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

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

PRINCIPAL BRIEF OF APPELLANT LEAH GILLIAM

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ORAL ARGUMENT REQUESTED

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Ms. Gilliam's brief uses the following designations:

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

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

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

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

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IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred by concluding that personalized plates are government speech.

2. Whether Tenn. Code Ann. § 55-4-210(d)(2) unconstitutionally discriminates on the basis of both content and viewpoint in violation of the First and Fourteenth Amendments.

3. Whether Tenn. Code Ann. § 55-4-210(d)(2) is unconstitutionally vague in violation of the Fourteenth Amendment.

4. Whether, as applied to Ms. Gilliam, Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate Ms. Gilliam's Fourteenth Amendment right to procedural due process.

5. Whether the Trial Court erred by failing to accord any weight to the case-dispositive admissions from the Department's Tenn. R. Civ. P. 30.02(6) depositions.

6. Whether the Trial Court erred by failing to assess discovery sanctions.

7. Whether the Trial Court erred by granting the Defendant Commissioner qualified immunity regarding Ms. Gilliam's damages claim.

8. Whether Ms. Gilliam is entitled to her attorney's fees and costs incurred both in the Trial Court and on appeal.

V. APPLICABLE STANDARDS OF REVIEW

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

2. "The determination of whether a statute is constitutional is a question of law, which [this Court] review[s] de novo on appeal." *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *13 (Tenn. Ct. App. Dec. 12, 2019).

3. The Trial Court's determination of the appropriate sanction to impose for discovery abuse is reviewed for abuse of discretion. *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988).

4. "The admission or exclusion of evidence is within the trial court's discretion" and "should be reviewed to determine: (1) whether the factual basis for the decision is supported by the evidence, (2) whether the trial court identified and applied the applicable legal principles, and (3) whether the trial court's decision is within the range of acceptable alternatives." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

VI. INTRODUCTION

The primary question presented in this appeal is whether "personalized" license plates are the government's speech. Nearly every court to consider this question has concluded that personalized license plates are—as their title suggests—*personal* speech.[1] Indeed, with just one exception, every court that has considered this question following the U.S. Supreme Court's decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017), has agreed that personalized plates are personal speech.[2] The lone post-*Matal* outlier is the Panel's contrary judgment below.

The unanimous post-*Matal* authority concluding that personalized plates are personal speech is not Ms. Gilliam's strongest claim in this appeal, though. Instead, in this unusual case, the Parties litigated the question at a full-blown trial, and the trial record permits no other conclusion. Here, for instance, Trial Exhibit #1—the first deposition of the Department of Revenue's designated Tenn. R. Civ. P. 30.02(6)

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[1] *See Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (2019); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (2020); *Ogilvie v. Gordon*, 540 F. Supp. 3d 920, 926 (N.D. Cal. 2020); *Bujno v. Commonwealth, Dep't of Motor Vehicles*, 86 Va. Cir. 32 (2012); *Montenegro v. New Hampshire Division of Motor Vehicles*, 166 N.H. 215 (2014); *Matwyuk v. Johnson*, 22 F.Supp.3d 812, 823 (2014); *Mitchell v. Maryland Motor Vehicle Admin.*, 148 A.3d 319, 325 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016); *Mitchell v. Maryland Motor Vehicle Admin.*, 126 A.3d 165, 186 (Md. 2015), *aff'd*, 148 A.3d 319 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016)); *Higgins v. Driver & Motor Vehicle Servs. Branch*, 335 Or. 481, 488, 72 P.3d 628, 632 (2003).

[2] *See Kotler*, 2019 WL 4635168, at *7; *Hart*, 422 F. Supp. 3d at 1233; *Carroll*, 494 F. Supp. 3d at 166; *Ogilvie*, 540 F. Supp. 3d at 926.

representative—reflects the Department's unqualified admission that Ms. Gilliam's personalized license plate conveys "Ms. Gilliam's own unique message[,]" and "not the government's message":

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

Tr. Ex. 1 at 28:5–15. In a second Tenn. R. Civ. P. 30.02(6) deposition taken just five days before the Parties' trial, the Department's designated representative also confirmed that the Department did not wish to change to that testimony. *See* Tr. Ex. 2 at 44:3–9.

Further, Tennessee's own website advertising its personalized plate program indicates to applicants in plain terms that personalized plates reflect "**your own** unique message[,]" rather than the government's message:

Apply and Choose Your Message Online

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

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

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

Personalized Plates Application

See Tr. Ex. 1, at Deposition Ex. #2 (emphasis added). The Department admitted that this website "accurately characterize[s] the personalized plate program[,]" *see* Tr. Ex. 1 at 7:16–8:1, and the Department admitted further that it does not have "any reason to believe that anything on this website is inaccurate[.]" *See id.* at 8:3–5.

Whether due to the Government's own website advertising that personalized plates reflect "your own unique message[,]" *see* Tr. Ex. 1, at Deposition Ex. #2, or whether due instead to what other courts to consider the same question presented here have characterized as "common sense," *Kotler*, 2019 WL 4635168, at *7, reliable polling—conducted by a qualified expert who the Trial Court agreed was a "highly

recognized, experienced pollster"—"established by a dispositive 87% that Tennesseans across the state consider the configurations on a personalized plate to be the message of the vehicle owner and not the message of the State of Tennessee." *See* R. at 3241. The reliability of that poll was also supported by the Defendants' discovery responses. For example, other than the three judges on the Panel below, the Defendants indicated through an interrogatory response that they could not identify even a single person in the entire State of Tennessee who held the view that personal plates expressed the government's speech. *See* Tr. Ex. 2, at Deposition Ex. 5, p. 2 (Interrogatory #3).

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

As noted above, in advance of trial, the Defendants indicated through an interrogatory response that other than the three judges on the Panel, they could not identify anyone who held the view that personal plates were government speech. *See* Tr. Ex. 2, at Deposition Ex. 5, p. 2 (Interrogatory #3). They also maintained that response up to trial and

confirmed it under oath five days beforehand. *See* Tr. Ex. 2 at 36:9–37:4. Even so, the Defendants called—and over the Plaintiff's objection, they were permitted to call—a surprise witness, Ms. Tammie Moyers, to testify in a manner contrary to the position that the Department's designated representative had taken across two 30.02(6) depositions.

At trial, Ms. Moyers advanced the view that personalized plates convey the government's message. During cross-examination, though, Ms. Moyers conceded that—according to her—it only "looks" that way. *See* Trial Tr. (Vol. II) at 247:18–23. Regardless of how it "looks," though, *see id.*, *in reality*, Ms. Moyers agreed that the messages on personalized plates are not actually the Department's—or the Defendant Commissioner's—at all. *See* Trial Tr. (Vol. II), at 248:3–13. Thus, Ms. Moyers admitted that the Department and the Commissioner did not and do not approve of any number of active personalized plate messages in Tennessee. *See id.*

Notwithstanding the foregoing, the Panel determined that personalized plates are the government's speech, rather than personal speech. *See* R. at 3213–51. In reaching this conclusion, the Panel accorded "no weight" to any of the case-dispositive admissions in the Defendants' 30.02(6) depositions, and it held that it "is not considering any part" of them. *See* R. at 3218. The Panel also failed to acknowledge the Defendants' admission that personalized plates "contain some individual speech as a matter of fact[.]" *Compare id. with* Tr. Ex. 6 at 6.

As a result, the Panel upheld Tenn. Code Ann. § 55-4-210(d)(2), a statute that facially discriminates on the basis of viewpoint. *See id.* ("The

commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency . . . ."). As the U.S. Supreme Court has clearly established, though, "that is viewpoint discrimination[,]" and the First Amendment prohibits it. *See Matal*, 137 S. Ct. at 1763 ("in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint."). In so holding, Tennessee has temporarily become the only state to extend the bounds of the government speech doctrine to personalized license plates following the U.S. Supreme Court's 2017 decision in *Matal*, 137 S. Ct. at 1760, wherein the Supreme Court expressly cautioned that its ruling in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015)—a case in which the Supreme Court "took pains not to express an opinion on vanity plates," *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020)—"likely marks the outer bounds of the government-speech doctrine." *Matal*, 137 S. Ct. at 1760.

For these reasons and several others, the Trial Court Panel's ruling is legally unsupportable; it is factually unsupportable; and it is out of step with the overwhelming majority of courts that have considered the same question. Accordingly, the Trial Court's judgment should be reversed. So, too, should this Court reverse the Trial Court's evidentiary rulings refusing to consider case-dispositive 30.02(6) admissions and refusing to assess discovery sanctions. Thereafter, this Court should remand with instructions to enter judgment in Ms. Gilliam's favor; grant Ms. Gilliam the relief that she sought in her Complaint; and award Ms. Gilliam her reasonable attorney's fees and costs incurred, both before the Trial Court and on appeal.

VII. STATEMENT OF THE CASE

This is an appeal from a three-judge Chancery Court Panel's final judgment dismissing Plaintiff-Appellant Leah Gilliam's claims with prejudice following a bench trial on the merits. *See* R. at 3213–52. Chronologically, the proceedings unfolded as follows:

A. Plaintiff's Complaint, Referral to Three-Judge Panel, and the Defendants' Answer

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

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

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

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

To remedy her constitutional injuries, Ms. Gilliam sought

injunctive and declaratory relief; "damages in an amount of $1.00 per day that she was unlawfully forbidden from displaying her constitutionally protected vanity plate[;]" and an award of reasonable costs and attorney's fees. *See* R. at 12. Ms. Gilliam sued Defendant Gerregano "in his official capacity with respect to Plaintiff's claims for injunctive and declaratory relief" and "in his individual capacity with respect to the Plaintiff's claim for damages." *See* R. at 4–5, ¶ 10. By contrast, Ms. Gilliam sued the Attorney General "in his official capacity only regarding the Plaintiff's claims for declaratory relief." *See id.* at 5, ¶ 11. Contemporaneously with the filing of her Complaint, Ms. Gilliam also applied for a temporary injunction. *See* R. at 21–22; R. at 23–123.

On July 9, 2021, the Defendants filed a request for a special three-judge panel. *See* R. 141–74. The presiding judge determined that Ms. Gilliam's Complaint qualified for referral to a three-judge panel based on the novel law enabling that referral, *see* R. at 176–181, which the General Assembly had just enacted because "Nashville chancellors have ruled against the state in several high-profile cases" and the Government was tired of losing. *See* Andy Sher, *Tennessee Republican lawmakers OK new three-judge panels to consider legal challenges against state*, TIMES FREE PRESS (May. 6, 2021), https://www.timesfreepress.com/news/local/story/2021/may/06/tn-republican-lawmakers-ok-new-three-judge-panels/546454/#/questions. The Tennessee Supreme Court appointed a three-judge panel on July 22, 2021. *See* R. at 182.

The Defendants answered Ms. Gilliam's Complaint on August 2,

2022. *See* R. at 190–202. Among other defenses raised in their Answer (some of which the Defendants later repudiated or abandoned), the Defendants asserted that: "Tennessee's personalized license plate program involves government speech, which is outside the scope of the First Amendment." *See* R. at 200.

B. Temporary Injunction Proceedings

On July 23, 2021, Ms. Gilliam renewed her application for a temporary injunction. *See* R. at 183–84. On August 2, 2021, the Panel scheduled a hearing and set a briefing schedule on Ms. Gilliam's application. *See* R. at 188–89.

The Defendants responded in opposition to the Plaintiff's application for a temporary injunction on August 17, 2022. *See* R. at 203–62. As evidentiary support for their opposition, the Defendants relied upon the Declaration of Ms. Demetria Michelle Hudson. *See* R. at 228–62. Ms. Hudson's initial Declaration was not executed under penalty of perjury, but she ultimately executed a Supplemental Declaration under penalty of perjury that reaffirmed the contents of her initial Declaration on August 25, 2021. *See* R. at 619–24.

The contents of Ms. Hudson's initial Declaration *were* submitted based on an assertion of personal knowledge, however. *See* R. at 228. Among other factual assertions contained in that Declaration, Ms. Hudson also attested with specificity that: "In May of 2021, the Department received a complaint that the configuration appearing on the personalized plate issued to Plaintiff carried connotations offensive to good taste and decency." *See* R. at 230, ¶ 12. Ms. Hudson's sworn

Supplemental Declaration, too, repeated this claim. *See* R. at 621, ¶ 12.

Ms. Hudson's professed declaration of both her personal knowledge regarding the claims contained in her Declaration and the substance of those claims would eventually become relevant over the course of two later depositions. In particular, it became clear that in her Declaration, Ms. Hudson had made serious factual misrepresentations, including with respect to the purported "complaint" about the Plaintiff's personalized license plate, its contents, and her professed personal knowledge of both. *Compare* R. at 621, ¶ 12 ("In May of 2021, the Department received a complaint that the configuration appearing on the personalized plate issued to Plaintiff carried connotations offensive to good taste and decency.") *with* Tr. Ex. 1 at 16:1–2 (Q. "And do you know what the complaint indicated?" A. "No."); *with* R. at 3224 ("The testimony of Ms. Moyers [at trial] established that the Department has received no complaints by anyone that they were offended by the Plaintiff's plate during its continuous display for eleven years.").

Before the hearing on Ms. Gilliam's application for a temporary injunction, the Plaintiff deposed a designated Tenn. R. Civ. P. 30.02(6) representative of the Department of Revenue. *See* Tr. Ex. 1. This deposition—highlighted portions of which were admitted at trial as Exhibit 1, *see* Trial Tr. at 24:2–25:9—was overwhelmingly favorable to the Plaintiff's positions in nearly every material respect. *See generally* Tr. Ex. 1. It also revealed that—despite the criteria that the Department of Revenue professed to apply neutrally to support the revocation of the Plaintiff's personalized license plate based on the numerical combination

"69," *see* R. at 229–30—the Department had approved each of the following personalized plates as well, all of which included the number "69" for overtly sexual purposes: "69420," "42069," "694FUN," "69BEAST," "69BOSS," "69HOSS," "69PONY," "AFINE69," "BAD69," "I69," "PONY69," "QUEEN69," "SMOKN69," "TOPLS69," and "X69." *See* Tr. Ex. 1 at 49:17–51:13, *id*. at 53:13–23. As the Department's designee, Ms. Hudson also testified that she could not even determine *whether the specific personalized plate at issue in this litigation*—"69PWNDU"—should be approved. *See* Ex. 1 at 42:16–25.

Because Ms. Hudson's initial Declaration: (1) was unsworn; (2) was not signed under penalty of perjury; and (3) was contradicted in multiple respects by her pre-hearing deposition testimony as the Department's designated 30.02(6) representative, the Plaintiff moved to strike Ms. Hudson's Declaration in advance of the Plaintiff's temporary injunction hearing. *See* R. at 585–99. On August 26, 2021, the Defendants furnished a Supplemental Declaration executed by Ms. Hudson under penalty of perjury to cure this deficiency. *See* R. at 619–24. The Supplemental Declaration also verified—under penalty of perjury—significant substantive modifications that Ms. Hudson made to her first deposition as the Department's 30.02(6) designee through a post-deposition errata sheet. *See* R. at 623.

The Panel held a hearing on the Plaintiff's application for a temporary injunction on August 27, 2021. *See* Tr. of Proceedings. On September 2, 2021, the Trial Court Panel issued a *Memorandum and Order (1) Denying Plaintiff's Application for a Temporary Injunction and*

(2) Denying Plaintiff's Motions on Excluding Evidence. As grounds, the Trial Court stated that it: "finds and concludes that the Plaintiff's license plate is government, not private, speech, and therefore the Department is not barred by the Free Speech Clause of the First Amendment to the U.S. Constitution from determining the content of the Plaintiff's license plate[.]" *See* R. at 629. Although this interlocutory order would ultimately be replaced by the Court's judgment following the Parties' trial, four findings within it are worthy of emphasis.

First, the Panel determined—based on the Defendants' explanation during the Parties' temporary injunction hearing—that the Department's "approval and use of license plates similar to the Plaintiff's are a mistake." *See* R. at 630. This finding matters, because by the time of trial four months later, the Department had only revoked four of the "similar" plates at issue: "I69, XTC69, 69420, and 42069." *See* Tr. Ex. 3. Thus, after four months of review, unmistakably sexual license plates containing the numerical combination "69"—including, for example, "TOPLS69" (which appears as an approved license plate on page 2055 of Tr. Ex. 2 within Deposition Ex. #6)—still remained approved, notwithstanding that the Defendants had previously convinced the Panel to find that they were issued by "mistake[,]" *see* R. at 630.

Second, despite unqualified, case-dispositive admissions from the Defendants' designated 30.02(6) designee on the central question presented—including admissions that Ms. Gilliam's personalized license plate conveys "Ms. Gilliam's own unique message[,]" and "not the government's message[,]" *see* Tr. Ex. 1 at 28:5–15—these admissions

were mentioned nowhere in the Panel's order. *See* R. at 627–55. The order did not mention the Government's website advertising Tennessee's personalized plate program, either, which declared without ambiguity that: "In Tennessee, license plates can be personalized with your own unique message." *See* Tr. Ex. 1, at Deposition Ex. #2.

Third, the Panel determined that it "overrules the Plaintiff's motion for exclusion of the errata sheet to Ms. Hudson's deposition. Tennessee Civil Procedure Rule 30.05 allows not only changes to form but also substance." R. at 630. This finding matters, too, because when Ms. Hudson was eventually examined about those substantive changes to her errata sheet during a second deposition, she admitted—remarkably—that *her errata sheet* was inaccurate:

Q. So can you tell or do you know that they should be rejected?

MR. PORCELLO: Objection to the form.
THE WITNESS: I wouldn't know that -- if they need to be rejected, without using my tools.
BY MR. HORWITZ:
Q. But that's not what your errata sheet says, is it?
MR. PORCELLO: Objection to the form.
THE WITNESS: No.
BY MR. HORWITZ:
Q. Is your errata sheet accurate then?
MR. PORCELLO: Objection to the form.
THE WITNESS: No.
MR. HORWITZ: I'd like to make this Exhibit 9.

See Tr. Ex. 2 at 50:24–51:15.

Fourth, based on Ms. Hudson's sworn Supplemental Declaration, the Panel made affirmative factual findings that: (1) "In May of 2021, the Department received a complaint that the configuration appearing on the personalized plate issued to Plaintiff carried connotations offensive to good taste and decency[,]" *see* R. at 636, and (2) "one unidentified person said that they were offended by the Plaintiff's plate on one occasion during its continuous display for eleven years." R. at 638. Discovery subsequently revealed that this sworn claim, too, was false. In truth, the Department had *never* received a complaint regarding Ms. Gilliam's personalized plate during its continuous display for eleven years. *See* R. at 3224 ("The testimony of Ms. Moyers [at trial] established that the Department has received no complaints by anyone that they were offended by the Plaintiff's plate during its continuous display for eleven years."). Further, the person that the Defendants had falsely claimed was "unidentified" was not actually unidentified at all; instead, he was *the Department of Revenue's Chief of Staff*. *See* R. at 277. The substance of the Chief of Staff's commentary—which Ms. Hudson had originally convinced the Panel to find was a "complaint" about "offensive" connotations—also turned out, instead, to have stated as follows: "Hahah thank you for your citizens report." Tr. Ex. 5 at 3.

C. Pre-Trial and Trial Proceedings

Based, *inter alia*, on the Panel's order denying her application for a temporary injunction, it was clear to Ms. Gilliam that the Panel would not permit her to prevail. Accordingly, Ms. Gilliam moved the Panel to

consolidate the temporary injunction hearing with the trial on the merits and enter judgment against her so that she could take an immediate appeal. *See* R. at 681–97. The Trial Court Panel denied Ms. Gilliam's motion and set the case for trial instead. *See* R. at 757–64.

The Parties thereafter engaged in pre-trial discovery. Over the course of two separate 30.02(6) depositions, the Department's designee testified that she could not explain or offer any testimony regarding any of the Defendants' asserted defenses despite the defenses in the Defendants' Answer being one of just two noticed deposition topics. *See* Tr. Ex. 1 at 65:14–66:11 (testifying that she could not explain any of the Defendants' defenses); Tr. Ex. 2 at 44:6–9 (testifying that she did not have any additional changes to make to the testimony from her first deposition). On this ground and others—including that the Defendants' designee had submitted a fraudulent errata sheet following her first deposition that she admitted was not accurate during her second—the Plaintiff moved the Panel to issue discovery sanctions. *See* R. at 868–89. One of the sanctions that the Plaintiff sought was an order "that the Defendants are precluded from introducing testimony in support of their defenses at trial, because they produced a woefully unprepared 30.02(6) witness who could not testify in support of any of them during either of two depositions[.]" R. at 889. The Defendants responded in opposition, insisting that Ms. Hudson "was adequately prepared." R. at 3150. The Panel denied the Plaintiff's motion. *See* R. at 3190.

A bench trial was held before the Panel as scheduled on December 8–9, 2021. *See* Trial Trs. (Vol. I–III). Ms. Hudson, among other witnesses, testified at that trial. With respect to the pre-trial 30.02(6)

depositions, Ms. Hudson also testified—contrary to what defense counsel had represented to the Panel before trial—that she had neither prepared for nor been told to prepare for any specific deposition topics. Trial Tr. (Vol. II) at 184:1–16. The Plaintiff accordingly renewed her motion for discovery sanctions based, *inter alia*, on the Defendants having furnished a now *admittedly* unprepared 30.02(6) witness. *See* R. at 203:11–15.

On January 18, 2022, the Panel issued its *Findings of Fact and Conclusions of Law from December 8–9 Bench Trial: and Final Order Dismissing Case with Prejudice*. *See* R. at 3213–52. The order denied the Plaintiff's renewed motion for discovery sanctions, *see* R. at 3218, and it embraced the Defendants' government speech defense based substantially upon the testimony of Tammie Moyers, *see* R. at 3216–25. Ms. Gilliam filed her Notice of Appeal the same day, *see* R. at 3257–59, and this appeal followed.

VIII. STATEMENT OF FACTS

Tennessee began issuing personalized license plates recently—in 1998. *See* R. at 3223 (taking judicial notice that "[i]n 1998, Tennessee . . . began issuing . . . personalized license plates."). The Plaintiff, Leah Gilliam, applied for her personalized license plate on December 13, 2010. *See id.* (citing Tr. Ex. 18). The Department of Revenue issued Ms. Gilliam her personalized plate—which contained the configuration "69PWNDU"—on January 31, 2011. *See* Tr. Ex. 7 at 1, ¶ 1.

After being issued her personalized license plate, Ms. Gilliam "displayed the plate on her car for eleven years." *See* R. at 3223. During this time, "the Department [] received no complaints by anyone that they

were offended by the Plaintiff's plate during its continuous display for eleven years." *See id.* at 3225. Ms. Gilliam's license plate never caused an accident. *See* Tr. Ex. 1 at 11:2–4. No children were harmed by it, either, *see id.* at 11:3–5, even though the Defendants had advanced that concern during the Parties' temporary injunction hearing. *See* Tr. of Proceedings at 72:12–14 (arguing that "the State has a legitimate interest in protecting the public, especially young children, from offensive terms on plates").

In fact, the only harm that the Defendants had claimed that Ms. Gilliam's personalized plate caused—"offending [one] person"—turned out to be fictional. *Compare* Tr. Ex. 1 at 11:22–12:6 *with* Tr. Ex. 2 at 29:2–17 (admitting that the report did not say that the Plaintiff's license plate was offensive and, in fact, was "not a complaint at all"). The Defendant Commissioner revoked Ms. Gilliam's personalized plate on a "summary" and "prehearing" basis anyway, though, and he exposed Ms. Gilliam to the immediate threat of criminal liability, a fine, and up to 30 days in jail if she did not acquiesce. *See id.* at 23:6–25. As grounds for that summary, pre-hearing revocation, the Department indicated by letter that Ms. Gilliam's plate "has been deemed offensive." *See* R. at 17; Tr. Ex. 7, at 2, ¶ 2.

With respect to the personalized plate application process: Tennessee maintains a website encouraging applicants to apply for personalized license plates. *See* Tr. Ex. 1, at Deposition Ex. #2. The website encourages applicants to "Apply and Choose Your Message[,]" and it states that: "In Tennessee, license plates can be personalized with

your own unique message." *See id.* A screenshot of the website at issue is attached to Ms. Hudson's first deposition (Tr. Ex. 1) at Deposition Exhibit #2, and it appears as follows:

Apply and Choose Your Message Online

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

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

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

Personalized Plates Application

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

On the actual personalized plate application itself, the Government reserves vast censorship authority over plate approvals, stating: "Tennessee reserves the right to refuse to issue objectionable combinations." *See* Tr. Ex. 18. In concluding that personalized plates are the government's speech, the Panel emphasized this reservation

twice. *See* R. at 3220; R. at 3223. The United States Supreme Court, however, has emphasized that this consideration is both improper and susceptible to "dangerous misuse." *See Matal*, 137 S. Ct. at 1758 ("while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. **If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.**") (emphasis added).

The Department admitted repeatedly that nobody "other than Ms. Gilliam designed the combination of letters and numbers on her personalized plate[.]" *See* Tr. Ex. 1 at 27:17–22. *See also id.* at 27:24–25. According to the Department's designee, Ms. Gilliam's personalized license plate also conveys "Ms. Gilliam's own unique message[,]" and "**not the government's message**":

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

Id. at 28:5–15 (emphasis added). In a second Tenn. R. Civ. P. 30.02(6)

deposition taken just five days before the Parties' December 8, 2021 trial, the Department's designated representative also confirmed that the Department did not want to change any of the above testimony, which was not among the testimony modified by her first deposition's errata sheet. Tr. Ex. 2 at 44:3–9. *See also id.* at Deposition Ex. #8.

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

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

Id. at 76:24–77:3.

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

> [I]s about as conclusive a finding as one ever sees in rigorously

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

Id. at 78:5–11.

The reliability of Mr. Secrest's poll—and the fact that "virtually no one" associates personalized license plates with government speech, *see id.*—was confirmed by the Defendants' discovery responses. In particular, other than the Panel's three judges, the Defendants indicated through an interrogatory response that they could not identify a single specific member of the public who held the view that any personalized plate in Tennessee reflects the government's speech or message:

3. Please identify by name and address each and every member of the public known to the Defendants who has stated or indicated a belief that any personalized plate in Tennessee reflects the government's speech or message.

RESPONSE:

Objection: It is irrelevant and immaterial whether any layperson has ever expressed an opinion regarding the legal conclusion that Tennessee personalized license plates constitute government speech as that concept is understood in decisions of the U.S. Supreme Court and other courts. Of course, in this case, a panel of three Tennessee judges recently expressed the opinion that Tennessee personalized license plates constitute government speech.

Without waiving any objection, Defendants have not conducted a poll or otherwise tracked whether members of the public have expressed the belief that Tennessee personalized license plates convey a government message (nor are Defendants required to do so). Defendants have likewise not conducted a poll or otherwise tracked whether members of the public have expressed the belief that Tennessee personalized license plates convey a private message. It is axiomatic, however, that nearly every person who views a Tennessee license plate, including personalized, understands that the plate is issued by the State and that the unique alphanumeric combination on the plate communicates the government message that the vehicle is registered and can be identified by the unique alphanumeric combination assigned to it.

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See Tr. Ex. 2, at Deposition Ex. #5, p. 2 (Interrogatory #3). The

Defendants also acknowledged that they "have likewise not conducted a poll or otherwise tracked whether members of the public have expressed the belief that Tennessee personalized license plates convey a private message." *Id.*

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

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

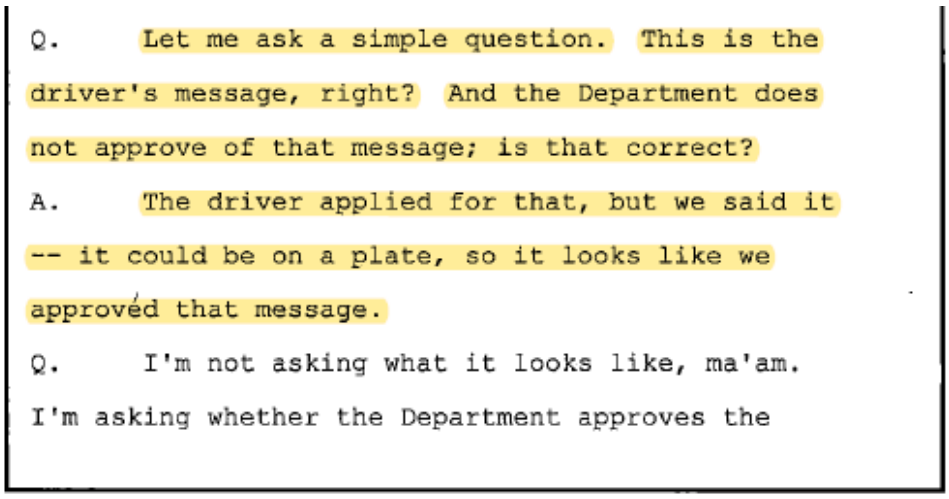
The Defendants asserted a contrary view through the testimony of surprise witness Tammie Moyers. Ms. Moyers vigorously disputed the

position that the Department of Revenue's designated representative had taken across the Defendants' two 30.02(6) depositions. Unlike the Defendants' designated 30.02(6) witness, though, Ms. Moyers conceded that she "can't speak for the Department," "can't speak for [Defendant] Commissioner Gerregano," and does not "have authority to speak for the Department[.]" Trial Tr. (Vol. II), at 226:7–18.

Ms. Moyers also agreed that she was "a member of the public[,]" *see* Trial Tr. (Vol. III), at 311:1–2. Ms. Moyers, however, was not identified by the Defendants in the aforementioned interrogatory response, which required them to "identify by name and address each and every member of the public known to the Defendants who has stated or indicated a belief that any personalized plate in Tennessee reflects the government's message." Tr. Ex. 2, at Deposition Ex. 5, p. 2 (Interrogatory #3). Just five days before the Parties' trial, the Defendants had also testified through their designated 30.02(6) representative that they did not have any names to add to that interrogatory response. *See* Tr. Ex. 2 at 36:9–37:4. Ms. Moyers thereafter acknowledged during her testimony that she had told the Defendants that she "believed that personalized plates in Tennessee reflect the government's speech or message" during her pre-trial preparation, *see* Trial Tr. (Vol. III), at 313:14–21—a clear indication that the Defendants' failure to disclose her in response to the relevant interrogatory was strategic and willful.

At trial, Ms. Moyers repeatedly advanced the view that personalized plates are the government's message. During cross-examination, though, she conceded that—at least according to her (a "dispositive" percentage of the public disagrees, *see* R. at 3241)—it only

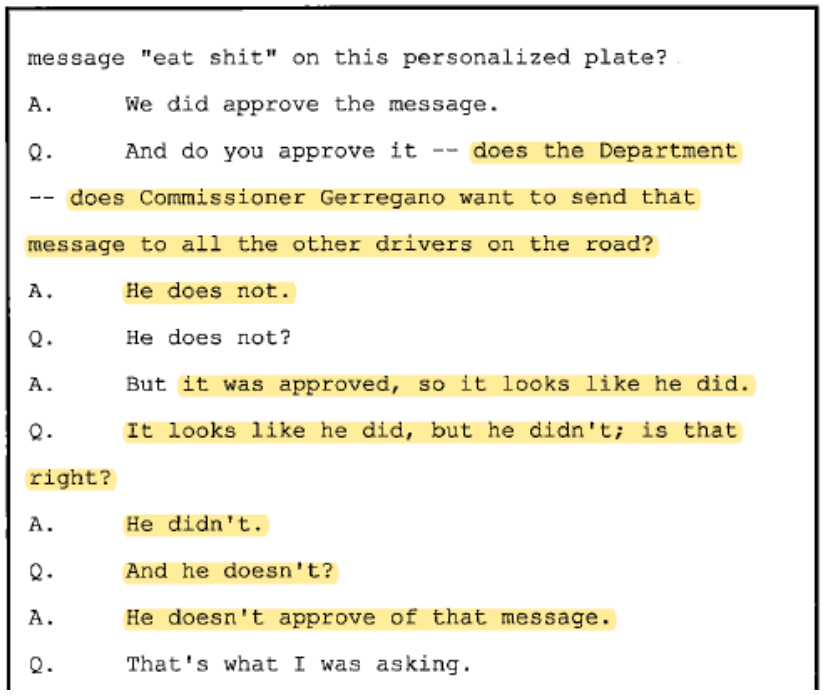
"looks like" that:



Q. Let me ask a simple question. This is the driver's message, right? And the Department does not approve of that message; is that correct?
A. The driver applied for that, but we said it -- it could be on a plate, so it looks like we approved that message.
Q. I'm not asking what it looks like, ma'am. I'm asking whether the Department approves the

Trial Tr. (Vol. II), at 247:18–23.

Despite the way it "looks," though, *see id.*, Ms. Moyers agreed that, *in reality*, the messages that are conveyed on personalized plates are neither the Department's nor the Defendant Commissioner's messages, and the Commissioner does not approve of them:



message "eat shit" on this personalized plate?
A. We did approve the message.
Q. And do you approve it -- does the Department -- does Commissioner Gerregano want to send that message to all the other drivers on the road?
A. He does not.
Q. He does not?
A. But it was approved, so it looks like he did.
Q. It looks like he did, but he didn't; is that right?
A. He didn't.
Q. And he doesn't?
A. He doesn't approve of that message.
Q. That's what I was asking.

Trial Tr. (Vol. II), at 248:3–13.

By the end of Ms. Moyers' testimony, it became obvious to everyone in the courtroom—including to the Panel itself, *see* Trial Tr. (Vol. III), at 310:4–5 ("CHANCELLOR JENKINS: Counsel, we get your point. Keep moving.")—that Ms. Moyers had been coached just a bit *too* strongly not to deviate from the view that personalized plates are government speech. *See id.* at 307:5–309:23. In particular, Ms. Moyers admitted that her rigid testimony that personalized license plates contain "purely the government's speech" conflicted directly *with the Defendants' own position at trial,* which admitted that personalized plates actually *do* contain some personal speech. *Compare id.* at 307:21–24 (Q. "Ma'am, is it your position that personalized plates, as a factual matter, contain purely the government's speech?" A. "Yes."), *with* Tr. Ex. 6 at 6 (Defendants' party admission that: "Defendants have not argued that license plates—as a factual matter—contain purely the State's speech. . . . [T]he plates contain some individual speech as a matter of fact[.]")

The foregoing notwithstanding, the Panel declined to exclude Ms. Moyers' testimony over the Plaintiff's objection that her testimony constituted unfair surprise, was contrary to the Defendants' interrogatory response failing to disclose her known view on the matter, and was contrary to the 30.02(6) deposition testimony given by the Department's designee as recently as five days before trial. *See* Trial Tr. (Vol. III), at 322:9–11. *See also id.* at 321:25–322:18. Instead, the Panel rewarded the Defendants' strategic discovery abuse by relying on Ms. Moyers's testimony extensively and allowing it to displace—*entirely*—the

myriad case-dispositive admissions in the Defendants' two 30.02(6) depositions, which the Trial Court Panel assigned "no weight." *See* R. at 3218 ("As to the testimony of Director Hudson: her first deposition, her second deposition . . ., the Panel places no weight on the testimony—for or against either party[.]"). Although the admissions in those depositions were case-dispositive, the Panel also claimed in its Order that "it is not prejudicial to the Plaintiff that the Panel is not considering any part of Ms. Hudson's testimony[.]" *Id.*

Thereafter, the Panel concluded that personalized plates are government speech, rather than personal speech. *See* R. at 3213–51. The Panel accordingly upheld as constitutional a facially viewpoint-discriminatory statute that requires the Department of Revenue to regulate "connotations offensive to good taste and decency[.]" *See* Tenn. Code Ann. § 55-4-210(d)(2). By enforcing this statute, the Government necessarily engages in viewpoint discrimination—an "egregious form of content discrimination" that is impermissible in any forum. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Worse: The Government engages in such viewpoint discrimination on an inherently subjective basis without any defined standards, because as both Ms. Moyers and Ms. Hudson separately admitted at trial, neither "connotations," nor "offensive," nor "good taste," nor "decency" are defined terms:

Q. What is the definition to your knowledge of connotations under this statute?
A. There's not a definition in the statute, I don't believe.
Q. What about offensive?
A. That is not in the statute.
Q. Good taste?
A. That is not.
Q. Decency?
A. No, sir.
Q. The Department make-up definitions for these terms, too?
A. Make-up?
Q. Are they written down anywhere?
A. I don't think they're written down anywhere.

Trial Tr. (Vol. II) at 228:10–24.

Q. Right, under the statute. Can you give me a statutory definition of that term?
A. No.
Q. What about offensive?
A. No.
Q. What about good taste?
A. No.
Q. What about decency?
A. No.

Id. at 191:11–19.

Given the foregoing, the evidence admitted at trial established that the Defendant Commissioner regulates connotations that are "offensive" to "good taste" and "decency" without reference to any statutory

definition. *Id.* Such determinations, it should be noted, are *inherently* (and hopelessly) subjective. *Cf. Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 CIV 10175 JSM, 2001 WL 170672, at *13 (S.D.N.Y. Feb. 21, 2001) ("a Latin proverb is particularly appropriate here: 'De gustibus non est disputandum,' or 'there is no disputing matters of taste.'") (quoting See B. Evans, Dictionary of Quotations 679 (1968)). As a consequence, the Department's wildly inconsistent applications of the statute's undefined terms are hilarious, albeit unsurprising.

For instance, the evidence admitted at trial powerfully reflects that the Department has approved a vast number of personalized plates that do not comport with the extra-statutory standards that the Department professed to apply throughout the proceedings below. For example, before Plaintiff's counsel was cut off by the Panel for introducing cumulative evidence on the matter, trial testimony reflected that the Department had approved personalized plates containing each of the following messages:

-"PHKAUF"[3] (audibly similar to "Fuckoff"[4]);

-"SHTUNOT"[5] (audibly similar to "Shit You Not"[6]);

-"OPHXGVN"[7] (audibly similar to "zero fucks given"[8]);

[3] Trial Tr. (Vol. II), at 236:10
[4] *Id.* at 235:24.
[5] *Id.* at 237:6.
[6] *Id.* at 237:9.
[7] *Id.* at 238:12.
[8] *Id.*

-"3JOH22A"[9] ("asshole" in a rearview mirror[10]);

-"BLZDEEP"[11] (audibly similar to the term "balls deep"[12]);

-"BADSS"[13] (audibly similar to the term "badass"[14]);

-"DEEZBLZ"[15] (audibly similar to the term "deez balls"[16]), as well as multiple additional iterations of the term "deez nuts[,]" including "DZNUTS," DZNUTTZ," DZNUTZ," and "DZNUTZ2"[17];

-"POOPOO"[18];

-"TIH2TA3"[19] ("eat shit" in a rearview mirror)[20];

-"ASSASIN"[21] (an admittedly "violent" message[22] despite a purported prohibition on violent terms)

-"SUICIDE"[23] (ditto)

-"MAFIA"[24] (ditto)

-"MOBJOB"[25] (ditto)

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[9] *Id.* at 238:25.
[10] *Id.* at 239:1–3.
[11] *Id.* at 240:6.
[12] *Id.* at 240:13–17.
[13] *Id.* at 240:23.
[14] *Id.* at 240:25.
[15] *Id.* at 241:11.
[16] *Id.* at 241:13.
[17] *Id.* at 241:21–242:12.
[18] *Id.* at 245:3–9.
[19] *Id.* at 245:16.
[20] *Id.* at 246:3–8.
[21] *Id.* at 248:25.
[22] *Id.* at 249:1–2.
[23] *Id.* at 249:18.
[24] *Id.* at 250:13.
[25] *Id.* at 252:17.

-"YURNXT"[26] (ditto again)

-"BUTNKD"[27] (audibly similar to "butt-naked"[28])

-"DRTYGRL"[29] (audibly similar to "dirty girl"[30])

-"SEXY"[31] (despite a purported prohibition on sex references[32]), as well as "SEXY01," "SEXY5," "SEXYGMA," "SEXYGRL," and "lots of [other] different references to sex explicitly on the personalized plates" that Tennessee has approved,[33] such as "BIGSEXI," "SEXYWMN," "SMKNHOT," "SMOKN69," "MRSEXY," "IMCMMIN," and "BIGPMPN."[34]

The Panel thereafter cut off the Plaintiff's questioning about the Department's approval of dozens of additional plates—a small, non-exhaustive sample of approved messages that should purportedly have been prohibited under the Department's guidelines—on the basis that "this appears to be cumulative at this point."[35] Accordingly, Plaintiff's counsel was cut off before questioning Ms. Moyers about additional approved plates like "'FAP2IT,' which . . . is a very common term for masturbation, and then 'BIGRACK', and then 'BUTSTUF[,]'" and also before addressing other approved personalized plates similar to the

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[26] *Id.* at 253:13–17.
[27] *Id.* at 254:5.
[28] *Id.* at 254:8.
[29] *Id.* at 254:22.
[30] *Id.* at 254:24.
[31] *Id.* at 255:6.
[32] *Id.* at 255:9–12.
[33] *Id.* at 255:13–254:7.
[34] *Id.* at 257:10–265:12.
[35] *Id.* at 265:17–18.

Plaintiff's revoked plate, such as: "SIXTY9," "694FUN," "69BOSS," "69HOSS," "69PONY," "MAGIC69," "TOPLS69," "PWN," and "PWNDLOL."[36] Plaintiff's counsel was additionally cut off before addressing further messages in the Department's record of approved personalized plates—including explicitly racist messages (*see, e.g.,* "COONHTR" on page 381 of Tr. Ex. 2) and explicitly white supremacist messages (*see, e.g.,* "88POWER" on page 1022 of Tr. Ex. 2, or "ARYANSH" on page 1067 or Tr. Ex. 2)—despite the Department's purported prohibition on racist messages. Notably, *if they were actually Commissioner Gerregano's messages*, such explicitly racist messages would presumably give rise to some form of civil rights liability or a claim of a hostile work environment, which they decidedly are not.

As grounds for limiting the Plaintiff's questioning on the matter, the Panel stated that: "We get your point." *See* Trial Tr. (Vol. II) at 275:7–10 ("We get your point. We get your point. And for the record we understand it's not exhaustive, but you've made a paper exhibit out of the ones you've picked out, so thank you."). The point, of course, was that the Department exerts minimal control over the messages contained on approved personalized plates; it acts arbitrarily and irrationally when approving personalized plate messages; and it enforces standards that are nowhere near as clear or robust as the Department—including Ms. Moyers—had claimed. Indeed, like the Department's designated 30.02(6) witness before her, Ms. Moyers testified repeatedly in response to questions about various personalized plate messages that she was unable

[36] *Id*. at 268:4–274:10.

to determine one way or another whether they should be approved. *See, e.g.*, Trial Tr. (Vol. II) at 229:21–23 (Q. "What about caffeine?" A. "I know it's in coffee, but it's also a drug. I'm not sure."); *id.* at 264:11–13 ("You can't tell me if Mr. Sexy is a sex reference sitting here today?" A. "I'm not sure."); *id.* at 193:1–25 (Q. "if Nancy Reagan wanted a 'Just Say No' license plate, would that be allowed?" . . . . A. "I can't determine that without going through the process.").

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

IX. ARGUMENT

A. PERSONALIZED LICENSE PLATES ARE NOT GOVERNMENT SPEECH.

Nobody involved in this case disputes that the government may speak for itself, and that "the Government's own speech . . . is exempt from First Amendment scrutiny." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). As the U.S. Supreme Court has observed, communicating governmental messages is necessary for government to "function." *See Matal*, 137 S. Ct. at 1757 (cleaned up). Government speech accordingly enables the government to communicate its policies

and ideas to the electorate, and it enables the electorate to hold the government accountable for them thereafter. *See Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

With the above considerations in mind, both Parties have maintained that government speech is involved in this case. For her part, Ms. Gilliam has asserted that Tennessee's government spoke to its citizens when it created a website to advertise Tennessee's personalized plate program. *See* Tr. Ex. 1, at Deposition Ex. #2. That website encourages applicants to "Apply and Choose Your Message[.]" *Id.* It also expressly *disassociates* the government from personalized plate messages and states that the resulting personalized plate messages are *the applicant's*. *See id.* ("In Tennessee, license plates can be personalized with **your own** unique message.") (emphasis added). Accordingly, the Parties agree that government speech is involved in this case.

The Parties disagree, however, about whether unique, citizen-created, and personalized messages on license plates are government speech. As noted above, the Government's own website advertising Tennessee's personalized plate program publicly and expressly disassociates the Government from the resulting citizen-created messages. *See id.* Even so, the Government maintains that it may lawfully regulate privately created messages for "offensive[ness]," for

"good taste," and for "decency" by reserving a right to disapprove them. *See* Tenn. Code Ann. § 55-4-210(d)(2).

This is not "government speech," though. Instead, it is straightforward, viewpoint-based censorship. *See Matal*, 137 S. Ct. at 1758 ("If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."). For that reason and others, Tenn. Code Ann. § 55-4-210(d)(2) should be declared unconstitutional and enjoined.

1. <u>Each of the non-dispositive *Walker* factors supports the conclusion that personalized plates are not government speech.</u>

To determine whether the government is speaking, the Supreme Court has made clear—in a recent case post-dating the Panel's judgment—that courts "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *See Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583, 1589 (2022). This review "is not mechanical; it is driven by a case's context rather than the rote application of rigid factors." *Id.* To facilitate the necessary review, courts consider: "several types of evidence to guide the analysis, including: [1] the history of the expression at issue; [2] the public's likely perception as to who (the government or a private person) is speaking; and [3] the extent to which the government has actively shaped or controlled the expression." *Id.* (citing *Walker*, 576 U.S. at 209–14). Here, all three non-dispositive factors favor Ms. Gilliam.

<u>*First*</u>, with respect to "the history of the expression at issue[,]" *id.*—

the Defendants failed to introduce any evidence that personalized plate messages have ever been used to convey a governmental message. This is not the Defendants' fault, of course. Instead, because the entire purpose of a personalized plate is to convey a personal message and to *disassociate* from a random, government-created combination, *see* Trial Tr. (Vol. I) at 47:15–49:5, other governmental defendants have similarly failed to muster such evidence under the same circumstances. *See Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *6 (C.D. Cal. Aug. 29, 2019) ("the Court is unaware of any history of states using the *customized* registration number configurations to speak."); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019) ("the Court disagrees that license plate *numbers*, separate and distinct from license plate *designs*, have historically been used to communicate messages from the State. . . . [V]anity plates convey a 'personalized message with intrinsic meaning (sometimes clear, sometimes abstruse) that is independent of mere identification and specific to the owner.'") (quoting *Mitchell v. Md. Motor Vehicle Admin.*, 450 Md. 282, 148 A.3d 319, 326 (2016)); *Ogilvie v. Gordon*, No. 20-CV-01707-JST, 2020 WL 10963944, at *3 (N.D. Cal. July 8, 2020) ("the State has not historically used the alphanumeric combinations on license plates to communicate messages to the public. . . . displaying information is not the equivalent of sending messages.").

Given that Tennessee's personalized plate program is a mere twenty-four years old, *see* R. at 3223 (taking judicial notice that "[i]n 1998, Tennessee . . . began issuing . . . personalized license plates."), one can safely assume that such evidence—if it existed—has not been lost to

history, either. Accordingly, the first non-dispositive *Walker* factor favors Ms. Gilliam.

Second, with respect to "the public's likely perception as to who (the government or a private person) is speaking[,]" *see Shurtleff*, 142 S. Ct. at 1589, the evidentiary record permits only one conclusion. In particular: (1) testimony furnished by the Department itself, *see* Tr. Ex. 1 at 28:5–15; (2) personalized plate owners themselves, *see* Trial Tr. (Vol. I) at 47:15–49:5; (3) expert testimony evidencing the public's actual likely perception of personalized plate messages, *see* Trial Tr. (Vol. I) at 68:24–78:11; and (4) the government's own website clarifying any remaining confusion, *see* Tr. Ex. 1, at Deposition Ex. #2—all uniformly support the conclusion that personalized plate holders are speaking personally. Perception aside, the Plaintiff also emphasizes that—even according to the Defendants—personalized plate holders are *actually* speaking personally when it comes to personalized plate messages as a matter of fact. *See* Tr. Ex. 6 at 6 (admitting that personalized plates "contain some individual speech as a matter of fact[.]").

Further, separate and apart from the one-sided evidentiary record on the issue, "common sense dictates that the public attributes any message on [a personalized plate] to the driver." *See Kotler*, 2019 WL 4635168, at *7. And to the extent that anyone in Tennessee lacks such "common sense," *see id.*, that person can simply consult the Government's own website advertising its personalized plate program to resolve the confusion, which clarifies for even the dimmest Tennesseans that personalized plates reflect "your own unique message[,]" *see* Tr. Ex. 1, at

Deposition Ex. #2, rather than the government's.

Accordingly, as other courts have concluded without difficulty, the public perception factor favors Ms. Gilliam as well. *See Kotler*, 2019 WL 4635168, at *7 ("Turning to audience perception, the Court thinks it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates. Although randomly-generated registration numbers, and license plates in general, may be closely identified with the state in the mind of the public, the same is not true of the personalized messages on vanity plates."); *Carroll*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) ("The portion of the plate at issue here – the unique alphanumeric sequence embossed on the metal – bears no indicia of government speech. . . . The very essence of vanity plates is personal expression.") (citing *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001)); *Ogilvie*, 2020 WL 10963944, at *3 ("it does not follow that Californians believe that the State is using the plates to send a message. Does the State seriously argue that someone viewing the license plate 'KNG KOBE,' for example, would infer that the California government was declaring Kobe Bryant the king of basketball, or of California, or of something else?"); *Hart*, 422 F. Supp. 3d at 1232 ("While plate *designs* are attributed by the populace to the state, vanity plates are not. The Kentucky personalization program, on its face, is concerned instead with the individual applicant's message. Even the statute establishing the personalization program in Kentucky describes vanity plates as consisting of 'personal letters or numbers significant *to the applicant*.') (quoting K.R.S. § 186.174(1)).

Third, with respect to "the extent to which the government has actively shaped or controlled the expression[,]" *see Shurtleff*, 142 S. Ct. at 1589—the evidence demonstrated that the government plays no role in crafting the message conveyed on a personalized plate. As the Department's 30.02(6) designee testified, nobody "other than Ms. Gilliam designed the combination of letters and numbers on her personalized plate[,]" *see* Tr. Ex. 1 at 27:17–22, and nobody from the Government designed the message on Ms. Gilliam's plate. *See id.* at 27:24–25.

Further, as to the extent of the Department's control: the Panel essentially concluded that "mistakes are made in the process of reviewing personalized plate applications" because there are too many applications per day for the Department to review competently. *See* R. at 3243 ("the Panel accredits the testimony of Ms. Moyers that mistakes are made in the process of reviewing personalized plate applications. Her testimony is supported by the evidence that five reviewers have 80 to 100 applications a day to review, and there are presently 60,000 active personalized plates."). Ms. Moyers' testimony did not merely indicate that "mistakes are made[,]" though. *See id.* Instead, her testimony—like Ms. Hudson's on behalf of the Department—supported the conclusion that *even the Department's employees* are unable to determine when a plate contravenes the Department's inherently arbitrary rules. *See, e.g.*, Trial Tr. (Vol. II) at 229:21–23 (Q. "What about caffeine?" A. "I know it's in coffee, but it's also a drug. I'm not sure."); *id.* at 264:11–13 ("You can't tell me if Mr. Sexy is a sex reference sitting here today?" A. "I'm not sure."); *id.* at 193:1–25 (Q. "if Nancy Reagan wanted a 'Just Say

No' license plate, would that be allowed?" . . . . A. "I can't determine that without going through the process.").

Given the substantially undefined and loosey-goosey nature of the criteria the Department applies, this is hardly surprising. As the Defendants admitted through counsel, their professed criteria only apply "generally," and "[i]t is ***impossible*** for the Department to predetermine specific criteria that will encompass all potentially objectionable configurations that may be submitted in the future[.]" *See* Tr. Ex. 4 at 5–6 (response to Interrogatory No. 7) (emphasis added). The Plaintiff also emphasizes that the obvious and consistent difficulty that the Department's witnesses had determining whether particular plates comported with Department's professed standards—difficulty exhibited by both Ms. Moyers *and* Ms. Hudson—could not be reconciled with the Defendants' position earlier in litigation to the effect that it would "ordinarily be apparent on the face of the vanity plate" whether a plate was objectionable or not. *See* Tr. Ex. 8 at 21.

In any event, the evidence admitted at trial demonstrated that the Department's control over personalized plate messages is so loose—and that so many plates that should have been denied under the criteria that the Department professed to apply are currently approved—that the Panel cut off the undersigned for presenting cumulative evidence on the matter. *See* Trial Tr. (Vol. II) at 275:7–10 ("We get your point. We get your point. And for the record we understand it's not exhaustive, but you've made a paper exhibit out of the ones you've picked out, so thank you."). Ms. Moyers also candidly admitted the historically loose nature of the Department's control. *See* Trial Tr. (Vol. II) at 244:8–24 (testifying

that before 2019, the review process was "not as strict as it is now."). *See also id.* at 245:7–9 (Q. "So tell me how 'POOPOO' slips through your process, if that's a mistake?" A. "I don't know."). The Defendants also judicially admitted, through counsel, that they do not go back to determine whether personalized plates were erroneously issued. *See* Tr. Ex. 11 at Excerpt 90:11–12.

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

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

Id.

This conclusion is not isolated, either. *See, e.g., Hart*, 422 F. Supp. 3d at 1233 ("The Transportation Cabinet argues that because every alphanumeric combination issued on any vanity plate in Kentucky has been reviewed and approved by its employees, those plates have acquired a "stamp of approval" from the Commonwealth. . . . Under the

Transportation Cabinet's logic, the Commonwealth is not only contradicting itself, but spewing nonsense. If the Court finds that vanity plates are government speech, then the Court would also be finding that Kentucky has officially endorsed the words 'UDDER', 'BOOGR', 'JUICY', 'W8LOSS' and 'FATA55'."); *Ogilvie*, 2020 WL 10963944, at *4 ("The fact that the government exerts regulatory control over speech cannot, on its own, transform that speech into government speech. . . . [The U.S. Supreme Court has determined that s]uch a holding 'would constitute a huge and dangerous extension of the government-speech doctrine[.]' . . . California's argument in this case raises the same concern.'") (quoting *Matal*, 137 S. Ct. at 1760).

For all of these reasons, the Panel erred in concluding that *any* of *Walker*'s factors supported the conclusion that personalized plates are government speech. The Panel's erroneous government speech determination should be reversed accordingly.

2. <u>The overwhelming weight of caselaw and scholarship supports the conclusion that personalized plates are not government speech.</u>

Applying the same analysis set forth above, the overwhelming majority of courts to consider whether personalized license plates—as opposed to specialty plates, which *are* designed and created by the government—are government speech have concluded that they are not. And other than the Panel's decision below, *every* court to consider that question after the U.S. Supreme Court's decision in *Matal* has concluded that personalized plates are personal speech. Thus, upon review, each of the following ten courts has rejected the Panel's contrary analysis below:

1. **The United States District Court for the Eastern District of Kentucky**. *See Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (2019);

2. **The United States District Court for the District of Rhode Island**. *See Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (2020)

3. **The United States District Court for the Northern District of California**. *See Ogilvie v. Gordon*, No. 20-CV-01707-JST, 2020 WL 10963944, at *3 (N.D. Cal. July 8, 2020);

4. **The United States District Court for the Central District of California**. *See Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019);

5. **The United States District Court for the Western District of Michigan**. *See Matwyuk v. Johnson*, 22 F.Supp.3d 812, 823 (2014);

6. **The Supreme Court of Oregon**. *See Higgins v. Driver & Motor Vehicle Servs. Branch*, 72 P.3d 628, 632 (Or. 2003);

7. **The Circuit Court of Virginia**. *See Bujno v. Commonwealth, Dep't of Motor Vehicles*, 86 Va. Cir. 32 (2012);

8. **The Supreme Court of New Hampshire** (by assumption only). *See Montenegro v. New Hampshire Division of Motor Vehicles*, 166 N.H. 215 (2014);

9. **The Court of Appeals of Maryland.** *See Mitchell v. Maryland Motor Vehicle Admin.*, 148 A.3d 319, 325 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016); and

10. **The Court of Special Appeals of Maryland**. *See Mitchell*

v. Maryland Motor Vehicle Admin., 225 Md. App. 529, 564 (2015).

Legal scholars, for their part, have overwhelmingly rejected the Panel's analysis of the issue, too. *See, e.g.,* Drew A. Driesen, *Vanity Lawfare: Vanity License Plates and the First Amendment*, 106 IOWA L. REV. 363, 401 (2020); Andy G. Olree*, Identifying Government Speech*, 42 CONN. L. REV. 365, 431 (2009); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U.L. REV. 605, 648–49 (2008); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U.L. REV. 587, 602–603 (2008).

By contrast, there is one lonely opinion—*Comm'r of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1206 (Ind. 2015)—that has reached a contrary conclusion. Of note, in response to questioning below about whether he knew of "any cases where *Vawter* has been cited with approval[,]" defense counsel responded that: "I have not checked the – recent appellate – recent citation history of *Vawter*." *See* Trial Tr. (Vol. III), at 348:1–5. The Plaintiff has doubts about that. There was also a correct answer. The answer is that with the sole exception of the Panel's decision, *Vawter*'s erroneous analysis has been forcefully rejected by every single court to address it. *See, e.g., Carroll*, 494 F. Supp. 3d at 167 ("I reject as wholly unpersuasive the reasoning of *Comm'r of Indiana Bur. of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1210 (Ind. 2015), an apparent outlier holding vanity plates government speech in ostensible reliance on *Walker*."); *Mitchell*, 450 Md. at 296 ("we reject the *Vawter* court's reasoning because vanity plates represent more than an extension by degree of the government speech found on regular

license plates and specialty plates. Vanity plates are, instead, fundamentally different in kind from the aforementioned plate formats."); *Hart*, 422 F. Supp. 3d at 1232 ("Setting aside the fact that the *Walker* court was specifically 'not [concerned] with the personalization program,' this Court is not persuaded by the analysis in *Vawter*. *Walker*, 135 S. Ct. at 2244. Both the *Vawter* court and the Defendant fail to address important differences between the specialized licenses plates at issue in *Walker*, and the vanity plates at issue here."); *Mitchell*, 225 Md. App. at 566–67 ("The problem with [*Vawter*'s] reasoning is that vanity plate messages that do not appear to be coming from the government are the rule, not the exception.").

Like every other court to evaluate the opinion, this Court should reject *Vawter*, too. *Vawter*'s analysis—upon which the Panel relied below—is hopelessly flawed, and its reading of *Walker*, 576 U.S. 200, is unsupportable.

In particular, unlike Tennessee's personalized plate program—which allows license plates to "be personalized with [an applicant's] own unique message[,]" *see* Tr. Ex. 1, at Deposition Ex. #2—*Walker* concerned specialty plates that were limited to "a selection of designs **prepared by the State**." *Id.* at 204 (emphasis added). Indeed, *Walker* itself emphasized this critical distinction, stating that:

> Finally, Texas law provides for personalized plates (also known as vanity plates). 43 Tex. Admin. Code § 217.45(c)(7) (2015). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as "BOB" or "TEXPL8." Here **we are concerned only with the second category of plates,**

> **namely specialty license plates, not with the personalization program.**

Id. (emphases added). Notably, after deciding *Walker*, the U.S. Supreme Court also advised that courts should exercise "great caution" before extending the government speech doctrine further, *see Matal*, 137 S. Ct. at 1758, and it held that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Id.* at 1760.

This Court should join the otherwise unanimous judicial chorus and reject *Vawter* as well. There is a fundamental difference between specialty plates—which display an identical, government-prepared message across thousands of license plates—and personalized plates, which display unique, applicant-created messages that are designed and displayed by the applicant alone. The Panel's contrary analysis—and its resulting holding—should be reversed accordingly.

B. BECAUSE PERSONALIZED LICENSE PLATES ARE NOT GOVERNMENT SPEECH, TENN. CODE ANN. § 55-4-210(d)(2) SHOULD BE DECLARED UNCONSTITUTIONAL AND ENJOINED ON SEVERAL GROUNDS.

Stripped of a government speech defense, which otherwise "exempt[s]" Tenn. Code Ann. § 55-4-210(d)(2) from First Amendment scrutiny[,]" *Johanns*, 544 U.S. at 553, the proper resolution of Ms. Gilliam's claims is straightforward. In particular, Tenn. Code Ann. § 55-4-210(d)(2) is a presumptively unconstitutional, content- and viewpoint-based speech restriction that the Defendants made no attempt to demonstrate was narrowly tailored to support a compelling governmental interest. Tenn. Code Ann. § 55-4-210(d)(2) is also unconstitutionally vague as applied, as the evidence adduced at trial

demonstrated overwhelmingly. Further, Tennessee law's summary, pre-hearing revocation of disfavored personalized license plate messages violates procedural due process, because there is no conceivable emergency that justifies pre-hearing revocation.

1. Tenn. Code Ann. § 55-4-210(d)(2) is a presumptively unconstitutional, content- and viewpoint-based speech restriction that contravenes the First Amendment.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (citations omitted). Here, Tenn. Code Ann. § 55-4-210(d)(2) requires the Defendant Commissioner to "refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency . . . ." *Id.* Thus, Tenn. Code Ann. § 55-4-210(d)(2) facially discriminates on the basis of content—some "connotations" are banned, the rest are permitted—and it triggers strict constitutional scrutiny as a result. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

Significantly, beyond just discriminating on the basis of content generally, Tenn. Code Ann. § 55-4-210(d)(2) regulates further based on *viewpoint*. *See Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint."). Viewpoint discrimination is presumptively forbidden, *see Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)

("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (collecting cases), and it is regarded as "an egregious form of content discrimination[,]" *Rosenberger*, 515 U.S. at 829. Viewpoint discrimination is also forbidden regardless of the type of forum involved. *See Matal*, 137 S. Ct. at 1763 ("When government creates [a limited public] forum, in either a literal or 'metaphysical' sense, some content- and speaker-based restrictions may be allowed [ ]. However, even in such cases, what we have termed 'viewpoint discrimination' is forbidden.") (cleaned up). *See also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting) ("while many cases turn on which type of 'forum' is implicated, the important point here is that viewpoint discrimination is impermissible in them all.") (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001)).

Under these circumstances, the Defendants bore the heavy burden of proving that Tenn. Code Ann. § 55-4-210(d)(2)'s facial viewpoint discrimination satisfied strict constitutional scrutiny. They also failed to meet that burden. Indeed, they did not even attempt to meet it.

Further, given the Defendants' judicial admission that non-compliant personalized plate messages are not important enough to police proactively, *see* Tr. Ex. 11 at Excerpt 90:11–12 ("the Department is not out on the streets policing plates to find out if any got through."), the Defendants cannot reasonably claim that Tenn. Code Ann. § 55-4-210(d)(2) furthers a compelling need. Even if they had attempted to do so, however, the U.S. Supreme Court has made clear that regulating offensiveness is not a compelling governmental interest as a matter of

law. *See Matal*, 137 S. Ct. at 1751 ("this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."). Tenn. Code Ann. § 55-4-210(d)(2) should be declared unconstitutional and enjoined accordingly.

2. Tenn. Code Ann. § 55-4-210(d)(2) is unconstitutionally vague.

Tenn. Code Ann. § 55-4-210(d)(2) is also unconstitutional because—as other courts have determined under the same circumstances—it is too vague to satisfy constitutional review. *See, e.g.*, *Montenegro*, 166 N.H. at 225 ("We conclude that the restriction in Saf–C 514.61(c)(3) prohibiting vanity registration plates that are 'offensive to good taste' on its face 'authorizes or even encourages arbitrary and discriminatory enforcement,' . . . and is, therefore, unconstitutionally vague."); *Matwyuk*, 22 F. Supp. 3d at 826 ("the 'offensive to good taste and decency' language grants the decisionmaker undue discretion, thereby allowing for arbitrary application."). *Cf. Lewis*, 253 F.3d at 1080 (8th Cir. 2001) ("The very fact that the DOR could so readily switch justifications for its rejection of the plate illustrates the constitutional difficulty with the statute.").

Vague laws chill speech and invite discriminatory enforcement, offending threshold requirements of due process. *See City of Knoxville v. Ent. Res., LLC,* 166 S.W.3d 650, 655 (Tenn. 2005). "A statute is unconstitutionally vague if it denies fair notice of the standard of conduct for which the citizen is to be held accountable, or if it is an unrestricted delegation of power which leaves the definition of its terms to law

enforcement officers." *American–Arab Anti–Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608–09 (6th Cir.2005) (citing *Leonardson v. City of East Lansing*, 896 F.2d 190, 196 (6th Cir.1990)); *see also United Food & Com. Workers, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) ("We will not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights; rather, the vagueness doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."); *Coates v. City of Cincinnati*, 402 U.S. 611, 611–14 (1971). Vagueness also "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

Here, Tenn. Code Ann. § 55-4-210(d)(2) easily qualifies as an unconstitutionally vague law that is not susceptible to ascertainable or predictable enforcement. That is not merely Ms. Gilliam's position, either. Instead, the Department itself maintained (and it did so through counsel, so there is no escaping the admission) that: "**[i]t is impossible** for the Department to predetermine specific criteria that will encompass all potentially objectionable configurations that may be submitted in the future[.]" *See* Tr. Ex. 4 at 5–6 (response to Interrogatory No. 7) (emphasis added). Both of the Defendants' witnesses also agreed that *none* of the material terms in Tenn. Code Ann. § 55-4-210(d)(2) is defined by statute. *See* Trial Tr. (Vol. II) at 228:10–24; *id.* at 191:11–19.

Given this context, it is no wonder that—when pressed—the Department's witnesses routinely indicated that they could not answer straightforward questions about whether various plates would or should be prohibited, at least without first consulting "tools" that are not set forth in the statute; are not the subject of any rule or regulation; and are not made available to the public. *See, e.g.*, Trial Tr. (Vol. II) at 229:21–23 (Q. "What about caffeine?" A. "I know it's in coffee, but it's also a drug. I'm not sure."); *id.* at 264:11–13 ("You can't tell me if Mr. Sexy is a sex reference sitting here today?" A. "I'm not sure."); *id.* at 193:1–25 (Q. "if Nancy Reagan wanted a 'Just Say No' license plate, would that be allowed?" . . . . A. "I can't determine that without going through the process."). Indeed, even many plate messages that the Defendants initially convinced the Panel to conclude were "mistakes" turned out not to be. *Compare* R. at 630 (crediting Defendants' representation that "approval and use of license plates similar to the Plaintiff's are a mistake."), *with* Tr. Ex. 3 (indicating that only "I69, XTC69, 69420, and 42069" were revoked in the four-month period that followed).

Under these circumstances, Tenn. Code Ann. § 55-4-210(d)(2) is void for vagueness. *See, e.g.*, *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (invalidating banner policy prohibiting signs and banners "not in good taste" as facially vague and overbroad); *Stanton v. Brunswick Sch. Dept.*, 577 F. Supp. 1560, 1572 (D. Me. 1984) ("[f]ree public expression cannot be burdened with governmental predictions or assessments of what a discrete populace will think about good or bad 'taste'"); *Penthouse Intl, LTD v. Koch*, 599 F. Supp. 1338, 1351 (S.D.N.Y.

1984) (finding "offensive to good taste" standard was "too vague and subjective to meaningfully circumscribe the discretion of subway officials"); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069 (4th Cir. 2006) ("While an adequate policy must contain 'narrow, objective, and definite standards,' 'the best interest of the district' is as subjective a notion as good government, good taste, or good character."). This Court should declare Tenn. Code Ann. § 55-4-210(d)(2) unconstitutionally vague and enjoin its enforcement accordingly.

3. Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate procedural due process.

With respect to the personalized plate revocation process, Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) work in tandem to deprive Ms. Gilliam—and others similarly situated—of her right to due process of law. Tenn. Code Ann. § 55-5-117(a)(1) provides that the Department "is authorized to suspend or revoke . . . [a] registration plate . . . (1) When the department is satisfied that the . . . plate . . . was . . . erroneously issued[.]" *See id.* Thereafter, Tenn. Code Ann. § 55-5-119(a) provides that:

> Whenever the department as authorized hereunder cancels, suspends, or revokes the registration of a . . . registration plate or plates, . . . **the owner or person in possession of the same shall immediately return the evidence of registration, title or license so cancelled, suspended, or revoked to the department**.

See id. (emphases added).

The Defendants also admitted that failure to comply with this

summary, pre-hearing revocation exposes a plate owner to immediate criminal liability, among other deprivations. *See* Tr. Ex. 1 at 23:6–25. The admission was correct. *See* Tenn. Code Ann. § 55-5-120(a) ("It is a Class C misdemeanor for any person to violate any of the provisions of chapters 1-6 of this title unless such violation is by chapters 1-6 of this title or other law of this state declared to be a felony.").

This process—particularly as it applies to Ms. Gilliam, who continuously displayed her plate without even an *allegation* of harm for *eleven years*, *see* R. at 3224—does not comport with minimum constitutional guarantees. "[I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971). "[T]he deprival of driving privileges" also is not exempt from such considerations. *See Dixon v. Love*, 431 U.S. 105, 113 (1977).

To determine whether a pre-hearing deprivation comports with due process, courts consider

> three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 112–13 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, once again, all of the relevant factors favor Ms. Gilliam.

As to the first factor: the private interest that will be affected—Ms. Gilliam's speech—carries surpassing importance. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[I]t is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

As to the second factor: the risk of an erroneous deprivation prior to a hearing is high. In contrast to circumstances when a revocation is "largely automatic," *Dixon*, 431 U.S. at 113, here, a deprivation is subject to vague, inconsistent, and fundamentally arbitrary determinations by the Department's employees about what "may carry connotations offensive to good taste and decency[.]" *See* Tenn. Code Ann. § 55-4-210(d)(2).

Third and finally, summarily revoking a personalized plate on a pre-hearing basis is not akin to, for instance, ensuring "the prompt removal of a safety hazard." *Dixon*, 431 U.S. at 114. The record is devoid of any evidence that any hazard was presented by Ms. Gilliam's license plate, and the evidence that was introduced powerfully supports the opposite conclusion. *See* R. at 3224 ("The testimony of Ms. Moyers [at trial] established that the Department has received no complaints by anyone that they were offended by the Plaintiff's plate during its continuous display for eleven years."). The Government also has no interest—much less a compelling one—in summarily effecting pre-hearing prior restraints against "offensive" speech. *See Matal*, 137 S. Ct. at 1763 ("We have said time and again that 'the public expression of ideas

may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

Taken together, then, due process requires that the Defendants provide hearings *before* revoking a personalized plate, rather than afterward. However, Tenn. Code Ann. §§ 55-5-117(a)(1) and 55-5-119(a) function to mandate summary, *pre*-hearing revocation that exposes personalized plate owners to immediate criminal liability. *See* Tenn. Code Ann. § 55-5-120(a). For all of these reasons, Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate due process, and as applied to Ms. Gilliam, they should be declared unconstitutional and enjoined.

C. THE TRIAL COURT ERRED BY FAILING TO ACCORD ANY WEIGHT TO THE CASE-DISPOSITIVE ADMISSIONS FROM THE DEPARTMENT'S TENN. R. CIV. P. 30.02(6) DEPOSITIONS AND BY FAILING TO ASSESS DISCOVERY SANCTIONS.

During pre-trial discovery—and over the course of two 30.02(6) depositions of the Department's designated representative—the Plaintiff generated what can fairly be characterized as extensive and case-dispositive admissions. For instance, the Department's designee testified that Ms. Gilliam's license plate conveys "Ms. Gilliam's own unique message[,]" and "not the government's message[.]" *See* Tr. Ex. 1 at 28:5–15. She also testified that the Government's website advertising Tennessee's personalized plate program—which described personalized plate messages as conveying "your own unique message," *see* Tr. Ex. 1, at Deposition Ex. #2—"accurately characterize[s] the personalized plate

program[,]" *see* Tr. Ex. 1 at 7:16–8:1, and that the Department does not have "any reason to believe that anything on this website is inaccurate[.]" *See id.* at 8:3–5. The Department's designee further testified that she could not determine whether or not the specific personalized plate at issue in this case should be approved, *see* Tr. Ex. 1 at 42:16–25, then changed her answer via an errata sheet, *see* Tr. Ex. 2 at 44:3–9; *id.* at Deposition Ex. #8, then admitted that *her errata sheet* was inaccurate, *see* Tr. Ex. 2 at 50:24–51:15. Ultimately, Ms. Hudson landed where she had initially testified: Acknowledging that she could not actually determine one way or another whether a particular personalized plate was offensive to good taste or decency without using her "tools," which she did not have with her during her first deposition. *Id.*

These admissions should have ended this case, because they are devastating. They demonstrated that the Department itself did not consider Ms. Gilliam's personalized plate to be government speech—even if the Department's attorneys were advancing a contrary view. They demonstrated that the Government's own website advertising Tennessee's personalized plate program was accurate and foreclosed the Defendants' position in this case. And they demonstrated that the very employees who are in charge of regulating offensiveness are incapable of doing so in a simple, consistent, or predictable way.

Instead of relying on these admissions to rule for Ms. Gilliam, though, the Panel "place[d] no weight on" the Department's 30.02(6) deposition testimony, concluding that "the testimony was confused, contradictory and in some areas uninformed," and concluding further that the Department's designee "was clearly intimidated by the questions

posed by Plaintiff's Counsel."[37] *See* R. at 3218. Thus, the Panel held that it "is not considering any part of Ms. Hudson's testimony, including parts damaging to the Defendants," *see id.*, and it held that doing so was "not prejudicial to the Plaintiff[.]" *See id.*

The Panel's determination not to consider *any* of the Defendants' case-dispositive admissions in the Department's 30.02(6) deposition testimony exceeded the bounds of the Panel's discretion, though, and it should be reversed accordingly. *See White*, 21 S.W.3d at 223. Several reasons support this conclusion.

First, the 30.02(6) testimony at issue was not simply "Ms. Hudson's," as the Panel's judgment erroneously suggests. *See* R. at 3218. Instead, Ms. Hudson was testifying *as the Department of Revenue,* given that Tenn. R. Civ. P. 30.02(6) mandates that a governmental litigant "designate one or more officers, directors, or managing agents, or other persons who consent to testify **on its behalf**," and that "[t]he persons so designated **shall testify as to matters known or reasonably available to the organization**." *See id.* (emphases added).

Given this context, the Panel's determination not to give *any* weight to *any* of the admissions in *either* of the 30.02(6) depositions introduced at trial is unsupportable. By rule, the deposition testimony reflects what was "known or reasonably available to" the Department of Revenue

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

regarding the noticed topics, *see id.*, and the Panel was bound to treat it that way. In lieu of doing so, however, the Panel erroneously accorded it no weight at all.

Second, admissions in 30.02(6) depositions are properly treated as binding unless they are formally withdrawn. *See, e.g., Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 95–96 (D.D.C. 1998) ("Rule 30(b)(6) does not require a corporate party to facilitate preparation of its opponent's legal case; but it binds the corporate party to the positions taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush."); *Med. Sales & Consulting Grp. v. Plus Orthopedics USA, Inc.*, No. 08CV1595 BEN BGS, 2011 WL 1898600, at *2 (S.D. Cal. May 19, 2011) ("The parties do not dispute that Defendants cannot offer testimony that contradicts the testimony of its Rule 30(b)(6) witnesses."). This disincentivizes parties from playing games with discovery by strategically furnishing unprepared witnesses to "obfuscate the discovery process[.]" *Cf. Rainey*, 26 F. Supp. 2d at 95–96. Put another way: Because governments and corporations are not human beings, outside of admissions contained in 30.02(6) depositions and other discovery responses executed on behalf of an organization, there is no other way to bind an entity to a particular position.

In any event, if the Panel was committed to finding that Ms. Hudson's testimony on behalf of the Department across two Tenn. R. Civ. P. 30.02(6) depositions was so "confused, contradictory and in some areas uninformed" that it needed to be disregarded in its entirety, *see* R. at 3218, then *at minimum*, the Panel should have assessed discovery

sanctions for furnishing an unprepared 30.02(6) witness, and it should have precluded the Defendants from introducing testimony that contradicted the Department's 30.02(6) deposition testimony at trial. As the Department's designee, Ms. Hudson testified across two depositions that she could neither explain nor offer testimony regarding the Defendants' asserted defenses—including the Defendants' government speech defense—despite the defenses in the Defendants' Answer being one of just two noticed deposition topics. *See* Tr. Ex. 1 at 65:14–66:11; Tr. Ex. 2 at 44:6–9. The Plaintiff sought discovery sanctions as a result, *see* R. at 868–89, which the Defendants opposed based on the claim that Ms. Hudson "was adequately prepared" to testify on the noticed topics. *See* R. at 3150. However, when Ms. Hudson was thereafter asked—during trial—whether she had been prepared to testify about the noticed topics, she admitted that she was not. *See* Trial Tr. (Vol. II) at 184:1–16. This admission prompted the Plaintiff to renew her motion for discovery sanctions based on the Defendants' decision to furnish a clearly and admittedly unprepared 30.02(6) witness. *See* R. at 203:11–15.

The Panel did not grant the Plaintiff's motion, though. *See* R. at 3218. Instead, the Panel *rewarded* the Defendants for furnishing an unprepared 30.02(6) witness in three critical ways. *First*, the Panel disregarded every single damning admission in the Department's 30.02(6) depositions, and there are dozens. *Second*, the Panel permitted the Defendants to call a different witness—Ms. Moyers—to introduce contrary testimony at trial, even though Ms. Moyers conceded that she "can't speak for the Department," "can't speak for [Defendant]

Commissioner Gerregano," and does not "have authority to speak for the Department[.]" Trial Tr. (Vol. II), at 226:7–18, and even though she was not disclosed in response to an applicable interrogatory. *See* Tr. Ex. 2, at Deposition Ex. #5, p. 2 (Interrogatory #3). *Third*, the Panel credited Ms. Moyers' testimony and excluded Ms. Hudson's. All of this was improper.

Stated simply: Strategic discovery misconduct of the kind that occurred below should not be tolerated. Beyond just tolerating it, though, the Panel *rewarded* it, and it did so in a way that deprived Ms. Gilliam of anything resembling a fair proceeding. The Panel's orders refusing to consider the Defendants' case-dispositive 30.02(6) depositions and refusing to assess sanctions for furnishing an admittedly unprepared 30.02(6) witness—then allowing the Defendants to call a surprise witness to testify contrarily at trial thereafter—should be reversed accordingly.

Significantly, failure to grant this relief risks incentivizing other litigants to do precisely what the Defendants did here: intentionally furnish an unprepared 30.02(6) witness *twice*, and then introduce directly contrary testimony at trial. This would "eviscerate the force of" Rule 30.02(6) as a discovery tool. *Cf. Rainey*, 26 F. Supp. 2d at 95–96 ("The cure for this violation should not be simply to give plaintiff a chance to depose Ms. Kurtz. If such were the remedy, corporate parties would have every incentive to 'bandy' or attempt 'trial by ambush,' as the only downside to their strategy would be that their adversary might eventually procure access to their theretofore-concealed witness. This incentive structure would eviscerate the force of Rule 30(b)(6), and would delay litigation, heighten suspicions, and obfuscate the discovery process."). The Panel's judgment should be reversed accordingly.

D. QUALIFIED IMMUNITY DOES NOT PRECLUDE ANY RELIEF.

Qualified immunity shields officials "from individual liability for money damages but not from declaratory or injunctive relief." *Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). Thus, this defense has no application to Ms. Gilliam's claims for declaratory and injunctive relief.

Regarding Ms. Gilliam's damages claim, though, the Panel granted the Defendant Commissioner qualified immunity, finding that liability was not clearly established. *See* R. at 3248–50. This was error. Clearly established law from the United States Supreme Court made plain that Tenn. Code Ann. § 55-4-210(d)(2) is facially unconstitutional and regulates illicitly on the basis of viewpoint. *See Matal*, 137 S. Ct. at 1763 ("The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint."). This clearly established law notwithstanding, though, through his designee, the Defendant Commissioner disputed Ms. Gilliam's claim of viewpoint discrimination on the grounds that it is impossible for a law to discriminate based on viewpoint:

Q. Does the Department deny that allegation?
A. Yes.
Q. And what is the basis for that denial?
MR. PORCELLO: Objection to the form, calls for a legal conclusion.
THE WITNESS: The decision is based on the law and not viewpoint.
BY MR. HORWITZ:
Q. Is it your position that a law cannot discriminate on the basis of viewpoint?
MR. PORCELLO: Objection to the form.
THE WITNESS: Yes.

See Tr. Ex. 1, at 20:1–12.

Because clearly established law provides otherwise, though—and because clearly established law provides the regulating offense "is viewpoint discrimination," *see Matal*, 137 S. Ct. at 1763—the Defendant Commissioner's qualified immunity defense fails.

E. THE PLAINTIFF IS ENTITLED TO HER ATTORNEY'S FEES AND COSTS INCURRED BOTH IN THE TRIAL COURT AND ON APPEAL.

The Plaintiff should prevail in this appeal because the law and the evidentiary record require that outcome. Further, upon prevailing on her federal constitutional claims, the Plaintiff is entitled to an award of attorney's fees under 42 U.S.C. § 1988(b), both in the trial court and on appeal. *See, e.g.*, *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("[I]n absence of special circumstances a district court not merely 'may' but *must* award fees to the prevailing plaintiff[.]"); *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52, 56 (Tenn. 1992) (same) (collecting cases); *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004) (affirming award of appellate fees to prevailing party as part of the costs (citing *Hutto v. Finney*, 437 U.S. 678, 693–98 (1979))); *Weisenberger v. Huecker*, 593 F.2d 49, 54 (6th Cir. 1979) (finding abuse of discretion in failing to award appellate attorney's fees to prevailing party).

Consequently, having raised her entitlement to an appellate fee award in her Statement of the Issues, *cf. Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410 (Tenn. 2006); *see also Nandigam Neurology, PLC v. Beavers*, No. M2020-00553-COA-R3-CV, 2021 WL 2494935, at *14 (Tenn. Ct. App. June 18, 2021), *no app. filed*, and having

advanced meritorious constitutional claims in this appeal, this Court should remand with instructions to award the Plaintiff her complete attorney's fees and costs under 42 U.S.C. § 1988(b).

X. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief (Sections IV–X) contain 14,966 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2022, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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