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1/18/2022 12:31 PM
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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

LEAH GILLIAM,	)
	)
Plaintiff,	)
	)
vs.	) **No. 21-606-III**
	) **Chancellor Ellen Hobbs Lyle (Chief Judge)**
DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, and HERBERT H. SLATERY III, TENNESSEE ATTORNEY GENERAL,	) **Chancellor Doug Jenkins**) **Judge Mary Wagner**)))))
Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM DECEMBER 8-9, 2021 BENCH TRIAL; AND FINAL ORDER DISMISSING CASE WITH PREJUDICE

This lawsuit concerns the revocation of the Plaintiff's personalized license plate by the Tennessee Department of Revenue (the "Department"), who regulates such matters. The license plate contained the configuration, "69PWNDU." Determining that the plate could be a reference to sexual activity and domination, the Department revoked the Plaintiff's license plate under the authority of Tennessee Code Annotated section 55-4-210(d)(2). That section authorizes the Commissioner to refuse personalized license

plate configurations that "may carry connotations offensive to good taste and decency." This lawsuit was then filed challenging the constitutionality of section 55-4-210(d)(2).[1]

Located in Part 2 "Special License Plates" of Title 55 of the Tennessee Code, "Motor and Other Vehicles," section 55-4-210(d)(2) is a statute pertaining to authorization and issuance of personalized license plates, also known as "vanity" license plates. The statute provides as follows (subsection (a) is also quoted for context).

> 55-4-210. Authorization; issuance by department.
>
> (a) The department is authorized to administratively issue personalized plates to qualified applicants; provided, that the minimum issuance requirements of § 55-4-202(b)(3) and all other requirements of this part are met.
>
> * * *
>
> **(d)(2) The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading** [emphasis added].

The Plaintiff's *Verified Complaint*, filed June 28, 2021, asserts that the Plaintiff's revoked personalized plate constituted private speech protected by the First Amendment to the U.S. Constitution and that Tennessee Code Annotated section 55-4-210(d)(2)

[1] The Plaintiff is also challenging the revocation of the license plate in an administrative proceeding under the Uniform Administrative Procedures Act as provided in Tennessee Code Annotated section 55-5-119(c). The lawsuit filed in the above captioned matter is a separate constitutional challenge to the revocation of the Plaintiff's personalized license plate pursuant to *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008) holding that facial constitutional challenges are to be decided by a court as opposed to the administrative agency.

regulating that speech violates the First Amendment and should be declared unconstitutional in three respects:

— Count V(1) Violation of the First and Fourteenth Amendments (Content—and Viewpoint—Discrimination);

— Count V(2) Violation of the Fourteenth Amendment (Unconstitutional Vagueness); and

— Count V(3) Violation of the Fourteenth Amendment (Due Process).

In particular the Plaintiff asserts that because section 55-4-210(d)(2) is government regulation of private speech in a manner that is not viewpoint neutral and discriminates based upon viewpoint, strict scrutiny must be applied in analyzing the statute. The relief the *Verified Complaint* seeks is a declaratory judgment under Tennessee Code Annotated sections 29-14-102 and 106, 1-3-121, and 42 U.S.C. section 1983, a permanent injunction under Tennessee Civil Procedure Rule 65; and recovery of damages, costs and attorneys' fees.

The Defendants' position is that the Panel never reaches an analysis of the three constitutional violations asserted by the Plaintiff because those three protections only apply to private speech. The Defendant's position is that the Plaintiff's revoked license plate constituted government speech which generally is not subject to the Free Speech Clause. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* ("*Walker*"), 576 U.S. 200, 201 (2015). Accordingly, the Plaintiff's three alleged constitutional violations (viewpoint discrimination, unconstitutional vagueness, and due process) are not implicated because the speech in issue is government speech. Alternatively, the Defendants assert that even

when courts have found that personalized license plates are not government speech, they nevertheless consistently have determined that the plates are nonpublic forums. As to the Defendant Commissioner, the Defendants assert the defense that he is entitled to qualified immunity.

On December 8 and 9, 2021, a bench trial was conducted before the Three-Judge Panel ("Panel") assigned to the case.[2] Four witnesses testified in the following sequence: George S. Scoville, III—owner of a personalized license plate; Alan Secrest—expert witness in polling and polling methodology; Demetria Michelle Hudson (by deposition and in person)—Assistant Director of Vehicle Services for the Tennessee Department of Revenue and Defendants' Rule 30.02(6) designee; and Tammi Moyers—Vehicle Services Division Manager over the Inventory and Specialized Application Unit, reporting directly to Ms. Hudson. Nineteen exhibits were admitted into evidence. At the conclusion of the trial, the Panel took the matter under advisement.

After considering the oral argument of Counsel, the evidence, and studying and applying the law and conferring, the Panel finds and concludes that the Plaintiff's license plate is government, not private, speech, and therefore the Department is not barred on constitutional grounds by the First Amendment to the U.S. Constitution from revoking issuance of the "69PWNDU" license plate. Because the speech in issue is government

[2] Pursuant to Tennessee Code Annotated section 20-18-101 the constitutional challenge made in this case was assigned by the Tennessee Supreme Court to a Three Judge Panel drawn from the three Grand Divisions of the State.

speech the Plaintiff's three causes of action: content and viewpoint discrimination, unconstitutional vagueness and due process are not implicated and must be dismissed. It is therefore ORDERED that the Plaintiff's *Verified Complaint* is dismissed with prejudice, and court costs are taxed to the Plaintiff.

In addition, with respect to motions filed pretrial but held in abeyance by the Panel until the conclusion of the trial, the Panel's rulings are as follows.

— *Plaintiff's Motion to Revise this Court's Clearly Erroneous "Conclu[sion] Because of the Denial of Certiorari by the United States Supreme Court"*, filed December 4, 2021—The revision sought by the Plaintiff is to page 20 of the September 2, 2021 *Memorandum and Order Denying the Plaintiff's Application for a Temporary Injunction* wherein the Panel stated that one reason it concluded the specialty plate context of *Walker* was not a material distinction for this case was, "because of the denial of certiorari by the United States Supreme Court of the *Commission of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015) case where the *Walker* three-part test was applied by an Indiana court to a personalized license plate." The Panel **GRANTS** the revision to the limited extent that the Panel acknowledges that a denial of certiorari by the United States Supreme Court of the case of *Commission of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015) is not a barometer/indicator of the U.S. Supreme Court's approval of the *Vawter* Court's determination that the content on Indiana's personalized plates constitutes government speech, but that the revision does not preclude the Panel from considering *Vawter* as persuasive authority, and the revision does not change the ultimate outcome herein that the speech in issue is government speech. The Panel acknowledges the admonition from Justice Frankfurter that no inferences may be drawn from a denial of certiorari. *See State of Maryland v. Baltimore Radio Show, Inc, et al*, 70 S.Ct. 252, at 255: " . . . this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." The Panel understands the admonition; however, the citation in the temporary injunction ruling to the U.S. Supreme Court's denial of

certiorari was not the sole basis for the outcome in that proceeding or herein. *See infra* at 19-36. The Panel sees no impediment in Justice Frankfurter's admonition to considering the reasoning of the *Vawter* Court as persuasive authority, so long as it is based on the circumstances and reasoning of the case (which is so) rather than the denial of certiorari by the United States Supreme Court.

— *Plaintiff's Motion for Discovery Sanctions*, filed December 5, 2021 and renewed at trial—**Denied.** As to the testimony of Director Hudson: her first deposition, her second deposition and her testimony at trial, the Panel places no weight on the testimony—for or against either party—because the testimony was confused, contradictory and in some areas uninformed. Nevertheless, having observed Director Hudson's demeanor and credibility from her in person testimony at trial, the Panel finds she was not fabricating, obfuscating or prevaricating. The inferences the Panel draws are that she is not knowledgeable about the legal doctrines of constitutional law of private and government speech, and she also does not know the details of the personalized license plate process outside of the specific work she does. In addition she was clearly intimidated by the questions posed by Plaintiff's Counsel. Moreover, considering Ms. Hudson's title of Assistant Director, it was not irrational or duplicitous for Defendants' Counsel to designate Ms. Hudson as a 30.02(6) representative. Further, it is not prejudicial to the Plaintiff that the Panel is not considering any part of Ms. Hudson's testimony, including parts damaging to the Defendants, because Ms. Hudson's testimony in some respect is cumulative of Ms. Moyers and of the Defendants' responses to discovery, admitted as trial exhibits. Also the State website description of the configuration on personalized license plates, characterized as a damaging Defendants' admission by the Plaintiff, was admitted into evidence as a part of Trial Exhibit 1. The Panel therefore concludes that the Plaintiff has failed to demonstrate circumstances warranting an award of sanctions.

— *Defendants' Objections to Certain Questions in Ms. Hudson's Depositions*— **Denied as moot.** Having placed no weight on the testimony of Ms. Hudson, it is unnecessary for the Panel to rule on the numerous objections made by the Defendants to the deposition testimony of Ms. Hudson.

The findings of fact and conclusions of law on which the above rulings are based are as follows.

Findings of Fact and Conclusions of Law

Tennessee's Personalized License Plate Process

As a condition precedent to operating a motor vehicle in the State of Tennessee, the vehicle must be registered in accordance with the requirements of Tennessee Code Annotated sections 55-4-101 *et seq*. Part of that process is that a motor vehicle is required to have registration plates for its operation. TENN. CODE ANN. § 55-4-101(a)(1). Part 2, of Chapter 4 "Registration and Licensing of Motor Vehicles," of Title 55 provides for "Special License Plates." This includes the issuance of a "Personalized Plate" defined as:

> (6) "Personalized plate" or "personalized license plate" means the class of cultural motor vehicle registration plates that features on each individual plate not less than three (3) nor more than seven (7) identifying numbers, letters, positions or a combination thereof for a passenger motor vehicle, recreational vehicle or truck of one-half or three-quarter-ton rating or, if authorized, not less than three (3) nor more than six (6) identifying numbers, letters, positions or a combination thereof for a motorcycle, as requested by the owner or lessee of the vehicle to which that plate is assigned.

To obtain a personalized license plate a vehicle owner completes an application to select alphanumeric combinations to be displayed on their license plate. Vehicle owners may submit up to three ranked choices for their preferred alphanumeric combination, subject to the approval of the Department. TENN. CODE ANN. § 55-4-210(c)(1) and (d)(2);

TENN. COMP. R. & REGS. 1320-08-01-.02. The proposed combinations must be unique[3] and cannot include offensive or misleading content. TENN. CODE ANN. § 55-4-210(d)–(e). A personalized license plate must be approved by the Department before it can be displayed. TENN. CODE ANN. § 55-4-210; TENN. COMP. R. & REGS. 1320-08-01-.02. The Department must approve every personal license plate. TENN. CODE ANN. § 55-4-210; *see also* TENN. COMP. R. & REGS. 1320-08-01-.02. As stated in Exhibit 2 to Trial Exhibit 1, the applicant requests the Department to approve a configuration of numbers and/or letters to be displayed on types of license plates designed by the State:

> 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 description 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 the 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.

The application to obtain a personalized plate (Trial Exhibit 18) provides in bold, "Tennessee reserves the right to refuse to issue objectionable combinations."

At trial the Defendants presented the testimony of Tammi Moyers who testified to the process the State uses to review personalized license plates for compliance with the good taste and decency requirements of section 55-4-210(d)(2). Ms. Moyers is employed by the Department of Revenue as the Vehicle Services Division Manager over the

[3] Personalized license plates "shall not conflict with or duplicate the registration numbers for any existing passenger, recreational, commercial, trailer or motor vehicle registration plates that are presently issued pursuant to statute, resolution, executive order, or custom." Tenn. Code Ann. § 55-4-210(e).

Inventory and Specialized Applications Unit. Part of her job is to review applications for personalized plates. She reports directly to Demetria Michelle Hudson, the Vehicle Services Assistant Director in the Department of Revenue who served as the Defendants' Tennessee Civil Procedure Rule 30.02(6) designee in this case for depositions and during the trial.

Ms. Moyers' testimony established that she is part of a five-person team which reviews the compliance of personalized plate applications with the statutory requirement that configurations issued by the Department shall not carry connotations offensive to good taste and decency, and shall otherwise comply with the requirements set forth in Tennessee Code Annotated section 55-4-210. If the reviewer does not recommend approval, the issue "moves up the chain" to the Assistant Director (Ms. Hudson) and Directors of the Division to also review it. If a configuration is reviewed for revocation, it is subject to review by the Department's legal counsel and the Commissioner.

Ms. Moyers' testimony established that in implementing Tennessee Code Annotated section 55-4-210(d)(2), management in the Department of Revenue has designated categories for the Inventory Unit to use in reviewing personalized plate applications for configurations that contain, allude to, or are audibly similar to any word or phrase with one or more of the following associations: profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs. These categories are not contained in a handbook or regulation. These categories have been identified by management in the Department for the reviewers to use. Ms. Moyers' testimony

established that the Inventory Unit utilizes various resources to assist in its evaluation of personalized plate applications, including a table of configurations (the "Objectionable Table") (Trial Exhibit 15). This is a collection of configurations that have previously been determined to carry connotations offensive to good taste and decency as prohibited by Tennessee Code Annotated section 55-4-210(d). Also Urban Dictionary is used.

Ms. Moyers' testimony established that it is the policy of the Department to reject configurations that include the sequence "69," because of its association with a sexual activity, unless "69" references a 1969 vehicle.

The historical context of personalized license plates in Tennessee[4] is that the State began issuing plates in 1915. In the century that followed, those plates were updated and changed several times. Tennessee case law establishes the facts that graphics were first used on Tennessee license plates in 1927, when the plate included a large, embossed outline of the shape of the State. Beginning in 1936, and continuing through 1956, Tennessee issued license plates that were shaped like the State. In 1977, Tennessee added the slogan "The Volunteer State" to its license plates. In 1989, Tennessee incorporated a three-star design taken from the Tennessee flag on its license plates. Tennessee's current standard passenger plate includes the name of the State, the slogan "The Volunteer State," and an

[4] These Tennessee historical facts are established in the work of James K. Fox, License Plates of the United States: A Pictorial History 1903–to the Present, pp. 94-95 (Interstate Directory Publ'g Co. 1997). Both the *Walker* and *Vawter* decisions relied on this publication. *Walker*, 576 U.S. at 211; *Vawter*, 45 N.E.3d at 1204-05. From these cases, the Panel takes judicial notice of these facts, which are "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). If, however, such facts are determined not to be admissible, they are not dispositive. There are many more facts the Panel relies upon for the application of *Walker* to this case.

image of green mountains used as the backdrop for the plate. In 1998, Tennessee significantly expanded its specialty-license plate program and began issuing cultural license plates, including collegiate license plates and personalized license plates. *See* 1998 Tenn. Pub. Acts., ch. 1063.

Plaintiff's Personalized Plate

Ms. Moyers' testimony and Trial Exhibits 18 and 19 established that on December 13, 2010, the Plaintiff applied for a personalized plate for a vehicle previously owned by or leased to her, which included the following requested plate configurations in order of the Plaintiff s preference: (1) 69PWNDU; (2) PWNDU69; and (3) IPWNDU. In the portion of the application requesting information about any special significance of the configuration, Plaintiff wrote "PWND=vid gaming term The first one is my google phone number." The application form contained the reservation in bold, "Tennessee reserves the right to refuse to issue objectionable combinations." Even though the requested content of the license plate contained "69," it was approved. On January 31, 2011, the Department issued a personalized license plate to Plaintiff with her first choice configuration, "69PWNDU." The Plaintiff has displayed the plate on her car for eleven years.

In May of 2021, the Director of Personnel of the Department, Justin Moorehead, received a text on his personal cell phone alerting Mr. Moorehead in a joking manner about the Plaintiff's license plate. Thereafter, during a Zoom meeting on other Department issues, Mr. Moorehead identified to Ms. Hudson and some members of the Inventory Unit the Plaintiff's plate. Mr. Moorehead is not involved in the personalized license plate

review process and was not involved in the review of the Plaintiff's plate that resulted in revocation. Ms. Moyers contacted the Department's legal staff. They and the Commissioner determined that the Plaintiff's plate should be revoked because it could be interpreted as a reference to sexual domination.

On May 25, 2021, the Department revoked the registration plate issued to Plaintiff with the following notification:

> **Re: Personalized License Plate 69PWNDU**
>
> Dear Leah,
>
> The Tennessee Department of Revenue (the "Department") is writing this letter to notify you that the above-referenced personalized plate has been deemed offensive. Pursuant to Tenn. Code Ann. § 55-5-117(a)(1) (2012) and Tenn. Code Ann. § 55-4-210(d)(2) (2012), the Department may revoke a personalized registration plate that has been deemed offensive to good taste or decency. Therefore, the Department hereby revokes the above-referenced plate.
>
> You may apply for a different personalized plate or request a regular, non-personalized plate to replace the revoked plate. The law requires you to immediately return the revoked plate. Tenn. Code Ann. § 55-5-119(a) (2012). . . . You will be unable to renew your vehicle registration until this plate has been returned.
>
> * * *

Trial Exhibit 20.

Ms. Moyers' testimony established that upon revocation, a vehicle owner may select another plate or be refunded the $35.00 application fee. Ms. Moyers' testimony established that the Plaintiff requested neither upon her plate being revoked.

The testimony of Ms. Moyers 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.

After the May 25, 2021 Department's revocation of the Plaintiff's personalized plate, the Plaintiff requested a hearing under the Uniform Administrative Procedures Act and Tennessee Code Annotated section 55-5-119(c) to challenge the revocation, and a contested case is proceeding. The Plaintiff also filed this lawsuit on June 28, 2021, challenging the facial constitutionality of Tennessee Code Annotated section 55-4-210(d)(2).

Law Cited by Counsel

In connection with the Plaintiff's June 28, 2021 *Application for Temporary Injunction*, the Panel thoroughly identified and analyzed the cases relied upon by each side. The legal authorities cited by Counsel have not changed. The Panel therefore repeats herein its summary and analysis of each side's legal authority.

As noted, the Plaintiff starts with a different premise than the Defendants. The Plaintiff's premise is that the configuration on her revoked license plate constituted private speech protected by the First Amendment to the U.S. Constitution. From that premise, the Plaintiff cites to California, Kentucky, Michigan, Rhode Island and New Hampshire federal and state court cases that have held prohibitions on personalized license plate configurations that carry connotations offensive to good taste and decency are facially

unconstitutional as constituting viewpoint discrimination, and as overbroad and void for vagueness. The Plaintiff's citations include the following:

— Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment at 8, *Ogilvie v. Gordon*, No. 4:20-cv-01707-JST (N.D. Cal. Nov. 24, 2020), ECF No. 54 ("the Court holds that California's prohibition on personalized license plate configurations 'that may carry connotations offensive to good taste and decency' constitutes viewpoint discrimination under *Tam* and *Brunetti*.");

— *Carroll v. Craddock*, 494 F. Supp. 3d 158, 170 (D.R.I. 2020) ("the Court finds that Mr. Carroll has satisfied the criteria for issuance of a preliminary injunction on his claims that the R.I.G.L. § 31-3-17.1 is unconstitutional both as applied in this case and on its face as overbroad and void for vagueness.");

— *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168 (C.D. Cal. Aug. 29, 2019);

— *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001);

— *Hart v. Thomas*, 422 F. Supp. 3d 1227 (E.D. Ky. 2019);

— *Montenegro v. New Hampshire Div. of Motor Vehicles*, 166 N.H. 215, 225, 93 A.3d 290, 298 (2014) ("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,' *see MacElman*, 154 N.H. at 307, 910 A.2d 1267, and is, therefore, unconstitutionally vague."); and

— *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 826 (W.D. Mich. 2014) ("the 'offensive to good taste and decency' language grants the decisionmaker undue discretion, thereby allowing for arbitrary application.").

With respect to content-based viewpoint discrimination, the Plaintiff cites to case law that strict scrutiny applies and that such speech is presumptively unconstitutional, including the following citations:

— *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.");

— *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989);

— Mary Beth Herald, *Licensed To Speak: The Case of Vanity Plates*, 72 Col. L. Rev. 595, 637 (2001) ("Offensiveness is in the eye of the beholder and is inherently viewpoint based.");

— *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."); and

— *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Plaintiff argues that regardless of the type of forum involved, viewpoint discrimination triggers strict scrutiny citing *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)).

The Plaintiff asserts that application of strict scrutiny requires the Defendants to demonstrate that Tennessee Code Annotated section 55-4-210(d)(2) is "narrowly tailored

to serve compelling state interests," citing *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("Both content- and viewpoint-based discrimination are subject to strict scrutiny." (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 2534 (2014))).

With respect to her due process claim, the Plaintiff's argument is that she has been subjected to a summary, prehearing suspension of her specialized plate. Under these circumstances, the Plaintiff cites to United States Supreme Court law that three factors must be examined to determine if the prehearing deprivation comports with due process:

> "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."

Dixon v. Love, 431 U.S. 105, 112–13 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "[I]t is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See, e.g., Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 15 (1st Cir. 2012) ("the Supreme Court noted in *Citizens United* that the suppression of political speech harms not only the speaker, but also the public to whom the speech would be directed[.]"). *See also Citizens United*, 558 U.S. at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."). Summarily revoking

a vanity plate on a pre-hearing basis also is not akin to, for instance, ensuring "the prompt removal of a safety hazard." *Dixon*, 431 U.S. at 114.

The law the Defendants primarily rely upon is *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) in support of their premise that a Tennessee personalized license plate is government property and its alphanumeric configurations constitute government speech that is not regulated by the First Amendment. In *Walker* the Supreme Court upheld Texas's specialty license plate program under the government speech doctrine. *See* 576 U.S. at 219–20.

The Defendants additionally rely upon *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) and *Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2015). *Summum* preceded *Walker* and is referred to in *Walker* as precedent. *Vawter* is a decision by the Supreme Court of Indiana that came after *Walker*. The *Vawter* court applied the *Walker* decision concerning specialized license plates to the personalized plates in issue in Indiana and determined that the personalized plates were government speech.

The significance of *Walker, Summum* and *Vawter* is that if they are applied to this lawsuit with the result that the speech in issue is government speech, the Plaintiff's revoked license plate is not protected by the Free Speech Clause, and the Plaintiff's claims of First Amendment violations of viewpoint discrimination, vagueness and due process are not triggered.

Alternatively, the Defendants assert that even when courts have found that personalized license plates are not government speech, they have nevertheless consistently determined that the plates are nonpublic forums, citing *See, e.g., Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) ("[L]icense plates, when made available for private expression, are a nonpublic forum."); *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 336 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016) ("Vanity plates are . . . a nonpublic forum, which 'exists where the government is acting as a proprietor, managing its internal operations." (cleaned up)); *Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001) ("[A] Vermont vanity plate is a nonpublic forum."). *Cf. Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008) ("We conclude that specialty license plates are a forum of the nonpublic variety.")

In reply, the Plaintiff asserts that *Walker* is distinguishable because it concerned specialty plates that were limited to a selection of designs prepared by the State.[5] The Plaintiff argues *Walker* itself emphasized this distinction, quoting the case as follows:

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[5] Personalized plates contain content created by the vehicle owner. Specialty plates have content/designs related to a category designated by the government. For example, Tennessee Code Annotated section 55-4-201 defines these terms as follows:

(6) "Personalized plate" or "personalized license plate" means the class of cultural motor vehicle registration plates that features on each individual plate not less than three (3) nor more than seven (7) identifying numbers, letters, positions or a combination thereof for a passenger motor vehicle, recreational vehicle or truck of one-half or three-quarter-ton rating or, if authorized, not less than three (3) nor more than six (6) identifying numbers, letters, positions or a combination thereof for a motorcycle, as requested by the owner or lessee of the vehicle to which that plate is assigned;

* * *

(8) "Special purpose plate" or "special purpose license plate" means all other motor vehicle registration plates issued pursuant to this part, including antique motor vehicle, dealer, disabled, emergency, firefighter pursuant to § 55-4-224, general assembly, government service, judiciary, national guard, OEM headquarters company, sheriff, special event, boat transport, United States house of representatives, United States judge and United States senate plates; and

> 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.**

Walker, 555 U.S. at 204 (emphases added).

Further, the Plaintiff argues that the U.S. Supreme Court itself stated in a later case, *Matal v. Tam*, 137 S. Ct. 1744 (2017), that *Walker* is limited to the facts of specialized plates. The Plaintiff cites to the U.S. Supreme Court's advice in *Matal* that courts should exercise "great caution" before extending the government speech doctrine further. "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." The Plaintiff also quotes the statement in *Matal*, that "*Walker* . . . likely marks the outer bounds of the government-speech doctrine." *Id.* at 1760. The Plaintiff additionally cites to the U.S. District Court case of *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) that used the *Matal* dicta to conclude personalized license plates are private speech, "In light of the foregoing, *Walker* 'likely

(9) "Specialty earmarked plate" or "specialty earmarked license plate" means a motor vehicle registration plate authorized by statute prior to July 1, 1998, and enumerated in § 55-4-203(c)(6), which statute earmarks the funds produced from the sale of that plate to be allocated to a specific organization, state agency or fund, or other entity to fulfill a specific purpose or to accomplish a specific goal. TENN. CODE ANN. § 55-4-201 (West).

marks the outer bounds of the government-speech doctrine.' *Matal*, 137 S. Ct. at 1760. Consequently, this Court finds that vanity plates are private speech."

The Plaintiff also disputes application of *Walker* to this case based upon the negative treatment of the Indiana Supreme Court case, *Vawter*, cited by the Defendants, in particular the following:

— *Carroll v. Craddock*, 494 F. Supp. 3d 158, 167 (D. Rhode Island 2020) ("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 v. Maryland Motor Veh. Admin.*, 450 Md. 282, 296 (Md. App. 2016) ("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 v. Thomas*, 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019) ("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 v. Maryland Motor Veh. Admin.*, 225 Md. App. (Court of Special Appeals 2015) 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.").[6]

[6] The Plaintiff also cites to the following post-*Walker* cases that rejected the *Vawter* analysis but were not explicitly critical of *Vawter*:

— *Ogilvie v. Gordon*, No. 4:20-cv-01707-JST, 2020 WL 10963944 *3 (N.D. Cal. Nov. 24, 2020), ECF No. 54 ("the alphanumeric combinations on California's environmental license plates are not government speech.").

The thrust of these cases is that *Walker's* analysis of specialty plates distinguishes it from the issue of personalized plates because with the latter the registration number is not only an identifier but—more than that—a personalized message with intrinsic meaning independent of the government and specific to the owner, and is perceived as such by the viewer. "Unlike the messages on specialty plates, which . . . are not one-of-a-kind and usually are displayed on a retooled plate design that bears graphics of emblems and slogans for an organization, the messages on vanity plates are not official-looking." *Mitchell*, 225 Md. App. at 563. "Specialty plates do not bear unique personalized messages." *Id.* at 562.

Panel's Analysis

Summum and *Walker*

In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 465, 129 S. Ct. 1125, 1131 172 L. Ed. 2d 853 (2009), in issue were monuments placed in a public park. Pleasant Grove City had previously accepted certain monuments that were designed or built by donating private entities including a Ten Commandments monument. 555 U.S. at 472-73. Summum, a religious organization, requested permission to erect a monument in the park setting forth its religious tenents. *Id.* at 465-66. The City denied this request. "The

— *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019) ("the Court thinks it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates . . . . 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.").

religious organization argued that the Free Speech Clause required the city to display the organization's proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments." *Walker v. Texas Div., Sons of Confederal Veterans, Inc.*, 576 U.S. 200, 209 (2015). The *Summum* Court rejected the organization's argument, holding,

> that the city had not "provid[ed] a forum for private speech" with respect to monuments. *Summum*, 555 U.S., at 470, 129 S.Ct. 1125. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engage[d] in expressive conduct." *Id.*, at 476, 129 S.Ct. 1125. The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause." *Id.*, at 464, 129 S.Ct. 1125.

Walker, 576 U.S. at 209. The *Summum* Court based its decision upon three factors: (1) history of the government's use of the medium to speak to the public; (2) observers of the medium appreciate/associate the content with the government; and (3) the government maintains direct control over the content.

Thereafter, in *Walker* the Sons of Confederate Veterans applied for a specialty license plate by submitting an application, including a draft of their proposed specialty plate. *Id.* at 205-06. It was their own unique design. Texas rejected the application. The *Walker* Court held the license plate to be government speech despite the fact that it was designed in whole by the Sons of Confederate Veterans and not the State. *Id.* at 217. The way that the *Walker* Court determined that government speech, not private speech, was at issue with the Texas specialized plates was by applying the three factors examined in *Summum*.

As to the first factor of the government's historical use of the medium to convey its message, the facts the *Walker* Court identified as dispositive included that Texas had put "state" speech on its license plates for decades, such as the Lone Star emblem or a small silhouette of the state or the word "Centennial."

In examining the second factor of association by the viewer of the message with the government, the facts identified by the *Walker* Court were,

> Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. See § 504.943. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. See § 504.002(3). And Texas dictates the manner in which drivers may dispose of unused plates. See § 504.901(c). See also § 504.008(g) (requiring that vehicle owners return unused specialty plates to the State).

Id. at 212. The *Walker* Court stated that Texas license plates are, essentially, government IDs. And issuers of ID typically do not permit placement on their IDs of messages with which they do not wish to be associated.

In examining the third factor of direct government control of the message, the facts the *Walker* Court identified were,

> Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." § 504.005. The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. 43 Tex. Admin. Code §§ 217.45(i)(7)-(8), 217.52(b). And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Reply Brief 10; Tr. of

Oral Arg. 49–51. Accordingly, like the city government in *Summum*, Texas "has 'effectively controlled' the messages [conveyed] by exercising 'final approval authority' over their selection." 555 U.S., at 473, 129 S.Ct. 1125 (quoting *Johanns*, 544 U.S., at 560–561, 125 S.Ct. 2055).

This final approval authority allows Texas to choose how to present itself and its constituency.

Id. at 213.

Explaining how the specialized license plates constituted government speech, the *Walker* Court reasoned that the plates were not a designated public forum, a limited public forum, a nonpublic forum or a forum for private speech. In so concluding the following facts were identified by the *Walker* Court.

Texas's policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. . . . Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas's specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–679, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas's specialty license plate designs "are meant to convey and have the

effect of conveying a government message." *Summum*, 555 U.S., at 472, 129 S.Ct. 1125. They "constitute government speech." *Ibid.*

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider. In *Summum*, private entities "financed and donated monuments that the government accept[ed] and display[ed] to the public." *Id.*, at 470–471, 129 S.Ct. 1125. Here, similarly, private parties propose designs that Texas may accept and display on its license plates. In this case, as in *Summum*, the "government entity may exercise [its] freedom to express its views" even "when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.*, at 468, 129 S.Ct. 1125. And in this case, as in *Summum*, forum analysis is inapposite. *See id.*, at 480, 129 S.Ct. 1125.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park. Indeed, we indicated that the permanent displays in New York City's Central Park also constitute government speech. *See id.*, at 471–472, 129 S.Ct. 1125. And an *amicus* brief had informed us that there were, at the time, 52 such displays. See Brief for City of New York in *Pleasant Grove City v. Summum*, O.T. 2008, No. 07–665, p. 2. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own.

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, see, *e.g., Lehman v. Shaker Heights*, 418 U.S. 298, 299, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (plurality opinion), the existence of government profit alone is insufficient to trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence

of annual fees does not convince us that the specialty plates are a nonpublic forum.

Id. at 216-218.

Application of Summum/Walker Factors

The evidence in the trial of this case establishes 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.

The governmental nature of the plates is clear from their face: Tennessee license plates are designed, and issued by the State and display "Tennessee" prominently at the top of every plate. *See* TENN. CODE ANN. § 55-4-103(b). As testified by Ms. Moyers, Tennessee requires motor vehicle owners to display license plates and to obtain them from the Department of Revenue or a county clerk acting on the Department's behalf. TENN. CODE ANN. § 55-4-101. Consistent with the requirements stated in Tennessee Code Annotated section 55-4-101, only the State of Tennessee can make, produce and approve the plate. TENN. CODE ANN. § 55-4-103(b). Tennessee owns the license plates.

Also like historical facts identified in *Walker* about Texas' license plates, the evidence in this case is that the State began issuing plates in 1915. In the century that followed, those plates were updated and changed several times. Tennessee case law establishes the facts that graphics were first used on Tennessee license plates in 1927, when the plate included a large, embossed outline of the shape of the State. Beginning in 1936, and continuing through 1956, Tennessee issued license plates that were shaped like the State. In 1977, Tennessee added the slogan "The Volunteer State" to its license plates.

In 1989, Tennessee incorporated a three-star design taken from the Tennessee flag on its license plates. Tennessee's current standard passenger plate includes the name of the State, the slogan "The Volunteer State," and an image of green mountains used as the backdrop for the plate. In 1998, Tennessee significantly expanded its specialty-license plate program and began issuing cultural license plates, including collegiate license plates and personalized license plates. *See* 1998 Tenn. Pub. Acts., ch. 1063.

Additionally, like the Texas process of approving the design of a specialty plate, Exhibit 2 to Trial Exhibit 1 establishes that the license plate used for personalized configurations is one of 100 designs created by the State of Tennessee. A personalized plate applicant chooses one of the 100 plate designs and then creates and applies for a configuration to be placed on the plate. *See* Trial Exhibit 18. Ms. Moyers' testimony established that Tennessee has implemented an approval process consisting of a five-member review team with further review by an Assistant Director and Director with use of resources such as the Objectionability Table and the Urban Dictionary. Thus, the configuration requested by the applicant for a personalized plate must be approved by the State to be displayed on a medium/property it owns, produces and uses for vehicle identification. The creation of the configurations by applicants for a Tennessee personalized plate that has to be approved by the State is very similar to the specialized plate design created by the Confederate Veterans in *Walker* that had to be approved by the State of Texas.

Further, like the Texas specialized plate, a viewer of a personalized plate in Tennessee associates the plate with the State of Tennessee. That is because the evidence established facts, like those in *Walker*, that each Tennessee license plate is a government article serving the government purposes of vehicle registration and identification.

Additionally, Tennessee maintains direct control over the messages conveyed on all of its license plates. Personalized license plates are not granted as a matter of course upon the payment of an application fee. The Department of Revenue must approve every personalized plate. *See* TENN. CODE ANN. § 55-4-210; *See also* TENN. COMP. R. & REGS. 1320-08-01-.02. The Department has the authority to revoke any personalized plates that are approved in error. TENN. CODE ANN. § 55-5-117. While Tennessee does allow vehicle owners to have some role in selecting the unique alphanumeric combination for their plates, this does not diminish the fact that the plates and their messages are government speech controlled and issued by the State.

The foregoing are the same facts identified in *Walker*, derived from *Summum*, that the U.S. Supreme Court concluded constituted government speech.

To detract from the foregoing facts, the Plaintiff presented the testimony of George Scoville, Alan Secrest, the deposition of Ms. Hudson, and a website maintained by the State of Tennessee (Trial Exhibit 1: Deposition of Ms. Hudson, Exhibit 2) to prove that the public/viewer does not consider the configuration on the personalized plate to be the message or speech of the State of Tennessee, but instead to be the private speech of the

vehicle owner. The Panel finds that the evidence submitted by the Plaintiff establishes the following.

— George Scoville applied and was approved for a personalized Tennessee license plate bearing his grandfather's plate configuration that include initials he shares with his father and grandfather but his separate roman numeral. Mr. Scoville testified he considers the message to be his own. He does not consider the message to be the government's message. On cross-examination he acknowledged the plate is also a specialty plate issued by the State with a Predators logo. This he also considers as content conveying his private message that he is a Predators' fan.

— Alan Secrest is a highly recognized, experienced pollster. A poll he conducted 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.

— Director Hudson testified several times over the course of two depositions that the content on a personalized plate is the vehicle owner's own unique message in the context of being asked if a State of Tennessee website says that.

— A State of Tennessee website (Exhibit 2 to Trial Exhibit 1) describes the personalized license plate program as "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 Panel finds that the foregoing evidence presented by the Plaintiff is not weighty because it does not accurately address the *Walker* factors. As identified above, the actual facts the *Walker* Court found to be dispositive were not the subjective response of a viewer. The Plaintiff's evidence is the argument made by Justice Alito in his dissent in *Walker* at 221, that a license plate is government speech only if an observer concludes that the content asserted in the personalized plate is the government making that assertion.

The *Walker* and *Summum* Courts reasoned that it matters not who initially designs the speech. "The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Walker*, 576 U.S. at 217; *see also Summum*, 555 U.S. at 468. In both *Walker* and *Summum*, the individuals claiming a violation of their free speech rights had initially designed the speech.

It does not matter that the State's message may be different than that of the designers. Both *Summum* and *Walker* addressed this issue. "[T]he thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor." *Summum*, 555 U.S. at 476. As explained by the 6th Circuit, "when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes." *ACLU v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006).

Finally, it matters not who pays for the speech. In *Summum*, the monuments at issue were designed, built and paid for by the private entities that donated them. The *Summum* Court held that the fact that the monuments were privately financed did not affect its finding of government speech. *Summum*, 555 U.S. at 470-71. The *Walker* Court addressed the fact that owners of specialty plates pay an additional fee for such a plate. *Walker*, 576 U.S. at 218. This fact did not alter the Court's finding of government speech. *Id.*

The Plaintiff also presented numerous examples throughout the trial of configurations on personalized plates containing sexual, vulgar, offensive and indecent connotations that made it through the State approval process and are currently displayed on license plates throughout Tennessee. From this evidence, the Plaintiff argues that the third factor of the *Walker/Summum* factors—government control—has not been established.

To the contrary, 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.

The Panel therefore concludes that the evidence presented by the Plaintiffs is not weighty because *Walker* takes into account that the content on the plate conveys government agreement with the message displayed or approval by the government that the license plate is allowed to display the content. *Walker*, in accordance with *Summum*, rejected the requirement that the subjective opinion of the viewer be controlling. In *Summum*, the Supreme Court recognized that the speech is designed by private parties and then approved by the state, and still held it to be government speech. In addition, mistakes in approval do not rebut the facts of government control found above.

Dicta on Scope of Walker

In addition to the evidence at trial, there are other reasons the Panel concludes the *Walker* factors apply to this case and that the speech in issue is government speech.

Walker is the most recent United States Supreme Court decision which analyzes a First Amendment challenge to content on a license plate. Although *Walker* dealt with a specialized, not personalized, license plate as in this case, the Panel does not conclude *Walker* is inapplicable as argued by the Plaintiff. The Panel concludes that the Court's statement in *Walker* that, "Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program," does not mean the conclusion in *Walker* that the speech in relation to specialized plates is government speech can not extend to personalized plates. The Panel concludes that the foregoing statement in *Walker* is provided to be clear that the Court was not issuing an advisory decision on personalized plates. The Panel is not persuaded by the Plaintiff's argument that the Supreme Court's statement in *Matal v. Tam,* 137 S. Ct. 1744 (2017) limited *Walker* to the realm of specialty plates not to be extended to personalized plates. That is because *Matal* acknowledges that its factual context "is vastly different from . . . even the specialty license plates in *Walker.*" *Id.* at 1760. The subject matter of *Matal*—trademarks—that Court observed, "have not traditionally been used to convey a Government message . . . . And there is no evidence that the public associates the contents of trademarks with the Federal Government." *Id.*

The Panel's conclusion is that: this case is more like *Walker* than *Matal* because in issue is a license plate which, unlike a trademark, has been traditionally and is presently used to convey a government message, and the distinction between a specialized plate and personalized plate does not change this analysis.

In addition, buttressing the application of *Walker's* finding of government speech to the personalized license plates herein is that such an outcome is not unprecedented. In *Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2015) the Indiana Supreme Court, applying *Walker*, held that the personalized license plates in *Vawter* constituted government speech. *Vawter* is persuasive because of its similarities to this case. That is, the Indiana statute, like Tennessee, authorizes revocation of a personalized plate for connotations offensive to good taste and decency. Like Tennessee, Indiana has a committee within the Bureau of Vehicle Administration that decides the revocation issues. That committee, like Tennessee, is guided by a compilation of disqualifying alphanumeric combinations. The *Vawter* Court's application of the factors identified in *Walker* is similar to the above analysis of the Panel, quoting pertinent portions of *Vawter* as follows.

> *a. Indiana's Historical Use of License Plates*
>
> * * *
>
> Originally, Indiana license plates served only as a unique identifier. But over time, Indiana included first words, then graphics, then eventually specialty designs and personalized plates. This history shows that Indiana often communicates through its license plates and has expanded how it does so. Furthermore, the plaintiffs' distinguishing features are fully compatible with government speech. "The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message...." *Walker*, 135 S.Ct. at 2251, 192 L.Ed.2d at 287. And, PLPs are no more unique than public park monuments, which "typically represent government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470, 129 S.Ct. 1125, 1132, 172 L.Ed.2d 853, 863 (2009).

b. Identification of PLP Alphanumeric Combinations in the Public Mind with the State

* * *

The plaintiffs argue that this second factor supports PLPs as government speech "only if it can be believed that a person who observes, for example, a personalized license plate of 'BIGGSXY' or 'FOXYLDY' or 'BLKJEW'9 will conclude that it is the State of Indiana that is making this assertion." Appellee's Supp. Br. at 4. The *Walker* dissent so argues, 135 S.Ct. at 2255, 192 L.Ed.2d at 291 (Alito, J., dissenting), but the majority instead held that all of Texas' specialty plates are government speech. *Id.* at 2253. PLPs do not cease to be government speech simply because some observers may fail to recognize that PLP alphanumeric combinations are government issued and approved speech in every instance. Instead, PLPs "are *often* closely identified in the public mind with the [State]." *Id.* at 2248, 284 (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. at 1133, 172 L.Ed.2d at 864) (emphasis added) (alteration in original). As in *Walker*, a few exceptions do not undermine the conclusion that PLPs are government speech. [footnote omitted] Rather, a PLP "is a government article serving the governmental purposes of vehicle registration and identification." *Id.* at 2248, 284. The alphanumeric combination, regardless of its content, is government speech specifically identifying a single vehicle. [footnote omitted]

c. Indiana's Control over PLP Alphanumeric Combinations

* * *

But under Walker, the BMV's final approval authority establishes effective control regardless of any set list of limits. 135 S.Ct. at 2249, 192 L.Ed.2d at 284–85. The final BMV approval authority is established both in the statute defining PLPs and in the statute challenged here. Ind.Code §§ 9–13–2–125, 9–18–15–4. The BMV applied its authority by creating an internal policy guide, establishing a PLP Committee, and allowing that Committee to approve or reject plates for any reason—whether listed in the policy guide or not. Because the BMV has final approval authority by statute, and exercises effective control, we reject the plaintiffs' argument.

Id. at 1204-1207.

Plaintiff's Counsel is highly critical of *Vawter*. During oral argument Plaintiff's Counsel argued that *Vawter* is an outlier, and that the majority of courts have not followed *Vawter's* outcome that personalized license plates constitute government speech.

Detracting from Plaintiff's criticism of *Vawter* is that some of the cases cited by the Plaintiff predate the 2015 issuance of *Walker*: *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001); *Montengegro v. New Hampshire Div. of Motor Vehicles,* 166 N.H. 215, 225, 93 A.3d 290, 298 (2014); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 826 (W.D. Mich. 2014); *Higgins v. Driver & Motor Vehicle Servs. Branch*, 335 Or. 481, 488 72 P.3d 628, 632 (2003); *Bujno v. Commonwealth, Dep't of Motor Vehicles*, 86 Va. Cir. 32 (2012); *Miller v City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010). That is significant, because it is *Walker* that applied the three-factor test from *Summum* park memorials to license plates. The elimination of Plaintiff's case authority predating *Walker* leaves cases in California, Rhode Island, Kentucky and Maryland critical of and/or contrary to *Vawter*—cases in just four states.

Further, this case is distinguishable from the Kentucky case cited by Plaintiff's Counsel, *Hart v. Thomas*, 422 F. Supp.3d 1227 (E.D. KY 2019). In finding that the vanity plates were not government speech, the *Hart* Court relied on the explicit language in the Kentucky statute. As *Hart* explained, the statute itself described the vanity plates as "personalized letters or numbers significant *to the applicant*." (Emphasis original) (*Hart*, 422 F.Supp.3d at 1232) (quoting K.R.S. § 186.174(1). The Tennessee statute at issue is more akin to the statute in *Vawter*. The Ind. Code § 9-13-2-125, at issue in *Vawter*, describes Indiana's personalized license plate program as a "combination of letter or numbers, or both, requested by the owner or the lessee of the vehicle and approved by the bureau." Ind. Code § 9-13-2-125. Similarly to Indiana, Tennessee's statutes require

approval by the State. Tennessee Code Annotated section 55-4-210(d)(2) provides: "The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading." Additionally, Tennessee Code Annotated section 55-4-210(d)(1) provides: "The commissioner shall not issue any license plate commemorating any practice which is contrary to the public policy of the state . . ." These two statutes indicate an intent for the personalized plates to represent speech of the State of Tennessee much more so than the Indiana statute in *Hart*.

Qualified Immunity

Lastly, there is the defense of qualified immunity asserted on behalf of the Commissioner of Revenue. The above determination by the Panel, that no constitutional rights have been violated because in issue is government speech, pretermits the qualified immunity defense. Nevertheless for completeness, the Panel shall address the defense.

The Defendants' position is that "This Panel should dismiss Plaintiff's damages claim against the Tennessee Commissioner of Revenue in his individual capacity because he is protected by qualified immunity." *Defendants' Trial Brief*, Dec. 2, 2021, at 25. The Panel agrees. As explained in the *Defendants' Trial Brief* at pages 24-25, the doctrine of qualified immunity precludes personal liability of a government official under certain circumstances.

> Courts generally provide "government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v.*

Creighton, 483 U.S. 635, 638 (1987). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639 (internal citations omitted). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. It follows that "public officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *King v. Betts*, 354 S.W.3d 691, 715 (Tenn. 2011) (cleaned up) (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)).

The Panel adopts the Defendants' analysis that this defense, shielding the Defendant Commissioner of Revenue from personal liability, applies to this case.

Here, the Commissioner of Revenue did not transgress any bright lines by revoking Plaintiff's personalized license plate on a pre-hearing basis. Indeed, as shown above and as this Panel concluded in its temporary-injunction decision, the Commissioner did not violate any constitutional right at all since Tennessee's personalized plates are government speech and thus outside the First Amendment's protections. *See generally* Order Den. Mot. for Temp. Inj., *Gilliam v. Gerregano*, No. 21-606-III (Davidson Ch. Ct. Sept. 2, 2021)

But even if the revocation of Plaintiff's plate did violate a constitutional right, the right was not clearly established at the time. A plaintiff "seeking to establish that their constitutional right is clearly established must support their claim with cases involving circumstances fairly similar to their own." *King*, 354 S.W.3d at 715. And while that plaintiff "need not find 'a case on all fours,' the contours of their asserted right 'must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates the right.'" *Id.* (citations omitted). Plaintiff cannot make that showing here. Neither the Tennessee Supreme Court nor the Tennessee Court of Appeals have ever held that a pre-hearing revocation of a personalized license plate violates any constitutional right. And while Plaintiff points to some out-of-jurisdiction cases standing for that proposition, Defendants have identified cases in which courts have reached opposite conclusions.

It was thus reasonable for the Commissioner to believe based on the state of the law at the time—especially *Walker* and *Vawter*—that

> personalized license plates are government speech and that revocation thus does not implicate First Amendment free-speech protections. Moreover, it was reasonable for the Commissioner to believe based on the state of the law at the time—especially *Perry v. McDonald* and *Vawter*—that due process does not require a hearing before revoking a personalized license plate. For these reasons, even if the revocation of Plaintiff's personalized license plate were a constitutional violation, the Commissioner would be shielded from Plaintiff's claim for damages by the qualified immunity doctrine.

Defendants' Trial Brief at 25-26.

Conclusion

As reasoned by the United States Supreme Court, "Indeed, a person who displays a message on a license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because license plate designs convey government agreement with the message displayed." *Walker*, 576 U.S. at 212-13. As further reasoned in *Walker*, license plates are essentially government IDs. They are "government mandated, government controlled, and government issued IDs that have traditionally been used as a medium for government speech." *Walker*, 576 U.S. at 214. Additionally, persuasive on this point is the reasoning in *Vawter* that the unique combination of numbers and letters that actually identify a vehicle are even more government IDs than the specialty plates in *Walker*. *See Vawter*, 45 N.E.3d at 1205, FN 7.

Applying this reasoning to this case, the Panel concludes that content on the Plaintiff's license plate conveys that the State of Tennessee has consented to and approved display of that content. Thus that even though the configuration, i.e. the numbers and letters, of a personalized plate are selected by the motor vehicle owner, the government context and identity on the license place is so clearly a part of what the viewer sees and perceives that the content on the plate is government speech.

The effect of the foregoing findings and conclusions of law that the speech in issue in this case is government speech is that the "Free Speech Clause . . . does not regulate government speech" and the government is not required to maintain viewpoint neutrality on its own speech. *Summum*, 555 U.S. at 467. The constitutional rights the Plaintiff claims in her complaint to have been violated are not triggered or implicated because the speech in issue is government, not private, speech, and therefore those constitutional claims must be dismissed as well as the Plaintiff's claims to recover damages, attorney's fees and expenses.

s/ Doug Jenkins
CHANCELLOR DOUG JENKINS

s/ Mary Wagner
JUDGE MARY WAGNER

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHIEF JUDGE

cc by U.S. Mail, fax, or efiling as applicable to:

Daniel A. Horwitz
Lindsay B. Smith
David L. Hudson, Jr.
R. Mitchell Porcello
Steven H. Hart
Matthew D. Cloutier

Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson January 18, 2022

Deputy Clerk
Chancery Court