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Sons of Confederate Veterans, Inc.: Specialty License Plates, Confederate Flags and Government Speech

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WALKER V. TEXAS-DIVISION, SONS OF CONFEDERATE VETERANS, INC.: SPECIALTY LICENSE PLATES, CONFEDERATE FLAGS, AND GOVERNMENT SPEECH

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I. INTRODUCTION

In a previous article[1] this author traced the history of the government speech doctrine from the time it first appeared in a concurring decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[2] to its prominent role in *Pleasant Grove City v. Summum*,[3] in which the U.S. Supreme Court ruled that the city's decision to display permanent monuments in a public park is a form of government speech, which is neither subject to scrutiny under the First Amendment, nor a form of expression to which public forum analysis applies. This review demonstrated that the intersection between government speech and the First Amendment is very tricky terrain, because of the inherent difficulties in determining what is government speech, mixed private and government speech, or private speech in a limited public forum.

These difficulties are vividly demonstrated by the recent U.S. Supreme Court decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[4] In *Walker*, the Texas Department of Motor Vehicles Board ("the Board) denied the application the Sons of Confederate Veterans, Texas Division ("SCV"), a nonprofit entity, for a specialty license plate containing the following design:

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[1] Edward J. Schoen & Joseph S. Falchek, Pleasant Grove v. Summum: *Government Speech Takes Center Stage*, 20 S. L J. 1 (2010).

[2] 412 U.S. 94, 139 n. 7 (1973).

[3] 555 U.S. 460 (2009).

[4] 135 S. Ct. 2239 (2015).

APPENDIX

Proposed License Plate Design. App. to Pet. for Cert. 191a.

Under Texas law, a nonprofit organization seeking to sponsor a specialty license plate must submit its proposed design to the Board for its approval. The Board may refuse to create the proposed specialty license plate for a variety of reasons, one of which is whether the license might be offensive to any member of the public. The Board denied SCV's application for the specialty license plate, because public comments showed many members of the public were offended by the design and "a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."[5]

Claiming that its First Amendment rights had been violated and seeking an injunction requiring the Board to approve its specialty license plate design, SCV filed suit against the Board in federal district court, which entered judgment for the Board. The Court of Appeals for the Fifth Circuit, in a divided panel decision, reversed, deciding that specialty license plates are private speech and that the Board's decision constituted viewpoint discrimination prohibited by the First Amendment.[6] In a 5-4 decision, the U.S. Supreme Court reversed the Fifth Circuit, and ruled the issuance of specialty license plates by Texas was government speech and the Board was entitled to refuse to approve and issue SCV's proposed license plate design.[7] Because the U.S. Supreme Court decision in *Summum* played a crucial role in the analysis of both the majority and the minority opinions, it is likely helpful to review that decision preliminarily.

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[5] *Id.* at 2245.
[6] *Id.*
[7] *Id.* at 2253.

II. *PLEASANT GROVE CITY V. SUMMUM*

Pleasant Grove City, Utah, maintains a public park containing about a dozen, permanent, privately donated displays, including a monument containing the Ten Commandments. Summum, a religious organization, petitioned Pleasant Grove City to install a monument containing its religious principles, the "Seven Aphorisms of Summum," and Pleasant Grove City denied the request. Summum filed suit in federal district court, claiming its First Amendment rights were violated. The district court denied Summum's request for a preliminary injunction, and the Court of Appeals for the Tenth Circuit reversed, determining public parks are traditionally regarded as public forums and the exclusion of Summum's proposed monument was unlikely to survive strict scrutiny.[8] Deciding Pleasant Grove City was engaged in government speech when it decided to accept and display monuments in the public park, the U.S. Supreme Court concluded the First Amendment was inapplicable and reversed the Tenth Circuit.[9]

The U.S. Supreme Court preliminarily described the role and importance of government speech, and explained why the First Amendment does not regulate or restrict government speech. Without government speech, the government could not function, debate and discussion of "issues of great concern to the public" would be confined to the private sector, and the process of government would be "radically transformed." [10] Without government speech, the public would have no understanding of what the government seeks to accomplish and why; and, in order to preserve the government's right to engage in speech, the First Amendment cannot limit government speech.[11] Otherwise, the government could be restrained by a "First Amendment heckler" from expressing its views, and thereby prevented from informing society about the policies it seeks to adopt or opposes and indeed how it governs.[12] In other words, in the absence of protected government speech, the government cannot govern.[13]

The Court then concluded that Pleasant Grove City engaged in government speech when it displayed permanent monuments on public property.[14] Several factors were considered in reaching this conclusion. First, governments have historically displayed monuments to commemorate important events, convey a message, or instill feelings in those who view the

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[8] Summan, 555 U.S. at 465-66.
[9] *Id.* at 472, 481.
[10] *Id.* at 467-68.
[11] *Id.* at 468.
[12] *Id.*
[13] *Id.* ("Indeed, it is not easy to imagine how government could function if it lacked this freedom.").
[14] *Id.* at 470, 472.

monument.[15] Second, individuals who observe the monument normally associate the meaning conveyed by the monument with property owner on which the monument is displayed.[16] Third, the City maintained control over the message conveyed by the monuments by exercising final authority in their selection and selecting only those monuments which presented the image the City wanted to project.[17] Fourth, the City took ownership of the monuments and placed them in a park it owns and manages, thereby signifying the monument speaks on its behalf.[18] Finally, the permanent nature of donated monuments and the finite amount of space in a public park preclude the application of public forum analysis. More particularly, if public forum analysis is applied to public monuments, Pleasant Grove City would be forced to accept and display all donated monuments, or to refuse to accept any donated monuments and remove monuments already on display to avoid exercising viewpoint discrimination. When public forum analysis eliminates the forum, it is obviously out of place.[19] Notably, then, even though the monuments were displayed in a public park, the Court decided public forum analysis was inapplicable.[20] Hence, the Court concluded, Pleasant Grove City's acceptance of privately donated monuments is government speech which is not subject to the First Amendment restrictions.[21]

III. *WALKER* MAJORITY OPINION: LICENSE PLATES CONVEY GOVERNMENT SPEECH

In the majority opinion in *Walker*, the Court employed the first four of the five factors identified above to buttress its conclusion specialty license plates convey government speech.[22] First, the Court noted, states have

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[15] *Id.* at 470.
[16] *Id.* at 471.
[17] *Id.* at 473.
[18] *Id.* at 474, 476.
[19] *Id.* at 480.
[20] *Id.* at 478.
[21] *Id.* at 481.
[22] The four factors cited in determining specialty license plates are government speech - conveyance of a state message on the license plate, identification of the license plate with the state, final state approval of the license plate design before issuance, and transmitting the stamp of government approval - echo the significant constitutional disputes triggered by the State Department's refusal to issue passports, unilateral revocation of passports, or imposition of geographic limitations on travel. Hopefully this will provide an interesting topic for a future research project. *See* Kent v. Dulles, 357 U.S. 116 (1958); Dayton v. Dulles, 357 U.S. 144 (1958); Zemel v. Rusk. 381 U.S. 1 (1965); Haig v. Agee, 453 U.S. 280 (1981); and United States v. Laub, 385 U.S. 475 (1967). *See also* Thomas E. Laursen, *Constitutional Protection of Foreign Travel,* 81 COLUM. L. REV. 902 (1981)*; The Right to Travel*, 95 HARV. L. REV. 201 (1981); Jeffrey Kahn, *International Travel and the Constitution,* 56 UCLA L. REV. 271 (2008);

historically employed license plates to convey messages beyond the state name and vehicle identification number. The additional messages include: depictions of the head of a Hereford steer (Arizona), a codfish (Massachusetts), a bucking bronco (Colorado) and a potato (Idaho); and slogans such as "Idaho Potatoes," "North to the Future" (Alaska), "Keep Florida Green," "Hoosier Hospitality," "Green Mountains" (Vermont), and "America's Dairyland" (Wisconsin).[23] Texas, too, communicated various messages on its license plates, including: "Hemisfair 68" (to promote a San Antonio event); a small silhouette of the State; and "150 years of Statehood." The Texas Legislature also authorized various slogans on license plates: "Read to Succeed," "Houston Livestock Show and Rodeo," Texans Conquer Cancer," and "Girl Scouts."

Second, Texas license plates are closely identified with the State of Texas. Not only do they serve the governmental purpose of registering and identifying vehicles, but they are issued by the State and each license contains the name "Texas" in large letters at the top. People who design and obtain approval of specialty license plates likely intend to convey the message of state approval. Otherwise, bumper stickers would suffice. People who view Texas license plates easily identify them with the State, and believe messages on the specialty license plates have been endorsed by Texas through its approval process.

Third, Texas directly and exclusively controls the messages appearing on its specialty license plates through the approval process, thereby reserving for itself final approval authority over what messages it wants conveyed to the public. It can celebrate educational institutions attended by its citizens, but can reject slogans deriding schooling. It can pay tribute to Texas' citrus industry, but need not tout Florida's oranges. It can offer plates saying "Fight Terrorism," but can refuse to promote al Qaeda.[24]

Fourth, the messages conveyed on specialty license plates not only have been approved by the Board, but appear directly below the large letters identifying "Texas" as the issuer of the plates. The approved designs "are meant to convey and have the effect of conveying a government message, and they thus constitute government speech," thereby making forum analysis misplaced and First Amendment restrictions inapplicable.[25]

The Court conceded the fifth factor was inapplicable. While a park can hold only a finite number of monuments, the Board can theoretically approve

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Jeffrey Kahn, *The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism*, 43 Conn. L. Rev. 819 (2011); and Ramzi Kasseem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases,* 82 FORDHAM L. REV. 2099 (2014).

[23] Walker v. Texas Division, Sons of Confederate Veterans, Inc., 135 S. Ct. at 2248.

[24] *Id.* at 2249.

[25] *Id.* at 2250.

as many license plate designs as are submitted and need not make them available forever. Nonetheless, the Court reasoned the public forum analysis was inapplicable, because "license plates are not traditional public forums for private speech."[26]

IV. *WALKER* DISSENTING OPINION: LICENSE PLATES ARE LIMITED PUBLIC FORUMS

The dissenting opinion in *Walker* immediately takes issue with the classification of specialty license plates as government speech, asking the reader to imagine she is sitting on the side of the road watching the license plates speed by. Would the reader honestly believe the license plate that says "Rather be Golfing" conveys official state policy or means Texas is promoting golf over tennis or bowling? That permitting the names Notre Dame, Oklahoma State, University of Oklahoma, Kansas State and Iowa State to appear on license plates meant Texas was officially rooting, not for the Texas Longhorns, but for the other team?[27] The dissent insists that placing these messages under the umbrella of government speech creates a dangerous precedent that "takes a large and painful bite out of the First Amendment."[28] It strips away all constitutional protection of whatever message the motorist has paid a premium to place on the license plate, and permits the state to engage in viewpoint discrimination when it approves some but rejects other specialty license plates.[29]

The dissent characterizes specialty license plates as small, mobile billboards, a portion of which can be used by the vehicle's owner to display a selected message, provided that message is preliminarily approved by the Board. The dissent asks the reader to imagine the state or a state university erecting a large, stationery, electronic billboard, some space on which can be rented by individuals who want to post a message, and renting that space only if the state found the message to be sufficiently noncontroversial or consistent with prevailing state or university views. No one could doubt, the dissent insists, that such a scenario involved blatant viewpoint discrimination which violates the First Amendment.[30]

The dissent also notes that the "contrast between the history of public monuments . . . and the Texas license plate program could not be starker."[31] Governments have accepted and displayed of monuments for centuries;

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[26] *Id.* at 2551.
[27] *Id.* at 2255.
[28] *Id.*
[29] *Id.* at 2255-56.
[30] *Id.* at 2256.
[31] *Id.* at 2260.

private party sponsorship of specialty license plates is comparatively quite new. The display of permanent monuments is limited by available space; specialty license plates have no limits beyond their sponsors. Government selects the monument to be displayed; the Board, attentive to the need to enhance state revenues, encourages sponsors to submit designs and routinely approves them. Monuments convey the message the government seeks to communicate; specialty license plates convey sponsor created messages, not messages the government supports.[32] That sponsors' desire to obtain the state's "seal of approval" of their messages transforms the message to government speech is "dangerous reasoning," because it ignores the huge difference between speech the government employs to further its programs and speech of private parties to which the government attaches its blessing or condemnation.[33]

The dissent concludes that selling space for messages on specialty license plates creates a limited public forum, because Texas permits state property (motor vehicle licenses) to be used by private speakers to convey their messages consistent with the rules of its approval process. Those rules, however, cannot permit viewpoint discrimination, and denying approval to SCV's confederate flag design because it may be offensive to others is "pure viewpoint discrimination."[34]

V. SIGNIFICANCE OF *WALKER*

The assessment of *Walker* by legal scholars has been limited. Helen Norton, Professor of Law at the University of Colorado School of Law, criticizes Walker, because the Court "again missed an important opportunity to clarify and refine its government speech doctrine to require that the government make clear when it is speaking before it can assert the government speech defense to Free Speech challenges."[35] David A. Anderson, the Fred and Emily Marshall Wulff Centennial Chair in Law at the University of Texas School of Law, criticizes *Walker*, because it insists there is a binary division between private and government speech, and ignores the growing phenomenon of the public/private partnerships in which (1) private sector companies run state prisons and public hospitals, fund university research, and manage public schools, (2) public/private partners develop sports facilities and office buildings, (3) the roles of private security officers and public officers intermingle and overlap, and (4) private companies are

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[32] *Id.* at 2260-62.
[33] *Id.* at 2261.
[34] *Id.* at 2262.
[35] Helen Norton, *Government Speech and Political Courage,* 68 STAN. L. REV. ONLINE 61, 62 (2015).

given powers of eminent domain. These public/private partnerships extend and blur the realm of speech, permitting government to promote beef, grapes, apples and citrus fruits, advertise soft drinks on university stadium scoreboards, and license the city of Dallas logo to promote the sales of insurance. Not addressing the public/private phenomenon the case overlooks "an opportunity to look for a more cogent way to deal with the privatization boom."[36]

The immediate impact of *Walker* is to give "significant leeway to states to issue or deny specialty plates as they see fit,"[37] and avoid legal skirmishes over whether to permit a confederate flag or Nazi swastika, right-to-life or pro-choice sentiments, gun rights or gun control advocacy, or promotions of controversial enterprises (tobacco and mining), sports (fox hunting), or team names (Washington Redskins) on specialty license plates.[38]

The broader implication of *Walker* is whether or not government control over application procedures might permit the government "to censor a broader range of private speech simply by claiming some level of governmental involvement."[39] This is demonstrated in part by six subsequent decisions that have substantively discussed *Walker*. Four of those decisions concluded government speech trumps First Amendment claims. Two did not.

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[36] David A. Anderson, *Of Horses, Donkey, and Mules,* 94 TEX. L. REV. 1, 4-5 (2015)

[37] David L. Hudson, Jr., *October 2014 Term: First Amendment Review*, 42 ABA PREVIEW 281, 282 (2015). *See* Sons of Confederate Veterans, Inc. v. Holcomb, 2015 W.L 4662435 at 1, 4 (W.D. Va. 2015) (vacating the district court's prior order enjoining the enforcement of that portion of the Virginia Code which banned the placement of the Sons of Confederate Veterans logo containing the Confederate flat on license plates).

[38] Walker v. Texas Division, Sons of Confederate Veterans, Inc., 135 S. Ct. at 2262. *See* Holcomb, 2015 WL 4662435 at 4:

> When the Supreme Court speaks, district courts must listen. In light of the ruling in *Walker,* the primary rationale for the 2001 judgment and injunction in this case is no longer good law. Specialty license plates represent the government's speech, and the Commonwealth may choose, consonant with the First Amendment, the message it wishes to convey on those plates. The Commonwealth's rationale for singling out SCV for different treatment is no longer relevant. According to the Supreme Court, the Commonwealth is free to treat SCV differently from all other specialty groups. Because the underlying injunction violates that right, I have no choice but to dissolve it.

Because Texas does not require its specialty license holders to adopt an approved license design, *Walker* likely does not face a challenge on the grounds of compelled speech. *See* Cressman v. Thompson, 798 F.3d 938, 956-958 (10th Cir. 2015) (while requiring license holders to display the image of a Native American Indian crouched down and shooting an arrow into the clouds may constitute compelled speech, the license holder "explicitly indicated" the image was not personally objectionable to him). *Cressman* is discussed more fully below in this article.

[39] Hudson *supra* note 32, at 282.

In *Pro-Football, Inc. v. Blackhorse*,[40] the federal district court ruled that the federal trademark registration program is government speech and therefore exempt from First Amendment scrutiny.[41] Amanda Blackhorse and four other individuals ("Defendants") filed a petition with the Trademark Trial and Appeal Board (TTAB) to cancel the six registrations of the logo of the Washington Redskins professional football team owned by Pro-Football, Inc. Finding that the marks "may disparage a substantial composite of Native Americans and bring them into contempt or disrepute," TTAB scheduled the cancellation of the registered marks under Section 2(a) of the Lanham Act. The parties then sought a *de nova* review of TTAB's decision in the federal district court based on the record before TTAB and additional evidence the parties submitted. Pro-Football, Inc. claimed, among other things, that Section 2(a) of the Lanham Act violated the First Amendment.[42]

The district court granted summary judgment in favor of Defendants denying Pro-Football's First Amendment claim, because: (1) cancelling the registrations of the Redskins marks under Section 2(a) of the Lanham Act does not burden, restrict, or prohibit Pro-Football, Inc.'s ability to use the marks, and does not restrict any expression,[43] and (2) the federal trademark registration program is government speech exempt from First Amendment protection.[44] The basis of the latter decision was *Walker*. The district court found that the federal trademark registration program communicates the message the federal government has approved the trademark," and that "the public closely associates federal trademark registration with the federal government." "[T]he insignia for federal trademark registration, ®, is a manifestation of the federal government's recognition of the mark," and "the federal government exercises editorial control over the federal trademark registration program." Further, Section 2(a) "empowers the PTO to deny or cancel a mark's registration, and thus control what appears on the Principal Register."[45] Because the *Walker* factors demonstrated the trademark registration program is government speech," it is exempt from First Amendment scrutiny and Pro-Football's First Amendment claim must fail.[46]

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[40] 112 F. Supp.3d 439 (E.D. Va. 2015), appeal docketed, No 15-1874 (4th Cir. Aug. 6, 2015).
[41] *Id.* at 8, 11, and 12.
[42] *Id.* at 2-4.
[43] *Id.* at 9.
[44] *Id.* at 8.
[45] *Id.* at 12.
[46] *Id.* at 17. *Contra* In re Tam, 808 F.3d 1321, 1335-1336, 1346-1348 (Fed. Cir. 2015), (en banc) (the refusal of the Trademark Trial and Appeal Board (TTAB) to register the trademark "The Slants" for a musical band on the grounds the mark was disparaging to people of Asian descent is a content-based restriction which cannot survive strict scrutiny, and the issuance of a trademark registration by TTAB is not government speech). The Federal Circuit Court decision makes it likely the U.S. Supreme Court will review whether trademark registration is government speech. *See* Debra Cassens Weiss, *Ban on disparaging trademarks violates First*

In *United Veterans Memorial and Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle*,[47] Plaintiffs, United Veterans Memorial and Patriotic Association of the City of New Rochelle ("United Veterans") and Peter Parente, objected to City Council's decision to remove the "Gadsden Flag" from a flagpole on the New Rochelle armory.[48] The flag had flown below the American flag, which had become tattered and worn. When the American flag was replaced, the Gadsden Flag was removed. A subsequent motion to restore the Gadsden Flag made at a City Council meeting was defeated by a vote of 5-2, and Plaintiffs claimed the removal of the flag violates their First Amendment rights.[49] The District Court dismissed Plaintiffs' Second Amended Complaint for failure to state a claim.[50] On appeal, the Second Circuit ruled the display of flags on the City of New Rochelle's Amory constituted government speech under *Walker*. When the Armory was deeded to the City of New Rochelle, the deed required that the property remain open for public use for recreation, park, highway and street purposes. While the City of New Rochelle delegated the selection of flags to the United Veterans, the display of flags constituted government speech, which did not implicate the First Amendment. Displaying and maintaining flags on its flagpole did not create a public forum or diminish the control of the flags displayed. The flagpole was owned by the government and located in a public space used for recreational purposes, and a reasonable observer would believe the flags conveyed a message of the City of New Rochelle.[51] Once again, then, government speech trumped a First Amendment claim.

In *American Freedom Defense Initiative v. King County,*[52] the King County's public transit agency ("Metro"), which operates an extensive public transportation system in the Seattle metropolitan area, rejected an advertisement submitted by Plaintiff, American Freedom Defense Initiative

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Amendment, Federal Circuit rules in band's appeal, ABA TECH MONTHLY (Dec. 23, 2015, 9:35 AM), http://www.abajournal.com/news/article/ban_on_disparaging_trademarks_violates_first_amendment_en_banc_federal_circ/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly.

[47] 72 F.Supp.3d 468 (S.D. N.Y. 2014).

[48] *Id.* at 471. The Gadsden Flag is historically important. It is named after Christopher Gadsden, who gave it to the Continental Navy in 1775. It is yellow and depicts a coiled rattlesnake above the words "Don't Tread on Me." Plaintiffs contend the flag honors represents the Nation's proud history and strength, and honors the sacrifices of Navy and Marine veterans who served under the Gadsden Flag throughout the nation's history.

[49] *Id.*

[50] *Id.* at 478.

[51] Veterans Mem'l and Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle, 615 Fed. Appx. 693 (2d Cir. 2015).

[52] 796 F.3d 1165 (9th Cir. 2015).

(AFDI), because the ad failed to meet its guidelines.[53] Metro's 2012 advertising policy, which was in effect when Metro rejected Plaintiff's ad, generally accepts advertisements unless they fall into eleven categories.[54] In 2013, Metro had approved an ad submitted by the United States Department of State, which contained the names and photos of 16 individuals under the caption "Faces of Global Terrorism" and stated: "Stop a Terrorist. Save lives. Up to $25 Million Reward."[55] After the ad appeared on the bus exteriors, Metro received complaints from the public, including a member of Congress and two community leaders, who claimed the ad was offensive and would foment mistreatment of racial, ethnic and religious minorities, who had similar appearances or names to the persons shown in the ad. Metro initiated a review of its advertising criteria, and the State Department voluntarily retracted the ad.[56]

Shortly thereafter, Plaintiff submitted a substantially similar ad to Metro, containing the same names, photos and caption, with the following statements: "AFDI Wants You to Stop a Terrorist" and "The FBI is Offering Up to $25 Million Reward If You Help Capture One of These Jihadis."[57] Metro concluded the AFDI's advertisement did not comply with its advertising criteria and declined to display Plaintiff's ad on Metro's buses.[58] Rather than discussing the rejection of the ad with Metro, Plaintiff filed an action under 42 U.S.C. § 1983 contending its First Amendment rights were violated and seeking an injunction ordering Metro to publish its ad.[59]

The Ninth Circuit determined that Metro did not intend to create a public forum in accepting advertisements on its buses, but rather created a nonpublic forum, because it employed a prescreening process to review submitted ads, rejected a range of proposed ads including other public-issue ads, and placed the ads on the buses whose primary purpose is to provide public transportation. The Ninth Circuit noted that this conclusion was confirmed by *Walker*, which held the exercise of final authority over content "mitigates against the determination Texas created a public forum" on its license plates.[60] Having created a nonpublic forum, Metro's rejection of

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[53] *Id.* at 1167.
[54] *Id.* Metro's 2012 advertising policy generally accepted advertisements unless they fell into eleven categories: (1) "political campaign speech"; (2) "tobacco, alcohol, firearms and adult-related products and services"; (3) "sexual or excretory subject matter"; (4) "false or misleading"; (5) "copyright, trademark, or otherwise unlawful"; (6) illegal activity"; (7) "profanity and violence"' (8) "demeaning or disparaging"; (9) "harmful or disruptive to transit system"; (10) "lights, noise, and special effects"; and (11) "unsafe transit behavior."
[55] *Id.*
[56] *Id.*
[57] *Id.* at 1168.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 1170.

Plaintiff's ad must be reasonable and viewpoint neutral.[61] Both criteria were satisfied, the Tenth Circuit decided, because the ad was false and misleading (the Department of State, not the FBI, offered the rewards), and there was no evidence in the record suggesting "Metro would have accepted the ad with the same inaccuracy if only the ad has expressed a different viewpoint or that Metro had accepted other ads containing false statements."[62]

In *Mech v. School Board of Palm Beach County*,[63] the School Board overseeing the Palm Beach County School District permitted schools to hang banners on their fences recognizing sponsors of school programs as "Partners in Excellence."[64] The banners were subject to several conditions. The principal of each school was required to select and approve business partners that were consistent with the school district's educational mission and community values. The banners, visible from the road, had to be a "uniform size, color and font" and express gratitude to the sponsor; the banners listed the name, phone number, web address and logo of the business partner, but could not include a photograph or large logo.[65] Three schools in the district displayed banners acknowledging David Mech, who offered math tutoring services under the name "The Happy/Fun Math Tutor." Mech also happened to be a retired porn star, who had performed in hundreds of pornographic films, and who owns Dave Pounder Productions LLC, a company that formerly produced pornography. Both the Happy/Fun Math Tutor and Dave Pounder Productions share a mailing address in Boca Raton, Florida. When several parents discovered the common ownership of The Happy/Fun Math Tutor and Dave Pounder Productions and complained about Mech's banners, the schools removed the banners on the grounds the connection between the two enterprises was inconsistent with the schools' educational mission and community values.[66] Mech sued the School Board for violating his First Amendment rights. Both parties moved for summary judgment, and the district court determined the removal of the banner did not abridge the First Amendment and ruled in favor of the School Board. Mech appealed to the Eleventh Circuit.[67]

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[61] *Id.*
[62] *Id.* at 1171. *Contra* Am. Freedom Def. Initiative v. Metro. Transp. Auth., 70 F.Supp.3d 572 (S.D. N.Y. 2015). Unlike the license plates in *Walker*, advertising space on New York City Metropolitan Transportation Authority buses was a public forum, because that space is traditionally available for private speech and there was no indication that the speech was owned or conveyed by the government. *Id.* at n. 4.
[63] 806 F.3d 1070 (11th Cir. 2015).
[64] *Id.* at 1 and 2.
[65] *Id.* at 2.
[66] *Id.*
[67] *Id.*

The Court of Appeals decided that the removal of Mech's banners from the schools did not violate the First Amendment, because under *Walker* the decision to do was government speech.[68] The Court considered the three factors applied in *Walker* in making its determination: history, endorsement and control. Because there was little or no evidence in the record detailing the history of the school banner program beyond its being launched in 2008, the Court, cautioning that "a long historical pedigree is not a *prerequisite* for government speech," concluded the first factor weighed in Mech's favor. The second factor – government endorsement of the message conveyed by the banner – squarely suggested the banners were government speech. The banners were hung on school fences, and the public closely identifies messages appearing on school district property with the school district. Further the banner contains the school's initials, is printed in the school's colors, and identifies the sponsor as a "Partner in Excellence" with the school, clearly conveying the message that the sponsor has a close relationship and works with the school.[69] Further, Mech's banner, promoting tutoring services in math, containing the schools initials and colors, and labeling the Happy/Fun Math Tutor as a partner in excellence, creates the clear impression the school endorsed the tutoring services.[70] The third factor – control over the message – "strongly suggests" the banners are government speech.[71] The schools dictate: the design, typeface and color of the banners; the information contained in the banner; the banner size and location; and the inclusion of the school's initials and the Partner in Excellence message. Further the school's principal exercises final approval of the banner before it is displayed. In short, the "message set out in [a banner] is from beginning to end the message established by the school."[72] Because the display of the Happy/Fun Math Tutor is government speech, Mech's First Amendment must fail. Hence, the Eleventh Circuit affirmed the decision of the district court.[73]

As noted above, two other decisions, which also substantively discussed *Walker*, declined to extend the reach of government speech. In *Cressman v. Thompson*.[74] a motorist objected to the depiction of a Native American shooting an arrow toward the sky on Oklahoma state vehicle license plates, claiming the display of the license plate on his car compelled him to communicate a pantheistic message which was contrary to his religious

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[68] *Id.* at 4.
[69] *Id.* at 5 and 6.
[70] *Id.* at 6.
[71] *Id.* at 7.
[72] *Id.*
[73] *Id.*
[74] 798 F.3d 938 (10th Cir. 2015).

beliefs.[75] The Tenth Circuit ruled that even though the display of the drawing on the license plate conveyed a government message and qualified as government speech under *Walker*,[76] it nonetheless could still implicate the First Amendment rights of individuals objecting to the message. The Court noted that "the affixation of objectionable speech on a standard license plate implicates compelled speech concerns if it forces a vehicle owner . . . [to foster] a point of view he finds unacceptable."[77] The Court then discussed the nature of the drawing appearing on the license plate, and concluded it was symbolic speech, which an objective observer would interpret as conveying the message that Oklahoma's history and culture was strongly influenced by Native Americans.[78] This message was not one to which Cressman objected. Rather he objected to the religious message conveyed by the drawing. Because he did not object to the message a reasonable observer would receive from the drawing, Cressman was not compelled to utter a view he opposed and could not succeed in his compelled speech claim.[79]

Likewise, in *Rideout v. Gardner*,[80] voters challenged a New Hampshire statute prohibiting them from disclosing or displaying a digital or photographic copy of their completed ballots.[81] The voters claimed the law violated their right of political expression, because it prohibited them from posting copies of their completed ballots in social media.[82] The Secretary of State defended the statute by arguing that, under *Walker*, "completed ballots are a form of government speech and thus do not trigger First Amendment protection at all.[83] The district court quickly dismissed this argument, because (1) ballots do not communicate a state message, but merely list the slate of candidates; (2) there is no possibility a voter's marking on the ballot

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[75] *Id.* at 944. The drawing on the Oklahoma license plates depicts a sculpture entitled "Sacred Rain Arrow" by Allan Houser, an award-winning Chiricahua Apache sculpture. The sculpture tells the story of a young Apache Indian who fired an arrow blessed by a medicine man and carrying prayers for rain into the sky to convince the spirits to release rain. The plaintiff, Keith Cressman, claimed the drawing on the license plate promotes belief in multiple gods and the use of arrows as means of prayer, contrary to his Christian belief in one god and Jesus Christ as the mediator between God and all people. *Id*. at 943.

[76] *Id.* at 948.

[77] *Id.* at 950.

[78] *Id.* at 957, 960.

[79] *Id.* at 963, 964.

[80] 123 F. Supp. 218 (D.N.H. 2015).

[81] N.H. Rev. Stat. Ann. § 659:35, 1 (2016): "No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted except as provided in RSA 659:20 [allowing voters who need assistance marking the ballot to receive assistance]. This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means."

[82] *Id.*

[83] *Id.* at 10.

will be interpreted as state speech; and (3) the state does not control the messages people convey on ballots beyond requiring they place no distinguishing mark on their ballot.[84] Hence the markings voters place on their ballots do not constitute government speech.[85] The Secretary of State also maintained that the principal purpose of the law was to prevent vote buying and voter coercion.[86] The district court determined that prohibiting the display of completed ballots was a content-based restriction that must be reviewed under strict scrutiny.[87] Because the government produced no evidence showing that "the state has an actual or imminent problem with images of completed ballots being used to facilitate either vote buying or voter coercion" or even "a single instance anywhere in the United States . . . that digital or photographic images of completed ballots have been used to facilitate vote buying or voter coercion," it failed to demonstrate the law serves a compelling state interest and hence flunks strict scrutiny.[88]

The limited number of post-*Walker* decisions restricts an assessment of whether *Walker* has extended the reach of government speech. Pro-Football, Inc. lost the registered status of its six Washington Redskins trademarks (though not the use of those trademarks), because the TTAB controls the application process for approval of trademarks and makes the ultimate regulatory decision on granting or denying the extension of trademark applications. The City of New Rochelle, the grantee of the City's Amory, required to hold the property for public use, retained ultimate authority to determine what flags would be displayed on its flagpoles on the Amory property. The King's County public transit agency was not required to accept the advertising message of AFDI, because the transit agency employed an approval procedure for submitted advertisements and retained control over which ads would be affixed to its buses. Schools within the Palm Beach County School District exercised government speech when they displayed (and removed) banners expressing gratitude for the assistance of sponsors of school programs and designated those sponsors as "Partners in Excellence."

On the other hand, the Tenth Circuit ruled that the authority of Oklahoma to approve the design and insignia on its license plates did not preclude a First Amendment claim of compelled speech, and a federal district court has ruled that New Hampshire's prohibition against displaying a copy of a completed election ballot violated the First Amendment, because it prevented voters from engaging in political expression by publicizing their completed ballots on social media.

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[84] *Id.*
[85] *Id.*
[86] Rideout, *supra* note 47, at 8.
[87] *Id.* at 9.
[88] *Id.* at 12-13.

VI. SUMMARY

Walker makes an interesting addition to the government speech terrain. The majority opinion, relying heavily on *Summum*, determined that a specialty state license plate constitutes government speech not subject to First Amendment restrictions, because states convey messages on license plates, are closely identified with license plates, exercise final approval of the license plate design, and convey the stamp of state approval. Hence similar government message approval processes, such as registering a trademark, deciding what flags may fly on public property, approving advertisements on public transit vehicles, and placing banners on school fences expressing gratitude to their "Partners in Excellence" constitute government speech which is not restricted by the First Amendment. It will be very interesting to learn where the *Summum/Walker* factors will coalesce in the future to expand the government speech terrain.