No. M2022-00083-SC-R11-CV

In the
Supreme Court of Tennessee

LEAH GILLIAM,

Plaintiff-Appellee,

v.

DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, et al,

Defendants-Appellants.

Court of Appeals Case No. M2022-00083-COA-R3-CV
Davidson County Chancery Court Case No. 21-0606-III

AMICUS CURIAE BRIEF OF THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLEE, LEAH GILLIAM

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has defended First Amendment rights on college campuses through advocacy, litigation, and *amicus curiae* filings—including as *amicus curiae* in the Court of Appeal in this matter. In 2022, FIRE expanded its advocacy beyond the university setting and now defends First Amendment rights on campus and in society at large.

FIRE has a significant interest in this appeal because an expansive interpretation of the government-speech doctrine would blur the distinction between a *government*'s message and those of individual speakers—like the multitude of Tennesseans who accept the state's invitation to share "your own unique message" through vanity plates. And in *amicus* FIRE's experience, the state's requirement that drivers' messages conform to officials' subjective conceptions of "good taste and decency" inexorably leads to abuse or absurd results.

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than amicus, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

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INTRODUCTION

Tennessee's vanity license plate program, which specifically invites residents to add "your own unique message" to their license plates for a fee, does not constitute the government's speech, and the State's benchmark for acceptable messages—"good taste and decency"—is hopelessly arbitrary.

States, drivers, and the general public all understand that vanity plates—numbering in the millions—deliver a message chosen by the vehicle's owner, not the government. By and large, courts have correctly concluded that drivers' messages on vanity plates are private speech, not government speech—a consensus undisturbed by the Supreme Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015); *see infra*, pp. 27–34.

If adopted, the Government's argument will cause constitutional injuries reaching beyond the bumpers of vehicles registered in Tennessee.

First, it will blur the distinction between an individual's speech and the government's own messages, evading the First Amendment scrutiny ordinarily applied to government regulation of speech. Because a good

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deal of speech involves some facilitation by government actors, courts should avoid the application of the government-speech doctrine when the government is facilitating others' speech, not speaking itself. The United States Supreme Court recently warned the government-speech doctrine is inappropriate when it is unclear whether the government intends to "transmit [its] *own* message." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022) (emphasis added). That's because the "boundary between government speech and private expression can blur" when government invites the public to contribute their own messages. *Id.*

Second, the standard chosen by Tennessee—prohibiting "connotations offensive to good taste and decency"—gives officials unfettered discretion to police speech they subjectively believe offensive, or fear others may find objectionable. As FIRE's research shows, subjective restrictions on vanity license plates result in arbitrary and discriminatory enforcement. That's why the First Amendment prohibits the government from "cleans[ing]" expression "to the point where it is grammatically palatable to the most squeamish," including minors. *Cohen v. California*, 403 U.S. 15, 25 (1971).

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The Court of Appeals was right to join most courts in rejecting the application of the government-speech doctrine to vanity license plates. Nothing requires Tennessee to adopt a vanity plate program. When it voluntarily does so, the First Amendment requires its officials to use standards other than their own taste.

ARGUMENT

When officials claim the authority to regulate speech based on their own subjective evaluations of "taste" and "decency," they inexorably invite arbitrary decisions and viewpoint discrimination. Because the First Amendment does not allow officials to exercise unfettered discretion over others' speech, Tennessee claims no First Amendment scrutiny is required at all because it is only regulating its *own* speech.

But the government-speech doctrine does not apply when, as here, the government facilitates speech by others. Vanity license plates have long been promoted, used, and understood as speech *by the vehicle's owner* that the government accommodates as a means of revenue generation. Because the government's own speech is not subject to First Amendment scrutiny at all, converting individuals' messages to the government's speech results in arbitrary and viewpoint-discriminatory

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censorship. Worse, because the government frequently facilitates speech by others, creeping expansion of the doctrine will lead to censorship of speech wholly unrelated to vanity plates.

I. Regulating Speech for "Good Taste and Decency" Leads to Arbitrary Decisions and Viewpoint Discrimination.

Tennessee clings to the government-speech argument because, without it, the bottom falls out. The State authorizes the Commissioner to refuse to issue any combination "that may carry connotations offensive to good taste and decency. . . ." Tenn. Code Ann. § 55-4-210(d)(2). This hopelessly subjective standard—if it can be said to be a standard at all—has been rejected by every court to consider it.[2] The First Amendment, at its core, recognizes that officials cannot distinguish the offensive from the tasteful. *Cohen*, 403 U.S. at 25.

[2] *See, e.g.*, *Montenegro v. N.H. Div. of Motor Vehicles*, 93 A.3d 290, 297–98 (N.H. 2014). New Hampshire is not alone in finding this language ripe for abuse, as officials may interpose their subjective views in enforcing "good taste." *See Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 825 (W.D. Mich. 2014); *Morgan v. Martinez*, No. 3:14-02468, 2015 WL 2233214 at *9, 2015 U.S. Dist. LEXIS 61877 at *27 (D.N.J. May 12, 2015); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 170 (D.R.I. 2020); *Ogilvie v. Gordon*, 540 F. Supp. 3d 920, 929 (N.D. Cal. 2020).

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For example, in *Montenegro*, the Supreme Court of New Hampshire held similar language void for vagueness, as it "fail[ed] to provide sufficient guidance to DMV officials in determining which vanity registration plates shall be authorized." *Montenegro*, 93 A.3d at 297. Since the "'offensive to good taste' standard was not susceptible to objective definition," it allowed officials too much discretion to censor plates based on their "subjective idea of what is 'good taste.'" *Id.* at 298.

Tennessee's "good taste and decency" language affords unfettered discretion to the officials assigned to enforce it. This purported power to regulate private expression is squarely prohibited to state officials in any context, as it knows no limits and undermines the First Amendment's protection for unpopular expression.

A. State authorities may not police private expression for conformity with "taste" and "decency."

Tennessee's "good taste and decency" standard is constitutionally infirm because it bestows upon authorities the unfettered power to limit any speech they subjectively deem offensive. As a result, Tennessee's standard cannot meet even the least-restrictive scrutiny applied in *nonpublic* forums, which requires that regulations be "viewpoint neutral"

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and "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

The reasonableness requirement means any decision to exclude an individual's speech must be governed by "some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 16 (2018). States may not grant officials unfettered discretion to determine whether speech is permissible, even in a nonpublic forum. *See, e.g.*, *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987) (striking down airport's requirement that speech be "airport related" because it confers "virtually unrestrained power" on authorities); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (striking down baseball stadium's arbitrary requirement that banners be in "good taste"). A standard premised on "good taste" is hopelessly vague because it "fail[s] to provide explicit standards guiding [its] enforcement," thereby "impermissibly delegat[ing]" evaluation of speech to authorities "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (quoting, in part, *Grayned v. City of*

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Rockford, 408 U.S. 104, 108–09 (1972)); *see also Coleman v. Ann Arbor Transp. Auth.*, 904 F. Supp. 2d 670, 691 (E.D. Mich. 2012) (holding *United Food* is "conclusive" on the question of whether a "good taste" regulation was impermissibly vague). But the First Amendment, at its core, recognizes that government officials are inherently incapable of making "principled distinctions" about whether speech is sufficiently inoffensive to be permitted. *Cohen*, 403 U.S. at 25.

Nor can officials claim they are simply acting to prevent offense to others. To the extent that the state's standard is premised on readers' opposition—real, imagined, or feared—to a plate's message, that interest cannot support a restriction on otherwise-protected expression. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit [expression] simply because society finds [it] offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Accordingly, listeners' anticipated reaction to speech is neither a viewpoint- nor content-neutral basis for regulation. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (security fees imposed due to expected hecklers were not content-neutral). Even if a policy prohibiting offensive speech yielded consistent results, "evenhandedly"

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prohibiting disparagement is still viewpoint discrimination. *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality opinion).

B. Unfettered discretion to police the "taste" of speech on license plates leads to censorship and absurd results.

Over the last several years, *amicus* FIRE has utilized public records requests, reviewed legal rulings, and compiled media reports to better understand how license plate regulators regulate speech in vanity programs and what plates are approved, denied, or rescinded. Consistent with our work defending expressive rights in other contexts (including higher education), broad authority to police expression leads to viewpoint discrimination or arbitrary results.

1. Vague limits on vanity plate expression suppress political speech across the ideological spectrum.

Censorship may often be a result of institutional aversion to conflict: It is easier to deny or rescind a plate based on a complaint, no matter how frivolous, than to expend institutional resources defending freedom of expression as a social value and an important right.

This means only popular expression—or speakers able to marshal support for their speech—survives state scrutiny. As a result, political speech, where the First Amendment's protection is "at its zenith,"

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Buckley v. Am. Const. Law Found., 525 U.S. 182, 186–87 (1999), lives or dies based on its popularity.

For example, Nathan Kirk, a gun store owner, paid $700 for a plate depicting the Gadsden flag and two acronyms deriding President Biden:[3]

After receiving the plate, Kirk received a letter demanding he return it due to use of "objectionable language . . . offensive to the peace and dignity of the State of Alabama." That "language" was the letter "F" in the latter acronym, commonly understood to mean "Fuck Joe Biden" (Kirk said he intended it to mean "Forget Joe Biden"). The State of Alabama's dignity was apparently *not* offended by the leading acronym ("LGB," or "Let's Go Brandon"), *itself* a phrase with origins in the words

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[3] Sarah Whites-Koditschek, *Alabama Man Gets to Keep 'Let's Go Brandon' Plate, State Even Apologizes*, AL.com (Mar. 15, 2022), https://bit.ly/3s85z2N [perma.cc/AQ7E-WQZJ].

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“Fuck Joe Biden.”[4] Yet after conservative media rallied around Kirk’s plate, the State of Alabama retreated and *apologized* to Kirk.[5]

But what about when the complaint catches the attention of political officials? In June 2021, a Michigan journalist tweeted a photo of a plate she thought amusing: “ACAB”—an anti-police acronym meaning “All Cops Are Bastards”:[6]

4 *Let’s Go Brandon: NASCAR Driver Brandon Brown Caught in Unwinnable Culture War*, Associated Press (Feb. 19, 2022), https://es.pn/3MPMBI0 [perma.cc/2JK6-KTQP].

5 Those who do not attract media attention to their cause get less mileage. While Kirk can parade his “LGBFJB” plate down interstates in North Dakota, its own residents cannot: North Dakota, too, bans “LETSGOBR,” “L3TSGOB,” and “FJB2020.” Notice of Denial, N.D. Dep’t of Transp. (Jan. 21, 2022), *available at* https://bit.ly/northdakotalgb; Notice of Denial, N.D. Dep’t of Transp. (Feb. 2, 2022), *available at* https://bit.ly/northdakotafjb.

6 Violet Ikonomova (@violetikon), Twitter (June 19, 2021, 10:29 AM), https://bit.ly/michiganacabplate.

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When another Twitter user alerted Michigan's Secretary of State to the tweet, the state launched an official investigation into the four letters.[7] It ultimately revoked the plate under a prohibition against language "used to disparage or promote or condone hate or violence directed at any type of business, group or persons"—in other words, a ban on hate speech. The revocation showed how restrictions on "hate speech" are inevitably repurposed to protect the powerful—here, a class of government officials[8]—from offense.

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[7] Email from Dawn VanAken, Dir., Off. of Bus. & Internal Svcs., Mich. Dep't of State, to James Fackler, Mich. Dep't of State (June 22, 2021, 8:14 AM), *available at* https://bit.ly/acab-plate [perma.cc/VLL7-ZVK4]. Like Nathan Kirk's "Forget Joe Biden" defense, the "ACAB" plate owner sought refuge from censorship by invoking a coded reference, arguing to state officials that the plate *really* meant "All Cats Are Beautiful"—a tongue-in-cheek variation on the acronym. *See* email from Amanda Bauer, Manager, Renewal by Mail, Mich. Dep't of State, to Doug Novak, Mich. Dep't of State (July 21, 2021, 4:02 PM) ("I will contest this claim and I would like to speak with somebody of what offense may be caused by a vanity plate to freely exclaim my love for cats"), *available at* https://bit.ly/love-for-cats [perma.cc/Q7YH-XSEV].

[8] In our constitutional system, police officers in particular are expected to be capable of a "higher degree of restraint than the average citizen" when facing public criticism. *Houston v. Hill*, 482 U.S. 451, 462 (1987) (cleaned up).

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Political speech often provokes public anger, and standards premised on "good taste" invite viewpoint discrimination. Because they are subjective, they are malleable. They provide an easy way for an official to mollify complaints from the public or to advance the official's personal views. Michigan's revocation of the "ACAB" plate, flowing from public objection to its message, is one example: It is doubtful that the state would have taken the same course in response to a plate reading "BLULINE" or promoting other pro-law enforcement messages. In *Montenegro*, for example, officials denied an anti-police message on viewpoint-discriminatory grounds by identifying it as "offensive to good taste" while approving pro-government messages. *Montenegro*, 93 A.3d at 292–93 (state refused "COPSLIE" plate but issued "GR8GOVT"). And in New York, prohibitions on "patently offensive" plates led state officials to refuse a plate offering support for Second Amendment rights ("PRO NRA").[9]

Even police officers are not immune from censorship. A retired NYPD sergeant learned that the hard way when New York revoked his

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[9] Eugene Volokh, *"PRO NRA" License Plate*, Volokh Conspiracy (Aug. 18, 2003), https://bit.ly/volokhnraplate [perma.cc/5R26-3GBD].

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post-9/11 plate—“GETOSAMA”—on the basis that it was “derogatory to a particular ethnic group.” (After successfully suing over the plate, he swapped it for “GOTOSAMA” a day after Osama bin Laden was killed.)[10]

2. *Limits on vanity plates invite viewpoint discrimination on religious speech, self-identification, and personal health.*

Vague standards on vanity plates also lead to arbitrary and discriminatory application to speech concerning religious beliefs, personal identity, and personal health.

For example, when New Jersey banned plates “offensive to good taste and decency,” it prohibited plates expressing atheistic views (“8THEIST” and “ATHE1ST”) but permitted registration of plates identifying the driver’s theistic beliefs (*e.g.*, “BAPTIST”). *Morgan*, 2015 U.S. Dist. LEXIS 61877 at *3, n.2, *19. Vermont, too, prohibited plates exhibiting a religious view (like “PRAY,” “ONEGOD,” “SEEKGOD,” and “PSALM48”), but permitted those expressing secular philosophical views (like “CARP DM” and “LIVFREE”). *Byrne v. Rutledge*, 623 F.3d 46, 56–57 (2010). New Mexico, for its part, prohibits plates with the words

[10] *New York Man Trades GETOSAMA License Plate for GOTOSAMA*, Reuters (May 4, 2011), https://reut.rs/3TG8oab [perma.cc/5RTH-5VEU].

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"MUSLIM" or "CATHOLIC."[11] And officials in Kentucky allowed "GODLVS" and "TRYGOD" on license plates, but refused a retiree's "IMGOD" request.[12] In Oregon, positive religious messages are approved while those negative toward a religious group are denied.[13]

These arbitrary restrictions also burden expression on sexual orientation and personal health. Oklahoma, for instance, prohibited an LGBTQ student from using the words "IM GAY," deeming that message "offensive to the general public," but permitted plates reading "STR8FAN" and "STR8SXI" ("straight sexy").[14] In Colorado, residents

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[11] Spreadsheet of New Mexico's "Restricted Words," *available at* https://bit.ly/newmexicoplates [perma.cc/5HZ7-JSA5].

[12] Sarah Ladd & Andrew Wolfson, *'TRYGOD' Is OK, 'IMGOD' No Way: Vanity Plate Rules and Free Speech Butt Heads*, Louisville Courier J. (Jan. 8, 2020), https://bit.ly/louisvillegodplates [perma.cc/T8JT-C4PS].

[13] Amanda Arden, *Oregon DMV Denied These Custom License Plates in 2021*, KOIN (Jan. 14, 2022), https://bit.ly/koinplates [perma.cc/2WPU-V9ME].

[14] Kirsten McIntyre, *Norman Man Sues Tax Commission over 'IM GAY' License Tag*, News 9 (Feb. 15, 2010), https://bit.ly/3Sb52aU [perma.cc/2ZG6-9VDW].

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can use the breast cancer awareness specialty plate, but they cannot add "LVBOOBS" to it.[15]

In Delaware, a federal court blocked the state's attempt to revoke a license plate issued to a cancer survivor on the basis that the plate—"FCANCER"—contained a "perceived profanity." Meanwhile, Delaware's DMV, the plaintiff observed, itself uses implied profanity on roadside signs, such "Get your head out of your Apps" and "Oh Cell No."[16]

3. Arbitrary standards predictably lead to arbitrary or absurd decisions.

Standards of "decency" inevitably lead to absurd results. As one official put it, identifying what's offensive is "kind of a moving target."[17] Sometimes a vanity plate's once-inoffensive message is deemed offensive because the world changes around them. For example, Michigan revoked a plate reading "JAN 6TH" in the summer of 2021, apparently because it

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[15] Letter from Colo. Dep't of Rev. (March 18, 2022), *available at* https://bit.ly/3eAp8Om [perma.cc/A9HS-CH7Q].

[16] Randall Chase, *Judge Refuses to Dismiss Lawsuit Against DMV for 'FCANCER' Vanity License Plate*, Associated Press (Aug. 1, 2022), https://bit.ly/3zcHfRB [perma.cc/65EN-33Y5].

[17] Bill Bowden, *Thousands of Personalized Plates — from ARSE to ZHIT — Are Banned in Arkansas*, Ark. Democrat Gazette (Feb. 6, 2022), https://bit.ly/4ciP6Pi [perma.cc/2PEC-RXZE].

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"describe[s] illegal activities" or "promote[s] or condone[s . . .] violence[.]"[18] The plate, however, predated the events at the U.S. Capitol by some three years—and far from being a clairvoyant supporter of political violence, its registrant explained that the date recognized "an instrumental day to my sobriety." Michigan cancelled the plate anyway.[19]

Some restrictions on vanity plates are absurd on their face. Take, for example, New Mexico's inexplicable prohibition on the word "CANADIAN." In neighboring Colorado, a vegan's love of tofu ran afoul of license plate censors, who feared that someone may "misread" the plate "ILVETOFU" by adding two letters to the end, in their mind.[20] (Tennessee followed suit when a PETA member sought the same plate.[21]) And in North Dakota, authorities denied an application for a plate about the Mafia—the word "OMERTA," referencing the "code of silence"—out

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[18] Letter from Renewal by Mail, Mich. Dep't of State (July 9, 2021), *available at* https://bit.ly/3TbWsKC [perma.cc/353J-VXHP].

[19] Email from Amanda Bauer, Manager, Renewal by Mail, Mich. Dep't of State (Aug. 10, 2021, 11:46 AM), *available at* https://bit.ly/3EHZgdY [perma.cc/2R9A-6TX3].

[20] *Colo. Rejects 'ILVTOFU' License Plate*, UPI (Apr. 8, 2009), https://bit.ly/tofuplate [perma.cc/LAD6-9UJS].

[21] David Lohr, *Tennessee Says 'F-U' to Tofu-Loving PETA Member over 'Obscene' License Plate*, Huffington Post (Dec. 6, 2017), https://bit.ly/tofuplate2 [perma.cc/3BDN-LUGR].

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of concern that it might encourage unlawful activity by others.[22] One might query whether a sincere effort to promote the Mafia's code of silence would involve advertising via license plate.

What leads state officials to conclude that some words are offensive and others are not? If their own subjective sense is inconclusive, many officials turn—by policy—to online sources like the Urban Dictionary to see whether members of the public have flagged a word or phrase as carrying offensive connotations. As Nevada's Supreme Court has held, these user-submitted definitions "can be personal to the user and do not always reflect generally accepted definitions for words." *Nev. Dep't of Motor Vehicles v. Junge*, 281 P.3d 1221 (Nev. 2009).[23] Crowdsourcing definitions does not establish even a veneer of objectivity in ascertaining what is "offensive"; it merely applies idiosyncratic and hypersensitive definitions to "cleanse" public discourse.

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[22] Notice of Denial, N.D. Dep't of Transp. (Feb. 25, 2022), *available at* https://bit.ly/omertaplate [perma.cc/4HZV-RJ8U].

[23] The Nevada Supreme Court's unpublished opinion is available at https://bit.ly/nvscplates.

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II. Vanity License Plates Convey Individuals' Messages, Not the Government's Message.

Tennessee encourages its residents to share "your own unique messages" through vanity plates but polices their messages for conformity with "good taste and decency."[24] To avoid the First Amendment's scrutiny, Tennessee claims it is *self*-censoring. Not so.

A. States, including Tennessee, foster the public's understanding that vanity plates convey drivers' messages.

Vanity plates are ubiquitous. A 2007 state-by-state survey found that some 9.3 million vehicles bore vanity plates[25]—a number that has undoubtedly increased in the seventeen years that have followed. As their use increases, so does the public understanding that vanity plates bear—as their name implies—the expression of the vehicle's owner, not the state behind the plate.

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[24] *Personalized Plates*, Tenn. Arts Comm'n https://tnspecialtyplates.org/personalized-plates [perma.cc/P425-WU76] (describing vanity plates as a way to share "your own unique message"), Tenn. Code Ann. § 55-4-210(d)(2) (prohibiting messages "that may carry connotations offensive to good taste and decency").

[25] *Va. Drivers Vainest of Them All with Their Plates*, Associated Press (Nov. 11, 2007), https://nbcnews.to/3wY4MYd [perma.cc/WM78-Y3WS].

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That public understanding is fostered by the States. Tennessee encourages drivers to share "your own unique message" through vanity plates.[26] Arizona encourages residents to "express yourself" through vanity plates.[27] And North Carolina's application form puts it bluntly: "Isn't it time you made a name for yourself? Now's your chance to join thousands . . . and show the world what you think, who you are or almost anything else[.]"[28] These invitations recognize what is plain to any reasonable observer: Vanity plates convey the vehicle owner's message, not the government's.

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[26] Tenn. Arts Comm'n, *supra* note 24. The government's contention that *another* state agency crafted this message, and that the government should not be held to it, is unpersuasive. The message demonstrates that "a reasonable and fully informed observer would understand the expression" to be that of the driver, not the state. *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring).

[27] *Plate Selections Detail*, Ariz. Dep't of Transp. , https://bit.ly/azplates [perma.cc/X8RZ-ABYU].

[28] Personalized Plate Form, N.C. Div. of Motor Vehicles, *available at* https://bit.ly/ncplatesform [perma.cc/K2TD-4XNP].

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B. Both before and after *Walker*, courts have correctly concluded vanity plates are private speech, not government speech.

Given the public understanding that vanity plates represent an individual's speech, it's no surprise that courts have broadly rejected the application of the government-speech doctrine.

The U.S. Supreme Court has not directly addressed the question of whether individual, personalized messages on license plates are private speech or government speech. In holding that license plate *background* designs were government speech, the Court expressly declined to reach the question. *Walker*, 576 U.S. at 204. Just two years later, the Supreme Court cautioned that its holding in *Walker* "marks the outer bounds of the government-speech doctrine," sharing a reluctance to "convert[]" private speech into government speech through regulation. *Matal*, 582 U.S. at 238–39.

Most courts addressing the issue—before and after *Walker*—found that vanity plates were private speech in a nonpublic forum, if not a designated or limited public forum. *See, e.g.*, *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (sharing "skepticism" that vanity plates are nonpublic fora, as "a personalized plate is not so very different from a

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bumper sticker that expresses a social or political message"); *Montenegro*, 93 A.3d at 294–95 (evaluating vanity plates as private speech on government property and declining to reach forum classification because "offensive to good taste" was facially unconstitutional even in nonpublic fora); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) (rejecting application of the government-speech doctrine to vanity plates and distinguishing *Walker*); *Kotler v. Webb*, No. CV-19-2682, 2019 U.S. Dist. LEXIS 161118, at *13–*24 (C.D. Cal. Aug. 29, 2019) (surveying cases post–*Walker*).

The majority view appropriately rejects the notion that vanity license plates are government speech. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467. However, private speech "is not transformed into government speech simply because it occurs on government property." *Matwyuk*, 22 F. Supp. 3d at 823–24. Nor does pervasive regulation of speech—even where the state is acting as a gatekeeper before conferring a government benefit, as was the case with trademarks—transmogrify private speech into government speech. *Matal*, 582 U.S. at 235–36; *see also Robb v. Hungerbeeler*, 370 F.3d 735,

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745 (8th Cir. 2004) (holding that adopt-a-highway signs, although "state-owned," were private speech as "an adopter speaks *through* the signs by choosing to undertake the program's obligations in exchange for the signs' announcement to the community" (emphasis added)).

Tennessee's argument relies on the solitary published decision holding vanity plates to be government speech, *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015). But the courts that have considered the "outlier" decision in *Vawter* have rejected its reasoning as "wholly unpersuasive." *Carroll*, 494 F. Supp. 3d. at 167.

Central to *Vawter*'s infirmity is its underappreciation for the public's understanding of *who* is speaking through vanity plates, as opposed to the background design of the plate at issue in *Walker*. "On a basic level, what it comes down to is that 'a reasonable observer would perceive the plate's message' as the driver's rather than the state's." *Kotler*, 2019 WL 4635168, at *8 (internal citation omitted).

For example, the Maryland Court of Appeals rejected *Vawter*'s reasoning "because vanity plates represent more than an extension . . . of the government speech found on regular license plates. . . ." *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 328 (Md. 2016). Personalized

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plates do not represent the message of the government, and observers of vanity plates "understand reasonably that the messages come" not from the government, but "from [the] vehicle owners." *Id.* The public's understanding that vanity plates represent a *driver's* speech was also important in *Hart v. Thomas*, which rejected *Vawter* as having failed to differentiate personalized messages from license plate designs and disagreed with the notion that vanity plates "have been closely identified in the public mind with the state." 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019). After all, if a state adopted the message of each vanity plate as its own message, it would adopt competing and contradictory messages, the state would be reduced to "babbling prodigiously and incoherently." *Id.* at 1232–33 (quoting *Matal*, 582 U.S. at 236). These prescient holdings have since been reinforced by the U.S. Supreme Court's recent decision in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

C. ***Shurtleff* further erodes the outlier *Vawter* because it reinforces the importance of public awareness of the message's origin.**

Shurtleff narrowed the government-speech doctrine's application where the "boundary between government speech and private expression" may "blur" because the government has invited private

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parties to speak through a government program—there, flags displayed outside of city hall. *Id.* at 244. In that instance, courts must conduct a threshold "holistic inquiry" into whether the government "intends to speak for itself or to regulate" others' expression when it "invites" speech from private citizens. *Id.* at 252.[29]

Shurtleff lays bare *Vawter*'s flawed reasoning in discounting the public's ability to identify a message's speaker, the very flaw that led other courts to find it unpersuasive. In *Shurtleff*, the Supreme Court acknowledged that the government-speech doctrine does not apply when it is unclear the government intends to "transmit [its] *own* message" through a speaker, as opposed to inviting other "speakers' views[.]" *Id.* (emphasis added). As Justice Alito put it, government speech requires a

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[29] *Vawter* stands alone as the solitary published decision holding that vanity plates are government speech. While a federal district court in Hawai'i took that position in an unpublished decision, it did not address *Shurtleff*'s directive that courts conduct a "holistic inquiry" into *who* is speaking. *Odquina v. City & County of Honolulu*, No. 22-cv-407, 2022 WL 16715714 at *7–12, 2022 U.S. Dist. LEXIS 201175 at *19–33 (D. Haw. Nov. 4, 2022). And although affirming the district court on this basis would have obviated the need for further analysis, the Ninth Circuit sidestepped the question by erroneously ruling—also in an unpublished decision—that Hawai'i's prohibition on profane speech was a permissible restriction on speech in nonpublic fora. *Odquina v. City & County of Honolulu*, No. 22-16844, 2023 WL 4234232 *1–2, U.S. App. LEXIS 16323 at *1–3 (9th Cir. June 28, 2023).

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"purposeful communication of a governmentally determined message[.]" *Id.* at 268 (Alito, J., concurring).

Because members of the public use vanity plates to express their own views and—thanks, in part, to states' promotion of vanity plates as a vehicle for self-expression—the public reasonably understands vanity plates to be private, not government, speech.

D. Because governments frequently facilitate private speech, an expansive government-speech doctrine will threaten speech elsewhere.

Although *Walker* represents the "outer bounds" of the government-speech doctrine, *Matal*, 582 U.S. at 238, government officials have a strong incentive to push its boundaries: Once applied, the doctrine frees governments of any First Amendment burden. But expanding the doctrine will threaten speech in a broad variety of contexts because governments facilitate a great deal of speech.

Take public libraries, for example. They facilitate speech by providing curated collections of books and hosting community events. In its battles over the content of library books, Florida has taken the position that every book in its public libraries is government speech, so

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officials may remove books based on the party affiliation of their authors.[30]

Or consider public universities. Student organizations—often using their institution's name, as do the "College Republicans at the University of Tennessee, Knoxville"—host speakers, often paid through fees collected by the institution, in venues bearing the university's name. It's not a stretch to foresee campus officials embracing the government-speech doctrine as a vehicle to suppress unpopular campus groups or speakers. Florida does exactly that, claiming it may prohibit university faculty members from promoting banned ideas, as faculty are "simply the State's mouthpieces."[31] Yet our Supreme Court has long recognized that individual faculty are understood to speak for themselves, as part of "that robust exchange of ideas which discovers truth out of a multitude of

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[30] Br. for State of Fla. as Amicus Curiae Supporting Def., *PEN Am. Ctr., Inc. v. Escambria Cnty. Sch. Bd.*, No. 3:23-cv-10385 (N.D. Fla. Aug. 22, 2023), ECF No. 31-1 at 3–4; Douglas Soule, *Judge Hears Florida's Argument that School Book Bans Are Protected Government Speech*, Tallahassee Democrat (Dec. 7, 2023), https://bit.ly/floridagovtspeech [perma.cc/P9MX-PTYQ].

[31] *Pernell v. Fla. Bd. of Govs. of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1233–34 (N.D. Fla. 2022) (rejecting government-speech argument), *appeal docketed*, Nos. 22-13992 & 22-13994 (11th Cir. Nov. 30, 2022).

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tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

Government facilitates speech in other ways, too. It does so when it provides intellectual property regimes, such as when the federal government provides trademarks—which it has claimed are a form of government speech.[32] It does so when it creates social media pages and allows comments from members of the public—who officials have widely argued, with limited success, are government speakers.[33] It does so when it sponsors art exhibits, museums, theaters, concerts, debates, and so on.

While some instances of government entanglement with speech may correctly be described as government speech because the government intends to endorse speech by selecting it, the central question is *who* is speaking. Otherwise, expansion of the government-

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[32] *Matal*, 582 U.S. at 233–39.

[33] *Compare Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011–12 (E.D. Ky. 2018) (Governor was justified in "culling" Facebook users' comments to "present a public image that he desires"), *with Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 572–73 (S.D.N.Y. 2018) (rejecting application of government-speech doctrine to users' comments on then-President Trump's tweets, as comments were "unlikely to be 'closely identified in the public mind' with" Trump).

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speech doctrine will empower censorship unencumbered by the First Amendment.

But an expansive application of the government-speech doctrine springs from a cynical premise: assuming the public attributes to the government those messages which it fails to censor. But the "proposition that [governments] do not endorse everything they fail to censor is not complicated." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). Government facilitation of speech doesn't mean the government *endorses* the expression. But censorship of some messages will invite further demands for censorship, until the public will come to believe that the government endorses speech it does not suppress.

CONCLUSION

Some license plates will doubtlessly offend those who briefly find themselves trailing their driver. This is not an ill to be cured through censorship, but a sign of resilience: In the United States, we embrace creative, even transgressive, means of expression without state limitation, recognizing that a "necessary side effect of these broader enduring values" is that "the air"—or the highways—"may at times seem filled with verbal cacophony." *Cohen*, 403 U.S. at 25 (cleaned up).

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Tennessee is not obligated to establish a vanity plate program. Having done so, it has not endeavored to establish objective criteria that would accommodate its interests while avoiding arbitrary and inconsistent application. Until it does, the First Amendment provides a time-honored remedy for those who encounter speech—whether on a license plate, bumper sticker, or shirt—that they believe objectionable: They may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id*. at 21.

Or switching lanes.

DATED: March 20, 2024

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Dated: March 20, 2024

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CERTIFICATE OF SERVICE

I certify that on March 20, 2024, I served a true and exact copy of the foregoing document via the Court's e-file system upon the following counsel of record:

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