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

REPLY BRIEF FOR THE PETITIONER

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The School Board's attempt to re-frame the question presented should be rejected, because that question is not presented by the record.[1] While some banner advertisements bore the school's initials, not all did. *E.g.*, App. 66. Many of the advertisements are not education-related. *Id.*; App. 65, 67. And not all of them contained the wording "Partner in Excellence." App. 66. The vast majority of the banner advertisements were private advertising. The School Board's Opposition is rife with other "straw man" arguments and factual inaccuracies.

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

The School Board argues that "the Eleventh Circuit did not rely solely on *Walker*." Opposition at 1. But Mech never argued that it did. In any event, while the decision below cited *Walker* seventeen times, Mech specifically noted in his Petition (at 5, 8) that the

[1] The School Board's Brief in Opposition ("Opposition") at i re-frames the question as:

> 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.

Eleventh Circuit also relied on *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).[2]

The court 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 v. Sch. Bd. of Palm Beach Cty*., 806 F.3d 1070, 1076 (11th Cir. 2015). 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 court's reasoning disregards *Walker's* narrow and limited reach.[3]

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[2] *Summum* involved a permanent monument in a park, and there was nothing commercial about it. Here, the banner advertisements are easily and promptly removed if the vendor does not pay the requisite fee. Doc. 48, Attachment 14, App. 12 (Stiefel at Ex. 47, Ex. 6, p.3); Policy 7.151(2)(e)).

[3] The decision is also incorrect regarding design, typeface, banner color, and a requirement that banners include school initials and the words "Partner in Excellence." While Policy 7.151(3) mentions that school colors can be used, it does not require them. Nothing in the policy requires that font size be uniform. The policy specifies a maximum size, not a minimum. Mech's fonts were at least twice the size of the school initials' fonts. And many banners can have private business logos displayed with corporate colors. Doc. 48, Attachment 8, App. 6 (Burke at 20-21, Ex. 58); Second Am. Compl., Exh. D; Policy 7.151(3)(f) (allowing "business partner's standard corporate colors for the logo"). Thus, the vast majority of the ad is directed to private speech. While the policy dictates some information the banners can contain, and limits the size, it does not dictate the signs' location. And, like private advertisements, the placement of the advertisements depends on the

Like the troubling scenario predicted by the four dissenters in *Walker*, the School Board "allowed only those messages [and messengers] that it liked or found not too controversial." 135 S. Ct. at 2256. The School Board acknowledges that 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."

Opposition at 6.

Notwithstanding the School Board's claim that "it argue[d] that the Eleventh Circuit should conclude the banners were government speech[,]" Opposition at 7 n.4, it never argued in its Supplemental Brief or oral argument that the banners were government speech. Indeed, the circuit court questioned that omission at oral argument.[4] The School Board's failure to argue

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amount of payment – the more a business pays, the more visible the banner. Doc. 48, Attachment 14, App. 12 (Stiefel at 16-17); Doc. 48, Attachment 8, App. 6 (Burke at Ex. 51). *See also* App. 68-91 (Mech's Petition for Rehearing or Rehearing *En Banc*).

[4] Judge William Pryor: "[T]he school board, when we requested supplemental briefing, did not argue that this was government speech." Oral Argument at 01:11-01:20. (https://www.youtube.com/watch?v=878jhF4m0Ro; http://mechforpbcschools.com/lawsuit.html)

that the banners were government speech further supports Mech's position that the speech was private.

The School Board suggests that the banners were not advertisements because the Eleventh Circuit called them banners. Opposition at 4 n.2. But the School Board's own administrators and the co-author of Policy 7.151, a school board attorney, consider the banners advertising. Doc. 48, Attachment 14, App. 12 (Stiefel at 22, 32, Ex. 47); Doc. 48, Attachment 6, App. 10 (Littlejohn at 12); Doc. 48, Attachment 11, App. 2 (Garrison (individual capacity) at 26).

The School Board claims that the "schools retain final approval authority over the banners" and condition the selection and approval of business partners on

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Judge William Pryor: "Ms. Bernard [the School Board's counsel], do you have a different perspective now about government speech? "Ms. Bernard: "**Well your honor, if I'm being frank, there is a lot of hesitation in branding this particular speech as government speech.**" *Id*. at 24:38-24:58 (emphasis added).

Judge Stanley Marcus: "If you don't think that this is government speech, you would concede, would you not, that this is at a bare minimum a limited public forum, right?" Ms. Bernard: "Yes, your honor. Absolutely." *Id*. at 27:30-27:42.

Judge William Pryor: "Would you like for us to rule that it is [government speech]?" Ms. Bernard: "Oh, absolutely your honor." Judge William Pryor: "OK, just wanted to get that on the record. Ms. Bernard: "No, absolutely; and if it wasn't apparent in my supplemental brief." Judge William Pryor: "**It certainly wasn't.**" Ms. Bernard: "There was hesitation in wanting to step out and frame this as government speech." *Id*. at 45:05-45:31 (emphasis added).

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." Opposition at 8, 11-12. But the School Board's asserted authority and educational mission were neither consistently enforced, nor exercised, except as to Mech. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1080-82 (9th Cir. 2001) (city failed to enforce consistently its "non-controversy" policy, as it "neither pre-screened submitted works, nor exercised its asserted right to exclude works"). The School Board allowed advertisements for ale houses, tattoo parlors, and churches, none of which was consistent with the school's educational mission. If anything, the retention of authority is consistent with the creation of a limited forum for private speech, and "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *Cuffley v. Mickes*, 208 F.3d 702, 709, 711 (8th Cir. 2000) (Missouri's purported reason for denying KKK's participation in Adopt-A-Highway program – that the Klan had a history of violent, criminal behavior – was a pretext for viewpoint discrimination; the State did not know how its regulation applied in practice, never applied it to anyone besides the KKK, and never asked other applicants about criminal history; the government's "actions speak louder than its words"); *Women's Health Link, Inc. v. Fort Wayne Public Transp. Corp.*, ___ F.3d ___, No. 16-1195, 2016 WL 3435633, at *1 (7th Cir. June 22, 2016) (Citilink's refusal to post "Health Link's proposed ad . . . in or on Citilink buses, even

though the ad itself – as any reader of this opinion can see – contains not the faintest reference to abortion or its alternatives" and "was groundless discrimination against constitutionally protected speech"; no discussion of government speech).[5]

The School Board argues that the "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." Opposition at 11. While SAT preparation is certainly education-related, no reasonable observer would conclude that the school was endorsing the testing services of Princeton Review, Kaplan, or Barron's. And while "Happy/Fun Math Tutor" is a catchy name meant to make math tutoring attractive, it was not like

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[5] Policy 7.151(1) states that the School Board did not intend to create a "forum for the expression of . . . 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." By this language, the schools are trying to avoid creating a public forum and to limit whatever forum is created by this program. They are not buying or owning the speech; rather, they are distancing themselves from whatever advertisements "could be perceived as bearing the imprimatur or endorsement of the School Board." Indeed, the co-author of Policy 7.151 denied that the banner advertisements were written as school speech:

> "The preference is for the banner to read 'XYZ Church supports PB Central' or 'PB Central is supported by XYZ Church' **as opposed to the verbiage being written from the school's perspective** (i.e. 'PB recognizes/thanks XYZ Church')."

Doc. 48, Attachment 6, App. 10 (Littlejohn at 33-35, Ex. 0062) (emphasis added).

"Omni Middle School Tutor" or "Boca Raton Middle School Tutor," which one might think was school-sponsored. Reasonable observers would think Happy/Fun Math Tutor is a private business, much like they would think that "Journey Church Math Tutoring" or "Wal-Mart Math Tutoring" are private businesses. The fact that the School District allowed advertisements for businesses having nothing to do with its educational mission, such as ale houses and tattoo parlors, would lead a reasonable observer to believe the banners were private, not government, speech.

Contrary to the contention that "Mech has failed to identify any material factual issue that requires further development," Opposition at 7 n.4, Mech told the appellate panel that the record was insufficient regarding the proximity of Mech's banners to other banner advertisements. Oral Argument at 53:14-53:47. *See* proffered signs showing close proximity:

(Not in record below.)

The School Board states that "all of the banners identify the sponsor as a 'Partner in Excellence' with the school," that "each banner bears the school's initials," and that "all of the banners identify the sponsor as a 'Partner in Excellence.' " Opposition at 8. These assertions are incorrect:

(App. 66).

The School Board's assertion that the "banners at the high school are printed in school colors," Opposition at 8, is also false. While Policy 7.151(3) mentions that school colors can be used, it does not require them. Mech's banners and those next to his did not use school colors, as incorrectly stated in the panel opinion, but were dictated by City of Boca Raton regulations –middle school banners must be green with white font, and high school banners must be blue with white font. 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); Policy 7.151(2)(k) ("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.").

The School Board states that the "banners were also conveying a governmental message and serving a governmental purpose by thanking and visibly recognizing the sponsors of school programs[,]" Opposition at 11, and that "[s]uch gestures of gratitude are a common form of government speech." App. 13-14 (citing *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1141-42 (10th Cir. 2001) (sign on government property thanking corporate sponsors of city's Keep the Lights Foundation was government speech), and *Knights of the Ku Klux Klan v. Curators of Univ. of Mo*., 203 F.3d 1085, 1093 (8th Cir. 2000) (acknowledgements by public radio station of donors that contributed to its programming were government speech)). In *Wells*, however, "the City built, paid for, and erected the sign" and there was "no indication that any of the corporate sponsors even knew about the Happy Holidays sign." 257 F.3d at 1142. Here, Mech and the other advertisers owned and paid for their banners, worked with private sign manufacturers in designing the banners, created their own logos with corporate colors, and delivered the finished banner advertisements to the schools. Doc. 48, Attachment 11, App. 2 (Mech at 50); Doc. 48, Attachment 14, App. 12 (Stiefel at 32).

Mech's Supplemental Brief at 4 (showing corporate logo in upper left corner).

Id. (Mech's logo enlarged).

(not in record below) (showing corporate logos and proximity of advertisements).

And the Eighth Circuit subsequently characterized its holding in the *Klan* case as "rest[ing] largely on the unique context of public broadcasting, in which editorial discretion to select programming and sponsors looms large. And unlike this case, the radio station had legitimate reasons for its refusal to accept the Klan's sponsorship, and there was absolutely no showing of viewpoint discrimination." *Cuffley*, 208 F.3d at 706 n.3. Here, there is nothing unique about Mech's banner advertisements, but there is abundant evidence of viewpoint and speaker identity discrimination presaged by the dissent in *Walker*.

If left standing, the decision below would have broad ramifications, enabling the government to strip private speech of First Amendment protection by converting such speech in a limited or nonpublic forum into government speech unprotected from censorship, viewpoint or speaker-identity discrimination, and unconstitutional conditions.[6] The decision affords the government unbridled discretion over both speech and

[6] In *Women's Health Link*, a women's healthcare service alleged that a public transportation company violated the First Amendment by refusing to display the healthcare service's advertisement/public service announcement on buses. The Seventh Circuit held that the company's refusal to display the advertisement was not reasonable in light of its own advertisement censorship policy:

> The basis on which Citilink refused to allow the ad to be posted in its buses appears to have been the mention of "life affirming healthcare" or more likely a connection between Health Link and Allen County Right to Life – the person who first emailed Citilink about the ad did so from an Allen County Right to Life email account, and the two organizations share a street address. Yet neither the ad nor Health Link's website mentions Allen County Right to Life, though the link between the two entities was a clue that "life affirming healthcare" in Health Link's website might well be a pro-life slogan.
>
> [The] public service announcement . . . does not so much as hint at advocating or endorsing any political, moral, or religious position. . . . Yet the district judge granted summary judgment in favor of Citilink. He shouldn't have.

2016 WL 3435633, at *1-2. Similarly, Mech has been denied the benefits of the banner advertisement program because he engaged in disfavored speech or conduct outside the program, and the only connection between his tutoring and his former adult media business was a shared address.

speakers merely by adding a "thank you" message ("Partners in Excellence"). As such, 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 could be extended even to spoken words in a nonpublic forum – e.g., a sign at a building entrance stating that the government has approved the speaker.

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

II. THE DECISION CONFLICTS WITH *WALKER* AND *IN RE TAM*, WHICH LIMIT THE GOVERNMENT SPEECH DOCTRINE.

The School Board argues that *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *cert. pet. filed sub nom. in Lee v. Tam*, April 20, 2016, No. 15-1293, is distinguishable because here:

> 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."

Opposition at 15 (quoting *Walker*, 135 S. Ct. at 2249). This distinction fails for the reasons set forth in note 3, *supra*, and because the program's administrators and the co-author of Policy 7.151 consider the banners advertising. Doc. 48, Attachment 14, App. 12 (Stiefel at 22, 32, Ex. 47); Doc. 48, Attachment 6, App. 10 (Littlejohn at 12); Doc. 48, Attachment 11, App. 2 (Garrison (individual capacity) at 26).

The Federal Circuit's reasoning in *Tam* is pertinent to Mech's argument that private advertisements that appear on school fences are neither created by the schools, owned, designed or formatted by them, understood as performing any school function, nor used as a platform for government speech, and thus are not government speech. Accordingly, the Eleventh Circuit's decision conflicts with *Tam*, which finds speech of a similar nature to constitute private speech. Certiorari review is therefore warranted 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 is appropriate for that independent reason.

CONCLUSION

The petition should be granted to resolve the circuit court split and clarify *Walker*. If this Court grants

certiorari in *Tam*, this case should be held for disposition in light of *Tam*. If *Tam* is affirmed, the Court should grant this petition, vacate, and remand.

Respectfully submitted,

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