IN THE SUPREME COURT OF ALABAMA

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

Appellants,

v.

FINIS ST. JOHN IV, Chancellor of the University of Alabama System; **DARREN DAWSON**, President of the University of the 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,

Appellees.

Case No. 1210309

MOTION OF AMICUS CURIAE SPEECH FIRST, INC. TO FILE BRIEF IN SUPPORT OF APPELLANT

Pursuant to Rule 29 of the Alabama Rules of Appellate Procedure, Speech First, Inc. respectfully moves this Court for leave to file a brief as amicus curiae in support of the Appellant in the above-numbered case. In support of this motion, Speech First states the following:

1. Speech First is a nationwide membership association of students, parents, faculty, alumni, and concerned citizens. Launched in

2018, Speech First is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation.

2. Speech First has a strong interest in this case. Despite the importance of free speech on college campuses, universities across the country are failing to protect the free speech rights of their students. The University of Alabama at Huntsville's prior restraint on student speech, if allowed to stand, will severely restrict the First Amendment rights of students at the University and on campuses across Alabama.

3. As set forth in greater detail in the attached brief, this case presents important First Amendment issues that are matters of first impression for this Court. Speech First respectfully submits that its participation as *amicus curiae* will assist this Court in its resolution of these issues.

For the foregoing reasons, Speech First respectfully requests that this Court grant its motion to participate as *amicus curiae* in the form of filing a brief on behalf of Appellants.

Dated: March 29, 2022 Respectfully submitted,

<u>*/s/Laura E. Clark*</u>

Laura E. Clark (GLI004)
Clark Law Group, LLC
PO Box 682034
Prattville, AL 36068
Lauraclark8319@gmail.com

James Hasson*
Consovoy McCarthy PLLC
1600 Wilson Boulevard, Suite 700
(703) 243-9423
james@consovoymccarthy.com

* *pro hac vice application forthcoming*

Counsel for Speech First

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2022, I emailed this motion to Appellee's counsel, Jay M. Ezelle, at the following email address: jme@starneslaw.com. I further certify that I emailed this brief to Appellant's counsel, Matthew W. Hoffman, at the following email address: mhoffman@adflegal.com.

/s/Laura E. Clark

IN THE SUPREME COURT OF ALABAMA

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

Appellants,

v.

FINIS ST. JOHN IV, Chancellor of the University of Alabama System; **DARREN DAWSON**, President of the University of the 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,

Appellees.

Case No. 1210309

AMICUS BRIEF OF SPEECH FIRST, INC. IN SUPPORT OF APPELLANT

CORPORATE DISCLOSURE STATEMENT

Speech First, Inc. has no parent corporation, and no corporation owns 10% or more if its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE vii

INTRODUCTION 1

I. College campuses are at least designated public forums for students. 2

II. The policy is unconstitutional under any forum analysis because it is a prior restraint that invests university officials with unbridled discretion. 10

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

CASES

Atlanta J. & Const. v. City of Atlanta Dep't of Aviation,
322 F.3d 1298 (11th Cir. 2003) 11

Barrett v. Walker Cty. Sch. Dist.,
872 F.3d 1209 (11th Cir. 2017) 3, 4

Bloedorn v. Grube,
631 F.3d 1218 (11th Cir. 2011) 5, 8

Bowman v. White,
444 F.3d 967 (8th Cir. 2006) 7

Brister v. Faulkner,
214 F.3d 675 6

Child Evangelism Fellowship of MD,
457 F.3d 376 (4th Cir. 2006) 11

DeBoer v. Vill. of Oak Park,
267 F.3d 558 (7th Cir. 2001) 11

F*W/PBS, Inc. v. City of Dallas*,
493 U.S. 215 (1990) 10

Glover v. Cole,
762 F.2d 1197 (4th Cir. 1985) 6

Healy v. James,
408 U.S. 169 (1972) 1

Hershey v. Turner,
2020 WL 1932911 (E.D. Okla. 2020) 6

Hotel Emps. & Rest. Emps. Union, Loc. 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks & Recreation,
311 F.3d 534 (2d Cir. 2002) 2, 3

Just. For All v. Faulkner,
410 F.3d 760 (5th Cir. 2005) 5, 6

Keister v. Bell,
879 F.3d 1282 (11th Cir. 2018) 8, 8

Keyishian v. Bd. of Regents of Univ. of State of N.Y.,
385 U.S. 589 (1967) 1, 8

Kim v. Coppin State Coll.,
662 F.2d 1055 (4th Cir. 1981) 1

McGlone v. Bell,
681 F.3d 718 (6th Cir. 2012) 6

Perry Ed. Assn. v. Perry Local Educators' Assn.,
460 U.S. 37 (1983) 3

Pleasant Grove City v. Summum,
555 U.S. 460 (2009) 3

Pro-Life Cougars v. Univ. Houston,
259 F. Supp.2d 575 (S.D. Tex. 2003) 7

Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 10

Smith v. Tarrant County College Dist.,
670 F. Supp. 2d 534 (N.D. Tex. 2009) 6

Southworth v. Bd. of Regents,
307 F.3d 566 (7th Cir. 2002) 11

Speech First, Inc. v. Cartwright,

21-12583 (11th Cir. 2020) vii

Speech First, Inc. v. Fenves,
979 F.3d 319 (5th Cir. 2020) vii

Speech First, Inc. v. Khator,
4:22-cv-582 (S.D. Tex.) vii

Speech First, Inc. v. Sands,
No. 21-2061 (4th Cir. 2021) vii

Speech First, Inc. v. Schlissel,
939 F.3d 756 (6th Cir. 2019) vii

Sweezy v. N.H. ex rel. Wyman,
354 U.S. 234 (1957) 1

Thomas v. Chicago Park District,
534 U.S. 316 (2002) 12

Univ. and Comm. College System of Nev. v. Nevadans for Sound Government,
120 Nev. 712 (2004) 7

Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams,
No. 12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) 4, 7

Walker v. Tex. Div. Sons of Confederate Veterans, Inc.,
135 S. Ct. 2239 (2015) 2, 4

Weinberg v. City of Chicago,
310 F.3d 1029 (7th Cir. 2002) 10, 13

Widmar v. Vincent,
454 U.S. 263 (1981) 5

OTHER AUTHORITIES

Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 Ind. L.J. (2004)......... 8

INTEREST OF AMICUS CURIAE

Speech First is a membership association of students, parents, faculty, alumni, and concerned citizens. Launched in 2018, Speech First is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation. For example, Speech First has challenged speech-chilling policies at the University of Michigan, *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); the University of Texas, *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333-334 (5th Cir. 2020); the University of Central Florida, *Speech First, Inc. v. Cartwright*, 21-12583 (11th Cir. 2020); Virginia Tech University, *Speech First, Inc. v. Sands*, No. 21-2061 (4th Cir. 2021); and the University of Houston, *Speech First, Inc. v. Khator*, 4:22-cv-582 (S.D. Tex.).

Speech First has a strong interest in this case. Despite the importance of free speech on college campuses, universities across the country are failing to protect the free speech rights of their students. The University of Alabama in Huntsville's prior restraint on student speech is sadly not unique. Speech First routinely defends students whose First Amendment rights have been violated by universities. The Court should reverse the decision below.

INTRODUCTION

Fifty years ago, the Supreme Court declared that American universities are "peculiarly the marketplace of ideas," training future leaders "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). Because "independent thinking" requires "constant questioning" and "the expression of new, untried and heterodox beliefs," universities would be "great bazaars of ideas where the heavy hand of regulation has little place." *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957). Put simply, "First Amendment protections [do not] apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972).[1]

[1] As YAL notes, the Alabama Constitution provides greater free speech protections than the First Amendment. *See* Opp'n to Mot. to Dismiss at 23.

To be sure, universities have some leeway to prohibit disruptive behavior, but any limits on expressive activity must be narrowly tailored and cannot give administrators unfettered discretion to permit or forbid student speech. The University's *Use of Outdoor Areas of Campus Policy* (the "Outdoor Expression Policy") policy violates both of these commands.

I. College campuses are at least designated public forums for students.

Courts use a "'forum analysis' when reviewing government restrictions on purely private speech that occurs on government property." *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015). The appropriate standard of review depends on the nature of the forum in which speech is restricted. At the most general level, courts distinguish between public forums and non-public forums. What types of speech the government is permitted to restrict—and how it does so—varies greatly between public and non-public forums.[2]

A non-public forum is "property that the government has not opened for expressive activity by members of the public," such as military

[2] As laid out in greater detail below, *supra* at 10-14, prior restraints that provide government officials with unbridled discretion to forbid expressive activity are unconstitutional regardless of forum type.

bases, airport terminals, and jailhouse grounds. *Hotel Emps. & Rest. Emps. Union, Loc. 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 546 (2d Cir. 2002). The government may restrict speech in non-public forums "subject only to the requirements of reasonableness and viewpoint neutrality." *Id.*

When public forums are involved, however, the analysis gets more complicated. Courts have recognized three categories of public forums: the traditional public forum, the designated public forum, and the limited public forum. *See Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017). Each of these forums is accompanied by a separate standard of review.

Traditional public forums are public spaces that have "traditionally been available for public expression and the free exchange of ideas." *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45 (1983). "Streets and parks" are classic examples of traditional public forums. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). Supreme Court precedent has long held that "government entities are strictly limited in their ability to regulate private speech" in these forums. *Id.* "[A]ny

restriction based on the content of the speech must satisfy strict scrutiny," and "restrictions based on viewpoint are prohibited." *Id.*

A designated public forum is "'government property that has not traditionally been regarded as a public forum [but] is intentionally opened up for that purpose.'" *Barrett*, 872 F.3d at 1224; *see also Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams,* No. 12-cv-155, 2012 WL 2160969, at *6-7 (S.D. Ohio June 12, 2012). Put differently, "a designated public forum consists of government property that has been opened for the purpose of functioning, more or less, as a traditional public forum, even though it does not possess the historical pedigree of a traditional public forum." *Id.* Unlike a traditional public forum, however, "expressive activity in a designated public forum can be limited to a particular class of speakers instead of being opened to the general public." *Id.* "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." *Summum*, 129 S. Ct. at 1132.

The final class of public forum is the "limited public forum." Government entities create a limited public forum by "reserv[ing] a forum for certain groups or for the discussion of certain topics." *Walker*,

135 S. Ct. at 2250. Unlike regulations of speech in traditional or designated public forums, restrictions on expressive activity in limited public forums must only be "reasonable and viewpoint neutral." *Bloedorn v. Grube*, 631 F.3d 1218, 1237 (11th Cir. 2011).

Designated public forums and limited public forums both fall in the gray area between traditional public forums and non-public forums and, as a result, distinguishing one from another requires some nuance. Courts use "a two-factor test for classifying such intermediate public forums as either designated or limited." *Just. For All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005). Courts look to "(1) the government's intent with respect to the forum, and (2) the nature of the forum and its compatibility with the speech at issue." *Id.*

YAL contends that the University's campus is at least a designated public forum and is thus subject to a higher level of scrutiny. *See* Compl. ¶143. The University argued that its campus is a limited public forum, and therefore its restrictions on speech only need to be reasonable and content neutral. *See* Mot. to Dismiss at 10-11. YAL has the better of the argument.

Where student speech is involved, courts have consistently held that universities are public forums. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) ("[A]t least *for its students*," a college campus "possesses many of the characteristics of a public forum." (emphasis added)); *Glover v. Cole*, 762 F.2d 1197, 1200 (4th Cir. 1985) ("experience and basic sense teach that" university campuses resemble public forums for students because "[a] college milieu is the quintessential 'marketplace of ideas'"). More pertinently, courts have found college campuses to be either traditional or designated public forums—*not* limited forums—for student speech.

Multiple federal courts have held that university thoroughfares are traditional public forums. *See, e.g.*, *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012) (holding that sidewalks around Tennessee Technological University's campus were traditional public forums); *Brister v. Faulkner*, 214 F.3d 675, 681-83 (holding that sidewalks surround the University of Texas at Austin's Erwin Center were traditional public forums); *Hershey v. Turner*, 2020 WL 1932911 *5 (E.D. Okla. 2020) (finding that the Northeastern State University's sidewalks, streets, and parks are traditional public forums); *Smith v. Tarrant County College Dist.*, 670 F.

Supp. 2d 534, 538 (N.D. Tex. 2009) ("streets, sidewalks, and campus common areas" at Tarrant County College are public forums).

Even when courts have held that campuses are not traditional public forums, however, they have still recognized that they are designated public forums for students—*i.e.*, that the traditional public forum analysis should apply to any restrictions on student speech. *See, e.g.*, *Just. For All.*, 410 F.3d at 769; *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969, at *4; *Bowman v. White*, 444 F.3d 967, 976 (8th Cir. 2006) (referring to "outdoor areas clearly within the boundaries of the campus known as the Union Mall, the Peace Fountain and Brough Commons" as "unlimited designated public fora"); *Pro-Life Cougars v. Univ. Houston*, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003) (finding that the "uncontroverted evidence compels the conclusion that both the University, and in particular Butler Plaza, are public fora designated for student speech"); *Univ. & Comm. College System of Nev. v. Nevadans for Sound Government*, 120 Nev. 712, 726 (2004) ("Typically, when reviewing restrictions placed on students' speech activities, courts have found university campuses to be designated public forums.").

Intuitively, this makes sense. The crucial inquiry when determining whether a particular campus is a designated public forum or a limited public forum is "whether outdoor open areas of the university's campus, accessible to students generally, have been designated as a forum for *student* expression." *Just. For All.*, 410 F.3d at 767 (emphasis original). Because universities are "peculiarly the marketplace of ideas," *Keyishian*, 385 U.S. at 603, courts have answered this question in the affirmative. Scholars who have examined this issue have reached the same conclusion:

> [The position] that *the campus of the public university is at the very least a designated public forum*, represent[s] the most rational approach. On a visceral level this seems self-evident. Universities are places of higher learning and intellectual pursuit—they are the quintessential "marketplace of ideas." *The notion that a university's campus has not been opened for the expressive activity of students seems antithetical.*

Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 Ind. L.J. 267, 275 (2004) (emphasis added).

The University chiefly relied on *Bloedorn* and *Keister v. Bell*, 879 F.3d 1282 (11th Cir. 2018), to support its position that its campus is a limited public forum, rather than a traditional or designated public

forum. *See* Mot. to Dismiss at 9-12. But neither case addressed whether college campuses were traditional or designated public forums *for students*, and, as such, neither case is applicable here. *Bloedorn* involved a challenge from a traveling preacher who sought to "enjoin Georgia Southern University . . . from enforcing its free speech policies regulating the access of outside, non-sponsored speakers to the university campus." 631 F.3d at 1225. *Keister* also involved an outsider's request to hold an event on campus, and there the court likewise held that the campus was a limited public forum *when members of "the [University] community" were not involved*. 879 F.3d at 1291 (emphasis added).

Put differently, the University's reliance on *Bloedorn*, *Keister*, and similar cases conflates two very distinct inquiries: whether campuses are public forums for students, and whether campuses are public forums for individuals who have no affiliation with the university. Indeed, the University cites no case in which a court concluded that college campuses have not been opened to students as a class of speakers—*i.e.*, that they are not designated public forums for students.

In sum, college campuses must be considered at least designated public forums when student speech is involved.

II. The policy is unconstitutional under any forum analysis because it is a prior restraint that invests university officials with unbridled discretion.

Even if this Court concludes that the University's campus is a limited public forum, the Outdoor Expression Policy is still unconstitutional. A prior restraint exists when a law or regulation gives "public officials the power to deny use of a forum in advance of actual expression." *See Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Although "[p]rior restraints are not per se unconstitutional," under the First Amendment, they are "highly disfavored and presumed invalid." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002). Prior restraints cannot overcome this heavy presumption of illegality if they "place[] unbridled discretion in the hands of a government official or agency" or "fail[] to place limits on the time within which the decisionmaker must issue the license." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990).

Crucially, "there is broad agreement that, *even in limited public and nonpublic forums*, investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Child Evangelism Fellowship of MD*, 457 F.3d 376, 386 (4th Cir. 2006) (emphasis added); *see also Atlanta J. & Const. v. City of Atlanta Dep't of*

Aviation, 322 F.3d 1298, 1310 (11th Cir. 2003) ("A grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional."); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001) ("Where virtually unlimited discretion exists, 'the possibility is too great that it will be exercised in order to suppress disfavored speech.'"); *see also Southworth v. Bd. of Regents,* 307 F.3d 566, 575-80 (7th Cir. 2002) (holding that unbridled discretion inquiry is a component of viewpoint discrimination analysis, which applies in all forums).

Indeed, when a policy gives government officials total discretion, courts "need not attempt to reconcile [any] confusion over the proper forum terminology," because "[e]ven assuming arguendo" that a particular forum is "subject to something less than the strict scrutiny review given to access restrictions in designated public forums," the risk of viewpoint discrimination is too great to allow discretionary permits for expressive activity. *DeBoer*, 267 F.3d at 566–67.

The Outdoor Expression Policy does exactly that:

> [The University] can reject an application if they determine that the "requested space is unreasonable given the nature of the Event and/or the impact it would have on [University] resources." . . . Or they can deny an application if Defendants

> believe it would jeopardize the "well-being of members of the campus community collectively and individually, as well as the educational experience." . . . Defendants also reserve for themselves the discretion to deny applications "inconsistent with the terms of this policy."

Opp'n to Mot. to Dismiss at 5. Allowing administrators to "reject an application" if they unilaterally determine that a request is "unreasonable" or that it would "'jeopardize' the well-being of members of the campus community" is the definition of unbridled discretion.

Contra the circuit court, *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), is inapposite. There, the Supreme Court upheld a Chicago ordinance requiring individuals to obtain permits before conducting events with more than fifty people and allowing the City to deny a permit if it determined that an event posed "an unreasonable danger to the health and safety of park users." *Id.* at 324. The Court held that the "unreasonable danger" standard did not give City officials unbridled discretion because it limited the reasons for which a permit could be denied and required explanations for a denial. *Id.* The Outdoor Expression Policy contains none of the constitutional safeguards present in *Thomas*. Unlike the Chicago ordinance, which only allowed City officials to deny permit requests when an event would be *unreasonably unsafe*, the Outdoor Expression Policy allows University officials to deny

permit requests whenever they subjectively determine that an expressive activity is "unreasonable." And unlike the city officials in *Thomas*, the University has no obligation to explain its decisions.

The Seventh Circuit's decision in *Weinberg* is directly on point. In that case, Chicago adopted an ordinance prohibiting individuals from selling books on public sidewalks without a license. 310 F.3d at 1046. The Seventh Circuit found the ordinance unconstitutional because "[t]here [was] no language in [the] procedure which curtails the discretion of City officials in granting a license." *Id.* Although the City argued that the licensing procedure was a "mere formality in which officials simply determine whether the applicant has conformed to applicable provisions in the ordinance," the court found these assurances irrelevant. The court refused to "presume that officials will act in good faith and follow standards not explicitly contained in the ordinance." *Id.* Because the policy, on its face, provided no safeguards, it was an unconstitutional prior restraint.

So too here. This Court need only look at the text of the Outdoor Expression Policy to conclude that it is unconstitutional. Because the policy itself contains no narrow, objective, and definite standards

constraining the university's discretion, the policy "does not sufficiently curtail the discretion of [University] officials in granting [approval] to [speak] and thus violates the law of prior restraint." *Id.* No additional inquiry is needed.

CONCLUSION

This Court should reverse the circuit court and deny the Defendants' motion to dismiss.

Dated: March 29, 2022

Respectfully submitted,

<u>/s/Laura E. Clark</u>

Laura E. Clark (GLI004)
Clark Law Group, LLC
PO Box 682034
Prattville, AL 36068
Lauraclark8319@gmail.com

James Hasson*
Consovoy McCarthy PLLC
1600 Wilson Boulevard, Suite 700
(703) 243-9423
james@consovoymccarthy.com

* *pro hac vice application forthcoming*

Counsel for Speech First

CERTIFICATE OF SERVICE

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

/s/Laura E. Clark

CERTIFICATE OF COMPLIANCE

Pursuant to Alabama Rule of Appellate Procedure 32(d), I hereby certify that that this brief complies with the Alabama Rules because it is written in 12-point Century Schoolbook font and contains 2,669 words, excluding those parts that can be excluded.

/s/Laura E. Clark