" and that "[t]his kind of state speech has appeared on Texas plates for decades.").

Next, the Government asserts that: "Under U.S. Supreme Court precedent, if a medium conveys *any government message*, the government-speech doctrine *does* apply, irrespective of any private message." *See* Government's Br. at 28. But this analysis is wrong, and *Shurtleff* forecloses it.

In *Shurtleff*, while addressing Boston's flag-flying program, the U.S. Supreme Court expressly noted that "Boston says that all (or at least

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[38] On this point, the Government simply misreads *Shurtleff*. *Compare* Government's Br. at 27, n.1 (asserting that "[r]ead in context, . . . that language came after *Shurtleff* concluded its discussion of the history of the expression at issue—flag flying—and was transitioning to analyze the other factors set out in *Walker*."), *with Shurtleff*, 596 U.S. at 253–55 ("To begin, we look to the history of flag flying, particularly at the seat of government. Were we to consider only that general history, we would find that it supports Boston. . . . While this history favors Boston, it is only our starting point. 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. So we must examine the details of *this* flag-flying program.").

most) of the 50 unique flags it approved reflect particular city-approved values or views." *Shurtleff*, 596 U.S. at 256. The *Shurtleff* court also noted that "the public seems likely to see the flags as conveying some message on the government's behalf." *Id.* at 255 (cleaned up). Thus, Boston's flag-flying program not only *did* convey a government message; the public was also "likely to see" it that way. *Id.*

Despite the actual government message involved, though—which (unlike here, where the Government does not want to be seen as endorsing personalized plate messages) Boston had claimed "reflect[ed] particular city-approved values or views[,]" *see id.* at 256—Boston's flag program was not held to be government speech. Why? Because in addition to the government message involved, "Boston told the public that it sought 'to accommodate all applicants' who wished to hold events at Boston's 'public forums,' including on City Hall Plaza." *Id.* Thus, although there was also a government message involved in *Shurtleff*, the government speech doctrine did not apply, because what the government had told the public about its program carried the day. *Id.* (emphasizing what "Boston told the public"). This case is no different. *See* Tr. Ex. 1, at Deposition Ex. #2 (telling the public that: "In Tennessee, license plates can be personalized with **your own** unique message.") (emphasis added). As a result, it should turn out the same way.

Further, when "inextricably intertwined" forms of speech are truly at issue—hardly the case here—the U.S. Supreme Court has suggested that courts should apply the "test for fully protected expression." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988)

("where, 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." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 474 (2007); *see also id.* at n.7 ("in a debatable case, the tie is resolved in favor of protecting speech."). The Government's dual message theory fails accordingly.

2. <u>The public's likely perception is that private persons are speaking through personalized plate messages.</u>

As to "the public's likely perception as to who (the government or a private person) is speaking" through personalized plate messages, *see Shurtleff*, 596 U.S. at 252, the evidentiary record permits only one conclusion. In particular: (1) the Department's own testimony, *see* Tr. Ex. 1 at 28:5–15; (2) personalized plate owners' testimony, *see* Trial Tr. (Vol. I) at 47:15–49:5; (3) expert testimony demonstrating the public's actual likely perception of personalized plate messages, *see* Trial Tr. (Vol. I) at 68:24–78:11; and (4) the Government's own website clarifying any remaining confusion, *see* Tr. Ex. 1, at Deposition Ex. #2—uniformly establish that personalized plate holders are speaking *personally*.

Perception aside, it is also true, as a matter of fact, that personalized plate holders are the ones speaking when it comes to personalized plate messages. *See, e.g.,* Tr. Ex. 6 at 6 (admitting that personalized plates "contain some individual speech as a matter of

fact[.]"). Thus, as to Ms. Gilliam's personalized plate, the Department unqualifiedly admitted both: (1) that nobody "other than Ms. Gilliam designed the combination of letters and numbers on her personalized plate[,]" *see* Tr. Ex. 1 at 27:17–22; *see also id.* at 27:24–28:3, and (2) that Ms. Gilliam's personalized license plate conveys "Ms. Gilliam's own unique message[,]" and "not the government's message[.]" *Id.* at 28:5–15.

Beyond the one-sided evidentiary record here, "common sense dictates that the public attributes any message on [a personalized plate] to the driver." *See Kotler*, 2019 WL 4635168, at *7. And to the extent that anyone in Tennessee lacks such "common sense," *see id.*, that person can simply consult Tennessee's own website discussing its personalized plate program to resolve the confusion, which clarifies for even the dimmest Tennesseans that personalized plates reflect an applicant's "own unique message[,]" *see* Tr. Ex. 1, at Deposition Ex. #2, rather than the government's. Thus, Tennessee not only failed to "make clear it wished to speak for itself" through its personalization program; it also affirmatively represents to the public that *driver*s are the speakers. *Cf. Shurtleff*, 596 U.S. at 257–58 ("Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities' flag-flying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its 'flagpoles are not intended to serve as a forum for free expression by the public,' and lists approved flags that may be flown 'as an expression of the City's official sentiments.'") (cleaned up).

For all of these reasons, as other courts have near-uniformly

concluded, the public perception factor favors Ms. Gilliam as well. *See* ***Kotler*, 2019 WL 4635168, at *7** ("Turning to audience perception, the Court thinks it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates. Although randomly-generated registration numbers, and license plates in general, may be closely identified with the state in the mind of the public, the same is not true of the personalized messages on vanity plates."); ***Carroll*, 494 F. Supp. 3d at 166** ("The portion of the plate at issue here – the unique alphanumeric sequence embossed on the metal – bears no indicia of government speech. . . . The very essence of vanity plates is personal expression.") (citing *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001)); ***Ogilvie*, 2020 WL 10963944, at *3** ("it does not follow that Californians believe that the State is using the plates to send a message. Does the State seriously argue that someone viewing the license plate 'KNG KOBE,' for example, would infer that the California government was declaring Kobe Bryant the king of basketball, or of California, or of something else?"); ***Hart*, 422 F. Supp. 3d at 1232** ("While plate *designs* are attributed by the populace to the state, vanity plates are not. The Kentucky personalization program, on its face, is concerned instead with the individual applicant's message. **Even the statute establishing the personalization program in Kentucky describes vanity plates as consisting of 'personal letters or numbers significant *to the applicant.*'**") (quoting K.R.S. § 186.174(1)) (bolded emphasis added).

Once more, the Government's contrary arguments lack merit. Personalized plate messages are not "license plate designs," so the

Government's insistence that "[t]he U.S. Supreme Court, in *Walker*, already held that 'license plate designs are often closely identified in the public mind with the State'" is immaterial here. *See* Government's Br. at 29 (quoting *Walker,* 576 U.S. at 212). If this distinction were not clear already, *Walker* also explicitly emphasized that "we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program." *Walker*, 576 U.S. at 204.

Nor is the Government's reference to what "independent sovereigns" have done helpful to its position here, for several reasons. *See* Government's Br. at 31.

For one, the Government's brief says nothing about whether other "independent sovereigns" do what Tennessee does: broadcast to the public that personalized plates convey a driver's "own unique message[,]" rather than the government's. Tr. Ex. 1, at Deposition Ex. #2.

For two, the way that "independent sovereigns" treat this issue must include the way that their courts address it. And other than the Panel's since-reversed decision below and a Hawaii District Court decision that the Ninth Circuit "assume[d] without deciding" was wrong on the issue presented here, *see Odquina v. City & Cnty. of Honolulu*, No. 22-16844, 2023 WL 4234232, at *1 (9th Cir. June 28, 2023), *every* court to consider this issue after *Matal* has concluded that personalized plates are personal speech, and several did so beforehand as well. Thus, upon review, each of the following ten courts has rejected the Government's proposed holding here:

1. **The United States District Court for the Eastern**

District of Kentucky. *See Hart*, 422 F. Supp. 3d at 1233;

2. **The United States District Court for the District of Rhode Island**. *See Carroll*, 494 F. Supp. 3d at 166;

3. **The United States District Court for the Northern District of California**. *See Ogilvie*, 2020 WL 10963944, at *3;

4. **The United States District Court for the Central District of California**. *See Kotler*, 2019 WL 4635168, at *7;

5. **The Court of Appeals of Maryland.** *See Mitchell*, 148 A.3d at 325;

6. **The Court of Special Appeals of Maryland**. *See Mitchell*, 126 A.3d at 186;

7. **The United States District Court for the Western District of Michigan**. *See Matwyuk*, 22 F.Supp.3d at 823;

8. **The Supreme Court of Oregon**. *See Higgins*, 72 P.3d at 632;

9. **The Circuit Court of Virginia**. *See Bujno*, 2012 WL 10638166, at *5; and

10. **The New Hampshire Supreme Court** (by assumption only). *See Montenegro*, 166 N.H. at 219.

This list does not include additional situations in which "independent sovereigns" have stipulated—in response to being sued—that they lack authority to enact statutes exactly like the one challenged here, either. *See, e.g.,* John Hult, *'Good taste and decency' standard for vanity license plates to be snuffed by settlement*, SOUTH DAKOTA SEARCHLIGHT (Dec. 11, 2023),

https://southdakotasearchlight.com/2023/12/11/good-taste-and-decency-standard-for-vanity-license-plates-to-be-snuffed-by-settlement/; *see also* *Hart v. Houdyshell, et al.*, No. 3:23-cv-03030-RAL, ECF 23, at 2 (D.S.D. Dec. 12, 2023) (stipulating within weeks that "[t]he 'carries connotations offensive to good taste and decency' standard in SDCL § 32-5-89.2 is unconstitutional on its face and as applied to the Plaintiff, thus, the standard is deemed severed from the statute and has no force and effect in the issuance of personalized plates or in the recall of any previously issued personalized plates.").

The rest of the Government's arguments fare no better. The Government insists that even though "citizens would not attribute the private message conveyed by" Tennessee's personalized plate messages to the Government, "Justice Alito's dissent argued the same thing in *Walker*[.]" *See* Government's Br. at 32. Justice Alito's dissent was a dissent, of course, so it hardly controls. Moreover, as the *majority* observed in *Walker*, Texas's "legislature ha[d] enacted statutes authorizing, for example, plates that say 'Keep Texas Beautiful' and 'Mothers Against Drunk Driving,' plates that 'honor' the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words 'Fight Terrorism.'" *Walker*, 576 U.S. at 205 (quoting Tex. Transp. Code Ann. §§ 504.602, 504.608, 504.626, 504.647). That means that at least some of Texas's specialty plates—and it is hard to imagine how an objective observer could know which ones—not only featured state-created *messages*; they featured state-created messages that were codified into state public policy through "enacted statutes." *Id.*

Further distinguishing *Walker*—in which the government "also own[ed] the designs on its license plates, including the designs that Texas adopt[ed] on the basis of proposals made by private individuals and organizations[,]" *id.* at 212 (citing Tex. Transp. Code Ann. § 504.002(a)(3))—the Government makes no claim here that it "owns" personalized plate messages, nor could it. There is a world of difference between state-owned and often state-created designs—some of which implement enacted statutes—and Ms. Gilliam's unique personalized plate message that she alone created, though. *Cf. Matal*, 582 U.S. at 235 (emphasizing that "[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration."). In these respects, the two situations are not the same, or even similar.

Next, the Government complains that "[t]he Court of Appeals also pointed to a 200-person survey presented by Gilliam at trial," which the Government asserts "rested on a false dichotomy[.]" Government's Br. at 33. The Government's complaint is not with Mr. Secrest's survey, though. Instead, it is with the U.S. Supreme Court, which frames the question the same way. *See, e.g., Shurtleff*, 596 U.S. at 244 (directing courts to consider "the public's likely perception as to who (the government or a private person) is speaking[.]"); *id.* at 263 (Alito, J., concurring) ("To prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker[,]" singular).

It is true that the U.S. Supreme Court's government speech jurisprudence acknowledges that speech can have more than one *message*. But that does not mean that a message should be attributed to

multiple *speakers*. To the contrary, *Summum* explicitly distinguished between the *speaker*—in that case, the "City [that] intend[ed] the monument to speak on its behalf"—and "the message intended by the *donor*[,]" who did not speak through the City's display at all. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 474 (2009) (emphasis added).

At any rate, Mr. Secrest's survey offered a third option: respondents could answer that they "were not sure" to whom to attribute the message a personalized plate. Trial Tr. (Vol. I) at 76:24–77:3. Given the public's overwhelming understanding that personalized plate messages are a driver's, though, few respondents chose this option. *Id.* Even fewer—just 4% of respondents—thought personalized plates represented the speech or views of the government: a number so small it was lower than the poll's margin of error. *Id.* By contrast, Mr. Secrest's poll "established by a dispositive 87% that Tennesseans across the state consider the configurations on a personalized plate to be the message of the vehicle owner and not the message of the State of Tennessee." R. (Vol. 22) at 3241. Had the Department's own 30.02(6) designee been among the respondents polled, she would have said the same. Tr. Ex. 1 at 28:5–15.

Finally, the Government complains about the Court of Appeals' observation that—unlike Ms. Gilliam—"the State failed to 'offer[] evidence tending to establish the public's perception about vanity license plates.'" Government's Br. at 34 (quoting *Gilliam*, 2023 WL 3749982, at *13). According to the Government, "Tennessee presented the exact evidence presented in *Walker*[,]" and "[i]f the evidence suffices for license plate designs, then it suffices for license plate registration numbers." *Id.*

That is not true. As noted, *Walker* stated it was "concerned only with the second category of plates, namely specialty license plates, not with the personalization program." *Walker*, 576 U.S. at 204. *Walker*'s facts also involved state-owned and sometimes state-*created* designs that were intended for mass display. *See id.* at 212 ("Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations."); *id.* at 205 ("The legislature has enacted statutes authorizing" some of its specialty plate designs). By contrast, personalized plate messages are exclusively citizen-created; Tennessee does not own the messages displayed on personalized plates; and "common sense dictates that the public attributes any message on [a personalized plate] to the driver." *See Kotler*, 2019 WL 4635168, at *7. Unlike in *Walker*, to the extent any Tennessean was uncertain, they could also consult Tennessee's own website advertising its personalized plate program, which explains that personalized plate messages reflect a plate holder's "own unique" message, rather than the government's. *See* Tr. Ex. 1, at Deposition Ex. #2.

Walker had none of these facts. It was also concerned with *actual messages*, which specialty plates convey but which a mere "government registration scheme" does not. *See Matal*, 582 U.S. at 241.

If Texas—like Tennessee—had maintained a website informing the public that specialty license plates reflected drivers' own messages, it also is safe to say that *Walker* would have turned out differently. The reason is twofold. For one, what the government has "told the public"

about a program matters. *See Shurtleff*, 596 U.S. at 256. For two, applying the government speech doctrine to messages that the Government publicly disclaims makes no sense, and doing so would interfere with the democratic accountability on which the government speech doctrine is premised. *See Bd. of Regents of Univ. of Wisconsin Sys.*, 529 U.S. at 235 ("When the government speaks, . . . it is, in the end, accountable to the electorate and the political process for *its* advocacy."); *cf. Gilliam*, 2023 WL 3749982, at *12 ("Plaintiff correctly points out that no evidence in the record establishes that the public likely perceives the State to be speaking through vanity license plates, nor do we believe the State really wants to be perceived as the author of the various vanity plate messages.").

For all of these reasons, the public's likely perception is that private citizens are speaking through personalized plate messages. Thus, *Walker*'s second factor favors Ms. Gilliam, too.

3. <u>The Government has neither actively shaped nor meaningfully controlled personalized plate messages.</u>

As to "the extent to which the government has actively shaped or controlled the expression[,]" *see Shurtleff*, 596 U.S. at 252—the evidence was that the government plays no role in crafting messages expressed on a personalized plate. To the contrary, as the Department's 30.02(6) designee testified, nobody "other than Ms. Gilliam designed the combination of letters and numbers on her personalized plate[,]" *see* Tr. Ex. 1 at 27:17–22, and nobody from the Government designed the message on Ms. Gilliam's plate. *See id.* at 27:24–28:3.

Further, as to the extent to which the government controls

personalized plate "expression," *Shurtleff*, 596 U.S. at 252, the Court of Appeals understated the problems:

> [T]he Department has no written policies about how to screen vanity plate applications for "good taste and decency." Rather, 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. The Department employees who testified at trial maintained that certain categories of messages are outright banned. Both Department witnesses testified that sexual activity, including the number sixty-nine, is one of these categories. Nonetheless, Plaintiff presented proof that there are numerous vanity license plates in circulation alluding to sexual activity. The members of the Inventory Unit team who testified at trial were unable to clarify these discrepancies, other than that the Unit is very busy.

Gilliam, 2023 WL 3749982, at *14.

The trial court adopted a slightly different characterization of the Government's incoherent enforcement, concluding that "mistakes are made in the process of reviewing personalized plate applications" because there are too many applications per day for the Department to review competently. *See* R. (Vol. 22) at 3243 ("the Panel accredits the testimony of Ms. Moyers that mistakes are made in the process of reviewing personalized plate applications. Her testimony is supported by the evidence that five reviewers have 80 to 100 applications a day to review, and there are presently 60,000 active personalized plates."). Ms. Moyers' testimony did not merely indicate that "mistakes are made[,]" though. *See id.* Instead, her testimony—like Ms. Hudson's on behalf of the Department—demonstrated that *even the Department's own employees* cannot determine when a personalized plate message contravenes the

Department's inherently arbitrary rules. *See, e.g.*, Trial Tr. (Vol. II) 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.").

Given the substantially undefined and loosey-goosey nature of the criteria the Department applies, this is not surprising. As the Defendants admitted through counsel, the Government's professed criteria apply only "generally," and based on their undefined nature, "[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 5–6 (response to Interrogatory No. 7) (emphasis added). The Department's witnesses also had consistent difficulty determining whether particular plates met Department's professed standards—difficulty that could not be squared with the Defendants' position earlier in litigation that it would "ordinarily be apparent on the face of the vanity plate" whether a plate was objectionable or not. *See* Tr. Ex. 8 at 21.

Indeed, the evidence admitted at trial proved that the Department's control over personalized plate messages is so loose—and that so many plates that should have been denied under the criteria that the Department professed to apply are approved—that the Panel cut off Ms. Gilliam's counsel for presenting cumulative evidence on the point. *See*

Trial Tr. (Vol. II) at 275:7–10 ("We get your point. We get your point. And for the record we understand it's not exhaustive, but you've made a paper exhibit out of the ones you've picked out, so thank you."). Ms. Moyers also candidly admitted the historically loose nature of the Department's control. *See* Trial Tr. (Vol. II) at 244:8–24 (testifying that before 2019, the review process was "not as strict as it is now."). The Defendants judicially admitted, through counsel, that they do not go back to determine whether personalized plates were erroneously issued, too. *See* Tr. Ex. 11 at Excerpt 90:11–12 ("the Department is not out on the streets policing plates to find out if any got through.").

Under these circumstances, the notion that *Walker*'s "control" factor could favor the Government is "nonsensical." *See Kotler*, 2019 WL 4635168, at *7. As another court has explained under materially identical circumstances:

> [T]here are "hundreds of thousands of personalized license plates on California's roads." [] To suggest that the state has somehow meticulously curated the message of each of these plates, or of license plates in general, is nonsensical. Further, the fact that California wrote statutory and regulatory provisions to determine when to reject a proposed license plate suggests that the state is not very selective at all. The implication of the regulation is that the DMV will accept any proposed configuration as long as it is not offensive or confusing. The message of the configuration is only relevant if it may be offensive. Thus, the Court is inclined to conclude that California does not exert the type of direct control over the driver-created messages that would convert those messages into government speech.

Id.

Other courts are in accord. *See, e.g., Hart*, 422 F. Supp. 3d at 1232–

33 ("The Transportation Cabinet argues that because every alphanumeric combination issued on any vanity plate in Kentucky has been reviewed and approved by its employees, those plates have acquired a 'stamp of approval' from the Commonwealth. . . . Under the Transportation Cabinet's logic, the Commonwealth is not only contradicting itself, but spewing nonsense. If the Court finds that vanity plates are government speech, then the Court would also be finding that Kentucky has officially endorsed the words 'UDDER', 'BOOGR', 'JUICY', 'W8LOSS' and 'FATA55'.").

Insisting otherwise, the Government maintains that none of this matters. "Tennessee scrutinizes each registration number request[,]" the Government insists. *See* Government's Br. at 35. *But see* Trial Tr. (Vol. II) at 244:8–24 (before 2019, the review process was "not as strict as it is now."); Trial Tr. (Vol. II) at 245:7–9 (Q. "So tell me how 'POOPOO' slips through your process, if that's a mistake?" A. "I don't know.").

It also "dedicates substantial state resources to doing so," the Government maintains. Government's Br. at 35. *But see* Tr. Ex. 11 at Excerpt 90:11–12 ("the Department is not out on the streets policing plates to find out if any got through."); R. (Vol. 22) at 3243 (finding that so many "mistakes are made in the process of reviewing personalized plate applications" because "five reviewers have 80 to 100 applications a day to review, and there are presently 60,000 active personalized plates.").

Though the Government acknowledges that its various "categories and processes" for determining offensiveness "were not written down," the Government defends its "process for determining" whether requested

personalized plate messages "fell within [the six] categories" the Department decided—untethered to any statute or regulation—encompassed offensiveness. Government's Br. at 37. Unmentioned in its brief, though, are the facts that none of the Government's censors could define any relevant statutory term; that they struggled to apply the very standards they claimed to enforce; and that the Department's own lawyer insisted that the Department's professed criteria apply only "generally" and 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 5–6 (response to Interrogatory No. 7) (emphasis added). Given that the Department all but makes it up as it goes along, the wildly inconsistent results that such a process produces are thus unsurprising. The Government's attempt to downplay those results as "some plates slip[ping] through the cracks[,]" Government's Br. at 38—which is like characterizing the Grand Canyon as a "small hole"—should be rejected accordingly.

At bottom, the issue is this: The Government barely controls—or even cares about—personalized plate messages. The Government only scrutinizes personalized plate messages at all if it thinks they might be offensive; otherwise, virtually anything goes, and the Government does not care what they say. Further, even when it comes to offensiveness, the Government acknowledges that its review process was lax until 2019; it asserts that it does not care to determine whether non-compliant plates were approved before that point; and it could neither explain coherently what its standards were nor apply its professed standards when asked to do so.

These are not facts that "strongly support[] recognizing [personalized plate messages] as government speech." *See* Government's Br. at 39. To the contrary, the U.S. Supreme Court has warned of the danger of such a holding. *See Ogilvie*, 2020 WL 10963944, at *4–5 ("The fact that the government exerts regulatory control over speech cannot, on its own, transform that speech into government speech. . . . [The U.S. Supreme Court has determined that s]uch a holding 'would constitute a huge and dangerous extension of the government-speech doctrine[.]' . . . California's argument in this case raises the same concern.'") (quoting *Matal*, 582 U.S. at 239). Thus, the third *Walker* factor supports Ms. Gilliam, too.

B. THE STATE'S ADDITIONAL ARGUMENTS ARE MERITLESS.

The Government offers several more arguments for treating Ms. Gilliam's private speech as the Government's. Each is unpersuasive.

First, the Government maintains that "[t]his case fits within existing precedent" and does not require this Court to extend *Walker*. *See* Government's Br. at 40. This is wrong. The specialty plate program addressed in *Walker* was meaningfully different from the personalization program at issue here. In particular, *Walker* explained that Texas's specialty plates—some of which were developed by the legislature itself through "enacted statutes"—were state-approved (and sometimes state-*created*) messages that were designed for mass display. *See Walker*, 576 U.S. at 205. "Texas also own[ed] the designs on its license plates, including the designs that Texas adopt[ed] on the basis of proposals made by private individuals and organizations." *Id.* at 212 (citing Tex. Transp.

Code Ann. § 504.002(a)(3) ("the department is the exclusive owner of the design of each license plate")). By contrast, Tennessee's personalized plate program involves exclusively user-generated messages; none of those messages are owned by the State; and the expressed purpose of the program is to enable drivers to "personalize[]" a portion of their license plates "with [their] own unique message[,]" Tr. Ex. 1, at Deposition Ex. #2. As noted, unlike mere registration numbers, specialty plates convey *actual messages*, too.

These differences are material. Thus, to rule for the Government, this Court would have to extend *Walker* in contravention of *Matal's* instruction that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal*, 582 U.S. at 238. There is a reason why no citable post-*Matal* decision has done so. Instead, only the since-reversed trial court decision below and a Hawaii federal district court decision that the Ninth Circuit "assume[d] without deciding" was wrong have taken the bait that the Government offers here. *Odquina*, 2023 WL 4234232, at *1. Justice Alito's dissent in *Walker*—which made passing reference to *state*-generated license plate combinations in a case in which the Supreme Court was "concerned only with" specialty plates and "not with the personalization program[,]" *see Walker*, 576 U.S. at 204—does not move the needle, either.

<u>Second</u>, the Government insists that "*Matal's* assessment of purely private speech is inapposite" because "[t]hat decision involved *purely private speech* containing no governmental message." *See* Government's Br. at 41. But *Matal* matters because it instructs that *Walker* "likely

marks the outer bounds of the government-speech doctrine." *Matal*, 582 U.S. at 238. *Matal*'s analysis also mocks the Government's position here, observing that if the speech the Government now claims is governmental were treated that way, then the Government "is babbling prodigiously and incoherently[,]" "[i]t is saying many unseemly things," and it is "expressing contradictory views." *See Matal*, 582 U.S. at 236; *see also Hart* 422 F. Supp. 3d at 1232–33 ("But if this is true, and the Commonwealth only approves vanity plates whose message it officially adopts and endorses, then the Commonwealth is 'babbling prodigiously and incoherently;' and 'saying many unseemly things.'") (quoting *Matal*, 582 U.S. at 236). *Matal* further rejects any new "doctrine that would apply to 'government-program' cases[,]" which—as a practical matter—is what the Government seeks here. *Matal*, 582 U.S. at 241.

Third, the Government maintains that "[t]here is no real risk of the State using control over registration numbers as a trojan horse to 'silence or muffle the expression of disfavored viewpoints.'" *See* Government's Br. at 43. No one familiar with the trial record could seriously make that claim, though. Here, not only is the Government's regulation inherently viewpoint-based; it has *already applied it* in a manner that favors the Government's preferred views while forbidding views the Government opposes. *Compare, e.g.,* Tr. Ex. 2 at Deposition Ex. 6, p. 1764 (approving personalized plate "NODRUGS"), *with id.* at Deposition Ex. 7, p. 2190 (rejecting personalized plate "DRUGS"); *compare id.* at Deposition Ex. 7, p. 2179 *with id.* at Deposition Ex. 6, p. 104 ("ATFSUKS" prohibited even though "1GNCTRL" is allowed); *compare id.* at Trial Ex. 6, p. 1993, *with*

id. at Deposition Ex. 7, p. 2187 ("SEEKGOD" and countless other God-promoting plates permitted, but "SATAN90" forbidden).

The Government also tries to cabin the dangerous consequences of its proposed holding by insisting that: "If this Court adopts the State's position, then the government-speech doctrine would continue to apply to expression (1) conveying a governmental message (2) on government-owned property (3) that serves as a government ID (4) subject to State approval." Government's Br. at 44. It then insists that "[t]hat application cannot realistically facilitate an expansive approach to government speech in future cases." *Id.*

This is nonsense. License plate regulations are not even close to the only way that the government facilitates identification. The government does the same thing, for instance, through birth certificate requirements. *Cf.* Tenn. Op. Att'y Gen. No. 16-38, 2016 WL 5539680. Accepting the Government's proposal here would enable the State to regulate children's names for connotations it considers offensive, though, given that the first three limiting criteria are met under the Government's "functional . . . identifying message" theory and the only criterion left to be implemented is a statute authorizing bureaucrats to "refuse to issue any birth certificate with a name that may carry connotations offensive to good taste and decency." This is not some abstract concern, either. Indeed, some members of Tennessee's judiciary have illicitly wielded professed governmental power to regulate the acceptability of children's names already. *See, e.g.,* Tim Ghianni, *Tennessee judge cited for ordering baby's name changed from Messiah*, REUTERS (Oct. 25, 2023),

https://www.reuters.com/article/idUSBRE99P01G/ ("A Tennessee judge who ordered a baby's name changed from Messiah to Martin, saying the former was reserved for Jesus Christ, has been cited by a court panel for an inappropriate religious bias in violation of the state judicial code of conduct.").

And what about *literal* government IDs, like driver's licenses? All driver's licenses contain photos, at least one purpose of which is to facilitate the government's "functional" interest in "identifying" the driver. Does that mean that a driver's own expressive choices depicted in a driver's license photo—one's hairstyle, for instance—are ipso-facto transformed into governmental speech, such that they can be regulated for governmental acceptability à la North Korea's 28 state-approved hairstyles? *See* Courtney Subramanian, *These Are North Korea's 28 State-Approved Hairstyles*, TIME (Feb. 25, 2013), https://newsfeed.time.com/2013/02/25/these-are-north-koreas-28-state-approved-hairstyles/. Certainly not. Under the Government's view, though, a lawful regulation to that effect would only be a statute away, given that driver's licenses: (1) convey a governmental message (2) on government-owned property (3) that serves as a government ID.

Once more, this is not an abstract concern. As silly as it may seem, it is also a serious one. Booking photos—otherwise known as "mugshots"—are yet another way that the government facilitates its professed "functional" interest in "identification." As part of that process, some Tennessee government officials have also insisted—illegally—that citizens are forbidden from communicating their deeply held religious views while being photographed. *See* Angele Latham, *Settlement reached*

over forced removal of hijab in Rutherford Cnty., THE TENNESSEAN (Jan. 29, 2024), https://www.tennessean.com/story/news/religion/2024/01/29/rutherford-county-settles-religious-discrimination-lawsuit-over-hijab-removal/72359099007/. Treating the content of such photos as government speech due to the "identifying message" involved risks blessing such malfeasance and removing it from the scope of normal constitutional constraints. The Government's say-so that its proposed holding "cannot realistically facilitate an expansive approach to government speech in future cases" should be rejected accordingly. Government's Br. at 44.

These are not the only regulations that facilitate the government's professed "functional" interest in "identification," either. Consider, for instance, municipal regulations governing public hearings, which commonly require speakers to identify themselves. *See, e.g.,* METRO COUNCIL PUB. HEARINGS, https://www.nashville.gov/departments/metro-clerk/public-hearing (last visited Mar. 9, 2024) ("Citizens will have 2 minutes to speak, and must identify themselves by name and home address before addressing the Council."). According to the Government, such regulations would "plainly communicate a functional message from the State: This [speaker] can be identified by" the speaker's name and home address. *See* Government's Br. at 11.

Based on this purported "functional message," the Government's position here would mean that it may engage in viewpoint-based censorship of such speakers' unrelated and purely personal messages without regard to First Amendment constraints. As grounds, the

Government maintains that its "identifying message" is wound up in the speaker's unrelated personal speech, and that the individual's own unique message "does not somehow negate the State's identifying message" when both are involved. Government's Br. at 11. This can't be right. The Government's contrary view should be rejected accordingly.

Fourth and finally, the Government insists that "[r]uling for Gilliam would open a doctrinal Pandora's Box." *See* Government's Br. at 44. This would be news to the many jurisdictions that have adopted Ms. Gilliam's proposed holding without any apparent problems, of course. The Government's hysterics also rest on an unwarranted assumption: that by enacting a regulation that merely facilitates identification, the government is saying anything at all.

It is not. The State of Tennessee neither "intends to convey" nor "in fact conveys any *message*" by requiring license plates. *Cf.* Tenn. Op. Att'y Gen. No. 16-38, 2016 WL 5539680, n.5 (emphasis added) ("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."); *Ogilvie*, 2020 WL 10963944, at *3 ("displaying information is not the equivalent of sending messages."). The Government's contrary claim fails accordingly.

C. POLICY CONSIDERATIONS FAVOR MS. GILLIAM.

The Government alternatively argues that policy considerations favor its position here. "The Constitution does not put the State to the

choice of either allowing profane, racist, and lewd messages on state-owned plates or eliminating requests for specific registration numbers altogether[,]" the Government insists. *See* Government's Br. at 13. That is true enough. As the Government is aware, though, the false dichotomy that it has presented—either free-for-all messaging or no personalized plate program whatsoever—is manufactured. Instead, because "the characters or message on a vanity license plate represent private speech" in a forum that is subject to regulation for reasonableness, the government may regulate personalized plate messages in a way that is "reasonable and viewpoint neutral." *Mitchell*, 148 A.3d at 323. What it may *not* do, though, is open a forum for private speech and then regulate the resulting messages based on their *viewpoint*, which is the problem with the "offensive[ness]" bar challenged here. *See Matal*, 582 U.S. at 243 ("in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.").

Nor does anyone dispute the Government's interest in "'protect[ing] children[.]'" *See* Government's Br. at 47. To the extent a personalized plate poses some actual danger to children, the Government surely may restrict it. The worry is that the government will instead engage in *viewpoint* discrimination under the guise of something like protecting children when, in fact, there is no such danger. That the Government is still asserting its interest "protecting children" here—even though the record evidence proved: (1) that "the Department [] received no complaints by anyone that they were offended by the Plaintiff's plate during its continuous display for eleven years[,]" R. (Vol. 22) at 3225; (2)

that Ms. Gilliam's license plate never caused an accident, *see* Tr. Ex. 1 at 11:2–4; and (3) that no children were harmed by Ms. Gilliam's license plate, *see id.* at 11:5–7—also makes concerns about the Government's integrity something more than imaginary.

On the other side of the ledger, giving government censors unrestricted authority to regulate private speech based on viewpoint whenever the government claims there is some "functional" identifying purpose involved poses real dangers. *See supra* at 61–65. That is especially true when the government's censors behave (at best) in a way that is "confused," "contradictory," and "uninformed." R. (Vol. 22) at 3218. The concern is also particularly acute when the Government insists that "[t]here is no real risk" of viewpoint discrimination (Government's Br. at 43) *while simultaneously engaging in it*. *See supra* at 26–27. And notwithstanding the Government's insistence that "the registration numbers on license plates have limited capacity to foster private expression[,]" *see* Government's Br. at 43, citizens have proven capable of communicating all manner of messages—including on political issues and other matters of public concern—through personalized plates, only to be met with raw viewpoint-based censorship by bureaucrats who dislike them. *See* Tr. Ex. 2 at Deposition Exs. 6–7; *cf.* Sarah Whites-Koditschek, *Alabama man gets to keep 'Let's go Brandon' plate, state even apologizes*, AL.COM (Mar. 15, 2022), https://www.al.com/news/2022/03/alabama-man-gets-to-keep-lets-go-brandon-plate-state-even-apologizes.html.

Given these concerns, this Court should join the Court of Appeals

in heeding "the Supreme Court's repeated warnings about the liberal expansion of the government speech doctrine." *Gilliam*, 2023 WL 3749982, at *15. "The government speech doctrine is 'susceptible to dangerous misuse' that [courts] must guard against." *Id.* (quoting *Matal*, 582 U.S. at 235). This Court should not bless that misuse in service of censors who—beyond engaging in flagrantly dishonest conduct throughout this litigation—maintain that is "impossible" for them to say in advance whether a citizen's speech will be considered acceptable or not. Tr. Ex. 4 at 5–6 (response to Interrogatory No. 7).

IX. CONCLUSION

For all of these reasons, "[m]essages on personalized vanity license plates are private, not government, speech." *Gilliam*, 2023 WL 3749982, at *15. As a result, the Court of Appeals' judgment should be **AFFIRMED**.

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 III–IX) contain 14,966 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 13th day of March, 2024, 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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