

PRIVATE SPEECH ON GOVERNMENT PROPERTY:  
DOES THE FIRST AMENDMENT APPLY TO SPECIALTY  
LICENSE PLATES?

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**ABSTRACT:** *The twenty-first century is an era of personalization, and license plates are no exception. Today, it is common for motorists to choose from more than one hundred varieties of specialty plates, featuring everything from sports teams to educational institutions to Superman. Towing the line between government and private speech, specialty plates have been a frequent source of litigation. Despite the private speech rights implicated on these government IDs, in June of 2015, the Supreme Court in Walker v. Texas Division, Sons of Confederate Veterans, Inc. ruled against nearly every circuit to address the issue and held that specialty plates constitute government speech immune from First Amendment protections. Applying a factors test, the Court analyzed the history of these programs, the public perception of speaker identity, and the editorial control exercised by the government. The implications of a narrow reading of Walker are troubling; indeed, legal professionals have used it to justify viewpoint discrimination in other areas of private subsidized speech as well as trademark law. Nevertheless, these same factors—when broadened to include an analysis of controlling precedent and specific features of the programs themselves—can and have been used to champion private speech.*

**INTRODUCTION:**

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The twenty-first century is an era of personalization. Monogram gifts are all the rage, displaying individuals' initials on everything from linens<sup>1</sup> to flatware.<sup>2</sup> Corporations like Coca Cola have launched initiatives such as the "Share a Coke" campaign, which features bottles labeled with America's most popular names.<sup>3</sup> Even social media users constantly customize their photos to show allegiance to causes, like after the devastating November 2015 terrorist attacks in France when thousands of Facebookers superimposed a French flag over their profile pictures.<sup>4</sup>

License plates are no exception to this customization frenzy. Since their inception in the late 1980s,<sup>5</sup> specialty plate programs have grown exponentially such that now every state in the nation offers both an ordinary license plate and a selection of customized alternatives<sup>6</sup> that feature state mottos, charities, organizations, causes, sports teams, educational institutions, and more. These programs vary by state, but generally designs are proposed by non-profit groups or the legislature and the plates must receive approval

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1 MONOGRAMMED LINEN SHOP, [HTTP://WWW.MONOGRAMMEDLINENSHOP.COM](http://www.monogrammedlinenshop.com) (LAST VISITED DEC. 5, 2015).

2 *Monogrammed Flatware*, BETTER HOMES AND GARDENS, <http://www.bhg.com/shop/dining/monogrammed-flatware-s.html> (last visited Dec. 5, 2015).

3 Jay Moye, *Share a Coke 2.0: The Hit Campaign is Back, and It's Bigger and Better Than Ever*, THE COCA COLA COMPANY (Apr. 14, 2015), <http://www.coca-colacompany.com/stories/share-a-coke-20-the-hit-campaign-is-back-and-its-bigger-and-better-than-ever/>.

4 Nisha Chittal, *How Social Media Played a Role in the Aftermath of the Paris Attacks*, MSNBC (Nov. 14, 2015), <http://www.msnbc.com/msnbc/how-social-media-played-role-the-aftermath-the-paris-attacks>.

5 Mark Vanhoenacker, *Montana Quilters Have Their Own License Plate*, SLATE (June 27, 2012), [http://www.slate.com/articles/life/design/2012/06/specialty\\_license\\_plates\\_why\\_are\\_there\\_so\\_many\\_.html](http://www.slate.com/articles/life/design/2012/06/specialty_license_plates_why_are_there_so_many_.html).

6 See, e.g., *Iowa License Plates*, LICENSE PLATE CENTRAL, <http://www.licenseplatecentral.com/usa/iowa> (last visited Dec. 28, 2015).

from the state Department of Motor Vehicle (DMV) before they are issued.<sup>7</sup> Consumers then select and purchase them for an additional fee that is allocated to the state and the organization affiliated with the chosen design.<sup>8</sup>

Given the highly polarized society of America,<sup>9</sup> it should come as no surprise that these programs have seen their fair share of litigation as various groups have pushed for the creation of controversial plates. After decades of lower courts seeking to achieve a balance between disseminating potentially offensive messages and protecting free speech, the Supreme Court handed down its decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*<sup>10</sup> in June 2015 and radically changed the way these cases will be handled. In a five-to-four decision, the Court upheld the rejection of a Texas specialty plate featuring a Confederate flag and proclaimed that each specialty plate affixed to an individual's car declares the government's—and not the motorist's—message.<sup>11</sup> As a result, the government may now discriminate based on viewpoint when deciding whether to approve the hundreds of specialty plates offered in these programs.<sup>12</sup>

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7 See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2244 (2015); *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 335 (2d Cir.) *vacated and remanded*, 611 F. App'x 741 (2015); *Roach v. Stouffer*, 560 F.3d 860, 862 (8th Cir. 2009).

8 *Fiala*, 790 F.3d at 335; *Az. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965–66 (9th Cir. 2008); *Roach*, 560 F.3d at 863.

9 *Political Polarization in the American Public*, PEW RESEARCH CENTER – U.S. POLITICS & POLICY (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

10 135 S. Ct. at 2239.

11 *Id.* at 2243, 2253.

12 *Id.* at 2256.

This Article posits that such a holding ignores the private speech implicated when an individual selects and purchases a specialty plate and imperils citizens' free speech rights. Accordingly, Part I explains the majority and dissenting arguments advanced in *Walker*. Part II proffers that *Walker* oversimplified the government speech doctrine inquiry and advances an analysis that uses the very factors utilized in *Walker* to more effectively address the nuances of hybrid speech. Part III discusses the troubling implications of *Walker* not only in the context of specialty license plates, but in all areas of private subsidized speech, as well as trademark law. Ultimately, this Article contends that lower courts analyzing specialty programs could still render an outcome championing private speech pursuant to the test in *Walker*. *Walker's* factors herein augmented can mitigate the effect of its holding.

#### I. OVERVIEW OF *WALKER*

The government speech doctrine, which undergirds the Supreme Court's decision in *Walker*,<sup>13</sup> is a new phenomenon; indeed, Justice Stevens described the inquiry as "recently minted" in his 2009 concurring opinion in *Pleasant Grove City v. Summum*.<sup>14</sup> Certainly noteworthy is that the Courts of Appeals—with the exception of the Sixth Circuit<sup>15</sup>—have held that specialty plates constitute private speech or a hybrid of private and government

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13 *Walker*, 135 S. Ct. at 2253.

14 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

15 *Am. Civil Liberties Union of Tn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).

speech.<sup>16</sup> This distinction is far from insignificant since it determines the degree to which the government controls the speech. Government speech is not subject to First Amendment limitations<sup>17</sup> because it is “generally entitled to promote a program, espouse a policy, or take a position.”<sup>18</sup> Conversely, private speech is protected by the First Amendment, which prohibits all discrimination based on viewpoint.<sup>19</sup>

*Sumnum*—which expanded the parameters of the government speech doctrine<sup>20</sup>—is fundamental to the instant analysis because the Supreme Court relied on it exclusively to support its decision in *Walker*.<sup>21</sup> In *Sumnum*, a religious organization sued the city of Pleasant Grove for rejecting its request to erect a religious monument in a park.<sup>22</sup> The city maintained it had the right to choose the monuments based on criteria including history and esthetics.<sup>23</sup> The Court ultimately found for the city, holding that notwithstanding a park’s designation as a traditional public forum, permanent

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16 *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 339 (2d Cir.), *vacated and remanded*, 611 F. App’x 741 (2015) (specialty plates constitute private speech); *Vandergriff*, 759 F.3d at 395 (same); *White*, 547 F.3d at 863 (same); *Az. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 960 (2008) (same); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 798 (4th Cir. 2004) (specialty plates constitute hybrid speech).

17 *Sumnum*, 555 U.S. at 467.

18 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 135 S. Ct. 2239, 2246 (2015).

19 *Rosenberger v. Rector*, 515 U.S. 819, 828 (1995).

20 Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Sumnum*, 19 WM. & MARY BILL RTS. J., 1, 4 (2010).

21 *Walker*, 135 S. Ct. at 2253.

22 *Sumnum*, 555 U.S. at 465–66.

23 *Id.* at 466.

monuments erected therein constitute government speech.<sup>24</sup>

In an opinion authored by Justice Breyer, the *Walker* Court mirrored its analysis in *Summum* and analyzed three factors: the history of the speech, the public perception of speaker identity, and the degree of editorial control exercised by the government.<sup>25</sup> The Court first explained that governments have historically used both monuments and specialty license plates to speak to the public.<sup>26</sup> The Court's examples included state-sponsored plates from the early 1900s depicting state animals, foods, and slogans, as well as Texas-themed plates ranging from the Lone Star emblem in 1919 to the 150-year plate in 1995.<sup>27</sup> The Court next reasoned that both monuments and specialty plates are "closely identified in the public mind with the [State]."<sup>28</sup> Lastly, the Court explained that both the city in *Summum* and Texas controlled the messages by exercising "final approval authority" over the monument and license plate design selections, respectively.<sup>29</sup>

The dissent in *Walker*—authored by Alito, the very justice who wrote the majority opinion in *Summum*<sup>30</sup>—responded to the majority's historical argument by explaining that state-sponsored

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24 *Id.* at 481.

25 *Walker*, 135 S. Ct. at 2243, 2248–49.

26 *Id.* at 2248.

27 *Walker*, 135 S. Ct. at 2248.

28 *Id.* at 2248–49 (discussing *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)).

29 *Id.* at 2249 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–61 (2005)).

30 *Summum*, 555 U.S. at 463.

plates<sup>31</sup> featured different messages than the general specialty plates at issue.<sup>32</sup> The former developed in the early 1900s and constituted government speech because they endorsed state programs.<sup>33</sup> General specialty plates did not develop until the late 1990s and from there burgeoned into the selection of 350 offered today.<sup>34</sup> Texas thus “crossed the line” from government to private speech “when . . . the State began to allow private entities to secure plates conveying their own messages.”<sup>35</sup>

The dissent responded to the majority’s public perception argument that plates indicate government support for the message by extending it to its logical conclusion: Texas espouses the content on all 350 specialty plates.<sup>36</sup> The state’s official policy thus includes preferences for golfing over working (“Rather Be Golfing” plate) and the University of Texas over its arch rivals (Notre Dame, Oklahoma State, and Kansas State license plates), among other absurdities.<sup>37</sup>

The dissent responded to the editorial control argument by explaining that the Board’s chairman who exercises “final approval

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31 In this Article, license plates developed by the state legislature, endorsing state programs, or featuring state milestones, animals, foods, slogans, sports teams, or educational institutions are referred to as state-sponsored plates.

32 *Walker*, 135 S. Ct. at 2256–57 (Alito, J., dissenting). In this Article, license plates developed by private vendors or non-profit organizations featuring general causes, private organizations, companies, charities, professions, military branches, and other messages that might be reasonably perceived as private are referred to as general specialty plates.

33 *Id.* at 2259.

34 *Id.* (Alito, J., dissenting).

35 *Id.* at 2260.

36 *Id.* at 2255.

37 *Id.*

authority” said that the program encouraged all kinds of private plates—not just those messages supported by the state—to raise money.<sup>38</sup> Even a Texas DMV brochure emphasized the consumer’s role in the process and the technical features that usually resulted in rejection by stating: “Q. Who provides the plate design? A. You do, though your design is subject to reflectivity, legibility, and design standards.”<sup>39</sup> The program is open to any license plates offered by private donors rather than only those reflective of the city’s culture and history like the monuments in *Summum*.<sup>40</sup> As the dissent concluded, the speech is more akin to government blessing private speech than government speech in furtherance of its programs.<sup>41</sup>

## II. DEVELOPING A TEST FOR GOVERNMENT SPEECH: MENDING *WALKER*’S OVERSIMPLIFICATION

The Supreme Court’s factors test in *Walker* constituted an oversimplification of the “recently minted” government speech doctrine. The three factors it addressed—the historical treatment of the speech, the public perception of the speaker’s identity, and the editorial control exercised by the government<sup>42</sup>—are unquestionably critical to the analysis, but are more nuanced than the Court acknowledged. A more comprehensive scrutiny of these factors, the Court’s previous decisions, and a wealth of precedents from the circuits is instructive for more adequately dealing with

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38 *Id.* at 2260 (emphasis added).

39 *Id.*

40 *Pleasant Grove City v. Summum*, 555 U.S. 460, 465 (2009).

41 *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting).

42 *Id.* at 2251 (majority opinion).

the nuances of hybrid speech without the troubling implications of *Walker*. Taking these into account, a lower court might still find that specialty plate programs constitute private speech.

*A. The History of Specialty License Plate Programs and the Government Speech Doctrine Favors Private Speech*

The *Walker* Court first considered whether the forum was one the government has traditionally used to speak.<sup>43</sup> When this analysis is broadened to include the explosion of customized plates in the late 1990s and the history of the government speech doctrine, this factor favors private speech.

The historical inquiry involves more than just a blanket assertion that the traditional usage of license plates as government IDs denotes government speech.<sup>44</sup> Granted, specialty plates conveying state slogans and emblems have disseminated a government message throughout history<sup>45</sup> because they conceivably promote state interests.<sup>46</sup> Such Texas-specific plates—ranging from the Lone Star emblem featured on the 1919 plate to the 1995 plate celebrating “150 years of Statehood”<sup>47</sup>—favored government speech. Nevertheless, the specialty plate program in *Walker* did not proliferate until the late twentieth century.<sup>48</sup> Thus, courts considering the program’s history should not mirror *Walker*’s shortsighted analysis of the forum. Moreover, the subject of the

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43 *Id.* at 2248.

44 *See id.* at 2249.

45 *Id.* at 2248 (majority opinion).

46 *Id.* at 2260 (Alito, J., dissenting).

47 *Id.* at 2248 (majority opinion).

48 *Id.* at 2257 (Alito, J. dissenting).

plate will likely be dispositive in determining whether its history weighs in favor of private or government speech.<sup>49</sup> Therefore, a plate honoring Nevada's 150th anniversary<sup>50</sup> or urging state citizens to "Protect Florida whales"<sup>51</sup> favors government speech (because it conceivably promotes state interests), while Hawaii's "Choose Life" plate<sup>52</sup> or Ohio's "Superman" plate<sup>53</sup> favors private speech (because it conceivably promotes private interests).

Furthermore, the history of the government speech doctrine is paramount. *Walker* explained that government speech's immunity from First Amendment scrutiny allows it to develop successful programs in areas pertaining to community health such as recycling and vaccinations.<sup>54</sup> Thus, when promoting such initiatives, the government is not required to disseminate the perspective of those opposed to them.<sup>55</sup> As the court in *Sumnum* reasoned, "it is not

49 *Am. Civil Liberties Union of N.C. v. Tata*, 742 F.3d 563, 573 (4th Cir. 2014), *cert. granted, vacated sub nom. Berger v. Am. Civil Liberties Union of N.C.*, 83 U.S.L.W. 3076 (U.S. June 29, 2015) (No.14-35) (subjects of 200 specialty plates "range from the controversial . . . to the religious . . . to the seemingly irrelevant to any conceivable North Carolina government interest . . . It defies logic . . . to suggest that all of these plates constitute North Carolina's—and only North Carolina's—message.").

50 *Charitable and Collegiate Plates*, DEPARTMENT OF MOTOR VEHICLES, <http://www.dmvnv.com/platescharitable.htm> (last visited Nov. 25, 2015).

51 *Specialty License Plate: Protect Florida Whales*, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, [http://www.flhsmv.gov/dmv/specialtytags/environmental/protect\\_florida\\_whales.html](http://www.flhsmv.gov/dmv/specialtytags/environmental/protect_florida_whales.html) (last visited Nov. 25, 2015).

52 CHOOSE LIFE AMERICA, <HTTP://WWW.CHOOSE-LIFE.ORG> (LAST VISITED NOV. 14, 2015).

53 OHIO BUREAU OF MOTOR VEHICLES, [http://bmv.ohio.gov/special\\_interest\\_plates.stm](http://bmv.ohio.gov/special_interest_plates.stm) (last visited Dec. 6, 2015).

54 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

55 *Id.*

easy to imagine how government could function if it lacked this freedom.”<sup>56</sup> Nevertheless, extrapolating this concept to specialty plate programs is tenuous. Under this reasoning, “[W]hen Texas issues a ‘Rather Be Golfing’ plate, but not a ‘Rather Be Playing Tennis’ or ‘Rather Be Bowling’ plate, it is furthering a state policy to promote golf but not tennis or bowling.”<sup>57</sup> Even though state-sponsored plates are indicative of state policy, for every state-related plate there are dozens of non-state related plates in most programs.<sup>58</sup> Under *Walker*’s reasoning, all of these subjects—from the Elvis Presley Club in Mississippi,<sup>59</sup> to the Penn State Alumni Association in Connecticut<sup>60</sup>—constitute state policies too.

Thus, this factor usually weighs in favor of private speech because more specialty plates tout generalized messages than state-

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56 *Pleasant Grove City v. Summum*, 555 U.S. 460, 464, 468 (2009).

57 *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting).

58 *See infra* note 61.

59 *Available License Plates*, DEPARTMENT OF REVENUE STATE OF MISSISSIPPI, <http://www.dor.ms.gov/TagsTitles/Pages/License-Plates.aspx> (last visited Dec. 6, 2015).

60 *All Special Plates in Connecticut*, DEPARTMENT OF MOTOR VEHICLES, <http://www.ct.gov/dmv/cwp/view.asp?a=811&q=276580> (last visited Dec. 6, 2015).

related messages.<sup>61</sup> For instance, Maryland, which offers one of the largest specialty plate programs in America, features approximately 835 generalized messages on its plates out of approximately 896 total messages.<sup>62</sup>

Furthermore, a check on the government speech doctrine is the government's accountability to the electorate.<sup>63</sup> This check is worthless if the people do not realize the government is speaking.<sup>64</sup> The breadth of specialty plates available makes it less likely that the public will perceive them as government speech, eliminating any checks that temper this concept.<sup>65</sup>

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61 See, e.g., MONTANA DEPARTMENT OF JUSTICE, <https://dojmt.gov/driving/plate-designs-and-fees/> (last visited Dec. 5, 2015) (146/201 plates are generalized specialty plates; the rest are state-sponsored plates); OHIO BUREAU OF MOTOR VEHICLES, [http://bmv.ohio.gov/sp\\_initial\\_reserve.stm](http://bmv.ohio.gov/sp_initial_reserve.stm) (last visited Dec. 6, 2015) (115/165); *Personalized and Specialty License Plates*, MISSOURI DEPARTMENT OF REVENUE, <http://dor.mo.gov/pdf/SpecialtyPlateChart.pdf> (last visited Dec. 5, 2015) (137/184). Even in programs that offer a greater percentage of state-sponsored plates than those already mentioned, generalized plates still constitute more than half of the program's offerings. See, e.g., *Application for Special Plates*, MINNESOTA DEPARTMENT OF PUBLIC SAFETY DRIVER AND VEHICLE SERVICES, [https://dps.mn.gov/divisions/dvs/forms-documents/Documents/MV\\_SpecialPlatesApplication.pdf](https://dps.mn.gov/divisions/dvs/forms-documents/Documents/MV_SpecialPlatesApplication.pdf) (last visited Dec. 5, 2015) (more than half of specialty plate offerings are generalized specialty plates); *Choose Plate Category*, MOTOR VEHICLE DIVISION GEORGIA DEPARTMENT OF REVENUE, <https://mvd.dor.ga.gov/motor/plates/PlateSelection.aspx> (last visited Nov. 27, 2015) (same).

62 DEPARTMENT OF TRANSPORTATION MOTOR VEHICLE ADMINISTRATION, <http://www.mva.maryland.gov/vehicles/licenseplates/bayandagricultural.htm> (last visited Dec. 6, 2015).

63 *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 315 (2000).

64 Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 U.C.L.A. L. REV. 1971, 2015–16 (2008).

65 *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 798 (4th Cir. 2004) (“Given the array of specialty plates available in South Carolina, a citizen is less likely to associate the plate messages with the State.”).

Therefore, this factor also weighs in favor of private speech because specialty plate programs do not comport with the purposes of the government speech doctrine, and the ambiguity surrounding the message bearer makes them immune from the doctrine's checks.

### *B. Public Perception of Speaker Identity Favors Private Speech*

The second factor *Walker* addressed was public perception of speaker identity. While this factor is critical to the government speech doctrine, *Walker's* analysis was incomplete. This factor should not just recognize license plates' designation as government IDs. It should also consider the Supreme Court's jurisprudence recognizing the private speech rights implicated on specialty plates, a reasonable observer standard, the eligibility requirements of certain plates, the competing messages advanced by specialty plates, and the lower courts' treatment of vanity plates.

#### 1. Supreme Court Jurisprudence Recognizes the Private Speech Rights Implicated on Specialty Plates

This is not the first time the Supreme Court has opined on the rights implicated on license plates, and the Court in *Walker* briefly discussed such precedent. Nevertheless, its hasty mention of *Wooley v. Maynard*<sup>66</sup> and *Perry Education Ass'n v. Perry Local Educators' Ass'n*<sup>67</sup> failed to adequately address the cases' implications: specialty plates involve private speech rights.

*Wooley* reasoned that automobiles are "readily associated"

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66 430 U.S. 705 (1977).

67 460 U.S. 37 (1983).

with their operators and drivers use their “private property” as “mobile billboards” for the state’s message.<sup>68</sup> Furthermore, the Court said requiring the display of a state motto on a plate interfered with “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control,” thus categorizing license plates within that sphere of intellect.<sup>69</sup>

As the *Walker* Court noted, public perception of speaker identity in this context is influenced by the fact that “TEXAS” is written across the top of license plates, and Texas issues the plates, owns their design, and prescribes their method of disposal.<sup>70</sup> Nonetheless, these are tempered by *Wooley*’s observations that cars are associated with their drivers, drivers use their cars as “mobile billboards,” and license plates are within “the sphere of intellect and spirit” protected by the First Amendment.<sup>71</sup> *Wooley* also demonstrates a noteworthy difference between public parks and license plates: messages in parks are advanced on government property while messages on license plates are advanced on private property.<sup>72</sup> The *Walker* majority failed to recognize such disparities.

Similarly, the *Walker* Court failed to distinguish *Perry* and its consequences. The *Perry* Court characterized a school district’s internal mail system as a nonpublic forum for private speech because it was a communication tool for private parties and the

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68 *Wooley*, 430 U.S. at 715, 717 n.15.

69 *Id.* at 715 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943)).

70 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015).

71 *Wooley*, 430 U.S. at 715, 717 n.15.

72 *See Wooley*, 430 U.S. at 715.

government.<sup>73</sup> *Perry* thus stands for the proposition that platforms private parties use to communicate warrant a forum analysis.

The *Walker* Court admitted that private parties use specialty plates to communicate when it stated, “[w]e have acknowledged that drivers who display a State’s selected license plate designs convey the messages communicated through those designs.”<sup>74</sup> Nevertheless, it dismissed *Perry* because each specialty plate was “stamped with the imprimatur of Texas.”<sup>75</sup> By focusing solely on the government speech aspects of license plates, the Court did not recognize its own admission about the private rights implicated.

Moreover, both drivers and the government use specialty plates to communicate—much like the internal mail system in *Perry* that both the teacher’s union and government used. Granted, the license plate, as a form of government identification,<sup>76</sup> conveys the state’s imprimatur, which is government speech.<sup>77</sup> Nevertheless, the driver also promulgates his own message by selecting a plate. For instance, New Yorkers can choose from among a variety of adventure specialty plates that read, “I love NY fishing,” “I love NY hunting,” and “I love NY state parks.”<sup>78</sup> Thus, although New York’s imprimatur reads across the top of the plate, the motorist’s message reads across the bottom.<sup>79</sup> This demonstrates that specialty

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73 *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 53 (1983).

74 *Walker*, 135 S. Ct. at 2252.

75 *Id.* at 2252.

76 *Id.* at 2249.

77 *Id.*

78 DEPARTMENT OF MOTOR VEHICLES, <http://dmv.ny.gov/custom-plates/nys-i-love-ny-adventure-plates-gallery> (last visited Nov. 28, 2015).

79 *See id.*

plates constitute at the very least a hybrid of government and private speech.<sup>80</sup>

State descriptions of these programs also demonstrate that private parties use them to communicate. Indeed, the Texas DMV website urges consumers to “show you [sic] support for a charity, cause, or other organization with an organizational plate. . . .”<sup>81</sup> Surely showing one’s support for a cause constitutes the communication of a message. Thus, by its own terms, Texas’s specialty program facilitates communication by private parties.<sup>82</sup>

Ultimately, *Wooley* and *Perry* strongly suggest that private individuals’ free speech rights are implicated when they select their own non-state specific messages.

## 2. The Reasonable Observer Test Demonstrates That the Public Perceives Specialty License Plates as Private Speech

Public perception also hinges on the reasonable observer test recommended by Justice Souter in *Sumnum* and adopted by several circuits,<sup>83</sup> which weighs in favor of private speech,

For instance, in *Children First Foundation, Inc. v. Fiala*, the Second Circuit had “little difficulty concluding” that a reasonable

80 See *Planned Parenthood of S.C., Inc. v. Rose* 361 F.3d 786, 799 (4th Cir. 2004) (mixed speech when speaker identity unclear).

81 *Types of Special License Plates in Texas*, DMV.ORG, <http://www.dmv.org/tx-texas/special-license-plates.php> (last visited Dec. 6, 2015).

82 See e.g., *Create a Plate: Special Plates*, VIRGINIA DEPARTMENT OF MOTOR VEHICLES, <https://www.dmv.virginia.gov/vehicles/#plates.asp> (last visited Nov. 14, 2015) (“Virginia offers more than 200 special plates that enable people . . . to identify or promote themselves or their cause.”).

83 *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring).

person would know car owners ask for specific specialty plates and choose to put them on their private property.<sup>84</sup> This is because “the connection between the message displayed by the specialty plate and the driver who selects and displays it is far stronger than the connection between the message and the Department’s stamp of approval.”<sup>85</sup> This is further supported by the breadth of specialty plates offered in specialty plate programs.<sup>86</sup> Texas itself now offers more than 480 varieties.<sup>87</sup> Thus, this factor favors private speech.

### 3. Specialty Plate Eligibility Requirements Denote Private Speech

Another feature of specialty plate program courts should address when considering public perception is the availability of certain plates for only qualifying individuals.

Numerous programs offer plates for members of the

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84 *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 339 (2d Cir. 2015), *vacated and remanded*, 611 F. App’x 741 (2015).

85 *Id.* at 339.

86 *See, e.g., Create a Plate: Special Plates*, VIRGINIA DEPARTMENT OF MOTOR VEHICLES, <https://www.dmv.virginia.gov/vehicles/#plates.asp> (last visited Nov. 14, 2015) (more than 200); *Delaware License Plates – Special Tags*, DELAWARE DIVISION OF MOTOR VEHICLES, [https://www.dmv.de.gov/services/vehicle\\_services/tags/tags\\_all.shtml](https://www.dmv.de.gov/services/vehicle_services/tags/tags_all.shtml) (last visited Nov. 27, 2015) (117); DEPARTMENT OF TRANSPORTATION MOTOR VEHICLE ADMINISTRATION, <http://www.mva.maryland.gov/vehicles/licenseplates/bayandagricultural.htm> (last visited Dec. 2, 2015) (896).

87 Transcript of Oral Argument at 45, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) (No. 14-144).

military,<sup>88</sup> professional trades,<sup>89</sup> or emergency response teams.<sup>90</sup> Such individuals must provide proof of membership in their respective group,<sup>91</sup> a limitations which favors private speech.

#### 4. Competing Messages on Specialty Plates Indicate the Government is Not Speaking

Another consideration imperative to the public perception analysis is the contradictory messages offered in some specialty plate programs. These also favor private speech.

For example, Virginia provides both “Choose Life”<sup>92</sup> and “Pro-Choice”<sup>93</sup> plates which represent both sides of the abortion debate.<sup>94</sup> It is counterintuitive to suggest that the state espouses such

88 See, e.g., *License Plates*, GEORGIA DEPARTMENT OF VETERANS’ SERVICE, <https://veterans.georgia.gov/book-page/license-plates> (last visited Dec. 29, 2015).

89 See, e.g., *RN License Plates*, MARYLAND NURSES ASSOCIATION, <http://www.marylandrn.org/Main-Menu-Category/About-Us/RN-License-Plates> (last visited Dec. 29, 2015).

90 See, e.g., *Firefighter Plates*, WYOMING DEPARTMENT OF TRANSPORTATION, [http://www.dot.state.wy.us/home/titles\\_plates\\_registration/specialty\\_plates/Firefighter.html](http://www.dot.state.wy.us/home/titles_plates_registration/specialty_plates/Firefighter.html) (last visited Dec. 29, 2015).

91 See, e.g., *id.*

92 CHOOSE LIFE AMERICA, *supra* note 52.

93 *Special Plates: Plate Information*, VIRGINIA DEPARTMENT OF MOTOR VEHICLES, <https://www.dmv.virginia.gov/exec/#vehicle/splates/info.asp?idnm=TWRC> (last visited Nov. 14, 2015).

94 Several other states have license plates supporting both pro-choice and pro-life views. See CHOOSE LIFE AMERICA, *supra* note 52 (Hawaii offers “Choose Life” plate); *Hawaii License Plates & Placards Information*, DMV.ORG, <http://www.dmv.org/hi-hawaii/license-plates.php> (last visited Nov. 14, 2015) (Hawaii offers “Planned Parenthood” specialty plate); *Personalized License Plate*, ALASKA DEPARTMENT OF ADMINISTRATION DIVISION OF MOTOR VEHICLES, <https://online.dmv.alaska.gov/dos/personalizedplate/personalizedplate/> (last visited Nov. 15, 2015) (Alaska offers “Choose Life” and pro-choice plate).

polar views. Moreover, the context of “Choose Life” license plates demonstrates another weakness of the *Walker* majority’s contention. New Jersey and Connecticut both offer “Choose Life” plates to state residents.<sup>95</sup> Nevertheless, New Jersey and Connecticut are the third and ninth most pro-abortion states in America.<sup>96</sup> Reasonable observers in New Jersey and Connecticut will thus assume that the pro-life message on the back of the vehicle represents the views of the driver and not the state.

#### 5. Public Perception of Vanity Plates Favors Private Speech

Finally, a comparison to vanity plates is instructive. Vanity plates—which contain a combination of letters and numbers chosen by the motorist—have traditionally been considered speech protected from viewpoint discrimination.<sup>97</sup> Every lower

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95 CHOOSE LIFE AMERICA, *supra* note 52.

96 *AUL’s 2016 Life List*, AMERICANS UNITED FOR LIFE, <http://www.aul.org/2016-life-list/> (last visited Nov. 10, 2016) (showing results of Americans United for Life’s annual survey based on state pro-life legislation).

97 See Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 U.C.L.A. L. Rev 1971, 1999 (2008).

court to consider the issue has conducted a forum analysis<sup>98</sup> which presupposes that private speech is at issue.<sup>99</sup>

Historically, vanity plates have communicated a message about the motorist; in the early 1900s, a low number constituted a status symbol.<sup>100</sup> Today, these alphanumeric combinations are tools of expression. Internationally renowned author Carolina Adams Miller describes them as a personal mission statement.<sup>101</sup>

Despite vanity plates being subject to the DMV's approval authority, the motorist determines the alphanumeric arrangement.<sup>102</sup> Yet, public perception of speaker identity is perhaps the most compelling rationale for vanity plates' classification as private speech.

98 *Byrne v. Rutledge*, 623 F.3d 46, 56 (2d Cir. 2010) (vanity plates nonpublic forum allowing "expression on a wide variety of subjects, including one's personal philosophy, beliefs, and values" as well as "statements of self-identity, affiliation, and inspiration."); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (vanity plates demonstrate the personality, character, and views of their owner); *Montenegro v. N.H. Div. of Motor Vehicles*, 166 N.H. 215, 219–20 (2014) (restriction facially unconstitutional whether vanity license plates constitute a designated public forum or a nonpublic forum); *Higgins v. Driver and Motor Vehicle Servs. Branch*, 72 P.3d 628, 631, 634 (Or. 2003) (vanity plates—which constitute a nonpublic forum—are not government speech); *Matwyuk v. Johnson* 22 F.Supp. 3d 812, 823 (W.D. Mich., N. Div. 2014) (vanity plates—which define the identity of the driver, are affixed to private property, and cannot be duplicated—are not government speech).

99 *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 339 (2d Cir. 2015), *vacated and remanded*, 611 F. App'x 741 (2015) ("a forum analysis is only undertaken once speech is deemed to be private").

100 Roger Grace, *License Plates With Low Numbers Became Political Rewards*, METROPOLITAN NEWS-ENTERPRISE (Nov. 5, 2015), <http://www.metnews.com/articles/2015/perspectives110515.htm>.

101 Nancy Keats, *What Drives People to Take a Creative License?*, THE WALL STREET J. (July 23, 2011), <http://www.wsj.com/articles/SB10001424052702303745304576359910386002034>.

102 *Byrne v. Rutledge*, 623 F.3d 46, 50 (2d Cir. 2010) (motorists use vanity plates to comment on various topics, subject to Commissioner's approval).

If the messages advanced on vanity plates implicate private speech, it follows that the messages on specialty plates (located on the same medium and containing the same characteristics of motorist selection and expression) are also private.<sup>103</sup> Furthermore, at least one lower court has used *Walker*'s three-factor test to find that vanity plates constitute private speech.<sup>104</sup>

Therefore, in examining public perception of speaker identity, courts must fully analyze the implications of *Wooley* and *Perry*, adopt a reasonable observer test, acknowledge the eligibility requirements of certain plates and any contradictory messages offered, and address any similarities to vanity plates. Such an analysis will likely tip this factor in favor of private or hybrid speech.

### *C. The Degree of Editorial Control Exercised Favors Private Speech*

This factor, analyzed by every circuit to address the issue,<sup>105</sup> is also fundamental to the inquiry. However, the Court in *Walker* failed to consider the implications of its own jurisprudence in *Sumnum* and *Johanns v. Livestock Marketing Association*, as well

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103 Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 U.C.L.A. L. REV. 1971, 2000 (2008).

104 *Mitchell v. Md. Motor Vehicle Admin.*, No. 713, 2015 WL 7573353, at 1\* (Md. Ct. Spec. App., Nov. 25, 2015).

105 *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 336 (2d Cir.), *vacated and remanded*, 611 F. App'x 741 (2015); *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 394 (5th Cir. 2014), *rev'd sub nom. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 135 S. Ct. 2239 (2015); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008); *Az. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (2008); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004).

as an analysis of the program itself. Thus, “final approval authority” does not denote total government control but depends on the degree of control exercised (including the substantive criteria considered) and the type and purpose of the program. Ultimately, this factor could favor private, hybrid, or government speech.

### 1. Supreme Court Jurisprudence Recognizes that Editorial Control Involves an Analysis of Context and Degree

This factor presents a challenging inquiry from a license plate standpoint since these programs are typically subject to a more diluted form of final approval authority than that exercised in *Sumnum*. There, the city exercised a significant degree of care in its monument selection because public parks define a city’s identity to its residents and the world.<sup>106</sup> They also have a limited space for accommodating permanent structures and thus only erect monuments serving a government purpose.<sup>107</sup> As a result, criteria relating to the substance of the display (such as esthetics and history) were weighed heavily in the decision.<sup>108</sup>

The *Walker* Court also failed to consider its holding in *Johanns v. Livestock Marketing Association*.<sup>109</sup> Although *Johanns* involved compulsory speech, lower courts have found it pertinent in determining whether speech is government speech.<sup>110</sup> In examining the constitutionality of a federal law requiring beef producers to

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106 *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 472, 478 (2009).

107 *Id.* at 478.

108 *Sumnum*, 555 U.S. at 472.

109 *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

110 *See Az. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (2008).

sponsor a promotional beef campaign, the Court explained that the content was the government's message "from beginning to end."<sup>111</sup> This was because the Secretary of Agriculture appointed the committee designing the ads and approved the final wording.<sup>112</sup> Furthermore, Department officials attended campaign meetings where they fleshed out various proposals.<sup>113</sup> Such government supervision and authority over the ultimate message presented an airtight case for government speech.<sup>114</sup>

Accordingly, *Sumnum* and *Johanns* broaden the editorial control analysis. *Sumnum* demonstrates that courts should inquire into the substantive criteria the state considers and whether the program is open to any license plates offered by private donors or a specific type of plate reflecting the city's culture and history. Similarly, *Johanns* indicates that courts should analyze each specialty plate program individually to determine what degree of editorial control the government exercises. The classification of all programs in which a government entity has "final approval authority" as fully selective oversimplifies the inquiry, given the stark difference between "final approval authority" in the context of these programs and in the context of government advertisements in *Johanns* and city park monuments in *Sumnum*. It also differs depending on whether such approval relates to technical or substantive features of the plate.

State law gave Texas "sole control over the design, typeface,

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111 *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005).

112 *Id.* at 560–61.

113 *Id.* at 561.

114 *Id.*

color, and alphanumeric pattern for all license plates”<sup>115</sup>— technical features differing from the substantive inquiry engaged in by the committee in *Johanns* and the city in *Sumnum*. And, the Board in *Walker* often rejects license plates based on reflectivity or readability<sup>116</sup> which further demonstrates its mission of inviting all private messages in order to raise money for the state.<sup>117</sup> Thus, the substance the Board considered and the lower degree of editorial control exercised favor private speech.<sup>118</sup>

## 2. The Type of Program at Issue Demonstrates the Degree of Editorial Control Exercised

The editorial control analysis also turns on the specialty program itself, which the Supreme Court failed to address in *Walker*. In Texas, there are three ways in which specialty plates may be developed: the legislature can authorize plates with specific messages, individuals or organizations may solicit state-designated private vendors to develop a design, and the Board can create a specialty plate or accept applications from nonprofits for plate sponsorship.<sup>119</sup> These different mechanisms implicate different

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115 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015).

116 *Id.* at 2260 (Alito, J., dissenting).

117 *See id.* at 2261.

118 *See Choose Life III, Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (editorial control shared between sponsoring organization and state when organization creates design and state retains modification authority); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (same); *Az. Life Coal. Inc. v. Stanton*, 515 F.3d 959, 966 (9th Cir. 2008) (specialty plate private speech because non-profit determined substance and commission determined whether statutory guidelines met).

119 *Walker*, 135 S. Ct. at 2244.

types of speech.

For example, it is axiomatic that a legislature which develops a design and votes on a statute promulgating that design is endorsing the message. This degree of editorial control is characteristic of government speech. Indeed, the only circuit to hold that license plates constitute government speech analyzed a plate developed by the state legislature.<sup>120</sup> Conversely, programs allowing non-profits to create the designs favor private speech, even if such creation was statutorily authorized.<sup>121</sup> Some programs are bifurcated whereby plates are developed by the legislature or a third-party;<sup>122</sup> thus, programs may offer plates that constitute government or private speech depending on the creating body.

This inquiry also may depend on whether the program itself is administratively run or subject to strict statutory rules.<sup>123</sup> Administratively run programs emphasize motorists' ability to express support and raise money for various causes and thus, tend to favor private speech.<sup>124</sup> Conversely, programs subject to stringent statutory rules weigh in favor of government speech or at least a hybrid, because the legislature affirmatively espouses the

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120 *Am. Civil Liberties Union of Tn. v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006) (government speech, even when design details delegated to nongovernment party, because "Tennessee set the overall message . . . when it spelled out in the statute that these plates would bear the words 'Choose Life'").

121 *White*, 547 F.3d at 863 (7th Cir. 2008) (specialty plate authorized by statute and designed by non-profit constitutes private speech).

122 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 135 S. Ct. 2239, 2244 (2015).

123 *Id.* at 2011.

124 *Id.*

plate by voting on a statute.<sup>125</sup> As Professor Eugene Volokh opined, these programs are not “generalized benefit scheme[s] aimed at stimulating a wide range of private speech—such as the post office, the tax exemption for nonprofit groups, copyright law, or a funding program for all student newspapers at a university—but rather the government’s own speech endorsing the merits of certain groups.”<sup>126</sup> Nevertheless, such programs are not per se government speech because nonselective programs focused on raising funds instead of “praising groups” transform the government’s message into a forum disseminating “a wide variety of private speech.”<sup>127</sup> Therefore, the selective nature of the program, its purpose to generate funds, and whether it praises certain groups are all relevant. As such, the nonselective nature of *Walker’s* program was evidenced by the rejection of only a dozen proposed designs (compared to the 350 available).<sup>128</sup>

Therefore, the editorial control prong involves an analysis of the substantive criteria used and degree of editorial control exercised (as demonstrated by *Sumnum* and *Johanns*), whether the program was developed by a non-profit or the legislature, and whether the program is administratively run. Programs created by

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125 *Id.* at 2011–12.

126 Eugene Volokh, *Free Speech and License Plate Designs*, VOLOKH CONSPIRACY, (Apr. 30, 2002, 10:42 AM), [http://volokh.com/2002\\_04\\_28\\_volokh\\_archive.html#76006887](http://volokh.com/2002_04_28_volokh_archive.html#76006887).

127 *Id.*

128 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015); *Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2012) (editorial control favored private speech because Commissioner only exercised statutory rejection over specialty plate once).

the legislature favor government speech, while administratively run programs developed by non-profits favor private speech.

*D. Consequences of the Augmented Factors Test: Offensive Speech is Protected*

Based on the factors test, specialty license plates constitute at least a hybrid of private and government speech, if not fully private speech. Thus, the First Amendment is implicated.

Admittedly, this means potentially offensive specialty plates are also protected. Indeed, the Court's decision in *Walker* appeared to be outcome-determinative in that the outlawed specialty plate was a Confederate flag associated with racial discrimination. Nonetheless, the United States has no anti-hate speech policy. A "bedrock principle" of the First Amendment is its protection of all speech, including that which is offensive or even shocking.<sup>129</sup> America is profoundly committed to an open forum for public debate because it constitutes the "essence of self-government."<sup>130</sup> Thus, a modern Nazi march through an American town,<sup>131</sup> the burning of a cross on an African American family's lawn,<sup>132</sup> and scathing anti-gay signs at a fallen soldier's funeral<sup>133</sup> have all been upheld as constitutional speech.

The First Amendment may not become a mechanism for

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129 *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on issues to ensure that we do not stifle public debate.")

130 *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

131 *Nat'l Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977).

132 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

133 *Snyder v. Phelps*, 562 U.S. 443, 443, 461 (2011).

suppressing legitimate forms of public speech<sup>134</sup> because they need “breathing space” to survive.<sup>135</sup> As a result, “vehement, caustic, and sometimes unpleasantly sharp attacks”<sup>136</sup> is tolerated to protect all freedom of expression.

Subsequently, if the Supreme Court is outcome-determinative with respect to controversial speech, negative consequences loom for the future of the First Amendment.

### III. *WALKER*'S IMPLICATIONS

Simply lifting Walker's factors from the opinion without the more comprehensive analysis proffered has significant implications for specialty plate programs because government speech is not subject to First Amendment protections and consequently, the government may now engage in viewpoint discrimination when deciding which plates to approve. This will result in the exclusion of controversial plates<sup>137</sup> that should be protected by the First Amendment.

Nevertheless, a broad reading of the *Walker* factors could still result in a win for private speech, as Children First Foundation, Inc. acknowledged in its petition for rehearing.<sup>138</sup> It urged the Second

134 *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984).

135 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

136 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

137 *Walker* explained that plates promoting messages from pro-life groups, the Boy Scouts, the National Rifle Association, or the Washington Redskins may be excluded from these programs. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 135 S. Ct. 2239, 2262 (2015) (Alito J., dissenting).

138 Appellee's Supplemental Petition for Panel Rehearing and for Rehearing En Banc, *Children First Found., Inc., v. Fiala*, 790 F.3d 328 (2d Cir. 2015) (No. 04-CV-0927), at \*1.

Circuit to consider “the history of New York custom plates, their nature as reflected in state law, the intricacies of the Department’s approval procedure, and the Department’s degree of selectivity in approving custom plates.”<sup>139</sup> If this analysis touches on the history of New York’s 1992-commenced “Take Your Pride For a Ride” custom program,<sup>140</sup> considers a fuller public perception scrutiny, and acknowledges the flexibility non-profits had with respect to plate creation and the percentage of plates actually rejected,<sup>141</sup> a legitimate case for private speech could be made.

Since *Walker* chips away at the fundamental protections of the government-speech doctrine, its implications now apply to other instances of government-subsidized private speech. Thus, the “generalized benefit schemes[s] aimed at stimulating a wide variety of private speech,” mentioned by Professor Volokh<sup>142</sup> may be subject to viewpoint discrimination. This could impact what kinds of claims organizations providing free legal services could bring on behalf of indigent clients,<sup>143</sup> gatherings public schools may exclude from school property after hours,<sup>144</sup> and programs

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139 *Id.* at 4.

140 *See Fiala*, 790 F.3d at 354.

141 *Id.* at 346 (DMV rejected a “scant” number of specialty plate applications).

142 Eugene Volokhh, *Free Speech and License Plate Designs*, VOLOKH CONSPIRACY, (Apr. 30, 2002, 10:42 AM), [http://volokh.com/2002\\_04\\_28\\_volokh\\_archive.html#76006887](http://volokh.com/2002_04_28_volokh_archive.html#76006887).

143 *Velazquez*, 531 U.S. at 537, 542 (statute conditioning federal funds on lawyers not bringing claims challenging current welfare law struck down because program did not advance government message but rather promoted private speech).

144 *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993) (unconstitutional to deny church access to premises for film series when district opened school to public for after-hours use).

mandatory university student activity fees can support.<sup>145</sup> If all of these benefit schemes implicating private speech rights are subject to the government's discretion under a strict reading of *Walker*, the government can suppress any speech it does not like.

The consequences of *Walker*'s simplified analysis are not merely speculative; they have been manifested in lower court decisions and ongoing litigation. For example, even though the *Walker* Court declined to comment on vanity plates,<sup>146</sup> the Indiana Supreme Court invoked *Walker* to render them government speech.<sup>147</sup> The court mirrored Walker's simplistic public perception analysis by focusing solely on license plates as government IDs and treated any potential public perception of profane combinations as private speech as "a few exceptions" that did not alter *Walker*'s conclusion.<sup>148</sup> The court even suggested that people prefer vanity plates over bumper stickers because they want state-authorization of their message.<sup>149</sup> This assigned motorist motive was inconsistent with the court's acknowledgement that "some observers may fail to recognize that [vanity plates] are government issued and approved speech . . ." <sup>150</sup> A more comprehensive public perception analysis would have rendered a different outcome as the Court of Special

145 See *Bd. of Regents, Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (mandatory student activity fee may finance groups with which student disagrees as long as program maintains viewpoint neutrality).

146 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2244 (2015).

147 *Comm'r of the Indian Bureau of Motor Vehicles v. Vawter*, No. 49S00-1407-PL-494 (Ind. 2015), <https://assets.documentcloud.org/documents/2515112/no-01nk.pdf>.

148 *Id.* at 8.

149 *Id.* at 7.

150 *Id.* at 8.

Appeals in Maryland demonstrated in its November 2015 decision, *Mitchell v. Maryland Motor Vehicle Administration*.<sup>151</sup> This case shows that not all of *Walker*'s progeny is doomed, as the court used *Walker*'s test to find that vanity plates are private speech.<sup>152</sup>

The *Mitchell* court's historical analysis went into more depth than *Walker*'s treatment of this factor.<sup>153</sup> It explained that Maryland's plates did not historically communicate state speech because they did not feature state slogans.<sup>154</sup> When weighing public perception, the court acknowledged that vanity plates are government IDs, but emphasized the reasonable person test and explained that drivers create a personal message independent of the plate's government identity function.<sup>155</sup> It explained that private speech does not morph into government speech just because it occurs on government property. Indeed, the court characterized *Vawter*'s "few exceptions"<sup>156</sup> of people who do not realize that vanity plates are government speech as "the rule."<sup>157</sup> Finally, the court said the DMV's screening method (which analyzed substance and excluded plates containing obscenities) was not a "rigorous process" constituting a degree of control rendering the plates government speech.<sup>158</sup>

A narrow reading of *Walker* may also impact the salient

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151 *Mitchell v. Md. Motor Vehicle Admin.*, No. 713, 2015 WL 7573353, at 1\* (Md. Ct. Spec. App. Nov. 25, 2015).

152 *Id.* at 14–16.

153 *Id.* at 13.

154 *Id.* at 13–14.

155 *Id.* at 14, 15 n.26.

156 *Comm'r of the Indian Bureau of Motor Vehicles v. Vawter*, No. 49S00-1407-PL-494 (Ind. 2015), <https://assets.documentcloud.org/documents/2515112/no-01nk.pdf> (Ind. 2015).

157 *Mitchell*, 2015 WL 7573353, at \*17.

158 *Id.* at 16.

issue of whether trademarks constitute government speech, which moved to the forefront of the nation's attention earlier this year when the Supreme Court granted certiorari in *Lee v. Tam*.<sup>159</sup> In this case, the Federal Circuit sitting en banc held it was unconstitutional to deny trademark registration to the Asian band the Slants under the "disparaging mark" exclusion of the Lanham Act.<sup>160</sup> Indeed, the high Court's decision may hinge on the government speech doctrine, as the majority and dissenting opinions in the appellate court differed on this point.<sup>161</sup> Similarly, the Fourth Circuit Court of Appeals is slated to consider whether to uphold the United States' Patent Office's cancellation of the Washington Redskins' trademark in December.<sup>162</sup> Once again, *Walker*'s analysis may be paramount. The Redskins' opening brief in *Pro-Football, Inc. v. Blackhorse* invoked arguments similar to the dissent in *Walker*, stating,

The notion that all 2 million currently-registered marks are government speech is astounding . . . No one today thinks registration reflects government approval. But if this Court holds that it does, how will the government explain registrations like MARIJUANA FOR SALE . . . LICENSED

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159 *Lee v. Tam*, 808 F.3d 1321 (Fed. Cir. 2016), *cert. granted*, \_\_\_ S. Ct. \_\_\_ (U.S. Sep. 29, 2016) (No. 15-1293).

160 *In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2016) (en banc), *cert. granted sub nom. Lee v. Tam*, \_\_\_ S. Ct. \_\_\_ (U.S. Sep. 29, 2016) (No. 15-1293).

161 *Id.* at 1346; *id.* at 1375 (Lourie, J., dissenting).

162 Ian Shapira, *Timeout Called in Redskins Name Case*, WASH. POST (Oct. 18, 2016), [https://www.washingtonpost.com/local/timeout-called-in-redskins-name-case/2016/10/18/b6b30dd0-908a-11e6-9c52-0b10449e33c4\\_story.html](https://www.washingtonpost.com/local/timeout-called-in-redskins-name-case/2016/10/18/b6b30dd0-908a-11e6-9c52-0b10449e33c4_story.html). The Supreme Court denied certiorari in this case. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015), *cert. denied*, \_\_\_ S. Ct. \_\_\_

(U.S. Oct. 4, 2016) (No. 15-1874).

SERIAL KILLER . . . and numerous Confederate flag logos?<sup>163</sup>

Nevertheless, the district court invoked *Walker*'s government speech analysis and ultimately found that trademarks constitute government speech because of the oversimplified historical, public perception, and editorial control arguments advanced in *Walker*.<sup>164</sup>

These cases demonstrate that the issue of government speech is relevant in more areas than just specialty plates. *Walker*, which has already resulted in progeny relying on a shaky theory of government speech, will have lasting effects on other areas of law. It has also put a chink in the armor of free speech protections, discarding the principle that there is no hate speech exception to the First Amendment. This outcome may be mitigated if courts, like the Maryland Court of Special Appeals, use the *Walker* factors to preserve private speech.

#### CONCLUSION

By designating specialty plates as government speech, *Walker* subjected these programs and the private rights of motorists to the whim of the government. This controverts controlling precedent and imperils speech that should be insulated from viewpoint discrimination.

The government's hesitation to embrace a hybrid speech doctrine may ultimately result in the transformation of previously

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163 Opening Brief of Appellant, *Pro-Football, Inc. v. Blackhorse*, No. 1:14-cv-01043-GBL-IDD, 2015 WL 4096277 (E.D. Va. 2015), *appeal docketed* (4th Cir. Aug. 6, 2015) (No. 15-1874), 2015 WL 6692133, at \*24.

164 *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 458-59 (E.D. Va. 2015).

designated public forums into platforms for government speech. Subsequently, not even six months after *Walker*, its oversimplified analysis was used to justify viewpoint discrimination in the contexts of vanity license plates and trademarks.

Nevertheless, if courts read *Walker* more expansively pursuant to the historical, public perception, and editorial control factors, private speech rights may still be salvaged. These factors provide a framework by which courts have and can champion private speech, if they are considered against a backdrop of Supreme Court jurisprudence and a fuller analysis of the modern history of specialty plates and the nuances of each state program. Ultimately, *Walker*'s progeny may be saved from its own consequences if courts use its factors to consider the private nature of specialty license plates.



