No. M2002-00083-COA-R3-CV

In The

Court of Appeals of Tennessee
Middle Section, at Nashville

LEAH GILLIAM,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On appeal from the Davidson County Chancery Court
Case No. 21-0606-III

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

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**Pro hac vice application pending*
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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. FIRE defends the rights of individuals through public advocacy, litigation, and participation as *amicus curiae* in cases that implicate First Amendment expressive rights.

FIRE has a significant interest in the appeal before this Court because the panel's decision, if allowed to stand, will blur the distinction between a *government*'s message and those of individual speakers—like the multitude of Tennesseans who accept the state's invitation to share "your own unique message" through vanity plates. Further, if speech must conform to state officials' subjective conceptions of "good taste and decency," no viewpoint will be safe from censorship. In *amicus* FIRE's experience, the authority to suppress subjectively offensive speech not only *risks* abuse, but is in frequently abused or leads to absurd results, whether on license plates, online, or on campus.

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

INTRODUCTION

Tennessee's vanity license plate program, which specifically invites residents to, for a fee, add "your own unique message" to their vehicles' license plates, does not constitute government speech.

States, drivers, and the general public all understand that the vanity plates—numbering in the millions—deliver a special message chosen by the vehicle's owner, not the government. Until now, courts have, with a solitary exception, concluded that vanity plates are private speech that occurs in a nonpublic forum, not government speech—a consensus undisturbed by the Supreme Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200, 135 (2015); *see infra,* pp. 8–9.

If left in place, the lower panel's decision will cause two constitutional injuries beyond the four corners of license plates in Tennessee.

First, the decision blurs the distinction between an individual's speech and the government's own messages, evading the First Amendment scrutiny ordinarily applied to government regulation of speech. If an individual person's speech in government-provided spaces

is deemed *government* speech because the State regularly censors those spaces, state actors will be incentivized to censor the people they serve.

Second, permitting the government to police speech it deems to have "connotations offensive to good taste and decency" gives authorities unfettered discretion to police speech they subjectively believe to be offensive or fear others may find objectionable. As FIRE's research shows, restrictions on vanity license plates results in arbitrary and discriminatory enforcement. That's why the First Amendment denies the government the authority to "cleanse" expression "to the point where it is grammatically palatable to the most squeamish." *Cohen v. California*, 405 U.S. 15, 25 (1971).

The government's argument mistakenly relies on the solitary decision holding vanity plates to be government speech, *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015) (*Vawter*). That error is all the more apparent in light of the United States Supreme Court's intervening decision in *Shurtleff v. City of Boston*, warning that the government speech doctrine is inappropriate when it is not clear that the government intends to "transmit [its] *own* message," as the "boundary between government speech and private expression can

blur" when government invites the public to contribute their own messages—exactly as it does with vanity plates. 142 S. Ct. 1583, 1589 (2022).

Because the First Amendment constrains the state's ability to limit the content of vanity plates, Tennessee Code section 55–4–210(d)(2)'s language allowing the state to withdraw a license plate is unreasonable—and fails the First Amendment scrutiny applied even to *non-public* forums—because it grants authorities the unfettered discretion to censor speech they subjectively believe offensive to "good taste" or "decency." In *amicus* FIRE's experience, officials empowered to ascertain whether speech is in "good taste," reflective of "decency," or otherwise inoffensive will abuse their charge and engage in impermissible viewpoint discrimination.

Because the trial panel below came to the incorrect conclusion, and because the language of the statute will likely lead to impermissible viewpoint discrimination, this Court should reverse and remand the decision.

ARGUMENT

Vanity license plates have long been promoted, used, and understood as *private* speech that the government obliges as a means of revenue generation. Yet, the panel below wrongly concluded that Tennessee's vanity -plate program reflects *government* speech, and is therefore immune from First Amendment scrutiny. Left in place, the panel's decision will invite censorship where the line between government speaker and private speaker is uncertain. So, too, will the authority to police speech according to subjective evaluations of its "taste" and "decency" inexorably invite viewpoint discrimination.

I. Vanity License Plates Convey Individuals' Messages, Not Government Messages.

The State of Tennessee encourages its residents to share "your" messages through vanity plates, but seeks to police their "unique messages" for conformity with "good taste and decency."[2] To avoid the First Amendment's scrutiny, Tennessee claims it is *self*-censoring. Not so.

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[2] *Cf. Tenn. Arts Comm'n, Personalized Plates*, https://tnspecialtyplates.org/personalized-plates [perma.cc/P425-WU76] (describing vanity plates as a way to share "your own unique message"), Tenn. Code Ann. § 55–4–210(d)(2) (West 2021) (prohibiting messages "that may carry connotations offensive to good taste and decency").

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

Vanity plates are ubiquitous. A 2007 state-by-state survey found that some 9.3 million vehicles bore vanity plates[3]—a number that has undoubtedly increased in the fifteen years that have followed, given that some states *reject* thousands of plates each year.[4] As their use increases, so, too, does the public understanding that vanity plates bear—as their name implies—the expression of the vehicle's owner, not the state behind the plate.

That public understanding is informed and encouraged by states offering vanity plate programs. Tennessee, for its part, encourages drivers to share "your own unique message" through vanity plates.[5] Arizona, too, encourages residents to "express yourself" through vanity

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[3] *Va. Drivers vainest of them all with their plates*, ASSOC. PRESS (Nov. 11, 2007), https://www.nbcnews.com/id/wbna21742618 [perma.cc/WM78-Y3WS].

[4] *See, e.g.*, Raga Justin, *NY DMV rejected over 1,000 vanity plate requests this year*, TIMES-UNION (Aug. 26, 2022), https://www.timesunion.com/state/article/ny-dmv-rejected-custom-license-plates-17393109.php [perma.cc/JM3U-3MRK].

[5] *Tenn. Arts Comm'n*, *supra* note 2. The government's contention that *another* state agency crafted this message, and that the government should not be held to it, is unpersuasive. The message demonstrates that "a reasonable and fully informed observer would understand the expression" to be that of the driver, not the state. *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring).

plates.[6] And North Carolina's application form puts it bluntly: "Isn't it time you made a name for yourself? Now's your chance to join thousands of North Carolinians and show the world what you think, who you are or almost anything else[.]"[7] These invitations recognize what is plain to any reasonable observer: Vanity plates convey the vehicle owner's message, not the government's.

B. With one exception, courts, both before and after *Walker*, correctly concluded vanity plates are private speech, not government speech.

Given the public understanding, fostered by the States, that vanity plates represent an individual's speech, not that of their government, it's no surprise that application of the government-speech doctrine has been broadly rejected.

The Supreme Court has not directly addressed the question of whether individual, personalized messages on license plates are private speech or government speech. In holding that license plate background designs were government speech, the Court expressly declined to reach

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[6] ARIZ. DEP'T OF TRANS., *Plate Selections*, https://azdot.gov/motor-vehicles/vehicle-services/plates-and-placards/plate-selections [perma.cc/X8RZ-ABYU].

[7] N.C. DIV. OF MOTOR VEHICLES, PERSONALIZED PLATE FORM, *available at* https://www.ncdot.gov/dmv/downloads/Documents/personalized-plate-form.pdf [perma.cc/K2TD-4XNP].

the question. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 204 (2015). Just two years later, the Supreme Court cautioned that its holding in *Walker* "marks the outer bounds of the government-speech doctrine," sharing a reluctance to "convert[]" private speech into government speech through regulation. *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017).

The broad majority of courts that have addressed the issue—both before and after *Walker*—overwhelmingly found that vanity plates were private speech in a nonpublic forum—if not a designated or limited public forum. *See, e.g.*, *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (sharing "skepticism" that vanity plates are nonpublic fora, as "a personalized plate is not so very different from a bumper sticker that expresses a social or political message"); *Montenegro v. N.H. Div. of Motor Vehicles*, 93 A.3d 290, 294–95 (N.H. 2014) (evaluating vanity plates as private speech on government property and declining to reach forum classification because "offensive to good taste" was facially unconstitutional even in nonpublic fora); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) (rejecting application of the government speech doctrine to vanity plates and distinguishing *Walker*); *Kotler v.*

Webb, No. CV-19-2682, 2019 U.S. Dist. LEXIS 161118, at *13–*24 (C.D. Cal. Aug. 29, 2019) (surveying cases post–*Walker*). The panel below departed from the consensus view of vanity plates and adopted the view of a lone state supreme court.

The majority view appropriately rejects the argument that vanity license plates are government speech. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467. However, private speech "is not transformed into government speech simply because it occurs on government property." *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 823–24 (W.D. Mich. 2014). Nor does pervasive regulation of speech—even where the state is acting as a gatekeeper before conferring a government benefit, as was the case with trademarks—transmogrify private speech into government speech. *Matal*, 137 S. Ct. at 1758; *see also Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004) (holding that adopt-a-highway signs, although "state-owned," were private speech as "an adopter speaks *through* the signs by choosing to undertake the program's obligations in exchange for the signs' announcement to the community" (emphasis added)).

The courts that have considered the outlier decision in *Vawter*, holding that vanity plates constitute government speech, have rejected that decision, "an apparent outlier," as "wholly unpersuasive" in its analysis, and it has not been followed elsewhere. *Carroll*, 494 F. Supp. 3d. at 167.

Central to *Vawter*'s infirmity is its underappreciation for the public's understanding of *who* is speaking through vanity plates, as opposed to the design of the plate itself. "On a basic level, what it comes down to is that 'a reasonable observer would perceive the plate's message' as the driver's rather than the state's." *Kotler*, 2019 WL 4695168, at *8 (internal citation omitted).

For example, the Maryland Court of Appeals rejected *Vawter*'s reasoning "because vanity plates represent more than an extension . . . of the government speech found on regular license plates." *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 328 (Md. 2016). Personalized plates do not represent the message of the government, and observers of vanity plates "understand reasonably that the messages come" not from the government, but "from [the] vehicle owners." *Id.* The public's understanding that vanity plates represent a *driver's* speech was also

important in *Hart v. Thomas*, which rejected *Vawter* as having failed to differentiate personalized messages from license plate designs and disagreed with the notion that vanity plates "are closely identified in the public mind with the state." 422 F. Supp. 3d 1227, 1232 (E.D. Ky. 2019). After all, if a state adopted the message of each vanity plate as its own message, it would adopt competing and contradictory messages, the state would be reduced to "babbling prodigiously and incoherently." *Id.* at 1232–33 (quoting *Matal*, 137 S. Ct. at 1758).

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

After the panel below rendered its opinion, the Supreme Court decided *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). *Shurtleff* narrowed the government speech-doctrine's application where the "boundary between government speech and private expression" may "blur" because the government has invited private parties to speak through a government program—there, flags displayed outside of city hall. *Id.* at 1589.

Shurtleff lays bare *Vawter*'s flawed reasoning in discounting the public's ability to identify a message's speaker, a flaw that led other

courts to find it unpersuasive. In *Shurtleff*, the Supreme Court acknowledged that the government speech doctrine does not apply when it is not clear the government intends to "transmit [its] *own* message" through a speaker, as opposed to inviting other "speakers' views[.]" *Id.* (emphasis added). As Justice Alito put it, government speech requires a "purposeful communication of a governmentally determined message[.]" *Id.* at 1598 (Alito, J., concurring). *Shurtleff*, therefore, directs a "holistic inquiry" in evaluating "whether the government intends to speak for itself[.]" *Id.* at 1589.

Because members of the public use vanity plates to express their own views and—thanks, in part, to states' efforts to confirm that vanity plates communicate the expression of a vehicle owner—the public reasonably understands vanity plates to be private speech, they cannot be said to be *government* speech.

II. Regulating Speech for "Good Taste and Decency" Is Not Reasonable and Leads to Viewpoint Discrimination

Beyond incorrectly expanding the government-speech doctrine, the panel below upheld statutory language that has been struck down in multiple other states for overbreadth and vagueness. Tennessee Code section 55–4–210(d)(2) allows the Commissioner to refuse to issue any

combination "that may carry connotations offensive to good taste and decency[.]" This standard has been rejected by every court to consider it.

In *Montenegro*, for example, the Supreme Court of New Hampshire held similar language void for vagueness, as it "fail[ed] to provide sufficient guidance to DMV officials in determining which vanity registration plates shall be authorized." 93 A.3d at 297-98. Since the "offensive to good taste standard was not susceptible to objective definition", it allowed too much discretion to officials to censor plates based on their "subjective idea of what is good taste." *Id.* at 298.[8]

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

[8] The Supreme Court of New Hampshire is not alone in finding this language ripe for abuse, as officials may interpose their subjective views in enforcing "good taste." *See Matwyuk*, 22 F. Supp. 3d at 825; *Morgan v. Martinez*, No. 3:14-02468, 2015 WL 2233214, 2015 U.S. Dist. LEXIS 61877 at *27 (D.N.J. May 12, 2015); *Carroll*, 494 F. Supp. 3d at 170; *Ogilvie v. Gordon*, 540 F. Supp. 3d 920, 929 (N.D. Cal. 2020).

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

Tennessee's "good taste and decency" standard is constitutionally infirm because it bestows authorities the unfettered power to limit any speech they subjectively deem offensive. As a result, Tennessee's standard cannot meet even the least-restrictive scrutiny applied in *nonpublic* forums, which requires that regulations be "viewpoint neutral" and "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

States may not grant themselves unfettered discretion to determine whether speech is permissible, even in a nonpublic forum. *See, e.g., Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987) (striking down airport's requirement that speech be "airport-related" because it confers "virtually unrestrained power" on authorities); *see also, e.g., Aubrey v. City of Cincinnati*, 815 F.Supp. 1100, 1104 (S.D. Ohio 1993) (striking down baseball stadium's arbitrary requirement that banners be in "good taste"). A standard premised on "good taste" is hopelessly vague because it "fail[s] to provide explicit standards guiding [its] enforcement," thereby "impermissibly delegat[ing]" evaluation of speech to authorities "on an ad hoc and subjective basis, with the attendant dangers of

arbitrary and discriminatory application." *United Food & Com. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 358–59 (6th Cir. 1998) (quoting, in part, *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)); *see also Coleman v. Ann Arbor Transp. Auth.*, 904 F.Supp.2d 670, 691 (E.D. Mich. 2012) (holding *United Food* as "conclusive" on the question of whether a "good taste" regulation was impermissibly vague).

To the extent that the state's standard is premised on readers' opposition—real, imagined, or feared—to the plates' message, that interest cannot support a restriction on otherwise-protected expression. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit [expression] simply because society finds [it] offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Accordingly, listeners' reaction to speech is neither a viewpoint- nor content-neutral basis for regulation. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (security fees imposed due to expected hecklers were not content-neutral); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) (the "heckler's veto is precisely

[the] type of odious viewpoint discrimination" prohibited by the First Amendment).

More directly, the Supreme Court has squarely held that the First Amendment "leaves matters of taste" to "the individual," as government officials are inherently incapable of making "principled distinctions" about whether speech is sufficiently inoffensive to be permitted. *Cohen*, 403 U.S. at 25. The state simply has no cognizable interest in attempting to "cleanse" expression "to the point where it is grammatically palatable to the most squeamish among us," including "children present" in a courthouse. *Id.* at 16, 25.

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

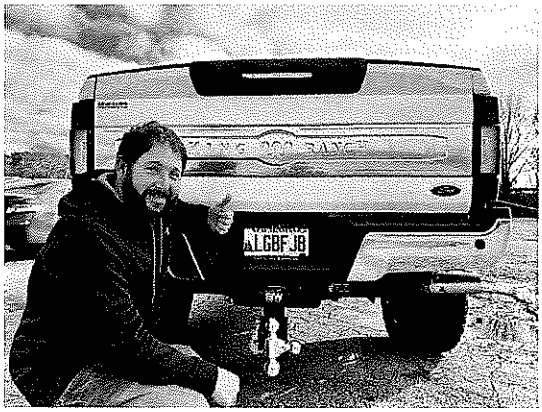
Over the last several months, *amicus* FIRE has utilized public records requests, reviewed legal rulings, and compiled media reports to better understand how license plate regulators regulate speech in vanity programs and what plates are approved, denied, or rescinded. Consistent with our work in higher education, broad authority to police expression is applied in manners suggesting viewpoint discrimination or otherwise resulting in absurd results.

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

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

This means that only popular expression—or speakers able to marshal support for their speech—survives state scrutiny. As a result, political speech, where the First Amendment's protection is "at its zenith," *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 186–87 (1999), lives or dies based on its popularity.

For example, Nathan Kirk, a gun store owner, paid $700 for a plate depicting the Gadsden flag and two acronyms deriding President Biden:[9]



[9] Sarah Whites-Koditschek, *Alabama man gets to keep 'Let's Go Brandon' plate, state even apologizes*, AL.COM (Mar. 15, 2022), https://bit.ly/3s85z2N [perma.cc/AQ7E-WQZJ].

After receiving the plate, Kirk received a letter demanding that he return it due to use of "objectionable language . . . offensive to the peace and dignity of the State of Alabama." That "language" was the letter "F" in the latter acronym, commonly understood to mean "Fuck Joe Biden" (Kirk said he intended it to mean "Forget Joe Biden"). The State of Alabama's dignity was apparently *not* offended by the leading acronym ("LGB," or "Let's Go Brandon"), itself a coded reference to the words "Fuck Joe Biden."[10] Yet after conservative media rallied around Kirk's plate, the State of Alabama retreated and *apologized* to Kirk.[11]

But what about when the complaint catches the attention of political officials? On June 19, 2021, a Michigan journalist tweeted a

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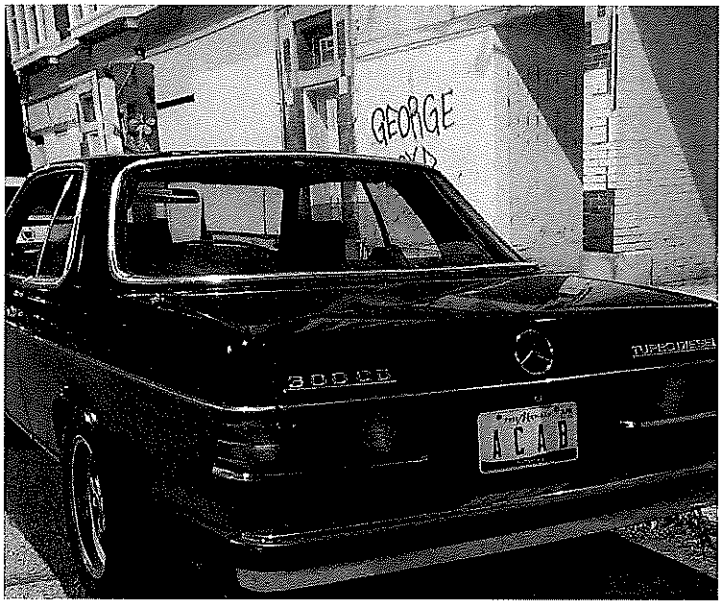
[10] *Let's go Brandon: NASCAR driver Brandon Brown caught in unwinnable culture war*, ASSOC. PRESS (Feb. 19, 2022), https://es.pn/3MPMBI0 [perma.cc/2JK6-KTQP].

[11] Those who do not attract media attention to their cause get less milage. Colorado bans "FKBIDEN." North Dakota, too, bans both "LETSGOBR" and "FJB2020." So while Kirk can parade his "LGBFJB" plate down interstates in North Dakota, its residents are prohibited from doing so.

photo of a plate she thought amusing: "ACAB"—an anti-police acronym meaning "All Cops Are Bastards":[12]



When another Twitter user alerted Michigan's Secretary of State to the tweet, the state launched an investigation and ultimately revoked the plate under a prohibition against language "used to disparage or promote or condone hate or violence directed at any type of business, group or persons"[13]—in other words, a ban on hate speech. The revocation was a

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[12] Violet Ikonomova (@violetikon), TWITTER (June 19, 2021, 10:29 AM), https://twitter.com/violetikon/status/1406257869687865349. Like Nathan Kirk's "Forget Joe Biden" defense, the plate owner sought refuge from censorship by invoking a coded reference, arguing to state officials that the plate *really* meant "All Cats Are Beautiful"—a tongue-in-cheek variation on the acronym.

[13] Email from Dawn VanAken, Director, Ofc. of Business and Internal Svcs., Mich. Dept. of State, to James Fackler, Mich. Dept. of State (June 22, 2021, 8:14 AM), *available at* https://bit.ly/3EOj4wc [perma.cc/VLL7-ZVK4].

timely example of how restrictions on "hate speech" are inevitably repurposed to protect the powerful—here, an entire class of government officials[14]—from offense.

Political speech often provokes public anger, and standards premised on "good taste" invite viewpoint discrimination as a means of satisfying inevitable complaints from the public or serving officials' personal political views. Michigan's revocation of the "ACAB" plate is a product of viewpoint discrimination, flowing from public objection to its message, and it is doubtful that the state would have taken the same course in response to a plate reading "BLUELINE" or promoting other pro-law enforcement messages. Other states, too, have rejected anti-police messages on viewpoint-discriminatory grounds by identifying them as "offensive to good taste." *See, e.g.*, *Montenegro*, 93 A.3d at 217–18 (state refused "COPSLIE" plate but issued "GR8GOVT"). And in New York, prohibitions on "patently offensive" plates led state officials to

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

refuse a plate offering support for Second Amendment rights ("PRO NRA").[15]

Even police officers are not immune from censorship. A retired NYPD sergeant learned that the hard way when New York revoked his post-9/11 plate—"GETOSAMA"—on the basis that it was "derogatory to a particular ethnic group."[16] (After successfully suing over the plate, he swapped it for "GOTOSAMA" the day after Osama bin Laden was killed.[17])

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

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

For example, when New Jersey banned plates "offensive to good taste and decency," it prohibited plates expressing atheistic views

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[15] Eugene Volokh, *"PRO NRA" LICENSE PLATE*, VOLOKH CONSPIRACY (Aug. 18, 2003), http://www.volokh.com/2003_08_17_volokh_archive.html#106099196178406020 [perma.cc/5R26-3GBD].

[16] *New York man trades GETOSAMA license plate for GOTOSAMA*, REUTERS (May 4, 2011), https://www.reuters.com/article/us-binladen-newyork-plate/new-york-man-trades-getosama-license-plate-for-gotosama-idUSTRE7437FR20110504 [perma.cc/5RTH-5VEU].

[17] *Id.*

("8THEIST" and "ATHE1ST"), but permitted registration of plates identifying the driver's theistic beliefs (*e.g.*, "BAPTIST"). *Morgan*, 2015 U.S. Dist. LEXIS 61877 at *3, n.2, *19. Vermont, too, ran afoul of the First Amendment when it prohibited plates exhibiting a religious view (such as "PRAY," "ONEGOD," "SEEKGOD," and "PSALM48"), but permitted those expressing secular philosophical views (such as "CARP DM" and "LIVFREE"). *Byrne v. Rutledge*, 623 F.3d 46, 57 (2010). New Mexico, for its part, prohibits plates with the words "MUSLIM" or "CATHOLIC."[18]

These arbitrary restrictions also burden expression on sexual orientation and personal health. Oklahoma, for instance, prohibited an LGBTQ student from using the words "IM GAY," deeming that message "offensive to the general public," but permitted plates reading "STR8FAN" and "STR8SXI" ("straight sexy").[19] In Colorado, residents can use the breast cancer awareness specialty plate, but they cannot add

[18] Spreadsheet of "Restricted Words," *available at* https://cdn.muckrock.com/foia_files/2022/04/22/ListofDeniedplatesandwordsnotallowed.xlsx [perma.cc/WK7U-223N].

[19] Kirsten McIntyre, *Norman man sues tax commission over 'IM GAY' license tag*, NEWS 9 (Feb. 15, 2010), https://bit.ly/3Sb52aU [perma.cc/2ZG6-9VDW].

"LVBOOBS" to it.[20] In Delaware, a federal court blocked the state's attempt to revoke a license plate issued to a cancer survivor on the basis that the plate—"FCANCER"—contained a "perceived profanity."[21] Delaware's DMV, the plaintiff observed, itself uses implied profanity on roadside signs, such "Get your head out of your Apps" and "Oh Cell No."

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

Sometimes vanity plates' messages are deemed offensive because the world changes around them. For example, Michigan revoked a plate reading "JAN 6TH" in the summer of 2021, apparently because it "describe[s] illegal activities" or "promote[s] or condone[s . . .] violence[.]"[22] The plate, however, predated the events at the U.S. Capitol by some three years—and far from being a clairvoyant supporter of

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[20] Letter from Colo. Dept. of Rev. (March 18, 2022), *available at* https://bit.ly/3eAp8Om [perma.cc/A9HS-CH7Q].

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

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

political violence, its registrant explained that the date recognized "an instrumental day to my sobriety." Michigan cancelled the plate anyway.[23]

Some restrictions on vanity plates are simply absurd. Take, for example, New Mexico's inexplicable prohibition on the word "CANADIAN." In neighboring Colorado, a vegan's love of tofu ran afoul of license plate censors, who feared that someone may "misread" the plate "ILVETOFU" by adding two letters in their mind.[24] (Tennessee followed suit when a PETA member sought the same plate.[25]) And in North Dakota, authorities denied an application for a plate about the Mafia—the word "OMERTA," referencing the "code of silence"—out of concern that it might encourage unlawful activity by others.[26] One might query whether a sincere effort to promote the Mafia's code of silence would involve advertising via license plate.

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[23] Email from Amanda, Manager, Renew By Mail (Aug. 10, 2021, 11:46 AM), *available at* https://bit.ly/3EHZgdY [perma.cc/2R9A-6TX3].

[24] *Colo. Rejects 'ILVTOFU' license plate*, UPI (Apr. 8, 2009), https://www.upi.com/Odd_News/2009/04/08/Colo-rejects-ILVTOFU-license-plate/46031239221493 [perma.cc/LAD6-9UJS].

[25] David Lohr, *Tennessee Says 'F-U' to Tofu-Loving PETA Member Over 'Obscene' License Plate*, HUFFINGTON POST (Sept. 15, 2011), https://www.huffpost.com/entry/tennessee-rejects-peta-plate_n_964109 [perma.cc/3BDN-LUGR].

[26] Notice of denial, N.D. DEP'T OF TRANS. (Feb. 25, 2022), *available at* https://documentcloud.org/documents/23166939-omerta [perma.cc/4HZV-RJ8U].

What leads state officials to conclude that some words are offensive and others are not? If their own subjective sense is inconclusive, many officials turn—by policy—to online sources like the Urban Dictionary to see whether members of the public have flagged a word or phrase as carrying offensive connotations. As Nevada's Supreme Court has held, these user-submitted definitions "can be personal to the user and do not always reflect generally accepted definitions for words." *DMV v. Junge*, 125 Nev. 1080 (2009). Crowdsourcing definitions does not establish even a veneer of objectivity in ascertaining what is "offensive"; it merely applies idiosyncratic and hypersensitive definitions to "cleanse" public discourse.

CONCLUSION

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

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

Or switch lanes.

DATED: October 19, 2022

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/s/ *Edd L. Peyton*
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CERTIFICATE OF SERVICE

I certify that on October 19, 2022, I served a true and exact copy of the foregoing document via the Court's e-file system upon the following counsel of record:

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