Case No. 1210309

IN THE SUPREME COURT OF ALABAMA

YOUNG AMERICANS FOR LIBERTY AT UNIVERSITY OF ALABAMA IN HUNTSVILLE and JOSHUA GREER,

Plaintiffs/Appellants,

vs.

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 HEBERT, Dean of Students; WILL HALL, Director of Charger Union and Conference Training Center; JUANITA OWENS, Associate Director of Conferences and Events; in their official capacities.

Defendants/Appellees.

On Appeal from Madison County Circuit Court
Civil Action No. CV-2021-900878

APPELLEES' BRIEF

Jay M. Ezelle (EZE002)
Cole R. Gresham (GRE127)
Sybil V. Newton (ABB001)
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
(205) 868-6000 – Telephone
jezelle@starneslaw.com
cgresham@starneslaw.com
snewton@starneslaw.com
Attorneys for Defendants/Appellees

STATEMENT REGARDING ORAL ARGUMENT

Defendants request oral argument only in the event this Court reaches the constitutional questions presented. This appeal can and should be resolved through a standard review of the Circuit's Court's straightforward application of the statutory text of the Alabama Campus Free Speech Act, ALA. CODE § 16-68-1, *et seq*. ("the Act") to the University of Alabama in Huntsville's (the "University's") Use of Outdoor Areas of Campus Policy (the "Policy"). Oral argument would be unnecessary for that basic exercise of statutory application. On the other hand, should this Court go beyond the application of the Act to the Policy and reach the constitutional questions, then Defendants agree with Plaintiffs that those questions are of such significance and complexity to merit oral argument.

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STATEMENT OF THE CASE

This case is not about whether free speech should be allowed on campus—as all of the parties and Amici agree on that point—but rather whether the University's Policy complies with the Act, and if it does not, then whether the Act complies with the Alabama Constitution. With regard to the first, the presenting question is whether the Circuit Court correctly granted the Motion to Dismiss finding that the University's Policy complies with the Act.[1] Plaintiffs contend that the Circuit Court erred because it did not blindly apply the conclusory allegations in their Complaint about what the Policy says and, instead, used the actual language of the Policy. Moreover, Plaintiffs complain that the Circuit Court did not rewrite certain provisions of the Act so that it could actually accomplish what Plaintiffs contend the Act should require.

If this Court focuses on the language of the Act and the Policy, it will reach the same conclusion as the Circuit Court that the Policy imposes appropriate time, place, and manner restrictions, as required by the Act. This is why Plaintiffs and Amici, in their 181 pages of briefing, go to great lengths to focus on the justifiable concerns about

[1] C433–49.

the free speech limitations imposed at UC Berkley and other campuses across the country rather than a straightforward application of the Act to the Policy. Yet, their attempted Sturm und Drang stands in stark contrast to the Complaint,[2] which does not contain a single allegation that anyone has ever been prevented from speaking on campus. Rather, the lack of such an allegation about the University demonstrates the Policy is accomplishing its purpose: allowing the University to be "an enclave created for the pursuit of higher learning [that] is committed to free and open inquiry and expression,"[3] which is also the purpose of the Act.

Should this Court follow the path of the Circuit Court of simple statutory application, then the Circuit Court's dismissal is due to be affirmed. On the other hand, should this Court go beyond the Act, then this Court must address two Constitutional questions:

First, Plaintiffs' claim that the Policy violates the Free Speech Clause of the Alabama Constitution, which they contend is far more stringent than the First Amendment. Yet, the text of the Clause and

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[2] C. 31-53.

[3] C. 82.

this Court's long history of interpreting it in a manner consistent with the First Amendment do not support Plaintiff's argument. Likewise, Plaintiffs' own pleadings in this case do not support such a finding because, if true, it would mean the very Act they seek to enforce is unconstitutional because it requires time, place, and manner restrictions. Moreover, it would mean the Legislature's own Events Policy, this Court's Media Coverage Plan, and countless statutes that have imposed some time, place, and manner restriction on speech are all unconstitutional.

Second, Defendants claim that the Act is unconstitutional because it violates Section 264 of the Alabama Constitution by usurping the Board of Trustees' right to "manage and control" the University. Although the University has the same desire as the Legislature to protect free speech on campus, the Alabama Constitution clearly recognizes the constitutional autonomy granted to the Board of Trustees and the Act clearly infringes on that autonomy by requiring the University to "manage and control" free speech in accordance with the Act.

For each of these reasons, this Court should affirm the Circuit Court and protect our state campuses—as well as all governmental buildings and courtrooms—from anarchy and mob rule. There is no legal or policy justification for such an extreme rewrite of the Act or the Free Speech Clause, especially when Plaintiffs cannot make a single allegation of the University ever preventing speech on its campus. By all accounts, the University is operating as the marketplace of ideas in its classrooms, assembly halls, auditoriums, and outdoor spaces. Preventing the University from using reasonable time, place, and manner procedures to ensure the safety of its campus and the pursuit of its educational mission cannot be supported by law or logic.

STATEMENT OF THE ISSUES

1. Did the Circuit Court properly reject Plaintiffs' mischaracterizations of and conclusory allegations about the Act and the Policy and correctly find the Policy complies with the Act because it allows students to engage in spontaneous speech subject only to limited time, place, and manner restrictions when such restrictions are specifically required by the Act?

2. Did the Circuit Court rightly apply the long-standing precedents of this Court when it concluded that the Free Speech Clause of the Alabama Constitution is not broader than the First Amendment and does not ban all prospective time, place, and manner restrictions?

3. Does the Act violate Section 264 of the Alabama Constitution by usurping the Board's right to "manage and control" the University by telling the Board how to regulate its property and mandating the Board adopt specific policies?

STATEMENT OF THE FACTS

Response to Plaintiffs' Statement of Facts

Instead of allowing the Act and the Policy to speak for themselves, Plaintiffs have constructed a strawman through misleading, out-of-context, and partial quotations of the Act and Policy. The table below highlights just a few of the Plaintiffs' many misleading statements of fact:

Plaintiffs' Statement of Fact	Actual Statement of Fact
The policy places limits on the "freedom to debate and discuss the merits of competing ideas. Defendants purport to recognize "free and open inquiry" but reserve for themselves the power to "restrict expression."[4]	"At UAH, **freedom of expression and assembly is vital to the pursuit of knowledge** . . . The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish. UAH may restrict expression or assembly that violates, the law, falsely defames a specific individual, constitutes a genuine threat or harassment, unjustifiably invades substantial privacy or confidentiality interests, or is otherwise incompatible with the functioning of the institution."[5]
As amended, the policy requires "reservations" for students to speak in the University's "outdoor	"Spontaneous activities of expression, which are generally prompted by news or affairs

[4] Appellants' Br. at 8.

[5] C. 86.

space," including campus sidewalks.[6]	coming into public knowledge less than forty-eight (48) hours prior . . . may be held by University affiliates in the following defined areas, **without advance approval**."[7]
And they can refuse permission if they determine that the speech would jeopardize the "well-being of members of the campus community collectively individually, as well as the educational experience."[8]	"The **safety and well-being** of members of the campus community collectively and individually, as well as the educational experience and other significant interest of UAH as outlined herein, must be protected at all times." . . . "Although great value is placed on civility, and while members of the campus community share in the responsibility for maintaining a climate of mutual respect, concerns about **civility and mutual respect can never be used to justify closing off the otherwise lawful discussion of ideas among members of the campus community, however offensive or disagreeable those ideas may be to some.**"[9]
Defendants limit those "spontaneous" activities to speech "generally prompted by new or affairs coming into the	"Spontaneous activities of expression, which **are generally** prompted by news or affairs coming into public knowledge less

[6] Appellants' Br. at 8.

[7] C. 87

[8] Appellants' Br. at 9.

[9] C85-86.

public knowledge less than forty-eight (48) hours prior to the spontaneous expression."[10]	than forty-eight (48) hours prior to the spontaneous expression."[11]
Plaintiff YAL an expressive association made up of University students. Plaintiffs want to speak in the outdoor areas of campus without seeking advance approval from Defendants and without limiting their speech to designated areas.[12]	According to the Complaint: "**YAL is not presently a recognized student organization** at the University . . ."[13]

The University's Statement of Facts

The Alabama Legislature passed the Act, and it was signed by the Governor becoming effective on July 1, 2020. According to the Act, "the primary function of the [University] is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate . . . ."[14] The Act explicitly allows the University to "maintain and enforce constitutional time, place, and manner restrictions for outdoor areas of campus only when they are narrowly tailored to serve a significant institutional interest and when

[10] Appellants' Br. at 9.

[11] C. 87.

[12] Appellants' Br. at 11.

[13] C. 33 at ¶ 17.

[14] ALA. CODE § 16-68-3(a)(1).

the restrictions employ clear, published, content-neutral, and viewpoint-neutral criteria, and provide for ample alternative means of expression."[15]

The Policy provides:

> The Board of Trustees of The University of Alabama, an independent, constitutional instrumentality of the state, controls The University of Alabama Huntsville ("UAH" or "University"), an enclave created for the pursuit of higher learning, and is committed to free and open inquiry and expression for members of its campus communities. Except as limitations on that freedom are appropriate to the functioning of the campuses . . . ..[16]

The Policy goes on to state that "UAH has a significant interest in protecting the educational experience of its students, in ensuring health, safety, and order on its campus, in regulating competing uses of its facilities and grounds, and in protecting the safety and wellbeing of those with the right to use its facilities and grounds to engage in protected speech, among other significant interests."[17] This is because the University's grounds and facilities "are intended primarily for the

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[15] ALA. CODE § 16-68-3(a)(7).

[16] C. 82.

[17] C. 86 at § F.

support of the teaching, research, and service components of its mission."[18]

UAH expressly recognizes in the Policy that:

> The ideas of different members of a campus community will often and quite naturally conflict, but it is not the proper role of UAH to shield or attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive . . . concerns about civility and mutual respect can never be used to justify closing off the otherwise lawful discussion of ideas among members of the campus community, however offensive or disagreeable those ideas may be to some.[19]

"[T]o ensure that these interests are protected and that expression does not disrupt the ordinary activities of the institution," the Policy sets forth certain time, place, and manner procedures for use of the University campus.[20]

Under the Policy, students are free to distribute materials such as pamphlets or leaflets anytime and anywhere on campus without the

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[18] *Id.*

[19] *Id.* (emphasis added).

[20] C. 82.

need to register or seek pre-approval.[21] Plaintiffs do not allege that they were ever denied the opportunity to distribute materials.[22]

With respect to holding events, the Policy distinguishes between events that can be planned and those that cannot, *i.e.* events that are "spontaneous." For any "spontaneous activities of expression," students can do so whenever they choose, without any requirement to register or seek any pre-approval of such an event.[23] To accomplish this while also preserving the educational mission of the University and protecting others' rights to engage in free expression, the University has designated certain areas—which consist of a large portion of the outdoor space on campus—where students can engage in such spontaneous expression anytime they so choose.[24] Plaintiffs do not allege that they were ever denied the opportunity to use these spaces.[25]

If students desire to engage in spontaneous expression in any other campus space—*i.e.*, parts of campus that risk interfering with the

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[21] C. 88 at § F(2).

[22] *See generally,* C. 31-53.

[23] C. 87 at § F(1).

[24] C. 87-88 at § F(1)(b).

[25] *See generally,* C. 31-53.

educational mission of the University or others' right to engage in free expression—then the students can make an expedited request to use those spaces with just twenty-four (24) hours' notice.[26] Plaintiffs do not allege that they ever sought to use such spaces or that they were ever denied such a request.[27]

For activities and expression that can be planned in advance, i.e., events that are not spontaneous, the University provides procedures for registering for the use of campus space and buildings to ensure that those activities do "not interfere with the academic mission or operation of UAH" including "protecting the educational experience of its students; ensuring health, safety, and order on its campus; regulating competing uses of its grounds as well as protecting campus property; and protecting the safety and wellbeing of those with the right to use its facilities and grounds to engage in protected speech."[28]

The Policy states in no uncertain terms that the University "will approve" a speaker's application "unless there are reasonable grounds to believe that one for more of the following conditions are present":

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[26] C. 88 at § F(1)(d).

[27] *See generally,* C. 31-53.

[28] C. 82.

1. The applicant has had their/its available privileges, such as the use of certain University space, withdrawn, suspended, and/or restricted.

2. The proposed space is unavailable at the time requested because of conflicting events previously planned in or around that location.

3. The proposed date, time, or requested space is unreasonable given the nature of the Event and/or the impact it would have on UAH's resources and teaching and research mission.

4. The Event would present logistical complexities that cannot be accommodated based on when the GUR application was submitted, the size of the event, and when the Event is to occur.

5. The Event would not comply with the provisions of Paragraph E (General Provisions Applying to All Use of Outdoor Space).

6. The Event would reasonably constitute an immediate and actual danger to the health or safety of UAH students, faculty, or staff, or to the peace or security of UAH that available law enforcement officials could not control with reasonable effort.

7. The University affiliate who submits the application has on prior occasions damaged UAH property and has not paid in full for such damage.

8. The requested use of campus space is inconsistent with the terms of this policy.[29]

Plaintiffs do not allege that they ever requested the use of any campus space or that they were ever denied such a request.[30] The

[29] C. 83-84 at § C(4).

Complaint does not allege that the University has failed to comply with its own policy.[31] And the Complaint does not allege that Plaintiffs were ever denied access to any campus space.[32]

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[30] *See generally,* C. 31-53.

[31] C. 31-53.

[32] C. 31-53.

STANDARD OF REVIEW

At the motion to dismiss stage, the court is only "required to accept [Plaintiffs'] factual allegations [it is] not required to accept [their] conclusory allegations."[33] "[T]o survive [a] motion to dismiss, [Plaintiffs are] required to plead facts that would support those conclusory allegations."[34] Further, at this stage, the court is not required to accept the Plaintiffs' "legal allegations" as true.[35] The issues presented here are purely legal questions: does the Policy comply with Act and, if not, does the Act comply with the Free Speech clause and Section 264 of the Alabama Constitution.

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[33] *Ex parte Gilland*, 274 So. 3d 976, 985 n.3 (Ala. 2018) (emphasis original).

[34] *Id.* (emphasis original).

[35] *Ex parte Marshall*, No. 1190644, 2020 WL 5743227, at *10 n.3 (Ala. Sept. 25, 2020).

SUMMARY OF THE ARGUMENT

The Circuit Court correctly concluded that the University's Policy is consistent with the Act. In so doing, the Court properly rejected the conclusory allegations, exaggerations, and outright misrepresentations in the Complaint of what the Act and the Policy require.

On appeal, Plaintiffs argue that the Circuit Court erred because it did not accept every conclusory allegation in the Complaint as true. Yet, it is axiomatic that courts are not required to accept "conclusory allegations" or legal interpretations, as that is the proper role of the court, even at the pleading stage.[36] This is especially true where Plaintiffs' contentions conflict with the plain language of the Act and the Policy, which Plaintiffs attached and incorporated into their Complaint.

Properly examined, the Policy—in compliance with the Act—allows spontaneous speech subject only to narrowly tailored time, place, and manner restrictions. These limited restrictions are mandated by the Act's requirement that the University "shall not permit members of the campus community to engage in conduct that materially and

[36] *Ex parte Gilland*, 274 So. 3d at 985 n.3.

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 that is occurring in a location that has been reserved for that protected expressive activity."[37] The limited restrictions are also necessary for the University to fulfill "the primary function of the public institution of higher education [which] is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate . . . ."[38] Plaintiffs' claim that the Act prohibits all rules regulating speech would result in a free-for-all on campus interfering not only with speech in reserved locations, but also the research and teaching necessary for the University to fulfill its "primary function."

According to Plaintiffs' fabricated view of the Act, Alabama campuses cannot be regulated in any manner, but rather are subject to the whims and desires of whoever may want to speak, whenever they want to, and however they choose to do so. Thus, according to Plaintiffs, if a student invited members of Antifa to protest an American History

[37] ALA. CODE § 16-68-3(6).

[38] ALA. CODE § 16-68-3(1).

seminar, Antifa could set up bull horns and loud-speakers right outside the classroom window and shout down any teaching they find disagreeable. Likewise, under Plaintiffs' view, if the Department of Music wanted to host a classical music concert outdoors, then they could not do so because any reservation system would violate the Act and would be subject to being drowned out by the shouts and screams of a protestor who disliked the music. The classic collegiate experiences of lectures, sporting events, concerts, and planned social events are incompatible with Plaintiffs' view that no outdoor space can ever be reserved and is always open to any crowd or mob that want to use the space.

Plaintiffs would apparently prefer counter-protestors to fight for space rather than the orderly, but open and free, procedures enacted by the University. Plaintiffs' proposal would actually do far more to harm and limit free speech than the Policy, which promotes free speech, while also recognizing the importance of the University's teaching and research functions. The Policy, in compliance with the directive of the Act, balances these University functions by allowing students to speak

spontaneously and allowing the University to implement time, place, and manner policies to protect its teaching and research mission.

The folly of Plaintiffs' position is further demonstrated by their argument that the Policy also violates the Free Speech Clause of the Alabama Constitution because they contend it prohibits any time, place, and manner restriction on speech. If that were so, then the very Act Plaintiffs seek to enforce would be unconstitutional, as well as any procedure that limited the ability of the mob to assemble and shout down the subject of their ire. The long sacred concepts of protected enclaves like courtrooms and classrooms would be unconstitutional under Plaintiffs view of the Alabama Free Speech Clause. Fortunately, Plaintiffs' argument finds no support in the text or this Court's precedent.

Finally, while the Court need not reach the issue because the Policy complies with the Act, the Act is unconstitutional as it interferes with the Board's "management and control" of the University. Alabama's Constitution grants the Board the exclusive right to "manage and control" the University. Even the Attorney General recognized: "The Alabama Supreme Court has recognized and affirmed that the

University of Alabama is under the management and control of the Board and that the Legislature has no authority by act to deprive the Board of their discretion as to such management and control."[39] The University's discretion in managing and controlling the University is not unique to Alabama, as numerous other states found it wise to insulate universities from the latest political whims. By mandating how the University manages its property and adopts and teaches specific policies, the Act clearly infringes upon the Board's exclusive authority to "manage and control" the University. As a result, the Act is unconstitutional.

[39] Opinion to Hon. Sid J. Trant, Secretary and General Counsel, Board of Trustees of the University of Alabama, dates March 20, 2019, A.G. No. 2019-026.

ARGUMENT

I. THE POLICY COMPLIES WITH THE PLAIN LANGUAGE OF THE ACT.

Plaintiffs' claim the Act prohibits all restrictions on spontaneous speech in the outdoor areas of campus. Plaintiffs' arguments, however, ignore the Act's plain language. According to the Act:

> [A] public institution of higher education **may maintain and enforce constitutional time, place, and manner restrictions** for outdoor areas of campus only when they are narrowly tailored to serve a significant institutional interest and when the restrictions employ clear, published, content-neutral, and viewpoint-neutral criteria, and provide for ample alternative means of expression. All restrictions shall allow for members of the university community to spontaneously and contemporaneously assemble and distribute literature.[40]

The Circuit Court properly found that this provision of the Act permits the University to enact time, place, and manner restrictions on spontaneous speech, and that the Policy is narrowly tailored, employs content- and viewpoint-neutral criteria, and provides ample alternative means of expression. A straightforward application of the Act to the terms of the Policy confirms the Circuit Court's finding.

[40] ALA. CODE § 16-68-3(a)(7)(emphasis added).

A. The Act specifically allows time, place, and manner restrictions on spontaneous speech.

Contrary to Plaintiffs' contention, the Act does not mandate a lawless, chaotic free-for-all on campus and does not bar the University from instituting procedures to regulate expressive activity on campus. Plaintiffs ignore the express language in the Act allowing the University to "maintain and enforce constitutional time, place, and manner restrictions" as long as they "are narrowly tailored to serve a significant institutional interest and when the restrictions employ clear, published, content-neutral, and viewpoint-neutral criteria, and provide for ample alternative means of expression."[41] The provision goes on to provide: "All restrictions shall allow for members of the university community to spontaneously and contemporaneously assemble and distribute literature."[42]

Notably, however, the provision does not provide that the time, place, and manner restrictions must allow students to spontaneously "speak." The omission was not a mistake as the Act earlier provides that students are free "to spontaneously and contemporaneously

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[41] ALA. CODE § 16-68-3(a)(7).

[42] *Id.*

assemble, speak and distribute literature."[43] Read together, these provisions explicitly authorize universities to subject the ability to "spontaneously . . . speak," to "constitutional time, place, and manner restrictions . . . ."[44]

The Act further requires:

> That the public institution of higher education shall not permit members of the campus community to engage 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 that is occurring in a location that has been reserved for that protected expressive activity and shall adopt a range of disciplinary sanctions for anyone under the jurisdiction of the institution who materially and substantially disrupts the free expression of others.[45]

According to the Act's plain language, students must be allowed to "reserve[]" space for "a protected expressive activity" and the University is required to protect against any "conduct that materially and substantially disrupts" the speech rights of the students who reserved

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[43] ALA. CODE § 16-68-3(a)(3).

[44] *See Ex parte Lambert*, 199 So. 3d 761, 766 (Ala. 2015) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.").

[45] ALA. CODE § 16-68-3(a)(6).

the space. To allow reservations and protect reserved spaces from disruption, the University must be able to subject spontaneous speech to time, place, and manner restrictions. Recognizing this reality, Plaintiffs and Amici make the unsupported argument that Section 16-68-3(a)(6) only applies to indoor areas of campus as the outdoor areas of campus cannot be reserved because they must be open for spontaneous speech.[46]

This argument that the Act only allows indoor areas of campus to be reserved finds no basis in the Act's text. Nothing in Section 16-68-6(a)(6) distinguishes between indoor or outdoor locations. Further, if Plaintiffs' argument is correct, then it would be unlawful to reserve space for an outdoor lecture, concert, or even a sporting event. Likewise, it would effectively prevent Plaintiffs from hosting outdoor rallies on campus, as groups such as Antifa could simply occupy the space they planned to use.

Fortunately, Plaintiffs' wishes are not the law. Plaintiffs' claim that "[t]he Act prohibits restrictions on spontaneous speech," is untenable in light of the Act's explicit authorization of "time, place, and

[46] Appellants' Br. at 19; Legislators' Br. at 11.

manner restrictions."[47] Accepting Plaintiffs' arguments will not lead to more freedom; it will result in less freedom. For instance, the free-for-all Plaintiffs request will lead to more instances of speakers being shouted down as the mob will be able to drown out less popular speech by "spontaneously" occupying more of the outdoor areas of campus. Thus, not only do Plaintiffs ignore the plain language of the Act, they ignore the purpose of the Act.

B. The Policy's definition of "spontaneous" speech is consistent with the Act.

The Policy specifically provides that "Spontaneous activities of expression, which are generally prompted by news or affairs coming into public knowledge less than forty-eight (48) hours prior to the spontaneous expression, may be held by University affiliates in the following defined areas, without advance approval." Plaintiffs argue the Policy violates the Act by limiting spontaneous speech to only "[s]peech 'prompted by news or affairs."[48] Plaintiffs' interpretation, however, is not supported by the Policy's plain language.

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[47] ALA. CODE § 16-68-3(a)(7).

[48] Appellants' Br. at 21.

Plaintiffs seize on the relative clause "which are generally prompted by news or affairs coming into the public knowledge less than forty-eight hours prior," and argue that the clause means these are the only forms of permitted spontaneous speech. Such an interpretation, however, is simply not supportable. "Generally" does not mean "exclusively." "Generally," means "usually."[49] The inclusion of exemplary circumstances that **might** prompt spontaneous expression does not limit the scope of that term under any reasonable reading of the policy. Had the University sought to define the entire universe of situations prompting spontaneous expression it could have easily done so by using limiting language or excluding the term "generally." But it did not. "[S]pontaneous activities of expression" is therefore broader than Plaintiffs' claimed "newsworthy" exception, and encompasses all spontaneous speech, as that term is used in the Act.

Plaintiffs fault the Circuit Court for not accepting the Complaint's tortured reading of the Policy.[50] The Complaint, however, attached and incorporated the Policy. By evaluating the actual words of the Policy,

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[49] "Generally." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/generally.

[50] Appellants' Br. at 20.

the Circuit Court was accepting the allegations of the Complaint. The Circuit Court was not required to accept Plaintiffs' "conclusory allegations" that conflict with the plain language of the Policy Plaintiffs attached to their Complaint.[51]

Finally, Plaintiffs attack the Circuit Court's definition of "spontaneous" as "unplanned" speech as opposed to "planned" speech.[52] Plaintiffs claim the Circuit Court's definition does not comport with the dictionary definition of spontaneous, which they posit as "speech proceeding from a natural feeling or arising from a momentary impulse."[53] The weakness of Plaintiffs' argument, however, is revealed by their claims that "Speech . . . arising from a momentary impulse could be planned."[54] Unsurprisingly, Plaintiffs do not provide any examples supporting their nonsensical claim. Further the dictionary on which Plaintiffs rely goes on to explain that spontaneous "as applied to human acts . . . can mean activated (or acting) without apparent

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[51] *Ex parte Gilland*, 274 So. 3d at 985 n.3.

[52] Appellants' Br. at 21.

[53] *Id.*

[54] *Id.*

thought or deliberation."[55] In other words, "spontaneous" means "unplanned," just as the Circuit Court found.

C. The Policy does not create "free speech zones," as defined by the Act.

According to the Act "the institution shall not create free speech zones or other designated outdoor areas of campus in order to limit or prohibit protected expressive activities."[56] Free speech zones have been defined as attempts to exclude speech to only "small and/or out-of-the-way areas on campus" while excluding the remainder of campus.[57] Consistent with this admonition, the Policy permits students to speak in all outdoor areas of campus, it just allows them to have immediate access to numerous designated areas all across the campus that will not interfere with other educational activities on campus and do not require any prior planning or logistical accommodation by the University. Speech on campus is not confined or limited to any zone or area of campus.

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[55] *Spontaneous*, *Webster's Third New International Dictionary*, (2002).

[56] ALA. CODE § 16-68-3(a)(4).

[57] Free Speech Zones, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (May 24, 2019), https://www. https://www.thefire.org/issues/free-speech-zones/.

As allowed by the Act, the Policy does implement time, place, and manner restrictions that vary depending on the area of campus. For instance, certain areas of campus are open for "spontaneous" speech immediately with no prior notice. Further, "spontaneous" speech can occur in any other outdoor area of campus with twenty-four hours' notice. These time, place, and manner restrictions, as specifically allowed by the Act, recognize that minimal notice is required in some areas of campus to make sure events do not interfere with classroom instruction, testing, or other previously scheduled student events.

Contrary to Plaintiffs' argument, the Policy does not "limit [spontaneous speech] to several 'defined areas' on campus."[58] The Policy clearly states that "Spontaneous activities of expression may occur in other areas of campus in addition to the areas listed above," on twenty-four hours' notice. Consistent with the Act, the Policy does not "limit or prohibit protected expressive activities," to or from any outdoor area of campus.

[58] Appellants' Br. at 23.

D. The Policy's time, place, and manner restrictions comply with the Act.

The Act explicitly allows the University to institute time, place, and manner restrictions as long as "they are narrowly tailored to serve a significant institutional interest and when the restrictions employ clear, published, content-neutral, and viewpoint-neutral criteria, and provide for ample alternative means of expression."[59] "[W]hether a restriction on the time, place, or manner of speech is reasonable presents a question of law."[60] "[W]here [as here] the evidence applicable to a particular element entitles a party to judgment as a matter of law," this issue is properly by decided as a matter of law. [61]

Plaintiffs did not dispute below—and do not do so in their brief here—that the University's Policy addresses as least two significant individual interests: (1) regulating competing uses of the space; and (2) ensuring the safety and order on campus. Instead, Plaintiffs only argue that the Policy is not viewpoint-neutral, is not content-neutral, is not narrowly tailored, and does not provide ample alternative means of

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[59] ALA. CODE § 16-68-3(a)(7).

[60] *McTernan v. City of York, PA*, 564 F.3d 636, 646 (3d Cir. 2009).

[61] *Id.*

expression. As discussed at length below, the Circuit Court properly dismissed Plaintiffs' claims, as the plain language of the Act and the Policy make clear the Policy complies with the Act.

1. The Policy is content-neutral.

To begin, "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[62] Plaintiffs' argument that the Policy is content discriminatory is wholly based on its willful misreading of the Policy's definition of "spontaneous." As discussed at length above, the Policy does not define "spontaneous" as "newsworthy" speech.[63] The Policy does provide that spontaneous expression is "**generally** prompted by news or affairs coming into public knowledge less than forty-eight (48) hours prior to the spontaneous expression."[64] But the Policy does **not** say "exclusively prompted," and to argue otherwise ignores the plain meaning of "generally."

The distinction between events that can be planned and spontaneous events is not content based, but rather a provision

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[62] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

[63] *Supra* Section I(B).

[64] C. 87 at § F(1)(b) (emphasis added).

required by Act. The spontaneous events distinction is a temporal one that applies equally to all topics and ideas. If Plaintiffs have an issue with the term "spontaneous," they must take it up with the Legislature as it mandated special treatment for "spontaneous" speech. Contrary to Plaintiffs' argument, the University cannot violate the Act by doing exactly what it requires.

2. The Policy is viewpoint-neutral.

"[V]iewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond."[65] As an initial matter, Plaintiffs claim that the "spontaneous" speech exception is viewpoint discriminatory because it "favors the viewpoints of talking heads on major media programs," has no basis in law or fact. Again, the "spontaneous" exception is not a "newsworthy" exception.[66] Moreover, even if it were, it would not be viewpoint discriminatory as nothing about the provision would prevent students from expressing opposition to the "talking heads" viewpoints.

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[65] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 894 (1995) (Souter, J., dissenting).

[66] *Supra* Section I(B).

Plaintiffs next argue the University's time, place, and manner restrictions "allow unbridled discretion" because:

> (1) the exemption for "casual recreational or social activities"; (2) the protection of "well-being" of the members of the campus community both "collectively and individually, as well as the educational experience"; (3) the "date, time, or requested space" is "unreasonable given the nature" of the speech and "the impact it would have on" Defendants' resources; and (4) consistency with University policies and procedures.[67]

"Condemned to the use of words, we can never expect mathematical certainty from our language."[68] "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'"[69] As a result, "[a] time, place, and manner regulation [need only] contain adequate standards to guide the official's decision and render it subject to effective judicial review."[70] Here, the Policy easily clears this relatively low bar, and there is abundant case law approving of the language used by the Policy.

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[67] Appellants' Br. at 31-21.

[68] *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

[69] *Id.* at 112 n.15 (quoting *Am. Commc'ns Assn. v. Douds*, 339 U.S. 382, 412 (1950)).

[70] *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002).

a. "Casual recreational or social activities" is not vague.

The Policy exempts "casual recreational or social activities" from the Policy. Plaintiffs argue this exemption is too vague to sufficiently guide the University's decisions. As an initial matter, Plaintiffs did not raise this argument below and have thus waived it.[71] Regardless, Plaintiffs' argument fails as the Eleventh Circuit recently rejected this exact argument in *Keister v. Bell*.[72] In *Keister*, Mr. Keister claimed the phrase "casual recreational or social activities," in the University of Alabama's speech policy was unconstitutionally vague. The court, however, rejected Mr. Keister's argument finding "[a] person of ordinary intelligence under-stands what these terms mean."[73] There is no reason to interpret the phrase any differently here. Such a well understood phrase certainly "contain[s] adequate standards to guide the official's decision and render it subject to effective judicial review."[74]

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[71] *Winkleblack v. Murphy*, 811 So. 2d 521, 530 (Ala. 2001).

[72] No. 20-12152, 2022 WL 881771, at *14 (11th Cir. March 25, 2022).

[73] *Id.*

[74] *Thomas*, 534 U.S. at 323.

b. Protecting the "safety and well-being" of students does not give the University unbridled discretion.

Plaintiffs next claim the Policy is viewpoint discriminatory because a permit can be denied in order to protect the "'well-being' of the members of the campus community both 'collectively and individually, as well as the educational experience.'"[75] When interpreting these provisions, courts must "consider [the provision] within the context of the Policy as a whole."[76] Moreover, the Supreme Court has cautioned "[w]e do not have here a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school."[77] Plaintiffs' argument, however, is based on a misleading, partial quotation of the Policy. The full provision reads:

> The safety and well-being of members of the campus community collectively and individually, as well as the educational experience and other significant interests of the University as outlined herein, must be protected at all times. The University maintains the right to regulate reasonable time, place, and manner restrictions for Events occurring on

[75] Appellants' Br. at 31.

[76] *Keister*, 2022 WL 881771, at *14.

[77] *Grayned*, 408 U.S. at 112.

> campus in a viewpoint-neutral manner to ensure that expressive activity is protected and that expression does not disrupt the ordinary activities of the institution. This includes, but is not limited to, modifying, disbanding or relocating an Event or activity that conflicts with previously scheduled events in or around that space or that reasonably creates a health or safety risk to persons or risk to property on campus.[78]
>
> The Policy further provides:
>
> The ideas of different members of a campus community will often and quite naturally conflict, but it is not the proper role of UAH to shield or attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although great value is placed on civility, and while all members of the campus community share in the responsibility for maintaining a climate of mutual respect, **concerns about civility and mutual respect can never be used to justify closing off the otherwise lawful discussion of ideas among members of the campus community, however offensive or disagreeable those ideas may be to some.**[79]

When read in the proper context, the Policy's protection of student "safety and well-being," has nothing to do with protecting students from speech that would make them uncomfortable. If Plaintiffs had not selectively quoted the definition of "well-being," they would know this as well. The entire definition is "the state of being comfortable,

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[78] C. 85 at § E(9).

[79] C. 86 at § F (emphasis added).

healthy, or happy."[80] Given the Policy's prohibition of closing off speech merely because it is "offensive or disagreeable," "well-being" clearly refers to protecting the health of the campus community.

The Supreme Court has recognized the government's interest in protecting the safety and well-being of its constituents in the First Amendment context.[81] In *Thomas*, the Supreme Court explicitly upheld a virtually identical provision protecting the "health and safety of park users," against a similar challenge that it granted the government too much discretion.[82]

Finally, contrary to Plaintiffs' argument, the University has a "significant interest is protecting the educational experience of the students in furtherance of the University's educational mission."[83] Even the Supreme Court has recognized the "university's mission is education, and decisions of this Court have never denied a university's

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[80] *Well-being, Lexico English Dictionary Powered by Oxford*, https://www.lexico.com/en/definition/well-being.

[81] *Thomas*, 534 U.S. at 324 (upholding a provision protecting the "health and safety of park users"); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding an anti-picketing ordinance that sought to "protect[] the well-being, tranquility, and privacy of the home.").

[82] *Thomas*, 534 U.S. at 324.

[83] *Bowman v. White*, 444 F.3d 967, 980 (8th Cir. 2006).

authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[84] Against this backdrop, the Policy provides "adequate standards to guide the official's decision and render it subject to effective judicial review."

c. Requiring that the "date, time, or requested space [not be] unreasonable given the nature of the Event," does not give the University unbridled discretion.

Plaintiffs fail to explain how allowing the University to deny a permit because "[t]he proposed date, time, or requested space is unreasonable given the nature of the Event and/or the impact it would have on UAH's resources and teaching and research mission," gives the school unbridled discretion. In actuality, this provision is very narrow. By its terms, the University can only deny a permit if the "proposed date, time, or requested space is unreasonable." Nothing in this provision has anything to do with the viewpoint expressed, and nothing allows the University to ban speech it does not like. Merely including

[84] *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

"unreasonable" in the provision does not grant the University unbridled discretion.[85]

d. The Policy only allows rejection of a permit if it "is inconsistent with the terms of this policy."

Plaintiffs again misrepresent the terms of the Policy when they claim an event can be denied because it is inconsistent with any University policy. To the contrary, the Policy only allows rejection of an event where "[t]he requested use of outdoor space is inconsistent with the terms of **this policy**."[86] The Policy only allows rejection if the application is inconsistent with its terms. Nowhere does the Policy allow rejection of an application that is inconsistent with the Office of Diversity, Equity, and Inclusion's separate policy. In fact, the Policy does not even reference the Office of Diversity, Equity, and Inclusion.

3. The Policy is narrowly tailored to serve significant institutional interests.

Plaintiffs did not dispute below—and do not dispute here—that the University's Policy addresses at least two significant institutional

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[85] *Thomas*, 534 U.S. at 324 (finding criteria asking whether "the intended use would present an unreasonable danger to the health or safety of park users . . . reasonably specific and objective, and do[es] not leave the decision 'to the whim of the administrator.'") (emphasis added).

[86] C. 84 at § C(4)(h).

interests: (1) regulating competing uses of the space; and (2) ensuring the safety and order on campus. Rather, Plaintiffs only claim the Policy is not narrowly tailored. Given that the Policy is content and viewpoint neutral, any time, place, and manner restrictions on speech "'need not be the least restrictive or least intrusive means of doing so.'"[87] Instead, the University need only avoid "'regulat[ing] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'"[88]

Plaintiffs' primary argument is that the Motion to Dismiss was improper because the University is required to present some pre-enactment evidence that it considered other less burdensome regulations. Plaintiffs are simply wrong. Where, as here, the only question is the applicability of the Policy to the Act, the Circuit Court properly determined the Policy was "narrowly tailored" and granted the Motion to Dismiss.[89] Moreover, none of the cases Plaintiffs rely on were

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[87] *Bloedorn v. Grube*, 631 F.3d 1218, 1238 (11th Cir. 2011) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

[88] *Id.* (citing *Ward*, 491 U.S. at 799).

[89] *See Bell v. City of Winter Park, Fla.,* 745 F.3d 1318, 1325 (11th Cir. 2014)(affirming grant of the motion to dismiss even though it required a finding that the regulation was narrowly tailored).

in the university context. According to the Supreme Court "'[w]e must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary.'"[90] As part of this analytical framework, the Supreme Court has "recognized the special governmental interests surrounding schools."[91] It further has found:

> Our inquiry is shaped by the educational context in which it arises: "First Amendment rights," we have observed, "must be analyzed in light of the special characteristics of the school environment."[92]

Finally, "Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, [the Court has] cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'"[93]

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[90] *Hill v. Colorado*, 530 U.S. 703, 728 (2000). (quoting *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 772 (1994)).

[91] *Id.*

[92] *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 685–86 (2010) (quoting *Widmar,* 454 U.S., at 268, n. 5).

[93] *Id.* at 686 (quoting *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley,* 458 U.S. 176, 206 (1982)).

It is against this backdrop that the University's Policy must be examined. As Plaintiffs recognize in their brief, it is a "'well-settled rule' . . . that when the Legislature uses 'technical words . . . in an act,' with meaning 'conclusively settled by long usage and judicial construction,' then courts give the words 'their generally accepted meaning.'"[94] In the university context, numerous courts have addressed virtually identical policies and found them to be narrowly tailored.[95]

Moreover, even if the University were required to present some pre-enactment evidence, the case on which Plaintiffs rely notes that "[t]his burden is not a rigorous one."[96] "Such evidence can include anything 'reasonably believed to be relevant—including a municipality's own findings, evidence gathered by other localities, or evidence described **in a judicial opinion**.'"[97] The numerous courts upholding virtually identical policies, in the university context, and under the

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[94] Appellants' Br. at 24-25 (quoting *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 353 (1897)).

[95] *Bloedorn*, 631 F.3d at 1240; *Bowman*, 444 F.3d at 982; *Sonnier v. Crain*, 613 F.3d 436, 445 (5th Cir. 2010).

[96] *Buehrle v. City of Key W.*, 813 F.3d 973, 979 (11th Cir. 2015).

[97] *Id.* (emphasis added).

exact same standard certainly satisfy any burden the University may have.

Plaintiffs attempt to distinguish these cases by claiming each involved non-students, and that the analysis for students should be different.[98] What Plaintiffs ignore is that the standard is the same for students and non-students. The narrowly tailored standard applies equally. Plaintiffs rely on *Turning Point USA*, to support their student/non-student dichotomy, but Plaintiffs misread that case. Nothing in *Turning Point USA* stands for the proposition that students cannot be subjected to time, place, and manner restrictions.[99] In fact, the Supreme Court in the context of a student challenge to a university policy noted that "A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[100] Rather, the regulation at issue in the case allowed registered student organizations to speak in the forum but not

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[98] Appellants' Br. at 41.

[99] *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 878-79 (8th Cir. 2020).

[100] *Widmar*, 454 U.S. at 268 n.5.

individual students.[101] The Eighth Circuit found the regulation improper because it provided no basis discriminating between different groups of students. Here, unlike *Turning Point USA*, the Policy applies equally to all students.

Likewise, the Policy is still narrowly tailored even though it applies to individuals. Courts routinely uphold similar policies on university campuses even though they apply to individual speech.[102] Plaintiffs argue there is no difference between an individual student who wants to hold an "Event" under the Policy and students engaged in "casual recreational or social activities." Contrary to Plaintiffs' argument, however, there is a clear, logical distinction. For instance, a single student with a bullhorn would certainly disrupt a previously scheduled event or class while a group of students talking to each other while walking to class (*i.e.* a casual social activity) are unlikely to disrupt anything. As previously stated, in the educational context, even an individual can substantially disrupt the University's educational mission.

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[101] *Id.*

[102] *Bloedorn*, 631 F.3d at 1242; *Keister*, 2022 WL 881771, at *16.

Finally, Plaintiffs argue the Policy is not narrowly tailored "because it inexplicably exempts newsworthy speech and literature distribution from its prior permission requirement." As discussed at length above, there is no newsworthy exception; there is only a spontaneous speech exception. If Plaintiffs need an explanation for the exemptions, they need look no further than the Act, which explicitly mandates that spontaneous speech and literature distribution be treated differently than other speech.[103] Again, the University cannot violate the Act by complying with its commands.

4. The Policy leaves open ample alternative means of communication.

Plaintiffs are simply wrong that the Policy does not provide ample alternative channels for speaking within their desired forum—the University's campus. The Policy specifically allows spontaneous speech to occur immediately in several prominent areas on campus, and within 24-hours anywhere on campus. It also allows students to immediately pass out literature—which Plaintiffs acknowledge is a "a manner of speech"[104]—anywhere on campus without prior approval.[105] Plaintiffs

[103] ALA. CODE §§ 16-68-3(a)(3), 16-68-3(a)(7).

[104] C. 332.

can also speak anywhere on campus with three-days' notice. Plaintiffs complain that the literature distribution exception fails because it forecloses an entire medium of distribution. Plaintiffs, however, overread *United Board of Carpenters* and *City of Ladue*. In both of those cases the regulations at issue completely prevented a given form of expression.[106] Here, the Policy does not foreclose any medium of expression; it simply requires notice for some speech in some areas. As the Court in *United Board of Carpenters*, stated "We will not invalidate a regulation merely because it restricts the speaker's preferred method of communication."[107]

* * * *

In sum, the Circuit Court correctly found that the Act allows the University to institute time, place, and manner restrictions for spontaneous speech. The Circuit Court also correctly found that the Policy's time, place, and manner restrictions are "narrowly tailored to serve a significant institutional interest and when the restrictions

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[105] C. 88 at § F(2)(a).

[106] *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994); *United Bd. of Carpenters & Joiners of Am. Loc.*, 586 v. N.L.R.B., 540 F.3d 957, 969 (9th Cir. 2008),*as corrected* (Oct. 28, 2008).

[107] *United Bd. of Carpenters*, 540 F.3d at 969 (9th Cir. 2008).

employ clear, published, content-neutral, and viewpoint-neutral criteria, and provide for ample alternative means of expression."

II. THE POLICY COMPLIES WITH THE ALABAMA CONSTITUTION'S SPEECH PROTECTIONS.

As an initial matter, if the Policy complies with the Act, the judgment is due to be affirmed, and the Court need not answer the constitutional questions. If the Policy complies with Act, the only way the Policy can be unconstitutional is if the Act is also unconstitutional. Plaintiffs, however, did not argue the Act was unconstitutional below, and they did not serve such a notice on the Attorney General as required by ALA. CODE § 6-6-227. As such, Plaintiffs have waived this argument. Regardless, the Policy complies with Alabama's free speech provision.

A. The Alabama Constitution's speech protections are not broader than the First Amendment.

According to Plaintiffs, the Alabama Constitution's free speech provision is broader than the First Amendment. But Plaintiffs fail to explain why no court has ever accepted their interpretation of a provision that has existed since 1819. Not a single Alabama case in the last 200 years even hints at the possibility that Alabama's free speech provision is broader than the First Amendment, while numerous cases

have analyzed claims under Alabama's free speech provision according to well-recognized First Amendment jurisprudence.[108] Numerous courts have already concluded that even more restrictive university speech policies comply with the First Amendment.[109] There is no reason to treat the Policy any differently.[110]

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[108] *King v. State*, 674 So. 2d 1381, 1384 (Ala. Crim. App. 1995) ("The construction given by the United States Supreme Court to provisions of the United States Constitution is persuasive in construing similar provisions of the Alabama Constitution."); *see also State v. City of Birmingham*, 299 So. 3d 220, 234 (Ala. 2019), *reh'g denied* (Jan. 17, 2020) ("Section 4 of the Alabama Constitution, like the First Amendment to the United States Constitution, 'restricts government regulation of private speech[.]'"); *J.C. v. WALA-TV, Inc.*, 675 So. 2d 360, 362 (Ala. 1996) ("In accord with the First Amendment to the United States Constitution is Art. I, § 4, of the Alabama Constitution of 1901.").

[109] *Bloedorn*, 631 F.3d at 1242; *Keister*, 2022 WL 881771, at *16; *Bowman*, 444 F.3d at 982; *Sonnier*, 613 F.3d at 445.

[110] All of the policies at issue in the cited cases applied to students and non-students alike. Plaintiffs point to *Turning Point USA* for the proposition that student speech cannot be subjected to time, place, and manner restrictions. *Turning Point* stands for no such proposition. The issue in *Turning Point* was that the university "never cited crowd control or safety to justify treating students representing registered student organizations differently from their unaffiliated peers." *Turning Point USA*, 973 F.3d at 878–79. Here, the Policy does not discriminate among different groups of students, and it does cite crowd control and safety to justify its provisions.

B. Under no interpretation of the Alabama Constitution's speech protections does it ban all prior restraints.

Plaintiffs make the breathtaking claim that the Alabama Constitutions bans all prospective time, place, and manner restrictions on government property.[111] Tellingly, Plaintiffs cite to no Alabama case law supporting this broad proposition. Even those cases on which Plaintiffs rely still recognize that "a regulation may not rise to the level of a prior restraint if it is merely a valid time, place or manner restriction on the exercise of protected speech."[112] According to Plaintiffs' interpretation, every parade ordinance and every noise ordinance in the State is unconstitutional.

All of the cases cited by Plaintiffs relate to prior restraints on speech on private property or through private media. None of the cases suggest that the government cannot institute time, place, and manner restrictions for speech occurring on government-owned property. Were it otherwise, the Act itself would be unconstitutional as it explicitly authorizes such time, place, and manner restrictions. According to Plaintiffs' reading, Alabama HB322 that was just passed by the

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[111] Appellants' Br. at 53-54.

[112] *State v. Coe*, 679 P.2d 353 (Wash. 1984).

Legislature would also be unconstitutional. Alabama HB322 bans "An individual or group of individuals [from] providing classroom instruction to students in kindergarten-fifth grade at a public K-12 school . . . regarding sexual orientation or gender identity in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards." HB322 is undeniably a prior restraint as it prohibits an entire topic of speech in school.

Additionally, Plaintiffs' interpretation would invalidate the State's policy that provides: "Nongovernmental events held at the Capitol require a permit and must be approved in advance."[113] Likewise, the Legislature's own rules require "approval from authorized legislative personnel" before public events or rallies may be held on State House grounds.[114] In fact, even this Court's Media Coverage Plan would be unconstitutional under Plaintiffs' novel interpretation of Alabama's free speech provision.[115] Accordingly, Plaintiffs' position would profoundly disrupt the law as it has been understood for the last 200 years and should be rejected.

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[113] https://capitoleventspermits.alabama.gov/.

[114] https://alison.legislature.state.al.us/visitors.

[115] https://judicial.alabama.gov/docs/SC_media_plan.pdf.

III. THE ACT IS UNCONSTITUTIONAL AS IT INTERFERES WITH THE BOARD'S MANAGEMENT AND CONTROL OF THE UNIVERSITY.

According to the doctrine of constitutional avoidance, "A court has a duty to avoid constitutional questions unless essential to the proper disposition of the case."[116] Because the University is complying with the Act, this Court does not need to reach the question of whether the Act is unconstitutional given the grant of "management and control" of the University to the Board of Trustees by Section 264 of the Alabama Constitution. Yet, if this Court does decide to address the constitutional question, the Act clearly infringes on the "management and control" of the University that is constitutionally vested in the Board.

The Attorney General filed an Amicus—as he is required to do by law[117]—defending the constitutionality of the Act. The Attorney General filed a virtually identical brief below,[118] and the University directly responded to all of the arguments raised by the Amicus.[119] Notably, however, the Amicus fails to address any of the arguments the

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[116] *Robbins v. Cleburne County Commission*, 300 So. 3d 573, n.1 (Ala. 2020)(quoting *Chism v. Jefferson Cty.*, 954 So. 2d 1058, 1063 (Ala. 2006)).

[117] ALA. CODE § 36-15-1(2).

[118] C. 277-303.

[119] C. 381-419.

University raised below. This failure demonstrates the weakness of the Attorney General's position. For the Court's convenience, the University again sets forth all of the reasons the Act unconstitutionally infringes upon the Board's power to "manage and control the University:

First, the Act is not a law of general application, as it is specifically directed only to public universities in Alabama;[120] specifically requires the Board of Trustees to adopt a policy;[121] requires universities to train their students, faculty and staff on the policy;[122] expressly states it is intended to apply to constitutionally created boards of trustees,[123] and (according to Plaintiffs) requires the University to allow students, employees, and faculty to express

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[120] ALA. CODE § 16-68-2(8) (using the definition of "Public Institutions of Higher Education" found in ALA. CODE § 16-5-1).

[121] ALA. CODE § 16-68-3 ("the board of trustees of each public institution of higher education shall adopt a policy on free expression that is consistent with this chapter").

[122] ALA. CODE § 16-68-3(c) ("shall include in the new student, new faculty, and new staff orientation programs a section describing to all members of the campus community the policy").

[123] ALA. CODE § 16-68-8 ("It is the intent of the Legislature that constitutionally created boards of trustees comply with the requirement of this chapter.").

themselves anytime and anywhere on campus, without any prior notice.

Second, the Court's prior case law provides further support for constitutional autonomy, which is consistent with the same opinion reached by the Attorney General outside the political moment of this particular issue.

Third, both the constitutions and case law from other states demonstrate that Alabama's constitutional autonomy for state universities is not new or unique. Rather, it is a long-standing doctrine that has been repeatedly upheld in other states.

Fourth, once the errors are corrected in the *Amicus* Brief's historical argument, it is apparent that the University's constitutional autonomy predates the creation of the State of Alabama and has been consistently protected throughout our state's history.

Finally, an examination of the other uses of "management and control" addressed in the Amicus Brief provides additional support for the University's position.

A. The Act is not a generally applicable state law as it explicitly interferes with the Board's ability to manage and control the University.

According to Article XIV, § 264 of the Alabama Constitution, the University "shall be under the management and control of a board of trustees." The University does not claim that Section 264 allows it to operate "above the law" or that it somehow has free reign to break the law whenever it chooses. This is clearly not the University's position. The University does not argue that Section 264 of the Alabama Constitution exempts it from generally applicable State law. Instead, the University argues that the Act, which is specifically directed only to universities in the State, improperly interferes with the Board's power to manage and control the University.

In *Ingram v. American Chambers Life Ins. Co.*,[124] the Alabama Supreme Court defined "generally applicable" as follows: "a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of" the specific issue in question, in that

[124] 643 So. 2d 575 (Ala. 1994).

case an ERISA plan.[125] In fact, under any standard, the Act is anything but a generally applicable state law.

The Act does not apply to all public land in Alabama, but rather is directed solely to the land owned by public universities in Alabama.[126] Nor does it apply to all citizens of Alabama on public university campuses; it only protects "students, administrators, faculty, and staff, as well as the invited guests."[127] It does not apply to all persons, or even all agencies of state or municipal government; rather, it only states that "the board of trustees of each public institution of higher education shall adopt a policy on free expression."[128] It does not require all persons or even governmental entities to change their training; instead, it only requires public universities to train their students, faculty and staff on the policy.[129] And, finally, to make it abundantly clear the specific application of the statute, it states: "It is the intent of the Legislature

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[125] *Id.* at 577.

[126] ALA. CODE § 16-68-2(6).

[127] ALA. CODE § 16-68-2(2).

[128] ALA. CODE § 16-68-3(a).

[129] ALA. CODE § 16-68-3(c).

that constitutionally created boards of trustees comply with the requirement of this chapter."[130]

It is beyond debate that the Act is not a generally applicable law. Instead, it is plainly and explicitly directed at how state universities manage and control the use of outdoor spaces on their campuses by their students, faculty, and staff. This law is tantamount to the Legislature mandating who can teach classes, which classes can be taught, where they can be taught, when they can be taught, and what subjects can be covered in those classes. It simply cannot be questioned that the Act directly interferes with the University's management and control of its campus. Consequently, the Act is unconstitutional.

B. The Alabama Supreme Court's repeated protection of constitutional autonomy for the University demonstrates that the Act is unconstitutional.

As the Alabama Supreme Court stated in 1901 in the case of *State v. Foster*,[131] with regard to Section 264: "the framers of the constitution were manifestly undertaking to provide for a stable and permanent organization for the management and control of the university" because

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[130] ALA. CODE § 16-68-8.

[131] 30 So. 477 (Ala. 1901).

"the management of this institution of learning was of so great importance."[132] Alabama has consistently protected the operation of its state universities against the whim of political influence. Although the number of cases that have addressed the issue are few, that is because the constitutional autonomy is so long-standing and clear. As both the Court and the Attorney General previously recognized "the legislature has no authority by act to deprive the board of trustees of their discretion as to the management and control of [the University]."[133]

The most direct statement on constitutional autonomy is found in *Opinion of the Justices No. 299.*[134] The Attorney General's office seeks to avoid this clear affirmation of constitutional autonomy, but Alabama case law does not support its position. The *Amicus* Brief asks this Court to ignore the opinion because it is not binding precedent.[135] While it is true that an advisory opinion is not "binding precedent," it is a clear expression of the opinions of the authoring justices "given in deference

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[132] *Id.* at 479.

[133] *Opinion of the Justices No. 299,* 417 So. 2d 946, 947 (Ala. 1982); *Opinion of the Alabama Attorney General 2019-026* (March 20, 2019).

[134] 417 So. 2d at 947.

[135] *Opinion of the Justices No. 381*, 892 So. 2d 375 (Ala. 2004).

to the executive and legislative departments of the state in order to guide them in the proper dispatch of their duties and to protect the officers and departments of the state in the performance of their duties under enacted legislation . . . ."[136] With respect to *Opinion No. 299*, that opinion was from not a single justice, but former Chief Justice Torbert and Justices Maddox, Faulkner, Almon, Shores, and Embry.[137] Accordingly, it provides a very clear picture of the Court's view on constitutional autonomy:

> Because management and control of [the University] is vested in a board of trustees by virtue of the Constitution, the legislature has no authority by act to deprive the board of trustees of their discretion as to the management and control of these institutions.[138]

Likewise, the Attorney General's attempt to distinguish the holding also fails. The Amicus Brief claims *Opinion No. 299* stands only for the proposition that the Legislature cannot transfer the discretion away from the Board of Trustees to a different State entity (*e.g.* the Alabama Higher Education Commission). There is no support in the

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[136] *Opinion of the Justices No. 160*, 96 So. 2d 752, 753 (1957).

[137] *Opinion No. 299,* 417 So. 2d at 946.

[138] *Id.* at 947.

text of the decision for this argument. *Opinion No. 299* did not say its holding only applies to transferring this discretion to another state entity; rather, it said, "no authority."[139] Moreover, if, as suggested in the Amicus Brief, the Legislature itself had the authority to adopt policies for the University, then there is no logical or legal reason the Legislature could not delegate that power to another state entity. The plain language of *Opinion No. 299* makes clear that only the Board of Trustees has the discretion to manage and control the University.

The Amicus Brief's attempt to distinguish *Opinion No. 299* is also inconsistent with the Attorney General's own March 20, 2019 Opinion to Hon. Sid J. Trant. In Opinion No. 2019-026, the Attorney General plainly stated: "The Alabama Supreme Court has recognized and affirmed that the University of Alabama is under the management and control of the Board and that the Legislature has no authority by act to deprive the Board of their discretion as to such management and control."[140] The Attorney General further found the Board has "broad constitutional power to manage and control the University," and "[t]he

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[139] *Id.*

[140] *Opinion of the Alabama Attorney General 2019-026* (March 20, 2019).

Board has the exclusive and discretionary constitutional authority to appoint and/or remove individuals to serve as its chief administrative officers, including its Chancellor and campus Presidents."[141] While Opinion No. 2019-026 predates the Act, its reasoning is clear. Regardless of what the Attorney General's office may say now, his prior opinion expressly recognized that under Alabama law "the Legislature has **no authority**" to deprive the Board of its power to manage and control the University. As that opinion was given outside the political pressure of the current moment, it is far more compelling.

The Amicus Brief also cites Chief Justice Anderson's opinion[142] in *Stevens v. Thames*[143] for the proposition that the Legislature has the power to manage and control the University. The Attorney General argues that *Stevens* stands for the proposition that the power of the Alabama Legislature put the University, "so to speak, entirely at the

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[141] *Id.*

[142] The Attorney General does recognize that this was an individual opinion of Chief Justice Anderson. Justice Brown wrote a separate opinion concurring in the result. The other four justices concurred in the result without opinion.

[143] 86 So. 77 (Ala. 1920).

mercy and control of the state of Alabama."[144] As the University pointed out below, that argument is based on a clear misreading of the opinion.[145] The *Amicus*, again, fails to address this argument.

Stevens was a lawsuit against the individual members of the Board of Trustees of the University of Alabama attempting to overturn their resolution moving the Medical College from Mobile to Tuscaloosa. The quote relied on by the Attorney General was not referring to the University of Alabama, but rather to the completely separate board of trustees of the Medical College.

The factual background is important to an understanding of that case. The Medical College of Alabama was not a constitutionally-created body, but rather was a completely separate corporate body created by legislative charter in 1859.[146] It was managed by its own board of trustees, but the chartering act stated that "upon the dissolution of said corporation from any cause whatever, all the property real or personal belonging to the corporation hereby created or held in trust for it shall

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[144] AG's *Amicus* Br. at 27 (quoting *Stevens,* 86 So. at 78).

[145] C. 396-399.

[146] ALA. ACTS 1859–60.

inure to the benefit of and vest in the University of the State of Alabama."[147] In 1907, the corporation was dissolved and the Medical College was placed under "the sole management, ownership and control of the board of trustees of the University of Alabama."[148] Yet, the dissolving legislation contained the following proviso: "Provided that the said Medical Department shall remain at Mobile for all time." [149] Thus, the question considered by Chief Justice Anderson was whether the Board of Trustees could move the Medical College despite the language in the statute dissolving the corporate entity that formerly managed the Medical College.

When Chief Justice Anderson said the legislation "put the institution, so to speak, entirely at the mercy and control of the state of Alabama," the "institution" to which he was referring was the legislatively created Medical College. Specifically, he was referring to the fact that the "management and control" of the Medical College was transferred from the dissolved board to the Board of Trustees of the

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[147] *Stevens,* 86 So. at 79 (quoting ALA. ACTS 1859–60 § 8).

[148] *Id.* (quoting ALA. ACTS 1907, p. 357, § 1).

[149] ALA. ACTS 1907, p. 357, § 1.

University of Alabama.[150] Accordingly, the Medical College was at the "mercy and control" of the Board of Trustees and the plaintiff could not stop the Board of Trustees' decision to move it to Tuscaloosa. That opinion supports constitutional autonomy of the University, it does not diminish it.

Likewise, Chief Justice Anderson, and Justice Brown in his separate opinion, addressed the impact of Section 267 of the Alabama Constitution, which provides the Legislature the power to move the University of Alabama "upon a vote of two-thirds of the legislature." Chief Justice Anderson quickly concluded that it only applies to the University of Alabama's campus in Tuscaloosa and, thus, was inapplicable to the Medical College in Mobile. Justice Brown dug deeper by comparing the constitutional grants in Sections 264 and 267. He reasoned that those sections must be read together, which led him to the conclusion that "the power of management and control vested in the Board of Trustees by section 264 does not include the power of removal—a power, in the absence of constitutional restraint, residing in

[150] *Stevens,* 86 So. at 78.

the Legislature."[151] In other words, the one thing the Board of Trustees did not have the power to do was to move the University of Alabama out of Tuscaloosa as that power was reserved to the Legislature in the Constitution. Obviously, that same reasoning recognizes that Section 264 grants the Board of Trustees all powers of management and control of the University except for the power to move the campus, which is reserved to the Legislature in Section 267. If anything, *Stevens* adds further support of the constitutional autonomy of the University, which explains why it was cited as supportive in *Opinion No. 299*.

The Amicus's reliance on *State ex. rel. Medical College of Alabama v. Sowell*,[152] is likewise misplaced. Amicus argues the court's statement that the University is "entirely under the direction and control of the state,"[153] means the Legislature "retains substantial authority over the University."[154] There is, however, no support for this conclusion in the *Sowell* opinion. The University is under the control of the State because it is under the "management and control" of the Board, a

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[151] *Id.* at 80.

[152] 39 So. 246 (Ala. 1905).

[153] *Id.*

[154] AG's Amicus at 29-30.

constitutionally created arm of the state. Nothing in *Sowell* undermines the Board's constitutionally mandated power to manage and control the University.

The Attorney General's reliance on the dissenting opinion in *Alabama Education Association v. The Board of Trustees of the University of Alabama*[155] hardly needs to be addressed. It goes without saying that a dissenting opinion is not binding. Moreover, the dissent's conclusion was based on the fact that the Constitution explicitly gives the Legislature the power over appropriations. The Amicus Brief, however, does not point to any analogous constitutional provision supporting the Act. Finally, any persuasive impact that may be garnered from such a dissenting opinion, is greatly diminished by the fact that the majority of the Court decided *Opinion No. 299* just three years later.

Finally, *Cox v. The Board of Trustees of the University of Alabama* reaches the unsurprising conclusion that the University "is part of the state; that it was founded by the state; that it is under the control of the

[155] 374 So. 2d 258 (Ala. 1979).

state. . . ."[156] Nothing about this conclusion means the Legislature has the power to manage and control the University. As recognized by the Alabama Supreme Court and the Attorney General, the Alabama Constitution specifically delegates that duty to the Board.

In sum, these cases do not, as the Attorney General contends, prove the Act "may not be lawfully applied to UAH," but rather repeatedly enforce constitutional autonomy of the University.

C. The law of other states demonstrates that constitutional autonomy is not unique to Alabama.

Section 264 is not unique. In fact, numerous states have constitutional grants of autonomy to state universities.[157] The Amicus,

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[156] 49 So. 814, 817 (Ala. 1909).

[157] *See e.g.,* CAL. CONST. art. IX, § 9 ("with full powers of organization and government"); IDAHO CONST. art. 9, § 2 ("general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education"); LA. CONST. art. VIII, § 7 ("shall supervise and manage the institutions"); MICH. CONST. art. VIII, §§ 5-6 ("board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds"); MINN. CONST. art. XIII, § 3 ("All the rights, immunities, franchises and endowments heretofore granted or conferred upon the University of Minnesota are perpetuated unto the university."); MONT. CONST. art. X, § 9(2)(a) ("shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system"); NEV. CONST. art. XI, § 7(2)(c) ("constitute a Board of Regents to control and manage the affairs of the University"); N.M. CONST. art. XII, § 13 ("legislature shall provide

again, fails even to address this argument despite it being raised below. Of those states, Michigan has the most case law on the interaction of the independence of a state university and legislative authority and, helpfully, its constitutional grant is similar to Alabama's.[158] The Michigan courts have repeatedly held that the Michigan "Legislature may not interfere with the management and control of" Michigan's state universities.[159]

The Michigan Supreme Court has drawn the line of separation of power between the Legislature and state universities using the following paradigm: "Legislative regulation that clearly infringes on the

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for the control and management of the university of New Mexico by a board of regents consisting of seven members."); N.D. CONST. art. VIII, § 6 ("created for the control and administration of the following state educational institutions"); OKLA. CONST. art. XIII, § 8 ("government of the University of Oklahoma shall be vested in a Board of Regents").

[158] *Compare* MICH. CONST. art. VIII, §§ 5-6 ("board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds") to ALA. CONST. art. XIV, § 264 ("university shall be under the management and control of the board of trustees").

[159] *Sterling v. Regents of Univ. of Mich.*, 110 Mich. 369, 395, 68 N.W. 253 (1896). *See also State Bd. of Agriculture v. Auditor General,* 226 Mich. 417, 424, 197 N.W. 160 (1924); *State Bd. of Agriculture v. Auditor Gen.,* 180 Mich. 349, 359, 147 N.W. 529 (1914); *Bauer v. State Bd. of Agriculture*, 164 Mich. 415, 129 N.W. 713 (1911).

university's educational or financial autonomy must, therefore, yield to the university's constitutional power."[160] Accordingly, Michigan state universities are subject to a public employee relations act, but that regulation cannot extend into the university's sphere of educational authority:

> Because of the unique nature of the University of Michigan ... the scope of bargaining by [an association of interns, residents, and post-doctoral fellows] may be limited if the subject matter falls clearly within the educational sphere. Some conditions of employment may not be subject to collective bargaining because those particular facets of employment would interfere with the autonomy of the Regents.[161]

Similarly, the Michigan Open Meetings Act could not constitutionally be applied to the Michigan State University's presidential search committee because it interfered with the Board's management and control of the university.[162]

Another state that is comparable in scope of constitutional autonomy is Minnesota because, like Alabama, its university was

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[160] *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 460 Mich. 75, 87, 594 N.W.2d 491 (1999).

[161] *Regents of the Univ. of Mich. v. Employment Relations Comm.*, 389 Mich. 96, 109, 108 N.W.2d 218 (1973).

[162] *Federated Publications*, 460 Mich. at 89.

originally chartered by an act of territorial legislature before it became a state and, when it achieved statehood, the first constitution confirmed the establishment of the university and placed all duties and control in an independent board.[163] In *University of Minnesota v. Chase*,[164] the Minnesota Supreme Court held that the power to manage the state university was constitutionally vested in the board and that the Minnesota Legislature did not have the power to impose restrictions on the way in which the board managed the university.[165] Likewise, in *University of Minnesota v. Lord*,[166] the Minnesota Supreme Court held that legislation could only avoid constitutional autonomy if it were enacted "to promote the general welfare" and was not specifically aimed at and did not invade the powers of the board to manage the state university.[167]

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[163] *Winberg v. Univ. of Minn.*, 499 N.W.2d 799, 801 (Minn.1993).

[164] 220 N.W. 951, 952, 953 (Minn. 1928).

[165] *Id*. at 954.

[166] 257 N.W.2d 796 (Minn. 1977).

[167] *Id.* at 802. *See also Star Tribune Co. v. Univ. of Minn. Bd. of Regents,* 683 N.W. 2d 274, 284 (Minn. 2004)("Neither statute controls any aspect of substantive decision-making of the University or gives another agency authority regarding academic or management decisions.

California is another state with a large amount of case law interpreting a similar grant of constitutional autonomy. For example, in *San Francisco Labor Council v. Regents of Univ. of Cal.*,[168] the California Supreme Court characterized California's board of regents as enjoying "broad powers" and exercising almost exclusive control over the state universities.[169] Likewise, in *Kim v. Regents of Univ. of Cal.*,[170] the court held that the regents were meant "to operate as independently of the state as possible."[171] The only limits imposed on the regents' authority are the following three areas: (1) certain legislative control over fiscal issues, (2) acts passed under the legislature's police powers, and (3) acts affecting issues of statewide concern that do not involve the internal management of the universities.[172]

Rather, the statutes merely determine the extent of public access to meetings and information of this public institution.").

[168] 608 P.2d 277 (Cal. 1980).

[169] *Id.* at 278.

[170] 95 Cal. Rptr. 2d 10 (Cal. Ct. App. 2000).

[171] *Id.* at 14.

[172] Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149, 180-81 (2005).

A good example of this division of powers is found in the case of *Wallace v. Regents of Univ. of California*,[173] where a challenge was brought to a state law which was directed at the board of regents. Although the law was directed to a public health issue—the board of regents' requirement of a smallpox vaccination—the court struck down the law because it was the legislature's attempt to limit the constitutional power granted to the board of regents rather than an attempt to exercise police power in the interest of the general public's welfare.[174] The court made it clear, however, that the legislature, pursuant to its police power, did have the power to adopt regulations concerning health measures such as vaccinations as long as they were directed to the general public and only incidentally affected the state university.[175]

The Act would be unconstitutional using any of the standards employed by Michigan, Minnesota, or California. For example, if the Michigan standard is used, the Act would be unconstitutional because it

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[173] 242 P. 892 (1925).

[174] *Id.* at 894.

[175] *Id.*

"clearly infringes on the university's educational or financial autonomy [and] must, therefore, yield to the university's constitutional power."[176] Likewise, the Act would be unconstitutional under the Minnesota standard because it was not enacted "to promote the general welfare," but rather was specifically aimed at and did invade the powers of the Board to manage and control the University.[177] The same result would be true in California as the Act is not a general fiscal issue, not a police power, and is directed to the internal management of the University. Thus, Alabama's constitutional autonomy is consistent with other states' laws and the Act would be unconstitutional under any of their standards.

D. The historical record on constitutional autonomy supports the University's interpretation of Section 264.

The Attorney General argues that ALA. ACT No. 1903-104 was the Alabama Legislature's attempt "'[t]o regulate, control and direct the management of the University of Alabama'" in 1903 and, thus, demonstrates "the Legislature's understanding of its authority in 1903,

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[176] *Federated Publications,* 460 Mich. at 87.

[177] *Lord,* 257 N.W.2d at 802.

while memories of the 1901 Constitutional Convention were fresh. As such, it is compelling evidence that Section 264 did not place the board of trustees above the law."[178] The Attorney General is wrong both legally and historically.

The Attorney General relies exclusively on Section 14 of ALA. ACT No. 1903-104 for the argument that the 1903 Alabama Legislature interpreted the 1901 Constitution to mean the Legislature, not the Board, actually had the power to manage and control the University. Section 14 of the 1903 Act provides:

> The right is reserved to the Legislature to revise or amend the provisions of this act; and in virtue of the character of the trust conferred by the act of Congress, to intervene and by special enactment, to direct and control the Board of Trustees in the discharge of their duties and functions.

The Attorney General's argument fails for the following reasons: (A) whatever the meaning of Section 14 of the 1903 Act, it has been repealed; (B) the Attorney General's office's interpretation of Section 14 is inconsistent with the rest of the 1903 Act; (C) the argument is contrary to the view of the Alabama Governor who signed the Act into law; (D) even assuming that the 1903 Legislature attempted to

[178] AG's Amicus Br. at 22-23 quoting ALA. ACT NO. 1903-104.

withdraw the power from the Board of Trustees, that attempt would have no bearing in the Court's interpretation of the Alabama Constitution; and (E) the history of Alabama demonstrates that constitutional autonomy in the 1901 Constitution was not a mistake.

1. Ala. Act No. 1903-104 has been amended and the modern version deleted the language upon which the Attorney General's Office relies.

In the very same paragraph that the Attorney General's office makes its argument about Section 14 of the 1903 Act, it states: "Many of the provisions of that Act remain in place today." Although that is true of the provisions that recognize that the Board of Trustees has the power to manage and control the University, it is not true of Section 14. Whatever impact Section 14 may have had in 1903, it is not applicable today because it has been repealed. Thus, the fact that the Alabama Legislature retained the provisions granting control of the University to the Board of Trustees, and deleted the only provision that could have potentially questioned that power, provides additional support to the conclusion the University is entitled to constitutional autonomy. This means that the Act is an unconstitutional attempt to manage and control the University.

2. Ala. Act No. 1903-104 supports constitutional autonomy.

The Attorney General's office suggests to this Court that the 1903 Alabama Legislature attempted to "regulate, control and direct the management of the University." Yet, a review of the actual text of the legislation demonstrates that ALA. ACT No. 1903-104 was, in accordance with the Alabama Constitution, merely enacting legislation to effectuate the grant of power to the Board of Trustees. Thus, it was the Board's power to "regulate, control and direct the management of the University," that was being enumerated and recognized.

This is evidenced by the actual legislation itself. For example, in Section 2 of the Act, it says that the Board "shall have all the Powers of such rights, powers and franchises necessary to, or promotive of the end of its creation." Then, in Section 6, the legislature added a catch-all to ensure the constitutional autonomy was complete:

> In addition to the rights, properties, privileges and franchises herein granted, all rights, properties, privileges and franchises heretofore, by any act of the General Assembly granted to, or vested in the University of Alabama, shall vest and continue in such corporation.

Further, in Section 7, the Act provides that the Board has the power "to institute, regulate, alter or modify the government of the University." In

Section 8, the legislature adopts the same language as the Constitution: "The State University shall be under the management and control of the Board of Trustees."

Although the language of Section 14 is certainly not clear, when read in conjunction with Sections 2, 6, 7, and 8 of the very same Act, it cannot be interpreted to mean that the Board does not have management and control of the University. In fact, "the rules of statutory interpretation require that all statutes relating to the same subject or having the same general purpose be read together to aid in determining legislative intent."[179] The Legislature would not follow the mandate of the Alabama Constitution that the Board of Trustees had the power to manage and control the University in Sections 2, 6, 7, and 8, and then seek to take away that same power in Section 14. The Amicus does not acknowledge or address the significance of these other provisions, even though the University raised them extensively below.

Reading Section 14 in light of the clear constitutional grant of authority to the Board and the Legislature effectuating those powers in

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[179] *Junkins v. Glencoe Volunteer Fire Dep't*, 685 So. 2d 769, 771 (Ala. 1996) (citing *Florence v. Williams*, 439 So. 2d 83, 87 (Ala. 1983)).

the remainder of the Act necessitates a conclusion that it is not an attempt to remove the University's constitutional autonomy. Rather, the key to understanding the power the Legislature seeks to reserve is the phrase "in virtue of the character of the trust conferred by the act of Congress." As discussed in more detail below, this refers to the independent grant of land by the United States Congress on April 20, 1818, which created a trust for a creation of "a Seminary of Learning." Accordingly, the reference to that trust is a limitation on the power of the Legislature and a recognition that, even beyond the Constitutional requirements, it had an obligation to ensure the preservation of this independent trust and the University as a seminary of learning. Accordingly, ALA. ACT No. 1903-104, when read in full, only reinforces the autonomy of the University.

3. The Attorney General's reading of Ala. Act No. 1903-104 is contrary to the view of the governor who signed the Act.

Governor William D. Jelks' Biennial Message to the Alabama Legislature as they opened the legislative session of 1903 is also clearly inconsistent with the Attorney General's interpretation of Section 14 of the Act. As the Governor was imploring the legislators to start the hard

work of enacting all of the new laws required to effectuate the new constitution, he said the following regarding the University:

> **The University is independent of any legislation you can enact for it**. Under the new Constitution, it draws out of the State $36,000 a year and has a large additional income from the lease of its coal lands. Only recently the Board leased 1500 acres of its lands at a minimum royalty of $4,000 a year and it is calculated that these acres will furnish, in the course of twenty years, $100,000 to the fund. Other leases have recently been made and it is in receipt of sufficient income to make it a great school. If it should fail to become an honor to the State, the failure will grow out of the unwisdom of its Board of Trustees, appearing in the selection of an inefficient head and faculty. At present, the attendance is small, but growing, and the patrons, as far as can be learned, are greatly pleased. Let us hope that it has begun a career of usefulness and glory which will rank with the first institutions in the whole country.[180]

Obviously, based on his message to the Legislature, the Governor did not think that the Act removed the constitutional autonomy of the University. Unsurprisingly, the Amicus does not address Governor Jelks's statement, which the University set forth in detail below.[181]

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[180] General Laws and Joint Resolutions of the Legislature of Alabama at 14 (1903)(emphasis added).

[181] C. 409.

4. The Legislature has no authority to interpret the Alabama Constitution.

Even assuming that Section 14 could be interpreted as the 1903 Legislature's attempt to withdraw the power from the Board of Trustees, that attempt would have no significance in this Court's interpretation of the Alabama Constitution. The Alabama Constitution expressly adopts the doctrine of separation of powers that is only implicit in the U.S. Constitution.[182] The Alabama Supreme Court has held that the "three principal powers of government shall be exercised by separate departments," and it "expressly vest[s] the three great powers of government in three separate branches."[183] Section 42 of the Alabama Constitution provides:

> The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Section 43 provides:

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[182] *Opinion of the Justices No. 380*, 892 So. 2d 332, 334 n. 1 (Ala. 2004).

[183] *Ex parte Jenkins*, 723 So. 2d 649, 653–54 (Ala. 1998).

> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

The Attorney General's position that the ALA. ACT No. 1903-104 § 14 constitutes "compelling evidence" of the meaning of the Alabama Constitution stands in direct opposition to the separation of powers required by the Alabama Constitution. Unlike legislative intent, where a legislature's statements about statutes they enacted could be helpful to the judicial branch's interpretation of that statute, the Legislature has no such standing to speak to the intent of the Constitution because they did not enact it. Rather, the Alabama Constitution of 1901 was created and adopted by the 1901 Constitutional Convention, which consisted of specially elected delegates, not the Legislature.[184] Thus, to the extent that Section 14 of the 1903 Act is construed as the Legislature's interpretation of its powers under the Alabama Constitution, then their opinion is entitled to absolutely no deference.

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[184] Official Proceedings of the Constitutional Convention of 1901, pp. 3-4.

ALA. ACT No. 1903-104 is substantively similar to the acts that the Legislature has passed effectuating the judiciary branch. Even though, as discussed above, it is beyond doubt that the Legislature cannot exercise judicial power, the entirety of Title 12 of the Alabama Code relates to the administration of the courts. Certainly, the Attorney General's office would not argue that because the Legislature passed Title 12, the Legislature actually controls the judiciary. Likewise, the mere fact that the Legislature passed laws effectuating Section 264 of the Constitution, does not somehow transfer the right to "manage and control" the University from the Board of Trustees to the Legislature.

Finally, the Attorney General's reliance on statutes providing for nursing scholarships does nothing to undermine the University's constitutionally authorized "management and control." The statutes in question create scholarships out of "**funds appropriated to** the Division of Nursing of the University of Alabama, Huntsville."[185] It is well-settled in this State that "the Legislature's power over appropriations is plenary."[186] In other words, in setting up the

[185] ALA. CODE § 16-47-152 (emphasis added).

[186] *State ex rel. King v. Morton*, 955 So. 2d 1012, 1018 (Ala. 2006).

scholarships, the Legislature was exercising power specifically dedicated to it in the Constitution. Whereas, there is no such constitutional provision authorizing the Legislature mandating the University implement the Act's provisions.

5. The history of constitutional autonomy in Alabama demonstrates that it is a long-standing, common sense protection of our State's seminary of learning.

A review of the history of constitutional autonomy demonstrates that the unique status of the University actually predates the birth of the State of Alabama. On April 20, 1818, the United States Congress approved "An Act respecting the surveying and sale of the public lands in the Alabama territory" which provided for the sale of public lands and stated that "there shall be reserved from sale, in the Alabama territory, an entire township, which shall be located by the Secretary of the Treasury, for the support of a seminary of learning within the said territory . . . ."[187] A year later, on March 2, 1819, in the Act for the

[187] April 20, 1818 Acts of the Fifteenth Congress, Chap. CXXVI, Sec. 2. F.

Admission of Alabama to the Union, a second township was added to the grant.[188]

Accordingly, the Alabama Constitution of 1819 mandated that it "shall be the duty" of the Alabama General Assembly to take the necessary steps to use the land grants to exclusively fund a state university "in strict conformity to the object of such grant."[189] The General Assembly promptly followed this Constitutional mandate at its meeting at Cahawba and, on December 21, 1820, it enacted: "That a Seminary of Learning be and the same is hereby established, to be denominated 'The University of the State of Alabama.' "[190] A year later, on December 18, 1821, in "An Act Supplementary to an Act to Establish a State University," the General Assembly created the Board of Trustees.[191] Except for a brief period during Reconstruction when the University was temporarily placed under the authority and control of "a

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[188] March 2, 1819 Acts of the Sixteenth Congress, 3 Stat. 489, Chap. 47.

[189] ALA. CONSTITUTION of 1819 (emphasis added).

[190] Acts Passed at the Second Session of the General Assembly of the State of Alabama (1820), pp. 4-6.

[191] Acts of Alabama approved December 18, 1821.

Board of Regents of the State University,"[192] the University has always been under the control of the Board of Trustees.[193] It is self-evident that Section 264 of the 1901 Constitution was an intentional grant of power to the Board of Trustees that was consistent with the common sense protection of this "seminary of learning" throughout the entire history of Alabama.

E. The use of the phrase "management and control" in the Constitution confirms the University's position.

The Amicus attempts to minimize the University's constitutional autonomy, but that argument ignores the plain language of Section 264, which provides:

> The state university shall be under the management and control of a board of trustees, which shall consist of two members from each congressional district in the state as constituted on January 1, 2018, an additional member from the congressional district which includes the site of the first campus of the university, and the governor, who shall be ex officio president of the board. The members of the board of trustees as now constituted shall hold office until their respective terms expire under existing law, and until their successors shall be elected and confirmed as hereinafter required. The additional trustees provided for by this amendment shall be elected by the existing members of the board, and confirmed by the senate in the manner provided

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[192] ALA. CONSTITUTION of 1868 art. 11.

[193] ALABAMA CONSTITUTION of 1875, § 9.

> below, for initial terms of not more than six years established by the board so that one term shall expire each three years in each congressional district. Successors to the terms of the existing and additional trustees shall hold office for a term of six years, and shall not serve more than three consecutive full six-year terms on the board. Election of additional and successor trustees or of trustees to fill any vacancy created by the expiration of a term or by the death or resignation of any member or from any other cause shall be by the remaining members of the board by secret ballot; provided, that any trustee so elected shall hold office from the date of election until confirmation or rejection by the senate, and, if confirmed, until the expiration of the term for which elected, and until a successor is elected. At every meeting of the legislature the superintendent of education shall certify to the senate the names of all who shall have been so elected since the last session of the legislature, and the senate shall confirm or reject them, as it shall determine is for the best interest of the university. If it rejects the names of any members, it shall thereupon elect trustees in the stead of those rejected. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such. Upon the vacation of office by a trustee, the board, if it desires, may bestow upon a trustee the honorary title of trustee emeritus, but such status shall confer no responsibilities, duties, rights, or privileges as such.[194]

The pronouncement that the University is under the "management and control" of the Board of Trustees is clear and simply cannot be contested. The remainder of the provision governs how trustees are elected and confirmed. Contrary to the Amicus's suggestion, the

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[194] ALA. CONST. art. XIV, § 264 (emphasis added).

inclusion of the Governor on the Board and the requirement of Senate confirmation for Board members, does not allow the Legislature to usurp the Board's constitutional right to "manage and control" the University. The Attorney General's argument is the equivalent of saying that the U.S. Senate actually controls the federal courts as a result of the "advice and consent" clause in the U.S. Constitution. That argument certainly does not withstand scrutiny.

Moreover, given the long-standing history of constitutional autonomy discussed above, that position is inscrutable. Obviously, the Alabama Legislature recognized the constitutional mandate as it has repeatedly enacted legislation complying with Section 264. More importantly, the Alabama courts have never questioned the grant of authority. Obviously, Section 264 provides a clear grant of power and control over the University to the Board of Trustees.

The other Constitutional provisions cited by the Attorney General's office merely confirm this reading of Section 264. Each of the provisions cited by him contains language that is not present in Section 264. For instance, Article XI, Section 213.36 states: "Alabama Space Exhibit Commission or any instrumentality of the state created and

established for the purpose of providing for such facility, its management or control." Similarly, Article XI Section 213.01 provides: "the management and control of the state through the Alabama state docks department or other state governing agency." The inclusion of the "or any instrumentality of the state" language makes clear that the Alabama Space Exhibit Commission's and the state dock's authority are not exclusive. Further, the Section 213.01 makes clear that the state retains the management and control, while Section 264 contains no such language.

Likewise, *State Docks Commission v. State ex rel. Cummings*[195] is distinguishable. The constitutional provision at issue in *Cummings* provided "work or improvement shall always be and remain **under the management and control of the state**, through its harbor commission, **or other governing agency**."[196] Here again, the Constitution reserves the management and control to the state. Moreover, Section 93 does not give the harbor commission exclusive power to manage or control. Section 93 gives the Legislature the

[195] 150 So. 345 (Ala. 1933).

[196] ALA. CONST. art. IV, § 93 (emphasis added).

authority to grant it to any "other governing agency," presumably including itself. As a result, the holding in *Cummings* is neither surprising nor appliable to this case. On the other hand, Section 264 gives the Board the "exclusive authority," to manage and control the University.[197]

The remaining constitutional provisions relied on by the Attorney General have no bearing on the interpretation of the Section 264. While the provisions cited in the *Amicus* Brief contain the words management and control, the remainder of each provision is significantly different than Section 264. For instance, the Alabama Music Hall of Fame Authority was only "created . . . for the purpose of providing for and **participating in** the management and control," of the Hall of Fame.[198] According to the Alabama Constitution, the Authority need only "participate in" the management and control of the Hall of Fame. Notably, the "participate in" language does not appear in Section 264.

Likewise, as the Attorney General recognizes, the provision creating the Alabama Trust Fund differs substantially from Section

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[197] *Opinion of the Alabama Attorney General 2019-026* (March 20, 2019).

[198] ALA. CONST. art. XI, § 213.35 (emphasis added).

264.[199] Most notably, the provision "recognizes the possibility of 'supplemental' legislation and preempts only laws 'inconsistent with the express provisions of this amendment.'"[200] Again, this limitation is not present in Section 264.

Finally, the Attorney General's attempt to distinguish Section 264 by saying it "simply designates *who* gets to manage a particular State function, not *how* it will be managed," is nonsensical. If the entity (or "who") that is chosen to manage or control the University does not get to say how the University will be managed and controlled, then it is not in fact managing and controlling the University. If the Legislature can tell the Board how to manage the University, then it is the Legislature that is ultimately managing and controlling the University. Such a result would violate Section 264.

CONCLUSION

A straightforward comparison of the plain language of the Act with the plain language of the Policy confirms the Circuit Court's dismissal of Plaintiffs' claims. Plaintiffs' arguments ask the Court to substitute the Complaint's selective quotations and legal conclusions for

[199] AG's Br. at 18-19.

[200] *Id.* (quoting ALA. CONST. art. XI, § 219.07(7)).

the plain language of the Act and the Policy. Such is not the law, even at the Motion to Dismiss stage. Properly viewed there is no question the Act complies with both the Act and the Alabama Constitution. As such, the University respectfully requests that the Court affirm the Circuit's Court's Order.

Dated: April 26, 2022

s/ *Sybil V. Newton*
Sybil V. Newton (ABB001)
Jay M. Ezelle (EZE002)
Cole R. Gresham (GRE127)
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
(205) 868-6000 – Telephone
svn@starneslaw.com
jme@starneslaw.com
crg@starneslaw.com
Attorneys for Defendants/Appellees

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28(j)(1) and the Court's April 18, 2022 Order granting Appellees an additional three thousand words because this brief contains 16,986 words, excluding the parts of the brief exempted by Ala. R. App. P. 28(j)(1), as counted by the word count function of Microsoft Word word processing software.

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(7) and the type style requirements of Ala. R. App. P. 32(a)(7) because this brief has been prepared in a proportionately spaced typeface using the Microsoft Word word processing software in 14-point Century Schoolbook font.

s/ *Sybil V. Newton*
Sybil V. Newton (ABB001)
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209

CERTIFICATE OF SERVICE

I do hereby certify that on **April 26, 2022**, I electronically filed the foregoing with the Alabama Supreme Court's electronic filing system, and I will serve it upon the following by email as noted below:

John J. Bursch, Esq.
Tyson C. Langhofer, Esq.
Michael R. Ross, Esq.
Mathew W. Hoffmann, Esq.
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
jbursch@adflegal.org
tlanghofer@adflegal.org
mross@adflegal.org
mhoffmann@adflegal.org

W. Brent Woodall, Esq.
THE WOODALL LAW FIRM
121 S. Court Street, Suite B
Florence, AL 35630
woodalltrialad@hushmail.com

Counsel for Appellants

s/ *Sybil V. Newton*
Sybil V. Newton (ABB001)
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
(205) 868-6000 – Telephone
snewton@starneslaw.com
One of the Attorneys for Defendants/ Appellees

ADDENDUM

Statutory Provisions

Constitutional Provisions

§ 16-68-2. Definitions.

For the purposes of this chapter, the following words have the following meanings:

(1) BENEFIT. Recognition, registration, the use of facilities of a public institution of higher education for meetings or speaking purposes, the use of channels of communications, and funding sources that are available to student organizations at the public institution of higher education.

(2) CAMPUS COMMUNITY. A public institution of higher education's students, administrators, faculty, and staff, as well as the invited guests of the institution and the institution's student organizations, administrators, faculty, and staff.

(3) FREE SPEECH ZONE. An area on campus of a public institution of higher education that is designated for the purpose of engaging in a protected expressive activity.

(4) HARASSMENT. Expression that is so severe, pervasive, and objectively offensive that it effectively denies access to an educational opportunity or benefit provided by the public institution of higher education.

(5) MATERIALLY AND SUBSTANTIALLY DISRUPTS. A disruption that occurs when a person: a. Significantly hinders the protected expressive activity of another person or group, prevents the communication of a message of another person or group, or prevents the transaction of the business of a lawful meeting, gathering, or procession by engaging in fighting, violence, or other unlawful behavior; or b. Physically blocks or uses threats of violence to prevent any person from attending, listening to, viewing, or otherwise participating in a protected expressive activity. Conduct that materially and substantially disrupts does not include conduct that is protected under the First Amendment to the United States Constitution or Article I, Section 4 of the Constitution of Alabama of 1901. Protected conduct includes, but is not limited to, lawful protests and counter-protests in the outdoor areas

of campus generally accessible to members of the public, except during times when those areas have been reserved in advance for other events, or minor, brief, or fleeting nonviolent disruptions of events that are isolated and short in duration.

(6) OUTDOOR AREAS OF CAMPUS. The generally accessible outside areas of the campus of a public institution of higher education where members of the campus community are commonly allowed including, without limitation, grassy areas, walkways, and other similar common areas.

(7) PROTECTED EXPRESSIVE ACTIVITY. Speech and other conduct protected by the First Amendment to the United States Constitution, to the extent that the activity is lawful and does not significantly and substantially disrupt the functioning of the institution or materially and substantially disrupt the rights of others to engage in or listen to the expressive activity, including all of the following:

a. Communication through any lawful verbal, written, or electronic means.
b. Participating in peaceful assembly.
c. Protesting.
d. Making speeches.
e. Distributing literature.
f. Making comments to the media.
g. Carrying signs or hanging posters.
h. Circulating petitions.

For purposes of this chapter, the term does not include expression that relates solely to the economic interests of the speaker and its audience and proposes an economic transaction.

(8) PUBLIC INSTITUTIONS OF HIGHER EDUCATION. As defined in Section 16-5-1.

(9) STUDENT. Any person who is enrolled in a class at a public institution of higher education.

(10) STUDENT ORGANIZATION. An officially recognized group at a public institution of higher education or a group seeking official recognition, composed of admitted students that receive or are seeking to receive benefits through the institution.

§ 16-68-3. Adoption of free expression policy.

(a) On or before January 1, 2021, the board of trustees of each public institution of higher education shall adopt a policy on free expression that is consistent with this chapter. The policy, at a minimum, shall adhere to all of the following provisions:

(1) That the primary function of the public institution of higher education is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate, and that, to fulfill that function, the institution will strive to ensure the fullest degree possible of intellectual freedom and free expression.

(2) That it is not the proper role of the institution to shield individuals from speech protected by the First Amendment to the United States Constitution and Article I, Section 4 of the Constitution of Alabama of 1901, including without limitation, ideas and opinions they find unwelcome, disagreeable, or offensive.

(3) That students, administrators, faculty, and staff are free to take positions on public controversies and to engage in protected expressive activity in outdoor areas of the campus, and to spontaneously and contemporaneously assemble, speak, and distribute literature.

(4) That the outdoor areas of a campus of a public institution of higher education shall be deemed to be a forum for members of the campus community, and the institution shall not create free speech zones or other designated outdoor areas of the campus in order to limit or prohibit protected expressive activities.

(5) That the campus of the public institution of higher education shall be open to any speaker whom the institution's student organizations or faculty have invited, and the institution will make all reasonable efforts to make available all reasonable resources to ensure the safety of the campus community, and that

the institution will not charge security fees based on the protected expressive activity of the member of the campus community or the member's organization, or the content of the invited guest's speech, or the anticipated reaction or opposition of the listeners to the speech.

(6) That the public institution of higher education shall not permit members of the campus community to engage 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 that is occurring in a location that has been reserved for that protected expressive activity and shall adopt a range of disciplinary sanctions for anyone under the jurisdiction of the institution who materially and substantially disrupts the free expression of others.

(7) That the public institution of higher education may maintain and enforce constitutional time, place, and manner restrictions for outdoor areas of campus only when they are narrowly tailored to serve a significant institutional interest and when the restrictions employ clear, published, content-neutral, and viewpoint-neutral criteria, and provide for ample alternative means of expression. All restrictions shall allow for members of the university community to spontaneously and contemporaneously assemble and distribute literature.

(8) That the public institution of higher education shall support free association and shall not deny a student organization any benefit or privilege available to any other student organization or otherwise discriminate against an organization based on the expression of the organization, including any requirement of the organization that the leaders or members of the organization affirm and adhere to an organization's sincerely held beliefs or statement of principles, comply with the organization's standard of conduct, or further the organization's mission or purpose, as defined by the student organization.

(9) That the institution should strive to remain neutral, as an institution, on the public policy controversies of the day, except as far as administrative decisions on the issues that are essential to the day-to-day functioning of the university, and that the institution will not require students, faculty, or staff to publicly express a given view of a public controversy.

(10) That the public institution of higher education shall prohibit harassment in a manner consistent with the definition provided in this chapter, and no more expansively than provided herein.

(b) The policy developed pursuant to this section shall supersede and nullify any prior provisions in the policies of the institution that restrict speech on campus and are, therefore, inconsistent with this policy. The institution shall remove or revise any of these provisions in its policies to ensure compatibility with this policy.

(c) Public institutions of higher education shall include in the new student, new faculty, and new staff orientation programs a section describing to all members of the campus community the policy developed pursuant to this section. In addition, public institutions of higher education shall disseminate the policy to all members of the campus community and make the policy available in their handbooks and on the institutions' websites.

Alabama Constitution article XIV, §264

The state university shall be under the management and control of a board of trustees, which shall consist of two members from each congressional district in the state as constituted on January 1, 2018, an additional member from the congressional district which includes the site of the first campus of the university, and the governor, who shall be ex officio president of the board. The members of the board of trustees as now constituted shall hold office until their respective terms expire under existing law, and until their successors shall be elected and confirmed as hereinafter required. The additional trustees provided for by this amendment shall be elected by the existing members of the board, and confirmed by the senate in the manner provided below, for initial terms of not more than six years established by the board so that one term shall expire each three years in each congressional district. Successors to the terms of the existing and additional trustees shall hold office for a term of six years, and shall not serve more than three consecutive full six-year terms on the board. Election of additional and successor trustees or of trustees to fill any vacancy created by the expiration of a term or by the death or resignation of any member or from any other cause shall be by the remaining members of the board by secret ballot; provided, that any trustee so elected shall hold office from the date of election until confirmation or rejection by the senate, and, if confirmed, until the expiration of the term for which elected, and until a successor is elected. At every meeting of the legislature the superintendent of education shall certify to the senate the names of all who shall have been so elected since the last session of the legislature, and the senate shall confirm or reject them, as it shall determine is for the best interest of the university. If it rejects the names of any members, it shall thereupon elect trustees in the stead of those rejected. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such. Upon the vacation of office by a trustee, the board, if it desires, may bestow upon a trustee the honorary title of trustee emeritus, but such status shall confer no responsibilities, duties, rights, or privileges as such.