IN THE SUPREME COURT OF TENNESSEE

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

PROPOSED *AMICUS CURIAE* BRIEF OF SIMON TAM

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Simon Tam asks for leave to file the attached *amicus curiae* brief in support of plaintiff-appellee Leah Gilliam. Tam was the respondent in *Matal v. Tam*, 582 U.S. 218 (2017), and has a longstanding interest in free expression. He is the author of *Slanted: How an Asian American Troublemaker Took on the Supreme Court* (2019).

INTRODUCTION AND SUMMARY OF ARGUMENT

The government operates a vast array of programs and controls a vast amount of property. First Amendment law recognizes that the freedom of speech must often include the freedom to speak within those programs and on that property—for instance, the freedom to choose one's own trademarks, free of government viewpoint discrimination; the freedom to create one's musical works, and to get copyright protection for them regardless of their subject matter; the freedom to speak in traditional, designated, and limited public fora; and more.

To be sure, the government is also entitled to speak itself, and when it speaks it is entitled to choose its own speech. But to maintain broad protection for nongovernmental speakers, the government speech doctrine must be properly limited. In particular, the government's power to decide which license plate *designs* to allow on its license plates does not entail the power to decide which *personalized license plates* it will allow.

Here, history—which also influences reasonable public perception—is the guide. States have long used license plate designs to convey some ideas. They may be political ideas embodied in the state motto (e.g., New Hampshire's "Live Free or Die"). They may be expressions of pride

in some feature of state history (e.g., North Carolina's "First in Freedom") or some characteristic state product (e.g., Idaho's "Famous Potatoes" or Wisconsin's "America's Dairyland"). They may be a combination of messages (e.g., Tennessee's "The Volunteer State" and the optional "In God We Trust").

Over time, states started to allow drivers to choose among various designs, which likewise often captured a range of state-approved ideas. And eventually, states allowed groups to choose their own designs as well. Because of this history, the Supreme Court held in *Walker v. Sons of Confederate Veterans*, 576 U.S. 200 (2015), that such designs were generally government speech. Drivers who see a mix of license plate designs on the roads may still see those designs—which are mostly the default government-created design—as a form of government speech, conveying predominantly the government's ideas.

But *Walker* itself concluded only that, "*insofar as license plates have conveyed more than state names and vehicle identification numbers*, they long have communicated messages from the States." *Id.* at 210-11 (emphasis added). *Walker* was thus distinguishing the plate designs, which were historically "messages from the States," from the license plate numbers,[1] which were *not* such state messages. And indeed license plate numbers had not been used by states to convey any messages. They conveyed

[1] This brief will follow the common practice of referring to these as "numbers," *see, e.g.*, *State v. Albright*, 564 S.W. 3d 809, 812 (Tenn. 2018), even though they are alphanumeric.

only an arbitrary set of letters and digits, made up solely to provide a unique identifier.

When vanity plates emerged, they for the first time allowed the expression of something meaningful through the license plate number—and that something was messages from the drivers, not "messages from the States." Passersby who see cars that have license plates containing, say, 7GVS439, LHG127, and SLANTS, will not likely think, "That is the state conveying the messages 7GVS439 and LHG127, and the state (or even the state plus the driver) conveying the message SLANTS." Rather, they will likely think, "Those are two license plates with no message, and one with the message SLANTS."

In this respect, vanity license plate numbers are much like the trademarks at issue in *amicus*'s case, *Matal v. Tam*. Everyone seeing the band name *The Slants* would view it as the trademark owner's speech marking and distinguishing the owner's product, and not as the government's speech. Likewise, everyone seeing the license plate with the message SLANTS would view it as the car owner's speech marking and distinguishing the owner's car, and not as the government's speech.

Yet under the government's view, if Mr. Tam applied for a SLANTS plate, the government could treat that plate as government speech, and reject it on the theory that it "may carry connotations offensive to good taste and decency." Tenn. Code Ann. § 55-4-210(d)(2). That was the argument that the U.S. Supreme Court rejected in *Matal*, which involved the same private message by the same person. And the Court of Appeals was

correct in rejecting such an argument here, and in concluding that the vanity license plate program involved private speech.

ARGUMENT

I. The government speech doctrine should be read narrowly, to prevent undue restriction of nongovernment speech.

As *Matal v. Tam* noted,

> [W]hile 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. For this reason, we must exercise great caution before extending our government-speech precedents.

582 U.S. 218, 235 (2017).

This is so in part because modern government is so large. It operates a vast range of programs that promote people's and organizations' speech: the trademark system involved in *Matal*, the copyright system, grants given to student groups (*see, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995)), charitable tax exemptions (*id.* at 834), and more. It likewise operates a vast range of property on which people and organizations are free to speak: traditional public fora such as streets and parks, designated or limited public fora such as university classrooms open to student groups, and more. If the government could label such private speech "government speech" simply because it is conducted within a government program or on government property, our free speech rights would be sharply diminished.

II. History provides the key here to distinguishing government speech from private speech, and vanity plate programs have historically involved private speech.

In determining whether a particular program involves government or private speech, the history of whose message the program has generally conveyed often provides the key. The Court stressed this history in *Matal*. Monuments in public parks are government speech, the Court recognized, even when the government accepts privately supplied monuments: "Governments have used monuments to speak to the public since ancient times . . . ." 582 U.S. at 238. But trademarks are private speech, in large part because "Trademarks have not traditionally been used to convey a Government message." *Id.*

Likewise, the Court in *Walker v. Sons of Confederate Veterans*, 576 U.S. 200, 210-11 (2015), concluded that license plate designs had a history of being used for government expression. The Court noted that license plates had long included graphics or text representing some point of state pride, such as Arizona's 1917 "depiction of the head of a Hereford steer," Idaho's 1928 "Idaho Potatoes," and South Carolina's "The Iodine Products State," or some other message, such as Florida's "Keep Florida Green." *Id.* at 211.

But the *Walker* Court noted that these messages were present "insofar as license plates have conveyed more than state names and vehicle identification numbers." *Id.* at 210-11. The "vehicle identification numbers" supplied purely identifying information, not any sort of "messages from the States." *Id.* at 211. When states created vanity plate programs,

they for the first time allowed messages as part of the license plate number itself (as opposed to the background design). And those messages were always selected by the owner, not by the government; that indeed was their point.

The other factors identified by *Walker* and *Matal* usually run in parallel with the history factor. As *Matal* noted, quoting *Walker*, "license plates 'are often closely identified in the public mind' with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of 'government ID.'" 582 U.S. at 238. But while this conjunctive test was satisfied as to the plate designs in *Walker*, it is not satisfied as to the vanity plate program in this case, because the only messages on the license plate tags are exclusively designed by owners. As with the trademark program in *Matal*, "there is no evidence that the public associates the contents of [vanity plates] with the . . . Government," *id.*, because members of the public are well aware that vanity plates have always been tools for them to express themselves, not for the government to express itself. *See also* Appellee Br. at 13, 62-63 (explaining why vanity plate numbers do not become government speech simply because they are part of a "government ID").

The Court in *Matal* also made clear that, while speech can be government speech when the government "maintain[s] direct control over the messages" within the program, 582 U.S. at 238, that control is not present merely because the government reserves the right to exclude some messages; after all, in *Matal* itself the government excluded supposedly derogatory trademarks (such as "The Slants"). Likewise, while

the messages within license plate designs are still largely and visibly directly controlled by states—since most cars still display the lower-cost state-provided design—any messages within the license plate tags are supplied by the drivers. *See also* Appellee Br. at 53-59 (explaining further why the government "has neither actively shaped nor meaningfully controlled personalized plate messages").

To be sure, sometimes the government may open a program to private speech despite a history of the program being used for government speech: Boston's unusual system of flying nearly every flag it was asked to fly, discussed in *Shurtleff v. City of Boston*, 596 U.S. 243, 254-55 (2022), is an example. But when, as in *Matal* and as in this case, a program has long been a tool for private speech, it should be governed by the protections that the First Amendment offers to private speech.

CONCLUSION

Walker, the Court unanimously held in *Matal*, "likely marks the outer bounds of the government-speech doctrine." 582 U.S. at 238. The Tennessee vanity plate program lies well beyond those bounds: Rather than having "long . . . communicated messages from the States," the contents of state-supplied license plate tags have historically been merely "vehicle identification numbers." *Walker*, 576 U.S. at 211. Ever since states began to allow owner-defined vanity plates, those plates have been mechanisms for private speech. They continue to be so in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief consists of 1,767 words, in compliance with Tenn. Sup. Ct. R. 46.3.02(a)(1)(c).

/s/ Sarah L. Martin
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