No. 15-1412

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit correctly held that banners hung on public school fences were government speech, where the banners bore the school's initials, identified an education-related math tutoring business as a "Partner in Excellence" with the schools, and were a gesture of gratitude by the schools, and the schools exercised substantial control and final approval authority over the messages on the banners.

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INTRODUCTION AND SUMMARY OF THE REASONS FOR DENYING THE PETITION

This case does not present the question that Petitioner, David Mech ("Mech") asserts it does, nor any other compelling basis for granting the Petition. Mech asks whether the Court's decision in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015), "allow[s] the government to place an imprimatur on private advertising and thereby render the advertisement government speech[.]" Pet. i. But the Eleventh Circuit did not rely solely on *Walker*, nor did it hold that the school banners in this case are government speech solely because they contain a government imprimatur. The Eleventh Circuit's decision was a fact-intensive application of three of the Court's government speech decisions, identifying multiple facts as pivotal: (1) the banners are displayed on school property, (2) the banners bear the schools' initials and identify Mech's tutoring business as a "Partner in Excellence" with the schools, (3) Mech's banners pertain to an education-related tutoring service, (4) the purpose of the banner program is to convey the governmental message of gratitude to the sponsors of school programs, (5) the schools control the design, typeface, and color of the banners and the information they can contain, and (6) the schools exercise final approval authority over the banners before they are displayed.

The case also does not present the unanswered question(s) posed in Justice Alito's dissenting opinion in *Walker*. Justice Alito presented scenarios in which

the government shared access to a space where it posted messages, also allowing private individuals or entities to pay to post their own messages, but disallowing certain kinds of messages. This case does not present such simple facts. Instead, it involves numerous other facts indicating that observers would reasonably believe the government endorsed the message and demonstrating substantial governmental control over the message conveyed.

The Eleventh Circuit's decision below is also not in conflict with the Federal Circuit's decision in *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *petition for cert. filed sub nom. Lee v. Tam* (Apr. 20, 2016) (No. 15-1293). Mech again misconstrues the Eleventh Circuit's decision, asserting that the two courts reached contrary conclusions about whether speech can become governmental solely by attachment of a "governmental label." Pet. 12. The Eleventh Circuit's decision did not turn only on the attachment of a government "label" or imprimatur, but also on several other crucial facts lacking in *In re Tam*. Even if the decision had been based solely on the "Partner in Excellence" label, there would still be no conflict, as the "label" on the banners was a governmental imprimatur, while the "label" at issue in *In re Tam* was not understood to be an imprimatur and had long been disclaimed as being an imprimatur by the government.

Finally, Mech has also failed to demonstrate that the Eleventh Circuit's decision conflicts with *Walker* or any other decision of this Court. Though factually distinguishable in some respects from *Walker*, the

Eleventh Circuit's decision is a careful application of the Court's reasoning in *Walker* and its other pertinent government speech jurisprudence. Mech's assertions about the ramifications of the case are also overstated in light of the highly fact-specific nature of the Eleventh Circuit's decision. Therefore, the Petition should be denied.

STATEMENT OF THE CASE

I. Factual Background.[1]

Mech provides a math tutoring service in Palm Beach County under the name "The Happy/Fun Math Tutor." He is also a retired pornographic film actor who 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, Respondent, the School Board of Palm Beach County ("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,

[1] Mech's Statement of the Case omits numerous facts that were essential to the Eleventh Circuit's reasoning. Accordingly, the Factual Background herein is taken from the Eleventh Circuit's opinion. App. 1-18.

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

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[2] While Mech consistently refers to the banners as "advertisements," the Eleventh Circuit expressly declined to decide

The Policy imposes several conditions on the banners that can be displayed. School principals 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."[3] *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,

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whether the banners were advertisements. *See* App. 15 ("Even if we were to assume that the banners for The Happy/Fun Math Tutor are advertisements. . . ."). For purposes of the government speech analysis, however, the circuit court correctly focused on whether the banners, even if they were advertisements, were purely private or government-sponsored. Consistent with the Eleventh Circuit's opinion, the term "banner" is used throughout this Brief.

[3] Mech is thus incorrect that "[t]he only real criterion for becoming a 'partner' is that the business pay money for its ads." Pet. 6-7.

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 on page 5 of the Appendix 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."

II. Procedural History.

Mech sued the School Board for violations of the First and Fourteenth Amendments and breach of contract. App. 43-67. After the district court entered summary judgment in favor of the School Board, App. 25-40, Mech appealed the dismissal of his First Amendment claim. The circuit court of appeals affirmed the judgment against Mech, concluding that Mech's claim under the First Amendment failed

because the banners for The Happy/Fun Math Tutor were government speech.[4] App. 1-18.

In his Statement of the Case and Proceedings, Mech mischaracterizes the Eleventh Circuit's holding as turning only on the fact that the banners "contained the tagline 'Partners in Excellence[.]'" Pet. 5. The Eleventh Circuit's government speech holding was based on several essential facts indicating endorsement and control, not only that the banners identified Mech as a "Partner in Excellence" with the schools where the banners were displayed. The Eleventh Circuit reasoned as follows.

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.'" App. 12 (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 472 (2009)). "Moreover, '[t]he governmental nature' of the banners 'is clear from their faces.'" App. 12 (quoting *Walker*, 135 S. Ct. at 2248). "Like the word 'TEXAS' on the specialty license

[4] Because the parties did not present the government speech issue to the district court and the district court did not consider the issue, Mech contends that the circuit court's ruling was based on an incomplete record. Pet. 7. Yet when the circuit panel specifically asked counsel for Mech whether the record was sufficient to decide the government speech issue at oral argument, counsel stated that it was. Oral argument at 53:14-54:10. Indeed, Mech has failed to identify any material factual issue that requires further development. Additionally, to the extent it is relevant, the School Board notes that it did argue that the Eleventh Circuit should conclude the banners were government speech. *Id.* at 45:00-45:10.

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." App. 12.

The banners are distinguishable from purely private advertising, even that which occurs on government property, because they are "formally approved by and stamped with the imprimatur of [the schools]." App. 15 (quoting *Walker*, 135 S. Ct. at 2252). This is especially true of Mech's banners, which pertain to an education-related math tutoring service and thus are particularly likely to be viewed as government-sponsored advertisements. App. 15. Further, the banners actually do convey a governmental message, as they "are the schools' way of saying 'thank you'" to the sponsors of programs at the schools. App. 13.

As for control, "[l]ike the board that approves specialty license plates in Texas, the schools control 'the design, typeface, [and] color' of the banners." App. 17 (quoting *Walker*, 135 S. Ct. at 2249). The schools also dictate the information the banners can contain, only allowing the sponsor's name, contact information, and business logo, along with the school's initials and the message "Partner in Excellence." App. 17-18. Further, the schools retain final approval authority over the banners, as "principals at the schools 'must approve every [banner]' before it goes up on a fence." App. 17 (quoting *Walker*, 135 S. Ct. at 2249). "'This final approval authority allows [the school] to choose how to present itself' to the community." App. 17 (quoting

Walker, 135 S. Ct. at 2249). The Eleventh Circuit summarized that "[t]he message set out in [a banner] is from beginning to end the message established by the [school]." App. 18 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005)).

Based on "the strong indicia of government endorsement and control," the Eleventh Circuit concluded that the banners were government speech and affirmed the judgment against Mech. App. 18. Mech subsequently filed a petition for rehearing and rehearing *en banc*, App. 68-92, which the circuit court denied. App. 41-42.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's decision below does not present the unanswered question(s) posed by the four dissenters in *Walker*.

As the first reason offered for why the Court should grant his Petition, Mech asserts that the decision below "presents the important unanswered question posed by the four dissenters" in *Walker*. In his dissenting opinion, Justice Alito presented the following questions:

> . . . 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.

Walker, 135 S. Ct. at 2256 (Alito, J., dissenting) (emphasis added).

Mech's attempted analogy to the examples presented by Justice Alito fails. This case did not just involve a government space where the government posted messages while also allowing the posting of purely private messages, with no discernible connection between the government messages and the private messages other than proximity.[5] While it was significant in the decision below that the banners were

[5] Put another way, the School Board's banner program, at least with respect to Mech's banners, was not "a routine time, place and manner regulation for the format and placement of advertising which [the School Board] offered to the public at large" as Amici contend, and thus this was not a "quintessential" First Amendment case. Brief of Amici Curiae First Amendment Lawyers Association, Free Speech Coalition and the Woodhull Freedom Foundation in Support of Petitioner ("Am. Br.") 12-13.

posted on the fences of public schools, App. 12, the Eleventh Circuit did not end there, further concluding that "'[t]he governmental nature' of the banners 'is clear from their faces.'" App. 12 (quoting *Walker*, 135 S. Ct. at 2248). Each banner bore the school's initials and identified Mech's math tutoring business as a "Partner in Excellence" with the school, suggesting a close relationship between the school and Mech. App. 12-13 (citing *Partner*, Oxford English Dictionary (online ed.)). Further, the banners did not concern just any business, but a math tutoring service, which is directly related to the schools' educational mission and its particular area of expertise. App. 15 (citing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

The banners were also conveying a governmental message and serving a governmental purpose by thanking and visibly recognizing the sponsors of school programs. App. 13-14. "Such gestures of gratitude are a common form of government speech." *Id.* (citing *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)).

School Board Policy 7.151(2)(h) does condition selection and approval of business partners on whether they are "consistent with the educational mission of the School Board, District and community values, and

appropriateness to the age group represented at the school." App. 4. While this is somewhat analogous to the control exercised in Justice Alito's scenarios – that the government only allows messages that "it like[s]" or finds "not too controversial" or that "are consistent with prevailing views on campus," *Walker*, 135 S. Ct. at 2256 (Alito, J., dissenting) – this was not the control that the circuit court found most relevant to the inquiry. The circuit court instead identified that the schools controlled the design, typeface, and color of the banners, dictated the information that the banners could contain, and regulated the banners' size and location. App. 17-18.

In sum, the circuit court's decision below does not squarely present the questions from Justice Alito's dissent in *Walker*. There were numerous additional facts that were essential to the circuit court's holding and that distance the decision below considerably from the scenarios presented by Justice Alito. Mech's first asserted reason for certiorari review accordingly fails.

II. The Eleventh Circuit's decision below does not conflict with the Federal Circuit's decision in *In re Tam*, as the two cases are factually distinguishable.

As part of his second asserted reason for certiorari review, Mech asserts that "[t]he Eleventh and Federal Circuits are split on whether attaching a government label to retail marketing renders the speech governmental." Pet. 12. To the contrary, the Eleventh Circuit's

decision below and the Federal Circuit's decision in *In re Tam* are factually distinguishable. The cases concern significantly different "government labels," and the Eleventh Circuit's decision below rested on more than the mere attachment of a government label anyway.

In *In re Tam*, the government argued that trademark registration and its accoutrements, "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."[6] 808 F.3d at 1345. The court rejected the argument as "meritless" because "[t]rademark registration is a regulatory activity" and the "manifestations of government registration do not convert the underlying speech to government speech." *Id.* at 1345-46. Trademark registration "no more transforms private speech into government speech than when the government issues permits for street parades, copyright registration certificates, or, for that matter, grants medical, hunting, fishing, or drivers licenses, or records property titles, birth certificates, or articles of incorporation." *Id.* at 1348.

The primary flaw in Mech's attempt to analogize *In re Tam* with the Eleventh Circuit's decision below is that the "government labels" in the two are materially

[6] The Federal Circuit was reviewing the constitutionality of a provision of the Lanham Act which bars the Patent and Trademark Office from registering disparaging marks. *In re Tam*, 808 F.3d at 1330.

different. The Federal Circuit noted that the trademark "label" was neither intended nor understood to carry a government endorsement. *Id.* at 1346-47. The government had even taken the position "[f]or decades" that "the act of registration is not a government imprimatur[.]" *Id.* at 1347 (citation omitted). The school banners in the Eleventh Circuit's decision, by contrast, were "stamped with the imprimatur of [the schools]."[7] App. 15 (quoting *Walker*, 135 S. Ct. at 2252). The "government label" on the banners was each school's initials and the phrase "Partner in Excellence." App. 4-5. Far beyond conveying only that some regulatory function had been performed, the "Partner" "label" suggested a close relationship between the schools and Mech. App. 12-13. The "label" was also applied in a different context, to an education-related math-tutoring business on a banner displayed on the public school's own property. App. 12, 15. Because the cases concern two significantly different kinds of "government labels," they do not present any conflict with respect to the government speech doctrine.

Mech's attempt to demonstrate conflict between the two cases also fails because he again misconstrues the Eleventh Circuit's decision to turn only on the "government label." In addition to the lack of any intention or appearance of endorsement, the Federal Circuit rejected the government's attempted reliance

[7] The Eleventh Circuit soundly rejected Mech's argument that there was a disclaimer by the School Board of the governmental nature of the banners, *see* App. 16-17, an argument that Mech has not re-asserted in the Petition.

on the government speech doctrine because "[t]he vast array of private trademarks are not created by the government, owned or monopolized by the government, sized and formatted by the government, immediately understood as performing any government function . . . , aligned with the government, or . . . used as a platform for government speech." *In re Tam*, 808 F.3d at 1346. Mech argues that the same reasoning applies to the banners, but he ignores pertinent facts that informed the circuit court's decision below.

Though it is true that the banners were not created or owned by the schools, Mech is simply incorrect that the banners were not "designed or formatted by [the schools], understood as performing any school function, or used as a platform for government speech." Pet. 13-14. The Eleventh Circuit below identified that "the schools control[led] 'the design, typeface, [and] color' of the banners," and "also dictate[d] the information that the banners [could] contain, regulate[d] the size and location of the banners, and require[d] the banners to include the school's initials and the message 'Partner in Excellence.'" App. 17 (quoting *Walker*, 135 S. Ct. at 2249). The court further observed that the banners conveyed the governmental message of thanking the sponsor of a school program and that "[s]uch gestures of gratitude are a common form of government speech." App. 13-14 (citations omitted). The Eleventh Circuit's reliance on these additional facts further demonstrates that the two circuit court decisions are factually distinguishable and that there is no conflict between them.

In short, there is no conflict between the Eleventh Circuit's decision below and the Federal Circuit's decision in *In re Tam* with respect to the application of the government speech doctrine. The Eleventh Circuit's decision turned on facts indicating that the banners bore the schools' imprimatur and conveyed a government message, and that the schools exercised substantial control over the messages on the banners. Similar facts were lacking in the purely regulatory trademark registration scheme at issue in *In re Tam*. Therefore, Mech's circuit-conflict argument for certiorari review fails, and there is also no need for the Court to hold this case for deposition in light of *In re Tam*.

III. The Eleventh Circuit's decision below does not conflict with the Court's decision in *Walker* or present the simple roadmap about which Mech warns.

Woven into both of his arguments for certiorari review is Mech's argument that the Eleventh Circuit's decision below conflicts with the Court's decision in *Walker*. Mech asserts that the Eleventh Circuit "found *Walker* dispositive" in the decision below, but that it "disregard[ed] the narrow and limited nature" of the decision. Pet. 8. Mech's argument about a conflict between the Eleventh Circuit's decision below and the specific facts of *Walker* is largely a nonstarter because the Eleventh Circuit did not rely solely on *Walker*. Instead, the Eleventh Circuit concluded that the factors in *Walker* and *Summum* provided a "useful framework," while also acknowledging that the factors may

not be "exhaustive" or "relevant in every case." *Mech*, 806 F.3d at 1075. The Eleventh Circuit's government speech analysis was informed not only by the Court's decision in *Walker*, but also the decisions in *Johanns* and *Summum*. The ways that Mech contends the Eleventh Circuit's decision purportedly conflicts with *Walker* are more appropriately characterized as factual distinctions that the Eleventh Circuit thoroughly and correctly addressed in light of the Court's reasoning in *Walker* and its other government speech decisions. Mech has failed to demonstrate that the Eleventh Circuit's decision conflicts with any of the Court's decisions.

Mech points out that the banners do not "have the history as government speech found so significant in *Walker*." Pet. 8. The Eleventh Circuit squarely addressed the lack of historical evidence, but reasoned that a long historical pedigree was not necessary for a finding of government speech, because the Court in *Johanns* had concluded that a promotional campaign for the beef industry was government speech without conducting any historical inquiry or citing any historical evidence. App. 11 (citing *Johanns*, 544 U.S. at 560-67). The Eleventh Circuit further recognized that the lack of historical evidence could not be dispositive because, "[f]or 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." App. 11 (citing *Sutliffe 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)). Thus, the Eleventh Circuit's weighing of the history factor was consistent with the Court's decision in *Johanns*, other circuit court decisions, and common sense.

Mech also contends that the Eleventh Circuit's decision was a wrongful application of *Walker* because the banners are not "government IDs" and are not government-issued or government-required. Pet. 8, 9. But the Court in *Walker* noted that license plates' status as government-issued IDs and the requirement that they be displayed supported the conclusion that license plates could be reasonably interpreted as conveying some message on the State's behalf. *See* 135 S. Ct. at 2248-49. The Eleventh Circuit thus acknowledged that "banners are not 'government IDs,'" but sought to determine whether there were nevertheless compelling indicia "that observers reasonably believe the government has endorsed the message." App. 12. And there were such indicia, including that the schools were identifying Mech's math-tutoring business as a "Partner in Excellence" on banners displayed on their own property, for the purpose of conveying a governmental message of thanking the sponsors of school programs.[8]

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[8] Mech suggests conflict because the School Board does not exercise "absolute control over language or design" with respect

Finally, Mech contends that the circuit court's decision warrants review because it enables the government to "merely" add a "meaningless and sham" (or "perfunctory") seal of approval to private speech to transform that speech into government speech.[9] Pet. 11. Mech overstates the duplicability of the decision below, however, because this case did not merely involve a governmental seal of approval on a private message. Rather, it involved the identification of a business that provided an education-related service as a "Partner in Excellence" on banners bearing the schools' initials and hung on school property. Further, the banners conveyed a governmental message of gratitude to and were displayed for the governmental purpose of recognizing the sponsors of school programs. And the schools exercised substantial control over the

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to the banners. Pet. 8. But the Court in *Walker* did not analyze whether Texas maintains *absolute* control, instead concluding that "Texas maintains *direct* control over the messages conveyed on its specialty plates." 135 S. Ct. at 2249 (emphasis added). To that end, the Eleventh Circuit's application of the control factor hewed closely to the Court's analysis in *Walker*, as well as *Johanns* and *Summum*. *See* App. 17-18.

[9] Mech elsewhere in his Petition similarly refers to the seal of approval as a "*pro forma*, ambiguous statement of approval" and a "rubber stamp." Pet. 14. Notably, even if the schools do not vet business partners for the quality of services they provide in their respective businesses, it does not follow that identifying a business as a "Partner in Excellence" with the school is meaningless. At the very least, the suggestion of a partnership provides a positive association with the schools, which the circuit court correctly observed "is likely why sponsors participate in the banner program, instead of appealing to parents and students through 'purely private' media." App. 13 (quoting *Walker*, 135 S. Ct. at 2249).

messages conveyed on the banners. The fact-intensive nature of the decision belies Mech's assertion that the decision provides "a roadmap for turning every sign on government property into government speech[.]"[10] Pet. 11.

[10] Amici take a different tack, though with a similar flaw, arguing that the Court should use this case "as an opportunity to narrow the government speech doctrine[.]" Am. Br. 17. They suggest that the Court in *Summum* may have "placed too much emphasis on whether government owns the land upon which the speech is to occur," that it "seems inappropriate to allow First Amendment protections to turn on whether a citizen might be confused as to the identity of a speaker or might believe that government endorses a particular speaker when such is not the case," and that the Court "expressed the view" in *Walker* "that exclusive government control over access to a forum may allow officials to invoke the government speech doctrine." Am. Br. 7, 9, 10. But the Eleventh Circuit's decision below did not suggest that only government property ownership, only the appearance of endorsement, or only the schools' exercise of control over the banners was dispositive. It instead considered all of these facts taken together, as well as the fact that the banners actually conveyed a governmental message. Amici have failed to demonstrate that the Eleventh Circuit's decision below (or any other lower court decision) has borne out their dubious warnings about potential misapplication of the Court's government speech jurisprudence.

CONCLUSION

For the foregoing reasons, Mech fails to set forth any valid basis for the Court to grant the Petition. The School Board respectfully requests that the Petition be denied.

Respectfully submitted,

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