IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

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

BRIEF FOR APPELLANTS

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ISSUE PRESENTED FOR REVIEW

Are the alphanumeric registration characters on state-issued, personalized license plates government speech?

INTRODUCTION

License plates are "government-mandated, government-controlled, and government-issued IDs . . . used as a medium for government speech." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 214 (2015). In *Walker*, the U.S. Supreme Court held that the designs on those IDs qualify as government speech. And the Court's reasoning applies with equal, if not greater, force to the registration numbers that convey the State's identifying message.

Registration numbers plainly communicate a functional message from the State: This vehicle can be identified by these alphanumeric characters. The State's identifying message allows the public to report cars driving in an erratic manner, to detect vehicles subject to an Amber Alert, or to inform owners that they left their lights on in the parking lot. The list goes on. The whole purpose of a license plate is to communicate the State's identifying message through the registration number.

That identifying message does not disappear on "personalized" plates. Like most States, Tennessee permits vehicle owners to request a specific combination of alphanumeric characters as the registration number for their state-issued license plates. The requested combination on these personalized plates may convey an idea or bear some special meaning to the requestor. But that does not somehow negate the State's identifying message. Registration numbers, even if selected by a vehicle owner, convey identifying information from the State.

The State accordingly maintains control over the registration numbers it issues. State law sets out numerous restrictions on the alphanumeric combinations available, and the Department of Revenue

exercises "final approval authority" for every one of the thousands of registration-number requests. *Id.* at 210. This extensive regulation of registration numbers reflects the reality that Tennessee license plates are "government IDs," and "issuers of ID typically do not permit the placement on their IDs of message[s] with which they do not wish to be associated." *Id.* at 212 (quotations omitted). That the State requires, issues, controls, and owns license plates naturally leads the public to associate registration numbers—the very impetus for the plates—with the State.

Plaintiff Leah Gilliam seeks to limit the State's control over license plate registration numbers. According to Gilliam, the mere fact that Tennessee allows vehicle owners to request specific alphanumeric characters as their registration number triggers free-speech, due-process, and void-for-vagueness protections. Specifically, she challenges the constitutionality of the state law prohibiting registration numbers containing "letters, numbers or positions that may carry connotations offensive to good taste and decency." Tenn. Code Ann. § 55-4-210(d)(2). This is the law that Tennessee—like many other States—uses to bar registration numbers that spell out profanities (like the f-word, Trial Ex. 15), include racial slurs (like the n-word, *id.*), suggest violence (like "RAPEME," *id.*), or describe sexual activity (like "IEATASS," Trial Tr. 380). And it is the law the State applied to prevent Gilliam from driving on Tennessee roadways with a registration number connoting sexual acts or domination—69PWNDU.

Gilliam now presses a facial challenge to § 55-4-210(d)(2)'s limitations on personalized plates, principally on First Amendment

grounds. But Gilliam's argument—adopted by the decision below—rests on the flawed premise that registration numbers are purely private speech. Indeed, under Gilliam's telling, registration numbers *do not convey any governmental message at all*. *Walker*'s on-point analysis—and the commonsense reality that registration numbers convey an identifying message—foreclose this position. The Constitution does not put the State to the choice of either allowing profane, racist, and lewd messages on state-owned plates or eliminating requests for specific registration numbers altogether. When the government speaks, it enjoys the freedom to "choose[] what to say and what not to say." *Shurtleff v. City of Boston*, 596 U.S. 243, 251 (2022). So Tennessee can choose what can or cannot be conveyed through registration numbers on the license plates it requires, owns, and issues.

The Court should reverse.

STATEMENT OF THE CASE AND FACTS

A. Tennessee License Plates

To operate a vehicle on Tennessee roadways, Tennessee vehicle owners must register their vehicle and obtain a license plate issued by the Department of Revenue. Tenn. Code Ann. § 55-4-101(a)(1), (b). Each license plate displays "Tennessee" (or an abbreviation thereof) at the top and contains a unique "registration number" made up of no more than seven alphanumeric characters. *Id.* § 55-4-103(b)(1). The plate must be "attached on the rear of the vehicle" and "clearly visible" at all times. *Id.* § 55-4-110(a), (b), (c)(1). In fact, state law specifically dictates that "plates and the required numerals thereon . . . shall be of sufficient size

to be readable from a distance of one hundred feet." *Id.* § 55-4-103(c). These requirements allow for the "ready identification of motor vehicles traveling on Tennessee highways." *United States v. Simpson*, 520 F.3d 531, 536 (6th Cir. 2008).

Vehicle owners who pay the normal vehicle-registration fee receive a license plate with a standard design and random registration number. For an additional fee, though, owners can obtain a "specialty" plate with a different design or request a "personalized" plate with specific alphanumeric characters as the registration number. *See* Tenn. Code Ann. §§ 55-4-202, 203, 210, 214; Tenn. Comp. R. & Regs. 1320-08-01-.02.

Tennessee law restricts the registration numbers available for personalized plates. To ensure proper identification of the vehicle, the Department of Revenue cannot issue a registration number that "conflict[s] with or duplicate[s] the registration numbers for any existing . . . vehicle registration plates." Tenn. Code Ann. § 55-4-210(e). State law also prohibits the issuance of registration numbers that contain "any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading." *Id.* § 55-4-210(d)(2). And it prohibits the issuance of "any license plate commemorating any practice . . . contrary to the public policy of the state." *Id.* § 55-4-210(d)(1). The application form for requesting a specific registration number states in bold: "Tennessee reserves the right to refuse to issue objectionable combinations." Trial Ex. 18.

The Department reviews all requests for specific registration numbers. Tenn. Code Ann. § 55-4-210(a); Tenn. Comp. R. & Regs. 1320-

08-01-.02. A five-person team, the Department's Inventory Unit, evaluates 80 to 100 applications per day. R. XXII, 3243; Trial Tr. 211.

The Department "has designated categories [of excludable material] for the Inventory Unit to use in reviewing personalized plate applications . . . : profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs." R. XXII, 3221; *see* Trial Tr. 210. The Inventory Unit consults several resources when evaluating applications, including a table of configurations that have been determined to carry connotations offensive to good taste and decency (the "Objectionable Table"). R. XXII, 3222; Trial Ex. 15. The Objectionable Table includes references to profanity (e.g., "F***," "B****," "S***"), violent acts (e.g., "MURDERG," "RAPEME"), sexual acts (e.g., "IEATPUS," "IEATA5S," "IJERK," "ORGY," "LUV69"), illegal substances (e.g., "KOCAINE," "GOTWEED," "METH"), and racial slurs (e.g., "N*****," "K***," "NOJEWS"). Trial Ex. 15. If a member of the Inventory Unit does not recommend approval, the request "moves up the chain" for further review. R. XXII, 3221; Trial Tr. 210-12.

If the Inventory Unit erroneously approves a registration number, the Department may revoke the plate. Tenn. Code Ann. § 55-5-117(a)(1). The vehicle owner must then "immediately return the . . . revoked [license plate] to the department." *Id.* § 55-5-119(a).

B. Factual and Procedural Background

In May 2021, the Department revoked Gilliam's personalized license plate with the registration number "69PWNDU." R. I, 17; Trial Ex. 20. It determined that these characters could be interpreted as a

sexual reference. R. XXII, 3224. In the Department's view, the "69" combined with "PWNDU"—a term used by gamers when one player has "owned" or dominated another player—could be read to signify sexual acts or sexual domination. Trial Tr. 220-21.

Gilliam requested an administrative hearing to contest the Department's revocation of her plate, R. III, 392, claiming that the "69" in her plate referred to the year of the moon landing. Two weeks later, Gilliam filed a suit challenging the State's offensiveness restriction under the Free Speech Clause, Due Process Clause, and void-for-vagueness doctrine. R. I, 1-13. Because Gilliam's suit challenged the constitutionality of a state statute, this Court convened a three-judge panel to hear the case. *See* R. II, 182.

Following discovery and a bench trial, the Chancery Court panel unanimously dismissed Gilliam's constitutional claims, concluding that the registration numbers on Gilliam's plate constituted government speech. R. XXII, 3213-52. The court rooted that conclusion in *Walker*.

In *Walker*, the U.S. Supreme Court found that the designs on specialty license plates—designs created by private parties—constituted government speech. 576 U.S. at 219. The Court considered three factors: (1) whether the government has a "history" of using "license plates" and "license plate designs" to "communicate" "messages"; (2) whether "license plate designs are often closely identified in the public mind with the [government]"; and (3) whether the government exercises "direct control over the messages conveyed." *Id.* at 209-14 (quotations omitted). Analyzing those factors, the Court concluded that license plates are "government-mandated, government-controlled, and government-issued

IDs that have traditionally been used as a medium for government speech," *id.* at 214, and that the challengers could not force Texas to convey their message through its specialty license plates, *id.* at 219.

Walker did not address Texas's "personalization program," which allowed "vehicle owner[s to] . . . request a particular alphanumeric pattern for use as a plate number," *id.* at 204, because no party before the Court had requested specific registration numbers. But even the dissent (taking a *narrower* view of the government-speech doctrine) recognized that "the numbers and/or letters identifying the vehicle" "unquestionably" qualify as "government speech." *Id.* at 222 (Alito, J., dissenting).

Applying *Walker*'s framework, the Chancery Court here explained that "the same facts on which the *Walker* Court concluded the Texas specialized license plates were government speech are present in this case of personalized plates." R. XXII, 3238. Tennessee has historically used license plates and registration numbers to convey identifying messages; "a viewer of a personalized plate in Tennessee associates the plate with the State of Tennessee"; and "Tennessee maintains direct control over the messages conveyed on all of its license plates." *Id.* at 3238-40. The court recognized *Walker*'s characterization of license plates as government IDs and pointed out that "the unique combination of numbers and letters that actually identify a vehicle"—i.e., the registration numbers—"are *even more* government IDs than the specialty plates in *Walker*." *Id.* at 3250 (emphasis added). "Because the speech in issue is government speech," the Chancery Court concluded that

Gilliam's First Amendment, Due Process, and vagueness claims "are not implicated and must be dismissed." *Id.* at 3216-17.

The Court of Appeals disagreed, holding that "alphanumeric configurations on vanity license plates" do not qualify as "government speech." *Gilliam v. Gerregano*, No. M2022-00083-COA-R3-CV, 2023 WL 3749982, at *10 (Tenn. Ct. App. June 1, 2023). In the court's view, the State does not "communicate *any message at all*"—not even an identifying message—"through the alphanumeric configurations" on personalized plates. *Id.* at *12 (quotations omitted) (emphasis added). Based on its conclusion that the trial court "erred in determining that the alphanumeric configurations . . . are government speech," the Court of Appeals remanded for further proceedings on Gilliam's claims. *Id.* at *15.

This Court granted the State's Rule 11 application for permission to appeal.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). When analyzing constitutional issues, the Court "indulge[s] every presumption and resolve[s] every doubt in favor of constitutionality." *Lynch v. Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (quotations omitted). And when, as here, a party "brings a facial challenge," the "presumption of constitutionality applies with even greater force." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009); *see also Fisher v. Hargett*, 604 S.W.3d 381, 398 (Tenn. 2020).

In a civil case heard without a jury, the Court presumes any factual findings by the trial court are correct unless the evidence preponderates

otherwise. Tenn. R. App. P. 13(d). When the trial court resolves issues of "credibility and weight of oral testimony," this Court affords "considerable deference . . . to the trial court's factual findings." *Seals v. England/Corsair Upholstery Mfg. Co.,* 984 S.W.2d 912, 915 (Tenn. 1999) (quotations omitted). Appellate courts refrain from "re-evaluat[ing] a trial [court]'s assessment of witness credibility absent clear and convincing evidence to the contrary." *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

ARGUMENT

I. License Plate Registration Numbers Are Government Speech.

The U.S. Constitution "does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). When the government speaks, it enjoys the freedom to "choose[] what to say and what not to say." *Shurtleff*, 596 U.S. at 251. Were it otherwise, "government would not work." *Walker*, 576 U.S. at 207. The government could not "implement programs," "formulate policies," or speak to "the community" without control over its speech. *Shurtleff*, 596 U.S. at 251.

"[T]o determine whether the government intends to speak for itself," courts engage in a "holistic" inquiry "guide[d]" by several factors. *Id.* at 252. Courts generally look to (1) whether the government has a "history" of using the medium at issue to convey a message; (2) whether the medium is "often closely identified in the public mind with the [government]"; and (3) whether the government exercises "direct control over the messages conveyed." *Walker*, 576 U.S. 209-14 (quotations omitted); *see also Shurtleff*, 596 U.S. at 252.

Walker held that, under these factors, the specialty *designs* on license plates qualify as government speech. Unsurprisingly, for many of the same reasons, all three factors support a finding that the *registration numbers* on license plates—including registration numbers on personalized plates—constitute government speech.

A. Registration numbers convey a state message.

The registration numbers on license plates easily satisfy the first factor—whether the government has historically communicated through the medium at issue. *Walker*, 576 U.S. at 209-12. Tennessee conveys (and has always conveyed) a functional, identifying message through registration numbers. That identifying message does not wane with personalized plates.

1. The State has historically conveyed an identifying message through registration numbers.

Registration numbers on license plates have historically served as state-approved "identifiers for public, law enforcement, and administrative purposes." *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1204 (Ind. 2015). They convey a simple message: Use these unique alphanumeric characters to identify this vehicle. In other words, license plates act as "government-mandated, government-controlled, and government-issued IDs," *Walker*, 576 U.S. at 214, and the State uses the registration number to communicate identifying information. That is why registration numbers must be unique and "clearly visible" on vehicles. Tenn. Code Ann. § 55-4-110(b); *id.* § 55-4-210(e).

In fact, "[l]icense plates originated solely as a means of identifying vehicles." *Walker*, 576 U.S. at 223 (Alito, J., dissenting). In 1903, "Massachusetts became the first State to issue license plates," requiring vehicles to bear "plates [that] . . . displayed the vehicle's registration number." *Id.* at 223-24; *see also* 1903 Mass. Acts, ch. 473, pp. 507-10. For decades thereafter, state-issued license plates "featuring a registration number, the name of the State, and sometimes the date . . . were the standard." *Walker*, 576 U.S. at 224 (Alito, J., dissenting). Thus, from the very beginning, registration numbers transmitted an identifying message from the States.

The history of Tennessee license plates follows the same arc. From the initial plates issued in 1915 until present day, Tennessee plates have consistently conveyed the name of the State ("Tenn." or "Tennessee") and a unique alphanumeric registration number to identify the vehicle. James K. Fox, *License Plates of the United States: A Pictorial History 1903 – to the Present*, pp. 94-95 (Interstate Directory Publ'g Co. 1994); *see also* R. XXII, 3222-23. In the trial court's words, "Tennessee license plates have for 100 years and continue to be used for government purposes: vehicle registration and identification." R. V, 651.

The identifying message conveyed by registration numbers serves a functional purpose. But functional speech still counts as speech. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-48 (2d Cir. 2001); *Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000). "Instructions, do-it-yourself manuals, recipes, even technical information about hydrogen bomb construction are often purely functional; they are also speech."

Bernstein v. U.S. Dep't of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (citation omitted). So the functional nature of the message conveyed through registration numbers cannot negate the reality that the government is speaking. Indeed, "[t]he very purpose of a license plate number . . . is to provide identifying information to law enforcement officials and others." *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006).

Plainly, Tennessee has historically communicated an identifying message through license plate registration numbers.

2. The State's identifying message persists in the registration numbers on personalized plates.

The registration numbers on personalized plates, like all other plates, convey an identifying message from the State. That the State allows persons to choose certain alphanumeric registration characters as their identifier in no way diminishes the State's identifying message. The registration number still tells the public that they should identify the vehicle by the alphanumeric characters listed—hence the requirement that no two vehicles may bear the same number. Tenn. Code Ann. § 55-4-210(e). While thousands of Tennessee citizens may want a personalized plate with a GOVOLS registration number, there can only be one such plate because the State conveys identifying messages through the registration numbers on personalized plates.

To be sure, drivers may seek to also communicate their own expression through registration numbers. But that does not somehow nullify the State's identifying message. *Summum* specifically rejected the theory that "a [medium] can convey only one 'message.'" 555 U.S. at

474. That the registration number also "may reflect an individual's personal or professional identity, or possibly express a thought or idea, is purely incidental to the primary function of vehicle identification"—a government message. *Kahn v. DMV*, 16 Cal. App. 4th 159, 166 (1993).

An example illustrates the point. If a car with a personalized license plate reading ROLTIDE drives in an erratic or dangerous manner, the State wants the public and law enforcement to know that they can identify that vehicle by the registration number R-O-L-T-I-D-E. The vehicle owner may seek to communicate their own expression—support for the University of Alabama's athletic teams—but that "does not extinguish the governmental nature of [Tennessee's identifying] message." *Walker*, 576 U.S. at 217; *see Kahn*, 16 Cal. App. 4th at 166. No matter the owner's intended communication, the State continues to convey its own functional, identifying message: this vehicle can be identified by the characters R-O-L-T-I-D-E. *See Vawter*, 45 N.E.3d at 1204-06; *Odquina v. City & Cnty. of Honolulu*, 2022 WL 16715714, at *9 (D. Haw. Nov. 4, 2022), *aff'd on other grounds*, No. 22-16844, 2023 WL 4234232 (9th Cir. June 28, 2023).

The question then becomes whether the government-speech doctrine applies when the same medium—here, a registration number—conveys *both* a governmental message *and* a private message. It does.

Walker applied the government-speech doctrine when the medium at issue (license plate designs) conveyed both governmental and private messages. There, the drivers conveyed a private message—support for organizations—through specialty license plate designs. *See Walker*, 576

U.S. at 205; *see also id.* at 219 ("[D]rivers who display . . . license plate designs convey the messages communicated through those designs."). The government-speech doctrine still applied, though, because the government conveyed its own message through the designs. That is, when faced with expression that was "neither purely government[al] . . . nor purely private" as a matter of fact, *Planned Parenthood v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004), *Walker* held that the expression was government speech as a matter of law, 576 U.S. at 214.

Similarly, *Summum* held that monuments conveying both governmental and private messages constituted government speech. 555 U.S. at 472-75. The Supreme Court recognized that "the thoughts or sentiments expressed by a government entity that accepts and displays [a monument] may be quite different from those of either its creator or its donor." *Id.* at 476. But even a private party's aim to convey a *different* message through the same medium did not cause the Court to reject the government-speech doctrine. Instead, the Court concluded that the monuments at issue constitute government speech because they conveyed a distinct governmental message. *Id.* at 474-77.

Lower courts have followed suit. For example, in *Mech v. School Board of Palm Beach County*, the Eleventh Circuit held that school sponsorship banners containing both governmental and private messages constituted government speech. 806 F.3d 1070, 1079 (11th Cir. 2015). There, the banners at issue contained a private message—the name, phone number, web address, and logo of the businesses that sponsored school programs. *Id.* at 1073. But, at the same time, the

banners conveyed a "government message": They were "the schools' way of saying 'thank you'" to the sponsors. *Id.* at 1077. Judge Pryor, writing for the panel, explained that "incidental benefit" from the private message (the conveyance of business information) "does not refute the governmental purpose." *Id.* (cleaned up). Again, the government-speech doctrine applied because the government conveyed a message.

None of these cases compared the relative strength or obviousness of the government message versus the private message. They simply asked whether the government conveyed a message through the medium at issue. And when the courts found a government message, it cut in favor of government speech. *Summum*, 555 U.S. at 470-78; *Walker*, 576 U.S. at 210-14; *Mech*, 806 F.3d at 1077.

The takeaway: The State uses the registration numbers on personalized plates to convey an identifying message, and that message does not dissipate when a private message coexists with the government message.

3. The contrary arguments lack merit.

The Court of Appeals categorically rejected the State's argument "that it historically has communicated an 'ID' message through the alphanumeric configurations on license plates." *Gilliam*, 2023 WL 3749982 at *12. But reality eviscerates that position. And neither the opinion below, nor Gilliam's briefing on this point, has been able to explain away the governmental message conveyed through registration numbers.

For one, the Court of Appeals claimed that the State failed to establish that it "*ever* used vanity plates to communicate government

messages," emphasizing that Tennessee's "[v]anity [i.e., personalized] plates did not come into existence until 1998." *Id.* at *11-12 (emphasis added). That is wrong as a factual matter. The alphanumeric registration characters on personalized plates, just like those characters on all other license plates, convey an identifying message—and always have. *See supra* 20-25.

More fundamentally, the court's narrow focus on the history of the personalized plate *program* rather than the history of the *medium of expression*—license plate registration numbers—directly contravenes precedent. As *Walker* makes clear, the program is not the expression at issue. 576 U.S. at 211; *Shurtleff*, 596 U.S. at 252 (looking to the "history of the expression at issue"). *Walker* looked to whether Texas "communicate[d] through its *license plate designs*," 576 U.S. at 211 (emphasis added); it did not limit its analysis to specialized license plate programs. *Id.* In fact, Texas's program for specialized license plate designs did not exist until, at the earliest, the "late 1990's." *Id.* at 224 (Alito, J., dissenting); *see* Tex. Acts 2003, 78th Leg., ch. 1320, § 6 (setting out Texas's specialty license plate program). Yet, *Walker*'s historical analysis of plate designs starts in 1919. *Id.* at 211.

Shurtleff and *Summum* likewise analyzed the medium of expression, not the program associated with the medium. *Shurtleff* did not focus on Boston's program for flag-raising ceremonies (which had only been in place since 2005); it analyzed "the history of flag flying,

particularly at the seat of government." 596 U.S. at 249, 253.[1] Similarly, *Summum* did not focus on the history of Pleasant Grove City's monument program in Pioneer Park; it looked at the "use[]" of "monuments to speak to the public." 555 U.S. at 470.

The Court of Appeals' program-centric inquiry simply misses the mark. The inquiry focuses on the medium of expression, not administrative programs related to the medium. And the history of government expression through license plate registration numbers is overwhelming. *See supra* 20-22.

Undeterred, Gilliam and the Court of Appeals insist that registration numbers either "only . . . identify a vehicle" or only convey private expression. *Gilliam*, 2023 WL 3749982 at *12. From that premise, Gilliam argues that "if Tennessee were actually conveying government messages through personalized plates, then Commissioner Gerregano is transmitting official, overtly racist and white supremacist messages to Tennessee's citizens." Reply Br. of Appellant at 11, *Gilliam*, M2017-01037-CCA-R3-CD (Tenn. Ct. App.). But *Summum* specifically rejected the theory that "a [medium] can convey only one 'message'—which is, presumably, the message intended by the [creator]—and that, if a government entity . . . does not formally embrace *that* message, then the government has not engaged in expressive conduct." 555 U.S. at 474.

[1] The Court of Appeals points to language in *Shurtleff* stating that the Court "must examine the details of *this* flag flying program." *Gilliam*, 2023 WL 3749982 at *12. Read in context, though, that language came after *Shurtleff* concluded its discussion of the history of the expression at issue—flag flying—and was transitioning to analyze the other factors set out in *Walker*.

Gilliam's either-or premise thus falls apart: Expression can communicate a *government* message even when a private party attempts to convey a *different* message through the very same medium. *Id.* at 476.

Finally, Gilliam suggests that if a medium conveys *any private message* at all, the government-speech doctrine *does not* apply. Br. of Appellant at 45-46, *Gilliam*, M2017-01037-CCA-R3-CD (Tenn. Ct. App.). But that gets it exactly backwards. Under U.S. Supreme Court precedent, if a medium conveys *any government message*, the government-speech doctrine *does* apply, irrespective of any private message. Independent private messages existed in both *Walker* and *Summum*, but that did not transform government speech into private speech as a legal matter. *See supra* 23-24.

Gilliam thus misses the point when she harps on the Tennessee Arts Commission's statement that personalized plates convey "your own unique message,"[2] and touts the State's recognition that drivers may attempt to convey "some individual speech" through personalized plates. Answer in Opp'n to Rule 11 Application at 7-8. The question is not whether any private message exists; it is whether any government message exists. And just as the monuments in *Summum* communicated government messages despite the different communicative intent of their donors, 555 U.S. at 476, the registration numbers on Tennessee's personalized license plates communicate identifying messages from the State no matter what else the driver might intend to express.

[2] The Department of Revenue exercises no control over the website for the independent Tennessee Arts Commission.

B. Registration numbers are closely identified with the State.

The second factor—association with the government—likewise favors government speech. The U.S. Supreme Court, in *Walker*, already held that "license plate designs are often closely identified in the public mind with the State." 576 U.S. at 212 (cleaned up). And the Court's reasoning fits hand-in-glove with the expression at issue here.

Walker relied on three points when analyzing the association between license plate designs and the State. *First*, the Court emphasized the "governmental nature" of the Texas "license plate," focusing on the purpose, appearance, and ownership of the plate. *Id.* *Second*, the Court highlighted that "Texas license plates are, essentially, government IDs," and "issuers of ID 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated.'" *Id.* *Third*, the Court observed that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message." *Id.* at 212-13.

A faithful application of that analysis resolves the question here. *First*, Tennessee's plates contain the same "governmental" features as Texas's. Just as in *Walker*, "[e]ach [Tennessee] license plate is a government article serving the governmental purposes of vehicle registration and identification." *Id.* at 212. Just as in *Walker*, "[t]he governmental nature of the plates is clear from their faces: The State places the name '[TENNESSEE]' in large letters at the top of every plate." *Id.* Just as in *Walker*, Tennessee "requires . . . vehicle owners to display license plates, and every [Tennessee] license plate is issued by

the State." *Id.*; *see also* Tenn. Code Ann. §§ 55-4-101(d)(1)(A), 110(b), 210(a). And just as in *Walker*, Tennessee owns the license plates and requires vehicle owners to return the plates upon revocation. *Walker*, 576 U.S. at 212; *see also Summum,* 555 U.S. at 472 (noting that government property is "often closely identified in the public mind with the government unit that owns the" property); *Mech*, 806 F.3d at 1076 (same, compiling examples).

Second, *Walker*'s conclusion that "license plates are . . . government IDs" associated with the State applies here. 576 U.S. at 212. Indeed, "*Walker* identified license plates as essentially government IDs even though it involved specialty designs instead of the combination of letters and numbers that actually identify the vehicle." *Vawter*, 45 N.E.3d at 1205 n.7. "[T]he unique combination of numbers and letters that actually identify a vehicle"—i.e., the registration numbers—"are *even more* government IDs than the specialty plates in *Walker*." R. XXII, 3250 (emphasis added); *Vawter*, 45 N.E.3d at 1205 n.7. And "issuers of ID typically do not permit the placement on their IDs of messages with which they do not wish to be associated." *Walker*, 576 U.S. at 212 (cleaned up). Accordingly, license-plate observers "routinely—and reasonably—interpret [registration numbers] as conveying some message on the [issuer's] behalf." *Id.* (quoting *Summum*, 555 U.S. at 471).

Third, as in *Walker*, "a person who displays a message on a [Tennessee] license plate" through their registration number "likely intends to convey to the public that the State" approved their message.

Id. at 212-13. Rather than use "private methods to display personal messages far more prominently and cost effectively," *Vawter*, 45 N.E.3d at 1206, an applicant for a personalized plate seeks to "enlist the *government* to print and issue an official license plate with his message and to use that message as the official identification and registration number for his vehicle," *Odquina*, 2022 WL 16715714, at *10. That "is not accidental." *Id.* "[V]ehicle owners requesting and displaying [personalized license plates] recognize the close association of the message with the state." *Vawter*, 45 N.E.3d at 1205.

States likewise recognize their association with the messages conveyed on license plates. *See Odquina*, 2022 WL 16715714 at *10. That is why numerous States have imposed offensiveness restrictions similar (and in some cases identical) to the restriction challenged here. *See* Ala. Admin. Code r. 810-5-1-.234(3)(a), (b); Fla. Stat. Ann. § 320.0805(4); Haw. Rev. Stat. § 249-9.1; Kan. Stat. Ann. § 8-132(d); La. Stat. Ann. § 47:463.2(A); Minn. Stat. Ann. § 168.12(2a)(d); Mo. Rev. Stat. § 301.144(3); Mont. Code Ann. § 61-3-405; Neb. Rev. Stat. § 60-3,118(2)(c); 67 Pa. Code § 49.3(b)(1); R.I. Gen. Laws Ann. § 31-3-17.1(a); S.C. Code Ann. § 56-3-2010(A); Utah Code Ann. § 41-1a-411(2)(a)(i); Wash. Rev. Code Ann. § 46.18.275(4)(b); Wis. Stat. Ann. § 341.145(7). That independent sovereigns have taken consistent action to restrict the available registration numbers confirms what common sense dictates: License plates "inevitably . . . will be associated with the [S]tate that issues them." *Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001).

In short, each aspect of *Walker*'s analysis under the government-association factor maps onto license plate registration numbers. But the Court of Appeals nonetheless rebuffed "the State's heavy reliance on *Walker*." *Gilliam*, 2023 WL 3749982 at *13. None of the lower court's arguments hold up.

For one, the Court of Appeals erred in concluding that the government-association factor cannot support government speech because citizens would not attribute the private message conveyed by "BIGRACK," "TOPLS69," and "WYTRASH" to the State. *Id.* at *12. Justice Alito's dissent argued the same thing in *Walker*, pointing out that no one who "saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming [football] games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would . . . assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents." *Walker*, 576 U.S. at 222 (Alito, J., dissenting). Not only did the Court reject that argument, it has repeatedly held that license plates are "'closely identified in the public mind' with the [State]" because they "serve as a form of 'government ID'"—an ID that includes designs *and* registration numbers. *Matal v. Tam*, 582 U.S. 218, 238 (2017) (quoting *Walker*, 576 U.S. at 212); *see also Vawter*, 45 N.E.3d at 1206. These holdings make clear that "[a] message may still be 'closely identified in the public mind' with the [State] irrespective of an explicit governmental endorsement" of a co-existing private message. *Vista-Graphics, Inc. v. Va. Dep't of Transp.*, 682 F. App'x 231, 236 n.6 (4th Cir. 2017).

The Court of Appeals also pointed to a 200-person survey presented by Gilliam at trial. *Gilliam*, 2023 WL 3749982 at *12. Gilliam's survey, however, rested on a false dichotomy: It asked whether "[t]he message featured on a personalized license plate represents the speech or views of the government" *or* "the person who chose it." Trial Tr. 76. That question erroneously presumes that "a [medium] can convey only one 'message.'" *Summum*, 555 U.S. at 474. That is, the survey forced participants to attribute "the message" to either the government or the private person; it did not ask whether the expression could contain both governmental and private messages. *Id.* The survey thus fundamentally failed to account for the reality that there can be mixed messages where the government conveys a message that differs from the intended private message. *Id.*; *supra* 22-25, 27-28.

Moreover, a survey cannot overcome Supreme Court precedent. If a survey on specialized license plates led to the same results, that would not mean that *Walker*'s conclusion that observers of specialized license plates "routinely—and reasonably—interpret [those plates] as conveying some message on the [government's] behalf" is no longer good law. 576 U.S. at 212 (quoting *Summum*, 555 U.S. at 471). The Court of Appeals cites not one case that has ever relied on a survey to resolve a government speech question—not *Summum*, not *Walker*, not *Shurtleff*, not any case. The court's decision thus warps the government-speech inquiry by jettisoning *Walker*'s clear associational analysis for flawed evidence that no other court has accepted.

Lastly, throughout its opinion, the Court of Appeals suggested that the State failed to "offer[] evidence tending to establish the public's perception about vanity license plates." *Gilliam*, 2023 WL 3749982 at *13. But Tennessee presented the exact evidence presented in *Walker*. *Supra* 29-32. If the evidence suffices for license plate designs, then it suffices for license plate registration numbers. Recognizing as much, the trial court properly relied on the evidence presented to find that "a viewer of a personalized plate in Tennessee associates the plate with the State of Tennessee." R. XXII, 3240.

That conclusion should carry the day here. "[A] government-issued license plate that every reasonable person knows to be government-issued, a fortiori conveys a government message." *ACLU v. Bredesen*, 441 F.3d 370, 377 (6th Cir. 2006). Under *Walker*, the second factor points directly at government speech.

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

The third factor—the degree of control over the communication at issue—also illustrates that license plate registration numbers constitute government speech. The State exercises supervisory authority over every requested registration number. So, again, *Walker*'s analysis governs and makes this an easy question.

In *Walker*, the Court explained that the State exercised control over license plate designs because Texas had "sole control over the design, typeface, color, and alphanumeric pattern for all license plates"; it required approval of "every specialty plate design proposal"; and it regularly exercised its authority to reject proposals. 576 U.S. at 213. By

"exercising 'final approval authority,'" the State controlled the medium of expression. *Id.* (quoting *Summum*, 555 U.S. at 473).

The same goes for Tennessee's personalized plates. As in Texas, Tennessee has "sole control over the design, typeface, color, and alphanumeric pattern for all license plates." *Id.* Not only that, state law sets out the requirements for registration numbers in minute detail, covering everything from the number of characters, to acceptable character configurations, to the physical size of the characters. Tenn. Code Ann. §§ 55-4-103(c), 55-4-210, 55-4-214(b)(2). The Department "'actively' review[s] every proposal" to ensure compliance with statutory requirements. *Shurtleff*, 596 U.S. at 257 (quoting *Walker*, 576 U.S. at 213); *see* Tenn. Code Ann. § 55-4-210(a); Tenn. Comp. R. & Regs. 1320-08-01-.02. And it regularly exercises its authority to reject proposed registration numbers. *Walker*, 576 U.S. at 213; *see* Trial Ex. 15. Even the Court of Appeals recognized that "the Department is, at times, heavy-handed in its regulatory authority" and noted that the record contained "a lengthy list of requested configurations that previously have been denied." *Gilliam*, 2023 WL 3749982 at *14.

Tennessee thus "maintains direct control over the messages conveyed on its . . . plates." *Walker*, 576 U.S. at 213. Unlike in *Shurtleff*, where the city "never requested to review" the message and had "no record of denying a request" before the denial at issue, 596 U.S. at 257, Tennessee scrutinizes each registration number request and dedicates substantial state resources to doing so. *Supra* 14-15. This level of control and "final approval authority" supports the treatment of license plate

registration numbers as government speech. *Vawter*, 45 N.E.3d at 1206 (quoting *Walker*, 576 U.S. at 213); *see also Mech*, 806 F.3d at 1078 (finding government "control" when a school exercised "final approval authority" over sponsorship banners); *Leake v. Drinkard*, 14 F.4th 1242, 1250 (11th Cir. 2021) (finding government "control" when a city "exercis[ed] final approval authority" over messages in parade).

Gilliam seeks to undermine the State's control by arguing that she—not the State—"designed" and "curated" the registration number at issue. Br. of Appellant at 50, *Gilliam*, No. M2017-01037-CCA-R3-CD (Tenn. Ct. App.). But the Supreme Court has refuted the notion that private involvement "in the design . . . of a message" undermines the governmental nature of the message when the government must "approve" the proposal. *Walker*, 576 U.S. at 212-13, 217. *Walker* held that the State controlled license plate designs, even when those designs were "made by private individuals and organizations." *Id.* 212-14. *Summum* also concluded that the government "'effectively controlled' the messages sent" even though "many of the monuments were not designed or built by the City and were donated in completed form by private entities." 555 U.S. at 472-73 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005)). "[T]he participation of [a private party] in designing [a message] has little or no relevance to whether a plate expresses a government message." *ACLU*, 441 F.3d at 377; *see also Vawter*, 45 N.E.3d at 1205; *Mech*, 806 F.3d at 1078-79. So Gilliam's selection of the registration number in no way undermines the State's control over what registration numbers it actually issues.

For its part, the Court of Appeals concluded that the State's control was dampened by the lack of "written policies about how to screen vanity plate applications for 'good taste and decency.'" *Gilliam*, 2023 WL 3749982 at *14. But the record establishes that the Department designated categories of excludable material: "profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs." R. XXII, 3221; *see also* Trial Tr. 210. And the Inventory Unit had a process for determining whether requested registration numbers fell within those categories. *Supra* 15. That these categories and processes were not written down does not diminish the control exercised. The State's "final approval authority establishes effective *control regardless of any set list of limits*" guiding the application of the governing standard. *Vawter*, 45 N.E.3d at 1207 (emphasis added) (citing *Walker*, 576 U.S. at 213).

Nor does it matter that the approval process turns, in part, on "the judgment of the . . . Inventory Unit team member reviewing the application." *Gilliam*, 2023 WL 3749982, at *14. The Department's control over personalized license plates does not turn on the objectiveness of the standard; it turns on whether the State retained "final approval authority" and "actively exercised th[at] authority." *Walker*, 576 U.S. at 213; *see also Shurtleff*, 596 U.S. at 257 (noting that the board in *Walker* "'maintain[ed] direct control' over license plate designs by 'actively' reviewing every proposal and rejecting at least a dozen"). Courts find the control factor satisfied when *no standard governed the exclusion at all. See McGriff v. City of Miami Beach*, 84 F.4th 1330, 1334-35 (11th Cir.

2023); *Gundy v. City of Jacksonville*, 50 F.4th 60, 79-80 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 790 (2023); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. V. Vilsack*, 6 F.4th 983, 990 (9th Cir. 2021) *cert. denied*, 142 S. Ct. 2867 (2022).

And the fact that some plates slip through the cracks does not mean that "the Department exerts minimal control." Br. of Appellant at 43, *Gilliam*, No. M2017-01037-CCA-R3-CD (Tenn. Ct. App.); *see Gilliam,* 2023 WL 3749982, at *14 (noting "discrepancies"). "[M]istakes are made in the process of reviewing personalized plate applications" because "five reviewers have 80 to 100 applications a day to review." R. XXII, 3243. The control factor does not require perfect accuracy in the application of a standard to tens of thousands of requests. R. XXII, 3243 (noting the 60,000 active personalized plates). It requires the government to exercise supervisory authority and not rubber stamp every request. *See Shurtleff*, 596 U.S. at 256; *cf. Katz v. DMV*, 32 Cal. App. 3d 679, 687 (1973).

The non-binding federal district court cases Gilliam cites for her control argument conflate differing inquiries and, more importantly, advance arguments rejected by the Supreme Court. For example, *Hart v. Thomas* claimed that the State could exercise control only if it "approv[ed] vanity plates whose message it officially adopts and endorses," not plates "babbling prodigiously and incoherently." 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019) (citation omitted). It is hard to see how that contention relates to *Walker*'s "control" analysis. 576 U.S. at 213. In any event, *Summum* rejected the notion that "a [medium] can convey only one 'message'—which is, presumably, the message intended

by the [creator]—and that, if a government entity . . . does not formally embrace *that* message, then the government has not engaged in expressive conduct." 555 U.S. at 474. And, as explained at length above, the State conveys an identifying message that exists independent of any private message.

Like the first two factors in the *Walker* analysis, the third factor—government control—strongly supports recognizing registration numbers as government speech.

* * *

A faithful application of U.S. Supreme Court precedent resolves this case. Each of *Walker*'s factors—communicative history, association with the State, and control through approval—supports government speech. This Court should therefore hold that the registration numbers on state-issued license plates constitute government speech.

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

Treating registration numbers as government speech requires no meaningful extension of existing precedent. It certainly does not require the type of "huge and dangerous extension of the government-speech doctrine" that *Matal* feared. 582 U.S. at 239. The State does not seek to convert purely private, commercial speech into government speech; it merely seeks to control a government-owned medium used to convey governmental messages. And it does so in a context that poses no threat to public discourse.

A. This case fits within existing precedent.

Walker held that license plates act as "government-mandated, government-controlled, and government-issued IDs . . . used as a medium for government speech." 576 U.S. at 214. Surely, then, the very part of those license plates that actually identifies the vehicle and conveys a government message—the registration number—qualifies as government speech. Recognizing as much does not "extend[]" *Walker*, *see Gilliam*, 2023 WL 3749982 at *13; it adheres to *Walker*'s reasoning in an even easier case.

In fact, even the dissent in *Walker* (arguing that license plate designs were *not* government speech) conceded that "license plates unquestionably contain *some* government speech (e.g., the name of the State and *the numbers and/or letters identifying the vehicle*)." 576 U.S. at 222 (Alito, J., dissenting) (second emphasis added). There was, thus, in effect, unanimity in *Walker* that the alphanumeric characters used on a license plate to identify the vehicle constitute government speech. The dissent said so explicitly, *see id.*, and the majority, while declining to explicitly resolve the issue, effectively did so by treating license plates as "government-mandated, government-controlled, and government-issued IDs," *id.* at 214.

Accordingly, deciding this case in the State's favor does not require this Court to break new doctrinal ground.

B. *Matal*'s assessment of purely private speech is inapposite.

Gilliam cannot dodge her doctrinal difficulties by pointing to *Matal*. That decision involved *purely private speech* containing no governmental message.

In *Matal*, the dispute centered on trademarks. Trademarks are "distinctive marks—words, names, symbols, and the like—[that private parties use to] help distinguish [their] goods from those of others." 582 U.S. at 223-24. For example, Nike Inc. has trademarked its iconic swoosh symbol and the phrase "Just do it," and Apple Inc. has trademarked its logo and the phrase "Think different." *Id.* at 236. Whether a mark is registered with the government or not, private parties can use these symbols and catchy phrases in commerce to identify and promote goods. *Id.* at 225; *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2297-98 (2019) ("Registration of a mark is not mandatory."). "And an unregistered trademark can be enforced against would-be infringers in several ways." *Matal*, 582 U.S. at 225.

The government's involvement with trademarks is limited to registration. If a private party chooses to register its mark, the government places the mark on the "federal register" and issues a certificate of registration. *Id.* at 224-25. Registration makes it easier for a private party to prevent others from using its mark—serving as constructive notice, establishing ownership, confirming validity, and conferring certain enforcement mechanisms. *Id.* at 226.

The *Matal* Court held that this governmental registration of private expression does not convert private speech into government speech. *Id.*

at 235-39. That makes sense. "Trademarks have not traditionally been used to convey a Government message," and the mere registration of a mark does not somehow infuse it with a governmental message. *Id.* at 238. Moreover, "there is no evidence that the public associates the contents of trademarks with the Federal Government." *Id.* In fact, the federal government in *Matal* affirmatively conceded that "even after a mark is registered, the owner's placement of the mark on goods or advertisements in commerce is private rather than government speech." Reply Br. of Petitioner at 14, *Matal v. Tam*, No. 15-1293, 2017 WL 117333 (U.S. Jan. 9, 2017). It is no surprise, then, that with "none of the[] [*Walker*] factors . . . present," the Court held that the government-speech doctrine did not apply to trademarks. *Matal*, 582 U.S. at 238.

That holding bears no relation to the question here. In allowing vehicle owners to request a specific registration number, the State is not merely "affixing a government seal of approval" on an otherwise purely private message. *Id.* at 235; *see also Women for Am. First v. Adams*, 2022 WL 1714896, at *3 (2d Cir. May 27, 2022). The message conveyed through registration numbers starts out governmental—and stays that way. That is, the State conveys its own identifying message through registration numbers and, for a fee, allows private parties to choose a governmental identifier that may have additional meaning to them.

Matal addressed a different issue: whether "government protection of [private] speech from commercial infringement" somehow renders it governmental. *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 364 (D.C. Cir. 2018). The Court rejected that distinct

proposition. And it explicitly distinguished trademarks from license plates, reiterating that "license plates have long been used by the States to convey state messages" and "'are often closely identified in the public mind' with the State." *Matal*, 582 U.S. at 238 (quoting *Walker*, 576 U.S. at 212). *Matal* itself put it best: trademark registration is "vastly different" from the "license plates in *Walker*." *Id.* at 239.

The punchline is that *Matal* provides "no reason. . . not to carefully employ the *Walker* rubric beyond plate designs, particularly to issues as closely related as plate alphanumerics." *Odquina*, 2022 WL 16715714 at *12 n.12.

C. The context prevents any undue expansion of the government-speech doctrine.

In any event, the dangers of an overly expansive government-speech doctrine that *Matal* feared pose no threat here. There is no real risk of the State using control over registration numbers as a trojan horse to "silence or muffle the expression of disfavored viewpoints." *Matal*, 582 U.S. at 235.

For one, the registration numbers on license plates have limited capacity to foster private expression. While they may convey some incidental private message, the "primary purpose" of registration numbers "is to identify the vehicle, not to facilitate the free exchange of ideas." *See Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008); *see also Kahn*, 16 Cal. App. 4th at 166. Tennessee license plates "are small and contain a maximum of [seven] characters, [so] they cannot realistically promote . . . discourse, communication, and debate." *See Vawter*, 45 N.E.3d at 1208; *see also Perry*, 280 F.3d at 167-68. With those

limits, State control over registration numbers cannot meaningfully dampen private expression or drive ideas from the marketplace.

For two, Tennessee has treated registration numbers as government speech and implemented offensiveness restrictions *for decades* without triggering any suppression of speech. *See supra* 14-15; 1998 Tenn. Pub. Acts, ch. 1063, § 1. History thus refutes the notion that registration numbers somehow serve as the gateway to an ever-expanding approach to government speech.

For three, the very nature of the medium of expression—license plate registration numbers—mitigates any slippery-slope concerns. If this Court adopts the State's position, then the government-speech doctrine would continue to apply to expression (1) conveying a governmental message (2) on government-owned property (3) that serves as a government ID (4) subject to State approval. That application cannot realistically facilitate an expansive approach to government speech in future cases.

D. Ruling for Gilliam would open a doctrinal Pandora's Box.

By contrast, adopting Gilliam's position would upend the government speech doctrine. Under Gilliam's rule, the government-speech doctrine would toggle off anytime a private message purportedly overshadows the government's identifying message. But, as explained, the U.S. Supreme Court has never parsed the putative strength of the governmental and private messages contained in mixed speech. *Supra* 23-25. It simply determines whether the speech contains a government message and, if so, applies the government-speech doctrine. *Id.* And

that is for good reason: Any attempt to balance or compare whether speech is more governmental or more private would be unworkable.

For starters, there is no principled manner for weighing messages' relative strength. Courts are not equipped to compare messages that differ in kind—e.g., the government's functional messages versus an individual's artistic messages. Attempting to craft such a comparative test would do nothing but "invite[] chaos"—as it has done in other contexts. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (noting courts' inability to apply a similar test to actions serving both religious and secular purposes).

Even if courts could conduct an apples-to-oranges comparison, it is anyone's guess as to the context in which such a comparison should occur. And context no doubt matters when assessing the strength of coexisting messages. If a drive-by shooting is in progress, for example, the import of the government's identifying message on the perpetrator's car would win out over any private message. The same goes for the many other scenarios where the public's identifying need would take precedence over internalizing a plate owner's personal message. This reality—that the import of messages differs based on context—compounds the complications associated with the adoption of a mixed-message balancing test.

What is more, the comparative analysis required by Gilliam's approach would seemingly require a case-by-case analysis, as some private messages may be more conspicuous than others. For example, a private message conveyed using the f-word likely stands out more than a plate owner's initials (like "GSSIII")—which likely bear little meaning to

the public. Trial Tr. 46-47. So not only would courts have to apply an unprincipled comparative test, they would have to apply it plate-by-plate in perpetuity. This approach simply does not square with Supreme Court precedent. *See Walker*, 576 U.S. at 210-14 (holding that "license plate designs" constitute government speech without analyzing each specific design); *Summum*, 555 U.S. at 472 (same, with monuments in park).

Further, Gilliam's proposed comparative inquiry conflicts with the principles underlying the government-speech doctrine. The doctrine recognizes that the government needs to speak to "implement programs," "formulate policies," or address "community" concerns. *Shurtleff*, 596 U.S. at 251. And, to do so effectively, the government must be allowed to "speak" without "giv[ing] every outside individual or group a First Amendment right to play ventriloquist." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). The government's need for bottom-line control over its communication does not fade just because the government allows some coexisting private message or involvement. The doctrine protects the government's right to "determin[e] the content of what it says"—full stop. *Walker*, 576 U.S. at 207.

At bottom, the State's position here hews to precedent; Gilliam's does not. The sky will not fall if this Court faithfully applies *Walker* and *Summum* to registration numbers. The Court will, though, confound the government-speech doctrine if it accepts Gilliam's request to conjure a new comparative test for mixed speech.

III. Practical Considerations Weigh in Favor of Treating Registration Numbers as Government Speech.

In contrast to the minimal private expression at issue, the State has substantial governmental interests in maintaining control of the registration numbers conveying its identifying messages. The lopsided nature of the private versus governmental interests confirms the governmental character of registration numbers in the "holistic" government-speech inquiry. *Shurtleff*, 596 U.S. at 252.

For one, the treatment of registration numbers as government speech furthers the State's interest in "protecting the public, especially young children, from offensive and indecent speech" on state-issued plates. *Perry*, 280 F.3d at 169. The registration numbers on Tennessee plates must be "clearly visible" and readable from 100 feet, Tenn. Code Ann. §§ 55-4-103(c), 55-4-110(b), meaning they are clearly visible to children in other vehicles and near roadways. The State has a substantial interest in "protect[ing] children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). That interest is amplified by the fact that the State itself owns the plates, and its issuance of the registration number, at a minimum, "communicat[es] the message that it approves of the public display of [the] offensive . . . terms on state license plates." *Perry*, 280 F.3d at 169.

Moreover, the treatment of registration numbers as government speech promotes the public interest in safety on public roadways. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). Courts have found that offensive advertisements on buses would

foreseeably cause harm or disruption, and offensive license plate registration numbers raise the same threats. *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 500-01 (9th Cir. 2015); *cf. Odquina*, 2022 WL 16715714, at *14. It is not hard to imagine a plate with a racial slur leading to violence with dire consequences. Allowing the government to control its own speech on government property would eliminate that threat and allow the State to effectively use government property for government purposes.

These considerations highlight *Walker*'s fundamental conclusion: License plates are "government-mandated, government-controlled, and government-issued IDs . . . used as a medium for government speech." 576 U.S. at 214. That conclusion—and *Walker*'s accompanying analysis—should resolve this case.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46 § 3.02, I certify that the number of words in this brief, excluding the portions of the brief exempted by the Rule, is 9403. This word count is based on the Microsoft Word system used to prepare this application.

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