IN THE SUPREME COURT OF TENNESSEE

LEAH GILLIAM, Appellee, v. DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, et al., Appellant.	Cases Numbered: M2022-00083-SC-R11-CV, and M2022-00083-COA-R3-CV

BRIEF OF *AMICUS CURIAE*
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Interest of *Amicus Curiae*

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprised of over 150 attorneys who routinely represent businesses and individuals engaged in constitutionally protected expression and association. FALA's members practice throughout the United States, resisting government censorship and intrusion on speech in defense of First Amendment freedoms.

Given the nationwide span of their experience and the particularized nature of their practices, FALA attorneys are uniquely poised to comment on the important constitutional issues raised in this case.

Introduction

Although this case most immediately concerns message license plates, it is about much more than that, to wit, the relatively new doctrine of government speech. Censors across the country have been aggressively attempting to label as "government speech" a variety of expression implicating citizens' First Amendment rights. For example, at least one local school board has labeled its entire student library as "government speech," advancing the proposition that "Beowulf," "Julius Caesar," "Great Expectations," and countless other titles with which no functionary of the relevant governmental body likely is at all familiar, may be censored for partisan purposes or with no justification at all, because the officials' arbitrary decisions are immune from First Amendment review. The same proposition is the gravamen of the state's case here with regard to individualized license plates.

The "newly minted" government speech doctrine is a dangerous tool of censorship. As Justice Brennan expressed almost 7 decades ago:

> "The fundamental freedom of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar;

> it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

Roth v. United States, 354 U.S. 476, 488, 77 S. Ct. 1304 (1957) (Footnotes omitted).

Those principles have not changed, as emphasized in more recent Supreme Court cases, for example: "First Amendment vigilance is especially important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it." *Counterman v. Colorado*, 600 U.S. 66, 87, 143 S. Ct. 2106 (2023). The Supreme Court has been "particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51, 108 S. Ct. 876 (1988).

When labeling speech by other than a government official as "government speech" (as the DMV did in this case), Justice Brennan's "door barring federal and state intrusion" into free speech is all too often kicked wide open. That, FALA believes, is wrong.

Automobiles are a powerful signifier of status and individuality in American culture. After all, in some quarters, "you are what you drive." The car one drives can make a statement, and personalized or "vanity" license plates often add a very literal statement. Justice Alito aptly characterized the latter as "little mobile billboards," in

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 223, 135 S. Ct. 2239, 2256 (2015) (Alito, J., dissenting, joined by Roberts, C.J., Scalia and Kennedy, JJ.).

A sign may have more than one message. For example, along the highways of Tennessee, billboards generally will feature a commercial or political message, usually with a large graphic and/or verbal message such as, "Drink Coke" or "Ford Tough." The billboard also features at the bottom the name of the billboard company's name, *e.g.*, CBS Outdoor, Lamar Advertising, etc. The first message is plainly the advertiser's content; the second identifies the billboard company. No reasonable person would interpret "CBS Outdoor," for example to be adopting the commercial or political message, other than furnishing the medium for its exposure.

Similarly, all Tennessee license plates say "TENNESSEE" at the top. That, of course, is government speech. Below it appear identifying letters and/or numbers. One license plate's identifier, randomly supplied by the state, may read, "9ABC123," while another "vanity plate" may say, "CRVYGRL." As the plaintiffs established with empirical survey evidence below, no reasonable person would perceive the latter message as expression by the State of Tennessee.

Contrary to the common sense embodied in a considerable body of case law on this point, the state would have this Court categorize "CRVYGRL" as government

speech. The Court of Appeals having corrected the trial panel's error, Tennessee joins virtually every other jurisdiction to have considered this question in the wake of recent Supreme Court decisions in defining individualized license plate messages as private speech, with the attendant First Amendment protections.

Although the decision below may be affirmed simply on grounds that the plaintiff's license plate message is private expression, this Court may wish to consider serious questions that persist regarding the government speech doctrine. Both courts and legal scholars have examined the mischief that may be visited upon freedom of Speech by that doctrine, particularly as it is often used as a cloak for viewpoint-based censorship. In the event that the Court elects to consider the issue more broadly, this brief will explore some of those arguments that the government speech doctrine must be further curtailed if it is not to severely erode rights of free expression.

Argument

Contrary to all of the evidence and clear legal doctrine, The state's central rationale in defense of the trial panel's judgment below is that personalized license plates are entirely "government speech" and thus exempt from First Amendment scrutiny. However, the centerpiece of Tennessee's argument, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 135 S. Ct. 2239 (2015), falls far short of authorizing the sort of arbitrary censorship authorized by § 55-4-210(d)(2), as the Court of Appeals correctly held.

In *Walker* itself and in several subsequent decisions, the U.S. Supreme Court has acknowledged necessary limitations of the government speech doctrine, recognizing its potential for abuse and specifically distinguishing the issue of personalized license plates. In the wake of those decisions, virtually every court to have addressed the question has held that such a discretionary personalized license plate scheme implicates private speech protected by the First Amendment, not government speech beyond its reach.

The issue of license-plate messages is not a new one, dating back at least to *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977), in which the Court recognized that New Hampshire's "Live Free or Die" slogan sent a message, there a case of government speech to which the plaintiffs objected on religious grounds. The

Court held that the state could not constitutionally compel individuals to display the state motto on their vehicles, because the "freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714.

Walker, importantly, dealt with a similar issue of government speech in the form of the design for "specialty plates" chosen by the state. The Court expressly distinguished a personalized license plate program allowing individuals to choose a message: "Here we are concerned only with . . . specialty license plates, not with the personalization program." 576 U.S. at 204; *see also Hart v. Thomas,* 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020).

Rather, *Walker* addressed "specialty plate" *themes*—the array of governmentally-created odes to various organizations offered by Texas, a context in which the Court concluded (5-4) that the state must have discretion, lest it be compelled to apparently endorse every organization that might apply, such as the KKK, as opposed to innocuous endorsements such as "Read to Succeed" and "Girl Scouts." 576 U.S. at 212. The state's choice to manufacture plates with such endorsements was obviously a very different matter than individualized messages created by the vehicle owner.

Follow-up attempts to expand *Walker*, *e.g.*, to convert trademark registrations into government speech, fell flat in *Matal v. Tam*, 582 U.S. 218, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294 (2019). The claim of government speech did not fare any better in *Shurtleff v. City of Boston, Massachusetts*, 596 U.S. 243, 142 S. Ct. 1583 (2022), where the city attempted to use the "government speech" rubric to stifle citizens wanting to raise a "Christian flag" in the town square, where other flags were regularly allowed. At least in circumstances where it would pose the clearest dangers of insidious censorship, the Court may has constrained the "government speech" category.

For present purposes, as recognized in a spate of **post-*Walker*/*Matal*** cases addressing license plate issues, the upshot is that personalized license plates are expression by the individual, not government speech, and any statutory scheme permitting such plates must comply with constitutional strictures. Misbegotten appeals to the "government speech" doctrine have been roundly rejected in this and other contexts, as a pretext for viewpoint discrimination and arbitrary censorship of disfavored content.

I. Courts and commentators have made clear that the government speech doctrine is disfavored because it is too often invoked as a pretext for viewpoint discrimination and/or censorship of disfavored content.

The government speech doctrine is relatively new, "a late twentieth century judicial creation." C. Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 227 (2021). "Its primary rule is fairly straightforward: If the speech is the government's, then the Free Speech Clause does not apply." *Id*. "Two recent cases—*Pleasant Grove City v. Summum* (2009), and *Walker v. Texas Division, Sons of Confederate Veterans*, Inc. (2015)—have cemented the government speech doctrine." *Id*. at 228.

The Supreme Court has recently emphasized that the government speech doctrine must be carefully limited because it is so easily abused for censorial purposes: "If private speech could be passed off as government speech simply by affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 582 U.S. at 235, 137 S. Ct. at 1758. Legal scholars have more broadly criticized the doctrine, concluding the Court has not done enough to avoid its pitfalls, and calling for its significant modification

if not outright abolition.[1] Fortunately, the lower courts have taken heed of the leading decisions and their cautionary notes, predominantly fending off opportunistic attempts to resuscitate the "government speech" excuse for outright censorship, in the license plate context and elsewhere.

Although the government's own speech, properly understood, may be "exempt from First Amendment scrutiny," *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553, 125 S. Ct. 2055, 2058 (2005), the overwhelming weight of post-*Matal* authority holds that personalized license plates do not fall within that narrow exemption.

A. The Supreme Court has recognized the need to confine the government speech doctrine to very narrow circumstances.

Given the novelty of the doctrine and its potential expansiveness, both jurists

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[1] *See, e.g.,* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224 (2021); Caroline Mala Corbin, *Mixed Speech:* WHEN *Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. ILL. L. REV. 1943 (2022); John E. Nowak, *Using the Press Clause to Limit Government Speech,* 30 ARIZ.L. REV. 1 (1988); G. Alex Sinha, *The End of Government Speech*, 44 CARDOZO L. REV. 1899 (2023); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578 (1980).

and scholars have waved red flags as the "government speech" case law has emerged. For example, Justice Souter expressed reservations in early cases, dissenting in *Johanns*, 544 U.S. at 574: "The government-speech doctrine is relatively new, and correspondingly imprecise." In *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009), where the Court upheld the city's discretion to exclude another religion's proffered statue from a park where the city had installed other donated statues including one extolling the Ten Commandments, Justice Souter concurred, urging the Court to take care in applying and expanding the government speech doctrine because "[t]he interaction between the 'government speech doctrine' and Establishment Clause principles has not . . . begun to be worked out." 555 U.S. at 485–86.

In *Walker*, the Court was at some pains to indicate that the government speech doctrine is a limited one, specifically distinguishing the issue of vanity license plates. 576 U.S. at 204. And yet, perhaps in reaction to alarm among commentators wary of an expanding doctrine, only two years later in *Matal*, 582 U.S. at 238, the Court was more cautionary, and opined that *Walker* "likely marks the outer bounds of the government-speech doctrine." As noted, the Court emphasized that "while the government-speech doctrine is important . . . it is a doctrine that is susceptible to dangerous misuse," especially viewpoint discrimination. 582 U.S. at 235. "For this

reason, we must exercise great caution before extending our government-speech precedents." *Id*.

Moreover, many legal scholars have concluded these acknowledgments do not go far enough, and have amounted to hand-wringing over a doctrine that some maintain is incoherent and inherently dangerous.

B. The weight of scholarly opinion is that the government speech doctrine should be substantially modified if not abandoned entirely.

Legal scholars have articulated cogent arguments that the government speech doctrine remains deeply problematic, because the Supreme Court has done far too little to develop a consistent set of principles that would make the doctrine both coherent and compatible with basic First Amendment values.

Some scholars have argued that the First Amendment affirmatively restricts political speech by the government: *see* R. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979)(cautioning, "participation by the government in the dissemination of political ideas poses a threat to open public debate"); S. Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 601 (1980) (noting that "one of the problems to be faced in assessing government speech [is] the concern that government speech could result in unacceptable domination of

the marketplace and the need for measures to confine the danger.").

Professor Caroline Mala Corbin, has explored this objection in her thoughtful recent article, *Government Speech and First Amendment Capture,* 107 VA. L. REV. ONLINE 224 (2021), concluding that the doctrine as currently construed creates the danger of government "capture" of large areas of public debate. She notes, for example, that some states including Tennessee have put a thumb on the scales in favor of a controversial viewpoint, by minting specialty plates with anti-abortion slogans, while refusing requests to issue pro-choice specialty plates. *Id.* at 233, citing *Hill v. Kemp*, 478 F.3d 1236, 1239 (10th Cir. 2007); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 371–72 (6th Cir. 2006); *Henderson v. Stalder*, 407 F.3d 351, 352 (5th Cir. 2005); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 787–88 (4th Cir. 2004).

Corbin also cites the danger of suppressing whistle-blower speech, often much-needed and in the public interest, under a broad government speech doctrine holding in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), that if an employee's speech is pursuant to official duties, it is essentially the government's speech, and without any First Amendment protection. 107 VA. L. REV. ONLINE at 239-241.

In her earlier essay, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008), Corbin argued for a more nuanced

analysis of fact patterns where the speech in question is both governmental and private. An "all or nothing" government speech doctrine is dysfunctional, she argued, and must be tempered with First Amendment analysis in cases involving "mixed speech."

Others have stressed that the government speech doctrine is incoherent, perhaps incurably so, and must at least be rationalized if not abolished: *see, e.g.*, S. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259 (2010) (advancing the proposition that the Court's attempted "distinctions are either nonexistent . . . or utterly baffling"); M. Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 85 (2011) (noting that the "blurred contours" of the doctrine cause "great confusion in the lower courts . . . [about] how or when to apply the doctrine"). Gey despairs of reforming the doctrine and advocates for limiting the doctrine in such a way that it "basically ceases to exist." 95 IOWA L. REV. 1314.

G. Alex Sinha extensively develops this abolitionist view in his very recent blockbuster analysis, synthesizing the analysis to date. He contends that the doctrine, "a significant exception to the First Amendment," is "inherently unconstitutional and doctrinally unsustainable;" it "simply cannot be reconciled with traditional First

Amendment jurisprudence, and it must be discarded entirely." *The End of Government Speech*, 44 CARDOZO L. REV. 1899, 1904 (2023). All of which is to say, the government speech doctrine is ripe for close re-examination.

C. Attempts to expand "government speech" as a pretext for censorship have largely failed.

Censorial officials have recently highlighted the potential for abuse in various contexts, including both this much-litigated question of personalized license plates, and the controversial banning of disfavored materials from classrooms and libraries. In both arenas, courts have generally rejected appeals to "government speech" as a pretext for arbitrary, viewpoint-based suppression of expression. Such vigilance is essential, wherever government actors with an agenda are eager to take refuge behind the government speech doctrine.

In *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982) (plurality opinion), the Supreme Court rejected the argument that the content of school libraries is "government speech," holding that although school boards have discretion over the contents of school libraries, "that discretion may not be exercised in a narrowly partisan or political manner." 457 U.S. at 870. The Court gave the specific example of officials "deciding to remove all

books authored by blacks or advocating racial equality and integration." *Id*. at 871. "[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' " *Id*. at 872, quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640, 63 S. Ct. 1178, 1187 (1943).

Undeterred by that precedent, school boards and other officials have attempted to invoke the government speech doctrine to justify broad partisan assaults on disfavored content, typically involving gender and racial justice, in schools and even in public libraries. Often, they have been responding directly to partisan political pressures and/or culture-war jihadists who clearly intend to "prescribe what shall be orthodox."

As should be readily apparent, affording government officials *carte blanche* to censor the contents of school and public libraries would take an enormous toll on the "free marketplace of ideas" that the First Amendment was enacted to protect. *See, e.g., Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct 17, 22 (1919) (Holmes, J., dissenting): "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market." And it is a prime example of the concerns voiced by

legal scholars about a doctrine of government speech run amok. As Erwin Chemerinsky wondered, "Could a city library choose to have only books by Republican authors by saying that it is the government speaking?" *Free Speech, Confederate Flags and License Plates*, ORANGE COUNTY REG. (June 25, 2015),[2] cited in Corbin, *supra* note 1, 107 VA. L. REV. ONLINE at 234.

Fortunately the lower courts have been largely unsympathetic to such outright attempts to censor under the rubric of "governmental speech." Just this year in *PEN American Center, Inc. v. Escambia County Sch.Bd.*, No. 3:23CV10385-TKW-ZCB, __ F. Supp. 3d __, 2024 WL 133213, at *2 (N.D. Fla. January 12, 2024), the court rejected such a claim, on grounds that "the traditional purpose of a library is to provide information on a broad range of subjects and viewpoints," and thus no "reasonable person would view the contents of the school library (or any library for that matter) as the government's endorsement of the views expressed in the books on the library's shelves."

More to the point here, the same result has prevailed in the many cases, state and federal, litigating challenges to censorial discretion in personalized license plate programs. As the Court of Appeals noted below, "a majority of lower courts ruling on the issue has held that *Walker* does not extend to vanity license plate messages,

[2] http://www.ocregister.com/articles/government-668320-texas-license.html

with some holding that the personalized alphanumeric configurations on such plates are private speech in a nonpublic forum." *Gilliam v. Gerregano*, No. M202200083COAR3CV, 2023 WL 3749982, at *10 (Tenn. Ct. App. June 1, 2023), citing *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) ("[V]anity plates . . . are not government speech and *Walker* has no applicability here."); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) ("[V]anity plates are private speech."); *Mitchell v. Md. Motor Vehicle Admin*., 126 A.3d 165, 172 (2015), *aff'd,* 148 A.3d 319 (Md. 2016); *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168 (C.D. Cal. Aug. 29, 2019); *Ogilvie v. Gordon*, No. 20-CV-01707-JST, 2020 WL 10963944 (N.D. Cal. July 8, 2020).[3]

II. Personalized license plates fail every test for "government speech."

As the Court of Appeals held, an individual's designated vanity plate message is private speech, not government speech, and as such it must be analyzed under the appropriate First Amendment forum scrutiny.

Recently in *Shurtleff*, 142 S. Ct. at 1589, the Court addressed the specific

[3] The only departures have been *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015), a pre-*Matal* decision roundly criticized as an outlier for extending *Walker* to hold that personalized vanity license plate messages are government speech); and *Odquina v. City and Cnty. of Honolulu*, No. 22-cv-407-DKW-RT, 2022 WL 16715714 (D. Haw. Nov. 4, 2022).

question of what qualifies as government speech "when, as here, a government invites the people to participate in a program." In such cases, the courts should "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Id.* Specifically, courts should consider "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id*. at 1589-90, citing *Walker*, 576 U.S. at 209–14.

First, almost every court applying those factors to personalized license plates has concluded that there is no history of regarding them as government speech. In *Mitchell*, 126 A.3d at 185, for example, the Maryland court observed that "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." Here, the Court of Appeals noted that "the record before us contains no evidence that the State has ever used vanity license plates to communicate government messages through the alphanumeric configurations." 2023 WL 3749982, at *12. *See also Kotler,* 2019 WL 4635168, at *5; *Ogilvie*, 2020 WL 10963944, at *3 (noting that the state had not "historically used the alphanumeric combinations on license plates to communicate messages to the public").

Second, the public's perception of who is speaking has likewise been deemed to be the individual fashioning the personalized license plate, not the government, as empirically demonstrated by Plaintiff's evidence in this case. The Court of Appeals found no evidence in the record "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." 2023 WL 3749982, at *12. The court cited *Kotler*, 2019 WL 4635168, at *7, where the court concluded that "it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates." *See also Mitchell*, 126 A.3d at 185: "The personal nature of a vanity plate message makes it unlikely that members of the public, upon seeing the vanity plate, will think the message comes from the State."

Additionally, in *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020), the court held that vanity plate messages bear "no indicia of government speech. Unlike the plate's design, which may include an official state motto or slogan, the vanity portion is chosen entirely by the automobile owner requesting it. . . . The very essence of vanity plates is personal expression." The court cited *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001), likening vanity plates to bumper stickers, intended to give vent to the driver's personality, to reflect the views of the holder of the plate.

Similarly in Hart v. Thomas, 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019):

"While plate designs are attributed by the populace to the state, vanity plates are not. . . . Even the statute establishing the personalization program in Kentucky describes vanity plates as consisting of 'personal letters or numbers significant to the applicant.' " Accordingly, the *Hart* court held the Kentucky statute banning religious references on vanity license plates violated the First Amendment.

"Finally," the Court of Appeals concluded, "notwithstanding the statutory framework for vanity license plate approval, the Department's shaping and control over vanity plate messaging has been inconsistent, at best." 2023 WL 3749982, at *15. Other courts have likewise concluded that the state's "control" over vanity plate messages is extremely tenuous. *See Kotler*, 2019 WL 4635168, at *7 ("that the state has approval authority over the personalized configurations does not necessarily suggest the type of direct control required to transform private speech into government speech."); *Ogilvie*, 2020 WL 10963944, at *4.

Most trenchantly, in response to Kentucky's argument that vanity plates had the state's "stamp of approval," the *Hart* court observed sardonically: "But if . . . 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.' " 422 F. Supp. 3d at 1232-33, quoting *Matal*, 582 U.S. at 236.

The court below correctly concluded that Tennessee's vanity plate program satisfies none of the three prongs of the Supreme Court's test for "government speech." Lacking the immunity that rubric would provide, § 55-4-210(d)(2) with its grant of untrammeled discretion so that officials may censor expression they find offensive to "good taste" or "decency," is an open invitation to viewpoint discrimination. Even under the scrutiny applicable to nonpublic forums, the personalized license plate statute violates both the First Amendment and, perforce, Article I, § 19 of the Tennessee Constitution.[4]

CONCLUSION

The central point that *Amicus* wishes to communicate here is that, in rejecting the State's claim of government speech—which the court certainly will—how that rejection is worded is crucial. As the court well knows, litigants often take language out of context in attempt to support an opposite conclusion. If it does not entirely reject th governmental speech exception to the First Amendment, as it should, it is

[4] *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763, 108 S. Ct. 2138, 2147 (1988): "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." That principle applies equally in nonpublic forum cases, *see, e.g., Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576, 107 S. Ct. 2568, 2573 (1987).

important for the court to unambiguously express that applying the government speech exception is an extremely tall order and must be done with extreme caution.

Tennessee having elected to adopt a vanity plate program, its choices are clear: administer that program in a manner consistent with the First Amendment's guarantees of free expression, or forego it entirely.

As the decision below correctly applies existing precedent to hold that personalized license plates are private speech entitled to constitutional protection, the First Amendment Lawyers Association as *Amicus Curiae* urges this Court to affirm the judgment of the Court of Appeals.

Dated: March 15, 2024

Respectfully Submitted,
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Dated: March 15, 2024

/s/ Edward M. Bearman
Edward M. Bearman

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that a copy of the foregoing document and all attachments thereto was served by this Court's electronic filing system on the date indicated thereon.

Dated: March 15, 2024

/s/ Edward M. Bearman
Edward M. Bearman