IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

ON APPEAL BY PERMISSION FROM THE JUDGMENT OF THE COURT OF APPEALS

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

License plate registration numbers convey a government message: Identify this vehicle by these alphanumeric characters. This common-sense reality effectively ends this case. To rule for the State, this Court need only adopt and apply the U.S. Supreme Court's reasoning in *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015). Each aspect of *Walker*'s three-part analysis maps onto Tennessee's license plate registration numbers—a result all nine Justices in *Walker* suggested.

Gilliam's core contention is that registration numbers do not "communicat[e] at all." Resp. 39-41. If that were right, though, then why even require a state-issued license plate? Try as she might, Gilliam cannot erase the State's communication of identifying information to the public. And she cannot explain away the Court's application of the government-speech doctrine to speech conveying both governmental and private messages. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

Nor can Gilliam credibly contend that Tennessee's narrow *Walker*-based position would enable government-speech expansionism. By contrast, Gilliam's dim view of the government's communicative content would remove categories of speech from First-Amendment protection. It also risks exposing the roadways to any manner of inflammatory messages on state-owned-and-issued license plates.

The Court should reverse.

ARGUMENT

I. License Plate Registration Numbers Are Government Speech.

All parties agree that the *Walker* factors "guide" this Court's analysis of the government-speech question. Resp. 36. And those factors "apply with equal or even greater force" to Tennessee's personalized plates "as they do to Texas' specialty plates." *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2015).

A. Registration numbers convey an identifying message.

Tennessee satisfies the first *Walker* factor because its license plate registration numbers convey—and have always conveyed—a message: Identify this vehicle by these alphanumeric characters. Opening Br. 20-22. That drivers often seek to communicate their own message by requesting a specific identifier changes nothing. *Id.* at 22-25, 27-28. Whatever the driver's message, the State conveys its own identifying message. And *Summum* holds that the government-speech doctrine applies when speech contains a governmental message, even if a private party conveys a "different" message through the same medium. 555 U.S. at 476.

Gilliam devotes much of her response to an undisputed point: The registration numbers on personalized plates sometimes convey private messages. But that point is no help here. The question is whether the government likewise conveys a message and what to do when expression conveys both governmental and private messages. Not until page 39 of her brief—past the halfway mark—does Gilliam engage with those issues, and even then, unpersuasively.

1. Gilliam claims that the State's "identifying message . . . is not an act of communication" and "not a message at all." Resp. 40-41. This position conflicts with governing precedent and, if adopted, would perversely restrict the scope of protected speech.

First, Gilliam argues that registration numbers are not speech because "merely disclos[ing]" or "displaying information is not the equivalent of sending messages." *Id.* at 39-41 (quotations omitted). The U.S. Supreme Court disagrees. It has stated that the "'disclos[ure]'" and "dissemination of information" is, in fact, "speech within the meaning of the First Amendment." *Sorrell v. IMS Health*, 564 U.S. 552, 570 (2011) (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)) (discussing "prescriber-identifying information"). That makes sense, given its general "rule" that the disclosure of "information is speech." *Id.*; *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 755-61 (1976) (holding that disclosure of prescription drug "price information" is speech). Neither Gilliam nor amici cite any case law that supports a gerrymandered line between the communication of information generally and the communication of identifying information.

Second, and relatedly, Gilliam suggests that communication must be expressive in nature to qualify as speech. But the Court has eschewed the notion that a party is not speaking unless some "expressive" communication exists. *Sorrell*, 564 U.S. at 570. All kinds of "dry information, devoid of advocacy, political relevance, or artistic expression" qualifies as speech that conveys a message. *Universal City Studios v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001). The "information on

beer labels" constitutes speech. *Rubin v. Coors Brewing*, 514 U.S. 476, 481 (1995). The same goes for credit reports, *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (plurality), functional computer software, *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000), and scientific research, *Stanford Univ. v. Sullivan*, 773 F. Supp. 472, 474 (D.D.C. 1991). The concept of speech "*is not reserved for purely expressive communication*." *Junger*, 209 F.3d at 484 (emphasis added).

Gilliam's contrary position rests on a misreading of *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011). That case dealt with whether *conduct* qualified as speech. Some "symbolic conduct" conveys a message that courts treat as speech—e.g., burning a flag. *Lichtenstein v. Hargett*, 83 F.4th 575, 583 (6th Cir. 2023). But, of course, not all conduct communicates. To determine what conduct warrants First-Amendment protection, courts look to whether the conduct is "inherently expressive." *Id.* at 594. *Carrigan* held that "the act of voting" by a city-council member "symbolizes nothing" and therefore did not constitute expressive conduct subject to First-Amendment protection. 564 U.S. at 126-27. That holding and any analysis of expressiveness is irrelevant because this case involves the "written word," not conduct. *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1434 (N.D. Cal. 1996).

Ironically, in claiming that "displaying information is not the equivalent of sending messages," Resp. 39, 41, 65 (quotations omitted), Gilliam seeks a dramatic *narrowing* of constitutionally protected speech. No case countenances that curious result.

Third, Gilliam contends (at 40-41) that registration numbers are non-communicative because their "function" is "to enable identification." But "[t]he fact that a medium of expression has a functional capacity" does not mean that it is not communicating. *Junger*, 209 F.3d at 484. And no case law indicates that the conveyance of identifying information is somehow not communicative. *Supra* 9-10. License plate registration numbers do, contrary to Gilliam's claim, "communicat[e]." Resp. 39.

An example illustrates. Consider the many commercial trucks that include a statement like the following: "How's my driving? Call 1-800-123-4567. Truck No. ABC1234." Everyone would agree that this qualifies as a communicative, identifying message. The vehicle owner is inviting the public to call the number listed to report on the driving of Truck No. ABC1234. When placed on state-issued license plates, registration numbers do the same thing. The State recognizes that the public may need to report a vehicle that drives recklessly, engages in criminal activity, faces an Amber Alert, etc. And it uses the registration number to tell the public: Identify this vehicle by ABC1234.

In this way, registration numbers differ from other identifiers used for purely internal purposes. Unlike, say, a VIN number which rests out of sight, the State uses registration numbers to convey information to the public. That is why registration numbers must be "clearly visible" on vehicles. Tenn. Code Ann. § 55-4-110(b). And it is why registration numbers must be readable from 100 feet. *Id.* § 55-4-103(c). The State plainly communicates *to others*.

Gilliam conflates the mere existence of an identifier with the communication of identifying information to others. And that difference

distinguishes registration numbers on a license plate from a person's name on a birth certificate. Resp. 40-41. Unlike registration numbers, the State generally does not use birth certificates to communicate identifying information to the public: Citizens are not required to walk around with a laminated birth certificate pinned to their shirt with text large enough to read the person's name. Rather, the State usually uses birth certificates to merely "record[]" information. Tenn. Op. Att'y Gen. No. 16-38, 2016 WL 5539680, at *2 n.5 (Sept. 21, 2016). In the limited instances in which the State requires disclosure of a birth certificate, any "speech" (to the extent there is any) conveyed by the certificate is governmental, not private. *Fowler v. Stitt*, 2023 WL 4010694, at *7-8 (N.D. Okla. June 8, 2023); *see Doe v. Kerry*, 2016 WL 5339804, at *17-18 (N.D. Cal. Sept. 23, 2016) (holding that a "passport identifier . . . constitutes government speech").

At bottom, a license plate registration number communicates information from the State to the public—and that qualifies as speech.

2. As a fallback, Gilliam doubles down on her view that the government-speech doctrine cannot apply if speech contains *any* private message. Resp. 42-43. Again, binding precedent forecloses that position. Opening Br. 23-25. *Summum* explicitly recognized that the speech at issue (monuments) conveyed more than "one message," and it held that the government-speech doctrine applied even if the speech's creator communicated a message that was "quite different" from the message "expressed by [the] government entity." 555 U.S. at 474-77 (quotations omitted); Opening Br. 24, 27-28. Gilliam ignores this mixed-speech decision.

Instead, Gilliam attempts to rewrite *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). Despite Gilliam's portrayal (at 42-43), *Shurtleff* did not involve speech containing both government and private messages. Rather, "[t]he parties dispute[d]" whether Boston "communicate[d] governmental messages" when allowing private groups to raise flags outside City Hall. *Id.* at 248. The Court held that Boston lacked sufficient "control" to "indicate that [it] meant to convey the flags' messages." *Id.* at 256. The city's post-hoc assertion that "most" of the flags "reflect particular city-approved values" did *not* mean that it conveyed a message. *Id.* And how could it? Boston did not "review" or "even see flags before the events." *Id.* at 257. The Court in *Shurtleff* thus did not confront speech that contained both private and governmental messages—like the speech in *Summum*. It held that "Boston's flag-raising program does not express government speech." *Id.* at 259.

Gilliam cites *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), for the proposition that "where the First Amendment is implicated, the tie goes to the speaker." Resp. 44. But, for one, the quoted language comes from a portion of Chief Justice Roberts's opinion that garnered only two votes, not a majority. 551 U.S. at 454. For two, Gilliam assumes away the question of whether "the First Amendment is implicated" or not; "[w]hen government speaks, it is not [constrained] by the Free Speech Clause." *Walker*, 576 U.S. at 207. And, for three, the government *is* a "speaker" here so this point resolves nothing.

Finally, Gilliam claims (at 43-44) that "when 'inextricably intertwined' forms of speech are truly at issue, . . . courts should apply

the 'test for fully protected expression,'" citing *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). But *Riley* did not involve speech containing both government and private messages; it dealt with "commercial" and non-commercial speech (which face different tiers of review) from the same speaker. *Id.* at 796.

Put simply, Gilliam's cases provide no guidance on how to address speech containing both governmental and private messages. *Summum* does, and Gilliam has no answer.

3. The remaining scattershot arguments also lack merit. Gilliam continues to focus on the "personalized plate program" rather than the medium of expression. Resp. 37, 39, 41-42. The Supreme Court has made clear, though, that the first-factor analysis focuses on the medium. Opening Br. 26-27. And even if the Court did look at the personalized-plate program, it would find that the registration numbers on personalized plates (like all other plates) convey an identifying message from the State—*and always have*. *Id.* at 20-25.

Gilliam deflects to her tired assertion that "[i]f these were actually Commissioner Gerregano's messages," then the State conveys "explicitly racist messages." Resp. 27 n.36; *id.* at 57. That contention ignores the State's independent, identifying message and ignores *Summum*'s instruction that the State need not "formally embrace" a coexisting private message to speak. 555 U.S. at 474; Opening Br. 27-28.

Next, Gilliam (at 13, 20, 45) suggests that the State admitted that personalized license plates do not convey government messages. Nonsense. The Arts Commission website (which the Department of

Revenue does not control) merely recognizes that vehicle owners may convey their "own unique message" through the registration numbers on personalized plates. Tr. Ex. 1, at Deposition Ex. #2. This recognition does not "disassociate" the State from the plate, Resp. 35, 37, or negate the State's identifying message, Opening Br. 22-23. That registration numbers may convey a private message says nothing about whether the State also speaks.

Finally, Gilliam errs (at 10, 20, 44, 45) in characterizing the deposition testimony of Demetria Hudson as an admission that the personalized plates do not convey government messages. Whether speech constitutes government speech is a legal question. Hudson "is not a lawyer"; her "personal conclusions" about the government-speech question are irrelevant. *Horton v. Hughes*, 971 S.W.2d 957, 960 (Tenn. Ct. App. 1998). And even treating this as fact testimony, the Chancery Court (acting as factfinder) "place[d] no weight on [Hudson's] testimony" because (1) "she is not knowledgeable about the legal doctrines of constitutional law of private and government speech," and (2) "she was clearly intimidated by the questions posed by Plaintiff's Counsel." R.XXII, 3218. That credibility finding cannot be overcome here.

The bottom line: The first factor favors government speech.

B. Registration numbers are associated with the State.

The second *Walker* factor asks whether the State is "closely identified" or "associated" with the speech at issue. 576 U.S. at 210, 212, 216; *Summum*, 555 US at 471 ("associated"); *Matal v. Tam*, 582 U.S. 218, 238 (2017) ("associates"); *Shurtleff*, 596 U.S. at 255 ("associate"). *Walker* relied on three points when holding that this factor favors government

speech: (1) the "governmental nature" of "license plate[s]," (2) "license plates[']" role as "government IDs," and (3) the reality that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State" approves. 576 U.S. at 212-13. Those three points map on perfectly here. Opening Br. 29-31.

Yet Gilliam all but ignores *Walker*'s directly applicable reasoning. According to Gilliam, *Walker* does not control because it dealt with "license plate designs," not registration numbers. Resp. 46-47. But "the *reasoning* of a Supreme Court case also binds lower courts." *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *see Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). And *Walker*'s reasoning on the association of "license plates" with the State applies here. Opening Br. 29-31.

For purposes of the associational analysis, Gilliam draws a single distinction (at 50) between this case and *Walker*: Texas "own[ed] the designs," whereas Tennessee does not "own" the sequence of alphanumeric characters used as a registration number. 576 U.S. at 212. But the fact that Texas owned the designs was one of a laundry list of facts mentioned to conclude that a "license plate is a government article serving the governmental purposes of registration and identification." *Id.* The other facts considered (state-branded, state-issued, state-required, etc.) leave no doubt as to the "governmental nature of [Tennessee's] plates"—the takeaway point from *Walker*. *Id.*; Opening Br. 29-30.

Nor can Gilliam override *Walker* with the survey presented at trial. Resp. 51. She still cannot identify a single case in *any court* that has relied on survey evidence to resolve a government-speech question.

In any event, Gilliam's survey presented a false dichotomy: It asked whether "[*t*]*he* message featured on a personalized license plate represents the speech or views of the government" *or* "the person who chose it." Trial Tr. 76 (emphasis added); Opening Br. 33. Gilliam's own polling expert admitted at trial, repeatedly, that there was "no option . . . where [participants could] say, I think it's a mixture of both." Trial Tr. 108; *see id.* at 105 (acknowledging the "two pretty clear alternatives").

On top of that, the survey stacked the deck in Gilliam's favor. The questions skewed towards private speech by emphasizing that "license plates can be personalized with your own unique message," without mentioning the identifying information conveyed by the State through registration numbers. *Id.* at 75. As Gilliam's expert acknowledged, "the framing of the polling questions is very important" and "can affect the outcome." *Id.* at 103-04. This case only highlights the precarious nature of being the first court to hinge speech rights on survey results.

Next, Gilliam claims (at 52-53) that the public does not associate personalized registration numbers with the State because, according to Gilliam, the Arts Commission's website "told the public" that those numbers do not convey a State message. Not true. The website did *not* "publicly disclaim[]" the existence of any state message, Resp. 53; it simply recognized that drivers may convey a private message through registration numbers. *Supra* 14-15. Again, the recognition of a distinct

private message in no way suggests that the State's independent message disappears.

Nor was Tennessee *required* to make an affirmative statement that registration numbers contain a government message. Resp. 38, 45. None of the Supreme Court cases finding government speech have required as much—not *Walker*, not *Summum*, and certainly not *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). And such a statement would make no sense in this context because everyone knows that license plates are state-issued, state-owned government IDs that convey identifying information from the State. Not only that, Tennessee *did* publicly acknowledge its association with the registration numbers by "reserv[ing] the right to refuse to issue objectionable combinations" on the personalized-plate application. Trial Ex. 18. And the public recognizes the association. That is why drivers, like Gilliam, "prefer[] a license plate . . . to the purely private speech expressed through bumper stickers." *Walker*, 576 U.S. at 213.

With no "evidence" that "accurately address[es] . . . *Walker*['s]" associational analysis, R.XXII, 3241, Gilliam turns to non-binding precedent, Resp. 46-48. But even a cursory analysis of the cited decisions shows their limited persuasive value. Four of the cases "predate the 2015 issuance of *Walker*," which "is significant" because *Walker* crystalized the "three-factor test" and adopted reasoning that applies here. R.XXII, 3247; *see Montenegro v. N.H. DMV*, 93 A.3d 290 (N.H. 2014); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812 (W.D. Mich. 2014); *Bujno v. DMV*, 86 Va. Cir. 32 (2012); *Higgins v. DMV*, 72 P.3d 628 (Or. 2003). One of the cases

"assume[s], without deciding, that the speech at issue in this case is private speech." *Montenegro*, 93 A.3d at 294. In another, the government did not "directly argue" the issue. *Matwyuk*, 22 F. Supp. 3d at 822.

And the four federal district court opinions that Gilliam leans most heavily on do not faithfully apply *Walker*. Most rely on pure *ipse dixit*. Resp. 46. And the only decision that provided reasoning departed from precedent. *Ogilvie v. Gordon*, 2020 WL 10963944 (N.D. Cal. July 8, 2020), claimed that no one could "seriously argue that [a person] viewing the license plate 'KNG KOBE,' for example, would infer that the California government was declaring Kobe Bryant the king of basketball," *id.* at *3. But *Walker* rejected that approach to the associational analysis. Justice Alito's dissent pointed out that no one who "saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming [football] games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would . . . assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents." *Walker*, 576 U.S. at 222 (Alito, J., dissenting). Yet, the majority held that the second factor favored government speech based on the three points discussed above. *Supra* 16.

Gilliam's largely unreasoned opinions are countered by the Indiana Supreme Court's unanimous decision in *Vawter*—a decision that Gilliam fails to even acknowledge—and a thoughtful opinion in *Odquina v. City and County of Honolulu*, 2022 WL 16715714 (D. Haw. Nov. 4, 2022).[1]

[1] Gilliam claims the Ninth Circuit assumed the government-speech holding in *Odquina* was "wrong," Resp. 47 (citing *Odquina v. City & Cnty. of Honolulu*, 2023 WL 4234232, at *1 (9th Cir. June 28, 2023)), but in

Gilliam cannot distance this case from *Walker*'s reasoning or its conclusion that license plates are associated with the State.

C. Tennessee controls the registration numbers on state-issued license plates.

The third *Walker* factor—control over the communication—confirms that registration numbers constitute government speech. Opening Br. 34-35. The State reviews and exercises final approval authority for every registration-number request. *Id.* at 35. And it routinely rejects objectionable combinations. *Id.* This is the exact type of control that courts have repeatedly held favors government speech. *Id.* at 35-36.

Gilliam disputes this control (at 53, 56) by asserting that the State "plays no role in crafting" or curating the requested registration numbers. But "[t]he monuments in *Summum* and the license plates in *Walker* were government speech, even though private entities designed them." *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1078-79 (11th Cir. 2015). A mountain of precedent makes clear that private involvement in the creation of speech does not undermine government control. Opening Br. 36.

Gilliam (at 55-58) then attempts to shift the inquiry from focusing on "final approval authority" to focusing on the "nature of the [approval] criteria." Contrary to her suggestion, though, courts do not analyze control based on the specificity of the applicable criteria. Opening Br. 37-38. For example, in *McGriff v. City of Miami Beach,* the court found that

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reality, the court affirmed on alternative grounds without reaching the government-speech issue.

the City's final approval authority weighed in favor of government speech, even though the approval criteria was no more specific than "the reasonable satisfaction of the City Manager." 84 F.4th 1330, 1335 (11th Cir. 2023). In *Mech*, the court found final approval authority supported government speech when officials were left "discretion" to select "partners . . . consistent with the educational mission . . . and community values." 806 F.3d at 1072. Tennessee's criteria contain more specificity than the criteria in almost all other approval-authority cases—and not one has even considered criteria specificity. Opening Br. 14-15, 37.

Gilliam questions (at 54, 58) whether the plates that slipped through the cracks were "mistakes," asserting that the State "barely . . . even cares about . . . personalized plate messages." At the same time, she admits (at 54) that the Chancery Court panel "accredit[ed] the testimony of Ms. Moyers that mistakes are made in the process"—a finding Gilliam has no basis for challenging. R.XXII, 3243. And the mistakes identified ("about 75 to a hundred," Trial Tr. 274) pale in comparison to the number of personalized plates (60,000, R.XXII, 3243). These mistakes happen in every personalized-plate program. *Perry v. McDonald*, 280 F.3d 159, 170 (2d Cir. 2001) (noting that given "the large number of applications," sometimes "plates . . . are issued in error"). The existence of mistakenly issued plates in no way undercuts the State's control.

Fundamentally, Gilliam asserts that nothing short of perfection would establish control. She portrays the State's efforts to look at requests "harder" in 2019, Trial Tr. 244, as evidence that the prior policy was "lax," Resp Br. 58. She suggests (at 28-29) that the State's failure to revoke all erroneously issued plates on her preferred timeline (a few

months) demonstrates a lack of control. And she requests (at 58) governing criteria specific enough to provide clear answers on "all potentially objectionable configurations." But neither the facts nor the law supports these demands. And even assuming the State's prior policy was "lax" (it was not), *Shurtleff* indicated that Boston's flag flying could become government speech if the city "chang[ed] its policies" to exercise greater control, 596 U.S. at 258—exactly what Gilliam claims happened here.

Under a faithful application of *Walker* and *Shurtleff*, the third factor favors government speech. Opening Br. 34-39.

II. Ruling for the State Raises No Risk of an Expansive Government-Speech Doctrine.

A. To rule for the State, this Court does not have to extend *Walker*. Opening Br. 40. Gilliam disagrees but identifies only two irrelevant differences between this case and *Walker*. First, she points out that "some of [the designs in *Walker*] were developed by the legislature," whereas here drivers request the configurations. Resp. 59-60. Second, she argues that Texas owned the designs, whereas Tennessee owns only the plates (not the configurations themselves). *Id.* But neither distinction affects the government-speech analysis. *Supra* 16, 20; Opening Br. 36.

Then, while canonizing Justice Alito's dicta in *Matal* that *Walker* "likely marks the outer bounds of the government-speech doctrine," Resp. 60-61, Gilliam simultaneously downplays his statement in *Walker* that "the numbers and/or letters identifying the vehicle" are "government speech." 576 U.S. at 222 (Alito, J., dissenting). Worse, Gilliam speculates

that Justice Alito's recognition of registration numbers as government speech applies only to "*state*-generated license plate combinations." Resp. 60. But even accepting as much, that means registration numbers convey identifying messages—a proposition that ends this case. *See* Opening Br. 20-25. That is why Gilliam maintains that even randomly generated registration numbers convey no "communication at all." Resp Br. 39-41.

B. Gilliam's skin-deep *Matal* analysis (at 60-61) likewise provides no basis for refusing to recognize registration numbers as government speech. Opening Br. 41-43. Gilliam claims that "*Matal*'s analysis . . . mocks the Government's position here" by stating that treating trademarks as government speech would mean "the government is babbling prodigiously and incoherently," "saying many unseemly things," and "expressing contradictory views." Resp Br. 61. But *Matal* made those statements because it concluded trademarks convey *no* "Government message"; the *only* messages conveyed were the "incoherent[]," "unseemly" private messages. 582 U.S. at 236, 238. When *both* private and government messages exist (as here), *Summum* instructs that the government *need not* "formally embrace" the "message intended by the [creator]" to speak. 555 U.S. at 474.

C. This case raises no threat of an ever-expanding government-speech doctrine. Opening Br. 43-44. If this Court adheres to *Walker*, the doctrine will continue to apply to speech (1) conveying a governmental message (2) on government-owned property (3) that serves as a government ID (4) subject to State approval. That is a narrow ruling.

Gilliam sees it differently. She warns (at 62) of "dangerous consequences" if the Court allows the State to control the 7-digit-or-less alphanumeric combination on state-owned, state-issued IDs. She even draws a parallel to "North Korea[.]" Resp. 63. But Gilliam's parade of horribles does not march.

Gilliam starts (at 62) by claiming that the State could regulate birth certificates and, in turn, "regulate children's names." As explained, though, birth certificates differ from license plates. *Supra* 11-12. Moreover, a birth certificate does not regulate a person's legal name; it merely records it. Tenn. Code Ann. §§ 29-8-101, 68-3-203. Gilliam gets the causal connection backwards.

Gilliam then turns (at 63) to the "serious" issue of photos on driver's licenses. That analysis, however, errs by assuming that all "hairstyle[s]" qualify as speech. *See* Resp. 63; *Karr v. Schmidt*, 460 F.2d 609, 613-14 (5th Cir. 1972); *Hatch v. Goerke*, 502 F.2d 1189, 1193 (10th Cir. 1974). (It is hard to see how a hairstyle could be speech but not actual language used to convey identifying information.) And Gilliam's analysis errs further in suggesting (at 64) that treatment of "photos as government speech . . . remove[s] [them] from the scope of normal constitutional constraints." *Summum* recognized that, "[f]or example, government speech must comport with the Establishment Clause," 555 U.S. at 468, and *Walker* recognized that government speech must comport with First-Amendment restrictions on compelled speech, 576 U.S. at 219. The Constitution still applies to government speech.

Lastly, Gilliam (at 64-65) points to municipal regulations requiring speakers to identify themselves at public hearings and claims that the

State's rationale could allow the State to censor those speakers. This argument is difficult to follow. The scenario posited does not involve the government conveying information; it involves the government compelling a private party to speak. And this case in no way implicates compelled speech, given that the private party affirmatively *requests* the speech at issue. The State does not argue that all speech related to identification by any party in any scenario is government speech. It argues that the government-speech doctrine applies when the government (1) communicates information to others (2) on government-owned property that (3) serves as a government ID (4) subject to State approval. Just reciting that narrow rule refutes any threat of opening the government-speech floodgates.

III. Practical Considerations Support Treating Registration Numbers as Government Speech.

The State's substantial interest in controlling the messages conveyed through its IDs confirms the governmental nature of registration numbers.

For one, recognizing registration numbers as government speech allows the State to protect children from harmful, indecent speech on public-facing government IDs. Opening Br. 47. Gilliam does not "dispute" this interest. Resp. 66. Nor does she dispute that children are a captive audience when riding in a vehicle. *Id.*

Instead, Gilliam claims that "[t]o the extent a personalized plate poses some actual danger to children, the Government surely may restrict it." *Id.* That unsupported proposition goes nowhere; in fact, Gilliam's argument in the preceding paragraph contradicts it. *Id.*

Gilliam contends that the State must regulate registration numbers in a viewpoint neutral manner. *Id.* But that means that the State could not, for example, impose a prohibition on offensive racial slurs—like in *Matal*. So children could be exposed to messages like "N*****," "K***," or "NOJEWS" on government IDs. Trial Ex. 15.

Nor can Gilliam (at 66-67) negate these concerns by claiming that "no children were harmed by Ms. Gilliam's license plate." This case does not involve an as-applied challenge. And the government-speech question is not resolved on a plate-by-plate basis. Opening Br. 46.

Not to mention, the State has an interest in ensuring that its government IDs do not cause harm or disruption on roadways. *Id.* at 47-48. Gilliam offers no response whatsoever to this very real threat of violence. Resp Br. 65-68.

These considerations underscore that the State should enjoy the freedom to "choose[] what to say and what not to say" through the state-issued registration numbers on license plates. *Shurtleff*, 596 U.S. at 251.

CONCLUSION

The Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46 § 3.02, I certify that the number of words in this brief, excluding the portions of the brief exempted by the Rule, is 4992. This word count is based on the Microsoft Word system used to prepare this application.

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