No. 18-17

In The

Supreme Court of the United States

RODNEY KEISTER,

Petitioner,

v.

STUART BELL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should create a new rule that all sidewalks are "invariably" traditional public fora and overrule the well-established forum analysis set forth and consistently applied in decades of case law including *Greer v. Spock*, 424 U.S. 828 (1976), *Widmar v. Vincent*, 454 U.S. 263 (1981), *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), *United States v. Grace*, 461 U.S. 171 (1983), *United States v. Kokinda*, 497 U.S. 720 (1990), and most recently, *Minnesota Voters Alliance v. Mansky*, ___ U.S. ___, 2018 WL 2973746 (June 14, 2018), simply because the application of that test results in differing factual determinations for sidewalks on different campuses depending on the specific environment of the sidewalk at issue in each case.

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INTRODUCTION

Keister's arguments are built on a faulty premise: that all sidewalks are traditional public fora. This Court implicitly rejected this view in *Greer* and *Grace* when it conducted a detailed analysis of the environment surrounding the sidewalks at issue.[1] This Court was explicit in its rejection of this very argument in the majority opinion in *Kokinda*:[2]

> *Grace* instructs that the dissent is simply incorrect in asserting that every public sidewalk is a public forum. As we recognized in *Grace*, the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.[3]

Unless this Court is interested in revisiting and abandoning the forum analysis used in *Greer, Perry, Grace, Kokinda*, and numerous other cases, then there is no reason for this Court to hear this Petition because the district court and the Eleventh Circuit properly applied that analysis to the specific location at issue in this case.

Keister proceeds from his faulty premise to argue that there is a split among the circuits.[4] The asserted

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[1] *Greer v. Spock*, 424 U.S. 828, 836-838 (1976); *United States v. Grace*, 461 U.S. 171, 179-180 (1983).

[2] Tellingly, Keister fails even to mention *Kokinda*, much less explain why this Court should not continue to follow its holding.

[3] *United States v. Kokinda*, 497 U.S. 720, 729 (1990) (internal citation omitted).

[4] Petition for Writ of Certiorari at 18-23.

split is illusory. It is based on nothing more than the fact that some circuit courts have concluded that sidewalks on other campuses were traditional public fora while other courts have concluded that sidewalks on different campuses are not. This is to be expected as forum analysis depends on the specific environment of each location; differing conclusions are the results of the diversity of the campuses, not a disagreement over the proper test. A review of the cases cited by Keister as evidence of a split demonstrates this very point: the cases do not use different tests but rather apply the exact same test to different facts.

Keister also argues that forum analysis—though he fails to acknowledge that this is the test that was applied in this case and, instead, calls it "the 'surroundings' test" or "the 'heart of the campus' test"—is "incoherent and unworkable."[5] Keister's only support for this argument is that the test will yield different results in different factual situations. Using Keister's approach of favoring rigidity in result over flexibility in application would undermine most of the modern legal system, which is dependent upon application of broad legal standards to the precise facts of each case.

With these errors corrected, Keister's arguments are revealed to be nothing more than a factual dispute over whether this particular sidewalk on the campus of the University of Alabama ("UA") is a special enclave. The fact that Keister's argument is a thinly

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[5] *Id.* at 23-26.

veiled factual dispute is further exposed by how much of his Petition is devoted to characterizing, albeit inaccurately, the physical environment of UA's campus and the full length of these two roads, well beyond the intersection at issue.[6] Such a factual dispute, already resolved below, does not warrant this Court's attention.

The Petition for certiorari should be denied.

STATEMENT OF THE CASE

UA has a Grounds Use Policy ("GUP") that governs access to the campus while upholding the "primacy" of UA's "teaching and research mission," including to "facilitate responsible stewardship of institutional resources and to protect the safety of persons and the security of property."[7] The GUP allows those who are

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[6] Keister's attempt to expand the inquiry of this Court by describing remote portions of Hackberry Lane and University Boulevard in great detail is misleading, irrelevant, and should not be considered by this Court. The "scope of the relevant forum is defined by the access sought by the speaker." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 801 (1985). Here, the only part of UA's campus Keister seeks to speak is on the sidewalk located at the intersection of University Boulevard and Hackberry Lane. Keister's reference to businesses located on those roads, many of which are more than a mile away from the intersection at issue, is nothing more than an attempt to obfuscate the findings of the district court and Eleventh Circuit that this particular intersection is surrounded by University indicia.

[7] CA App. 083 at Purpose ("CA App." refers to the Appendix in the Court of Appeals).

unaffiliated with UA to speak publicly on campus if they are sponsored by or affiliated with a UA department or registered student organization.[8]

Keister is a traveling evangelist from Pennsylvania unaffiliated with UA.[9] On March 10, 2016, on a sidewalk at the corner of the intersection of University Boulevard and Hackberry Lane, Keister, using a loudspeaker and a banner, began preaching and passing out religious literature to students.[10] Because Keister was not sponsored by a university organization and had not submitted the necessary paperwork under the GUP, he was asked to leave.[11]

It is uncontested that the intersection at issue lies within the bounds of UA's campus.[12] While these streets and accompanying sidewalks extend beyond the UA campus perimeter, within the campus (including at the intersection), landscaping fences line the sidewalks, street signs bear the script "A" UA logo, and UA signs hang from the streetlamps.[13] As recognized by both lower courts, there are also numerous UA facilities and landmarks visible from the intersection.[14] The university Quad (a hub of

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[8] *Id.* at Policy (A) General Policy.

[9] CA App. 022 at ¶ 2-3.

[10] CA App. 077 at ¶¶ 43, 46.

[11] *Id.* at ¶¶ 44-45.

[12] *Keister v. Bell*, 879 F.3d 1282, 1285 (11th Cir. 2018).

[13] CA App. 077 at ¶¶ 37-39.

[14] *Keister*, 879 F.3d at 1285; *Keister v. Bell*, 240 F. Supp. 3d 1232, 1234-1235 (N.D. Ala. 2017).

student gatherings and activity) is one block from, and in clear sight of, the intersection.[15] Russell Hall sits prominently at the northwest corner of the intersection where Mr. Keister was preaching.[16] Gallalee Hall and a UA parking lot restricted to UA faculty and staff occupy the northwest corner.[17] The southwestern corner includes Farrah Hall and its adjacent UA-restricted parking lot.[18] A park on the southeastern corner of the intersection connects to the campus Episcopal ministry building.[19] Not only the centrality of the location but also the overwhelming amount of indicia surrounding this area of UA's campus led the district court to specifically note that the intersection was in the "heart" of UA's campus. The location of the intersection, centrally located within the confines of UA's campus, is circled in the map below.[20]

[15] CA App. 081.

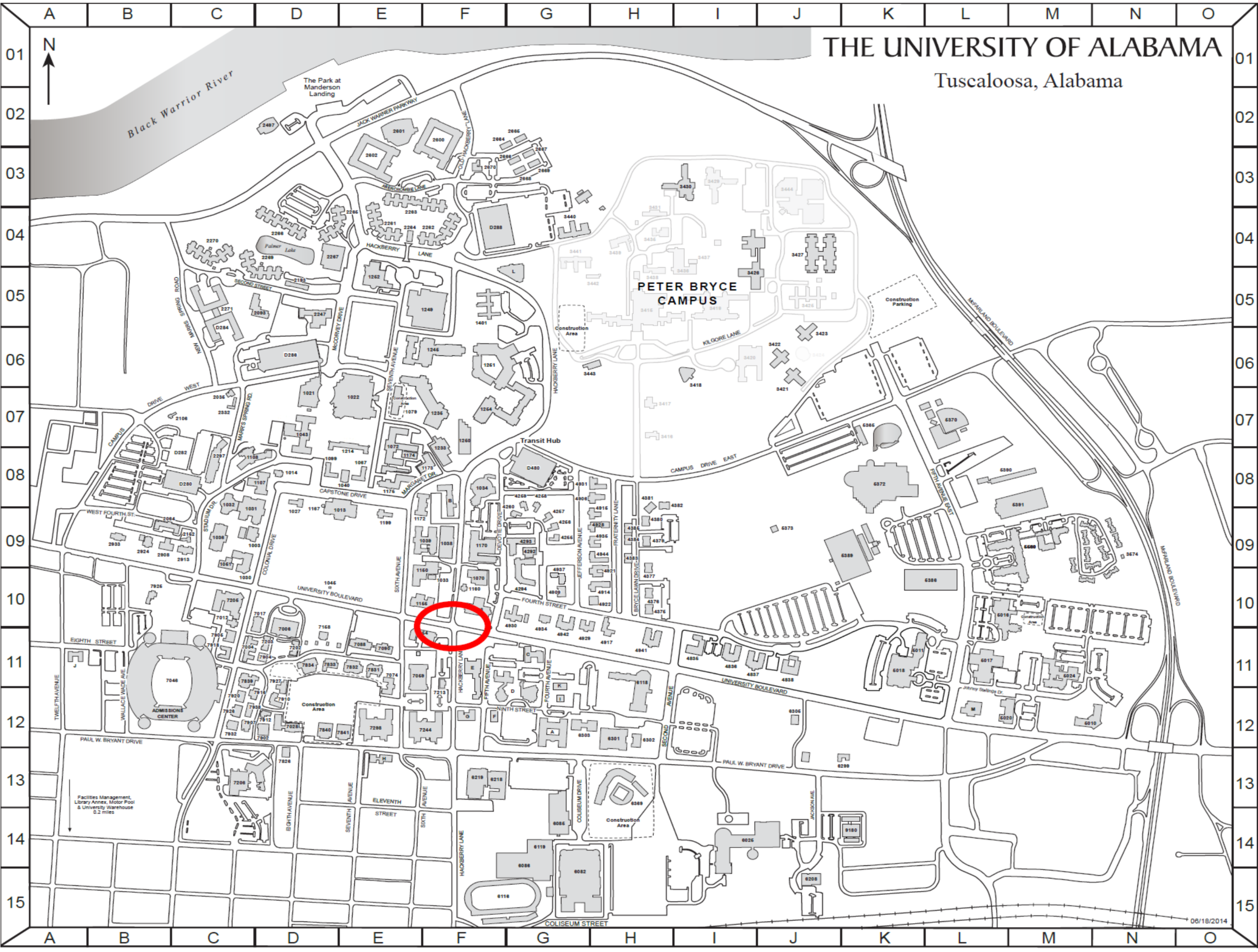
[16] CA App. 077 at 35; CA App. 081; CA App. 098; CA App. 100.

[17] CA App. 081; CA App. 104.

[18] CA App. 081; CA App. 116.

[19] CA App. 81.

[20] *Id.* (emphasis added).


THE UNIVERSITY OF ALABAMA
Tuscaloosa, Alabama
Black Warrior River
The Park at Manderson Landing
PETER BRYCE CAMPUS
Transit Hub
UNIVERSITY BOULEVARD
PAUL W. BRYANT DRIVE
CAMPUS DRIVE EAST
McFARLAND BOULEVARD
HACKBERRY LANE
FOURTH STREET
COLISEUM STREET
ADMISSIONS CENTER
06/18/2014

ARGUMENT

I. THE DISTRICT COURT AND ELEVENTH CIRCUIT CORRECTLY ANALYZED THE FORUM AT ISSUE.

To assist in determining the extent to which government property may be used for expressive purposes by the general public, this Court articulated the contours of what has become commonly known as "forum analysis" in numerous cases including *Greer*,[21] *Perry*,[22] *Grace*,[23] and *Kokinda*.[24] In these cases, this Court set forth the proper test for determining whether a sidewalk is a public forum or a special enclave based on its location, its purpose, and the surrounding indicia.[25] The Eleventh Circuit properly applied this analysis to the UA campus sidewalk in this case. Although Keister contends that all sidewalks are public fora, that argument has been soundly rejected by this Court.[26]

In *Widmar v. Vincent*, this Court ruled that college campuses are not *per se* traditional public fora.[27] This is because, unlike classical traditional

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[21] *Greer*, 424 U.S. 828.

[22] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[23] *Grace*, 461 U.S. 171.

[24] *Kokinda*, 497 U.S. 720.

[25] *Greer*, 424 U.S. at 836-838; *Grace*, 461 U.S. at 179-180; *Kokinda*, 497 U.S. at 726-729.

[26] *Kokinda*, 497 U.S. at 727-729.

[27] *Widmar*, 454 U.S. 263, 267 n.5 (1981).

public fora, a university's mission is education, not public discourse.[28] Consequently, this Court has "never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[29] More to the point in the present case, this Court has never held "that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings."[30] Thus, for nearly 37 years, this Court has recognized the general rule that college campuses are not traditional public fora but rather special enclaves dedicated to higher learning. Read together with *Grace*, then, this Court has instructed that, unless intentionally opened for public discourse, college sidewalks are not traditional public fora so long as the location and surroundings provide notice to the speaker that he or she has entered a college campus.

Here, both the district court and the Eleventh Circuit properly applied this test to determine that the intersection at issue was a special enclave because it is located in the heart of UA's campus and is surrounded by UA buildings and indicia.[31] This is exactly what *Greer*, *Perry*, *Grace*, and *Kokinda* required those courts to do.

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Keister*, 879 F.3d at 1290-1291; *Keister*, 240 F. Supp. 3d at 1238-1241.

The cases cited by Keister—*Hague*,[32] *Jamison*,[33] and *McCullen*[34]—are irrelevant to this analysis. All three cases address city-wide regulations which limited speech in public fora; none address (or even mention) the proper test for determining whether a particular sidewalk *is* a public forum as opposed to a special enclave. In *Hague*, the ordinance at issue prohibited all "public assembly in or upon public streets, highways, public parks or public buildings" unless a permit was obtained.[35] In *Jamison*, the ordinance prohibited the distribution of any written materials "along or upon any street or sidewalk in the City of Dallas."[36] *McCullen* involved a legislative act that "by its very terms . . . regulates access to 'public way[s]' and 'sidewalk[s]' " surrounding all reproductive health care facilities, which had been traditionally open for speech activities.[37] These cases have no relevance to the issue here of whether the lower courts properly applied the forum analysis set forth in *Grace* and its progeny to the intersection in question.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Keister's alleged conflict between the circuits is illusory. A review of the cited cases reveals that those

[32] *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

[33] *Jamison v. State of Texas*, 318 U.S. 413, 416 (1943).

[34] *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

[35] *Hague*, 307 U.S. at 502-503, n.1.

[36] *Jamison*, 318 U.S. at 415, n.2.

[37] *McCullen*, 134 S. Ct. at 2528-2529.

Courts applied the exact same analysis when characterizing differing locations. In *McGlone v. Bell*, the Sixth Circuit's analysis of the forum turned on whether the sidewalks at issue "blend[ed] into the urban grid" and were "physically indistinguishable" from the surrounding sidewalks.[38] Likewise, in analyzing the campus sidewalks surrounding a building owned by the University of Texas at Austin, the Fifth Circuit in *Brister v. Faulkner* considered whether there was any "indication or physical demarcation of the public sidewalk, which is a public forum, and the university grounds, which typically are not."[39]

Other circuits addressing the status of campus sidewalks have also followed the same forum analysis. In *Bloedorn v. Grube*, the Eleventh Circuit considered whether the "traditional uses made of the property" and any "special characteristics" put the speaker on notice that he had entered a special enclave.[40] The Eighth Circuit applied the identical test in *Bowman v. White* and determined that different areas on campus were designated public fora because the university opened up those areas to public discourse, and there was no showing that the university intended to limit the use of the areas to a particular type of speech or speaker.[41]

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[38] 681 F.3d 718, 732-733 (6th Cir. 2012).

[39] 214 F.3d 675, 683 (5th Cir. 2000).

[40] 631 F.3d 1218, 1233 (11th Cir. 2011).

[41] 444 F.3d 967 (8th Cir. 2006).

Keister's claim that *Henderson*[42] and *Lederman*[43] are indicative of a circuit split is misplaced. To the contrary, in both instances, the circuit courts applied *Grace*'s forum analysis to determine whether the speaker was given notice of entering a special enclave.[44] For instance, in *Henderson*, the circuit court specifically cited to *Kokinda* and acknowledged that "the cases generally focus on physical differentiation" between a special enclave and its surrounding environment to determine the issue of notice.[45] Similarly in *Lederman*, the circuit court noted that to prove that the sidewalks surrounding the Capitol grounds were not public fora, the government "must establish that the sidewalk differs from the remainder of the public grounds in ways that make it uniquely 'nonpublic.' "[46]

As noted by the *Henderson* Court, "[c]ommon sense and the cases make clear that when government has dedicated property to a use inconsistent with conventional public assembly and debate . . . then the inconsistency precludes classification as a public forum."[47] Taken as a whole, *Henderson* confirms what this Court recognized in *Widmar*: because a university's dedication to education is inconsistent with unsponsored and unaffiliated discourse, a sidewalk

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[42] *Henderson v. Lujan*, 964 F.2d 1179 (D.C. Cir. 1992).

[43] *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002).

[44] *Lederman*, 291 F.3d at 42; *Henderson*, 964 F.2d at 1182.

[45] *Henderson*, 964 F.2d at 1182.

[46] *Lederman*, 291 F.3d at 42.

[47] *Henderson*, 964 F.2d at 1182.

in the heart of a campus surrounded by university buildings and clearly marked university indicia is not a traditional public forum. In short, each of these cases demonstrate a consistently applied, fact-based test; none evidence a conflict between the Eleventh Circuit and other circuits meriting this Court's intervention.

III. FORUM ANALYSIS IS NOT INCOHERENT OR UNWORKABLE.

Keister attempts to recast the forum analysis applied by the lower courts in this case as a new "surroundings" or "heart of campus" test and posits that it is an unworkable test because it will result in different outcomes in different environments.[48] This argument has no basis in fact or logic. The well-established forum analysis used by the lower courts in this matter is by no means "new." Furthermore, courts regularly apply legal tests to particular facts, resulting in different outcomes depending on the facts presented. There is nothing unworkable or incoherent about such an analysis; it happens every day in courts around the nation. Indeed, forum analysis has been applied consistently and coherently by various circuits in the very cases cited in *Keister*'s Petition. In truth, what Keister is asking the Court to do is abandon a fact-based test as "unworkable" simply because the facts do not support his position. This Court should decline his invitation.

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[48] Petition for Writ of Certiorari at 24-25.

IV. THE FACTUAL RECORD SUPPORTS THE FINDINGS OF THE DISTRICT COURT AND THE ELEVENTH CIRCUIT.

Keister's arguments are merely a factual dispute over the application of the forum analysis that does not warrant this Court's attention. The relevant inquiry under *Grace* is whether Keister had notice he was on UA's campus when he was standing at the intersection of Hackberry Lane and University Boulevard. This is necessarily a factual inquiry. Based on the numerous UA facilities and landmarks visible from the intersection—including UA buildings, UA restricted parking lots, UA banners, UA street signs, and obvious campus landscaping—and its central location one block from the Quad, both the district court and the Eleventh Circuit answered this question in the affirmative. In fact, based on the location of the site and the overwhelming university indicia, the district court in Tuscaloosa—sitting just over a mile from the intersection at issue—determined that this intersection is in the "heart" of UA's campus. Without question such indicia put Keister on notice that he was on UA's campus. His Petition is simply a disagreement with the lower courts' factual findings. It is well established that a petition is rarely granted when the claimed error is based solely on an argument asserting erroneous factual findings.

CONCLUSION

When the window dressing is pulled aside, Keister's Petition amounts to a factual dispute, not a misapplication of this Court's long-standing forum analysis test. Such a review is unwarranted and discouraged by Sup. Ct. R. 10. The Petition should be denied.

Respectfully submitted,

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