Note

The Impact of *Walker*'s Government Speech Extension on Public Transit Advertising

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ABSTRACT

In its 2015 decision, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court held that a state specialty license plate program constituted government speech, even though a private entity created and submitted the plate for approval. The Court's decision broadened the scope of the government speech doctrine and failed to remedy the constant clash between the public forum doctrine and the government speech doctrine in situations where a private individual or organization speaks while utilizing government property.

Walker is directly at odds with the public forum jurisprudence, specifically *Rosenberger v. Rector & Visitors of University of Virginia* and *Lehman v. Shaker Heights*. Further, the Court has offered no guidance regarding the distinct similarities between the cases or the context at issue. Thus, the *Walker* extension reinforces the argument for the government speech analysis in the public transit-advertising context. The current instability that exits within the public transit cases suggests that

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the government speech argument will likely be reconceptualized and extended to cover private speech and transit advertisements.

This Article argues that courts should adopt a concrete test to distinguish between private speech and government speech, in order to preserve the protections afforded private speech by the forum doctrines. Part I of this Article provides a concise overview of the government speech doctrine and the public forum doctrine, and addresses the Court's most recent government speech doctrine extension in *Walker*. Part II examines the dangers of extending government speech and analyzes the tension between *Walker* and the application of the public form analysis in *Rosenberger and Lehman*. To address the conflict between private speech and government speech, and the dangers of extending the government speech doctrine, Part III examines the current instability of the public forum analysis in the transit-advertising cases, including an evolving circuit-split, and pre-*Walker* government speech arguments. Finally, Part IV identifies and crafts a factor test that courts should consider when rectifying the conflict between private speech and government speech post-*Walker*.

I. Introduction

In its 2015 decision, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court held that a state specialty license plate program constituted government speech, even though a private entity

created and submitted the plate for approval.[1] The Court's decision broadened the scope of the government speech doctrine without identifying a clear test to distinguish government speech from private speech.[2] Further, the holding failed to remedy the constant clash between the public forum doctrine and the government speech doctrine, and created increased confusion regarding which analysis applies to situations where a private individual speaks while utilizing government property.

It is a foundational First Amendment principle that the government must remain viewpoint neutral when restricting private speech.[3] Even though viewpoint based restrictions involving private speech and government property are presumed unconstitutional,[4] according to government speech doctrine jurisprudence, "[w]hen [the] government speaks, it is not barred by the Free Speech Clause from determining the content of what is says."[5] Despite First Amendment protections, the government has the power to silence private speech in reference to its messages, ideas, subject matter, and content, so long as the government asserts its own viewpoint.[6] Thus, when the government facilitates speech through a forum, the line separating government speech and private speech blurs, resulting in direct tension with the public forum jurisprudence.

As a result, courts are frequently required to remedy these two competing doctrines by identifying speech as either governmental or private in nature, and the resulting determinations vary in application and rea-

1. 135 S. Ct. 2239, 2253 (2015).

2. To date, the Supreme Court has not instated a test to determine the identity of private speech as opposed to government speech. Rather, the Court is making determinations on a case-by-case factor basis. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Johanns Livestock Mktg. Ass'n, 544 U.S. 550 (2005); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

3. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 695-96 (2011) ("[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001).

4. *See Rosenberger*, 515 U.S. at 828; *see also* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 368 (2009) ("[I]f the speech is private speech facilitated by government resources, viewpoint restrictions are generally impermissible."); *see also Good News Club*, 533 U.S. at 106-07; *Velazquez*, 531 U.S. at 541-42; *see generally* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Bd. of Edu., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982); United States v. Am. Library Ass'n Inc., 539 U.S. 194 (2003); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

5. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (citing *Summum*, 555 U.S. at 467-68).

6. Blocher, *supra* note 4, at 696; *see generally* Rust v. Sullivan, 500 U.S. 173 (1991); *Johann*, 544 U.S. 550; Garcetti v. Ceballos, 547 U.S. 410 (2006); *Summum*, 555 U.S. 460.

soning.[7] This tension can be seen in the circuit split prior to the Court's government speech determination in *Walker*.[8]

Currently, instability exists in forum doctrine application concerning private advertisements on public transportation.[9] Due to the similarities between a specialty license plate program and a public transit-advertising program, *Walker* will likely initiate an expansion of the government speech argument into the public transit realm. To date, current First Amendment scholars are suggesting that *Walker* could trigger a more expansive government speech argument in the public transit cases.[10] Further, prior to the Court's decision in *Walker*, transit authorities advanced the government speech argument.[11] Taken together, these scholarly suggestions, pre-*Walker* arguments, and clear program similarities indicate a substantial likelihood that *Walker* will only bolster the government speech argument in the public transit cases.

Further, the Court made no effort to guide lower courts in applying *Walker* to the transit-advertising context. Despite raising the issue briefly in the majority opinion, the Court seems to suggest that *Lehman* is still good law, but makes a poor attempt to distinguish *Lehman* or acknowl-

7. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 378 (6th Cir. 2006) (outlining a single-factor binary approach); *see also* Wells v. City & Cty. of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (outlining a four-prong mixed-speech test); Choose Life Ill., Inc. v. White, 547 F.3d 853, 855-56 (7th Cir. 2008) (applying a modified mixed-speech test); Roach v. Stouffer, 560 F.3d 860, 871 (8th Cir. 2009) (adopting a reasonable observer approach).

8. *See infra* Part IV.A.

9. *See generally* Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489 (9th Cir. 2015) (applying a limited public forum analysis); Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., 698 F.3d 885 (6th Cir. 2012) (applying a nonpublic forum analysis); Am. Freedom Def. Initiative v. Metro Transp. Auth., 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (applying a designated public forum analysis); Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp., No. 1:14-CV-107 RLM, 2016 WL 67288, at *1, (N.D. Ind. Jan. 5, 2016), *appeal docketed*, No. 16-1195 (7th Cir. Feb 3, 2016) (applying a nonpublic forum analysis).

10. *See* Ruthann Robson, *Court Decides Specialty License Plate is Government Speech in Sons of Confederate Veterans License Plate*, CONSTITUTIONAL LAW PROF BLOG (June 18, 2015), http://lawprofessors.typepad.com/conlaw/2015/06/court-decides-specialty-license-plate-sons-of-confederate-veterans-license-plate-.html ("[R]ecent controversies about advertising on public transport, as in New York, the Sixth Circuit, and Ninth Circuit, could be reconceptualized after *Walker v. Sons of Confederate Veterans*."); David L. Hudson Jr., *Controversial Transit Ads: Destination, U.S. Supreme Court?*, NEWSEUM INSTITUTE (Sep. 22, 2015), http://www.newseuminstitute.org/2015/09/22/controversial-transit-ads-destination-u-s-supreme-court/ ("The U.S. Supreme Court may well wade into the troubled waters of advertising on city transportation if it decides to review a case involving the rejection of highly charged political ads in Boston."); Noah Feldman, *Thomas's Vote Speaks Volumes in License Plate Case*, BLOOMBERG VIEW (June 18, 2015), http://www.bloombergview.com/articles/2015-06-18/thomas-s-vote-speaks-volumes-in-license-plate-case ("Perhaps the liberals might be willing to follow this doctrinal direction even in a public transportation case, which would at least be consistent.").

11. Coleman v. Ann Arbor Transp. Auth., 904 F. Supp. 2d 670, 696-697 (E.D. Mich. 2013); *see generally* Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty., 653 F.3d 290 (3d Cir. 2011).

edge the substantial constitutional similarities between the two cases.[12]

Since the application of the government speech doctrine or the forum doctrine is the central factor in deciding these dueling speech cases,[13] the overextension of the government speech doctrine in public forum-like cases may result in the government taking interpretive ownership of individual viewpoints. *Walker* marks the beginning of a more expansive reading of the government speech doctrine, and likely a diminished use of the public forum analysis.

To remedy the current confusion regarding transit advertising speech and the dangerously arbitrary extension of the government speech doctrine, this Comment will argue that courts, post-*Walker*, should adopt a new, modified factor test based on precedent to distinguish between government speech and private speech. This Comment is original in that it is the only work to analyze the extension of the government speech doctrine post-*Walker* and note *Walker*'s danger to a similar body of cases.

Part II of this Comment provides a concise overview of the government speech doctrine and the public forum doctrine, and addresses the Court's most recent government speech doctrine extension in *Walker*. Part III examines the dangers of extending the government speech doctrine and analyzes the tension between *Walker* and the application of the public forum analysis in *Rosenberger* and *Lehman*. To address the conflict between private speech and government speech, and the dangers of extending the government speech doctrine, Part IV examines the current instability of the public forum analysis in transit-advertising cases, including an evolving circuit split, and pre-*Walker* government speech arguments. Part V identifies and crafts a factor test that the courts should consider when rectifying the conflict between private speech and government speech post-*Walker*. This Comment ultimately concludes that the overextension of the government speech doctrine, without a concrete test, results in viewpoint infringement, and that courts should adopt a test to preserve the protections afforded to private speech by the forum doctrines.

12. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2252 (2015) ("Nor is this case like *Lehman*, where we found the advertising space on city buses to be a nonpublic forum. . . . There, the messages were located in context (advertising space) that is traditionally available for private speech. And the advertising space, in contrast to license plates, bore no indicia that the speech was owned or conveyed by the government."); *but cf. infra* Part V.

13. Olree, *supra* note 5, at 368 ("Classifying the speech as either government speech or private speech becomes a crucial question–often *the* crucial question–in deciding these speech cases.").

II. Background

A. The Public Forum Doctrine

The public forum doctrine is defined as a citizen's "right of access to public property for expressive purposes."[14] The Supreme Court first recognized the public forum as a "legal category" in 1972.[15] Since that recognition, the Supreme Court has instituted a "complex maze of categories and subcategories" to deduce what level of constitutional scrutiny to apply to speech regulations.[16]

The first category, the traditional public forum, applies to locations traditionally open to private speakers, such as speech on a public street, in a park, or on a sidewalk.[17] Traditional public forums are typically categorized as such due to their historical commitment to freedom of expression.[18] The forum concept originated in *Hague v. Committee for Industrial Organization*, where the Court held that these physical spaces "have immemorially been held in trust for the use of the public and . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[19]

The government cannot "close the [traditional public] forum or enforce content-based restrictions on speech . . . unless the restriction is 'necessary to achieve a compelling state interest and . . . narrowly drawn to achieve that end.'"[20] However, a state can restrict traditional public forum speech through "content-neutral 'time, place, and manner' restrictions . . . but only if they are 'narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.'"[21] Since the traditional public forum is consistently applied to historical property use, "[t]he Court has rejected the view that traditional public forum status extends beyond its historical confines."[22]

14. Randal P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1402 (2001).

15. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. Rev. 1975, 1979 (2011). The term was first promulgated in *Police Dept. of City of Chi. v. Mosley*. *Id.* at 1979, n.13. At issue in *Mosley* was a federal employee's First Amendment right to picket a high school during school hours. 408 U.S. 92, 92-93 (1972). The Court noted that "[c]onflicting demands on the same place may compel the State to make choices among potential users and uses. And the State may have a legitimate interest in prohibiting some picketing to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized." *Id.* at 98-99.

16. Lidsky, *supra* note 15, at 1980.

17. *Id.* at 1981 (noting that the traditional public forum refers to "physical property owned or controlled by the government").

18. *Id.* at 1981-82.

19. *Id.* at 1982.

20. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

21. *Id.*

22. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 ("Moreover, even within the rather

The second forum category is the designated, or general, public forum.[23] A designated public forum is defined as "public property which the state has opened for use by the public as a place for expressive activity."[24] The Supreme Court has categorized a designated public forum as the use of "government property that has not traditionally been regarded as a public forum [but] is intentionally opened up for [expressive] purpose[s]."[25] If the government opens a designated forum, it is subject to the same restraints as the traditional forum, with the only difference being the government's power to close the forum.[26] Further, "[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."[27]

The third forum category, the limited public forum, exists where the government "reserve[s a forum] for certain groups or for the discussion of certain topics."[28] This can also be referred to as a grant of "selective access."[29] Speech restrictions within the limited public forum must be "reasonable in light of the purposes served by the forum" and viewpoint neutral, but when the government excludes speech that falls within a reserved topic, the restriction is subject to strict scrutiny.[30]

Both the designated and limited public forums are considered government-created forums and "[the] government 'does not create a public forum by inaction or by permitting limited discourses, but only by intentionally opening a nontraditional forum for public discourses.'"[31] In or-

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short history of air transport, it is only '[i]n recent years [that] it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities.' Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity.") (internal citation omitted).

23. Lidsky, *supra* note 15, at 1983.

24. *Perry*, 460 U.S. at 45.

25. Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009); *see also Forbes*, 523 U.S. at 678 (categorizing a designated forum as "almost unfettered access," but noting that the designated forum does not rise to the level access afforded the traditional forum).

26. *Perry*, 460 U.S. at 46 (citing Widmar v. Vincent, 454 U.S. 263, at 269-270 (1981) ("Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.").

27. Perry, 460 U.S. at 46; *see generally* Widmar, 454 U.S. at 263 (university meeting facility); City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167 (1976) (school board meeting); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater).

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

29. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998).

30. *Id.* at 682.

31. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015) (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 488, 802 (1985)).

der to determine if the government intended to open a forum, the Court "look[s] to the policy and practice of the government" and to the "nature of the property and its compatibility with [the] expressive activity."[32]

Further, in terms of government created forums, the Court "ha[s] observed a distinction between . . . content discrimination, which may be permissible if it preserves the purposes of the . . . forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[33]

Lastly, the fourth category is the nonpublic forum.[34] The nonpublic forum is defined as property "which is not by tradition or designation a forum for public communication."[35] "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property."[36]

While its is important to understand the differences between each forum category, arguably, the substantive analyses have no bearing on the identity of the speech at issue. Since identifying the speech as either governmental or private in nature is the first step in determining which doctrine to apply to cases involving private speech on government property,[37] this Article will not address the intricacies of forum application.

B. The Government Speech Doctrine

The cardinal purpose of the government speech doctrine is to protect the Government's expression of its own viewpoint, under the accepted principle that the Government must be able to "transmit messages with-

32. *Cornelius*, 473 U.S. at 802 (noting that these factors are considered to gauge government intent).

33. *Rosenberger*, 515 U.S. at 829-30; *see also* Perry Edu. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 61 (1983) ("Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not."); *but cf. Cornelius*, 473 U.S. at 806 ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

34. Lidsky, *supra* note 15, at 1989.

35. *Perry*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.").

36. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (quoting *Cornelius*, 473 U.S. at 800). The *Cornelius* Court further noted that "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

37. *See* Olree, *supra* note 4, at 368.

out 'distortion' by private speakers."[38] Government speech is not subject to a First Amendment scrutiny analysis, even though it may operate as an unconstitutional speech restriction.[39] Because there is no recourse for individual claims once the government speech doctrine is enforced, the main concern that arises is governmental suppression of disagreeable viewpoints.[40]

1. Background

It is generally accepted that the Government must speak for the sake of democracy.[41] In the practice of governing, "the roles occupied by government when it speaks, are vastly multiplied in the modern state. In domestic affairs, modern government is . . . a creator of rights and programs, a manager of economic and social relationships, a vast employer and purchaser, an educator, investor, curator, librarian, historian, patron, and on and on. Government . . . defines justice, fairness, and liberty, and shapes behavior. It assures safety, protects the helpless, and uninformed, and prevents injustice. It taxes and spends, subsidizes and penalizes, encourages and discourages."[42] Thus, this great responsibility requires the government to remain accountable to the people, and "explain, persuade, coerce, deplore, congratulate, implore, teach, inspire, and defend with *words*."[43]

The newly minted government speech doctrine originated with the 1991 Supreme Court decision, *Rust v. Sullivan*.[44] In *Rust*, the speech at issue concerned physicians as private speakers and a government program designed to discourage abortion and promote the use of alternative family planning methods.[45] The Court found the physicians were essentially acting as government employees when transmitting information pertaining to a government function, noting "[t]he employees' freedom of expression is limited during the time that they actually work for the pro-

38. Blocher, *supra* note 3, at 696, 700; *but cf.* Blocher, *supra* note 3, at 702 ("Although there is very little agreement about the core 'purpose' of the First Amendment, there is near unanimity that *one* such purpose–and certainly a core function–is to protect private viewpoints from government regulation. Thus the Amendment flatly prohibits the government from engaging in viewpoint discrimination, even within classes of speech that could otherwise be completely proscribed.").

39. Blocher, *supra* note 3, at 695. ("Government speech creates a paradox at the heart of the First Amendment" and thus, "[the g]overnment speech doctrine therefore rewards what the rest of the First Amendment forbids: viewpoint discrimination against private speech.").

40. *Id.* at 696.

41. *See generally* Bezanson & Buss, *supra* note 14, at 1381 (noting that government speech is a necessary part of the American constitutional structure).

42. *Id.* at 1380.

43. *Id.* (emphasis added).

44. Rust v. Sullivan, 500 U.S. 173 (1991); Olree, *supra* note 4, at 374.

45. *Rust*, 500 U.S. at 177-79, 181.

ject; [and] this limitation is a consequence of their decision to accept employment . . . ."[46] Thus, even though a private speaker voiced the speech, the Court instituted the government speech doctrine to protect the government's right to develop, fund, and implement a government program, without the possibility of an infringement claim.[47]

In the 1995 case, *Rosenberger v. Rector and Visitors of University of Virginia*, the Court declined to extend the government speech doctrine in a case involving student activity fund disbursements.[48] In *Rosenberger*, a campus student organization alleged that the university exercised viewpoint discrimination when it refused to authorize student activity funds based on the organization's religious affiliation.[49] The *Rosenberger* Court found that the speech at issue constituted private speech.[50] In distinguishing *Rust*, the Court noted that in *Rust*, "the government did not create a program to encourage speech but instead used private speakers to transmit specific information pertaining to its own program."[51] The *Rosenberger* Court reasoned that the university students "[were] not the University's agents [were] not subject to its control, and [were] not its responsibility."[52] Ultimately, the Court applied a public forum analysis and determined that withholding funds due to the organization's religious affiliation constituted unconstitutional viewpoint discrimination.[53]

In 2000 and 2005, the Court again addressed the government speech doctrine in two cases concerning compelled speech claims.[54] In the 2000 case, *Board of Regents of University of Wisconsin System v. Southworth*, the speech at issue concerned a university policy requiring students to pay student activity fees.[55] Wisconsin university students alleged that disbursing the required fee to organizations that forwarded messages contrary to their own beliefs violated their First Amendment rights by compelling them to speak, and support a message they did not agree with.[56] Ulti-

46. *Id.* at 198-99.

47. *Id.* at 193. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.*

48. 515 U.S. 819, 834-35, 837 (1995).

49. *Id.* at 827.

50. *Id.* at 831, 834 (noting that the public forum doctrine constituted the proper analysis).

51. *Id.* at 833.

52. *Id.* at 835.

53. *Id.* at 845. ("The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophical assumptions respecting religious theory and belief.").

54. *See generally* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Johanns Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

55. 529 U.S. at 221.

56. *Id.* at 227.

mately, the *Regents* Court found that the speech at issue constituted private speech and found no violation of the viewpoint neutrality principle.[57]

Further, the Court expanded the government speech doctrine in the 2005 case, *Johanns v. Livestock Marketing Association*.[58] In *Johanns*, beef producers claimed that a federal tax-funded advertising campaign compelled them to speak in favor of a message they did not support.[59] The Court, however, found that the speech at issue constituted government speech because "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government."[60] Further, the Court reasoned that the government used the advertising campaign to forward an "overarching message" and retained final approval authority over the words used in the advertisements.[61]

In 2001, the Court again addressed the issue of private speech within a government program.[62] In *Legal Services Corporation v. Velazquez*, attorneys, representing indigent clients through a federally funded legal assistance program, claimed that a program restriction prohibiting "litigation, lobbying, or rulemaking, involving an effort to reform a [f]ederal or [s]tate welfare system . . ." violated the First Amendment.[63] The Court, relying on *Rosenberger*, found that the program constituted private speech because it was designed to "facilitate private speech, not to promote a governmental message."[64] The Court reasoned that "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts [could not] be classified as government speech even under a generous understanding of the concept."[65] Ultimately, the Court applied a limited public forum analysis and found that the restriction resulted in a First Amendment violation.[66]

Lastly, in *Pleasant Grove City v. Summum*, the Court determined that permanent monuments placed in a city park constituted government

57. *Id.* at 230. The Court did note that a university activity fund was not a public forum in the "traditional sense of the term," but nevertheless found that the public forum viewpoint neutrality principle was the controlling standard in the analysis. *Id.*

58. 544 U.S. 550 (2005).

59. *Id.* at 560.

60. *Id.*

61. *Id.* at 561.

62. *See generally* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

63. *Id.* at 538. While acknowledging that when the government expends funds to convey governmental messages it has the right to forward its policies, the Court recognized that "government speech nor its rationale applies to subsidies for private speech in every instance . . . ." *Id.* at 541-42.

64. *Id.* at 542. (noting that "[t]he lawyer is not the government's speaker").

65. *Id.* at 542-543. The Court further determined this case differed from *Rust* because the attorney was not acting as an agent transmitting a governmental message. *Id.*

66. *Id.* at 543-44.

speech.[67] While acknowledging that it is sometimes difficult to determine whether a government entity is speaking or providing an open forum for private speech, the Court's determination hinged on four major justifications.[68]

First, the Court reasoned that "[g]overnments have long used monuments to speak to the public;" thus when a government entity commissions a monument, according to the Court, there is a presumption that it wishes to convey some message to the general public.[69] Second, the Court determined that the practice of "selective receptivity," or final selection authority, weighed in favor of a government speech determination.[70] Third, by noting that public parks are "often closely identified in the public mind with the government," the court reasoned that the public's association of monuments with governmental endorsement further warranted a government speech analysis.[71] Finally, the Court concluded by noting that because governments accept monuments that "portray what they view as appropriate . . . , taking into account . . . esthetics, history, and local culture," monuments convey a governmental message, and "thus constitute government speech."[72]

In denying the public forum application, the Court acknowledged that a park is a traditional public forum, but found that the forum doctrine applied only in situations where "government-owned property or government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or program."[73] The Court reasoned "public parks can accommodate only a limited number of permanent monuments" and "'one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy space with any manner of monuments.'"[74] However, the Court suggested that the forum doctrine *could apply*, "if a town created a

67. 555 U.S. 460, 472 (2009). Prior to the Supreme Court's ruling in *Summum*, which held that permanent monuments displayed in a city park constituted government speech, the Tenth Circuit categorized permanent monuments as private speech, subject to a forum analysis. Summum v. Pleasant Grove City, 483 F.3d 1044, 1050 (10th Cir. 2007). More specifically, the Tenth Circuit applied a traditional public forum analysis because "people ha[d] traditionally gathered in these places to exchange ideas and engage in public debate." *Id.* The court did not consider the government speech doctrine at any point during its analysis. *Id.*

68. *Summum,* 555 U.S. at 470-72.

69. *Id.* at 470.

70. *Id.* at 471-72.

71. *Id.* at 472.

72. *Id.*

73. *Id.* at 478.

74. *Id.* at 478-79 (quoting Summum v. Pleasant Grove City, 499 F.3d 1170, 1173 (10th Cir. 2007)) (Lucero, J. dissenting from the denial of rehearing en banc). The Court further noted that if parks were considered traditional public forums for the purposes of permanent monuments, "most parks would have little choice but to refuse all such donations." *Id.* at 480.

monument on which all of its residents . . . could place the name of a person to be honored or some other private message."[75]

C. *Walker v. Texas Division, Sons of Confederate Veterans*: "Texas Specialty License Plates Constitute Government Speech"

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court held that a state specialty license plate program constituted government speech.[76] Despite a circuit split weighing heavily in favor of a private speech and public forum analysis, the Court found no First Amendment violation.[77] In determining the identity of the license plate speech, the *Walker* majority relied almost exclusively on the justifications set forth in *Summum*.[78]

First, the Walker Court reasoned that license plates, historically, have "long communicated messages from the States" to the public.[79] For example, the Court noted that States have used specialty plates to "urge action, to promote tourism, and to tout local industries."[80] The Court determined that since 1919, Texas had used its specialty plate program to "select messages to communicate" to viewers.[81]

Second, the Court determined that Texas license plates "'are often closely identified in the public mind with the [State]'" and "'persons who observe' [the] designs . . . 'routinely-and reasonably-interpret them as conveying some message on the [issuer's] behalf.'"[82] The Court noted that the state placed "'TEXAS'" in large print on each plate, and determined that the plate essentially functioned as form of government identification.[83] Relying on *Summum*, the Court reasoned that "issuers of

75. *Id.* at 480. This distinction further adds confusion to the ruling because, considering past precedent, a government commissioned monument is akin to government initiated speech, which would likely fall under the umbrella of government speech.

76. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2252 (2015). In 2009, the Texas Divisions of the Sons of Confederate Veterans ("SCV") applied for and were denied a specialty tag. *Id.* at 2245. The plate design included a "square Confederate battle flag framed by the words 'Sons of Confederate Veterans 1896.'" *Id.* In 2010, the SCV renewed its application and the Board again denied the application, reasoning that the design was offensive to the general public. *Id.* The SCV filed suit in 2012, alleging a Free Speech Clause violation. *Id.* The district court found for the Board. *Id.* The Fifth Circuit, however, reversed, finding that the specialty plate constituted private speech; thus, holding that the Board's actions resulted in viewpoint discrimination. *Id.*

77. *Id.* at 2250; *see also infra* Part IV.A.

78. *See generally Walker*, 135 S. Ct. 2239.

79. *Id.* at 2248 (noting that license plates convey more than just names and vehicle identification numbers).

80. *Id.*

81. *Id.*

82. *Id.* at 2248-49.

83. *Id.*

[government] ID[s] 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to [associate].'"[84]

Third, because Texas maintained direct control and final approval authority over the license plate messages, the Court further found the license plate speech weighed more heavily in favor of government speech.[85] The Court recognized that Texas law gives the Department of Motor Vehicles "sole control over the design, typeface, color, and alpha-numeric pattern for all license plates."[86] Further, the Court noted that the department consistently used this authority when authorizing and rejecting plate applications.[87]

The *Walker* Court rejected the forum analysis by "'look[ing] to the policy and practices of the government' [program] and to 'the nature of the property and its compatibility with [the] expressive activity,'" thus determining that license plate speech constituted government speech.[88] The Court reasoned that the policies and nature of the Texas specialty license plate program did not suggest the State had opened a forum because procedurally, the State exercised final authority over and took ownership of each plate design.[89] Further, the Court reasoned that traditionally, license plates have functioned as a form of government identification while also "bear[ing] the State's name."[90] Considering all these factors, the Court concluded that a government speech analysis applied because Texas engaged in expressive conduct by "explicitly [associating] itself" with license plate speech.[91]

III. Walker and the Free Speech Threat

This section discusses the overarching dangers of extending the government speech doctrine and showcases the tension between *Walker* and two similar cases that utilize the public forum analysis: (1) *Rosenberger v. Rector and Visitors of University of Virginia* and (2) *Lehman v. Shaker Heights*. This section further proposes that the Court's determination in *Walker* results in an open-ended reading of *Lehman*, causing confusion in the transit-advertising context.

84. *Id.* at 2249.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 2250-51.
89. *Id.* at 2251.
90. *Id.*
91. *Id.*

A. The Danger of Government Speech: Unconstitutional Restrictions

The government speech doctrine operates as a complete bar to a First Amendment infringement analysis.[92] Despite the Free Speech Clause protection granting "[citizens] the right to express any thought, free from government censorship[,]"[93] the government speech analysis negates the viewpoint neutrality principal by allowing the government to forward its own viewpoint without restriction.[94]

Government speech inherently limits private speech and distorts the market place of ideas by "regulat[ing] individual private speakers – either forbidding them to express viewpoints they support or compelling them to express viewpoints they do not support."[95] Due to its strict operative nature, the doctrine fosters an environment ripe for suppression. The First Amendment's long history of tolerance mandates that the government speech doctrine be cautiously extended.

1. The First Amendment Protects Controversial Speech

The First Amendment consistently safeguards controversial viewpoints by extending speech protections.[96] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds that idea itself offensive or disagreeable."[97] "[T]he Constitution does not permit the government to decide which types of . . . protected speech are sufficiently offensive to require protection . . . ."[98] "Speech remains protected even when it may stir people to action, move them to tears, or inflict great pain."[99] An individual's right to speak freely does not depend on the views of the opposition and courts "must remain attentive to the guarantees of the First Amendment, and in particular to the protection[s these guarantees] afford to minorities against the standardization of ideas . . . by . . . dominate political or community groups."[100] "[W]hen the government, acting as [a] censor, undertakes selectively to shield the public from some kinds of speech[,] . . . the First Amendment strictly limits its

92. Pleasant Grove City v. Summum, 555 U.S. 460, 467-68 (2009).

93. Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95-96 (1972).

94. Blocher, *supra* note 3, at 698.

95. *Id.*

96. *See generally* Snyder v. Phelps, 562 U.S. 443 (2011); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Boos v. Barry, 485 U.S.312, 322 (1988).

97. *Snyder*, 562 U.S. at 458 (quoting Texas v. Johnson, 491 U.S. 397 (1989)).

98. *Erznoznik*, 422 U.S. at 210. Rather, if society finds certain speech offensive, the individual has the responsibility to ignore it. *Id.* at 210-11.

99. *Sorrell*, 131 S. Ct. at 2670 (internal quotation marks omitted).

100. *Schad*, 452 U.S. at 79 (internal quotation marks omitted).

power."[101]

Blatant viewpoint discrimination exists when a state restricts speech because the state thought its citizens would find the speech offensive.[102] "What if a state college or university did the same thing with a similar billboard or campus bulletin board . . ." and ". . . allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty?"[103] "[I]n public debate [one] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[104]

Even though the government speech doctrine protects the governing process, it provides the government with the ability to restrict speech via an offensive standard, ultimately resulting in restrictions based on public perception. Limiting speech based on majority interpretation is not a proper determination under the First Amendment.

2. *The Government Speech Doctrine Results in Government Determined Viewpoints*

Application of the government speech analysis to speech originating with a private speaker allows the government to endorse interpretations it favors and silence interpretations it finds disagreeable. Thus, the government speech doctrine distorts private speech by espousing the government's power to determine the proper interpretation of a private viewpoint.

However, the First Amendment mandates that the government "[can] not select which issues are worth discussing or debating in public facilities. There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard."[105] "[I]f it is the speaker's opinion [at issue, that issue] . . . is a reason for according it constitutional protection."[106] "The government may not regulate use based on . . . favoritism . . . towards the underlying message expressed."[107]

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101. *Ernoznik*, 422 U.S. at 209.

102. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2256 (2015) (Alito, J., dissenting).

103. *Id.* at 2256.

104. Boos v. Barry, 485 U.S.312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

105. Henderson v. Stalder, 287 F.3d 374, 387-88 (5th Cir. 2002) (Davis, W. E., dissenting) (quoting Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (emphasis omitted) (internal quotations omitted)).

106. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991).

107. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

For example, in *Walker*, the Sons of the Confederate Veterans ("SCV") argued the Confederate flag plate design was meant to convey pride in Southern heritage and honor soldiers who fought under the Confederacy.[108] Alternately, the Texas Department of Motor Vehicles Board ("DMVB") found the flag design "embod[ied] principles of discrimination, segregation, white supremacy, and rebellion."[109] Ultimately, by placing a specialty license plate under the umbrella of government speech, the Court labeled the viewpoint as offensive, where SVC viewed the symbol as a mark of cultural heritage; thus, the Court essentially determined and instituted the meaning of a private viewpoint. This type of speech should be afforded protection under the viewpoint neutrality principle.

3. Government Speech Blurs the Lines of Political Accountability

Because the government speech doctrine operates as a complete bar to a First Amendment claim, the doctrine ultimately eases the government's ability to silence viewpoints, and blurs the lines of accountability. Joseph Blocher's work, *Viewpoint Neutrality and Government Speech,* attributes this idea to the government's vast resource pool.[110]

As a result of resource control, Blocher argues "protecting government speech means running the risk that the government will drown out dissenting private voices."[111] "[T]he government's unique position in the marketplace of ideas carries with it special risks of distortion and dominance," which grow as the doctrine expands.[112]

Blocher's argument can be further extended to the democratic principle of accountability. If the government can easily place private speech into the government speech category, any government restriction on that speech is then immune from suit. How does the government remain accountable to the public, if it can transform private speech into government speech? Because the government speech doctrine eliminates any infringement claim, the doctrine should not be extended freely.

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108. Brief of Appellants at 27, Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, No. 13-50411 (5th Cir. July 1, 2013).

109. *Id.* at 27-28.

110. Blocher, *supra* note 3, at 709 (noting "the government 'speaks' in all kinds of unrecognized and underappreciated ways[,]" . . . and "the government has access to methods of speech that the rest of [society] do[es] not have-platforms such as presidential press conferences for example"); *see also* MARK YUDOF, WHEN GOVERNMENT SPEAKS 6-10 (1983) (noting that the government can drown out private voices and distort democracy).

111. Blocher, *supra* note 3, at 708.

112. *Id.* at 709.

B. Rosenberger v. Rector & Visitors of University of Virginia: Walker's Tension With Public Forum Jurisprudence

In *Rosenberger*, the Court held that a state entity should not exercise viewpoint discrimination in a limited public forum in reference to a university student activity fund.[113] In contrast, the Court held, in *Walker*, that a state specialty license plate program constituted government speech not subject to a First Amendment analysis.[114]

Despite the contradictory analyses, three distinct similarities exist between *Rosenberger* and *Walker* that cannot be ignored: (1) a basic concern for First Amendment principle, (2) the origin of the speech in question, and (3) the program's procedural operation. Taken together, these similarities suggest that no difference in constitutional significance exits between the programs; thus, the failure of the *Walker* Court to address these similarities suggests that the Court misapplied the government speech doctrine in a case warranting a forum analysis.

1. Identical in First Amendment Principle

Both *Rosenberger* and *Walker* propose the same basic First Amendment speech concern: viewpoint discrimination. In taking note of the vital speech principles at risk in *Rosenberger*, Justice Kennedy, for the majority, stated, "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them."[115] Justice Kennedy further stated that ". . . a pure forum for the expression of ideas, . . . would be both incomplete and chilled were the Constitution to be interpreted to require state officials and courts [to] scan . . . [and] ferret out views."[116] Ultimately, the Majority concluded that "scan[ning] and interpret[ing] student publications to discern their underlying philosophical assumptions . . ." resulted in viewpoint discrimination that fostered bias and hostility.[117]

The Dissent in *Walker* suggested that the Majority should have been decided the case along similar lines, and recognized the same underlying

113. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1996) (finding a First Amendment violation where a university withheld student activity funds from a student organization based on religious association).

114. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2253 (2015).

115. *Rosenberger,* 515 U.S. at 835.

116. *Id.* at 844.

117. *Id.* at 845-46. Additionally, Justice O'Connor, in concurrence, further emphasized the problem of government interpretation of private viewpoints, concluding that withholding the activity funds "would leave an impermissible perception that religious activities are disfavored." *Id.* at 846.

First Amendment speech concern present in *Rosenberger*.[118] In his critique of the majority holding, Justice Alito contended that blatant viewpoint discrimination exits when the State allows restrictions where "public comments have shown that many members of the general public find the design offensive . . . ."[119]

Justice Alito, for the Dissent, reasoned that a motorist and an observer can have differing perceptions when displaying or viewing a specialty license plate.[120] Further, Justice Alito noted that the SCV plate design both honors veterans who fought during the Civil War and evokes an air of oppression.[121] Nevertheless, the Dissent concluded that "[a]llowing States to reject specially plates based on their potential to offend is viewpoint discrimination" and thus "establishes a precedent that threatens private speech."[122]

2. *Identical in Origin*

Secondly, in *Rosenberger*, the viewpoint at issue originated with a private speaker.[123] The Court in *Rosenberger* emphasized that "'the government [or university] ha[d] not fostered or encouraged' any mistaken impression that the student newspapers [spoke] for the university."[124] The Court further noted that a concern that religious messages would be attributed to the University was not warranted because the University had clearly disassociated itself from the group.[125] Thus, absent a clear showing that the government intended to adopt the message as its own, *Rosenberger* suggests that a public forum analysis controls.

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118. *Walker*, 135 S. Ct. at 2262 (Alito, J. dissenting). In dissent, Justice Alito argued that by selling space on its license plate, Texas created a limited public forum and engaged in viewpoint discrimination by refusing to issue the SCV plate. *Id.* at 2262.

119. *Id.* at 2245.

120. *Id.* at 2255.

121. *Id.* at 2262. Further, in noting the Board's inconsistencies in approving plate applications, Justice Alito analogized the SCV plate to the Buffalo Soldier plate. *Id.* The Buffalo soldier plate, which the Board approved, commemorates African American soldiers who fought for the Confederacy. Brief of Appellants, *supra* note 108, at 13. In analyzing this determination, Justice Alito argued that the Board rejected the SCV plate because it disapproved of the ideas it expressed. *Walker,* 135 S. Ct. at 2263.

122. *Walker*, 135 S. Ct. at 2254, 2262-63.

123. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1996).

124. *Id.* at 841 (quoting Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995)).

125. *Id.* Additionally, in concurrence, Justice O'Connor, in stating that "the student organizations, at the Universities insistence, remain[ed] strictly independent . . ." and "any reader . . . would be on notice of the publications independence from the University," clearly recognized the weakness of the public association argument. *Id.* at 849-50 (Justice O'Connor concurring). In reference to the religious endorsement limitation, Justice O'Connor further argued that no reasonable observer would attribute the message to the University because the message at issue was a result of an individual's private choice. *Id.* at 848.

Further, the Dissent in *Walker* followed a similar pattern of reasoning.[126] The Dissent found that specialty license plates constitute speech by and derivative of private individuals by categorizing license plates as "mobile billboards."[127] Justice Alito, in dissent, posed this question: "[W]ould you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars?"[128] Further, Justice Alito hypothesized:

> If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games— Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State— would you *assume* that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorn's opponents?[129]

To further criticize the Majority's use of the public association standard, Justice Alito noted that "[t]here is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech."[130] Ultimately, Justice Alito concluded that specialty license plates were messages proposed by private parties attributable to those parties, and not linked to the State in any capacity, similar to the determination in *Rosenberger*.[131]

3. *Substantially Similar in Procedure*

Lastly, procedurally, individual submission for a specialty license plate is substantially similar to an individual submission for student activity funds. Both programs involve private speech and government resources, and initiate a submission, review, and rejection based on the governing entity's policies. As noted by the Court in *Rosenberger*, university policy required a student group to submit an application for funds, and then submit bills to the Student Activity Fund.[132] Initially, the Student Council made disbursement decisions, but decisions were subject to review by a faculty body.[133]

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126. *See Walker*, 135 S. Ct. at 2254-63.

127. *Id.* at 2256.

128. *Id.* at 2255. Justice Alito further encouraged readers to test his theory by sitting by the side of the Texas highway studying the plates on passing vehicles. *Id.*

129. *Id.* (emphasis added).

130. *Id.* at 2261.

131. *Id.* at 2263.

132. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824 (1996).

133. *Id.* While the Student Activity Fund guidelines required that funds should be "administered 'in a manner consistent with the educational purposes of the University as well as with state and federal law[,]'" University policy excluded funding for religious organizations. *Id.* at 824-25.

Likewise, in *Walker*, the submission procedures for a specialty license plate are similar. As noted by the Majority in *Walker*, the Texas specialty license plate program grants vehicle owners the option to purchase a specialty plate for an annual fee.[134] Once the private individual or organization has designed and submitted the plate, the designated Board approves or rejects the plate.[135] Further, Texas law placed a limitation on plate design by granting the DMVB the authority to refuse an application "if the design might be offensive to any member of the public . . . or for any other reason established by the rule."[136]

Despite these similarities, the *Walker* Majority failed to address the substantial connection between the student activity fund and the license plate program in all three respects: First Amendment principle, origin, and procedure. These similarities are significant because they suggest that there is no difference in constitutional significance between the programs.

Considering that the *Rosenberger* Court and the *Walker* Court applied differing analyses, the decision in *Walker* deviates from *Rosenberger* by applying the government speech doctrine in what likely should have initiated a forum analysis. Failure to rectify these similarities begs the question of how the Court will likely distinguish between the government speech analysis and the forum analysis in the future. Arbitrary application without clear distinctions fosters a fear that the public forum doctrine protections will cripple in cases involving a private speaker and the State.

C. *Lehman v. Shaker Heights*: The Unanswered Question of Transit Advertising

Further, *Walker* is in direct tension with the longstanding public forum application in *Lehman v. Shaker Heights*. In *Lehman*, the Court held that individual submission of a political advertisement to a public transit-advertising program warranted a nonpublic forum analysis.[137] Because the application of the proper forum constituted the main argument in *Lehman*, this section draws support from both the majority and the dissenting opinions.

Similar to the tension present in *Rosenberger*, *Lehman* and *Walker*

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

135. *Id.* at 2244-45.

136. *Id.* (quoting Tex. Transp. Code Ann. §504.801(c)).

137. Lehman v. Shaker Heights, 418 U.S. 298, 301-02 (1974). The Court reasoned that the city "limited access to its transit system advertising space in order the minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.* at 304. The Court ultimately found that no First Amendment violation occurred because the city advanced "reasonable legislative objectives" in a "proprietary capacity." *Id.*

both initiate a basic First Amendment speech concern: individual self-expression.[138] According to the *Lehman* Dissent, the First Amendment's "constitutional safeguard was fashioned to encourage and nurture 'uninhibited, robust, and wide-open' self-expression . . . ," and "[t]he fact that the message [was] proposed as a paid advertisement [did] not diminish the impregnable shelter afforded by the First Amendment."[139] While acknowledging that self-expression is not entirely "unfettered," the Dissent noted, "a function of free speech under our system of government is to invite dispute."[140] Similarly, the Dissent in *Walker* suggested the same underlying speech concern by noting that discrimination exists when the State allows restrictions where "public comments have shown that many members of the general public find the design offensive . . . ."[141]

Further, the speech at issue in *Lehman* originated with a private individual.[142] Justice Douglas, in concurrence, noted that these types of advertisements "[were] ordinarily seen as a matter of choice on the part of the observer . . . ."[143] One justification addressed by the *Lehman* Majority centered on the idea of political favoritism or endorsement.[144] The city argued that "acceptance of 'political advertisements . . . would suggest . . . some political favoritism [was] being granted to candidates who advertise[d], or . . . that the candidate so advertised [was] being supported or promoted by the government of the [c]ity.'"[145] In dissent, Justice Brennan argued that:

> [t]he endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board.[146]

138. *See generally* Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239 (2015); Lehman v. Shaker Heights, 418 U.S. 298 (1974).

139. *Lehman*, 418 U.S. at 310-311. In terms of the political speech category, the Dissent argued that political speech was essential to government accountability and any restriction on self-expression in that realm was contrary to the First Amendment. *Id.* at 311.

140. *Id.* at 311, 319. The Dissent argued that the Majorities' reliance on shielding passengers from controversial or unsettling speech was improper because this type of speech should be expected under our constitutional mode of governing. *Id.* at 319. The Dissent reasoned that "surely . . . [glancing at a self-determined offensive advertisement] is a small price to pay for the continued preservation of so precious a liberty as free speech." *Id.* at 320-321.

141. *Walker,* 135 S. Ct. at 2258, 2261.

142. According to the oral argument transcript, Mr. Lehman testified that "[he] 'was using various methods [of promoting his candidacy], including newspaper advertising . . . direct mail advertising, postcards, and circulars of various types." *Lehman*, 418 U.S. at 300 n.2.

143. *Id.* at 308.

144. *Id.* at 304.

145. *Id.* at 321.

146. *Id.* (quoting Wirta v. Alameda-Contra Costa Transit District, 434 P. 2d 982, 989 (1967)).

Ultimately, Justice Brennan concluded that even if "there may be 'lurking doubts about favoritism,' the Court has held that '[no] such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved.'"[147] The Dissent in *Walker* followed a similar pattern of reasoning in finding that specialty license plates constituted speech derivative of private individuals.[148]

Lastly, procedurally, a submission to place an advertisement on a public bus is equally similar to a submission for student activity funds or a specialty license plate. A public transit advertisement involves private speech on government property, and an application includes a submission, a review, and a rejection or approval based on a transit policy.[149] Similarly, in *Walker*, the submission procedures for a specialty license plate are virtually indistinguishable.[150]

IV. Public Transit Advertising: Private Speech or Government Speech?

Currently, instability exists in forum doctrine application in reference to private advertisements on public transportation systems.[151] The Sixth Circuit has applied a nonpublic forum analysis to advertisement speech, while the Ninth Circuit favored a limited public forum analysis.[152] Further, a district court in the Second Circuit deviated from both the Sixth and Ninth Circuits, and applied a designated public forum analysis in the public transit-advertising context.[153] Most recently, a district court in the Seventh Circuit held in congruence with the Sixth Circuit and ap-

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Further, Justice Brennan reasoned that no evidence suggested that transit passengers would "naively" associate the speech with the transit authority. *Id.*

147. *Id.* (quoting Williams v. Rhodes, 393 U.S. 23, 33 (1968)).

148. *See supra* Part II.B.2.

149. As noted by the Court in *Lehman*, the process began when an individual purchased a "car card space" on the Shaker Heights Rapid Transit System. 418 U.S. at 299. Metromedia, Inc., an exclusive agent under city contract, accepted the applications and managed the overall advertising space. *Id.* Once an applicant submitted a completed application, Metromedia reviewed and accepted advertisements pursuant to city contract terms. *Id.* At the time Lehman submitted his advertisement, the management contract with the city did not permit political advertisements. *Id.* at 300. However, the agreement did permit advertisements from certain groups, including cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and public-service oriented groups. *Id.*

150. *See supra* Part III.B.3.

151. *See generally* Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., 698 F.3d 885 (6th Cir. 2012); Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456 (S.D.N.Y. 2012); Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489 (9th Cir. 2015).

152. *Suburban Mobility Auth.*, 698 F.3d at 889; *Seattle Mideast Awareness*, 781 F.3d at 503.

153. *Metro. Transp. Auth.*, 880 F. Supp. 2d at 466.

plied a nonpublic forum analysis.[154]

A. The Circuit Split: Public Forum Applies

1. *The Sixth Circuit: American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*

In *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*, the Sixth Circuit upheld a speech restriction denying advertising space to an American Freedom Defense Initiative ("AFDI"),[155] which sponsored an advertisement depicting a fatwa symbol.[156] The court began its analysis by noting, "[w]e are required to classify the forum under the Supreme Court's forum analysis, which courts use to determine 'whether a state-imposed restriction on access to public property is constitutionally permissible.'"[157]

After determining a traditional public forum analysis was not applicable, the court followed the seminal public transit case, *Lehman v. Shaker Heights*, and applied a nonpublic forum analysis based on two main considerations.[158] First, the court determined that the transit authority's "tight control over the advertising space . . . ma[d]e the space incompatible with . . . a designated public forum."[159] Although the transit policy did not identify a bus as a nonpublic forum, the court reasoned that the existence of multiple governing rules weighed against a designated forum analysis.[160] Second, in justifying the nonpublic forum distinction, the court analyzed the "relationship between the restrictions and the purpose of the forum," and determined that the main purpose of the program was to increase revenue.[161] Ultimately, the court found that a nonpublic forum analysis was proper.[162]

2. *The Ninth Circuit: Seattle Mideast Awareness Campaign v. King County*

Furthermore, the Ninth Circuit, in *Seattle Mideast Awareness Cam-*

154. Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp., 45 F.Supp.3d 857, 865 (N.D. Ind. 2014).

155. AFDI is a nonprofit corporation centered on sponsoring anti-jihad messages, including bus and billboard campaigns. *Suburban Mobility Auth.*, 698 F.3d at 888.

156. *Id.* The full advertisement read: "Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got questions? Get Answers! RefugefromIslam.com."

157. *Id.* at 890 (quoting United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 349 (6th Cir. 1998)).

158. *Id.* at 889-92.

159. *Id.* at 890.

160. *Id.* at 889.

161. *Id.* at 892.

162. *Id.* at 890. Ultimately, the court determined that the restrictions on the political advertising at issue was reasonable and viewpoint neutral in light of the nonpublic forum analysis.

paign v. King County, refused to issue an advertisement submitted by the Seattle Mideast Awareness Campaign, which read: "Israeli War Crimes, Your Tax Dollars at Work, www.Stop30Billion-Seattle.org."[163] The court determined that since "the [c]ounty . . . opened the sides of . . . buses to speakers other than the government itself," the speech warranted a forum analysis.[164] After applying the *Cornelius* factors, the court concluded that the county created a limited public forum based on three justifications.[165]

First, the court reasoned that since the county established "fixed guidelines that imposed categorical subject-matter limitations," it only intended to grant "selective access," and not "unfettered access" in its public transit advertising program.[166] Second, in analyzing the county's access policy, the court determined that, as a whole, the county had consistently pre-screened rejected ads that were not in compliance.[167] Lastly, the court noted that the principal purpose or nature of the program was to increase revenue; thus, allowing "unfettered access for expressive activities" could "harm advertising sales or tarnish [the county's] business reputation."[168]

3. *The Second Circuit: American Freedom Defense Initiative v. Metropolitan Transportation Authority.*

Alternately, in refusing to issue an advertisement including the statement "Support Israel, Defeat Jihad," a district court in the Second Circuit placed the public transit advertisement under the designated public forum doctrine.[169] In analyzing the speech at issue, the district court relied heavily on *New York Magazine v. Metropolitan Transportation Authority*, which held that the Metropolitan Transportation Authority ("MTA") intended to open a designated forum because it "open[ed] up its ad space to potentially controversial political speech."[170] Thus, the district court in *American Freedom Defense Initiative v. Metropolitan Transportation Authority*, followed the foundation laid in *New York Magazine*, by finding that because MTA buses were "open for *all* types of expressive activity–e.g., political, commercial, religious, charitable, military, etc.," a desig-

163. 781 F.3d 489, 494 (9th Cir. 2015).

164. *Id.* at 496. In noting the applicable forum, the court relied on the *Cornelius* factors by weighing (1) the policies governing forum access, (2) the implementation of those policies, and (3) the nature of the government property at issue. *Id.* at 497 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

165. *Id.* at 497.

166. *Id.* at 497-98.

167. *Id.* at 498.

168. *Id.*

169. Am. Freedom Def. Initiative v. Metro Transp. Auth., 880 F. Supp. 2d 456, 459, 466 (S.D.N.Y. 2012).

170. *Id.* at 472.

nated forum analysis was proper.[171] Further, the district court noted that any restrictions imposed within those types of expression did not alter the designated forum application.[172]

4. The Seventh Circuit: Women's Health Link, Inc. v. Fort Wayne Public Transportation Corp.

Further, in *Women's Health Link, Inc. v. Fort Wayne Public Transportation Corp.*, a district court in the Seventh Circuit upheld the transit authority's decision to deny advertising space to Women's Health Link, a pro-life organization focused on educating women regarding abortion services.[173] The court began its analysis by noting that the parties disagreed about whether the advertising space constituted a public form or a nonpublic form.[174]

In light of the *Walker* decision, the court addressed the government speech issue and determined that public transit advertisements did not warrant a government speech analysis.[175] After eliminating government speech, the court moved to determine the applicable forum designation.[176] Reasoning that no evidence suggested the transit authority "allowed any group with non-life-affirming purposes and messages to display advertisements or public service announcements in its buses[,]" the court applied a nonpublic forum analysis and determined that "reasonable content-based restrictions [were] permissible, as long as they d[id not] target 'particular views taken by speakers on a subject.'"[177]

B. Pre-*Walker* Government Speech Arguments In Public Transit Cases

1. Coleman v. Ann Arbor Transportation Authority

In *Coleman v. Ann Arbor Transportation Authority*, the defendant

171. *Id.* at 473.

172. *Id.*

173. Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp., No. 1:14-CV-107 RLM, 2016 WL 67288, at *1, *7 (N.D. Ind. Jan. 5, 2016), *appeal docketed*, No. 16-1195 (7th Cir. Feb 3, 2016). The advertisement contained "a head shot of a young woman, and stated: 'You are not alone. Free resource for women seeking health care.'" *Id.* at *1. Further, the organization's logo, website link, and phone number appeared at the bottom of the advertisement. *Id.*

174. *Id.* at *3. "Women's Health Link contends that when [the transit authority] allowed its advertising space to be used for public service announcements, it created a designated, or limited designated, public form – one reserved for 'certain groups or for the discussion of certain topics[,]'" and engaged in viewpoint discrimination when the authority rejected the ad. *Id.*

175. *Id.* at *6 ("This case involves neither government speech nor a public forum."). The Court offered no further government speech analysis.

176. *Id.*

177. *Id.* at *7 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

transit authority, relying primarily on *Summum*, argued that it could reject a public transit advertisement because the ad constituted government speech.[178] The transit authority contended that "because there [was] no sponsor identification in [the] . . . proposed ad, the ad would be attributable to [the transit authority]."[179] Coleman, in response, argued that it is "universally understood" that public transit advertisements are displays forwarded by private individuals, and not government agencies.[180]

The court, in interpreting *Summum*, found that a distinct difference existed between monuments and public transit advertisements.[181] The court noted that the transit authority offered "no [evidence] indicating that the speech in ads on . . . buses [were] reasonably attributable to the transit authority."[182] While the court noted that an element such as an "overarching [governmental] message," or "retaining the power to approve every word," or "a long tradition of the government using private speech to 'speak to the public'" could sway its analysis, ultimately, the court determined that "if private speech takes place on government property, that does not, without more, suffice to create government speech."[183]

2. *Pittsburgh League of Young Voters Education Fund v. Port Authority of Allegheny County*

In *Pittsburg League of Young Voters Education Fund v. Port Authority of Allegheny County*, the port authority contended that any co-sponsored advertisement run by itself or any other government agency constituted government speech.[184] In response, the Pittsburgh League of Young Voters claimed that the transit authority had opened a designated public forum on its public buses due to its practice of accepting non-commercial advertisements.[185]

In formulating its determination, the court recognized that "[t]he

178. 904 F. Supp. 2d 670, 696 (E.D. Mich. 2012). The advertisement at issue included the phrase "Boycott Israel; Boycott Apartheid" and included an insect like-figure with a skull as its head, gripping a skull in one hand and a bone in the other, with additional skulls and bones floating in the background. *Id.* at 675.

179. *Id.* at 696.

180. *Id.* Further, the plaintiff contended that the transit authority's failure to require identification did not allow the authority to transform the speech into government speech. *Id.*

181. *Id.* at 696-97.

182. *Id.* at 697.

183. *Id.*

184. Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty., No. 2:06-cv-1064, 2008 WL 4965855, at *1, *10, *14 (W.D. Pa. Aug. 12, 2008). The advertisement at issue was designed to inform ex-convicts they had the right to vote in Pennsylvania. *Id.* at *4.

185. *Id.* at *6. The port authority further argued that the organization only presented evidence of alleged government speech advertisements and commercial advertisements consistent with transit policy. *Id.*

natural first step in a case involving a state's action in refusing or authorizing a particular message is to determine whether the message is government speech or whether it falls '[i]n the realm of private speech or expression [where] government regulation may not favor one speaker over the other.'"[186] In determining if the government intended to promote its own message through the advertisement, the court applied a four-prong test to distinguish between government speech and private speech.[187] The balancing test included weighing four factors: (1) the central purpose of the program, (2) the degree of editorial control exercised by the government, (3) the identity of the literal speaker, and (4) whether the government or the private entity bore the ultimate responsibility for the content of the speech in question.[188]

In analyzing the central purpose of the transit program, the court determined that the purpose of the program was to "publish messages beneficial to [the] business [of the transit authority] while maximizing its advertising revenue."[189] Relying primarily on *Johanns*, the court reasoned that the "control over the message involved [was] suggestive of government speech."[190]

The court determined that the second factor, the degree of "editorial control," weighed more heavily toward a private speech determination because the transit authority only retained a veto power over the advertisement.[191] The court reasoned that this constituted a minimal degree of control because the authority "lack[ed] involvement in creating the advertisements' message" and exercised no control over the ad's substance.[192]

Next, the court found that the literal speaker factor weighed in favor of private speech.[193] The court determined that even though the transit authority owned the advertising space, the "messages displayed [were] more closely identified with the organizations that created the original message."[194] Ultimately, the court found that the literal speaker factor had characteristics of both private and government speech, but the origin and identification distinctions prompted the court to side with a private

186. *Id.* at *7 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)).

187. *Id.* at *7-8. The court followed the government speech test adopted by the Fourth, Eighth, and Tenth Circuits. *Id.* at *8.

188. *Id.*

189. *Id.* at *12.

190. *Id.*

191. *Id.* at *12-13.

192. *Id.* at *13.

193. *Id.*

194. *Id.*

speech determination.[195]

Lastly, in analyzing the ultimate responsibility factor, the court determined that a private organization bears a greater responsibility for the advertisement content because it initiated the ad and controlled the overall message.[196] However, since the transit authority co-sponsored the advertisement, the court found that it also bore responsibility because of co-sponsorship.[197] The court ultimately determined that the responsibility factor suggested both government speech and private speech.[198]

After weighing the four factors, the court concluded that the advertisement more closely resembled private speech.[199] In determining whether the advertisement constituted government speech or private speech, the court found that the first and fourth factors were inconclusive, and the second and third factors favored private speech.[200] The court further found persuasive the fact that even though the transit authority co-sponsored the advertisement, it took no part in creating the message.[201] Ultimately, the court concluded that the advertisement constituted private speech and not government speech.[202]

C. *Walker's* Disturbing Implication: The Government Speech Argument Re-conceptualized

Considering the distinct similarities between the public transit cases and the license plate cases, *Walker* likely suggests that the public transit cases could be re-conceptualized under a government speech doctrine analysis based on a three-prong argument: (1) government property use, (2) public association, and (3) procedural similarities.[203]

First, a government property distinction clearly signifies government involvement. State-run transit authorities are established, controlled, and funded by the state governments.[204] Thus, when government property is at issue, the transit authorities can more easily argue that the messages conveyed through their property are governmental in nature.

In *Walker*, the Court used the government property argument to determine that "Texas [was] not simply managing government property [when regulating its license plate program], but . . . [was also] engaging in

195. *Id.* at *14.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* (noting that a private organization bore significant monetary responsibility).
202. *Id.*
203. *But see* discussion *infra* Part V.B.
204. *See, e.g.*, Tex. Transp. Code §§ 201.051, 201.101, 201.201 (2015).

expressive conduct."[205] In addition, the *Walker* Majority reasoned that because a license plate program constituted a "government-mandated, government-controlled, and government-issued" program, it conveyed a governmental message.[206] Public transit advertising programs are similar in terms of establishment and control; thus, a *Walker* government speech argument is likely on the horizon.

Additionally, because transit advertisements are affixed to government property, the *Walker*-based argument of public association or attribution will likely develop.[207] Despite the current circuit split giving clear support to a private speech, public forum analysis, *Walker* allotted no weight to the private origin of the viewpoint at issue, suggesting that government association in the public mind trumps the individual's right to free speech.[208] Considering the reasoning set forth in *Walker*, transit authorities can now begin using the public association argument to forward a government speech doctrine application.

Lastly, procedurally, a public transit-advertising program includes a submission, a review, and a rejection or approval based on agency policy.[209] Similarly, in *Walker*, the submission procedures for a specialty license plate are substantially the same.[210] Roughly identical procedural control further suggests a government speech argument in the transit cases is ripe for the choosing.

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205. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2251 (2015).

206. *Id.* at 2250.

207. *See supra* text accompanying note 179 ("The transit authority contended that 'because there [was] no sponsor identification in [the] . . . proposed ad, the ad would be attributable to [the transit authority].'") (citing Coleman v. Ann Arbor Transp. Authority, 904 F. Supp. 2d. 670, 696 (E.D. Mich. 2012)).

208. *Walker*, 135 S. Ct. at 2248, 2253 (noting that the license plate program constituted government speech). The Court in *Walker* found that the "Texas license plate designs 'are often closely identified in the public mind with the [State].'" *Id.* at 2248 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)).

209. *E.g.*, Chi. Transit Bd., Ordinance No. 013-63, Exhibit A, at (III)(A) (May 8, 2013), http://www.transitchicago.com/assets/1/miscellaneous_documents/013-63_Advertising_Policy_and_Ordinance.pdf.

210. As noted by the majority in *Walker*, once the private individual or organization has designed and submitted the plate, a designated board approves or rejects the plate. *Walker*, 135 S. Ct. at 2244-45; *see generally* TEX. TRANSP. CODE ANN. §§ 504.6011(a), 504.851(a) (2013); 43 TEX. ADMIN. CODE §217.53(b); *see also id.* §217.45(i)(7) (granting the Board the authority to approve or disapprove applications). Further, Texas law placed a limitation on plate design by granting the Board the authority to refuse an application "if the design might be offensive to any member of the public . . . or for any other reason established by the rule." *Walker*, 576 U.S. at 2244 (quoting TEX. TRANSP. CODE ANN. §504.801(c).

V. REMEDYING *WALKER*'S MISSTEPS: THE GOVERNMENT SPEECH TEST

A. GOVERNMENT SPEECH TESTS PRE-*WALKER*

In the specialty license plate context, prior to *Walker*, the circuits applied varying tests to identify government speech versus private speech. The Fourth, Eighth, and Ninth circuits adopted the four-prong test formulated by the Tenth Circuit.[211] The Fifth and Seventh Circuit adopted the reasonable observer test, and the Sixth circuit adopted an effective control test.[212]

1. The Four-Prong Test

Prior to the license plate cases, the Tenth Circuit formulated a four-prong test for classifying speech as either private or governmental based on four factors: (1) the central purpose of the governmental program;[213] (2) the exercise of editorial control over the content of the message; (3) the literal speaker of the message; and (4) who bore the ultimate responsibility for the content of the message.[214]

As the license plate circuit split emerged, the Ninth Circuit, in *Arizona Life Coalition, Inc. v. Stanton*, adopted the four-prong test promulgated by the Tenth Circuit.[215] In noting that "[t]here is some question as to what standard [the court] should apply in differentiating between private and government speech[,]" the *Stanton* court opted to apply the four-prong test because of its similarities to the factors used in the *Johanns* decision.[216] Despite finding that *Johanns* was factually distinguishable from *Stanton*, the court reasoned that the factors still applied because the *Johanns* court relied on factors similar to those in the four-prong test.[217]

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211. Sons of Confederate Veterans, Inc. *ex rel.* Griffin v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618-19 (4th Cir. 2002) (specialty plates constitute private speech); Roach v. Stouffer, 560 F.3d 860, 865, 867-68 (8th Cir. 2009) (same); Arizona Life Coal. v. Stanton, 515 F.3d 956, 965, 968 (9th Cir. 2008) ("Choose Life" plate was private speech); Wells v. City & Cty. of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001).

212. Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 394 (5th Cir. 2014) *rev'd* Walker v. Texas Div., Sons of Confederal Veterans, Inc., 135 S. Ct. 2239 (2015); Choose Life of Illinois, Inc. v. White, 547 F.3d 853, 866 (7th Cir. 2008) (specialty plates constitute private speech); ACLU of Tennessee v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) (specialty plates constitute government speech).

213. *Wells*, 257 F.3d at 1141. The Tenth Circuit noted that when making this determination, courts should consider whether the overall purpose was to forward a government message, or facilitate the forwarding of private messages. *Id.*

214. *Id.*; *see also* Olree, *supra* note 4, at 386-87.

215. 515 F.3d 956, 965 (9th Cir. 2008).

216. *Id.* at 963, 965.

217. *Id.* at 965. The court noted that *Johanns* raised issues of "compelled speech" or "com-

In its analysis, the Ninth Circuit determined that the state's "*de minimus* editorial control over the plate design and color [did] not support a finding that the *messages* conveyed by the organization constitute[d] government speech."[218] After analyzing the four factors, the Ninth Circuit ultimately found that the Arizona state license plate program constituted a limited public forum subject to viewpoint neutral restrictions that are "reasonable in light of the purpose served by the forum."[219]

In addition, the Eighth Circuit, in *Roach v. Stouffer*, analyzed the plate at issue using the four-prong test, but noted "[the] analysis boil[ed] down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party."[220] The Eighth Circuit ultimately weighed the factors and concluded that the factors suggested "a reasonable observer could not think that the [s]tate . . . communicate[d] all [license plate] messages."[221]

Lastly, in *Planned Parenthood of South Carolina, Inc. v. Rose*, the Fourth Circuit weighed in on the license plate issue, with a plurality noting the adoption of a four-factor test in *Sons of Confederate Veterans, Inc. v. Comisioner of Virginia Department of Motor Vehicles*.[222] After apply-

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pelled-subsidy" and in *Stanton*, private individuals chose to purchase specialty license plates. *Id.* at 964.

218. *Id.* at 966 (first emphasis added). Further, the court noted that a private organization controlled the message of its specialty plate and "individual members who [chose] to purchase the plate voluntarily [chose] to disperse that message." *Id.* at 967. The court noted that specialty license plate programs provided the state with increased revenue and encompassed a wide range of organizations, while also giving vehicle owners "the opportunity to identify themselves with individualized messages" and "benefit worthy organizations financially." *Id.* at 965. In weighing these factors, the court ultimately concluded that the state discriminated based on an individual viewpoint because the denial of the plate application was "motivated by the nature of the message rather than the limitations of the forum . . . ." *Id.* at 972.

219. *Id.* at 971. The court noted that although license plates do possess some characteristics of government speech, they "represent primarily private speech." *Id.* at 960.

220. 560 F.3d 860, 867 (8th Cir. 2009). In applying the four-factor test, the court determined that the primary purpose of the program was to allow individual expression and increase state revenue. *Id.* Further, the court acknowledged that both the state and the private speaker had some editorial control over the plate's message. *Id.* Lastly, the court found that the literal speaker identification and the ultimate responsibility fall with the sponsoring organization and the vehicle owner, both of which choose to submit and display the plate. *Id.* at 867-68.

221. *Id.* at 868.

222. *Rose*, 361 F.3d 786, 792-93 (4th Cir. 2004). This court did not officially adopt the Tenth Circuit four-prong test, as each judge wrote a separate concurrence. After applying the four-factor test, dubbed the "SCV factors", Judge Michael determined that the purpose of the program was to promote the State's preferences, not increase revenue, which weighed "in favor of a government speech designation." *Id.* at 793. Judge Michael weighed the editorial control factor and found that since the legislature initiated the plate, it maintained a higher degree of editorial control. *Id.* Further, Judge Michael determined that even though the plate at issue was initiated by the state legislature, which weighed in favor of government speech, the vehicle owners were the literal speakers and bore the ultimate responsibility for the speech. *Id.* at 794. In his concur-

ing the factor test, Judge Michael determined that specialty plates constituted a "mixture of private and government speech[,]" and did not distinguish between the two.[223] Instead, he found that South Carolina's specialty license plate program constituted a limited public forum for expression, applied a forum analysis, and found that the state had engaged in viewpoint discrimination.[224] Judge Michael reasoned that finding government speech in the instant case would "require an unwarranted extension of the government speech doctrine and of the State's power to promote some viewpoints above others."[225]

2. The Reasonable Observer Test

In *Texas Division, Sons of Confederate Veterans, Inc. v. Vandergriff*, the Fifth Circuit determined the specialty license plate program constituted private speech because "a third party designed and submitted the specialty plate, making the connection between the plate and the driver of the car even closer."[226] In an attempt to remedy past precedent, specifically *Johanns* and *Summum*, the court stated, "we think the proper inquiry here is whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech . . . ."[227] While acknowledging that there may be times when it is difficult to determine whether a government entity is speaking or providing a public forum for private speech, the court remained confident that "a reasonable observer would know that a specialty license plate is the speech of the individual driving the car," and not a governmental message.[228]

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rence opinion, Judge Gregory noted that "because I believe the judgment reached today applies the factors set forth in *Sons of Confederate Veterans* . . . are implicated in the vanity license plate forum, I concur in the judgment." *Id.* at 801.

223. *Id.* at 794. "[T]he speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two." *Id.*

224. *Id.* at 795-96. "South Carolina has engaged in viewpoint discrimination . . . and . . . insulated itself from electoral accountability by disguising its own pro-life advocacy. This is prohibited by the First Amendment." *Id.* at 799.

225. *Id.* at 795. Judge Michael favored adopting a "mixed speech" category, along with a four-prong test to distinguish between private speech and government speech. *Id.* at 794-95.

226. 759 F.3d 388, 395 (5th Cir. 2014), *rev'd,* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

227. *Id.* at 394 (quoting Pleasant Grove v. Summum, 555 U.S. 460, 487 (2009) (Souter, J., concurring)).

228. *Id.* at 396. The court further noted that their conclusion was consistent with the majority of other circuits that had considered the issue, including the Seventh, Eighth, and Ninth. *Id.* at 395-96. In rejecting the Sixth Circuit effective control test, the court determined that the control test did not apply because the plate at issue before the Sixth Circuit was created via Tennessee state statue and did not originate with a private speaker. *Id.* at 396. Further, the Court noted that the Sixth Circuit's decision did not align with the Supreme Court's ruling in *Wooley*. *Id.* (noting that in *Wooley*, the Court found that a license plate message was private

The Second Circuit, in *Children First Foundation, Inc. v. Fiala*, followed the Fifth Circuit ruling and applied the reasonable observer test.[229] Relying on *Wooley v. Maynard*, the court held that "an observer would know that motorists affirmatively request specialty plates and choose to display those plates on their vehicles, a form of private property."[230] Ultimately, the court concluded that the specialty plate program constituted private speech and analyzed the claim under the public forum doctrine.[231]

Further, the Seventh Circuit, in *Choose Life of Illinois, Inc. v. White*, also adopted the reasonable observer test.[232] In analyzing the earlier decisions by the Fourth and Ninth Circuits, the court concluded that while the factor test was concrete, it could "be distilled (and simplified) by focusing on the following inquiry: [u]nder all the circumstances, would a reasonable person consider the speaker to be the government or a private party?"[233] Further, the court noted that the private organization and the state shared editorial control over the plate design, but determined that the message on the plate was more closely associated with the sponsoring organization and the vehicle owner.[234] Ultimately, in applying the reasonable observer test (modified from the factor test), the Seventh Circuit concluded that the specialty plate program constituted private speech and analyzed the speech under the public forum doctrine.[235]

3. *The Effective Control Test*

As the sole outlier, the Sixth Circuit, in *ACLU of Tennessee v. Bredesen*, applied an effective control test, and held that the Tennessee specialty license plate program constituted government speech.[236] In

speech, even though the government "crafted" and "had ultimate control over" the message). The court reasoned that the Sixth Circuit's failure to address the *Wooley* precedent further evidenced that the Sixth Circuit erroneously categorized license plate speech as government speech. *Id.*

229. 790 F.3d 328, 338 (2d Cir. 2015), *op. withdrawn and superseded in part sub nom* Children First Found., Inc. v. Fiala, 611 Fed.Appx. 741 (2d Cir. 2015) (remanding the case to the district court in light of *Walker*).

230. *Id.* The court reasoned that the connection between the message and the driver "is stronger than the connection between the message and the [state's] stamp of approval. *Id.* at 338-39.

231. *Id.* at 339.

232. 547 F.3d 853, 863 (7th Cir. 2008).

233. *Id.* at 863; *see also* Pleasant Grove v. Summum, 555 U.S. 460, 487 (2009) (Souter, J., concurring) ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.")

234. *Choose Life*, 547 F.3d at 863-64.

235. *Id.* at 863.

236. 441 F.3d 370, 375-76 (6th Cir. 2006); *see also* Olree, *supra* note 4, at 379 (noting that the Sixth Circuit approached the license plate issue with a binary perspective by using a "single-factor" test based on control).

agreement with *Johanns*, the court concluded that when "the government sets the overall message to be communicated and approves every word that is disseminated, it is engaging in government speech."[237] The court reasoned that even though vehicle owners express agreement with the plate's message by purchasing and displaying the tag, that fact did not necessitate a finding of private speech.[238] Rather, the court determined that vehicle owners were volunteer "carriers of Tennessee's [governmental] message" and that the "volunteers' display of the [plate] expresse[d] agreement with Tennessee."[239]

In response, Judge Martin, for the dissent, criticized the majority's failure to apply the forum doctrine to the instant case.[240] Judge Martin favored examining the "overall purpose" of the program as a whole, finding that it was "designed to facilitate private speech" in a public forum, not a governmental message.[241] Judge Martin reasoned that because "license plates represent a wide-array of viewpoints, some arguably conflicting, and many not germane to any governmental interest," the purpose and manner in which the state operated the program demonstrated forum creation.[242] Overall, Judge Martin cautioned the majority by noting the danger in finding that "any government involvement in speech turns that speech into government speech immune from First Amendment restrictions."[243]

B. Damage Control: A Four-Factor Test to Distinguish Between Government Speech and Private Speech Post-*Walker*

Since the application of the government speech doctrine or the public forum doctrine depends solely on the identity of the speech at issue,[244] the courts should clarify their government speech approach and adopt a concrete test based on (1) historical use, (2) reasonable observation, (3) the degree of control, and (4) the identity of the literal speaker. Continuing to arbitrarily extend the government speech doctrine without a clear

237. *Bredesen*, 441 F.3d at 376.

238. *Id.* at 378.

239. *Id.*

240. *Id.* at 381 (Martin, J., dissenting).

241. *Id.*

242. *Id.* at 382-83.

243. *See id.* at 388; *see also id.* at 391 ("'[T]he First Amendment was not written for the vast majority . . . . It belongs to a single minority of one.'") (quoting *Sons of Confederate Veterans, Inc. v. Comm'r of Virginia Dep't of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing en banc).

244. *See* Olree, *supra* note 4, at 368 ("Classifying the speech as either government speech or private speech becomes a crucial question–often the crucial question–in deciding these speech cases.").

test endangers free speech rights by neutralizing the public forum doctrine.

1. Historical Use

When applying the government speech test Post-*Walker*, courts should begin by considering the historical purpose of the property at issue. In analyzing the historical use factor, the *Walker* Court determined that "license plates . . . [have long] communicated messages from the States."[245] The Court relied primarily on its decision in *Summum*, where it concluded that "[g]overnments have long used monuments to speak to the public."[246] The Court analyzed the Texas program in particular, noting that Texas plates have communicated state speech for decades.[247] Thus, in terms of monuments and license plates, the Court determined, at least historically, that this type of speech favored the government.[248]

When examining this factor, courts should consider not only the historical use of the claimed medium, but also the overall purpose of the medium. For example, in the transit-advertising context, courts should take note of the long history of allowing individual organizations to place private advertisements on public transportation systems, and weigh the factor in favor of a private speech distinction.

2. Reasonable Observation

Next, courts should consider the degree of public association afforded the property at issue. The *Walker* Court determined that the license plate program more closely resembled government speech because "license plate designs 'are [more] often . . . identified in the public mind with the [State].'"[249] The Court found that because the state placed "TEXAS" on each license plate, the plate essentially functioned as a government ID, and "'persons who observe' designs on IDs [or license plates] 'routinely and reasonably interpret them as conveying some message on the issuer's [or government's] behalf.'"[250]

245. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S.Ct. 2239, 2248 (2015). The Court noted that the first specialty license plate depicting an image originated in Arizona in 1917, including the image of a Hereford steer. *Id.* Further, the court noted that Idaho became the first state to issue a specialty plate adorning a slogan, with "Idaho Potatoes." *Id.*

246. Pleasant Grove v. Summum, 555 U.S. 460, 470 (2009).

247. *Walker*, 135 S.Ct. at 2248. The Court cited examples of state-issued designs such as statehood celebrations, state silhouettes, livestock, rodeos, cancer research, and girl scouts. *Id.* Ultimately, the Court found that license plates historically communicate state messages because in the past "states have used license plate slogans to urge action, to promote tourism, and to tout local industries." *Id.*

248. *See generally Walker*, 125 S. Ct. 2339.

249. *Id.* at 2248.

250. *Id.* at 2248-49.

In analyzing the public association factor, courts should consider adopting a reasonable observer standard, similar to the Fifth Circuit's determination in *Texas Division, Sons of Confederate Veterans v. Vandergriff*. Adopting a *Walker* standard based purely on "identifi[cation] in the public mind" is too subjective and extends little protection to the private speech category. "[W]hether a reasonably and fully informed observer would understand the expression to be governmental speech, as distinct from private speech . . . [,]"[251] is a more speech protective standard.

For example, in applying a reasonable observer standard to a transit advertisement program, courts should conclude that any reasonable observer would associate the advertisement with the private organization submitting it, and the not the state, unless the state is the submitting organization.

3. The Degree of Control

Courts should also consider the amount of government control exerted over the medium at issue. The *Walker* Court determined that "Texas maintain[ed] direct control over the messages conveyed on its specialty plates."[252] In reference to the its earlier decision in *Summum*, the *Walker* Court found that "Texas 'ha[d] effectively controlled' the messages conveyed by exercising 'final approval authority' over their selection[,]'" ultimately giving Texas the ability to choose which plates to approve and which plates to reject.[253] Reasoning that the ability to "choose how to present itself and its constituency" indicated a close association with the state, the Court determined a government speech analysis was proper.[254]

In analyzing the direct control factor, courts should consider adding a degree determination. Instead of granting government speech protection exclusively on final approval grounds, courts should take note of the degree of control exercised by the governmental body.

Thus, in applying a degree of control factor to transit advertising programs, courts should note that the applicant organization develops, designs, and submits the advertisement for review, while the transit

251. *See* Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 394 (5th Cir. 2014), *rev'd,* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

252. *Walker*, 575 U.S. at 2249. The Court noted that "the State 'ha[d] sole control over the design, typeface, color, and alphanumeric pattern for all license plates.'" *Id.* (quoting TEX. TRANSP. CODE ANN. § 504.005(a) (2015). The Court further noted that pursuant to Texas Code §504.002(3), "Texas own[ed] the designs on its license plates, including the designs that Texas adopt[ed] on the basis of proposals made by private individuals and organizations." *Id.* at 2248.

253. *Id.* at 2249 (quoting Pleasant Grove v. Summum, 555 U.S. 460, 473 (2009)).

254. *Id.; see also id.* at 2251 ("This [final approval] authority mitigates against a determination that Texas has created a public forum.").

authority simply accepts or rejects the proposed ad. Courts should weigh the control factor in favor of a private speech determinate due to the greater degree of control exercised by the applicant.

4. Identity of the Literal Speaker

Finally, courts should determine the identity of the literal speaker. Though the *Walker* Court did not directly weigh the origin of the speech at issue, the literal identity of the speaker is essential to determining whom the speaker is, and subsequently, the speaker's intent in conveying the overall message.[255]

The circuits pre-*Walker* recognized the importance of analyzing the identity of the literal speaker.[256] For example, the Ninth Circuit noted that private organizations controlled the message of a specialty plate and "individual members who [chose] to purchase the plate voluntarily [chose] to disperse that message."[257] Further, the Eighth Circuit found that the literal speaker factor favored the sponsoring organization and the vehicle owner because both chose to submit and display the plate design.[258]

In analyzing the identity of the literal speaker, courts should consider not only the origin of the message, but also the intent in conveyance. For example, in the public transit context, courts should take note of the ad's origin, whether it is sponsored by an individual organization, in partnership with a governmental body, or fully by a government entity. If the advertisement is sponsored solely by an individual organization, or in partnership with a governmental body, courts should weigh the factor in favor of a private speech determination. However, if a transit advertisement is exclusively governmental in nature, the factor should weigh in favor of government speech.

C. Further Danger: Public Transit Advertising Policies Reconceived

In response to the Court's decision in *Walker*, states can now reconceive their transit policies to function more like the specialty license plate policies.

255. Typically, if speech originates with a private speaker, presumably, the speaker intended to convey private speech. On the other hand, if the speech originated with the government, the speech is deemed governmental in nature. *See* Arizona Life Coal. v. Stanton, 515 F.3d 956, 966-67 (9th Cir. 2008).

256. *E.g.,* Roach v. Stouffer, 560 F.3d 860, 867-868 (8th Cir. 2009); *Stanton*, 515 F.3d at 967; Planned Parenthood of South Carolina v. Rose, 361 F.3d 786, 794-95 (4th Cir. 2004); Wells v. City & Cty. of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001).

257. *Stanton*, 515 F.3d at 967.

258. *Roach*, 560 F.3d at 867-868.

For example, according to Texas law, all license plates are issued by the state[259] and all vehicle owners are required to maintain a plate on their vehicle.[260] Texas, by way of the Texas Department of Transportation, owns all designs affixed to its plates, including, those submitted by private individuals and organizations.[261] Further, the state also controls the manner in which vehicle owners can dispose of expired plates.[262]

Additionally, Texas law gives the transportation department approval authority over all design submissions before a proposal can appear on a plate.[263] The department's approval authority extends to "sole control over the design, typeface, color, and alphanumeric pattern for all license plates."[264]

Similarly, the Chicago Transit Authority requires that all proposed transit advertisements be submitted to the authority for initial review.[265] In addition to final approval power, the authority evaluates all submissions, and may suggest any revisions.[266] Further, the transit authority has the discretion to deny any advertisement determined to be noncompliant.[267]

The key policy difference between the license plate program and the transit-advertising program is the state's authority to take ownership of proposed submissions. Currently, the Chicago Transit Authority does not take ownership of the advertisements it approves.[268] However, in light of the Court's decision in *Walker*, state transit authorities have a clear opportunity to rewrite their advertisement policies in preparation for litigation.

VI. Conclusion

It is a foundational First Amendment principle that the government must remain viewpoint neutral when restricting private speech.[269] Even though viewpoint based restrictions involving private speech on government property are presumed unconstitutional, the government speech

259. Tex. Transp. Code Ann. §§504.010; 504.101 (2015).

260. *Id.* § 504.943(a).

261. *Id.* §504.002(3).

262. *Id.* §504.901(c); *see also id.* §504.008(g) (requiring vehicle owners return plates to the State if owners dispose of vehicles or are no longer eligible).

263. *Id.* §504.005(a); *see also* 43 Tex. Admin. Code §§217.45(i)(7)-(8), 217.52(b) (2015).

264. Tex. Transp. Code Ann. §504.005(a).

265. Chi. Transit Bd., Ordinance No. 013-63, Exhibit A, at (III)(A) (May 8, 2013), http://www.transitchicago.com/assets/1/miscellaneous_documents/013-63_Advertising_Policy_and_Ordinance.pdf.

266. *Id.*

267. *Id.* at (III)B and (III)C.

268. *See generally* Chi. Transit Bd., Ordinance No. 013-63.

269. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); *see also* Blocher, *supra* note 3, at 695-96.

doctrine permits the government to act directly contrary to the First Amendment, and silence private speech in reference to its own messages, ideas, subject matter, and content consistent with its own viewpoint.[270]

The Court's most recent government speech doctrine extension in *Walker v. Texas Division, Sons of Confederate Veterans* failed to remedy the current clash between the public forum doctrine and the government speech doctrine, and further created increased confusion regarding which analysis applies when private individuals or organizations speak in conjunction with government property. Thus, continuing to expand the doctrine without a clear test distinguishing between private speech and government speech will result in unpredictable results and clear opportunities for unconstitutional viewpoint restrictions.

Walker is directly at odds with the public forum jurisprudence, specifically *Rosenberger v. Rector & Visitors of University of Virginia* and *Lehman v. Shaker Heights*, and the Court has offered no guidance regarding the distinct similarities between the cases or the programs at issue. The failure to remedy the *Walker* decision with the public forum cases suggests that the Court simply did not agree with the content of the *Walker* speech and used the government speech doctrine to silence a viewpoint it found disagreeable.

The *Walker* extension reinforces the government's ability to argue for a government speech analysis in similar government operated programs. The transit advertising cases are a prime example. Further, the *Walker* holding gives transit authorities the go ahead to reconceive their advertisement policies to mirror the license plate policies, resulting in further speech restrictions.

To remedy the confusion concerning government speech and private speech, and the current danger implicating public transit advertising programs, courts should adopt a concrete test to distinguish between government speech and private speech, consisting of at least four factors: (1) historical use, (2) reasonable observation, (3) the degree of control, and (4) the identity of the literal speaker.

Delineating a government speech test first and foremost safeguards the public forum doctrine and the speech it controls. Secondly, the test functions as a speech protective measure consistent with the viewpoint neutrality principle. The First Amendment, at its core, protects individual speech from government restrictions. Any principle or doctrine act-

270. Blocher, *supra* note 3, at 696; *see generally* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015); Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Garcetti v. Ceballos, 547 U.S. 410 (2006); Johanns Livestock Mktg. Ass'n, 544 U.S. 550 (2005); Rust v. Sullivan, 500 U.S. 173 (1991).

ing inherently opposite from that foundation warrants a predictable and definite analysis.