No. 21-213

In the
Supreme Court of the United States

Nathaniel Borrell Dyer,
Petitioner

v.

Atlanta Independent School District,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY FOR THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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Mr. Dyer's petition comprises one of the worst abuses of protected speech by a government agency in modern United States history. The Respondent's Brief in Opposition showcases facially unconstitutional violations of Mr. Dyer's First Amendment and Fourteenth Amendment rights. The Respondent's mis-characterizations of Mr. Dyer date back to January 2016. In comparison, the Respondent is on record for unethical behavior that led to the worst public school cheating scandal in US history which occurred in 2011. However, Mr. Dyer has remained steadfast and focused on the event that occurred on February 5, 2018. On this date, Mr. Dyer engaged in protected speech and was banned for distribution of a satirical flyer at the Respondent's board of education meeting (Pet. App. D 80-81). The Respondent's February 8, 2018 letter that banned Mr. Dyer 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. (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." (Pet. 11-12)

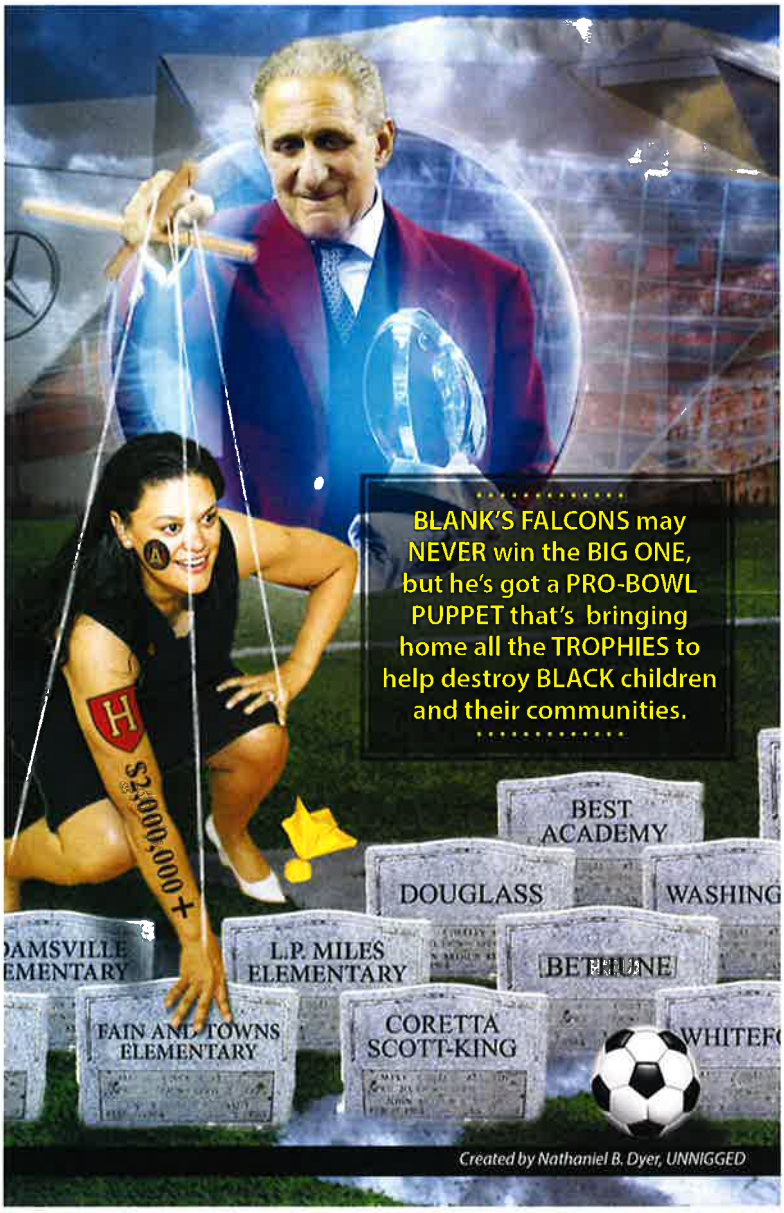
The Respondent doubled down on their disregard for the constitution by leveling unreasonably harsh punishments toward Mr. Dyer for exercising his freedom of speech. The Respondent's February 8, 2018 letter that banned Mr. Dyer also stated,

> "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." (Pet. 11)

The Respondent states that the record shows they did not engage in viewpoint discrimination or regulated Mr. Dyer's speech because of its content. The Respondent further states there is no record of evidence supporting Mr. Dyer's characterization of AISS's motivation. (Resp. Opp. 17) Mr. Dyer will show that the record states otherwise.

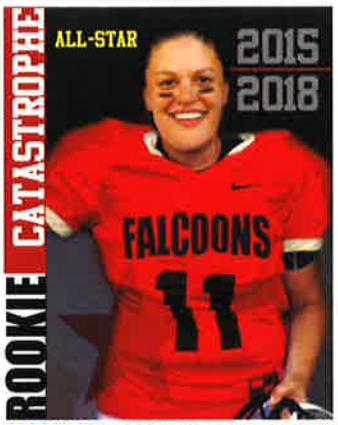
> After distributing the flyer to audience members, Mr. Dyer began to speak at the podium during public comment. (ECF No. 33-1 at 151; ECF No. 34-3 at 6.) Soon after he began, the Board's general counsel directed his microphone to be shut off because Mr. Dyer's flyer contained racial slurs. (ECF No. 34-3 at 7.) Police then escorted him out of the meeting. (*Id.*) (Resp. Opp. 6)

I. Mr. Dyer's Satirical Flyer (Front)



(Pet. App. D 80)

II. Mr. Dyer's Satirical Flyer (Back)



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 Kindesl, carte blanc and long contracts with little to no accountability.
5. **CHARTER SCHOOLS** - She places Kindesl 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 Deals' 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@nathanielbdyer.com.

(Pet. App. D 81)

While the conduct on behalf of the Respondent was atrocious, the injustices committed by the lower courts was even more egregious.

Eight Justices (Justice Gorsuch was recused) held that offensive speech is, itself, a viewpoint and that the government engages in viewpoint discrimination when it suppresses speech on the ground that the speech offends. It is a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend. ("Giving offense is a viewpoint.") *Matal v Tam,* 582 U. S. ____ (2017). Certiorari is warranted.

ARGUMENT

I. The 11th Circuit Incorrectly Analyzed Mr. Dyer's First Amendment Claim

The 11th Circuit applied a three-step analysis established by this Court in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). The Respondent conceded Dyer's speech was protected by the First Amendment, and the 11th Circuit agreed. They also agreed with the parties' other concession—that the Respondent's community meeting was a "limited public forum." They then turned to the proper standard against which the Respondent's restrictions must be assessed. "The government may restrict access to limited public fora by content neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Crowder v. Hous. Auth. of Atlanta,* 990 F.2d 586, 591 (11th Cir. 1993)). "[A] content-neutral ordinance is one that 'places no restrictions on ... either a particular viewpoint or any subject matter that may be discussed.'" *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1259 (11th Cir. 2005) (second alteration in original) (quoting *Hill v. Colorado,* 530 U.S. 703, 723 (2000)). (Pet. App. A 40)

The analysis applied by the 11th Circuit was imprudent in regards to the record. In the district court's Motion to Dismiss Order, the Respondent is on record contesting that the content of Mr. Dyer's speech was not protected. The record reflects the following:

> APS [AISS] argues that Dyer's speech was not protected by the First Amendment, and that even if it was protected, the restrictions were reasonable. (Pet. App. C 65) 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. (Pet. App. C 65-66)

As Judge Sam Sparks put it, censoring speech because of its "ostensibly mocking tone" equates to "viewpoint discrimination as a matter of law." *Id.* at *18. First Amendment jurisprudence, as Justice Ruth Bader Ginsburg crisply explained in 2014, "disfavors viewpoint-based discrimination[,]" *Wood v. Moss,* 572 U.S. 744, 748 (2014).

In its Order, the district court reversed its course and ruled in favor of the Respondent. (Pet. App. B 59) The 11th Circuit affirmed. (Pet. App. A 43) Furthermore, the 11th Circuit conflicted with its own precedent. In regards to *Crowder v. Hous. Auth. of Atlanta* (11th Cir. 1993) and *Solantic, LLC v. City of Neptune Beach* (11th Cir. 2005) quoting *Hill v. Colorado,* (2000)), the 11th Circuit went against the very law they ruled on which states, "[A] content-neutral ordinance is one that 'places no restrictions on ... either a particular viewpoint or any subject matter that may be discussed."

Counter to what the Respondent initially stated as their rational for banning Mr. Dyer (Pet. App. C 65-66), the records shows the following:

> The 11th Circuit agreed with the district court's determination that AISS did not regulate Dyer's speech based on its content, i.e., because it was offensive. Rather, AISS regulated 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 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. (Pet. App. A 36)

The ruling by the 11th Circuit overlooked the malfeasance perpetrated by the Respondent on February 5, 2018. The Respondent 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. (Exhibit C – February 5, 2018 Flyer). (Pet. 11-12) Besides distributing a flyer that the Respondent found offensive, Mr. Dyer was not engaged in any disruptive and unruly behavior. After distributing the flyer to audience members, Mr. Dyer began to speak at the podium during public comment. (ECF No. 33-1 at 151; ECF No. 34-3 at 6.) Soon after he began, the Board's general counsel directed his microphone to be shut off because Mr. Dyer's flyer contained racial slurs. (ECF No. 34-3 at 7.) Police then escorted him out of the meeting. (*Id.*) (Resp. Opp. 6)

II. The 11th Circuit's Decision Conflicts With The Rulings By This Court And Other Appellate Courts

The Respondent states that Mr. Dyer's sole argument that the 11th Circuit incorrectly analyzed his First Amendment claim rests on the belief that the "reoccurring theme in the 11th Circuit's order is the word 'offensive.'" (Resp. Opp 17) In *Billy Ison, et al v. Madison Local School Board,* President French testified that giving offense sufficed, under the Policy, to prevent someone from speaking. (See R. 31-3 at PageID #: 493 ("If [the speech is] perceived to be particularly offensive or abusive, then yes, I would stop [the speaker.]")). On July 7, 2021, the 6th U.S. Circuit Court of Appeals said a citizen cannot be thrown out of a public meeting simply because he or she offends, antagonizes or harshly criticizes a governing body or members of a governing body during a public-comment period. The antagonistic restriction, by definition, prohibits speech opposing the Board. These terms plainly fit in the "broad" scope of impermissible viewpoint discrimination because, like in *Matal* and *Iancu,* they prohibit speech purely because it disparages or offends. See *Matal,* 137 S. Ct. at 1763. *Billy Ison, et al v. Madison Local School Board,* No. 0:20-cv-04108 (6th Cir. 2021)

In *Wandering Dago, Inc. v. Destito,* the Second Circuit concluded that the District Court erred in granting summary judgment in defendants' favor, and should instead have awarded judgment to *Wandering Dago (WD).* It is undisputed that defendants denied WD's applications solely because of its ethnic-slur branding. As the Supreme Court recently clarified in *Matal v. Tam,* 137 S. Ct. 1744 (2017), such an action amounts to viewpoint discrimination and is prohibited by the First Amendment. *Wandering Dago, Inc. v. Destito,* No. 16-622 (2d Cir. 2018)

III. Mr. Dyer Created The Term "Unnigged"

The Respondent makes mention that Mr. Dyer[1] explained at his deposition that the word "unnigged" means "never been a nigger." (ECF No. 33-1 at 153-154, 271-274.) (Resp. Opp. 6) On March 5, 2010, *Tam* filed his first application to register THE SLANTS. *Tam* gave that name to his band to "reclaim" and to "take ownership" of Asian stereotypes. Similar to *Tam,* Mr. Dyer created the term "UNNIGGED". Mr. Dyer's goal was to turn what the Respondent's referred to as a negative connotation of the "n-word" and make it a positive term. Mr. Dyer's slogan is "Uplifting Brilliance While Destroying Ignorance". The wording on the flyer, "UNNIGGED Coming Soon" was made in reference to Mr. Dyer's website which is www.unnigged.com.

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[1] Mr. Dyer is a Black man and he never referred to AISS students as "sambos".

IV. The Georgia Open Meetings (GOMA) Act Under O.C.G.A. § 50-14-1 Was Not A Sufficient Post-Deprivation Remedy

Mr. Dyer was under a categorical ban that cut off all alternate channels of communication with the Respondent. (ECF No. 33-1 at 150, 261-270.) (Resp. Opp. 7)

In the district court's Motion to Dismiss Order, the Respondent 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., provided an adequate state remedy to 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. However, a cause of action under GOMA is only a post-deprivation remedy in the form of a civil suit. This is insufficient here. (Pet. App C 75-76)

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." (ECF No. 21 at 22-26)

V. The Respondent Had A Duty To Provide A Pre-Deprivation Hearing

For the Respondent to tout a policy for speakers to "faithfully and impartially conduct themselves in ways that demonstrate mutual respect, fair play, and orderly decorum," and must be respectful and courteous "even when expressing disagreement, concern, or criticism." (ECF No. 34- 3 at 3.) Board Policy BC-R(1) (Resp. Opp. 3), the Respondent's malicious double standard was illustrated in the 32 month ban on Mr. Dyer because they were offended.

> 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. (Pet. App. C 76) 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. (Pet. App. A 43)
>
> Mr. Dyer has alleged sufficient facts, which APS has not rebutted, to make it at least plausible that a pre-deprivation remedy was practical before he was suspended. APS's suspensions were not issued immediately or as an emergency measure to stop a live disruption. E.g., [1-1] at 45 (suspending Dyer on October 11 for conduct at an October 10 meeting). APS was

able to predict that a hearing was required before suspending Dyer because it took the time to create a letter that applied prospectively to him. Moreover, as APS 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. (Pet. App. C 76-77)

VI. Mr. Dyer's Case Is Similar To *Hustler V. Falwell*

The Respondent believes this case in no way resembles *Hustler*. (Resp. Opp. 16) Contrary to the Respondent's viewpoint, *Hustler v. Falwell* and Mr. Dyer's case are quite similar. Although one is considered a parody and the other satire, this Court considers both political cartoons. In both cases, *Hustler* and Mr. Dyer engaged in protected speech when they created and published satire critical of public figures.

In *Hustler vs. Falwell,* Jerry Falwell was described as a nationally syndicated television show host and was the founder and president of a political organization formerly known as the Moral Majority. He was also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. *Who's Who in America* 849 (44th ed.1986-1987). In comparison, the Respondent used the following language to describe Arthur Blank as it relates to Mr. Dyer's satirical flyer:

> On February 5, 2018, he distributed a double-sided flyer that depicted various images, including one of Arthur Blank (co founder of The Home Depot, owner of the Atlanta Falcons of the National Football League, and owner of Atlanta United of Major League Soccer) holding marionette strings attached to Dr. Carstarphen. (Petitioner's App. D-48-49; ECF No. 33-1 at 151-152, 271- 274.) (Resp. Opp. 6)

Based on the Respondent's viewpoint, Mr. Dyer would have been allowed to distribute a flyer at board meetings praising Arthur Blank. However, Mr. Dyer was banned for the distribution of a flyer that was critical of Arthur Blank and the Respondent. By this Court's standard, this is a classic example of viewpoint discrimination. Justice Frankfurter put it succinctly in *Baumgartner v. United States,* 322 U. S. 665, 322 U. S. 673-674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times,* supra, at 376 U. S. 270.

CONCLUSION

The Respondent believes this case presents no novel or unsettled legal question or opportunity for law clarification. (Resp. Opp. 14) According to the record, Mr. Dyer has proven that it does. Based on the egregious behavior of the Respondent and the incorrect analysis of the lower courts decisions, this case is even more pertinent. According to this Court, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." In practice, this Court will usually defer to its previous decisions even if the soundness of the decision is in doubt. A benefit of this rigidity is that a court need not continuously reevaluate the legal underpinnings of past decisions and accepted doctrines. Moreover, proponents argue that the predictability afforded by the doctrine helps clarify constitutional rights for the public. The record has shown that the 11th Circuit's decisions conflict with relevant decisions of this Court and should be settled by this Court.

Chief Justice William H. Rehnquist, writing for a unanimous Court, stated that a parody depicting the Reverend Jerry Falwell as a drunken, incestuous son could not be defamation since it was an obvious parody, not intended as a statement of fact. To find otherwise, the Court said, was to endanger First Amendment protection for every artist, political cartoonist, and comedian who used satire to criticize public figures. *Hustler Magazine v. Falwell* (1988).

The 11th Circuit has departed from the accepted and usual course of judicial proceedings that justify exercise of this Court's supervisory powers. The events of February 5, 2018 arise from Mr. Dyer's distribution of a satirical flyer that the Respondent found offensive. 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. *Texas v. Johnson,* 491 U.S. 397, 414 (1989)

For this reason, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November 9, 2021