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Government Identity Speech Programs: Understanding and Applying the New Walker Test

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Abstract

In Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Court extended its previous holding in* Pleasant Grove City, Utah v. Summum *that a city's donated park monuments were government speech to the privately proposed designs that Texas accepts and stamps onto its specialty license plates. The placement of the program into the new doctrinal category is significant because the selection criteria for government–private speech combinations that produce government speech are "exempt from First Amendment scrutiny." By contrast, when the government selects private speakers to participate in a private speech forum, its criteria must be reasonable in light of the forum's purpose and viewpoint neutral. The* Walker *Court drew from* Summum *to offer three features of the speech access programs to support its reasoning that they produced government speech rather than the "purely private speech" that emanates from created forums. Courts have accurately perceived the three factors to form a "test," but have applied it too broadly to all types of programs where governments assert that their combinations with private entities produce government speech. The results have been conflicting and display confusion about what the prongs of the new test mean and how they should be applied to make the critical determination of which government–*

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private speech combinations create government identity speech and which are forums.

In fact, the Walker *test appropriately applies only when a government entity asserts that its collaboration with private speakers is to convey a message about its own "image" or "identity." In the context of commissioned government speech, the Court has held that a showing of government control effective to tailor the content of the private submissions to advance the substantive policy objective is sufficient to demonstrate that the combination produces government speech. But when the government's purpose is to fuse private submissions into a broad statement of group identity, no determinate policy parameters exist against which to assess whether the government's control over the private speech content is effective to achieve the objective. This difference from the preexisting combinations that the Court had labeled "government speech" explains the need to articulate a new test to assess a government entity's claim that its combination with private entities produces a government identity message. This Article situates the new* Walker *test within the broader Free Speech Clause doctrinal framework, and within the different types of government–private speech combinations. It explains the steps of inquiry that lead to application of the test, and analyzes each prong in depth, the underlying constitutional speech principles, and the relevant evidence. The final result is a blueprint for legal analysis and policymaking at the thin line between speech access programs that the government can administer without constitutional restraint because they produce government speech and those to which Free Speech Clause equal access limits apply.*

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INTRODUCTION

The Supreme Court has spoken again, adding one more to its small but growing repertoire of cases finding that government–private speech combinations produce government speech.[1] In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[2] the Court held that Texas's program of accepting designs proposed by private entities and printing them on the background of its specialty license plates transformed the private messages into government speech. Specifically, the Court upheld the Texas Department of Motor Vehicles Board's rejection of the Sons of Confederate Veterans' proposed design that included the confederate battle flag on the grounds that many members of the public interpreted the flag design as offensive and associated it with groups that advocated hate based upon race.[3] Several years earlier, in *Pleasant Grove City, Utah v. Summum*,[4] the Court had found a program of accepting privately produced monuments and placing them in a city park produced government speech. In this application, the Court upheld the city's rejection of a private group's request to erect a monument etched with aphorisms of a newly formed religion in a park that already displayed a Ten Commandments monument.[5]

The consequences of these determinations that the government–private speech combinations produced government speech are significant[6] because they render the selection criteria, and the government's application of them, "exempt from [Free Speech Clause] scrutiny."[7] This means that when the government uses private speakers to promulgate its own speech, it may choose among privately proposed messages according to the viewpoints they

1. *See infra* notes 2–4 and accompanying text.

2. 135 S. Ct. 2239, 2251 (2015).

3. *Id.* at 2245.

4. 555 U.S. 460, 481 (2009).

5. *See id.*at 465–66.

6. This is true even though the concept of "viewpoint neutrality" is not clearly established and some forum rules border on viewpoint discriminatory. *See* discussion *infra* Section I.A. Abner Greene argues that this difference should not be so dramatic. *See* Abner S. Greene, *The Concept of the Speech Platform:* Walker v. Texas Division, 68 ALA. L. REV. 337, 338 (2016). Rather, in his view, the Court should abandon "a firm rule against viewpoint restrictions" when the government creates a "speech platform," providing space for private speakers. *Id.*

7. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005); *Summum*, 555 U.S. at 467. Although the Court has said the First Amendment does not apply to government speech, it means the Free Speech Clause, because the Establishment Clause limits the content of government speech. *Id.*

present on controversial public issues.[8]

By contrast, when the government selects private speakers to participate in a private speech forum, its criteria must at least be viewpoint neutral and reasonable in light of the property on which the program takes place.[9] Courts will review the government's selection of private speakers to ensure that the criteria do not discriminate according to viewpoint on their face,[10] are not so vague that they leave room for the forum administrator to discriminate,[11] and will assess the government's application of the criteria for consistency[12] and for reasonableness.[13] In making these latter judgments, courts may resolve disputes about the social meaning of words and symbols and apply their determinations against the government.[14]

Neither the rejection of the pro-slavery viewpoint in *Walker* nor the privileging of one private religious viewpoint over another in *Summum*

8. *See Summum*, 555 U.S. at 467–68.

9. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983). Greater restrictions apply in a traditional or designated public forum. *See infra* notes 75–76 and accompanying text.

10. Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth., 92 F. Supp. 3d 314, 329 (E.D. Pa. 2015) ("The plain language of the restriction only prohibits expression which disparages certain groups. Under the anti-disparagement standard, speech which praises those same groups is clearly permissible. Therefore, the restriction is viewpoint based and unconstitutional . . . .").

11. Hopper v. City of Pasco, 241 F.3d 1067, 1079–80 (9th Cir. 2001) ("controversial" art standard creates too much room for viewpoint discrimination); United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 353–54 (6th Cir. 1998) ("controversial public issues"); Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 257 (3d Cir. 1998) ("misleading" standard creates pretext for viewpoint discrimination).

12. AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 10–12 (1st Cir. 1994) (where MBTA claimed to be excluding condom-promotion advertisements because they were sexually explicit and patently offensive, but MBTA allowed other sorts of sexually explicit advertisements, such as movie advertisements, where "unrebutted *appearance* of viewpoint discrimination" is found); Nieto v. Flatau, 715 F. Supp. 2d 650, 655 (E.D.N.C. 2010) (limit on "extremist, indecent, sexist or racist messages"); Vaguely Qualified Prods. LLC v. Metro. Transp. Auth., No. 15 Civ. 04952(CM), 2015 WL 5916699 (S.D.N.Y. Oct. 7, 2015), at *11 ("Assuming, *arguendo*, that VQP's ads were political, refusing to run two sets of advertisements on either side of a political debate about Islam and Muslims cannot be deemed viewpoint neutral when the MTA has approved other advertisements addressing issues of cultural import that are similarly, or far more, 'political.'").

13. Vaguely Qualified Prods., 2015 WL 5916699, at *11–12 (administrators could not reasonably find advertisements for pro-Muslim film stating "The Muslims are Coming!" to be demeaning or disparaging).

14. *Id.*

would be permissible in a private speech forum.[15] In a government–private speech combination that produces government speech, however, the specific grounds for these decisions need not even be explained. The distinguishing feature of the *Walker–Summum* paradigm is that the government may legitimize its private speech selections by offering only the indeterminate purpose of presenting messages consistent with its "image" or "identity."[16] Moreover, because courts will not review application of the access criteria for reasonableness or consistency, the government can arbitrate and act upon its own determinations of the disputed meaning of words[17] and symbols.[18] Another feature of the paradigm may be that many private applicants will gain access to the program, and rejections will be relatively rare. It is at this point that the "selective receptivity" to private messages that helps qualify a government–private speech combination as government speech[19] edges up to and into the "targeted" disadvantaging of unwanted messages, which signals unconstitutional regulation of the private speech forum.[20] Thus, it is critically important to have effective tools to distinguish government–private speech combinations that produce government speech from those that are forums.

In *Walker,* the Court drew three attributes from the *Summum* opinion, to navigate this whisper-thin divide.[21] Lower courts have gamely tried to use them to evaluate various types of government–private speech combinations,

15. *See supra* notes 9–14 and accompanying text.

16. *See infra* note 19 and accompanying text.

17. *In re* Tam, 808 F.3d 1321, 1331–33 (Fed. Cir. 2015) (noting different meanings that Asian–American band members and outside entities attach to the name SLANTS), *cert. granted sub nom*. Lee v. Tam, 137 S. Ct. 30 (2016).

18. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2262 (2015) (Alito, J., dissenting) (noting the different meanings viewers may attach to the confederate flag).

19. *See generally* Summum v. Pleasant Grove City, 555 U.S. 460, 472 (2009) ("City parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world."); *Walker*, 135 S. Ct. at 2247 (quoting *Summum*, 555 U.S. at 471) ("'[O]bservers' of such monuments . . . ordinarily 'appreciate the identity of the speaker.'").

20. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (even where discretionary criteria are necessary to fulfill the function of a program, a government entity may not selectively fund speakers in a way that has the effect of "a penalty on disfavored viewpoints").

21. *See Walker*, 135 S. Ct. at 2247 (the factors are whether (1) the government has historically used the medium for expression, (2) observers are likely to appreciate that the government is speaking through the private participants, and (3) the government exercises effective control and "final approval authority" over the content of the messages).

but the initial results are not encouraging.[22] Most fundamentally, courts have described and applied the three factors too broadly as the new "government speech test."[23] While the attributes may helpfully be described and applied as a "test" to determine whether government–private speech combinations produce government speech in contexts similar to *Summum* and *Walker*, there is no indication inside the opinions or out of them that the "test" articulated by the *Walker* Court applies to most government–private speech combinations that produce "government speech."[24] Rather, the *Walker* test applies only to the more specific circumstance when the government collaborates with private speakers for the purpose of sending a message about its "image" or "identity."[25]

Additionally, within only a number of months after the test's articulation, courts have applied the new test and reached conflicting results on whether the privately proposed messages listed in the federal trademark registry,[26] and, somewhat ironically, on "vanity" license plates, produce government speech.[27] While it is certainly possible to condemn the test as indeterminate and unworkable,[28] or to criticize *Walker* as having reached the

22. *See infra* Section I.B.4.b.

23. *See, e.g.*, Comm'r of Ind. Bureau of Motor Vehicles v. Vawter, 45 N.E.3d 1200, 1204 (Ind. 2015) ("In *Walker*, the Supreme Court identified a three-factor standard for identifying government speech."); *see also* Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1197 (2016) (lamenting the "potentially explosive" ramifications of the *Walker* test if applied to all types of government speech programs).

24. *Walker*, 135 S. Ct. at 2246 (resting its reasoning "primarily on [its] analysis in *Summum*" because it presented a "similar problem"); *see infra* Section I.B (discussing commissioned government speech).

25. *See supra* note 19 and accompanying text.

26. *Compare In re* Tam, 808 F.3d 1321, 1345 (Fed. Cir. 2015) (trademark registry is not government speech), *cert. granted sub nom*. Lee v. Tam, 137 S. Ct. 30 (2016), *with* Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 464 (E.D. Va. 2015) (trademark registry is government speech).

27. Comm'r of Ind. Bureau of Motor Vehicles v. Vawter, 45 N.E.3d 1200, 1204 (Ind. 2015) (program is government speech); Mitchell v. Md. Motor Vehicle Admin., 126 A.3d 165, 191 (Md. Ct. Spec. App. 2015) (program is a nonpublic forum).

28. The Court's frequent failure to articulate its "tests" clearly and in ways that can be understood and applied by lower courts and others who must work with them is frustrating. Two examples in the free speech area continue to vex lower courts. First, the Court has described the test that applies to distinctions made by a government entity administering a limited public forum differently. *Compare* Widmar v. Vincent, 454 U.S. 263, 276 (1981) (strict scrutiny), *with* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) (reasonable and viewpoint neutral). Second, in setting out the test for regulations aimed at reducing the secondary effects of sexually

wrong result,[29] these conclusions are not helpful to courts and government entities that must apply it to concrete cases—at least until the Court weighs in on government speech again. Moreover, when limited in application to government identity speech programs, the *Walker* test's prongs can be understood and applied both to validate and cabin assertions by government entities that they are free to discriminate among private contributions according to viewpoint.

The purpose of this Article is to work within the confines of the three-pronged test to uncover its meaning and application beyond monuments and license plate designs to all types of government–private speech combinations where a government entity may claim to be producing identity speech.[30] Going both wider and deeper than the Court's explanations aids in understanding and applying the prongs of the new test.[31] Going wider means recognizing that the identity speech test excises programs that, with only slight variations, would be private speech forums according to the forum "test" the Court applies.[32] Although the Court has articulated the two

oriented businesses, the Court has purported to restate the test for time, place, or manner regulations, but has left out one of the prongs—twice—even though it applied the prong in its analyses. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) ("[In Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986),] we stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available."); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (explaining that a content-neutral regulation must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information").

29. *See Walker*, 135 S. Ct. at 2254–64 (Alito, J., dissenting) (pointing out weaknesses in the Court's reasoning); *see also* David A. Anderson, *Of Horses, Donkeys, and Mules*, 94 TEX. L. REV. SEE ALSO 1, 7 (2015) ("One wonders why the Court took a case with so little real-world importance and resolved it in a way that has little precedential value.").

30. Professor Mary Jean Dolan first used the term "identity speech" to describe the program in *Summum*. Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After* Summum, 19 WM. & MARY BILL RTS. J. 1, 3 (2010) [hereinafter Dolan, *Establishment Clause Limits After* Summum]. She also argued in favor of expanding the government speech category to include programs where the government produces identity speech. Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 73 (2004) [hereinafter Dolan, *New Extensions of Government Speech*] (describing these programs as ones where "government has a subjective expressive purpose that includes particular values and is carried out through selection of private speakers").

31. *See infra* Part II.

32. *See infra* Section I.B.4.

tests as free-standing, they are, in fact, mirror images. Both tests hinge most basically on the government's purpose for combining with private entities to produce speech.[33] A more complete application of the government identity speech test incorporates the forum inquiry and asks both sides of the questions, thereby making the appropriate comparisons.[34]

Going deeper means identifying how each prong of the test functions to implement the competing government speech and forum principles.[35] Part of this analysis identifies how, and how much, the government's history of messaging through a medium can prove its intent and the effect of inviting private speakers to participate.[36] A deeper part of this analysis explains the mystery of why the Court resurrected an inquiry into viewer perception of speaker identity in the context of identity speech after rejecting that same inquiry when the government commissions private entities to speak on its behalf to help fulfill functional objectives.[37] The answer is that to gain the broad discretion to choose among messages according to viewpoint that applies to identity speech, a government entity must show that it could rationally believe that a communication between it and viewers is taking place. For this communication to occur, the government must provide viewers with sufficient signals to alert them that it has fused the privately proposed messages into its own identity message, so that they recognize the government as a source, even if not the exclusive source, of the speech.[38] Additionally, inquiry into the "selective receptivity" that the Court says characterizes government identity speech selections reveals that it cannot be gauged against substantive criteria and it is quite empty when understood quantitatively.[39] Instead, control effective to transform individual submissions into identity speech must be shown through procedures, including deep review of the submissions and imposition of identity-conforming mandates that fuse the individual expressions into a government expression of identity.[40]

33. *See infra* Section I.B.4.
34. *See infra* Section II.A.
35. *See infra* Part II.
36. *See infra* Part I.
37. *See infra* notes 364–66 and accompanying text; *see also infra* Section II.B.3.
38. *See infra* note 369 and accompanying text.
39. *See infra* notes 261–64 and accompanying text.
40. *See infra* note 369 and accompanying text.

Part I provides a brief history of government identity speech, situating it within the broader category of government speech and adjacent to the private speech forums.[41] Part I also reviews the development of the Court's new identity speech test and how the lower courts have applied it.[42] Part II gives an overview of the new test and examines each of its prongs in light of both government speech and forum principles.[43] Part II also includes a flowchart to aid courts in applying the government identity speech analysis.[44] Part III uses the understandings gained in Part II to apply the test to government–private speech interactions over which lower courts have split.[45]

I. A BRIEF HISTORY OF GOVERNMENT SPEECH

Government speech, of course, has always existed, but only recently has become a defined category in constitutional doctrine.[46] While it has long been established that the Constitution limits the ability of government entities at all levels from discriminating among messages when they regulate private speech, it has similarly been understood that when the government speaks for itself, "it is not barred by the Free Speech Clause from determining the content of what it says."[47] Both the individual free speech right and the government's ability to "say what it wishes"[48] and "select the views that it wants to express"[49] stem from democratic imperatives rooted in the Constitution. Unrestricted private speech supports educated participation by citizens in the process of selecting the officials and creating the entities that carry out the functions necessary to implement the policy choices of the

41. *See infra* Part I.

42. *See infra* Section I.B.4.

43. *See infra* Sections II.A–B.

44. *See infra* Section II.C.

45. *See infra* Part III.

46. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 5–68 (Regents of the Univ. of Cal. ed., 1983) (setting out the many ways government entities have always spoken to fulfill their various functions); Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (government speech doctrine is "recently minted").

47. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

48. *Summum*, 555 U.S. at 467–68 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

49. *Id.* at 468.

electorate. Government officials and entities must speak to function, and they must tailor their speech according content and viewpoint to fulfill their democratic mandates to implement the particular policy choices of their electorates.

These principles, and the rules that determine the range of government discretion to discriminate by content or viewpoint, are relatively uncontroversial at the two extremes of the source-of-speech spectrum. Moving inward, however, from "pure" government or "pure" private speech to instances where government and private entities combine to produce speech, the constitutional principles that should dominate and the rules that flow from them become less well defined. In many instances where the government facilitates private speech by granting access to property or providing resources, the Free Speech Clause limits the government's discretion to restrict the content of the messages broadcast from the "forum." Nevertheless, the Court has made clear that the government's freedom to pick and choose among viewpoints when it creates its own content also applies when it "receives assistance from private sources" to deliver a government message.[50] Through this interpretation, the Court has carved out the new category of "government speech" by means of government–private speech combinations. Additionally, between private speech forums and government–private speech combinations that produce government speech are programs through which the government curates and presents selected private speech according to customary or professional standards of quality or relevance to the intended audience.[51] In administering these types of programs, government entities may make content-sensitive speech selections that would not be permissible in a forum, while the First Amendment's equal access principle may limit the range of those selections to some extent. This Part will present the development of these three government–private speech combination categories to establish the backdrop against which the Court created and defined the more recent category of government–private combinations that produce government speech.

50. *Summum*, 555 U.S. at 468.
51. *See supra* note 160 and accompanying text.

A. Forum Doctrine

Early in its articulation of the free speech guarantee, the Court recognized that the Constitution limits the government's discretion to allocate access to certain types of property that it owns and controls.[52] According to the Court's interpretation, streets, parks, and sidewalks are traditional public forums, "which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[53] Because these types of public places are "so historically associated with the exercise of First Amendment rights . . . access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."[54] In addition to implementing the constitutional value of promoting public discourse, the traditional public forum concept enforces the same "equality of status in the field of ideas" principle that applies to government restrictions of private speech that occurs off public property and without government assistance.[55] Applied to forum access decisions, this principle means that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[56]

The equal access principle translates into a doctrine under which governments may impose content-neutral time, place, or manner regulations to keep order in a traditional public forum.[57] However, restrictions on private speech according to its content must satisfy strict scrutiny, meaning that the government must offer a compelling reason for the discrimination and the regulation must be narrowly tailored to serve it.[58] Few regulations

52. *Summum*, 555 U.S. at 469 (holding the Court "long ago recognized" free speech rights in traditional public forums); Harry Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 3 (1965) (identifying the concept of the public forum as "implicit" in the Court's cases).

53. *Summum*, 555 U.S. at 469 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

54. Carey v. Brown, 447 U.S. 455, 460 (1980) (quoting Hudgens v. NLRB, 424 U.S. 507, 515 (1976)).

55. *Id.* at 463 (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

56. *Id.* (quoting *Police Dep't of Chicago*, 408 U.S. at 96).

57. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

58. *Summum*, 555 U.S. at 469.

can survive this high level of review.[59] Access by private speakers to traditional public forums does not depend on a decision by the government to make the space available for private speech.[60] The history and tradition of public use of the property for private speech define the few types of government property to which broad, nondiscriminatory access is guaranteed without respect to the government's intent to grant it.[61]

The Court subsequently interpreted free speech protections to apply to private speakers granted access to government property or programs that are not traditional government forums.[62] By contrast to the historical usage that defines the traditional public forum, the government's purpose for opening property or creating a program "that has not traditionally been regarded as a public forum" to private speakers establishes the existence and defines the scope of a created forum.[63] The Court's most recent list contains three types of created forums.[64] The government creates a "designated public forum"[65] when it "open[s]" property for "use by the public as a place for expressive activity" to an extent that approximates the mandatory openness of the traditional public forum.[66] A limited public forum exists where a government has "reserv[ed a forum] for certain groups or for the discussion of certain topics."[67] A nonpublic forum[68] comes into being when a

59. *See* Burson v. Freeman, 504 U.S. 191, 200 (1992) (upholding a law restricting political speech within a certain radius of a polling place, but noting in the context of strict scrutiny applied to a content-based regulation in a traditional public forum that "a law rarely survives such scrutiny").

60. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) ("[T]raditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers.").

61. *Id.* (citing Int'l Soc'y for Krishna Consciousness, Inc., v. Lee, 505 U.S. 672, 678 (1992) ("The Court has rejected the view that traditional public forum status extends beyond its historic confines . . . ."); *id.* (access to a traditional public forum is "almost unfettered").

62. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015).

63. *See id.* (quoting *Summum*, 555 U.S. at 469); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

64. *Walker*, 135 S. Ct. at 2250–51.

65. *Id.* at 2250 (quoting *Summum*, 555 U.S. at 469).

66. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The Court has said that the government creates a designated public forum when it intends to make property that hasn't traditionally been open to assembly and debate "generally available," Widmar v. Vincent, 454 U.S. 263, 264–65 (1981), open to "indiscriminate use," *Perry*, 460 U.S. at 47, or provides "almost unfettered access" to the public for expressive activity, *Forbes*, 523 U.S. at 678.

67. *Walker*, 135 S. Ct. at 2250 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

government entity provides access to private speakers in the course of "acting as a proprietor, managing its internal operations."[69]

Through judicial review, courts evaluate and may second-guess the government's assertion of the type of forum it intended to create and, after that determination, the government's claim that it has administered the forum appropriately. Relevant evidence of the type of forum that the government intended to create is its "policy and practice" with respect to private speaker access and "the nature of the property and its compatibility with expressive activity."[70] Judicial interpretation of the "compatibility" consideration could implement an analog of the mandatory access that applies in a traditional public forum in created forums by inferring an intent to open property when allowing access to private speech would not disrupt its essential function.[71] The Court has not, however, applied the compatibility consideration in this way. Instead, it has applied the compatibility consideration in the negative, listing the potential

68. The Court has not been consistent in using the various forum labels; in a series of cases, it failed to list the nonpublic forum as a category. *See, e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 n.11 (2010) ("In conducting forum analysis, our decisions have sorted government property into three categories[, which are the traditional, designated, and limited public forums]."); *Summum*, 555 U.S. at 469–70 (listing the designated and limited public forums as sharing the "essential attributes of the traditional public forum"); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) (listing the types of "public forums" from which a speaker could be excluded as "a traditional or open public forum" and a "limited public forum"). *But see* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007) (mentioning the category of nonpublic forum). Then, in *Walker*, the Court resurrected the nonpublic forum category, describing its characteristics as differing from the limited public forum. 135 S. Ct. at 2251 (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)) (describing the limited public forum as a subset of the designated public forum, intentionally opened as a public forum but reserved for certain groups or discussion of certain subjects and describing a nonpublic forum as existing when the government provides access to private speakers when "acting as a proprietor, managing its internal operations"). Although Justice Thomas joined the *Walker* majority opinion, he more recently asserted that limited public forum and nonpublic forum are different names for the same thing. Am. Freedom Def. Initiative v. King Cty., 136 S. Ct. 1022, 1024–25 (2016) (Thomas, J., dissenting from denial of cert.).

69. *Walker*, 135 S. Ct. at 2251 (quoting *Lee*, 505 U.S. at 678–79).

70. *Id.* at 2250 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

71. Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101–05 (1992) (explaining that under an "Enhancement Approach" the Court could actively review forum managers' decisions and enforce access whenever it is compatible with the use of the forum, but under the Distortion Approach, which has been embraced by the Court, it defers to managers' decisions about compatibility and polices only for viewpoint discrimination).

incompatibility of excluded expression as a consideration supporting the government's assertion that it intended to restrict access to the forum.[72] Moreover, the Court has repeatedly emphasized that a government does not create a forum "by inaction or by permitting limited discourse" but only by intentional action aimed at opening property for public discourse.[73] The strong emphasis on government intent as the touchstone of forum creation prioritizes the government's managerial interests over the value of private speaker access.[74]

Although the doctrine of created forums does not define a substantive scope of private speaker access to government property, the Court has embedded the equality value into its review of the government's administration of the forum. It has always been established that exclusions from a designated public forum, whatever they may be,[75] "are subject to the same strict scrutiny as restrictions in a traditional public forum."[76] Similarly, it has been "black-letter law" that the government may exclude speech from a nonpublic forum "so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum."[77] Although the standard of review applicable to exclusions from a limited public forum has been in flux, it is now clear that exclusions from a limited public forum are subject to the same standard of review as

72. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 681 (1998) (quoting Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257 (1974)) (finding where the incompatibility of admitting more speakers to a forum may cause forum administrators to close it, a "[g]overnment-enforced right of access inescapably dampens the vigor and limits the variety of public debate").

73. *Walker*, 135 S. Ct. at 2250 (quoting *Cornelius*, 473 U.S. at 802).

74. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1789 (1987).

75. The Court has consistently listed the designated public forum as a distinct category and has recited that exclusions are subject to the same strict scrutiny review as are exclusions from a traditional public forum. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 n.11 (2010). Nevertheless, since its initial articulation of categories in *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), it has never classified a property or program as a designated public forum or subjected exclusions from a forum other than a traditional public forum to heightened review. Lower courts continue to find created forums to be designated public forums subject to strict scrutiny but are split as to the attributes that define the category. *See* Am. Freedom Def. Initiative v. King Cty., 136 S. Ct. 1022, 1024–25 (2016) (Thomas, J., dissenting from denial of cert.).

76. Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009).

77. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007).

exclusions from a nonpublic forum.[78] So, the requirement that exclusions from a created forum reasonably relate to the forum's purpose and be viewpoint neutral establishes a minimum equal access guarantee applicable to exclusions from any type of created private speech forum.[79]

What the concept of "viewpoint neutrality" means, across free speech applications and in particular application to created forums, is far from clear.[80] In the context of created forums, the Court has only determined that excluding groups because of a religious perspective is unconstitutional viewpoint discrimination.[81] Lower courts have more actively developed the concept. Courts have found a number of policies to be viewpoint discriminatory on their faces[82] or because vague standards leave too much discretion to administrators to discriminate.[83] Courts have found standards to be neutral on their faces but viewpoint discriminatory as applied.[84] Courts and judges have also differed as to how much deference to accord to administrators' judgments on whether particular words or images fall within an exclusion standard, sometimes rejecting applications of standards as

78. *Martinez*, 561 U.S. at 685 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)) ("The constitutional constraints on the boundaries the State may set bear repetition here: 'The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint.'").

79. Advocates of speaker access have complained that the reasonableness requirement places almost no restriction on the government's ability to limit access to a created forum. *See, e.g.*, C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 118 (1986) (reasonableness standard is "essentially no review at all").

80. *See* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 101 (1996) ("[T]he Supreme Court, despite its inspiring rhetoric on the subject [of viewpoint discrimination], has not been a model of clarity."); *see also* Barr v. Lafon, 538 F.3d 554, 572 (6th Cir. 2008) (explaining that the line between content and viewpoint discrimination is "often imprecise").

81. *Rosenberger*, 515 U.S. at 829 (finding that viewpoint discrimination is "an egregious form of content discrimination," and the government "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is that rationale for the restriction").

82. Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of Chi., 45 F.3d 1144, 1157 (7th Cir. 1995) ("Although the City describes the category of speech that it wishes to prohibit as that creating 'a hostile business environment,' these terms have meaning only when considered in the context of the viewpoint that the ALPA wishes to express."); NAACP v. Philadelphia, 39 F. Supp. 3d 611, 634 (E.D. Pa. 2014) (establishing that the standard that advertisements cannot reflect poorly on the city is viewpoint discriminatory).

83. *See supra* note 11 and accompanying text.

84. *See supra* note 12 and accompanying text.

unreasonable.[85] In addition to the viewpoint neutrality requirement itself, the uncertainty that surrounds its meaning effectively restricts the scope of government administrators' choices among speakers, because it deters them from applying standards that may provoke time-consuming and costly challenges.[86] So, despite the Court's failure to define the viewpoint neutrality concept precisely or enforce it rigorously outside the context of religious expression, the prospect of judicial review of forum administration for reasonableness and viewpoint discrimination acts as a real limit on government speech selections.

B. Commissioned Government Speech

The Court first mentioned the category of government speech in the context of finding a government–private speech interaction to be a created forum.[87] In *Rosenberger v. Rector and Visitors of University of Virginia*, the Court relied upon a public university's written policy distancing itself from funded speech and found the government's intent in collecting and distributing funds to student groups was to "encourage a diversity of views from private speakers."[88] The Court distinguished government speech, noting that the government may constitutionally "regulate the content of what is or is not expressed" when it crafts its educational program, "when it is the speaker or when it enlists private entities to convey its own message."[89] In subsequent decisions, the Court has explained that

85. *See supra* note 13. In *In re Tam*, 808 F.3d 1321, 1329–30 (Fed. Cir. 2015), *cert. granted sub nom. Lee v. Tam*, 137 S. Ct. 30 (2016), the Patent and Trademark Office rejected trademarks for a band's name, the SLANTS, as demeaning and disparaging. However, the Asian–American band members say that they are "reclaiming a term once used as an insult and transforming it into a statement of cultural pride." *Justices Considering Offensive Trademarks*, HERALD & REV. (Jan. 16, 2017), http://herald-review.com/justices-considering-offensive-trademarks/article_a3239398-bc66-582f-b14b-a2118a61c4d3.html.

86. *See, e.g.*, Emma G. Fitzsimmons, *M.T.A. Board Votes to Ban Political Ads on Subways and Buses*, N.Y. TIMES (Apr. 29, 2015), http://www.nytimes.com/2015/04/30/nyregion/mta-board-votes-to-ban-political-ads-on-subways-and-buses.html (transit agency changes advertising policy to avoid legal challenges associated with rejecting certain political ads).

87. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833, 841–42 (1995).

88. *Id.* at 834–35 (noting that in its agreement with student groups, "[t]he University declares that the student groups eligible for [Student Activity Fund] support are not the University's agents, are not subject to its control, and are not its responsibility").

89. *Id.* at 833.

democratic principles of function[90] and accountability[91] ground the government's ability to discriminate according to content and viewpoint when it interacts with private entities to produce government speech.

The *Rosenberger* Court harked back to *Rust v. Sullivan*,[92] in which it upheld a federal program prohibiting funded doctors from discussing abortion as an option.[93] It distinguished the provision of funds to private doctors from a created forum, noting that "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."[94] Because the structure of the program demonstrated that its purpose was to enlist "private entities to convey a governmental message," the government could, without restriction by the Constitution's free speech guarantee, "take legitimate and appropriate steps to ensure that its message [wa]s neither garbled nor distorted by the grantee."[95]

In *Johanns v. Livestock Marketing Ass'n*, the Court again found a government–private speech combination to produce government speech.[96] At issue was a portion of a federal beef promotion program that funded advertisements created by a board made up of private industry representatives and approved by the Secretary of Agriculture.[97] Beef producers forced by law to help fund the advertising campaign argued that they were unconstitutionally compelled to subsidize promulgation of a viewpoint with which they disagreed.[98] Despite the assistance from the

90. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009)) ("'[I]t is not easy to imagine how government could function if it lacked th[e] freedom' to select the messages it wishes to convey.").

91. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (noting that when the government speaks, it is "accountable to the electorate and the political process for its advocacy").

92. 500 U.S. 173 (1991).

93. *Id.* at 196; *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

94. 515 U.S. at 833.

95. *Id*.

96. 544 U.S. 550, 566–67 (2005).

97. *Id.* at 551.

98. *Id.* at 550–51.

private board in crafting the content of the advertisements, the Court held the content to be government speech because the government "effectively controlled" the messaging.[99] Congress "set out the overarching message and some of its elements," agency officials attended and participated in some of the meetings where message proposals were developed, and the Secretary exercised "final approval authority over every word used in every promotional campaign."[100] Three dissenting justices argued that the government must effectively disclose its messaging role to fulfill the democratic accountability principle that underpins the exemption of government speech from Free Speech Clause restraints.[101] The Court, however, found enactment and administration of the messaging mandate through legitimate and transparent political processes to fulfill the accountability requirement.[102]

In *Garcetti v. Ceballos*,[103] the Court applied the theory of government control over private speech it funds or "commission[s]" to the workplace. The Court held that the government employer did not violate a deputy district attorney's First Amendment rights when supervisors disciplined him for writing a memo to them complaining of problems in the prosecution of a criminal case.[104] As with enlisted private speakers, the Court traced the government's discretion to discriminate according to content and viewpoint in rewarding or punishing employee speech to its need to do so to function effectively.[105] The feature significant to classifying employee speech as

99. *Id.* at 560.

100. *Id*. at 561.

101. *Id.* at 577–78 (Souter, J., dissenting) ("It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message . . . .").

102. *Id.* at 563 (majority opinion) ("[T]he beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.").

103. 547 U.S. 410, 422 (2006).

104. *Id.* at 421.

105. *Id*. at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

government speech is that it is uttered "pursuant to [the employee's] official duties."[106]

The Court has described government access allocations to a government speech program as outside Free Speech Clause restraints.[107] It is important to recognize, however, that this freedom from judicial review applies to a government entity's administration of a government–private combination that is properly classified as a government speech program. The questions whether a particular program produces government speech, and the boundaries of the program, are judicial determinations. As described above, the government's need to control commissioned speech to fulfill its legitimate functions explains the discretion to discriminate, and so the link between speech content control and furthering a government program establishes the boundary of a program administrator's freedom from Free Speech Clause constraint. When the government seeks to control the content of a speaker outside the boundaries of the government speech program, constitutional limits apply to its decision making.[108]

C. Government-Curated Speech Selections

In a third set of government–private speech combinations, the Court has found that certain types of quality-curator roles require government entities to make subjective, "content-based" choices among private speakers, which

106. *Id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."). Persons employed by the government may also speak on matters of public concern, in which instance constitutional limits apply to their employers' ability to control the content of their speech. Lane v. Franks, 134 S. Ct. 2369, 2377 (2014) (noting that *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563, 568 (1968) "provides the framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech [on public concern] of its employees").

107. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause . . . does not regulate government speech.").

108. *Lane*, 134 S. Ct. at 2379–80 (employer control of speech by employees on matters of public concern, as opposed to owing its existence to the employees' fulfillment of job responsibilities, is subject to constitutional constraint); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2328 (2013) (noting, with respect to the constitutionality of funding conditions beyond only government speech programs that limit recipients' speech, "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself").

would not be permissible in a private speech forum.[109] The speech produced through these types of combinations differs from commissioned government speech in that the government does not present the private speech selections as its own.

In *United States v. American Library Ass'n*,[110] the Court upheld a congressional command that libraries receiving federal funding limit patrons' access to pornography.[111] According to the plurality, "[t]o fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons."[112] The plurality looked to prior cases to identify "two analogous contexts" in which the Court held "that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public."[113] One of these is "a public television station's editorial judgments regarding the private speech it presents to its viewers."[114] The other is when the government entity's role requires it to make quality judgments among competing private speakers, such as when the National Endowment of the Arts makes funding decisions.[115]

Government entities occupying these roles often choose among and present a wide variety of private viewpoints without being able to justify their selectivity by identifying a non-speech functional objective that requires content control of "commissioned" private speech to achieve it.[116] These government–private speech combinations thus exist at the border of private speech forums, which can look much the same.[117] Nevertheless, the professional role cases are properly read to involve just that—a government entity occupying a role "traditionally occupied by professionals in a field,"

109. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 19.16 (3d ed. 1996) (describing the "professionalism principle," according to which decisions concerning the content of speech are committed "to the sound discretion of professionals in the field").

110. 539 U.S. 194 (2003) (plurality opinion).

111. *Id.* at 214.

112. *Id.* at 204.

113. *Id.*

114. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682–83 (1998) (finding the candidate debate at issue to be a nonpublic forum, but noting that most other broadcaster decisions require greater subjectivity than would be permissible in a private speech forum).

115. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

116. *Compare* Section I.B.3, *with* Sections I.B.1, I.B.2.

117. *See Forbes*, 523 U.S. at 677–78 (defining private speech forum).

employing "criteria that have evolved within their areas of expertise."[118] So, while the role requires subjective choices among private speakers, standards that cabin the exercise of discretion, at least somewhat, exist both traditionally and within the delegations.[119] These standards, although vague, limit the justifications a government entity may offer for its viewpoint-based decision-making and place some types of viewpoint discrimination out of bounds.[120] The need for a government entity to demonstrate that its legitimate functions require it to curate and present private speech according to customary, professional or otherwise recognized quality standards that cabin its discretion to discriminate invidiously among speech applicants limits the types of government–private speech combinations that may fall within this category.

D. Government Identity Speech

1. *Summum*, *Walker*, and the Identity Speech Test

The government–private speech combinations present in the two most recent government speech cases do not fit within either of the existing paradigms. The Court explicitly rejected classifying the combinations as created forums.[121] It implicitly rejected the models of curated private speech and commissioned government speech by articulating attributes of government–private speech combinations that produce government identity speech.[122] These are different from the attributes that justify the government's discretion to discriminate according to private speech content

118. *See* SMOLLA, *supra* note 109, at § 19:16.

119. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 203–04 (2003) (noting that libraries exist to "facilitat[e] learning and cultural enrichment" and collect only those materials deemed to have "requisite and appropriate quality"); *Forbes*, 523 U.S. at 673 (public broadcasters exercise discretion "to fulfill their journalistic purpose and statutory obligations"); *Finley*, 524 U.S. at 585–86 (quoting Advocates for Arts v. Thomson, 532 F.2d 792, 795 (1st Cir. 1976)) (arts grants are "awarded according to the 'artistic worth of competing applicants,'" according to an "'excellence' threshold for NEA support").

120. *Am. Library Ass'n*, 539 U.S. at 236 (Souter, J., dissenting) (library selections may not exclude all books advocating a particular point of view); *Finley*, 524 U.S. at 582 (arts funding may not be used as "a tool for invidious viewpoint discrimination").

121. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2251 (2015); *cf. supra* notes 64–69 and accompanying text.

122. *Walker*, 135 S. Ct. at 2249–51.

when selecting contributions to produce these types of speech. As described by the Court, government identity speech is located at the border of created forums.[123] On the one hand, the government has broad discretion to discriminate according to viewpoint among private participants when producing identity speech without tying its determinations to recognized quality standards or a functional objective that the private speech must be tailored to achieve. On the other hand, and unlike the speech that emanates from forums, private contributions to image or identity are transformed, somehow, into speech by the government, even as the private messaging appears to take place simultaneously. Features of these types of government–private speech combinations, identified in the two recent decisions, provide clues as to the Court's theory of how and why this transformation takes place.

In *Pleasant Grove City, Utah v. Summum*, the City had placed fifteen permanent displays in its downtown public park, a number of which were privately created and donated.[124] Its rejection of a stone monument offered by the Summum church prompted a lawsuit in which the church claimed that it had a constitutionally guaranteed right of access to the public space.[125] The Court, however, held the monument program to be government speech.[126] In its analysis, the *Summum* Court harked back, in part, to the "effectively control" consideration it articulated in *Johanns v. Livestock Marketing Ass'n*.[127] Although the city did not set out an overarching message or publish criteria prior to its decisions on the proposed donations,[128] or participate in developing the message of the monuments, the Court found the city's "final approval authority" over the selection of the monuments for the purpose of projecting an "image" or "identity" to be sufficient to establish effective control.[129] The Court explicitly rejected

123. *See id.*; Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

124. 555 U.S. at 464–65.

125. *Id.* at 465.

126. *Id.* at 481.

127. *Id.* at 473 (referencing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005)).

128. *Id.* at 465 (noting that after denying the church's donation, the city formalized the criteria it had given for the denial, which were that monuments "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community").

129. *Id.* at 473. Earlier in its opinion, as part of establishing a presumption that donated monuments are government speech, the Court noted that municipalities generally exercise editorial

imposing a requirement that the city articulate more precisely the message it intends to convey when accepting a donated monument.[130] In its inquiry, the Court relied also on a historical demonstration that government entities and officials have used monuments to speak to the public throughout history, and its conclusion that viewers who see monuments on public property, whether or not they are donated, will understand that the government is speaking.[131] It primarily distinguished situations where a public–private speech combination can be a public forum involving property or a program that is "capable of accommodating a large number of . . . speakers without defeating the essential function of the land or the program."[132]

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[133] reviewing a state specialty license plate program, the Court faced the same question: By publishing privately created messages through the program, had the state transformed them into government speech, or was the program a private speech forum in which it could not discriminate according to viewpoint in its speech selections? This time, however, the designs were not permanent structures, and there was no shortage of space.[134] The Court nevertheless held the hundreds of background designs to be government speech.[135] It looked back to its decision in *Summum*, which relied in part on *Johanns*, and formalized the considerations into a three-part test.[136] First, it noted that with both permanent monuments and license plate background designs, governments—including the government entity that is the subject of the lawsuit—have historically used the medium to speak to the public.[137] Second, the Court concluded that license plate designs, like permanent monuments, "are often closely identified in the public mind with the [State]" because the State produces the plates and requires their display and, most obviously, because the State stamps its name in large letters at the top of the

control through more formalized requirements and participation in the design process. *Id.* at 471.

130. *Id.* at 476 ("[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure . . . .").

131. *Id*. at 471.

132. *Id.* at 478.

133. 135 S. Ct. 2239 (2015).

134. *Id.* at 2249 (acknowledging that "[h]ere, a State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial").

135. *Id.* at 2253.

136. *Id.* at 2247.

137. *Id.* at 2248.

plate.[138] Third, the Court found that "like the city government in *Summum*," Texas had "effectively controlled" the messages sent by the background design on the plates by exercising "selective receptivity" to proposals and "final approval authority" over the designs and messages.[139] The Court observed that Texas law gives its Motor Vehicles Board "sole control" over the designs and that the Board and its predecessor "actively exercised this authority" by rejecting "at least a dozen proposed designs."[140] Once again, the Court did not require that the State articulate a specific message sent by single plates or the combination, finding that a purpose to select plates "to present itself and its constituency" was sufficient to demonstrate that the plate program produced government speech.[141]

The *Walker* Court could not distinguish the forum cases based on capacity.[142] Instead, it addressed more directly the forum precedents in terms of the key indicator of a forum—the government's demonstrated intent to create one—and the elements in its new three-part test.[143] According to the Court, the State did not intend to create a designated or limited forum for public discourse for the reasons it found the designs to be government speech—the plates have "traditionally been used for government speech," they "bear the State's name," and the State exercises "final authority" over each design.[144] Because these features indicate that Texas "explicitly associates itself with the speech on its plates," it did not intend to create a forum for "purely private" speech.[145]

For "similar reasons," the Court found that the specialty license plate program was not a nonpublic forum—the State was not simply interacting with private speakers in the course of "managing its internal operations," because it intended to convey a government message through the private speakers, and viewers would likely perceive the speech that way.[146]

138. *Id.*
139. *Id.* at 2247 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 473 (2009)).
140. *Id.* at 2249.
141. *Id.*
142. *Id.*
143. *Id.* at 2247–49.
144. *Id.* at 2251.
145. *Id.* at 2250–51.
146. *Id.* at 2251 (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 378–79 (1992)).

Although a program of selling advertising space on public vehicles may create a nonpublic forum,[147] "the existence of government profit alone is insufficient to trigger forum analysis."[148] So, the fact that Texas made money through its specialty plate program did not change its characterization as government speech. Additionally, advertising space "is traditionally available for private speech," and the program addressed by the Court, in which the messages were located on city buses, "bore no indicia that the speech was owned or conveyed by the government."[149] Whereas a program of providing private groups access to a public school mail system by "permission from the individual school principal" created a nonpublic forum,[150] each specialty license plate design is "formally approved by and stamped with the imprimatur of Texas," which means that the program produces government speech.[151] Similarly, a specialty license plate program is not like the federal government's Combined Federal Campaign. The charitable campaign, which occurs in federal workplaces, lacks a history of government messaging, gives no reason for employees to interpret the private solicitations as bearing a government imprimatur, and is designed to manage private solicitations to minimize workplace disruption, not to "communicate messages from the government."[152]

By contrast to the unanimous *Summum* decision, *Walker* was a close case, decided 5–4 with a strong dissent.[153] In the view of the dissenting justices, the program of selling space on license plates created a limited public forum.[154] The dissenters found the history of privately proposed plate designs[155] and viewers' perception of the messaging[156] supported the

147. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 301–02 (1974) (plurality opinion); *Walker*, 135 S. Ct. at 2252 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 390 n.6 (1992)) (noting that *R.A.V.* identified the program in *Lehman* as a nonpublic forum).

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

149. *Id.*

150. *Id.* at 2251.

151. *Id.* at 2251–52 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 3748–49 (1983)).

152. *Id.* at 2252.

153. In the majority were Justices Thomas, Ginsberg, Sotomayor, Kagan, and Breyer, who authored the opinion. *Id.* at 2243–54. Justice Alito wrote the dissent, joined by Justices Roberts, Scalia, and Kennedy. *Id.* at 2254–63 (Alito, J., dissenting).

154. *Id.* at 2262 (Alito, J., dissenting).

155. *Id.* at 2260 (plates that express messages chosen by private entities are "quite new").

156. *Id.* at 2255 (suggesting that viewers could not reasonably perceive designs as messaging "the

conclusion that the plates constituted private speech. As to state control, the dissenters found insufficient evidence in the record to conclude that Texas exercised "selective receptivity" sufficient to transform the private messages into government speech.[157] According to the dissent, the majority's decision "passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing."[158]

The *Summum–Walker* duo establishes the category of government identity speech through private speakers. According to the Court, this category is necessary to allow governments to fulfill their democratic mandates.[159] Quite obviously, however, and as noted by the *Walker* dissent, it threatens to undermine the equal access values that forum doctrine implements. By contrast to commissioned government speech or curated private speech selections, no substantive programmatic purpose or customary and recognized quality standards limit the scope of the viewpoint discrimination that governments may exercise when selecting private speakers to present their "images" or "identities."[160] Consequently, the definition of this new type of government identity speech through private speakers is highly significant because it identifies the tipping point between promulgating speech to implement majority will and protecting equal access for individual speakers to property and resources regardless of their viewpoints.

2. The *Walker* Test in the Lower Courts

Undoubtedly, the *Walker* Court intended its three-part test to guide government entities and lower courts as they navigate the divide between government–private speech interactions that produce government identity

views of the State of Texas and not those of the owners of the cars").

157. *Id.* at 2260.

158. *Id.* at 2254.

159. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 481–82 (2009).

160. The *Summum* Court used the term "editorial control" to describe the monument selection process, but notably it did not cite any of its media precedents, which confer discretion on the selection and presentation of private speech. *Summum*, 555 U.S. at 472. Instead, it emphasized that privately created monuments became government speech because their messages became the government's own. *Id.*

speech and those that create private speech forums.[161] Lower courts are beginning to address programs at the government speech–forum intersection in light of *Walker*, and the results are not promising.[162]

a. Vanity License Plates

Most directly on point, two lower courts applying the *Walker* test have come to different conclusions about how to characterize a personalized or "vanity" license plate program, a part of the Texas license plate program that the Court did not address.[163] Vanity plate programs allow individuals to select a "personalized" combination of letters and numbers to replace the alphanumeric sequence that the state would otherwise issue for the purpose of vehicle identification.[164] The letter–number sequence is stamped over the plate's background design.[165] Typically, the state agency responsible for motor vehicle registration reviews each application and issues rejections based on standards embodied in legislation, regulations, or more informal guidelines or lists.[166] Whatever the type of standards, they are often broad enough to authorize any denial an agency may choose to make.[167] Part of the fun of the plates is capturing meaning in the 6–8 characters that can fit on the plate. Thus, some plates with unwanted messages slip past the agency's initial review. Agencies usually retain the ability to recall plates that have been issued once they become aware of an unwanted meaning through motorist complaints or otherwise.[168]

Indiana's Supreme Court applied the *Walker* test and held its state's

161. *See Walker*, 135 S. Ct. at 2246 (majority opinion).

162. *See infra* Sections I.D.2.a–c.

163. *Walker*, 135 S. Ct. at 2244 n.4 (2015); Comm'r of Ind. Bureau of Motor Vehicles v. Vawter, 45 N.E.3d 1200, 1208 (Ind. 2015) (program is government speech); Mitchell v. Md. Motor Vehicle Admin., 126 A.3d 165, 177 (Md. App. 2015) (program is a nonpublic forum).

164. *See, e.g.*, *Mitchell*, 126 A.3d at 170.

165. *Id.*

166. *Id.* at 171 ("objectionable plate list" kept and updated by the agency).

167. *Id.* at 170 (agency has discretion to "refuse any combination of letters and numerals" requested); *Vawter*, 45 N.E.3d at 1202 (agency may reject any combination that "(1) carries a connotation offensive to good taste and decency; (2) would be misleading; or (3) the bureau otherwise considers improper for issuance").

168. *Mitchell*, 126 A.3d at 171 (agency recalled plate with "MIERDA," the Spanish word for "shit," which the applicant had had stamped on a plate with the special agricultural plate design and motto, "Our Farms, Our Future").

vanity plate program to be government speech.[169] First, it described the letter–number combinations as being "identifiers for public, law enforcement, and administrative purposes."[170] It then moved to describe the history of state slogans appearing on the backgrounds of license plates.[171] The court rejected the challenger's argument that the state's historical practice of government messaging via license plates does not extend to the letter–number sequence, which has always been "individually-crafted" and "unique."[172] Rather, "history shows that Indiana often communicates through its license plates," and the vanity program is properly viewed as an "expan[sion of] how it does so."[173] Moreover, the court added, vanity plates "are no more unique than public park monuments, which 'typically represent government speech.'"[174]

Second, and for the same reasons as recited in *Walker*, the court determined that the alphanumeric combinations "are often closely identified in the public mind with the [State]."[175] The court listed the name at the top of the plate, its official function, and the ease with which individuals could send their messages via bumper sticker or window decal were they not seeking the imprimatur of the state.[176] In response to the argument that viewers could not possibly believe the state would embrace all vanity plate messages, the court responded that the dissent made that argument in *Walker* and lost.[177] The categorization does not depend upon how every viewer perceives the source of every message.[178] The relevant question is how viewers are likely to perceive the source of the vanity plate messaging generally.

Third, the court found that Indiana maintains effective control over all of the letter–number sequences that appear on its plates.[179] The challengers argued that Indiana did not exercise control because its statutory mandate

169. *Vawter*, 45 N.E.3d at 1206.
170. *Id.* at 1204.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1205 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).
175. *Id.*
176. *Id.* at 1206.
177. *Id.*
178. *Id.*
179. *Id.*

was so broad and its guidelines allowed it to approve or reject plates for any reason.[180] The court responded that regardless of the scope of its discretion, the state by statute has final approval authority, which it exercises with regularity.[181] Because it found all three of the *Walker* prongs met, the court concluded that the Indiana vanity plate program is government speech.[182]

Several weeks later, the Court of Special Appeals of Maryland held that its state's vanity license plate program is not government speech.[183] The court was aware of the Indiana Supreme Court's result but found it "unpersuasive"[184] and, in fact, disagreed with the Indiana court's application of the *Walker* test in almost every respect.[185] First, the court gave a nod to a historical inquiry by noting that, in contrast to the norm, Maryland does not have a long and robust tradition of using the background of its standard base plates for government messaging.[186] The court distinguished a plate's background design, which can be displayed by many motorists, from the letter–number combination, which when "personalized," becomes imbued with "intrinsic meaning . . . that is independent of mere identification and specific to the owner."[187] Then, it used this observation to flip its conclusion about the traditional expressive use of the relevant medium: "[H]istorically, vehicle owners have used vanity plates to communicate their own personal message and the State has not used vanity plates to communicate any message at all."[188]

180. *Id.*

181. *Id.*

182. *Id.*

183. Mitchell v. Md. Motor Vehicle Admin., 126 A.3d 165, 177, 185–86 (Md. App. 2015) (concluding that the program is a nonpublic forum but nevertheless upholding the recall of the plate that prompted the lawsuit because it found the "profanity" prohibition reasonable and viewpoint-neutral).

184. *Id.* at 185.

185. *Id.*

186. *Id.* at 184 ("Until [2010 when it adopted a 'War of 1812' design], Maryland's standard license plates did not urge, promote, or tout anything about itself."). *But see id.* at 183 n.23 (noting that the base plate for 1934 bore the word "Tercentenary," honoring Maryland's 300th anniversary, and that from 1942 through 1947, the plate read "Drive Carefully," but noting that the latter "is not a State slogan in that it does not concern Maryland in particular"); *id.* at 183 n.25 (noting that in 1976 Maryland began designing and issuing a number of different types of commemorative plates, which individuals can purchase as an alternative to the base plates).

187. *Id.* at 184.

188. *Id.* at 185.

Second, the court rejected the Indiana Supreme Court's conclusion that the state's name on the plate, its governmental origin and official, identifying function dominate viewers' perceptions of the origin of the speech on every part of the plate.[189] Instead, the "personal nature of a vanity plate message makes it unlikely" that viewers will perceive it as coming from the State.[190] Unlike background designs, which display emblems and slogans produced by a template, vanity plate messages are not, according to the court, "official-looking."[191] Given the "plainly personal nature" of vanity plate messages, viewers would not assume that just because the State allowed the message to be printed, that it endorsed it as its own.[192]

Finally, the Maryland court did not view the undisputed power that the Maryland Motor Vehicle Administration (MVA) exercises to review every vanity plate application and to reject those deemed objectionable as sufficient to establish effective control over the message.[193] In contrast to the specialty plate approval process, which the court characterized as "stringent," vanity plates undergo only an "initial screening," which may fail to detect messages the MVA would disapprove of.[194] According to the Maryland court, these aspects of the process mean that the MVA does not "exert[] such tight control" that the vanity plate messages become government speech.[195]

b. Trademarks

Lower courts have also split in applying the *Walker* test to the federal program of registering trademarks.[196] Relying on statutory authority, the government has argued that it may fail to register or cancel marks because of the viewpoints they express.[197] The district court for the Eastern District of

189. *Id.* at 185–86.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 186.
195. *Id.*
196. *Compare In re* Tam, 808 F.3d 1321, 1329–30 (Fed. Cir. 2015), *cert. granted sub nom.* Lee v. Tam, 137 S. Ct. 30 (2016), *with* Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 458 (E.D. Va. 2015).
197. *See Pro-Football, Inc.*, 112 F. Supp. 3d at 453 (noting that "[Trademark Trial and Appeal

Virginia reviewed the Trademark Trial and Appeal Board's (TTAB) cancellation of the registrations of various "REDSKINS" trademarks on the ground that the message "may disparage" a substantial composite of Native Americans and bring them into contempt or disrepute.[198] The Court addressed the three *Walker* prongs quite briefly.[199] It found the first *Walker* factor was met because "registry with the federal trademark registration program communicates the message that the federal government has approved the trademark."[200] As to the second prong, it found "the public closely associates federal trademark registration with the federal government as the insignia for federal trademark registration, ®, is a manifestation of the federal government's recognition of the mark."[201] And third, it found the "effective control" prong was met because "the federal government exercises editorial control over the federal trademark registration program," as it did by cancelling the REDSKINS trademark.[202]

The United States Court of Appeals for the Federal Circuit, sitting en banc, reviewed the TTAB's refusal to register THE SLANTS as a trademark on the same ground that it "may disparage" persons of Asian descent.[203] In its view, the government's claim in support of the denial was "at odds with the Supreme Court's analysis in *Walker* and unmoored from the very concept of government speech."[204] The closest the court came to addressing the history prong was to note that "[w]hen the government registers a trademark, the only message it conveys is that a mark is registered."[205] As to viewer perception gleaned from the nature of the property, it contrasted

Board (TTAB)] itself pointed out that it is only empowered to cancel the statutory *registration* of the marks under Section 2(a)" if it does not approve of the viewpoint expressed).

198. *Id.* at 450, 467–68 (citing § 2(a) of the Lanham Act, 15 U.S.C. § 1052(a) (2012)).

199. *Id.* at 458–59. The court issued its opinion only a few weeks after the *Walker* decision. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015). In addition to the *Walker* test, the court applied the government speech test developed in the Fourth Circuit and found the trademark program to be a subsidy in which viewpoint discrimination is permissible. *Pro-Football, Inc.*, 112 F. Supp. 3d at 459–60 (citing Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002)).

200. *Id.* at 458.

201. *Id.* at 458–59.

202. *Id.*

203. *In re* Tam, 808 F.3d 1321, 1329–30 (Fed. Cir. 2015), *cert. granted sub nom*. Lee v. Tam, 137 S. Ct. 30 (2016).

204. *Id.* at 1346.

205. *Id.*

trademarks with license plates: the government does not "own[]," "monopolize[]," "size[]," or "format[]" trademarks, and they are not "immediately understood as performing any government function (like unique, visible vehicle identification)" or otherwise "aligned with the government."[206] The court noted that the government "routinely registers" marks that "no one can say the government endorses" and listed examples of trademark messages that contradict official government policy.[207] According to the court, to the extent that trademarks are expressive, viewers associate the messages with the private sellers who use them, not with the government.[208] Finally, the court did not find the acts undertaken by the government in "processing" trademarks—the act of registration including granting the right to use the registry symbol, issuing a registration certificate, or listing trademarks in the government's database—to be sufficient "control" to meet the third prong of the *Walker* test.[209] In the court's view, equal access and protection against "rampant viewpoint discrimination"—not the government's functional need to speak—was the principle that governed the result of the case.[210]

c. Advertising Space on Government Property

The dispute over application of the "demeaning or disparaging" standard to trademarks is, in fact, just one manifestation of a controversy that is erupting across a number of government–private speech combination programs. Comparing the dispute in *Walker* to other disputes between the government and programs that solicit private advertising on government property illustrates the very thin line between government combinations with private speakers that produce identity speech and those that create forums. In *Walker,* the Texas DMV Board relied upon application of a form of the "disparaging or demeaning" standard to reject the confederate flag logo.[211]

206. *Id.*
207. *Id.*
208. *Id.* at 1348.
209. *Id.*
210. *Id*.
211. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015). The Board explained that public comments indicated that many members of the general public find the design "offensive," the comments "reasonable," and that the message was an expression of "hate . . . that is demeaning to . . . people or groups." *Id.* at 2258 (Alito, J., dissenting).

The Court upheld the Board's authority to reject the design on this ground, even though it accepted other designs that members of other groups may perceive as demeaning.[212] Meanwhile, controversy over the constitutionality of the "demeaning or disparaging to individuals or groups" standard in advertising space programs is raging through the lower courts.[213] Courts are split as to whether the standard, stated generally, meets the forum doctrine's viewpoint-neutrality requirement.[214] However, where the standard distinguishes among groups, as in *Walker*, courts are more likely to find that it results in unconstitutional viewpoint discrimination in a program that is classified as a private speech forum.[215]

So, classification of the program as a forum or as government speech makes all the difference. However, the apparent differences between the license plates designs addressed in *Walker* and advertising on public property are slight.[216] States sell license plate access to private speakers, place the designs on government property, and display them to the public, individually and as a compilation.[217] These same things are true of private advertisements that appear on all sorts of government property.[218] Government entities and courts have assumed that advertising space creates some sort of private speech forum.[219] *Walker*, however, creates an opening with respect to the multiple variations of advertising space[220] and the many

212. *Id.* at 2262 (arguing that rejecting the confederate flag design was "pure viewpoint discrimination," especially because the Board approved a Buffalo Soldiers plate with a design Native Americans find offensive and demeaning to their group).

213. *See, e.g.*, Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth., 781 F.3d 571, 573 (1st Cir. 2015) ("Many circuits and district courts have addressed the First Amendment issues that public transit authority advertising policies raise.").

214. *Compare id.* at 579–80 (upholding application of the guideline in a nonpublic forum), *with id*. at 594–95, n.8 (summarizing cases finding application of the standard in a private speech forum to be unconstitutional).

215. *See* Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 474–75 (S.D.N.Y. 2012) (relying on R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992)).

216. *See, e.g.*, *Walker*, 135 S. Ct. at 2251–52 (majority opinion).

217. *See id.* at 2251.

218. *Id.* at 2252 (listing the types of private advertising that is tied to government property, such as a school district's internal mail system, a city bus, or a charitable fundraiser directed by government employees).

219. *Id.* (citing Lehman v. Shaker Heights, 418 U.S. 298, 299 (1974)) (distinguishing the specialty license plate program from advertising on city buses, which a plurality found to create a nonpublic forum).

220. *Walker*, 135 S. Ct. at 2252 (distinguishing specialty license plate designs from the advertising

other types of government–private speech combinations that have been presumed to create private speech forums.[221] Government entities will undoubtedly seize on the new prospect of classifying a program as government identity speech to justify viewpoint discrimination in their speech selections. Hence, it is critically important to understand how the *Walker* test can be applied as an effective tool to identify the boundary between government–private speech combinations that are forums and those that produce government identity speech.

II. UNDERSTANDING THE TEST FOR GOVERNMENT IDENTITY SPEECH

A. Situating the Walker *Test*

The *Walker* test and the category of government identity speech programs are the most recent of the many tests and types produced by the Court to segregate and analyze restrictions on government–private speech combinations. The Court's immediate plunge into articulation and application of the factors of its new test in *Summum*,[222] and again in *Walker*,[223] obscures the preliminary determinations implicit in its decision to create the test and apply it to the programs before it. Other entities that must determine whether and how to apply the *Walker* test must understand where it is situated in the broad government–private speech combination framework.

The government interacts with the speech of private individuals in many different ways. Little recognized, but crucial to sifting through the doctrine and cases, is that a basic attribute of government speech programs, government-curated speech programs, and created forums is that the government operates them, at least in part, for the purpose of adding

space it had addressed years before in part on the ground that the advertising space "bore no indicia that the speech was owned or conveyed by the government"); Mech v. School Bd. of Palm Beach Cty., 806 F.3d 1070, 1079 (11th Cir. 2015) (applying the *Walker* test and finding that advertisements on school stadium banners constitute government speech).

221. *See Walker*, 135 S. Ct. at 2252.

222. Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) ("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, but this case does not present such a situation.").

223. *Walker*, 135 S. Ct. at 2246 (beginning its analysis section by stating, "In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech").

information or ideas to the speech market.[224] Lower courts have struggled when trying to use government–private speech combination models to analyze speech restrictions imposed on access to programs that do not require private entities to speak or assist in the production of speech to achieve any of the government's purposes.[225] So, the first question when assessing application of the *Walker* test, or any other government speech or forum test, is whether the government is running a program that grants access to private speakers and whether a purpose of the program is to produce speech.[226] Absent a plausible assertion by either party that a program granting access to private entities exists, and that an attribute necessary to fulfilling its purpose is that the private entities produce speech, neither the government speech nor the forum precedents apply.[227]

Another preliminary determination is inherent in the Court's decision to

224. *See Summum*, 555 U.S. at 469–70, 473 (holding that the government may designate forums typically outside of the traditional public forum, as well as programs for itself, to allow for the expression of ideas).

225. *See, e.g.*, Wandering Dago, Inc. v. Destito, No. 1:13-CV-1053, 2016 WL 843374, at *9 (N.D.N.Y. Mar. 1, 2016) (addressing the exclusion of a vendor from a government office lunch program because of its name and stating that the court "has struggled with the idea that this case does not neatly fit within [the forum discussion] framework"); Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 669–72 (2010) (noting other examples where courts apply forum doctrine to situations where the government is not running a program for private participants for the purpose of producing speech).

226. *See generally Walker*, 135 S. Ct. at 2247 (showing that the first factor considered by the Court in its analysis regarding government speech [after its forum analysis] was whether the government was speaking to the public or if the forum at issue was reserved for private speech); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (showing that the Court must first decide what type of forum is at issue, keeping in mind that the government may deny access to some public speech in the limited public forum); Rust v. Sullivan, 500 U.S. 173, 194–95 (1991) (showing the Court's need to determine whether the funding program at issue was designed by the government to produce private speech).

227. This assertion goes beyond what the Court has held specifically, but follows from the Court's statement that some government properties are "not fora at all." *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998). So, exclusion of an audience member from a speech because of a bumper sticker or leafletters from welfare office waiting rooms limited to persons there on official business do not present government speech or forum questions because the government is not running a program for the purpose of producing speech. *See* Weise v. Casper, 593 F.3d 1163, 1169 (10th Cir. 2010) (explaining that as attendees at a president's speech, plaintiffs were "not speakers at all"); Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 145, 146 n.7 (2d Cir. 2004) (classifying a welfare office waiting room as nonpublic forum, while noting that "[l]ike waiting rooms in airport terminals, medical clinics or doctor's offices, or motor vehicle departments, welfare office waiting rooms generate casual conversations" but are otherwise not opened for expression).

create and apply the new *Walker* test. This is that the attributes that define commissioned government speech programs and government-curated speech were not appropriate or sufficient in the context of the government–private speech combinations at issue and that, instead, it was necessary to define a new government speech program type.[228] Although the Court did not set out the analysis, other entities must reason from the government's assertion that it should have the discretion to discriminate among private speech applicants to the particular type that identifies the test the program must meet.[229] With respect to all of the types, the need to fulfill a legitimate government function justifies restrictions imposed by a government on the content, including the viewpoints, of private speech.[230] Consequently, the government's asserted functional purpose for restricting the content of the private speaker challenging the restriction will determine the program type or types that may apply.[231] When the government asserts that its purpose in combining with private speakers is to produce its own identity speech, then the *Walker* test applies to determine whether the attributes that justify judicial deference to the government's content control of speech selections exist.

The *Walker* Court began its analysis by presenting its "precedents regarding government speech" and its "precedents regarding forums for private speech" as if they constituted dichotomous "framework[s] through which to approach the case."[232] But this dichotomous presentation is misleading. In fact, the Court created the *Walker* test to resolve both sides of a speech program's classification, as its redundant distinctions of forum precedents illustrate. Entities seeking to apply the test meaningfully and coherently must understand how the government speech and forum inquiries intersect within the test.

To be sure, the Court has not been obvious in explicating the overlaps

228. *Walker*, 135 S. Ct. at 2250–53 (distinguishing the government speech in that case from the modalities of the traditional forum analysis).

229. *See id.* (demonstrating that although the Court's inquiry does not fit within the forum analysis, there are various ways in which it distinguished the speech as government speech, even though some private speech was at issue).

230. *Id.* at 2245–46, 2253 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009)).

231. *Id.* at 2248–49 (holding that the government's purpose of using license plates as a state-sponsored identification system warranted a restriction on private speech because the speech was more closely related to government speech to serve a legitimate government purpose).

232. *Id.* at 2246.

between government speech and forum doctrine. But, of course, they exist. According to the Court, private messages accepted and displayed by the government "constitute government [identity] speech" when they "are meant to convey and have the effect of conveying a government message."[233] Although the mention of the effect of the speech is new and will need to be explained, the focus on the government's intent to classify a government identity speech program is the same as the created forum determination.[234]

Mere reference to "government intent" in creating a speech access program, however, is insufficiently specific. As noted above, the classification of a government speech program as a particular type depends upon the function to which the speech restriction relates. So, "government intent," with respect to government speech programs, means the function that the government intends to fulfill through the speech restriction.[235] In fact, "government intent" as the function to which the restrictions imposed on private speech relate applies to created forums as well.[236] That is, the scope of the government's ability to discriminate among private speakers depends upon the relationship of the speaker access program to the government entity's constitutionally mandated function in both government speech and forum doctrine.[237] It is the government's reason for restricting the content of the private expression and the role of the restriction in fulfilling a government function that distinguishes the two types of access programs.[238] With government speech programs, function justifies affirmative discrimination among private messages because the government's intent in interacting with the private speakers is to use the content of the private speech as the means to accomplish a function that requires speech.[239] With created forums, function justifies some degree of

233. *Id.* at 2250 (quoting *Summum*, 555 U.S. at 472).

234. *See supra* notes 63–69 and accompanying text.

235. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009) (identifying the city's intent with regard to the monument program as showing the area's identity, and therefore, warranting a restriction on speech that conflicts with that idea).

236. *See Walker*, 135 S. Ct. at 2250 (focusing on the intent required of the government to open specific fora not traditionally designated as such).

237. *See supra* notes 235–36 and accompanying text.

238. *See infra* notes 239–40 and accompanying text.

239. *Summum*, 555 U.S. at 468 ("A government entity may [select the views that it wants to express] when it receives assistance from private sources for the purpose of delivering a government-controlled message.").

negative discrimination among private speakers or messages because the government's intent in interacting with the private participants is to facilitate private speech but to avoid disruptions caused by the content.[240]

This recognition of the different reasons that the Constitution permits governments to restrict access to government speech programs and created forums clarifies the specific meaning of the inquiry into government intent in the *Walker* test, or any other test that purports to distinguish government speech programs from created forums.[241] The question of whether the government intends to produce government speech by means of an access program requires a targeted inquiry into whether the government intends its speech restrictions to tailor private submissions so that their content will impact listeners in a way that fulfills a government purpose. The government's reason for imposing the particular speech restriction at issue will guide the inquiry.[242] If the government can only articulate a purpose to avoid interference with a function that does not require the government to speak, then its speech access program is a created forum that does not produce government speech.[243] If the government can plausibly describe its speech restrictions as tailoring private speech content to influence viewers to perceive its own image or identity in certain, presumably positive, ways, then the factors set out in *Walker* provide the tool to "test" whether sufficient evidence exists to support the government's assertion of its intent.

In addition to the substantive determination of government intent, the same types of evidence are probative in making the determination across the range of government–private speech combinations. To determine the extent to which the government intended to open a forum, the Court looks to the "policy and practice of the government."[244] The policy sets out the restrictions that the government intends to impose on access to the forum.[245]

240. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 807 (1985) (government may limit access by certain speakers to a nonpublic forum to avoid "unwelcome disruption" of the workplace in which the forum is situated).

241. *See Summum*, 555 U.S. at 471–72 (examining the selectivity used by government speech programs in the past to tailor the "allowed" speech to the government's specific objective or idea it wishes to express).

242. *Id.*

243. *Id.*

244. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015) (quoting *Cornelius*, 473 U.S. at 802).

245. *Id.* at 2251.

Courts seek evidence of the government's administration of its forum to confirm the boundaries in the stated policy.[246] Evidence of inconsistent enforcement of an access restriction can contradict the government's claim that it intends to limit access and change a court's classification of the forum.[247] The government's access policy and practice provides relevant evidence across and into the forum–government identity speech program divide.[248] The government's asserted policy to restrict private submissions to create government identity speech begins the inquiry. To apply the *Walker* test prongs, the Court looked to both the government's stated policy and its practice in soliciting, evaluating, and broadcasting private submissions.[249]

In the forum context, the Court also recites that it looks to "the nature of the property and its compatibility with [private] expressive activity" to determine the program's classification.[250] As noted above, the Court has not used the compatibility consideration to force the government to grant access to its property greater than its expressed intent.[251] Rather, it has cited evidence about the function of the property in which a forum is placed and its incompatibility with a greater scope of private expression as confirming the government's asserted intent to restrict access.[252] The Court has used this type of evidence in the same way as in the government speech program

246. United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 352–53 (6th Cir. 1998) (looking "closely" to "examine whether in practice [the government] has consistently enforced its written policy in order to satisfy [itself] that [the government's] stated policy represents its actual policy").

247. *See, e.g.*, Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 252 (3d Cir. 1998).

248. *Id.* at 253.

249. *Walker*, 135 S. Ct. at 2249 (noting rules and applications of rules that showed that Texas maintained "direct control over the messages conveyed"); *id.* at 2260–61 (Alito, J., dissenting) (relying on the same evidence of Texas's practice to find a lack of selective receptivity, which should indicate that the Texas specialty license plate is a created forum).

250. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

251. Some lower courts have read the Court's precedents to direct this type of compatibility inquiry. *See, e.g.*, *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 350 ("Discerning whether the government permits general access to public property or limits access to a select few does not end our inquiry, however, for we must also assess the nature of the forum and whether the excluded speech is compatible with the forum's multiple purposes.").

252. *Cornelius*, 473 U.S. at 804 ("In cases where the principal function of the property would be disrupted by expressive activity, the Court [has been] particularly reluctant to hold that the government intended to designate a public forum.").

inquiry. In *Summum* specifically, as noted above, the Court relied upon the incompatibility of forum-type permanent monument access with the function of parks and public open spaces to support the government's assertion that it intended its program to produce government speech.[253] So, the fundamental inquiries into the government's intent in creating and running a speech access program, as well as the evidence sought by the tests to classify particular programs, are the same across the spectrum of government–private speech programs. Specific inquiries, including applications of the *Walker* test, will be more coherent, consistent, and principled when understood in this way.

B. Parsing the Prongs

The purpose of the *Walker* test is to determine whether a speech access program is "meant to convey and ha[s] the effect of conveying a government message."[254] So, its three prongs focus on reviewing evidence of the government's intent in creating and running a speech access program and the program's effect on listeners.[255] Evidence of intent and effect will overlap, because viewer perceptions will often be conditioned by intentional government acts.[256] Nevertheless, prong two of the *Walker* test explicitly addresses viewer perception.[257] The other two prongs, which ask about the government's historical use of the medium and its effective control over the content of private submissions, can be seen primarily as an inquiry into the government's intent.[258] With the inevitable overlaps in mind, this Section will address the prongs in this way.

Additionally, the *Walker* test presents the effective control inquiry as prong three.[259] Entities applying the test will likely follow the prongs'

253. Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009) (quoting Summum v. Pleasant Grove City, 499 F.3d 1170, 1175 (2007) (McConnell, J., dissenting from denial of rehearing en banc)) ("If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments.").

254. *Walker*, 135 S. Ct. at 2250 (quoting *Summum*, 555 U.S. at 472).

255. *See id.* at 2248.

256. *See id.*

257. *Id.* at 2247.

258. *Id.*

259. *Id.*

sequence.[260] Prong three, however, presents the most obvious overlap with the tests for created forums and the other government speech program types. Also, its "effective control" determination is the only requirement to identify commissioned speech programs, which is a difference that is best understood before applying the other prongs. Thus, this Section will address prong three first.

1. Prong 3: Government's Effective Control over the Message

The third prong of the *Walker* test requires that the government "effectively control" the message sent by private speech participants.[261] This prong is drawn directly from the commissioned government speech test and in that context, is the sole requirement.[262] In the context of government identity speech, the Court has described this prong as evidenced by a practice of "selective receptivity."[263] The counterpart to this requirement in forum doctrine is that to avoid strict scrutiny of exclusions, the government must demonstrate an intent to grant "selective" rather than "general" access.[264] To use this prong to distinguish policies and practices that create government identity speech programs from those that characterize created forums, it is necessary to probe and clarify the similar terminology.

To gauge the type and degree of control over the content of speech that marks different types of government speech programs and created forums, it is necessary to recognize that the government's apparent intent to exercise "control" over the content of private speech cannot alone provide a principled justification for it to do so. In forum doctrine, which has had longer to develop, lower courts have recognized that selectivity and

260. *See, e.g.*, Am. Civil Liberties Union of N.C. v. Tennyson, 815 F.3d 183, 187 (4th Cir. 2016) (applying the three-factor *Walker* test in sequence).

261. *Walker*, 135 S. Ct. at 2247 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 473 (2009)).

262. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 560 (2005).

263. *Walker*, 135 S. Ct. at 2247 (quoting *Summum*, 555 U.S. at 471).

264. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804 (1985)) ("On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers, as the university made its facilities generally available to student groups in *Widmar*. On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission,' to use it.").

permission requirements, standing alone, implement only the government's will, which does not trace to any coherent set of constitutional values.[265] Selectivity and "by permission" requirements, when accepted as legitimate by the Court, are indicia of a more fundamental linkage between government speech content control and preservation of the property that hosts the forum so that it can fulfill its primary functions, which do not involve promoting private speech. So, in the forum context, a government entity may acquire the discretion to distinguish among private speakers when it plausibly asserts that the restrictions that allocate access to the program that it has created are for the purpose of limiting negative impacts to its ability to effectively carry out its other, constitutionally mandated functions.[266]

With government speech programs, as with created forums, a mere showing by the government of an intent to control the content of private speech it facilitates does not provide a principled basis for allowing the government to do so. The Court has explicitly grounded the government's ability to discriminate among private speakers when it produces government speech on its need to do so to carry out its constitutionally mandated functions.[267] So, as with forums, a link between the assertion of control and the fulfillment of a legitimate government function provides the grounding for the "effective control" requirement in the context of government speech.[268] With all types of government speech, the effective control over the speech content must be sufficient to transform private contributions into a government message.[269] Nevertheless, the types differ in the extent of control that must be shown according to the function that the speech

265. *See, e.g.*, N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998). A rule that focused solely on whether a speaker must obtain permission to access government property "would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content." *Id.*

266. Post, *supra* note 74, at 1770–71 (explaining forum doctrine as drawing a line between realms of public discourse and managerial domains, where government managers can limit speech to promote internal objectives).

267. Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

268. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005). Effective control of the message is for the purpose of fulfilling Congress's mandate to implement a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." *Id.* at 561.

269. *Id.* This does not apply to speech selections by government entities occupying recognized professional quality arbiter roles.

fulfills.[270] In assessing the evidence of "policy and practice" necessary to show "effective control," the function that justifies the particular category provides the guidepost.[271]

As noted above, the Court originally articulated the "effective control" requirement in the context of commissioned speech.[272] In commissioned speech programs, the government enlists private speakers to broadcast information or messages for the purpose of accomplishing policy objectives that are not contained in the speech itself.[273] So, "effective control" means a type and degree of control over private speech content that the government could reasonably believe will be effective to ensure that the speech is tailored to be an effective means to achieve the objective.[274] With commissioned speech, the government directs the content of private speech to achieve a result with identifiable substantive boundaries, so "effective control" requires evidence of some degree of content control evident in the government's selection policies and confirmed by its procedures.[275] With every government–private speech combination that the government asserts to produce commissioned speech, the stated objective provides a marker against which to assess whether the government's policy and practice evidence "effective control" sufficient to qualify for the discretion that attaches to the category.[276]

Because the use of private speech in the programs differs, "effective control" does not mean the same thing in the context of government identity speech programs.[277] What sets the category of government identity speech

270. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015) (explaining license plates were government speech because of the level of control the government had over them).

271. *Id.* (stating that there must be an examination of the "compatibility with expressive activity").

272. *Johanns*, 544 U.S. at 560.

273. *Id.* at 561.

274. *Id.* at 562. The Court has determined that when the statutory mandate is to promote the consumption of beef products, evidence that the government "sets the overall message to be communicated and approves every word that is disseminated" is sufficient to show effective control. *Id.*

275. *Id.* (stating that there was control because the government approved the overall message, as well as each word in the end product).

276. *Id.* This means that under minimum rationality review, some speech selections could be determined to be unreasonable or arbitrary. *Id.* at 553 (stating that the question of whether something is the government's own speech is reviewed under rational basis).

277. *See infra* notes 278–84 and accompanying text.

apart from commissioned speech is that the government need not articulate an objective that is independent of the meaning of the private speech submissions and against which the extent of effective control that the government must exercise to achieve it can be assessed.[278] An acceptable objective for a government identity speech programs can be simply to "present itself and its constituency."[279] According to the Court, a requirement that the government attach particular meaning to private speech that it selects and presents "fundamentally misunderstands the way [private contributions to government identity speech] convey meaning."[280] As noted above, "effective control" means a type and degree of control over private speech content that the government could reasonably believe will be effective to ensure that the speech is tailored to achieve the objective.[281] The lack of substance in the "image" or "identity" objective and in the content criteria for speech selections makes almost impossible an objective assessment of whether the content control exercised by the government effectively achieves its identity-broadcast objective.[282] In *Walker*, for example, the dissent emphasized the inclusion of "[a]n even larger number of schools from out-of-state [than in-state]" as inconsistent with meaningful identity messaging.[283] The Court, however, viewed the inclusion as consistent application of an implicit standard "celebrating the many educational institutions attended by its citizens" while failing to include a message "deriding schooling."[284]

Without a substantive standard against which to evaluate effective control, what is left is "selective receptivity" as a clue to control without the requirement that the selectivity be explained.[285] One measure of selectivity

278. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2257 (2015) (Alito, J., dissenting).

279. *Walker*, 135 S. Ct. at 2249 (majority opinion).

280. Pleasant Grove City v. Summum, 555 U.S. 460, 474 (2009); *see also Walker*, 135 S. Ct. at 2251–52 ("Texas's desire to convey numerous messages does not mean that the messages conveyed are not Texas's own.").

281. *See supra* note 274 and accompanying text.

282. *Summum*, 555 U.S. at 474 (stating messages may be interpreted in different ways by different observers).

283. *Walker*, 135 S. Ct. at 2257 (Alito, J., dissenting).

284. *Id.* at 2249 (majority opinion).

285. *Id.* at 2247.

is the number or percentage of applications rejected.[286] The *Walker* Court mentioned this type of evidence as probative of the government's exercise of effective control.[287] Some caution in using this type of evidence to support the type of effective control necessary to categorize a program as government identity speech makes sense.[288] A history of frequent and consistent rejections of certain viewpoints is helpful to support a claim that speech selections create identity speech, but it is not necessary.[289] It is plausible that only extreme outlier viewpoints may interfere with the identity message of a state as big as Texas, especially since the specific and broad content of the identity message need not be explained.[290] Whether or not the state also rejected a "pro-life" plate years before does not add a significant amount of information to whether the state exercises effective control over its specialty plate program.[291] Another reason for a lack of pattern of rejections is that significant barriers to entry may exist.[292] To the extent that the government is effectively messaging identity through the medium, outliers may understand that they are not welcome and so may not apply.[293] Expense may also be a barrier.[294] Thus, a tally of many rejections may support a finding that the government is exercising some sort of control, but

286. *Id.* at 2260 (Alito, J., dissenting) (pointing to the few number of rejections to indicate a lack of selectivity).

287. *Id.* at 2249 (majority opinion) ("[T]he Board and its predecessor have actively exercised this [review and approval] authority. Texas asserts, and [Sons of Confederate Veterans] concedes, that the State has rejected at least a dozen proposed designs.").

288. *See id.* at 2251 (showing that the analysis is not necessarily a quantitative one).

289. *See id.*

290. *See id*. at 2264–69 (showing pictures of thirty-seven different personalized license plates, representing a wide spectrum of political, social, and personal perspectives).

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

292. *See id.* at 2245 (majority opinion) (indicating the approval process consists of an application, a period of public comment, public hearings, and a review period by the Department of Motor Vehicles).

293. *See id*. (showing additional rules against offensive material that may guide applicants with questionable material away from applying).

294. Monuments are expensive to produce. *See* Mary Jean Dolan, *Why Monuments Are Government Speech: The Hard Case of* Pleasant Grove City v. Summum, 58 CATH. U. L. REV. 7, 38 (2008). While it is true that hundreds of groups gathered the requisite signatures to support specialty plates, likely a number of smaller clusters of individuals were deterred by the requirement. *Cf.* Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 427–28 (2001) (describing Florida's $30,000 application fee and 10,000 signatures requirement, which is a substantial barrier to overcome).

few rejections does not necessarily mean that it is failing to do so.

Instead of a focus on rejections, inquiry into "effective control" in the context of identity speech must more appropriately focus on review procedures and imposition of identity-conforming mandates on accepted submissions. The procedures must demonstrate the government's intent to review and evaluate private submissions for the purpose of tailoring them and accepting them into the government's broadcast of identity.[295] Therefore, the evidence of review must show policies sufficient to ensure that the selecting entity views, understands, and assesses the full content of every submission. Otherwise, the government's assertion that it intends to incorporate the private message into its identity is not plausible. Evidence of deep and active review includes requirements for "design input," "requested modifications,"[296] levels of review, and formal approvals.[297] Although the government's practice cannot identify content or viewpoint selection inconsistencies, evidence of failure to follow review procedures consistently can provide a check on the government's assertion that it exercises effective control of submissions. While presentation policies and practices do not set substantive standards against which the reasonableness or consistency of the government's content decisions can be evaluated, they nevertheless provide some evidence of the type and degree of control that is relevant to the government's intent to convert private submissions into identity speech.

Although these indicia of selectivity and control can provide some evidence of the government's intent to transform private speech into identity speech, unmoored to a substantive objective they cannot provide all the evidence necessary to place a program into the category.[298] Specifically, these indicia can exclude many created forums, but not all of them. Detailed presentation requirements, content restrictions, and pre-publication review

295. *See generally* Claudia E. Haupt, *Mixed Public–Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 591–600 (2011) (describing the effective control theory and "the theme of control at different stages throughout the lifespan of a message" including the design stage, the "articulation stage," and the display stage).

296. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009) (quoting Brief for Int'l Mun. Lawyers Ass'n as Amicus Curiae Supporting Petitioners at 21, Pleasant Grove City v. Summum, 555 U.S. 460 (2005) (No. 07-665)).

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

298. *See generally* Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 368–69 (2013).

are types of control that can also characterize created forums.[299] The crucial distinguishing question then becomes whether the government exercises the control for the purpose of using the content of the private submissions to fulfill a democratically mandated function or to prevent disruption of one. Without an objective way to evaluate the relationship of the private speech to the function, the effective control determination cannot answer this question.

The limited value of effective control in the context of identity speech explains why additional prongs of the *Walker* test are necessary. The Court has determined that "effective control" is sufficient to place commissioned speech in the category because policies and practices that demonstrate the speech control to be a means to achieve a legitimate function ensure democratic accountability for the government's exercise of viewpoint selectivity.[300] Diligent citizens can discover in the law a direction created through legitimate democratic procedures that the government enlist private speakers to assist it to fulfill a valid substantive functional objective.[301] Courts can conduct minimal rational basis review to ensure that that the government could reasonably believe that the speech restrictions imposed will fulfill the substantive functional objective.[302]

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299. CHI., ILL., CHI. TRANSIT BD. ORDINANCE 013-63 (May 8, 2013), http://www.transitchicago.com/assets/1/miscellaneous_documents/013-63_Advertising_Policy_and_Ordinance.pdf (Chicago Transit Authority advertising policy and guidelines).

300. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563–64 (2005) ("Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.").

301. Justices and commentators have argued that the government should be required affirmatively to disclose its role in creating government speech. *Id.* at 578 (Souter, J., dissenting) ("It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them. The political accountability of the officials with control is insufficient, in other words, just because those officials are allowed to use their control (and in fact are deliberately using it) to conceal their role from the voters with the power to hold them accountable."). The Court has rejected this requirement. *Cf. id.* at 578 n.8 ("Notably, the Court nowhere addresses how, or even whether, the benefits of allowing government to mislead taxpayers by concealing its sponsorship of expression outweigh the additional imposition on First Amendment rights that results from it.").

302. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (applying minimum rational

Because the functional objective of projecting "image" or "identity" does not have ascertainable substantive content, effective control over the content of private speakers does not by itself demonstrate that the control is actually being exercised in a way that takes it out of Free Speech Clause scrutiny. More evidence is required to demonstrate that the government's control over private speech is for the purpose of fulfilling the legitimate function of producing identity speech. The evidence must show that the government could reasonably believe that the control it exercises will fulfill the purpose of producing identity speech. Communication requires a speaker with an intent to send a message and listeners reasonably likely to understand that a communication from the speaker is happening.[303] The additional prongs of the *Walker* test must be understood and applied to require this additional evidence that the government's assertion that it intends to control the content of private speech to fulfill the purpose of producing an identity communication is rational.

2. Prong 1: History of Government Expression via the Medium

The first prong of the *Walker* test asks whether "the history of [the medium through which the government uses private speech]" shows that it "long ha[s] communicated messages from the [government]."[304] To make some sense of this prong, it is necessary to understand the doctrinal dilemma that prompted the Court to create it.

The historical inquiry began in *Summum,* a case that involved a demand to place a permanent monument in a public park, which everyone acknowledged to be a traditional public forum.[305] The plaintiffs' argument was that permanent monuments are like private speakers, with the same rights to enter a traditional public forum and "speak" free from viewpoint discrimination.[306] To find the monuments to be government speech, the

basis review under the due process and equal protection clauses).

303. Spence v. Washington, 418 U.S. 405, 410–11 (1974) (conduct was sufficiently imbued with elements of a communication because the speaker had "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

304. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).

305. *Summum*, 555 U.S. at 464.

306. *Id.* at 473.

Court needed to separate the monument program from the park in which it took place.[307] History and tradition define the contours of a traditional public forum, so the Court needed to demonstrate that according to history and tradition, permanent monuments were never part of the traditional public forum.[308] The discussion of "ancient times" and "kings, emperors and other rulers" using monuments as a means of expression met the definition of the traditional public forum on its own terms and accurately excised monuments and other structures "commissioned and financed by a government body for placement on public land" from the "time out of mind" commons "held in trust for use of the public" for assembly and private speech.[309] Thus, in *Summum*, the "history" consideration served primarily as a qualification of the scope of the traditional public forum (open space where people gather and not monuments erected by the government that occupy some of the space), not as an affirmative demonstration that government collaboration with private speakers in the same medium also constitutes government speech.[310]

In *Walker*, however, no one argued that the license plate medium was a traditional public forum to which all members of the public presumptively have access to speak.[311] So, the historical inquiry was not necessary to excise the background, which the state makes available through the specialty license plate program, from the rest of the plate. Instead, the only reason for the Court to offer the history of states using license plate backgrounds to send their own messages was as evidence that the messages remain properly classified as government speech when they are crafted by private speakers. That is, the history and tradition provide relevant evidence of the government intent to speak through the private speakers when it invites them to join a medium the government has previously occupied exclusively.[312] This solidifying of the "history and tradition" consideration into a prong of the government speech inquiry requires analysis of the work it can do to

307. *Id.* at 473–78.

308. *Id.* at 465–66.

309. *Id.* at 470–71.

310. *See generally* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

311. *See id.*

312. *See, e.g.*, *id.* at 471 ("We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity.").

distinguish the two sides of government intent at the intersection of government speech and a private speech forum.

The *Summum* Court relied on examples from "ancient times" such as "kings, emperors, and other rulers" erecting "statues of themselves" and "[t]riumphal arches, columns, and other monuments" to "remind their subjects of their authority and power" or to "commemorate military victories and sacrifices and other events of civic importance" to support its conclusions that the monuments are means of expression and when governments create them, they intend to use them to communicate.[313] The Court then moved from a general discussion of the government's use of monuments to speak through time and across different jurisdictions to observations about the history of use of monuments by the city government in the private access program at issue.[314] Similarly, the *Walker* Court began its discussion by harking back to 1917, when "Arizona became the first State to display a graphic on its plates."[315] It provided examples of graphics and mottos chosen by states across the country through the last century and then narrowed its examples to Texas, the state whose plate designs were at issue, concluding that state messages, including those proposed by private speakers, have "appeared on Texas plates for decades."[316]

The Court's reasoning about historical use refers to behavior of the particular governmental entity at issue and to behaviors of governments generally, across jurisdictions and over time.[317] These sources provide evidence with differing weights. Inferences drawn from the behavior of the

313. *Id.* at 471–72; *see also Walker*, 135 S. Ct. at 2247 (quoting *Summum*, 555 U.S. at 470) ("[W]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure."). The evidence relevant to intent and effect overlap significantly, because a speaker's intentional actions should lead to viewer perceptions in line with the speaker's intent. *See Walker*, 135 S. Ct. at 2248. Nevertheless, the Court segregated prong two as addressing effect and described the prong-one inquiry as primarily addressing intent. *Id.* Consequently, this discussion of prong one will refer to it as providing evidence of the government's intent, with the understanding that intent often conditions effect.

314. *Summum*, 555 U.S. at 472 ("[I]t is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park.").

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

316. *Id*.

317. *Id.* at 2248; *Summum*, 555 U.S. at 470.

same governmental entity are stronger than inferences from use by other entities, but, even as to these, it is important to look carefully at the evidence needed to help show that the government intends to use private speakers to produce identity speech, and what historical use of the medium can show. The Court reasoned in both *Summum* and *Walker* that historical use of a medium by the government provides relevant evidence of the government's intent to speak through private speakers when it invites them to join a medium the government has previously occupied exclusively.[318] But the government creates a private speech forum when it opens "government property that has not traditionally been regarded as a public forum" to private speakers.[319] The switch from exclusive government use to private speech forum can be very rapid, and displaces, rather than continues, a history of government messaging through the medium.[320] In fact, the *Summum* Court noted that a permanent monument—a medium with a history of being used by the government for its own speech—could become a forum if the government opened access to "all of its residents (or all those meeting some other criterion)."[321] And, governments can close private speech forums that they create.[322] Thus, government intent gleaned from a changed access policy must be weighed against evidence about the history of the government's use of the medium to discover government intent.[323]

In both *Summum* and *Walker*, the Court addressed the forum-intent question separately, and less effectively than if it had engaged in a single, comprehensive intent inquiry.[324] The relevant question when the government creates a program that includes private participants in a medium that it used to occupy exclusively is whether the government intends to continue creating government speech through private participants or to open

318. *See Walker*, 135 S. Ct. at 2251; *Summum*, 555 U.S. at 472.

319. *Summum*, 555 U.S. at 469.

320. *Id.* at 480.

321. *Id*.

322. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) ("[A] state is not required to indefinitely retain the open character of [a forum].").

323. *See Walker*, 135 S. Ct. at 2250 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)) ("And in order 'to ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum,' this Court 'has looked to the policy and practice of the government' and to 'the nature of the property and its compatibility with expressive activity.'").

324. *Id.* at 2250–51; *Summum*, 555 U.S. at 474.

a forum for private speech.[325] The complete prong one inquiry must ask how evidence of the government's historical use of the medium impacts both possible answers to this question.[326] Along with evidence of the government's usage of the medium for identity messaging, it must also ask what the lack of this evidence can show.[327]

In *Summum* and *Walker*, the Court relied on a positive history of government use of the medium to support an inference of the government's intent to continue using private speakers to produce government identity speech.[328] Several qualifications to the government's historical use, drawn from the cases, identify when this inference is most justified. The first is that only a history of the government using a medium *for identity speech* can support an inference of identity speech through private participants.[329] In both *Summum* and *Walker*, the Court emphasized that the broad range of messages offered through the medium by the government prior to including private speakers were for the purpose of establishing identity.[330] Use of the medium for some other type of government speech, such as commissioned speech, would not support the inference.[331]

Another qualification that helps explain the *Summum* and *Walker* results is that the inference of an intent to continue producing identity speech is stronger when as the government changes its program to include private participants, it continues its historical use of the medium to message identity.[332] In *Summum*, the city filled its park with a mix of monuments it had created and ones donated by private entities.[333] So, too, in *Walker*, the license plate mottos recited by the Court as creating the relevant history continue to exist alongside plates with specialty designs.[334] The continuous and simultaneous identity messaging by the same government entity before and through the private speaker program provides support for the

325. *Walker*, 135 S. Ct. at 2251.
326. *Id.* at 2247.
327. *See generally Cornelius*, 473 U.S. at 802.
328. *Walker*, 135 S. Ct. at 2248; *Summum*, 555 U.S. at 470.
329. *Walker*, 135 S. Ct. at 2248; *Summum*, 555 U.S. at 470.
330. *Walker*, 135 S. Ct. at 2248; *Summum*, 555 U.S. at 470.
331. *Cf. Summum*, 555 U.S. at 470 (noting the importance of the government using the medium for identity speech).
332. *See Walker*, 135 S. Ct. at 2244; *Summum*, 555 U.S. at 461.
333. *Summum*, 555 U.S. at 461.
334. *Walker*, 135 S. Ct. at 2244.

presumption that the government intends the inclusion of private speakers to "add to" its own identity messaging rather than change its use of the medium to produce private speech.[335]

Beyond positive history, the Court has implied that a negative history of the use of a medium for government identity speech may create an inference that the government does not intend to use private submissions to create identity speech.[336] With respect to use of the medium by the same government entity, this inference would seem to be justified to the same extent and subject to the same qualifications as an inference from a positive history of use by the government for identity speech. If a government entity has been using a particular medium to operate a created forum for private speech, then its intent to use the medium in that way would presumptively continue until it engaged in sufficient affirmative actions to signal a change in its intent.[337]

In both *Summum* and *Walker*, the Court also relied on evidence about the use by governments generally of a type of medium to reach conclusions about the use by a particular government of private speech introduced into the same type of medium.[338] But evidence of the use by governments generally of a particular type of medium for identity speech at most provides some evidence of the current intent of a particular government to use private speech in the same way.

It is important, as well, to recognize the limits of broad generalizations about types of mediums. For purposes of constitutional evaluation, "mediums" for government–private speech interactions do not exist in the abstract.[339] Forums are defined by function, in the context of the type of government property or program within which they are located.[340] The same is true of mediums for government speech.[341] So, evaluation of the historical use of a medium for identity speech by the Court has included the access

335. *See Walker*, 135 S. Ct. at 2244; *Summum*, 555 U.S. at 461.

336. *See Walker*, 135 S. Ct. at 2248.

337. Coleman v. Ann Arbor Transp. Auth., 904 F. Supp. 2d 670, 696 (E.D. Mich. 2012) (noting that "courts have never held that privately paid advertisements are government speech just because they are displayed on public property" and that there was no long history of the government using the medium to speak or effective control by the government over the content of the message).

338. *Walker*, 135 S. Ct. at 2248; *Summum*, 555 U.S. at 470.

339. *Walker*, 135 S. Ct. at 2250.

340. *Id.*

341. *Id.*

program in the context of the type of government property on which it takes place.[342] Additionally, even when the historical use of the medium, in context, shows that it has been used by the government for identity speech, the Court has acknowledged that intentional action by the government can refute the historical evidence.[343] As noted above, the Court has said that even a monument can be the location for either government identity speech or a private speech forum depending upon the structure of the particular access program.[344] This suggests that the historical use of a medium is a piece of evidence that goes to the more fundamental inquiry into the attributes of the current access program, including its relationship to the function of the property in which it is situated, and what it says about the government's intent in creating and running the program.[345]

The *Walker* Court's reference to evidence of negative historical use of a medium as probative of the government's intent in granting access confirms that a speech medium must be narrowed to a location within a particular type of government property for the prong-one determination of historical use of the "type" of medium to provide useful evidence in particular applications.[346] Specifically, it distinguished the medium of "advertising space" as having been "traditionally available for private speech" to explain a prior decision in which a plurality had characterized bus advertising space as a nonpublic forum.[347] However, "advertising space" does not have a fixed physical existence like a monument on government property or a license plate design.[348] It is a conclusion drawn from the attributes of an access program that can apply to any type of government property.[349] In fact, the claim in *Walker* was that the government was effectively

342. *Id.* at 2248 (discussing Texas's history of communicating via "license plate designs"); *Summum*, 555 U.S. at 472 (noting that "[g]overnment decisionmakers select the monuments that portray what they view as appropriate for the place in question").

343. *Summum*, 555 U.S. at 472.

344. *Id.*

345. *Id.* at 472, 480. While "monuments . . . are meant to convey and have the effect of conveying a government message," the Court noted that "there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument," presenting an example of a town creating a monument where its residents could write someone's name to be honored or a private message. *Id.*

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

347. *Id.* at 2252.

348. *Id.*

349. *Id.*

distributing advertising space because the private speakers had to pay to participate.[350] Now we know, however, that "the existence of government profit alone is insufficient to trigger forum analysis."[351] Forum analysis hinges on the government's intent. So, the mere fact that the government charges money to participate in a government–private speech transaction does not provide sufficient proof of an intent that the speech remain "purely private."[352] Nevertheless, in *Lehman v. City of Shaker Heights*,[353] the plurality hinged its decision that a transit advertising program was a nonpublic forum on the fact that the private speaker program was "part of the commercial venture."[354] In context, this meant that the government function that prompted the creation of the program was to provide transportation.[355] The advertising space was "incidental" to that function, which meant that its purpose was to raise revenue to support the transportation function.[356] The value of the speech to the government function came from its money-generating capacity, not from a link between the content of the speech and fulfillment of the government function.[357] So, the "advertising space"[358] referenced by the *Walker* Court as being "traditionally available for private speech"[359] is a speech access program that is similarly "part of the commercial venture"[360]—or at least incidental to a government function in the sense that its purpose is to raise money to support the government function—as opposed to integral to a government function in that its content affirmatively furthers a government objective.[361]

350. *Id.* at 2262 (Alito, J., dissenting) (stating that specialty license plates are "little mobile billboards" offered for sale by the state programs "because they bring in money").

351. *Id.* at 2252 (majority opinion).

352. *Id.* at 2250.

353. 418 U.S. 298 (1974).

354. *Id.* at 303.

355. *Id.*

356. *Id.*

357. *Id.* at 304.

358. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2252 (2015).

359. *Id.*; *Lehman*, 418 U.S. at 303.

360. *Lehman*, 418 U.S. at 303.

361. This is a factual judgment on which the *Walker* majority and dissent disagreed. *Compare Walker*, 135 S. Ct. at 2252 ("[W]e think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plats are a nonpublic forum."), *with Walker*, 135 S. Ct. at 2261–62 (Alito, J., dissenting) ("States have not adopted specialty license plate programs like Texas's because they are now

In sum, the genesis of the historical use inquiry in a particular context, and its limited utility when generalized as an attribute of government–private speech combinations that produce identity speech, confirms that it is but one piece of evidence that must be augmented by evidence relevant to prongs two and three to classify a particular government–private speech combination.[362]

3. Prong 2: Viewer Perception of Speaker Identity

In both *Summum* and *Walker*, the Court found it important that observers of the private contributions to identity speech "appreciate the identity of the [government] speaker."[363] This is a new development. The Court has not interpreted this viewer-perception requirement to apply to commissioned government speech.[364] As noted above, the requirement that viewers are reasonably likely to perceive that the government is speaking through the private speech submissions is particularly necessary in the context of identity speech programs to ground the broad discretion that the government may exercise in selecting speech.[365] Specifically, the viewer-perception requirement acts as a check on the government's potentially self-serving assertion that it intends to control the speech content to serve the

bursting with things they want to say" but because the programs "bring[] in many millions of dollars every year.").

362. *Walker*, 135. S. Ct. at 2247 (majority opinion).

363. *Id.*; *Summum,* 555 U.S. at 471.

364. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564 n.7 (2005). In the context of a claim of forced subsidization of speech,

> the correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights. As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and whether or not the reasonable viewer would identify the speech as the government's,

so long as viewers would not identify the speech as the message of the individual paying the subsidy. *Id.*; *see also* Rust v. Sullivan, 500 U.S. 173, 199–200 (1991). A number of commentators have urged the Court to require transparency as a condition to allowing government entities to gain the protection of the government speech category. *See*, *e.g.*, Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899 (2010) (arguing that government entities should be required to disclose their identities to be able to claim private submissions on websites to be government speech).

365. *See supra* note 278 and accompanying text.

valid purpose of producing government identity speech.[366] As with any action, the government's assertion that its means will serve its end must at least be rational. Combined with adequate evidence that the government intends to transform private submissions into identity speech, the viewer-perception requirement ensures that the government could rationally believe that the communication it intends will effectively be made.

To apply this prong, it is also important to clarify precisely what viewers must likely perceive with respect to the source of the speech to appreciate that the government is speaking. The common understanding, and the one applied by the *Walker* dissent, is that viewers perceive a message to have a single source.[367] But the Walker Court revealed that it was applying a different concept when it distinguished speech from created forums as "purely private."[368] After *Walker*, it is clear that mixed-source messages can be government identity speech. In fact, fused identity statements, meaning statements that convey individual and group identity simultaneously, may best describe the product of government identity speech programs.[369] Certainly, this concept helps explain how the *Walker* Court could describe the hundreds of privately proposed messages on Texas specialty plates, almost all of which the government accepts and publishes without altering their content one bit, as "conveyed on behalf of the government."[370] In one sense, this concept of government identity speech as including messages that viewers will perceive as privately generated expands the government's power to suppress speech it finds displeasing.[371] In another sense, however, the concept of a fused identity statement as the product of legitimate identity speech programs, combined with the viewer perception prong of the *Walker* test, may significantly limit the circumstances under which the government

366. *Cf.* Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 86 (1st Cir. 2004) ("The [government's] mere recitation of viewpoint-neutral rationales (or the presentation of a viewpoint-neutral guideline) . . . does not immunize [its] decisions from scrutiny. The recitation of viewpoint-neutral grounds may be a mere pretext for an invidious motive. . . . In practical terms, the government rarely flatly admits it is engaging in viewpoint discrimination.").

367. *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting) (suggesting that to appreciate the identity of the government speaker, a viewer must perceive license plate designs as the "views of [the state] and not those of the owners of the cars").

368. *Id.* at 2250 (majority opinion).

369. *Id.* (through specialty license plate designs, Texas "present[s] itself and its constituency").

370. *Id.* at 2250.

371. *Id.* at 2254.

may reasonably intend to use private submissions to broadcast its own identity.

With this reason why viewer perception is a part of the government identity speech test in mind and the concept of a fused identity as the message that the government must intend to send, it is possible to identify what types of evidence can be relevant indicators of what viewers perceive. As noted above, visible expressions of government intent to speak through private speakers may condition viewer perception.[372] So, evidence particularly relevant to prongs one and three may be relevant in the prong two inquiry as well. In fact, most of the types of evidence listed by the Court as relevant to prong two are expressions of government intent to control, own, and integrate itself with the content of the private speech. With the interrelationship of intent and effect in mind, this Section will discuss the types of evidence deemed relevant by the Court to show viewer perception of the government's intent to speak through private submissions.

The inquiry into viewer perception resembles the Establishment Clause endorsement test,[373] which is notoriously indeterminate.[374] A relevant difference, however, exists. The endorsement test requires a court to determine both whom a reasonable viewer will perceive as speaking and what meaning the viewer will attach to particular words or images, alone or in combination, in the context of where they appear.[375] The prong-two inquiry asks only the first question, as a guide to determine whether the Constitution permits the government to exercise the discretion to select private speech according to its own determination of what viewers may perceive its message to be.[376] The inquiry into viewers' perceptions of

372. *See supra* note 363 and accompanying text.

373. *See* Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits . . . government endorsement . . . of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

374. *See* Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (resulting in opinions that reach different conclusions about how viewers will perceive a lone crèche and a menorah situated with other holiday symbols); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 510–35 (2002) (reviewing the shortcomings of the endorsement test, including academic criticisms).

375. *See Lynch*, 465 U.S. at 690.

376. *See infra* notes 377–93 and accompanying text.

speaker identity certainly requires judgment, but, supplemented by the inquiry in government intent, can be more determinate than an inquiry into how viewers perceive the meaning of speech. In fact, the particular indicia of viewer perception of speaker identity offered by the Court can lend a fair amount of objectivity and predictability to the prong-two inquiry.

To determine viewer perception, the Court considered a number of different types of evidence.[377] In *Summum*, the Court found public parks to be "often closely identified in the public mind with the government unit that owns [them.]"[378] According to the *Walker* Court, license plate *designs* are what are closely identified in the public mind with the state, because of the type of property on which they appear.[379] The fact that the Court mixed references in the two cases—to the property that hosts the program and to the speech that appears on it—is revealing.[380] Public parks are traditional public forums.[381] Much of the speech that occurs on them is "purely private" despite the close association of the property with the government in the public mind.[382] License plates are "government articles," which serve the official purposes of vehicle registration and identification.[383] But official government property, such as government buildings, and government articles that serve recognized government functions, such as a government agency's website, can host created speech forums.[384] And, pieces of government property that do not serve "official" purposes, such as train stations, may still be closely identified in the public mind with the government entity that owns it, so that viewers perceive monuments, designs, or other features displayed in them as expressing the government entity's identity. [385]

377. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009).

378. *Id.*

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

380. *See infra* notes 381–85 and accompanying text.

381. *See Summum*, 555 U.S. at 464.

382. *Id.* at 469.

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

384. City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 174–76 (1976) (school board meeting is a public forum); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 844 (6th Cir. 2000) (city's internet homepage is a nonpublic forum); Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 231 (2d Cir. 1996) (police department bulletin board is a nonpublic forum).

385. Brigham Yen, *Ideas for Downtown LA: Using Grand Central Terminal NYC as a Model for LA Union Station*, DTLA RISING (Jan. 14, 2013), http://brighamyen.com/2013/01/14/ideas-for-

These observations reveal that the inherent attributes of types of government property do not alone condition viewers to attribute speech on it to the government. Instead, it is the combination of the obvious identity of the owner of the property and the apparent interrelationship of the property owner with the privately contributed expression that appears on it that causes viewers to perceive the owner to be a source of the expression. Sufficient evidence to meet the prong-two viewer-perception requirement thus must relate to both parts of the combination.

As to the government property, evidence must show that it is "closely associated" in the public mind with its owner.[386] In *Summum*, the Court suggested that the ownership of public parks is inherently obvious.[387] Almost always, however, public owners brand the parks they operate with a name that signals their ownership, which viewers see when they use the property. In addition to citing the "official" nature of license plates, the *Walker* Court emphasized that Texas stamps its name on license plates, as do most other states.[388] Certainly, the mix of inherent qualities and affirmative government acts of identification will vary according to the particular property or program. What can be said, however, is that absent obvious and inherent qualities that associate the property or program with a particular government entity, prong two requires evidence showing affirmative government actions apparent to viewers acknowledging ownership of the property or program through which an identity speech program operates by the particular government entity doing the messaging.[389]

The other part of the combination is the apparent interrelationship of the private speech with the property or program that is "closely associated" with the government's identity. Because such properties or programs can be places for either government identity speech or created forums, the apparent interrelationship must distinguish the two types of access programs. The *Summum* Court relied on the fact that monuments are permanent.[390] License

downtown-la-using-grand-central-terminal-nyc-as-a-model-for-los-angeles-union-station/ ("The beautiful opal-faced, brass clock that sits in the middle of Grand Central Terminal is now the station's official logo and brand in a smart marketing move to give the station a stronger identity.").

386. *Summum*, 555 U.S. at 472.

387. *Id.*

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

389. *See supra* notes 387–88 and accompanying text.

390. *Summum*, 555 U.S. at 478 ("[P]ublic parks can accommodate only a limited number of permanent monuments.").

plate designs can disappear more easily. Still, the designs are permanent on the particular plates on which they appear. The *Walker* Court recited that the state participates in the process of fusing identities by stamping both the state name and the privately proposed design into property it mandates be displayed publicly.[391] Both Courts also noted that each government took legal ownership of the private speech after making the decision to display it.[392]

The Court's emphasis on the apparent permanence or embeddedness of private speech in public property is helpful. Park monuments, license plate designs, and a feature such as the Grand Central Station clock are the same in that they appear to viewers as expressive fixtures, attached to property obviously owned and operated by the government. Viewers identify property with its owner and hold the owner responsible for how it appears and functions, and, when expressive fixtures appear on it, for what the expressive fixtures say. The Court also analogized viewer perceptions of the government's identity as speaker to behaviors of private individuals in accepting and displaying speech.[393] Expressive fixtures on government property have their counterpart in expressive features that private individuals agree to display in public on their bodies.[394] Private individuals' willingness to wear the speech of another on their bodies is usually reasonably perceived by viewers as an intermingling that signals a merging of identity messages.[395] Insignia or slogans on clothing or tattoos appear as an intimate merger, with the participation of both parties obvious in a single visual impression.[396] The intimacy may appear lopsided, as when fans purchase clothing with team colors and logos, or when consumers purchase apparel

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

392. *Id.*; *Summum*, 555 U.S. at 472.

393. *See Walker*, 135 S. Ct. at 2249. The *Summum* Court noted that private owners generally do not "open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Summum*, 555 U.S. at 471. In *Walker*, the Court repeated this language to make the same point about "issuers of ID." 135 S. Ct. at 2249.

394. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (black armbands are expressive).

395. John A. Fortunato, *Sponsorship Implications of the* Lance Armstrong v. USPS *Lawsuit*, 3 BERKELEY J. ENT. & SPORTS L. 72, 76 (2014) (stating that a shared image between a sponsor and a sponsee can help achieve brand association).

396. *Id.*

with commercial product insignias.[397] Often, however, it may appear more balanced, as in the instances of commercial sponsorship of individual athletes or teams.[398] The individual athlete, by wearing apparel with the insignia, broadcasts intermingling with the brand.[399] Commercial sponsors consider their identities to be intertwined with the actions and speech of the athletes they sponsor, and viewers perceive the speech this way.[400] Although the private analogy is not precise, it provides guidance as to the type of interrelationship between the government and private speech that must exist for viewers to perceive a shared identity.[401] For private submissions to be perceived on government property or in programs as expressive fixtures, they must appear like insignia, tattoos, or hairstyles on individuals, more deeply embedded in the property or united with the government's own expressions of identity than transitory forum speakers.[402]

Private combinations that the Court has found to be expressive associations provide another type of example of private entities crafting and broadcasting identity speech through private submissions.[403] Parades are expressive associations, as are certain types of membership organizations that broadcast commonly crafted speech publicly.[404] In these types of private expressive combinations, the private submission need not appear as

397. *See, e.g.*, Eben Novy-Williams, *NFL Teams Split $7.3 Billion in Revenue, Packers Numbers Reveal*, BLOOMBERG (July 10, 2015, 1:00 PM), http://www.bloomberg.com/news/articles/2015-07-20/nfl-teams-split-7-3-billion-in-revenue-packers-numbers-reveal (announcing $7.3 billion in revenue for the National Football League due in large part to licensing and merchandise sales).

398. *See, e.g.*, Emmett Knowlton, *Lebron James' Business Partner Confirms Lifetime Deal with Nike is Worth Over $1 Billion*, BUS. INSIDER (May 17, 2016, 2:16 PM), http://www.businessinsider.com/lebron-james-nike-deal-exceeds-1-billion-maverick-carter-says-2016-5.

399. *See* Fortunato, *supra* note 395.

400. *See, e.g.*, *Athletes Who've Lost Endorsements After Scandals*, CBS NEWS (Oct. 23, 2012, 12:39 PM), http://www.cbsnews.com/media/athletes-whove-lost-endorsements-after-scandals/ (listing examples of athletes who lost lucrative sponsorships after behavior scandals).

401. *See* Fortunato, *supra* note 395, at 79.

402. *Id.* (explaining that a successful sponsorship must go beyond "stick[ing] a badge or logo onto something").

403. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (stating that the courts have "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in a pursuit of a wide variety of a political, social, economic, educational, religious, and cultural ends").

404. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (Boy Scouts are an expressive association); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 570 (1995).

fixtures to send a message of merged identity.[405] Instead, the obvious appearance of individuals as units within an expressive group signals the intermingling of identity.[406] Parades appear publicly as a single visual grouping, so viewers can perceive the common speech net that binds the various speech contributions of the participants.[407] The members of expressive organizations may appear together publicly as assembled physically or on lists, and in this way present a single visual image to link their identities.[408] Often, however, they may appear in public individually.[409] In such instances, a message of expressive association may emanate from the individual through identity-conforming messaging, such as uniforms, colored clothing, or insignia.[410]

As with expressive fixtures, the private expressive association analogy provides guidance as to the affirmative steps the government must take to bind multiple private submissions together in a way that will be perceived by viewers as government identity speech. Of course, the government can host a parade. If the private submissions are not, however, viewed together as a branded grouping, the government must brand the units individually.[411] The indicia of expressive association will be manifestations of the identity-conforming mandates that show effective control over the presentation of private submissions.[412] License plate designs stake out the current border between combinations that present sufficient indicia of expressive association to produce government speech and those where the degree of

405. *See Hurley*, 515 U.S. at 568 (stating that there is an "inherent expressiveness [in] marching to make a point").

406. *Id.*

407. *Id.* at 569 (explaining the expressive nature of marches and parades).

408. *Boy Scouts*, 530 U.S. at 653 (noting that because the scout leader was "one of a group of gay Scouts who ha[d] become leaders in their community and [we]re open and honest about their sexual orientation," his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior").

409. *See Hurley*, 515 U.S. at 570 (observing that the very purpose of marching was to show solidarity with other such individuals in the community).

410. *See* Fortunato, *supra* note 395.

411. *Cf. Hurley*, 515 U.S. at 576 (holding that most parades will be a form of expressive association due in part to the fact that they do not consist of "individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience").

412. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that a newspaper was entitled to First Amendment protections because the decision of what goes into the newspaper constitutes "the exercise of editorial control and judgment").

interaction means that the program is a created forum.[413] While it is true that specialty license plate programs bear multiple indicia of forums, the manifestations of identity-conforming mandates meaningfully sets them apart from programs that the Court has found to be forums.[414] Each plate is "official" and is also branded with the state names, so the government as the property "owner" is obvious.[415] In line with the private behavior analogy, plate designs appear as expressive fixtures.[416] The state accepts the design proposals and then through its own actions, stamps the designs permanently onto the official plates, like a tattoo or piercing.[417] The plate designs also bear some indicia of identity-conforming mandates appearing in public as units in an expressive association.[418] The plates are a uniform size, the designs are similarly formatted, all appear beneath the alpha-numeric sequence that performs the official function of the plate, and the common "TEXAS" branding, which appears in the same way on every plate, segregates the state plates from other plates branded with other state names, creating an impression of individual units in a common grouping or "parade."[419] New programs will present different combinations of branding and indicia of identity-conforming mandates. The Texas specialty license plate program presents a strong guidepost against which the extent of branding and conforming mandates must be assessed.[420]

In assessing the attributes necessary for a private submission to appear as an expressive fixture or a part of an expressive association on government property or in a program, it is helpful to compare how private submissions appear in programs the Court has characterized as forums. Groups that use space to meet,[421] pieces that travel through a workplace mail system,[422]

413. *See* discussion *supra* Section I.D.2.a.

414. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2251 (2015).

415. *See generally id.*

416. *Id.* at 2250.

417. *Id.*

418. *Id.*

419. Jess Stoner, *IH8YRST8*, MORNING NEWS (Nov. 4, 2015), http://www.themorningnews.org/article/ih8yrst8 (describing "license plate prejudice" based on association of driver with the state on the plate).

420. *Walker*, 135 S. Ct. at 2251.

421. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 117–18 (2001); Widmar v. Vincent, 454 U.S. 263, 274 (1981) (holding that a religious, open forum at a public university is only

individuals distributing leaflets to passersby,[423] and candidates in televised debates[424] appear on government property only briefly or intermittently. No government branding of individual participants or indicia of government review and tailoring of the submissions to a common presentation format is apparent.[425] A comparison makes the point as well. When the post office allows private groups to distribute literature and speak to patrons on the sidewalk area leading into its building, it creates a forum for private speech.[426] The groups appear haphazardly with no indicia of government identity branding other than their presence on the property.[427] By contrast, private submissions that appear on postage stamps are accepted by the government and through its own processes stamped onto an official item, the submissions appear under the name of the government, and in uniform size and presentation, and they endure for months or years.[428] Thus the submissions that appear on postage stamps, like license plate designs, appear both as expressive fixtures and as units in an expressive association, in ways that meaningfully distinguish the program from forums for private speech.[429]

A final determination implicit to finding that viewers perceive private submissions as government identity speech, and which overlaps with the inquiry into government intent, is that the government appears to be running the program for this purpose.[430] A complicating consideration, relevant to viewer perception and present in both *Summum* and *Walker*, is that the government may have the additional purpose of saving or making money when it accepts private submissions for what it claims is identity speech.[431] The *Walker* Court touched on the relevance of a financial motive by the

"incidental").

422. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983).

423. *See* United States v. Kokinda, 497 U.S. 720, 736–37 (1990).

424. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

425. *See supra* notes 421–24 and accompanying text.

426. *See Kokinda*, 497 U.S. at 738.

427. *See* Miller v. City of Cincinnati, 622 F.3d 524, 537 (6th Cir. 2010) ("[N]o one can reasonably interpret a private group's rally or press conference as reflecting the government's views simply because it occurs on public property.").

428. *See generally* Kevin R. Kosar, Cong. Research Serv., RS22611, Common Questions About Postage and Stamps (2013).

429. *Id.*

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

431. *See id.* at 2255–56 (Alito, J., dissenting).

government, holding that the government may make a profit from private submissions but still be using them to create identity speech.[432] It also said that "advertising space" has traditionally produced private rather than government identity speech.[433] So, at some point, an apparent government intent to make money from the sale of space overwhelms any assertion by the government that it is using the private submissions to produce identity speech.[434] As noted above, the indicia of effective control can be the same with identity speech programs and advertising forums, and historical usage cannot meaningfully distinguish the status of money-making programs.[435] So, it is the prong-two viewer perception inquiry that must make this distinction.

Once again, an analogy to the behavior of private speech sponsors and recipients can provide guidance as to when a money-making purpose is consistent with the intent and effect of conveying a government identity message. It is tempting to say that when money is the primary motivation for the government to enter into a speech combination, then it cannot broadcast identity speech. But this conclusion is too strong when assessed against the instances where private individuals can be motivated to make money but still convey identity speech.[436] In fact, instances of financial sponsorship of government operations—akin to private commercial sponsorships—present strong financial motivation on the part of both the government and the sponsor along with visible intermingling of the government and sponsor identities.[437] A corporate name on a government operation presents in the same way as a corporate logo on an athlete's cap or shoulder. The government's apparent intent is like the athlete's: both want to make money, not to speak. But both nevertheless broadcast the content of the private submission as a means to their end. And prong two of the

432. *Id.* at 2252 (majority opinion) ("The existence of government profit alone is insufficient to trigger forum analysis.").

433. *Id.*

434. *Id.*

435. *See supra* note 361 and accompanying text.

436. *See Why Sponsor Sponsorship Benefits & Event Sponsorship Benefits*, MOREBUSINESS.COM (July 16, 2007), http://www.morebusiness.com/running_your_business/marketing/Sponsorship-Marketing.brc (discussing the benefits of sponsorship to companies).

437. *Id.* ("Given the propensity of consumers to associate sponsors with the event they promote, it is important for companies to select events that are appropriate with their product or corporate image.").

Walker test asks whether viewers perceive the entity who has agreed to broadcast the private message for the purpose of making money nevertheless to be speaking on its own behalf.[438] The *Walker* Court observed that specialty plate design sponsors pay for space because of the merger between their message and the government's that they believe viewers will perceive.[439] The same is true of corporate sponsors of teams and athletes. In both instances, the sponsor is the one motivated to broadcast a merged identity, while the speaker does it as a means to fulfilling the function of providing financial support for its operations. While the money-making end is the same, the means of broadcasting a merged identity is different from the means of selling only advertising space. Even though the government is motivated to make money, it intends to broadcast a merged identity and, so long as viewers are likely to perceive it, the requirements of accountability to the electorate and minimal judicial means–end review of the government action are met.[440]

The line between sponsorship that creates an identity message and advertising that remains purely private is not bright and will have to be drawn according to criteria in addition to the government's primary money-making motive.[441] Many of these features of merger are identified above. With respect to sponsorships particularly, features of particular relevance are practices that are obvious to viewers and suggest that the government is mitigating its financial motive with requirements that conform the speech so that it is an acceptable addition to the government's identity.[442] These types of practices include restrictions on word count; uniform or limited color, typeface, or size options; rules that forbid certain types of messaging such as urging action or listing price; formats such as those common on public radio whereby announcers read the copy and merchants have the option of

438. *See* discussion *infra* Section II.C.

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

440. *Id.* at 2252.

441. *Id.*

442. *See generally* Jason Bradley Kay, *What Is a Good Name Worth? Local Government Sponsorships and the First Amendment*, POPULAR GOV'T, Fall 2003, at 31, http://sogpubs.unc.edu/electronicversions/pg/pgfal03/article4.pdf (discussing the government's ability to "encourage some sponsorships and discourage others," which "allows a local government to generate revenue and community involvement through beneficial sponsorships while avoiding the problems that can result from associating with a sponsor that does not espouse the values and beliefs of the citizenry.").

"underwriting" the production of particular programming;[443] identification of "donors" as "sponsors" or "partners" without additional persuasive messaging;[444] and exclusive or extensive sponsorships of structures or events.[445]

C. Summary of Inquiry

The flowchart below summarizes the inquiry into whether a government–private speech program produces government identity speech.[446]

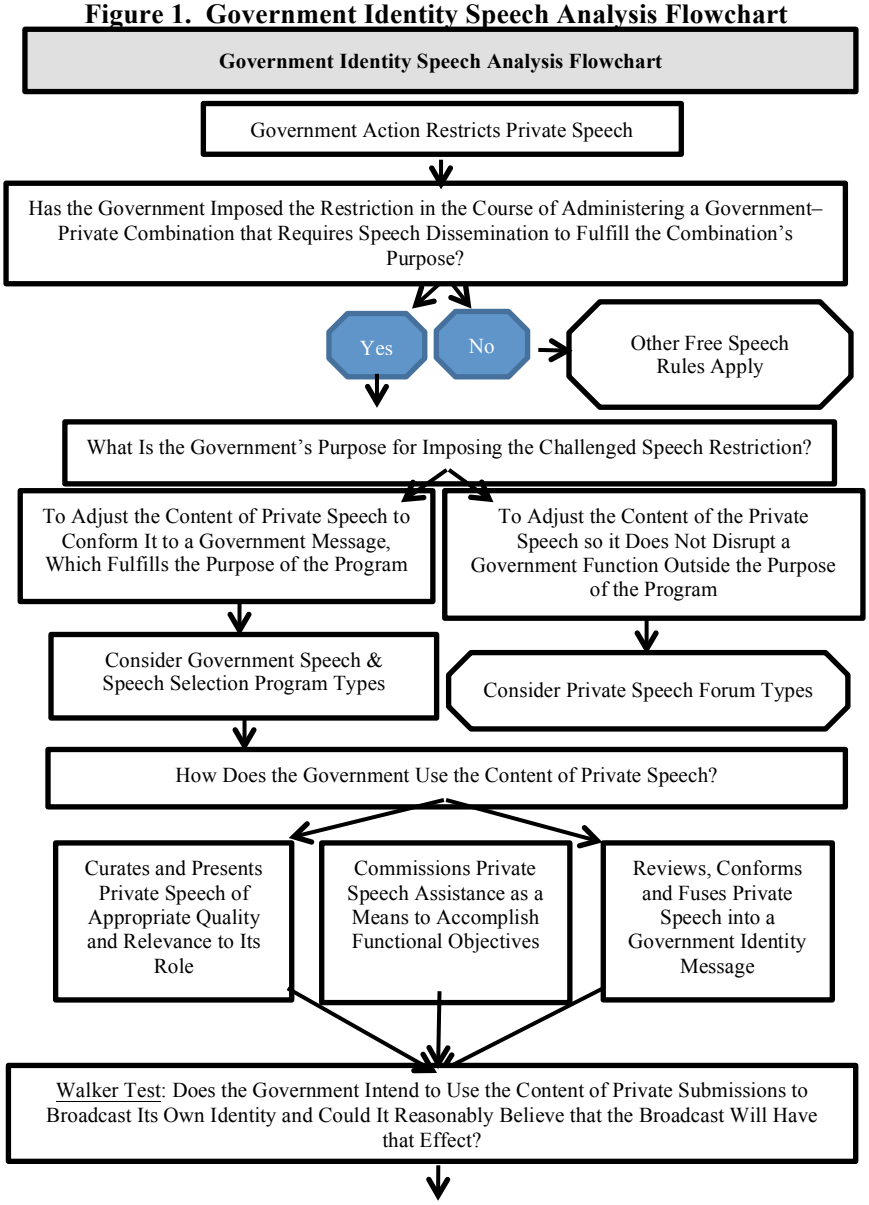
443. Knights of Ku Klux Klan v. Curators of Univ. of Mo., 203 F.3d 1085, 1087 (8th Cir. 2000) (upholding public radio station's refusal to accept "underwriting" of its "All Things Considered" program).

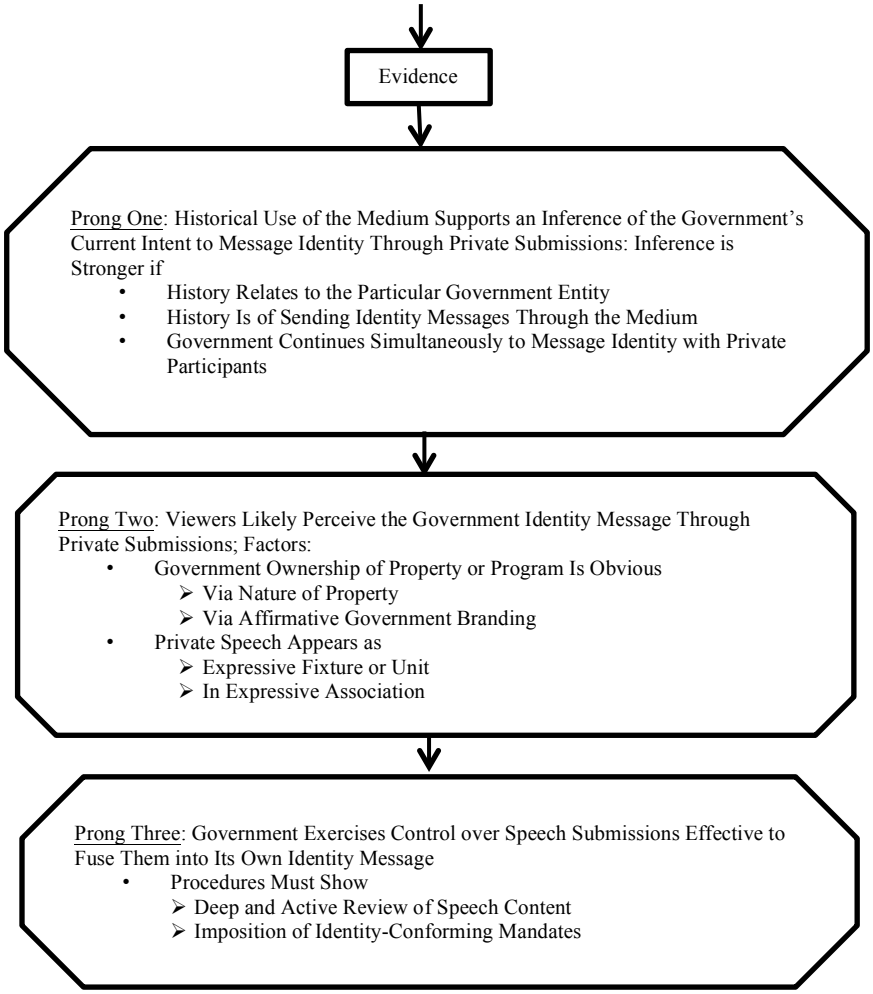
444. Wells v. City & Cty. of Denver, 257 F.3d 1132, 1143 (10th Cir. 2001) (finding sign thanking "sponsors" was speech by the city and not the private sponsors).

445. Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 6–9 (2007) (describing the "growth of school house commercialism"); *Corporate Sponsorship*, CHI. HIST. MUSEUM, https://www.chicagohistory.org/join-support/sponsorship/ (last visited Jan. 4, 2017) ("Sponsorship of public programs, educational programs, exhibitions and events at the Chicago History Museum offers creative and cost-effective strategies to meet corporate objectives. As a Sponsor, you can strengthen and enhance visibility of your brand in [a number of] ways.").

446. *See infra* Figure 1.

Figure 1. Government Identity Speech Analysis Flowchart




Evidence
Prong One: Historical Use of the Medium Supports an Inference of the Government's Current Intent to Message Identity Through Private Submissions: Inference is Stronger if
• History Relates to the Particular Government Entity
• History Is of Sending Identity Messages Through the Medium
• Government Continues Simultaneously to Message Identity with Private Participants
Prong Two: Viewers Likely Perceive the Government Identity Message Through Private Submissions; Factors:
• Government Ownership of Property or Program Is Obvious
➢ Via Nature of Property
➢ Via Affirmative Government Branding
• Private Speech Appears as
➢ Expressive Fixture or Unit
➢ In Expressive Association
Prong Three: Government Exercises Control over Speech Submissions Effective to Fuse Them into Its Own Identity Message
• Procedures Must Show
➢ Deep and Active Review of Speech Content
➢ Imposition of Identity-Conforming Mandates

III. APPLICATIONS

A. Vanity Plates

Through vanity plates programs, states allow drivers to choose letter–number combinations for the purpose of sending a message.[447] This means that a vanity plate program is either a government speech program or a created forum. States are not able to claim that they are commissioning the private speech that appears on vanity plates as a means to achieve a functional objective that requires tailoring the content of the speech. They do not occupy the role of a quality curator or editor, selecting speech according to accepted, professional standards.[448] States are unable to articulate a function that requires tailoring the content of private speech other than to broadcast image or identity.[449] Thus, the *Walker* test must be applied to determine whether, in selecting and broadcasting private speech, the government intends to fulfill its legitimate function of broadcasting its own image and identity, and whether the communication has that effect.

The core difference between vanity and specialty license plates is with respect to prong one.[450] States have not historically used the letter–number sequence for identity messaging.[451] Rather, this part of the license plate has always served the nonexpressive function of identifying vehicles.[452] Under vanity plate programs, it serves this same, nonexpressive function for the government even as it conveys unique messages chosen by the vehicle owners.[453] These facts create a negative history of government identity messaging through the medium: the medium existed prior to the private participation program without government identity messaging and, in the new program, the government does not simultaneously identity message. The negative history exists both as to a specific program at issue in litigation and, generally, across states and through the years the programs have

447. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2244 (2015).
448. *See id.*
449. *See id.*
450. *See id.* at 2248.
451. *See id.*
452. *See id.*
453. *See id*. at 2244.

operated. This negative history creates some evidence that the particular state at issue does not intend to use private participants to send identity messages and that viewers will expect that the vanity messages are private.

With respect to prong two, however, the same evidence that the private speech is an expressive fixture and appears as an expressive association exists with vanity plate and specialty plate expression.[454] The government's "ownership" of the license plate and its official function are clear to viewers through its inherent qualities and the affirmative acts of branding the plate with the state's name.[455] The private speech appears in the same intimate, embedded, and stamped-on way as the specialty designs.[456] For the same reason that they are subject to uniform size, format, text-length, and style of messaging, viewers will likely understand the fusing of individual unit and group identity to the same extent that they understand it with specialty plate designs. A possible distinction is that each vanity plate message is unique and represents the expression of a single driver rather than a group.[457] According to the Court's instructions, however, the number of private submissions is not as significant to gauging viewer perception of the source of speech as the relationship between the government property and the private speech.[458] For all of the reasons listed above, the relationship in the context of vanity and specialty plates is best viewed as the same.

Similarly, states' "effective control" over vanity configurations is generally of the same type and degree as with specialty designs.[459] State agencies impose "prior submission requirements" and exercise "selective receptivity" to proposed configurations, permitting most, rejecting some, and recalling a few of them if some objectionable messages slip past the initial

454. *See id.* at 2248–49.

455. *See id.* at 2242.

456. *See id.* at 2248–49.

457. *See, e.g.*, Matwyuk v. Johnson, 22 F. Supp. 3d 812, 823–24 (W.D. Mich. 2014).

458. Mitchell v. Md. Motor Vehicle Admin., 126 A.3d 165, 185–86 (Md. Ct. Spec. App. 2015). While it is true that states may not intend to send messages such as "BOB" or "FROSTY," and viewers will perceive that the messages were chosen by the drivers and not by the state, the government's specific embrace of individual messages simply is not necessary when the government is identity messaging. *Id.*

459. *See* Comm'r of Ind. Bureau of Motor Vehicles v. Vawter, 45 N.E.3d 1200, 1206 (Ind. 2015). State programs will differ, and if a state fails to demonstrate deep and active review of submissions, either prior to accepting them or in response to complaints, then this crucial prong of the *Walker* test is not met.

review.[460] Even though "written criteria" usually exist, they are often vague and leave room for viewpoint discrimination in the selection process.[461] While this discretion to discriminate according to the viewpoints expressed in the proposed messages might be fatal in a forum, it supports the government's claim that its choices are for the purpose of sending a message "present[ing] itself and its constituency."[462] Most important, however, is that with vanity configurations, as with specialty designs, the crucial aspect that allows the government to claim an intent to identity message through private participants exists. This is that the state agencies review every part of every letter–number configuration for the purpose of understanding the proposed message in its entirety before exercising "final approval authority."[463] In this way, the states provide evidence that they are exercising judgment over the proposals for the purpose of presenting image or identity.

B. Trademarks

The purpose of a trademark is to identify and distinguish the source of the goods or services to which it attaches.[464] Trademark owners may obtain legal rights by using a mark in commerce without registering it through the federal system.[465] Trademark registry, however, confers additional rights.[466] Marks approved through the federal trademark registration program are published in the Official Gazette of the Patent and Trademark Office and its

460. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009); Walker v. Tex. Div. Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2247 (2015).

461. *See Walker*, 135 S. Ct. at 2256 (Alito, J., dissenting) (finding "blatant" viewpoint discrimination when the State rejected a specialty plate configuration just because many citizens may find it offensive).

462. *Id.* at 2249 (majority opinion).

463. *Id.* at 2247.

464. Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 453 (E.D. Va. 2015) (quoting Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992)) ("A trademark is 'any word, name, symbol, or device or any combination thereof used by any person to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.'").

465. *See id.* at 453–54.

466. *Pro-Football, Inc.*, 112 F. Supp. 3d at 454 (quoting B & B Hardware, Inc., v. Hargis Indus., 135 S. Ct. 1293, 1300 (2015)) ("The Lanham Act confers important legal rights and benefits on trademark owners who register their marks.").

Principal Register.[467] Trademark holders receive a certificate of registration and receive the right to place the "®" symbol on the mark.[468]

Courts addressing whether the federal trademark program produces government speech have focused on the appearance of the marks in the trademark registry, not on the mark-holder's use of the trademark.[469] For a complete inquiry, it is best to look at the medium of registered trademarks and consider all the places where they appear. The first question is whether, through the program of registering trademarks the government provides private individuals or entities access to property or a program for the purpose of producing speech. As noted above, the purpose of the trademark program is to facilitate commerce by granting exclusive use of words or symbols.[470] Although in an important sense, the government limits speech rather than expands it through the trademark program, the program enhances the ability of trademark owners to produce speech as a means to accomplishing a non-speech purpose.[471] In this way, the government has a purpose to produce speech.

The next question is how the restrictions imposed on trademark content fulfill the government's purpose. Do they tailor the private speech so that its content fulfills a legitimate government function or to avoid interference with government functions or objectives outside the purpose of the trademark program? When this question is posed specifically, it seems quite clear that the federal government cannot plausibly assert that it intends to tailor the content of trademarks so that they individually, or in combination, send a government message.[472] To test this conclusion, it is clear that the government cannot claim that commissions trademark speech to fulfill a determinate functional objective that requires it to speak or that, in tailoring trademark speech content, it occupies a customary or delegated role of speech curator or editor. Because the federal government can make no

467. *See id.* at 454.

468. *In re* Tam, 808 F.3d 1321, 1345 (Fed. Cir. 2015).

469. *Pro-Football, Inc.*, 112 F. Supp. 3d at 453 ("[W]hat is at issue in this case [is] trademark registration, not the trademarks themselves."); *In re Tam*, 808 F.3d at 1345 ("Wisely, the government does not argue that a mark-holder's use or enforcement of its federally registered trademark is government speech.").

470. *See supra* note 464 and accompanying text.

471. *See Pro-Football, Inc.*, 112 F. Supp. 3d at 460–61.

472. *Cf. In re Tam*, 808 F.3d at 1348 ("When the government registers a trademark, it regulates private speech. It does not speak for itself.").

plausible claim that by placing an "®" symbol on individual trademarks or listing the trademarks together in the Federal Registry it is trying to broadcast national identity or national commercial identity through the trademark program, the government speech inquiry should be at an end.[473] The trademark program is a created forum or a program that incidentally allows a private individual to speak but is not a forum at all.[474]

A brief run through the *Walker* test illustrates the perils of attempting to apply it to access programs that do not present a plausible fit. The federal government cannot show a history of messaging its own identity through the medium of registered trademarks.[475] It has never messaged identity through the program exclusively.[476] Rather, the program's history reflects its purpose of distinguishing private statements of identity to serve the government purpose of facilitating private commercial transactions.[477] As to prong two, viewers may perceive trademarks in commerce marked with the "®" symbol, although they need not always be, and listed in the Federal Registry.[478] Both the "®" symbol and the Registry signal federal ownership of the program or property.[479] Other signs of intermingling, however, are lacking.[480] The private speech does not appear as an expressive fixture, embellishing and broadcasting from recognizable federal property.[481] The Federal Register is not widely visible, is consulted by individuals with commercial purposes, is "owned" and operated by the Patent and Trademark Office and not by the federal government generally, and for these reasons is not a piece of property from which viewers would expect the federal government to broadcast identity through private submissions.[482] Nor does it

473. *See In re Tam*, 808 F.3d at 1348.
474. *Pro-Football, Inc.,* 112 F. Supp. 3d at 462–63.
475. *See In re Tam*, 808 F.3d at 1346.
476. *See Pro-Football, Inc.*, 112 F. Supp. 3d at 461–62.
477. *See id.*
478. *See id.* at 458–59.
479. *See id.*
480. *See In re Tam*, 808 F.3d at 1346.
481. *See id.* at 1347.
482. *See Getting Started with Trademarks*, U.S. PAT. & TRADEMARK OFF., http://www.uspto.gov/trademark (last modified Nov. 4, 2016, 5:32 PM) (allowing for a web search of the trademark data base). Although the contents of the Principal Register can be found by the public, registered trademarks are not published to the public individually or as grouping in a way that would indicate a government intent to use private participants for identity speech or condition viewers to expect that speech in the medium is government identity speech. *Id.*

bear marks of identity-conforming mandates that signal an expressive association.[483] The single conforming feature is the "®" symbol, which, as noted above, need not appear for private speakers to gain the benefit of the program.[484] Importantly, nothing about the "®" symbol signals that the government has imposed restrictions or required modifications on the content or presentation of the private submissions to tailor and merge the identity presented by registered trademarks individually, or as a "parade."[485] Finally, the government's policies and procedures do not indicate imposition of identity-conforming mandates, which would be necessary to demonstrate a purpose of using private speech content to send an identity message.

C. Advertising Space

In programs that sell "advertising space," the government's purpose is to make money.[486] The purpose of the advertisers, however, is to produce and broadcast speech.[487] The government intentionally uses the means of broadcasting speech to serve the function of making money, so a purpose of the programs is to produce speech.[488] The next inquiry asks why the government asserts that it needs to restrict the content of advertising speech. If the government acknowledges that it restricts the content of submissions to avoid interference with government functions or objectives outside the purpose of the advertising program, then the program is a forum.[489] If the government claims, however, that in addition to making money, it intends to tailor the content of the "advertisements" to a government function, then the evidence of the government's policy and practice must be examined to determine whether the program meets the requirements of a type of government speech program.[490] It is possible that some types of programs that require participants to pay for space may fit into a type other than

483. *See id.*
484. *See supra* note 465 and accompanying text.
485. *See In re Tam*, 808 F.3d at 1348.
486. *See* Catherine Rampell, *On School Buses, Ad Space for Rent*, N.Y. TIMES (Apr. 15, 2011), http://www.nytimes.com/2011/04/16/business/media/16buses.html?_r=0.
487. *See id.*
488. *See id.*
489. *See* Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 498 (9th Cir. 2015).
490. *See id*. at 496–97.

identity speech.[491] If a program does not fit one of these types, which is more likely, then the *Walker* test is the tool to determine if the program produces identity speech.

The *Walker* Court quickly distinguished a city's program of selling advertising space on car cards located inside city buses from specialty license plate designs.[492] It relied upon a prong-one determination that the medium of advertising space has traditionally been available for private speech, and a prong-two determination that the private speech "bore no indicia" that it was owned or conveyed by the government.[493] The Court did not mention prong three, which was wise, given that the city's exercise of "final approval authority" after deep and thorough review of the proposed political advertisement was what provoked the lawsuit.[494] As noted above, government entities typically administer advertising programs under programs that require prior submission and involve back-and-forth review that may result in requested modifications to the message proposed by the private speaker.[495] The primary distinguishing features between advertising programs that produce private speech and money-making government identity speech programs are the extent to which the government exercises deep review of submissions and imposes identity-conforming mandates in its policy and practice, and whether viewers are likely to perceive these affirmative behaviors as fusing the private expression into a government identity message.[496]

Some programs addressed by lower courts provide examples of identity-conforming mandates imposed to a greater degree than in the typical sale of "advertising space."[497] One court found public radio "sponsorship" announcements produced government speech.[498] Although the court did not

491. For example, a city could "commission" private vendors to provide live demonstrations and sell produce at a "Cook with Vegetables" event, and charge a fee to participate.

492. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2252 (2015).

493. *Id.*

494. *See id.* at 2249, 2252.

495. *See id.* at 2242.

496. Coleman v. Ann Arbor Transp. Auth., 904 F. Supp. 2d 670, 696–97 (E.D. Mich. 2012) ("[E]ven if private speech takes place on government property, that does not, without more, suffice to create government speech. . . . The Court concludes that no additional element is present here and, therefore, the ads on AATA buses are not government speech.").

497. *See* discussion *supra* Section I.D.2.

498. Knights of the Ku Klux Klan v. Curators of Univ. of Mo., 203 F.3d 1085, 1093 (8th Cir.

specifically address the type of identity speech, it noted the identity-conforming features that distinguish public radio sponsorship announcements from typical advertisements.[499] These are that the government broadcaster "exercises control not only over the decision to accept or reject the donations, but also over the form and content of the announcements themselves."[500] Staff members "compose, edit, and review acknowledgment scripts to insure compliance with both [federal] and internal guidelines."[501] Moreover, "the station does not broadcast "pre-produced" announcements submitted by underwriters; instead, employees themselves read the acknowledgments on air."[502]

In another, more recent case, an Eleventh Circuit panel applied the *Walker* test to find banners thanking "sponsors" hung on school fences were government identity speech.[503] The court distinguished "purely private advertising," which "convey[s] the words, pictures, and colors that the advertiser wants to convey" from the banners, which were "printed in school colors [and] subject to uniform design requirements . . . . [and] b[ore] the initials of the school and identifie[d] the sponsor as a 'partner' with the school."[504]

Other access programs, not yet addressed by courts under the *Walker* test, exist at the boundary between government identity speech and forums that sell advertising space.[505] Thus far, courts have addressed buy-a-brick programs as forums, even though submissions generally appear as expressive fixtures on government property and are generally subject to a number of identity-conforming mandates that support the appearance of an expressive association with the government entity that hosts the speech.[506] "Sponsorship" programs take various forms, appear on different types of

2000).

499. *See id.* at 1995–96. The court also relied on the radio station's professional role as an editor. *Id*.

500. *Id.* at 1994.

501. *Id.*

502. *Id.*

503. *See* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1075 (11th Cir. 2015).

504. *Id.* at 1077.

505. *See* NAACP v. City of Phila., 2016 WL 4435626, at *18 (3d Cir. Aug. 23, 2016).

506. *See* Tong v. Chi. Park Dist., 316 F. Supp. 2d 645 (N.D. Ill. 2004); Demmon v. Loudoun Cty. Pub. Schs., 279 F. Supp. 2d 689 (E.D. Va. 2003).

government property, are permanent to varying degrees,[507] and are subject to identity-conforming mandates.[508] The boundary between government identity-speech programs and forums will need to be based on the particular context, with the relevant inquiry being the extent to which the government intends to merge its identity with the sponsor and the extent to which viewers are likely to perceive it, because the private speech appears as an expressive fixture on government property or as part of an expressive association branded as part of the government's identity.

CONCLUSION

The Court has twice confirmed that when government entities broadcast privately produced messages for the purpose and with the effect of sending a message about their own "image" or "identity," their viewpoint-based selections among messages are not constrained by the Constitution's Free Speech Clause.[509] This ability to exercise broad discretion to privilege or disadvantage private speakers exists in stark contrast to the bedrock rule against viewpoint discrimination, which applies when government entities create private speech forums. Despite the different constitutional rules that apply to government conduct, the two types of government–private speech interactions—use of private speakers to send government identity messages and accommodation of private speakers in private speech forums—hardly differ at all to the naked eye. The three-pronged test articulated by the Court in *Walker* is the tool that government entities and lower courts must use to distinguish the two types of programs.[510] Courts have already split trying to apply it to new types of programs, suggesting that the meaning of the prongs beyond the particular contexts of park monuments and specialty license plates is not obvious.[511] A broader and deeper meaning for the test, however, can be found and will assist government entities and courts

507. *See, e.g.*, United Veterans Mem'l & Patriotic Ass'n v. City of New Rochelle, 72 F. Supp. 3d 468, 475 (S.D.N.Y. 2014) ("[F]lags are displayed for long periods of time (until they become tattered) and then promptly replaced, [so] their presence . . . is nearly as constant as that of . . . park monuments.").

508. *See id.* at 476.

509. *See supra* notes 21–25 and accompanying text.

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

511. *See* discussion *supra* Section I.D.2.

navigating the divide.[512]

Courts need to consider all of these prongs in any particular case, implementing them with the competing principles of democratic function and equal access in mind. The *Walker* test is one side of a two-faceted inquiry into programs where government entities interact with private speakers. Whenever a court applies the *Walker* test to determine whether the government has fused private speech into government identity speech, it is also asking whether the same evidence indicates that the speech remains "purely private," and thus, takes place in a forum where threshold nondiscrimination limits apply.[513] Understanding both sides of the *Walker* test makes it more complete, useful, and likely to strike a principled balance between the majority's ability to assert its will in speech selections and the right of individuals to demand equal speaking space.

512. *See* discussion *supra* Section II.A.

513. *See Walker*, 135 S. Ct. at 2246 (finding that the Court's "precedents regarding government speech (and not [its] precedents regarding forums for private speech) provide[d] the appropriate framework through which to approach the case").

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