No. _____

In The
Supreme Court of the United States

DAVID BENOIT MECH, d/b/a
THE HAPPY/FUN MATH TUTOR,

Petitioner,

v.

SCHOOL BOARD OF PALM
BEACH COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc*., ___ U.S. ___, 135 S. Ct. 2239 (2015), allow the government to place an imprimatur on private advertising and thereby render the advertisement government speech, stripping it of all First Amendment protection?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceedings are listed below:

David Benoit Mech, d/b/a The Happy/Fun Math Tutor, *Petitioner*.

The School Board of Palm Beach County, Florida, *Respondent*.

The ACLU of Florida, amicus below, is a nonprofit corporation and has no stock. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

This case presents the scenario that Justice Alito and three other dissenting Justices feared in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015):

> . . . Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?
>
> What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

Id. at 2254-56 (Alito, J., dissenting).

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals for which review is sought is reported at 806 F.3d 1070 (11th Cir. 2015). (App. 1-18). That opinion affirmed the district court's order on summary judgment (App. 25-40) as well as the district court's decision on Mech's motion to amend judgment. (App. 21-24).

BASIS OF JURISDICTION

The Eleventh Circuit entered the judgment below on November 23, 2015. (App. 19-20). The court denied a timely petition for rehearing and rehearing *en banc* on January 19, 2016. (App. 41-42).

On April 8, 2016, Justice Thomas granted Petitioner an extension of time to file his Petition for Writ of Certiorari to May 18, 2016. This petition is timely filed.

Jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, Section 1.

STATEMENT OF CASE AND PROCEEDINGS

Petitioner David Mech a/k/a The Happy/Fun Math Tutor ("Petitioner" or "Mech") sued the School Board of Palm Beach County, Florida, for violating his First and Fourteenth Amendment rights when three of the County's public schools removed Mech's math tutoring business banner advertisements from their fences.

In 2008, the School Board – which oversees the Palm Beach County School District – adopted a pilot program for its schools to hang banners on their fences to recognize the sponsors of school programs. The banner program was codified in 2011 as Policy 7.151, "Business Partnership Recognition – Fence Screens." Subsection (1) of the Policy states its purpose:

> Purpose. – The District recognizes that athletic sponsors and other business partners

> provide a vital role in sponsorship of key programs within our schools. As such, schools have increased needs to visibly recognize these partners in the community. In the interests of community aesthetics and in consideration of local ordinances that may prohibit or restrict banners and advertising, these uniform standards have been developed. By permitting the recognition of business partners on school campuses, it is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity, nor is it the intent of the School Board to create a venue or forum for the expression of political, religious, or controversial subjects which are inconsistent with the educational mission of the School Board or which could be perceived as bearing the imprimatur or endorsement of the School Board.

Id. at 7.151(1). Mech complied with the requirements for the banner ad program, and the schools hung his banner advertisements on their fences.

The schools subsequently removed the banners, however, after some parents complained upon discovering that Mech's tutoring business shared a mailing address at a private postal center with his former adult media business, Dave Pounder Productions. The schools informed Mech that his "position with Dave Pounder Productions, together with the fact that Dave Pounder Productions utilizes the same address as The Happy/Fun Math Tutor creates a

situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values." *Mech v. Sch. Bd. of Palm Beach Cty*., 806 F.3d 1070, 1072-74 (11th Cir. 2015).

The district court entered summary judgment against Mech on the ground that since the schools did not remove the banners due to their content, no First Amendment violation had occurred. App. 25-40. The district court's ruling failed to address Mech's core claims, which were rooted not in the content of the banner, but in the censorship of his speech based on his viewpoint and identity, which resulted from the unbridled discretion afforded by the School Board's Policy.

The Eleventh Circuit panel affirmed, but on a different ground. Citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), the court concluded that the Free Speech Clause of the First Amendment does not protect Mech because the banner advertisements contained the tagline "Partners in Excellence" and thus constituted "government speech." *Mech*, 806 F.3d at 1072. Prior to its decision, the Eleventh Circuit had ordered supplemental briefing after *sua sponte* raising the question of whether the banners were government speech under the recently decided *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015). Neither party in either their original or supplemental briefs had argued that the speech was government speech. *See* oral argument at http://mechforpbcschools.com/lawsuit.html or

https://www.youtube.com/watch?v=878jhF4m0Ro The issue was likewise not briefed or factually developed in the district court.

The Eleventh Circuit held that the banner advertisements constituted government speech even though indicia of private advertising predominate, in that: 1) the advertisers own the banners; 2) School Board officials acknowledged that the banners are advertising; 3) the banners have private logos of the sponsored business prominently displayed with corporate colors; 4) the location of the banners varies depending upon the size of the contribution; 5) local governments commonly regulate the size and location of private signs; 6) the banners contain contact information exclusively for the private business; 7) the banners are not permanent; 8) the banners are not government IDs or monuments; 9) the history of banner ads is brief rather than longstanding; and 10) the advertisers pay a fee in exchange for their banners being displayed for a fixed period of time. Notably, the School Board never claimed in its answer or supplemental briefs, *even when invited to do so during oral argument*, *id*. (oral argument at 0:55-1:22, 24:38-26:38, and 27:26-27:42), that the "Partners in Excellence" taglines were its own (i.e., government) speech. Further, neither School Board Policy 7.151(2)(h) nor protocol requires principals to conduct criminal or background checks on businesses with whom the District partners. Thus, there is no vetting of purported "partners" for their "excellence." The only real criterion

for becoming a "partner" is that the business pay money for its ads.

The Eleventh Circuit's ruling that Mech's banners constituted "government speech" under *Walker* was based on an incomplete record, since the issue of government speech was never litigated or factually developed in the district court.

Mech filed a Petition for Rehearing and Rehearing *En Banc*. App. 68. On January 19, 2016, the circuit court denied Rehearing and Rehearing *En Banc*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS THE IMPORTANT UNANSWERED QUESTION POSED BY THE FOUR DISSENTERS IN *WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.*, ___ U.S. ___, 135 S. CT. 2239 (2015).

In *Walker*, this Court determined that specialty license plates issued by the State of Texas were government speech and that the State's denial of a Confederate Flag plate was therefore not subject to First Amendment scrutiny. *Walker*, 135 S. Ct. at 2244-45. In so holding, this Court concluded that because (1) the States have historically used license plates to communicate with the public, (2) license plates are often closely identified in the public's mind with the State, and (3) Texas effectively controlled the expressive content of the license plates by exercising

final approval authority over submitted designs, Texas' specialty plates "are similar enough to the monuments in *Summum* to call for the same result." *Walker*, 135 S. Ct. at 2249. *Walker* acknowledged, however, that its holding applied only in limited circumstances, noting the unusually close connection between license plates and State directives. *Id*. at 2251. *Walker* held that license plates are government speech because they are government items serving governmental purposes of vehicle registration and identification, are required by law for every Texas vehicle owner, are issued by the State, and are, "essentially, government IDs." *Id*. at 2249.

The Eleventh Circuit found *Walker* dispositive for two reasons. First, it held that "observers reasonably believe the government has endorsed the message[s]" because they were hung on school fences. *Mech*, 806 F.3d at 1076. Second, it held that because the schools control "the design, typeface, [and] color" of the banners, *id.* at 1078 (quoting *Walker*, 135 S. Ct. at 2249), "and require the banners to include the school's initials and the message 'Partner in Excellence,'" *id.*, the banners are government speech. The circuit court's reasoning is faulty because it disregards the narrow and limited nature of this Court's 5-to-4 decision in *Walker*.

Unlike the license plates at issue in *Walker*, the banner advertisements here are not government IDs over which the School Board exercises absolute control over language or design. Nor do they have the history as government speech found so significant in *Walker*. And while the circuit court's decision places

great weight on the language "Partners in Excellence," this statement is nothing more than a passing reference to the paid affiliation with the school that permitted the placement of the banner. Also, while license plates are required on all motor vehicles, schools are not required to have banner ad programs, nor are businesses required to advertise on school fences.

The danger of expanding *Walker*'s limited holding that government-issued license tags are government speech was cogently framed by Justice Alito in his dissent (joined by Chief Justice Roberts, and Justices Scalia and Kennedy) in *Walker*:

> **The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing.** Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468, 129 S. Ct. 1125, 172 L.Ed.2d 853 (2009). By contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another. *Rosenberger v. Rector and Visitors of Univ.of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510,132 L.Ed.2d 700 (1995). Unfortunately, the Court's decision categorizes private speech as government speech and

thus strips it of all First Amendment protection. . . .

. . . **Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?**

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

135 S. Ct. at 2254-56 (emphasis added).

The decision below merits review because it will have broad ramifications, enabling the government to convert private speech in a limited or nonpublic forum into government speech unprotected from censorship, viewpoint or speaker-identity discrimination, and

unconstitutional conditions.[1] The decision affords the government unbridled discretion over both speech and speakers merely by adding a meaningless and sham seal of approval or, in this case, a "thank you" message (i.e., "Partner in Excellence"). In fact, the circuit court's reasoning offers a roadmap for turning every sign on government property into government speech by adding a perfunctory seal of approval, and it could be extended even to spoken words in a nonpublic forum – e.g., a sign at the entrance to the building stating that the government has approved the speaker.

In short, the circuit court's decision represents a stark departure from the narrowly-defined realm of government speech delineated in *Walker* and permits the government to avoid any constitutional scrutiny of its actions merely by affixing a meaningless affiliation to private speech and advertising.

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[1] Even under the federal government's crimped view of the unconstitutional conditions doctrine taken in its Petition for Writ of Certiorari in *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *petition for cert. filed sub nom. in Lee v. Tam*, (April 20, 2016) (No. 15-1293), it conceded that the "doctrine would apply, for example, if the Lanham Act denied the benefits of trademark registration to persons who had engaged in specified speech or conduct outside the registration program (e.g., if respondent's use of THE SLANTS as a mark in commerce rendered him ineligible to register other marks)." Petition for Writ of Certiorari filed in *Lee v. Tam*, No. 15-1293, at 17. So, too, has Mech been denied the benefits of the banner ad program because he engaged in disfavored speech or conduct outside the banner ad program.

II. THE DECISION BELOW CONFLICTS WITH *WALKER* AND *IN RE TAM*, 808 F.3D 1321 (FED. CIR. 2015), *PETITION FOR CERT. FILED SUB NOM. IN LEE V. TAM*, (APRIL 20, 2016) (NO. 15-1293) WHICH LIMIT THE APPLICABILITY OF THE GOVERNMENT SPEECH DOCTRINE.

The Eleventh and Federal Circuits are split on whether attaching a government label to retail marketing material renders the speech governmental. The Eleventh Circuit held that it did; the Federal Circuit held to the contrary.

The decision below conflicts with this Court's decision in *Walker* and circuit courts that limit the applicability of the government speech doctrine to situations where: 1) the government has long been using the speech as a means of expressing a government message; 2) the speech is closely identified in the public's mind with the government; and 3) the government controls the message.

In *In re Tam*, 808 F.3d 1321, the Federal Court of Appeals, sitting *en banc*, rejected the government's argument that trademark registration "and the accoutrements of registration – such as the registrant's right to attach the ® symbol to the registered mark, the mark's placement on the Principal Register, and the issuance of a certificate of registration – amount to government speech." *Id*. at 1343.

"The logical extension of the government's argument is that these indicia of registration convert the

underlying speech into government speech unprotected by the First Amendment. Thus, the government would be free, under this logic, to prohibit the . . . registration of any work deemed immoral, scandalous, or disparaging to others. This sort of censorship is not consistent with the First Amendment or government speech jurisprudence." *Id*. at 1346.

"The vast array of private trademarks are not created by the government, owned . . . by the government, sized and formatted by the government, immediately understood as performing any government function (like unique, visible vehicle identification), aligned with the government, or (putting aside any specific government secured trademarks) used as a platform for government speech. There is simply no meaningful basis for finding that consumers associate registered private trademarks with the government." *Id*.

Accordingly, the court held that trademark processing "no more transforms private speech into government speech than when the government issues permits for street parades, . . . grants . . . licenses, or records property titles, birth certificates, or articles of incorporation. To conclude otherwise would transform every act of government registration into one of government speech and thus allow rampant viewpoint discrimination. When the government registers a trademark, it regulates private speech. It does not speak for itself." *Id*. at 1348.

The Federal Circuit's reasoning is pertinent to Mech's argument that the private advertisements that

appear on school fences are not created by the schools, owned, designed or formatted by them, understood as performing any school function, or used as a platform for government speech, and thus are not government speech. Accordingly, the Eleventh Circuit's decision in this case is in conflict with *In Re Tam*, which finds speech of a similar nature to constitute private, not government, speech. Certiorari review is therefore appropriate to resolve the split in the circuits on this important constitutional issue.

Additionally, given the significant impact of the government speech doctrine on the protections otherwise afforded private speech, certiorari review is warranted on that independent basis.

CONCLUSION

The Eleventh Circuit's decision, if left standing, would allow the government to strip private speech of all First Amendment protection merely by adding a *pro forma*, ambiguous statement of approval. If allowed to stand, the decision threatens to undermine well-established constitutional jurisprudence in the free speech realm, by allowing the School Board to rubber stamp traditionally private speech and thereby strip protected expression of fundamental First Amendment safeguards.

The petition for certiorari should be granted to resolve the circuit court split and to clarify the limits of *Walker*. If this Court grants certiorari in *In re Tam*,

then at the very least, this case should be held for disposition in light of *In re Tam*. If *In re Tam* is affirmed, the Court should grant this petition, vacate and remand.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10778

D.C. Docket No. 9:13-cv-80437-KAM

DAVID BENOIT MECH,
d.b.a. The Happy/Fun Math Tutor,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF PALM
BEACH COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 23, 2015)

Before MARCUS, WILLIAM PRYOR, and JILL PRYOR, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

The Supreme Court once predicted that "[t]here 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." *Pleasant Grove*

City v. Summum, 555 U.S. 460, 470, 129 S. Ct. 1125, 1132 (2009). This appeal presents one of those situations. David Mech complains that the School Board of Palm Beach County, Florida, violated his constitutional right to free speech, U.S. Const., amends. I, XIV, when three of its schools removed banners for Mech's tutoring business from their fences. The schools removed the banners after they discovered that Mech's tutoring business shares a mailing address with his pornography business. The district court entered summary judgment against Mech because the schools did not remove the banners based on their content. We affirm, but on a different ground. We conclude that the Free Speech Clause of the First Amendment does not protect Mech because the banners are "government speech." *Summum*, 555 U.S. at 467.

I. BACKGROUND

David Mech has a unique resume. He provides a math tutoring service in Palm Beach County under the name "The Happy/Fun Math Tutor." He has a bachelor's degree from Michigan State University, a master's degree from Arizona State University, and is enrolled in a Ph.D. program at Florida Atlantic University. He has taught mathematics at Palm Beach State College and is certified to teach secondary math in Florida. Mech is also a retired porn star. He has performed in hundreds of pornographic films. And he owns Dave Pounder Productions LLC, a company that formerly produced pornography. The Happy/Fun Math Tutor

and Dave Pounder Productions share a mailing address in Boca Raton, Florida.

In 2008, the School Board – which oversees the Palm Beach County School District – adopted a pilot program for its schools to hang banners on their fences to recognize the sponsors of school programs. The banner program was codified in 2011 as Policy 7.151, "Business Partnership Recognition – Fence Screens." *See* Sch. Bd. Policies 7.151, http://www.boarddocs.com/fl/palmbeach/Board.nsf/goto?open&id=9R8NDB5ADOA1#. Subsection (1) of the Policy states its purpose:

> **Purpose**. – The District recognizes that athletic sponsors and other business partners provide a vital role in sponsorship of key programs within our schools. As such, schools have increased needs to visibly recognize these partners in the community. In the interests of community aesthetics and in consideration of local ordinances that may prohibit or restrict banners and advertising, these uniform standards have been developed. By permitting the recognition of business partners on school campuses, it is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity, nor is it the intent of the School Board to create a venue or forum for the expression of political, religious, or controversial subjects which are inconsistent with the educational mission of the School Board or which could be perceived as bearing the imprimatur or endorsement of the School Board.

Id. at 7.151(1). "Because the [banners] are not considered advertising," contributions by the sponsors are treated as "donations." *Id.* at 7.151(2)(b).

The Policy imposes several conditions on the banners that can be displayed. The principals of each school must "use their discretion in selecting and approving business partners that are consistent with the educational mission of the School Board, District and community values, and appropriateness to the age group represented at the school." *Id.* at 7.151(2)(h). The Policy requires the banners that are visible from the road to use a uniform size, color, and font; to include a message thanking the sponsor; and to forego photographs and large logos. *See id.* at 7.151(3).

Beginning in 2010, Mech inquired about displaying a banner for The Happy/Fun Math Tutor at three schools in Palm Beach County: Omni Middle School, Spanish River Community High School, and Boca Raton Community Middle School. Representatives from the schools encouraged Mech to apply: Mech specializes in the math courses that are taught at those schools and, according to a representative of the School Board, "[h]e apparently is a very good tutor." The high school requires banners to be printed in school colors, and all of the banners include the message "[School Initials] Partner in Excellence." The banners can include only the name, phone number, web address, and logo of the business partner. To obtain a banner, the schools require a minimum donation of $250-$650.

Mech complied with these requirements, and the schools hung the banners displayed below on their fences.

In 2013, the schools removed the banners for The Happy/Fun Math Tutor. Several parents complained about the banners after discovering the common ownership of The Happy/Fun Math Tutor and Dave Pounder Productions. The schools informed Mech that his "position with Dave Pounder Productions, together with the fact that Dave Pounder Productions utilizes

the same principal place of business and mailing address as The Happy/Fun Math Tutor creates a situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values."

Mech sued the School Board for violations of the First and Fourteenth Amendments and breach of contract. Both parties moved for summary judgment, and the district court ruled in favor of the School Board. The district court ruled that the schools did not abridge the First Amendment because they removed the banners due to the common ownership of Mech's companies, not the content of the banners. The district court also rejected Mech's claims under the Fourteenth Amendment and declined to exercise supplemental jurisdiction over his claim for breach of contract.

On appeal, Mech challenges only the dismissal of his claim under the First Amendment. After the parties submitted their appellate briefs, the Supreme Court decided *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015). Before oral argument, we ordered the parties to provide supplemental briefing on whether *Walker* affects this case.

II. STANDARD OF REVIEW

"We review a summary judgment *de novo*." *Zibtluda, LLC v. Gwinnett Cty. ex rel. Bd. of Comm'rs*, 411 F.3d 1278, 1281 (11th Cir. 2005). Summary judgment is appropriate if, viewing the record in the light

most favorable to Mech, "there is no genuine dispute as to any material fact" and the School Board "is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56). We can affirm a summary judgment "on any alternative ground fairly supported by the record." *Rozar v. Mullis*, 85 F.3d 556, 564 (11th Cir. 1996).

III. DISCUSSION

The parties disagree about how to classify the school banners. According to Mech, the banners for The Happy/Fun Math Tutor are private speech in a limited public forum. As such, the First Amendment forbids the School Board from acting unreasonably or engaging in viewpoint discrimination. *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 n.11, 130 S. Ct. 2971, 2984 n.11 (2010). The School Board argues that the removal of the banners was reasonable and viewpoint neutral. It also argues, in the alternative, that the banners are government speech.

If the banners are government speech, Mech loses. The Free Speech Clause of the First Amendment "restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467, 129 S. Ct. at 1131. When the government exercises "the right to 'speak for itself,' " it can freely "select the views that it wants to express." *Id.* at 467-68, 129 S. Ct. at 1131 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 120 S. Ct. 1346, 1354 (2000)). This freedom includes "choosing not to

speak" and "speaking through the . . . removal" of speech that the government disapproves. *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000) (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674, 118 S. Ct. 1633, 1639 (1998)). Government speech is regulated primarily by "the political process," not the Constitution. *Southworth*, 529 U.S. at 235, 120 S. Ct. at 1357. Because characterizing speech as government speech "strips it of all First Amendment protection" under the Free Speech Clause, *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting), we do not do so lightly.

The Supreme Court has not articulated a precise test for separating government speech from private speech, but its recent decision in *Walker* concluded that the specialty license plates for motor vehicles in Texas were government speech based on three factors. First, "the history of license plates" suggests "they long have communicated messages from the States." *Id.* at 2248 (majority opinion). States have featured graphics and slogans on license plates since the early twentieth century, and Texas has approved specialty license plates "for decades." *Id.* Second, reasonable observers would conclude that Texas "agree[s] with the message displayed" on specialty license plates. *Id.* at 2249. Each plate bears the name "TEXAS" at the top; and Texas issues the plates, regulates their disposal, and owns the designs. *Id.* at 2248. License plates "are, essentially, government IDs," and individuals choose specialty plates over bumper stickers because they hope to convey the impression that "the State has endorsed th[e]

message." *Id.* at 2249. Third, Texas exercises "direct control over the messages" on specialty license plates. *Id.* The Texas Department of Motor Vehicles Board "must approve every specialty plate design proposal," *id.*, and Texas dictates "the design, typeface, color, and alphanumeric pattern for all license plates," *id.* (quoting 43 Tex. Admin. Code § 504.005(a)). These factors taken together established that the specialty license plates were government speech.

The three factors that the Supreme Court applied in *Walker* came from *Summum*, a decision in which the Court concluded that privately donated monuments in public parks were government speech. *See Summum*, 555 U.S. at 470-72, 129 S. Ct. at 1133-34. There, the Court explained that "[g]overnments have long used monuments to speak to the public." *Id.* at 470, 129 S. Ct. at 1132. Moreover, "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* at 471, 129 S. Ct. at 1133. "[T]here is little chance that observers will fail to appreciate the identity of the speaker" when they view a monument in a public park, *id.*, especially because "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land," *id.* at 472, 129 S. Ct. at 1133. Finally, the city "'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection." *Id.* at 473, 129 S. Ct. at 1134 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61, 125 S. Ct. 2055, 2062-63

(2005)). "The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 472, 129 S. Ct. at 1134.

In the light of *Walker* and *Summum*, we conclude that this case also involves government speech. Although the parties have not presented evidence about the history of banners on school fences, the banners bear the imprimatur of the schools and the schools exercise substantial control over the messages that they convey. We do not mean to suggest that the factors identified in *Walker* and *Summum* are exhaustive or that they will be relevant in every case. *See Walker*, 135 S. Ct. at 2249. Whether speech is government speech is inevitably a context specific inquiry. But these decisions provide a useful framework. Below, we address how each of the three factors from *Walker* and *Summum* – history, endorsement, and control – applies to the banners in Palm Beach County.

A. History

The record contains no evidence about the history of banners on school fences. And the banner program in Palm Beach County has a relatively recent vintage: the School Board launched it in 2008 and codified it in 2011. On this record, we cannot conclude that such banners "long have communicated messages from the [government]." *Id.* at 2248.

The absence of historical evidence weighs in Mech's favor, but it is not decisive. A medium that has

long communicated government messages is more likely to be government speech, *see id.*; *Summum*, 555 U.S. at 470, 129 S. Ct. at 1132-33, but a long historical pedigree is not a *prerequisite* for government speech. For example, in *Johanns v. Livestock Marketing Association*, the Supreme Court concluded that a promotional campaign for the beef industry was government speech without conducting any historical inquiry or citing any historical evidence. *See* 544 U.S. at 560-67, 125 S. Ct. at 2062-66. According to the Court, the promotional campaign – which was written by a nongovernment entity – was government speech because "[t]he message . . . is effectively controlled by the Federal Government itself." *Id.* at 560, 125 S. Ct. at 2062. *Johanns* makes clear that a particular medium may be government speech based solely on present-day circumstances. For example, if the School Board posted a message about school closings for inclement weather on Facebook or Twitter, we would have little difficulty classifying the message as government speech, even though social media is a relatively new phenomenon. *See, e.g.*, *Sutlige v. Epping Sch. Dist.*, 584 F.3d 314, 331 (1st Cir. 2009) ("[T]he Town engaged in government speech by establishing a town website and then selecting which hyperlinks to place on its website."); *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 288 (4th Cir. 2008) (school website and email communications were government speech). The absence of historical evidence can be overcome by other indicia of government speech. And, as we explain below, such other indicia are present here.

B. Endorsement

The second factor – that observers reasonably believe the government has endorsed the message – strongly suggests that the banners are government speech. The banners are hung on school fences, and government property is "often closely identified in the public mind with the government unit that owns the land." *Summum*, 555 U.S. at 472, 129 S. Ct. at 1133; *see, e.g.*, *United Veterans Mem'l & Patriotic Ass'n v. City of New Rochelle*, 72 F. Supp. 3d 468, 474-75 (S.D.N.Y. 2014) (Gadsden flag at a government armory was government speech), *aff'd*, No. 15-120 (2d Cir. Sept. 9, 2015); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1115-16 & n.8 (10th Cir. 2010) (cross memorials on the side of public highways were government speech). Although banners are not "government IDs," *Walker*, 135 S. Ct. at 2249, schools typically do not hang them on school property for long periods of time if they contain "message[s] with which the[schools] do not wish to be associated," *id.* (first alteration in original) (quoting *Summum*, 555 U.S. at 471, 129 S. Ct. at 1133). Moreover, "[t]he governmental nature" of the banners "is clear from their faces." *Id.* at 2248. Like the word "TEXAS" on the specialty license plates in *Walker*, each banner bears the school's initials. The banners at the high school are printed in school colors, and all of the banners identify the sponsor as a "Partner in Excellence" with the school. The word "partner" suggests that the sponsor has a close relationship with the school – *i.e.*, that the sponsor is an "associate" or is "engaged together in the same activity, occupation, etc."

Partner, Oxford English Dictionary (online ed.). Indeed, this positive association is likely why sponsors participate in the banner program, instead of appealing to parents and students through "purely private" media. *Walker*, 135 S. Ct. at 2249.

Mech contends that the banners for The Happy/Fun Math Tutor are private speech because they are essentially advertisements; they invite the reader to do business with the sponsor, not the school. Mech bolsters his argument by identifying other examples of "Partners in Excellence" that provide services totally unrelated to the school, such as Maggiano's Italian restaurant, Atlas Roofing, and The Journey Church. The schools must not be speaking on their own behalf, Mech reasons, because they neither know nor care whether these miscellaneous businesses provide "excellent" services.

Mech misunderstands the nature of the government message conveyed by the banners. The banners for "Partners in Excellence" are the schools' way of saying "thank you." The School Board requires the banners to expressly "thank the sponsor." Sch. Bd. Policies 7.151(3)(e). Indeed, the entire purpose of the banner program is for the schools to "visibly recognize" the "business partners" that "provide a vital role in sponsorship of key programs." *Id.* at 7.151(1). The sponsors recognized on the banners have "provide[d] adequate funding for an important program or activity at the school." *Id.* at 7.151(3)(g). To return the favor, the schools display the sponsor's information on school property where parents and students will see it. Such

gestures of gratitude are a common form of government speech. *See, e.g.*, *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1141-42 (10th Cir. 2001) (sign on government property thanking the corporate sponsors of the city's Keep the Lights Foundation was government speech); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093 (8th Cir. 2000) (acknowledgements by a public radio station of the donors that contributed to its programming were government speech). The schools in Palm Beach County have an interest in expressing gratitude to *all* of their sponsors, regardless of the services or the quality of services that they provide. "The fact that the sponsors may receive an incidental benefit from the [message] – in the form of publicity and good will – does not refute . . . the [governmental] purpose. Indeed, any benefit that accrues to the sponsors ultimately serves the [government's] interests by providing current and putative sponsors with an incentive to contribute to [government programs] in the future." *Wells*, 257 F.3d at 1142.

The banners for The Happy/Fun Math Tutor are distinguishable from purely private advertising in other ways as well. Private advertisements are typically designed by the advertisers: they convey the words, pictures, and colors that the advertiser wants to convey. Even when they are located on government property, private advertisements typically bear "no indicia that the speech [i]s owned or conveyed by the government." *Walker*, 135 S. Ct. at 2252. The banners on the school fences, by contrast, are subject to uniform

design requirements imposed by the schools. Each banner bears the initials of the school and identifies the sponsor as a "partner" with the school. Unlike an advertisement on a city bus, the banners are "formally approved by and stamped with the imprimatur of [the schools]." *Id.* Observers would reasonably interpret them as "conveying some message on the [school's] behalf." *Id.* (quoting *Summum*, 555 U.S. at 471, 129 S. Ct. at 1133). That the sponsors "pay annual fees in order to display [the banners]" does not alter this conclusion. *Id.*

Furthermore, the banners for The Happy/Fun Math Tutor are qualitatively different from the other banners that Mech identifies. His banners pertain to an education-related service – namely, math tutoring. Because schools are experts in matters of education, *see generally Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S. Ct. 625, 627 (1923), an observer who saw a banner for tutoring services on school property with the imprimatur "[School Initials] Partner in Excellence" would reasonably conclude that the school was endorsing the services of this tutor. Indeed, school representatives encouraged Mech to apply for a banner because he taught the same math courses that they offered and because "[h]e apparently is a very good tutor." Even if we were to assume that the banners for The Happy/Fun Math Tutor are advertisements, observers would view them as government-sponsored advertisements because tutoring services are related to the schools' educational mission.

Mech further contends that the schools have disclaimed the governmental nature of the banners. He points to Policy 7.151 as the source of this supposed disclaimer. Mech argues that, according to subsection (1) of the Policy, the banners do not "bear[] the imprimatur or endorsement of the School Board."

But Mech misreads the Policy. Subsection (1) expresses the intent of the School Board not to endorse some kinds of messages:

> [I]t is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity, nor is it the intent of the School Board to create a venue or forum for the expression of political, religious, or controversial subjects which are inconsistent with the educational mission of the School Board or which could be perceived as bearing the imprimatur or endorsement of the School Board.

Sch. Bd. Policies 7.151(1). Subsection (1) does not say that the banners do not "bear[] the imprimatur or endorsement of the School Board." Instead, it says *because* the banners may be perceived as "bearing the imprimatur or endorsement of the School Board," the schools must be able to control the messages that they convey. The School Board seeks to avoid "the expression of political, religious, or controversial subjects." *Id.* This concern is why the School Board requires principals to "use their discretion in selecting and approving business partners." *Id.* at 7.151(2)(h). Read in context,

subsection (1) is not a disclaimer, but a recognition that the banners will likely be attributed to the schools.

C. Control

The third factor – the government's control over the message – strongly suggests that the banners are government speech. Like the board that approves specialty license plates in Texas, the schools control "the design, typeface, [and] color" of the banners. *Walker*, 135 S. Ct. at 2249. The schools also dictate the information that the banners can contain, regulate the size and location of the banners, and require the banners to include the message "Partner in Excellence." Furthermore, the principals at the schools "must approve every [banner]" before it goes up on a fence. *Id.* "This final approval authority allows [the school] to choose how to present itself" to the community. *Id.* And it ensures that the messages on the banners are "effectively controlled" by the schools. *Summum*, 555 U.S. at 473, 129 S. Ct. at 1134 (quoting *Johanns*, 544 U.S. at 560, 125 S. Ct. at 2062).

Mech contends that the schools do not meaningfully control the messages on the banners because the bulk of the information – the logo, name, phone number, and web address – comes from the sponsor, not the school. But "[t]he fact that private parties take part in the design and propagation of a message does not extinguish [its] governmental nature." *Walker*, 135 S. Ct. at 2251. The monuments in *Summum* and the license plates in *Walker* were government speech, even though

private entities designed them. *See id.*; *Summum*, 555 U.S. at 470-71, 129 S. Ct. at 1133. Here, the sponsors have even less say-so about the messages on the banners. The schools do not allow the banners to list anything but the sponsor's name, contact information, and preexisting business logo. "The message set out in [a banner] is from beginning to end the message established by the [school]." *Johanns*, 544 U.S. at 560, 125 S. Ct. at 2062.

We conclude that the banners for The Happy/Fun Math Tutor are government speech. Despite the lack of historical evidence in the record, the banners exhibit strong indicia of government endorsement and control. Accordingly, Mech's claim under the First Amendment fails. His redress lies with the political process, not the courts. *See Southworth*, 529 U.S. at 235, 120 S. Ct. at 1357.

IV. CONCLUSION

We **AFFIRM** the judgment against Mech.

IN THE UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 15-10778

District Court Docket No.
9:13-cv-80437-KAM

DAVID BENOIT MECH,
d.b.a. The Happy/Fun Math Tutor,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF PALM
BEACH COUNTY, FLORIDA,

Defendant-Appellee.

THE SCHOOL DISTRICT OF
PALM BEACH COUNTY, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: November 23, 2015
For the Court: AMY C. NERENBERG,
Acting Clerk of Court
By: Djuanna Clark

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-80437-CIV-MARRA

DAVID BENOIT MECH
d/b/a/ THE HAPPY
MATH TUTOR,

Plaintiff,

vs.

SCHOOL BOARD OF
PALM BEACH COUNTY,

Defendant. /

ORDER DENYING PLAINTIFF'S MOTION TO AMEND JUDGMENT UNDER RULE 59(e)

(Filed Jan. 28, 2015)

This cause is before the Court on Plaintiff's Motion to Amend Judgment Under Rule 59(e). (DE 82). Defendant responded (DE 83), and Plaintiff did not file a reply. The motion is ripe for review, and for the following reasons, the Court concludes that the motion should be denied.

On October 27, 2014, this Court granted Defendant summary judgment on Plaintiff's federal claims, entered judgment on those claims, and dismissed Plaintiff's state law claims without prejudice. (DEs 80, 81). Briefly, the Court held that Defendant's decision to remove Plaintiff's marketing banners from fences at Defendant's schools did not infringe Plaintiff's

commercial speech rights because the removal was not based on the protected commercial speech within the banners. (DE 80 at 8). Plaintiff challenges that holding, arguing that Defendant's actions infringed his First Amendment rights because the removal targeted "Plaintiff's prior speech through Dave Pounder Productions, LLC ("DPP"), a former adult media corporation." (DE 82 at 3). To the extent that Plaintiff is framing his First Amendment claim in a new light, the Court will not consider it for the first instance on a reconsideration motion.

A court enjoys discretion in deciding whether to grant a motion to alter or amend judgment brought under Rule 59(e) of the Federal Rules of Civil Procedure. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). "The only grounds for granting a Rule 59 a [sic] motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Id.* (internal quotation marks, citations, and alterations omitted).

In his Motion for Summary Judgment, Plaintiff plainly argued that his "banner ads offering math tutoring services constitute non-misleading speech proposing a lawful transaction," and are therefore protected by the First Amendment. (DE 48 at 3). He argued that Defendant's actions infringed on that right, since its policies granted it standardless discretion to bar protected commercial speech. (DE 48 at 4 (First

Amendment "forbids standardless licensing of commercial advertising"); *id.* ("math tutoring is a lawful activity"); *id.* at 5 (First Amendment protects Plaintiff's "license to advertise his math tutoring"); *id.* at 6 (concluding that "Defendant cannot defend under *Central Hudson* its censorship of Plaintiff's banner ads")).

Plaintiff's argument takes a new tenor. He asserts, forcefully, that it was his "speech through his media company and/or his identify as the owner of an adult media company" that provided the unconstitutional motivation for Defendant's decision to remove his protected banners. (DE 82 at 3). He cites several cases where courts have recognized that "speaker-based" restrictions on speech are every bit as actionable as "content-based" restrictions (*id.* at 7); however, he fails to articulate how Defendant's decision to remove his banners constituted "censorship" of the views he expressed as the manager of an adult media company, *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), or "suppress[ed]" and "unjustified[ly] burden[ed]" Dave Pounder Production's protected speech, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011). In any event, Plaintiff failed to present this argument – that his status as a producer of adult movies (DE 82 at 4) afforded his banners protection under the First Amendment – in his motion for summary judgment (DE 48) and response to Defendant's motion for summary judgment (DE 64).[1]

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[1] The closest Plaintiff came to advancing such an argument was in the "Introduction" to these motions, where he stated that

Accordingly, Plaintiff's Motion to Amend Judgment Under Rule 59(e) is **DENIED**.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 28th day of January, 2015.

/s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge

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the Defendant's policy prohibited Plaintiff "and other disfavored advertisers from advertising on the premises of" schools "on terms equal to those afforded favored advertisers." (DE 48 at 1-2; DE 64 at 1-2). Plaintiff did not support the assertion that Defendant had branded Plaintiff, and others, as "disfavored advertisers," and he did not attempt to demonstrate that such branding was a result of the protected speech of those advertisers. The "disfavored advertiser" assertion was not developed into an argument.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 13-80437-CIV-MARRA

DAVID BENOIT MECH
d/b/a/ THE HAPPY
MATH TUTOR,

Plaintiff,

vs.

SCHOOL BOARD OF
PALM BEACH COUNTY,

Defendant. /

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIMS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 27, 2014)

This Cause is before the Court on the parties' competing motions for summary judgment. Plaintiff moved first, filing his Motion for Summary Judgment on April 25, 2014 (DE 48). Defendant responded on May 16, 2014 (DE 57), and Plaintiff replied on June 6, 2014 (DE 68). Plaintiff's Motion for Summary Judgment is ripe for review.

Defendant filed its Motion for Summary Judgment on May 13, 2014 (DE 54). Plaintiff responded on May 30, 2014 (DE 64), and Defendant replied on June

6, 2014 (DE 66). Defendant's Motion for Summary Judgment is ripe for review.

After considering the competing motions, responses, replies, and materials in the record, the Court finds that Plaintiffs Motion for Summary Judgment should be denied and Defendant's Motion for Summary Judgment granted in part.

I. Background[1]

Plaintiff David Benoit Mech provides math tutoring services to school-age children under the business name "The Happy/Fun Math Tutor." (DE 55 ¶ 1) (Defendant's Statement of Undisputed Material Facts). In addition to his tutoring business, Plaintiff is the managing member of Dave Pounder Productions LLC, a company that formerly produced explicit adult media. (DE 49-1 ¶¶ 30-31) (Plaintiff's Corrected Statement of Undisputed Material Facts). Plaintiff operates his businesses as separate entities, although The Happy/Fun Math Tutor and Dave Pounder Productions share the same mailing address. (*Id.* ¶¶ 28-29).

In late 2010, Plaintiff noticed that several public schools in the area where he offers his tutoring services displayed banners on school fences from local businesses. (*Id.* ¶ 18). Plaintiff contacted three schools, Omni Middle School, Spanish River Community High

[1] The factual background is drawn from the summary judgment record. Unless otherwise indicated, the facts are not in dispute.

School, and Boca Raton Community Middle School, about placing a banner for The Happy/Fun Math Tutor on school fences. (*Id.*). Starting in May 2011, Plaintiff entered into arrangements with these schools to display such banners. (DE 55 ¶¶ 14-16). Plaintiff contends that these arrangements were contractual "advertising agreements," whereas Defendant contends they were donations. (DE 49-1 ¶ 22, 37). The banners that were hung at the schools displayed The Happy/Fun Math Tutor's name, phone number, and email address and stated "Partner in Excellence." (DE 48-4 at 27).

In February 2013, Defendant removed The Happy/Fun Math Tutor banners at Omni Middle, Spanish River High, and Boca Raton Middle. (DE 55 ¶¶ 23, 34, 40.), In separate letters, the principals of Omni Middle and Spanish River High informed Plaintiff of the removal. (DE 49-1 ¶ 49). The principals stated that Plaintiff's "position with Dave Pounder Productions, together with the fact that Dave Pounder Productions utilizes the same principal place of business and mailing address as The Happy/Fun Math Tutor creates a situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values." (DE 48-4 at 28, 29). In a subsequent letter, the School Board's General Counsel informed Plaintiff that the "connection between the Happy/Fun Math Tutor and Dave Pounder Productions was brought to the attention of the school administration by multiple parents who expressed great concern over the potential for the students using your

tutoring service to become subjected to your adult entertainment business. Given that parents within the community have already made the connection between your tutoring business and your adult entertainment business, the principals had no choice but to remove your banners." (*Id.*).

Each of the letters stated that the banners were removed according to School Board Policies 7.151(1) and 7.151(2)(h). (DE 49-1 ¶ 49; DE 48-4 at 35). School Board Policy 7.151(1) states that:

> The District recognizes that athletic sponsors and other business partners provide a vital role in sponsorship of key programs within Our schools. As such, schools have increased needs to visibly recognize these partners in the community. In the interests of community aesthetics and in consideration of local ordinances that may prohibit or restrict banners and advertising, these uniform standards have been developed. By permitting the recognition of business partners on school campuses, it is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity, nor is it the intent of the School Board to create a venue or forum for the expression of political, religious, or controversial subjects which are inconsistent with the educational mission of the School Board or which could be perceived as bearing the imprimatur or endorsement of the School Board.

(DE 49-1 ¶ 44). Policy 7.151(2)(h) states that:

> In keeping with the express purpose of this Policy not to create or open schools as a public forum for expressive activity, Principals shall use their discretion in selecting and approving business partners that are consistent with the educational mission of the School Board, District and community values, and appropriateness to the age group represented at the school. Examples of inappropriate business partners include but are not limited to: businesses that sell goods or services which are illegal if possessed by or sold to a minor, adult entertainment establishments, businesses whose primary source of revenue is generated from the sale or distribution of alcohol or tobacco products, tattoo parlors, pain clinics and businesses soliciting addicts.

(*Id.* ¶ 45).

On April 30, 2013, Plaintiff initiated this action against Defendant and several School Board officials in their official capacities. (DE 1). Plaintiff dropped the officials from the suit and now brings four claims against Defendant School Board for violating his First Amendment right to Free Speech (Count I), Fourteenth Amendment rights to Due Process (Count II) and Equal Protection (Count III), and breach of contract (Count IV). (DE 36 ¶¶ 55-68).

Plaintiff moves for summary judgment on Defendant's liability. (DE 48). He argues that he is entitled

to judgment as a matter of law because Defendant utilized "unbridled, standardless discretion" in deciding to remove his banners (*id.* at 3-5) and because Policy 7.151(h) is an unconstitutional "commercial advertising restriction" (*id.* at 5-6). In turn, Defendant moves for summary judgment arguing that Plaintiff did not have enforceable contracts with the schools at the time his banners were removed, thus negating his contractual and constitutional claims. (DE 54 at 2-3). For the following reasons, the Court agrees with Defendant that Plaintiff's federal constitutional claims fail as a matter of law and summary judgment for Defendant on these claims is appropriate.

II. Motion for Summary Judgment

A. Legal Standard

The Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It must do so by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). If the movant bears

the burden of persuasion at trial, "that party must support its motion with credible evidence – using any of the materials specified in Rule 56(c) – that would entitle it to a directed verdict if not controverted at trial." *Celotex*, 477 U.S. at 331. On the other hand, if the burden of persuasion lies with the nonmovant, summary judgment may be granted if the movant either negates an essential element of the nonmovant's claim or demonstrates to the Court that the nonmovant's evidence is insufficient to establish an essential element of that claim. *Id.* Any doubt regarding whether a trial is necessary must be resolved in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

After the movant has met its burden of production under Rule 56(a), the burden of production shifts to the nonmovant. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot product [sic] admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) and (B). The nonmovant's evidence cannot, however, "consist of conclusory allegations or legal conclusions." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). And where the nonmovant bears the burden of persuasion on a claim, it must come forward with more than a mere scintilla of evidence supporting its position; "there must be enough of a showing that the jury

could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

B. Discussion

Defendant argues that, for Plaintiff to have claims under the First and Fourteenth Amendment, he must "show that at the time of the removal of the fence screens from the schools['] fences, he had valid, enforceable contracts with each of the schools." (DE 54 at 2). Because Plaintiff's agreements with the schools had either expired or were not contractual, Defendant owed Plaintiff no contractual or constitutional duty to display the banners in February 2013. (*Id.*). Defendant further argues that Plaintiff's First Amendment claim is misplaced because the banners were not removed "because of the content of [Plaintiff's] speech or in retaliation for comments of great public concern." (DE 66 at 3).

Plaintiff responds that he "needs no contract or other property interest as a predicate to First Amendment protection," and "[e]ven if he did, the contracts were valid and enforceable." (DE 64 at 1). The Court concludes that Defendant's argument prevails.

1. First Amendment Claim

The thrust of Plaintiff's claims stem from the alleged violation of his First Amendment rights. Plaintiff's Motion for Summary Judgment asserts that, "[b]ecause the principals have and relied on unbridled

discretion to disapprove his banners, Plaintiff is entitled to summary judgment under the First Amendment." (DE 48 at 3). Plaintiff's Response to Defendant's motion voices a similar theme – "First Amendment protections are not dependent on the existence of an enforceable contract or other state-recognized property interest." (DE 64 at 2). In his complaint, Plaintiff alleges that Defendant violated his "right to advertise useful, lawful consumer infolination at a limited public forum, in violation of the First and Fourteenth Amendments." (DE 36 ¶ 56).

It is axiomatic that in order to have a claim for a commercial speech violation, the defendant must have taken action against the plaintiff *because of* his commercial speech. Plaintiff asks this Court to follow the seminal commercial speech case, *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). (DE 48 at 3, 5). That case was decided, however, only because the law in question banned advertising that "promot[ed] the use of electricity." 447 U.S. at 558. That is, the *content* of the advertising – nonmisleading speech concerning a lawful activity – was the target of government action. *Id.* at 566. This is true in all First Amendment settings – scrutiny of the government's actions is warranted where the government directly limits speech itself or takes action because of the speech in question. *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) ("The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern.") (emphasis in

original); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression *because of* its message, its ideas, its subject matter, or its content.") (emphasis added). For example, to state a claim for retaliation against one's speech under 42 U.S.C. § 1983, the plaintiff has the initial "burden of establishing that his protected conduct was a *motivating factor* behind any harm" caused by the defendant. *Smith v. Mosley*, 532 F.3d 1270, 1278 (11th Cir. 2008) (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999)) (emphasis added).

The parties agree that The Happy/Fun Math Tutor was lawful activity and that the banners did not contain misleading information. The parties also agree, however, that the message conveyed by the banners – the only commercial speech present in this case – was *not* a motivating factor behind Defendant's decision to remove the banners. Rather, Plaintiff asserts that Defendant branded him a "disfavored advertiser" after his banners went up (DE 64 at 1), apparently because of The Happy/Fun Math Tutor's indirect association with Dave Pounder Productions (*see* DE 36 ¶ 60).

Simply put, this case does not implicate Plaintiff's commercial speech rights. Defendant did not remove Plaintiff's banners because of the expression contained therein. Rather, it removed the banners for a reason unrelated to Plaintiff's speech – the known association of Plaintiff's tutoring business with his adult media business. There is no genuine dispute that Defendant's actions were not motivated by Plaintiff's

commercial speech; therefore, Defendant is entitled to summary judgment on Plaintiff's First Amendment claim (Count I).

Moreover, to the extent Plaintiff might be attempting to assert a "freedom of association" claim,[2] such a claim also fails. First, Plaintiff makes no attempt to allege facts that would extend constitutional association protection between him, The Happy/Fun Math Tutor, and Dave Pounder Productions. *See Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 965 F.2d 1030, 1036 (11th Cir. 1992). Second, as the Supreme Court reserves freedom-of-association protection for "intimate" relationships, *see City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989), constitutional protection does not exist for "unrelated, indirect associations" such as those between The Happy/Fun Math Tutor and Dave Pounder Productions (DE 36 ¶ 60).

For the foregoing reasons, Plaintiff's First Amendment claim fails as a matter of law.

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[2] Passing allegations in the complaint indicate that Plaintiff might have had such a claim in mind. Plaintiff alleged that Defendant applied School Board Policy 7.151 to his "other lawful, independent businesses," thus singling him out for "removal due to an indirect but lawful association with an adult media company." (DE 36 ¶¶ 38, 41). He also alleged that Defendant discriminated against him, a "disfavored advertiser," "on the basis of the content of the speech of [his] completely separate businesses." *Id.* ¶ 44). Plaintiff does not support these allegations in his Motion for Summary Judgment or Response to Defendant's Motion for Summary Judgment.

2. Fourteenth Amendment Claims

Plaintiff devotes his summary judgment arguments to his First Amendment claim. Thus, it appears to the Court that his other constitutional claims rise and fall with the First Amendment. Nonetheless, the Court will discuss why Plaintiff's other constitutional claims, due process and equal protection, also fail as a matter of law.

a. Due Process

Plaintiff's due process claim contains both substantive and procedural components. First, he alleges that School Board Policy 7.151 vests "unbridled discretion" in Defendant to approve or disapprove of advertisements. (DE 36 ¶ 58). This substantive argument rests on an interference with a fundamental right, in this case the right to free speech. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) ("[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."); DE 48 at 4; DE 68 at 5 (Plaintiff relying on *City of Lakewood* to argue that unbridled discretion to "approve or disapprove of proposed speech" is unconstitutional). As discussed above, Defendant's actions do not implicate Plaintiff's fundamental right to free speech; therefore, neither do they implicate Plaintiff's substantive due process rights.

Second, Plaintiff invokes procedural due process and alleges that Defendant failed to give him "notice of

wrongdoing and a meaningful opportunity to be heard." (DE 36 ¶ 59). In his summary judgment papers, Plaintiff makes no effort to support this assertion by citing particular parts of the record, and Defendant's Motion for Summary Judgment may be granted for that reason. *See* Fed. R. Civ. P. 56(c)(1)(A).

Summary judgment is appropriate on the procedural due process claim for another reason. A claim alleging a denial of procedural due process requires proof of "a constitutionally-protected liberty or property interest." *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). Plaintiff argues the exact opposite, that he "needs no contract or other property interest" to avail himself of constitutional protection from Defendant's actions. (DE 64 at 1). In essence, Plaintiff argues that, because he was engaged in commercial speech, he was entitled to continue to engage in that speech. "[T]he First Amendment," however, "does not create property or tenure rights." *Umbehr*, 518 U.S. at 675; *see also Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution."). Plaintiff must therefore come forward with a constitutionally recognized property interest to invoke the protections of procedural due process.

To be sure, a contract with the state may give rise to a "property" interest entitled to due process protection. *See Gary v. Bd. of Regents*, 150 F.3d 1347, 1350-51 (11th Cir. 1998). However, "not every interest held by virtue of a contract implicates such process." *Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989) (citing cases). In *Lujan v. G & G Fire Sprinklers, Inc.*, the Supreme

Court held that a claim for breach of contract by a state actor would not support a procedural due process claim unless state contract remedies were closed to the plaintiff. 532 U.S. 189, 196 (2001). Where a plaintiff fails to allege the absence of a complete and adequate remedy available under state law for breach of a state contract, the plaintiff's procedural due process claim fails as a matter of law. *See Ramirez v. Arlequin*, 447 F.3d 19, 25 (1st Cir. 2006) (discussing *Lujan*).

In this case, Plaintiff does not allege that the process afforded by a state law breach of contract action is unavailable to him. In fact, Plaintiff sues Defendant for both a violation of due process (Count II) *and* breach of contract (Count IV). An adequate remedy exists under state law, and Plaintiff's procedural due process claim must be dismissed. Defendant is therefore entitled to summary judgment on Count II.

b. Equal Protection

Defendant moves for summary judgment on all claims asserted by Plaintiff, arguing that Plaintiff's constitutional rights were not violated because Defendant did not act in a way that implicated constitutional protections. (DE 54). In his complaint, Plaintiff alleges that Defendant discriminated against "certain individuals" in a way that "implicates a fundamental right and, alternatively, is arbitrary and capricious." (DE 36 ¶ 62). Plaintiff makes no effort to support his equal protection claim in his summary judgment papers, devoting his entire argument to his commercial

speech claim. The Court has already discussed why Defendant's actions did not implicate a fundamental right, i.e., free speech. And Plaintiffs conclusory allegation that "certain individuals" have been denied equal protection cannot survive a motion for summary judgment. Defendant is therefore entitled to summary judgment on Count III.

3. Remaining State Law Claim

Plaintiff's federal constitutional claims eliminated, all that remains is Plaintiff's state law claim for breach of contract (Count IV). In cases such as this, where the Court's jurisdiction is based solely on a federal question, the Court may decline to exercise supplemental jurisdiction over remaining state law claims if the Court has eliminated all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). In accordance with 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over the remaining state law claim. Because this Court lacks jurisdiction, Plaintiff's state law claim for breach of contract (Count IV) is dismissed without prejudice.

III. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment (DE 48) is **DENIED**. Defendant's Motion for Summary Judgment (DE 54) is **GRANTED** as to Counts I, II, and III of Plaintiff's Second Amended Complaint (DE 36). Count IV of the Second Amended

Complaint (DE 36) is **DISMISSED WITHOUT PREJUDICE**.

DONE AND ORDERED in Chambers in West Palm Beach, Palm Beach County, Florida, this 24th day of October, 2014.

/s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10778-CC

DAVID BENOIT MECH,
d.b.a. The Happy/Fun Math Tutor,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF PALM
BEACH COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Jan. 19, 2016)

BEFORE: MARCUS, WILLIAM PRYOR and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor, Jr.
UNITED STATES CIRCUIT JUDGE

ORD-42

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No: 13-cv-80437-Marra/Matthewman

DAVID BENOIT MECH d/b/a THE HAPPY/FUN MATH TUTOR,

Plaintiff,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

Defendant.

AMENDED COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §§ 1983, FOR DAMAGES, INJUNCTIVE, AND DECLARATORY RELIEF

(Filed Feb. 13, 2014)

Plaintiff, DAVID BENOIT MECH d/b/a THE HAPPY/FUN MATH TUTOR, hereby files this Amended Complaint for damages, injunctive relief and declaratory relief against Defendant, SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA ("School Board" or "Defendant") and states:

INTRODUCTION

1. By this action, Plaintiff challenges the School Board's custom, policy or practice that prohibits David

Mech d/b/a The Happy/Fun Math Tutor and other disfavored advertisers from advertising on the premises of public secondary schools within the School District of Palm Beach County on terms equal to those afforded favored advertisers, who have been, and are permitted to advertise on the premises of those schools. Further, Plaintiff seeks an injunction prohibiting the School Board from continuing to violate the Plaintiff's rights under the United States Constitution, as well as compensatory, consequential, statutory, and special damages, together with pre- and post- judgment interest, for violation of the Plaintiff's constitutional rights and breach of contract.

JURISDICTION

2. Plaintiff brings this action pursuant to 42 U.S.C. § 1983 for violation of his rights under the First and Fourteenth Amendments to the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and injunctive relief pursuant to Fed. R. Civ. P. 65.

4. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Plaintiff's state law claim because that claim is so related to the federal claims that it forms part of the same case or controversy.

PARTIES

5. Plaintiff, DAVID BENOIT MECH d/b/a THE HAPPY/FUN MATH TUTOR ("Mech"), is an individual who resides in Boca Raton, Florida, and was an advertiser at several schools within the boundaries of the Palm Beach County School District.

6. Defendant, SCHOOL BOARD OF PALM BEACH COUNTY (the "Defendant" or "School Board") is a body corporate pursuant to Fla. Stat. §1001.40 and is the governing body for the Palm Beach County School District (the "District"), the public school district for Palm Beach County's K-12 schools. Fla. Stat. §§1001.30 and 1000.01(4).

7. At all times material hereto, the School Board controlled and operated the public secondary schools at issue within the Palm Beach County School District, including Omni Middle School, Boca Raton Community Middle School, and Spanish River Community High School. The Board also is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

FACTS

8. At all times material hereto, the School Board has solicited and posted paid advertising from local businesses and individuals. Advertisers pay the District money in exchange for advertising space on District school property for a fixed period of time.

9. Plaintiff Mech initially contacted Omni Middle School, Spanish River Community High School, and Boca Raton Community Middle School regarding advertising opportunities after he noticed several banner advertisements on the school fences. Mech was encouraged to advertise by school representatives, including Gerald Burke (Boca Raton Community Middle School), Sandy Quinter (Omni Middle School), Sheryl Stiefel (Spanish River Community High School), and Frances Donadio (Spanish River Community High School). School representatives sent Mech paperwork to complete, which included the business name to be advertised, name of the business owner, and the business phone number, address, email, etc. (*See* Exhibits A & B).

10. At all times material hereto, E. Wayne Gent ("Gent") was the Superintendent of the School District of Palm Beach County; Constance Tuman-Rugg ("Rugg"), was the Area Superintendent of the District with specific oversight of the aforementioned schools; Gerald Riopelle ("Riopelle") was the principal of Omni Middle School, located within the District; William Latson ("Latson") was the principal of Spanish River Community High School; Peter Slack ("Slack") was the principal of Boca Raton Community Middle School.

11. Mech completed and mailed the required paperwork, along with an enclosed check, to each school, at which time the school processed the application and subsequently created and displayed the banner. An example of one of the completed agreements is attached as Exhibit C.

12. Mech has no criminal background, a prime credit score, and is a taxpaying property owner in Boca Raton, Florida.

13. Mech provides a mobile math tutoring service, in his individual capacity, under the fictitious business name, "The Happy/Fun Math Tutor." The objective of the business is to help students improve their math skills, which subsequently improves student confidence, test scores, and increases the likelihood of students being admitted into top universities. There is no "on-site" tutoring at any location that Mech owns or rents. Mech meets clients in public libraries, cafes, bookstores, or their homes. Since he travels to his clients, Mech limits the geographic region that he covers to the area north to Linton Boulevard, south to Glades Road, west to Lyons Road, and east to Military Trail.

14. Given that Mech is a math tutor for students from 6th grade up and considering the region which he can feasibly cover as a mobile tutoring service, Omni Middle School ("Omni") and Spanish River Community High School ("Spanish River") are both critical advertising locations for Mech's tutoring service, since all of the middle and high school students living in his area are zoned to those schools. Students from Spanish River and Omni currently make up 50% of Mech's clients.

15. Mech's tutoring service offers students help with arithmetic, pre-algebra, algebra 1, algebra 2, geometry, trigonometry, pre-calculus, and calculus, all of which are courses offered, and in some cases required,

at the District's schools, and all of which are, therefore, consistent with the education mission of the District and the Board.

16. Mech's background qualifies him to tutor math. He holds a Bachelor's degree in Finance from Michigan State University, a Master's degree in Information Management from Arizona State University, and is currently enrolled in a PhD program in Computer Science at Florida Atlantic University. In addition, Mech is an adjunct professor teaching Developmental Mathematics at Palm Beach State College and has successfully passed the Grade 6-12 Mathematics component of the Florida Teacher Certification Examinations (FTCE).

17. In addition to tutoring, Mech has other businesses. All of Mech's businesses operate as completely separate entities, with separate websites, email addresses, EINs, and telephone numbers. The only thing his businesses share is a mailing address, which is a privately staffed postal center used for receiving packages and other correspondence.

18. Mech is a licensed Florida real estate sales associate and has been practicing, without incident, since 2010 (License Number: SL3234861).

19. Mech is also the managing member of Dave Pounder Productions LLC ("DPP"), a company that formerly produced adult media. DPP is organized under the laws of the State of Florida in 2007 (document number: L08000002730). Prior to organizing in Florida, DPP was a California company.

20. DPP is no longer involved in the production of explicit adult media. The last adult film that DPP produced was in 2008. (DPP did produce individual scenes for other movies (which DPP did not own) through 2010.) DPP's only projects are: 1) a mainstream documentary project about the psychological, economic, and health impacts of performing in the adult industry (*see* RiskyBusinessTheMovie.com); and 2) a mainstream book utilizing sociology, psychology, and economic theory in analyzing relationships. The documentary has been "officially selected" at several mainstream film festivals for 2013, and the book is slated for publication by the CreateSpace Independent Publishing Platform and will be distributed this summer by Amazon.com.

21. The DPP company website does not contain or link to any explicit adult media.

22. Mech has never sought, nor will he seek, advertisement of DPP with the District.

TUTORING ADVERTISEMENTS

23. At all times material hereto, Mech was a party to multiple advertising agreements with the District, including separate agreements with Omni Middle School, Boca Raton Community Middle School, and Spanish River Community High School.

24. Since 2010, pursuant to those advertising agreements, Mech has been advertising, without any issues or complaints, his math tutoring service at

Omni Community Middle School, Boca Raton Community Middle School, and Spanish River High School.

25. The advertisements consisted of banners attached, by District personnel, to fences at the various schools. The banners, which were paid for by Mech, were consistent in size, color, lettering, and content with District requirements. An approved proof of each of the banners is attached hereto as Composite Exhibit D.

26. The advertisements contained useful, lawful consumer information.

27. While Defendant has no obligation to accept outside advertising or create a limited public forum, once it does it must administer the advertising scheme and forum constitutionally or not at all.

28. After being accepted and displayed by the District for over two (2) years, in February 2013, the respective principals at the aforementioned schools breached those advertising contracts by removing Plaintiff's banner advertisements and threatening to dispose of them if they were not picked up within fifteen (15) calendar days.

29. Mech received two separate undated letters, one from Principal Riopelle of Omni and one from Principal Latson of Spanish River, stating that Mech's banner advertisements were removed pursuant to School Board policies 7.151(1) and 7.151(2)(h). *See* Exhibits E & F. ("Letters").

30. School Board Policy 7.151(1) provides:

> Purpose. – The District recognizes that athletic sponsors and other business partners provide a vital role in sponsorship of key programs within our schools. As such, schools have increased needs to visibly recognize these partners in the community. In the interests of community aesthetics and in consideration of local ordinances that may prohibit or restrict banners and advertising, these uniform standards have been developed. By permitting the recognition of business partners on school campuses, it is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity, nor is it the intent of the School Board to create a venue or forum for the expression of political, religious, or controversial subjects which are inconsistent with the educational mission of the School Board or which could be perceived as bearing the imprimatur or endorsement of the School Board.

29. School Board Policy 7.151(2)(h) provides:

> In keeping with the express purpose of this Policy not to create or open schools as a public forum for expressive activity, Principals shall use their discretion in selecting and approving business partners that are consistent with the educational

> mission of the School Board, District and community values, and appropriateness to the age group represented at the school. Examples of inappropriate business partners include but are not limited to: businesses that sell goods or services which are illegal if possessed by or sold to a minor, adult entertainment establishments, businesses whose primary source of revenue is generated from the sale or distribution of alcohol or tobacco products, tattoo parlors, pain clinics and businesses soliciting addicts.

31. On February 25, 2013, Mech sent a response letter via United States Certified Mail to Superintendent Gent, and copied Area Superintendent Rugg and Principals Riopelle, Laston, and Slack, explaining why removal of the advertisements were unjustified and, therefore, a breach of contract and in violation of Mech's First and Fourteenth Amendment rights. *See* Exhibit G.

32. Mech received a response letter via United States First Class Mail dated March 15, 2013 from the District's general counsel, Sheryl G. Wood, supporting the decision to remove Mech's tutoring banners. *See* Exhibit H. The District has refused to restore the banners to their previous locations.

33. Mech's math tutoring advertisements do not violate any portion of School Board policy 7.151(1) or policy 7.151(2)(h).

34. The advertisements do not express opinions, or address political, religious, or any other controversial subjects which are inconsistent with the education mission of the School Board. Rather, a math tutoring service, which is all that is advertised, is perfectly consistent with the educational mission of the school board.

35. Mech's math tutoring advertisements are age-appropriate, consistent with community values, and most definitely consistent with the educational mission of the school district and school board.

36. Mech's math tutoring advertisements are not for an adult entertainment company; they do not advertise a business that generates income from the sale or distribution of alcohol or tobacco products; they do not advertise tattoo parlors; they do not advertise pain clinics; they do not advertise a business that solicits addicts; they do not advertise a religion; and they do not advertise a business that sell goods or services that are illegal if possessed by a minor. Rather, the advertisements are for a math tutoring service, which is an ideal service to advertise at a school.

37. Mech has no duties under School Board Policy 7.151(2)(h), which confers a duty upon the principals of the school, not Mech, to vet the businesses with whom the District partners. In this case, Mech was selected, approved and a contract entered. Nothing in regard to Mech's unrelated business has changed since the time the contracts were executed.

38. School Board personnel illegally applied School Board policies 7.151(1) and 7.151(2)(h) beyond what is set out in the clear language of the Rules to an advertiser's other lawful, independent businesses. If the School Board is genuinely concerned about the nature of external, unrelated businesses owned by advertisers, the Rules need to so reflect.

39. The School Board maintains that its agreements with advertisers are "donations," yet the advertising agreements meet all of the legal requirements of a contract.

40. The District displays banner advertisements for entities such as Journey Church (displayed at Spanish River Community High School), which is an advertisement that directly violates the religious component expressed in 7.151(1). *See* Exhibit I. Further, Olympic Heights High School, another District school, has a banner advertisement for Miller's Ale House, which is an advertisement in violation of the prohibition on advertisements for alcohol.

41. The District has singled out Mech's math tutoring advertisements for illegal removal due to an indirect but lawful association with an adult media company.

42. Riopelle and Latson's Letters identify the shared mail drop as the sole "link" between Mech's tutoring company and DPP. They assert that the shared address violates "community values" because one of those companies, DPP, produced adult media in the past. Notably, the banners did not advertise DPP or

adult media – they advertised math tutoring. This is an overt attempt to twist District policies to apply them in an inequitable manner.

43. Defendants improperly classify some advertisers that are "not policy compliant" as "policy compliant" and those that are "non-academic" related advertisers to allow those advertisers to remain on school premises at public secondary schools within the District, notwithstanding their written "policies." In both these ways, Defendant has created a limited public forum at the fences at public secondary schools within the District, notwithstanding Defendant's written "policy" purporting not to allow such a limited public forum. Such a limited public forum exists at the present time at almost all of the public secondary schools within the District.

44. By forbidding advertisers who associate with businesses whose speech Defendant disfavors (including Mech) to advertise on the same terms and conditions as advertisers Defendant prefers (such as Journey Church and Miller's Ale House), Defendant has denied those disfavored advertisers, like Plaintiff, equal access to the schools' limited public forum and Defendants have discriminated against those disfavored advertisers on the basis of the content of the speech of their other completely separate businesses.

45. In this case, the District accepted advertisements from religious institutions and from companies that offer products which are illegal if possessed by a minor *(e.g.*, ale) but treated useful, lawful and truthful

advertisements to student consumers of tutoring services by Plaintiff as a violation of School Board policies because the company shares a mailing address with a company that used to produce adult entertainment.

46. Defendant has not established or applied clear or consistent, content-neutral criteria for determining which advertisers will be allowed to use the limited public forum Defendants have created. To the contrary, Defendant improperly has afforded itself unlimited discretion, has applied vague standards, and has acted arbitrarily and in a content biased manner in deciding which advertisers will be allowed to use the limited public forum.

47. The Defendant's decisions to specifically target Mech, in addition to its preemptive, arbitrary, and unilateral decisions to remove Mech's math tutoring banner advertisements, without ever consulting Mech, violated Mech's First and Fourteenth Amendment rights, protecting freedom of speech, freedom of expression, freedom of association, and his right to due process and equal protection under the law.

48. Prior to the banners being removed by Defendant, Mech received approximately four new tutoring clients per month from each banner. This data is gathered from the "Schedule a Session" form, which all new clients are required to fill out, located on the company website (www.HappyFunMathTutor.com). After an initial session, approximately 75% of these students decide to purchase long-term subscription plans (either 10 hours @ $550, or 20 hours @ $1,000), and about

75% of those clients continue to renew their subscription plans for several periods or indefinitely.

49. Plaintiff has retained undersigned counsel, agreed to pay him reasonable attorney's fees, and will also seek reasonable attorney's fees under 42 U.S.C. § 1988.

50. Plaintiff has no adequate remedy at law, because the denial of Plaintiff's constitutional rights cannot be remedied through legal relief.

51. Unless enjoined by this Court, Defendant's biased, unequal, inconsistent, and improper interpretation and application of District policies will continue to irreparably infringe on Mech's constitutional rights and fundamentally interfere with his ability to earn a livelihood; restoring the advertisements to their original locations and precluding Defendants from removing the advertisements again or otherwise targeting Mech, including refusing to consider future requests for renewal on this basis, is required to redress the violation of Mech's constitutional rights.

FLORIDA EDUCATION PRACTICES COMMISSION DECISION

52. In January 2011, the Miami-Dade Public School District suspended and subsequently fired Shawn Loftis, a teacher at Nautilus Middle School, when the principal learned of his past experience as a producer and performer in adult films (*see* Exhibit J). In April, 2011, his teaching certification was revoked.

Mr. Loftis successfully challenged the dismissal. On March 9, 2012, the Florida Education Practices Commission in Orlando ruled that Mr. Loftis can go back to teaching. "A part-time teacher's gay porn past isn't reason enough to keep him out of the classroom," according to Florida education officials. "He could even turn it into a full-time job," the commission held. The commission said his past pursuits were not illegal and the school did not have the authority to dismiss him on that basis. Since the Florida Education Practices Commission ruled that it is acceptable for a person with an adult media past to be employed by the school district and to teach in the classroom, then the District can't legally argue that Mech's math tutoring banner advertisements are inappropriate due to an indirect association to an adult media company.

53. As to Mech's claims for declaratory relief, there is a bona fide dispute between the parties; Mech has a justiciable question as to the existence or nonexistence of some right, status, immunity, power or privilege, or as to some fact upon which the existence of such right, status, immunity, power or privilege does or may depend; Mech is in doubt as to the right, status, immunity, power or privilege; and there is a bona fide, actual, present need for the declaration.

54. As to Mech's claims for declaratory relief, he will succeed on the merits; will suffer irreparable injury unless the injunction issues; the threatened injury to him outweighs whatever damage the proposed injunction may cause the opposing party; and, if issued,

the injunction would not be adverse to the public interest.

CAUSES OF ACTION

COUNT I: VIOLATION OF FIRST AMENDMENT RIGHTS

55. Plaintiff hereby incorporates paragraphs 1 through 54 above as though fully set forth herein.

56. Defendant Board's customs and policies directly caused the violation of Plaintiffs right to advertise useful, lawful consumer information at a limited public forum, in violation of the First and Fourteenth Amendments to the United States Constitution. This deprivation may be redressed pursuant to 42 U.S.C. § 1983.

COUNT II: VIOLATION OF FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

57. Plaintiff hereby incorporates paragraphs 1 through 54 above as though fully set forth herein.

58. Defendant is applying School Board policies 7.151(1) and 7.151(2)(h) in a manner that violates the Due Process Clause by vesting unbridled discretion in the Defendant for approving or disapproving advertisements.

59. Defendant's summary practice of arbitrarily removing advertisements violates the Due Process

Clause by failing to give advertisers notice of wrongdoing and a meaningful opportunity to be heard.

60. In this case, the Defendant had an existing advertising guideline that pertained to direct advertisements and is now arbitrarily extending the definition to include unrelated, indirect associations to the primary product or service being advertised.

COUNT III: VIOLATION OF FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION

61. Plaintiff hereby incorporates paragraphs 1 through 54 above as though fully set forth herein.

62. The manner in which Defendant is applying School Board policies 7.151(1) and 7.151(2)(h) violates the Equal Protection Clause by discriminating against certain individuals in a manner that implicates a fundamental right and, alternatively, is arbitrary and capricious.

COUNT IV: BREACH OF CONTRACT

63. Plaintiff hereby incorporates paragraphs 1 through 54 above as though fully set forth herein.

64. An actual controversy has arisen and now exists between the Plaintiff and Defendants.

65. The advertising agreements attached hereto as Exhibits A, B and Composite I entered into between the parties constitute valid and binding contracts.

66. Plaintiff has paid the required amount under those contracts, and, as such, has performed.

67. Defendant has breached the contracts by removing the advertisements without valid cause.

68. As a result of Defendant's contract breaches, Plaintiff has and will continue to be damaged.

DEMAND FOR RELIEF

WHEREFORE, Plaintiff, DAVID BENOIT MECH d/b/a THE HAPPY/FUN MATH TUTOR, with regard to all claims, respectfully requests this Court enter final judgment, declaratory relief and a permanent injunction in favor of Plaintiff and against Defendants, as follows:

A. Declare that:

a. Defendant's actions in removing Plaintiff's math tutoring advertisements a violation of Plaintiff's First and Fourteenth Amendment rights;

b. the District's advertising agreements are indeed legally enforceable contracts and not merely donations;

c. School Board policies 7.151(1) and 7.151(2)(h) may not be used to bar otherwise lawful advertisements based on unrelated, independent businesses or activities of the advertisers that are not related to the advertised business; and

d. the rights and responsibilities of the parties to this action under the First and Fourteenth Amendments to the United States Constitution, and particularly declaring that a limited public forum exists at the public secondary schools within the District and that Defendant unlawfully has denied equal access to that forum and discriminated against the Plaintiff and all other lawful advertisers that are being precluded from advertising on the premises of public secondary schools within the District by Defendant's policy and practice;

B. Issue an injunction as to Counts I-III affirmatively requiring Defendant to resume posting Plaintiff's compliant advertising banners; grant permanent injunctive relief in Plaintiff's favor prohibiting Defendant from:

a. removing Plaintiff's math tutoring advertisements from permitted public advertising forums and from denying Plaintiff future advertising opportunities and contract renewals based on impermissible violations of constitutional protections;

b. interfering in any way with Plaintiff's right to use the limited public forum Defendants have created on the same terms as Defendants have allowed other advertisers to use it; and

c. discriminating against Plaintiff on the basis of the content of the speech and

viewpoints expressed by Mech or his associated businesses, and limiting the Plaintiffs freedom of expression or association other than through the application of established, clear, content-neutral, unbiased, non-arbitrary criteria that are consistently applied to all advertisers using or seeking to use the limited public forum Defendant has created;

C. Award Plaintiff compensatory, consequential, statutory, and special damages against Defendant, including, without limitation, Plaintiff's lost profits, loss of goodwill and damage to his business reputation, together with pre- and post- judgment interest, as provided by law;

D. Order Defendant to extend Plaintiff's current advertising contracts into the next academic school year by the number of days Defendant improperly prevented the banners from being displayed;

E. If Plaintiff retains counsel, award him reasonable attorney's fees under 42 U.S.C. § 1988; and

F. Grant such further and different relief as this Court deems just and proper.

Dated this 13th day of February, 2014.

Respectfully submitted,

s/ James K. Green
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COUNSEL FOR PLAINTIFF

CERTIFICATE

I hereby certify that this motion has been filed on this 13th day of February, 2014, with the Court using the CM/ECF system which will send notice of electronic filing to parties and counsel of record.

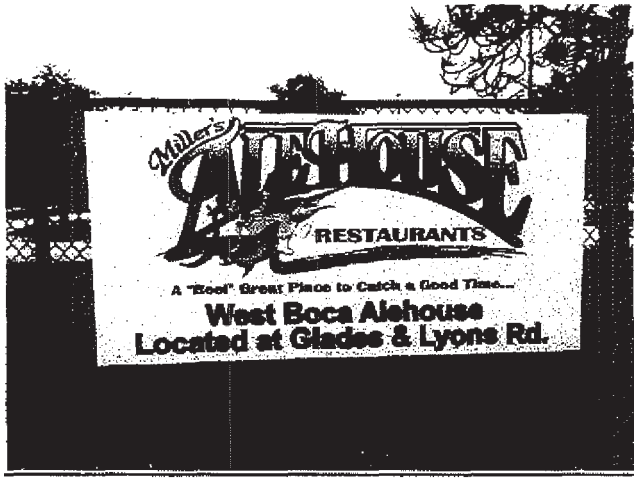
s/James K. Green

EXHIBIT I

EXAMPLES OF NON-COMPLAINT ADVERTISING AT PUBLIC SECONDARY SCHOOLS IN PALM BEACH COUNTY, FL

Photographs Taken 3/25/2013

Journey ***Church*** – Direct Advertisement of Religious Organization **[violation of School Board policy 7.151(1)]**



Miller's ***Ale*** House – A direct advertisement for a sports bar that primarily serves alcohol, which cannot be lawfully possessed by or sold to minors – **[violation of School Board policy 7.151(2)(h)]**

Maggiano's Italian Restaurant – An advertisement for a company who directly sells alcohol, which cannot be lawfully possessed by or sold to minors. –
[violation of School Board policy 7.151(2)(h)]

15-10778-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAVID BENOIT MECH, d/b/a
THE HAPPY/FUN MATH TUTOR,

Plaintiff/Appellant,

vs.

SCHOOL BOARD OF
PALM BEACH COUNTY, FLORIDA,

Defendant/Appellee.

On Appeal from the
United States District Court,
Southern District of Florida

U.S.D.C. Case No. 13-cv-80437
The Honorable Kenneth Marra, Judge Presiding

PETITION FOR REHEARING OR REHEARING *EN BANC*

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Attorneys for Plaintiff-Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, David Benoit Mech, d/b/a The Happy/ Fun Math Tutor, certifies that the following persons have an interest in the outcome of this appeal:

1. Abudu, Nancy
2. American Civil Liberties Union Foundation of Florida, Inc.
3. Bernard, Shawntoyia
4. Dillard, Kalinthia R.
5. Garrison, Kris
6. Green, James K.
7. Jacque-Adams, Kathelyn
8. Latson, William
9. Littlejohn, Blair
10. Marra, Kenneth
11. Matthewman, William
12. Mech, David Benoit
13. Riopelle, Gerald
14. Rico, JulieAnn
15. The School Board of Palm Beach County, Florida
16. Slack, Peter
17. Walters, Lawrence

CERTIFICATION OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015), and that consideration by the full court is necessary to secure and maintain the uniformity of decisions in this Court.

I further express a belief, based on reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

1. Whether the panel opinion allows a government to transform private speech protected from unbridled discretion and censorship based on viewpoint or speaker identity in a limited public forum into government speech unprotected by the First Amendment's Free Speech Clause merely by adding an ambiguous and phony statement of approval.

2. Whether rehearing is required where the panel's opinion contains numerous factual errors that formed the basis for its conclusion that banner ads on school fences constituted government speech, where the opinion omitted various facts establishing that the banners were private speech, where historical evidence regarding the school fence ads is admittedly lacking, and where the parties were given

no opportunity to develop the record in light of the Supreme Court's post-summary judgment decision in *Walker*.

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STATEMENT OF ISSUES MERITING *EN BANC* CONSIDERATION

Whether the panel opinion allows the government to transform private speech protected from unbridled discretion and censorship based on viewpoint or speaker identity in a limited public forum into government speech wholly unprotected by the First Amendment's Free Speech Clause merely by adding an ambiguous and meaningless statement of approval.

STATEMENT OF ISSUES MERITING PANEL REHEARING

Whether rehearing is required where the banners are not government IDs, historical evidence and permanency is admittedly lacking, the panel opinion contains multiple errors of fact that the panel deemed significant in concluding that the school banner ads were government speech, and the panel opinion omits various record indicia that the banner ads were private rather than governmental speech.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

The following are the facts and course of proceedings set forth in the panel opinion (with changes in brackets and corrections footnoted):

> Plaintiff David Mech complains that the School Board of Palm Beach County, Florida, violated his constitutional right to free speech, U.S. Const., amends. I, XIV, when three of its schools removed banners for Mech's tutoring business from their fences. The schools removed the banners after they discovered that Mech's tutoring business shares a mailing address [at a private postal center] with his [former adult media] business. The district court entered summary judgment against Mech because the schools did not remove the banners based on their content. The Panel affirmed, but on a different ground. It concluded that the Free Speech Clause of the First Amendment does not protect Mech because the banners are "government speech." [*Pleasant Grove City v.*] *Summum*, 555 U.S. [460], 467 [(2009)].
>
> . . .
>
> David Mech . . . provides a math tutoring service in Palm Beach County under the name "The Happy/Fun Math Tutor." He has a bachelor's degree from Michigan State University, a master's degree from Arizona State University, and [was] enrolled in a Ph.D. program at Florida Atlantic University. He has taught

mathematics at Palm Beach State College and is certified to teach secondary math in Florida. Mech is also a retired [adult film] star [who] owns Dave Pounder Productions LLC, a company that formerly produced [adult media]. The Happy/Fun Math Tutor and Dave Pounder Productions share a mailing address [at a private postal center] in Boca Raton, Florida.

In 2008, the School Board – which oversees the Palm Beach County School District – adopted a pilot program for its schools to hang banners on their fences to recognize the sponsors of school programs. The banner program was codified in 2011 as Policy 7.151, "Business Partnership Recognition – Fence Screens." *See* Sch. Bd. Policies 7.151 . . . Subsection (1) of the Policy states its purpose:

> Purpose. – The District recognizes that athletic sponsors and other business partners provide a vital role in sponsorship of key programs within our schools. As such, schools have increased needs to visibly recognize these partners in the community. In the interests of community aesthetics and in consideration of local ordinances that may prohibit or restrict banners and advertising, these uniform standards have been developed. By permitting the recognition of business partners on school campuses, it is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as

> a public forum for expressive activity, **nor is it the intent of the School Board to create a venue or forum** for the expression of political, religious, or controversial subjects which are inconsistent with the educational mission of the School Board or **which could be perceived as bearing the imprimatur or endorsement of the School Board**.

Id. at 7.151(1). [emphasis added].

"Because the [banners] are not considered advertising," contributions by the sponsors are treated as "donations." *Id.* at 7.151(2)(b).

The Policy imposes several conditions on the banners that can be displayed. The principals of each school must "use their discretion in selecting and approving business partners that are consistent with the educational mission of the School Board, District and community values, and appropriateness to the age group represented at the school." *Id.* at 7.151(2)(h). The Policy requires the banners that are visible from the road to use a uniform size, color, and font; to include a message thanking the sponsor [(*e.g.*, "Partner in Excellence")]; and to forego photographs and large logos. *See id.* at 7.151(3).

Beginning in 2010, Mech inquired about displaying a banner for The Happy/Fun Math Tutor at three schools in Palm Beach County: Omni Middle School, Spanish River Community High School, and Boca Raton Community

Middle School. Representatives from the schools encouraged Mech to apply: Mech specializes in the math courses that are taught at those schools and, according to a representative of the School Board, "[h]e apparently is a very good tutor." The schools require banners to be printed in school colors[1] and to include the message "[School Initials] Partner in Excellence."[2] The banners can include only the name, phone number, web address, and logo of the business partner. To obtain a banner, the schools require a minimum donation of $250-$650.

Mech complied with these requirements, and the schools hung the banners displayed below on their fences.

In 2013, the schools removed the banners for The Happy/Fun Math Tutor. Several parents complained about the banners after discovering the common ownership of The Happy/Fun Math Tutor and Dave Pounder Productions. The schools informed Mech that his "position with Dave Pounder Productions, together with the fact that Dave Pounder Productions utilizes the same [postal center] address as The Happy/Fun Math Tutor creates

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[1] This is incorrect. The schools did **not** require banners to be printed in school colors. *See* discussion below.

[2] This is incorrect. The phrase "Partner in Excellence" is not required. Rather, only a "thank you" message is required per 7.151(3). Most school[s] have chosen the phrase "Partner in Excellence" as their preferred method of thanking the partner.

> a situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values."
>
> Mech sued the School Board for violations of the First and Fourteenth Amendments and breach of contract. Both parties moved for summary judgment, and the district court ruled in favor of the School Board. The district court ruled that the schools did not abridge the First Amendment because they removed the banners due to the common ownership of Mech's companies, not the content of the banners. The district court also rejected Mech's claims under the Fourteenth Amendment and declined to exercise supplemental jurisdiction over his claim for breach of contract.
>
> On appeal, Mech challenges only the dismissal of his claim under the First Amendment.[3] After the parties submitted their appellate briefs, the Supreme Court decided *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015). Before oral argument, the Panel ordered the parties to provide supplemental briefing on whether *Walker* affects this case.

Slip. Op. at 2-6.

The November 19, 2015 decision (the "Opinion") issued by Judges William Pryor, Stanley Marcus and

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[3] This is incorrect. Mech specifically stated in a footnote of his Supplemental Brief that he still prevails on 14th Amendment equal protection analysis if the banners are deemed government speech. *Id.* at 7, n. 3.

Julie Pryor contains numerous errors concerning facts that the panel deemed significant, such as stating that the banners must be printed in school colors, with uniform font size and location. The Opinion also overlooks various record indicia of private advertising, including that: 1) local governments commonly regulate the size and locations of private signs; 2) the advertisers own the banners; 3) the banners can have private logos of the sponsored business prominently displayed with corporate colors; 4) the location of the banners varies depending upon the size of the contributions; 5) School Board officials acknowledged that the banners are advertising; 6) the banners contain contact information exclusively for the private business; 7) the vendors are given input as to precisely what appears on the banner and where their banner is posted; and 8) the banners are not permanent.

Notably, the School Board never claimed in its answer or supplemental briefs, even when invited to, that the "Partners in Excellence" taglines were its own (i.e., government) speech. Yet the Opinion erroneously asserted that the School Board had urged that position. Slip op. at 7. Further, neither School Board Policy 7.151(2)(h) nor protocol require principals to conduct criminal or background checks on businesses with whom the District partners. Thus, there is no vetting of "partners" for "excellence." The only real criterion for becoming a "partner" is that the business pay money for its ads.

IMPORTANCE OF THE ISSUE PRESENTED

The panel's opinion threatens to allow government to transform private speech protected from unbridled discretion and censorship based on viewpoint or speaker identity in a nonpublic or limited public forum into government speech wholly unprotected by the First Amendment's Free Speech Clause merely by adding an ambiguous and phony statement of approval. For this reason, rehearing *en banc* is of exceptional importance.

ARGUMENT

I. THE PANEL ESSENTIALLY HOLDS THAT GOVERNMENT CAN TRANSFORM PRIVATE SPEECH PROTECTED FROM UNBRIDLED DISCRETION AND CENSORSHIP BASED ON VIEWPOINT OR SPEAKER IDENTITY IN A LIMITED PUBLIC FORUM INTO GOVERNMENT SPEECH UNPROTECTED BY THE FIRST AMENDMENT'S FREE SPEECH CLAUSE MERELY BY ADDING AN AMBIGUOUS AND MISLEADING STATEMENT OF APPROVAL.

Unlike the license plates in the 5-4 decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015), the banner ads here are not government IDs. Nor do they have the history as government speech found so significant in *Walker*. While the panel opinion places great weight on

the language "Partners in Excellence," there is no vetting of the advertisers for excellence, competence or even mediocrity.

The danger of expanding *Walker*'s limited holding that government issued license tags are government speech was framed by Justice Alito in dissent (joined by three other justices) in *Walker*:

> The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). By contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection. . . .
>
> . . . Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards **and then, to raise**

> **money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?**
>
> What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? **What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty?** Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

Id. at 2254-56 (emphasis added).

The *Walker* majority tacitly responded by repeatedly emphasizing the narrowness of its holding, stating that "Texas is not simply managing government property," *id.* at 2251, but is using the license plates it creates and requires motorists to install as a government ID, on which it exercises absolute control over language, design, font, and images displayed.

Putting aside the errors and omissions discussed herein, the Opinion is important because it will have broad ramifications, enabling the government to convert private speech in a limited or nonpublic forum into government speech unprotected from censorship,

viewpoint or speaker-identity discrimination, and unbridled discretion merely by adding a meaningless and sham seal of approval or, in this case, "thank you" message. In fact, the Opinion's reasoning offers a roadmap for turning every sign on government property into government speech by adding a fake seal of approval, and it could be extended even to spoken words in a nonpublic forum – e.g., a sign at the entrance to the building stating that the government has approved the speaker.

Under the Opinion, a school could allow Planned Parenthood to post an ad for its services on a school fence stating it is a "Partner in Excellence" but refuse to allow an adoption counseling center to post its ad for family planning services. Or a public school could allow advocates opposed to Syrian immigration to post a sign on the school fence but refuse access to those advocating for Syrian immigration. Government buildings could presumably permit signs during election season for one political party, but not another, by affixing some seal of approval on the selected party's signs.[4] Decades of First Amendment jurisprudence prohibiting just this sort of content-based or speaker-based censorship will be upended absent reconsideration and vacating of the Opinion.

The informed observer does not view a sign or display in isolation. Just as the informed observer in

[4] Or a government building could allow a sign from a restaurant owned by an Auburn grad but reject one from a restaurant owned by an Alabama grad.

Lynch v. Donnelly, 465 U.S. 668 (1984), saw the entire Christmas display in Pawtucket, Rhode Island, including the reindeer, candy-striped pole, clown, elephant and bear, and not just the créche, the informed observer in Palm Beach County saw all of the school fence signs for commercial establishments such as an ale house and a tattoo parlor, and for a religious establishment – the Journey Church – and not just Mech's sign advertising math tutoring, and so could easily deduce, as did the reasonable observer in *Lynch*, that the government was not speaking as an endorser through the displays.

The Opinion says the banner ads are governmental because the principals screen the ads for content. Slip Op. at 3, 16-17. But pre-screening does not convert speech in what has traditionally been a nonpublic forum into government speech *post-Walker*. Rather, pre-screening is the hallmark distinction between a limited or nonpublic forum and a designated public forum, since it is the means by which the government exercises its permissible authority to impose viewpoint-neutral and reasonable content restrictions. *See American Freedom Defense Initiative v. King County*, 796 F.3d 1165, 1169-1170 (9th Cir. 2015) (pet. for certiorari filed November 5, 2015) (citing *Walker*) (pre-screening bus ads for approval means the ads are private speech in a nonpublic forum rather than private speech in a designated public forum).

The Opinion applies the "reasonable observer" test but ignores Establishment Clause jurisprudence to flesh out the test. Slip Op. at 8. Two points are clear

from Establishment Clause cases that rely on this test. First, the créche cases make clear that a display is not viewed in isolation but rather in context with other displays (créche plus reindeer plus Santa, etc. is not endorsement, but a freestanding créche is). Therefore, the Panel was required to consider all the other obviously private speech in determining the context, not just Mech's ads in isolation.

Second, Establishment Clause cases make clear that the reasonable observer is an **informed** reasonable observer. *See, e.g.*, *Cressman v. Thompson*, 798 F.3d 938, 958 (10th Cir. 2015) (the "reasonable observer is not the everyday casual gawker" and "knowledge of the Establishment Clause's 'reasonable observer' is not 'gleaned simply from viewing the challenged display' . . . [Rather,] the reasonable observer is also aware of 'the nature and history of the . . . community, the circumstances surrounding the [display's] placement . . . [,] [the] community's response . . . [and the] motivation for seeking the erection of the [display]' ") (citations omitted). Public elementary and secondary schools are no exception. *See also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) ("erroneous conclusions [about endorsement] do not count"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U. S. 384, 401 (1993) (Scalia, J., concurring in judgment) ("I would hold, simply and clearly, that giving [a private religious group] nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local

embrace of a particular religious sect"); *King v. Richmond County, Ga.*, 331 F.3d 1271, 1279 (11th Cir. 2003) (employing the informed, reasonable observer standard).

II. THE OPINION'S FACTUAL ERRORS AND OMISSIONS REGARDING SUPPOSED INDICIA OF GOVERNMENT SPEECH, TOGETHER WITH THE ADMITTED ABSENCE OF HISTORICAL EVIDENCE AND PERMANENCY REQUIRE REHEARING.

As Judge William Pryor announced at oral argument, "no matter what the parties argue, **we have an obligation to decide the issue correctly based on the law**, although the school board, when we requested supplemental briefing, **did not argue this was governmental speech**." Oral Argument at: 0:53-1:22, available at: https://www.youtube.com/watch?v=878jhF4m0Ro. (emphasis added). He also correctly noted that the absence of historical evidence about banners on school fences and the fact that the banners are not government IDs

> weigh[ ] in Mech's favor, but it is not decisive. A medium that has long communicated government messages is more likely to be government speech . . . but a long historical pedigree is not a prerequisite for government speech, [and] [t]he absence of historical evidence can be overcome by other indicia of government speech.

Slip Op. at 11-12.[5] And Judge Marcus commented: "I will tell you candidly because it's a hard case." Oral Argument at 44:45:00-45:02:00.

Notwithstanding the panel's desire to decide the issue correctly, the Opinion rested on factual errors and omissions that bear directly on whether the speech was private or governmental. First, the Opinion states three times, and implies once, that school colors are required on the ads, when in fact they are not. *See* Slip Op. at 4 ("The schools require banners to be **printed in school** colors . . . "); *id.* at 12 ("Like the word "TEXAS on the specialty plates in *Walker*, each banner

[5] The Opinion also notes that the "banners for The Happy/Fun Math Tutor are qualitatively different from the other banners that Mech identifies [because they] pertain to an education-related service – namely, math tutoring[, and] an observer who saw a banner for tutoring services on school property with the imprimatur '[School Initials] Partner in Excellence' would reasonably conclude that the school was endorsing the services of this tutor." Slip Op. at 15. While SAT preparation is certainly education-related, no reasonable observer would conclude that the school was endorsing the test preparation services of Princeton Review, Kaplan, or Barron's. And while the Happy/Fun Math Tutor is a catchy name meant to make math tutoring attractive to students, it was not like "Omni Middle School Tutor" or "Boca Raton Middle School Tutor," which one might think was school-sponsored. Most reasonable observers would think Happy/Fun Math Tutor is a private business, much like they would think that "Mickey Mouse Tutoring," "Journey Church Math Tutoring," "Miller's Ale & Tutoring House" or "Wal-Mart Math Tutoring" would be a private business. The fact that the School District allowed ads for businesses that have nothing to do with its educational mission, such as ale houses, tattoo parlors, and churches, would lead a reasonable observer to believe that the banners were private advertising and not government speech.

bears the school's initials and is **printed in school colors**."); *id.* at 15 ("private advertisements are typically designed by the advertisers: they convey the words, pictures, and **colors** that the advertiser wants to convey. . . . The banners on the school fences, by contrast, are **printed in school colors** and are **subject to uniform design requirements** imposed by the schools.") (emphasis added).[6]

Next, the Opinion contains errors about: 1) uniform font size, when the font size is not uniform and the advertiser's font size was twice that of the school's "thank you" message);[7] and 2) location, which is determined by how much the advertiser pays. Also, the Opinion ignores record indicia of private advertising,

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[6] While Policy 7.151(3) does mention that school colors can be used, it does not require them. Importantly, Mech's banners and the ones next to his did not carry the school colors as incorrectly stated in the panel opinion but were dictated by regulations of the City of Boca Raton – all middle school banners in the city are to be green with white font and facing inward toward the school's public parking lot, and all high school banners are to be blue with white font and facing outward toward the public street. *See* Doc. 48, Attachment 11, App. 2 (Mech at 34-35); Doc. 48, Attachment 11, App. 2 (Garrison (individual capacity) at 6, 58, 59); Doc. 48, Attachment 6, App. 10 (Littlejohn at 35). *See also*, Policy 7.151(2)(k) provides: "Nothing herein precludes negotiation of customized standards with an individual Municipality or with the County via an Interlocal Agreement in coordination with the Planning Department.").

[7] Nothing in the policy requires that font size be uniform. The policy specifies a maximum size, not a minimum. Mech's fonts referencing his business were at least twice the size of fonts of the school initials. Thus, the vast majority of the ad is directed to private activity or speech.

including that: 1) local governments commonly regulate the size and location of private signs;[8] 2) the advertisers own the banners;[9] 3) the banners can have private logos of the business prominently displayed with corporate colors;[10] 4) the banners' location varies depending on the size of the "donation,"[11] 5) School Board officials acknowledged that the banners are advertising;[12] 6) the banners contain contact information

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[8] Regulation of private signs is common, including in Boca Raton where these signs were located. "It is common ground that governments may regulate the physical characteristics of signs." *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). The schools where Mech placed his signs are all located in Boca Raton, which also specifies maximum sign sizes for private signs in Residential Business and Commercial, Miscellaneous and Industrial Districts. *See* §§ 24-77, 24-79, 24-79, Code of Ordinances of Boca Raton, Florida. The City also requires permits for private signs. *Id.*

[9] The vendors themselves believe they are paying for an advertisement. *See* Doc. 48, Attachment 11, App. 2 (Mech at 34-35). The banners themselves are the property of the advertiser. Quinter Dep p. 42 ("It's his banner.").

[10] See Doc. 48, Attachment 8, App. 6 (Burke at 20-21, Ex. 58); Second Am. Compl., Exh. D; Policy 7.151(3)(f) (allowing the "business partner's standard corporate colors for the logo").

[11] The Opinion states that the "schools also dictate the information that the banners can contain, regulate the size and location of the banners." Slip Op. at 17. While the policy dictates some information the banners can contain, and limits the size – but establishes no minimum size – it does not dictate the location of the signs. Like private ads, the placement of the ads depends on amount of payment, i.e., the more a business pays, the more visibility the banner gets. *See* Doc. 48, Attachment 14, App. 12 (Steifel at 16-17); Doc. 48, Attachment 8, App. 6 (Burke at Ex. 51).

[12] The administrators of the program for the school district and the co-author of Policy 7.151, a senior school board attorney, regard the banners as advertising. *See* Doc. 48, Attachment 14, App. 12 (Steifel at 22, 32, Ex. 47); Doc. 48, Attachment 6, App. 10

exclusively for the private business;[13] 7) the vendors have input as to what appears on the banner and where it is posted;[14] 8) unlike in *Summum*, the banners are not permanent;[15] 9) the School Board lacks control over the design process for the banner; 10) contrary to the Opinion's statement that "the School Board argues, in the alternative, that the banners are government speech," Slip op. at 7, the School Board never claimed that the ads were its own (i.e., government) speech; and 11) neither school board policy nor protocol requires any vetting of "partners" for excellence or competence.[16]

These errors resulted in a decision that stripped all First Amendment protection from Mech's private speech. The Panel noted that, given the importance of this issue, "we do not do so lightly." Slip Op. at 8. Such

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(Littlejohn at 12). *See also* Doc. 48, Attachment 11, App. 2 (Garrison (individual capacity) at 26).

[13] *See* Second Amended Complaint, Exhibit D.

[14] *See* Doc. 48, Attachment 14, App. 12 (Steifel at Ex. 44). Another vendor obtained permission from the Coordinator to move his banner to a preferable location. *Id.* (Steifel at 25).

[15] Rather, banners are easily and promptly removed if the vendor does not pay the contract renewal fee. *See* Doc. 48, Attachment 14, App. 12 (Steifel at Ex. 47, Ex. 6, p.3); *see also* Policy 7.151(2)(e)).

[16] Furthermore, neither Policy 7.151(2)(h) nor protocol requires principals to conduct criminal or background checks on those with whom the District partners. The only real criterion for being a "partner" is that the business pay for its ads. Doc. 48, Attachment 11, App. 2 (Garrison (individual capacity) at 26).

a decision should thus be based on a correct reading of the record.

Moreover, given that the Supreme Court has not yet articulated a test for determining when private speech is transformed into government speech, this case is one of the first *post-Walker* attempts to formulate such a test. *See Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) ("the [government speech] doctrine is still at an adolescent stage of imprecision") (*pre-Walker*).

CONCLUSION

For the foregoing reasons, Appellant Mech respectfully requests rehearing by the panel or rehearing by the full court *en banc.*

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CERTIFICATE OF SERVICE

I, James K. Green, certify that, on December 15, 2015, a copy of this Petition was electronically filed with the Court using CM/ECF. I further certify that, on December 15, 2015, copies of this Petition were sent, by Federal Express for overnight delivery, to the Clerk of the Court:

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