IN THE SUPREME COURT OF ALABAMA

YOUNG AMERICANS FOR LIBERTY AT UNIVERSITY OF ALABAMA IN HUNTSVILLE and **JOSHUA GREER,**	)	
Appellants,	)	
v.	)	**Case No. 1210309**
FINIS ST. JOHN IV, Chancellor of the University of Alabama System; **DARREN DAWSON**, President of the University of Alabama in Huntsville; **KRISTI MOTTER,** Vice President for Student Affairs; **RONNIE HERBERT**, Dean of Students; **WILL HALL**, Director of Charger Union and Conference Training Center; and **JUANITA OWEN,** Associate Director of Conferences and Events, in their official capacities,	)	
Appellees.	)	

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF APPELLANTS

COMES NOW Amicus Curiae, Alabama Center for Law and Liberty ("ACLL"), and files this motion pursuant to Rule 29, Ala. R. App. P., to file the attached amicus curiae brief in the above-styled case. In support of this motion, ACLL shows the following:

1. Amicus Curiae Alabama Center for Law and Liberty is a nonprofit public interest firm based in Birmingham, Alabama, dedicated to the defense of limited government, free markets, and strong families.
2. ACLL takes a particular interest in cases raising federal and state constitutional issues affecting the People of Alabama.
3. The above-styled case implicates free-speech rights, which are protected by both the Federal and Alabama Constitutions.
4. Last year, two Justices of this Court urged attorneys to brief the Court on the original public meaning of the state constitution where applicable. *See Barnett v. Jones*, No. 1190470, slip op. at 24 (Ala. May 14, 2021) (Mitchell, J., joined by Parker, C.J., concurring specially).
5. Like Chief Justice Parker and Justice Mitchell, Chief Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit called for lawyers to brief judges on the meaning of state constitutions in a book he wrote. *See* Jeffrey S. Sutton: *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018).

6. ACLL agrees that there is an important need for attorneys to brief the courts on the original meanings of the state constitutions, not just the Federal Constitution.

7. Being a nonprofit organization dedicated to the defense of limited government in Alabama, ACLL believed that it could be of service to the Court by filing the attached brief, which explains the original public meaning of Article I, Section 4 of the Alabama Constitution of 1901. In the brief, ACLL thoroughly explains its meaning and argues that it provides even more protection from prior restraints on speech than the First Amendment to the United States Constitution does (at least as interpreted by the federal courts).

8. Therefore, in an effort to assist the Court with understanding the meaning and application of Article I, Section 4 of the Alabama Constitution of 1901, which is implicated in this case, ACLL respectfully moves this honorable Court for leave to file the attached amicus curiae brief.

Respectfully submitted March 29, 2022,

/s/ Matthew J. Clark
Matthew J. Clark (CLA-108)

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Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d) and 32(b)(5), Ala. R. App. P., I hereby certify that this motion complies with the font and word limits as required by Rules 27(d) and 32(b)(5), Ala. R. App. P. This motion was written in 14-point Century Schoolbook font, and the text is fully justified. This motion contains 654 words.

/s/ Matthew J. Clark
Matthew J. Clark

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2022, I emailed the foregoing to Appellees' counsel, Jay M. Ezelle, at the following email address: jme@starneslaw.com. I further certify that I emailed this brief to Appellants' counsel, Mathew W. Hoffman, at the following email address: mhoffman@adflegal.com.

/s/ Matthew J. Clark
Matthew J. Clark

Counsel for Amicus Curiae

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STATEMENT REGARDING ORAL ARGUMENT

Amicus Curiae Alabama Center for Law and Liberty ("ACLL") defers to Appellants' judgment as to whether oral argument is necessary in this case. ACLL believes that it has sufficiently presented its case through its brief and therefore will not file the unusual motion for an amicus curiae to participate in oral argument. *See* Rule 29(f), Ala. R. App. P. However, if the Court desires for ACLL to participate in oral argument, then it will gladly accept the invitation.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Alabama Center for Law and Liberty ("ACLL") is a nonprofit law organization based in Birmingham, Alabama, that advocates for limited government, free markets, and strong families. ACLL has an interest in this case because this case involves the fundamental right of freedom of speech, protected by both the United States and Alabama Constitutions, that is essential to limited government. ACLL desires to file this brief because it desires to respond to the calls of Justice Mitchell and Chief Justice Parker to brief the Court on the original meaning of the Alabama Constitution. *See Barnett v. Jones*, No. 1190470, slip op. at 24 (Ala. May 14, 2021) (Mitchell, J., joined by Parker, C.J., concurring specially). In this case, ACLL desires to brief the Court on the original meaning of Article I, Section 4, of the Alabama Constitution of 1901.

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[1] Appellant has consented to the filing of this brief; ACLL did not ask for consent from Appellee because the typical amicus practice in Alabama is to file a motion instead of asking for consent. *See* Ala. R. App. P. 29 and comments. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than ACLL and its counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In 1769, Sir William Blackstone wrote that the liberty of the press was the liberty to be free from prior restrains. The great legal thinkers of the nineteenth century, such as Chancellor James Kent, United States Supreme Court Associate Justice Joseph Story, and Michigan Supreme Court Justice Thomas Cooley wrote that Blackstone's rule lied at the heart of the state and federal constitutional guarantees of freedom of the press and freedom of speech. Noah Webster also wrote in his 1828 American Dictionary of the English Language that the liberty of the press was the freedom from prior restraints. State supreme courts have also acknowledged the connection between their constitutional provisions and Blackstone's rule.

With that background in mind, Pennsylvania was the first state to include a protection for freedom of speech its constitution of 1776. Pennsylvania's guarantee of free speech was tied to freedom of the press. In 1788, one year before James Madison submitted a Bill of Rights to Congress, the Pennsylvania Supreme Court interpreted the Pennsylvania Constitution's guarantee of freedom of speech and press to mean that one had the right to say or publish whatever he wanted but

could be held liable if such a publication constituted defamation, which fits comfortably with Blackstone's rule.

To better articulate this position, when Pennsylvania adopted a new constitution in 1790, it provided that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Pa. Const. of 1790, art. IX, § VII. Many of the states adopted the Pennsylvania provision, including Alabama, which provided in its 1819 Constitution that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Ala. Const. of 1819, art. I, § 8. There were no material changes to this provision in the Alabama Constitutions of 1861, 1865, 1868, or 1875.

The constitutional convention of 1901 brought two material changes to the Alabama Constitution's free-speech protections, but both changes *increased* freedom from prior restraints. The 1901 constitution added a line about the legislature never passing a law abridging the freedoms of speech or press, but then it also included the old line from the past constitutions. Thus, the new provision forbidding the legislature from abridging those freedoms emphasized the point, but it did not limit

the freedom of speech to freedom from legislative action only. Furthermore, it changed the word "citizen" to "person," which extended the free-speech protections to aliens and, if the word "citizen" had not been clear enough, to women as well. In addition to the evidence from the text of the constitution itself and from the debates, an examination of the key words from Webster's 1901 International Dictionary shows that the meaning of the operative language had not changed since 1819. Thus, the changes adopted in the 1901 convention *increased* freedom from prior restraints, but it did not do anything to *decrease* it.

Sadly, after the federal courts became viewed as the predominant protectors of individual rights in the 1960's, lawyers stopped looking to state constitutions as valuable bulwarks of liberty against government power. In the absence of quality briefing from the bench, state courts began copying how the federal courts interpreted the Federal Constitution and applied those rules of decisions to state constitutions. But when it comes to freedom from prior restraints, the federal courts have not done an adequate job of protecting freedom of speech, especially when it comes to student speech at public universities. Therefore, it is necessary to acknowledge in this case that the Alabama Constitution's

protection against prior restraints on speech provides more protection than the First Amendment does (at least as interpreted by the federal courts). Applying the Alabama Constitution's stringent prohibition on prior restraints to this case, the trial court undoubtedly erred in granting Appellees' motion to dismiss. Therefore, the judgment of the trial court is due to be reversed.

ARGUMENT

I. Background: The Sources on Which the Alabama Constitution Was Based

In order to understand the original public meaning of Article I, Section 4, of the Alabama Constitution of 1901, it is necessary to understand the historical background on which it was based. ACLL's contention is that Article I, Section 4 drew on an unbroken tradition of freedom from prior restraints, beginning with Blackstone and lasting through 1901. This section will therefore examine those sources.

A. Blackstone and the Common Law

In 1769, Sir William Blackstone wrote his fourth and final volume of his famous work, *Commentaries on the Laws of England*.[2] In this volume, Blackstone addressed the liberty of the press as follows:

> In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less, degree of severity, the *liberty of the press,* properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and

[2] "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." *Schick v. United States*, 195 U.S. 65, 69 (1904).

> religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly vend them as cordials. And to this we may add that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary, to prevent the daily abuse of it," will entirely lose its force when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it never can be used to any good one when under the control of an inspector. So true it will be found that to censure the licentiousness is to maintain the liberty of the press.

4 William Blackstone, *Commentaries* *151-53.

Courts and commentators have noted the connection between the freedom from licensure, which Blackstone recognized was at the heart of freedom of the press, and constitutional provisions that are identical to Alabama's. *See, e.g.*, *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1245 (Utah 2006) (noting that the free-speech provision in Utah's constitution "has its roots in Blackstone's formulation of common law, which prohibits prior restraints on publications, but reserves for the state the power to punish publications considered to be an abuse of the liberty of the press"); *William Goldman Theaters, Inc. v. Dana*, 173 A.2d 59, 62 (Pa. 1961)

(connecting the language in the Pennsylvania Constitution of 1790 directly to Blackstone); Frederick D. Rapone, Jr., *Article I, Section 7 of the Pennsylvania Constitution and the Public Expression of Unpopular Ideas*, 74 Temp. L. Rev. 655, 663-65 (2001) (noting the connection between Blackstone and liberty of the press in early American state constitutions).

B. The Pennsylvania Constitutions of 1776 and 1790

The first state constitution to recognize the freedom of speech was the Pennsylvania Constitution of 1776, which provided: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Const. of 1776, Declaration of Rights, art. XII; *see also* Rapone, *supra*, at 664 ("Remarkably, Pennsylvania was the first to memorialize the freedom of speech, in a Constitution."). In 1788, one year before James Madison drafted the Federal Bill of Rights, the Supreme Court of Pennsylvania considered the meaning of this phrase in *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (Pa. 1788). In expounding the meaning of Article XII, the Pennsylvania Supreme Court said the following:

What then is the meaning of the Bill of rights, and the Constitution of Pennsylvania, when they declare, "That the freedom of the press shall not be restrained," and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?" However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections: they give to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to setter the press by the institution of a licenser. The same principles were settled in England, so far back as the reign of William the Third, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there any thing in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode or trial, and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or, will it be said, that the constitutional right to examine the proceedings of government, extends to warrant an anticipation of the acts of the legislature, or the judgments of the court? and not only to authorize a candid commentary upon what has been done, but to permit every endeavour to biass [sic] and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort, must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the

> latter description, it is impossible that any good government should afford protection and impunity.

Respublica, 1 U.S. at 325. Thus, the Pennsylvania Supreme Court appeared to believe that Article XII meant that one was free to speak, write, or publish his sentiments on a subject, especially concerning matters of public affairs, but could be held liable if he defamed another person or committed a crime in the process.

Two years later, Pennsylvania adopted a new constitution, which discussed the freedom of speech and press in more detail, likely because of the court's decision in *Respublica*. Article IX, Section VII, of the Pennsylvania Constitution of 1790 provided:

> "That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government: And no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and *every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty*. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence: And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." (Emphasis added.)

This language in the Pennsylvania Constitution was soon replicated by other states in their constitutions. *See, e.g.*, Ky. Const. of 1792, art. XII, § 7 ("every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty"); Vt. Const. of 1793, ch. 1, art. XIII (same); Tenn. Const. of 1796, art. XI, § 19 (same).

C. The Alabama Constitution of 1819

Following Pennsylvania's lead, Alabama recognized the freedom of speech and press in its 1819 Constitution. That provision provided, "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Ala. Const. of 1819, art. I, § 8. It appears that there were no objections to this provision in the convention. Sections 3, 5, 9, 11, 17, and 21 were debated, but it appears that nobody objected to Section 8. *Journal on the Convention of the Alabama Territory* 21 (1819).

D. Early American Commentators' View of Freedom of Speech and of the Press

Leading American commentators continued to maintain the view that Blackstone articulated and the Alabama Constitution of 1819 enshrined. Chancellor James Kent, writing in 1827, noted: "It has, accordingly, become a constitutional principle in this country that '*every*

citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press." 2 James Kent, *Commentaries on American Law* 14, lec. 24 (1827) (emphasis added). One year later, Noah Webster wrote in the first American Dictionary of the English Language:

> *Liberty of the press*, in civil policy, is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state.

Webster's American 1828 Dictionary of the English Language 629 (Compact ed., Walking Lion Press 2010) (1828). Finally, in 1833, Joseph Story wrote, "The doctrine laid down by Mr. Justice Blackstone, respecting the liberty of the press, has not been repudiated (as far as known) by any solemn decision of any of the state courts, in respect to their own municipal jurisprudence." 3 Joseph Story, *Commentaries on the Constitution of the United States* 741 §1883 (Cosmo reprints 2020) (1833).

Finally, after the Civil War, Thomas Cooley continued to affirm that the heart of freedom of speech and the press was freedom from prior restraints. In his famous treatise, Cooley wrote that freedom of the press

means "only that liberty of publication without the previous permission of the government, which was obtained by the abolition of censorship." Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 516 (6th ed. 1890) (hereinafter "*Constitutional Limitations*"). Cooley further said concerning the freedom of speech and press together:

> The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted.

Id. at 518. Thus, Chancellor Kent, Noah Webster, Justice Story, and Thomas Cooley all agreed that the original public meaning of the freedoms of the press and speech was freedom from prior restraints. Thus, the primary application of freedom of speech was thought to be freedom from prior restraint. Whatever the contours of the right of free

speech may be, freedom from prior restraint lies at the heart, not the edges, of that right. Freedom from prior restraint was thought to be just as fundamental to freedom of speech—if not more so—than freedom from viewpoint discrimination.

E. The Continuity Between the Alabama Constitutions of 1819 and 1901

Alabama has had six constitutions throughout its existence, adopting new constitutions in 1861, 1865, 1868, 1875, and 1901. From the constitutions of 1819 through 1875, there were no material changes to Alabama's free-speech provisions. *See* Ala. Const. of 1861, art. I, § 8; Ala. Const. of 1865, art. I, § 6; Ala. Const. of 1868, art. I, § 6; Ala. Const. of 1875, art. I, § 5. The only change came with the Alabama Constitution of 1865, which inserted the word "that" at the beginning of the section to make it grammatically consistent with the preamble, and the constitutions of 1868 and 1875 followed suit. Ala. Const. of 1865, art. I, § 6; Ala. Const. of 1868, art. I, § 6; Ala. Const. of 1875, art. I, § 5. But beyond that, Alabama's free-speech clause remained identical to the way it appeared originally in the Alabama Constitution of 1819.

II. The Alabama Constitution of 1901 Maintained the Material Portions of the Old Constitution and Increased Protection for Speech in Other Respects.

The Alabama Constitution's Free Speech Clause was materially altered for the first time in the Alabama Constitution of 1901. Some individuals and organizations maintain that the main purpose of the 1901 Constitutional Convention was to harm African-Americans. *See Alabama Makes Racial Segregation Mandatory*, Equal Justice Initiative, https://calendar.eji.org/racial-injustice/sep/3 (last visited Mar. 29, 2022) ("The state constitutional convention's primary purpose was to legally disenfranchise Black votes[.]"). Even if there is some truth to EJI's sweeping assertion, the evidence will show that, as to freedom of speech specifically, the framers' intent was to *increase* liberty, not decrease it.

A. Evidence from the Text and Convention

In the Convention of 1901, the free-speech provision would be materially altered for the first time. By the time the convention was finished, the new clause read, "That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Ala. Const. of 1901, art. I, § 4.

The Free Speech Clause of the Alabama Constitution was revised by the Committee on Preamble and Declaration of Rights. 1 *Proceedings of the Alabama Constitutional Convention of 1901* 784 (1940) (hereinafter "*Proceedings*"). The committee rejected "a large number" of proposed amendments "because it was believed that the great and essential principles of liberty embodied in the bill of rights, being, as they are, the crystallization of the experience of centuries, should be preserved, as far as possible, from change and innovation." *Id.* The Committee added some parts, even though it had not been asked to consider those parts, "because in the judgment of the Committee they made more clear and specific, and gave greater emphasis to, those rights of the people which are above and beyond the general power of government." *Id.* Thus, the primary object of the Committee appeared to be *protecting* liberty, rejecting the proposals that interfered with it and adding to the old text to better protect liberty.

The Committee reported the following material changes to the Free Speech Clause from the Constitution of 1875:

> The following material changes are reported:
>
> ....

> To Section 5 of the Declaration of Rights the following words have been added: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

1 *Proceedings* at 785.

The following debate took place as to the meaning of the proposed revisions to the Alabama Constitution's Free Speech Clause:

> MR. LOMAX — I will state that the committee has amended that section or added to the section in the Constitution of 1875, the first clause of the present section 'that no law shall ever be passed to curtail or restrain the liberty of speech or of the press.' Those words have been added by the committee. The original section reads in the present Constitution, 'Any person may speak, write or publish his sentiments on all subjects, being responsible for the abuse of that liberty.' I move the adoption of that section as read.
>
> MR. ASHCRAFT — I would like to ask the chairman of the committee. It seems in the original it was "any citizens" may speak. What was the design of the committee in changing the word 'citizen' to the word 'person'?
>
> MR. LOMAX — There was no special design at all, but I should think that the right to speak and publish his sentiments ought to be enjoyed by everybody, whether he is a citizen or not."
>
> MR. ASHCRAFT — I ask for information. There must have been some design in the original framers, for limiting it to the citizens as distinguished from a person. We might have an alien in an alien undertaking to stir up sedition and strife, and it might be possible in the interest of the country to prevent aliens from speaking and writing."

> MR. LOMAX — I will state to the gentleman from Lauderdale in the event of such a thing as that taking place, as an alien may undertaking to stir up sedition, he would be chargeable and liable to be convicted of treason.
>
> MR. BOONE — Was it not the purpose of the committee to allow the women of the State the right to express their views, also?
>
> MR. LOMAX — Women are citizens any how, but every person within the commonwealth ought to be permitted to write, speak and publish his sentiments whether he be a citizen of the commonwealth or not, and be responsible for the abuse of that liberty as every one else is.
>
> MR. CUNNINGHAM — What would be the status of an alien? Could he be indicted and tried for treason?
>
> MR. LOMAX — No sir, but he could be tried for something else that would be equally as bad.
>
> Upon a vote being taken the section was adopted.

2 *Proceedings* at 1643-44.

Thus, two material changes were made from the Constitution of 1875. First, although the idea seemed somewhat controversial, the new amendment protected the rights not only of citizens but of all people to speak, write, publish their sentiments on any subject. Second, it included a provision clearly stating that no law should be passed to curtail freedom of speech or of the press. However, it did not *limit* the freedom of speech by prohibiting *only* the legislature from abridging it. On the contrary, it

added an extra layer of protection to ensure that the legislature was clearly put on notice that it could not pass such a law. By also keeping the operative language from the prior constitution, the old right was still intact and given even more protection than it had before.

B. Evidence from the Dictionary

An interesting problem in originalism arises when the same words are adopted from an old constitution, but the understanding of the words changes between the old and new constitutions were adopted. In that case, a court would have to wrestle with the question of which meaning governs the words in the document. Nevertheless, ACLL does not believe that this problem exists in this case, because it appears that the understanding of the words did not change between 1819 and 1901.

In the same year that Alabama adopted its new constitution, G. & C. Merriam Company produced a massive new dictionary: *Webster's International Dictionary of the English Language* (1901) ("hereinafter *Webster 1901*"). Unlike Webster's 1828 dictionary, the 1901 international dictionary did not have an entry for liberty of the press. However, it defined the key words as follows:

- May: "An auxiliary verb qualifying the meaning of another verb, by expressing: (*a*) ability, competency, or possibility; -- now oftener expressed by *can*," and (*b*) Liberty; permission; allowance. Thou *mayest* no longer steward. *Luke* xvi. 2." *Webster 1901* at 904.
- Speak: "To utter with the mouth; to pronounce; to utter articulately, as human beings" and "To declare; to proclaim; to publish; to make known; to exhibit; to express in any way." *Webster 1901* at 1379.
- Responsible: "Liable to respond; likely to be called upon to answer; accountable; answerable; amendable; as, a guardian is *responsible* to the court for his conduct in office." *Webster 1901* at 1228.
- Abuse: "Improper treatment or use; application to a wrong or bad purpose; misuse; as, an *abuse* of our natural powers; an *abuse* of our civil rights, or of privileges or advantages; an *abuse* of language." *Webster 1901* at 9.

Putting it all together, that all people "may speak" means that they have the "liberty, permission, or allowance" to "utter with the mouth …

to declare, to proclaim, to publish, to make known, to exhibit, [or] to express in any way" their sentiments on any subject. The operative language makes no room for prior restraints. By being responsible, i.e., "accountable" for the abuse, which is "misuse … of our civil rights," the people are still liable for defamation and the like if they cross that line. Thus, a reasonable person in 1901 would understand the freedom to speak in Article I, Section 4 of the Alabama Constitution of 1901 the same way that a reasonable person would understand it in Article I, Section 8, of the Constitution of 1819 in all material respects (except that all people, not just citizens, may speak). In other words, in 1901, the Alabama Constitution still prohibited prior restraints.

III. The Alabama Constitution of 1901, Interpreted According to Its Original Meaning, Provides More Protection for Freedom from Prior Restraints Than the First Amendment as Interpreted by the Federal Courts.

Thus, in light of the foregoing, the evidence overwhelmingly (and unanimously) leads to the conclusion that Article I, Section 4 of the Alabama Constitution of 1901 prohibits prior restraints on speech. This is not necessarily to say that it *only* protects a person's right to be free from prior restraints. *See Constitutional Limitations*, *supra*, at 516 & 518 (acknowledging that the heart of freedom and speech and press was

freedom from prior restraints but that it also generally protected the right of the people to say what they please subject to limited exceptions). However, protection from prior restraints was undoubtedly the primary object that the Alabama Constitutions sought to secure.

With that background in mind, perhaps the Federal Constitution's Free Speech Clause, interpreted according to its original meaning, also provides protection that extensive against prior restraints. However, in modern times, it is questionable whether the United States Supreme Court has protected freedom from prior restraints as vigorously as it should. *See, e.g.*, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 n.2 (1994) (declining to view an injunction restricting pro-life sidewalk-counselor speech as prior restraint but instead as a time, place, or manner restriction); *id* at 797-800 (Scalia, J., dissenting) (criticizing the supposedly content-neutral time, place, and manner restriction as a *de facto* prior restraint); Calvin Massey, *American Constitutional Law: Powers and Liberties* (3d ed. 2009) (citing *Madsen* and arguing that "[o]nly content-based restrictions on speech before it occurs are prior restraints.). Clever lawyering can easily reframe a content-based restriction, which could be a prior restraint, as a content-neutral

restriction. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 485, 496-97 (2014) (concluding that a Massachusetts law restricting pro-life sidewalk counselor speech was content-neutral but was still unconstitutional under that test); *id.* at 497 (Scalia, J., concurring in judgment) (arguing that the Massachusetts law was clearly a content-based restriction and that strict scrutiny should apply).

Moreover, in the context of American Universities, the Framers of the Alabama and United States Constitutions would have been shocked to learn that many public universities place substantial and irrational limits on whether students, who attend universities to learn, may speak or not. As the United States Supreme Court has correctly held:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

Sadly, despite the Supreme Court's recognition in *Sweey* of how essential freedom of thought, inquiry, and speech are, the federal courts often apply the Supreme Court's forum analysis in the context of campus free speech and shockingly find that most places on campus are not open forums. *See, e.g.*, *Keeton v. Anderson-Wiley*, 664 F.3d 865, 872 (11th Cir. 2011) (finding that a public university's counseling program is a nonpublic forum); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (holding that a public university classroom was not an open forum). While ACLL does not know exactly where the analysis has broken down, when freedom of speech and inquiry are not protected at a public university, then the system is clearly broken down somewhere. When ACLL may not know how he came to this point, ACLL can see that the emperor clearly has no clothes. Hans Christian Andersen, *The Emperor's New Clothes*, in *Andersen's Fairy Tales* 220 et seq. (Wodsworth ed. 1993) (1837). This is a huge problem that state courts should not replicate.

Chief Judge Jeffrey Sutton of the Sixth Circuit, who held that bans on same-sex marriage were constitutional[3] and reasoned that OSHA

[3] *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *reversed sub nom. Obergefell v. Hodges*, 576 U.S. 644 (2015).

exceeded its authority in requiring businesses with over 100 employees to vaccinate them,[4] has recently lamented the unfortunate state-court practice of blindly following federal-court decisions in interpreting state constitutions. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 9 (2018). Judge Sutton compares this to a basketball game where a fouled player gets two free-throw shots. *Id.* at 7. If the player takes one shot but declines to take the other, such a decision would be unforgivable. *Id.* But often in constitutional law, lawyers stake their case on the Federal Constitution only, not realizing that the state constitution creates a second wall of protection for liberty that may provide even more protection than the Federal Constitution does. *Id.* at 9.

Chief Judge Sutton observes that the bench and bar did not look to the Federal Constitution as the main source of protection for individual rights until the Supreme Court incorporated the Bill of Rights against the States, most of which was complete by the 1960's. *Id.* at 13-14. The

[4] *In re MCP No. 165*, 20 F.4th 264 (6th Cir. 2021) (Sutton, C.J., dissenting). The United States Supreme Court adopted much of Chief Judge Sutton's reasoning when the case reached that Court. *NFIB v. Department of Labor*, 142 S.Ct. 661, 665 (2022).

unfortunate side-effect of incorporation was that the federal courts became the leaders in interpreting constitutional rights, leaving the state courts unsure what to do or what to think about their own constitutions. *Id.* at 14-15. But if the state courts gave independent thought as to what their own constitutions say and mean, as they did from the Founding era until the Incorporation era, then the liberties of the People would be more secure than they are now. Where the federal courts have failed to protect liberty, the state courts may do so by applying their own constitutions when they protect more freedom than the Federal Constitution (at least as interpreted by the federal courts) does.

IV. Under the Foregoing Principles, the Judgment of the Trial Court Must Be Reversed.

In this case, therefore, the evidence is absolutely overwhelming that Article I, Section 4 of the Alabama Constitution of 1901 protects Appellants' rights to speak without prior restraints. Here, Appellees have subjected Appellants to sweeping and unreasonable prior restraints on their speech that violate both the letter and the spirit of the Alabama Constitution. Consequently, the trial court's order granting Appellees' motion to dismiss is due to be reversed.

If there are any limitations on the Alabama Constitution's ban on prior restraints, then they are not apparent from the text or history of that Amendment. As Thomas Cooley reasoned, if there are any limits on the prior-restraint rule, then "we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted." *Constitutional Limitations*, *supra*, at 518. Although most of the rules of which ACLL is aware require punishment after the event instead of seeking permission before the event, perhaps there are some obscure common-law rules describing when and where students could speak on campus. But if such rules exist, then Appellees should be required to bring them to the Court's attention if they want the trial court's decision to be upheld. The overwhelming evidence at this point compels the conclusion that Appellees' restrictions on Appellants' speech are unconstitutional.

CONCLUSION

Because the original public meaning of Article I, Section 4 of the Alabama Constitution of 1901 forbids prior restraints of speech, and because Appellees' rules run afoul of the Alabama Constitution, the trial court's judgment should be reversed.

Respectfully submitted March 29, 2022,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28(a)(12) and 29(c), Ala. R. App. P., I hereby certify that this brief complies with the font and word limits as required by Rule 32(d), Ala. R. App. P. This brief was written in 14-point Century Schoolbook font, and the text is fully justified. Not counting the portions exempted by Rules 28(j)(1) and Rule 29(c), this brief contains 6,094 words.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2022, I emailed the foregoing to Appellees' counsel, Jay M. Ezelle, at the following email address: jme@starneslaw.com. I further certify that I emailed this brief to Appellants' counsel, Mathew W. Hoffman, at the following email address: mhoffman@adflegal.com.

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