No. 25-107

In the
Supreme Court of the United States

LEAH GILLIAM,

PETITIONER,

v.

DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, AND JONATHAN SKRMETTI, TENNESSEE ATTORNEY GENERAL,

RESPONDENTS.

On Petition for Writ of Certiorari to the Tennessee Supreme Court

BRIEF OF *AMICUS CURIAE* WISCONSIN INSTITUTE FOR LAW & LIBERTY INC. AND THE BUCKEYE INSTITUTE SUPPORTING THE PETITIONERS

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QUESTION PRESENTED

Whether the messages paid and chosen by car owners on personalized license plates—commonly known as "vanity" plates—are government speech.

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INTEREST OF *AMICUS CURIAE*[1]

The Wisconsin Institute for Law & Liberty Inc. (WILL) is a nonpartisan, not-for-profit law and policy center based out of Milwaukee, Wisconsin. WILL's mission is to advance the public interest in the rule of law, constitutional government, and a robust civil society. We further that mission through education, litigation, and participation in the public discourse.

WILL is interested in this action because it presents a good vehicle for this Court to clarify the scope of the government speech doctrine, which is being abused by government actors to engage in censorship.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission.

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[1] As required by Supreme Court Rule 37.2, the Counsel of Record for all parties received timely notice of intent to file this brief. No party's counsel authored any part of this brief; no person other than *amicus* or its members made a monetary contribution to fund its preparation or submission under Supreme Court Rule 37.6.

The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). As such, it relies on support from individuals, corporations, and foundations that share a commitment to individual liberty, free enterprise, personal responsibility, and limited government. The Buckeye Institute vigorously defends the right to freedom of speech.

SUMMARY OF ARGUMENT

The government speech doctrine, which permits government to engage in its own expressive activity without First Amendment scrutiny, must be narrowly applied to prevent misuse and safeguard the free speech rights of all Americans.

The doctrine's caselaw development shows its lack of clarity and potential for abuse, especially when governments classify private speech—such as the messages conveyed on personalized license plates—as government speech in order to justify viewpoint discrimination. Lower courts have applied differing interpretations of what constitutes government versus private speech, and such inconsistent application risks censorship under the guise of government control based upon the location of the speaker. This Court should grant certiorari to clarify the doctrine's boundaries, particularly by refining the traditional government speech analysis factors (history, perception, control) to ensure the doctrine applies only when the government *actively* crafts the message, and not when it merely regulates private expression.

ARGUMENT

I. The Government Speech Doctrine Must Be Narrowly Applied to Protect First Amendment Rights.

The First Amendment prohibits the government from abridging Americans' fundamental right to free speech, subjecting viewpoint discrimination to strict scrutiny. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995). The government speech doctrine is a narrow carve out to the First Amendment, and allows the government to engage in its own expressive activity—sometimes including viewpoint discrimination—without triggering heightened scrutiny. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). While often described as necessary for government to function, the doctrine is "susceptible to dangerous misuse" if not carefully circumscribed. *Matal v. Tam*, 582 U.S. 218, 235 (2017) (Alito, J., concurring). This case, involving the expression of messages by individuals on their personalized license plates, exemplifies the doctrine's potential for overreach and underscores the urgent need for this Court to clarify its scope.

The Court should grant certiorari to resolve a growing circuit split and ensure the doctrine does not undermine First Amendment protections.

A. The Government Speech Doctrine Requires Narrow Application to Safeguard Free Speech.

This case presents a critical opportunity to resolve courts' inconsistent application of the government speech doctrine and to define its limits, ensuring it does not become a tool for censorship. The application of the government speech doctrine has produced significant debate over its potential to be used as cover by rogue government actors looking to censor disfavored viewpoints.

This Court should grant the writ to provide clarity for litigants and courts alike, and to ensure the prevention of misuse and censorship.

1. The Doctrine's Relative Infancy Demands Clear Boundaries.

Since this Court recognized it in *Rust v. Sullivan*, 500 U.S. 173 (1991), the government speech doctrine has permitted the government to regulate speech in support of its own programs, even if such regulation would otherwise amount to viewpoint discrimination in violation of the First Amendment.

In *Rust*, the Court upheld federal regulations prohibiting certain federally funded clinics from counseling or referring patients for abortions. In reaching that conclusion, the Court reasoned that it was "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Id.*, at 194. That is, the government may control the message being disseminated with its own funds. However, that 5-4

decision was not without controversy. Justice Blackmun's dissent warned that this marked the Court's first endorsement of "viewpoint-based suppression of speech" tied to public funding, highlighting the doctrine's potential for abuse. *Id.* at 207 (Blackmun, J., dissenting).

Subsequent cases continued to underscore the difficulty in distinguishing government speech from private speech. In *Rosenberger*, for example, the Court was asked to review a state university program which funded student speech on diverse topics. The Court distinguished the challenged program in *Rosenberger* from the regulations that were upheld by the Court in *Rust*, explaining the "University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Rosenberger,* 515 U.S. at 834.

Similarly, the Court was asked to review whether speech was government speech or impermissible viewpoint discrimination in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). There, a 5-4 Court struck down restrictions on Legal Services Corporation-funded attorneys challenging welfare laws, again distinguishing that challenge from *Rust* because the funding supported *private* advocacy, and was not government speech. *Id.* at 542–43. These opinions (and the dissents) showed the Court's difficulty in applying the doctrine. Justice Scalia's dissent in *Velazquez* argued for upholding the restrictions under *Rust*. *Id.* at 554 (Scalia, J., dissenting).

In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the Court further dealt with the doctrine's

scope in a case involving a challenge to a federal program mandating beef producers to fund promotional campaigns for the industry (including "Beef. It's What's for Dinner." *Id.* at 554) The plaintiffs, beef producers, argued that the requirement that they provide funding for the promotional campaigns violated their First Amendment rights by forcing them to subsidize speech they disagreed with. *Id.* at 555–56. Justice Scalia, writing for a 6-3 majority wrote that the advertisements constituted government speech because the message was "effectively controlled" by the government, which designed and approved the campaign through a federally overseen board. *Id.* at 560. *Johanns* expanded the scope of the government speech doctrine by applying it to speech funded by private parties if their speech is directed by the government, distinguishing it from cases like *Rosenberger* where private speakers retained independence over the speech.

Johanns also revealed the continuing tensions in the doctrine's application. In dissent, Justice Souter argued that the beef advertisements were not purely government speech because they were funded by private producers and could be perceived as industry-driven, raising concerns about compelled speech. *Id.* at 577–78 (Souter, J., dissenting) ("Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?"). The dissent warned that to be "government" speech, the message should actually come from the government, not merely be a government endorsed message like the beef advertisement. *Id.* at 579–580 (Souter, J. dissenting). This disagreement underscores the doctrine's ambiguity, particularly when private speech mixes

with some form of government control or regulation. *Johanns* thus illustrates the doctrine's potential to be abused where a particular situation blurs the line between government and private speech, and the necessity for clearer boundaries on the doctrine to prevent overreach.

In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Court held that the placement of monuments in a public park was government, not private speech. *Summum* began to develop a three-factor test to distinguish government versus private speech, looking at: (1) the historical context of the expression, (2) public perception of the speaker, and (3) government control over the message. *Id.* at 470–73. Yet, even in *Summum*, the majority still acknowledged the doctrine's potential for "subterfuge for favoring certain private speakers over others based on viewpoint." *Id.* at 473. And although the outcome was unanimous, there were four separate concurring opinions—underscoring the continued lack of cohesion amongst the justices.

2. The Doctrine's Application to Mixed Speech Demands Clarity.

This case, which involves individuals expressing private messages on their personalized state-issued license plates, highlights the doctrine's ambiguity when expressive activity blends both governmental and private elements.

This is, of course, not the first time the Court has taken up a case involving a question of the application of the government speech doctrine to state-issued license plates. In *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,* 576 U.S. 200 (2015), the

Court held that specialty license plate designs were government speech and further developed the *Summum* analysis by clearly laying out the three factors. *Id.* at 209–210. Importantly, in *Walker* the Court made explicitly clear it was limited to those specialty plate designs, and was not ruling on personalized license plates. *Id.* at 204 (mentioning that, in addition to the specialty plate program, Texas also had a "personalization program" whereby an owner "may request a particular alphanumeric pattern for use as a plate number" and explaining "we are concerned only with the . . . specialty license plates, not with the personalization program."). This Court has explained that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal*, 582 U.S. at 238.

Those *Summum/Walker* factors would continue to be applied by the Court in government speech cases involving governmental regulation of private speech. In two of the Court's most recent government speech cases, *Matal v. Tam*, 582 U.S. 218 (2017) and *Iancu v. Brunetti,* 588 U.S. 388 (2019), the Court considered challenges to various parts of the Lanham Act, regarding federal trademarks. In particular, those cases challenged provisions of that act which prohibited certain disfavored trademarks from being registered.

In *Matal*, the Supreme Court held that the Lanham Act's prohibition on certain "disparaging" trademarks was viewpoint discriminatory and unconstitutional, but here again, the Court's opinion was fractured on its exact reasoning. *Brunetti*, 588 U.S. at 390 (summarizing *Matal*, and explaining that in "two non-majority opinions, all Members of the Court agreed that the provision violated the First

Amendment because it discriminated on the basis of viewpoint"). Justice Alito's opinion (joined by three justices) further explained that "[g]iving offense is a viewpoint" and prohibiting "registration" with the government because something is "offensive" is plainly "viewpoint discrimination." *Matal*, 582 U.S. at 243 (Alito, J., concurring).

A few years after *Matal*, the Supreme Court took up *Brunetti* and struck down a related provision of the Lanham Act which prohibited "immoral or scandalous" trademarks. *Brunetti*, 588 U.S. at 399. A 6-3 majority of the Court noted that, like the provision struck down in *Matal*, the provision challenged in *Brunetti* "disfavors certain ideas," and was therefore "viewpoint-based." *Id.* at 390, 394. Summarizing the Lanham Act's provisions, the Court explained the provision at issue was viewpoint discrimination because it "allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety." *Id.* at 394. In this way, the statute "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation." *Id.*

These cases all show the complexities with analyzing speech developed by private parties when there is some governmental approval and/or role in the regulatory process. It is in this context that there is the greatest possibility of subterfuge and where this Court should most clearly draw the lines.

3. A Narrow Doctrine Protects Free Speech Without Impeding Government Function.

The caselaw developing the government speech doctrine is a confusing misadventure attempting to balance what has been viewed as a necessary function of government with the need to maintain First Amendment protections. As these cases indicate, there is often no clear majority rationale from the Court for lower courts to rely on—and there is a clear need for development of the law in this area.

To prevent misuse, the government speech doctrine must be confined to situations where the government is *clearly* the speaker, not merely a regulator or facilitator of private expression. This case presents the Court with a clear pathway to developing the law in this direction.

The Tennessee Supreme Court's decision shows how these factors can be misapplied, resulting in more government control and censorship. *Amicus* will not repeat those arguments, The *Summum / Walker* factors—history, perception, and control—provide a starting point but require refinement to more clearly address mixed-speech scenarios like personalized license plates.

This case presents the Court with the opportunity to clarify the third factor in situations regarding governmental involvement in private expression, such as approving personalized license plates, and make clear that government involvement *alone* does not automatically render it government speech unless the government actually and actively *crafts* the message. This approach balances any concerns with the

government's need to function, as the Court recognized in *Shurtleff v. City of Boston*, 596 U.S. 243, 248 (2022), while maintaining vital First Amendment protections for all Americans.

II. Granting Certiorari Is Essential to Resolve Confusion and Protect Free Speech.

The growing circuit split and the government speech doctrine's susceptibility to misuse demand this Court's intervention. This brief will not reiterate what the Petition already makes clear, except to note that by granting the writ, the Court can resolve a growing split amongst lower courts and further clarify the government speech doctrine's boundaries, ensuring it does not become a loophole for viewpoint discrimination. A clearer standard would better guide lower courts, preventing misapplication like occurred in this case, and protect Americans' First Amendment rights without undermining the government's ability to express itself where needed.

Granting the writ is essential here for three separate reasons:

First, to resolve the split amongst courts nationwide. There is no reason why someone in Tennessee should have fewer speech rights than someone in Rhode Island—and it is incumbent upon the Court to step in and fix that.

Second, this case presents the Court with an ideal opportunity to develop the law and is a matter of public interest. Indeed, the facts of this case underscore the urgent need to provide clarity to lower courts so that the government speech doctrine does not become a mere pretext for government censorship.

And third, to correct the Tennessee Supreme Court's obvious misapplication of the *Summum / Walker* factors.

III. The Challenged Statute Violates the First Amendment

Resolving this case will also reduce uncertainty and limit litigation elsewhere, saving resources for individuals, government regulators, and the courts.

The underlying statute in this case allows Tennessee to censor license plates it finds "may carry connotations offensive to good taste and decency." Tenn. Code § 55-4-210(d)(2). Similar language, as the Petition notes, has been challenged elsewhere. Pet. at 27. Counsel for *amicus* WILL is currently representing a Wisconsin vehicle owner challenging a nearly identical statute in Wisconsin.[2] The facts of that case highlight the arbitrary nature of these laws, and why it is so vital that the government speech doctrine is not applied to personalized license plates.

Mike Nichols is the Wisconsin vehicle owner challenging the Wisconsin statute. About twenty years ago, Mike applied for and was issued a personalized license plate for his red Trans Am which read "RDRRAGE." Mike drove with that plate for a few years before selling that vehicle and surrendering the plate. Mike always missed that car and was able to locate and purchase another identical red trans am. When he went to get the license plate back, however, he was denied. After a public records request, he learned that after he applied and was denied, his requested license plate was added to a list of

[2] *See Nichols v. Boardman,* W.D. Wisc. Case No. 24-CV-0566, filed August 12, 2024.

"objectionable" license plates maintained by the state.

There has been no change in the law between the original issuance of the plate to Mike and the subsequent denial—the government officials making the decision just changed their mind. This type of arbitrary decision making is little more than government censorship, and it should never be allowed. The Court should grant certiorari so that vehicle owners like Mike no longer must be subjected to the changing whims of state bureaucrats.

CONCLUSION

The government speech doctrine, if left unchecked, risks eroding the First Amendment's core protections.

This case offers an opportunity to resolve lower court confusion and refine the doctrine with a more narrow and principled approach. This Court should grant the writ and ensure the government speech doctrine serves its limited purpose without becoming a tool for censorship.

For these reasons, WILL and the Buckeye Institute respectfully urges this Court to grant the writ.

Dated: August 28, 2025.

Respectfully submitted,

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