No. 15-1412

IN THE
Supreme Court of the United States

DAVID BENOIT MECH,
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

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION, FREE SPEECH COALITION AND THE WOODHULL FREEDOM FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eleventh Circuit improperly expanded the "government speech" exception to the First Amendment to include circumstances where the government was not itself a "speaker" and had clearly discriminated against private speech on the basis of content.

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INTERESTS OF *AMICI CURIAE* [1]

Amicus Curiae First Amendment Lawyers Association ("FALA") is a nonprofit association incorporated in Illinois, with some 180 members throughout the United States, Canada, and Europe. Its membership consists of preeminent attorneys whose practice emphasizes the defense of First Amendment rights and related liberties. FALA members have litigated cases involving a wide spectrum of such rights, including free expression, free association, and privacy issues, including many cases before this Court. FALA has also frequently appeared as an *amicus* before this Court to provide its unique perspective on the most important First Amendment issues of the day.

The "government speech" doctrine at issue in this case represents a rare instance where the courts afford no First Amendment protection whatsoever despite the fact that free speech and communication are clearly involved. The limits of the government speech doctrine have not been well-developed by this Court and the lower courts continue to wrestle with the issue. The opportunity for misapplication of the government speech doctrine and the censorship of valuable communications are of concern to the FALA.

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[1] Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6 no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

The Free Speech Coalition is a trade association that assists film makers, producers, distributors, wholesalers, retailers, Internet providers, actors and other creative artists located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. Founded in 1991, the Free Speech Coalition represents hundreds of businesses and individuals involved in the production, distribution, sale, and presentation of constitutionally-protected and non-obscene materials which are disseminated to consenting adults. Those individuals and businesses creating and performing in sexually explicit but non-obscene works have a keen interest in legal protections against retaliation or discrimination against those who engage in such constitutionally protected activity.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and family diversity. The Foundation's name was inspired by the Nineteenth Century suffragette and women's rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual thru advocacy, education and action. Woodhull's mission is focused on affirming sexual freedom as a fundamental human right. The Foundation's advocacy has included a wide range of human rights issues, including immigration equality, reproductive justice, prison reform, anti-discrimination legislation, comprehensive nonjudgmental sexuality education, and the right to define ones' own family. Woodhull is concerned that affirmance of the Circuit Court's

opinion could permit widespread discrimination and violation of constitutional rights by labeling otherwise protected expression "government speech."

SUMMARY OF ARGUMENT

The "government speech" doctrine represents a dangerous exception to the First Amendment because it has the potential to cripple speech whenever citizens interact with government. In our complex society, government is everywhere: as a landowner, as the source of funding and contract rights, and as the indispensable partner in a variety of public-private joint ventures.

In such a world, the protections of the First Amendment are more important than ever as a bulwark against government censorship. Traditional First Amendment principles, including public forum analysis and strict scrutiny for content-based decisions, provide a vigorous and reliable means of resolving disputes without the need for an *ad hoc* and poorly-defined exception to the Constitution.

ARGUMENT

A. The "government speech" doctrine must be narrowly defined and carefully applied so that this exception to the First Amendment does not swallow the free speech rights of all.

"Government speech" is one of the rare exceptions to the rule that the First Amendment protects all forms of communication, from the most profane utterances to the most sublime prose. Other

than obscenity, state secrets in time of war, and, possibly, "fighting words", the list of communications which receive no First Amendment scrutiny at all is very short indeed.[2] The doctrine of "government speech" is a relatively new addition to this list.[3] It is also the category which poses the greatest risk of

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[2] This Court summarized the major exceptions to the First Amendment in *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011) and reiterated that the list was unlikely to grow any longer:

> 'From 1791 to the present,' ... the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *United States v. Stevens,* 559 U.S. ——, ——, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010) (quoting *R A.V. v. St. Paul,* 505 U.S. 377, 382–383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). These limited areas—such as obscenity, *Roth v. United States,* 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), incitement, *Brandenburg v. Ohio,* 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam),* and fighting words, *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.,* at 571–572, 62 S.Ct. 766.

[3] In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) this Court summarized the development of the doctrine through its several opinions, the oldest of which was a concurring opinion from 1998.

outright censorship of speech which most observers would otherwise conclude is otherwise firmly within the ambit of the First Amendment.

This Court should recognize that potential applications of the government speech doctrine are vast and that the need to carefully define and constrain the doctrine is manifest. The risk of misapplication of this powerful doctrine arises from the fact that the concept is neither well-developed in the case law nor capable of precise definition. As this Court itself noted "[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". *See*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009).

Obscenity is not well-defined beyond the concept of "I know it when I see it". However, that exception to First Amendment protection is at least confined to sexually explicit speech – a relatively narrow and easily identified category. Similarly, the *Chaplinsky* exception for fighting words will not apply except where a riot is imminent – a circumstance which is both relatively rare and readily perceived.[4]

The "government speech" doctrine is not constrained by any such categorical barrier, but extends to communications we might otherwise consider to be political, religious or, as in the instant case, commercial in nature.

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[4] See, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

For good or for ill, Federal, state and local laws permeate every aspect of our daily lives. Even where government does not intrude directly into the marketplace of ideas, contracting and funding decisions and public-private partnerships have enormous impact on how we American citizens communicate, including what we see, read and hear. Government has an outsized role in our lives through direct ownership and control over property as well as its influence and sheer purchasing power in the marketplace. This influence extends far beyond "public service messages" addressing health concerns, providing storm warnings and speaking on other matters of general concern.

The government speech doctrine began as a common sense way of expressing the need for our government to communicate messages of public importance. Some of those messages necessarily present a partisan view on which opinions may differ. *See, generally, Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."). It is safe to say that the Surgeon General's message about the dangers of cigarette smoking was quite controversial when it was first disseminated in the early 1960s. Surely no less controversial is the debate over global warming and the government's increasingly strident messages about the dangers of carbon dioxide emissions.

This Court has suggested that disputes concerning these important policy issues are to be resolved through the political process and that the First Amendment places no restrictions on that debate. *See, Southworth*, 529 U.S. at 235 ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."). That makes sense in the context of controversial speech involving central government functions. However, it makes much less sense where that debate takes place on the periphery of day-to-day life involving matters on which the government has taken no principled policy position. Traditional First Amendment principles can be used to resolve those issues without resorting to a special exception to our most treasured constitutional rights.

It can be argued that this Court has placed too much emphasis on whether government owns the land upon which the speech is to occur. This Court's decision in *Summum* appears to have turned on the fact that landowners do not usually allow monuments on their property which may be objectionable to them:

> It 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. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—

> and reasonably—interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

555 U.S. at 471. That principle makes sense within the limited context of that case, but care should be taken to prevent a metastasis of that idea into other areas of First Amendment law.

Surely it is too simplistic to state that government can regulate speech without regard to the First Amendment whenever the government is the landowner. The Federal government owns millions of acres of land in the West, large tracts of which it leases to private citizens for grazing, oil exploration and mining.[5] Could the government, by virtue of its ownership of this land, allow only pro-choice signs on its property, or outlaw gatherings of the Libertarian Party or punish tenants who publicly oppose the Affordable Care Act? Does the fact that the School District owns the fences upon which advertising was placed mean that it can do anything

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[5] The New York Times reports that "The United States government owns 47 percent of all land in the West." Quoctrung Bui and Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, New York Times, Jan. 5, 2016 (http://www.nytimes.com/2016/01/06/ upshot/why-the-government-owns-so-much-land-in-the-west.html?_r=0) (accessed 6/17/16).

it wants with those fences under all circumstances with no possibility of review for content-based decisionmaking?

Historically, issues concerning the ownership and use of government property have been evaluated under "forum analysis" – whether the venue is a traditional public forum, a limited public forum or non-public forum. *Compare, United States v. Grace*, 461 U.S. 171, 180, (1983) ("Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression.").

In the particular context of this case, the usual inquiry would focus on the School Board's policy concerning advertisements on its fences. Presumably the School Board would maintain that it did not open up its fences as a public forum and Mr. Mech would argue that the fences had been converted to a limited public forum. Nothing about the facts of this case suggest that the dispute could not have been resolved under this traditional, well-established framework complete with a healthy body of precedent and many concrete examples.

It also seems inappropriate to allow First Amendment protections to turn on whether a citizen might be confused as to the identity of the speaker or might believe that government endorses a particular speaker when such is not the case. Private citizens who claim trademark infringement or unfair trade practices resulting in customer confusion have resort

to the law to correct any misunderstandings. *See, generally,* Lanham Act, 15 U.S.C.A. §1125 "False designations of origin, false descriptions, and dilution forbidden." *See*, Lanham Act, *generally*. The Government has staked out areas for its own proprietary interests by prohibiting citizens from obtaining trademarks incorporating national and state insignia which might lead to abuse. *See,* 15 U.S.C.A. §1052(a).

It must also be acknowledged that the government has a louder voice than most in the marketplace of ideas. The government can speak for itself and it can resort to the same tools to dispel confusion that are available to private citizens. There is no compelling reason to put a thumb on the scale of every debate in which government may be involved.

This Court has also expressed the view that exclusive government control over access to a forum may allow officials to invoke the government speech doctrine. This seems to have been the factor driving the Court's recent decision in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, __ U.S. ___, 135 S. Ct. 2239 (2015). As Justice Alito wryly pointed out, no own could have really believed that the State of Texas advocated for some of the messages which appeared on its license plates. For instance, most Texans would not believe that the State favored universities in Florida and Alabama over state facilities nor would viewers necessarily believe that Dr. Pepper was the favorite beverage of state officials. *See*, *Walker*, 135 S.Ct. at 2257 (J. Alito, dissenting). Rather, the determinative factor seemed

to be that Texas had a legitimate public interest in issuing license plates and that it exercised complete control over the manufacture and distribution of its plates.

The license plates in *Walker* involved a forum created specifically for the purpose of carrying out an important public function – the prompt identification of drivers. It is not often that public speakers seek access to a forum which is as limited and specialized as a motor vehicle tag. Given the odd facts of that case, and the narrow 5-4 ruling, *Walker* represents a particularly thin foundation on which to erect an entire constitutional doctrine.

Again, traditional public forum analysis could have provided an alternative – and better – rule of decision for *Walker*. This Court could have easily concluded that Texas had not opened up its license plates as a forum for public debate or routine advertising. Such a resolution seems preferable to a holding that government control over a forum avoids First Amendment scrutiny altogether. *Contrast*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (Court found an unconstitutional prior restraint and content-based discrimination where a controversial theatrical presentation was barred from a city owned and operated auditorium).

One reason for avoiding a broad application of *Walker* is that government control over a forum need not take the form of physical occupation. Government engages in a variety of public-private partnerships for research and development, public housing, access to the International Space Station and a host of other matters. Where Government is

the primary source of funding, it might well be said to control a forum to the exclusion of the private interests. There appears to be no doctrinal reason why the exception for government speech would not extend to include non-physical domination of a forum where officials exercise the power of the purse. This possibility is a further example of the need to carefully limit the government speech exception to the First Amendment.

B. The decision below illustrates exactly what can go wrong when the government speech doctrine is applied in an imprecise manner.

There was nothing obviously offensive about the Petitioner's advertisements. Neither were they much different in terms of content or appearance than the other advertisements which the School Board had approved over the years.[6] The School Board had not adopted a policy that math tutors were bad – or even, for that matter, an express policy discouraging pornographic films. Instead, it adopted a routine

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[6] The School Board apparently operated under the fiction that the commercial banners were permitted in exchange for a "donation" and were not advertisements for a fee. Apparently, the Respondent took this position in order to avoid a prohibition against third party advertisements imposed by the local sign ordinance. *Amici* take no position over the propriety of avoiding local sign codes in this creative manner. However, the economic realities of this transaction amounted to advertising and the protections afforded to commercial speech should have applied to this case. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (Applying heightened scrutiny under the First Amendment where a state statute distinguished between commercial speakers based on their identity).

time, place and manner regulation for the format and placement of advertising which it offered to the public at large.

In past years, this case would have been treated as a quintessential First Amendment claim. The Court would have first determined whether the School District had created a limited public forum for advertising on its fences. Had the facts supported that conclusion, the Court would then have considered whether the School Board had engaged in content-based discrimination under the guidelines set forth in *Hudson Gas*[7] and *Sorrell*. Those guidelines have traditionally been thought to represent a fair and context-specific balancing of the government interest against the right of expression

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[7] *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999) provided a useful summary of the *Hudson Gas* test:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (citation omitted). In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction.

of its citizens. Furthermore, commercial speech cases have provided additional protections where the government is motivated by a disagreement with the content of the speech or with the particular speaker. That is the lesson learned from *Sorrell*.

Rather than following this time-honored course, the Eleventh Circuit inexplicably invoked the doctrine of government speech and concluded that there was no reason to engage in First Amendment analysis even if the School's decision was blatantly content-based.

The Eleventh Circuit did not suggest that the School Board was attempting to promulgate any particular message or that the commercial advertising posted by Mr. Mech was antithetical to the School's educational mission. If either of those two possibilities were true, there *might* be a legitimate reason to invoke the government speech doctrine. However, there appears to be no reason to do so on this record.

The lack of vigor in defining exactly what is meant by "government speech" is amply illustrated by the decision below. The Eleventh Circuit pointed to three factors or elements in *Summum* and *Walker* which were to guide the inquiry into whether communications were government speech or private speech: (1) the "history" of regulation in the field or the long-standing nature of the policy or practice; (2) whether a reasonable observer might believe that the government endorses or approves of the speech; and (3) whether the government exercises "direct control" over the forum and the messages allowed in the

forum. *See*, *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1074-75 (11th Cir. 2015).

In this instance, the Eleventh Circuit acknowledged that "[t]he record contains no evidence about the history of banners on school fences… [which] has a relatively recent vintage". *Id*. at 1075. Nevertheless, the Court found that the failure of this portion of the tri-partite test could be "overcome by other indicia of government speech". *Id*. at 1076. The problem with the current status of the government speech doctrine is that one cannot tell whether the Eleventh Circuit was right or wrong in concluding that "two out of three ain't bad".[8]

This Court has suggested that the test for whether a communication is government speech or private speech is necessarily dependent on context. Nevertheless, the importance of the First Amendment rights at stake must surely require something other than an *ad hoc* balancing test. Other areas of First Amendment law include vigorous and robust standards for analyzing speech claims and for determining the limits of the government's ability to censor or deter that speech. Prior restraints are governed by the tests laid out in *Freedman v. State of Md.*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Commercial speech cases are evaluated under *Hudson Gas* and *Sorrell*. Even obscenity has the "*Miller* test" to guide the inquiry. *See*, *Miller v. California*, 413 U.S. 15 (1973).

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[8] With apologies to Meatloaf. *See*, Meatloaf, *Two Out of Three Ain't Bad*, Bat Out of Hell (1977) [written by Jim Steinman].

With respect to all of these tests, a failure to meet a single one of the defined standards typically means that the speech is protected and the government effort to limit the speech is unconstitutional. It is far from clear whether the government speech doctrine is applied with the same intellectual vigor as the remainder of First Amendment jurisprudence or whether decisions are actually made on a subjective and *ad hoc* basis. The Eleventh Circuit's treatment of these important issues below strongly suggests that the latter approach prevails.

CONCLUSION

It should be clear that the "government speech" doctrine, left unchecked, poses a real threat to our cherished First Amendment freedoms. As a practical matter, government is one of the most vocal speakers in the marketplace of ideas: it owns more land than any individual citizen; it has direct access to the entire public purse; it literally licenses the airwaves; and its financial power is felt in every corner of the economy. In short, government needs no special protection in order to get its message across.

The government speech doctrine was designed in order to allow the government "space" in order to promulgate important public messages – even if partisan in nature. It makes not doctrinal sense to expand this doctrine beyond that narrow concern. More important still is the fact that the doctrine is relatively new and its contours have not been well-defined – leaving open the prospect for the sort of abuse which occurred in this case below.

Traditional First Amendment analysis must apply in all cases except those narrow instances where the government is actively communicating a particular message for a legitimate public purpose. The Court should use this case as an opportunity to narrow the government speech doctrine and reassert the primacy of the First Amendment.

Respectfully submitted,

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