Case No. 20-10115-HH

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NATHANIEL BORRELL DYER,
Plaintiffs and Appellant

v.

ATLANTA INDEPENDENT
SCHOOL SYSTEM,
Defendant and Respondents

On Appeal from the
United States District Court for the
Northern District of Georgia Atlanta Division
1:18-cv-03284-TCB

APPELLANT'S REPLY BRIEF

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Nathaniel Borrell Dyer *vs.* AISS Appeal No. 20-10115-HH

11th Cir. R. 26.1-1(a) (enclosed) requires the appellant or petitioner to file a Certificate of Interested Persons and Corporate Disclosure Statement (CIP) with this court within 14 days after the date the case or appeal is docketed in this court, and to include a CIP within every motion, petition, brief, answer, response, and reply filed. Also, all appellees, intervenors, respondents, and all other parties to the case or appeal must file a CIP within 28 days after the date the case or appeal is docketed in this court. **You may use this form to fulfill these requirements.** In alphabetical order, with one name per line, please list all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

(please type or print legibly):

Applin, Ronald

Atlanta Board of Education

Batten, Judge Timothy

Bell, MaryGrace Kathleen

Brock, Glenn D.

Carstarphen, Meria Joel

English, Courtney

Esteves, Jason

Jernigan, David

Moulard, Brandon

Sands-Hall, Marquenta

Warco, Laurence Joseph

Self-Represented Appellant

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Since 2006, Pro Se Nathaniel Borrell Dyer has faithfully participated in public comment at Atlanta Independent School System (AISS) Board Meetings. Dyer has a longstanding reputation for speaking up for children in economically challenged neighborhoods of Atlanta, Georgia. Over the past 14 years, Dyer has garnered support from the community as well as AISS employees. The Defendant states that Dyer used the "n-word," the word "coons," the word "buffoons," and the word "sambo" in reference to Board members and AISS employees and students during the public-comment portion of two Board meetings. Appellee Brief, Pg. 19. Dyer did not attack AISS students and employees in a demeaning manner. [A]s we have explained, th[e] idea [that the Government has an interest in preventing speech expressing ideas that offend] strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States v. Schwimmer,* 279 U. S. 644, 655 (1929) (Holmes, J., dissenting).

In contrast to the Defendant's assertion, Dyer has been highly successful in advocating on behalf of educators, bus drivers and custodial workers. As a result of his tireless activism, 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. 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.

THE RESTRICTIONS ON DYER'S SPEECH WERE CONTENT AND VIEWPOINT BASED

The Defendant state that the third ground for banning Plaintiff from future meetings cited by Defendant in his February 8, 2018 trespass warning states "were offensive to the Board, our Superintendent, and our staff and community." (Doc 1-1 at 52; Pl. Ex. J) In *Matal v. Tam,* 582 U.S. __ (2017), 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." 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).

The Defendant states that Dyer does not explain how the district court's reliance on the February 6 letter altered its decision to grant summary judgment on his First Amendment claim. Appellee Brief, Pg. 36. The February 8, 2018 letter personally delivered to Dyer lays the foundation for his case simply because (1) it was content and viewpoint based (2) it was not narrowly tailored to achieve a significant governmental interest, and (3) it foreclosed all alternative channels for communication. A reasonable person could conclude that the Defendant altered the original letter and created the February 6, 2018 to influence judgment in their favor – even if it meant perjury. The February 8, 2018 letter states in part:

> "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). 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. 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." (Doc 1-1 at 52; Pl. Ex. J)

This section was omitted by the Defendant in their February 6, 2018 letter.

> 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." (Doc 1-1 at 52; Pl. Ex. J)

Defendant's animosity toward the substance of Plaintiff's speech and the arguable absence of an objective basis for excluding Plaintiff, a reasonable jury could find that the justifications offered by Defendant for banning Plaintiff were pretexts masking viewpoint discrimination, and that Defendant targeted Plaintiff precisely "because of" Plaintiff's unwelcome criticism of the Superintendent and the Board of AISS. *Pahls,* 718 F.3d at 1230.

The Defendant states that soon after he began, the Board's general counsel directed his microphone to be shut off because Dyer's flyer contained racial slurs. Appellee Brief, Pg. 18. Dyer's comments contained no language that could be misconstrued as being a racial-slur or epithet. Nonetheless, Dyer was served with a trespass warning in retaliation for the satirical flyer and his harsh criticism of the Superintendent's policies listed on it. Just as the First Amendment protects freedom of expression, it prohibits actions by state officials to punish individuals for the exercise of that right. *Bennett v. Hendrix,* 423 F.3d 1247, 1255 (1lth Cir. 2005) (This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights.); *Georgia Ass'n of Educators v. Gwinnett County Sch. Dist.,* 856 F.2d 142, 145 (11th Cir. 1988). The following excerpt from Dyer's public comment illustrates Board Chair Esteves' viewpoint regarding the flyer.

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.

The U.S. Supreme Court 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 lower courts' decisions would put all political satire at risk.

THE RESTRICTIONS ON DYER'S SPEECH WERE NOT NARROWLY TAILORED BECAUSE HE WAS CATEGORICALLY BANNED

A categorical ban of a single individual from open school board meetings, however, is not narrowly tailored and does not leave open ample alternative channels of communication. First, a categorical ban on speech is not tailored at all, as it entirely forecloses any 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"). He was not banned only during regular school hours, but at all hours, for two years and eight months. Additionally, the Second Circuit has found that a categorical ban on expressive speech singling out an individual does not even satisfy the lower threshold of reasonableness review. *See Huminski v. Corsones,* 396 F.3d 53, 92 (2d Cir. 2004). In *Huminski,* the court observed that notices against trespass which barred the plaintiff from all state courthouses in Rutland due to a perceived danger "in effect prohibit[ed] indefinitely any and all expressive activity in which [plaintiff] might want to engage in and around Rutland state courthouses." *Id.* "The defendants' singling out of[plaintiff] for exclusion, thereby permitting all others to engage in similar activity in and around the courts, suggests to us that the trespass notices are not reasonable." *Id.*

THE DEFENDANT FAILED TO PROVIDE DYER WITH ADEQUATE ALTERNATIVE CHANNELS OF COMMUNICATION.

The Defendant suggests that Plaintiff has ample channels through which he can communicate with community members and other elected officials. Doc. 9, Pg. 11. The Defendant states that none of the suspensions imposed on Dyer prevented him from contacting community members, whether by telephone, email, or other written correspondence, to express his views. Appelle Brief, Pg. 29. The various social media websites, including YouTube, Facebook, and Instagram, provided him with many platforms to express his views. *Id.* The Defendant failed to acknowledge the blaring fact that the trespass warning forbids any contact with AISS elected officials or APS employees which could be considered community. In this instance, Dyer could have access to the most antiquated technology of the past to the latest techno gadgets of the future but it would be inadequate according to AISS Board Chair's directives in the trespass warning dated February 8, 2018. The Defendant's malicious tone of the letter states in part:

> "You are 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." (Doc 1-1 at 52; Pl. Ex. J)

The Seventh Circuit addressed the inadequacy of remote participation in political activity in the context of state curfew laws. *Hodgkins v. Peterson,* 355

F.3d 1048, 1063 (7th Cir. 2004); *see also Riley v. Nat'l Fed'n of Blind,* 487 U.S. 781, 791 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."). As an initial matter, the ARSU fails to consider the nature of a school board meeting. The "intended audience of those participating and speaking at a [school board] meeting is not isolated to district personnel," but includes community members as well. *Teufel v. Princeton City Sch. Dist. Bd. of Educ.,* No. 1:12-cv-355, 2013 U.S. Dist. LEXIS 4923, at *43 (S.D. Ohio Jan. 11, 2013).

THE DISTRICT COURT RULED INCORRECTLY IN GRANTING AISS'S MOTION FOR SUMMARY JUDGMENT

Dyer discovered that the February 6, 2018 was fabricated and disputed it during Summary Judgment. The court acknowledged the dispute in a footnote which states:

> There may be a dispute regarding APS's February 2019 letter(s) to Dyer. One letter, dated February 6, does not ban all forms of communication with APS officials. The other, dated February 8, does include such a ban. Though Dyer contends in his response to APS's motion for summary judgment that APS "submitt[ed] tampered evidence" and committ[ed] "perjury" by offering the February 6 letter into evidence, [35-2] at 25, he authenticated and acknowledged receipt of the February 6 letter during his deposition.

The Defendant and their legal counsel, Nelson Mullins Riley and Scarborough

state that Dyer has still presented no evidence showing that AISS tampered or falsified evidence to support its Motion for Summary Judgment, and AISS vehemently denies the suggestion of such wrongdoing. (Appellee Brief, Pg 35). Contrary to the Defendant's stance, the record will prove that the Defendant declared admission by referencing the February 8, 2018 letter in several court documents. The documents and admissions are as follows:

a) Document 25 - Filed 04/26/19: Defendant Atlanta Independent School ...

46. Defendant admits that a third suspension letter was issued to Plaintiff on or about February 8, 2018, the terms .... Doc. 25, Pg. 14

47. Defendant admits that a third suspension letter was issued to Plaintiff on or about February 8, 2018, the terms .... *id.*

50. Defendant admits that a letter was delivered to Plaintiff on or about February 8, 2018 and that he was not permitted to .... *id.*

52. Defendant admits that a third suspension letter was issued to Plaintiff on or about February 8, 2018, the terms .... (Doc. 25, Pg. 15)

b) Document 26 - Filed 04/26/19: Joint Preliminary Report and ...

The Board suspended Plaintiff for a third time on February 8, 2018, ... That prohibition on communication included, but was not .... (Doc. 26, Pg. 2-3)

c) Document 29 - Filed 05/14/19: Plaintiff's Statement Of Undisputed ...

Statement No. 23: On February 8, 2018, AISS issued a third "Suspension from Public Comment at Atlanta Board of Education Meetings" letter. (Exhibit 3)

Response: Admitted. Doc. 40, Pg. 12

Statement No. 25: The On [sic] February 8, 2018 letter accused Mr. Dyer of

> introducing racist and hate-filled epithets ... (Exhibit 3, Exhibit 13, Exhibit 14) Response: Admitted. id.
>
> Statement No. 32: The February 8, 2018 suspension letter instructs Mr. Dyer not to set foot ... (Exhibit 3) Response: Admitted. Doc. 40, Pg. 15
>
> Statement No. 33: Exhibit 12 submitted by AISS was dated February 6, 2018. (Exhibit 12) Response: AISS objects to this statement on the grounds that it is immaterial. The date listed at the top of the suspension letter does not affect whether AISS violated Mr. Dyer's rights under the First or Fourteenth Amendments. Doc. 40, Pg. 16

In the court order from the Motion to Dismiss, Judge Batten even made a reference to Dyer's February 8, 2018 letter which further proves its authenticity by stating the following:

> February 8, 2018, APS suspended Dyer a third time. The suspension letter accused 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 APS Superintendent Meria J. Carstarphen wearing a jersey superimposed with the word "FALCOONS." Doc. 22, Pg. 4

"As to materiality, ... [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In evaluating whether summary judgment should be granted, "[t]he court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). Once such a showing has been made, the non-moving party

must offer specific facts contradicting those averred by the movant to establish a genuine issue of material fact. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990). "Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir.1992), cert. denied 507 U.S. 912 (1993).

AISS FALSIFIED EVIDENCE AND COMMITTED PERJURY

The Defendant continues to dig the proverbial hole for themselves by asserting that the February 6, 2018 letter is the only authenticated letter in the record, and Dyer was the one who authenticated it. (Appellee Brief, Pg. 27-28) Under Rule 902(a) of the Federal Rules of Evidence, an exception exists for a select group of documents where no authentication is required in order for the document to be admissible as evidence. Self-authenticating documents in which authenticity is not a prerequisite to admissibility include: ... and (v) public records or official records with proper certification. The February 8, 2018 document in question became self-authenticated in Superior Court on June 4, 2018 by Notary Marvin Wooley of Dekalb County. It was later filed in Federal Court on June 9, 2018 as a public record or official record with proper certification. The document was authentic well before the Defendant's deposition which occurred on October 2, 2019. The assertion that the Defendant did not fabricate evidence is patently false and a true representation of their lack of judgment and credibility.

THE DISTRICT COURT ERRED IN RELYING ON THE FEBRUARY 6, 2018 LETTER

The Defendant believes that the district court's decision would be the same regardless of the letter on which it relied. Appellee Brief, Pg. 36. According to the record, only one letter should be in existence. Dyer supplied the Defendant with all of his evidence during initial disclosures. Dyer's evidence included relevant documents that date back to 2006. It also included video of the board meetings in question including the one held on February 5, 2018. It should also be noted that the Defendant did not record audio, video or transcribe the public comment portion of the Board Meetings at that time. (Doc. 8 at 6)

By not disclosing the February 6, 2018 letter until Dyer's Deposition, the Defendant did not adhere to Fed. R. Civ. P. 26(f). Because Dyer never received the letter from the Defendant, he assumed that the document presented was a copy of his file. After all, only Dyer and Board Chair Esteves should have had access to the February 8, 2018 letter. In addition, Dyer received the letter via personal delivery by Chief Ronald Applin who dropped it in his lap. According to the following timeline, the first time Dyer saw the February 6, 2018 letter was at his deposition and without reading it assumed it had the same content as the February 8, 2018 letter:

• April 26, 2019: Joint Preliminary Report and Discovery Plan (26)

• April 26, 2019: Initial Disclosures requested by the Defendant (Doc. 26)

• May 2, 2019: Scheduling Order (Doc. 27)

• May 14, 2019: Initial Disclosures submitted by Dyer (Doc. 29)

• Time for Initial Disclosures: For Parties Served or Joined Later. A party that is

first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

- Defendant failed to disclose the February 6, 2018 letter within the 30 day limit according to Rule 26(f)
- October 2, 2019: Dyer's Deposition (1st appearance of February 6, 2018 letter) Doc. 33-1, Pg. 261
- October 3, 2019: Summary Judgment (2nd appearance of February 6, 2018 letter) Doc. 34-6, Pg. 44-45

THE DEFENDANT PROVIDED NO ADEQUATE POST-DEPRIVATION PROTECTIONS

The GOMA 50-14-5 (a) The superior courts of this state shall have jurisdiction to enforce compliance with the provisions of this chapter, including the power to grant injunctions or other equitable relief. In addition to any action that may be brought by any person, firm, corporation, or other entity, the Attorney General shall have authority to bring enforcement actions, either civil or criminal, in his or her discretion as may be appropriate to enforce compliance with this chapter.

The Defendant's deception continues as they assume that *Kirkland v. Luken* is about the term “Nigganati”. Kirkland was not prosecuted for the use of the term “Nigganati” which the Mayor found out of order and the Judge considered it offensive. *Kirkland* was arrested because he stepped away from the podium and approached the Mayor while shouting loudly, as a result of which he was asked

to leave the meeting by Sergeant Gladden several times. Plaintiff refused to leave unless he was placed under arrest. Plaintiff was then arrested by Sergeant Gladden and transported to the Hamilton County Justice Center by Officer Sneed, who filed a complaint against him for criminal trespass in violation of O.R.C. § 2911.21. Plaintiff was tried and convicted of that offense by the Hamilton County Municipal Court. *State of Ohio v. William Kirkland,* Case No. 01-CRB-17165. *Kirkland v. Luken,* 536 F. Supp. 2d 857 (S.D. Ohio 2008).

The Defendant states that to prevent Dyer from disrupting future meetings, AISS needed to stop him from even entering the room in which these meetings occurred because Dyer was equally disruptive at the podium as he was when sitting in the audience. Appellee Brief, Pg. 28. In contrast to *Kirkland,* Dyer was issued five trespass warnings within a year for protected speech and no speech at all. Dyer was never arrested.

Defendant's Trespass Warnings and Suspension letters issued to Dyer are as follows:

- January 15, 2016: Suspension/Trespass Warning delivered via email (nate@natbotheedge.com) and U.S. mail (Doc. 1-1, Pg. 39)
- February 2, 2016: Issued by former Chief Marquita Sands-Halls (Doc. 1-1, Pg. 41)
- February 29, 2016: Issued by former Chief Marquita Sands-Hall and Attorney Laurance J. Warco of Nelson Mullins Riley and Scarborough (Doc. 1-1, Pg. 43)
- October 11, 2016: Suspension Letter/Trespass Warning delivered via personal delivery by an AISS officer to Dyer's home (Doc. 1-1, Pg. 45)
- February 8, 2018: Suspension Letter/Trespass Warning delivered via personal delivery by Chief Ronald Applin at Perkinson Elementary School (Doc. 1-1, Pg. 50)

CONCLUSION

The Defendant has once again misinterpreted Dyer's message as shown here: The Defendant's statement that AISS's restriction was content-neutral, and Dyer even admits this fact in his opening brief. Appellant's Br., p. 12. ("AISS does not favor one viewpoint over another."). Appellee Brief, Pg. 25. Dyer was making reference to board policy at (Doc. 34-4, Pg 2) and not admitting to anything.

In conclusion, The Defendant stated that Dyer used some of the most—if not the most—racially offensive language in the English language. (Appellee Brief, Pg. 37) Writing for a unanimous three-judge panel, Judge Susan Carney added that *Tam* "is clear that '[g]iving offense is a viewpoint' when it comes to ethnic slurs." *Id.* at 32 (*quoting Tam,* 137 S. Ct. at 1763) (alteration in original). In the opinion of Kennedy, J., a law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society. 582 U. S. ____ (2017)

The district court erred in granting summary judgment to the Defendant on Dyer's First or Fourteenth Amendment claims. Thus, Dyer asks this Court to reverse the district court's decision.

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(s) Pro Se

Attorney for Nathaniel B. Dyer

Dated: 11/9/2020

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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