NO. 18-17

IN THE
# Supreme Court of the United States

RODNEY KEISTER,
*Petitioner*,

v.

STUART BELL, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF ALABAMA, ET AL.,
*Respondents*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE ALLIANCE DEFENDING FREEDOM AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONER


Kristen K. Waggoner
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020

Tyson C. Langhofer
J. Caleb Dalton
Alliance Defending Freedom
440 1st Street NW, Ste. 600
Washington, DC, 20001
202-393-8690

David A. Cortman
*Counsel of Record*
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE,
Suite D-1100
Lawrenceville, GA 30043
770-339-0774
dcortman@ADFlegal.org

*Counsel for Amici Curiae*

## MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Alliance Defending Freedom ("ADF") and Young America's Foundation ("YAF") respectfully move for leave to file this amici curiae brief in support of the Petitioner, pursuant to Supreme Court Rule 37.2(b).

ADF is a non-profit organization devoted to the defense and advocacy of First Amendment freedoms and is particularly well-suited to provide additional insight into the broad implications of the decision below. ADF has extensive litigation experience with claims involving the Free Speech Clause of the First Amendment and represents a diverse range of students and student organizations at colleges and universities throughout the country. Many of ADF's clients are students and student organizations, such as YAF, that—like Petitioner Rodney Keister—regularly engage in expressive activities on college campuses throughout the nation.

ADF is also a frequent advocate in cases involving First Amendment rights at the U.S. Supreme Court, serving as counsel in the recent First Amendment cases such as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Arlene's Flowers, Inc. v. Washington*, __ S. Ct. __, No. 17-108, 2018 WL 3096308 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curium); *Reed v. Town of Gilbert*, 135 S. Ct. 2218

(2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). ADF likewise serves as frequent amicus curiae before this Court, contributing briefs in numerous cases each Term.

Young America's Foundation ("YAF") is a national non-profit organization committed to ensuring that increasing numbers of young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. Young Americans for Freedom is YAF's chapter affiliate on high school and college campuses across the country.

YAF is leading the Conservative Movement on college campuses throughout the country. YAF's campus lectures and other activities are often the most well-attended events of a school year. YAF's advocacy for conservative ideas and free speech on campuses often results in conflict with university administrators and student government leaders.

Amici timely notified all counsel of record that they intended to submit this brief more than 10 days prior to filing. Counsel for the Petitioner consented to the filing of this brief. Counsel for the Respondents declined. Leave should be granted for ADF and YAF to file this amici curiae brief to assist the Court in considering the critical legal implications raised by the Petition.

Respectfully submitted,

David A. Cortman
*Counsel of Record*
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
770-339-0774
dcortman@ADFlegal.org

Kristen K. Waggoner
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

Tyson C. Langhofer
J. Caleb Dalton
Alliance Defending Freedom
440 1st Street NW, Ste. 600
Washington, DC, 20001
202-393-8690

August 2, 2018

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases*:**



***Ordinances*:**

***Other Authorities*:**

## INTEREST OF AMICI CURIAE[1]

Alliance Defending Freedom ("ADF") is a non-profit organization devoted to the defense and advocacy of First Amendment freedoms. ADF regularly serves as counsel or amicus curiae in cases concerning First Amendment liberties. Many of ADF's clients are students or student organizations that, like Petitioner, regularly engage in expressive activities on university campuses.

If Respondents are able to shut down Petitioner's speech on a public sidewalk in this case without violating the First Amendment, then students and student organizations at colleges and universities throughout this country may also be subject to the suppression of their speech on public sidewalks at the whim of university administrators. Granting university administrators the unbridled discretion to reclassify certain public sidewalks as limited public fora will chill student speech and result in the suppression of their First Amendment activities.

Young America's Foundation ("YAF") is a national non-profit organization committed to ensuring that increasing numbers of young Americans understand and are inspired by the ideas

---

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The Petitioner, but not the Respondents, consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, or its counsel made a monetary contribution to its preparation or submission.

of individual freedom, a strong national defense, free enterprise, and traditional values. Young Americans for Freedom is YAF's chapter affiliate on high school and college campuses across the country.

YAF is leading the Conservative Movement on college campuses throughout the country. YAF's campus lectures and other activities are often the most well-attended events of a school year. YAF's advocacy for conservative ideas and free speech on campuses often results in conflict with university administrators and student government leaders.

Amici curiae have a substantial interest in the resolution of this case.

## SUMMARY OF ARGUMENT

For more than 100 years, this Court has classified public sidewalks as traditional public fora, regardless of the location or surroundings. In fact, public sidewalks are the quintessential traditional public fora, along with streets and parks. Ignoring this long-standing precedent, the Eleventh Circuit held that a public sidewalk abutting a public street running through the University of Alabama campus is not a traditional public forum. Instead, the court held that the sidewalk was a limited public forum because (i) the street runs through the heart of the campus, (ii) the street is surrounded by university buildings, and (iii) some of the street signs and signs hanging from lampposts bear the university logo.

The Eleventh Circuit's ruling should be reversed for two reasons. First, the ruling conflicts with long-

standing precedent of this Court. Second, the ruling transforms this Court's traditional public forum analysis from an objective, easily applicable standard to a subjective, unworkable, ad hoc analysis that is easily manipulated.

Amici's extensive experience in challenging subjective speech policies illustrates their chilling effect. And it demonstrates that the Eleventh Circuit's ad hoc test will chill student speech at universities throughout the country and will result in discriminatory enforcement.

## ARGUMENT

### I. A public sidewalk is a traditional public forum regardless of its proximity to a university campus.

The lower court erred because it held that a public sidewalk adjacent to a public thoroughfare was not a traditional public forum based solely on the physical characteristics of the surrounding buildings and signage. *Keister v. Bell*, 879 F.3d 1282, 1291 (11th Cir. 2018). The court acknowledged that "physical characteristics are not dispositive for forum analysis." *Id.* Nevertheless, the court held that the public sidewalk in question was not a traditional public forum based on physical characteristics alone: the sidewalk was within the university's campus and contained markings identifying it as an enclave. *Id.* The lower court's holding transforms the traditional public forum analysis from a precise, objective standard into an imprecise, subjective determination that will chill

speech and lead to unequal and indiscriminate enforcement.

With one narrow exception for a military base,[2] this Court has uniformly held that public sidewalks are traditional public fora regardless of the physical surroundings. "Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, *generally without further inquiry*, to be public forum property." *United States v. Grace*, 461 U.S. 171, 179 (1983) (emphasis added). A public sidewalk does "not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.* at 180. To be clear, "the government [cannot] transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property." *Id*.

In *Frisby v. Schultz*, this Court specifically rejected the subjective, surroundings-based test adopted by the lower court. 487 U.S. 474, 480-81

---

[2] *Greer v. Spock*, 424 U.S. 828, 838 (1976) ("A necessary concomitant of the basic function of a military installation has been the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command. The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." (internal citations omitted)).

(1988). Instead, the Court made clear that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Id*. at 481. The character of a street "may well inform the *application* of the relevant test, *but it does not lead to a different test*." *Id*. (emphasis added). Thus, any restriction on speech on a public sidewalk "must be judged against the stringent standards we have established for restrictions on speech in traditional public fora." *Id*.

This strict classification remains the same even for sidewalks adjacent to educational institutions. "Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public." *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972).

## II. The Eleventh Circuit's holding creates a subjective, unworkable standard that will chill speech and result in discriminatory enforcement of speech policies on college campuses throughout the country.

### A. Public streets running through university campuses are common throughout the country.

From Oxford and Cambridge, to Harvard and Yale, universities historically operate in the heart of towns, and are constantly intermingling their

campuses with businesses and neighborhoods. University buildings are located in downtown areas and urban centers, often mixed with retail establishments, and dining and entertainment. Contrary to the Eleventh Circuit's holding, however, putting the name of a university on a building or a street sign cannot transform the public sidewalk into a non-public forum. Such a rule is impractical and encroaches into traditional public fora.

If the Eleventh Circuit's holding is left unchecked it will create uncertainty within what was previously a well-established rule: public streets and sidewalks (whether they be near the capital, court, or commons) are traditional public fora.

The University of Alabama is not unique. In fact, it is quite common for public streets, accompanied by public sidewalks, to run through university campuses. It will become even more so as towns and universities intersect and mixed-use areas grow. Thus, it is critical for government officials to have an objective, easily applicable standard for determining the proper forum classification of a public sidewalk on a public street that just happens to run through a university campus, because this question will occur on a regular, maybe even daily, basis.

To illustrate the commonplace nature of public sidewalks running through university campuses, this brief will highlight several examples. The first example is the University of Texas at Austin. Dean Keeton Street is a public four-lane road that runs through the city of Austin, including a section that passes through the University of Texas at Austin's

campus. As with the University of Alabama, university buildings are adjacent to the street, and signs denoting the area as UT property are visible alongside the street.[3]


Similarly, Beach Drive is a four-lane road that runs, in part, through the campus of California State University at Long Beach. The street image is highlighted on the campus map and is near the intersection of Beach Drive and Merriam Way.[4]

---

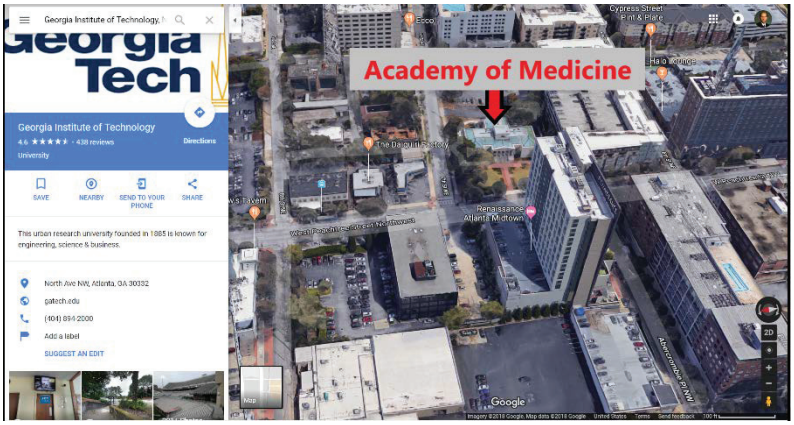
[3] *See* Google Street View, intersection of W Dean Keeton St. and University Ave., Austin TX, https://www.google.com/maps/place/W+Dean+Keeton+St+%26+University+Ave,+Austin,+TX+78705/@30.2896314,-97.7412783,17z/data=!3m1!4b1!4m5!3m4!1s0x8644b582e2e81dc1:0x99da4cec2002e7c5!8m2!3d30.2896314!4d-97.7390896?hl=en (last visited July 31, 2018).

[4] *See* Google Street View, Intersection of Beach Drive and Merriam Way, Long Beach, CA, https://www.google.com/maps/place/Merriam+Way+%26+Beach+Drive,+Long+Beach,+CA+90815/@33.7820291,-118.1193699,18z/data=!3m1!4b1!4m5!3m4!1s0x80dd31da1faf4363:0xf1be27cdc534fe52!8m2!3d33.7820291!4d-118.1182756?hl=en (last visited July 31, 2018).


Georgia Institute of Technology's campus is integrated into the City of Atlanta. The campus map clearly shows numerous public streets that interlace the campus, as well as campus buildings that intersperse into the city. For example, as noted in the two street view pictures below, the Academy of Medicine sits at the corner of West Peachtree St. NW and 7th St. NW, across from the Biltmore, Renaissance Atlanta Midtown, and a small strip mall.[5]

---

[5] *See* Google Street View, Intersection of West Peachtree St. NW and 7th St. NW, Atlanta, GA, https://www.google.com/maps/place/7th+Street+Northeast+%26+West+Peachtree+Street+Northwest,+Atlanta,+GA+30308/@33.778728,-84.3894717,842m/data=!3m1!1e3!4m5!3m4!1s0x88f50467b9b8d25d:0xb598319491954986!8m2!3d33.778728!4d-84.387283?hl=en (last visited July 31, 2018).


These examples are virtually indistinguishable from the facts of the present case. In all three, the streets run through campus and are public streets. Each campus occupies the property on both sides of the public streets and in many cases university signage is visible from the street. None of the campuses are gated, fenced off, or otherwise self-contained to prevent public access. Similar examples abound at universities throughout the country.

The uncertainty caused by the Eleventh Circuit's subjective test will only grow as universities and cities continue to expand. For example, New York University has announced plans to increase its physical space in New York City by forty percent by 2031.[6] Understandably so, projected spaces are not centralized but are spread throughout the city: including locations in Brooklyn, on Bleecker Street, Governors Island, and Lafayette Street.[7] Should residents fear that sections of sidewalk will be closed to public expression at the whim of NYU administrators?

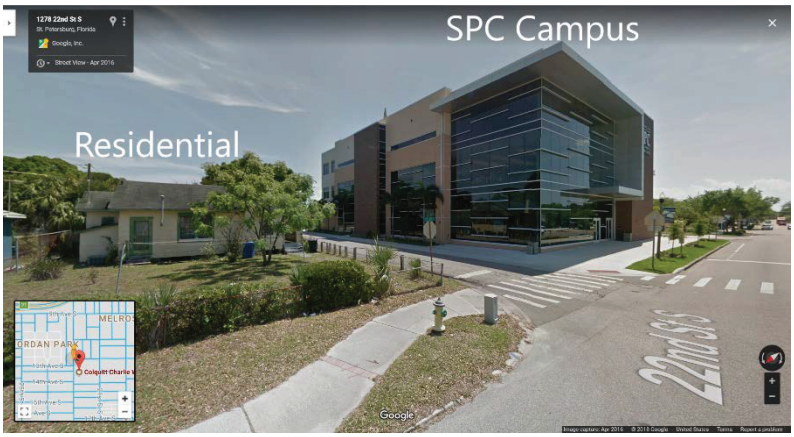
Town and gown conflicts are not limited to large cities. In 2015, St. Petersburg College opened its new Midtown campus in the heart of "the Deuces" in St. Petersburg, Florida, a few yards from small church buildings, cafes, and residential housing.[8]

---

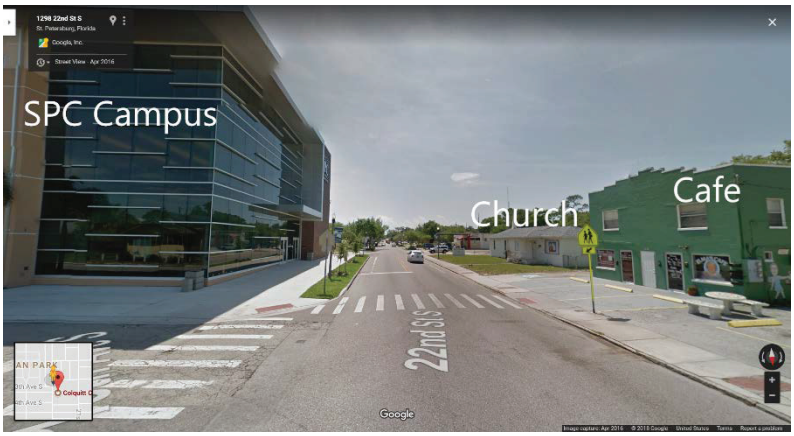
[6] Robin Pogrebin, *N.Y.U. Plans to Expand Campuses by 40 Percent*, N.Y. Times, Mar. 22, 2010, https://www.nytimes.com/2010/03/23/arts/design/23nyu.html?src=me.

[7] *Id.*

[8] Katie Mettler, *SPC Continues its Careful Expansion Into Midtown With Plans to Re-open Center*, Tampa Bay Times, Dec. 11, 2014, http://www.tampabay.com/news/education/college/spc-continues-its-careful-expansion-into-midtown-with-plans-to-re-open/2209875; *see also*, St. Petersburg College, Locations, http://www.spcollege.edu/friends-partners/about/locations/midtown-center (last visited July 31, 2018).

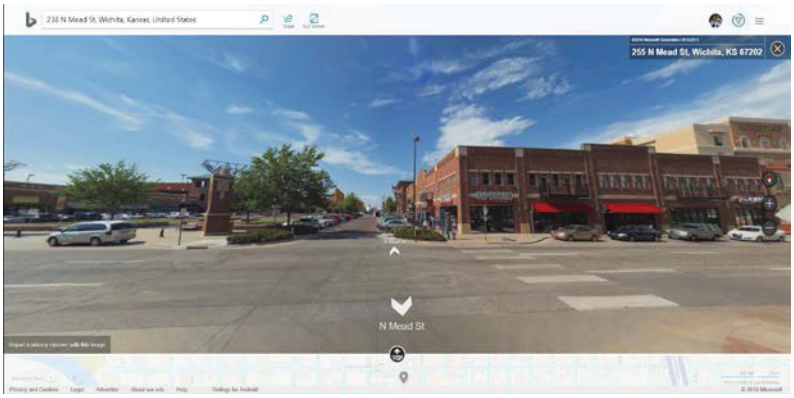



Under the Eleventh Circuit's holding it is entirely possible that speech that is permissible on the sidewalk on one side of the street may be banned by the college on the other side of the street.[9]




[9] *See* Google Street View, Intersection of 22nd St. S and 13th Ave. S, St. Petersburg, FL, https://www.google.com/maps/place/22nd+St+S+%26+13th+Ave+S,+St.+Petersburg,+FL+33712/@27.7574951,-82.6651702,17z/data=!3m1!4b1!4m5!3m4!1s0x88c2e23c46483445:0x1c4806c9d04b3ca4!8m2!3d27.7574951!4d-82.6629815?hl=en (last visited July 31, 2018).

Wichita State University recently expanded into three buildings in the heart of "Old Town" Wichita.[10] Below is the view from the street approximately one hundred yards from one of the new Old Town Campus buildings:[11]




The heart of Old Town Wichita, with its open areas and public square, could hardly encapsulate more the essence of the traditional public forum. Yet, the Eleventh Circuit's ruling could put this forum in jeopardy, or at a minimum chill speech by creating uncertainty as to when individuals are freely permitted to speak on a sidewalk and when they must receive a permit from the University to do so.

---

[10] Sean Sandefur, *Wichita State Reveals Sizeable Expansion Into Old Town*, KMUW (NPR), Mar. 31, 2015, http://www.kmuw.org/post/wichita-state-reveals-sizeable-expansion-old-town.

[11] *See* Bing Maps, Old Town Wichita Campus Buildings, https://www.bing.com/maps?osid=38f4281b-5f57-4b94-9560-0da12a9cbb56&cp=37.689706~-97.328878&lvl=18.79618&dir=4.512589&pi=8.195627&style=x&mo=z.0&v=2&sV=2&form=S00027 (last visited August 1, 2018).

The University of Chicago, of course, straddles public parks and streets, and is integrated with the city. May the University declare Washington or Midway parks, or their adjoining sidewalks, to be non-public fora?

Cambridge Street, Broadway, and Massachusetts Avenue, much like the street at issue in this case run straight through both Cambridge proper and Harvard University—yet the existence of university buildings on either side of the street does not negate its status as a public street and sidewalk integrated with the city.

Most city universities are not some closed enclave with traditional boundaries that exclude non-university members; they are generally integrated components of the larger communities in which they reside. As they traverse the cities' sidewalks, citizens should not have to fear whether they are free to speak or not. Under the Eleventh Circuit's test, residents will be forced to guess whether the placement of university signage indicates that they are free to engage in the marketplace of ideas or whether the traditional public forum—the sidewalk—is closed.

### B. The Eleventh Circuit's standard is unworkable and will chill speech due to its ambiguity and officials' inevitable discriminatory application.

The Eleventh Circuit's holding transforms this Court's traditional public-forum analysis from an objective, easily applicable standard to a subjective,

discretionary determination that will result in selective and discriminatory application. Under this Court's traditional public-forum analysis, public sidewalks, streets, and parks are classified as traditional public fora regardless of the surrounding property. *Supra* § I. This test is objective and easily applied.

Conversely, the Eleventh Circuit's holding adds a number of subjective factors that may potentially transform an otherwise public sidewalk from a traditional public forum to a limited public forum. Does the sidewalk contain university signage? Is the street surrounded by university buildings? Is the street in the "heart" of the campus? Yet, the questions don't end there. All of these questions raise further questions. How much signage is necessary to complete the transformation? Does one sign suffice? How large does the sign have to be? How many university buildings must be present to complete the transformation? Does the presence of non-university buildings affect the analysis? What is considered the heart of the campus? What if the street is not in the heart of the campus? The only thing certain about the Eleventh Circuit's standardless standard is that it will chill speech due to its ambiguity and through officials' selective and discriminatory enforcement.

When evaluating the constitutionality of policies that regulate speech, this Court "consistently condemn[s]" speech regulations that "vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Shuttlesworth v.*

*City of Birmingham*, 394 U.S. 147, 153 (1969) (internal citation omitted). Given vague or non-existent criteria, 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). Speech restrictions must contain "narrow, objective, and definite standards to guide" officials, *Shuttlesworth*, 394 U.S. at 150–51, and cannot involve the "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal citation omitted).

If narrow, objective, and definite standards are necessary constitutional requirements for a government speech policy, then surely such narrow, objective, and definite standards are also necessary for a government policy that classifies the speech forum itself. After all, the classification of the forum determines the level of scrutiny that courts will apply to restrictions placed on citizens' speech.

**1. The Eleventh Circuit's holding creates confusion between university policies and city ordinances regulating expressive activities on public sidewalks.**

Given that public universities are typically situated within a city and are interspersed with public streets, the confusing, subjective nature of the Eleventh Circuit's holding creates uncertainty both for citizens wishing to speak in their towns and for government officials in determining what

restrictions apply. This uncertainty matters because city ordinances and university policies widely differ. For instance, a city ordinance may authorize a speech activity while university policies prohibit or require a prior permission for the same thing.

This conflict is perfectly illustrated by the present case. University of Alabama policy conflicts with Tuscaloosa's ordinance governing expressive activity on public sidewalks. The UA policy requires any non-university affiliated individual to obtain a permit from the university before engaging in expressive activity anywhere on university property.[12] In contrast, Tuscaloosa City Ordinance § 21-27 authorizes expressive activities involving less than 20 persons on public sidewalks[13] without a prior permit.[14] Both of these policies purport to apply to all public sidewalks adjacent to public streets that run through the UA campus.

---

[12] *Keister*, 879 F.3d at 1286.

[13] A public street is defined as "every area in the city or in its police jurisdiction dedicated, platted, used, established or acquired by prescription as a street, alley or roadway, whether or not such area is open to public travel or is used or usable by the public as a street or roadway. . . . The term 'public street' shall also mean and include all of the area between private property lines on each side of such area or right-of-way, including the sidewalks and parkways . . . ." Tuscaloosa, Ala., Code of Ordinances § 21-1 (emphasis added).

[14] "It shall be unlawful for any person to organize or hold, assist in organizing, or holding, or take part, or participate in a special event as defined herein without a special event permit. Provided however, that a minor event demonstration shall not require a permit." *Id.* at § 21-27. A "minor event demonstration" is defined as "[a] demonstration of fewer than twenty (20) people on public property that is not within ten (10) feet of a major arterial road." *Id.*

These two policies' contradictory requirements will chill speech because persons wishing to speak on public sidewalks running through the campus are unable to determine which policy applies. And application of each policy will result in vastly different outcomes. For example, if a Tuscaloosa police officer or other city official had witnessed Petitioner Keister speaking and handing out literature on the street in question without a permit, Mr. Keister would have been allowed to continue his activities uninterrupted. Instead, Mr. Keister encountered the UA police who applied the UA policy and forced Mr. Keister to stop speaking because he did not have a prior permit.

The confusion and ambiguity created by the Eleventh Circuit's ruling chills protected speech and results in the policies being void for vagueness. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (citations omitted).

The uncertainty created by the Eleventh Circuit's ruling regarding the proper forum classification of a public sidewalk on a university campus is not limited to the UA campus but will also occur at many other universities resulting in the

chilling of student and non-student speech alike on a nationwide basis.

### 2. Ambiguous speech regulations chill student speech and result in discriminatory enforcement of such policies.

Amici's experience with university policies throughout the country illustrates the chilling effect that ambiguous speech policies—and discriminatory enforcement of such policies—have on student speech. Over the last three years, ADF has successfully represented students and student organizations in approximately 20 federal lawsuits that challenge unconstitutional speech policies. Similarly, over the last three years, the expressive activities of YAF's student groups have regularly been suppressed by universities' ambiguous speech policies and officials' discriminatory enforcement of such policies.

In October 2017, for example, ADF filed a lawsuit against officials at Southern Illinois University-Edwardsville on behalf of College Republicans of SIUE.[15] The lawsuit challenged a speech policy which limited all student expressive activity to a 905-square-foot speech zone within 20 feet of an area known as "The Rock" in Stratton Quadrangle and required prior permission before students could use the speech zone. The policy

[15] Press Release, Alliance Defending Freedom, Student group sues SIU-Edwardsville for restricting speech to less than .0013% of campus (October 25, 2017), http://www.adfmedia.org/News/PRDetail/10404.

permitted university officials to consider the requesting student organization's content and viewpoint to determine whether its desired event is "controversial in nature" and therefore subject to assessment of security fees or outright denial. The College Republicans refrained from engaging in certain expressive activities on campus for fear of violating the ambiguous policy. After the lawsuit was filed, SIUE agreed to modify its policy to remove the ambiguous language and allow students to engage in expressive activities in all open, generally accessible outdoor areas of campus without prior permission.[16]

In January 2017, ADF filed a lawsuit against officials at Kellogg Community College on behalf of a Young Americans for Liberty student group and two of its members, Michelle Gregoire and Brandon Withers.[17] Michelle and Brandon were on a large walkway on the KCC campus talking with students about the club and handing out pocket-sized copies of the U.S. Constitution. They were not blocking access to buildings or pedestrian traffic and were not interfering with any KCC activities or other events on campus. Yet, KCC administrators and campus security approached them and said that they were violating the Solicitation Policy because they failed

---

[16] Press Release, Alliance Defending Freedom, Illinois university rescinds policy that restricted speech to less than 1 percent of campus (February 5, 2018), http://www.adfmedia.org/News/PRDetail/10465.

[17] Press Release, Alliance Defending Freedom, Student club supporters arrested for handing out US Constitution at Michigan college, ADF sues (January 18, 2017), http://www.adfmedia.org/News/PRDetail/10155.

to obtain prior permission from KCC, and consequently they were not allowed to conduct expressive activity in that part of campus.

One of the administrators told Michelle and Brandon that "engaging [students] in conversation on their way to educational places" is a violation of the Solicitation Policy because it is an "obstruction to their education" to ask them questions like, "Do you like freedom and liberty?"[18] The administrator added that he was concerned that the students from "rural farm areas…might not feel like they have the choice to ignore the question."[19]

The officials instructed Withers, Gregoire, and the others that they must immediately stop engaging in their speech activities and leave campus. When Gregoire and two of the other club supporters politely informed KCC's chief of public safety that they were going to continue exercising their First Amendment freedoms by talking with students and handing out copies of the Constitution, he arrested them and charged them with trespass.

After months of litigation, KCC officials finally agreed to settle the dispute by modifying the speech policy to allow students to freely engage in expressive activities anywhere in the open, outdoor areas of campus and payment of $55,000 in damages and attorneys' fees.[20]

---

[18] *Id.*

[19] *Id.*

[20] Press Release, Alliance Defending Freedom, Michigan college finally fixes policies that led to arresting people handing out

Numerous YAF groups have also had their speech chilled and suppressed through application of vague and ambiguous speech policies. Earlier this month, ADF filed a lawsuit on behalf of YAF, and another student group, against officials at the University of Minnesota after the officials applied the school's "Large Scale Events Policy" to limit the size and location of a lecture they sponsored by Ben Shapiro, a conservative commentator.[21] The policy allows university officials to impose restrictions based on the viewpoint of student speech if the university determines, in its own discretion, that the speech represents a security concern.

The student group originally reserved Willey Hall for the event which is a 1,056-person facility located on the Minneapolis campus near public transportation. However, despite the facility's availability when requested, university officials determined that Shapiro was "controversial and a security concern." As a result, the university arbitrarily capped the number of attendees to 500 persons, and banished the event to UMN's St. Paul campus, depriving hundreds of students of the opportunity to attend the Shapiro lecture and participate in a dialogue on matters of public concern. The lawsuit is currently pending.

---

Constitution (January 24, 2018), http://www.adfmedia.org/News/PRDetail/10276.

[21] Press Release, Alliance Defending Freedom, Univ. of Minnesota sued for banishing conservative event to inadequate venue (July 3, 2018), http://www.adfmedia.org/News/PRDetail/10579.

In May 2016, ADF filed a lawsuit on behalf of YAF against officials at California State University-Los Angeles.[22] YAF scheduled Ben Shapiro to give a presentation on freedom of speech and diversity at the university in February 2016. University officials first attempted to shut down the event by charging the group for security and then cancelled Shapiro's visit because students and professors objected to the viewpoint of Shapiro's speech. When those efforts failed and the event was able to proceed, professors helped incite a mob of protestors to block entry to the venue where Shapiro was speaking. Although the protestors were violating numerous university policies, the university refused to enforce its own rules because officials disagreed with Shapiro's viewpoint. As a result of the protest, Shapiro was forced to speak to a half-empty auditorium and more than a hundred students were prevented from attending the event.

After months of litigation, the university finally agreed to modify its unconstitutional security-fee policy, agreed that it will not cancel or refuse to schedule a speaker based on their viewpoint, and will enforce the university's Free Expression Policy in a viewpoint-neutral manner.[23]

---

[22] Press Release, Alliance Defending Freedom, When the 'marketplace of ideas' becomes a dangerous place for free speech (May 19, 2016), http://www.adfmedia.org/News/PRDetail/9966.

[23] Press Release, Alliance Defending Freedom, Cal State L.A. agrees to drop discriminatory speech policies, settles lawsuit (February 28, 2017), http://www.adfmedia.org/News/PRDetail/10117.

As these examples illustrate, it is imperative that policies with objective, viewpoint-neutral criteria restrain university officials' actions. University officials must never possess unbridled discretion to interpret and enforce policies governing expressive activities. Absent such protections, experience proves that university officials will abuse their discretion and suppress First Amendment protected activities.

Ignoring this fact, the Eleventh Circuit has transformed the public-forum analysis governing public sidewalks on university campuses from an objective, easily applicable standard to an unworkable, subjective analysis subject to the whims of university administrators. This ruling will result in chilled speech and uneven, discriminatory enforcement. Thus, this Court should grant review and reverse.

## CONCLUSION

For the foregoing reasons, and those explained by Petitioner, Keister's Petition for Certiorari should be granted.

Respectfully submitted,

David A. Cortman
*Counsel of Record*
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
770-339-0774
dcortman@ADFlegal.org

Kristen K. Waggoner
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

Tyson C. Langhofer
J. Caleb Dalton
Alliance Defending Freedom
440 1st Street NW, Ste. 600
Washington, DC, 20001
202-393-8690

August 2, 2018