No. 23-10656

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOMS FOR LIBERTY – BREVARD COUNTY, FL, *ET AL.*,

Plaintiffs-Appellants,

v.

BREVARD PUBLIC SCHOOLS, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida, Honorable Roy B. Dalton, Jr., Case No. 6:21-cv-01849-RBD-DAB

BRIEF OF *AMICUS CURIAE* YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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Pursuant to Local Rules 26.1-1 through 26.1-3, the undersigned certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case, in addition to those set forth in the Initial Brief of Appellants, include:

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MOMS FOR LIBERTY – BREVARD COUNTY, FL V. BREVARD PUBLIC SCHOOLS, NO. 23-10656

The undersigned will enter this information in the Court's web-based CIP contemporaneously with filing this Certificate of Interested Persons. Young America's Foundation has no parent corporation, and no corporation owns 10% or more of its stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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STATEMENT OF THE ISSUE

At its core, the First Amendment protects the right to express opinions and contribute to public debate. The founders recognized that freedom of expression safeguards representative democracy by allowing all to express their views. The Supreme Court and this Court have consistently condemned government action that distorts public debate by picking and choosing which viewpoints people may voice—including by limiting speech some find "offensive" or "abusive." Brevard Public Schools maintains a policy that bans "abusive" "statement[s]" at board of education meetings. And it has censored speakers—including Plaintiffs—for speech it labels "abusive." Does the First Amendment allow government to ban speech officials subjectively find "abusive"?

INTEREST OF *AMICUS CURIAE*[1]

Young America's Foundation ("YAF") is a national, non-partisan, non-profit organization that ensures young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. Young Americans for Freedom is YAF's chapter affiliate on high school and college campuses across the country.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a) *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

To fulfill its mission, YAF hosts prominent conservative speakers on campuses nationwide. Often, these speakers meet resistance from students, faculty, and administrators alike. Rather than engage with and debate YAF's views and speakers, those who disagree commonly turn to name-calling instead, falsely claiming that YAF promotes "hate speech," "offensive" speech, and "controversial" ideas. Incited by these falsities, students and professors have vandalized YAF's posters, administrators have imposed viewpoint-based security fees, and universities have sought to cancel its events.

YAF believes that robust debate on all sides of issues furthers the academic functioning of schools and universities. But it is impossible to have debate of any sort when one side labels everything the other side says as "abusive," then uses that pejorative to shut down dialogue altogether.

Free speech—not censorship—promotes true understanding and allows all of us to remain faithful to the individual liberties that make our country great. YAF therefore has a strong interest in ensuring that government policies do not license viewpoint discrimination. Those policies—as YAF has time and again observed—will be weaponized to squelch disfavored speech, precisely as happened here. The Court should use this opportunity to reaffirm the Free Speech Clause's robust protection against government officials' viewpoint censorship.

BACKGROUND

Moms for Liberty, like YAF, exists to engage in the public debate protected by the core of the First Amendment. It seeks to "organize, educate and empower parents to defend their parental rights at all levels of government." Compl. ¶ 3, ECF No. 1. Part of that mission involves advocating for parental rights at school board meetings. *Id.* ¶ 22. The two founders of the national organization themselves served as school board members and "witnessed how short-sighted and destructive policies directly hurt children and families." Moms for Liberty, *Who We Are*, https://www.momsforliberty.org/about/. To help children and parents, the group "hold[s] decision makers accountable" or "work[s] to replace them with liberty-minded individuals." *Id.*

In all advocacy, Moms for Liberty retains a "[c]ommitment to civility." Compl. ¶ 20. It and its members engage as "joyful warriors," understanding that "advocating for their views in a positive, respectful, and peaceful manner" has the greatest likelihood of attracting "support for their policies." *Id.* ¶ 21. Even so, the group expresses its views on issues of hot public debate—issues likely to enflame passions. For example, Moms for Liberty – Brevard County, FL member Plaintiff Joey Cholewa has criticized the mandatory masking of schoolchildren during the COVID-19 pandemic and alleged that the Democratic party believes white people are inherently racist. *Id.* ¶ 43. Another Mom for Liberty

criticized the school library for containing books with what she perceived to be inappropriate sexual content. *Id.* ¶ 47. And—to prove the point—Mr. Cholewa's criticism of "administer[ing] hormone blocking drugs to small children in the process of transitioning their gender" prompted the chair of the Brevard Public Schools board to ask him to stop speaking, labeling his views as "insulting half of [the] audience." *Id.* ¶ 44.

The policy Brevard Public Schools uses to regulate school board meetings admittedly extends to speech. That Public Participation Policy permits the "Board Chair" to censor "a participant's statement" when it becomes "too lengthy, personally directed, abusive, obscene, or irrelevant." *Id.* ¶ 19. And the board in fact applied that policy to censor Mr. Cholewa for his "comments" on race and gender transitions it labeled "personally-directed, abusive, and irrelevant." Defs.' Mot. Summ. J. 15, ECF No. 90; Aff. Haggard-Belford ¶¶ 193–96, ECF No. 20. Contending that what's "abusive" lies in the eye of the beholder and thus grants overbroad freedom to discriminate based on the viewpoint of speech, the chapter and some members sued to enjoin the policy facially and as-applied. *See* Compl. ¶ 59.

But the district court rejected that claim with a single-sentence analysis. 1/24/22 Order Denying PI 6, ECF No. 46. Prohibiting "abusive" "statements"—in the district court's estimation—did not target either the "content or viewpoint" of speech but rather "prevent[ed] disruption,

preserve[d] 'reasonable decorum,' and facilitate[d] an orderly meeting." *Id.*; *see* 7/12/22 Order Granting Mot. to Dismiss 8, ECF No. 63. The court thought Plaintiffs' contrary argument "barely warrant[ed] mention" because it relied on a Supreme Court plurality statement that "[g]iving offense is a viewpoint" and two other cases citing that proposition. 1/24/22 Order Denying PI 6 n.8 (quoting *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality)). *But see Iancu v. Brunetti*, 139 S. Ct. 2294, 2298–99 (2019) (In *Matal*, "all the Justices agreed" that a "ban on registering marks that 'disparage' any 'person[ ], living or dead'" was "viewpoint-based."). For the same reason, the district court rejected Plaintiffs' overbreadth challenge. 1/24/22 Order Denying PI 9; 7/12/22 Order Granting Mot. to Dismiss 8 n.3. The district court thus dismissed Plaintiffs' facial claims against the policy. 7/12/22 Order Granting Mot. to Dismiss 8 & n.3.

The ruling below contravenes the First Amendment's original meaning and Supreme Court and Eleventh Circuit precedent. It strikes at the heart of the First Amendment by licensing the suppression of public debate that expresses potentially unpopular ideas. To preserve the free and open dialogue essential to self-representative government, this Court should reverse.

SUMMARY OF THE ARGUMENT

In an age where some teach that "words wound" and that mere expression of certain beliefs is "dangerous," schools and universities are quick to trample the First Amendment by vetoing viewpoints. Universities and other government bodies—like Brevard Public Schools here—use excessively broad policies that prohibit subjectively "offensive" or "abusive" statements to censor speech officials dislike. The First Amendment demands more.

When government picks winners and losers in public debate by labeling what's "abusive" or "offensive," our representative democracy loses. The ability to express opinions on issues of public concern underpins self-government. Without free speech, we could not meaningfully advocate for change, criticize wrongful government action, or praise our leaders for doing the right thing. To preserve that ability, both the Founding Fathers and binding precedent recognize the impermissibility of government censorship based on viewpoint.

The district court overlooked all that. Instead, it found that a prohibition on—what Brevard Public Schools labels—"abusive" speech passed constitutional muster. This Court should take the opportunity to make clear that subjective offense cannot justify government interference in public debate.

Universities and schools often weaponize their speech policies to label and censor unpopular—yet protected—speech. YAF remains committed to civil dialogue. Yet numerous YAF chapters and members have suffered censorship and punishment simply because they peacefully expressed what some considered to be controversial views. For example, California State University prohibited YAF from hosting Ben Shapiro, relented, but then did nothing to stop a mob from blockading the lecture. Within the Eleventh Circuit, the University of Alabama asserted a right to censor "offensive material or hate speech." Similarly, in Georgia, Kennesaw State imposed a security fee for a "controversial" conservative speaker while allowing a Black Lives Matter protest to occupy freely a whole quadrangle of campus.

Both the original meaning of the First Amendment and modern jurisprudence prohibit the viewpoint discrimination inherent in overbroad policies that regulate "abusive" speech. The First Amendment protects the people's natural, inalienable right to contribute to public debate in our representative democracy. If government labels and censors certain disfavored views, our entire society loses out on additional perspectives that enable self-government. Given the troubling campus—and wider—trend towards viewpoint-based censorship, this Court should reaffirm that the First Amendment prohibits viewpoint discriminatory, overbroad policies like Brevard Public Schools'.

ARGUMENT

I. Universities frequently censor YAF and its members' speech that expresses their views on issues of public concern.

YAF knows firsthand the perils of government viewpoint discrimination. On school and college campuses nationwide, conservative speech, in particular, often provokes debate. But that is precisely why it deserves First Amendment protection. It expresses the speaker's deeply held beliefs and contributes to the public debate essential to our self-governing Republic. Universities serve as institutions dedicated to the pursuit of knowledge and truth and should be even more ready to entertain dialogue. Yet today, they are all too quick to clamp down on protected speech by claiming subjective offense—as YAF chapters at California State, the University of Alabama, and Kennesaw State know all too well. University officials censored each of them for engaging in respectful dialogue on issues of public concern.

A. California State University officials sought to cancel a "controversial" YAF event involving Ben Shapiro, then did nothing to stop students and professors from blockading the event.

YAF has faced stiff opposition to hosting well-known commentator Ben Shapiro on college campuses because some think his views controversial. For example, at California State University-Los Angeles, YAF reserved a theater in the student union to host Mr. Shapiro. *See* Verified Complaint, *Young Ams. Found. v. Covino*, No. 2:16-cv-03474

(C.D. Cal. May 19, 2016). He planned to speak about trigger warnings and micro-aggressions in a talk titled, "When Diversity Becomes a Problem." But when students and professors began to complain about the event and threatened violence against YAF, the university charged YAF over $600 in security fees by labeling Shapiro's speech "controversial."

When YAF objected to the fees, the university rescinded them, but then cancelled the event. University President William Covino explained to YAF that he thought it "best for our campus community" to censor Shapiro's speech. Lest YAF worry about the missed opportunity, President Covino promised to schedule a "more inclusive event" where Shapiro could speak "as part of a group of speakers with differing viewpoints on diversity." That event would—in President Covino's estimation—"better represent [the] university's dedication to the free exchange of ideas and the value of considering multiple viewpoints."

Undeterred by this censorship, YAF and Shapiro decided to proceed. The morning of the event, the university relented and allowed Shapiro to speak—it just failed to allow him an audience. President Covino issued a press release affirming that he "strongly disagree[d] with Mr. Shapiro's views," but that the university would "make every effort to ensure a climate of safety and security" for the talk. As the time for the talk approached, hundreds of protestors flooded the student union and linked arms to block access to the theater. Many professors and faculty

assisted with organizing the protest, encouraged their students to attend the protest, physically blocked the doors to the theater, and urged students to do the same. Incredibly, despite his assurances of safety, President Covino ordered campus police *not* to interfere with the protestors.

University officials' failure to protect the event forced Shapiro to speak to a half-empty theater—depriving numerous interested students who could not enter due to the blockade the opportunity to hear what he had to say. To add insult to injury, at the end of the talk, police advised students not to leave the theater because they could not guarantee their safety. The students remained trapped for 15–20 minutes before they could safely leave.

B. University of Alabama asserted a right against YAF to censor "offensive material or hate speech."

In 2019, a Young Americans for Freedom chapter at the University of Alabama wanted to host a speaking event titled "The Trump Economy," featuring a Heritage Foundation economist. To advertise, the group put up posters around campus. In response, a student and two professors tore down the posters. The student informed YAF members that he wasn't "interested in white supremacist ideas"—despite the event and speaker having nothing to do with race.

When a YAF member complained about the vandalism, an associate dean told him that professors cannot remove flyers "unless those flyers display offensive material or hate speech"—which the dean admitted "of course was not the case here." The YAF member patiently explained to the administrator that the "First Amendment protects speech even if others believe it is offensive." YAF appealed further to a dean who finally made things right. The dean required all department heads under his jurisdiction to undergo training on free speech and why they could not tear down students' flyers. The department heads were then instructed to lead the same training for their professors.

C. Kennesaw State University imposed security fees for a YAF event it labeled "controversial."

YAF has faced viewpoint discrimination in Georgia, too. In 2018, the YAF chapter at Kennesaw State University wanted to bring conservative commentator Katie Pavlich to speak about media usage and politics. *See* Verified Compl., *Young Ams. for Freedom of Kennesaw State Univ. v. Harmon*, No. 1:18-cv-00956-TWT (N.D. Ga. Mar. 5, 2018). The university's policy allowed it to impose security fees in varying amounts based on the "type, nature, attendance, and logistics of the event." University officials thus had discretion to charge security fees—and in higher amounts—for speech they labeled "controversial."

And that's exactly what the university did for Ms. Pavlich's event. The university slapped YAF with a $320 security fee because "there [was] a little more controversy surrounding this person." But university officials had allowed other speech some may find to be controversial—and of the opposite view of YAF's—to proceed unencumbered. For example, a group of students had recently held a Black Lives Matter protest taking up a whole quadrangle of campus. Yet officials did not require any security fees, indicating they didn't find that speech "controversial." (The university's mascot even attended the protest.)

* * * *

These three real-life situations, just a few examples among many, demonstrate the harms caused by viewpoint discriminatory government policies. They show the risks inherent in allowing government officials to subjectively label speech as "abusive" or "controversial." In all three instances, YAF hosted events with well-known speakers on issues of unquestioned public concern. YAF sought to participate in the marketplace of ideas, educate others, and advance knowledgeable public debate. But because some on campus disagreed with the viewpoint of this speech, the YAF chapters—and many others like them—suffered state-sponsored sanctions.

It is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas some find "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In places that are designed to serve as marketplaces of ideas, hecklers drowned out YAF's speech on matters of political and social concern. The First Amendment does not allow the government to pick winners and losers in the marketplace of ideas. When government moderates public debate, we all lose.

II. The Free Speech Clause protects the free and open public debate necessary for our representative government.

A. Free speech is an inalienable natural right that enables democratic self-government.

The Founding Fathers understood free speech as an inalienable natural right that could not be surrendered to the government. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 281 (2017). Thomas Jefferson wrote in 1789 that all had the inalienable "rights of thinking, and publishing our thoughts by speaking or writing." *Id.* (quoting Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789)). In a 1791 congressional debate, Fisher Ames declared that the freedom of speech is "an unalienable right, which you cannot take from [people], nor can they divest themselves of." *Id.* at 282 (cleaned up). Thus, Ames considered any governmental attempt to abridge that freedom "nugatory." *Id.*

The inalienable right to freedom of speech sprung from the recognition that civil authorities had no proper role in controlling a person's opinions and beliefs, *id.* at 280–81, a freedom that exists independent of any governmental authority. Thus, forming beliefs and speaking them were natural rights retained by the people under any system of government. *Id.* at 274–75. As James Madison put it, "Opinions are not the objects of legislation." 4 Annals of Cong. 934 (1794) (statement of Rep. James Madison).

The First Amendment thus exhibits a "jealous care" for "a sacred right"—one "essential to the existence and perpetuity of a free government." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 457 (2d ed. 1871). The Free Speech Clause "guard[s] against" the "evils" of government prevention of "such free and general discussion of public matters," which is "absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Id.* at 465. "When"—as in our system of government—"the people frame their own constitution" and "reserve to themselves the power to amend it," the "[r]epression of full and free discussion is dangerous." *Id.* at 472–73. The people must have the freedom to discuss and debate the issues of the day and how government should respond to those issues or self-government becomes meaningless. A weaker guarantee of speech would "in times of

high party excitement" encourage "prosecutions by the party in power, to bolster up wrongs and sustain abuses and oppressions by crushing adverse criticism and discussion." *Id.* at 473.

The First Amendment offers no exception for heated political and ideological debates and criticism. "Sharp criticism" and "ridicule" come in the natural course of "discussions of supposed evils in the government." *Id.* at 472. The "heat of the discussion" is directly proportional to "the magnitude of the evil, as it appears to the party discussing it." *Id.* But—to preserve the essence of self-government—that speech must be protected. That freedom extends even to "violent discussion[s]" (in terms of excitement, not physical conduct) that "exceed all the proper bounds of moderation." *Id.* at 473. Any "consolation" being that "the evil likely to spring forth" from such discussions will experience a "speedy" course correction by the expression of other "public sentiment" in the marketplace of ideas. *Id.* And any "evil" from the free expression of ideas surely outweighs those "if the terrors of the law were brought to bear to prevent the discussion." *Id.*

The government cannot serve as the people's debate moderator. Officials, and society at large, may desire "fair discussion" "conducted with calmness and temperance." *Id.* at 472. "But what is calmness and temperance . . . ?" *Id.* They remain in the eye of the beholder. Those in power "will be very likely to" view speech critical of them "with a

preconceived notion that such assaults upon their reasonable regulations must necessarily be unreasonable." *Id.* Again, to preserve the ability of the people to govern themselves, the "judgment" of government itself on the "temperance or fairness" of speech cannot serve as a basis for its regulation. *Id.* at 473.

B. Modern free speech jurisprudence conforms to the original meaning protecting the expression of all viewpoints in free public debate.

The development of free-speech jurisprudence has hewn closely to this history and tradition. Even when faced with speech thought to undermine our very system of government, the Supreme Court has affirmed the First Amendment's broad protection.

For example, in the early and mid-20th century, our country faced existential threats from both fascism and communism. The natural fear from those ideologies—both explicitly hostile to that of democratic self-government—naturally caused many Americans to fear for the country's existence. So ensued a rash of prosecutions of suspected Communists, on the basis that they sought to overthrow our system of self-government. *E.g.*, *Stromberg v. People of State of Cal.*, 283 U.S. 359, 362 (1931) ("radical communist propaganda" included "incitements to violence and to 'armed uprisings,' teaching 'the indispensability of a desperate, bloody, destructive war as the immediate task of the coming action'").

The Court rejected those convictions. It understood that the way to preserve our government was not to label and silence dissenting views, but to expose them to the free debate the First Amendment protects. Indeed, the "greater the importance of safeguarding the community from incitements to the overthrow of our institutions," the all "the more imperative is the need to preserve inviolate the constitutional right[ ] of free speech." *De Jonge v. State of Oregon*, 299 U.S. 353, 365 (1937). The "security of the Republic" "lies" in "the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." *Id.*

To achieve a responsive and representative government, free speech should "*invite* dispute." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (emphasis added). "Speech is often provocative and challenging." *Id.* And it "best serve[s] its high purpose" by creating "unrest," "dissatisfaction with conditions as they are," or even "anger." *Id.* Any "alternative" would allow "standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id.* at 4–5. But "our Constitution" leaves "no room" for a "more restrictive view" of free speech protections. *Id.* at 4.

More speech—not censorship—advances public debate. The First Amendment "presupposes that right conclusions are more likely to be

gathered out of a multitude of tongues, than through any kind of authoritative selection." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)). So the Supreme Court repeatedly reaffirms that the First Amendment seeks to "preserve an uninhibited marketplace of ideas" where "truth will ultimately prevail." *E.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (*NIFLA*); *accord, e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

Government cannot "choose[ ] winners and losers in the marketplace of ideas." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1127 (11th Cir. 2022). The First Amendment "remove[s] governmental restraints from the arena of public discussion," which "put[s] the decision as to what views shall be voiced largely into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971). That freedom "will ultimately produce a more capable citizenry and more perfect polity." *Id.* And such freedom "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times*, 376 U.S. at 270. When officials are given the power to favor one viewpoint over others by labeling it offensive or disruptive, "the people lose." *NIFLA*, 138 S. Ct. at 2375.

C. Both the Supreme Court and this Court have held that restrictions on "offensive" or "abusive" speech discriminate based on viewpoint and are overbroad.

As Cooley recognized, government can impermissibly veto certain views both by explicit censorship and by granting limitless discretion to officials to regulate speech. Cooley, *supra*, at 472 ("[W]hat is calmness and temperance . . . ?"); *see also Cox v. State of Louisiana*, 379 U.S. 536, 557 (1965) ("[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not."); *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1226 (11th Cir. 2017) ("[T]he unbridled-discretion doctrine . . . combat[s] the risk of unconstitutional viewpoint discrimination."). History and precedent reveal the utmost protection for public debate extending even to "violent discussion[s]," that is, speech (not conduct) others may view as offensive or abusive. Cooley, *supra*, at 473.

Unsurprisingly, a long line of cases show that government regulation of "offensive" or "abusive" speech impermissibly censors certain views. The Court has "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.'" *Matal v. Tam*, 582 U.S. 218, 244 (2017) (plurality) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). What's more, regulating "offensive" speech is the "essence of viewpoint discrimination" because that censorship "reflects the Government's

disapproval of a subset of messages *it* finds offensive." *Iancu*, 139 S. Ct. at 2299 (emphasis added). And "[g]iving offense is a viewpoint." *Matal*, 582 U.S. at 243.

Restrictions on "abusive" speech meet the same fate as those on "offensive" speech. "The language of the political arena . . . is often vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). But that doesn't mean it's any less protected—even saying, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *See id.* at 706. Quite the opposite, the First Amendment protects unpopular views, "for popular ideas have less need for protection." *B.L.*, 141 S. Ct. at 2046.

For example, the Supreme Court has invalidated as overbroad a Georgia statute that prohibited the "use to or of another, and in his presence . . . abusive language, tending to cause a breach of the peace." *Gooding v. Wilson*, 405 U.S. 518, 519 (1972). The Northern District of Georgia, surveying the Court's free speech cases including *Terminiello* and *Cox*, had also rejected the statute as overbroad. *Wilson v. Gooding*, 303 F. Supp. 952, 953–54 (N.D. Ga. 1969). Because "speech is normally intended to change the opinions or reinforce the opinions of others," the district court understood that the First Amendment "encourage[s]" the "peaceful expression of even unpopular views." *Id.* at 953.

The old Fifth Circuit undertook a "careful independent examination of the constitutionality" of the statute and adopted the reasoning of the district court, which "fully delineate[d] the reasons for holding" the statute "unconstitutionally vague and overbroad." *Wilson v. Gooding*, 431 F.2d 855, 858–59 (5th Cir. 1970). The high Court affirmed, "agree[ing] with the District Court." *Gooding*, 405 U.S. at 527. The plain meaning of "abusive," the Court wrote, includes "harsh insulting language." *Id.* at 525; *see also Wilson*, 303 F. Supp. at 955 ("[T]he dictionary sense of" "abusive" "include[s] . . . words that are offensive.") But by creating a crime "merely to speak words offensive to some who hear them," the statute "swe[pt] too broadly." *Gooding*, 405 U.S. at 527.

Fifteen years later, the Supreme Court recognized that the statutory label "abuse" also confers unbridled discretion. *City of Houston v. Hill*, 482 U.S. 451, 466–67 (1987). There, a Houston ordinance made it a crime to "molest, abuse, or interrupt any policeman in the execution of his duty." *Id.* at 455. The Court noted that it "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Id.* at 465. The Houston ordinance was one such law because "[a]ll that [was] required for conviction [was] that the court accept the testimony of the officer that [such] language had been used toward him." *Id.* at 466. The record revealed that the ordinance was "admittedly violated scores of times

daily," but that "only some individuals—those chosen by police in their unguided discretion—[were] arrested." *Id.* at 466–67; *accord id.* at 462 n.11 (rejecting argument that "contentious and abusive" speech absent accompanying conduct "interrupt[s] an officer's investigation").

This Court, too, has invalidated government action prohibiting speech labeled "abusive." Relying on its *Gooding* decision, this Court's predecessor noted many courts had "held impermissibly vague and overbroad" laws "attempting to proscribe . . . abusive speech." *Livingston v. Garmire*, 437 F.2d 1050, 1055 (5th Cir. 1971).[2] And rightly so. Prohibitions of "abusive speech" grant "unbridled discretion" to censor "views unpopular" with government. *Id.* at 1056. So a "stump speaker"—who raises views controversial or offensive to some—runs the risk of censorship "depending on one's interpretation of his remarks" and may thus self-censor—making "the free dissemination of ideas . . . the loser." *Id.*

School board policies that allow officials to label certain views "abusive" and then give unbridled discretion to censor also discriminate based on viewpoint. *See Barrett*, 872 F.3d at 1229. The *Barrett* policy prohibited "abusive or disruptive" "statement[s]" from public participants

[2] The old Fifth Circuit withdrew this opinion solely because "the district court did not have the benefit" of intervening Supreme Court decisions regarding federal court abstention from state criminal proceedings. *Livingston v. Garmire*, 442 F.2d 1322, 1325 (5th Cir. 1971). But the original *Livingston* opinion's First Amendment analysis was correct, as *Barrett* recognized.

in school board meetings. *Id.* at 1218. Those terms, this Court held, allowed school board officials impermissibly to consider the "content and viewpoint of the speaker's speech" when determining whom to allow to speak. *Id.* at 1229;[3] *see also Speech First*, 32 F.4th at 1126 (government discriminates based on viewpoint when it tries to "ban[ ]" speech because "it expresses ideas that offend"). Thus, the Court affirmed a permanent injunction against the policy for licensing unbridled discretion. *Barrett*, 872 F.3d at 1229.

III. The district court's ruling contravenes the First Amendment's original meaning and binding precedent.

The district court's single-sentence rejection of Plaintiffs' viewpoint-discrimination claim contravenes both the original meaning of the First Amendment and binding precedent. It fails to acknowledge the inalienable right to participate in public debate even by excited discussions. And the district court did not cite *any* Supreme Court or Eleventh Circuit case involving a prohibition on "abusive" language. For good reason—the cases all go the opposite way.

Instead, the court below relied on three inapposite cases. 1/24/22 Order Denying PI 6 (citing *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th

[3] This Court frequently referred to content discrimination, but it did so within its unbridled discretion analysis, which it recognized "combat[s] the risk of unconstitutional viewpoint discrimination." *Barrett*, 872 F.3d at 1226. And viewpoint discrimination is simply "an egregious form of content discrimination." *Id.* at 1225 n.10.

Cir. 1989); *Rowe v. City of Cocoa*, 358 F.3d 800, 803 (11th Cir. 2004); *Dyer v. Atlanta Indep. Sch. Sys.*, 852 F. App'x 397, 402 (11th Cir. 2021)); *see* 7/12/22 Order Granting Mot. to Dismiss 8. The *Jones* court went to great lengths to stress that censorship at a city commission meeting "resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion." 888 F.2d at 1332; *accord id.* ("The substance of Jones' views on the agenda item was thus never expressed."). *Rowe* never mentions a prohibition on "abusive" speech, and merely cites *Jones* for the unremarkable proposition that public bodies can "confine their meetings to specified subject matter." 358 F.3d at 803. It—like *Jones*—reaffirms the government's inability to target "the speaker's viewpoint" at a public meeting. *Id.* at 803.

The nonprecedential *Dyer* case similarly focuses on conduct, not speech. This Court "agree[d] with the district court's determination that [the public body] did not regulate Dyer's speech based on its content, i.e., because it was offensive." 852 F. App'x at 402. Instead, it punished Dyer because "his *conduct* failed to advance any meaningful discourse." *Id.* (cleaned up; emphasis added). That the public body told Dyer "his comments were 'abusive, abhorrent, [and] hate-filled'" "merely support[ed]" its punishment for "disruptive and unruly behavior." *Id.*

The exact opposite is true here. Brevard Public Schools' policy targets "abusive" "statement[s]" with no link to any conduct at all. Compl. ¶ 19. And Plaintiffs brought a facial challenge to that policy. *See id.* ¶ 59. The school district cannot square its policy with the First Amendment. "[T]he magnitude of the evil, as it appears to the party discussing it" no doubt increases the "heat of the discussion." Cooley, *supra*, at 472. But far from justifying government censorship, "uninhibited, robust, and wide-open" "debate on public issues" is "essential to the security of the Republic." *N.Y. Times*, 376 U.S. at 269–70.

Binding precedent also invalidates the challenged policy three times over. The *Gooding*/*Wilson* line of cases establish that "abusive" speech is "insulting" or "offensive." *See Gooding*, 405 U.S. at 525, 527. *Matal* and *Iancu* hold that targeting "offensive" speech discriminates based on viewpoint. *Iancu*, 139 S. Ct. at 2299. Ergo, forbidding "abusive" speech censors because of the views expressed. *See Mama Bears of Forsyth Cnty. v. McCall*, --- F. Supp. 3d ----, 2022 WL 18110246, at *12 (N.D. Ga. Nov. 16, 2022) ("[A] provision prohibiting abusive speech constitutes impermissible viewpoint discrimination."). What's more, the label "abusive" licenses unbridled discretion to once again discriminate based on viewpoint. *Barrett*, 872 F.3d at 1229. And prohibitions on "abusive" speech "sweep[ ] too broadly" in violation of the First Amendment. *Gooding*, 405 U.S. at 527; *see Wilson*, 431 F.2d at 858–59.

Invalidating prohibitions on "abusive" speech does not mean public body meetings will degenerate into chaos. Government may prohibit and punish "disruptive *conduct*." *Jones*, 888 F.2d at 1332 (emphasis added). In the limited public forum of a public meeting, a body may also restrict "discussion to certain topics" and limit access to a certain class of speakers, such as residents of the district. *Barrett*, 872 F.3d at 1225. And a board remains free to enact any other viewpoint neutral requirements "reasonable in light of the forum's purpose." *Id.*

But without reversal, YAF knows intimately "the evil likely to spring forth" from "prevent[ing]" speech some may find "abusive" or "offensive." Cooley, *supra*, at 473. Just like Brevard Public Schools censored Mr. Cholewa because his views may have "insult[ed] half of [the] audience," so too has government censored YAF for speech others labeled offensive or controversial. California State officials thought Ben Shapiro's views too "controversial" for campus, attempted to prevent him from coming to campus, then failed to provide adequate security for him to express his views and for students to hear him. A University of Alabama associate dean licensed professors to tear down YAF flyers they found "offensive." And Kennesaw State imposed a security fee on a conservative speaker because some found her "controversial," but did not stop the school mascot from attending a Black Lives Matter protest. To

ensure robust debate and protection of all views, this Court should reverse.

CONCLUSION

To some, the "consequence[s]" of spirited public debate "may often appear to be only verbal tumult, discord, and even offensive utterance." *Cohen*, 403 U.S. at 24–25. But the potential for a "verbal cacophony" is "not a sign of weakness but of strength." *Id.* at 25. Indeed, "no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.* at 24. Rather than protect the public debate that is essential to our Republic, Brevard Public Schools has chosen to silence speech with which it disagrees. This Court should reverse the decision upholding that censorship and make clear that the government has no role in picking winners and losers in the marketplace of ideas, including by prohibiting speech that government officials label "abusive."

Respectfully submitted this 17th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5). Exclusive of the sections exempted by Fed. R. App. P. 32(f), the brief contains 5,914 words, according to the word count feature of the software (Microsoft Word 365) used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 17th day of April, 2023. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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