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

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request oral argument. This appeal raises novel legal questions of significant statewide impact and presents substantial questions of state constitutional law.

This case is the first challenge brought under the recently enacted Alabama Campus Free Speech Act, Ala. Code § 16-68-1, *et seq*. The Act prohibits university policies that restrict students' spontaneous speech and that limit speech to speech zones. Plaintiffs also argue that the Alabama Constitution's free speech protection has a broader application than the federal First Amendment. And, at the very least, significant textual differences between art. I, § 4 and the First Amendment require this Court to address the state provision's contours.

This Court is the only court that can authoritatively decide these questions affecting the free speech rights of current and future college students across Alabama. Oral argument will aid the Court in deciding these far-reaching questions of first impression.

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STATEMENT OF JURISDICTION

This Court has "appellate jurisdiction coextensive with the state," which includes cases seeking equitable relief. Ala. Code § 12-2-7(1). Plaintiffs brought purely equitable claims in circuit court. C50–51. Thus, this Court has appellate jurisdiction.

The circuit court, without explaining its decision, granted Defendants' motion to dismiss Plaintiffs' entire complaint on January 11, 2022. C420. Plaintiffs filed a motion under Alabama Rule of Civil Procedure 59(e) on January 20, 2022. C421. In response, the circuit court called for proposed orders. C432. On February 9, 2022, the court adopted nearly verbatim Defendants' proposed order, which provided reasons why the circuit court granted Defendants' motion to dismiss. C433. Plaintiffs timely filed their notice of appeal on February 14, 2022. C450.

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Alabamians made a choice to favor speech. Through their elected representatives, they chose to promote free expression on public university campuses to the "fullest degree possible" under the Campus Free Speech Act. Ala. Code § 16-68-3(a)(1). They did so because of the paramount place speech holds in education. Universities provide a "marketplace of ideas" from which students and faculty discover and transmit knowledge. *Id.* §§ 16-68-1(3), 16-68-3(a)(1). Universities best serve their educational function when they allow free speech and debate to flourish. *Id.* § 16-68-3(a)(1).

Less than three years ago, the Alabama Legislature passed the Act. It prohibits public universities from infringing on students' right to speak "spontaneously" in the outdoor areas of campus. *Id.* § 16-68-3(a)(3). It also bans those institutions from restricting speech to certain zones on campus. *Id.* § 16-68-3(a)(4). And Alabama's organic law—from the very first constitution—has always forbidden interference with the right to "speak" freely "on all subjects." Ala. Const. art. I, § 4.

Defendants—officials at the University of Alabama in Huntsville—passed a policy that directly contradicts the Act. The Act protects spontaneous speech; Defendants require three business days' notice for nearly all student speech. The Act bans speech zones;

Defendants created speech zones for speech they subjectively deem "prompted by news or affairs."

Plaintiffs Joshua Greer and Young Americans for Liberty at the University of Alabama in Huntsville (YAL), a student and student group, filed suit to vindicate their speech rights. They desire to speak in the outdoor areas of campus without Defendants' prior permission and without limiting their speech about "news or affairs" to University-created zones. But Defendants' policy forbids just that. So, Plaintiffs have refrained—and continue to refrain—from speaking on campus.

The circuit court declined to rule on Plaintiffs' motion for preliminary injunction and instead granted Defendants' motion to dismiss for failure to state a claim. Plaintiffs appeal from that dismissal. C433–49. The circuit court disregarded the high threshold for a motion to dismiss and the plain text of the Act and Alabama Constitution. The court went so far as to claim that, though the Act prohibits interference with spontaneous speech, it actually *requires* a prior permission requirement. C439. And it ultimately ruled that Defendants' policy was an acceptable time, place, and manner regulation of speech.

Defendants' policy cannot be reconciled with the Act and is not a valid time, place, and manner restriction in any event for at least three reasons. First, it regulates speech based on content.

Second, it discriminates based on viewpoint. Third, it is not narrowly tailored and fails to leave open ample alternative means for speech.

The University of Alabama in Huntsville cannot undo the people's choice, as expressed by the Alabama Legislature. The people of Alabama decided that the fullest degree of free speech advances—rather than inhibits—a university's educational mission. This case provides the Court the chance to vindicate the people's will and uphold Plaintiffs' free speech rights. This Court should reverse the circuit court's dismissal and enter a preliminary injunction in favor of Plaintiffs or remand with instructions to do so.

STATEMENT OF THE ISSUES

This appeal presents two issues:

(1) The Campus Free Speech Act prohibits public universities from restricting spontaneous student speech in the outdoor areas of campus and from quarantining speech to "speech zones." A student and student group alleged that the University's policy requires students to give three business days' notice to speak in the outdoor areas of campus and allows for an exception for speech about "news or affairs" only if that speech is confined to "designated areas" on campus. Did the circuit court err in ruling that Plaintiffs failed to state a claim under the Act?

(2) The Alabama Constitution's free speech guarantee bars prior restraints and, at the very least, protects students' speech from all but content-neutral, narrowly tailored regulation that provides ample alternative means for speech. As alleged, the University's policy requires students to secure advance permission to speak in the outdoor areas of their campus, unless they discuss "news or affairs," in which case they can speak only in certain areas of campus. Did the circuit court err in ruling that Plaintiffs failed to state a claim under the Alabama Constitution?

STATEMENT OF THE FACTS

I. The Alabama Legislature passed the Act to protect college students' speech rights.

In 2019, the people's representatives in the Alabama Legislature took up a "critically important" question: the protection of free speech rights on college campuses. Ala. Code § 16-68-1(6). The stakes were—and remain—high. Colleges 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." *Id.* § 16-68-1(3). The Legislature found that if public universities "stifle" student speech, then "our civilization will stagnate and die." *Id.* § 16-68-1(4).

Given the free expression rights at stake and the "significant amount of taxpayer dollars" legislatively appropriated to public colleges each year, the Legislature found a "statewide concern" that those institutions "provide adequate safeguards" for speech. *Id.* §§ 16-68-1(5), (8). Alabama's universities "have historically embraced a commitment" to free speech. *Id.* § 16-68-1(2). But the Legislature made clear that its colleges must remain faithful to their historical commitment and purpose. *Id.* § 16-68-1(5).

The Legislature recognized that universities have no "proper role" in "shield[ing] individuals from speech." *Id.* § 16-68-1(5). That

includes even "ideas and opinions" some "may find unwelcome, disagreeable, or offensive." *Id.* Rather, free expression on college campuses is "critically important." *Id.* § 16-68-1(6). So much so, that colleges must work towards "free, robust, and uninhibited debate and deliberation by students." *Id.* § 16-68-1(6); *accord id.* § 16-68-1(7) (citing Committee on Freedom of Expression at the University of Chicago, Report (2015)).

The Legislature determined that free expression—not censorship—best serves the educational ends of a university. *Id.* § 16-68-3(a)(1). After all, a public university exists to promote "discovery, improvement, transmission, and dissemination of knowledge." *Id.* Freedom of speech allows those things that most promote knowledge in the marketplace of ideas—"strong disagreement, independent judgment, and the questioning of stubborn assumptions"—to "flourish." Chicago Report 1.

The people's representatives passed the Act to retain universities' historic commitment and purpose and to "promote, protect, and uphold" free speech protections. Ala. Code § 16-68-1(8). The Legislature charged each public university with "re-examin[ing], clarif[ying], and re-publi[shing]" their policies to "ensure the *fullest* degree possible" of free expression. *Id.* (emphasis added).

II. The Act prohibits prior-permission requirements and speech zones.

The Act prohibits university policies inconsistent with its terms. Ala. Code § 16-68-3(a). Policies must recognize that the "primary function" of a college is the "discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate." *Id.* § 16-68-3(a)(1). To "fulfill that function," universities must "ensure the fullest degree possible" of free expression. *Id.*

The Act identifies the "outdoor areas" of a college campus as "a forum for members of the campus community"—most notably, students. *Id.* § 16-68-3(a)(4). The "outdoor areas of campus" are the "generally accessible outside areas of campus" where students "are commonly allowed." *Id.* § 16-68-2(6). They include "grassy areas, walkways, and other similar common areas." *Id.*

The Act provides that members of the campus community, including students and student groups, "are free" to "spontaneously and contemporaneously assemble, speak, and distribute literature" in the "outdoor areas of the campus." *Id.* § 16-68-3(a)(3). And the Act bans "free speech zones." *Id.* § 16-68-3(a)(4). It defines such zones as "area[s] on campus" that the university "designate[s] for the purpose of engaging in a protected expressive activity." *Id.* § 16-68-2(3).

Otherwise, universities may regulate speech in the outdoor areas of campus only with a light touch. Colleges can have time, place, and manner requirements for speech "only when" they are narrowly tailored to a significant institutional interest and employ "clear, published, content-neutral, and viewpoint-neutral criteria." *Id.* § 16-68-3(a)(7). Any such regulations must also ensure "ample alternative means of expression." *Id.* And "[a]ll restrictions" must allow for students to distribute literature "spontaneously and contemporaneously." *Id.*

III. In direct contradiction to the Act, Defendants amended their policy to retain a prior permission requirement and to create speech zones.

In response to the Act, Defendants amended their Use of Outdoor Areas of Campus Policy. C40. The policy places limits on the "freedom to debate and discuss the merits of competing ideas." C86. Defendants purport to recognize "free and open inquiry" but reserve for themselves the power to "restrict expression." *Id.*

As amended, the policy requires "reservations" for students to speak in the University's "outdoor space," including campus sidewalks. C40. The reservation requirement applies to *all* student speech, even a single student speaking alone. *Id.* Defendants "strongly encourage[ ]" written requests to use outdoor spaces on

campus 10 days in advance, but demand—"[a]t a minimum"—three business days' notice to speak. C41, C83.

Defendants will refuse a request to speak if they have "reasonable grounds"—whatever that means—to believe that an applicant fails to meet at least one of 24 conditions. C41, C83–86. For example, University administrators can deny a request if they deem the date, time, or space for the expressive activity "unreasonable." C41, C84. And they can refuse permission if they determine that the speech would jeopardize the "well-being of members of the campus community collectively and individually, as well as the educational experience." C41, C85. Defendants' policy also has a catch-all provision prohibiting speech "inconsistent with the terms of this policy" and "U[niversity] policies and procedures" writ large. C84–85.

Defendants offer two, narrow exceptions from their prior permission requirement. First, Defendants exempt "casual recreational or social activities." C83. But Defendants' policy neither defines those terms nor provides examples of such activities. Second, Defendants exempt what they call "spontaneous activities of expression" from their "advance approval" requirement. C42, C87. Defendants limit those "spontaneous" activities to speech "generally prompted by news or affairs coming into public knowledge less than

forty-eight (48) hours prior to the spontaneous expression." C42, C87.

Students must still confine their "spontaneous" expression to "designated" areas, however. C42, C87. Defendants' policy identifies several areas at the University that in total make up a "very small percentage of campus." C42, C101. Thirteen of Defendants' "defined areas" exclusively border parking lots, roads, or lakes. C87, C101. And Defendants confine nearly all these zones to the peripheries of campus. C101. Defendants allow "spontaneous" speech outside these areas only on an "expedited request" of 24 hours' notice. C88. Defendants nonetheless have no requirement that students receive prior approval before distributing literature on campus. C43.

Defendants prescribe punishment for students who violate their policy. C45. Students who fail to seek proper advance approval for their speech may run afoul of the student code of conduct or handbook. C90. Punishment ranges from a written warning all the way up to expulsion. C45. Defendants also threaten discipline for students who try to "circumvent" the notice requirement by falsely claiming to speak "spontaneous[ly]." C88. Defendants reserve for themselves the discretion to "consider any relevant evidence" as to whether the speech was not "spontaneous" and thus "inappropriate[ly]" evading the policy's requirements. *Id.*

IV. Defendants' policy is currently preventing Plaintiffs from speaking on their campus.

Plaintiff Greer is a junior at the University and Plaintiff YAL an expressive association made up of University students. C33. Plaintiffs want to speak in the outdoor areas of their campus without seeking advance approval from Defendants and without limiting their speech to certain designated areas. C45. For example, Plaintiffs want to "promote free speech as a fundamental constitutional right" by speaking on campus, even though some "increasingly criticize" free speech as "dangerous" and "biased" against some groups. C44. But Plaintiffs have "refrained" from speaking freely in the outdoor areas of campus because they credibly fear discipline for violating Defendants' policy. C45–46. This self-censorship has prevented Plaintiffs from recruiting as effectively for YAL. C46.

V. The circuit court ignored Plaintiffs' motion for preliminary injunction and granted Defendants' motion to dismiss.

To remedy the ongoing censorship, Plaintiffs brought claims for injunctive and declaratory relief under the Act and the Alabama Constitution's free speech guarantee. C47–51. Plaintiffs filed a motion for preliminary injunction on the same day Defendants moved to dismiss for failure to state a claim. C159, C203. Defendants argued primarily that their policy complied with the substantive

provisions of the Act and the Alabama Constitution. C205–06. They also argued that the University need not comply with the Act because section 264 of the Alabama Constitution purportedly exempts it from much legislative oversight. C206.

The circuit court set a hearing for the motions nearly three months out but later cancelled the hearing on Plaintiffs' motion for preliminary injunction. C237, C243, C355. Two months after the hearing, the circuit court issued a three-sentence order granting the motion to dismiss. C420. Plaintiffs moved to amend the judgment pursuant to Alabama Rule of Civil Procedure 59(e) to clarify the circuit court's dismissal. C421. In response, the circuit court called for proposed orders. C432. Defendants filed a proposed order providing the basis for the circuit court's dismissal for failure to state a claim of both Plaintiffs' statutory and constitutional claims. CS38.[1]

The circuit court adopted Defendants' proposed order verbatim as to the reasons for dismissal. *Compare* CS38–53, *with* C433–49. The court first dismissed Plaintiffs' statutory claim. C438. It determined that Defendants' policy "[c]omplies" with the Act for two reasons. *Id.* First, the Act, in the court's estimation, "requires" the

[1] In line with ARAP 28(g), references to the clerk's record begin with "C" and references to the clerk's supplemental record begin with "CS."

University to have a prior permission requirement because it mandates that universities allow students to "reserve[ ]" space for "protected expressive activity" and protect against "any 'conduct that materially and substantially disrupts' the speech rights of the students who reserved the space." C439 (quoting Ala. Code § 16-68-3(a)(6)).

Second, the court held that the Act required that the University "enact procedures" regulating speech to protect the "discovery, improvement, transmission, and dissemination of knowledge." C439–40 (quoting Ala. Code § 16-68-3(a)(1)). The regulations must pass the Act's requirements of viewpoint and content neutrality and narrow tailoring with ample alternative means of expression. C440. But the court found that Defendants' policy met all those requirements. C440–46.

The circuit court also dismissed Plaintiffs' constitutional free speech claim. C447. The court ruled that Defendants' policy "complies" with the Alabama Constitution. C448. It first doubted that the Alabama Constitution provides greater protection than the federal Free Speech Clause. C447. Even if it did, however, the court thought the Alabama Constitution would not prohibit narrowly tailored viewpoint- and content-neutral time, place, and manner requirements. C447–48. So, the court adopted its statutory analysis as support for its dismissal of Plaintiffs' constitutional claim. C448.

Following the lead of Defendants' proposed order, the court declined to determine whether the University was exempt from the Act, though it left some footnotes relating to the section 264 argument in its order. C448–49. The court never ruled on Plaintiffs' motion for preliminary injunction.

STATEMENT OF THE STANDARD OF REVIEW

"Rarely should motions to dismiss be granted." *Karagan v. City of Mobile*, 420 So. 2d 57, 59 (Ala. 1982). And dismissals are even rarer still in declaratory judgment proceedings where a court merely looks to whether a justiciable controversy exists. *Pittsburgh & Midway Coal Mining Co. v. Tuscaloosa Cnty.*, 994 So. 2d 250, 254 (Ala. 2008). Because Rule 12(b)(6) employs such a lenient standard, this Court "disfavor[s]" motions to dismiss. *Strain v. Hinkle*, 457 So. 2d 394, 397 (Ala. 1984).

On appeal, a 12(b)(6) dismissal has no entitlement to a presumption of correctness. *Pittsburgh & Midway*, 994 So. 2d at 254. This Court reviews such dismissals de novo. *Id.* It views the complaint's allegations "most strongly in the pleader's favor." *Id.* If it appears Plaintiffs could prove "any set of circumstances" would entitle them to relief, then this Court will reverse. *Id.* This Court does not consider whether Plaintiffs "will ultimately prevail," but "only" whether they "may possibly prevail." *Id.* Dismissals are proper

"only" when it "appears beyond doubt" that Plaintiffs can prove "no set of facts" in support of their claims. *Id.*

This Court must "construe all doubts" about the sufficiency of the complaint in favor of Plaintiffs. *Ex parte Austal USA, LLC*, 233 So. 3d 975, 981 (Ala. 2017). This "broad and well settled standard" does not allow courts to "consider the plausibility of the allegations." *Id.* Instead, this Court must take all of the complaint's allegations "as true." *Id.* Thus, a court does not have carte blanche to "pick and choose which allegations of the complaint to accept as true." *Id.* Courts must even accept as true allegations "so shocking" as to "invite[ ] skepticism." *Id.*

SUMMARY OF THE ARGUMENT

The circuit court incorrectly dismissed both of Plaintiffs' claims. The court disregarded the high threshold for a motion to dismiss and made factual findings contrary to Plaintiffs' allegations. Under any appropriate motion-to-dismiss scrutiny, Plaintiffs sufficiently alleged violations of both the Act and Alabama Constitution.

The Act's plain text prohibits prior permission requirements and speech zones. It bars universities from restricting "spontaneous" speech in the outdoor areas of campus and from limiting speech to "designated" areas. Ala. Code §§ 16-68-2(3), 16-68-3(a)(3),

(4). Yet that is exactly what Defendants' policy does. Defendants require three business days' notice to speak in the outdoor areas of campus and limit speech "prompted by news or affairs" to "designated areas." C41–42. Plaintiffs thus stated a claim under the Act.

The circuit court largely ignored those allegations and upheld Defendants' policy as an appropriate time, place, and manner regulation. That was also error. The Act prohibits policies that discriminate based on content and viewpoint, fail to use means narrowly tailored to a significant government interest, and do not provide ample alternative channels for speech. Ala. Code § 16-68-3(a)(7). Defendants' policy flunks each of those requirements.

As for the constitutional claim, vast textual differences between the federal First Amendment and the Alabama Constitution's free speech guarantee reveal that Alabama provides more protection for speech. That protection includes an absolute bar on prior restraints. Plaintiffs alleged the prior permission requirement—by definition—imposes a prior restraint on speech. C49. The circuit court rejected out-of-hand that allegation and adopted its statutory analysis to conclude that Defendants imposed a constitutional time, place, and manner requirement. C447–48. But under both the Alabama Constitution and persuasive federal First Amendment jurisprudence, Defendants' policy cannot meet time, place, and manner requirements. This Court should reverse and

enter a preliminary injunction for Plaintiffs or remand with instructions for the circuit court to do so.

ARGUMENT

I. Plaintiffs stated a claim under the Act.

This case is the first under the Act. Instead of proceeding with caution on this question of first impression, the circuit court ruled that Plaintiffs had not even *alleged* a violation. That was error. Throughout, the circuit court held Plaintiffs to an impossibly high pleading standard. The court did not even mention the well-established "no set of facts" test. Rather, it ignored the plain text of the Act and made factual findings against Plaintiffs.

Defendants' policy violates the Act's plain text. The Act prohibits restrictions of "spontaneous[ ]" speech, yet Defendants require "prior approval" for almost all student speech. C40. And the Act bans "speech zones," *i.e.* areas "designated" for "engaging" in speech, but Defendants created just such "designated areas." C42–43 (quoting Ala. Code §§ 16-68-2(3)), C436. Plaintiffs also sufficiently alleged that Defendants' policy cannot pass muster as a time, place, and manner requirement under the Act. It discriminates based on viewpoint and content and neither is narrowly tailored to a significant government interest nor provides ample alternatives for speech.

A. The Act prohibits restrictions on spontaneous speech, which means—by definition—it bars prior permission schemes.

Plaintiffs sufficiently alleged that Defendants' policy violates the plain text of the Act's protection for spontaneous student speech. The Act recognizes the "outdoor areas" of campus as a forum for students. C37. It prohibits university policies that infringe on students' freedom to speak "spontaneously" in those areas. C38 (quoting Ala. Code § 16-68-3(a)(3)). But—as the circuit court recognized—Defendants' policy requires students to give three business days' notice to speak in the outdoor areas of their campus. C40–41, C445. By "requiring advance notice" to speak, Defendants "outlaw[ ] spontaneous expression." *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984); *accord* C47.

The Act does not define "spontaneous," so its "plain and ordinary meaning" controls. *Ex parte Christopher*, 145 So. 3d 60, 64 (Ala. 2013). As Defendants conceded below, spontaneous means "proceeding from natural feeling or native tendency without external constraint" or "arising from a momentary impulse." C223–24 (quoting *Spontaneous*, *Webster's Third New International Dictionary* (2002)). But Defendants' Policy imposes a three-business-day, prior permission requirement. C41. By any definition, waiting three business days to speak is not "spontaneous."

The circuit court looked to a different statutory subsection to infer that the Act actually *requires* a prior permission scheme for spontaneous speech. C439 (citing Ala. Code § 16-68-3(a)(6)). That subsection allows universities to regulate "conduct" that "materially and substantially disrupts" speech in a location reserved for that purpose. Ala. Code § 16-68-3(a)(6). It cannot invalidate Plaintiffs' allegations for at least two reasons. First, unlike the spontaneous-speech protection, the portion of the subsection relied on by the circuit court has no applicability to the "outdoor areas" of campus. *See* Ala. Code § 16-68-3(a)(6). The Act recognizes the outdoor areas of campus as fora for students and opens them for spontaneous speech. *Id.* §§ 16-68-3(a)(3), (a)(4). The relevant portion of subsection (a)(6) governs other fora, such as lecture halls or auditoriums, that can be "reserved for" speech. *Id.* § 16-68-3(a)(6).

Second, the circuit court thought that subsection (a)(6)'s requirement that Defendants discipline "*conduct*" that disrupts speech justified Defendants' prior permission requirement. C439 (citing Ala. Code § 16-68-3(a)(6)) (emphasis added). But regulations of "protected speech" demand much more governmental justification than standard "prohibit[ions]" of "conduct." *Dowling v. Ala. State Bar*, 539 So. 2d 149, 153 (Ala. 1988) (per curiam). The Act prohibits university policies more restrictive of "free expression" than its provisions allow. Ala. Code § 16-68-3(a). It contains no

similar safeguard for unprotected conduct. A subsection allowing Defendants to regulate certain *conduct* does not permit them to implement a prior permission requirement on *speech*.

Given the Act's lack of ambiguity, the circuit court had no textual basis for its opinion that the subsection protecting spontaneous speech conflicts with the subsection regarding conduct interfering with speech. C439. Courts should "never" presuppose "conflicting intentions in the same statute," unless "forced on the Court by unambiguous language." *Leath v. Wilson*, 192 So. 417, 579 (Ala. 1939) (per curiam). Here, the ordinary meaning of the subsections shows no ambiguity. One prohibits university policies that restrict spontaneous speech in the outdoor areas of campus. Ala. Code § 16-68-3(a)(3). The other regulates conduct interfering with speech. *Id.* § 16-68-3(a)(6).

The circuit court next attempted to sidestep a collision with the Act by adopting Defendants' re-definition of "spontaneous." Without citation to the Act, complaint, policy, or dictionary, Defendants proposed that "spontaneous" speech cannot "be planned" while non-spontaneous speech can. C208. The circuit court repeatedly assumed—similarly without citation—the accuracy of that definition. *E.g.*, C435–36, C443. On this motion to dismiss, the circuit court had an obligation to accept Plaintiffs' accurate allegations that the Policy defined "spontaneous" speech as "generally prompted by

news or affairs." C42. Far from making a "conclusory" allegation, C438, Plaintiffs quoted that definition word-for-word from Defendants' policy, C87.

The circuit court's definition of "spontaneous" inherently contradicts the policy's definition. Speech "prompted by news or affairs" does not fit into the circuit court's invented "temporal" definition of spontaneous. C443. Speech about news or affairs could be planned. Consider speech, either supporting or criticizing, the eventual verdict in the Kyle Rittenhouse trial. A group could plan for weeks in advance to speak immediately after the verdict comes out, no matter what the verdict. The temporal definition would categorize such speech as non-spontaneous. But the only definition Defendants' policy gives for spontaneous speech says the opposite. And on review of a motion to dismiss, the policy's definition must control.

The circuit court's definition of "spontaneous" also conflicts with the Act. The distinction between speech that "can be planned" and speech that cannot, C435–36, bears no relation to speech proceeding from a natural feeling or arising from a momentary impulse. The definition of spontaneous does not revolve around planning. Speech proceeding from a natural feeling or arising from a momentary impulse could be planned.

The circuit court's reading of "spontaneous" for other sections of the Act undermines its approval of Defendants' prior permission requirement. The Act prohibits colleges from restricting students' right to "spontaneously . . . distribute literature." Ala. Code § 16-68-3(a)(7). Citing that subsection in its narrow tailoring analysis, the court ruled that the Act "mandates" that Defendants allow "literature distribution without prior notice," regardless of whether the literature relates to news or affairs. C446; *accord* C226–27 (Defendants arguing that the Act "mandates" that Defendants "allow students to immediately distribute literature"). That's correct. And that also means that the Act's protection of spontaneous speech requires Defendants allow it "without prior notice" and without limiting it to speech about "news or affairs." C446. "[I]n the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016). Spontaneous has the same meaning whether it applies to speech or literature distribution. And applying that meaning as alleged, the Act prohibits Defendants' prior permission requirement.

B. The circuit court ignored the Act's prohibition of speech zones.

Plaintiffs also sufficiently alleged that Defendants' policy violates the Act by creating speech zones. The Act prohibits colleges from "creat[ing] free speech zones." C37 (quoting Ala. Code § 16-68-

3(a)(4)). Those zones include any "area" on campus "designated for the purpose of engaging in" speech. Ala. Code § 16-68-2(3). Plaintiffs, quoting Defendants' policy, alleged that Defendants exempt what they consider "spontaneous" speech from their "advance approval" requirement, but still limit it to several "defined areas" on campus. C42, C87. Those "defined areas" fit the statutory definition of speech zones like a glove.

Following Defendants' lead, the circuit court recognized as much. Defendants conceded that they "designated certain areas" for students to "engage in such spontaneous expression." C209. Parroting both Defendants' and the statutory definitions of speech zones, the circuit court wrote that Defendants "designated certain areas on campus where students can engage in such spontaneous expression." C436. But the circuit court still refused to credit Plaintiffs' allegations—backed by the plain text of Defendants' policy—that the Act prohibits Defendants from establishing these areas. "[C]ompletely ignor[ing]" the complaint's allegations "misapplie[s] the 12(b)(6) standard of review." *Jackam v. Hosp. Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986). That alone requires reversal. *Id.* at 1583.

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

Not only did the circuit court contravene the plain text of the Act, it also erroneously upheld Defendants' policy as a time, place, and manner requirement. C440–46. Plaintiffs alleged that Defendants' policy cannot meet the Act's requirements in that regard either. The Act only allows universities to maintain time, place, and manner restrictions on speech in the outdoor areas of campus that are "narrowly tailored" to a significant government interest and that "employ clear, published, content-neutral, and viewpoint-neutral criteria." Ala. Code § 16-68-3(a)(7). Defendants must also provide "ample alternative means of expression." *Id.* Failing to meet any one of these seven criteria is fatal to Defendants' policy. *Id.*

The time, place, and manner analysis under the Act proceeds according to well-established constitutional principles. The Act safeguards "speech protected by the First Amendment to the United States Constitution and Article I, Section 4 of the Constitution of Alabama." Ala. Code § 16-68-3(a)(2). It draws its time, place, and manner requirements directly from constitutional free speech jurisprudence. *E.g.*, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The "well-settled rule" provides 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." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 353 (1897); *accord Harris v. Garner*, 216 F.3d 970, 974 (11th Cir. 2000) (en banc).

Defendants bear the burden of proving the constitutionality of their time, place, and manner requirements. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Harmon v. City of Norman*, 981 F.3d 1141, 1147 (10th Cir. 2020); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990). Time, place, and manner analysis is "highly fact-bound." *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 455 (6th Cir. 2004). The reasonableness of such a restriction "involves an underlying factual inquiry." *McTernan v. City of York*, 564 F.3d 636, 646 (3d Cir. 2009). Determinations of viewpoint and content neutrality, narrow tailoring, and ample alternative means all implicate "fact questions that must be submitted to a jury." *Id.*

The circuit court failed to take as true Plaintiffs' allegations, hold Defendants to their burden, and—at a minimum—recognize the inherently factual nature of the time, place, and manner analysis. Instead, the court took as true "facts" contradicting the complaint to find that Defendants satisfied their burden of meeting all of the Act's time, place, and manner requirements.

Plaintiffs sufficiently alleged that Defendants' policy fails as a time, place, and manner requirement. The policy discriminates based on content and viewpoint by defining "spontaneous" speech as prompted by "news or affairs" and granting unbridled discretion to administrators to squelch speech. Defendants also did not narrowly tailor it to any interest—such as quiet around a classroom during class hours—nor provide ample alternative channels for speech. Defendants prevent students—and even a single student—from speaking on their own campus for three business days, unless they talk about "news or affairs" and then only in small, designated speech zones. But a single student's speech poses no risk of undermining the University's educational mission. In fact, the Legislature instructed the University that what most advances its educational mission is "the fullest degree possible of intellectual freedom and free expression." Ala. Code § 16-68-3(a)(1). Under the Act, any one of these grounds is fatal to Defendants' policy.

1. Defendants' policy discriminates based on content.

Content-based regulations are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). That is because "[a]ny" content-based restriction "completely undercut[s]" our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Police*

Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972). The prohibition on content discrimination "put[s] the decision as to what views shall be voiced" where it should be—"into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971). Indeed, "no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.*

Content-based regulations "appl[y] to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. To assess content discrimination, courts "consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* (cleaned up).

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." Governmental "[p]references" for "news" and "affairs" plainly "make reference to content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 677 (1994) (O'Connor, J., concurring in part). On its face, Defendants' policy allows for students to make "newsworthy" speech of recent vintage without prior approval, while restricting non-newsworthy speech or speech on topics more than two days old to Defendants' prior permission

requirement, all based on what Defendants, in their discretion, consider newsworthy.

The circuit court erroneously exempted Defendants from the content-discrimination analysis. The court thought that the policy's non-exhaustive definition of spontaneous as "*generally* prompted by news or affairs" immunized it from content discrimination. C440. Not so. The newsworthy definition conflicts with both the ordinary meaning of spontaneous and the circuit court's definition. *Supra* Section I.A. Thus, "spontaneous" can have no other definition than the one Defendants provided in their policy. What's more, Defendants threaten punishment for non-"spontaneous" speech masquerading as "spontaneous" speech and reserve for themselves the power to assess "any relevant" evidence to consider spontaneity. C88. But the only definition Defendants offer to guide students in the exercise of their free speech rights is "prompted by news or affairs." Defendants had the luxury of writing their policy. They cannot now seek to escape from a definition they wrote.

Whether Defendants' definition of spontaneous reaches more than newsworthy speech does not change the content-discrimination calculus. *Contra* C440. Courts reject as a mere "matter of semantics" arguments that policies do not discriminate based on content because they allow for more favorable treatment for certain types of speech. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d

1250, 1264 n.13 (11th Cir. 2005). When a government "reward[s] one type of speech, the necessary effect is that all other types of speech are penalized." *Id.*

Reed itself illustrates this rule. In that case, the town's "Sign Code" required a permit to display an outdoor sign but exempted 23 sign categories from that requirement. *Reed*, 576 U.S. at 159. The Court only examined "[t]hree categories of exempt signs" for content neutrality, including for ideological, political, and directional signs. *Id.* Despite only assessing a small number of the exemptions from a purportedly content-neutral permit requirement, the Court had no hesitation in concluding that the "Sign Code [wa]s content based on its face" because of those exemptions. *Id.* at 164. So too here. The definition of spontaneous as "generally prompted by news or affairs" renders it an impermissible content-based restriction on speech.

Plaintiffs sufficiently alleged that Defendants' policy discriminates based on content. This ground alone requires reversal.

2. Defendants' policy discriminates based on viewpoint.

Plaintiffs' well-pleaded allegations establish that Defendants' policy discriminates based on viewpoint by: (1) the policy's express terms; and (2) granting unbridled discretion to administrators. When a college targets not only the topic discussed but also

"particular views taken by speakers on a subject," the college violates free speech rights "all the more blatant[ly]." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). That viewpoint discrimination is "an egregious form" of content discrimination. *Id.* The government has no role in regulating speech when the "specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

The policy's express terms regulate speech based on the viewpoint of newsworthy speech. Defendants' definition of spontaneous substitutes speech on "attention-grabbing news headlines" for "discourse from a variety of viewpoints on issues of public importance." C43. Defendants' preference for newsworthy speech favors the viewpoints of the talking heads on major media programs, while disfavoring less publicized views that may not be tied to recent news or affairs, including views of students themselves not considered "newsworthy." For example, a student could speak about Ukraine but not about how terrible the University's food is. But the Act prohibits interference with students' free speech rights precisely because their speech is "critically important" to preserving the college's role as a "marketplace of ideas." Ala. Code § 16-68-1.

Defendants' policy additionally discriminates based on viewpoint by its grant of unbridled discretion. Courts "consistently condemn" speech regulations that "vest in an administrative official

discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). Left with only vague or non-existent criteria on which to make their decision, government officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988).

Viewpoint neutrality demands that college policies limit the discretion of officials. *E.g.*, *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002); *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1226 (11th Cir. 2017); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 387–88 (4th Cir. 2006). If the permit scheme involves the "appraisal of facts, the exercise of judgment, and the formation of an opinion," the danger of viewpoint discrimination is too great to be permitted. *Forsyth Cnty.*, 505 U.S. at 131. Instead, speech restrictions must contain "narrow, objective, and definite standards to guide" officials. *Shuttlesworth*, 394 U.S. at 151.

At least four provisions of Defendants' prior permission requirement allow unbridled discretion: (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. C41, C83–85

Defendants' policy fails to define "casual recreational or social activities." C83. The phrase raises many unanswerable questions that require officials' exercise of judgment to determine whether the prior permission requirement applies. R31. Take, for example, two students walking to class. Does their conversation between each other qualify as a "casual recreational or social activit[y]"? What if they discuss a controversial topic, such as gun control, and hold opposing views? *Cf.* C44. What if they share their views on gun control with other students on the way to class? What if they ask those other students for their positions on gun control? But what if those students do not want their gun control views solicited? Or what if one of the students points to a pin on his backpack that says "Guns Save Lives" as he passes other students? Many of the above scenarios would undermine Defendants' purported interests in their prior permission requirement just as much as or more than a single student speaking alone—for which Defendants require three business days' notice. C40; *accord infra* Section I.C.3.a. This "undefined" exemption "g[ives] unbridled discretion." *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020).

Similarly, Defendants' policy fails to define "well-being," "collectively and individually," "educational experience," or "unreasonable given the nature of the Event." C84–C85. That is particularly troubling given the Legislature's mandate that Defendants' proper role does not include "shield[ing]" students from "unwelcome, disagreeable, or offensive" speech. Ala. Code § 16-68-3(a)(2). The ordinary meaning of well-being includes the "state of being comfortable." *Well-being*, *Lexico English Dictionary Powered by Oxford*, https://bit.ly/3wctmlv (last accessed Mar. 29, 2022). But universities "may not regulate speech because it 'causes offense or makes listeners uncomfortable.'" *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1294 (11th Cir. 2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 481 (2014)).

In an age where some teach that "words wound," the terms Plaintiffs identify allow Defendants to target speech that may make students "collectively and individually" uncomfortable and thus hamper their "educational experience." *See Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990) (The criterion "'educational mission of the school' is so vague that [the government] has virtually unlimited discretion in deciding which groups qualify and which do not."). To Defendants, such uncomfortable speech and the possible adverse reaction it provokes may be "unreasonable" in view of the University's "resources." All of those terms allow Defendants

to form an "opinion" on what viewpoints to allow. *Forsyth Cnty.*, 505 U.S. at 131.

Defendants also have unbridled discretion to deny permission to speak by reference to their own policies. C84–C85. The circuit court thought that because Defendants require speech to be consistent with the "terms" of other policies they did not grant unbridled discretion. C442. But it is the very "terms" of a policy that "give[ ]" unbridled discretion to government officials. *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 791 (9th Cir. 2008). And the terms of the challenged policy allow Defendants to look to their other policies and procedures to deny permission to speak based on their whim. For example, Defendants have an "Office of Diversity, Equity, and Inclusion" that "oversees a number of policies and procedures" related to discrimination. Univ. of Ala. in Huntsville Office of Diversity Equity, and Inclusion, *Policies*, https://bit.ly/3CGhdq8 (last accessed Mar. 29, 2022). Plaintiffs may speak about "equality of opportunity regardless of race" and criticize the Office's equity mission that "guarantee[s] equality of outcome based on race." *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 648 (5th Cir. 2021) (Ho, J., concurring in part). But Defendants can use the reference to consistency with other policies to censor viewpoints that contradict official equity promotion.

The circuit court relied on a single, inapposite case to reject Plaintiffs' unbridled discretion allegations. C441–42 (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002)). The only potentially relevant provision of the ordinance at issue in *Thomas* provided that the city could 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. *Thomas* connected the "health or safety" criterion to an objective "*unreasonable danger*" standard. *Seattle Affiliate*, 550 F.3d at 800.

Far from "virtually identical" to the *Thomas* provision, C441, Defendants' reasonableness measure refers only to the "nature of the Event" or its "impact" on University resources, C84, terms "undefined" by Defendants, *Seattle Affiliate*, 550 F.3d at 800. "This language gives officials less guidance and more leeway than those standards" in *Thomas* and other cases. *Id.* (collecting cases). "Put differently," it does not follow from *Thomas* that "a nebulous consideration for 'personal safety'" or other government interest is "acceptable." *Candy Lab Inc. v. Milwaukee Cnty.*, 266 F. Supp. 3d 1139, 1152–53 (E.D. Wis. 2017).

Citing *Thomas*, the circuit court faulted Plaintiffs for purportedly divorcing "well-being" from Defendants' "health or safety" criterion. C441–42. But Defendants' policy seeks to protect "well-being" in addition to "health or safety." C85. Courts must give effect

to "every word" of the policy. *In re Ashworth*, 287 So. 2d 843, 846 (Ala. 1974) (per curiam). The *Thomas* court never considered a "well-being" criterion. And Defendants' policy makes no link between "well-being" and an objective reasonableness standard. As discussed above, "well-being" allows for a range of subjective determinations about the effect of speech on its listeners. It grants unbridled discretion.

Thomas also did not alter the well-established rule that permitting regimes must provide "narrowly drawn, reasonable and definite standards." *Thomas*, 534 U.S. at 324. The *Thomas* court, on a summary judgment record, *id.* at 320, assessed an ordinance which applied to events "for large-groups of over 50 people in busy Chicago parks," *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1258 (11th Cir. 2004) (Barkett, J., concurring); *accord Thomas*, 534 U.S. at 318. Defendants' policy, however, applies to even a single student speaking in the outdoor areas of his own campus. C40. The potential safety impacts of large groups meeting in public parks are a world away from that of a single student speaking on campus. *Infra* Section I.C.3.a. But the circuit court ignored those dispositive differences to find that under "no set of facts" could Plaintiffs show unbridled discretion. That was error.

Plaintiffs sufficiently alleged that Defendants' policy discriminates based on viewpoint both by its express terms and by its grant of unbridled discretion. This ground alone requires reversal.

3. Defendants' policy fails intermediate scrutiny.

The Act requires content- and viewpoint-neutral time, place, manner regulations to survive intermediate scrutiny. Ala. Code § 16-68-3(a)(7). Under that standard, speech restrictions must be "narrowly tailored" to a "significant institutional interest." *Id.*; *accord McCullen*, 573 U.S. at 486. Narrow tailoring means the regulation cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486. The government may not simply choose the "easier" route. *Id.* at 495. It must demonstrate that "alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* And the Act requires Defendants' policy provide "ample alternative means" of speech. Ala. Code § 16-68-3(a)(7). Defendants' policy cannot meet either requirement.

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

A court "do[es] not simply take the [government] at its word that the [policy] serves [its] interests." *Buehrle v. City of Key West*, 813 F.3d 973, 978–79 (11th Cir. 2015). Rather, the government

"must rely on at least *some* pre-enactment evidence that the regulation would serve its asserted interests." *Id.* at 979 (cleaned up). Given the government's burden, a plaintiff's adequate allegations of lack of narrow tailoring, as here, generally suffice to overcome a motion to dismiss. *E.g.*, *Free Speech Coal., Inc. v. Att'y Gen.*, 677 F.3d 519, 537 (3d Cir. 2012).

The circuit court incorrectly exempted Defendants from the pre-enactment evidence requirement. C444. The court thought the rule applied only to secondary effects cases and even went so far as to claim that "[n]o cases" have applied the requirement to speech restrictions on government property. *Id.* Not so. Indeed, a government "*ordinarily* need[s] to show that it *seriously considered* alternative regulatory options that burden less protected speech." *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1246 (10th Cir. 2021); *accord id.* at 1232 (examining ordinance restricting expressive activities in traditional public fora and faulting government for not relying on certain evidence "during the drafting of the Ordinance—and, more broadly, [for] undert[aking] little, if any, empirical or data-driven research prior to the Ordinance's passage").

Mere "evidence" from a prior judicial opinion will not meet the government's burden. *Contra* C445. "[W]hether the restrictions at issue in [other] cases were narrowly tailored in the respective contexts of those cases does not compel any conclusion as to"

Defendants' policy here. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1134 (10th Cir. 2012). For it to be relevant, evidence from past cases must be closely analogous to the policy at issue. "General reference" to other cases, "other cities, [and] other restrictions" does not "relieve" Defendants' burden. *Id.* Defendants must show *their* policy "ameliorates real, not speculative, harms, in a direct and material way." *Brewer*, 18 F.4th at 1243.

At the motion-to-dismiss stage, Defendants did not—and could not—provide anything beyond their speculation that the policy serves their asserted interests. Narrow tailoring "measure[s]" the policy "against [Defendants'] asserted interests." *Brewer*, 18 F.4th at 1226 (cleaned up). The circuit court assessed Defendants' interests in regulating competing uses of space and ensuring safety and order on campus. C443–44. But Defendants employ an overbroad prophylactic regulation of speech that is both over and underinclusive. As alleged, it lacks narrow tailoring for at least four reasons.

First, Defendants' policy requires prior permission for even a single student to speak alone in the outdoor areas of campus. C40. But Defendants have no evidence—or even reasons—why a single student speaking on his own campus poses a risk to competing uses of space or campus safety. Indeed, "[p]ermit schemes and advance notice requirements that potentially apply to small groups are

nearly always overly broad and lack narrow tailoring." *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005); *accord Burk*, 365 F.3d at 1255 n.13 (collecting cases and noting that "several courts have invalidated" speech restrictions "because their application to small groups rendered them insufficiently tailored."). A government fails to meet its "congestion and safety" interests when it "has no basis in the record for expecting more than a handful of [speakers] to show up." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 859–60 (9th Cir. 2004).

The circuit court resisted this conclusion by making two improper factual findings. C445. It thought that even with one student, Defendants need "a way to regulate the competing use" of space and that a single student's speech could disrupt activities at a reserved location. *Id.* That speculation has no basis in the complaint or reason. And, as discussed above, the case law rejects it. Defendants' policy is overbroad and overinclusive because it applies to the speech of a single student. It is also underinclusive because it exempts "casual recreational or social activities" from its prior permission requirement. C83. Those activities pose at least as much risk to Defendants' interests as a single student speaking alone, *supra* Section I.C.2, but Defendants make no attempt to regulate them.

Second, Defendants' policy applies to *all* student speech on their *own* college campus. The circuit court was untroubled by the breadth of Defendants' restriction because it reasoned that the Act allowed speech regulations to protect the "discovery, improvement, transmission, and dissemination of knowledge" at colleges. C439–40 (quoting Ala. Code § 16-68-3(a)(1)). That reading flips the Act on its head. The Legislature recognized that the "primary function" of a college is to promote the discovery and dissemination of knowledge. Ala. Code § 16-68-3(a)(1). But it did not prescribe prior permission requirements and speech zones to meet this end. Quite the opposite, the Legislature determined that to "fulfill that function," colleges must "strive to ensure the *fullest degree possible* of . . . free expression." Ala. Code § 16-68-3(a)(1) (emphasis added). Free expression—not the regulation of it—serves Defendants' interests. Therefore, a policy that restricts all student speech in fact contravenes a college's interest and, naturally, cannot be narrowly tailored.

Third, Defendants' policy cuts off much student speech for three business days. C50. During that time, it provides no alternative avenues for expression, unless Defendants deem a topic to be newsworthy. This requirement is not "virtually identical" to what other courts have upheld. *Contra* C444. Those "other cases" involve different policies, "other [colleges], [and] other restrictions." *Doe*,

667 F.3d at 1134. All of the circuit court's cited cases assessed narrowing tailoring of a policy to a non-student speaker during a merits proceeding. *Bloedorn v. Grube*, 631 F.3d 1218, 1225 (11th Cir. 2011) (preliminary injunction, non-student speaker); *Bowman v. White*, 444 F.3d 967, 972, 974 (8th Cir. 2006) (trial, non-student speaker); *Sonnier v. Crain*, 613 F.3d 436, 438 (5th Cir. 2010) (preliminary injunction, non-student speaker).

Those cases ignore the "critical fact" that Plaintiffs here are students. *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 880 (8th Cir. 2020). Students "belong[ ] on campus" and are "part of the campus community." *Id.* at 877 (cleaned up); *accord* Ala. Code § 16-68-2(2). Narrow tailoring requires much more targeted measures when applied to students speaking on their own campus.

The circuit court's cases also relied on the perceived difficulty of a university responding to a disruption on short notice. C445–46. Those cases could properly consider any such evidence during their merits proceedings. But on this motion to dismiss, Defendants have not—and could not—provide evidence about their purported lack of resources.[2] Nor does anything suggest students speaking on their

[2] Good reason exists to doubt the lack of resources. Defendants' police department is "a full-service, state law enforcement agency." Univ. of Ala. in Huntsville, *2021 Annual Security Report* 7,

campus present "compelling safety and administrative concerns." *Turning Point USA*, 973 F.3d at 880.

Fourth, Defendants' policy lacks narrow tailoring because it inexplicably exempts newsworthy speech and literature distribution from its prior permission requirement. C48. Allowing for speech about newsworthy topics and literature distribution without prior permission undermines Defendants' purported interest in regulating use of space and safety just as much as any other student expressive activity.

The circuit court again looked outside the complaint to find that literature distribution would not interfere with "other events and classes." C446. But what if a student wanted to hand out literature right outside an academic building? What if other students did not want to receive literature as they prepared for classes? What if both Black Lives Matter and Blue Lives Matter supporters wanted to hand out literature at the same time and at the same place? Defendants have no evidence to answer these questions.

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https://bit.ly/3tfUjmE (last accessed Mar. 29, 2022). It is "open twenty-four hours a day, seven days a week, including weekends, holidays, and semester breaks." *Id.*

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

Plaintiffs lack ample alternative channels. Ample alternatives "must exist within the forum in question," *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 524 (D.C. Cir. 2010) (cleaned up), and an "alternative is not ample if the speaker is not permitted to reach the intended audience," *Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011).

Plaintiffs have no ample alternatives for speaking in the outdoor areas of campus for at least three business days. C47. The circuit court made an improper factual finding that Plaintiffs could use "several prominent" speech zones on campus. C446. But—by definition—speech zones cannot be ample alternatives under the Act because the Act prohibits exactly those zones. *Supra* Section I.B. And Plaintiffs can only use Defendants' speech zones if they talk about things Defendants consider newsworthy. C42. Even so, Plaintiffs' complaint reveals that Defendants' speech zones are far from "prominent." Defendants tuck them into remote and undesirable areas of campus where Plaintiffs cannot communicate with other students or—really—anyone in the campus community. C101. Thirteen of Defendants' 20 speech zones exclusively border parking lots, roads, or lakes. C87–88, C101. Further, Defendants relegate almost all of these zones to the outskirts of campus, far

from main campus walkways and buildings where students congregate. C101.

The literature distribution exception also fails as an alternative channel. *Contra* C446. "[A] regulation that forecloses an entire medium of public expression across the landscape of a particular community or setting fails to leave open ample alternatives." *United Brotherhood of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008); *accord City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("voic[ing] particular concern with laws that foreclose an entire medium of expression"). The right of free speech "extend[s] to the right to choose a particular means or avenue of speech in lieu of other avenues." *United Brotherhood*, 540 F.3d at 969 (cleaned up). Defendants expect students to hand out literature silently instead of making their voices heard on their own campus. C43–44. But Defendants cannot close off an entire medium of expression for their students.

* * * *

In sum, Plaintiffs adequately alleged that Defendants' policy violates the Act's plain text protecting spontaneous speech and banning speech zones. Nor does Defendants' policy satisfy the statutory requirements for a time, place, and manner requirement. This Court should reverse the circuit court's dismissal of Plaintiffs'

statutory claim and enter a preliminary injunction or remand with instructions for the circuit court to do so. *See infra* Part III.

II. Plaintiffs sufficiently alleged Defendants' policy runs afoul of the Alabama Constitution's speech protection.

The text of Alabama's free speech guarantee differs vastly from the federal First Amendment. 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. As Plaintiffs alleged, Defendants impose a prior restraint. The circuit court again ignored that allegation and adopted its statutory time, place, and manner analysis to dispose of Plaintiffs' constitutional claim. But Defendants' policy is no more valid a time, place, manner restriction under the Alabama Constitution than it is under the Act. Defendants' policy discriminates based on content and viewpoint and cannot meet the Act's intermediate scrutiny. So it has no chance of surviving constitutional strict scrutiny. The circuit court erred in concluding that no set of facts could support Plaintiffs' constitutional claim.

A. The Alabama Constitution protects more speech than the federal Free Speech Clause and bans prior restraints.

Significant textual differences separate the federal Constitution's Free Speech Clause from the Alabama Constitution's free

speech guarantee. Where the federal provision provides "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, the Alabama clause reads "[t]hat no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty," Ala. Const. art. I, § 4. This Court is the "final arbiter" of the Alabama Constitution. *Hexcel Decatur, Inc. v. Vickers*, 908 So. 2d 237, 242 (Ala. 2005). Alabama courts have looked to the federal First Amendment as persuasive in interpreting Alabama's free speech protection. *E.g.*, *King v. State*, 674 So. 2d 1381, 1384 (Ala. Crim. App. 1995). But no Alabama court has held that Alabama's protection is limited to what the First Amendment provides. The vast textual differences between the provisions provide good reason to construe them differently. *State v. Coe*, 679 P.2d 353, 373–74 (Wash. 1984) (en banc) ("[S]tate courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts.").

The "plain meaning" of the Constitution controls. *Campbell v. City of Gardendale*, 321 So. 3d 635, 641 (Ala. 2020). Because the Constitution "is a document of the people," this Court interprets its words according to "their ordinary meaning common to

understanding at the time of its adoption by the people." *Id.*; *accord Barnett v. Jones*, --- So. 3d ----, 2021 WL 1937259, at *7 (Ala. May 14, 2021) (Mitchell, J., concurring specially) ("It is critical to interpret the Alabama Constitution according to its text."). Given Alabama's constitutional history, this Court "construe[s]" provisions "in the light of common law and of previously existing Constitutions." *Henry v. State*, 117 So. 626, 629 (Ala. 1928) (Thomas, J., dissenting) (per curiam). Those provisions "designed for the protection of life, liberty, and property" receive an especially "liberal[ ]" construction. *Id.*; *accord Sadler v. Langham*, 34 Ala. 311, 322 (1859) (each state constitutional body is "charged with the protection and preservation of the inalienable rights of the citizen").

Alabama's free-speech protection dates to its first constitution. The 1819 Constitution provided basically the same relevant guarantee as the current version: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Ala. Const. art. I, § 8 (1819). Because "Alabama had formerly been a part of the Mississippi Territory and since conditions in Alabama paralleled conditions there," its founders generally followed the Mississippi constitution's lead, including adopting word for word its speech protection. Malcolm Cook McMillan, *Constitutional Development in Alabama, 1798–1901: A Study in Politics, the Negro and Sectionalism* 46 (1955); Miss. Const. art.

I, § 6 (1817). In turn, Mississippi's constitution took mainly from those of Tennessee and Kentucky. John W. Winkle, III, *The Mississippi State Constitution* 4 (2d ed. 2014).

Despite the constitution-borrowing on the expanding frontier, these speech provisions all trace their way back to Pennsylvania's. By 1776, our nation's founders had had enough of British rule. At the direction of the Continental Congress, states began drafting constitutions to prepare for self-government. Frederick D. Rapone, Jr., *Article I, Section 7 of the Pennsylvania Constitution and the Public Expression of Unpopular Ideas*, 74 TEMPLE L. REV. 655, 663 (2001). Pennsylvanians—motivated by the "Lockean principal that government should proceed upon the consent of the governed"—created a committee to draft such a document. *Id.* at 663–65. The result gave the world the first written protection of free expression: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments." *Id.* at 664 (quoting Article XII, Declaration of Rights, Pennsylvania Constitution of 1776).

Post-independence, the 1790 Pennsylvania constitutional convention rewrote the speech guarantee to provide essentially what Alabama's clause provides today: "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PENN. J. CONST. L. 12, 18 (2002)

(quoting Pa. Const. art. IX, § 7 (1790)). The provision applied Blackstone's natural-right protection from government restraint on press to the Lockean language of speech rights. *See William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 62 (Pa. 1961).

"[U]ndoubtedly," the framers of the 1790 Constitution enjoyed "full[ ] cognizan[ce] of the vicissitudes and outright suppressions to which printing had theretofore been subjected." *Id.* at 61. Namely, the framers would have been familiar with the case of William Bradford who, in 1689, printed William Penn's famous charter so that the people could know their rights. *Id.* at 61 n.1. In response, the governor summoned Bradford and interrogated him as to why he had not obtained a government license prior to printing. *Id.* And they would have known that Penn himself had been prosecuted "for the 'crime' of preaching to an unlawful assembly." Kreimer, *supra*, at 23 & n.39.

Blackstone condemned all prior restraints. The outrage caused by the licensing acts on press—like the one that landed Bradford in hot water—led the freedom from "censorship" to assume the status of a "common law or natural right." *William Goldman Theatres*, 173 A.2d at 62. Blackstone viewed a free press as "essential to the nature of a free state." *Id.* (quoting William Blackstone, 4 *Commentaries on the Laws of England* 151–52). Each person has "an undoubted right to lay what sentiments he pleases

before the public." *Id.* Prior restraints "subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." *Id.*

Responsibility for the "abuse" of free speech corresponds to those categories of speech that are historically unprotected, such as obscenity and fighting words. Blackstone allowed subsequent liability for publication of things "improper, mischievous, or illegal." *Id.* That phrase "preserv[es] the power of the state to regulate speech under certain historical exceptions." *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1248 (Utah 2006); *accord Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (obscenity and fighting words represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem").

Consistent with the textual and historical evidence, Alabama's free speech protection—like Pennsylvania's—prohibits prior restraints.[3] The clause is "absolute in phraseology." *K. Gordon*

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[3] The clause protects against more than prior restraints as conceived by Blackstone, who dealt only with the freedom of the press and had "precisely nothing to say about freedom of speech." Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 BYU L. REV. 1151, 1155. Freedom of speech was a uniquely American invention, and strong textual and historical

Murray Prods., Inc. v. Floyd, 125 S.E.2d 207, 212 (Ga. 1962). It "absolutely interdict[s]" prior restraints. *Id.* at 213. "This means that no interference, no matter for how short a time nor the smallness of degree, can be tolerated." *Id.* "Neither a court of equity, nor any other department of government, can set up a censorship in advance over [speech]." *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 556 (C.C.M.D. Ala. 1909). Numerous other state courts with similar constitutional language have so held. *E.g.*, *K. Gordon*, 125 S.E.2d at 212; *William Goldman Theatres*, 173 A.2d at 65; *Coe*, 679 P.2d at 360; *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 773 P.2d 455, 459–60 (Ariz. 1989); *Dailey v. Superior Court*, 44 P. 458, 459–60 (Cal. 1896) ("petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments"); *State v. Henry*, 732 P.2d 9, 11 (Or. 1987). This Court should too.

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reasons exist for its broad protection. *Id.* at 1160; *accord* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 282 (2017) (founders understood that "[a]ll men had a right of speaking and writing their minds—a right, of which no law can divest them" (cleaned up)). But the Alabama Constitution's ban on prior restraints alone demonstrates that the circuit court incorrectly dismissed Plaintiffs' constitutional claim.

B. Defendants impose a prior restraint on nearly all student speech on campus and except only a content- and viewpoint-based subset of speech from that requirement.

Defendants—in nearly every circumstance—require students to obtain prior approval before speaking on campus. C49. That is a quintessential prior restraint. *Turning Point USA*, 973 F.3d at 878 (university created prior restraint when it required "a speaker [to] get prior permission from the school in order to use [speech zones]"); *accord Alexander v. United States*, 509 U.S. 544, 550–51 (1993) (distinguishing "subsequent punishments" from prior restraints, which "forbid[ ] certain communications . . . in advance of the time that such communications are to occur"—for example, by requiring a person "to obtain prior approval for . . . expressive activities."). The circuit court's factual finding to the contrary, that Defendants' policy "does not prevent Plaintiffs' expression," C447, contradicts Plaintiffs' allegation, supported by the policy's text, that "students must receive *prior approval* from the University *before* engaging in expressive activities anywhere on campus," C40 (emphasis added).

Thus, the Alabama Constitution's flat prohibition on prior restraints invalidates Defendants' policy. That does not mean that Defendants lose control over campus. Far from it. The bar on prior restraints still allows retrospective and otherwise valid, time, place, and manner requirements. Thomas M. Cooley, *A Treatise on the*

Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 597 (1868). Nor does the prior restraint ban give Plaintiffs the right to close down streets or block access to buildings. Governmental regulations of non-speech conduct are generally appropriate. And Defendants may impose subsequent punishment on speech that falls into one of the traditionally unprotected categories.

But Defendants' speech zones fail any level of time, place, and manner scrutiny, let alone constitutional strict scrutiny. *See also infra* Section II.C. They target speech based on the content and viewpoint of the message expressed. *Supra* Sections I.C.1, I.C.2. Restricting speech because of the idea spoken strikes at the very heart of what the Alabama Constitution protects—the freedom to "*express* opinions." Campbell, *supra*, at 281. And Defendants have no justification for why they need to quarantine even individual students speaking alone to designated areas on campus. *Supra* Section I.C.3.

Alabama's Constitution provides broad protection for speech. That is the choice the people of Alabama have made. And it makes eminent sense given the "history of authoritarian government as the Founders then knew it," which showed "how relentless authoritarian regimes are in their attempts to stifle free speech." *Nat'l Inst. for Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring). The framers of Alabama's Constitution

made the choice "to carry those lessons onward as [they sought] to preserve and teach the necessity of freedom of speech for the generations to come." *Id.* Judges interpreting the Constitution "have no alternative to saying, thus sayeth the Constitution, and we cheerfully obey." *K. Gordon*, 125 S.E.2d at 213.

C. Defendants' policy fails under persuasive federal First Amendment jurisprudence.

The Alabama Constitution protects more speech than the federal Free Speech Clause, but federal jurisprudence is "persuasive" in interpreting the state constitutional protection. *King*, 674 So. 2d at 1384. To dispose of Plaintiffs' constitutional claim, the circuit court adopted the exact same reasoning as for the statutory claim. C448. That was also error.

The circuit court did not—and could not—dispute Plaintiffs' allegation that the outdoor areas of campus are public fora. C49. The Act recognizes as much. Ala. Code § 16-68-3(a)(4). Government time, place, and manner restrictions on speech in public fora must be content- and viewpoint-neutral, be narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). If the regulation is content or viewpoint discriminatory, the government must satisfy strict

scrutiny. *Id.* That is, the regulation must be narrowly tailored to achieve a compelling government interest. *Id.*

Defendants' policy is neither content- nor viewpoint-neutral. *Supra* Sections I.C.1, I.C.2. Therefore, it must pass strict scrutiny. But the policy cannot even pass intermediate scrutiny. *Supra* Section I.C.3. So, as alleged, it cannot pass strict scrutiny, where the policy must be the "least restrictive means" to the government's end. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). It cannot be the least restrictive means to Defendants' ultimate goal of preserving the educational mission of the University to stifle student speech—speech the Legislature found to advance precisely that mission. Ala. Code § 16-68-3(a)(1).

What's more, Defendants' policy imposes a prior restraint on student speech. C49. The First Amendment "forbid[s]" them "except in the most extreme circumstances." *Ex parte Wright*, 166 So. 3d 618, 623 (Ala. 2014). And they come with a "heavy presumption" against their constitutionality. *Id.* at 631. The Eighth Circuit recently observed that it could not identify a single case in which it "allowed a university to impose a prior restraint on a student wishing to use an unlimited public forum." *Turning Point USA*, 973 F.3d at 879. For good reason. No extreme justifications exist to subject student speech on campus to prior approval. But the circuit court refused to accept Plaintiffs' well-pleaded prior restraint allegations.

Plaintiffs have stated a claim for a violation of the Alabama Constitution's free speech protection.

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

This Court should enjoin Defendants from enforcing the general requirement in Sections B and C of their policy requiring three business days' notice to speak in the outdoor areas of campus, C83–84; the speech zones and 24-hour prior permission requirement in Section F of Defendants' policy that apply to so-called "spontaneous" speech, C86–88; and the provisions in Sections C and E of the policy that grant administrators unbridled discretion, C83–86. *See also* C160; *supra* Section I.C.2.

This Court has authority "[t]o issue writs of injunction," Ala. Code § 12-2-7(3), and to order circuit courts to enter such orders, *id.* § 6-6-500. Plaintiffs must show four factors to obtain a preliminary injunction: (1) they have "at least a reasonable chance of success on the ultimate merits of [their] case"; (2) they would suffer "immediate and irreparable injury" without an injunction; (3) no adequate remedy at law exists; and (4) the balance of the hardships weighs in Plaintiffs' favor. *Baldwin Cnty. Elec. Membership Corp. v. Catrett*, 942 So. 2d 337, 344 (Ala. 2006). Plaintiffs meet all four factors.

Plaintiffs—at the very least—have a reasonable chance of success on the ultimate merits of their statutory and constitutional claims. Plaintiffs need not put on a "more-likely-than-not showing of success on the merits." *Mallet & Co., Inc. v. Lacayo*, 16 F.4th 364, 380 (3d Cir. 2021). Rather, they need only demonstrate that they "*can* win." *Id.* They far exceed this low threshold. The plain text of the Act prohibits Defendants from imposing prior permission requirements and restricting newsworthy speech to speech zones. *Supra* Sections I.A, I.B. Similarly, the plain text of the Alabama Constitution bars Defendants' prior permission requirement. *Supra* Section II.B. And Defendants' policy fails as a time, place, manner restriction because it is viewpoint and content discriminatory, not narrowly tailored to any government interest, and fails to provide ample alternative channels for speech. *Supra* Sections I.C, II.B, II.C.

In cases involving precious speech freedoms, the reasonable-chance factor is dispositive. *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020). "[C]ontinued enforcement" of "direct penalization[s]" of "protected speech," as here, "for even minimal periods of time," is "per se irreparable injury." *Id.*; *accord Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1123 (Ala. Crim. App. 1993) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And irreparable injury "necessarily shows that there is no adequate remedy at

law." *Water Works & Sewer Bd. of the City of Birmingham v. Inland Lake Investments, LLC*, 31 So. 3d 686, 692 (Ala. 2009). Finally, "the fact that Plaintiffs have raised serious [protected speech] questions compels a finding that the balance of hardships tips sharply in Plaintiffs' favor." *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (cleaned up). "It is clear that neither the government nor the public has any legitimate interest in enforcing an unconstitutional [policy]." *Otto*, 981 F.3d at 870.

Plaintiffs cannot wait for continued delays before the circuit court. Each day Defendants' policy remains in effect inflicts new irreparable injury on Plaintiffs. C44–46. And each day that passes brings Plaintiff Greer closer to the end of his classes. Mtn. to Expedite 4–5. Without immediate preliminary relief, Defendants will have successfully chilled Plaintiff Greer's speech for the majority of his time on campus. C33, C40, C45–46.

Plaintiffs moved the circuit court for a preliminary injunction on the basis of their verified complaint, C162, so this Court has before it all the facts necessary to grant preliminary relief. This Court should do so or remand with instructions that the circuit court enter a preliminary injunction. *See Fulani v. Krivanek*, 973 F.2d 1539, 1542, 1548 (11th Cir. 1992) (reversing trial court and remanding with instructions to enter injunction to protect "fundamental rights").

CONCLUSION

The people of Alabama made the choice to provide robust protection for student speech. They recognized that the "fullest degree possible" of free speech best fulfills public universities' traditional function to discover and transmit knowledge. Ala. Code § 16-68-3(a)(1). The University of Alabama in Huntsville cannot ignore the people's command and enact policies contrary to both the letter and the spirit of the law. The circuit court erred in concluding Plaintiffs could prove no set of facts in support of their statutory and constitutional claims. This Court should reverse and enter a preliminary injunction or remand with instructions to do so.

Respectfully submitted this 29th day of March, 2022.

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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 12,462 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 March 29, 2022, I electronically filed the foregoing with the Clerk of the Supreme Court of Alabama using the Alabama Appellate Courts' Online Information Service and emailed the filing to and will serve paper copies upon the following:

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ADDENDUM

ADDENDUM

Statutory Provisions

Constitutional Provisions

Ala. Code § 16-68-1. Legislative findings.

The Legislature makes the following findings:

(1) Article I, Section 4 of the Constitution of Alabama of 1901, recognizes that all persons may speak, write, and publish their sentiments on all subjects, and that "no law shall ever be passed to curtail or restrain the liberty of speech . . . ."

(2) Alabama's public institutions of higher education have historically embraced a commitment to freedom of speech and expression.

(3) The United States Supreme Court has called public universities "peculiarly the marketplace of ideas," *Healy v. James*, 408 U.S. 169, 180 (1972), where young adults learn to exercise those constitutional rights necessary to participate in our system of government and to tolerate the exercise of those rights by others, and there is "no room for the view that First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180.

(4) The United States Supreme Court has warned that if state-supported institutions of higher education stifle student speech and prevent the open exchange of ideas on campus, "our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

(5) A significant amount of taxpayer dollars is appropriated to public institutions of higher education each year, and all public institutions of higher education should strive to ensure the fullest degree of intellectual and academic freedom and free expression and recognize that it is not their proper role to shield individuals from speech that is protected by the First Amendment to the United

States Constitution, including ideas and opinions the individuals may find unwelcome, disagreeable, or offensive.

(6) Freedom of expression is critically important during the education experience of students, and each public institution of higher education should ensure free, robust, and uninhibited debate and deliberation by students.

(7) The 1974 Woodward Report, published by the Committee on Free Expression at Yale, the 2015 report issued by the Committee on Freedom of Expression at the University of Chicago, and the 1967 Kalven Committee Report of the University of Chicago articulate well the essential role of free expression and the importance of neutrality at public institutions of higher education to preserve freedom of thought, speech, and expression on campus.

(8) It is a matter of statewide concern that all public institutions of higher education provide adequate safeguards for the First Amendment rights of students, and promote, protect, and uphold these important constitutional freedoms through the re-examination, clarification, and re-publication of their policies to ensure the fullest degree possible of intellectual and academic freedom and free expression.

Ala. Code § 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.

Ala. Code § 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 I, § 4

That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.