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Honorable Julia Jordan Weller
Clerk of the Court

No. 1210309

In the Supreme Court of Alabama

YOUNG AMERICANS FOR LIBERTY, ET AL.,

Appellants,

v.

FINIS ST. JOHN IV, ET AL.,

Appellees.

BRIEF OF *AMICI CURIAE* ALABAMA STATE LEGISLATORS IN SUPPORT OF APPELLANTS

On Appeal from the Circuit Court of Madison County
(CV-2021-900878, Hon. Alison S. Austin presiding)

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

On March 18, 2022, the editorial board of The New York Times ran a piece lamenting that *America Has a Free Speech Problem*.[1] The article catalogued the fears people have when offering potentially controversial speech. And this isn't a new problem. The past decade has seen increased protests of certain speech and even the destruction of campus property when groups attempt to host speakers on campus. *See, e.g.*, Madison Park & Kyung Lah, *Berkeley protests of Yiannopoulos caused $100,000 in damage*, CNN.com (Feb. 2, 2017). Proving the editorial board's point, many excoriated the Times's attempt to highlight free speech problems in America. *See, e.g.*, Dan Froomkin, *The New York Times editorial board should retract and resign*, Press Watch, presswatchers.org (Mar. 18, 2022). Their basic critique was that a publication like The Times—devoted to progressive causes—should not highlight the importance of free speech when there are topics that progressives believe should not be open for debate.

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[1] https: // www.nytimes.com/ 2022 / 03 / 18 / opinion / cancel-culture-free-speech-poll.html.

But in a functioning and robust society, debate can and should take place even on questions that one side feels are settled. When such speech is prevented, progress stops. And when university students have their knowledge—including their understanding of the nation's diversity of thought—dramatically reduced by the banning of free speech, that censorship shrinks their intellectual world. This is true even when the censored opinions are inartful or even offensive.

As it is, though, protesters on college campuses often exercise a heckler's veto over speech they do not like. For instance, when a Texas political candidate recently attempted to express his concern about young children sex transitioning, he was prevented from speaking by a University of North Texas crowd that gathered in the classroom chanting "Fuck these fascists!" Chris Bertman, *'F*ck These Facists': Activists Disrupt Republican Texas House Candidate's Speech At University Of North Texas*, Daily Caller (Mar. 4, 2022). The examples, unfortunately, abound. *See, e.g.*, Ilya Shapiro, *Mob Rule and Cancel Culture at Hastings Law School*, Wall Street Journal (Mar. 22, 2022); Jonathan Turley, *CUNY Law Dean: Students Shutting Down Speech on Free Speech Was Free Speech*, jonathanturley.org (Apr. 17, 2018).

In the face of these assaults on free speech, states across the nation have enacted robust protections for speech on college campuses. Seeking to ensure the broadest protections possible under the First Amendment, legislatures have purposefully sought to tie the hands of administrators who would otherwise curb certain types of speech or relegate it to specified areas. The law at issue was passed precisely for that reason. *See* Campus Free Speech Act, Ala. Code § 16-68-1, et seq. ("CFSA"). Rather than allow officials at Alabama state universities to place restraints on speech ex ante, the law requires good reason for university officials to regulate speech in the slightest. Here, the University's attempt to evade the Legislature's express directives only highlights the instinct that administrators have to regulate speech and the need for this Court to enforce the statute as written.

Amici are a group of Alabama legislators—*see* Appendix A—who fought to ensure that free speech would be protected on the State's higher education campuses to the fullest degree possible. Ala. Code § 16-68-3(a)(1). *Amici* are thus well-situated to explain that the statute at issue intended to prevent administrators from establishing speech zones to which to relegate groups or speakers and to allow for unfettered access

to outdoor areas on campus for spontaneous speech—in other words, the law means what it says. The trial court's confusion stemmed from a misreading of the Act that would allow the University to establish speech zones as a time, manner, and place restriction on campus speech and require prior approval for spontaneous speech. But the statute here seeks to do away with those very types of restrictions and to categorically ban Alabama colleges from interfering with spontaneous student speech in the outdoor areas of campus.

SUMMARY OF ARGUMENT

Over the past decade, student groups on university campuses have seen their free speech rights attacked by other students, faculty, and administrators. As a result, many became uncomfortable speaking out in favor of freedom of speech. To combat that, many states adopted free speech protection statutes specifically intended to provide a blueprint for college administrators on how (not) to regulate speech. Alabama's version of such a law is robust. It was intended to prevent administrators from enacting any standing restrictions on free speech *ex ante* while still allowing orderly regulation of conduct if it poses an obstacle to the speech of other groups or the learning environment of the campus. As the text

of the statute establishes, however, such regulation must be done on a case by case basis and cannot be done by establishing free speech zones ahead of time or requiring permission for speech in outdoor areas of a campus. The University's policy here violates the CFSA, because it violates both of these provisions of the statute. Ala. Code § 16-68-3(a)(3–4).

ARGUMENT

I. In Light Of Systemic Interference With Speech On College Campuses, The Legislature Drafted The CFSA To Prohibit Universities From Restricting Protected Speech On Campus.

In the face of concerted efforts across the country to shut down free speech on college campuses, the Alabama Legislature adopted the CFSA. The Legislature determined that such a law was necessary in light of those attacks on free speech (and others outside the campus) that have been seen over the past decade.

The recent Times editorial showcases the problem: "However you define cancel culture, Americans know it exists and feel its burden." *America Has a Free Speech Problem*, *supra.* This can be seen online where actors such as Twitter or YouTube censor viewpoints with which their leadership disagree. Daniel Victor, *YouTube suspends Rand Paul*

for a week over a video disputing the effectiveness of masks, N.Y. Times (Aug. 11, 2021).[2] If a sitting United States Senator—who is also a medical doctor—can be banned for raising questions about a public health issue, college students are right to fear losing what could otherwise be a vital part of their education: social media platforms that allow for discussion about current events as well as political and social controversies.[3]

But not only do the online platforms work as censorship tools against disfavored viewpoints, they also serve as rallying tools for groups that work to "cancel" speech with which they disagree. And as seen in the messaging of the pro-censorship groups, violence is often suggested and encouraged. *See, e.g.*, Robby Soave, *'Grow Up': Yale Law School Students Interrupt Event, Demand Right To Talk Over Speakers*, reason.com (Mar. 16, 2022). Speech is only further chilled as a result.

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[2] https: // www.nytimes.com / 2021 / 08 / 11 / business / youtube - rand - paul-covid-masks.html.

[3] States are also separately attempting to address the First Amendment problem of online forums censoring viewpoints with which they disagree. *See, e.g.*, HB 20, Tex. Civ. Prac. & Rem. Code § 143A.002 ("Censorship Prohibited"), Dec. 2, 2021.

In addition to the online censorship running rampant, the Legislature also took note of the instances where college administrators have been complicit in some manner with the banning of speech on campus by anti-speech groups (whether led by students or outside groups). *See* Robby Soave, *CUNY's Law Dean Is Wrong About the Attempted Shutdown of Josh Blackman*, reason.com (Apr. 17, 2018). In the event at the CUNY Law School, the Dean defended a student-led protest, concluding that it was "limited and reasonable" "when a group of activists crashed the event, surrounded [the speaker], and heckled," stopping the event for some length of time. *Id.* There have also been instances where no students were disciplined even though actual violence took place during the "cancelling" of someone's speech. *See* Katherine Q. Seelye, *Protestors Disrupt Speech by 'Bell Curve' Author at Vermont College*, NY Times (Mar. 3, 2017).

Against this backdrop of systemic censorship faced by college students in Alabama, the Legislature passed the CFSA. The Legislature found that Alabama's universities are "peculiarly the marketplace of ideas" where "young adults learn to exercise those constitutional rights [such as the freedom of speech] necessary to participate in our system of

government and to tolerate the exercise of those rights by others." Ala. Code § 16-68-1(3).

Moreover, the Legislature found that several previous academic reports "articulate well the essential role of free expression and the importance of neutrality at public institutions of higher education." *Id.* § 16-68-1(7). This included a 2015 report issued by a committee on free speech at the University of Chicago indicating that "all members of the University community" must be guaranteed "the broadest possible latitude to speak, write, listen, challenge, and learn." *Report of the Committee on Freedom of Expression*, Univ. of Chi. (July 2015). Additionally, "debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed." *Id.* Members of the campus community must then make judgments for themselves and "act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose." *Id.*

Meant to avoid the situations seen on other college campuses, the Act is purposefully designed "to ensure the fullest degree of intellectual

and academic freedom and free expression." Ala. Code § 16-68-1(5). The statute accomplishes this in large part by prohibiting speech zones and designating the outdoor campus space as being available for spontaneous speech. *Id.* § 16-68-3(a)(3–4). This is in line with the explicit goal of the Act to cultivate an environment of free speech that fosters the intellectual and social growth of Alabama's college students rather than stymies it. *See id.* § 16-68-3(a)(1–2).

II. The CFSA Does Not Allow The Speech Limitations Found In The University's Policy Here.

As made clear in the text of the Act, the CFSA is meant to allow for "spontaneous[]" speech in any outdoor location. *Id.* § 16-68-3(a)(3). Indeed, the statute was specifically drafted to prevent prohibitions on protected expressive activities that take place outdoors. *Id.* § 16-68-3(a)(4). In keeping with the goal of ensuring that speech is heard rather than silenced, the CFSA prohibits members of the campus community from "engag[ing] in conduct that materially and substantially disrupts another person's protected expressive activity or infringes on the rights of others to engage in or listen to a protected expressive activity." *Id.* § 16-68-3(a)(6). Finally, any time/place/manner restrictions that a university does put in place must be "narrowly tailored to serve a

significant institutional interest" (in addition to being content/viewpoint neutral and providing alternative means of communication). *Id.* § 16-68-3(a)(7).

In response to the passage of the CFSA, the University of Alabama in Huntsville not only retained its three-business-day notice requirement for students to speak in outdoor areas of campus, it added zones for so-called "spontaneous" speech—*i.e.*, only speech "prompted by news or affairs." Complaint ¶¶ 72, 82; Circuit Court Opn. at 5. These areas are necessary, according to the school, because using other parts of the campus for spontaneous free speech would "risk interfering with the educational mission of the University or other[s'] right to engage in free expression." Circuit Court Opn. at 5. The University's policy allows students to engage in "spontaneous" expression outside of those zones, but only if they make "an expedited request . . . [requiring] twenty-four (24) hours' notice." Circuit Court Opn. at 5.

It is clear, then, that the text of the CFSA is directly at odds with the University's policy. Indeed, the policy is 180 degrees from the Legislature's express protection of speech to the fullest extent possible in order to promote the University's mission of discovery and dissemination

of knowledge. Ala. Code § 16-68-3(a)(1). To reconcile that text, the Circuit Court focused primarily on the University's responsibility to prevent anyone's speech rights (speaking or listening) from being infringed. Circuit Court Opn. at 8. The court assumed that Plaintiffs' interpretation would prevent the University from complying with both § 16-68-3(a)(4) and § 16-68-3(a)(6). Circuit Court Opn. at 8.

But such a conflict need not be presumed. If a group holds an event in "a location that has been reserved for that protected expressive activity," there is no reason to assume that should be anything other than an indoor location under the Act (since outdoor locations must be available for spontaneous speech). *Compare* Ala. Code § 16-68-3(a)(6), *with id.* § 16-68-3(a)(3). And even under the Circuit Court's interpretation, if an outdoor location has not been reserved, it should remain—according § 16-68-3(a)(4)—open for spontaneous speech. Thus the Circuit Court's own reading cannot justify a policy that specifically violates the portions of the statute indicating that all outdoor areas on campus should remain open for spontaneous speech and that the school should not create speech zones. Moreover, allowing standing speech zones would also create a conflict with § 16-68-3(a)(7) since the constant

existence of such time/manner/place restrictions cannot qualify as satisfying the narrow tailoring required by the Legislature. The University cannot continue to place the burden on speakers to justify their ability to speak in any outdoor space when the Legislature specifically removed that impediment to spontaneous speech in any outdoor area.

In short, reading the statute as a whole—as the Circuit Court recognized should be done, *Ex parte Lambert*, 199 So.3d 761, 766 (Ala. 2015)—reveals that all of the portions of the CFSA may be reconciled. It merely requires that a university: (1) not create speech zones; and (2) not infringe on students' ability to speak spontaneously in any outdoor space.

CONCLUSION

The Circuit Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to ARAP 28(a)(12), I hereby certify that that the foregoing document complies with the font and word limits of ARAP 32(d). The brief contains 2257 words, according to the word processing software used to write the brief, and the brief is typed in Century Schoolbook with 14 point font.

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CERTIFICATE OF SERVICE

Pursuant to ARAP 25(b) and 31(b), I hereby certify that a copy of the foregoing document has been filed with the Clerk of the Supreme Court of Alabama on March 31, 2022, using the Alabama Appellate Courts' Online Information Service and emailed to the following (with paper copies to be mailed):

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APPENDIX A

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- Representative Danny Crawford
- Representative Bob Fincher
- Representative Tommy Hanes
- Representative Mike Holmes
- Representative Jamie Kiel
- Representative Arnold Mooney
- Representative Ed Oliver
- Representative Ivan Smith
- Representative Andrew Sorrell
- Representative Tim Wadsworth
- Representative Ritchie Whorton

SENATORS:

- Senator Arthur Orr
- Senator David Sessions
- Senator Shay Shelnutt
- Senator Larry Stutts