No. 21-213

In the Supreme Court of the United States

Nathaniel Borrell Dyer,
Petitioner

v.

Atlanta Independent School District,
Respondents

On Petition For A Writ Of Certiorari to the United States Court of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Nathaniel Borrell Dyer
Petitioner Pro Se
202 Joseph E. Lowery Blvd. NW
Atlanta, Georgia 30314
(404) 964-6427

QUESTIONS PRESENTED FOR REVIEW

On February 8, 2018, Atlanta Independent School System (AISS) attached a scanned version of Mr. Dyer's satirical flyer to a suspension letter which banned him from public comment for one year. AISS stated, "Specifically, you passed out flyers to audience members that contained the phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it. These insulting references are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community."

This court has stated "giving offense is a viewpoint." *Matal v. Tam,* 582 US _ (2017). We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U. S. 576, 592 (1969). ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55–56 (1988). The questions presented are:

1. Whether Atlanta Independent School System violated Mr. Dyer's First Amendment right to free speech by categorically banning him from using protected speech in a limited public forum because of a satirical flyer depicting public figures and elected officials which AISS found to be offensive?

2. Whether AISS violated Mr. Dyer's Fourteenth Amendment due process rights by categorically banning him from engaging in public comment at school board meetings while instructing him not to set foot on any AISS property or have any communication with AISS officials and staff, without providing him a way to contest the suspension?

LIST OF PARTIES TO PROCEEDING

Petitioner Nathaniel Borrell Dyer was plaintiff pro se in the district court and appellant in the court of appeals. Respondent Atlanta Independent School System was defendant in the district court and appellee in the court of appeals.

- *Nathaniel Borrell Dyer v. Atlanta Independent School System*, No. 20-10115, United States Court of Appeals, 11th Circuit. Judgment entered March 22, 2021.

- *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB, United States District Court, Northern District of Georgia, Judgment entered December 5, 2019.

- *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB, United States District Court, Northern District of Georgia, Judgment entered March 14, 2019.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Petitioner Nathaniel Borrell Dyer, has no parent corporation. He has no publicly owned stock, and no publicly held company owns 10 percent or more of his stock.

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The Appeals Court Order of the United States Court of Appeals, 11th Circuit, *Nathaniel Borrell Dyer v. Atlanta Independent School System*, No. 20-10115 (March 22, 2021), is attached to the Appendix as Appendix "A".

The Summary Judgment Order of the United States District Court, Northern District of Georgia, *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB (December 5, 2019), is attached to the Appendix as Appendix "B".

The Motion to Dismiss Order of the United States District Court, Northern District of Georgia, *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB (March 14, 2019), is attached to the Appendix as Appendix "C".

STATEMENT OF THE BASIS FOR THE JURISDICTION

The judgement of the Court of Appeals was entered on March 22, 2021. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment (Amendment I) to the United States Constitution prevents the government from making laws which regulate an establishment of religion, or that would prohibit the free exercise of religion, or abridge the freedom of speech, the freedom of the press, the freedom of assembly, or the right to petition the government for redress of grievances.

The Fourteenth Amendment states that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Since 2006, Pro Se Nathaniel Borrell Dyer has consistently attended and participated in public comment at Atlanta Independent School System (AISS) Board meetings. Mr. Dyer has a longstanding reputation for advocating for children, who are predominantly Black, in economically challenged neighborhoods of Atlanta, Georgia. Over the past 14 years, Mr. Dyer has garnered support from the community, as well as AISS employees. He has been successful in advocating on behalf of AISS educators, bus drivers and custodial workers. As a result of his tireless activism, Mr. Dyer had the honor of being endorsed by the Atlanta Association of Educators (AAE) and their parent organization the National Association of Educators (NEA) in his bid for AISS School Board in 2017. Mr. Dyer's mother, who is a retired educator of 33 years, was also a longtime member of her local teacher's union and the NEA.

Mr. Dyer, who is a graphic artist, has been creating and distributing satirical flyers critical of AISS policies since 2009. Before the board meetings, he ensures that each board member receives a copy of the flyer. Mr. Dyer's first flyer depicted AISS Interim Superintendent Erroll Davis, an African American man, donning a Ku Klux Klan robe. This flyer made national news as it protested Davis' policy to close 13 schools in low-income communities on the south side of Atlanta which were predominately Black.

AISS, who is no stranger to wrongdoing, was involved in what is rivaled to be the worst school cheating scandal in U.S. history. According to an 800 page Investigative Report, "A culture of fear and a conspiracy of silence infected this school system, and kept many teachers from speaking freely about misconduct." The report stated, "From the onset of this investigation, we were confronted by a pattern of interference by top APS leadership in our attempt to gather evidence." Mr. Dyer is completely aware of the tactics AISS uses on those they wish to silence. For example, Mr. Dyer has been falsely accused of fighting

a student; he was instructed not to raise his hand to ask questions in meetings; was forcefully removed from meetings just for being in attendance, and was labeled a pedophile by AISS. To prove Mr. Dyer's case even further, the character assassination tactics of AISS can be seen by this statement, "as AISS had a substantial government interest in "preserving meeting decorum" and the suspensions were necessary because Mr. Dyer continued to disrupt meetings when he was on school property, regardless of whether he was able to speak or enter the meeting room."

On February 8, 2018, Mr. Dyer was attending a community meeting at Perkinson Elementary School in Atlanta, Georgia. During the meeting, AISS Chief Ronald Applin arrived and told Mr. Dyer that he was not allowed on the campus. When Mr. Dyer asked for an explanation, Applin callously dropped a stack of papers in his lap which included the letters that served as trespass warnings. One letter referenced the February 5, 2018 AISS board meeting where Mr. Dyer distributed a satirical flyer. The letter read in part, "You once again introduced racist and hate-filled epithets at an ABOE meeting. Specifically, you passed out flyers to audience members that contained the phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it. (Exhibit C – February 5, 2018 Flyer). These insulting references are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community. These references fail to advance any meaningful discourse upon which the Board or Superintendent could possibly act. We cannot and will not allow such abhorrent and hate-filled behavior in a meeting of an organization whose sole purpose is to educate children."

This letter of trespass represented the third suspension delivered to Mr. Dyer with no opportunity to contest the ban.

PROCEDURE

I. District Court's Motion to Dismiss Proceedings

AISS holds monthly community meetings with a time set aside for public comment. Speakers are asked to sign up between 5-5:50 p.m. Once signed up, speakers are given two minutes; or four minutes if another speaker has yielded their time. When the meeting starts, speakers are called in the order they signed up. Board policy states there should be no applauding, cheering, jeering or speech that defames individuals or stymies or blocks meeting progress. Board policy also states that no board member should interrupt the speaker because it may impugn the speaker's motives.

On February 5, 2018, Mr. Dyer was granted two minutes to speak. As he was speaking, his microphone was cut off before his time ended. According to Mr. Dyer's video evidence, AISS General Counsel Glenn Brock, partner at Nelson, Mullins, Riley and Scarborough, told the Board Chair that the flyer Mr. Dyer was holding contained racially charged information and he should not be allowed to continue to speak. AISS Board Chair Jason Esteves agreed and informed Mr. Dyer that his time for public comment was over. Mr. Dyer responded by asking the Board Chair if he knew what satire was and told him that the flyer was satire. The Board Chair stated, "It is not".

Mr. Dyer brought this suit under 42 U.S.C. § 1983 against AISS for violations of his right to free speech under the First Amendment (count 1) and right to procedural due process under the Fourteenth Amendment (count 2). He also alleges claims that the Court construes as arising under state law for slander per se (count 3), discrimination and retaliation (count 4), and harassment (count 5).

February 8, 2018 was Mr. Dyer's third time receiving a letter of suspension. The suspension letter accused Mr. Dyer of using "racist and hate-filled epithets," [1-1] ¶ 47, based on photoshopped fliers containing the tagline "unnigged coming soon" and a photo of AISS Superintendent Meria J. Carstarphen wearing a jersey superimposed with the word "FALCOONS." Mr. Dyer

claims he used no racially insensitive language in his verbal comments and that the suspension was based only on the literature distributed at the meeting. The suspension was for one year. The suspensions restricted Mr. Dyer from participating in public comment, stepping foot upon any AISS property, or communicating with any AISS personnel. This suspension was to start on February 6, 2018 and end in one year. There were no options given to contest the ban.

The first suspension occurred on January 15, 2016. The suspension letter alleged that Mr. Dyer used racial slurs and derogatory terms that violated the rules of decorum for school board meetings. The suspension lasted six months, until July 2016. There were no options given to contest the ban.

On February 1, 2016, Mr. Dyer attended the next meeting in order to contest the ban. He was not allowed to speak during the public-comment segment and was, in his words, "harassed" by resource officers for attending.

The second suspension occurred on October 11, 2016. Mr. Dyer was told this suspension was based, at least in part, on his use of the word "Sambos" to refer to AISS students during a public comment session. Mr. Dyer does not deny using this term but states that he was not referring to AISS students. Instead, he contends he was not given an opportunity to finish or expound upon his statement before being asked to step down. Mr. Dyer was led out of the meeting by AISS officers while he tried to explain his use of the term. This suspension lasted fourteen months, until December 31, 2017. There were no options given to contest the ban.

AISS moved to dismiss all of Mr. Dyer's counts for failure to state a claim. AISS argued, and Mr. Dyer contested, that his speech at the school board meetings was not protected by the First Amendment. First, AISS alleged that Mr. Dyer's reference to "Sambos" was not protected as it was "insulting, racially-insensitive language" used in reference to AISS students. [2-1] at 4-5. Second, AISS alleged that Mr. Dyer's distribution of flyers containing the

phrase "unnigged" and "FALCOONS" was not protected because it involved "offensive and racially-charged" language aimed at "mocking" a school board official. *Id.* at 17. AISS also appeared to argue that Mr. Dyer's use of the word "buffoon" or other derogatory terms to criticize the school board fell outside the First Amendment's protections. The district court soundly rejected such an argument. It is beyond peradventure that a citizen has a First Amendment right to criticize government officials. *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001) ("The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government and government officials."). Contrastingly, when the district court viewed the complaint in the light most favorable to Mr. Dyer, they stated that AISS's suspensions were issued in direct response to Mr. Dyer's alleged protected speech at the school board meetings.

The district court wanted to make it abundantly clear that the terms Mr. Dyer used are abhorrent. But abhorrence does not ipso facto bring them outside the First Amendment's protection.

The district court also recognized that the restrictions were also a form of prior restraint on Mr. Dyer's speech. Such restraints occur when the Government has "den[ied] access to a forum before the expression occurs." *Bourgeois v. Peters, 387 F.3d 1303, 1319 (11th Cir. 2004) (quoting United States v. Frandsen*, 212 F.3d 1231, 1236-37 (11th Cir. 2000)). And a "prior restraint of expression comes before [the] court with 'a heavy presumption against its constitutional validity.'" *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165 (5th Cir. 1978) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

Following *Cyr v. Addison Rutland Supervisory Union,* the district court did not hold that Mr. Dyer "possessed a liberty interest-independent of the First Amendment-in accessing school property." *Id.* It did, however, allow his claim to proceed on the basis that he had a liberty interest in engaging in public comment at school board meetings.

The district court also found that Mr. Dyer had alleged

sufficient facts, which AISS had not rebutted, to make it at least plausible that a pre-deprivation remedy was practical before he was suspended. AISS's suspensions were not issued immediately or as an emergency measure to stop a live disruption. E.g., [1-1] at 45 (suspending Mr. Dyer on October 11, 2016 for conduct at an October 10, 2016 meeting). AISS was able to predict that a hearing was required before suspending Mr. Dyer because it took the time to create a letter that applied prospectively to him. Moreover, as AISS has presumably been clothed with the state's authority to suspend persons from attending public meetings, it is its "duty ... to provide pre-deprivation process." *Burch*, 840 F.2d at 802 n.10.

The district court's conclusion was that Mr. Dyer's allegations made it plausible that he was entitled to a hearing before AISS deprived him of his liberty interest. Under these circumstances, a post-deprivation remedy, such as the Georgia Open Meetings Act (GOMA), would not satisfy due process. Mr. Dyer's procedural due process claim was therefore allowed to proceed.

II. District Court's Summary Judgment Proceedings

AISS moved for summary judgment on Mr. Dyer's constitutional claims. Although conceding Mr. Dyer's offensive speech was "protected" under the First Amendment, AISS argued there was no genuine dispute that, as a matter of law, its suspending Mr. Dyer from attending community meetings was lawful because that offensive speech was disruptive and violated its policies on proper decorum. In other words, AISS insisted that it removed Mr. Dyer from its community meetings "not because it disagreed with Mr. Dyer's message, but because it regarded his use of racially-insensitive language to be ... disruptive to the meeting." (emphasis added). As for Mr. Dyer's due process claim, AISS argued that the claim failed because it was duplicative of the First Amendment claim.

In support of its motion, AISS submitted a declaration from its deputy superintendent. The deputy superintendent stated that, at the October 16, 2016 community meeting,

Mr. Dyer refused to leave the speakers' podium when instructed to do so. Following Mr. Dyer's refusal, police officers escorted Mr. Dyer from the meeting, and Mr. Dyer continued to shout and curse outside of the meeting room. AISS also submitted the three suspension letters: one from January 15, 2016, one from October 11, 2016, and one from February 6, 2018[1]. In the January 15, 2016 letter, AISS told Mr. Dyer that he was suspended because his use of racial slurs was "outside the bounds [of] decorum," "offensive," and "failed to advance any meaningful discourse." In the October 11, 2016 letter, AISS stated that Mr. Dyer's use of the word "sambos" was "completely outside the bounds of civility," "offensive," and "failed to advance any meaningful discourse." AISS informed Mr. Dyer that he was suspended from participating in meetings or entering AISS property until December 31, 2017. AISS also told Mr. Dyer that, if he entered school property, he would be arrested for trespassing and warned him of additional consequences if his conduct continued, including permanent suspension of his privilege to speak during meetings. In the February 6, 2018 letter, AISS again suspended Mr. Dyer from meetings and prohibited him from entering school property because of his "inappropriate and disruptive behavior." The suspension and trespass warning were for the remainder of the term of the letter's author, and the letter again told Mr. Dyer that, if he entered school property, he would be arrested. It stated that his flyers were "offensive" and "failed to advance any meaningful discourse."

On December 5, 2019, the district court granted AISS's motion for summary judgment on both remaining constitutional claims. For the First Amendment claim, the district court found that AISS's restrictions on Mr. Dyer were content-neutral, as AISS "cut off Mr. Dyer's speech because he expressed himself in a hostile manner

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[1] The February 6, 2018 letter appeared during Mr. Dyer's deposition. Mr. Dyer's February 8, 2018 letter was personally delivered to him by AISS Chief Ronald Applin. Mr. Dyer is on record filing the document in Fulton County Superior Court on July 9, 2018 where it was authenticated.

that disrupted meeting progress." The district court also found the restrictions were narrowly-tailored to advance a substantial government interest, as AISS had a substantial government interest in "preserving meeting decorum" and the suspensions were necessary because Mr. Dyer continued to disrupt meetings when he was on school property, regardless of whether he was able to speak or enter the meeting room. As to the Fourteenth Amendment claim, the district court found that, although Mr. Dyer had a protected liberty interest in attending the AISS community meetings, AISS had no requirement to provide him a pre-deprivation remedy because he had an adequate post-deprivation remedy in the Georgia Open Meetings Act ("GOMA"). See Ga. Code Ann. § 50-14-1. Therefore, the district court found that there was no procedural due process violation.

Defendants' motion [34] for summary judgment was granted. To the extent that Mr. Dyer intended to file a cross-motion [37] for summary judgment, that motion was denied. Mr. Dyer timely filed his notice of appeal.

III. 11th Circuit Court Proceedings

Because Mr. Dyer's claim is based on private speech on government property, we apply the three-step analysis established by the Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). First, because not all speech is protected, we must determine if Mr. Dyer engaged in speech protected by the First Amendment. *Id.* at 797. Second, if that speech was protected, "we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, we must determine whether AISS suspending Mr. Dyer from its public meetings satisfied "the requisite standard" that is applied to the forum identified in step two. *Id.* The first and second steps are uncontested. AISS concedes Mr. Dyer's speech was protected by the First Amendment, and the 11th Circuit agreed. See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) ("Speech may not be

banned on the ground that it expresses ideas that offend."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). The 11th Circuit also agreed with the parties' other concession—that an AISS community meeting is a "limited public forum." *See Cambridge Christian Sch. Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1237 (11th Cir. 2019) ("[W]e have identified the public-comment portions of school board meetings, among other things, as limited public forums.").

Here, the AISS board policies outlining how someone may speak at a community meeting, prohibiting disruption, and requiring decorum are content-neutral policies. The 11th Circuit agreed with the district court's determination that AISS did not regulate Mr. Dyer's speech based on its content, i.e., because it was offensive. Rather, AISS regulated Mr. Dyer's offensive speech because it was disruptive. The letters sent by AISS explained that his suspensions were the result of his conduct "fail[ing] to advance any meaningful discourse." The fact that AISS also told Mr. Dyer that his comments were "abusive, abhorrent, [and] hate-filled" was merely support for the suspensions for disruptive and unruly behavior; the offensiveness of the comments themselves was not the basis for his suspension. We have made this distinction before, and we believe it is a meaningful one. *See, e.g., Jones*, 888 F.2d at 1332 ("The district court found that Jones had complied with the time, place and manner restrictions imposed on the meeting and was silenced because of the content of his speech. We disagree. In our opinion, the mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion.").

Moreover, AISS's actions seem justified as, by Mr. Dyer's own admission, his aggressive and offensive choice of words were calculated to "send a message" and engage in "psychological warfare." Removing Mr. Dyer

for his disruptive behavior and lack of proper decorum at an AISS community meeting was content-neutral and, thus, permissible. The district court therefore did not err in granting AISS summary judgment as to the First Amendment claim.

Mr. Dyer asserted that the district court erred by not finding that AISS had "altered and falsified evidence in violation of Georgia Code § 16-10-20.1 and ABA Model Rule of Professional Conduct Rule 3.3.(a)(3)." Specifically, Mr. Dyer contended that there is a dispute between the February 6 letter and a different letter dated February 8, 2018. It appears that Mr. Dyer presumed that the February 6, 2018 letter shown to him at his deposition was actually the February 8, 2018 letter and AISS deliberately misled him. He then argued to the district court, and here on appeal, that AISS "falsified" this evidence.

The 11th Circuit concluded that Mr. Dyer failed to adequately explain—and cite to legal authority demonstrating—how AISS falsified evidence and how that alleged falsification constituted violations of section 16-10-20.1 and rule 3.3(A)and abandoned the argument.

Moreover, Mr. Dyer had an adequate post-deprivation remedy in state law under GOMA, which authorizes an individual to file a civil suit when he or she is affected by a violation of the statute, including the requirement that government meetings be open to the public. See Ga. Code Ann. § 50-14-1. Through GOMA, Mr. Dyer could seek an injunction or other equitable relief to challenge his trespass notice. *See id.*; see also *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (holding that an adequate state remedy providing for a post-deprivation process is sufficient to cure a procedural deprivation). Because a pre-deprivation remedy was impracticable in this situation and because GOMA provides an adequate post-deprivation remedy, Mr. Dyer's Fourteenth Amendment claim fails. The 11th Circuit affirmed the district court's order granting summary judgment in favor of AISS.

The following pages contain the documents personally delivered by AISS Chief Ronald Applin to Mr. Dyer.

February 8, 2018 Trespass Warning Documents

ATLANTA PUBLIC SCHOOLS

Jason Esteves
Chair, Atlanta Board of Education
Center for Learning & Leadership
130 Trinity Avenue, S.W.
Atlanta, Georgia 30303
Phone 404-802-2801
Fax 404-802-1801
www.atlantapublicschools.us

February 8, 2018

Via Personal Delivery

Nathaniel B. Dyer
202 Joseph E. Lowery Blvd NW
Atlanta, GA 30314

Re: Suspension from Public Comment at Atlanta Board of Education Meetings

Dear Mr. Dyer:

This letter is to inform you that your privilege to speak at any meeting sponsored by the Atlanta Board of Education ("ABOE") is hereby suspended for one year beginning on February 6, 2018. In addition, this letter will serve as a trespass warning. You are instructed not to set foot on Atlanta Public Schools ("APS") property during this one-year suspension. If you do, you will be arrested for trespassing. You are further instructed not to have any communication whatsoever with any employee or representative of the ABOE or APS for the duration of this suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication. These actions are a direct result of yet another instance of inappropriate and disruptive behavior by you at the February 5, 2018 ABOE meeting. This is your *third* violation of ABOE directives to you, and future occurrences will not be tolerated.

As you know, on January 15, 2016, you were suspended from speaking at any ABOE meeting because of your use of several racial slurs during the public comment portion of the January 2016 ABOE meeting. You then attended a town hall meeting and disrupted the meeting being led by Dr. Carstarphen's senior staff. As a result of that behavior, Former APS Chief of Police Sands issued a trespass warning against you, prohibiting you from coming onto school property. You were notified that any future similar demonstration may result in additional suspensions. (Exhibit A – January 15, 2016 Letter). Your suspension at that time ended in July 2016. However, despite that warning, on October 10, 2016, you used a racial slur when you referred to APS students as "sambos" during the public comment portion of the ABOE meeting. That behavior led to another suspension and trespass warning through December 31, 2017. (Exhibit B – October 11, 2016 Letter). You were also warned that similar conduct in the future could lead to additional consequences, including permanent suspension of your privilege to speak at APS board meetings.

Nevertheless, on February 5, 2018, you once again introduced racist and hate-filled epithets at an ABOE meeting. Specifically, you passed out flyers to audience members that contained the

phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it. (Exhibit C – February 5, 2018 Flyer). These insulting references are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community. These references fail to advance any meaningful discourse upon which the Board or Superintendent could possibly act. We cannot and we will not allow such abhorrent and hate-filled behavior in a meeting of an organization whose sole purpose is to educate children.

I once again further advise you that any further demonstration of such conduct may result in additional consequences, including permanent suspension of your privilege to speak at APS board meetings.

Sincerely,

/s/ Jason Esteves

Jason Esteves

cc: Meria J. Carstarphen, Superintendent
Ronald Applin, APS Chief of Police
D. Glenn Brock, General Counsel

ATLANTA PUBLIC SCHOOLS
Making A Difference

Courtney D. English
Chair, Atlanta Board of Education
Center for Learning & Leadership
130 Trinity Avenue, S.W.
Atlanta, Georgia 30303
Phone 404-802-2801
Fax 404-802-1801
www.atlantapublicschools.us

January 15, 2016

Via Email (nate@natbotheedge.com) and U.S. Mail

Nathaniel B. Dyer
202 Joseph E. Lowery Blvd NW
Atlanta, GA 30314

Re: Suspension from Public Comment at Atlanta Board of Education Meetings

Dear Mr. Dyer:

This letter is to inform you that your privilege to speak at any meeting sponsored by the Atlanta Board of Education (ABOE) is hereby suspended until July 2016.

This action is taken as a result of your public comments during community meeting portion of the January meeting of the ABOE. Using race-based slurs (including the "N" word, "coons," and "buffoons") was outside the bounds decorum that such a setting demands. They were not only disrespectful but were offensive to our board, our superintendent and our staff. Further, those abusive comments failed to advance any meaningful discourse upon which the board or superintendent could possibly act. As Chairman of the Board, I cannot and will not allow such abhorrent and hate-filled epithets, that can create a hostile work environment, during a meeting of an organization where the sole purpose is to advance the education of children. Members of our staff must attend our meetings as well as children along with their families are often present and none of them deserve to be subjected to such behavior.

I would further advise you that any further demonstration of such conduct may result in additional consequences including permanent suspension of your privilege to speak at APS board meetings.

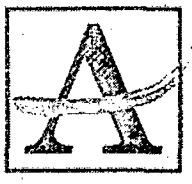
Sincerely,

/s/ Courtney D. English

Courtney D. English

cc: Meria J. Carstarphen, Superintendent
D. Glenn Brock, General Counsel

Exhibit A



ATLANTA PUBLIC SCHOOLS

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Center for Learning & Leadership
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Atlanta, Georgia 30303
Phone 404-802-2801
Fax 404-802-1801
www.atlantapublicschools.us

October 11, 2016

Via Personal Delivery

Nathaniel B. Dyer
202 Joseph E. Lowery Blvd NW
Atlanta, GA 30314

Re: Suspension from Public Comment at Atlanta Board of Education Meetings

Dear Mr. Dyer:

This letter is to inform you that, once again, your privilege to speak at any meeting sponsored by the Atlanta Board of Education ("ABOE") is hereby suspended until December 31, 2017. In addition, this will serve as a trespass warning. You are instructed not to set foot on Atlanta Public Schools ("APS") property for the remainder of this year and next year. If you do, you will be arrested for trespassing. These actions are a direct result of your inappropriate and disruptive behavior at yesterday's October 10, 2016 ABOE meeting.

As you know, on January 15, 2016, you were suspended from speaking at any ABOE meeting because of your use of several racial slurs during the public comment portion of the January ABOE meeting (see attached 1/15/2016 letter from C. English to you). You then attended a *town hall meeting and disrupted the meeting being led by Dr. Carstarphen's senior staff. As a* result of that behavior, Former APS Chief of Police Sands issued a trespass warning against you, prohibiting you from coming onto school property. (Copy attached). You were notified that any future similar demonstration may result in additional suspensions. Your suspension at that time ended in July 2016.

Nevertheless, on October 10, 2016, you brazenly ignored our previous warnings and again, you used a racial slur when you referred to APS students as "sambos" during the public comment portion of the ABOE meeting. You also referenced on the official sign-in sheet to speak at the ABOE meeting having previously spoken to "[a]ll of these fools." (Copy attached). Your insulting comments, particularly your reference to APS students as "sambos," are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community. Your comments failed to advance any meaningful discourse upon which the Board or Superintendent could possibly act.

In addition to subjecting everyone in the meeting to your offensive language, you refused to leave the podium after I repeatedly directed you to do so. Police ultimately escorted you from

Exhibit B

the meeting room, but you continued to disrupt the meeting by shouting within and outside of the room. We cannot and we will not allow such abhorrent and hate-filled behavior in a meeting of an organization whose sole purpose is to educate children.

I would further advise you that any further demonstration of such conduct may result in additional consequences, including permanent suspension of your privilege to speak at APS board meetings.

Sincerely,

/s/ Courtney D. English

Courtney D. English

Enclosures

cc: Meria J. Carstarphen, Superintendent
Ronald Applin, APS Chief of Police
D. Glenn Brock, General Counsel


BLANK'S FALCONS may NEVER win the BIG ONE but he's got a PRO-BOWL PUPPET that's bringing home all the TROPHIES to help destroy BLACK children and their communities.
$2,000,000+
BEST ACADEMY
DOUGLASS
L.P. MILES ELEMENTARY
BETHUNE
CORETTA SCOTT-KING
Exhibit C
Created by Nathaniel B. Dyer, UNNIGGED


ROOKIE BASTROPHE
ALL-STAR
2015
2018
FALCOONS
SUPERINTENDENT
Meria Catastrophe's
TOP 10
CATASTROPHIC
PLAYS
1 SELLING SCHOOLS - She tackles the issues of deeds from the city to sell them to developers for gentrification of Black neighborhoods.
2 CLOSING SCHOOLS - She closed schools such as Bethune ES and Kennedy MS located in the midst of a minimum of five billion dollars in development which includes Arthur Blank's Mercedes Benz Stadium Project.
3 MERGING SCHOOLS - She has merged Black students together into overcrowded situations while proposing options to alleviate overcrowding for White students.
4 PRIVATIZING SCHOOLS - She gives private operators, Purpose Built Communities and Kindesi, carte blanc and long contracts with little to no accountability.
5 CHARTER SCHOOLS - She places Kindesi and KIPP schools in the heart of neighborhoods where she claims there is low student population. Her latest KIPP move will kill Douglas High School.
6 OPPORTUNITY SCHOOL DISTRICT (OSD) - She hired the architect of Gov. Nathan Deal's OSD proclaiming to save schools from takeover but she closed them instead.
7 AGE DISCRIMINATION - More than 100 teachers over 40 are suing this rookie for age discrimination. The culture of fear and intimidation still exists within Atlanta Public Schools and it may have intensified.
8 POLICE FORCE - She created a police force claiming they are to aid with mentoring students. To date, bullying and discipline issues are still prevalent within APS at an all-time high.
9 BODY CAMERAS FOR OFFICERS - Offering little money for exposure and resources to help children, this rookie wants to expose them in a hi-tech manner to be legally profiled for life.
10 INEQUITIES - She caters heavily to White communities through whatever measures it takes to help them maintain stability and an uninterrupted learning experience. Anything to the contrary, this would cause White Flight. And Lawdy, She's Sho nuffin Don't Wants Dat!
It's time to retire this rookie. A new contract cannot be an option for what this third year rookie has done to Atlanta's children who possess so much promise and potential.
UNNIGGED COMING SOON! For more information, please contact Nathaniel B. Dyer at 404.964.6427 or email district7@nathanielbd

REASON FOR GRANTING THE PETITION

THE ARGUMENT

"In limited public forums, to avoid infringing on First Amendment rights, the government regulation of speech only need be viewpoint-neutral and 'reasonable in light of the purpose served by the forum.'" *Galena v. Leone*, 638 F.3d 186, 198 (3d Cir. 2011). To determine whether a restriction on speech in a limited public forum passes constitutional muster, the court must analyze whether the restriction on speech is a valid time, place, or manner restriction. *Id.* at 199. A restriction on speech is a valid time, place, or manner restriction if it (1) is justified without reference to the content of the regulated speech; (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open alternative channels for communication of the information. *Id.*

The 11th Circuit claimed to have applied the three-step analysis established by the Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). The 11th Circuit agreed that Mr. Dyer's speech was protected speech. They also determined that it was given in a limited public forum. The step unanswered was that the government restriction must have been content-neutral for time, place, and manner of access all of which must have been narrowly tailored to serve a significant government interest.

I. Mr. Dyer Briefed the District Court on Narrow-Tailoring

The 11th Circuit stated in part, "We offer no comment on the issues of narrow-tailoring or satire because Mr. Dyer has failed to brief the issue adequately or failed to raise it below to the district court."

To say that Mr. Dyer did not brief narrow-tailoring and satire in the district court is not only misleading but utterly false. The record shows that Mr. Dyer did in fact brief narrow-tailoring as follows:

Mr. Dyer also argues that his suspensions constitute an overbroad, "categorical ban," rather than being narrowly tailored. [35–1] at 13.

Mr. Dyer goes even futher by addressing narrow-tailoring by this excerpt:

> A categorical ban on speech is not tailored at all, as it entirely forecloses a means of communication. *Cf Hill v. Colo.*, 530 U.S. 703, 726 (2000) ("when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal"). In order to be narrowly tailored, a time, place, or manner restriction must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at W. Here, ostensibly because of a satirical flyer and words the Defendant viewed as offensive, Plaintiff was banned not only from the AISS school grounds, but from all premises owned by the AISS. He was not banned only during regular school hours, but at all hours, for a total of two years and eight months.
>
> In addition to proscribing certain conduct by the *Visors*, the injunctions also prohibited "mak[ing], post[ing] or distribut[ing] comments, letters, faxes, flyers or emails regarding [Hansen or Streeter] to the public" at large. This broad restriction expressly forbidding future speech is a classic example of a prior restraint. *See Alexander v. United States*, 509 U.S. 544, 550 (1993). Prior restraints, which we have characterized as "the most serious and least tolerable infringement on First Amendment rights," carry a heavy presumption of invalidity. *Nash v. Nash*, 232 Ariz. 473, 481–82, ¶ 32, 307 P.3d 40, 48–49 (App. 2013). A restriction like this based on the content of speech is permissible only if narrowly tailored to achieve a compelling state interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Because of the dangers of prior restraints, even content-neutral

injunctions should not burden more speech than necessary to serve a significant government interest. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Here, the injunctions at issue were not narrowly tailored and were overbroad because they prohibited all public speech regarding Hansen or Streeter.

The record clearly refutes the 11th Circuit's assertion that Mr. Dyer failed to brief the subject of narrow-tailoring.

II. Mr. Dyer Briefed the District Court on Satire

The following excerpt from Mr. Dyer's motion can prove that he did in fact brief the issue:

> The February 8, 2018 trespass warning was issued to the Plaintiff for a flyer that he created. The flyer, commonly known as satire, depicted Superintendent Carstarphen as a puppet on a string for billionaire Arthur Blank's business developments around Vine City and English Ave. which are located in downtown Atlanta, Georgia. The tombstones represented the schools Superintendent Carstarphen has closed and/ or merged on the neighborhood children during her tenure. The back of the flyer has a photoshopped image of the superintendent wearing a football jersey with the word "FALCOONS" on it and a list with the caption "Superintendent Meria Carstarphen's Top Ten Catastrophic Plays." Being a community activist and a seasoned graphic designer for 30 years, the Plaintiff uses his artistic capability to protest bad policies governed by the Superintendent and elected officials that are unfavorable to the children of AISS. For close to 10 years, the Plaintiff has designed up to 20 satirical flyers which have been instrumental in impacting Board policy. As common practice at AISS Board's Community Meetings, Plaintiff printed hundreds of colorful copies at his own expense and distributed them to the Board, Superintendent and to those in the audience who would accept them.
>
> Both AISS Board Chair Jason Esteves and AISS General Counsel D. Glenn Brock, Nelson Mullins Riley

and Scarborough LLP, ordered the Plaintiff removed by law enforcement even after he explained that the flyer was satire which is protected by the First Amendment. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L.Ed.2d. 41 (1988): Hustler Magazine published a parody of a liquor advertisement in which Rev. Jerry Falwell described his "first time" as a drunken encounter with his mother in an outhouse. The Court held that political cartoons and satire such as this parody "have played a prominent role in public and political debate. And although the outrageous caricature in this case "is at best a distant cousin of political cartoons," the Court could see no standard to distinguish among types of parodies that would not harm public discourse, which would be poorer without such satire."

Mr. Dyer's motion contained the definition for satire[2]. Further evidence shows Mr. Dyer on record for submitting interrogatories which posed questions to the AISS Board Chair related to his comments on satire. The following excerpt is from Mr. Dyer's interrogatories:

Statement No. 29: Mr. Dyer explained to Board Chair Esteves that the flyer was satire. (Exhibit 7)
Response: Admitted.
Statement No. 30: Board Chairman Jason Esteves told Mr. Dyer that it was not satire. (Exhibit 7)
Response: Admitted. Doc. 40, Pg. 14; Appendix O (Video of Feb. 5th board meeting on USB drive).

Finally, Mr. Dyer also cited the U.S. Supreme Court's decision which unanimously agreed in *Hustler v. Falwell*, 485 U.S. 46 (1988), that a parody, which no reasonable person expected to be true, was protected free speech. The justices also stated that upholding the 11th Circuit's decisions would put all political satire at risk.

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[2] Satire is a genre of literature that uses wit for the purpose of social criticism. Satire ridicules problems in society, government, businesses, and individuals in order to bring attention to certain follies, vices, and abuses, as well as to lead to improvements. Irony and sarcasm are often an important aspect of satire.

III. This Court's Precedents State that "Giving Offense" is a Viewpoint

A limited public forum, according to the Supreme Court, is a forum set aside by government for expressive activity. Like a traditional public forum, content-based speech restrictions in a designated public forum are subject to strict scrutiny. Content-based restrictions limit speech based on its subject matter. Viewpoint discrimination is the singling out of a particular opinion or perspective on that subject matter for treatment unlike that given to other viewpoints. In the words of Justice Anthony M. Kennedy in *Rosenberger v. Rector and Visitors of the Univ. Of Virginia* (1995). Viewpoint discrimination is thus an egregious form of content discrimination.

From the majority opinion of this court, written by Justice Samuel A. Alito Jr. and joined by Chief Justice John G. Roberts Jr., Justice Clarence Thomas and Justice Stephen G. Breyer; but a concurring opinion by Justice Anthony M. Kennedy, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, agreed:

> [The Government argues] that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so ... The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The 11th Circuit's opinion states, "We agree with the district court's determination that AISS did not regulate

Mr. Dyer's speech based on its content, i.e., because it was offensive. Rather, AISS regulated Mr. Dyer's offensive speech because it was disruptive. The letters sent by AISS explained that his suspensions were the result of his conduct "fail[ing] to advance any meaningful discourse." The fact that AISS also told Mr. Dyer that his comments were "abusive, abhorrent, [and] hate-filled" was merely support for the suspensions for disruptive and unruly behavior; the offensiveness of the comments themselves was not the basis for his suspension.

The 11th Circuit's order reads in part, "The suspension and trespass warning were for the remainder of the term of the letter's author, and the letter again told Mr. Dyer that, if he entered school property, he would be arrested. It stated that his flyers were offensive and "failed to advance any meaningful discourse." Because Mr. Dyer's speech was defined by its content (i.e. "unnigged" and "FALCOONS"), and then regulated and censored, this court has described this as viewpoint discrimination.

The district court's records reflect that AISS argued Mr. Dyer's speech at the school board meetings was not protected by the First Amendment. First, AISS alleged that Mr. Dyer's reference to "Sambos" was not protected as it was "insulting, racially-insensitive language" used in reference to AISS students. [2-1] at 4-5. Second, AISS alleges that Mr. Dyer's distribution of flyers containing the phrase "unnigged" and "FALCOONS" was not protected because it involved "offensive and racially-charged" language aimed at "mocking" a school board official. *Id.* at 17. AISS also appears to argue that Mr. Dyer's use of the word "buffoon" or other derogatory terms to criticize the school board fell outside the First Amendment's protections.

The 11th Circuit's conclusion cannot be squared with this court's precedents. The reoccurring theme in the 11th Circuit's order is the word "offensive". This court has been clear in its assertion that "giving offense" is a viewpoint. We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street*

v. New York, 394 U. S. 576, 592 (1969). *See also Texas v. Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55–56 (1988); *Coates v. Cincinnati*, 402 U. S. 611, 615 (1971); *Bachellar v. Maryland*, 397 U. S. 564, 567 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 509–514 (1969); *Cox v. Louisiana*, 379 U. S. 536, 551 (1965); *Edwards v. South Carolina*, 372 U. S. 229, 237–238 (1963); *Terminiello v. Chicago*, 337 U. S. 1, 4–5 (1949); *Cantwell v. Connecticut*, 310 U. S. 296, 311 (1940); *Schneider v. State* (Town of Irvington), 308 U. S. 147, 161 (1939); *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937).

"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745-746, 98 S.Ct., at 3038. *See also Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1366, 22 L.Ed.2d 572 (1969) ("It is firmly settled that ... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

The Supreme Court has long identified the suppression of speech by public officials to be unlawful: It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys (citations omitted) ... When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. (Citations omitted.) *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-830 (1995) (forbidding viewpoint discrimination regardless of nature of forum).

The 11th Circuit stated, "We have made this distinction before, and we believe it is a meaningful one. *See, e.g.*,

Jones, 888 F.2d at 1332 ("The district court found that Jones had complied with the time, place and manner restrictions imposed on the meeting and was silenced because of the content of his speech. We disagree. In our opinion, the mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion.")."

In contrast to Jones, Mr. Dyer was silenced specifically because he distributed a satirical flyer that contained the phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it that the AISS board found to be offensive. Here, ostensibly because of a satirical flyer and words the AISS board viewed as offensive, Mr. Dyer was banned not only from the AISS school grounds, but from all premises owned by the AISS. Mr. Dyer was not banned only during regular school hours, but at all hours, for a total of two years and eight months.

The current state of First Amendment jurisprudence, as articulated in *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam), prohibits restrictions on mere advocacy and requires the government to prove that the expression it would sanction is intended to incite imminent lawless action and is likely to produce such action. (The Government may not retaliate against individuals or associations for their exercise of First Amendment rights.); *see also Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) (retaliatory prosecution goes to the core of the First Amendment). ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978):

The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to

pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, *The Quill* 56, 57 (Nov. 1962).

The 11th Circuit doubled down on their rhetoric by stating, "AISS's actions seem justified as, by Mr. Dyer's own admission, his aggressive and offensive choice of words were calculated to "send a message" and engage in "psychological warfare." Removing Mr. Dyer for his disruptive behavior and lack of proper decorum at an AISS community meeting was content-neutral and, thus, permissible. The district court therefore did not err in granting AISS summary judgment as to the First Amendment claim." As the words "Sambo" and "unnigged" were taken out of context, the 11th Circuit's interpretation of Mr. Dyer's use of the phrase "psychological warfare" is not in alignment with this courts precedents. Below is a brief excerpt from Mr. Dyer's deposition in response to the question asked by AISS attorneys at Nelson, Mullins, Riley and Scarborough.

4 · · Q · · What is psychological warfare, in your
5 · · view?
6 · · A · · Psychological warfare is getting into
7 · · someone's head; to get them to think consciously
8 · · about the decisions that they're making.

In comparison to *Hustler Magazine v. Falwell*, Larry Flynt's deposition reveals that he freely admitted running the ad to "settle a score" with Falwell for his criticism of his private life and said he included the small disclaimer at the bottom only at the insistence of his in-house lawyer (David Kahn), who Flynt identified only as "that asshole sitting over there." His goal was "to assassinate" Falwell's integrity. Grutman, who was Falwell's attorney, opened his argument with the words before this court, "Deliberate, malicious character assassination is not protected by the First Amendment to the Constitution." Apparently, this court was not moved or impressed. On February 24, 1988, Chief Justice Rehnquist announced the decision of a unanimous Supreme Court reversing the jury's award of

damages to Jerry Falwell. Rehnquist wrote:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern ... [I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. "'Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred ...' Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

The 11th Circuit suggests that Mr. Dyer had ample channels through which he could communicate with community members and other elected officials. However, the February 8, 2018 letter of trespass states, "You are not to set foot on Atlanta Public Schools ("AISS") property during this one-year suspension. If you do, you will be arrested for trespassing. You are further instructed not to have any communication whatsoever with any employee or representative of the ABOE or AISS for the duration of this suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication."

III. Mr. Dyer was Deprived of His Due Process Rights

The 11th Circuit states, "Mr. Dyer clearly presented such a threat when he shouted racial slurs in front of children present at the board meetings, accused school board officials of committing crimes akin to murder, and tried to "send a message" that school officials were "just as destructive" as members of the Ku Klux Klan." Here, the 11th Circuit is meshing the hearsay of AISS and Mr. Dyer's deposition to paint him as a stark raving lunatic. If the 11th Circuit would have chosen to view Dyer's video evidence and adhered to the precedents of this

court, they would have found the truth and reversed the district court's order. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court established that speech advocating illegal conduct is protected under the First Amendment unless the speech is likely to incite "imminent lawless action."

Dyer has been participating in public comment at AISS since 2006. AISS had 14 years to establish a due process policy to address disruptive speakers who received a trespass warning because of offensive speech.

Before the district court contradicted itself, it believed "some kind of a hearing" is required "before the State deprives a person a liberty or property interest." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). At the Motion to Dismiss, the record clearly shows that AISS asked the Court to apply *Parratt's* principles here and hold that the Georgia Open Meetings Act ("GOMA"), O.C.G.A. § 50-14-1 *et seq.*, provides an adequate state remedy to Mr. Dyer's alleged deprivation. GOMA authorizes anyone to file a civil suit when he or she is affected by a violation of GOMA, such as the requirement that government meetings be open to the public. The district court explained that a cause of action under GOMA is only a post-deprivation remedy in the form of a civil suit. The district court claimed that it was insufficient here. *Parratt* and the adequate-state-remedy doctrine have no application "when the state is in the position to provide pre-deprivation process." *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 801 (11th Cir. 1988); *see also Rittenhouse v. DeKalb Cty.*, 764 F.2d 1451, 1454 (11th Cir. 1985) ("Since pre-deprivation process was not feasible [in *Parratt*], the Court held that the appropriate analysis for a procedural due process claim would focus on postdeprivation remedies."); *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983)

The 11th Circuit has put it this way: "[A] pre-deprivation hearing is practicable when officials have both the ability to predict that a hearing is required and the duty because of their state-clothed authority to provide a hearing." *Burch*, 840 F.2d at 802. In this instance, the 11th Circuit acted in direct

conflict with *Burch* by affirming that a pre-deprivation remedy was impracticable in this situation and claimed GOMA provides an adequate post-deprivation remedy.

In contrast, the district court acknowledged that Mr. Dyer had alleged sufficient facts, which AISS had not rebutted, to make it at least plausible that a pre-deprivation remedy was practical before he was suspended. AISS's suspensions were not issued immediately or as an emergency measure to stop a live disruption. E.g., [1-1] at 45 (suspending Mr. Dyer on October 11, 2016 for conduct at an October 10, 2016 meeting). AISS was able to predict that a hearing was required before suspending Mr. Dyer because it took the time to create a letter that applied prospectively to him. Moreover, as AISS has presumably been clothed with the state's authority to suspend persons from attending public meetings, it is its "duty ... to provide pre-deprivation process." *Burch*, 840 F.2d at 802 n.10.

The district court concluded by saying that Mr. Dyer's allegations make it plausible that he was entitled to a hearing before AISS deprived him of his liberty interest. Under these circumstances, a post-deprivation remedy, such as GOMA, would not satisfy due process. The district court decided Mr. Dyer's procedural due process claim would therefore be allowed to proceed. The district court was correct in its decision.

In response to Mr. Dyer's February 8, 2018 trespass warning inquiry, Assistant Attorney General Jennifer Colangelo stated, "This is not a matter that our office will be able to assist with. The primary duties of this office are to represent State agencies, departments, authorities and the Governor. Our office does not have the authority to oversee the operations of local agencies, or to investigate allegations of First Amendment violations."

In sum, the district court contradicted itself by saying that the GOMA provided an adequate post-deprivation remedy. The 11th Circuit contradicted their own precedents in *Burch* by affirming the district court's decision. The 11th Circuit erred in affirming the district court's decision.

IV. The Questions Presented Give This Court Opportunity to Bring Clear Precedents to "Giving Offense" is a Viewpoint.

From the outset of this case, Mr. Dyer possessed overwhelming evidence in the form of documents and recorded video of each occurrence. At the time, AISS did not record their meetings, therefore, Mr. Dyer had the only recorded evidence of the incidents in question. He did so to protect himself from the malicious tactics of AISS. However, the district court and the 11th Circuit never referenced Mr. Dyer's evidence in their orders. Both courts only responded to hearsay and innuendo from AISS whose goal was to maliciously attack Mr. Dyer's character.

Mr. Dyer has been advocating on behalf of children within AISS and surrounding school systems for over a decade. Mr. Dyer would never call or refer to children as "Sambos" or act in a manner outside of his constitutional freedoms. The district court construed Mr. Dyer's alleged speech as political speech regarding local school governance; this category of speech finds First Amendment protection at "its zenith." *Meyer v. Grant*. Mr. Dyer concedes that the school boards have an interest in running orderly meetings. However, elected officials who randomly and indiscriminately ban a speaker because they are offended by protected speech, contradict the basic premise of the First Amendment and this court's precedents. And the standard that was used in this case (i.e. "The insulting references are completely out of bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community."), is no standard at all. All it does is allow the punishment of unpopular speech, flyers of satire and criticisms that elected officials choose not to hear at their discretion.

The 11th Circuit's Order is in direct conflict with *MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ.* and *Cyr v. Addison Rutland Supervisory Union*. These two cases involved speakers exercising protected speech at school board meetings and were banned because of it. In the case of Mr. Cyr, the district court stated, "The First Amendment

does not permit the ARSU to confine Mr. Cyr's speech to telephone or "assistive technologies" by issuing a blanket notice against trespass when less burdensome alternatives exist. *See Madsen*, 512 U.S. at 765. Accordingly, Mr. Cyr's motion for summary judgment is granted as to his First Amendment freedom of expression claim." In regards to Mr. Cyr's due process, the district court stated, "Upon weighing the *Mathews* factors, the court found the notices against trespass violated Mr.Cyr's due process rights by depriving him of his First Amendment right to express his views at school board meetings without adequate process." The district court in Mr. MacQuigg's case stated, "It is further ordered and declared that, on its face, the "personal attacks" policy of Defendant Albuquerque Public Schools Board of Education violates the First Amendment as applied to the States through the Fourteenth Amendment." "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural ..." *Turner Broadcasting System, Inc. v. Federal Commc'n Comm'n*, 512 U.S. 622, 664 (1994).

The 11th Circuit's Order also contradicts the precedents of this court. The U.S. Supreme Court which unanimously agreed in *Hustler v. Falwell*, 485 U.S. 46 (1988), that a parody, which no reasonable person expected to be true, was protected free speech. The justices also stated that upholding the 11th Circuit's decisions would put all political satire at risk.

In *Matal v. Tam*, 582 U.S. __ (2017), the band called the "Slants" said it wanted to reclaim what is often seen as a slur against Asian Americans. Similarly, Mr. Dyer created the word "unnigged", an online publication, to reclaim the slur into a positive one. In *Tam*, the U.S. Supreme Court unanimously ruled 8-0 that a federal law prohibiting trademark names that disparage others was unconstitutional because "speech may not be banned on the grounds that it expresses ideas that offend." Today,

this court is challenged with protecting these precedents by securing protected speech and satire from viewpoint discrimination from government abuse within limited public forums because "giving offense" is a viewpoint.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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July 4, 2021