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.

APPELLANT'S REPLY IN SUPPORT OF MOTION FOR RECALL OF MANDATE BASED ON *MATAL V. TAM*, 137 S. Ct. 1744 (2017)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, David Benoit Mech, d/b/a The Happy/Fun Math Tutor, submits this list which includes the district judge, and all attorneys, persons, associates of persons, firms, partnerships, or corporations that have an interest in the outcome of this review:

1. Dillard, Kalinthia R.
2. Green, James K.
3. Jacques-Adams, Kathelyn
4. Latson, William
5. Marra, Kenneth
6. Matthewman, William
7. Mech, David Benoit
8. Riopelle, Gerald
9. School Board of Palm Beach County, Florida
10. Slack, Peter
11. Walters, Lawrence G.
12. Shawntoyia Bernard, Esq.
13. JulieAnne Rico, Esq.
14. Nancy Abudu, Esq.

CORPORATE DISCLOSURE STATEMENT

None of the parties currently has corporate affiliates that have issued shares to the public.

APPELLANT'S REPLY IN SUPPORT OF MOTION TO RECALL MANDATE BASED ON *MATAL V. TAM*, 137 S. Ct. 1744 (2017)

INTRODUCTION

In its Opposition to Mech's Motion to Recall the Mandate, the School Board asserts that *Matal v. Tam,* 137 S. Ct. 1744 (2017), does not directly or seriously undermine this Court's Opinion in this case, nor does *Matal* "cast[] any doubt on the correctness of [this Court's] opinion." Opp. at 3-4. Opp. at 10. In a word, this is poppycock. The School Board attempts to explain away and distinguish *Matal,* but cannot get around the fact that *Matal* expressly stated that *Walker v. Texas Division, Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239 (2015), "likely **mark[ed] the outer bounds** of the government-speech doctrine." 137 S. Ct. at 1760 (emphasis added).

This Court acknowledged in its Opinion that this was not an easy case to decide. *See Mech v. School Bd. of Palm Beach County, Fla.*, 806 F.3d 1070, 1071 (11th Cir. 2015) ("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, 172 L.Ed.2d 853 (2009). This

appeal presents one of those situations.") (emphasis added). Given the statement in *Matal* that *Walker* represented the outer bounds of the government speech doctrine, and this Court's acknowledgment that this was not an easy case to decide, this Court should recall its mandate.

ARGUMENT

The linchpin of this Court's Opinion was as follows: "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.'" 806 F.3d at 1077. But *Matal* directly calls this reasoning into question, by cautioning that "[i]f private speech could be passed off as government speech by **simply affixing a government seal of approval**, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents." 137 S. Ct. at 1758 (emphasis added).

And here, as in *Matal*, the government does not place its imprimatur on the banner ads, nor does it endorse them. Indeed, the School Board's written policy expressly provides that "[b]y permitting the recognition of business partners on school campuses, it is not 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." School Board Policy 7.151(1) (emphasis added). Similarly, as the School Board notes, the U.S. Patent and Trademark Office has made it clear that registration does not constitute approval of the mark. Opp. at 5-6 (citing *Matal,* 137 S. Ct. at 1759).

The School Board's attempts to distinguish *Matal* are unavailing. It argues that whereas the trademarks do not convey a government message, the banners "convey a governmental message of gratitude to sponsors of school programs," Opp. at 8-9. But this argument simply ignores the Supreme Court's cautionary statement in *Matal* that affixing a government seal of approval does not justify application of the government-speech doctrine.

The School Board argues that in *Matal,* the Supreme Court observed that the government does not "dream up" the trademarks or edit them. Opp. at 4 (citing *Matal,* 137 S. Ct. 1758). But the same is true here. The School Board does not "dream up" the banners or edit them. That is the job of the private persons or businesses who wish to advertise on the school fences. The School Board simply ignores the fact that the banner ads at Omni Middle School were created and manufactured by a third party -- not the school. And the banners themselves are the property of the advertiser.

It also ignores Supreme Court precedent that private speech does not become government speech merely because a university plays a role in sponsoring the

activity, *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995), or paying the speakers, *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 542 (2001) ("Like the *Rosenberger* program, the LSC program was designed to facilitate private speech, not to promote a governmental message.").

The School Board tries to defend the drinking pub ads as somehow consistent with its mission and not in violation of its own policy, and it claims that the ad for a tattoo parlor that hung on its school fence was an anomaly. Opp. at 8. But the fact that a banner advertising a tattoo parlor was expressly prohibited by School Board Policy 7.151(2)(k) shows that, as Mech argued to this Court, the School Board is not screening its partners for "excellence," and apparently, is not screening them at all. As argued in the opening brief, the only criterion for displaying a banner ad is that the advertiser pay for the ad, and that is commercial - not government - speech.

The School Board argues that even if *Matal* signals some sort of modification of the government speech doctrine, it does not affect the validity of the decision in this case, which rested on far more than a government seal of approval. *Id*. at 12. Notably, however, the School Board never says what more there was besides a government seal of approval that would indicate the school board's endorsement of the banner's content.

CONCLUSION

For the foregoing reasons, this Court should grant the motion to recall the mandate and reconsider its decision in light of *Matal.*

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CERTIFICATE OF COMPLIANCE WITH TYPE-FACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

We hereby certify that this motion complies with the type-face requirements of Fed.R.App.P. 32(a)(5) and the type-style requirements of Fed.R.App.P. 32(a)(6) because this reply has been prepared in a proportionally spaced type-face using Microsoft Word software in 14-point Times New Roman font.

/s/ James K. Green

CERTIFICATE OF SERVICE

I, James K. Green, certify that on August 16, 2017, a copy of this Motion was electronically filed with the Court using CM/ECF and delivered electronically to all parties and counsel of record.

/s/James K. Green