No. 1210309

IN THE SUPREME COURT OF ALABAMA

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

Plaintiffs-Appellants,

v.

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; and JUANITA OWEN, Associate Director of Conferences and Events, in their official capacities,

Defendants-Appellees.

On appeal from the Circuit Court of Madison County, Alabama
Case No. 47-CV-2021-900878.00
Honorable Alison S. Austin

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

In passing the Campus Free Speech Act, Alabama's Legislature understood its universities had "problems with speech codes, speech zones, and related issues." Eagle Forum Br. Ex. 3 at 2. The Legislature heard testimony that two Alabama universities had policies that "clearly and substantially restrict[ed] freedom of speech" and that in two consecutive years, the University of South Alabama relegated a student group to "a tiny so-called free speech zone." *Id.* The University of Alabama itself even censored a display "simply because someone complained that it offended them." *Id.*

Against this backdrop, the Legislature desired that its universities "fulfill" their "primary function," and it directed those universities to "ensure the fullest degree possible" of free speech. Ala. Code § 16-68-3(a)(1). To that end, the people's representatives banned university policies that restrict spontaneous student speech in the outdoor areas of campus and that impose speech zones.

In response, Defendant officials at the University of Alabama in Huntsville passed a policy "180 degrees from the Legislature's express protection of speech to the fullest extent possible." Alabama Legislators Br. 10. In other words, those officials implemented speech zones and retained other speech restrictions. And to defend

their defiance, the officials twist the pertinent law and policies like a pretzel.

Plaintiffs' allegations—supported by the plain text of Defendants' policy—establish an unlawful prior permission requirement and speech zones. Appellants' Br. 17–23. What's more, Defendants' policy cannot pass muster as an allowable time, place, manner requirement. *Id.* at 24–46. For similar reasons, Defendants' policy violates the Alabama Constitution's free speech guarantee, which bars prior restraints. *Id.* at 46–57.

Defendants imagine that compliance with the Act and Constitution's free-speech protection will invite anarchy. Appellees' Br. 4. But the Legislature passed the Act precisely because its universities did *not* provide proper protection for speech. And the Alabama Constitution reflects the people's choice to promote individual liberty over government censorship. Far from fomenting mob rule, abiding by both provisions' plain terms respects the rule of law. Rather, it is Defendants' argument—that they can choose to disobey state laws that apply to the University—that distorts the law and limits freedom. Their position has no support in text, history, precedent, or current practice. The people's representatives in the Legislature have the appropriate power to set policy for their state universities.

Because Defendants' speech violations are ongoing, this Court should reverse and enter a preliminary injunction in favor of Plaintiffs, or remand with instructions to do so.

ARGUMENT

I. The circuit court and Defendants fundamentally misunderstand the motion-to-dismiss standard.

Dismissals are proper "only" when it "appears beyond doubt" that Plaintiffs can prove "no set of facts" in support of their claims. *Pittsburgh & Midway Coal Mining Co. v. Tuscaloosa Cnty.*, 994 So. 2d 250, 254 (Ala. 2008). That's why this Court has admonished lower courts that "[r]arely should motions to dismiss be granted." *Karagan v. City of Mobile*, 420 So. 2d 57, 59 (Ala. 1982).

Defendants first err by arguing that this case presents pure legal questions. Appellees' Br. 15. But as Defendants' cited case recognizes, the reasonableness of a time, place, and manner restriction "involves an underlying factual inquiry." *McTernan v. City of York*, 564 F.3d 636, 646 (3d Cir. 2009); *accord* Ams. for Prosperity Br. 11–12; *see* Appellees' Br. 30 n.60. And while the law applied to the undisputed facts here requires entry of a preliminary injunction, the necessity of further factual inquiry undermines Defendants' request for dismissal.

Defendants next try to evade the standard of review by ad hominem. Defendants wrongly accuse Plaintiffs of "misleading, out-

of-context, and partial quotations," "outright misrepresentations," a "fabricated view," and "willful misreading." Appellees' Br. 5–6, 16–17, 26, 31. Yet Defendants do not dispute Plaintiffs' allegations that University officials instituted a three-business-day prior permission requirement. *Id.* at 45–46. And Defendants admit, consistent with Plaintiffs' allegations, that they "designated certain areas"—i.e., speech zones—for student "spontaneous expression," which they define as "generally prompted by news or affairs" *Id.* at 7–8, 11. Those alleged and admitted facts state a claim under both the Act and the Alabama Constitution. Appellants' Br. 17–23, 53–56; *accord infra* Part II, Part III.

II. Plaintiffs stated a claim under the Campus Free Speech Act.

A. The Act prohibits Defendants' prior permission requirement.

The Campus Free Speech Act categorically protects students' "free[dom]" to "spontaneously . . . speak" in the "outdoor areas" of campus. Ala. Code § 16-68-3(a)(3). Defendants do not address Plaintiffs' authority that "advance notice" requirements "outlaw[ ] spontaneous expression." Appellants' Br. 18 (quoting *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984)); *accord Berger v. City of Seattle*, 569 F.3d 1029, 1038 (9th Cir. 2009). Nor could they. Plaintiffs' well-pleaded allegation that Defendants

impose a three-business-day, prior permission requirement to speak in the outdoor areas of campus violates the Act's plain language and thus states a claim. C40–41.

The content-neutral and narrowly tailored time, place, manner restrictions allowed by the Act do not authorize Defendants to outlaw nearly all spontaneous expression. *Contra* Appellees' Br. 22. Defendants argue primarily that because a different subsection, § 16-68-3(a)(7), allows them to impose time, place, and manner requirements, they can also have a prior permission requirement. *Id.* Plaintiffs have never disputed that Defendants can impose time, place, and manner requirements that comply with statutory and constitutional requirements. *Contra* Appellees' Br. 19, 43, 48 n.110. For example, Defendants may be able to impose a decibel limit on spontaneous speech around classrooms during exam season. *See* Appellants' Br. 26. But the Act does not allow an outright ban on "spontaneous" speech, which is exactly what Defendants' prior permission requirement effects. *Berger*, 569 F.3d at 1038.

Defendants say that the Act actually *requires* an advance reservation requirement. Appellees' Br. 23 (citing Ala. Code § 16-68-3(a)(6)). But that subsection of the Act prohibits only "conduct" that "infringes" on speech in "a location that has been reserved." Ala. Code § 16-68-3(a)(6); *accord* Appellants' Br. 19. Nothing in the text

requires a reservation system. It simply protects speech in a location that in fact has been reserved. *Id.*

Nor does the Act prohibit Defendants from holding events such as lectures, concerts, or sporting events outdoors. *Contra* Appellees' Br. 24. Nothing in the Act so provides. Defendants could have a notice requirement for such large-scale events and then regulate conduct, such as an "occup[ation]" by Antifa, *contra* Appellees' Br. 24, that interferes with that event. Ala. Code § 16-68-3(a)(6).

Defendants' re-definition of spontaneous does not fix their policy's statutory infirmities. The circuit court adopted Defendants' argument that "spontaneous" speech cannot "be planned." C208. But that definition finds no basis in Plaintiffs' allegation—or the text of Defendants' policy—that Defendants define spontaneous to mean "generally prompted by news or affairs." Appellants' Br. 20–21 (quoting C42). Indeed, Defendants' re-definition conflicts with the only definition their policy gives for spontaneous speech because speech about news or affairs could be planned. Appellants' Br. 21.

Defendants' re-definition of spontaneous also conflicts with the word's plain meaning. Appellants' Br. 18, 21. As Defendants admitted below, spontaneous means "proceeding from natural feeling or native tendency without external constraint" or "arising from a momentary impulse." C223–24. Defendants' "temporal" definition conflicts with the dictionary definition. *Contra* Appellees' Br. 27.

Plaintiffs could plan to go to the outdoor areas of campus and speak whatever comes to their minds about gun control or they could decide to do so on a whim. *See* C44. Either way, Plaintiffs' speech meets the Act's definition of spontaneous.

B. The Act prohibits Defendants' speech zones.

Defendants cannot override the complaint's allegations and statutory definition of speech zones with one they grabbed from the internet. Defendants—citing a website—claim that they did not create speech zones, or "small and/or out-of-the-way areas on campus." Appellees' Br. 28 & n.57. That argument improperly contradicts the complaint's factual allegations. C42, C101. Plaintiffs allege that Defendants' speech zones "make up a very small percentage of campus." C42. Defendants' map proves the point. Thirteen of Defendants speech zones exclusively border parking lots, roads, or lakes. Appellants' Br. 10 (citing C101). And Defendants relegate nearly all their speech zones to the peripheries of campus. *Id.*

For this statutory claim, the Campus Free Speech Act's definition controls, no matter what Defendants dig up on the internet. The Act is unequivocal: it bans speech zones which *it* defines as "area[s] on campus . . . designated for the purpose of engaging in" speech. Ala. Code §§ 16-68-2(3), 16-68-3(a)(4). In line with the complaint's allegations, C42, C87, Defendants continue to concede that

they have created exactly what the Act prohibits. Appellees' Br. 11 ("designated certain areas); *id.* at 28 ("designated areas"); *id.* at 29 ("certain areas").

Nor does the Act's allowance of time, place, and manner requirements allow Defendants to impose speech zones. *Contra* Appellees' Br. 29. The Act prohibits *all* speech zones. Ala. Code § 16-68-3(a)(4). Defendants cannot argue that the separate subsection allowing time, place, and manner restrictions invalidates the speech-zone ban. *See Barnett v. Panama City Wholesale, Inc.*, 312 So. 3d 754, 757 (Ala. 2020) ("There is a presumption that every word, sentence, or provision of a statute has some force and effect and that no superfluous words or provisions were used." (cleaned up)); *accord* Appellants' Br. 44.

C. Defendants' policy is not a valid time, place, and manner requirement.

Besides violating the Campus Free Speech Act's bans on prior permission requirements and speech zones, Defendants' policy cannot meet the Act's demanding time, place, and manner requirements. The time, place, manner analysis involves an "underlying factual inquiry" into viewpoint and content discrimination, narrow tailoring, and ample alternative channels of communication. *McTernan*, 564 F.3d at 646. Despite that clear rule, Defendants prefer to think of the analysis as a purely legal question. Appellees' Br.

30. Not only does that contradict the law, it ignores Defendants' burden to prove the constitutionality of their restriction. Appellants' Br. 25. As Plaintiffs have chronicled exhaustively, their allegations establish that Defendants' policy flunks the Act's requirements. Appellants' Br. 24–45.

1. Defendants' policy discriminates based on content.

Plaintiffs—quoting Defendants' policy—allege that Defendants define "spontaneous" speech as "generally prompted by news or affairs coming into public knowledge less than" 48 hours prior to the speech. C42, C87. That definition applies to speech based on the topic discussed—"news or affairs." Appellants' Br. 27–28. Defendants argue that "spontaneous" only draws a temporal distinction. Appellees' Br. 31–32. But that contention conflicts with the plain meaning of spontaneous, Plaintiffs' allegations, and Defendants' own policy. Appellants' Br. 20–21, 28; *supra* Section II.A.

The policy's limitation to speech "generally" prompted by news or affairs does not make it content neutral. *Contra* Appellees' Br. 31. As Plaintiffs have already explained, courts appropriately reject that logic as a mere "matter of semantics." Appellants' Br. 28. Whether Defendants' definition of spontaneous reaches more than newsworthy speech matters not because Defendants' definition "applies to particular speech because of the topic discussed"—news or

affairs of recent vintage—and thus discriminates based on content. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Defendants make no effort to engage with these authorities.

2. Defendants' policy discriminates based on viewpoint.

a. The policy's express terms discriminate based on viewpoint.

Defendants ignore Plaintiffs' allegation that the policy's definition of spontaneous substitutes speech on "attention-grabbing news headlines" for "discourse from a variety of viewpoints on issues of public importance." C43. Rather, Defendants merely offer their bald assertion that Plaintiffs can express viewpoints opposing those of journalists. Appellees' Br. 32. But the views of journalists shape what Plaintiffs can express: their silence means Plaintiffs cannot share their views at all. For example, if a University official prefers CNN, he may not think school board reform a newsworthy topic. R31. So students would be unable to express their views about the necessity of such reform. Similarly, if the news does not cover partisan gerrymandering at all, students could not express their views about any ongoing vote dilution. *Id.*

b. Defendants' policy grants unbridled discretion to discriminate based on viewpoint.

Defendants do not dispute that unbridled discretion is a form of viewpoint discrimination, but rather attempt to hold Plaintiffs to the due process void-for-vagueness standard instead of the proper free speech standard. Appellees' Br. 33 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). Due process primarily focuses on the perspective of the person who must obey the law: whether "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108; *accord Keister v. Bell*, 29 F.4th 1239, 1259 (11th Cir. 2022). Whereas unbridled discretion looks to the perspective of the government official: whether the law "vest[s] in an administrative official discretion to grant or withhold a permit." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969).

Plaintiffs never raised a due process challenge, but instead claim that criteria in Defendants' policy grant unbridled discretion. C48. Thus, the appropriate analysis asks not whether people of ordinary intelligence can understand Defendants' policy, but whether its terms allow the "appraisal of facts, the exercise of judgment, and the formation of an opinion," that license viewpoint discrimination. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). They do. Appellants' Br. 31–36.

i. "Casual recreational or social activities" grants unbridled discretion.

Defendants fail to answer any of the questions Plaintiffs pose, showing the discretion inherent in deciding what constitutes "casual recreational or social activities." Appellants' Br. 32. An official will especially have trouble line-drawing when it comes to student speech on campus. Casual recreational or social activities could include walking to class, but possibly not when students begin to discuss gun control and hold opposing and hotly contested views. A disc golf game may be recreational but could transform into speech requiring prior permission when one group of players asks another for their views on immigration. Defendants' "casual recreational or social activities" exception allows administrators—in their discretion—to decide.

Defendants incorrectly claim that Plaintiffs waived the argument and that a void-for-vagueness case forecloses this unbridled discretion claim. Appellees' Br. 34. But Plaintiffs "can make any argument in support of th[eir] claim" of unbridled discretion; Plaintiffs "are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Nor did the Eleventh Circuit reject "this exact argument." *Contra* Appellees' Br. 34. In *Keister*, the court concluded that "casual recreational and social

activities" was not unconstitutionally vague. 29 F.4th at 1259. The court had no occasion to consider an unbridled discretion challenge, which, as discussed above, implicates a significantly different legal standard.

ii. Defendants' policy fails to define "well-being," "collectively and individually," "educational experience," or "unreasonable given the nature of the Event."

Defendants contend that their policy prohibits "concerns about civility and mutual respect" to allow censorship, Appellees' Br. 36 (quoting C86), but well-being is much different from civility and respect. In an age when some teach that speech is "dangerous," C44, Defendants' criterion invests them with unbridled discretion to censor viewpoints listeners subjectively perceive to threaten their well-being. And that's already happened at the University of Alabama. When it considered the Act, the Legislature heard testimony that in 2014, "a University of Alabama administrator" removed a "pro-life display by Bama Students for Life . . . simply because someone complained that it offended them." Eagle Forum Br. Ex. 3 at 2.

Defendants attempt to rely on a general interest in their educational mission, Appellees' Br. 37–38, but whatever interest they claim has no bearing on whether their policy's terms grant

unbridled discretion. Anyway, an "educational mission of the school" criterion grants unbridled discretion, too. Appellants' Br. 33 (quoting *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990)). Allowing officials to consider how speech promotes the "educational experience," licenses "virtually unlimited discretion in deciding" what qualifies and what does not. *Gregoire*, 907 F.2d at 1374. Defendants can "stretch[ ] or contract[ ]" "educational experience" to "fit whatever [Defendants] decide[ ]." *Id.* at 1374–75.

Defendants again trot out the case both they and the circuit court thought upheld an ordinance "virtually identical" to their policy. Appellees' Br. 37 (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002)); C441–42. It did anything but. The *Thomas* ordinance allowed the city to deny a permit to an event with more than 50 individuals if it presented an "unreasonable danger to the health or safety of park users." 534 U.S. at 318, 324. But Defendants' policy applies to even a single student speaking alone and allows administrators to assess "well-being," "educational experience," or "unreasonable given the nature of the Event." Appellants' Br. 33–36.

Nor do Defendants address the numerous cases cited by Plaintiffs discussing how *Thomas* connected its "health or safety" criterion to an objective "*unreasonable danger*" standard. Appellants' Br. 35; Speech First Br. 12–13. Defendants revert to the ipse dixit that their "nature of the Event" and "impact" criterion is "very

narrow." Appellees' Br. 38. They simply offer that Defendants can deny a request to speak if it is "unreasonable." *Id.* That's precisely the problem. A reasonableness standard divorced from any definition of what exactly needs to be reasonable "gives officials less guidance and more leeway" than in *Thomas*. Appellants' Br. 35.

Thomas never mentions a "well-being" criterion. Appellants' Br. 36. Similarly, the Court did not uphold a "well-being" criterion in *Frisby v. Schultz*, 487 U.S. 474 (1988). *Contra* Appellees' Br. 37 n.81. That case involved a blanket prohibition on picketing in front of a residence. 487 U.S. at 477. The reference to well-being occurred only in the ordinance's non-operative "purpose" statement. *Id.* The ordinance did not give discretion to any officials to consider "well-being" when determining whether to approve speech. *Id.* Defendants' policy does.

iii. Defendants have discretion to determine whether speech is consistent with other University policies.

Defendants' policy allows them to prohibit speech "inconsistent with the terms of this policy" and "U[niversity] policies and procedures" writ large. Appellants' Br. 9 (quoting C84–85). Defendants ignore their policy's incorporation of "all applicable" other University policies. C85. By the policy's terms, Defendants can censor speech inconsistent with policies enforced by their Office of

Diversity, Equity, and Inclusion. *Contra* Appellees' Br. 39. For example, Defendants could prohibit Plaintiffs' speech about the importance of a person's "own merit and essential qualities" instead of skin color, *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), which runs contrary to Defendants' official promotion of books such as *How to Be an Anti-Racist*. Univ. of Ala. in Huntsville Office of Diversity, Equity, and Inclusion, *Anti-Racism Resources*, https://bit.ly/3spn2UZ (last accessed May 10, 2022); *see* Ibram X. Kendi, *How to Be an Anti-Racist* 19 (2019) ("The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."); *accord* Appellants' Br. 34.

3. Defendants' policy fails intermediate scrutiny.

a. Defendants' policy is not narrowly tailored to any governmental interest.

On a motion to dismiss, Defendants' policy fails narrow tailoring because they have no evidence to measure their interest in requiring prior permission and speech zones. Appellants' Br. 37–39. Furthermore, as alleged, Defendants' policy requires even a single student speaking on his own campus to obtain Defendants' prior permission, cuts off most student speech for three business days,

and inexplicably exempts newsworthy speech and literature distribution from the prior permission requirement. *Id.* at 39–43.

Government must provide pre-enactment evidence to show its regulation of speech is narrowly tailored to its purported ends. Appellants' Br. 38. Defendants argue that special considerations surrounding schools give them greater leeway to regulate speech. Appellees' Br. 40–41. That's exactly backwards. College campuses are "peculiarly the marketplace of ideas" where students "learn to exercise those constitutional rights necessary to participate in our system of government and to tolerate the exercise of those rights by others." Ala. Code § 16-68-1(3). Colleges—far from having more authority to regulate speech—must in fact "ensure the fullest degree possible of" speech. *Id.* § 16-68-3(a)(1). Narrow tailoring does not require this Court to "substitute" its "own notions of sound educational policy for those of the school authorities which [it] review[s]." *Contra* Appellees' Br. 41. Rather, the people of Alabama, through their elected representatives, have already made that determination in the Act's substantive provisions. There is thus "no room for the view" that speech "protections should apply with less force on college campuses than in the community at large." Ala. Code § 16-68-1(3).

Defendants next return to their non-student speech cases, involving merits proceedings, to meet their evidentiary burden.

Appellees' Br. 42–43. Defendants claim that the narrow tailoring standard applies the same regardless of whether the restriction deals with students or non-students. *Id.* at 43. But narrow tailoring "requires" the court to apply free speech law to "the specific facts of this case." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 100 n.17 (2d Cir. 2006); *accord Doe v. City of Albuquerque*, 667 F.3d 1111, 1134 (10th Cir. 2012); *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015). "General reference to other cases, other cities, and other restrictions does not relieve Defendants' burden." Appellants' Br. 39 (cleaned up).

Defendants' case proves the point. Appellees' Br. 40 n.89 (citing *Bell v. City of Winter Park*, 745 F.3d 1318, 1325 (11th Cir. 2014)). In *Bell*, the court affirmed the grant of a motion to dismiss on narrow tailoring because it found the challenged ordinance "nearly on all fours with *Frisby*." *Bell*, 745 F.3d at 1322. That is, the evidence from *Frisby* was "closely analogous to the policy at issue." Appellants' Br. 39. But here, none of Defendants' cited cases are "on all fours" with their policy. *See id.* at 42.

The application of Defendants' policy to all student speech on their own campus—and even to a single student speaking alone—forecloses narrow tailoring. Students are members of the "campus community." *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 877 (8th Cir. 2020). Defendants think *Turning Point*

inapposite. Appellees' Br. 43–44, 48 n.110. But the operative portion of *Turning Point* invalidates Defendants' analogy to non-student cases. The Eighth Circuit held, "unlike the plaintiff in *Bowman*[*v. White*, 444 F.3d 967 (8th Cir 2006), the plaintiff here is] a student—she belong[s] on campus." *Turning Point*, 973 F.3d at 877; *see also* Appellees' Br. 37, 42, 48 (relying on *Bowman*). Defendants' "view of *Bowman* . . . ignores the critical fact that the *Bowman* plaintiff was a non-student." *Turning Point*, 973 F.3d at 880. College campuses exist to promote—not limit—student speech. Ala. Code § 16-68-1(6).

Similarly, Defendants cannot rely on past cases that upheld prior permission requirements on individual campus outsiders. *Contra* Appellees' Br. 44. Those cases are not "on all fours" with the present one because they all went to great lengths to explain the policies did not apply to students.[1] Students speaking on their

[1] *See Turning Point*, 973 F.3d at 880 (*Bowman* plaintiff was a "non-student, and the speech restrictions were justified by compelling safety and administrative concerns"); *Keister*, 29 F.4th at 1248, 1253 (policy applied to "individuals who [were] not affiliated with the University" and noting that in both *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011) and *Keister*, "the University did not intend to open the sidewalks for non-student use"); *Bloedorn*, 631 F.3d at 1225 (policy "regulat[ed] the access of outside, non-sponsored speakers to the university campus"); *Sonnier v. Crain*, 613 F.3d 436, 448 (5th Cir. 2010) (policy "limiting where outside speakers may assemble or demonstrate [was] narrowly tailored").

campus advances rather than "hamper[s] the university's ability to meet its primary goal—the education of its students." *Sonnier*, 613 F.3d at 445; *accord* Ala. Code § 16-68-3(a)(1).

b. Defendants' policy closes off alternative channels of communication.

Plaintiffs lack ample alternative channels. Appellants' Br. 44–45. They cannot speak in the outdoor areas of campus for at least three business days. C47. Defendants' speech zones cannot serve as ample alternatives because the Act prohibits them. *Supra* Section II.B. *Contra* Appellees' Br. 45. And Plaintiffs can only use those speech zones if they talk about things Defendants deem "spontaneous." C42.

Defendants' policy forecloses an entire medium of expression. Appellants' Br. 44. It is no answer that Plaintiffs can use Defendants' speech zones if they speak on a topic and viewpoint Defendants deem newsworthy and thus acceptable. *Contra* Appellees' Br. 46. In *City of Ladue v. Gilleo*, the challenged ordinance prohibited residential signs, but did not impose a "flat ban on signs" because it allowed for 10 exemptions. 512 U.S. 43, 46, 53 (1994). Nonetheless, the Court still "voiced particular concern" with the law for "suppress[ing] too much speech." *Id.* at 55. Similarly, in *United Brotherhood*, the challenged rule banned "carrying or wearing of signs," but not signs attached to a table. *United Brotherhood of*

Carpenters & Joiners of Am. Local 586 v. NLRB, 540 F.3d 957, 960, 970 (9th Cir. 2008). Even so, the court concluded that the signage ban left "a narrow range of ineffective options" for speech. *Id.* at 970. So too here.

III. Plaintiffs stated a claim under the Alabama Constitution.

Alabama's organic law allows "any person" to "speak" on "all subjects." Ala. Const. art. I, § 4. The plain text and history make clear that this provision bans prior restraints. Appellants' Br. 46–55; *accord* Ala. Ctr. Law & Liberty Br. 5–14. Contrary to Defendants' novel argument, Appellees' Br. 47, the Act and Constitution are not coterminous. The Campus Free Speech Act has numerous provisions dealing with speech on campus, while the contours of Alabama's free speech guarantee remain largely unmapped. But at the very least, the constitutional text prohibits prior restraints, and Defendants impose a prior restraint and unconstitutional speech zones and violate persuasive First Amendment jurisprudence. Appellants' Br. 53–56; Speech First Br. 10–14. Plaintiffs have therefore stated a claim under the Alabama Constitution.

Instead of engaging with the textual and historical analysis, Defendants offer an observation that no Alabama case has held, then trot out a parade of inapplicable horribles. Appellees' Br. 47–50. Defendants cite no Alabama case that has ever limited

Alabama's free speech protection to what the First Amendment provides. Rather, all of Defendants' cases have simply looked to the First Amendment for *guidance* in situations where the Alabama Constitution provides the same result. Two cases involved historically unprotected categories of speech. *King v. State*, 674 So. 2d 1381, 1384 (Ala. Crim. App. 1995); *J.C. v. WALA-TV, Inc.*, 675 So. 2d 360, 362 (Ala. 1996); *accord* Appellants' Br. 51. The third undertook an independent textual analysis of the Alabama Constitution's free speech protection to conclude that it—like the First Amendment—applies in modified form to government speech. *State v. City of Birmingham*, 299 So. 3d 220, 234 (Ala. 2019).

A straightforward application of the Alabama Constitution's plain text will hardly upend society. *Contra* Appellees' Br. 50. Each of Defendants' examples contains the seeds of its own undoing. Plaintiffs recognized that the ban on prior restraints does not prohibit retrospective and otherwise valid time, place, and manner requirements. Appellants' Br. 53. Defendants' concern about noise ordinances is thus misplaced. Plaintiffs also acknowledged the prior restraint ban allows for restrictions on blocking streets and other conduct, so Defendants' argument about parade limitations and events held on state capitol grounds also falls by the wayside. *Id.* at 54. What's more, governments can impose deterrent penalties for abuse of the free speech right by failing to comply with valid time,

place, and manner restrictions. *Id.* at 53–54. And requiring notice, rather than prior permission, to use busy thoroughfares or capitol grounds does not inflict a prior restraint. Alabama's bill regarding "classroom instruction" regulates *government speech* to which the free speech guarantee applies in modified form, as Defendants' own case holds. *See State*, 299 So. 3d at 234. Similarly, it is unclear if this Court's media broadcast policy even implicates a speech right. *See United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983).

Defendants cannot brush off the numerous cases from other jurisdictions holding that similar constitutional language bans prior restraints. Without any citation or attempted explanation why it matters, Defendants dismiss those legion cases as involving "private property" or "private media"—whatever that means. Appellees' Br. 49. That's inaccurate. *E.g.*, *State v. Coe*, 679 P.2d 353, 356 (Wash. 1984) (en banc) (invalidating prior restraint that had "no express temporal or geographic limits" on the broadcast of certain materials); *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 749–50 (Cal. 2000) (state constitution bars prior restraints and provides more protection for commercial speech than First Amendment). And all the cases invalidate government prior restraints, which is what Defendants impose here. That Defendants' policy applies on a college campus—the quintessential marketplace of ideas—renders it even more constitutionally infirm. Much more so than on "private

property" or with "private media," universities promote the discovery of knowledge through "discussion" and "debate." Ala. Code § 16-68-3(a)(1).

Far from inviting anarchy, a proper reading of Alabama's free speech guarantee will vindicate the people's sovereign will and protect a fundamental liberty. The text is "terse and vigorous" with "meaning so plain that construction is not needed." *Dailey v. Superior Court*, 44 P. 458, 459 (Cal. 1896) (interpreting a nearly identical provision). This Court should read Alabama's Constitution according to its plain text, not in deference to federal courts applying a wholly different constitutional provision.

IV. Defendants are not exempt from the Campus Free Speech Act.

Defendants claim the power to disregard a broad swath of state law. Appellees' Br. 54. They believe that the Alabama constitutional provision giving the University's board of trustees "management and control" of the University exempts them from compliance with duly enacted laws that apply to the University. *Id.* (citing Ala. Const. art. XIV, § 264). Defendants disclaim their ability to ignore generally applicable laws, such as those prohibiting discrimination, but they offer no guiding or limiting principles for their discretion. *See id.* Instead, Defendants grant themselves the power to ignore any law they do not like. But Defendants' interpretation

conflicts with text, history, precedent, and current practice. All that evidence makes clear—as the Attorney General concludes—that section 264 governs "*who*" runs the University, not "*how*" the University is run. AG Br. 11. The Campus Free Speech Act does not change who runs the University, so it does not violate section 264.

The Act has "every presumption and intendment in favor of its validity." *Westphal v. Northcutt*, 187 So. 3d 684, 691 (Ala. 2015). Courts "seek to sustain rather than strike down the enactment of a coordinate branch of government." *Id.* Thus, Defendants bear the heavy "burden of overcoming" this presumption. *Thorn v. Jefferson Cnty.*, 375 So. 2d 780, 787 (Ala. 1979). They must show that the Act "clear[ly] beyond reasonable doubt" violates "the fundamental law." *Westphal*, 187 So. 3d at 691. Defendants cannot meet this extraordinarily high standard.

A. Text and history prove that section 264 preserves the board of trustees as the University's body corporate.

Section 264 places the University "under the management and control of a board of trustees." Ala. Const. art. XIV, § 264. This provision first entered the Alabama Constitution in 1875, and the 1901 Constitution, in effect today, retains the same language. *Cox v. Bd. of Trs. of Univ. of Ala.*, 49 So. 814, 817 (Ala. 1909). This Court has held that section 264 "simply ratified former legislation"

stretching back to the University's founding. *Id.*; *accord Trs. of Univ. v. Moody*, 62 Ala. 389, 393 (1878).

Early practice defines the board's corporate powers and shows the Legislature's substantial control of the University. In the 1821 Act creating the board, the Legislature identified the powers of the trustees, including calling board meetings, prescribing the course of studies at the University, and enacting by-laws for the good government of the University. Acts Passed at the Third Annual Session of the General Assembly of the State of Alabama 3 (1821), https://bit.ly/3fB23YT. The Legislature made sure to provide that the board's rules for the University "be not repugnant to the laws of the United States, and of this State." *Id.*; *accord* AG Br. 22–24 (discussing 1903 Act showcasing the broad scope of legislative power over the University).

Adopting what is now section 264 did not change the legislative power over the University. In preserving the board of trustees, "the framers of the constitution were manifestly undertaking to provide for a stable and permanent organization for the management and control of the university." *State v. Foster*, 30 So. 477, 479 (Ala. 1901); *accord* C342–44 (original meaning of "management and control" refers to operating a corporation toward its purpose). That is, the framers wanted the board to remain the entity to govern the University, not to have the final say in how the University is in fact

run. Indeed, in 1909, this Court held that section 264 "*simply ratified former legislation*," including the legislative acts dictating how the board should operate the University. *Cox*, 49 So. at 817 (emphasis added). Under the original land grant, the Legislature retains control over the University: "although the legislative power could not divert from its use the donation of the lands made by Congress or those of individuals, yet it could alter, amend, vary, or enlarge the original act of incorporation." *Id.* Thus, the University of Alabama is "an institution of the state created, provided for, and preserved by the legislative power thereof." *Id.* at 816.

B. Precedent and current practice confirm the Legislature's power to set policy for the University.

Binding section 264 precedent tracks this textual and historical evidence. *See Stevens v. Thames*, 86 So. 77 (Ala. 1920). In *Stevens*, this Court upheld an act prohibiting the University's board from moving its medical department out of Mobile. General Laws and Joint Resolutions of the Legislature of Alabama Passed at the Session of 1915, at 133, https://bit.ly/37aDZYw. This Court rejected the argument that the law violated section 264 because it allegedly "attempt[ed] to deprive the trustees of the University of Alabama of a discretion as to the management and control of the University." *Stevens*, 86 So. at 79. To the contrary, the act did not "invade[ ] the powers of management and control of the trustees, within the

provision of section 264, but relate[d] to a matter within the legislative power of the state." *Id.*

The *Stevens* concurrence does not control the majority opinion. *Contra* Appellees' Br. 60 & n.142, 63. Four other justices concurred fully—not only in result, as Defendants contend—in Chief Justice Anderson's opinion. *Stevens*, 86 So. at 79. Justice Brown alone "concur[ed] in the conclusion." *Id.* at 81 (Brown, J., concurring in judgment). Even so, the solo concurrence explained that, considered with section 267, "it is manifest that the power of management and control vested in the trustees by section 264 does not include the power of removal—a power, in the absence of constitutional restraint, residing in the Legislature." *Id.* Section 267 merely modifies the usual legislative rule to require two-thirds approval to change the location of the University's Tuscaloosa campus. AG Br. 14. Thus, absent the provision, the Legislature could have moved the campus by simple majority vote. *Id.* Section 267 "clearly is not dealing with the power of control vested in the trustees of the University by section 264." *Stevens*, 86 So. at 81 (Brown, J., concurring in judgment); *accord id.* at 78 (majority op.) (section 267 did not apply to the medical department, so the Legislature could move it at will, regardless of section 264).

Defendants also cite an advisory opinion and an attorney general opinion, but neither is an authoritative interpretation of

section 264, and both are consistent with the board's corporate power subject to the Legislature's rules. C346–47; AG Br. 32. The advisory opinion considered a legislative proposal to vest the Alabama Higher Education Commission with the "authority to approve new programs or units or to terminate existing programs and units of instruction, research and public service." *Op. of the Justices*, 417 So. 2d 946, 947 (Ala. 1982). But that would transfer the corporate power of the board to another entity, in violation of section 264. *See id.* For similar reasons, the board has the exclusive authority to appoint and remove the officers of its university system. *See* Appellees' Br. 60 (citing Ala. AG Op. 2019-026 (Mar. 20, 2019)). Appointment of corporate officers is essential to the corporate power exercised by the board.

As to current practice, the Legislature has passed laws targeted directly at the University that the University abides by and recognizes as binding. For example, despite the board's general power to set tuition, Ala. Code § 16-47-34, the Legislature has mandated that the University charge nonresident undergraduates a minimum of double the tuition charged resident undergraduates. Ala. Code § 16-64-4(a). The University does just that, recognizing that the "rules regarding residency for tuition purposes at The University of Alabama in Huntsville are governed by the State of Alabama Code." Univ. of Ala. in Huntsville, Vice President for Student

Affairs, *Residency*, https://bit.ly/38y6GPJ. The University also recognizes that it has a "stewardship responsibility for the proper use of public funds," so it acknowledges that the "State of Alabama's ethics laws" govern employee conduct. Univ. of Ala. in Huntsville, Div. of Bus. Servs., *Expenditure Guidelines* 3 (July 2012), https://bit.ly/2WGGwYi; *see also* C347–48.

C. Other state provisions differ fundamentally in text, history, and precedent.

Given the clear textual, historical, and precedential evidence, this Court has no need to import law from other jurisdictions. Still, the constitutional provisions of California, Minnesota, and Michigan, Defendants' cited jurisdictions, all have markedly different text, history, and precedent, rendering them inapposite. None of them use the "management and control" language that Defendants make the cornerstone of their argument.

California's constitution gives the regents of the University of California "full powers of organization and government, subject only to such legislative control as may be necessary to insure" certain financial requirements. Cal. Const. art. IX, § 9(a). Section 264 neither gives Defendants "full powers" to govern the University, nor explicitly limits the Legislature's authority.

Minnesota links its university's corporate powers to a historical analysis: "All the rights, immunities, franchises and

endowments heretofore granted or conferred upon the University of Minnesota are perpetuated unto the university." Minn. Const. art. XIII, § 3. This provision nullified a statute that allowed the legislature to "alter, amend, modify, or repeal" various powers conferred on the university's regents. *Fanning v. Univ. of Minn.*, 236 N.W. 217, 218–19 (Minn. 1931). Alabama has no such provision or case law. Quite the opposite, this Court has held that section 264 "simply ratified former legislation," *Cox*, 49 So. At 817, including that the board's actions "be not repugnant to the laws of the United States, and of this State." *Supra* Section IV.A.

Michigan grants the university "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. art. VIII, § 5. Its provision stems from a unique constitutional history. From the federal land grant to the 1850 constitution, the legislature unsuccessfully ran the University of Michigan. *Sterling v. Regents*, 68 N.W. 253, 254 (Mich. 1896) *impliedly overruled as recognized by Rudolph v. Lloyd*, 807 F. App'x 450, 457 n.3 (6th Cir. 2020). Members of the 1850 constitutional convention lamented that "some of the denominational colleges had more students than did the university," so they designed the provision to "intrust" the university to the trustees, who the framers thought "directly responsible and amenable to the people." *Id.* Here, Defendants—who bear the burden of proving the Act's

unconstitutionality beyond a reasonable doubt—offer no similar historical or original public meaning proof. Instead, the evidence shows the exact opposite. *Supra* Sections IV.A, IV.B.

D. The Act does not infringe on the board's corporate status.

The Campus Free Speech Act neither strips the board of its corporate authority nor directs how the board selects its corporate officers. Rather, it instructs the board to set standards for protecting speech. In sum, the Act regulates how the University operates, not who operates it. AG Br. 11. It would be no different if the Legislature instructed Alabama universities not to discriminate in their hiring of faculty and staff, or directed that Alabama universities properly investigate reported campus sexual assaults.

Defendants' arguments for so-called constitutional autonomy "know no discernable bounds." *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 289 (Minn. 2004) (rejecting University of Minnesota's similar assertion of unfettered authority). Their "rationale" has no "principled end point" and would "result in exempting the University from many other laws currently applied to it." *Id.*; *accord supra* Section IV.B. Defendants would "elevate" themselves to the "status of a coordinate state entity, not answerable to state government except as [they] choose[ ]." *Star Tribune*,

683 N.W.2d at 289. That cannot be—and, fortunately, is not—the law in Alabama.

V. This Court should enter a preliminary injunction, or remand with instructions to do so.

Defendants do not oppose Plaintiffs' request for a preliminary injunction. Plaintiffs have a reasonable chance of success on the merits. *Supra* Part II, Part III. And Defendants cannot prove beyond a reasonable doubt their authority to disobey state law. *Supra* Part IV; *see Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). Each day, Defendants' policy prevents Plaintiffs—and all other students—from speaking freely in the outdoor areas of their campus. C44–46. And without immediate relief, Defendants will have chilled Plaintiff Greer's speech for the majority of his time on campus. Appellants' Br. 59. Plaintiffs merit preliminary relief.

CONCLUSION

This Court should reverse and enter a preliminary injunction, or remand with instructions to do so.

Respectfully submitted this 10th day of May, 2022.

By: */s/Mathew W. Hoffmann*

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of ARAP 32 because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook, 14-point type and contains 6,982 words, excluding the parts of the brief exempted by ARAP 32(c).

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CERTIFICATE OF SERVICE

Pursuant to ARAP 25(b) and 31(b), I hereby certify that on May 10, 2022, I electronically filed the foregoing with the Clerk of the Supreme Court of Alabama using the Alabama Appellate Courts' E-Filing System, C-Track, and emailed the filing to and will serve paper copies upon the following:

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