

App. No. 22A112

ORIGINAL

In the Supreme Court of the United States

RODNEY KEISTER,

*Applicant-Appellant,*

v.

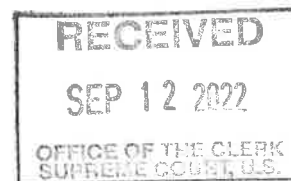
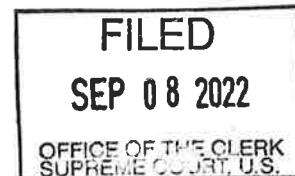
STUART BELL, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE  
UNIVERSITY OF ALABAMA, ET AL.,

*Respondent-Appellee.*

SECOND APPLICATION FOR EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Clarence Thomas, as Circuit Justice for the United States  
Court of Appeals for the Eleventh Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, Applicant Rodney Keister respectfully requests a 30-day extension of time, to and including October 24, 2022, to file a petition for a writ of certiorari seeking review of the Eleventh Circuit's opinion in *Keister v. Bell*, 29 F.4th 1239 (11th Cir. 2022). See App. A. The Eleventh Circuit denied a timely request for *en banc* rehearing on May 26, 2022, App. B, and you granted (in part) a timely application for an extension to file a petition for certiorari, making the new due date September 24, 2022. *Keister v. Bell*, No. 22A112. Applicant is filing this second request at least 10 days before the current due date. S. Ct. R. 13.5.



As described in the prior application, this case is about a public university that violated the First Amendment by impinging a citizen's fundamental right to hand out literature and express his views on a city sidewalk bordering the university campus. The Eleventh Circuit's decision applied a multifactor balancing test using considerations contrary to this Court's and other circuits' precedent and well beyond considerations of text as informed by history and tradition that is a more appropriate way of evaluating First Amendment claims per this Court's more recent constitutional jurisprudence. Addressing the proper means of categorization of traditional public versus limited public fora is an important question on which courts are in conflict and thus the forthcoming petition has a strong prospect of being granted by this Court. A further extension is thus appropriate to allow new Supreme Court counsel to prepare a thorough petition addressing these issues and to accommodate counsel's additional case demands and pre-existing travel plans that have made it difficult as yet to devote the desired amount of time to this matter.

### **Background**

The relevant facts are set out more fully in the first Application for an extension of time. Appl. 2-3, *Keister v. Bell*, No. 22A112. For ease, Applicant briefly restates the relevant facts here.

1. Applicant travels around sharing his Christian faith on city sidewalks. On March 10, 2016, he attempted to speak and evangelize on a sidewalk that is part of two public streets, but that borders certain buildings of the University of Alabama. *Keister v. Bell*, 29 F.4th 1239, 1246-1247 (11th Cir. 2022). A police officer initially told

Applicant he could proselytize there, but officials subsequently told Applicant the university's grounds-use policy applied to those city sidewalks and that Applicant would need to secure a permit and university approval to speak there. *Id.* at 1245-1246.

3. After unsuccessfully litigating a request for a preliminary injunction all the way to this Court, Applicant made his fuller case on remand. *Keister v. Bell*, 139 S. Ct. 208, 209 (2018) (denying certiorari).

4. Despite evidence refuting the district court's initial conclusion that the sidewalks were in the heart of campus, the lower court granted the university's motion for summary judgment and classified the sidewalks as limited public fora instead of traditional public fora. The Eleventh Circuit affirmed and denied rehearing *en banc*. In the process, it applied a multi-factor test that, among other things, addressed the university's intent with respect to the sidewalk. *Keister*, 29 F.4th at 1255.

### **Reasons for Granting an Extension of Time to File a Petition for a Writ of Certiorari**

This second Application for an extension of 30 days to file a Petition should be granted for several reasons:

1. As the initial application made clear, the forthcoming Petition has a reasonable likelihood of being granted. The decision that the Petition will ask this Court to review flies in the face of this Court's free speech precedents and exacerbates a circuit split about the proper analysis for determining traditional public fora status. The Petition will ask whether a multi-factor test should be applied when determining

if a particular space is a traditional public forum or whether courts should look at history and tradition like the Court does when addressing other constitutional rights. *E.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

Had the Eleventh Circuit applied a history-and-tradition review, it would not have reached the extraordinary conclusion that a city sidewalk—the epitome of a traditional public forum—is a limited public forum. *See United States v. Grace*, 461 U.S. 171, 179 (1983) (“Sidewalks . . . 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[.]”).

The Eleventh Circuit’s factor test erred in elevating government intent above history and tradition and, in the process, it clashed with approaches used by this Court and other circuits. *See, e.g., Ark. Educ. Television Com’n v. Forbes*, 523 U.S. 666, 677 (1998); *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100-01 (9th Cir. 2003); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124-25 (10th Cir. 2002); *Warren v. Fairfax County*, 196 F.3d 186, 189-90 (4th Cir. 1999). The split among the circuits is clearest with respect to the Fifth and Sixth Circuits, both of which have found analogous sidewalks bordering university property to be traditional public fora. *Brister v. Faulkner*, 214 F.3d 675, 681 (5th Cir. 2000); *McGlone v. Bell*, 681 F.3d 718, 732-33 (6th Cir. 2012). The

Petition will ask this Court to resolve that conflict. S. Ct. R. 10.

2. An extension of time is also warranted to allow adequate time to prepare a Petition to this Court. Mr. Jaffe has numerous other professional obligations to meet. For example, he is currently working on a complaint in Delaware that raises Second Amendment questions. He is also briefing multiple motions for preliminary injunctions in Delaware, California, and New Jersey in cases raising both First and Second Amendment issues. In addition, he is preparing a petition for rehearing *en banc* in *Guedes v. ATF*, No. 21-5045 (D.C. Cir.), which was previously before this Court on petition for writ of certiorari and which will certainly be before this Court again. Furthermore, Mr. Jaffe is currently out of the country from September 2-19 and will have limited access to the internet and other work facilities during the latter half of that period.

The associate tasked with the initial draft of the Petition also faces several deadlines in the weeks leading up to the current deadline. Over the next month, he will be working to meet several discovery deadlines in *In re Georgia Senate Bill 202*, No. 1:2021-mi-55555 (N.D. Ga.). This will include preparing for, travelling to, and taking multiple depositions. In addition, he faces deadlines for briefs in several other courts.

3. No apparent prejudice would arise from the extension for submitting a petition. Having prevailed below, respondents suffer no disability from an extension.

## Conclusion

For the foregoing reasons, Applicant requests an extension of time to file a Petition for a Writ of Certiorari to and including October 24, 2022.

Respectfully submitted,

s/Erik S. Jaffe

ERIK S. JAFFE

JOSHUA J. PRINCE

SCHAERR | JAFFE LLP

1717 K St. NW, Suite 900

Washington, DC 20006

[ejaffe@schaerr-jaffe.com](mailto:ejaffe@schaerr-jaffe.com)

*Counsel for Applicant*

September 8, 2022