A PURPOSE-AND-EFFECT TEST TO LIMIT THE EXPANSION OF THE GOVERNMENT SPEECH DOCTRINE

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The First Amendment of the Constitution prohibits the government from passing any law that limits the freedom of private speech. However, in order to effectively govern, the state must communicate its policies and messages in ways that may not leave room for competing views. Since the early 1990s, the Supreme Court has articulated and developed the doctrine of government speech: when the government speaks, it is exempt from the First Amendment.

The doctrine's use and expansion has its detractors. Many are worried that government speech should only be protected when it would be clear to a reasonable listener that the government is indeed the speaker. Otherwise, government speech may be used to manipulate the marketplace of ideas, either by placing a thumb on the scale of a favored viewpoint or silencing an unpopular one.

In Walker v. Texas Division, Sons of Confederate Veterans, *the Supreme Court held that a state license plate scheme where private individuals submitted designs to be printed on specialty license plates was government speech, so denial of certain designs based on their content did not violate the Constitution. The Court applied a three-part test that has been inconsistently applied in lower courts, setting the stage for an expansion of government speech with real consequences.*

I argue in this Comment that the time to abandon the Walker *test is now. The Court should adopt a test that requires the government to show both a purpose and an effect:*

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that the government intends the speech at issue to be its own and that a reasonable observer would attribute the speech to the government. Such a test is logical in government speech cases and would do much to limit the doctrine's spread.

INTRODUCTION

The concept of the marketplace of ideas may bring to mind a bustling bazaar populated by noisy speakers hawking information and thoughts to the discerning (and not so discerning) listener. The metaphor aptly describes how the modern individual is constantly barraged with information from an astonishing array of sources, which all demand attention. But, like the animating principal of laissez-faire capitalism, a truly free marketplace allows the best and wisest ideas to flourish.

Indeed, the Supreme Court has recognized that one of the purposes of the First Amendment is to protect the marketplace of ideas by limiting the government's ability to regulate what may be expressed, how, and by whom:

> [The First Amendment is] designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[1]

This principle has played out over the history of our country: the individual speaks, the government sometimes regulates that speech, and courts analyze the regulation to ensure it complies with the First Amendment.[2] The Supreme Court recognizes that democracy is predicated on an open exchange of ideas, which the First Amendment protects by allowing free expression.[3] This body of law promotes robust discussion and dissemination of ideas by proscribing government intrusion upon the marketplace of ideas.[4] Government actions that hamper individual free expression satisfy the First Amendment only in limited circumstances.[5]

However, when the government is itself the speaker, the Court does not consider that speech to constitute a regulation of private speech. Rather, the government is seen as just another merchant in the marketplace of ideas (albeit one subject

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1. Cohen v. California, 403 U.S. 24, 24 (1971); *see also* Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 353 (2010) ("At the founding [of the United States], speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge."); N.Y. Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.").

2. *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 3–18 (4th ed. 2012).

3. *Cohen*, 403 U.S. at 24.

4. *Id.*

5. For example, laws barring defamatory statements have traditionally been upheld as not violating the First Amendment. STONE, *supra* note 2, at 154–55.

not only to market forces but also to the political process).[6] Speeches by elected officials on matters of public policy, empirical studies conducted by bureaucratic agencies, and taxpayer-subsidized public service announcements are necessary to convey the government's messages.[7] But what happens when that expression either drowns out or advocates for a specific viewpoint? In a line of cases dating back to the early 1990s, the Supreme Court has sketched the outlines of the "recently minted government speech doctrine,"[8] which exempts government speech from First Amendment scrutiny.[9] For example, when the National Institute of Health issues a report on the benefits of vaccinating children, the First Amendment does not require that it publish materials warning of vaccinations' dangers. In these cases, the government competes for listeners with the other merchants in the marketplace; because the marketplace is thought to be self-regulating, judicial scrutiny is neither warranted nor appropriate.[10] The most difficult question is often how to tell when the government is the one doing the speaking[11]: what is otherwise government speech could also be viewed as facilitating or funding the speech of private citizens.

Only recently has the Court begun to introduce useful tools for determining when the government is speaking rather than merely establishing a forum for private expression. This includes a three-part analysis examining how the media and the

6. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary.").

7. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 992 (2004).

8. Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

9. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

10. Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 HASTINGS CONST. L.Q. 37, 49–51 (2016) (discussing the competing entries of speech in *Finley*, 524 U.S. at 598).

11. Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1765 (2016) ("The limits of the government speech doctrine remain murky, however, because the Supreme Court's case law applying the doctrine is limited, and the Supreme Court has never articulated a clear standard for when the doctrine applies.").

message relates to the government.[12] In *Walker v. Sons of Confederate Veterans, Texas Division, Inc.*, the Court applied this analysis as a test, holding that a specialty license plate approval scheme was government speech because Texas had a long history of using plates to distribute government messages, the plates were linked to the state in the public's mind, and the state exercised control over the messages on the plates by having final approval of their content.[13]

However, many commentators (and four Justices on the *Walker* Court) worry that this holding unwisely overexpands government speech, with the likely effect that the precedent will be used to defend government actions that frustrate the purposes of the First Amendment.[14] I will argue that a narrower and more principled test should be developed to define government speech in a way that protects core free speech principles.

This Comment examines the evolution of the government speech doctrine and identifies how *Walker* fits into overall First Amendment case law. By expanding the universe of what may be considered government speech, the Court has created an exception that threatens to swallow free speech rules. *Walker* has the potential to reshape existing relationships between government actors and the public and—if not restrained—could limit the marketplace of ideas so that it is neither free nor robust.

Section I.A discusses the history and development of the government speech doctrine, while Section I.B specifically dissects the *Walker* decision. Part II discusses the feared consequences of an expanded application of *Walker*, as well as lower court rulings that suggest such a broad application is taking place. Section III.A argues that *Walker* is ripe to be limited and that such a limitation will signal a reversal in the expansion of the government speech doctrine. Finally, Section III.B suggests

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12. *Summum*, 555 U.S. at 471–74 (finding monuments in a public park are government speech because they: (i) are closely related to the government in the public's mind; (ii) have traditionally been used to display government messages; and (iii) were adopted by the city when the city exercised "selected receptivity").

13. 135 S. Ct. 2239 (2015).

14. *Id.* at 2254 (Alito, J., dissenting) ("The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing."); *see also* Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1197 (2016); Strasser, *supra* note 10, at 55.

that a purpose-and-effect test would best balance the government's interests in expressing necessary information about legitimate actions and policies while protecting individual free speech interests.

I. *WALKER*'S PLACE IN THE DEVELOPMENT OF THE GOVERNMENT SPEECH DOCTRINE

According to Justice Black, the First Amendment acts as a "constitutional safeguard" by protecting private citizens' free speech from restriction by state and federal actors.[15] Its purpose is to prevent the government from impinging on the free marketplace of ideas that enhances citizens' political decision-making, protects individual autonomy, and serves as a check on government.[16] The First Amendment is understood to provide "that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems."[17] This high purpose has led the Court to presume that government regulations of private speech are impermissible when based on that speech's content.[18]

For example, government regulations on the time, place, and manner of speech in areas designated as public fora are afforded rational basis scrutiny,[19] but regulations on the content of speech are subject to strict scrutiny: the government interest must be compelling and the restriction narrowly tailored to achieve that interest.[20] Strict scrutiny is such an onerous standard that commentators have long stated it is "strict in

15. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960).

16. *See* STONE *supra* note 2, at 3–18.

17. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3.

18. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

19. Public fora are those places that since "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939). Designated public fora are "intentionally designated . . . place[s] or means of communication." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

20. *Cornelius*, 473 U.S. at 800 ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.").

theory, fatal in fact"—meaning few, if any, regulations survive.[21] Time, place, and manner restrictions are more easily accepted because they preserve the public "peace and good order," while content-based restrictions are less acceptable because they abridge or deny the diversity of viewpoints the First Amendment seeks to protect.[22] However, public forum analysis only applies to government restrictions on private speech.[23] This suspicion of government action is absent from the government speech doctrine, under which the government may say what it pleases.[24]

Since the early 1990s, the Supreme Court has explicitly recognized that the government may—in fact must—express its own views and opinions in order to effectively govern.[25] This is true even where the government's message favors one viewpoint over another and does not equally endorse its critic.[26] The fact that the doctrine is "relatively new, and correspondingly imprecise"[27] suggests that the struggle for courts is less about the assumption that the government may express itself, and more about how to determine when the government is actually speaking (rather than opening a forum for private expression).[28] The Court first wrestled with the doctrine in cases involving viewpoints expressed through government-funded programs, then explored how it applies to more traditional media where the message is not directly attributable to the government, and most recently examined situations where the government's message includes input from private parties.

Section A of this Part examines the development of the government speech doctrine, from its earliest cases up until the *Walker* decision. Section B explores the immediate run-up to

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21. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

22. *Hague*, 307 U.S. at 515–16.

23. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

24. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998).

25. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, government has to say something . . . .").

26. *See* Strasser, *supra* note 10, at 55.

27. *Johanns*, 544 U.S. at 574 (Souter, J., dissenting).

28. *Summum*, 555 U.S. at 470 ("There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech . . . .").

Walker and analyzes the decision's three-part test for determining government speech. Section B also analyzes the decision's dissenting opinion.

A. The Development of the Government Speech Doctrine

The Court first wrestled with government speech in cases where public agencies expended funds that supported private individuals or groups.[29] These cases identified the tension between, on the one hand, the pragmatic need of the government to convey its own messages[30] by funding private groups with whom it agrees, and on the other hand, a fear that the government will exclusively support its favored viewpoint, thus impermissibly skewing the marketplace of ideas.[31]

The origin of the government speech doctrine is typically traced back to *Rust v. Sullivan*, decided in 1991.[32] In *Rust*, the Court considered a First Amendment challenge to federal regulations that prohibited doctors who accepted certain federal funds from counseling patients on abortion as a family planning method.[33] Although the Court never used the term "government speech doctrine," or any variation on the phrase, it held that the government need not support messages that compete with its own viewpoint.[34]

Four years later, the Court revisited government funding used for expressive activities in *Rosenberger v. Rector and Visi-*

29. Rust v. Sullivan, 500 U.S. 173, 203 (1991) (holding that a federal health care funds' condition that doctors agree not to counsel abortion did not violate the First Amendment); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 852 (1995) (holding that a university program funding student groups violated the First Amendment by denying funding to a Christian organization).

30. *Rust*, 500 U.S. at 193 (stating that a government may permissibly determine when to express one viewpoint at the expense of another).

31. *See id.* at 192 (noting petitioners' position: "Because [government funding] continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint." (internal quotations and citation omitted)).

32. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904 (2010) (identifying *Rust* as the first case in which the Supreme Court began "sketch[ing] out" the government speech doctrine).

33. *Rust*, 500 U.S. at 191–92.

34. *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.").

tors of the University of Virginia.[35] In that case, a public university established a student activity fund with which to support "activities that are related to the academic educational purpose of the University."[36] The Court held that the University's decision not to reimburse a religious student group's printing costs impermissibly violated the First Amendment because the University had opened a forum for private speech and impermissibly discriminated based on the viewpoint of the speaker.[37] In contrast, because the funds in *Rust* were determined to support the government's own viewpoint, their expenditure was not found to discriminate against any private speaker, so there could be no First Amendment violation.[38] While the *Rosenberger* Court did not find the student activity fund to be government speech, it did say that when "the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[39] In other words, where the government is using a private group to distribute the government's message, it can control how the message is distributed.

In *Johanns v. Livestock Marketing Association*, just such a situation presented itself—with the added twist that the actual speech was not readily attributable to a government actor.[40] In that case, the USDA ordered that proceeds from a per-cattle tax be passed to a board representing the beef industry.[41] The board created promotional and advertising materials that the USDA approved prior to publication.[42] The advertisements were identified as coming from "America's Beef Producers" or with a branded logo, neither of which disclosed the USDA's involvement with the communications.[43] Some beef producers who wanted the Board to promote alternative messages sued under the theory that by expressing only the single message, the board was violating the other producers' free speech

35. 515 U.S. 819 (1995).
36. *Id.* at 824 (internal quotations omitted).
37. *Id.* at 836–37.
38. *Rust,* 500 U.S. 173.
39. *Rosenberger*, 515 U.S. at 833.
40. 544 U.S. 550 (2005).
41. *Id.* at 553–54.
42. *Id.* at 554.
43. *Id.* at 555.

rights.[44] The Court, however, held that the advertisements were government speech because the USDA Secretary and Congress gave general guidelines for the advertisements, they were funded by government revenue, and the USDA had final approval over the messaging.[45] Ultimately, the advertisements were government speech because the "message of the promotional campaigns [was] effectively controlled by the Federal Government itself."[46]

More recently, the Court has applied the doctrine to speech proposed or crafted by private parties and facilitated by the government, for instance by displaying the message on a government medium. In *Pleasant Grove City, Utah v. Summum*, a town rejected the donation of a monument conveying religious text in a public park even though the park already had a privately donated statue of the Ten Commandments.[47] The Court did not apply a traditional First Amendment forum test.[48] Instead, the Justices unanimously held that curation of privately donated monuments in the park was the town's own speech and thus did not violate the First Amendment rights of the donor.[49] The Court relied on the fact that monuments have historically been used by governments to express their messages, that the town exercised "selected receptivity" to curate its message, and that the public closely identifies city parks with the cities that own them.[50] Importantly, the holding recognized that the doctrine could apply where private parties express the government's message: "[a] government entity may exercise [the] same freedom to express its views [even] when it receives assistance from private sources for the purpose of delivering a government-controlled message."[51]

Summum is also notable for its concurring opinions, which identify some of the difficulties in creating a workable test for

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44. *Id.* at 556.
45. *Id.* at 560–63.
46. *Id.* at 560.
47. 555 U.S. 460 (2009). It is worth noting that because no Establishment Clause issue was raised on appeal, the Court did not rule on it. *Id.* at 482 (Scalia, J., concurring).
48. Private speech on streets and in parks may only be regulated as to its time, place, or manner, while content regulations must pass strict scrutiny. *See supra* Part I.
49. *Summum*, 555 U.S. at 481.
50. *Id.* at 471–72.
51. *Id.* at 468.

determining when the government is speaking. Justice Stevens was unpersuaded that the verdict turned on government speech and worried that the "recently minted" doctrine was itself "of doubtful merit."[52] He viewed the situation simply as a property owner rejecting a message that it did not want to endorse.[53] He also wrote to limit the holding,[54] focusing on the salient circumstances of the town's role as landowner and the monument's permanence.[55]

Justice Breyer was more interested in the harm to free speech principles protected by the First Amendment. Rejecting both forum analysis and the government speech doctrine, he thought the Court should instead ask "whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."[56] He contended that this simple balancing test would further the purposes of the First Amendment better than the majority's "rigid" categorical approach because its flexibility goes beyond strict labels.[57]

The final concurrence of note, authored by Justice Souter, echoed Justice Breyer's concurrence in that Souter warned against moving too quickly and broadening the government speech doctrine too greatly.[58] Souter, however, was concerned with identifying the message's speaker and the difficulty of making such a determination.[59] He would have held that "the government should lose when the character of the speech is at issue and its governmental nature has not been made clear."[60] He proposed using a reasonable observer test to determine whether or not the speech at issue is clear: whether a "reason-

52. *Id.* at 481 (Stevens, J., concurring).

53. *Id.*

54. *Id.* ("The Court's opinion in this case signals no expansion of that doctrine.").

55. *Id.* ("This case involves a property owner's rejection of an offer to place a permanent display on its land.").

56. *Id.* at 484 (Breyer, J., concurring).

57. *Id.*

58. *Id.* at 485 (Souter, J., concurring) ("Because the government speech doctrine, as Justice Stevens notes, . . . is 'recently minted,' it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." (citations omitted)).

59. *Id.* ("I agree with the Court that the Ten Commandments monument is government speech . . . . I have qualms, however, about accepting the position that public monuments are government speech categorically.").

60. *Id.* (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 577 (2005) (Souter, J., dissenting)).

able and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."[61]

These concurrences, while supporting the Court's holding, signal a distrust of the underlying reasoning and highlight the Justices' divergent thinking on how government speech should be identified. Both Souter and Breyer feared an expansion of the doctrine, with Souter explicitly stating that an overly broad government speech doctrine would make it easy for the government to pick and choose among viewpoints, supporting those it favors and suppressing those it does not.[62]

At the time the Court announced its three-pronged analysis in *Summum*, it had also developed other tests to decide if speech was governmental or not;[63] it remained unclear exactly which test should be applied in which situation.[64] In *Walker v. Texas Division, Sons of Confederate Veterans*,[65] discussed in the next Section, the Court purported to resolve this inconsistency and confusion.

B. Walker *and the Continued Expansion of the Government Speech Doctrine*

Summum did not settle how to determine whether speech is attributable to the government or private individuals; government speech cases continued to be litigated, pushing on the edges of the doctrine.[66] Specialty license plates were particu-

61. *Id.* at 487.

62. *Id.* (Souter, J., concurring) ("[I]t would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.").

63. *See infra* Section I.B.1.

64. *See, e.g.*, Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dept. of Motor Vehicles, 305 F.3d 610, 618 (4th Cir. 2002) ("No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.").

65. 135 S. Ct. 2239 (2015).

66. *See, e.g.*, Freedom from Religion Found., Inc. v. City of Warren, 707 F.3d 686 (6th Cir. 2013) (holding that a city holiday display containing pieces purchased by the city as well as donated by private individuals and erected on city property was government speech); Sutliffe v. Epping Sch. Dist., 584 F.3d 314 (1st Cir. 2009) (holding that a town official's refusal to link to a group's website from the town's website was government speech and did not violate the First Amendment).

larly problematic for numerous circuit courts, leading to a circuit split over whether license plates were indeed government speech,[67] and what test should be used in order to make that determination.[68] Ultimately the Court in *Walker* resolved the circuit split and solidified the test from *Summum* as the definitive government-speech test.

1. The Cases Leading Up to *Walker*

The Fourth Circuit took a stab at the issue in *Planned Parenthood of South Carolina v. Rose*.[69] There, a state statute authorized the production and sale of license plates imprinted with specialty designs.[70] Nonprofit groups could, with a large enough order, submit designs to be printed on license plates for distribution to their members.[71] A government-run board had final approval authority over the design.[72] A separate statute authorized the printing of license plates with the phrase "Choose Life" inscribed on them for sale to the general public.[73] Pro-choice advocates challenged the scheme as an impermissible viewpoint restriction under the First Amendment.[74] The court rendered a First Amendment forum analysis inapplicable when it used a four-factor test to determine if the messages on the license plates constituted government speech: (1) whether the central purpose of the program in which the speech occurs is to express a government message; (2) the degree of editorial control exercised by the government, relative to private entities, over the speech's content; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears ultimate responsibility for the speech's content.[75] The

67. *See, e.g.*, Planned Parenthood of S.C. v. Rose, 361 F.3d 786 (4th Cir. 2004) (holding that specialty license plates are private speech); *cf.* ACLU v. Bredesen, 441 F.3d 370 (finding specialty plates to convey government speech).

68. *See, e.g.*, *Sons of Confederate Veterans, Inc.*, 288 F.3d at 618 (using a four-factor test to determine whether speech is government or private); *cf.* Tex. Division, Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 397–98 (5th Cir. 2014) (applying a reasonable observer test), *rev'd sub nom.* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

69. 361 F.3d 786.

70. *Id.* at 788.

71. *Id.*

72. *Id.*

73. *Id.* at 787.

74. *Id.* at 790.

75. *Id.* at 792–93.

Fourth Circuit held that the license plate message was private speech because such messages are more closely associated with the driver than the government, and the driver must affirmatively choose a specialty plate.[76] The scheme was therefore an impermissible content-based restriction.[77]

Conversely, a Tennessee statute making "Choose Life" plates available but not pro-choice ones was challenged in *ACLU v. Bredesen*.[78] The Sixth Circuit, relying on *Johanns*, held that the specialty plate program was government speech because the statute "determines the overarching message and [the state] approves every word on such plates."[79] Whereas the Fourth Circuit in *Rose* found that content-based regulation of license plates as a form of private speech was impermissible, the *Bredesen* court's holding meant that the failure to provide plates with a pro-choice message was not a First Amendment violation.[80]

Finally, the Fifth Circuit heard *Texas Division, Sons of Confederate Veterans, Inc. v. Vandergriff*,[81] the case that became *Walker* upon grant of certiorari.[82] Texas law allowed the state to create a specialty license plate on its own or to solicit designs from private parties, which would be printed and sold if approved by a board of the Department of Motor Vehicles.[83] Accepted designs included soft drink brand logos, trade organization messages, and professional sports team mascots.[84] A private group sued when the board rejected its Confederate battle flag design for being offensive.[85] The group claimed that the determination violated the First Amendment.[86] The Fifth Circuit Court of Appeals considered and rejected the test developed in *Summum* for determining if the license plates were

76. *Id.* at 794 ("[N]o one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint.").

77. *Id.* at 794, 800.

78. 441 F.3d 370, 371–72 (6th Cir. 2006).

79. *Id.* at 375.

80. *Id.*

81. 759 F.3d 388 (5th Cir. 2014).

82. 135 S. Ct. 752 (2014).

83. *Vandergriff*, 759 F.3d at 390.

84. Walker v. Tex. Division, Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2255 (2015).

85. *Vandergriff*, 759 F.3d at 391.

86. *Id.*

government or private speech.[87] It differentiated the cases by focusing on the permanence of the monuments in *Summum* and the long history of monuments conveying government messages.[88] Ultimately, the court applied the reasonable observer test advocated by Justice Souter in his *Summum* concurrence.[89] The court determined that a reasonable observer would associate the speech with the driver and not the state. Such messages, therefore, were private speech, and the state's refusal to print the Confederate flag plates was impermissible viewpoint discrimination in violation of the First Amendment.[90]

2. *Walker* at the Supreme Court

This rash of cases exposed a circuit split as to whether or not messages on license plates constitute government speech. The Fourth and Fifth Circuits found such messages to be private speech,[91] whereas the Sixth Circuit found them to be government speech.[92] Moreover, all three circuit courts used different tests in determining whether the speech was government or private in nature.[93] The Supreme Court settled the split with a 5–4 decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[94]

Hearing the case from *Vandergriff* on certiorari,[95] the Court distinguished Texas's program from advertisements on public transit because that advertising space is traditionally associated with private speech and bears "no indicia that the speech was owned or conveyed by the government."[96] Also, the

87. *Id.* at 394–95.

88. *Id.*

89. Pleasant Grove City 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 . . . .").

90. *Vandergriff*, 759 F.3d at 396, 397–98.

91. *Vandergriff*, 759 F.3d 388; Planned Parenthood of S.C. v. Rose, 361 F.3d 786 (4th Cir. 2004).

92. ACLU v. Bredesen, 441 F.3d 370 (6th Cir. 2006).

93. *Rose*, 361 F.3d at 792–93 (applying the four-factor test); *Bredesen*, 441 F.3d at 376 (applying the *Johanns* control test); *Vandergriff*, 759 F.3d at 394 (applying the reasonable observer test).

94. 135 S. Ct. 2239 (2015).

95. *Id.*

96. *Id.* at 2252.

fact that Texas charged a fee to display the designs on license plates was not dispositive because "the existence of government profit alone is insufficient to trigger forum analysis."[97] Ultimately, the Court held that restricting vanity plate designs was permissible as government speech using the test from *Summum*: (1) whether the medium of expression has traditionally been used to express government messages, (2) whether the medium is "closely identified in the public mind" with the state, and (3) whether the state maintains "direct control" and "final approval authority" over the message.[98]

When it applied the three-part *Summum* test, the Court reached the following conclusions. First, the Court recognized the long history of states using license plates to express messages of their choice.[99] Texas, specifically, had begun including the Lone Star emblem as early as 1919.[100] Second, the Court noted that "license plate designs are often closely identified in the public mind with the State."[101] Texas requires every vehicle to display a plate, its Department of Motor Vehicles issues the plates, and the word "TEXAS" is stamped on each one.[102] Finally, the Court determined that Texas law giving the Department of Motor Vehicles, through a board, final approval authority over license plate designs meant that the state "effectively controlled" the messages expressed on the plates.[103] Application of the *Summum* test convinced the Court that the license plates were government speech, as opposed to the creation of a public forum for private speech or mixed government and private speech.[104]

A few things about the choice to use the test developed in *Summum* are interesting to note. First, the *Walker* Court did not explain exactly why it chose to use this test. It also never explained why the appellate court's reasoning was incorrect or flawed. It simply applied the test from *Summum*. Finally, it neither explicitly endorsed the test developed in *Summum* for all government-speech cases, nor explicitly rejected any of the other tests used in circuit court cases or developed in the

97. *Id.*
98. *Id.* at 2248–49.
99. *Id.*
100. *Id.*
101. *Id.* (internal quotations and citations omitted).
102. *Id.*
103. *Id.*
104. *Id.* at 2249–50.

Summum concurrences. This simultaneous non-endorsement and non-rejection is surprising because the *Walker* decision was penned by Justice Breyer. As noted above, his concurrence in *Summum* itself seemed skeptical of an expansive government-speech rule and favored weighing the harm to the aggrieved party's ability to express its viewpoint against the furtherance of the government's legitimate interest.[105]

The dissent is also noteworthy in that it full-throatedly sounded the alarm about the potential pitfalls of an expanded government speech doctrine.[106] Although Justice Alito recognized the legitimate need for the government to be able to speak, he advocated for a reasonable person test.[107] He was skeptical that the Texas specialty license plate would pass such a test,[108] likening the specialty plates to "little mobile billboards."[109] His pragmatic worry was that such a "capacious understanding of government speech takes a large and painful bite out of the First Amendment"[110] and invites government actors to control speech or suppress unpopular viewpoints through the use of media that are ostensibly controlled by the government but primarily used by private individuals.[111] Additionally, Alito argued that use of the test from *Summum* was improper because the facts in *Walker* were so different: in *Summum*, the monuments were permanently affixed in the park and there was a finite amount of space, which significantly limited the number of monuments that could be erected; whereas in *Walker*, license plates were meant to be temporary and were only limited by the number of vehicles registered.[112]

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105. Pleasant Grove City v. Summum, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).

106. *Walker*, 135 S. Ct. at 2254 (Alito, J., dissenting) ("[The decision] establishes a precedent that threatens private speech that government finds displeasing.").

107. *Id.* at 2255.

108. *Id.* (Alito, J., dissenting) ("Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. . . . [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?").

109. *Id.* at 2256.

110. *Id.* at 2255.

111. *Id.* at 2255–56 (Alito, J., dissenting) (discussing the negative effects of extending the government speech doctrine to state-owned roadside billboards or electronic messaging sign and college bulletin boards).

112. *Id*. at 2261.

Alito also squarely took aim at the majority's application of the test developed in *Summum*. With regard to the first prong, which looks at the history of government use of the media to express its message, Alito argued that there is no longstanding history of governments using license plates to communicate the types of messages approved by the Texas program.[113] With regard to the final prong, which examines the level of government control over the message's content, he argued that Texas never really had effective control over the license plate messages[114]: there was scant evidence that any other license plate had been rejected because of its content in the entire history of the program.[115] Regardless of the test used, Justice Alito's cautious approach to the government speech doctrine reflects his fear that an overexpansion could lead to government censorship of individual viewpoints.[116]

Since *Walker* was decided, courts have adopted the *Walker* test in several government speech cases.[117] Many commentators believe that Justice Alito's fears are being realized, namely that the doctrine will be used to subvert the purpose of the First Amendment's free speech protections.[118] The next Part will explore how government speech has expanded and how the *Walker* test is being used to facilitate this expansion.[119]

II. SUBSEQUENT APPLICATION OF THE *WALKER* TEST AND THE DANGERS OF AN OVER-EXPANSIVE GOVERNMENT SPEECH DOCTRINE

In the short time since the Court decided *Walker*, several cases raising government speech issues have been litigated, many with circumstances novel to government speech jurispru-

113. *Id.* at 2257 ("It was not until 1989 that anything that might be considered a message was featured regularly on Texas plates.").

114. *Id.* at 2260 (Alito, J., dissenting) ("The Texas specialty plate program also does not exhibit the 'selective receptivity' present in *Summum*. To the contrary, Texas's program is *not* selective by design.").

115. *Id.* (Alito, J., dissenting) ("Pressed to come up with any evidence that the State has exercised 'selective receptivity,' Texas (and the Court) rely primarily on sketchy information not contained in the record.").

116. *See id.* at 2254.

117. *See infra* Section II.A.

118. *See infra* Section II.B.

119. Subsequent cases and academic literature have called this test both the *Summum* test and the *Walker* test. I use the term "*Walker* test" throughout the rest of this Comment.

dence.[120] These cases show a worrisome trend toward finding government speech in any situation where there is a message and *some* government involvement.[121] Section II.A will explore these cases with an eye toward how courts have applied the *Walker* test to expand the government speech doctrine. Section II.B catalogs the potential harms that could result from such an expanded doctrine.

A. Application of the Walker *Test in Subsequent Government Speech Cases*

Since *Walker*, there has been continued litigation about when a message is government speech and when it is private speech. While not all cases have expanded the government speech doctrine to new media, many have.[122] Additionally, the lower courts are applying the test inconsistently by emphasizing or dropping its different prongs.[123]

The only case citing *Walker* to make it to the Supreme Court is *Matal v. Tam*, which found federally issued trademarks not to be government speech.[124] In *Matal*, the Court invalidated parts of the Lanham Act[125] that prohibit "the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead.'"[126] A band sued after having their trademark application rejected due to the offensive nature of their name.[127] In an opinion written by Justice Alito, the Court held that the content of trademarks issued by the Patent and Trademark Office is not government speech, and therefore the disparagement clause enabled impermissible viewpoint discrimination.[128] In doing so, the Court distinguished the trademarking scheme from the

120. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1760 (2017) (holding that trademarks are not government speech); *see also* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1075 (11th Cir. 2015) (using the *Walker* test to find sponsors' banners hung on school fences to be government speech).

121. *See infra* Section II.A.

122. *See, e.g.*, Higher Soc'y of Ind. v. Tippecanoe Cty., 858 F.3d 1113, 1118 (7th Cir. 2017); Vista-Graphics, Inc. v. Va. Dep't of Transp., 682 Fed. App'x 231, 236–37 (2d Cir. 2017); *Mech*, 806 F.3d at 1074–75.

123. *See infra* Section III.A.

124. 137 S. Ct. at 1760.

125. *Id.* at 1765.

126. *Id.* at 1751 (quoting 15 U.S.C. § 1052(a) (2012)).

127. *Id.*

128. *Id.* at 1758, 1763.

Beef Board advertisements in *Johanns* and the town's monument curation in *Summum*.[129] The Court also distinguished the case from *Walker*, finding that *Walker* "likely marks the outer bounds of the government speech doctrine."[130] The Court relied on the fact that the Patent Trademark Office itself had made clear that a trademark is not a mark of government approval and that the facts fail the *Walker* test.[131] It is notable that the Court applied the *Walker* test at all, given the difference between government-issued trademarks and monuments in a public park or state-issued specialty license plates.

On appeal, the Eleventh Circuit applied the *Walker* test as a balancing test to find that banners hung on school fences were government speech in *Mech v. School Board of Palm Beach County*.[132] There, the school district had instituted a program to hang from school fences banners that recognized sponsors of school programs.[133] The program policy gave the schools discretion in selecting which banners to display and also expressly provided that this was not an advertisement program because any payment received by the schools would be considered a donation.[134] A sponsor sued when his banner—which displayed information about his math tutoring business—was removed after parents discovered his former occupation as a producer of pornographic materials.[135] The Eleventh Circuit applied the three-part *Walker* test. First, the court found that there was not a long history of using school fences to display government messages; but it then concluded that such a finding was not strictly required in identifying government speech.[136] Second, the court held that the school's endorsement of the message closely associated it with the school in the public's mind. Specifically, the court observed that there was an approval process for the banners, they were hung on school property, and they were printed in school colors with state-

129. *Id.* at 1759.
130. *Id.* at 1760.
131. *Id.* at 1759–60.
132. 806 F.3d 1070 (11th Cir. 2015).
133. *Id.* at 1072–73.
134. *Id.* at 1072.
135. *Id.* at 1072–73.
136. *Id.* at 1075–76 ("The absence of historical evidence weighs in Mech's favor, but it is not decisive. A medium that has long communicated government messages is more likely to be government speech, but a long historical pedigree is not a *prerequisite* for government speech." (internal citations omitted)).

ments that the sponsors were partners of the school.[137] Finally, the court found that the school had control over the message due to its uniform design requirement and final approval power over all banners.[138]

Despite the finding that such banners have not long been used to express school messages, the court held that the final two factors alone weighed heavily enough to find that the banners were indeed government speech and the school could permissibly regulate the signs' content.[139] In other words, the court de-emphasized the history prong of the *Walker* test, which relieved the government of some of the burden to show that the speech was, in fact, theirs.[140]

Conversely, the Second Circuit held that advertisements at highway rest stops are government speech in *Vista-Graphics, Inc. v. Virginia Department of Transportation*.[141] There, Virginia outsourced management of advertisements at rest stops and welcome areas to a private firm.[142] Using the *Walker* test, the court found that rest center and welcome area materials had long been used to "disseminate information to visitors," the Commonwealth heavily regulated the content of guides displayed there, and "most importantly, the rest areas [were] operated by the Commonwealth and [were] located along public highways," meaning that the public associated rest stop information with the Commonwealth.[143] Therefore, the court held that the advertisements were government speech, rather than the advertisers' messages, and could be regulated.[144]

Not all cases applying the *Walker* test have resulted in a court finding the speech at issue to be government speech. In an appeal from a temporary restraining order, the Seventh Circuit reasoned that events on a county courthouse's grounds were likely to be held a forum for private speech, rather than government speech.[145] Thus, the court held that refusing to grant a permit for a specific group's demonstration was an im-

137. *Id.* at 1077.
138. *Id.* at 1078–79.
139. *Id.* at 1079.
140. *See id.* at 1073, 1079.
141. 682 Fed. App'x 231, 237 (2d Cir. 2017).
142. *Id.* at 233.
143. *Id.* at 236.
144. *Id.* at 237.
145. Higher Soc'y of Ind. v. Tippecanoe Cty., 858 F.3d 1113 (7th Cir. 2017).

permissible viewpoint restriction.[146] The county had closed the courthouse grounds for general expressive purposes but did sponsor its own events there, including an annual arts fair and other ad hoc gatherings.[147]

Applying the *Walker* test, the Seventh Circuit held that the county courthouse grounds were not likely to be considered a medium for expressing government viewpoints.[148] The court found no evidence that the grounds had historically been used by the county to express messages.[149] It also found that the county had no editorial control over the individual speakers at the events it did permit.[150] Finally, it interpreted the second factor of the *Walker* test as a question: would a reasonable observer view the speakers as expressing a government or private message?[151] The court concluded that the nature of the county courthouse grounds as "symbolic public property" would likely lead an observer to conclude that a speaker was using it for her own expression.[152] Although the Seventh Circuit declined to extend the government speech doctrine to this case, it did so based on protesters' traditional use of public open space to voice private messages rather than relying on the *Walker* test.[153]

Despite the implications of an expanded government speech doctrine in *Mech* and *Vista-Graphics*, the Supreme Court denied certiorari in both cases.[154] However, such implications have not escaped the notice of commentators. The next Section will explore why attributing more messages to the gov-

146. *Id.* at 1118 (noting "[i]t may still be possible for the County to accommodate some of its concerns . . . while closing the grounds to Higher Society's rally and not violating the First Amendment").

147. *Id.* at 1115. Ad hoc events included a celebration of the League of Women Voters's longevity, a Fraternal Order of Police event honoring fallen officers, and activities in support of Child Abuse Prevention and Awareness Month.

148. *Id.* at 1117.

149. *Id.* at 1117–18.

150. *Id.* at 1118.

151. *Id.*

152. *Id.* (quoting Higher Soc'y of Ind. v. Tippecanoe Cty., 223 F.Supp.3d 764, 770 (N.D. Ind. 2016)).

153. *Id.* (stating that the public reasonably knows that protesters on government property have a protected right to protest, even if the government does not agree with the message).

154. Vista-Graphics, Inc. v. Va. Dep't of Transp., 682 Fed. App'x 231 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 304 (2017); Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

ernment can harm the marketplace of ideas and, thus, democratic institutions dependent on free speech.

B. The Dangers of an Overly Expansive Government Speech Doctrine

Criticism of *Walker* and an expanded government speech doctrine has come from many people, including legal experts and, as noted, Supreme Court Justices themselves.[155] Much of the fear centers around the confusion of government speech with private speech[156] and the government's ability to restrict viewpoints while crafting its own message.[157] Because the public is unable to discern between the two types of speech and the government is able to advocate one side of a public debate, the free marketplace of ideas is in jeopardy.[158] By limiting the number of viewpoints espoused, government control will dampen the robust trade of viewpoints that allows the best ones to take hold and flourish.

Where the public disagrees with a government message (and realizes it is coming from the government), the political process is the remedy.[159] For example, imagine that the public disagreed with a government policy articulated in a publication or were offended by language used in an elected official's speech. Individuals would be able to apply political pressure by directing their own opinions toward the appropriate entity, lobbying officials to see things their way, or, most directly,

155. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2254 (2015) (Alito, J., dissenting) ("The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing."); *see, e.g.*, Strasser, *supra* note 10, at 55; Papandrea, *supra* note 14.

156. *See* Leslie Gielow Jacobs, *Government Speech Identity Programs: Understanding and Applying the New Walker Test*, 44 PEPP. L. REV. 305, 310 (2017) (noting that the divide between "government-private speech combinations that produce government speech from those that are forums" is "whisper-thin").

157. *See* Strasser, *supra* note 10, at 59–60 ("Doing so might yield great benefits to the government, because constitutional constraints will have been nullified, and the political costs might be negligible, if only because the public might not even know that the government was speaking.").

158. *Id.* at 60.

159. *See* Norton & Citron, *supra* note 32, at 904 ("Political accountability mechanisms such as voting and lobbying then provide the sole recourse for those displeased by their government's expressive choices.").

casting ballots for politicians who will better communicate what the individual wants the government to communicate.[160]

The danger of an overly expansive government speech doctrine is that it will protect too much government action from First Amendment scrutiny.[161] Some of that action may look and feel like the communication of a private individual to a reasonable observer or, conversely, like a private speaker representing the views of the government.[162] But the harms are not directly correlated. If the observer mistakes private speech for public speech, the upshot is that the government entity may receive unwarranted political pressure, which it could easily fix with a clarifying informational campaign.[163] If the observer misattributes government speech to private speakers, however, she would not know to take political action to dispute the speech.[164] This latter point is significant because the government's ability to control the content and viewpoint of private speakers' messages vitiates the concept of the free marketplace of ideas.[165] The First Amendment stands as a guard protecting unpopular ideas or opinions.[166] Because the First Amendment's prohibition of viewpoint and content restrictions do not apply to government speech, the government is free to promote or

160. *Id.*

161. *See* Jacobs, *supra* note 156, at 310.

162. *See* Papandrea, *supra* note 14, at 1229–30.

163. *Id.* at 1219.

164. Norton & Citron, *supra* note 32, at 910 ("If a message's governmental source is obscured, moreover, political accountability mechanisms provide no meaningful safeguard."); *see also* Timothy Zick, Summum*, the Vocality of Public Places, and the Public Forum*, 2010 BYU L. REV. 2203, 2217 (2010) ("If the municipality is not required to identify a particularized message, how are the people to know whether to be offended and object, to agree with the government's sentiment, or simply to ask for clarification?").

165. *See, e.g.*, Papandrea, *supra* note 14, at 1220 ("The expansion of the government speech doctrine to protect the government's interests in misattribution threatens to pervert the marketplace of ideas by allowing the government to prefer some speech over others."); *see also* Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1108–09 (1979) ("In the case of direct government advocacy . . . the dangers to first amendment values inherent in government distortion of the marketplace of ideas would remain.").

166. Roth v. United States, 354 U.S. 476, 514 (1957) (Black, J., dissenting) ("The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence.").

foreclose any viewpoint it wishes.[167] The casual observer in our scenario who mistook government for private speech would not know that the scales were tipped by official endorsement.[168]

Commentators further argue that such power is attractive to government actors and that such an expansion of the government speech doctrine would be widely used.[169] Justice Alito recognized this possibility in his majority opinion in *Summum*: "[there is a] legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."[170] Because the government's mechanism for protecting itself from viewpoint-discrimination attacks is simply to adopt a position as its own, it is no small leap to imagine government actors readily doing so.[171] In such a scenario, the government would be free to enter into public debate, using its sovereign powers either to push a preferred viewpoint or to close off an avenue of expression for a disfavored viewpoint without repercussion. Take, for example, the license plate fight in *Planned Parenthood of South Carolina v. Rose*.[172] The Fourth Circuit's determination that specialty license plates are government speech leaves the state's DMV free to offer only pro-life messages to drivers and to reject any pro-choice plate. If the government did so, the viewing public—unaware that pro-choice viewpoints are simply unable to access the license plate medium—might believe that pro-life supporters vastly outnumber pro-choice supporters. And, because most people would not associate the specialty license plate message with the state, they would not know to

167. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

168. *See* Norton & Citron, *supra* note 32, at 910.

169. *See, e.g.*, Strasser, *supra* note 10, at 59 ("[T]he government will likely be tempted to classify more and more expression as government speech.").

170. Pleasant Grove City v. Summum, 555 U.S. 460, 473 (2009).

171. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2255 (2015) (Alito, J., dissenting) (arguing the negative effects of extending the government speech doctrine to state-owned roadside billboards or electronic messaging sign and college bulletin boards); *see also* Erwin Chemerinsky, *Moving to the Right, Perhaps Sharpley to the Right*, 12 GREEN BAG 413, 426 (2009) ("[*Summum*] seemingly opens the door for the government to engage in viewpoint discrimination in any public forum just by adopting a private message as its own.").

172. Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 787–88 (4th Cir. 2004).

take political action to get the DMV program changed if they disagreed with the government's stance on abortion.

Reigning in *Walker* with a more restrictive test would better tailor the government speech doctrine to only those situations where the government unequivocally intends to be and is unequivocally perceived to be the speaker. This would hold the government politically accountable for its messages while limiting the damage to First Amendment protections—namely, furthering the marketplace of ideas by ensuring that the government does not impermissibly favor or suppress opinions or viewpoints. Such limitation, however, must necessarily come from the Supreme Court. The next Part will discuss alternative tests the Court should consider and why a purpose-and-effect test best protects core First Amendment values.

III. THE SUPREME COURT SHOULD ADOPT A PURPOSE-AND-EFFECT TEST TO LIMIT *WALKER*'S IMPACT ON THE GOVERNMENT SPEECH DOCTRINE

While the government speech doctrine is a relatively new concept, it is already an entrenched addition to First Amendment case law.[173] In fact, the number of government speech cases has increased dramatically over the past decade.[174] Given the rancor about the doctrine's expansion and the lower courts' confused application of the *Walker* test, it is time for the Supreme Court to revisit the subject. Ideally, the Court would scrap the test for the following: government speech is only those communications that the government intends to be received as such, and that a reasonable observer with knowledge of the medium's history and context would perceive to be government speech.

Section III.A will argue that the government speech doctrine needs to be limited—and soon. Section III.B will argue that the *Walker* test should be replaced with a purpose-and-effect test. Such a test would still allow courts to recognize government speech where proper but would limit its harm to free speech interests protected by the First Amendment.

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173. *See supra* Section II.B.

174. As of October 1, 2018, 345 of the 613 federal cases referencing "government speech" in a search of Westlaw's database were published since 2007.

A. The Time Is Ripe for the Supreme Court to Revisit the Government Speech Doctrine

Even though the *Walker* decision was handed down less than four years ago, the Supreme Court should weigh in on the government speech doctrine to limit its expansion. There has been an uptick in the number of government speech cases handed down as governments, citizens, and courts try to make sense of the doctrine's application.[175] Additionally, lower courts have begun inconsistently interpreting the test.[176] While there has not been a full-blown circuit split on a consistent set of facts like the license plate programs that precipitated *Walker*, such a split appears inevitable. Additionally, some fear that communications traditionally held to be fora for private speech will be reinterpreted as government speech.[177] As noted, this would allow governments to hinder expression of viewpoints that they find to be objectionable.[178]

So far, the fears of the doctrine's critics have arguably been realized in government speech holdings. Despite the Supreme Court's ruling in *Matal* that trademarks are not government speech, the holdings in *Vista-Graphics* and *Mech* added new media in which government speech could be voiced through private actors: advertisement brochures at public highway rest stops[179] and banners on school properties displaying the names

175. *See id.* Over half of all federal government speech case decisions have been handed down in the past ten years. As of October 1, 2018, 120 of the 345 cases decided since 2007, or 35 percent, have been handed down since the *Walker* decision in 2015. This likely undercounts the increase in government speech cases filed because cases currently being decided would not appear in the database yet. An interesting empirical study would look at the number of First Amendment cases where the government used the government speech doctrine as a defense and the rate of success for that defense. Such a study, however, is beyond the scope of this Comment.

176. *See, e.g.*, Higher Soc'y of Ind. v. Tippecanoe Cty., 858 F.3d 1113, 1117 (7th Cir. 2017) (interpreting the "closely associated in the public's mind" prong of the test as a reasonable-observer test); *cf.* Mech v. Sch. Bd. of Palm Springs Cty., 806 F.3d 1070, 1077 (11th Cir. 2015) (interpreting the government endorsement as sufficient for close association in the public's mind).

177. *See* Papandrea, *supra* note 14, at 1229–30 (arguing that even though *Walker* specifically stated that public transit advertising was a nonpublic forum, that was mere dicta and application of the *Walker* test would favor viewing it as public speech).

178. *See supra* Section II.B.

179. Vista-Graphics, Inc. v. Va. Dep't of Transp., 682 Fed. App'x 231, 232 (4th Cir. 2017).

and businesses of donors to school programs.[180] Although no nefarious purpose was alleged in *Vista-Graphics*, the school's removal of the sponsor's banner in *Mech* because parents complained of his former occupation is indicative of how government speech decisions can be used to limit unpopular individuals' ability to express their viewpoints.[181]

The circuit courts' cases also demonstrate that the *Walker* test is prone to confusion. For example, in *Mech* the Eleventh Circuit's application of the *Walker* test's second prong asks whether "observers reasonably believe the government has *endorsed* the message."[182] State endorsement of a message, rather than true authorship, reads much more weakly than "closely identified in the public mind."[183] While any flexible standard is necessarily applied differently to different situations, the lower courts' varied approaches are unprincipled and provide no guidance for policymakers and concerned citizens. Trying to apply the test ex ante is a guessing game and would depend entirely on which circuit one happened to be in at any given time.

In *Vista-Graphics*, the Fourth Circuit interpreted the third prong of the test to include heavy regulation as sufficient government control over the message.[184] But neither *Summum* nor *Walker* indicated that regulation of the message alone was adequate to find government speech. In *Summum*, the proposed monument was rejected by the city after the mayor received a letter requesting the rejection.[185] In *Walker*, a statute set guidelines for specialty plate designs but also required a DMV board to review each design for approval or disapproval.[186] Allowing simple regulation to suffice as final approval effectively

180. Mech v. Sch. Bd. of Palm Springs Cty., 806 F.3d 1070, 1071 (11th Cir. 2015).

181. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) ("In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.").

182. *Mech*, 806 F.3d at 1076 (emphasis added).

183. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015) (citing Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)).

184. 682 Fed. App'x at 236 ("Moreover, the gravamen of the plaintiffs' complaint is that the Commonwealth regulates too heavily the content of guides displayed at such centers.").

185. *Summum*, 555 U.S. at 464–65.

186. *Walker*, 135 S. Ct. at 2249 ("The Board must approve every specialty plate design proposal before the design can appear on a Texas plate.").

saps this prong of any probative value: if the speech in question were not regulated or impaired by the government in some way, it would not be litigated as a First Amendment violation in the first place.

B. Ways to Limit Walker*'s Impact on the Doctrine*

There are two tests that could be used to better distinguish where the government is speaking from when it has created a forum for private speech. The first is the simple reasonable observer test, identified by Justice Souter in his concurrence in *Summum*.[187] In Section III.B.1, I describe this test as well as the flaws that make it inadequate for determining government speech. The second is a purpose-and-effect test, which asks whether the government intended the speech to be its own message *and* whether a reasonable observer would view it as such. In Section III.B.2, I propose the adoption of this test and discuss why it is superior to both the *Walker* and reasonable observer tests.

1. The Simple Reasonable Observer Test

The reasonable observer test would ask a court to decide, as a matter of law,[188] to whom a reasonable observer would attribute the speech in question: the private speaker or a government entity.[189] Ostensibly, this test is already baked into the *Walker* test as its second prong, which asks whether the medium is "closely identified in the public mind with the [State]."[190] Indeed, the Seventh Circuit has already transformed this prong explicitly into a reasonable observer test in

187. Pleasant Grove City v. Summum, 555 U.S. 460, 487 (2009) (Souter, J., concurring) ("To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech.").

188. *See, e.g.*, B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1440 ("[T]he perspective of the reasonable person is employed by juries, while the interpretive conclusions of the reasonable observer are to be reached by judges, as a matter of law.").

189. *Summum*, 555 U.S. at 486–87.

190. *Id.* at 472.

Higher Society,[191] suggesting that such an interpretation is fairly logical.

The advantage of the simple reasonable observer test is that some of the Justices have endorsed it as a simple, common-sense solution. As noted, in his concurrence in *Summum*, Justice Souter proposed using the reasonable observer test in government speech cases, with the hope that it would prevent the government speech doctrine's unwanted spread.[192] Justice Alito echoed this argument in his dissent in *Walker*.[193] Support among the Justices suggests that it is, at least, an alternative to the *Walker* test that could have a reasonable chance of being adopted.

Additionally, some of the lower courts have effectively adopted the reasonable observer test by jettisoning the first and third prongs of the *Walker* test when their application would be inconvenient. For example, in *Vista-Graphics* the Fourth Circuit greatly relaxed the third prong's effective-control requirement to simple regulation,[194] and in *Mech* the Eleventh Circuit outright held that while school banners have at most a minimal history of communicating government messages, the strength of the other two prongs warranted a finding of government speech.[195]

There are serious potential problems with a simple reasonable observer test, however. First, it is an overly flexible standard. In many ways, the fight in *Walker* was as simple as Breyer and the majority thinking that specialty license plate messages would be reasonably attributable to the government by an observer,[196] and Justice Alito thinking otherwise.[197] The Court could use different criteria to measure reasonableness for different media, but ultimately that would smack of post

191. Higher Soc'y of Ind. v. Tippecanoe Cty., 858 F.3d 1113, 1118 (7th Cir. 2017).

192. *Summum*, 555 U.S. at 486–87.

193. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2255–56 (2015).

194. Vista-Graphics, Inc. v. Va. Dep't of Transp., 682 Fed. App'x 231, 236 (4th Cir. 2017).

195. Mech v. Sch. Bd. of Palm Springs Cty., 806 F.3d 1070, 1075–76 (11th Cir. 2015).

196. *Walker*, 135 S. Ct. at 2251 ("[W]e reach this conclusion based on the historical context, *observers' reasonable interpretation of the messages conveyed by Texas specialty plates*, and the effective control that the State exerts over the design selection process." (emphasis added)).

197. *Id.* at 2255.

hoc justification rather than a principled test to guide lower courts. Second, because this test is already baked into the three-pronged *Walker* approach, it would not yield a more limited government speech doctrine if applied on its own. If the first and third prongs—history of use for expressing government messages and government control of the message, respectively—are absent from the Court's reasoning, there is even less of an opportunity for the test to effectively rein in expansion of the government speech doctrine. Third, and of most concern, the simple reasonable observer test would find government speech in situations where the government did not intend a message to be its own; this would allow government to impermissibly regulate speech that it had not originally intended through the backdoor and without any political accountability.

For example, in *Vista-Graphics* there was no evidence that the Virginia Department of Transportation affirmatively intended the advertisements in the rest stops be the state's expression; the advertisement program's restrictions on political content and disparaging messages could just as easily have been an attempt at generating the most revenue.[198] Where the government can claim, after the fact, that a speech-regulating program is actually its own speech, there is a very real danger that it will be used to silence disfavored viewpoints, distorting the marketplace of ideas in ways the First Amendment was intended to protect against.

2. A Purpose-and-Effect Test

To more effectively restrict the simple reasonable observer test, I would add a second prong: whether the government intended the speech in question to be its own. I would urge adoption of this test because courts in several government speech cases have already invoked this element implicitly, and it is flexible enough to cover many factual situations while limiting the spread of the doctrine by requiring affirmative government intent to act as the speaker. Such a test would require both that the purpose of the speech is to express a government message and that the effect of the speech would lead a reasonable observer to conclude that it was government speech.

198. *Vista-Graphics*, 682 Fed. App'x at 233.

This purpose-and-effect test borrows liberally from one proposed by Justice O'Connor in a concurring opinion in *Lynch v. Donnelly* to determine if government action violated the Establishment Clause of the First Amendment.[199] The test, as formulated, states that "[t]he purpose prong . . . asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether . . . the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid."[200]

Adapting a purpose-and-effect test to government speech is logical because both the government speech doctrine and Establishment Clause cases look to the impermissible mix of government action and the content of messages.[201] Additionally, changing the *Donnelly* test to require *both* prongs to be satisfied in order to find government speech requires a finding of affirmative intent by the government as well as the perception by its audience that the message is, in fact, conveyed by the government. This pairing would present a higher, but not insurmountable, bar to proving government speech. It would prevent the government from retroactively claiming speech as its own and also make it more difficult for a government actor to surreptitiously pass off its own speech as private speech.

The purpose prong of this test is more useful than the "effective control" prong of the *Walker* test because it is specific to affirmative government action showing an intent to own the speech. This is a more appropriate approach because there are instances in which the government intends to exercise *some* control over messages without intending to adopt them. For instance, public transit authorities clearly intend to have some control over the advertisements they display but do not adopt

199. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

200. *Id.*

201. As noted, programs that result in government speech may permissibly limit viewpoints, while government action that restricts viewpoints expressed by private individuals violates the First Amendment. *See supra* Section I.A. Establishment Clause cases also involve government speech—specifically, government speech that impermissibly advances religion or a particular religion. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (holding that religious invocations for a state's legislative body did not violate the Establishment Clause); Lynch v. Donnelly, 465 U.S. 668 (1984) (holding that a city's nativity scene did not violate the Establishment Clause); McCreary Cty. v. ACLU, 545 U.S. 844 (holding that the posting of the Ten Commandments at a county courthouse violated the Establishment Clause).

them as their own expressions.[202] Without the proactive intent to author or adopt the message, a government authority would have too much leeway to claim effective control after the fact.

Applying this prong to *Summum*, *Walker*, and *Matal* would yield satisfying results. In *Summum*, the city enacted a policy stating that only monuments directly related to the city's history or donated by groups with longstanding ties to the city would be accepted.[203] This strongly implies that the city intended the monuments to act as its own speech. In *Walker*, the statute allowed the DMV board to approve design applications from non-profits.[204] No evidence on the record suggests that the government intended to adopt the approved specialty plate messages as their own, so no express purpose would be found. Finally, in *Matal*, the PTO statute that allows for trademark registration made it clear that no trademark will be denied based on content and that no trademark will be removed except at the request of the owner.[205] This was noted by the Court as showing that the government did not intend for a trademark award to designate the underlying message as the government's own.[206]

The effect prong would simply be the reasonable observer test: asking "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech."[207] As a flexible standard, there is room to fight about whom a reasonable person would find to be the speaker, as the majority and dissent did in *Walker*.[208] There is no other way, however, to allow for private speakers to convey government messages outside of requiring such messages to have an explicit disclaimer that the government is the "true" author of the message.

The effect prong of the test would ensure government transparency in its messaging, even where it explicitly intends for speech to be its own. This would help ensure two things. First, it would prevent government actors from intentionally

202. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 303–04 (1974) (holding that advertisements on city buses constituted a limited public forum).

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

204. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2244–45 (2015).

205. Matal v. Tam, 137 S. Ct. 1744, 1758 (2017).

206. *Id.*

207. *Summum*, 555 U.S. at 487 (Souter, J., concurring).

208. *Walker*, 135 S. Ct. at 2239.

designing scenarios that co-opt private citizens to transmit their messages in a way intended to disguise the government's involvement. Second, it would encourage those government actors to think proactively about how to identify speech in such scenarios as their own. Ideally, the policy, statute, or other statement of intent to own the message's content would include a blueprint on how such communications would be "branded" as government speech.

As the government speech doctrine evolves, hard-and-fast rules for different media may emerge as to what would constitute notice of authorship to a reasonable observer. For example, electronic communications could be required to include an explicit note from the government claiming the content as its own because this would be a cheap and easy disclaimer.[209] While this may be criticized as overkill, such a requirement would be well suited to messages conveyed in emails or on websites.

Adopting a purpose-and-effect test over the *Walker* test or a simple reasonable observer test would provide lower courts with more specific and useful tools. Additionally, the test would better identify when a private actor was truly delivering the government's message. Finally, the purpose-and-effect test would slow the disquieting expansion of the government speech doctrine and incentivize government actors to carefully think through scenarios where private actors may express government speech or where the line becomes blurry.

CONCLUSION

It is clear that the government must speak in order to govern.[210] There are very real dangers, however, when government messages are not clearly attributable to the government. These include backdoor attempts by the government to regulate the types of content and viewpoint restrictions the First Amendment protects against, as well as a lack of political accountability because the public does not know which

209. Norton & Citron, *supra* note 32, at 901 ("The Court's failure to condition the government speech defense on the message's transparent identification as governmental is especially mystifying because the costs of such a requirement are so small when compared to its considerable benefits in ensuring that government remains politically accountable for its expressive choices.").

210. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998).

messages are from the government. Courts have struggled mightily to identify a workable standard that helps them differentiate between government and private speech.

The *Walker* test is, at best, unsatisfying. Applications of the test amount to a confused body of law lacking the clarity of a uniform approach. As more government speech cases find their way to court, the mess will continue to compound. And, if critics are right that *Walker* has expanded the government speech doctrine as drastically as they fear, the test will only embolden government actors to use government speech in ways that harm free speech principles.

While a reasonable observer test appears to rectify the situation, it is so flexible as to be useless. The addition of a purpose requirement—that governments actually intend the message to be their own speech—would provide lower courts with a useful tool to prevent the finding of government speech where the *Walker* test is satisfied but nevertheless does not belong. Additionally, other areas of First Amendment jurisprudence show that the purpose-and-effect test is a logical fit for government speech. Now is the time for the Supreme Court to take a case and apply such a purpose-and-effect test to better clarify the government speech doctrine.