

No. 1210309

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**IN THE SUPREME COURT OF ALABAMA**

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YOUNG AMERICANS FOR LIBERTY  
AT THE UNIVERSITY OF ALABAMA IN HUNTSVILLE,  
*Plaintiffs-Appellants,*

*v.*

FINIS ST. JOHN IV, IN HIS OFFICIAL CAPACITY AS  
CHANCELLOR OF THE UNIVERSITY OF ALABAMA SYSTEM, *ET AL.*  
*Defendants-Appellees.*

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On Appeal from the  
Circuit Court of Madison County  
47-CV-2021-900878.00

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**AMICUS BRIEF OF THE STATE OF ALABAMA**

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## **STATEMENT REGARDING ORAL ARGUMENT**

The State does not request oral argument. But if the Court determines that oral argument will be of assistance to it in determining the issues in this appeal, the State would welcome the opportunity to participate.

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## INTRODUCTION

This case is about an issue of vital importance—the freedom of speech at our State’s public colleges and universities. The Attorney General, on behalf of the State of Alabama, submits this brief to make clear that the Legislature has authority to address this important issue.

In 2019, the Legislature enacted a law that requires public institutions of higher education to provide certain free speech guarantees to students, faculty, and staff. Plaintiffs are a student and student group at the University of Alabama in Huntsville (UAH) who allege that the Defendants-Appellees—officials affiliated with the university—have violated that law. One of Defendants’ responses below was that the 2019 Act could not be constitutionally applied to UAH. In Defendants’ view, because Section 264 of the Alabama Constitution provides that the University of Alabama “shall be under the management and control of a board of trustees,” Ala. Const. art. XIV, § 264, the 2019 Act fails because it affects how the board carries out its duties.

Defendants are mistaken. While Section 264 serves an important role by setting forth in detail *who* will manage and control the “state university,” the Legislature retains significant authority regarding *how*

the board must do so. Just as the Legislature does not violate the separation of powers every time it passes a law requiring or forbidding certain actions by the Governor, it does not violate Section 264 simply by requiring or forbidding certain actions by public universities.

The contrary interpretation pressed by Defendants below would make public universities sovereigns within the State, free to ignore numerous laws enacted by the people's representatives. That sweeping view is not supported by the text of the Constitution, historical practice, or relevant precedent. The Constitution creates a board to manage and control the University of Alabama, including UAH, as the State's agents and in accordance with State law, not a board that may operate above the law. Any argument to the contrary should be rejected.

### **STATEMENT OF THE CASE**

Plaintiffs filed suit against the trustees of the Board of Trustees of the University of Alabama System, Chancellor St. John, and five named UAH officials, alleging that UAH's *Use of Outdoor Areas of Campus Policy* violates Plaintiffs' rights under Alabama Constitution art. I, § 4

and Ala. Act No. 2019-396. (C. 31-110.)<sup>1</sup> Relevant here, the 2019 Act requires public colleges and universities to provide certain guarantees of free expression on campus, *see* Ala. Code § 16-68-3(a), and Plaintiffs alleged that Defendants had failed to comply with the Act.

Defendants moved to dismiss Plaintiffs' claims. (C. 203-34). One of their contentions was that the 2019 Act violates Section 264 of the Alabama Constitution by interfering with the board's discretion to set policies for UAH. (C. 228-33). In Defendants' view, the 2019 Act is unconstitutional because it "clearly and directly attempts to remove . . . authority from the Board of Trustees and place it in the hands of the Alabama Legislature," (C. 229).

The Defendants served the Attorney General. (C. 235-36.) Invoking Ala. Code § 6-6-227, the Attorney General moved to file an *amicus* brief to respond to the Defendants' challenge to the constitutionality of the 2019 Act, as applied to UAH. (C. 244-75.) That motion was granted (C. 276), and the Attorney General filed his brief (C. 277-303).

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<sup>1</sup> The trustees were subsequently dismissed pursuant to an agreement of the parties. (C. 238-42.)

The Defendants filed a reply in support of their motion to dismiss. (C. 356-80.) They also filed a memorandum of law in response to the Attorney General's *amicus* brief in which they made additional arguments. (C. 381-419.)

The circuit court held a hearing (R.1-50) and later dismissed the case (C. 420). Plaintiffs moved to alter, amend, or vacate the judgment (C. 421-28), and the Defendants partially joined, and partially opposed, that motion (C. 429-31). On the court's order (C. 432), the parties filed proposed orders (Supp. C. 36-53). The circuit court then entered an order dismissing the case on grounds that UAH complies with the free speech guarantees of the 2019 Act and the Alabama Constitution. (C.433-49.) The circuit court did not reach the question of the constitutionality of the 2019 Act. (C. 448.) Plaintiffs timely appealed. (C. 450-54.)

### **STATEMENT OF THE ISSUES**

This case presents issues regarding whether UAH's policies comply with the free speech guarantees of article I, § 4 of the Alabama Constitution and the free speech guarantees that Ala. Act No. 2019-396 requires public colleges and universities to provide to students. UAH contended below that it complies with these laws and, in the alternative,

that the Act is unconstitutional as applied to UAH. The State addresses only whether the Act is constitutional under Section 264 of the Alabama Constitution.

### **STATEMENT OF FACTS**

The right to free speech is foundational in this country and in this State. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. Amend. 1. And Alabama’s Constitution likewise secures free speech rights: “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.” Ala. Const. art. I, § 4.

In the interest of promoting free speech and expression on State campuses, the Alabama Legislature passed, and Governor Ivey signed, Ala. Act No. 2019-396, which is codified at Ala. Code §§ 16-68-1 *et seq.* The Legislature made various findings in support of the Act. The Legislature found, *inter alia*, that “[f]reedom 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.” Ala. Code § 16-68-1(6). The Legislature also found that the protection of these rights by public institutions of higher education “is a matter of statewide concern,” Ala. Code § 16-68-1(8), and thus the Legislature ordered the State’s colleges and universities to take certain steps to guarantee these rights.

The Act requires that “the board of trustees of each public institution of higher education . . . adopt a policy on free expression” that meets specific criteria set out in the Act. Ala. Code § 16-68-3(a). The policy must be real, not merely written down. Accordingly, the institutions must “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” and they must disseminate the policy. Ala. Code § 16-68-3(c).

The boards must “submit to the Governor and the Legislature a report that details” the actions they took to come into compliance with the Act and any subsequent changes they make. Ala. Code § 16-68-4. Additionally, the boards must “prepare and disseminate” an annual



report covering specified topics, Ala. Code § 16-68-5(a), and those reports are “to be published in a prominent location on its institution’s website” as well as submitted to the Alabama Commission on Higher Education (ACHE), Ala. Code § 16-68-5(b). In turn, ACHE “shall publish the report in a prominent location on its website and notify the Governor and the Legislature of its receipt of the report.” *Id.* These provisions are intended to enable the State to ensure that its directives are being carried out by its agents.<sup>2</sup>

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<sup>2</sup> The Board of Trustees of the University of Alabama System submitted a “Report of Efforts to Further Promote Freedom of Speech and Expression” dated August 31, 2021. The report is available at [https://ache.edu/ACHE\\_Reports/Misc/Free\\_Speech/UA\\_System.pdf](https://ache.edu/ACHE_Reports/Misc/Free_Speech/UA_System.pdf) (last visited March 18, 2022). Footnote 1 provides: “The Board of Trustees of The University of Alabama voluntary releases this report for informational purposes only to promote transparency in its ongoing efforts to further enhance opportunities for free speech and expression on its individual campuses.”

The report is subject to judicial notice. Ala. R. Evid. 201; *cf. Paez v. Sec’y, Fla. Dept. of Corr.*, 947 F.3d 649, 651-52 (11th Cir. 2020) (approving of judicial notice of State court records where safeguards were followed); *Coastal Wellness Ctrs., Inc. v. Progressive Am. Ins. Co.*, 309 F.Supp. 3d 1216, 1220 n. 4 (S.D. Fla. 2018) (“The Court may take judicial notice of government publications and website materials.”); *see also Ex parte Maple Chase Co.*, 840 So. 2d 147, 150 (Ala. 2002) (“Because the Alabama and federal rules are virtually identical, a presumption arises that cases construing the federal rules are authority for construction of the Alabama rules.”) (citations and quotation marks omitted).

The 2019 Act specifically provides that “[i]t is the intent of the Legislature that constitutionally created boards of trustees comply” with the Act. Ala. Code § 16-68-8. The University of Alabama has a constitutionally created board of trustees, Ala. Const. art. XIV, § 264, as does Auburn University, Ala. Const. art. XIV, § 266.

### **STATEMENT OF THE STANDARD OF REVIEW**

This Court reviews constitutional challenges to statutes *de novo*. *State ex rel. King v. Morton*, 955 So. 2d 1012, 1017 (Ala. 2006). “The power of the courts to declare an act of the legislature unconstitutional and void . . . is a highly responsible and delicate power, and never to be exercised, unless the exigencies of the particular case require it.” *Jones v. Black*, 48 Ala. 540, 542 (1872). “[A]cts of the legislature are presumed constitutional” and thus the Court “approach[es] the question of the constitutionality of a legislative act with every presumption and intendment in favor of its validity, and seek[s] to sustain rather than strike down the enactment of a coordinate branch of the government.” *Bynum v. City of Oneonta*, 175 So. 3d 63, 66 (Ala. 2015) (cleaned up). Thus, should Defendants ask this Court to hold the 2019 Act unconstitutional as applied to UAH, they would bear a heavy “burden of

overcoming the presumption of constitutionality.” *Thorn v. Jefferson Cty.*, 375 So. 2d 780, 787 (Ala. 1979).

### **SUMMARY OF THE ARGUMENT**

Section 264 of the Alabama Constitution occupies an important but limited role in our constitutional order, providing that “[t]he state university shall be under the management and control of a board of trustees,” and then setting forth in detail who may be part of the board and how they must be selected. Ala. Const. art. XIV, § 264. For example, the board must include the Governor, two members from each of Alabama’s seven congressional districts, and a third member from the district that contains Tuscaloosa. Board members serve six-year terms and elect their successors who must be confirmed or rejected by the Senate. This provision guarantees that the power to manage and control the state university shall be vested only in this board rather than some other person or entity of the Governor’s or Legislature’s design.

But while Section 264 declares *who* will run the state university, the provision is not the last word on *how* the university will be run. In separation-of-powers terms, the board occupies the executive role over

the university, but the Legislature may still speak to what policies will be executed on campus.

Accordingly, when the Legislature determined in 2019 that UAH and other public institutions of higher learning should provide certain minimum free speech guarantees on campus, Section 264 did not stand in the State's way. The 2019 Act does not transfer the board's authority to another body; the board still runs UAH. Nor can one say that the Legislature has seized this executive authority, for the legislative branch routinely requires or forbids certain actions from the executive branch without transgressing the separation of powers. Thus, UAH has long been subject to general laws as well as to laws specific to the University of Alabama and even UAH. Section 264 does not allow the board to pick and choose which laws to follow; it simply guarantees that the board will be the entity ultimately responsible for following them. As this Court put it more than a century ago, the university is "clearly simply [an] agenc[y] of the state." *State ex rel. Medical Collage of Alabama v. Sowell*, 39 So. 246 (Ala. 1905); *see also Stevens v. Thames*, 86 So. 77, 78 (Ala. 1920).

This conclusion is supported by the text of Section 264 and its relevant context. Other constitutional provisions focused on the University of Alabama and other uses of the phrase “management and control” outside the university context underscore that Section 264 does not prohibit the Legislature from legislating regarding public universities and colleges.

Indeed, the Legislature has long done so. This historical practice likewise supports the State’s reading of Section 264.

Finally, relevant precedents point to the same conclusion: Act No. 2019-396 is a law which the board is required to follow in governing UAH.

## **ARGUMENT**

### **I. The 2019 Act Does Not Violate Section 264 of the Alabama Constitution.**

Section 264 of the Alabama Constitution plays an important role in our constitutional order by placing “[t]he state university” under the “management and control of a board of trustees,” and then setting the size of the board, how members must be selected, from where various board members must hail in the State, and how long they may serve. Section 264 thus pays careful attention to *who* will be running the state university, but it does not grant the board the last word regarding *how*

that authority will be executed. No person or other State agency may be given authority to manage and control the State university, but like any State agency, the board must still follow State law—including Act 2019-396. That result follows from the text and context of Section 264, historical practice, and relevant precedents. Thus, if a Section 264 constitutional challenge to the 2019 Act is raised in this case, it should be rejected.

**A. Section 264’s Text and Context Show That the Provision Does Not Divest the Legislature of Power to Legislate Regarding Public Universities and Colleges.**

Section 264 begins: “The state university shall be under the management and control of a board of trustees, which shall consist of two members from each congressional district in the state as constituted on January 1, 2018, an additional member from the congressional district which includes the site of the first campus of the university, and the governor, who shall be ex officio president of the board.” Ala. Const. art. XIV, § 264. The remainder of the provision explains how the trustees are selected, the confirmation process, and their term of office—except, of course, for the Governor who serves as president of the board of trustees by virtue of her office. *Id.* The other trustees are elected by the sitting

trustees by secret ballot and take office immediately, though they are subject to “confirmation or rejection by the senate.” Ala. Const. art. XIV, § 264. The Senate is to make its decision “as it shall determine is for the best interest of the university,” and, if the Senate rejects any trustee, then the Senate shall elect a replacement itself. *Id.* These details make clear that the State exerts control over the board through the inclusion of the Governor and through the process for selecting trustees.

The only other time “management and control” is used in the EDUCATION article of the Constitution, article XIV, is with respect to Auburn University, Ala. Const. art. XIV, § 266. Like Section 264, Auburn’s Section 266 is primarily about the membership of the board of trustees. *Compare* Ala. Const. art. XIV, § 264 *with* Ala. Const. art. XIV, § 266.

Two additional provisions of the EDUCATION article concern the University of Alabama, namely Sections 265 and 267. While those provisions do not directly address the phrase “management and control,” they shed light on its meaning by imposing express limitations on the Legislature. Section 265 provides that a set annual amount must be paid out of the treasury “as interest on the funds of the University of Alabama,

heretofore covered into the treasury, for the maintenance and support of said institution.” Ala. Const. art. XIV, § 265. And the provision makes clear that the Legislature may abolish or reduce the military system that previously existed at the University, so long as that action does “not cause any diminution of the amount of annual interest payable out of the treasury for the support and maintenance of” the University. *Id.*

Section 267 imposes an additional express limitation on the inherent power of the Legislature as it relates to the University. It does so by requiring a 2/3 vote to change the location of the Tuscaloosa campus and other designated institutions. Ala. Const. art. XIV, § 267 (“The legislature shall not have power to change the location of the state university . . . except upon a vote of two-thirds of the legislature taken by yeas and nays and entered upon the journals.”). Of course, the usual rule is that only a majority vote is needed. *See* Ala. Const. art. IV, § 63.

It thus follows from Section 267 that—but for that provision—the Legislature could have moved the University out of Tuscaloosa by a majority vote. And it further follows that a decision as fundamental as where the University should be located is the Legislature’s to make, even though “management and control” of the University rests in the board.



Moving outside the Constitution's EDUCATION article, three provisions refer to "the management and control of the state through the Alabama state docks department or other state governing agency," Ala. Const. art. XI, §§ 213.01, 213.06 & 213.09, while a fourth refers to the "Alabama Space Science Exhibit Commission or any instrumentality of the state created and established for the purpose of providing for such facility, its management or control," Ala. Const, art. XI, § 213.36. These provisions make explicit that which is implicit in Section 264's creation of a board as an agent through which the State maintains the management and control of its university. This is especially true in the light of the State's control over the membership of the board and longstanding statutory treatment of the University. *See infra*.

Yet another provision and this Court's precedent construing it support this conclusion. Section 93 provides that certain "work or improvement shall always be and remain under the management and control of the state, through its state harbor commission, or other governing agency." Ala. Const. art. IV, § 93. The State Docks Commission replaced the State Harbor Commission, *State Docks Comm'n v. State ex rel. Cummings*, 150 So. 345, 348 (1933), and a Docks Commission

employee sued because a general law had reduced his salary, which he believed was within the “exclusive power” of the Docks Commission, *id.* at 347. Indeed, he argued that the Legislature could not act on his salary directly, but only through the Docks Commission or a successor that it could name. *Id.* (“It is insisted by appellee that by this amendment to our Constitution, the State Harbor Commission, now the State Docks Commission, was vested with that exclusive power, and that the same must be exercised by that commission or such other governing agency of the state as the Legislature may prescribe, and not by the Legislature acting in its own behalf in the premises.”). This Court, after reviewing legislation impacting the Commission at length, rejected the employee’s argument. *Id.* at 349. In an opinion concurring specially, Justice Brown explained that “[t]he constitutional provision clearly recognized in the Legislature the power and authority to create a ‘State Harbor Commission or other governing agency,’ and to prescribe the powers of such agency, to the end that the management and control should be retained and continue to reside in the state.” *Id.* at 350 (Brown, J., concurring specially). Four decades later, this Court relied on this precedent when it held that the Public Safety Commission’s statutory

authority to regulate transportation companies—which the Legislature specifically made clear applied to such companies owned by the State (much as it made clear the 2019 Act applies to the University)—did not interfere with the power under Section 93 of the Alabama State Docks Department (as it was then called). *Ala. State Docks Dep’t v. Ala. Pub. Serv. Comm’n*, 265 So. 2d 135, 140, 142-44 (Ala. 1972) (*per curiam*).

“Management” and “control” are used in additional sections of the Constitution which demonstrate that Defendants’ arguments as to the scope of Section 264 could grant numerous State entities the power to ignore various laws. The Marion County Agriculture and Exhibit Center Authority consists of seven members who “shall oversee the construction, *management*, maintenance, and *control* of any structure or facility constructed as a center for promoting cattle, horses, and livestock and for agricultural, educational, and civic exhibits.” Ala. Const. Marion County § 1 (emphasis added). Their constitutional provision includes language similar in concept to some of the statutes governing the University of Alabama, *compare id. with* Ala. Code §§ 16-47-1 *et seq.*, addressing matters like gifts, property, and personnel.

Similarly, the Alabama Music Hall of Fame Authority was “created and established a state agency . . . for the purpose of providing for and participating in the management and control of” “a music hall of fame and exhibition facility,” “a library, research, and educational center,” “an audio visual auditorium/theatre,” “a recording studio,” or “other facilities necessary or useful in connection with the use of any of the aforesaid facilities.” Ala. Const. art. XI, § 213.35. That provision sets out the powers of the Authority at length, and includes a catch-all for additional acts “not otherwise prohibited by law.” *Id.*

The Alabama Trust Fund “shall be under the management and control of” its board of trustees, “and all powers necessary or appropriate for the management and control of the trust fund shall be vested solely in the board.” Ala. Const. art. XI, § 219.02. The constitutional provision contains broad statements of authority and is emphatic about the board’s investment discretion, *id.* at §§ 3(h) & 5(b), going so far as to say that “[n]o law shall be enacted nor any action taken by the executive department of the state which impairs or interferes with the power, authority and discretion conferred upon the board by this amendment with respect to the acquisition, management, control and disposition of

investments at any time constituting part of the trust fund,” *id.* at § 5(b). Section 264 has no such similarly clear language. In any event, as emphatic as the language is about the level of control given to the Alabama Trust Fund Board, it is within the narrow field of investing. Other portions of Section 219.02 explicitly recognize a role for legislation that is specific to the board, Ala. Const. art. XI, § 219.02 at §§ 5(c)-(d), and subsection 7 recognizes the possibility of “supplemental” legislation and preempts only laws “inconsistent with the express provisions of this amendment,” *id.* at § 7.

Turning from constitutional to statutory text, some statutes use the phrases “management” and “control” in conjunction with additional phrases. *See e.g.*, Ala. Code § 16-47A-2 (“Commencing on October 1, 2012, the Athens State University Board of Trustees, as created in Section 16-47A-4, shall have exclusive jurisdiction, supervision, and control of Athens State University and the State Board of Education shall be divested of all jurisdiction, power, and authority with regard to the supervision, management, and control of the university, except as otherwise provided in this chapter.”); Ala. Code § 16-49-24 (similar for Alabama A&M University); Ala. Code § 16-50-24 (similar for Alabama

State University); Ala. Code § 16-51-7 (similar for University of North Alabama); Ala. Code § 16-60-38 (“The board of trustees is also authorized to relinquish such authority and responsibility for the operation, management, control, supervision, maintenance, regulation, upkeep, improvement, equipment and enlargement . . . .”); Ala. Code § 16-60-131 (“Upon the acceptance of Southern Union College as a state educational institution, as provided in Section 16-60-130, the college shall be operated, managed, controlled, maintained and regulated thereafter as other like institutions.”). Within an article entitled the “management and control of community and technical colleges,” Ala. Code §§ 16-60-110 *et. seq.*, one statute provides, “The authority and responsibility for the operation, management, control, supervision, maintenance, regulation, improvement, and enlargement of community colleges and technical colleges shall be vested in the Chancellor, subject to the approval of the board.” Ala. Code § 16-60-111.2.

These varying constitutional and statutory provisions make clear that Section 264’s “management and control” language simply designates *who* gets to manage a particular State function, not *how* it will be managed. The Legislature cannot set up a new entity to manage and

control the University (or Alabama Music Hall of Fame). But the board’s “management and control” is not exclusive of the powers of the State itself. At bottom, the board has the authority invested in it by statute, *see, e.g.*, Ala. Code § 16-47-34, and may have additional constitutionally derived authority necessary to conduct the business of the University. But Section 264 does not grant the board the authority to act in conflict with the 2019 Act at issue in this appeal.

**B. Consistent Practice Supports the Legislature’s Authority to Legislate Regarding Public Universities and Colleges.**

As the United States Supreme Court has recognized in interpreting the federal Constitution, “the longstanding ‘practice of the government,’ can inform our determination of ‘what the law is.’” *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting first *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819) then *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). In Alabama, the Legislature has enacted many statutes directed to particular public institutions of higher education, including the University of Alabama, and even UAH. The fact that the 2019 Act is directed at all the State’s public institutions of higher learning does not make it constitutionally suspect. Rather, historical practice in Alabama

supports the State’s position that Section 264 does not deprive the Legislature of its power to legislate regarding the State’s public universities and colleges.

As early as 1903, the Alabama Legislature was passing legislation “[t]o regulate, control and direct the management of the University of Alabama.” Ala. Act No. 1903-104 (title). Many of the provisions of that Act remain in place today. *See* Ala. Code §§ 16-47-1 *et seq.* (Articles 1 and 2 of Chapter 47 of Title 16). Section 14 of the 1903 Act went so far as to state that “[t]he right is reserved to the Legislature to revise or amend the provisions of this act; and in virtue of the character of the trust conferred by the act of Congress, to intervene and by special enactment, *to direct and control the Board of Trustees in the discharge of their duties and functions.*” Ala. Act No. 1903-104 at § 14 (emphasis added). While this particular provision no longer governs, it does represent the Legislature’s understanding of its authority in 1903, while memories of the 1901 Constitutional Convention were fresh.<sup>3</sup> As such, it is compelling

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<sup>3</sup> Section 264 was not entirely new in 1901, but had been revised. *See* 1875 Ala. Const. art. XIII, § 9. Section 264 has since been amended in 1982 (Amendment 399) and in 2018 (Amendment 933), but these Amendments did not impact the “management and control” language at



evidence that Section 264 did not place the board of trustees above the law.

Today, Title 16 of the Alabama Code is entitled Education, and Chapter 47 is dedicated to the University of Alabama. The first article in that chapter creates a body corporate, Ala. Code § 16-47-1, confers “rights, powers, and franchises” on the corporation, Ala. Code § 16-47-2, provides for the “[p]ower to hold and dispose of property,” Ala. Code § 16-47-3, and ensures other “rights, properties, privileges and franchises” are retained, Ala. Code § 16-47-6. It provides for the University fund, Ala. Code § 16-47-4, and for police officers, Ala. Code § 16-47-10; *see also* Ala. Code § 16-47-11, among other things.

Article 2 of Chapter 47 specifically concerns the board of trustees for the University of Alabama. Ala. Code §§ 16-47-30 through 16-47-37. It addresses some topics also covered in section 264, *compare* Ala. Code § 16-47-30, as well as matters like quorums, Ala. Code § 16-47-31, meetings, Ala. Code § 16-47-32, and records, Ala. Code § 16-47-33. One particularly important provision, Ala. Code § 16-47-34, is entitled *Powers*

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issue here. Citations to Section 264 are to the current version of the provision unless otherwise specified.

*generally* and was critical to the recent Attorney General’s opinion on which Defendants relied before the circuit court. *See infra*.

Additional provisions apply specifically to the University of Alabama, including Article 6, which is dedicated specifically to UAH and contains three statutes concerning nursing scholarships. The first statute establishes 30 scholarships to be awarded annually throughout the State, Ala. Code § 16-47-150, while the second statute addresses eligibility, Ala. Code § 16-47-151. The third statute concerns how recipients are selected and makes clear that the scholarship money comes out of UAH’s budget. Ala. Code § 16-47-152. These statutes have been in place for five decades.

Other public institutions are also governed by statutes specific to them within Title 16. For instance, Chapter 47A governs Athens State University,<sup>4</sup> Chapter 48 governs Auburn University,<sup>5</sup> Chapter 49 governs Alabama A&M University,<sup>6</sup> and so on. Among these statutes are some reflecting the Legislature’s intent for the State’s public universities to be equals. *See e.g.*, Ala. Code § 16-49-1 (“It is the intention of the Legislature by passage of this chapter that Alabama [A&M] University shall enjoy no

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<sup>4</sup> Ala. Code §§ 16-47a-1 *et. seq.*

<sup>5</sup> Ala. Code §§ 16-48-1 *et. seq.*

<sup>6</sup> Ala. Code §§ 16-49-1 *et. seq.*

less and no more autonomy than any other public university in the State of Alabama . . . .”); Ala. Code § 16-50-1 (similar for Alabama State University). These statutes undermine any argument that Act No. 2019-396 is particularly offensive because it “explicitly declares that this statute is directed to the boards of trustees created by the Alabama Constitution,” (C. 229).

Defendants argued below that only generally applicable laws may apply to the University of Alabama.<sup>7</sup> But that position is undermined by the numerous statutes that apply specifically to the University as well as those that apply specifically to other public institutions. Generally applicable laws, school-specific laws, and those falling in between will generally pose no constitutional concern under Section 264 so long as the board retains the duty and authority to execute them.

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<sup>7</sup> Defendants recognized below that UAH is subject to generally applicable laws. (See C. 230 n.10.) But Defendants’ broad reading of the guarantee of “management and control” would seem to apply to any law the inhibits the board’s discretion. The demands of criminal and tort law—no less than the 2019 Act—take certain policy options off the table for the boards running our public colleges and universities.

**C. Precedent Supports the Legislature’s Authority to Legislate Regarding Public Universities and Colleges.**

Relevant precedents further support the State’s position that Act No. 2019-396 may be lawfully applied to UAH.

In *Stevens v. Thames*, 86 So. 77 (Ala. 1920), this Court held that Ala. Act No. 1915-89 (alternatively cited as Acts 1915, p. 133) does not “invade[] the powers of management and control of the trustees, within the provision of section 264, but relates to a matter within the legislative power of the state, and which is not included in the powers of management and control of the trustees, as governed by said section 264 of the Constitution.” *Stevens*, 86 So. at 79. The 1915 Act concerned the medical department of the University of Alabama. Ala. Act No. 1915-89. The department began as a separate college and had been conveyed to the University of Alabama in a 1907 Act that called for it to always remain in Mobile. *Stevens*, 86 So. at 78; *see also id.* at 79 (Brown, J., concurring) (reprinting portions of the 1907 Act). Importantly for present purposes, the opinion of Chief Justice Anderson<sup>8</sup> explains that the 1907

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<sup>8</sup> Five Justices concurred in Chief Justice Anderson’s opinion, which repeatedly uses the pronoun “I.” For example, the opinion begins, “I am of the opinion that . . . .” *Stevens*, 86 So. at 78.

Act “put the institution, so to speak, entirely at the mercy and control of the state of Alabama,” precisely because it had become a part of the University. *Id.* at 78. The State could not be contractually obligated “as to the future maintenance and location of its own agency.” *Id.* at 78; *see also id.* (describing the University as a “department[] of the state” “which, [the state] controls and selects as an agency for carrying on special kinds of work for its benefit or for the public interest”).

Amending the 1907 Act, the 1915 Act provided that the medical department “shall hereafter be under the sole management, ownership, and control of the board of Trustees of the University of Alabama,” except that it “shall remain at Mobile” unless certain conditions arose, and then the trustees were required to move it from Mobile to “Tuscaloosa or elsewhere[,]” in order to meet certain goals. Ala. Act No. 1915-89 § 1. While the 1915 Act granted the board of trustees discretion in where to move the medical department, that discretion was constrained and the requirement to move it was firm. *Id.* Apparently the conditions were later met, and the board followed through. *Stevens*, 86 So. at 81 (Brown, J., concurring). As already noted, the majority concluded that the 1915 Act did not “invade[] the powers of management and control of the trustees,

within the provision of section 264, but relates to a matter within the legislative power of the state . . . .” *Id.* at 79.<sup>9</sup>

An even earlier decision involving the medical college is also instructive. The case of *State ex rel. Medical College of Alabama v. Sowell*, 39 So. 246 (Ala. 1905), concerned the medical college’s attempt to force the State Auditor to take steps to provide to the college \$20,000 that had been appropriated to it in 1903. The Auditor refused because, with exceptions not applicable, “no appropriation shall be made to any . . . educational institution not under the absolute control of the state . . . .” *Id.* at 247 (quoting Ala. Const. art. IV, § 73). The case turned on whether the medical college was under the absolute control of the State, and the Court held that it was not: despite some contradictory language suggesting that the college was part of the University, it was

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<sup>9</sup> Justice Brown, in a separate concurrence, did point out that he thought that the 1915 Act had been repealed by a subsequent Act which left the location of the medical department entirely to the discretion of the board (and so they might leave it in Mobile). *Stevens*, 86 So. at 81. Justice Brown does not say that Section 264 had placed the discretion in the board, but that the Legislature had done so by subsequent legislation. *Id.*

actually (at that time) private and subject to the control of a different board. *Id.* at 247-48.<sup>10</sup>

The *Sowell* Court’s opinion is clear that the college would have been under the “absolute control of the state” if it had been governed by the University’s board, *Sowell*, 39 So. at 247-48, as it later was. Indeed, “[t]he entire control and management of this college [the medical college] is committed to the self-perpetuating board of trustees[,]” and so the college “cannot come under the control of the state, unless the trustees abandon it, and then its assets would go to the University.” *Id.* at 248. That is, bringing the college under the control of the University would bring it under the “absolute control of the state.” *Id.* This is because, in contrast to what may be in other States, the University and “insane hospitals” here “are clearly simply the agencies of the state to administer its funds for certain purposes. They make reports to the state, and are entirely

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<sup>10</sup> In *Stevens v. Thames*, Chief Justice Anderson “d[id] not care to commit [him]self to the soundness of these expressions” in the *Sowell* case, but it appears his hesitation was only that he thought the medical college was subjected to the control of the University before the 1907 Act discussed in *Stevens* and when *Sowell* was resolved to the contrary. *Stevens*, 86 So. at 78.

under the direction and control of the state.” *Id.* (citations omitted).<sup>11</sup> Thus, these early decisions support the proposition that the Legislature retains substantial authority over the University.

Section 264 was also discussed more recently in a case challenging legislation concerning a dues check-off for employees. *Ala. Educ. Ass’n v. Bd. of Tr. of Univ. of Ala.*, 374 So. 2d 258 (Ala. 1979) (*per curiam*). The boards of five universities challenged the legislation on grounds not relevant here, and the University of Alabama and Auburn University, invoking Sections 264 and 266, additionally argued that the legislation was “an unconstitutional interference with the management and control of these two universities.” *Id.* at 260. The majority did not reach “the management issue,” *id.* at 262, while four dissenting Justices rejected that claim, *id.* at 264. The dissent summarized the claim as follows:

The remaining issue is raised by the University of Alabama and Auburn University. They contend that s 5 of Act No. 12 [Ala. Act No. 1978-12, 2nd Sp. Sess. 1978] interferes with the day-to-day management and control of these Universities,

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<sup>11</sup> See also Ala. Code 16-47-36 (“It shall be the duty of the board of trustees to make to the Legislature, at each session thereof, a full report of its transactions and of the condition of the university, embracing an itemized account of all receipts and disbursements on account of the university by those charged with the administration of its finances.”). Section 12 of Ala. Act No. 1093-104 was to the same effect, with only stylistic differences.



thus violating the Constitution of 1901 (s 264 and Amendment No. 161 [*i.e.*, Section 266]), providing that the management and control of these universities rest in boards of trustees. Concisely stated, they argue that, given the constitutional status of the boards of trustees, their power cannot be abrogated by mere legislative enactment. They argue that the dues check-off necessarily interferes with their management because it necessitates the long-run recognition of, and bargaining with, labor unions, as opposed to the present practice of direct bargaining with faculty employees. Furthermore, they argue that the “check-off” provision adds numerous complexities to the daily administration of the Universities’ business affairs by requiring additional personnel, and extensive computer reprogramming to implement the “check-off” program.

*Ala. Educ. Ass’n*, 374 So. 2d at 264 (Jones, J., dissenting). The dissent summarized *Stevens v. Thames* and concluded that the check-off legislation “[s]imilarly . . . relates directly to a matter expressly within the legislative power of the State,” namely appropriations. *Id.* at 264. The dissent recognized that, “[i]f Plaintiffs’ management and control argument is accepted, the logical conclusion is that the entire Appropriation Bill drastically interferes with the management and control of these schools because of its specificity; and, therefore, the entire Act must fail.” *Id.* It is plain that the level of “interference” effected by the 2019 Act would not be greater than the “interference” at issue in the *AEA* case. While only the dissent in *AEA* addressed the management and

control issue, the Justices who considered it acted consistently with those who rejected the claim in *Stevens v. Thames*.

Defendants previously relied on *Opinion of the Justices No. 299*, 417 So. 2d 946 (Ala. 1982). (C. 230, C. 393-95.) But that opinion is not binding<sup>12</sup> and, in any event, fits with the State’s approach to Section 264. The advisory opinion addressed a question from the Alabama Senate about potential legislation that would have empowered a State commission “to approve new programs or units or to terminate existing programs and units of instruction, research and public service funded by state funds . . . .” *Id.* at 947. In other words, the proposed legislation would have taken management and control authority away from the board and vested it in a different entity. In a brief opinion, six Justices reasoned that “[b]ecause management and control of” the University of Alabama and Auburn University is vested in a board of trustees by virtue of the Constitution, *see* Ala. Const. art. XIV, §§ 264, 266, “the legislature has no authority by act to deprive the board of trustees of their discretion

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<sup>12</sup> Because “an advisory opinion is not issued by the Alabama Supreme Court acting in its judicial capacity[,]” such an opinion “is not binding precedent.” *Opinion of the Justices No. 382*, 907 So. 2d 1022, 1025 (Ala. 2005). Thus, “[r]eliance on advisory opinions must always be tempered with caution,” *McInnish v. Riley*, 925 So. 2d 174, 183 n.4 (Ala. 2005).

as to the management and control of these institutions.” *Opinion of the Justices No. 299*, 417 So. 2d at 947 (citing *Stevens v. Thames*, 86 So. 77 (Ala. 1920)). Thus, the question presented concerned not just what State policy would be, but who would implement it on campus—the constitutionally created boards or the Alabama Higher Education Commission.<sup>13</sup>

Finally, the Defendants also relied on an Attorney General opinion, *Opinion to Hon. Sid J. Trant, Secretary and General Counsel, Board of Trustees of the University of Alabama*, dated March 20, 2019, A.G. No. 2019-026. (C. 231, 395-96.) But the Attorney General understands his opinion differently than do the Defendants. Properly understood, the opinion is narrow and distinguishable.

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<sup>13</sup> Moreover, the legislation concerned the classes to be taught, research to be conducted, and public service to be performed. By contrast, the 2019 Act reflects a policy adopted by the State itself in the form of legislation passed by the Legislature and signed by the Governor. The Act concerns a very different subject matter and does not interfere with UAH’s core mission as a “seminary of learning,” Act of March 2, 1819, 3 Stat 491, simply by virtue of requiring the board to develop a free expression policy, incorporate that policy into orientation programs, and follow the policy. Indeed, because the policy development is left to board, the 2019 Act allows the board substantial discretion to govern UAH within the legal framework adopted by the State.

The Trant Opinion concludes only that “[t]he Board has the exclusive and discretionary constitutional authority to appoint and/or remove individuals to serve as its chief administrative officers, including its Chancellor and campus Presidents. No legislative act may diminish or modify that authority.” Trant Opinion at 3. The opinion does not speak to any issue outside of the appointment and removal of the University’s high-level officers.<sup>14</sup>

The appointment and removal of University officers is specifically addressed by the Legislature in setting out the board’s powers in Ala. Code § 16-47-34, one of the provisions that dates back to at least 1903.<sup>15</sup> That provision provides, in part, that “[t]he board of trustees has the power to organize the university by appointing . . . such other officers as the interest of the university may require [and] to remove such . . . officers . . . .” Ala. Code § 16-47-34. The Opinion thus makes Ala.

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<sup>14</sup> The opinion also does not reach issues like whether the State may, through legislation, require the University’s high-level officers to meet specified qualifications in terms of education or experience, for example. *Cf.* Ala. Code § 16-47-34 (requiring a bond for anyone “authorized to receive, hold or disburse any funds of the university”); *see also* Ala. Act No. 1903-104 at § 7 (same, except as to capitalization).

<sup>15</sup> Westlaw lists as “Credits” School Code 1927, § 549 and Code 1940, T. 52, § 492. However, these provisions are nearly identical to not only each other but also to Section 7 of Ala. Act No. 1903-104.

Code § 16-47-34 the centerpiece of its analysis by block-quoting a portion of the statute and then concluding that “[t]his section specifically authorizes the Board to appoint and remove officers at its discretion.” Trant Opinion at 2.

While the Trant Opinion does conclude that “[n]o legislative act may diminish or modify [the board’s] authority[]” “to appoint and/or remove individuals to serve as its chief administrative officers, including its Chancellor and campus Presidents,” Trant Opinion at 3, it would be error to read the opinion to implicitly cast doubt on the constitutionality of various State statutes that apply to the University—statutes that are not even considered in the opinion and are far afield from the question of who the board may select to fill the most senior roles at the university.

“It is the longstanding policy of [the Attorney General’s] Office not to issue opinions regarding the constitutionality of statutes enacted by the Legislature.” Opinion to Hon. Carl E. Chamblee, Jr., Municipal Judge, Trussville Municipal Court, dated March 20, 2000, A.G. No. 2000-104 at 1. *See also* Opinion to Hon. Scott Harris, State Health Officer, dated July 31, 2020, A.G. No. 2020-046 at 2 (“The Attorney General, however, does not issue opinions addressing the constitutionality of a

statute or an act because they are presumed constitutional unless or until held unconstitutional by a court with jurisdiction to determine the issue.”). “In fact, [the Attorney General’s] office would have an obligation to defend [the] constitutionality” of those statutes “unless the law is patently unconstitutional.” Chamblee Opinion at 1-2.<sup>16</sup>

Thus, there is no basis for reading the Trant Opinion to suggest that all statutes applicable to the University are somehow undermined by Section 264. Even if the Opinion were read to cast doubt on statutes concerning employment at the University, there would be no basis for reading the Opinion to cast doubt on the constitutionality of Act No. 2019-396. The 2019 Act had not yet been enacted when the opinion was issued,

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<sup>16</sup> See also Ala. Const. art. V, § 137 (“The legislature may require the attorney general to defend any or all suits brought against the state . . . .”); Ala. Code § 36-15-1(2) (requiring the Attorney General to attend to cases where the State is concerned); Ala. Code § 36-15-12 (“The Attorney General is authorized to institute and prosecute, in the name of the state, all civil actions and other proceedings necessary to protect the rights and interests of the state.”); Ala. Code § 6-6-227 (requiring notice to the Attorney General when a “statute, ordinance or franchise is alleged to be unconstitutional” and saying the Attorney General “shall be . . . entitled to be heard”); Ala. R. App. P. 44 (requiring notice to the Attorney General if, *inter alia*, “the validity of any statute . . . is raised in the appellate court” and providing the State “shall . . . be entitled to be heard orally or on brief or both”).

and the 2019 Act does not concern the appointment or removal of chief administrative officers.

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In sum, it “clearly appears that the University of Alabama . . . is a part of the state; that it was founded by the state; that it is under the state control . . . ; and that the board of trustees are mere agents of the state.” *Cox v. Br. of Tr. of Univ. of Ala.*, 49 So. 814, 817 (Ala. 1909). The 2019 Act does not violate Section 264. The board continues to manage and control UAH; it must merely do so in accordance with State law.

### **CONCLUSION**

Should this Court reach the issue, it should hold that Ala. Act No. 2019-396 does not violate Section 264 of the Alabama Constitution.

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## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the word limitation set forth in Ala. R. App. P. 28(j)(1) as required for amicus briefs by Ala. R. App. P. 29(c). According to the word-count function of Microsoft Word, the brief contains 7,945 words from the Introduction through the Conclusion. I further certify that this brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief was prepared in the Century Schoolbook font using 14-point type. *See* Ala. R. App. P. 32(d).

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2022, I filed the foregoing with the Clerk of the Court using the electronic filing system and served a copy on the following counsel by e-mail:

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