11-5199

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHILDREN FIRST FOUNDATION, INC.,

Plaintiff-Appellee,

v.

BARBARA J. FIALA, in her official capacity as Commissioner of the New York State Department of Motor Vehicles,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of New York
Honorable Neal P. McCurn
Case No. 04-CV-0927

APPELLEE'S SUPPLEMENTAL PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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INTRODUCTION

Children First Foundation ("CFF") commenced the present action in 2004 based on the New York State Department of Motor Vehicles' refusal to approve its "Choose Life" custom plate. In November 2011, the United States District Court for the Northern District of New York entered summary judgment on CFF's behalf because it concluded that: (1) CFF's custom plate constituted private, as opposed to government, speech, (2) the Department engaged in viewpoint discrimination by excluding CFF's custom plate from the forum, (3) the Department's denial of CFF's custom plate was unreasonable, and (4) Department regulations and practice gave officials unbridled discretion to approve or reject custom plates.

The Department appealed to this Court. A panel of this Court heard oral argument in December 2012. In May 2015, the panel majority issued a decision reversing the district court's judgment because it determined that: (a) although CFF's custom plate constituted private, as opposed to government speech, (b) the Department engaged in permissible content-based discrimination by excluding the topic of abortion from the custom plate forum, (c) the Department's denial of CFF's custom plate was reasonable, and (d) the Department's policies and practice did not give officials unbridled discretion to approve or reject custom plates. Judge Livingston dissented based on her conclusion that the Department's policy and practice gave officials unbridled discretion to approve or reject custom plates.

CFF filed a Petition for Panel Rehearing and Rehearing En Banc in June 2015. About two weeks later, the Supreme Court issued its decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (June 18, 2015), a case regarding the State of Texas' denial of a proposed "Confederate flag" custom plate. The panel subsequently granted CFF until July 7, 2015 to file a supplemental rehearing petition that addresses the impact of *Walker* and any other relevant issues. For the reasons explained below, this Court should rescind the panel opinion, vacate the judgment of the district court, and remand for reconsideration in light of *Walker*.

ARGUMENT

I. The Supreme Court's Decision in *Walker* Changed the Legal Landscape For First Amendment Challenges to State Denials of Custom Plates.

Prior to the Supreme Court's decision in *Walker*, an overwhelming consensus existed among the courts of appeals that custom plates represented private speech. *See Children First Found. v. Fiala*, No. 11-5199, __ F.3d __, 2015 WL 2444501, at *5 (2d Cir. May 22, 2015) (noting that the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits had all reached this conclusion). Courts—including the district court below and the panel in this case—routinely determined that messages on custom plates were attributable to the drivers who purchased them. *See, e.g.*, *id.* at *5 (holding that "[t]he connection between the message displayed by the specialty plate and the driver who selects and displays it is far stronger than the

connection between the message and the Department's stamp of approval"); *Children First Found. v. Martinez*, 829 F. Supp. 2d 47, 54-55 (N.D.N.Y. 2011) ("Here, the parties agree that the speech at issue in this case is private speech ….").

Walker established that this is not always the case. Instead, the Supreme Court inquired whether "Texas's specialty license plate designs are meant to convey and have the effect of conveying a government message." *Walker*, 135 S. Ct. at 2251 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2010)). The *Walker* Court held that Texas' custom plates were meant to convey and had the effect of conveying a government message. Consequently, they were government speech. *See id.* at 2250 ("'The [designs] that are accepted … are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.'" (quoting *Summum*, 555 U.S. at 472).

Three main factors informed *Walker's* analysis: (1) the history of Texas license plate designs, *id.* at 2248, (2) the nature of Texas custom plates as reflected in state laws related to their function, ownership, and treatment, *id.* at 2248-49, and (3) Texas' procedure for approving custom plates and degree of selectivity in approving custom plates in practice, *id.* at 2249. None of these factors was alone sufficient to justify a finding of government speech. But the Supreme Court found that "[t]hese considerations, taken together" demonstrated that Texas' "specialty plates [were] similar enough to the monuments in *Summum* to call for the same

result." *Id.*

In stark contrast, neither the district court nor the panel engaged in a searching analysis of the history of New York custom plates, their nature as reflected in state law, the intricacies of the Department's approval procedure, and the Department's degree of selectivity in approving custom plates in practice. *Walker* requires that this inquiry take place, at the outset, to determine whether New York custom plates are private or government speech. *See, e.g.*, *id.* (asking whether "[t]hese considerations, taken together" demonstrated that Texas' "specialty plates [were] similar enough to the monuments in *Summum* to call for the same result").

II. This Court Should Rescind the Panel Opinion, Vacate the Judgment of the District Court, and Remand for Reconsideration in Light of *Walker*.

Where, as here, a question of law—like the application of *Walker's* new government-speech test—"has been briefed and argued only cursorily in this Court" and was not ruled on by the court below, it is the Court's "preferred practice … to remand the issue for consideration by the district court in the first instance." *Cmty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 139 (2d Cir. 2002) (quotation omitted). The Court should employ that standard practice here.

First, it is the "distinctly preferred practice" of this Court "to remand" issues not considered below "for consideration by the district court in the first instance." *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000). It is, after all, a "rare

case[]" in which this Court will "resolv[e] an issue not passed on below." *United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980). No pressing reason exists for the Court to rule, in the first instance, on *Walker's* application to this case. As this Court has long acknowledged, "'the applicability and impact … of [*Walker*] is more appropriately considered by the district court in the first instance on remand.'" *United States v. Cordoba-Murgas*, 422 F.3d 65, 68 (2d Cir. 2005); *see also Women's Health Servs., Inc. v. Maher*, 636 F.2d 23, 26 (2d Cir. 1980) (explaining that new issues raised by two recent Supreme Court decisions "were [not] presented to the district court" and "remand[ing] for that court to rule upon them in the first instance").

Second, the principal briefing in this case does not address *Walker* or its factors because the parties' submissions long predate the Supreme Court's decision. The only briefs before the Court that even mention *Walker's* sea-change in the law will be a supplemental petition for panel rehearing and for rehearing en banc and the Department's response to that petition. *See, e.g.*, *Biglo v. Coca-Cola Co.*, 239 F.3d 440, 455 (2d Cir. 2000) ("Because the issues relating to Rule 19 were briefed only cursorily before this Court and were not ruled on by the court below, we decline to consider [that issue] at this juncture."). Such cursory, after-the-fact briefing regarding a panel opinion that is out of date is insufficient for this Court to render a fully-informed decision on the merits, particularly when the

parties had no opportunity to tailor discovery to the *Walker* factors below. *See, e.g.*, *Morris-Hayes v. Bd. of Educ. of Chester Union Free City Sch.*, 211 Fed. Appx. 28, 29 (2d Cir. 2007) (remanding because *Garcetti* "was decided a few months after the district court issued its opinion, the parties did not have the opportunity to develop the record related to Morris-Hayes's job duties, and the district court did not have a chance to consider" the Supreme Court's opinion).

Third, particularly when a new Supreme Court case fundamentally alters an area of the law, this Court's unerring procedure is to vacate the district court's judgment and remand for further proceedings consistent with the Supreme Court's opinion. *See, e.g.*, *Saferstein v. Lawyers' Fund for Client Protection*, 142 Fed. Appx. 494, 496 (2d Cir. 2005) ("Given the fundamental change *Exxon* has effected in the *Rooker-Feldman* doctrine, we remand to the district court to consider, in the first instance, whether its [ruling] is consistent with … *Exxon*."); *Cockfield v. United Techs. Corp.*, 39 Fed. Appx. 657, 658 (2d Cir. 2002) ("Because the Supreme Court overruled a line of Second Circuit precedent …, we vacate the district court's decision and remand for reconsideration …."); *Alier v. Tuscan Dairy Farms, Inc.*, 979 F.2d 946, 947 (2d Cir. 1992) ("Without reaching [the parties'] present contentions, we vacate the judgment and remand for further consideration in light of recent Supreme Court authority."); *Sobel v. Yeshiva Univ.*, 797 F.2d 1478, 1479 (2d Cir. 1986) ("Because the court below did not have the

benefit of the views of the Supreme Court …, we remand for reconsideration and if necessary, further proceedings ….").

When the panel issued its decision, "[t]he Supreme Court ha[d] not yet articulated a test to distinguish government speech from private speech." *Children First Found.*, 2015 WL 2444501, at *5. It has now done so and fundamentally altered the legal landscape in the process. Rescinding the panel opinion, vacating the district court's judgment, and remanding for proceedings consistent with *Walker* is the appropriate, standard course.

CONCLUSION

For the foregoing reasons, CFF respectfully requests that the Court rescind the panel opinion, vacate the district court's judgment, and remand this case to the district court for reconsideration in light of *Walker*.

Respectfully submitted this 7th day of July, 2015.

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation established by Federal Rule of Appellate Procedure 35(b)(2) in that is contains seven (7) pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6), as it has been prepared in Word 2007 using a proportioned spaced typeface, specifically 14-point Times New Roman font.

Dated: July 7, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2015, I electronically filed the foregoing Supplemental Petition for Panel Rehearing and for Rehearing En Banc with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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