IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 8, 2023 Session

LEAH GILLIAM v. DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE ET AL.

Appeal from the Chancery Court for Davidson County, Special Panel
No. 21-606-III
Ellen Hobbs Lyle, Chancellor; Doug Jenkins, Chancellor; and
Mary L. Wagner, Judge

No. M2022-00083-COA-R3-CV

Citizens of Tennessee may apply to the Tennessee Department of Revenue (the "Department") for license plates featuring unique, personalized messages. Tennessee Code Annotated section 55-4-210(d)(2) provides that "[t]he 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." After her personalized plate featuring the message "69PWNDU" was revoked by the Department, Leah Gilliam ("Plaintiff") filed suit against David Gerregano (the "Commissioner"), commissioner of the Department, as well as the then-Attorney General and Reporter. Plaintiff alleged various constitutional violations including violations of her First Amendment right to Free Speech. The Department and the State of Tennessee (together, the "State") responded, asserting, *inter alia*, that the First Amendment does not apply to personalized plate configurations because they are government speech. The lower court, a special three judge panel sitting in Davidson County, agreed with the State. Plaintiff appeals, and we reverse, holding that the personalized alphanumeric configurations on vanity license plates are private, not government, speech. We affirm, however, the panel's decision not to assess discovery sanctions against the State. Plaintiff's other constitutional claims are pretermitted and must be evaluated on remand because the panel did not consider any issues other than government speech. This case is remanded for proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in part; Affirmed in part; Vacated in Part; Case Remanded

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which FRANK G. CLEMENT JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Daniel A. Horwitz, Lindsay Smith, Melissa K. Dix, and David Hudson, Jr., Nashville, Tennessee, for the appellant, Leah Gilliam.

Jonathan Skrmetti, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; J. Matthew Rice, Special Assistant to the Solicitor General; and Travis J. Royer, Office of the Solicitor General Honors Fellow, for the appellees, the State Attorney General and Reporter and the Tennessee Department of Revenue.

Edd Peyton, Memphis, Tennessee, and Adam Steinbaugh, Philadelphia, Pennsylvania, for the Amicus Curiae, Foundation for Individual Rights and Expression.

OPINION

BACKGROUND

In 1998, the Tennessee General Assembly formalized Tennessee's personalized license plate program allowing Tennessee drivers to receive a customized license plate with their own message, instead of receiving a randomly assigned standard license plate. *See* Tenn. Code Ann. § 55-4-210 (2021); 1998 Tenn. Pub. Acts ch. 1063, § 1.

Plates with customized alphanumeric messages are commonly referred to as "vanity plates." Interested drivers send an application to the Department with their proposed combination of three to seven alphanumeric characters. The application goes to the Department's five-person "Inventory Unit" team to confirm that the configuration (1) is not already in use and (2) under Tennessee Code Annotated section 55-4-210(d)(2), does not "carry connotations offensive to good taste and decency or that are misleading." The statute does not define "good taste and decency," and there is no written Department policy explaining "good taste and decency." However, Department employees understand the statute as barring configurations alluding to several categories: profanity, violence, sex, illegal substances, derogatory slang terms, and/or racial or ethnic slurs. The record establishes, however, that vanity plates alluding to such topics slip through the cracks and are issued to drivers.[1] The Department is entitled to rescind "erroneously issued" vanity plates. Tenn. Code Ann. § 55-5-117(a)(1).

To comply with its internal interpretation of "offensive to good taste and decency," the Department uses a number of resources in determining whether a requested vanity plate should be denied. These resources include Urban Dictionary and the "Objectionable Table," which is a lengthy list of previously denied configurations that the Department deems offensive to good taste and decency. Assuming the configuration is not already

[1] For example, the record establishes that the following vanity plates, among others, have been issued by the Department: BUTNAKD; BIGRACK; TOPLS69; WYTRASH; 88POWER; ARYANSH; and CONFDRC.

taken, if the reviewing Inventory Unit employee determines the configuration is not prohibited, the reviewing employee approves the application. Conversely, if the employee perceives the configuration as offensive, the application is referred to a supervisor.

In December of 2010, Plaintiff submitted a vanity license plate application requesting the following proposed configurations in order of her preference: (1) 69PWNDU, (2) PWNDU69, or (3) IPWNDU. The parties agree that the sequence "69" sometimes alludes to a sexual activity. Read aloud, "PWND" pronounces the slang word "pwned" (a misspelling of "owned"), which is common in video gaming communities and, essentially, means "to dominate."[2] Nevertheless, the Inventory Unit approved Plaintiff's application, and the Department issued her a license plate reading "69PWNDU" on January 31, 2011. Plaintiff displayed this license plate on her car for the next decade.

On May 7, 2021, the Department's then-Chief of Staff, Justin Moorhead, received a text message on his personal cell phone containing a picture of Plaintiff's license plate. The message stated: "If I could take a moment of personal privilege and acknowledge the tireless work that Justin does for his department[.] I commend you sir[.]" Mr. Moorhead responded: "Hahah thank you for your citizen[']s report[.]" Thereafter, Mr. Moorhead brought Plaintiff's license plate to the attention of the Inventory Unit. The Department reviewed the plate, determined it was erroneously issued to Plaintiff, and revoked it. The Department mailed Plaintiff a letter dated May 25, 2021, informing her the Department revoked her license plate and to contact Ms. Tammy Moyers at the Inventory Unit to request a replacement license plate. The letter also provided that Plaintiff would be unable to renew her vehicle registration until her plate was returned.

On June 28, 2021, Plaintiff filed the instant case in the Chancery Court for Davidson County (the "trial court"), naming the Commissioner in both his official and individual capacities as a defendant. Plaintiff also named the then-Tennessee Attorney General and Reporter, Herbert H. Slatery III, in his official capacity with regard to Plaintiff's requests for declaratory relief, as a defendant. Plaintiff claimed that Tennessee Code Annotated section 55-4-210(d)(2) was facially unconstitutional because it discriminated on the basis of content and viewpoint, and asked that the statute's enforcement be permanently enjoined. Plaintiff averred that the statute violated her First and Fourteenth Amendment rights and that she "suffer[ed] injury and damages that are subject to redress under 42 U.S.C. § 1983." Plaintiff also claimed that section 55-4-210(d)(2) was unconstitutionally vague and that the Department's "summary, pre-hearing revocation[] violat[ed] [Plaintiff's] constitutional right to due process." As relief, Plaintiff asked the court for a temporary and permanent injunction on revocation of her license plate, a final judgment declaring section 55-4-210(d)(2) facially unconstitutional, damages in the amount of $1.00 per day that she was forbidden from displaying her vanity plate, and reasonable costs and

[2] Plaintiff maintains in her brief that she is an "astronomy buff" and avid gamer. She posits that "69" refers to the year 1969 and the first moon landing.

attorney's fees pursuant to 42 U.S.C. § 1983.

The case was referred to a special three judge panel (the "panel") on July 23, 2021.[3] The State answered the complaint on August 2, 2021. It claimed, *inter alia*, that vanity plate messages amount to government speech, meaning the messages are outside the scope of the First Amendment. It also argued that even if the vanity plates are not government speech, the license plates are a nonpublic forum subject to certain government restrictions. The Department also asserted that Commissioner Gerregano had qualified immunity from the suit.

Leading up to the hearing on Plaintiff's request for a temporary injunction, the parties proceeded with discovery, which became contentious. On July 9, 2021, Plaintiff sent the State requests for production of documents, including, *inter alia*, a request for complaints regarding Plaintiff's personalized license plate received by the Department. The Department did not disclose Mr. Moorhead's text messages and responded that "the [Plaintiff] may infer that there were no written complaints regarding her plate from non-parties to the litigation."

Plaintiff's counsel deposed the Department's appointed representative, Demetria Michelle Hudson, for the first time on August 12, 2021. Ms. Hudson is the assistant director of vehicle services at the Department and was designated by the Department to give a deposition pursuant to Tenn. R. Civ. P. 30.02(6).[4] During this deposition, Plaintiff's

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[3] Tennessee Code Annotated section 20-18-101 provides:

> (a) A civil action in which the complaint meets each of the following criteria must be heard and determined by a three-judge panel pursuant to this chapter:
>
> (1) Challenges the constitutionality of:
>
> (A) A state statute, including a statute that apportions or redistricts state legislative or congressional districts;
>
> * * *
>
> (2) Includes a claim for declaratory judgment or injunctive relief; and
>
> (3) Is brought against the state, a state department or agency, or a state official acting in their official capacity.
>
> Tenn. Code Ann. § 20-18-101 (2021).

[4] Pursuant to this rule,

> [a] party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so

counsel questioned Ms. Hudson at length regarding the Department's vanity plate approval process and standards. At one point, Plaintiff's counsel asked Ms. Hudson a series of questions about specific vanity plates that previously had been approved by the Department:

> Q. What about I69, can you tell me if that should be approved?
>
> MR. PORCELLO: Objection to the form. You can answer.
>
> THE WITNESS: No.
>
> BY MR. HORWITZ:
>
> Q. Can you tell me if 69 -- or, sorry, if PONY69 should be approved?
>
> MR. PORCELLO: Objection to the form. You can answer.
>
> THE WITNESS: No.

This line of questioning continued for several iterations, Ms. Hudson each time responding "No." Following the deposition, Ms. Hudson furnished an errata sheet correcting her answers to these questions, indicating that the answer should have been "No, it should not be approved." Plaintiff later filed a "Motion to Strike [Ms. Hudson's] Non-Compliant Errata Sheet," claiming that the new answers were supplied by the Department's counsel. Plaintiff also filed a motion to exclude a declaration made by Ms. Hudson and attached to one of the Department's pleadings, claiming that it was not sworn and was directly contradictory to Ms. Hudson's deposition testimony. On August 25, 2021, the panel entered an order providing that it would not rule on Plaintiff's motions, but rather that the parties would argue the motions at the hearing for the temporary injunction, which was held on August 27, 2021.

Following the August hearing, the panel entered an order on September 2, 2021, denying Plaintiff's request for a temporary injunction. In pertinent part, the order provides:

> After considering the oral argument of Counsel, the evidence of record, and applying the law and conferring, the Panel ORDERS that the Plaintiff's application for a temporary injunction is denied. The Panel finds and concludes that the Plaintiff's license plate is government, not private, speech,

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named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

Tenn. R. Civ. P. 30.02(6).

> and therefore the Department is not barred by the Free Speech Clause of the First Amendment to the U.S. Constitution from determining the content of the Plaintiff's license plate, particularly based on the evidence in the temporary injunction record of this case that use of the numbers "69" on Tennessee license plates is routinely disallowed and revoked by the Department because of the widely recognized sexual connotation to a viewer.
>
> In addition, with respect to the Plaintiff's Motion in Limine to Exclude the Declaration of [Ms.] Hudson and Plaintiff's Motion to Strike [Ms.] Hudson's Non-Compliant Errata Sheet, filed August 24, 2021, it is ORDERED that those motions are denied. The Panel overrules exclusion of the [Ms.] Hudson Declaration, as urged in the Plaintiff's motion in limine, because the Panel finds the oversight of omission of Tennessee Civil Procedure Rule 72 has been cured with the filing of a Supplemental Declaration. In addition the Panel concludes the Declaration does not contradict Ms. Hudson's deposition testimony upon application of the Department's explanation that approval and use of license plates similar to the Plaintiff's are a mistake. Finally the Court finds Ms. Hudson has knowledge not only of her personal observations but those reported to her by Department employees or in Department records based upon her authority as Assistant Director. The Panel also overrules the Plaintiff's motion for exclusion of the errata sheet to Ms. Hudson's deposition. Tennessee Civil Procedure Rule 30.05 allows not only changes to form but also substance.

In determining that the alphanumeric configuration on vanity license plates constitutes government speech, the panel relied heavily on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). It reasoned that inasmuch as the vanity plates are government speech, forum analysis was unnecessary because the First Amendment does not apply. Plaintiff asked the panel's permission to appeal the interlocutory ruling, specifically the issue of government speech, but the panel denied this request.

The parties' discovery dispute continued. Based on the issues with Ms. Hudson's errata sheet, Plaintiff sought to re-depose her. The panel agreed, noting in an order entered October 5, 2021 that "the [Department] opened the door with the changes made on the errata sheet to Ms. Hudson's deposition." Consequently, Ms. Hudson was deposed a second time on December 3, 2021. On December 5, 2021, Plaintiff filed a Motion for Discovery Sanctions. First, Plaintiff claimed that Ms. Hudson was a "woefully unprepared 30.02(6) witness" because she could not testify adequately about the Department's affirmative defenses. For example, when asked about whose speech was on Plaintiff's vanity plate, Ms. Hudson agreed that it was Plaintiff's own unique message, not the government's message. Plaintiff also asserted that in Ms. Hudson's second deposition, she contradicted the errata sheet furnished following the first deposition. Specifically, at the

second deposition, Plaintiff's counsel again asked Ms. Hudson a series of questions about whether certain configurations should be approved, given that on the errata sheet, Ms. Hudson was able to say that certain configurations should be denied. Upon being presented with the same task in the second deposition, however, Ms. Hudson maintained that she could not answer such questions without the "tools" used by the Department to screen vanity plate applications. Based on this development, Plaintiff maintained in her motion for discovery sanctions that "[i]n an effort to undo case-dispositive admissions, Ms. Hudson-after consultation with Defendants' counsel-submitted a fraudulent errata sheet that she [later] admitted is not accurate." Plaintiff asked the panel to hold Ms. Hudson to her original deposition testimony. Finally, Plaintiff argued in her motion that the Department should be sanctioned for failing to disclose the Justin Moorhead texts from May of 2021, which the Department eventually had sent to Plaintiff's counsel on November 17, 2021.[5] According to Plaintiff, the Department "concealed critical and material evidence, then lied about the reason they had done so."

Naturally, the Department filed a response to the motion for sanctions. The Department claimed that the discovery discrepancies were inadvertent and that Plaintiff's counsel asked Ms. Hudson for legal conclusions throughout both of her depositions. Regarding the Justin Moorhead texts, the Department averred that it disclosed the texts as soon as it became of aware of them and did so without any prompting or request by Plaintiff. Along with its response, the Department filed a declaration by Tammie Moyers, the Manager of the Inventory Unit. This declaration explained how the Department obtained the Justin Moorhead texts, noting that Mr. Moorhead first made an oral statement about Plaintiff's vanity plate to the Inventory Unit in May of 2021. Ms. Moyers maintained that the Department became aware of the text messages "during the course of trial preparations" and came to possess same on November 17, 2021, the same day counsel for the Department sent them to Plaintiff's counsel.

On December 7, 2021, the panel entered an order ruling on the discovery issues and other pending pre-trial motions. Most pertinent to the issues on appeal, the panel denied Plaintiff's request for discovery sanctions:

> [Plaintiff's motion] is denied because it is not clear from the pretrial record that the Defendants submitted a fraudulent errata sheet and concealed critical and material evidence and then "lied about the reason why they had done so," as asserted by the Plaintiff for pretrial exclusion of a defense by the Defendants. The Defendants have asserted competing explanations. It will take a trial with the Panel viewing witnesses and making credibility determinations to decide whether wrongful intentional conduct by the Defendants transpired. The Panel therefore cannot rule on this pretrial.

[5] Plaintiff averred in her motion that disclosing the text messages so close to the end of discovery was an attempt to "prevent [Plaintiff] from deposing the Department's Chief of Staff regarding the matter."

The bench trial was held December 8 and 9, 2021. The panel heard testimony from Ms. Hudson and Ms. Moyers. The panel also heard from Plaintiff's expert witness, Alan Secrest, who testified about a poll he conducted on Tennessee citizens. The results of the poll established that eighty-seven percent of people surveyed believe vanity plates display the respective driver's unique message, as opposed to a government message.

The panel took the case under advisement and entered a final order on January 18, 2022. The panel held that the alphanumeric configurations on vanity license plates are government speech because they convey government agreement with the message displayed. Further, license plates are "government mandated, government controlled, and government issued IDs that have traditionally been used as a medium for government speech." Inasmuch as the message on the plate amounts to government speech, the panel concluded that the "Free Speech Clause . . . does not regulate government speech[,]" and thus "[t]he constitutional rights the Plaintiff claims in her complaint to have been violated are not triggered or implicated[.]" Finally, although it recognized that the analysis was unnecessary, the panel "for completeness" found that Commissioner Gerregano is entitled to qualified immunity.

Plaintiff timely appealed to this Court.

ISSUES

Plaintiff raises the following issues on appeal, which are taken verbatim from her appellate brief:

> 1. Whether the trial court erred by concluding that personalized plates are government speech.
>
> 2. Whether Tenn. Code Ann. § 55-4-210(d)(2) unconstitutionally discriminates on the basis of both content and viewpoint in violation of the First and Fourteenth Amendments.
>
> 3. Whether Tenn. Code Ann. § 55-4-210(d)(2) is unconstitutionally vague in violation of the Fourteenth Amendment.
>
> 4. Whether, as applied to Plaintiff, Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate Plaintiff's Fourteenth Amendment right to procedural due process.
>
> 5. Whether the trial court erred by failing to accord any weight to the case-dispositive admissions from the Department's Tenn. R. Civ. P. 30.02(6) depositions.
>
> 6. Whether the trial court erred by failing to assess discovery sanctions.

7. Whether the trial court erred by granting the Defendant Commissioner qualified immunity regarding Plaintiff's damages claim.

8. Whether Plaintiff is entitled to her attorney's fees and costs incurred both in the trial court and on appeal.

DISCUSSION

Standard of review

> In a non-jury case such as this one, appellate courts review the trial court's factual findings de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). We review the trial court's resolution of questions of law de novo, with no presumption of correctness.

Kelly v. Kelly, 445 S.W.3d 685, 691–92 (Tenn. 2014). Further,

> "[w]hen analyzing the constitutionality of a statute, [the appellate courts] review the issue *de novo* with no presumption of correctness to the lower court's legal conclusions." [*Hughes v.*] *Tenn. Bd. of Prob. and Parole*, 514 S.W.3d [707, 712 (Tenn. 2017)] (citing *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009)).

Fisher v. Hargett, 604 S.W.3d 381, 395 (Tenn. 2020).

Government versus private speech

The first issue Plaintiff raises is whether the panel erred in concluding that vanity license plate messages constitute government speech.

The distinction between government and private speech is imperative because "when the government speaks for itself, the First Amendment does not demand airtime for all views." *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1587 (2022). Stated differently, "'the Free Speech Clause does not regulate government speech.'" *Matal v. Tam*, 582 U.S. 218, 234 (2017) (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009)). While the First Amendment "'forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,' . . . imposing a requirement of viewpoint-neutrality on government speech would be paralyzing." *Matal*, 582 U.S. at 234 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)). Indeed, "'[i]t is not easy to imagine how government could function if it lacked the freedom' to select the messages it wishes to convey." *Walker v. Tex. Div.*,

Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015) (quoting *Summum*, 555 U.S. at 468); *see also Matal*, 582 U.S. at 234 ("When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.").

While "essential[,]" the government speech doctrine is also "susceptible to dangerous misuse." *Matal*, 582 U.S. at 235. As Justice Alito aptly noted in writing for the *Matal* majority,

> [i]f 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.

Id. "[C]ourts must be very careful when a government claims that speech by one or more private speakers is actually government speech." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring). "When that occurs, it can be difficult to tell whether the government is using the doctrine 'as a subterfuge for favoring certain private speakers over others based on viewpoint[.]'" *Id.* (quoting *Summum*, 555 U.S. at 473).

Distinguishing government and private speech is "not always clear[,]" *Shurtleff*, 142 S. Ct. at 1587, and "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech[.]" *Summum*, 555 U.S. at 470. The line may "blur[,]" for example, when "a government invites the people to participate in a program." *Shurtleff*, 142 S. Ct. at 1589. In *Shurtleff*, the Supreme Court articulated a test for differentiating government and private speech in such situations:

> [W]e conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. *See Walker*, 576 U.S. at 209–214.

Id. at 1589–90.

In the present case, the panel relied primarily on two cases, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), and *Commissioner of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015), in concluding that vanity license plate messages are government speech. On appeal, the parties dispute the

interpretation of these two cases and several others. Insofar as the parties agree that *Walker* and several other government speech cases bear heavily here, a discussion of that line of cases is helpful.

We begin with *Pleasant Grove City, Utah v. Summum* because *Walker*, the case primarily relied on by the panel, was decided in large part based on *Summum*. At issue in *Summum* were privately funded and donated monuments placed in a park. Summum, a religious organization, sought to have a monument honoring the "Seven Aphorisms of SUMMUM" erected in a large public park in Utah. *Summum*, 555 U.S. at 465. At the time, the park contained several monuments, many of which had been "donated by private groups or individuals." *Id.* at 464. Summum's proposed stone monument was "similar in size and nature to the Ten Commandments" monument already on display in the park. *Id.* at 465. The city denied Summum's request, and Summum filed suit, asserting that the city had violated the Free Speech Clause of the First Amendment. When Summum was denied a preliminary injunction in the district court, it appealed to the Tenth Circuit, which reversed. The Supreme Court granted certiorari and reversed the Tenth Circuit, reasoning that the monuments are government speech not subject to the strictures of the First Amendment.

First, the Court noted that the private funding of the monuments did not alter the analysis because the government may "express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.* at 468. Second, the Court expounded on the public's traditional understanding of monuments, noting that "[a] monument, by definition, is a structure that is designed as a means of expression. . . . [T]hroughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." *Id.* at 470, 471. Further, "[c]ity parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world[,]" *id.* at 472, and "the City [at issue had] effectively controlled the messages sent by the monuments in the [p]ark by exercising final approval authority over their selection." *Id.* at 473 (quotations and citation omitted). Finally, the Court also noted that spatial issues affected its analysis– "public parks can accommodate only a limited number of permanent monuments." *Id.* at 478.

Several years later, the Court decided *Walker*, which dealt with specialty license plate designs. Historically, the State of Texas "offer[ed] automobile owners a choice between ordinary and specialty license plates." 576 U.S. at 203. Under the program, groups could "propose a plate design, comprising a slogan, a graphic, or (most commonly) both." *Id.* The specialty plates were subject to approval by the Texas Department of Motor Vehicles Board ("DMVB"). In 2009, the Texas chapter of the Sons of Confederate Veterans ("SCV") applied for a specially designed license plate featuring, *inter alia*, "a square Confederate battle flag framed by the words 'Sons of Confederate Veterans 1896.'" *Id.* at 206. This began a dispute with the DMVB, who refused to issue the specialty plates,

resulting in a lawsuit by SCV against the DMVB and its chairman. SCV maintained that the DMVB violated the Free Speech Clause of the First Amendment through illegal viewpoint discrimination, but the district court sided with the DMVB. "A divided panel of the Court of Appeals for the Fifth Circuit reversed[,]" holding that "Texas's specialty license plate designs are private speech and that the [DMVB], in refusing to approve SCV's design, engaged in constitutionally forbidden viewpoint discrimination." *Id.* at 206–07.

On appeal, the Supreme Court reversed, finding that the specialty license plates were government speech and that the DMVB did not violate the First Amendment in rejecting SCV's proposed design. Relying heavily on *Summum*, the *Walker* Court again rejected the notion that the involvement of private parties in the design proved dispositive. Comparing the specialty plate designs to monuments, the Court also explained that "the history of license plates shows that . . . they long have communicated messages from the States." *Id.* at 210–11. For example, the Texas legislature previously had approved specialty plate designs with messages such as "Read to Succeed" and "Texans Conquer Cancer." *Id.* at 212. Further, the Court reasoned that insofar as license plates are required and issued by the State, "Texas license plate designs 'are often closely identified in the public mind with the [State].'" *Id.* (quoting *Summum*, 555 U.S. at 472). Accordingly, "Texas license plates are, essentially, government IDs." *Id.*

Third, the Court noted that "Texas maintains direct control over the messages conveyed on its specialty plates[,]" and the DMVB had "actively exercised this authority." *Id.* at 213. Ultimately, the Court concluded that because the specialty plate designs are presented "on government-mandated, government-controlled, and government-issued IDs that have been traditionally used as a medium for government speech," they too constitute government speech. *Id.* at 214. Nonetheless, and important to the case at bar, the *Walker* Court expressly noted that the opinion dealt exclusively with specialty license plate designs, and not with "the personalization program[,]" or, vanity plates. *Id.* at 204.

While Justice Alito wrote the majority opinion in *Summum*, concluding that privately funded monuments placed in public parks are government speech, he dissented in *Walker*. Justice Alito reasoned that the *Walker* Court "badly misunderstands *Summum*[,]" *id.* at 227, inasmuch as "[t]he history of messages on license plates is quite different" from that of monuments, which have always been used to express a government message. *Id.* at 230. Justice Alito further explained:

> The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. This is dangerous reasoning. There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and government blessing (or condemnation) of private speech.

Id. at 232 (internal citation omitted). What Justice Alito primarily took issue with, however, was the all-or-nothing approach used by the majority. Specifically, he argued that "[w]hile all license plates unquestionably contain *some* government speech . . . the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages." *Id.* at 222–23. Regulating such messages in the manner Texas did, Justice Alito posits, "is blatant viewpoint discrimination." *Id.* at 223.

Government speech reared its head again, albeit in a slightly different context, in *Matal v. Tam*, 582 U.S. 218 (2017). There, the Supreme Court considered whether a disparagement clause in the Lanham Act, prohibiting the registration of trademarks disparaging any persons, living or dead, was invalid under the First Amendment. In that case, an Asian music group wanted to register its trademark as "The Slants," purportedly to "reclaim the term and drain its denigrating force" as to Asians. 582 U.S. at 223. The federal Patent and Trademark Office (the "PTO") denied the band's application based on the disparagement clause. When the case made its way to the Supreme Court, the majority rejected the government's argument that registered trademarks are government speech and found the disparagement clause facially invalid under the First Amendment. Justice Alito, again writing for the majority, noted first the PTO's lack of involvement in creating the marks. *See id.* at 235 ("The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the [disparagement clause], an examiner may not reject a mark based on the viewpoint that it appears to express."). The Court described the government's government speech argument as "far-fetched":

> If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

Id. at 236 (footnote and citations to brief omitted). Distinguishing the marks from the monuments at issue in *Summum*, the Court explained that "[t]rademarks have not traditionally been used to convey a [g]overnment message[,]" and "there is no evidence that the public associates the contents of trademarks with the Federal Government." *Id.* at 238.

The Court also distinguished *Matal* from *Walker*, noting that the latter "likely marks the outer bounds of the government-speech doctrine." *Id.* at 238. Moreover, trademarks are different from Texas' specially designed license plates because

> license plates have long been used by the States to convey state messages. Second, license plates are often closely identified in the public

> mind with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of government ID. Third, Texas maintained direct control over the messages conveyed on its specialty plates. As explained above, none of these factors are present in this case.

Id. at 238 (cleaned up). Ultimately, "[t]rademarks are private, not government, speech." *Id.* at 239.

Finally, in 2022, the Supreme Court again addressed government versus private speech in *Shurtleff v. City of Boston, Mass.*, mentioned *supra*. There, a Christian organization called Camp Constitution sought to erect a flag with its logo outside of Boston's city hall. This was not unusual– "since at least 2005, the city has allowed groups to hold flag-raising ceremonies on [the city hall] plaza." *Id.* at 1588. These events typically lasted "a couple of hours." *Id.* When Camp Constitution sought permission to hold its event and fly its flag, the commissioner of Boston's Property Management Department denied the request. Camp Constitution and its director, Harold Shurtleff, sued the city and the commissioner, arguing that the denial of the flag raising violated, among other things, the Free Speech Clause of the First Amendment. The district court held that flying a private organization's flag from the city's flag pole was government speech, and the First Circuit affirmed.

The Supreme Court determined, pursuant to the factor test noted *supra*, that the city's flag-raising program was not government speech. Applying the first factor, the Court explained that the contents of flags, as well as their "presence and position[,] have long conveyed important messages about government." *Id.* at 1590. The Court then noted, however, that "[w]hile this history favors Boston, it is only our starting point." *Id.* at 1591. Turning to the second factor, public perception, "circumstantial evidence [did] not tip the scale." *Id.* In that case, because the city often flew private groups' flags along with the United States and Massachusetts flags, the Court reasoned that passersby might not necessarily associate the flags with the government. In *Shurtleff*, then, "evidence of the public's perception [did] not resolve whether Boston conveyed a city message with these flags." *Id.*

Rather, *Shurtleff*'s analysis rises and falls on the third factor– "the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent." *Id.* at 1592. Here, the Court distinguished the case before it from *Walker*, noting that Boston 1) never previously requested changes to a flag-raising ceremony before approval; 2) never previously saw the flags before the events; 3) approved flag raisings without exception; 4) had no record of another denial of a flag raising; and 5) held no "written policies or clear internal guidance" regarding which groups could participate in the flag-raising events. *Id.* Boston's "lack of meaningful involvement in the selection of flags or the crafting of their messages [led the Court] to classify the flag raisings as private, not government, speech[.]" *Id.* at 1593.

In the wake of *Walker*, several lower courts have considered the question squarely before us, namely, whether the foregoing cases establish that vanity license plate messages are government speech. Courts concluding in the affirmative are in the minority. *See, e.g.*, *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015) (extending *Walker* and concluding that personalized vanity license plate messages are government speech); *Odquina v. City and Cnty. of Honolulu*, No. 22-cv-407-DKW-RT, 2022 WL 16715714, at *9 (D. Haw. Nov. 4, 2022) (applying *Vawter* to conclude that vanity plates are government speech, noting that "*Walker*'s three-part test is as substantively relevant to personalized alphanumerics as it was to plate design"). However, a majority of lower courts ruling on the issue has held that *Walker* does not extend to vanity license plate messages, with some holding that the personalized alphanumeric configurations on such plates are private speech in a nonpublic forum. *See, e.g.*, *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D.R.I. 2020) ("*Walker* itself insisted that its holding on government speech did not extend beyond those specialty plates and it took pains not to express an opinion on vanity plates . . . . They are not government speech and *Walker* has no applicability here."); *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019) (quoting *Matal*, 582 U.S. at 238 ("*Walker* 'likely marks the outer bounds of the government-speech doctrine'. . . . Consequently, this Court finds that vanity plates are private speech.")); *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165, 172 (2015), *aff'd*, 148 A.3d 319 (Md. 2016), *as corrected on reconsideration* (Dec. 6, 2016) (vanity license plates do not constitute government speech, but "the State of Maryland did not intend to create a public forum of any type by enacting vanity plate legislation"); *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019) (agreeing with *Mitchell* and noting that "it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates").

Several of the opinions in this majority criticize *Vawter* and characterize the opinion as an outlier. *See Carroll*, 494 F. Supp. 3d at 167 ("I reject as wholly unpersuasive the reasoning of [*Vawter*], an apparent outlier[.]"); *Hart*, 422 F. Supp. 3d at 1232 ("[T]he *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*, 126 A.3d at 187 ("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.").

Against this backdrop, we return to the case at bar. Having reviewed the record and above-cited authorities at length, we conclude that the panel below erred in categorizing alphanumeric configurations on vanity license plates as government speech.

Applying the *Shurtleff* factors, we look first to the history of the expression at issue. The State argues that license plates have long been used by the States to convey state messages and that "States have conveyed messages through both registration numbers on license plates and license plates more generally." The message that the State contends it

is sending through vanity plates is not one necessarily dependent upon the alphanumeric configuration. Rather, the State posits that the message is simply one of identification. That is, regardless of the alphanumeric configuration, the "government message" is that the vehicle is lawfully registered with the State. On the other hand, Plaintiff claims that there is no evidence the State has ever used vanity license plates to communicate with the public. To this, the State avers that our analysis should focus on "the medium of expression, not the history of a 'program' related to the medium."

The State's argument does not hold water. The State wants to focus on the medium, but what is at issue here, specifically, is the alphanumeric configuration as opposed to the background of a specialized plate, the sticker communicating the month registration expires, or the state the plate belongs to. Vanity plates (that is, the use of personalized alphanumeric configurations chosen by the public) did not come into existence until 1998, and since then they communicate what the individual driver, not the government, chooses.

The State relies on *Walker* for the proposition that license plates have long been used to convey state messages. The State's reading of *Walker* is overbroad, however. In *Walker*, the Supreme Court expressly clarified early in the opinion that it was not addressing vanity license plates. 576 U.S. at 204 (emphasis added) ("Here we are concerned *only* with the second category of plates, namely specialty license plates, *not with the personalization program*."). As we understand the discussion of license plates following that caveat, then, it pertains to the history of license plate designs and slogans. Indeed, later in the opinion the Court extrapolated that "States have used license plate slogans to urge action, to promote tourism, and to tout local industries." *Id.* at 211. None of this addresses the alphanumeric configurations at issue with vanity plates. Moreover, and perhaps most importantly, only two years after the Court decided *Walker*, it clarified that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal*, 582 U.S. at 238.

Nonetheless, the State posits that we are required to consider the history of license plates generally:

> Plaintiff claims that "Defendants failed to introduce any evidence that *personalized plate messages* have ever been used to convey a governmental message," focusing on the fact that "Tennessee's *personalized plate program* is a mere twenty-four years old." (emphases added) (citing *Kotler v. Webb*, 2019 WL 4635168, at *6 (C.D. Cal. Aug. 29, 2019)). But the first factor focuses on the history of the medium of expression, not the history of a "program" related to the medium. *Shurtleff* did not focus on Boston's program for flag-raising ceremonies (which had only been in place since 2005); it analyzed "the history of flag flying, particularly at the seat of government." 142 S Ct. at 1588, 1590. Similarly, *Summum* looked generally

> at the "use[]" of "monuments to speak to the public," 555 U.S. at 470, and *Walker* focused on "the history of license plates," 576 U.S. 210.

Respectfully, we do not understand *Walker* to impose this requirement. *Walker* contains a detailed history of the Texas specialization program at issue, specifically pointing out that Texas oft uses specialty designs to promote certain messages, such as "Read to Succeed" and "Houston Livestock Show and Rodeo." While it is true that the Court examines the general history of the medium at issue, this is not to say that the particular program in question is ignored entirely. *See Shurtleff*, 142 S. Ct. at 1591 ("While this history favors Boston, it is only our starting point. . . . [W]e must examine the details of *this* flag-flying program."). Disregarding the history of the program at issue would also contravene the High Court's directive to conduct a "holistic inquiry . . . driven by [the] case's context rather than the rote application of rigid factors." *Id.* at 1589.

Finally, we are unpersuaded by the State's position that it historically has communicated an "ID" message through the alphanumeric configurations on license plates. If this were true, the message on the vanity plates would be inapposite, and the State would have no incentive to regulate said messages. Stated differently, to the extent the unique alphanumeric configuration serves *only t*o identify a vehicle as lawfully registered, then it is unclear why the State has an interest in the phonetic message.

The Maryland Court of Special Appeals aptly addressed the "government ID" argument urged here:

> The registration number on a vanity plate is an identifier, as all license plate registration numbers are, but it is more than that. The combination of characters the vehicle owner selects creates a personalized message with intrinsic meaning (sometimes clear, sometimes abstruse) that is independent of mere identification and specific to the owner. Because it is the registration number that is being personalized, and registration numbers must be unique, the message on a vanity plate necessarily will be one-of-a-kind. Indeed, vanity plate messages are more "one-of-a-kind" than bumper stickers. At any given time, there may be multiple Maryland vehicles displaying a particular bumper sticker, but there only will be one Maryland vehicle displaying a particular vanity plate message.

Mitchell, 126 A.3d at 184. We further find persuasive the *Mitchell* court's reasoning that "historically, vehicle owners have used vanity plates to communicate their own personal messages and the State has not used vanity plates to communicate any message at all." *Id.* at 185. Notwithstanding the State's position that we are not to analyze the history of vanity plates specifically, the record before us contains no evidence that the State has ever used vanity license plates to communicate government messages through the alphanumeric configurations. *See Shurtleff*, 142 S. Ct. at 1591 ("[W]e must examine the details

of *this* flag-flying program."). While license plates as a whole undoubtedly contain some government speech, the alphanumeric configuration does not; both private and government speech can exist on government property.

That said, the State is correct that *Walker* provides "the history of license plates shows that . . . they long have communicated messages from the States." 576 U.S. at 210–11. However, even assuming arguendo that the general history of license plates points to government speech, this factor does not carry the day. Indeed, our analysis "is not mechanical; it is driven by a case's context." *Shurtleff*, 142 S. Ct. at 1589. And other factors weigh more heavily under the circumstances of this case than the broad history of license plates. *See id.* at 1591 ("While [history] favors Boston, it is only our starting point."). For example, "whether the public would tend to view the speech at issue as the government's" militates in Plaintiff's favor here. *Id.*

Plaintiff correctly points out that no evidence in the record establishes that the public likely perceives the State to be speaking through vanity license plates, nor do we believe the State really wants to be perceived as the author of the various vanity plate messages. On the other hand, Plaintiff offered expert testimony at trial establishing that when two-hundred Tennesseans were polled, eighty-seven percent of them associated vanity plate messages with the driver of the respective vehicle as opposed to the State.[6] Plaintiff also offered the testimony of George Scoville, a Tennessean who previously had obtained a vanity plate bearing the message "GSSIII." Mr. Scoville, the third of his name, testified that he obtained the vanity plate after his grandfather, George S. Scoville the first, passed away. The plate is Mr. Scoville's "way to just sort of honor [his grandfather] and sort of follow his practice of using his initials on his license plate of his vehicle." While not dispositive, the evidence proffered by Plaintiff at trial lends itself to the finding that members of the public perceive vanity license plate messages to be that of the vehicle driver. In addressing this factor, the *Shurtleff* Court discussed the scene that "[o]n an ordinary day, a passerby on Cambridge Street sees" outside Boston's City Hall. *Id.* In the context of this case, what Tennesseans see on an ordinary day are unique, personalized

[6] The polling expert, Alan Secrest, testified as follows about the poll:

> A. "When you see a personalized license plate that contains a combination of letters and numbers chosen by the car's owner, which of the following statements comes closer to your point of view? Statement A: The message featured on a personalized license plate represents the speech or views of the government or Statement B: The message featured on a personalized license plate represents the speech or views of the person who chose it"?
>
> Q. What were the results of that question in your poll?
>
> A. Almost unanimous. 87 percent chose Statement B, that is, that a personalized plate represents the speech or views of the person who chose it. Just 4 percent indicated it represented the speech or views of the government and 9 percent were not sure.

messages, albeit on government property, affixed to privately owned vehicles. We are unpersuaded that citizens, upon viewing messages such as BIGRACK, TOPLS69, and WYTRASH, affixed to personal vehicles believe that the State is conveying a message to the public.[7]

Instead of offering evidence tending to establish the public's perception about vanity license plates, the State again relies on *Walker* and *Summum*:

> The same type of independent expression existed in *Walker* and *Summum*, but that did not transform government speech into private speech as a legal matter. Rather, the Supreme Court explicitly recognized that expression can be governmental speech *even if* a private party attempts to convey a different message through the same expression. *Summum*, 555 U.S. at 476 ("[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."). Just as the monuments in *Summum* communicated government messages despite the different communicative intent of their donors, Tennessee's personalized license plates communicate messages from the State no matter what else the driver might intend to express.
>
> * * *
>
> [A]s a general matter, license plates are "closely identified in the public mind with the [State]." *Walker*, 576 U.S. at 212; *see also Matal*, 137 S. Ct. at 1760. The registration numbers on license plates "do not cease to be government speech simply because some observers may fail to recognize that [the] alphanumeric combinations are government issued and approved speech in every instance." *Vawter*, 45 N.E.3d at 1206.

We have already addressed the reasons why the State's heavy reliance on *Walker* (and thus *Vawter*) is misplaced--we review government speech cases for unique context, *Shurtleff*, 142 S. Ct. at 1589, and the mode of speech at issue here was not before the Court in *Walker* or *Summum*. Inasmuch as "we must exercise great caution before extending [] government-speech precedents[,]" *Matal*, 582 U.S. at 235, we cannot rubber-stamp the State's argument as the next natural iteration of the government speech doctrine. *See Summum*, 555 U.S. at 473 (acknowledging the "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint"). To that point, we understand *Matal* as rejecting, at least in part, the

[7] In contrast to Plaintiff's proof, the only witnesses offered by the State were two Department employees. And the record shows that one of those witnesses, Ms. Hudson, gave inconsistent testimony throughout the pendency of this case regarding the Department's position on the source of the speech at issue.

State's position that *Walker* and *Summum* may be extended beyond the circumstances at issue in those cases. To reiterate, in *Matal* the government argued that registering privately designed trademarks with the federal government amounted to government speech. In that case too, the government relied heavily on *Walker* and *Summum* and the Court rejected its position:

> Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way.

582 U.S. at 239. The *Matal* Court also noted that, within the particular context of that case, "there is no evidence that the public associates the contents of trademarks with the Federal Government." *Id.* at 238. The same is true here, and we are unpersuaded by the State's position that *Walker* must be read broadly to mean that all information on any license plate is closely attributed to the State in the mind of the general public. While some license plate components are undeniably government speech—and the public view them as such (for example the month and expiration year)—others are personalized messages chosen by the taxpayer as a form of self-expression, and the public recognizes that as well.

Moreover, Plaintiff points out in her brief that many lower courts have soundly rejected the proposition that the public widely associates vanity license plate messages with the State. *See Kotler*, 2019 WL 4635168, at *7 ("[I]t strains believability to argue that viewers perceive the government as speaking through personalized vanity plates."); *Mitchell*, 126 A.3d at 185 ("The personal nature of a vanity plate message makes it unlikely that members of the public, upon seeing the vanity plate, will think the message comes from the State."). The State responds that Plaintiff "jettison[s] the holdings of *Summum* and *Walker* for non-binding district court cases (and arguments raised in dissent) simply because she prefers their outcome." We disagree. The idea that the public perceives messages on vanity license plates as government speech is unsupported, this was not the holding of *Walker* or *Summum*, and the cases cited by Plaintiff address the issue squarely before this Court. The public perception factor militates against government speech.

Third, we look at the extent to which the State "has actively shaped or controlled the expression." *Shurtleff*, 142 S. Ct. at 1590. On the record before us, we cannot say that this factor militates heavily in favor of one side or the other. On one hand, our General Assembly has passed a statute allowing the Department to regulate vanity license plate messages. Citizens must apply to the Department and pay a fee in order to obtain same. Before the plate is issued, the Inventory Unit reviews the proposed configuration and consults several resources. In the event of confusion over whether the plate should be issued, the Unit consults a supervisor. The record contains a lengthy list of requested configurations that previously have been denied, suggesting the Department is, at times,

heavy-handed in its regulatory authority. Further, as occurred here, the Department is authorized by statute to revoke plates it determines were issued in error. These circumstances are distinguishable from those in *Shurtleff*, in which the Court determined that the flag raising outside Boston City Hall was not government speech because Boston had a "come-one-come-all attitude—except, that is, for Camp Constitution's religious flag[.]" 142 S. Ct. at 1592–93.

Although the statutory framework allows the Department to approve or deny vanity license plate messages, the record establishes that in reality, the Department's oversight has been inconsistent. *See id.* at 1592 ("[I]t is Boston's control over the flags' content and meaning that here is key[.]"). Plaintiff displayed the vanity plate at issue for a decade before the Department revoked it. Had an acquaintance of Mr. Moorhead not photographed the plate and texted the photo to Mr. Moorhead, it is unknown whether the plate would have been revoked at all. Further, the Department has no written policies about how to screen vanity plate applications for "good taste and decency." Rather, the record shows that the approval process depends largely upon the judgment of the particular Inventory Unit team member reviewing the application that particular day. The Department employees who testified at trial maintained that certain categories of messages are outright banned. Both Department witnesses testified that sexual activity, including the number sixty-nine, is one of these categories. Nonetheless, Plaintiff presented proof that there are numerous vanity license plates in circulation alluding to sexual activity. The members of the Inventory Unit team who testified at trial were unable to clarify these discrepancies, other than that the Unit is very busy. Primarily, the Department's witnesses mechanically maintained that vanity plate messages are government speech, while at the same time acknowledging that the plates display the driver's unique, personal message.

The State's control over the vanity license plate program is not as lax as the city's was in *Shurtleff*; indeed, in that case, the Court concluded that Boston did not control the message at issue "at all," and this factor was "the most salient feature" of that case. *Id.* at 1592. Nonetheless, the Department's actions also cannot be fairly characterized as "actively" shaping or controlling the messages at issue. *Id.* at 1590. *Matal* is instructive here, because in that case the Court determined that trademarks are not government speech, despite the fact that there was a statutory framework in place to exclude or later revoke certain trademarks. 582 U.S. at 235–36. The PTO approved and registered all kinds of different marks without considering viewpoint, and it only rejected marks it deemed offensive. *Id.* The level of control exercised by the Department here is not comparable to the specially curated monuments at issue in *Summum* or specially designed license plates in *Walker*. Under all of these circumstances, we conclude that this factor does not significantly weigh in favor of or against either party.

Based on our holistic inquiry of this case, we conclude that the panel erred in determining that the alphanumeric configurations, distinct from license plates as a whole, are government speech. First, and contrary to the State's contentions, the Supreme Court

has never addressed this specific question. Second, there is no evidence, and it "strains believability" that the public perceives messages on vanity plates as government messaging. *Kotler*, 2019 WL 4635168, at *7. Finally, notwithstanding the statutory framework for vanity license plate approval, the Department's shaping and control over vanity plate messaging has been inconsistent, at best.

Lastly, we have considered all of the foregoing against the backdrop of the Supreme Court's repeated warnings about the liberal expansion of the government speech doctrine. While "[t]he boundary between government speech and private expression can blur[,]" *Shurtleff*, 142 S. Ct. at 1589, it has not done so here. The government speech doctrine is "susceptible to dangerous misuse" that we must guard against. *Matal*, 582 U.S. at 235. Messages on personalized vanity license plates are private, not government, speech. We reverse the panel as to this issue.

The parties dispute, in the alternative, whether vanity license plates are a nonpublic forum, and Plaintiff asserts that several of her constitutional rights were violated by the Department revoking her personalized license plate. In light of its conclusion that the plates are government speech, the panel below did not reach any of these issues. Nor did the panel reach the constitutionality of Tennessee Code Annotated section 55-4-210(d)(2). Consequently, in light of our decision that the panel erred regarding the government speech question, we deem it prudent to remand this case back to the panel for consideration of Plaintiff's constitutional claims, including her claim for attorney's fees pursuant to 42 U.S.C. § 1983, and challenges to Tennessee Code Annotated sections 55-4-210, 55-5-117, and 55-5-119.

The panel did address however, out of an abundance of caution, Commissioner Gerregano's qualified immunity defense. The panel reasoned that it was

> 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.

In the context of the panel's decision that vanity license plate messages are government speech, its conclusion about qualified immunity is well-reasoned. Nonetheless, per this Court's decision, the panel will have to re-evaluate Plaintiff's claims in an entirely different framework, to-wit, the strictures of the First Amendment and forum

analysis. Under these circumstances, we deem it prudent to vacate the panel's decision regarding the Commissioner's qualified immunity defense and allow the panel the opportunity to revisit this issue under the appropriate framework.

Discovery Sanctions

The remaining issues raised on appeal deal with the discovery dispute detailed *supra*. Because these issues have nothing to do with government speech, the First Amendment, or Plaintiff's remaining claims, we will resolve Plaintiff's discovery issue on appeal.

To recap, Plaintiff filed a motion for discovery sanctions against the State on December 5, 2021, after Plaintiff deposed Department employee Ms. Hudson for the second time. As relevant, Plaintiff claimed that Ms. Hudson was unprepared at both depositions and furnished a "fraudulent" errata sheet following the first deposition. Rather than impose sanctions, the panel determined that the issue was one of credibility that it would address at trial. In its final order, the panel found as follows:

> 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.

On appeal, Plaintiff claims that the panel erred by "failing to accord any weight to the case-dispositive admissions" from Ms. Hudson's deposition testimony, and "by failing to assess discovery sanctions."

First, we take no issue with the panel's decision to treat the discrepancies in Ms. Hudson's testimony as a credibility issue. Plaintiff's counsel had ample opportunity to and did cross examine Ms. Hudson about the inconsistencies in her testimony, resulting in the panel giving her testimony no weight. The panel was well within its authority to do so, as "the weight, faith, and credit to be given witnesses' testimony lies in the first instance with the trial court." *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007) (citing *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991)).

Further, while Ms. Hudson was deposed as a Tenn. R. Civ. P. 30.02(6) witness, Plaintiff cites no Tennessee cases, nor has our research revealed any, providing that the panel had to assess her credibility differently in light of that posture. Nor are we persuaded by Plaintiff's assertion that the panel should have treated Ms. Hudson's first deposition as binding as opposed to simply treating it as a credibility problem. Plaintiff is correct, and the panel aptly noted, that Ms. Hudson's testimony throughout this case has been confused and contradictory. Nonetheless, we also agree with the panel that at many points, Ms. Hudson was asked for legal conclusions by Plaintiff's counsel.

Under all of the circumstances, the panel handled this issue appropriately. Trial courts have broad discretion over when and how to impose discovery sanctions. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004). "Such a discretionary decision will be set aside on appeal only when 'the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence.'" *Id.* (quoting *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999)). No abuse of discretion occurred here, and we affirm the panel's decision not to assess discovery sanctions.

CONCLUSION

The order of the Special Panel sitting in the Chancery Court for Davidson County is reversed in part, vacated in part, and affirmed in part. The case is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed to the State Attorney General and Reporter and the Tennessee Department of Revenue.

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KRISTI M. DAVIS, JUDGE