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.	)

PLAINTIFF'S MOTION TO AMEND JUDGMENT UNDER RULE 59(e)
AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, DAVID BENOIT MECH d/b/a THE HAPPY/FUN MATH TUTOR ("Mech" or "Plaintiff"), hereby moves for reconsideration of the Court's order denying summary judgment to Plaintiff and granting summary judgment for Defendant, SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA ("School Board" or "Defendant"), based on a manifest error of law or fact.

I. INTRODUCTION

By this action, Plaintiff challenges the School Board's custom, policy or practice of granting itself the power to exercise unbridled discretion on the basis of speech and the identity of the speaker as void on its face and asserts that the First Amendment protects speech irrespective of whether the speaker speaks as an individual or through his corporation.

II. ARGUMENT

A. STANDARDS ON A RULE 59(e) MOTION FOR RECONSIDERATION

Rule 59(e) of the Federal Rules of Civil Procedure authorizes the Court, upon timely motion, to alter or amend a judgment. District courts are necessarily afforded substantial discretion in ruling on motions for reconsideration. *Mackin v. City of Boston*, 969 F.2d 1273, 1279 (1st Cir. 1992); *Clark v. U.S. Postal Service*, No. 3:11–cv–899–J–32JBT, 2012 WL 2044812 at *1 (M.D. Fla. June 6, 2012).

> Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion. ... There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice.... Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2810.1 (2002). *See Frantz v. Walled*, 513 Fed. Appx. 815, 822 (11th Cir. 2013) (district court may grant reconsideration under Rule 59(e) based on newly discovered evidence or a manifest error of law or fact).

In its October 27, 2014 Order Granting Defendant's Motion for Summary Judgment on Plaintiff's Federal Constitutional Claims and Denying Plaintiff's Motion for Summary Judgment ("Summary Judgment Order") [ECF 80] in the above-styled case, the Court concludes that:

> 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 corporation with his adult media corporation. 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).

Id. at 8.

B. THIS COURT SHOULD GRANT PLAINTIFF'S MOTION TO AMEND JUDGMENT UNDER RULE 59(e)

1. The School Board's custom, policy or practice of granting itself governmental power to exercise unbridled discretion on the basis of speech is void on its face

In rejecting Plaintiff's First Amendment challenge to the Defendant's censorship of his banner based on its exercise of unbridled discretion, the Court appears to have assumed erroneously that, so long as the motive for the removal of the banner was not the content of the banner, unbridled discretion to remove it did not render its removal unconstitutional. But Defendant exercised unbridled discretion to remove the banner based on Plaintiff's speech through his media company and/or his identity as the owner of an adult media company. The absence of standards prescribing the scope of that discretion renders the power to remove the banner facially unconstitutional.

As the Supreme Court repeatedly has held, "it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, ***whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.***" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 (1988) (emphasis in original) (quoting *Freedman v. Maryland*, 380 U.S. 51, 56 (1965)). "[T]he Constitution requires that [defendant] 'establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.'" *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 322 F.3d 1298, 1311 (11th Cir. 2003) (*en banc*) (quoting *City of Lakewood*, 486 U.S. at 760).

It is undisputed that Plaintiff's banner qualified for display as commercial speech, was displayed for over a year without incident, and that Defendant subsequently removed his banner upon discovery of Plaintiff's prior speech through Dave Pounder Productions, LLC ("DPP"), a former adult media corporation. Because unbridled discretion empowered Defendant's action

based on Plaintiff's speech, it simply does not matter whether, under a properly drawn banner program, Defendant lawfully could have excluded Plaintiff's banner from being displayed; what matters, and under the First Amendment, all that matters, is that unbridled discretion left Defendant free to remove Plaintiff's banner due to speech in which he engaged at DPP or because of his ownership of that company, which Defendant found inappropriate. Whether that speech took the form of a political statement, a poem, a song, or, as here, movies, such speech is fully protected by the First Amendment. *Jenkins v. Georgia*, 418 U.S. 153 (1974).

In short, under the First Amendment, governmental power to exercise unbridled discretion on the basis of speech is void on its face. *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 223 (1990) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad."); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 133 (1992) ("There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural

distaste of a free people—is deep-written in our law."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"); *Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274, 1284-1285 (11th Cir. 2004) (same, citing cases).

2. The First Amendment protects speech irrespective of whether the speaker speaks as an individual or through his corporation

The court also appears to have misunderstood Plaintiff's claim that he was subjected to censorship based on the actions of his corporation to be a freedom of association claim rather than a free speech claim. *See* Order at 8-9. However, the First Amendment protects speech irrespective of whether the speaker speaks as an individual or through a corporation, *Citizens United v. FEC*, 558 U.S. 310 (2010), and has long protected speech through media corporations, *id*. at 352. Defendant concededly removed Plaintiff's banner because of his speech, through his media corporation, and his identity as the owner of that company.[1]

[1] The court misspoke when it ruled that the First Amendment only protects intimate association, Order at 9, overlooking the many cases that hold that it also protects expressive association. *Christian Legal Soc. Chapter of the Univ. of Calif., Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984).

In any event, as recognized by the Supreme Court in *Christian Legal Society*, "speech and expressive-association rights are closely linked" and "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association." 561 U.S. at 680-81. Accordingly, the analysis and standards are the same in the limited-public-forum context. *Id.* at 681 ("The same ground rules must govern both speech and association challenges in the limited-public-forum context."). *See also City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (in addition to the constitutionally protected freedom of association that is based on certain intimate human relationships, a second line of Supreme Court precedents recognizes "a right to associate for the purpose of engaging in those activities protected by the First Amendment—***speech***, assembly, petition for the redress of grievances, and the exercise of religion") (emphasis added).

Moreover, contrary to this Court's conclusion that for a plaintiff to have a claim for a commercial speech violation, the defendant must have taken action because of the plaintiff's commercial speech, *see* Order at 7, discrimination based either upon the content of the speech ***or*** the ***speaker's identity*** violates the First Amendment. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 193-194 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."). As the Supreme Court recognized in *Citizens United*:

> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. ... By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. ***The First Amendment protects speech and speaker***, and the ideas that flow from each.

558 U.S. at 340-41. This prohibition against speaker-based discrimination applies in the context of commercial speech. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. … ***Commercial speech is no exception***.") (emphasis added). As explained in *1-800-411-Pain Referral Service, LLC v. Otto*:

> In *Sorrell*, the Supreme Court reviewed Vermont statutes restricting pharmaceutical companies and similar entities from using prescriber-identifying information obtained from pharmacists for marketing purposes. 131 S. Ct. at 2661–62. The Supreme Court held that the laws unconstitutionally restricted the commercial speech rights of pharmaceutical manufacturers and their agents. *Id.* at 2672. In the process, the Court devised a new two-part test for assessing restrictions on commercial speech. … The first question to ask is whether the challenged speech restriction is content- ***or speaker*-based**, or both. *Sorrell*, 131 S. Ct. at 2663. While this inquiry is "not always a simple task," *Turner Broad.*

> *Sys., Inc. v. FCC*, 512 U.S. 622, 643 … (1994), "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based," *id*.; *Sorrell*, 131 S.Ct. at 2663 (identifying Vermont's law as speaker-based ***because it "disfavors specific speakers"***).
>
> If a commercial speech restriction is content- ***or speaker-based***, then it is subject to "heightened scrutiny." *Sorrell*, 131 S.Ct. at 2664…. The upshot is that when a court determines commercial speech restrictions are content- ***or speaker-based***, it should then assess their constitutionality under *Central Hudson* [*Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980)]. ... The well-known *Central Hudson* inquiry, in turn, employs a four-part standard to test the constitutionality of laws burdening commercial speech: (1) whether the commercial speech at issue concerns unlawful activity or is misleading; (2) whether the governmental interest is substantial; (3) whether the challenged regulation directly advances the government's asserted interest; and (4) whether the regulation is no more extensive than necessary to further the government's interest. *Cent. Hudson*, 447 U.S. at 566….

744 F.3d 1045, 1054-55 (8th Cir. 2014) (emphasis added). *See also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (explaining that "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (**or aversion to what the *disfavored speakers* have to say**)") (emphasis added); *Incredible Investments, LLC v. Fernandez-Rundle*, No. 13–22678–CIV, 2014 WL 2959455 at *7 (S.D. Fla. Mar. 3, 2014) (Ungaro, J.) ("even if the Court were to assume that Plaintiff's Game Promotions are commercial speech, the Court finds that Section 849.16 does not impose a ***speaker* or content-*based restriction*** on Plaintiff's Game Promotions because it targets conduct and does not include a distinction between speakers") (emphasis added). *Accord Entertainment Software Ass'n v. Chicago Transit Authority*, 696 F. Supp. 2d 934, 949 (N.D. Ill. 2010) ("Even in cases involving commercial speech, decisions that select among speakers conveying virtually identical messages conflict with the principles undergirding the First Amendment.") (citing *Greater New Orleans*, 527 U.S. at 194).

The First Amendment forbids the standardless exercise of unbridled discretion. Thus, in

Greater New Orleans, the Supreme Court invalidated a federal law banning private casino broadcast advertisements because the law was "***so pierced by exemptions and inconsistencies"*** that the speech restriction failed to "materially advance[ ] the asserted governmental interest" of discouraging gambling. 527 U.S. at 190 (emphasis added). As explained in *Paradigm Media Group v. City of Irving*, 65 Fed. Appx. 509 (5th Cir. 2003),

> The regulatory regime in *Greater New Orleans,* on its face, drew distinctions between the identity of speakers. The law prohibited private casinos from broadcast advertising, while permitting broadcast advertising by, for example, tribal casinos and state-run casinos. *Id.* at 190. By "pegging its speech ban to the identity of the owners or operators of the advertised casinos," *id.* at 191, the government failed to demonstrate "why such lines bear any meaningful relationship to the particular interest asserted….

Here, as in *Greater New Orleans,* the School Board's policy, practice or custom is so full of exclusions and inconsistencies that it affords the government standardless, unbridled discretion that fails to materially advance the asserted governmental interest and denies Plaintiff his First Amendment rights.

WHEREFORE, Plaintiff respectfully urges the Court to reconsider its earlier ruling, based on a manifest error of law or fact, and enter summary judgment for Plaintiff and deny summary judgment to Defendant.

Dated this 24th day of November, 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 24th day of November, 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