No. 22-_____

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, JOHN HOOKS, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE FOR THE UNIVERSITY OF ALABAMA POLICE DEPARTMENT, MITCHELL ODOM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE LIEUTENANT FOR THE UNIVERSITY OF ALABAMA POLICE DEPARTMENT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Rodney Keister sought to evangelize at the intersection of sidewalks open to the public, owned by the City of Tuscaloosa, but adjacent to the University of Alabama. Both university and private buildings line the streets forming the intersection, the sidewalks of which the city maintains as public rights-of-way. Despite the public nature of the intersection, the University, which handles certain maintenance and policing functions for those sidewalks, has forbade Keister from attempting to speak with passersby without securing its permission.

Although this Court has consistently held that public sidewalks are "prototypical" examples of traditional public forums, the Eleventh Circuit here ruled that this sidewalk is not a public forum. In doing so, the court expressly deferred to the University's "intent" to limit and control expressive activity on the sidewalks, notwithstanding the broad right of public access to traverse them.

The Questions Presented are:

1. Whether the Eleventh Circuit erred in relying on the government's (or its delegee's) intent to regulate speech in determining that public sidewalks adjacent to government buildings are not traditional public forums, in conflict with decisions by this Court and numerous circuits?

2. Whether the status of a public sidewalk as a protected traditional public forum should be determined by the text, history, and tradition of the First Amendment rather than by an indeterminate multi-factor balancing test?

PARTIES TO THE PROCEEDING

The petitioner is Rodney Keister.

The respondents, defendants/appellees below, are Stuart Bell, sued in his official capacity as President of the University of Alabama; John Hooks, sued in his official capacity as Chief of Police for the University of Alabama Police Department; and Mitch Odom, sued in both his individual capacity and his official capacity as Police Lieutenant for the University of Alabama Police Department.

STATEMENT OF RELATED PROCEEDINGS

No other proceedings are "directly related" to the case in this Court for purposes of this Court's Rule 14(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rodney Keister respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

The Eleventh Circuit in this case held that a publicly owned sidewalk reserved for public access, adjacent to various public university and private property on one side and a public street open for vehicular public access on the other, is *not* a traditional public forum for free-speech purposes. In doing so, the court of appeals applied a multi-factor test that, among other things, explicitly relied upon the government's and its delegee's intention to limit speech as a decisive factor in the analysis, thereby allowing the mere desire to regulate or censor speech to override speech protections normally applied in such a "prototypical" traditional public forum. *Schenck* v. *Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997). The Eleventh Circuit reached the wrong result by applying the wrong test, deepened circuit splits over the significance of government intent and the First Amendment status of sidewalks abutting campus spaces, and departed from this Court's precedents.

Under those precedents, the question whether a city-owned sidewalk maintained as public right-of-way is a traditional public forum is not even close. This Court has consistently held that a sidewalk open to the public—regardless of what the sidewalk borders—remains a public forum notwithstanding the government's or a third party's desire or intent to

regulate speech within that forum. *Hague* v. *CIO*, 307 U.S. 496, 515 (1939); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *United States* v. *Grace*, 461 U.S. 171 (1983); *Boos* v. *Barry*, 485 U.S. 312 (1988); *Frisby* v. *Schultz*, 487 U.S. 474 (1988); *Snyder* v. *Phelps*, 562 U.S. 443 (2011); *McCullen* v. *Coakley*, 573 U.S. 464 (2014).

This case presents this Court with a clean and timely vehicle to protect central and historic venues for free speech. The court of appeals wrongly denied petitioner access to the most traditional of public forums, based on a multi-factor test with an inappropriate controlling factor and with no basis in the First Amendment's text or in the nation's history and tradition. Here, as in the application of other constitutional rights, the text of the Constitution, informed by history and tradition, should control. See *New York State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2129 (2022) (applying text as informed by history and tradition, rather than a balancing test, to Second Amendment protections); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (same regarding First Amendment protections of private religious expression by public employees). This Court should grant the petition, reverse the decision below, and in so doing make clear that application of the First Amendment to traditional public forums must be grounded in the Amendment's text as informed by history and tradition.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 29 F.4th 1239. App. 1a-40a. The order denying the Petition for Rehearing and Petition for Rehearing En Banc is not reported. App. 41a-42a. The decision of the United States District Court, Northern District of Alabama is reported at 461 F. Supp. 3d 1152. App. 43a-82a.

JURISDICTION

The complaint raised claims under 42 U.S.C. § 1983, and the district court had jurisdiction under 28 U.S.C. §§ 1331, 1343. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The judgment of the Eleventh Circuit was entered on March 25, 2022. App. 1a. The Eleventh Circuit denied a timely Petition for Rehearing and Rehearing En Banc on May 26, 2022. App. 41a-42a. Justice Thomas granted two timely requests for an extension to file this petition, to and including October 24, 2022. *Keister* v. *Bell*, No. 22A112.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the First Amendment provides:

> Congress shall make no law * * * abridging the freedom of speech[.]

Section 1 of the Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portion of 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

STATEMENT

This case asks whether a sidewalk adjacent to a public street and connected seamlessly to the vehicular and pedestrian grid of a city is stripped of its status as a public forum because it also abuts public university property, based on the "intent" of the university, acting as the government's delegee, to regulate speech.

A. The Intersection

The University of Alabama ("UA") is a state-funded public university in Tuscaloosa, Alabama. Various sections of the campus straddle public streets of the city, including the two streets relevant to this petition—namely, University Boulevard and Hackberry Lane. See Google Maps, https://tinyurl.com/2e2ms8b4 (showing the relevant

intersection and surrounding buildings). University Boulevard is a city-owned, public street that begins outside of the UA campus, runs east/west through portions of the UA campus, and continues beyond that campus. Likewise, Hackberry Lane is a city-owned, public street that begins south of and outside of UA grounds and then runs north through the UA campus until just short of the river forming the University's northern border.

At the intersection of University Boulevard and Hackberry Lane—where petitioners sought to speak—lie sidewalks on property owned by the City. App. 24a. Through a revocable, non-exclusive license, the City has granted UA limited authority over these intersection sidewalks for maintenance and policing, but under this agreement, the City retains ownership and control over the property, specifically reserving use and enjoyment of the rights-of-way for pedestrian access. App. 8a, 24a.[1]

Extending out from the intersection, "[s]idewalks open to the public" abut both University Boulevard and Hackberry Lane for much of their length. App. 8a. The intersection sidewalks are up to 25 feet wide, to which the general public has free and unhindered access. These sidewalks appear and function like other city sidewalks, connecting to the urban grid of Tuscaloosa. The properties adjacent to them—and along both roads for some distance in both directions—

[1] The Eleventh Circuit correctly assumed the City owned the sidewalk even though it "granted the University permission to maintain and repair the sidewalks." App. 24a.

are a mixture of university facilities and private buildings and businesses.[2]

Approaching the subject intersection, moreover, whether travelling west on University Boulevard, or north on Hackberry Lane, one cannot detect any signs, pillars, gates, or other indicators signaling entry into UA campus property. The decorative fencing located at the intersection is planted squarely on campus grounds, providing a visible separation between the UA campus and the intersection sidewalks. App.24a.

Street signs at the intersection show UA's "A" logo, but, consistent with the nature of the intersection, the same street signs also contain the official seal of the City of Tuscaloosa on the left-hand side. See Google

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[2] Heading eastward from the intersection along University Boulevard toward McFarland Boulevard one passes a park fronting an Episcopal Chapel and adjacent to a campus ministry, various school buildings and parking lots, several fraternities, a window-replacement business, a pharmacy, multiple restaurants, and thereafter a continuous mix of private businesses and university buildings, including the medical center. C.A. App. 207.

Heading westward from Hackberry Lane along University Boulevard one passes a variety of university facilities set back from the street; the Bryant-Denny Stadium, which attracts nationwide football fans and television network coverage, additional fraternities, and then a plethora of retail establishments referred to as the "The Strip," which includes multiple restaurants, a pharmacy, and a supermarket. C.A.App. 209.

As for Hackberry Lane, once again there are a variety of university, religious, and commercial entities, as well as residences, apartments, and a public park situated along the street. C.A.App. 205-206.

Maps, https://tinyurl.com/45fkna3b (showing the Street View of the intersection). And, while UA banners stating, "Where legends are made" hang from streetlamps at the intersection, *id.*, those same banners also hang downtown and in other parts of the City. *E.g.*, C.A.App.204-210.

B. The Restricted Speech

Petitioner Rodney Keister, a traveling evangelist, wishes to be able to speak and/or hand out literature on the sidewalks at the intersection of University Boulevard and Hackberry Lane. He uses verbal speech, distribution of literature, and display of banners to communicate to passersby. App. 44a-45a. He does so alone or with a companion, does not block pedestrian or vehicular traffic, and has never come into conflict with any competing public or university event such as a parade or protest.

On March 10, 2016, Keister and a companion initially took to the sidewalk on 6th Avenue, between Smith and Lloyd Halls within the University of Alabama campus. App. 45a. Keister held a banner and handed out literature while his companion engaged in street preaching. UA police officers and a UA grounds official approached Keister and told him he "could not continue" his expressive activity at that location without a UA permit under UA campus use policy. App. 45a. The permit applies to any outdoor activity, including speech and literature distribution, and requires Keister to secure sponsorship and joint participation from a university-affiliated group and to provide advance notice of 10 working days before he would be allowed to speak at that location. App. 37a.

Multiple university officials informed Keister and his companion that they could relocate to the sidewalk at the intersection of University Boulevard and Hackberry Lane, which they identified as municipal property. App. 5a, 46a. Taking them up on their suggestion, Keister and his companion subsequently moved to the new location, where they resumed their evangelism. App. 5a. But a UA police officer approached again and claimed that they were mistaken about the sidewalks along University Boulevard, asserting that those areas (including the intersection with Hackberry Lane) are also considered UA property on which Keister could not engage in any expression without a University permit. App. 5a. Keister and his companion, fearing arrest, then left the area. App. 6a.

Keister wishes to return to the sidewalks at the intersection of University and Hackberry to preach his religious message orally and by literature distribution, but he refrains from doing so because of the threat of arrest. App. 5a-6a. That is because, when Keister asserted a right to speak on the sidewalks in question, UA asserted that the sidewalks at that intersection were not traditional public forums for free-speech purposes.

C. Initial Procedural Background

Keister sued University of Alabama officials and promptly moved for a preliminary injunction barring the UA defendants from enforcing the UA campus use policy against his peaceful speech and literature distribution at the intersection of University Boulevard and Hackberry Lane, on a public sidewalk. The district court denied the motion, holding that the

intersection was a limited public forum and hence permissibly subject to reasonable and viewpoint-neutral speech restrictions. *Keister* v. *Bell*, 240 F. Supp.3d 1232 (N.D. Ala. 2017)

Keister appealed, and the Eleventh Circuit affirmed the denial of a preliminary injunction. *Keister* v. *Bell*, 879 F.3d 1282 (11th Cir. 2018). Keister unsuccessfully sought certiorari of his case in its preliminary posture. *Keister* v. *Bell*, 139 S. Ct. 208 (2018).

D. Remand Proceedings

On remand, Keister amended his complaint, and the parties engaged in discovery, after which they filed cross-motions for summary judgment. The district court again concluded that the sidewalk at the intersection is a limited public forum (not a traditional one) and upheld the University's permit policy as reasonable. App. 70a-71a.

The Eleventh Circuit affirmed. The court applied a multi-factor test that considered, among other factors: the sidewalk's proximity to university buildings, the presence of university banners and fencing separating the sidewalk from those buildings, and UA's maintenance of and control over the sidewalk. App. 8a-9a. The court held that, even though the sidewalk was owned by the City, the sidewalk's location and maintenance resulted in there being "no question that the University does not *intend* to open the Sidewalk up to unchecked expressive activity by the public at large." App. 26a (emphasis added). "Given the University's control over the Sidewalk," the Eleventh Circuit thus concluded that it was

"the *University's* intent that matters with respect to that property." App. 26a (emphasis in original). Like the district court, the Eleventh Circuit again held that the intersection was a limited public forum, not a traditional one. App. 17a-27a.

Keister unsuccessfully sought en banc review. Justice Thomas then granted two timely applications for an extension to file this petition.

REASONS FOR GRANTING THE PETITION

The questions presented in this case ask how courts should determine the First Amendment status of sidewalks that line streets fully accessible to the public and that happen to be next to campus (or other private or government) buildings: Can Courts apply an amorphous and manipulable balancing test that relies on the government's or its delegee's intent to restrict speech as a justification for doing so? Or must they look to the First Amendment's text as informed by history and tradition to determine what constitutes a *traditional* public forum protected by the textual prohibition on infringement of freedom of speech?

The courts of appeal have divided over the correct test to apply in these circumstances. And the issues in this case regularly arise on and adjacent to government buildings across the country, presenting important questions regarding the identification and scope of public forums as well as the constitutional methodology for implementing First Amendment protections. Such important and oft-arising constitutional issues are worthy of this Court's attention, and this case presents an excellent vehicle for resolving them. The Court should grant the petition for certiorari and reverse the decision below.

I. The Decision Below Deepens Multiple Circuit Splits.

The court of appeals below relied on UA's intent to limit speech as a reason to deny petitioner the protections guaranteed him by the First Amendment. Despite the traditional public-forum status of streets and sidewalks open to the public, the Eleventh Circuit concluded that the sidewalks of the intersection in this case were merely limited public forums. App. 27a. As part of a malleable multi-factor test, the court of appeals focused upon the "traditional uses made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics." App. 17a (quoting *Bloedorn* v. *Grube*, 631 F.3d 1218, 1233 (11th Cir. 2011)). Of those considerations, the Eleventh Circuit elevated the government's intent above all others, finding it to be the controlling factor. App. 26a. It thus denied public-forum status to a space otherwise freely open to the public because it thought there was "no question that the University does not intend to open the Sidewalk up to unchecked expressive activity by the public at large." App. 26a.

The Eleventh Circuit reached that conclusion based on the proximity of the intersection to the University, signs and banners on streetlamps and between the sidewalk and university property reflecting the University's presence, the University's limited authority to maintain and police the area (though not to restrict public access), and, ultimately, the University's circularly obvious "intent" to limit free expression on such sidewalks—based upon the

challenged rules restricting free speech absent a university permit.

That decision deepens a conflict between the Ninth, Tenth, and D.C. Circuits, on one hand, and the Second, Eighth, and now Eleventh Circuits, on the other, over whether government intent to limit speech is a reason to strip a public forum of constitutionally protected status. It also departs from decisions of the Fifth, Sixth, and Eighth Circuits that have protected individual speech on similar sidewalks. The Court should grant certiorari to resolve those divides.

A. The decision below conflicts with circuit decisions rejecting government intent to limit speech as a factor that can undermine the status of a traditional public forum.

Unlike the decision below, several circuits have, in their First Amendment analysis of public sidewalks, denied the significance of the government's intent to limit speech.

1. The D.C. Circuit, for example, has relied upon history and tradition, rather than government intent, to determine the contours of constitutionally protected speech. In *Henderson* v. *Lujan*, 964 F.2d 1179, 1180 (D.C. Cir. 1992), the court considered whether a sidewalk that was officially part of the Vietnam War Memorial and adjacent to a public street was a public forum where a street evangelist could preach. The court emphasized that, "because of their historical association with the exercise of free speech, streets, parks, and sidewalks are often viewed as quintessential examples [of public forums]." *Id.* at 1182. Although the court recognized that a

government can set aside property for limited use that is inconsistent with speech, the court emphasized that the mere intent to forbid speech on property otherwise open to ordinary public use was insufficient to negate the property's status as a public forum. The court concluded that even a "consistent practice of forbidding expressive conduct on the walkways" could not override the history and tradition of sidewalks being public forums, and that relying on such considerations would "misconceive[] the role of government intent and practice" in the forum analysis. *Ibid.* While the government can dedicate property for use inconsistent with speech—such as the restricted-access military base in *Greer* v. *Spock*, 424 U.S. 828 (1976)—the D.C. Circuit held that the government "cannot establish the inconsistency simply by declaring it and by enforcing restrictions on speech." *Henderson*, 964 F.2d at 1183. "[S]peech regulations," the court reasoned, "regardless of their longstanding character, do not undermine the evidence" of history and tradition. *Ibid.*

The court also emphasized that "tradition operates at a very high level of generality, establishing a working presumption that sidewalks, streets and parks are normally to be considered public forums." *Id.* at 1182. And, as particularly relevant to the situation in this case, the court held that "[t]he mere fact that a sidewalk abuts property dedicated to purposes other than free speech is not enough to strip it of public forum status." *Ibid.*

The same court took a similar approach in *Lederman* v. *United States*, 291 F.3d 36 (D.C. Cir. 2002), where the federal government attempted to

prohibit a solitary demonstrator from holding a sign or distributing leaflets on the grounds of the Capitol building. While such grounds are obviously under federal government authority for purposes of maintenance and policing, and their internal sidewalks do not border on public streets, they have traditionally been open to the public to come and go as they like, functioning much like a public park. See *id.* at 41 ("courts have long recognized that the Capitol Grounds as a whole meet the definition of a traditional public forum" because it has "traditionally been open to the public").

The court, moreover, roundly rejected any claim that the grounds were a "special type of enclave" inconsistent with use for free expression. *Id.* at 42. The court noted that, like the public intersection at issue in this case, the sidewalk on the Capitol grounds was "continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of the city's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors." *Id.* at 44 (internal punctuation omitted). Nor did it matter to the analysis whether the sidewalk "is used primarily by people coming to and from the Capitol building," as it was not "sufficiently 'specialized' to warrant distinguishing the sidewalk from the remainder of the Grounds for purposes of the public forum analysis." *Id.* at 43. And the fact that the government, by definition, *intended* to restrict expression on the Capitol grounds did not even warrant a mention as a relevant consideration in forum analysis.

In this case, the Eleventh Circuit's analysis and conclusion conflict with that of the D.C. Circuit in every meaningful respect. Whereas the D.C. Circuit found it important that the Capitol grounds were traditionally "open to the public," the Eleventh Circuit discounted the fact that the intersection of University and Hackberry is "open as a public thoroughfare." App. 25a. Whereas the D.C. Circuit found unpersuasive the fact that the Capitol grounds were adjacent to the buildings serving a central government function and were used by, among others, persons going to and from those buildings, the Eleventh Circuit irrelevantly emphasized the "educational mission" of UA and its adjacent buildings. App. 35a. And, while the sidewalk in *Lederman* was plainly within well-marked property owned by the federal government itself, the Eleventh Circuit here relied on banners and signs indicating the obvious proximity of the University to strip public-forum status from an intersection that was not owned by the University and was in fact required to be maintained as a public right of way. App. 8a-9a.

In the end, the Eleventh Circuit relied almost entirely upon the circular notion that the intent to restrict speech on sidewalks otherwise open and available for public passage for all other purposes was sufficient to remove the traditional public-forum status of those sidewalks. App. 26a. That reasoning would necessarily uphold every restriction on speech in such forums because the restriction itself would demonstrate the *intent* to limit speech—and hence short-circuit all subsequent scrutiny.

Like the D.C. Circuit, the Tenth Circuit has recognized that the government's intent to restrict speech does not control the public forum analysis. In *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corporation*, for example, the Tenth Circuit expressly "reject[ed] the contention" that Salt Lake City's "express intention not to create a public forum control[led] [its] analysis." 308 F.3d 1114, 1124 (10th Cir. 2002). While such intent might be relevant to a designated forum not freely accessible to the public, "for property that is or has traditionally been open to the public, objective characteristics are more important and can override express government intent to limit speech." *Id.* at 1125.

First Unitarian is particularly noteworthy in that the City there had deeded property it owned to a church but maintained an easement for public passage, though not necessarily for expressive activities. But that transfer of ownership—which was far greater than the limited powers given to the University here—was deemed irrelevant to the constitutional forum analysis. *Id*. at 1122-1123. Looking to the character and use of the property, rather than any transfer of power to a private party, the court concluded that the "government cannot simply declare the First Amendment status of property regardless of its nature and its public use. *Id.* at 1124 (citing cases rejecting reliance on government *ipse dixit* or intent to restrict speech in a public forum). Looking to the actual use of the property in question, and whether expressive activity was inconsistent with that use, the court readily concluded that, because the "actual purpose and use of the easement here is a pedestrian throughway for

the general public" and because such use is "compatible with expressive activities," the property was a public forum. *Id.* at 1126, 1129.

As the court explained:

> The objective nature and purpose of the easement and its similarity to other public sidewalks indicate it is essentially indistinguishable from other traditional public fora. We reach this conclusion in spite of the City's express intent not to create a public forum, because the City's declaration is at odds with the objective characteristics of the property and the City's express purpose of providing a pedestrian throughway. Accordingly, we hold that the easement is a public forum.

Id. at 1131; *accord McCraw* v. *City of Oklahoma City*, 973 F.3d 1057, 1069-1070 (10th Cir. 2020) (holding that roadway medians are traditional public forums and that government may not transform the property by *ipse dixit* or an intent to restrict speech).

The Ninth Circuit has likewise rejected the notion that government may convert a traditional public forum into a limited forum by mere "proximity to other property, or by governmental *ipse dixit*." *Kreisner* v. *City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993) (citing *Grace*, 461 U.S. at 180). And it has rejected a city's claim that its "'subjective intent' is a key factor in traditional public forum analysis" because that claim "conflates the factors necessary for the creation of a designated public forum with those of a traditional public forum." *ACLU* v. *City of Las Vegas*, 333 F.3d 1092, 1104 (9th Cir. 2003). As the court concluded in

one leading case, "traditional public fora are open for expressive activity regardless of the government's intent." *Ibid.* (quoting *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678 (1998)).

2. On the other hand, the Second and Eighth Circuits have agreed with the Eleventh Circuit that government intent to limit speech is an important factor in determining whether public property is a traditional public forum.

For example, in *Hotel Employees & Restaurant Employees Union, Local 100* v. *New York Department of Parks & Recreation*, the Second Circuit explained that, while the court's First Amendment analysis considers whether government property "falls within those categories of property historically deemed to be traditional public fora," it also encompasses a variety of other factors, including "the City's intent in constructing and opening [the property] to the public." 311 F.3d 534, 546-547 (2d Cir. 2002). The court applied that analysis to deny public-forum status to Josie Robertson Plaza outside of Lincoln Center in New York City. The court did so despite the fact that the Plaza was a "public place," was "owned by the City," fell "within the jurisdiction of the Parks Department," *id.* at 548, and was used by "non-patrons" for "the purpose of traversing between surrounding streets," "to read or eat lunch by the fountain[,] or simply to take in the sun," *id.* at 550. In so concluding, the court expressly cited New York's "intent *not* to treat the Plaza as it would a typical city park." *Id.* at 549 (emphasis in original); *accord id.* at 547 (looking to "government's intent in constructing the space and its need for controlling expressive

activity on the property, as evidenced by its policies or regulations").

The Eighth Circuit likewise considers government intent in its forum analysis, albeit in a more limited fashion. In *Bowman* v. *White*, 444 F.3d 967, 977-979 (8th Cir. 2006), the Eighth Circuit considered whether areas within a college campus and sidewalks bordering college campuses were traditional public forums. The court looked to, among other things, "the government intent and policy with respect to the property, not merely its physical characteristics and location." *Id.* at 978.

In applying that test, the court of appeals concluded that the specified open areas on college campus grounds were designated (*i.e.*, limited) public forums, but concluded, contrary to the Eleventh Circuit here, that the sidewalks at the borders of campus were likely traditional public forums. *Id.* at 977 ("[T]he public streets and sidewalks which surround the campus but are not on the campus likely constitute traditional public fora."); but see *id.* at 978 ("[S]treets, sidewalks, and other open areas that might otherwise be traditional public fora may be treated differently when they fall within the boundaries of the University's vast campus."). That the Eighth Circuit can agree on the legal standard but differ on the outcome in such a comparable case illustrates the malleability of the "intent" standard itself, and the need to remove government intent to restrict speech as a factor in the traditional-public-forum analysis.

B. The decision below further conflicts with circuit decisions holding that the sidewalks adjacent to public university buildings are traditional public forums.

In addition to conflicting with the Ninth, Tenth, and D.C. Circuits regarding the general significance of government intent in the First Amendment analysis, the decision below conflicts with Fifth, Sixth, and Eighth Circuit decisions holding that streets open to the public but adjacent to college and university buildings are traditional public forums.

The Eight Circuit decision in *Bowman*, above, is one such example of a case reaching an opposite conclusion about sidewalks abutting campus. 444 F.3d at 977.

The Sixth Circuit has likewise held that sidewalks alongside a college campus constituted a traditional public forum. In *McGlone* v. *Bell*, 681 F.3d 718 (6th Cir. 2012), the court considered a challenge much like the one here, where a street evangelist sought to speak on the city-owned sidewalks along city streets that ran through and around the Tennessee Technological University (TTU), "a public university located in Cookeville, Tennessee." *Id.* at 723. The Sixth Circuit embraced the presumption that sidewalks are public forums, placed "[t]he burden * * * on TTU to show that the sidewalk is overwhelmingly specialized to negate its traditional forum status," *id.* at 732, and concluded that, because the sidewalks in question "blend into the urban grid and are physically indistinguishable from public sidewalks, they constitute traditional public fora," *id.* at 733. The court focused on objective criteria, such as whether the sidewalks were open to

the public or instead overwhelmingly specialized in a way that negates ordinary public access. At no point did the court even suggest that the mere intent to restrict speech on a sidewalk open to the public for all other purposes could possibly qualify as a reason for negating a sidewalk's traditional public-forum status.

The Fifth Circuit's decision in *Brister* v. *Faulkner*, 214 F.3d 675 (5th Cir. 2000), likewise rejected an attempt to limit the public-forum status of open areas adjacent to campus buildings. *Brister* involved leafletting outside the (now-closed) Erwin Center at University of Texas-Austin, on a paved area that connected the public sidewalk with the event center. *Id.* at 678. Noting that the paved area seamlessly connected to the public sidewalk, the court looked to history and tradition and determined that "public sidewalks are, by long tradition, public fora." *Id.* at 681-682. Again, the court did not suggest that the university's intent to restrict speech in this public-adjacent space could have any bearing on whether the space was a traditional or even limited public forum. See *id.* at 682; see also *McGlone*, 681 F.3d at 732-733 (relying on *Brister* in reaching its similar conclusion). Thus, neither the Fifth nor Sixth Circuits looked to the government's intent regarding whether to permit speech in an otherwise public space, and both found spaces adjacent to campus buildings to be traditional public forums.

Neither the results nor the reasoning of those cases can be squared with the decision below. On either the broader methodological question of whether government intent is a proper factor in determining the First Amendment status of traditional public

forums like sidewalks and parks, or on the narrower question of the public-forum status of sidewalks and other spaces open to the public adjacent to college and university buildings, the decision below cannot be reconciled with decisions from multiple circuits. This Court should grant certiorari to resolve both of those conflicts and to ensure that such prototypical traditional public forums are consistently protected throughout the country.

II. The Petition Presents Important Questions Regarding the Application of the First Amendment.

The questions presented by this case are frequently recurring and constitutionally important. They arise on public spaces, including college campuses, across the nation. Individuals' First Amendment rights depend on courts' applying the correct analysis in evaluating these traditional public spaces as public forums. But the use of multifactor balancing tests makes the outcomes in any given case unpredictable and unprincipled. There is a better way. Relying on the text of the First Amendment, read in light of history and tradition, provides a surer approach and leads to the ready conclusion that restrictions on speech in spaces traditionally open to the public are forbidden.

A. First Amendment protections for public streets and sidewalks are grounded in our history and tradition.

Traditional public spaces are not public forums as a mere matter of government grace but are protected by the text of the First Amendment as understood by our history and tradition. This Court's cases have

repeatedly recognized the importance of free speech in those "'public places' historically associated with the free exercise of expressive activities." *United States* v. *Grace*, 461 U.S. 171, 177 (1983). These places have played a "historic role as sites for discussion and debate." *McCullen* v. *Coakley*, 573 U.S. 464, 476 (2014). And they have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 469 (2009) (citation omitted).

The quintessential examples of such traditional public forums are "streets, sidewalks, and parks," which "are considered, without more, to be 'public forums.'" *Grace*, 461 U.S. at 177. Indeed, the public-forum nature of such property "follow[s] automatically" from its identification as a public street, sidewalk, or park. *Frisby* v. *Schultz*, 487 U.S. 474, 480 (1988); see also *ibid.* ("our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché'"). This Court has insistently adhered to the well-established rule that streets and sidewalks are presumptively, indeed virtually invariably, traditional public forums. Sidewalks on public streets are public forums "automatically." *Ibid.* They are the "prototypical" example of traditional public forums, *Schenck* v. *Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997), the "archetype"—together with parks—on which all other public forum analyses are based. *Snyder* v. *Phelps*, 562 U.S. 443, 456 (2000).

One "virtue" of these traditional public forums is that they subject members of the public to "speech"—and therefore ideas—they "might otherwise tune out." *McCullen*, 573 U.S. at 476. This, in turn, serves the "First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Ibid.* (citations omitted).

Recognizing the importance of sidewalks and streets in the constitutional order, this Court has afforded First Amendment protection to speech conducted on sidewalks open to the public regardless of the buildings to which they are adjacent. See *Grayned*, 408 U.S. at 105-106 (a high school); *Grace*, 461 U.S. at 180 (this Court's own building); *Boos*, 485 U.S. at 315, 334 (the Soviet Embassy in the final years of the Cold War); *Frisby*, 487 U.S. at 480 (a residential neighborhood); *Snyder*, 562 U.S. at 448, 456 (a church conducting a funeral); *McCullen*, 573 U.S. at 497 (an abortion facility).[3] And that is what the Eleventh Circuit should have done here.

B. The Eleventh Circuit applied an erroneous multi-factor intent test that ignores text, history, and tradition.

In reaching the wrong conclusion about the public-forum status of the sidewalk, the Eleventh Circuit applied not merely the wrong test, but the wrong

[3] The solitary exception to this rule has been sidewalks abutting a military base. *Greer* v. *Spock*, 424 U.S. 828 (1976), which this Court has since described as a "special type of enclave." *Grace*, 461 U.S. at 180. Naturally, a street evangelist like Keister teaching passersby about the Bible on a street corner in Tuscaloosa does not raise the same national-security concerns as protesters outside a military base.

approach entirely. Instead of relying upon the history and tradition of sidewalks as traditional public forums, the court applied a multi-factor test relying, circularly, on the government's or its delegee's intent to restrict speech as a factor supporting its constitutional authority to restrict speech. See *supra* Part I.A.

The Eleventh Circuit's errant methodology led the court to the remarkable conclusion that a sidewalk expressly reserved and open to the public—a forum "so historically associated with the exercise of First Amendment rights that access to [it] for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely," *Carey* v. *Brown*, 447 U.S. 455, 460 (1980) (internal quotations omitted)—was merely a *limited* public forum—simply because the University desired it to be so. This Court, however, has long rejected such reasoning, explaining that "Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." *U.S. Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981). More recently, the Court made the point more clearly: "traditional public fora are open for expressive activity regardless of the government's intent." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678 (1998).

The fact that a university or municipality "intends" to keep a street publicly available *except* for speech flies in the fact of that historical tradition and in fact turns the First Amendment on its head. A government desire to restrict free speech does not

reduce the protections of the First Amendment by creating a limited public forum any more than the government's desire to censor the content of an otherwise publicly available flagpole converts such a limited forum into government speech. Compare *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1592-1593 (2022) ("[T]he city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raising as private, not government, speech[.]"); *id.* at 1597-1598 (Alito, J, concurring) (rejecting attempts to "allow[] governments to exploit public expectations to mask censorship" by conflating "whether the government is actually merely facilitating private speech" or is instead itself "speaking").

In the context of a large public university that is well-integrated into the fabric of the town in which it is located, the historical considerations for maintaining the streets open to the public as a public forum is even more important. Indeed, in this case, there is little question that the University could not restrict public pedestrian or vehicular access to the intersection at the heart of this case, which is a substantial thoroughfare and contains or is adjacent to numerous religious institutions. See *supra* note 2. Furthermore, the importance of public speech on public streets on or near campus is heightened when many local public issues likely involve the relationship between the University and the town itself. Allowing a public university to regulate speech on public streets abutting its facilities eliminates the very "virtue" of enabling citizens to expose the public, including members of the university itself, to "speech"—and

therefore ideas—they "might otherwise tune out." *McCullen*, 573 U.S. at 476.

By denying traditional public forum status to a place that has traditionally been a public forum—sidewalks tied to public streets—the decision below threatens the First Amendment, not merely in Tuscaloosa, but throughout the Nation. As educational and other state, public, or even private institutions grow and integrate themselves throughout cities and towns, and as localities seek to offload their costs by delegating maintenance and even policing functions to such institutions, the line between public and private can be blurred when applying any multi-factor test. This obscures the larger historical fact that the streets and sidewalks on which citizens are free to come and go as they please are and have always been understood to be open public forums.

By creating a new exception to the general rule for cases where the government or its delegee does not want speech, the Eleventh Circuit departed from this Court's longstanding guidance on the historical importance of streets and sidewalks as traditional public forums. Left uncorrected, the court of appeals' focus on government intent will distort the classification of forums from what history and tradition provide to whatever the property controllers (or those who presume to have control) say they are.

C. The proper test for First Amendment protection of speech in public spaces should look to constitutional text as informed by history and tradition.

Beyond misclassifying the sidewalk at issue in this case, the court of appeals' decision disregards this Court's precedent governing constitutional interpretation generally. Just last term, for example, the Court explained that "'[t]he very enumeration of [a] right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *N.Y. State Rifle & Pistol Ass'n.* v. *Bruen*, 142 S. Ct. 2111, 2129 (2002) (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 634 (2008)).

This Court has increasingly moved away from difficult-to-apply balancing tests and toward more objective and less malleable tests focused on the text of the Constitution and the history and tradition that gave meaning to those words at the time they were adopted. See *Bruen*, 142 S. Ct. at 2129-2130 (applying the text of the Second Amendment and looking to history and tradition to evaluate any claimed limits on the scope of such textual commands); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule[.]"); *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022) (Fourteenth Amendment protections should be "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty"). Indeed, this Court has recently emphasized that the text, history,

and tradition rubric, rather than the judicially created means-ends balancing of the past, is the proper standard to apply when deciding "how we protect other constitutional rights." *Bruen*, 142 S. Ct. at 2130.

Sanctioning the Eleventh Circuit's multifactor analysis—with outsized importance given to government intent—will undermine the status of free speech under the First Amendment as a right "*really worth* insisting upon." *Id.* (citation omitted). By relying on an indeterminate and easily manipulated multi-factor test, rather than the text of the First Amendment, read in the context of history and tradition, the decision below calls into question the forum status of every sidewalk that is bordered on one side by a public street and on the other by a college campus or other similar dedicated space. Educational institutions for centuries have often been integrated into or have projected into the surrounding cities and towns, and have shared public space with private businesses, residences, and religious institutions. *E.g.*, Blake Gumprecht, *The American College Town*, 93 GEOGRAPHICAL REV. 51, 51 (2003) (explaining that in college towns, campuses are "a hub of activities that serve not only students and staff but also the larger population of the town and region" while serving "both as an environment for learning and as a public space"). The notion that such integration robs citizens of a traditional public forum on streets and sidewalks otherwise open to all other manner of public coming and going has no historical pedigree. And it certainly lacks any pedigree adequate to overcome the plain text of the First and Fourteenth Amendments prohibiting government infringement of the freedom of speech.

This Court should grant certiorari to reject the malleable approach applied below and to (re)affirm the application of history and tradition in the forum-analysis context, as it has with other rights. *Kennedy*, 142 S. Ct. at 2428; *Town of Greece* v. *Galloway*, 572 U.S. 565, 589 (2014); *Bruen*, 142 S. Ct. at 2130; *Dobbs*, 142 S. Ct. at 2248.

III. This Case Is an Excellent Vehicle for Answering the Questions Presented.

This case not only raises important constitutional questions on which the courts of appeals have divided but also presents an excellent vehicle for resolving them.

The decision below squarely resolved the questions presented to deny petitioner and his companion their First Amendment rights to evangelize in a public space, and did so on a complete evidentiary record.[4] If petitioner's interlocutory petition was denied because it lacked a final judgment, that defect has been cured, and this Court is no longer asked to decide the legal issues on the preliminary-injunction record. See generally *United States* v. *Virginia*, 518 U.S. 515, 526 (1996) (hearing and deciding case after noting that

[4] Even in cases that present clearly important constitutional questions, the Court has occasionally denied certiorari where "the issue was * * * not ripe enough." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, SUPREME COURT PRACTICE § 4.12, p. 4-37 (11th ed. 2019) (quoting *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting)). That may have been true of the interlocutory first petition in this case, but any such defect has been cured now that the Court is presented with the issue on final judgment rather than on a preliminary injunction record.

Court previously denied certiorari when case was in interlocutory posture); *Va. Mil. Institute* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. * * * Our action does not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered.").

In addition, the facts of this case make it an ideal vehicle to address the forum-analysis questions. Acting as the City's delegee, the University here blocked two people from peacefully handing out literature on a sidewalk that was open to them and to the public generally. App. 8a. Petitioner and his companion engaged in no violent acts or otherwise improper conduct that could implicate the University's safety interests. There is no suggestion that they were disruptive, were a hindrance to pedestrian traffic, or that their presence conflicted with competing expressive uses by other speakers or groups. Nor did petitioner or his companion coerce the acceptance of their literature by blocking the path of students and community members. They spoke only with interested individuals. In such circumstances, if the intersection and sidewalks in question were a traditional public forum, there is no credible claim that petitioner and his colleague they could have been restricted from engaging in their speech.

Accordingly, this Court can resolve the questions presented here without having to deal with alternative substantive grounds that might prevent

reaching the legal issues. This case is as clean as they come. The petition should be granted.

CONCLUSION

The sidewalk on the corner of University Boulevard and Hackberry Lane is a traditional public forum under a proper understanding of the First Amendment. The Eleventh Circuit applied an incorrect, atextual, and ahistorical test to conclude otherwise. This Court should grant the petition for certiorari, resolve the division among the circuits over the questions presented, and reverse the decision below.

Respectfully submitted,

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OCTOBER 21, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

USCA11 Case: 20-12152 Date Filed: 03/25/2022

[PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12152

RODNEY KEISTER,

Plaintiff-Appellant,

versus

STUART BELL, in his official capacity as President of the University of Alabama,
JOHN HOOKS, in his official capacity as Chief of Police for the University of Alabama Police Department,
MITCHELL ODOM, individually and in his official capacity as Police Lieutenant for the University of Alabama Police Department,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-00131-RDP

Before WILSON, ROSENBAUM, and ED CARNES, Circuit Judges.

ROSENBAUM, Circuit Judge:

Sidewalks have long been a part of Americana.[1] Cultural anthropologist Margaret Mead remarked that "[a]ny town that doesn't have sidewalks doesn't love its children." And Shel Silverstein named an entire book after his famous poem "Where the Sidewalk Ends."[2] The significance of sidewalks was not lost on traveling evangelical preacher Plaintiff-Appellant Rodney Keister, either. This case stems from Keister's efforts to use a sidewalk at Defendant-Appellee University of Alabama to spread the good word.

Not long after Keister set up shop on that University sidewalk, he learned that University policy required him to have a permit to engage in public speech there. That did not suit Keister. So he brought a 42 U.S.C. § 1983 action against University officials,

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[1] In fact, sidewalks go back much further. Ancient Rome is a case in point. William Smith & Charles Anthon, *A School Dictionary of Greek and Roman Antiquities* 355 (Harper & Bros., 1851) https://archive.org/details/aschooldictiona00smitgoog/page/n2/mode/2up (last visited Mar. 17, 2022). Even today, visitors to Pompeii can see remnants of sidewalks from that era. *See, e.g.*, @pompeii_sites (Official Twitter Account of Archaeological Park of Pompeii), tweet posted Mar. 10, 2021 https://twitter.com/pompeii_sites/status/1369657737592926208 (showing a photograph and explaining, "The sidewalks, just like the pedestrian crossings, were elevated . . . and they were useful for not walking on the road. . . .").

[2] Shel Silverstein, "Where the Sidewalk Ends," *Where the Sidewalk Ends* (1974).

alleging that the University's policy violated his First and Fourteenth Amendment rights.

Among other relief, Keister sought to preliminarily enjoin the University from enforcing its policy. The district court denied his motion. That precipitated Keister's first trip to our Court. On appeal, we affirmed the district court. We concluded, among other things, that Keister had not shown a substantial likelihood of success on the merits of his case. More specifically, we agreed with the district court that the sidewalk in question is a limited public forum, so the University's permitting requirement needed to be only reasonable and viewpoint-neutral. *Keister v. Bell*, 879 F.3d 1282 (11th Cir. 2018).

On remand, Keister amended his complaint. After discovery, the parties filed cross-motions for summary judgment. Once again, the district court concluded that the sidewalk at the intersection is a limited public forum and upheld the University's permit policy as reasonable.

Now, on his second trip to this Court, Keister asserts that the evidence uncovered in discovery shows that the City of Tuscaloosa owns the sidewalk at issue. Consequently, he reasons, the sidewalk is a traditional public forum, and the University's permitting requirement is unconstitutional.

After careful consideration and with the benefit of oral argument—and even assuming that the City of Tuscaloosa owns the sidewalk at issue—we disagree with Keister that any facts material to our analysis have changed. So we once again conclude that the sidewalk is a limited public forum. And this time, we also review the permitting requirement. Because we

find it is reasonable, we affirm the judgment of the district court.

I.

A. Factual Background[3]

As a Christian evangelist, Keister believes his mission is to share his faith and beliefs with others in public spaces. Typically, he presents his message on public sidewalks and thoroughfares by passing out religious literature, preaching, and engaging passersby in one-on-one conversation. He likes speaking with college students, so he often visits college campuses to spread his message.

On March 10, 2016, Keister and a companion went to Tuscaloosa, Alabama, to disseminate their message to the students at the University of Alabama—a state-funded public University. Keister and his friend started preaching on a sidewalk next to Sixth Avenue, in the middle of campus. They were located between two school buildings, Smith and Lloyd Halls, and across from the Quad—a grassy area at the center of campus. Keister set up a banner and passed out literature, while his companion preached through a megaphone.

Soon after Keister and his friend began, campus police and a University representative approached. They informed Keister that the University's Policy for the Use of University Space, Facilities and Grounds ("Policy") required him to obtain a permit before

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[3] We are reviewing an order granting summary judgment, so we present the evidence in the light most favorable to Keister, against whom the district court granted summary judgment. See *Rodriguez v. City of Doral*, 863 F.3d 1343, 1349 (11th Cir. 2017).

participating in expressive conduct on University grounds. According to Keister, the University representative told him that campus "is open to the public, and Keister was allowed to be there, but he could not engage in his [preferred form] of expression on [University] campus without first obtaining a permit."

After further discussion with the campus police and a University representative, Keister and his companion decided to move to the sidewalk at the northeast corner of University Boulevard and Hackberry Lane (the "Sidewalk" or "Intersection"). He chose that corner because, he says, one of the campus police officers told him, "On that corner, you're good." Keister also thought that the Sidewalk was public and not part of the University's campus.

So Keister and his companion moved to the front of Russell Hall, a University building, to continue preaching. Later that day, the weather started to turn, and they decided to leave.

That's when one of the officers who had stopped them earlier approached them again. The officer said he and the other University employees were mistaken earlier when they told Keister he could preach at the Intersection. In fact, the officer explained, Keister could not preach in front of Russell Hall without a permit. Keister claims that when he questioned the officer about the policy, the officer confirmed that Keister could not return without a permit and that, if he did, he would be arrested for trespass.

Keister wishes to go back to that spot to share his message with University students. He has not

returned, though, because he worries he will be arrested.

B. Relevant Procedural History and Evidence

1. Complaint and Preliminary Injunction

On January 25, 2017, Keister filed a complaint under 42 U.S.C. §§ 1983 and 1988 against Stuart Bell, the President of the University of Alabama; John Hooks, the Chief of Police for the University Police Department; and Mitch Odom, the University police lieutenant who stopped Keister on March 10, 2016. Keister sued all defendants in their official capacity. For this reason and for convenience, we refer to the three defendants collectively as the "University."

Keister alleged that the University's Policy violates the First Amendment's Free Speech Clause and the Fourteenth Amendment's Due Process Clause. The next day, he filed a motion for preliminary injunction seeking to prevent the University from enforcing its Grounds Use Policy. In his motion, Keister argued that the University should be enjoined from enforcing its Policy because the Intersection is a traditional public forum, and the policy fails appropriate scrutiny.

Following briefing and a hearing, the district court issued a written opinion denying Keister's injunction motion. The district court determined that the Intersection is a limited public forum, and it found that the Policy satisfied the requisite level of scrutiny.

Keister filed an interlocutory appeal. In a published opinion, we affirmed. *Keister*, 879 F.3d at 1291. We held that the Intersection is a limited public forum. *Id.* But because Keister did not raise the issue on appeal, we did not consider whether the

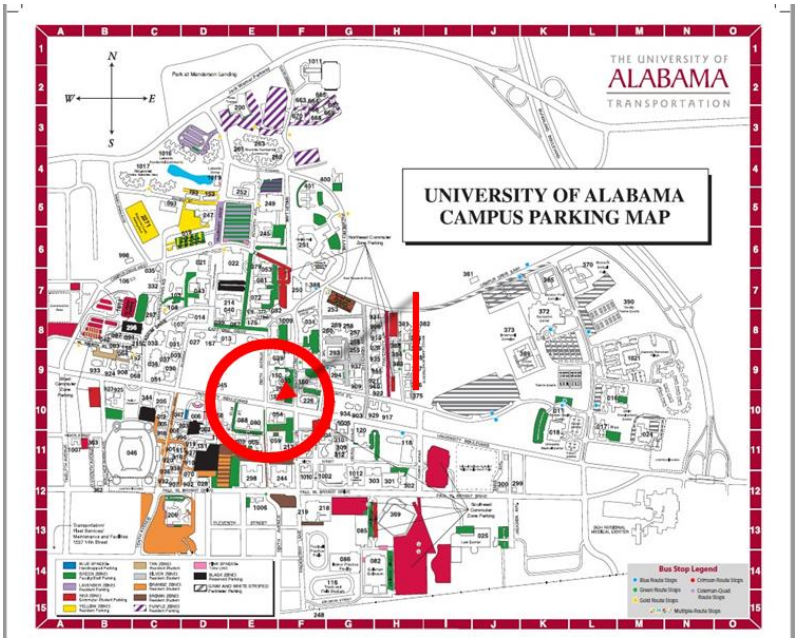
University's Policy would survive the level of scrutiny applied to limited public forums. *Id.* at 1288 n.4. Keister filed a petition seeking rehearing en banc and a petition for a writ of certiorari with the Supreme Court. Both petitions were denied.

Back in the district court, Keister filed an amended complaint, again alleging First Amendment and Fourteenth Amendment Due Process claims. He asserted that the Intersection did not actually fall within campus bounds, but rather, was only near campus. After the University unsuccessfully moved to dismiss, the parties engaged in discovery, which produced more information on the property at issue and the University's Policy.

2. Evidence Gleaned from Discovery

a. The Intersection

For orientation purposes, we begin with a map of the University of Alabama. Circled in red is the Intersection (where University Boulevard and Hackberry Lane meet).



University Boulevard and Hackberry Lane are Tuscaloosa city streets that, as the map reflects, run through the University's campus. Sidewalks open to the public line both streets. The Intersection is just one block east of the University Quad. It's surrounded by clearly identified University buildings: Farrah Hall on the southwest corner of the Intersection, Gallalee Hall on the northwest corner, Russell Hall on the northeast corner, and a public park on the southeast corner. Keister, as we have mentioned, was preaching in front of Russell Hall, to which the red arrow on the map points.

Objective signs literally indicate the Intersection is on campus: the street signs at the Intersection are embossed with the script "A" logo, and University banners adorn the streetlamps. Landscaping fences, which run throughout campus, also sit on each corner

of the Intersection. Roughly two blocks to the east, on University Boulevard, some private businesses are interspersed among University buildings. But all the property immediately around the Intersection is University property.

The parties dispute who owns the Sidewalk at issue: the City of Tuscaloosa or the University.[4] Because we are reviewing an order granting the University's motion for summary judgment, we assume for purposes of our analysis Keister's contention—that the City owns the Sidewalk.

Nevertheless, Keister and the University agree that the University maintains it. The University is responsible for clearing the sidewalks, and its police respond to incidents there.

b. The Policy

The University's Grounds Use Policy governs when, where, and how a person not affiliated with the University may engage in public speaking on campus. It applies to any activities or events that occur on

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[4] Keister originally alleged that the Intersection was within the University's bounds, *Keister*, 879 F.3d at 1290 n.5, but in his amended complaint, he asserted that the Intersection is near campus but not a part of it. The evidence reflects that in 1921, the University conveyed the property on the northeast corner of the Intersection to the City of Tuscaloosa to build a hospital. Then, in 1944, the City of Tuscaloosa granted an easement to Tuscaloosa County on the land that includes the Sidewalk for making a public street or highway. Two years later, in 1946, the City transferred the land it received in 1921 back to the University "except that portion of the above-described parcel which was conveyed by said CITY OF TUSCALOOSA and others to Tuscaloosa County for the purpose of widening the highway."

campus grounds, including on campus sidewalks, other than "casual recreational or social activities."

According to the University's Senior Director of Facilities Operation and Grounds Use Permits, the Policy is "intended to facilitate responsible stewardship of institutional resources and to protect the safety of persons." It is also meant to "preserv[e] the primacy of the university's teaching and research mission."

When Keister attempted to speak publicly on campus,[5] the Policy required individuals who are not affiliated with the University to (1) be sponsored by a University academic department or student organization (the "University Affiliate" requirement), and (2) apply for and obtain a Grounds Use Permit ("Permit"). Under the Policy, applications for a Permit "should" be submitted ten working days before the public-speaking engagement occurs. The Policy set forth this aspirational waiting period to "facilitate the review by all the different University departments that have responsibility for the various aspects of an Event (e.g., tents, food service, UAPD, electrical service, etc.)." But the Policy did not require that an application be submitted ten days in advance. Nor did it make the failure to do so a basis for denial. Rather, the Policy explained that "[i]f an Event does not involve factors that require multiple University department approvals, approval may be given in as few as three (3) days, if the [Permit] form is filled out completely and accurately."

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[5] As we further explain later, *see infra* at 13, the Policy in effect during Keister's attempts to speak on campus has since been superseded.

And the University's practice showed that was the case. Usually, an applicant had to wait much less time than ten days to receive a response. In 2018, for example, Permit applications were approved in an average of 4.4 days. Some months, the average was even lower. Take March 2018, for instance. That month, the University averaged only 2.9 days to approve an application. (Keister visited the University in March 2016).

The University could also approve "spontaneous" events and "counter-events" in as little as twenty-four hours. Spontaneous events concern issues that have become public knowledge within two days of the event. And counter-events are those held in response to an event for which a Permit has been issued. Keister is not claiming that his preaching and leafletting qualified as a spontaneous or counter-event.

Outside speakers who obtain a Permit and sponsorship can also seek permission to use amplification equipment. But speakers must submit these applications ten working days before use. Similarly, Permit holders may distribute printed materials (including leaflets) in conjunction with an event.

Although the University receives a fair number of Permit applications, it approves almost all of them. Nevertheless, the University may deny an application under certain, content-neutral conditions. For example, the University may deny an application if the "proposed location [for the event] is unavailable . . . because of events previously planned for that location." It may also deny an application if the event would unreasonably obstruct pedestrian or vehicular

traffic or unreasonably interfere with regular academic and student activities. Applicants may challenge the denial of their applications.

In July 2020, after Keister filed a notice of appeal for this case, the University instituted a new Grounds Use Policy ("New Policy"). The New Policy still requires outside speakers to obtain a sponsorship and a permit before hosting an expressive event on campus. And it still has an exception for "casual recreational or social activities." But the New Policy does slightly change the advance notice provision and sponsorship requirement. Under the New Policy, outside speakers "are strongly encouraged" to apply for a permit at least ten business days before an event, and "at a minimum" they must apply "no less than five" business days before the event. The New Policy also requires University Affiliates who reserve campus space to "actively participate in any activity associated with that reservation."

3. Summary Judgment and Appeal

Now, we return to the procedural history. After the parties completed discovery, they filed cross-motions for summary judgment. The district court granted the University's motion and denied Keister's. In reaching these resolutions, the district court concluded that the Sidewalk is a limited public forum because it is "within the University's campus, is not intended as an area for the public's expressive conduct, and contains markings sufficiently identifying it as an enclave." Then, applying the requisite level of scrutiny, the district court held that the University's Grounds Use Policy and its related requirements were reasonable and viewpoint neutral.

Keister timely appealed. In response, the University moved to dismiss the appeal as moot based on the University's adoption of the New Policy that took effect after Keister filed his notice of appeal. For the reasons we explain below, we conclude this appeal is not moot and address the merits.

II.

We review *de novo* a district court's grant of summary judgment. *Rodriguez v. City of Doral*, 863 F.3d 1343, 1349 (11th Cir. 2017). In our review, we draw all inferences and review all evidence in the light most favorable to the non-moving party. *Id.*

III.

Before launching into our analysis, we take a moment to explain the organization of our discussion. Article III of the Constitution limits our jurisdiction to "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. As relevant here, that means the plaintiff must have standing (a personal stake in the matter, *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021)), and the case must not be moot (it must present a live, ongoing controversy that the court may redress, *see Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1255 (11th Cir. 2017) (en banc), *abrogated on other grounds by Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021))—issues we address in more detail later.

The University argues that Keister may lack standing and that this case is moot. Because these arguments concern our jurisdiction to entertain the case in the first place, we would normally consider each of them, in order, before addressing the merits.

But here, the University contends that Keister does not enjoy standing only if we conclude, in our analysis of his First Amendment claim, that the Sidewalk is a limited public forum—a concept we explain more later. So understanding the University's position on Keister's standing requires knowledge of First Amendment forum analysis. For that reason, we do not consider the University's standing argument until after we identify the type of forum the sidewalk represents.

Nevertheless, and at the risk of ruining the ending, we reveal now that we conclude Keister enjoys standing. As a result, we must also address the University's mootness argument. A finding of mootness based on the University's theory that we cannot redress Keister's claims now that the University has replaced the Policy at issue would obviate the need for us to consider the merits here. So we start our analysis by examining the University's mootness argument.

A. This case is not moot

Article III requires a "[c]ase[]" or "[c]ontrovers[y]" to exist at all times during the litigation. *Alvarez v. Smith*, 558 U.S. 87, 90–91 (2009). Our jurisdiction ceases if a case becomes moot while it pends before us. *See Flanigan's*, 868 F.3d at 1255. A case can become moot, in turn, if an event occurs that ends "any actual controversy about the plaintiff['s] particular legal rights," *Alvarez*, 558 U.S. at 91, and makes redressability by the court an impossibility.

Despite this general rule, a party cannot necessarily moot a case for injunctive relief by simply voluntarily agreeing to stop the allegedly illegal

conduct. *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1282–83 (11th Cir. 2004). This voluntary-cessation exception to mootness seeks to prevent defendants from returning to their old ways while nonetheless skirting judicial review. *Id.* at 1283. But the doctrine of voluntary cessation does not apply when there is "no reasonable expectation that the voluntarily ceased activity will, in fact, actually recur after the termination of the suit." *Id.* That is so because when offending conduct ends or a law is repealed, it is not able to further injure a party in a way that an injunction is capable of redressing. *Checker Cab Operations, Inc. v. Miami-Dade Cnty.*, 899 F.3d 908, 915 (2018).

Government defendants receive the benefit of the doubt in voluntary-cessation cases: When they voluntarily stop the challenged conduct, a rebuttable presumption arises that they will not reengage in it. *Troiano*, 382 F.3d at 1283. For instance, when a government fully repeals a challenged law, a case challenging that law is almost surely moot. *Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1331 n.9 (11th Cir. 2004). And even when a challenged law is not fully repealed, we have held that so long as the law or policy has been "unambiguously terminated," any challenge to it is moot, unless a plaintiff identifies a "reasonable basis to believe that the policy will be reinstated if the suit is terminated." *Troiano*, 382 F.3d at 1285.

Yet the government cannot always moot a case by simply changing the challenged policy or law. If a new policy leaves the challenged aspects of the old policy "substantially undisturbed," the case avoids mootness.

Naturist Soc., Inc. v. Fillyaw, 958 F.2d 1515, 1520 (11th Cir. 1992). A change in policy will moot a case only if it "fundamentally alter[s]" the original policy so "as to render the original controversy a mere abstraction." *Id.*

Here, we need not consider whether the University's replacement of the Policy that was in place when Keister filed his suit "fundamentally altered" the original Policy.[6] Even if it did, Keister's challenge is not moot. After all, he seeks, among other relief, nominal damages for the University's past alleged violation of his First Amendment rights. Ceasing an offending policy going forward does not redress an injury that occurred in the past. *Checker Cab Operations, Inc.*, 899 F.3d at 916. And the Supreme Court recently held in *Uzuegbunam* that, in circumstances materially indistinguishable from those here, a request for nominal damages saves a matter from becoming moot as unredressable when the plaintiff bases his claim on a completed violation of a legal right. 141 S. Ct. 792, 801–02 (2021). Because the University's adoption of the New Policy does not render the case moot, we next consider the merits of Keister's claim.

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[6] We also do not consider whether the New Policy violates the First Amendment. Because the New Policy was not enacted until after this matter was already pending on appeal, the parties did not have the opportunity in the district court to conduct discovery concerning it, and the district court did not have a chance to address it. Under these circumstances, any challenge to the New Policy is better fully developed and first considered in the district court.

B. The Sidewalk at the Intersection of University Boulevard and Hackberry Lane is a limited public forum

The Free Speech Clause of the First Amendment forbids the government's enactment of laws "prohibiting the free exercise" of speech. U.S. Const. amend. I. As state-funded entities, universities like the University of Alabama are subject to the First Amendment. *Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011). Nevertheless, the First Amendment does not guarantee a private speaker's right to speak publicly on all government property. *Id.* at 1230. Rather, the government, similar to a private-property owner, enjoys the power to maintain its property for a lawfully prescribed use. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

To determine when private speakers can use government property for public expression, we apply a "forum analysis." *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015). The type of forum to which a government rule or policy pertains determines the level of scrutiny we apply to that rule or policy. *See Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017). Assessing the type of forum a particular piece of government property may be requires us to consider "the traditional uses made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics." *Bloedorn*, 631 F.3d at 1233.

The Supreme Court has identified four categories of government fora: the traditional public forum, the designated public forum, the limited public forum, and

the nonpublic forum.[7] *Barrett*, 872 F.3d at 1224. This case presents the question of whether the Sidewalk at the Intersection is a traditional public forum or limited public forum.

A "traditional public forum" is government property that has "immemorially been held in trust for the use of the public[.]" *Walker*, 576 U.S. at 215 (cleaned up). It is government property that has "time out of mind . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* Think fully public parks and streets, for example. Traditional-public-forum status does not reach further than its "historic confines." *Ark. Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 678 (1998).

When we evaluate a government regulation on speech in a traditional public forum, we apply strict scrutiny. *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). That means a government entity may subject speech in a traditional public forum to a time, place, and manner restriction only if its policy is "content neutral, narrowly tailored to achieve a significant government

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[7] We discuss only the traditional public forum and the limited public forum below. But for reference, a designated public forum is "government property that has not traditionally been regarded as a public forum [but] is intentionally opened up for that purpose." *Barrett*, 872 F.3d at 1224. And a nonpublic forum is property for which the government "act[s] as a proprietor, managing its internal operations." *Id.* at 1225. The term "nonpublic forum" was once synonymous with "limited public forum," but the Supreme Court has since clarified that that the terms "limited public forum" and "nonpublic forum" delineate two distinct types of fora. *Id.*

interest, and leaves open ample alternative channels of communication." *Bloedorn*, 631 F.3d at 1231 (cleaned up).

The term "limited public forum," on the other hand, describes government property where only particular subjects may be discussed or that only certain groups may use. *Id.* In other words, a limited public forum is not "open to the public at large for discussion of any and all topics." *Barrett*, 872 F.3d at 1224. The government may exclude a speaker from a limited public forum "if he is not a member of the class of speakers for whose especial benefit the forum was created." *Bloedorn*, 631 F.3d at 1231 (quoting *Cornelius*, 473 U.S. at 806). When the forum is a limited public one, regulations on speech must be only reasonable and viewpoint neutral. *Id.* We assess reasonableness by looking to the purpose of the forum and "all the surrounding circumstances." *Id.* at 1232 (quoting *Cornelius*, 473 U.S. at 809).

The Supreme Court has recognized that universities differ from other public fora in important ways. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). Among other distinctions, universities have a particular mission to educate. *Id.* So when it comes to their campus and facilities, universities generally may issue reasonable regulations that are consistent with that mission. *Id.* For this reason, university public-speaking venues often qualify as limited public fora.

Despite this general rule, a college campus "will surely contain a wide variety of fora on its grounds." *Bloedorn*, 631 F.3d at 1232. To determine the type of forum at issue, we must first identify the precise piece of campus the speaker wishes to access. Our cases

instruct that the "scope of the relevant forum is defined by 'the access sought by the speaker.'" *Id.* (quoting *Cornelius*, 473 U.S. at 801). Because Keister seeks to speak on only the Sidewalk at the Intersection, that is the relevant forum for our purposes.

The first time this case made an appearance in this Court, on review from the denial of the preliminary injunction, we concluded that the Sidewalk was a limited public forum. *Keister*, 879 F.3d at 1290. We reached this conclusion after applying *Bloedorn*, which we explained governs us in determining the type of forum a particular part of a university campus is. *Id.* For the reader's convenience and to lay the groundwork for explaining why the evidence garnered in discovery does not change our conclusion that the Sidewalk is a limited public forum, we again discuss *Bloedorn* and its application here.

Bloedorn, an evangelical preacher like Keister, sought to preach on Georgia Southern University's ("GSU") campus. 631 F.3d at 1225. He started speaking on a sidewalk ("Pedestrian Mall") near the rotunda and student union. *Id.* After he'd begun, a university official told him that he could not speak on campus without a permit. *Id.* at 1226–27. Bloedorn eventually filed suit, arguing that the policy violated the First Amendment. *Id.* at 1227. Ultimately, we held that GSU's Pedestrian Mall and its rotunda were a limited public forum because state-funded universities are generally not considered traditional public fora, and GSU "expressed no intention to open these areas to the general public for expressive conduct." *Id.* at 1232. We concluded that it was of

"lesser significance that the GSU sidewalks and Pedestrian Mall physically resemble municipal sidewalks and public parks" because "[t]he physical characteristics of the property alone cannot dictate forum analysis." *Id.* at 1233.

In arriving at this conclusion, we noted that the Supreme Court had found sidewalks not to constitute traditional public fora in similar circumstances. We pointed out that in *Greer v. Spock*, 424 U.S. 828, 835–38 (1983), the Supreme Court concluded that the presence of sidewalks and streets within a military base did not transform the base into a traditional public forum. *Bloedorn*, 631 F.3d at 1233. And we observed that in *United States v. Kokinda*, 497 U.S. 720, 727–28 (1990) (plurality opinion), the Supreme Court held that a sidewalk running between a parking lot and a post office was not a traditional public forum—even though it looked exactly like adjacent municipal sidewalks. *Bloedorn*, 631 F.3d at 1233. The Court reached this conclusion, we remarked, because the sidewalk there was not constructed to support expressive activity. *Id.* Rather, the government built that sidewalk only to allow postal customers to navigate between the parking lot and the post office's front door. *Kokinda*, 497 U.S. at 727.

By contrast, we distinguished GSU's sidewalks from the sidewalks at issue in *United States v. Grace*, 461 U.S. 171 (1983). In *Grace*, the Supreme Court addressed whether the sidewalks in front of its own building were a traditional public forum. The Court concluded they were. *Id.* at 180. It explained that the sidewalks were "indistinguishable from any other sidewalks in Washington, D.C.," and contained "no

separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds they have entered some special type of enclave." *Id.* at 179–80.

We found the opposite to be true of the sidewalks in *Bloedorn*: there, the sidewalks and Pedestrian Mall were "contained inside of the GSU campus," which had entrances "identified with large blue signs and brick pillars," buildings with "large blue signs," and parking lots with "signs restricting their use to GSU community members." 631 F.3d at 1234.

Perhaps not surprisingly, when we applied *Bloedorn* the first time Keister's case reached us, we arrived at the same conclusion about the University of Alabama Sidewalk as *Bloedorn* did for the GSU sidewalk at issue there. *Keister*, 879 F.3d at 1290–91. We noted that, in both cases, the University did not intend to open the sidewalks for non-student use. *Id.* at 1290. In both cases, too, we identified objective indicia showing that the sidewalks were on campus, and they were distinguishable from other municipal streets, unlike the sidewalks in *Grace*. *Id.* at 1291. We pointed out, for example, in the University's case, that the Sidewalk was in the "heart" of campus and was surrounded by University buildings and "numerous, permanent, visual indications that the sidewalks are on [University] property including landscaping fences and [University] signage." *Id.* at 1291. In other words, we determined, the Sidewalk here, like GSU's at issue in *Bloedorn*, was clearly inside a special enclave—the University's campus. *Id.*

Now, after discovery, Keister argues that new facts require the conclusion that the Sidewalk is a traditional public forum. He claims that new evidence reveals that the Sidewalk is not in the "heart" of campus, after all, but rather is a simple municipal sidewalk that the City of Tuscaloosa owns. In Keister's view, city ownership renders the Sidewalk a traditional public forum as a matter of law. Keister also insists that the appearance and function of the Sidewalk confirm that it is a traditional public forum. We are not persuaded.

We begin with Keister's claim that new facts alter the analysis. In Keister's view, the Sidewalk is not a part of campus. Keister contends that campus cannot be viewed as a single, uninterrupted entity because private businesses and non-University property appear next to and among University property, so it is impossible to locate the "heart" of campus. He also argues that the Sidewalk is not inside a "special enclave" because unlike with the sidewalks in *Bloedorn*, no signs, pillars, or other markers near the Sidewalk indicate to someone that they have entered campus. Instead, Keister contends the Sidewalk is indistinguishable from the City sidewalks adjoining it. In insisting that the Sidewalk is not a part of campus, Keister relies on *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012), and *Brister v. Faulkner*, 214 F.3d 675, 681–83 (5th Cir. 2000), where the courts found the sidewalks there to be traditional public fora.

We disagree that the expanded record warrants the conclusion that the Sidewalk here is a traditional public forum. For starters, we easily conclude that the Sidewalk where Keister wants to speak is on campus.

It's just a block from the Quad—the center of campus. And it lies immediately in front of Russell Hall—home to the University's history department. Even Keister conceded during his deposition that he believed Russell Hall and the grounds in front of Russell Hall were part of the University and were maintained by it. The buildings across the street from the Sidewalk are also University buildings. On the northeast corner of the Intersection, a parking lot is explicitly limited to University-affiliated individuals. Streetlamps by the Sidewalk boast University banners, and the street signs are inscribed with the University's script "A" logo. A chain-linked fence that often surrounds the University's campus also borders the Sidewalk around the Intersection.

On top of that, the University controls and maintains the Sidewalk. It shovels snow there, and its police department is responsible for responding to incidents on that spot. And though we assume the City owns the Sidewalk, the evidence shows that it unambiguously granted the University permission to maintain and repair the sidewalks (including the Sidewalk) on University Boulevard. Indeed, no evidence shows that the Sidewalk has ever been treated as anything other than part of a college campus. In short, Keister's fact-based arguments provide no basis for altering the forum analysis from our first opinion.

Nor do his legal arguments. Regardless of where the sidewalk may end,[8] whether a sidewalk is owned by a city has never been the beginning and end of the forum analysis. Perhaps for this reason, Keister cites

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[8] *See* Silverstein, *supra*, note 2.

no case that stands for the proposition that sidewalks are traditional public fora *because* the government owns them. In fact, in Keister's first appeal, we dismissed another flavor of this *per se* argument: that "because the intersection is open as a public thoroughfare, it is *per se* a traditional public forum." *Keister*, 879 F.3d at 1291.

Keister's claim that municipal ownership is dispositive also makes little sense in the forum-analysis context, given that the government owns all property we evaluate under that framework. *Walker*, 576 U.S. at 215 (explaining that forum analysis is used "to evaluate government restrictions on purely private speech that occurs on government property"). If government ownership were the deciding factor, then we would not need to perform forum analysis to differentiate among different types of government property. And in any case, even if the Sidewalk were owned by the University (instead of the municipality), the University is still a public entity. So if Keister were correct, his rule would require the conclusion that the Sidewalk is a public forum even without considering whether the City owned the Sidewalk. But as we have explained, Keister is mistaken: the mere fact that the government may own the property does not determine the type of forum the property presents.

Keister's argument that the particular government owner drives the outcome of the forum analysis fails for similar reasons. To be sure, as Keister submits, the Supreme Court has held that public sidewalks that are operated by a "government proprietor" like a military base, *Greer*, 424 U.S. at 836–40, or a post office, *Kokinda*, 497 U.S. at 730, are limited public

fora. And it has acknowledged in *Kokinda* that "governmental actions are subject to a lower level of First Amendment scrutiny" when the government is acting as a "proprietor, to manage its internal operations." 497 U.S. at 725 (cleaned up).

But again, the Supreme Court has not created a *per se* rule that sidewalks are traditional public fora simply because they are owned by a municipality (as opposed to a different government owner). Instead, and as we have emphasized, forum analysis requires us to consider the location, purpose, and traditional use of a piece of government property—whoever the governmental owner may be. *Bloedorn*, 631 F.3d at 1233.

Here, though we accept for purposes of this appeal that the City owns it, the Sidewalk—with its location immediately in front of and across from two University buildings—functions as a part of the University. And as we have noted, the University maintains the Sidewalk and is responsible for its upkeep. Even Keister acknowledges that the University could enforce its Policy on the Sidewalk. Given the University's control over the Sidewalk, it's the *University's* intent that matters with respect to that property. And there's no question that the University does not intend to open the Sidewalk up to unchecked expressive activity by the public at large.

Finally, Keister's reliance on the out-of-circuit cases *McGlone* and *Brister* is misplaced. In those cases, the sidewalks at issue were clearly municipal sidewalks that abutted campus. *McGlone*, for example, described them as "perimeter sidewalks" outside of campus. *McGlone*, 681 F.3d at 732–33. And

Brister emphasized that "no indication or physical demarcation" told an individual that the sidewalks were part of the University of Texas campus and not just city sidewalks. *Brister*, 214 F.3d at 681–83. Here, though, the Sidewalk is just as unambiguously within campus. That a sprinkling of private businesses sit a few blocks east of the Intersection does not change this. Anyone approaching the Intersection from any direction encounters numerous school buildings and signage plainly signaling that they are within a college campus, and not just on a city street.

In sum, we conclude that the Sidewalk on the northeast corner of the Intersection is a limited public forum.

C. Keister has standing to challenge the University's Policy

The University makes its argument that Keister lacks standing contingent on our conclusion that the Sidewalk is a limited public forum. So now that we have determined that the Sidewalk is, in fact, a limited public forum, we interrupt our merits analysis to consider Keister's standing.

Our Constitution separates legislative, executive, and judicial powers among our three corresponding branches of government, so that no one branch has too much power. Under the separation-of-powers scheme and as we have noted, the Constitution authorizes the courts to hear only "[c]ases and [c]ontroversies." U.S. Const., Art. III. Standing doctrine helps to identify which matters fall within those bounds. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). To enjoy standing, a litigant must show all the following: (1) he

"suffered an injury in fact that is concrete, particularized, and actual or imminent;" (2) the defendant "likely caused" his injury; and (3) judicial relief would likely redress his injury. *TransUnion*, 141 S. Ct. at 2203.

The gist of the University's position is that, on this record, Keister's injury cannot be redressed by a favorable ruling. More specifically, the University asserts that the determination that the Sidewalk is a limited public forum means that Keister would necessarily have to obtain a permit at some point to publicly speak there.[9] But Keister testified he would never apply for a permit before speaking on campus, no matter how easy the process. Because Keister refuses to seek a permit, the University reasons, he would never be able to take advantage of any favorable decision here based on a finding that the Sidewalk is a limited public forum, so his claim is not redressable. We disagree.

As an initial matter (and as we have pointed out), Keister seeks nominal damages to redress the injury he claims to have suffered to his First Amendment rights when University employees instructed him to stop preaching on University property. That checks the redressability box to establish standing, since "for the purpose of Article III standing, nominal damages provide the necessary redress for a complete violation of a legal right." *Uzuegbunam*, 141 S. Ct. at 802. To put a finer point on it, if we conclude that the University's Policy was unreasonable for First

[9] If the Sidewalk were a traditional public forum, it could be subjected to only content-neutral time, place, and manner restrictions.

Amendment purposes, then Keister suffered a constitutional injury when the University enforced the Policy against him on March 10, 2016. As a result, he could obtain nominal damages, even if he never seeks a permit.

Not only that, but Keister also had standing to seek declaratory and injunctive relief. After all, we assess standing "as of the time the complaint is filed." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) (citation and quotation marks omitted). And when Keister filed his complaint and right up until the University superseded the old Policy with the New Policy well into this litigation, we could have enjoined the University from enforcing its Policy if we concluded that the Policy was unreasonable or not viewpoint neutral. That is the exact relief Keister sought in his amended complaint. While the University argues that Keister would have had to be "willing to accept a permit at some point in the future," that was not necessarily the case before the University revised the old Policy. Had we enjoined the Policy, that itself was the redress Keister sought.

In short, Keister has standing to challenge the University's Policy.

D. The University's Policy is constitutional

With that resolved, we return to our merits analysis. When we last left off, we had determined that the Sidewalk is a limited public forum. For that reason, the University can exclude speakers who seek "to address a topic not encompassed within the purpose of the forum" or who are "not a member of the class of speakers for whose especial benefit the forum

was created." *Cornelius*, 473 U.S. at 806.

But the University's power to limit expression is not boundless. Rather, restrictions on speech in a limited public forum still must be viewpoint neutral and reasonable. *Bloedorn*, 631 F.3d at 1235. The reasonableness standard is not demanding; a restriction on expression is reasonable even if it is not "the most reasonable or the only reasonable limitation" on expression. *Cornelius*, 473 U.S. at 808. At a minimum, a restriction must simply be "reasonable in light of the purpose which the forum at issue serves." *Bloedorn*, 631 F.3d at 1235.

Keister challenges three aspects of the University's Policy. First, he asserts that the Policy banned leafletting, which the Supreme Court has held is not a reasonable restriction on speech in a limited public forum. Second, he contends that the Policy's exception for "casual recreational or social activities" was vague and would lead to arbitrary censorship by University officials. And third, he takes issue with the ten-working-day advance-notice requirement as unreasonable.

1. Leafletting

We begin with leafletting. As it turns out, the University's Policy, in fact, allowed outside speakers to distribute leaflets if they had a Permit. A Permit, though, required a University-affiliated sponsor. Keister claims that requirement imposed an effective ban on leafletting because he could not obtain a sponsor. For its part, the University responds that requiring a Permit and sponsor for leafletting was not tantamount to a "ban," but rather a reasonable time, place, and manner restriction.

We conclude the Policy provisions on leafletting were reasonable. Courts have upheld regulations in limited public fora that require speakers to obtain permission before distributing leaflets. In *Greer*, for example, the military prohibited the distribution of leaflets and other literature in Fort Dix without prior approval from the commanding general. 424 U.S. at 831. The Supreme Court upheld the regulation because the commanding general could deny a request for leafletting only if he believed that it would be a danger to the "loyalty, discipline or morale" of the military, and he could not do so "simply because he [did] not like [the leaflet's] contents, or because it [was] . . . even unfairly critical of government policies or officials." *Id.* at 840 (cleaned up). Though the Court recognized the possibility that a commander could, in the future, apply this requirement "irrationally, invidiously, or arbitrarily," it observed that "none of the respondents in the . . . case even submitted any material for review." *Id.*

The University used a similar permission scheme for leafletting in this case. Outside speakers who wished to distribute leaflets on campus were required to seek permission from the University by obtaining a sponsor and applying for a Permit. The University would then approve a properly submitted request for a Permit unless certain neutral and objective conditions were present. For example, the University could deny an application if the proposed location were unavailable at the time requested or if the event would interfere with regular academic and student activities.

Keister contends that the Policy's sponsor

requirement in this case is more like the problematic policy in *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 672 (1992), where the Court struck down a ban by the Port Authority on leafletting at New York City airports. We think not.

As Justice O'Connor explained in her concurrence in *Lee*, the Port Authority's policy laid down an absolute ban on leafletting. *Id.* at 691 (O'Connor, J., concurring in judgment). But here, the University's Policy allows leafletting—it just requires a permit. The University has more than 38,000 students and nearly 7,000 staff members for a permit-seeker to choose from to serve as an affiliate—roughly 45,000 chances to obtain a permissible sponsor. And as in *Greer*, the Policy does not allow the University to deny a permit simply because it disagrees with the content of the speaker's speech. In sum, the Policy operates similarly to the permission scheme in *Greer*.[10] And it is likewise constitutional.

2. "Casual Recreational or Social Activities" Exception

Keister also asserts that the Policy's permit exception for "casual recreational or social activities"

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[10] Keister also cites to a nonbinding decision, *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004), to support his argument that requiring a permit for leafletting is tantamount to a ban on leafletting. But *Parks* involved a restriction on leafletting in a public forum, so it was subject to strict scrutiny. The permitting scheme here applies to a *limited* public forum and therefore need be only reasonable. In a limited public forum, the government may exclude speakers who are "not a member of the class of speakers for whose especial benefit the forum was created." *Cornelius*, 473 U.S. at 806.

is unconstitutionally vague and violates due process. As Keister sees it, the University's answer that the terms "casual recreational or social activities" are "basic, [and] well-understood" is an "I know it when I see it approach" that gives University officials too much power to decide what falls within those categories and therefore invites officials to burden disfavored speech by classifying it as not recreational or casual. This argument fares no better than Keister's leafletting contention.

Under due-process principles, a law or regulation is "void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Unconstitutionally vague laws fail to provide "fair warning" of what the law requires, and they encourage "arbitrary and discriminatory enforcement" by giving government officials the sole ability to interpret the scope of the law. *Id.* at 108–09. The First Amendment context amplifies these concerns because an unconstitutionally vague law can chill expressive conduct by causing citizens to "steer far wider of the unlawful zone" to avoid the law's unclear boundaries. *Id.* at 109. To prevent these problems, due process "insist[s] that laws give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108. Yet despite this concern, we do not "expect mathematical certainty from our language." *Id.* at 110.

The phrase "casual recreational and social activities" is not unconstitutionally vague. A person of ordinary intelligence understands what these terms mean. Indeed, the Policy's exception for "casual

recreational and social activities" is no vaguer than the Trenton, New Jersey, ordinance in *Kovacs v. Cooper*, 336 U.S. 77 (1949), which prohibited "loud and raucous noises." And the Supreme Court upheld that ordinance. As the Court explained, though the words "loud and raucous" "are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Id.* at 79. So too with "casual recreation and social activities."

Not only that, but we do not read the phrase "casual recreational and social activities" in isolation. Rather we consider it within the context of the Policy as a whole. *See, e.g.*, *Pine v. City of West Palm Beach*, 762 F.3d 1262, 1265 n.2, 1275 (11th Cir. 2014) (concluding that a sound ordinance that prohibited "unnecessary noise or amplified sound" was not unconstitutionally vague because, viewed within the context of the ordinance as a whole, it was clear that the phrase "prohibit[ed] only shouting and loud, raucous, or unreasonably disturbing amplified noise near health care facilities or institutions for the sick"). And the Policy's "announced purpose," *Grayned*, 408 U.S. at 112—furthering the University's education mission, responsibly allocating its scarce resources, and protecting the safety and security of the University's property and students—further informs the meaning of the phrase.

With these considerations in mind, we have no difficulty concluding that Keister's actions do not fall within the "casual recreational and social activities" exception. Keister and his companion set up a display with signs, preached with an amplifier for a time,

distributed literature, and used short and loud bursts of oration to draw attention. These actions do not fall within a common-sense understanding of "casual recreational and social activities." In fact, some of these actions—leafletting and using signs—are expressly covered by the Policy and therefore explicitly do not constitute "casual recreational or social activities." And it's obvious that preaching with an amplifier and speaking loudly for the purpose of drawing attention, by definition, can interfere with the University's educational mission by disrupting ongoing classes and school activities.

As for one-on-one conversations or prayer, as the district court noted, "[d]iscussing sports or religion while strolling through campus with a friend" does not require a permit. But Keister was not just having a conversation with a friend or quietly praying; he was using loud oration to try to engage passersby on their way to class.

Nor do we agree with Keister that *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), requires the conclusion that the "casual recreational and social activities" exception is impermissibly vague. There, Los Angeles International Airport (the "Airport") adopted a resolution that banned all First Amendment activity. *Id.* at 574–75. The Airport tried to save the ban by arguing that "airport related" expression was excepted. *Id.* at 576. The Supreme Court rejected the Airport's argument. *Id.* It reasoned that "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be 'airport related,' but is still protected speech

even in a nonpublic forum." *Id.* And while the Court concluded that "[t]he line between airport-related speech and nonairport-related speech is, at best, murky[,]" the Airport could not have described what it believed qualified as "airport-related" speech more vaguely: "an individual who reads a newspaper or converses with a neighbor at [the Airport] is engaged in permitted 'airport-related' activity because reading or conversing permits the traveling public to 'pass the time.'" *Id.*

The Supreme Court's holding has little application here for three reasons. First, unlike the Airport's resolution, the University's Policy does not ban all First Amendment activity; rather, it requires permitting of public-speaking events. Second, unlike with the phrase "casual recreational and social activities," which has a commonly understood meaning, the phrase "airport-related" enjoys no such common understanding, and to the extent that it carries a common meaning, that meaning is clearly overly narrow to encompass permissible speech in an airport. Third, to the extent the Airport attempted to define the term "airport-related" speech, it did so in the litigation and uniquely for purposes of the Airport resolution only. So the term "airport-related" had no common meaning. And even then, the Airport's definition—First Amendment activity that allows the traveling public to "pass the time"— was broad enough to include virtually anything, so it could not provide appropriate notice to those who wished to engage in First Amendment activity at the Airport.

But the phrase "casual recreational and social activities" requires no special definition because its

meaning is sufficiently clear, especially in the context of the Policy and its purpose. A person with "ordinary intelligence" knows what kind of activities qualify as "casual recreational and social activities" and what do not. And that is even more the case when a person considers what activities can interfere with the school setting and what will not. It is also not practical to expect a university to draft a policy of this type to identify by explicit description each and every activity that exists that requires a permit.

In a nutshell, the Policy's exception for "casual recreational and social activities" is not unconstitutionally vague, and Keister's actions clearly did not qualify for this exception.

3. Advance-Notice Requirement

Finally, Keister challenges the University's advance-notice requirement. The University's Policy stated that "applicants for use of the Grounds should request permission for such use ten (10) working days prior to the Event."

Keister complains that this notice period is unreasonably long. He notes that it is much longer than the advance-notice requirements upheld in *Bloedorn* and other cases, and he asserts that the University does not have a particular reason for having such a lengthy notice period. Though Keister acknowledges that under the Policy, applications for a permit could be approved in as few as three days, he concludes that's irrelevant. According to Keister, the University is free to bar any application that is not submitted ten working days in advance because it can deny any application not "properly made."

The University responds that submitting applications ten working days in advance is "best practice" but not required. It points out that the Policy expressly provides that Keister's application could have been approved in as few as three days because it related to a smaller event. The University also points out that Keister could have planned his trip in advance, since he does that with churches. Finally, the University argues that it had good reasons for the notice period: it needs time to make sure that a space is available and that it will not interfere with University operations, like ongoing classes in Russell Hall.

As we suggested at the preliminary-injunction stage, a ten-working-day advance notice period is likely excessive. *Keister*, 879 F.3d at 1288 n.4 ("[T]his Court does have some concerns about whether UA's 10 working day advance notice requirement would be reasonable for events that do not require multiple department approvals[.]"). Ten working days is also much longer than the advance notice periods upheld in other cases. *See Bloedorn*, 631 F.3d at 1240 (upholding a 48-hour notice requirement); *see also Bowman v. White*, 444 F.3d 967, 982 (8th Cir. 2006) (upholding a three-day notice requirement).

But the Policy did not *require* an application to be submitted ten working days before an event. Rather, it instructed that an application "should" be submitted ten days ahead of time—and even then only to "facilitate the review by all the different University departments that have responsibility for the various aspects of an Event (e.g., tents, food service, UAPD, electrical service, etc.)." In fact, this record contains

no indication that the University ever construed the Policy to require a ten-day lead time.

On the contrary, under the express terms of the Policy, Keister could have submitted his application as few as three working days in advance and still obtained a permit. His simple event— standing on a sidewalk and speaking to passersby—did not involve multiple University departments. Nor did it require tents, food service, the University's police department, or electrical service—the kinds of things for which the Policy's advisory ten-day window was designed. Of course, Keister never actually applied for a Permit, but there's no basis to think the University would have taken more than three days to approve one if he had.

The cases that Keister relies on do not affect our analysis. The advance-notice provisions in both *Bloedorn* and *Bowman* applied to designated public forums, so they had to satisfy strict scrutiny. *Bloedorn*, 631 F.3d at 1240 (assessing whether the notice period was "narrowly tailored"); *Bowman*, 444 F.3d at 982 (concluding that the advance notice period was sufficiently "narrowly tailored"). But here, the University applied its advance-notice provision to a limited public forum, so the provision had to be only reasonable. Other courts have upheld a seven-day notice requirement in a limited public forum. *Sonnier v. Crain*, 613 F.3d 436, 445 (5th Cir. 2010), *opinion withdrawn in part on reh'g*, 634 F.3d 778 (5th Cir. 2011). So certainly three days—the amount of time that would have been required to process a Permit in Keister's situation—is not excessive.

And that is particularly so, given the University's reasons for requiring that waiting period. The

University receives thousands of speaking requests each year. For each speaker, the University must ensure that the space the speaker seeks is available and that the speaker will not interfere with classes or other University operations. Plus, as other courts have recognized, universities are "less able than a city or other entity . . . to deal with significant disruption on short notice." *Bowman*, 444 F.3d at 982.

The University's Policy must be reasonable, not perfect. Here, the Policy satisfies that requirement. It phrases the ten-day advance-notice period in terms of "should," not "must," and the record contains no evidence that the University has rejected an application simply because it was not submitted ten days before the event. The University's reasons for the advance-notice requirement are also reasonable, and the Sidewalk is a limited public forum. Besides this, the Policy permits the fast-tracking of a Permit if an event relates to a current issue or responds to another event. Under these circumstances, we do not think the University's three-day notice requirement is unconstitutional.

IV.

For the reasons we have explained, we affirm the district court's entry of summary judgment. The University's motion to dismiss this appeal as moot is DENIED.

AFFIRMED.

Appendix B

[Date Filed: 05/26/2022]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12152-CC

RODNEY KEISTER,

Plaintiff-Appellant,

versus

STUART BELL, in his official capacity as President of the University of Alabama,
JOHN HOOKS, in his official capacity as Chief of Police for the University of Alabama Police Department,
MITCHELL ODOM, individually and in his official capacity as Police Lieutenant for the University of Alabama Police Department,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ROSENBAUM, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

Appendix C

Case 7:17-cv-00131-RDP Document 74 Filed 05/19/20

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

FILED
2020 May-19 PM 03:02
U.S. DISTRICT COURT
N.D. OF ALABAMA

RODNEY KEISTER,	}	
	}	
Plaintiff,	}	
	}	**Case No.:**
v.	}	**7:17-cv-00131-RDP**
	}	
STUART BELL, et al.,	}	
	}	
Defendants.	}	

MEMORANDUM OPINION

This case is before the court on the parties' cross Motions for Summary Judgment. (Docs. # 59, 60). The motions are fully briefed. After careful consideration, and for the reasons explained below, the court finds that Defendants' Motion for Summary Judgment (Doc. # 59) is due to be granted, and Plaintiff's Motion for Summary Judgment (Doc. # 60) is due to denied.

I. Background[1]

The facts of this case have been briefed (repeatedly) by the parties. This court (*see* Docs. # 22, 49), and the Eleventh Circuit, *Keister v. Bell*, 879 F.3d 1282, (11th Cir. 2018), *cert. denied*, 139 S. Ct. 208 (2018), have addressed requests for interim relief. Although the material facts that form the basis of Plaintiff's Complaint have not substantially changed, the parties, after conducting extensive discovery, have presented their fact submissions and legal arguments. Thus, the court once again dives in and reviews the undisputed Rule 56 facts.

Plaintiff Rodney Keister ("Keister") is a traveling Christian missionary, who is personally dedicated to glorifying God through the public sharing of the gospel in public areas throughout the nation. (*Id.* at ¶¶ 12-13). His basic message is that whoever trusts in Jesus Christ will be saved from their sins. (*Id.* at ¶ 25). As part of his ministry, he presents the merits of Christianity by preaching, handing out religious literature ("gospel tracts"), and engaging people in one-on-one conversations and prayer. (*Id.* at ¶¶ 17-19). Keister has a sincere desire to reach out to college-aged students, and he regularly visits college and

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[1] The facts set out in this opinion are gleaned from the parties' submissions and the court's own examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of the nonmoving party. *See Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002). These are the "facts" for summary judgment purposes only. They may not be the actual facts that could be established through live testimony at trial. *See Cox v. Adm'r U.S. Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1400 (11th Cir. 1994).

university campuses. (*Id.*). He typically conveys his message on public sidewalks. (*Id.* at ¶ 15). He generally does not draw large crowds, nor does he intend to do so. (*Id.* at ¶¶ 21, 22). He does not hinder pedestrian traffic, solicit or ask for money, harass passersby, or litter. (*Id.* at ¶¶ 22, 23). Keister is sometimes accompanied in his sidewalk evangelism by one or two friends. (Doc. # 39 at ¶¶ 24).

On March 10, 2016, Keister arrived at the University of Alabama ("University" or "UA"). (*Id.* at ¶ 29). The University is a state-funded public university located in Tuscaloosa, Alabama. (*Id.*). Around 4:00 p.m., Keister and a companion began speaking with passersby and distributing literature on the University's campus. (*Id.* at ¶¶ 45, 54). Keister's companion briefly used a megaphone while speaking, but Keister did not. (Doc. # 59-4 at 20-21). The duo were located on a sidewalk on UA's campus next to 6th Avenue, near the corner of Smith Hall and Lloyd Hall. (Doc. # 39 at ¶ 52). Shortly after Keister and his companion began their sidewalk evangelism, they were approached by the campus police and a University representative, who informed them that they could not continue their activities because University policy required a grounds use permit before engaging in such expressive conduct. (*Id.* at ¶¶ 55-57). The University representative confirmed that the "campus is open to the public, and Keister was allowed to be there, but he could not engage in his preferred forms of expression on the University's campus without first obtaining a [grounds use] permit." (*Id.* at ¶ 60).

Because Keister and his companion did not have a grounds use permit, they moved to the sidewalk at the intersection of University Boulevard and Hackberry Lane (the "intersection"). (*Id.* at ¶¶ 60-65). Keister testified that he picked this spot for two reasons. First, he believed it was a public city sidewalk, as opposed to UA property (where he would be required to apply for and receive a grounds use permit). (*Id.*). Second, Keister contends that while speaking with a campus police officer on 6th Avenue, Keister specifically proposed that he move locations and preach on the sidewalks at the University Boulevard and Hackberry Lane intersection. (*Id.*). In response, the campus police officer stated, "[o]n that corner, you're good." (*Id.* at ¶ 68).

Shortly after arriving at the intersection of University Boulevard and Hackberry Lane, Keister was again approached by UA campus police, who informed him that the intersection (and its contiguous sidewalk) were indeed part of UA's campus, and UA's grounds use policy applied at that location as well. (*Id.* at ¶ 73). Fearing arrest for criminal trespass, Keister left UA's campus and has not returned.[2] (*Id.* at ¶¶ 74). Keister testified that he "fervently desires" to return to the public sidewalks next to public streets flowing

[2] Keister's Amended Complaint states that "[he] along with [his companion], packed up and walked back to their vehicle because it was getting late in the day." (Doc. # 39 at ¶ 72). In his deposition, Keister stated that he and his companion left the corner because the weather "turned" and it started raining. (Doc. # 59-4 at 32-33). Although the reason Keister and his companion began packing up is contested, it is undisputed that the duo were approached by a campus police officer and threatened with arrest for trespass, departed, and have not returned.

through UA's campus. (*Id.* at ¶¶ 77, 86). Specifically, Keister wishes to return to the sidewalks situated at the corner of University Boulevard and Hackberry Lane and share his message with UA students and others affiliated with the University. (*Id.*).

On January 25, 2017, Keister filed his complaint in this court alleging violations of 42 U.S.C. §§ 1983 and 1988, and asserting that UA's grounds use policy violates the First Amendment's free speech clause and the Fourteenth Amendment's due process clause. (Doc. # 1). The next day Keister filed a Motion for Preliminary Injunction. (Docs. # 6, 7). In his Motion, Keister argued the University's ground use policy violates the First Amendment, and that the University should be enjoined from enforcing its ground use policy because the intersection of University Boulevard and Hackberry Lane is a traditional public forum and the policy cannot withstand scrutiny. (*Id.*). This court set an expedited briefing schedule and held a preliminary injunction hearing. (Docs. # 8, 16). After the hearing, this court issued a written opinion and denied Keister's Motion. (Docs. # 22, 23). In its Memorandum Opinion, the court determined that the intersection was a limited public forum, and the grounds use policy satisfied the requisite level of scrutiny. (Doc. # 22).

Keister appealed the ruling. (Doc. # 26). The Eleventh Circuit affirmed, holding that this court properly determined the intersection at issue is a limited public forum within UA's campus. *Keister*, 879 F.3d at 1291. Keister filed a petition seeking rehearing *en banc*, but his request was denied. Keister

then petitioned the Supreme Court for a writ of certiorari. That petition was also denied.

After the Supreme Court denied certiorari, the parties continued litigating in this court. Keister filed an amended complaint, again alleging violations of both the First Amendment and the Due Process Clause. (Doc. # 39). In response, Defendants filed a Motion to Dismiss Keister's Amended Complaint (Doc. # 41), which the court denied. (Docs. # 49, 50). On October 10, 2019, the parties filed cross Motions for Summary Judgment. (Docs. # 59, 60). Those have been fully briefed and are now ripe for decision.

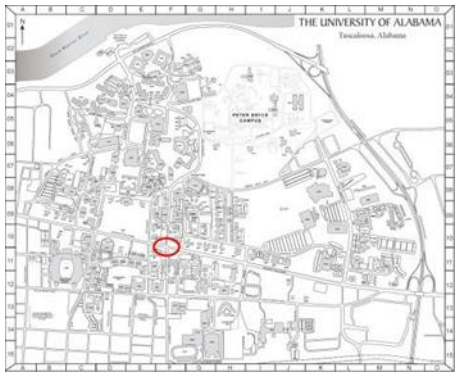
A. The Intersection and Sidewalk

University Boulevard and Hackberry Lane are city streets that run through and beyond the perimeter of UA's campus. (Doc. # 39 at ¶¶ 34-36). Sidewalks abound both University Boulevard and Hackberry Lane. (*Id.* at ¶ 37). At the preliminary injunction stage, the district court found that the sidewalks were located in the "heart" of UA's campus. (Doc. # 22 at 3). In its opinion affirming this court's denial of Keister's Motion for Preliminary Injunction, the Eleventh Circuit stated:

> Because Mr. Keister pled in his Complaint that the intersection is within UA campus's bounds, we need not resolve the parties' disputes as to who maintains and owns the sidewalks at issue. What is clear is that the intersection is within UA's campus and UA treats it as such, as the district court found. And that is all that matters for our purposes today. *See Bloedorn*, 631 F.3d at 1233 (11th Cir. 2011) ("Publicly owned or operated

> property does not become a public forum simply because members of the public are permitted to come and go at will. Instead, we look to the traditional uses made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics.") (internal quotations and citations omitted)).

Keister, 879 F.3d at 1290 n.5. On remand, Keister amended his complaint and now claims that the intersection at the intersection of University Boulevard and Hackberry Lane is *near* UA's campus, but not on it, inside it, or a part of it. (Doc. # 39 at ¶¶ 28-44). The below map shows the circled location of the intersection in reference to the outer limits of UA's campus:



(Doc. # 59-2 at ¶ 34, Exh. A). Further, Keister claims that newly presented evidence shows that the corner sidewalks are city property, not UA property. (Doc. # 60-8 at 4). Defendants, of course, dispute that the city

owns the sidewalks. (Doc. # 63 at 15-16).[3] Although the parties dispute whether the city or the University owns the sidewalks at the intersection, it is undisputed that they are maintained by the University. (Doc. # 22 at 3 n.4; Doc. # 60-7; Doc. # 63 at 15-16).

The University is not fenced-off, gated, or otherwise self-contained. (Doc. # 39 at ¶¶ 30, 31). The intersection at issue is surrounded by UA buildings and is approximately one block from UA's famous Quad. (Doc. # 59-2 at ¶ 34). Visible from the intersection are numerous UA facilities and landmarks. (*Id.* at ¶ 35). Russell Hall, where Keister was preaching, sits at the northeast corner of the intersection. (*Id.*). Gallalee Hall and a UA Parking lot (with a sign restricting its use to UA faculty and staff) occupy its northwest corner. (*Id.*). The southwest corner includes Farrah Hall, and its adjacent UA-only parking lot. (*Id.* at ¶ 36). A park sits at the intersection's southeast corner. (*Id.* at ¶ 34, Exh. D-Q). About a block away from the intersection on Hackberry Lane, there are a smattering of private businesses (namely, a PNC Bank and an Arby's) mixed in among the UA buildings. (Doc. # 59-4 at ¶¶ 14-19). There are streetlamps at the intersection, and University signs hang from the streetlamps. Doc. # 59-2 at ¶ 39). The street signs at the intersection display the script "A" logo of the university. (*Id.* at ¶ 37). Landscaping fences, which run throughout UA's

[3] Although ownership of the sidewalks at issue is disputed, the dispute is not material. *See infra* pp. 11-12.

campus, are on each corner of the intersection. (*Id.* at ¶ 38).

B. UA's Grounds Use Policy

UA's grounds use policy is intended to "preserve[] the primacy of the university's teaching and research mission" and "facilitate the responsible stewardship of institutional resources and to protect the safety of persons and the security of property." (Doc. # 59-2 at 9). The policy governs how, when, and where those who are unaffiliated with the University may speak publicly on campus. (*Id.*). Sidewalks are specifically included in the definition of "grounds" by the University. (*Id.* at 10).

To obtain approval to speak publicly at the University, an unaffiliated person must: (1) be sponsored by or affiliated with a University academic or administrative department or registered student organization; and (2) complete a grounds use permit (sometimes referred to as a "GUP"). (*Id.* at 9-10). The policy states that applicants for a GUP "should request permission for such use ten (10) working days prior to the [e]vent."[4] (*Id.* at 12). According to the

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[4] The University does make an exception to the ten-day advance notice policy for "counter-events" and "spontaneous events." (Doc. # 59-2 at 12). A counter-event is defined by the policy as one that is "occasioned in response to an Event for which a GUP has been issued[.]" (*Id.*). A spontaneous event is defined as one that is "occasioned by news or issues coming into public knowledge within the proceeding two (2) calendar days[.]" (*Id.*). For both of these events, "an expedited request for a GUP may be made by a University affiliate" and "the University will attempt to accommodate and provide access to the University Affiliate within twenty-four (24) hours, to an area of the Grounds which is available and which does not interfere with regular academic

University, the notice requirement is necessary "to facilitate the review by all the different University department that have responsibility for the various aspects of an [e]vent (*i.e.*, tents, food service, UAPD, electrical services, etc.)[.]" (*Id.*). The Policy provides that, "[i]f an [e]vent does not involve factors that require multiple University department approvals, approval may be given in as few as three (3) days, if the GUP form is filled out completely and accurately."[5] (*Id.*).

The University will approve a GUP application unless there is reason to believe that one or more of the following are present:

> a) The applicant, if a student or a recognized student organization, is under a disciplinary penalty withdrawing or restricting privileges made available to the student or a recognized student organization[ ], such as use of a facility.
>
> b) The proposed location is unavailable at the time requested because of events previously planned for that location.
>
> c) The proposed date or time is unreasonable given the nature of the Event and the impact it would have on University resources.
>
> d) The Event would unreasonably obstruct

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programs or scheduled events and programs." (*Id.*). Keister's desired expression does not constitute a "counter-event" or a "spontaneous event." Thus, Keister does not qualify for an expedited request for a grounds use permit.

[5] The average approval time for a grounds use permit is 4.4 days. (Doc. # 59-7).

pedestrian or vehicular traffic.

e) The Event would prevent, obstruct, or unreasonably interfere with the regular academic, administrative, or student activities of, or other approved activities at, the University.

f) The Event would constitute an immediate and actual danger to University students, faculty, or staff, or to the peace or security of the University that available law enforcement officials could not control with reasonable effort.

g) The University Affiliate on whose behalf the application is made has on prior occasions:

1) Damaged University property and has not paid in full for such damage, or

2) Failed to provide the designated University official with notice of cancellation of a proposed activity or Event at least two (2) University working days prior to a scheduled activity or Event.

(*Id.* at 13). If a GUP application is denied, there is an appeal process. (*Id.* at 14-15). Keister has not availed himself of the grounds use policy or the appeals process, nor does he plan to do so. (Doc. # 59-4 at 46).

II. Standard of Review

Under Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323. Once the moving party has met its burden, Rule 56 requires the non-moving party to go beyond the pleadings and -- by pointing to affidavits, or depositions, answers to interrogatories, and/or admissions on file -- designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

The substantive law will identify which facts are material and which are irrelevant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *See Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1314 (11th Cir. 2007); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See id.* at 249.

When faced with a "properly supported motion for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations." *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997). As *Anderson* teaches, under Rule 56(c) a plaintiff may not simply rest on her allegations made in the complaint; instead,

as the party bearing the burden of proof at trial, she must come forward with at least some evidence to support each element essential to her case at trial. *See Anderson*, 477 U.S. at 252. "[A] party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* at 248 (citations omitted).

Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. "Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative." *Sawyer v. Sw. Airlines Co.*, 243 F. Supp. 2d 1257, 1262 (D. Kan. 2003) (citing *Anderson*, 477 U.S. at 250-51).

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "Essentially, the inquiry is 'whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Sawyer*, 243 F. Supp. 2d at 1262 (quoting *Anderson*, 477 U.S. at 251-52); *see also LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1381 (S.D. Fla. 1999) ("The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment.").

III. Analysis

The court has carefully reviewed the Rule 56 record and analyzed the parties' claims under the appropriate legal frameworks. The court has determined that the cross motions for summary judgment and Rule 56 record present three issues key issues for the court's consideration: (1) does Keister have standing to assert his claims?; (2) if so, has Keister presented evidence sufficient to show that the intersection of University Boulevard and Hackberry Lane is, in fact, a traditional public forum?; and (3) is the University's grounds use policy unconstitutional? The court addresses each issue, in turn.

A. Keister Has Standing to Pursue His Claims

At the outset, the court is required to examine whether Keister has Article III standing to bring his claims. *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1253 (11th Cir. 2009) (citing *Elend v. Basham*, 741 F.3d 1199, 1204 (11th Cir. 2006)). Defendants argue that Keister lacks standing to bring a claim for actual damages because he has not suffered an actual injury. (Doc. # 59 at 12-14). Further, Defendants claim that Keister lacks standing to challenge the reasonableness and view-point neutrality of the University's grounds use policy because Keister's proposed remedy would not redress any such alleged harm. (*Id.* at 14-17). The court disagrees.

As a threshold matter, Article III standing has three elements:

> (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Fla. Family, 561 F.3d at 1253 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1991)) (internal citations and quotation marks omitted). The burden is on Keister, as the party seeking to invoke this court's jurisdiction, to produce facts sufficient to support Article III standing. *Id.* (citing *Pittman v. Cole*, 267 F.3d 1269, 1282 (11th Cir. 2001)).

Defendants' primary argument is that Keister left the intersection at issue due to the weather, not for fear of arrest. Specifically, Defendants argue that Keister did not encounter the University police officer until after he packed up and left the intersection, due to the weather. (Doc. # 59 at 18). And when Keister did encounter the officer, he was "only told that he would be trespass[ing] if he returned." (*Id.*) (emphasis omitted). According to Defendants "[g]iven that the undisputed evidence demonstrates that [ ] Keister never suffered any 'past injury,' he lacks standing to bring his claim for actual/nominal damages." (*Id.*). Defendants are incorrect. Although the parties

dispute the reason Keister and his friend packed up their materials, it is undisputed that they encountered the officer before they left the intersection and were threatened with arrest if they returned without a permit. (Doc. # 59-4 at 42).

Keister suffered an injury-in-fact related to his ability to speak at the intersection of University Boulevard and Hackberry Lane that is both concrete and imminent. When considering a similar standing argument in the analogous case of *Bloedorn v. Grube*, the Eleventh Circuit observed that "[i]n determining whether an injury is imminent, the law 'requires only that the anticipated injury occur within some fixed period of time in the future. Immediacy, in this context, means reasonably fixed and specific in time and not too far off.'" 631 F.3d 1218, 1228 (11th Cir. 2011) (citing *Am. Civil Liberties Union of Fla., Inc. v. Miami–Dade Cnty. Sch. Bd.,* 557 F.3d 1177, 1193-94 (11th Cir. 2009)) (internal quotation marks, alterations, and citation omitted); *see also Pittman v. Cole,* 267 F.3d 1269, 1283 (11th Cir. 2001) ("[T]he injury requirement is most loosely applied—particularly in terms of how directly the injury must result from the challenged governmental action—where First Amendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced.") (internal quotation marks omitted). "Moreover, a plaintiff need not expose himself to enforcement of a law to challenge it in the First Amendment context; instead, 'an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences.'" *Bloedorn*, 631 F.3d at 1228 (citing

Pittman, 267 F.3d at 1283). But, to establish standing, "the plaintiff must show that he has an unambiguous intention at a reasonably foreseeable time to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute or rule, *and* that there is a credible threat of prosecution." *Id.* (emphasis added).

Here, Keister is an outside, unsponsored speaker who attempted to speak at multiple University locations, but was turned away from the campus because he refused to comply with the University's grounds use policy. He was told that if he returned to campus and attempted to share his message without a grounds use permit, he would be arrested for trespassing. Keister has repeatedly stated that he fervently wishes to return and share his message with UA students, but he has not been able to do so for fear of arrest. The Rule 56 record leads this court to believe that University police officers would arrest Keister if he returned to campus to speak at the intersection of University Boulevard and Hackberry Lane (or, anywhere on campus) without a grounds use permit. This is enough to establish an injury in fact that is actual, concrete, and particularized. *See Bloedorn*, 631 F.3d at 1228.

Second, there is a "causal connection" between Keister's injuries and the University's grounds use policy. Keister has stated multiple times that *but for* the policy, he would return to UA and share his message with the college-aged students and others. The only hurdle to Keister returning to UA is the grounds use policy. That is, the Rule 56 evidence

clearly permits the inference that nothing else is keeping Keister away. (*Id.*).

Finally, the court has little doubt that each of Keister's complained of injuries could be addressed by a favorable decision in this case. *Id.* (citing *Fla. Family*, 561 F.3d at 1253). In sum, the court easily concludes that Keister has standing to pursue his claims.

B. Forum Analysis

As an initial matter, the court reminds the parties that under "law-of-the-case doctrine" *Kesiter*, as a published Eleventh Circuit decision, is binding on its court. *See Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1288 (11th Cir. 2000) ("Under the law of the case doctrine, both the district court and the appellate court are generally bound by a prior appellate decision of the same case."). This means the Eleventh Circuit's conclusion that the intersection of University Boulevard and Hackberry Lane is a limited public forum, *Keister*, 879 F.3d at 1289-91, is at least presumptively binding on this court (subject, of course, to it becoming clear the Rule 56 facts are different from those in the record at the time the circuit reviewed this court's Rule 65 denial).

As the court noted in its opinion denying Defendants' 12(b)(6) Motion:

> If discovery shows that the relevant facts on which the Eleventh Circuit's decision was based were, in fact, not the real facts, then Plaintiff will of course be free to argue that the intersection is not a limited public forum. Even under the law-of-the-case doctrine, a prior

> judicial decision is not binding if, since the prior decision "new and substantially different evidence is produced." *This That And The Other Gift And Tobacco, Inc*. v. Cobb County, 439 F.3d 1275, 1283 (11th Cir. 2006) (internal quotation marks omitted). Thus, while the facts on which the Eleventh Circuit's decision was based do not appear to be subject to reasonable dispute, that does not prohibit Plaintiff from trying to show otherwise.

(Doc. # 49 at 5). Keister has tried mightily to discover and present new evidence showing the intersection at issue is a traditional public forum. (Doc. # 60-8 at 14-15). Defendants presented additional evidence refuting that claim. (Docs. # 63, 63-1, 63-2). In light of this, the court's next step is to conduct a forum analysis and consider all of the Rule 56 record evidence. (Doc # 49-5); *This That And The Other Gift*, 439 F.3d at 1283.

i. The Intersection at University Boulevard and Hackberry Lane is a Limited Public Forum

The court begins its analysis by reciting the unremarkable principle that the First Amendment does not guarantee access to property just because it is owned by the government. *Bloedorn*, 631 F.3d at 1230 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 803 (1985). Rather, the courts perform a "forum analysis" to evaluate restrictions on private speech and expression that occur on government property. *Keister*, 879 F.3d at 1288. The Supreme Court has recognized four different categories of government fora: (1) the

traditional public forum; (2) the designated public forum; (3) the limited public forum; and (4) the non-public forum. *Id.* (citing *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1223 (11th Cir. 2017)) The parties agree there are only two fora at issue here: (1) the traditional public forum, and (2) the limited public forum. *Keister*, 879 F.3d at 1288.

A traditional public forum is property that "ha[s] immemorially been held in trust for the use of the public[.]" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). The Supreme Court has restricted traditional public forum status to its "historic confines." *Walke*r, 872 F.3d at 1223 (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998)). These "historic confines" include public areas such as public streets and parks that, since "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry,* 460 U.S. at 45. "[A] time, place, and manner restriction can be placed on a traditional public forum *only* if it is content neutral, narrowly tailored to achieve a significant government interest, and "leave[s] open ample alternative channels of communication." *Bloedorn,* 631 F.3d at 1231 (citing *Perry,* 460 U.S. at 45) (emphasis in original).

By comparison, a limited public forum "is established when governmental entities open their property but limit its use to 'certain groups or dedicate[ ] [it] solely to the discussion of certain subjects.'" *Bloedorn*, 631 F.3d at 1231 If a space is classified as a limited public forum, the government

may exclude a speaker "if he is not a member of the class of speakers for whose especial benefit the forum was created." *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49). "Indeed, implicit in the idea that a government forum has not been opened widely and intentionally to the general public is the government's right to draw distinctions in access based on a speaker's identity." *Bloedorn*, 631 F.3d at 1235 (citing *Perry*, 460 U.S. at 49). Restrictions in a limited public forum only need to be "reasonable and viewpoint neutral." *Id.* at 1231.

The Eleventh Circuit has made it clear that "[t]he physical characteristics of the property alone cannot dictate forum analysis." *Bloedorn*, 631 F.3d at 1233. "Instead, we look to the traditional uses made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics." *Id.* "[T]he scope of the relevant forum is defined by 'the access sought by the speaker.'" *Id.* at 1232 (quoting *Cornelius*, 473 U.S. at 801). Just as at the preliminary injunction stage, Keister solely seeks to speak at the intersection. As such, that is the scope of our forum assessment today. *Keister*, 879 F.3d at 1289.

Keister contends that the intersection's sidewalks are a tradition public forum. Specifically, he argues: (1) the Rule 56 record confirms that those sidewalks are city-owned, and thus, traditional public fora as a matter of law; and (2) the objective function and appearance of the sidewalks confirm traditional public forum status. (Doc. # 60-8 at 18).

In support of his first argument, Keister states that although he initially believed the City held an

easement on the sidewalk, that is not so. According to Keister, "this court and the appellate court, based on the record at the time of the motion for preliminary injunction, deduced that these sidewalks are limited public fora on the belief that they sat on university property internal to— indeed in the 'heart of—UA.'" (Doc. # 60-8 at 16). But, Keister now maintains the sidewalks are property wholly owned and controlled by the City of Tuscaloosa, and are on the periphery of the campus, not in the "heart" of it.[6] (*Id.*). As such, Keister maintains the Eleventh Circuit's "erroneous presumptions" no longer hold true and the pathways "must" be deemed traditional public fora. (*Id.*). The issue of city ownership, Keister argues, "settle[s] the matter."[7] (*Id.* at 19, n.1).

In opposition, Defendants disagree with Keister's assertions about ownership of the sidewalks. Alternatively, they maintain that even if it could be shown that the City of Tuscaloosa owns the sidewalks,

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[6] The undisputed Rule 56 evidence is to the contrary. It is clear the intersection is located in the heart of campus. *See supra*, p. 4, Campus Map; *see also Keister*, 879 F.3d at 1291.

[7] To bolster his arguments, Keister has attached the following exhibits to his brief:

- Photographs of the intersection of University Boulevard and Hackberry lane.
- Multiple maps depicting the demarcation of the University and the City of Tuscaloosa.
- Multiple photographs featuring the University, and other landmarks.
- Municipal right-of-way use license agreement between the City of Tuscaloosa and the University.

(Docs. # 60-1 to 60-8).

ownership is not dispositive in a forum analysis, and the objective function and appearance of the sidewalks indicate they still constitute a limited public forum. (Doc. # 63 at 12).

The Eleventh Circuit has previously provided controlling guidance on how to determine the type of forum on a public college campus. For example, on the prior appeal in this case, the Eleventh Circuit noted that in the factually similar case of *Bloedorn*:

> The plaintiff wished to preach on Georgia Southern University's ("GSU") campus and, when denied, filed suit asserting that GSU's speech policy violated the First Amendment. This Court held that GSU's sidewalks, pedestrian mall, and rotunda were limited public fora because (1) a state-funded university is not *per se* a traditional public forum; and (2) there was no evidence GSU intended to open those areas for public expressive conduct. By limiting who may use its facilities to a discrete group of people—the GSU community—we concluded "[t]his is precisely the definition of a limited public forum."
>
> We also held that it is of lesser significance that the GSU sidewalks and Pedestrian Mall physically resemble municipal sidewalks and public parks. The physical characteristics of the property alone cannot dictate forum analysis. Noting that although GSU's campus possessed many features similar to public parks—such as sidewalks, pedestrian malls, and streets—we held its essential function was quite different: education. Thus, because GSU did not intend to

> open its sidewalks to public discourse, it was a limited public forum.

Keister, 879 F.3d at 1290 (11th Cir. 2018) (internal citations omitted). Importantly, in coming to its conclusion in *Bloedorn*, the Eleventh Circuit stated "the purpose of a university is strikingly different from that of a public park. Its essential function is not to provide a forum for general public expression and assembly; rather, the university campus is an *enclave* created for the pursuit of higher learning[.]" *Bloedorn*, 631 F.3d at 1332-34 (emphasis added).

Keister's main argument is that the intersection sidewalks are owned by the City of Tuscaloosa, and not the University. Keister likens this case to other cases in which courts have held that city-owned sidewalks are traditional public fora. (Doc. # 60-8 at 20-21) (citing *Int'l Caucus of Labor Comm. v. City of Montgomery*, 111 F.3d 1548, 1550 (11th Cir. 1997) (recognizing "city sidewalks" as traditional public fora); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *McCullen v. Coakley*, 573 U.S. 464, 474-75 (2014); *Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005)). But Keister's "new" argument is merely a re-packaged version of his prior arguments. In his Motion for Preliminary Injunction, Keister argued that because the intersection is open as a public thoroughfare, it is a *per se* public forum. (Doc. # 6-12 at 10). This argument has already been addressed by this court and was squarely rejected by the Eleventh Circuit. *Keister*, 879 F.3d at 1291.

Further, the court need not decide whether the documents submitted by Keister (namely, the Municipal Land Permit) prove that the intersection

sidewalks are owned by the City of Tuscaloosa. Even if the City of Tuscaloosa does own the sidewalks at issue, that does not change in any way the court's analysis. Regardless, the sidewalks are owned by a government and (as Keister has acknowledged in previous briefing) "forum depiction does not turn on ownership." (Doc. # 10 at 12) (internal citations omitted); *see Greer v. Spock*, 434 U.S. 828 (1976) (noting that the government permitting citizens to access its land via sidewalks and streets does not automatically convert a nonpublic forum to a public one); *Bloedorn*, 631 F.3d at 1233 ("Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will.") (quoting *Grace*, 461 U.S. at 177). Because city ownership does not, as Keister maintains, "settle[] the matter," the court proceeds to conduct a forum analysis by examining the physical characteristics and visual surroundings of the intersection sidewalks to determine if they constitute an "enclave" distinguishable from the city streets and sidewalks outside of the campus' reach. *See Bloedorn*, 631 F.3d at 1233-34.

Here, the objective characteristics and traditional uses of the sidewalks confirm the intersection's status as a limited public forum. As the Eleventh Circuit previously found:

> [T]here are objective indications that University Boulevard and Hackberry Lane are within UA's campus as opposed to "mere" public Tuscaloosa streets at that intersection. Unlike in *Grace*, where the Supreme Court held that its perimeter sidewalks were traditional public

> fora because they were not distinguishable from the Washington, D.C. public sidewalks, here the intersection, as evident from the UA map, is in the heart of campus. It is surrounded by UA buildings, and there are numerous permanent, visual indications that the sidewalks are on UA property including landscaping fences and UA signage. While physical characteristics are not dispositive for forum analysis, they independently support a limited public forum in this case as they suggest to the intended speaker that he has entered a special enclave.

Keister, 879 F.3d at 1290-91 (internal citations and quotations omitted). None of these facts have changed nor are they genuinely disputed. Specifically, on this Rule 56 record, the following physical characteristics support a finding that the intersection sidewalks are limited public forum: street signs bear the script "A" logo of the University; the intersection is embellished by University markings; the intersection is surrounded by prominent university buildings and marked faculty only parking lots; the landscaping fences that run through campus are on each corner of the intersection.

The undisputed Rule 56 record evidence support this conclusion. *Id.* at 1335 (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129-30 (1981) ("[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (internal quotation marks omitted)). The Eleventh Circuit's decision in *Bloedorn* confirms this

court's determination that the intersection sidewalks are a limited public forum. Just as in *Bloedorn*, the University's essential function is not to provide a forum for public expression. 631 F.3d at 1334. Rather, the campus functions as an enclave "created for the pursuit of higher learning by its admitted and registered students and by its faculty."

Further reinforcing this determination, "virtually every recent case involving a First Amendment speech challenge to a university policy regulation, or action has been analyzed under the 'limited public forum' framework." *Young America's Foundation v. Kaler*, 370 F. Supp. 3d 967 (D. Minn. 2019) (concluding that the University of Minnesota's large-scale events policy created a limited public forum); *see e.g.*, *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679-84 (2010 ("[T]his case fits comfortably within the limited-public-forum category, for [the Christian Legal Society], in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition."); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-30 (1995) (concluding the limited public forum framework appropriate for analyzing payments from the University of Virginia to its Student Activities Fund ("SAF") to outside contractors for the printing costs of a variety of publications issued by student groups); *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017) (affirming on re-hearing the district court's conclusion that Iowa State University created a limited public forum for First Amendment purposes); *Bloedorn*, 631 F.3d at 1232-33 (affirming that district

court's conclusion that the sidewalks, pedestrian mall, and rotunda at Georgia State University falls into the category of a limited public forum); *Young Am.'s Found. v. Napolitano*, No. 17-CV-02255-MMC, 2018 WL 1947766, at *3 (N.D. Cal. Apr. 25, 2018) (concluding the forum at issue at the University of California, Berkeley was a limited-public forum); *Kushner v. Buhta*, No. 16-CV-2646 (SRN/SER), 2018 WL 1866033, at *10 (D. Minn. Apr. 18, 2018), *aff'd*, 771 F. App'x 714 (8th Cir. 2019) (affirming the district court's conclusion that the parties' stipulation that a lecture hall at the University of Minnesota Law School was a limited public forum was appropriate); *Bus. Leaders in Christ v. Univ. of Iowa*, No. 317CV00080SMRSBJ, 2018 WL 4701879, at *7 (S.D. Iowa Jan. 23, 2018) (concluding that "[a] [U]niversity [of Iowa] program that grants student organizations official registration or recognition amounts to a limited public forum."); *Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1233 (S.D. Ala. 2016) (concluding that the perimeter of campus at the University of South Alabama is "at best a limited public forum.").

Because the undisputed Rule 56 record evidence shows that the intersection is within the University's campus, is not intended as an area for the public's expressive conduct, and contains markings sufficiently identifying it as an enclave, the intersection sidewalks are a limited public forum.

C. The University's Permitting Restrictions are Constitutional

Having determined that the intersection is a limited public forum, the court turns to Keister's

challenges to the University's grounds use policy. Keister maintains that the grounds use policy: (1) is unconstitutionally vague; (2) is content based; (3) vests University officials with unbridled discretion for licensing speech; (4) is not narrowly tailored;[8] (5) does not leave open ample alternatives for speech; and (5) that a ten working day advance notice requirement is unconstitutional.

In analyzing the constitutionality of the grounds use policy, the court is cognizant of the Supreme Court's guidance on this topic:

> Our inquiry is shaped by the educational context in which it arises: First Amendment rights, we have observed, must be analyzed in light of the special characteristics of the school environment. This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist substituting their own notions of sound

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[8] Because the court has concluded that the intersection sidewalks are a limited public forum, the University's policy is not required to be "narrowly tailored." *Bloedorn*, 631 F.3d at 1231 (Restrictions in a limited public forum only need to be "reasonable and viewpoint neutral."). Thus, the court need not address this argument. Having said that, the court notes that while considering a similar policy in *Bloedorn*, the Eleventh Circuit found that the restrictions imposed were in fact narrowly tailored. 631 F.3d at 1228-1242.

> educational policy for those of the school authorities which they review.

Christian Legal Soc'y, 561 U.S. at 685-86 (internal citations, alterations, and quotation marks omitted). Because the intersection sidewalks are a limited public forum "any time, place, and manner restrictions made on expressive activity need only be viewpoint neutral and reasonable; and the restriction need not 'be the most reasonable or the only reasonable limitation.'" *Bloedorn*, 631 F.3d at 1235 (quoting *Cornelius,* 473 U.S. at 808). "The regulation is constitutional so long as it is 'reasonable in light of the purpose which the forum at issue serves.'" *Id.* (quoting *Perry Educ. Ass'n,* 460 U.S. at 49).

i. The Ground Use Policy is Not Unconstitutionally Vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). According to the Supreme Court, vague laws offend several important values:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for

> resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (internal quotations omitted).

Keister maintains that the University's grounds use policy exception for "casual recreational or social activities" is vague, enables censorship, and is unconstitutional in any fora. (Doc. # 60-8 at 25). Keister argues that the phrase is unconstitutionally vague because the policy "does not define th[ese] terms and neither are they self-explanatory" and "sans definition, [this] vague language empowers UA officials to divide for themselves what is 'casual' (with no standards to go on) and shut down for lack of permit." (Doc. # 60-8 at 25-26). According to Keister, "[t]his gives UA officials opportunity to censor controversial topics or disagreeable viewpoints by simply concluding the speech is not 'casual,' while leaving others who lack a permit but have more favorable viewpoints alone." (*Id.* at 26).

When viewing the totality of the grounds use policy, the phrase "casual recreational or social activities" is not unconstitutionally vague. In full, the grounds use policy states "[o]ther than uses for casual recreational or social activities, reservations must be made for the use of buildings and grounds under the

control of the University, including University sidewalks (an 'Event')." (Doc. # 59-2 at 10). Although, the language of the policy is not precise, "we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Where, as here, the language of the grounds use policy is "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" it is clear what the ordinance as a whole prohibits.[9] *Id.* (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Blackmun, J.), *cert. denied*, 398 U.S. 965 (1970)). Specifically, the policy makes it clear that individuals (affiliated or not) who wish to engage in a casual picnic on University grounds need not obtain a permit. But, non-affiliated individuals who wish to speak in "short bursts to draw attention," with voice amplification systems, or desire to share their "message" by approaching students and faculty on University grounds (including sidewalks) to hand out literature, must obtain a permit.

The Rule 56 record evidence shows that the grounds use policy furthers the University's purpose of preserving the primacy of its teaching and research missions, as well as facilitating the responsible stewardship of University resources. (Doc. # 59-2 at 9). Requiring the University to list all activities that qualify as "casual recreational or social activities" would be tedious, unnecessary, and largely unhelpful.

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[9] As the Supreme Court has noted, "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" *Grayned*, 408 U.S. at 110 n.15 (quoting *American Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).

The University's current policy gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and does not impermissibly delegate basic policy matters to University officials for resolution on an *ad hoc* and subjective basis. *See Grayned*, 408 U.S. at 108-09. Thus, the court concludes that the grounds use policy is not unconstitutionally vague.

ii. The Grounds Use Policy is Content Neutral and Does Not Vest University Officials with Unbridled Discretion for Licensing Speech.

To begin, Keister simply has not established that the grounds use policy discriminates based on content.[10] Nor has he established that the permitting

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[10] Keister also maintains that the exception to the grounds use policy for casual recreational or social activities" is content based. (Doc. # 60-8 at 25). Keister states that if he "and another individual discuss sports as they traverse the sidewalks, their expression is likely deemed exempt as 'recreational' speech, but if the conversation turns to the merits of Keister's religious beliefs, then it is no longer 'casual recreational or social,' but an 'event' requiring a permit." (*Id.* at 25-26). Thus, Keister maintains, the permit scheme is "unavoidably and impermissibly content-based." (*Id.* at 26). Keister is grasping at straws with this argument.

Discussing sports or religion while strolling through campus with a friend is not prohibited by the grounds use policy. In fact, this type of activity exemplifies a "casual recreational or social event." Prohibiting non-affiliated individuals from using University grounds without a permit is in line with the purpose and mission of the University. The space and facilities on University grounds are primarily intended for the teaching, research, and service components of the University's mission.

scheme affords University officials unbridled discretion for licensing speech (*i.e.*, assigning the location, date time, and length of the grounds use permits). Facially, the grounds use policy is content neutral. It does not discriminate based on the speaker or the message the speaker wishes to convey. All non-affiliated outside speakers (regardless of the message they wish to promote) must follow the grounds use policy and obtain a permit if they wish to speak on University grounds.

Keister also maintains the grounds use policy sponsorship requirement vests unbridled discretion with University officials to license speech. (Doc. # 60-8 at 26). According to Keister, "[m]andating the need for a sponsor, UA supplies no criteria on whether sponsorship should be granted, leaving it entirely to the whims of each UA entity to decide whether to sponsor the speech or not."[11] (Doc. # 60-8 at 26). The Rule 56 evidence does not support that argument. Rather, it shows that a grounds use permit is only

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And, the grounds use policy is intended to "facilitate the responsible stewardship of institutional resources." Activities outside the teaching, research, and service components of the University "must not interfere with the academic climate of the University." Speaking in "short bursts to draw attention," handing out literature, or using voice amplification, certainly has the potential to detract from the academic climate of the University.

[11] For example, the University notes that Milo Yiannopoulos was allowed to speak on campus, despite counter-protests of several student organizations, because he was sponsored by the University of Alabama College Republicans (a registered student organization). (Doc. # 59-2 at ¶ 47).

denied for one of the seven enumerated reasons in the policy handbook. (Doc. # 59-2 at 14).

Moreover, Keister's arguments are foreclosed for the reasons noted in the court's initial opinion denying Keister's Motion for a Preliminary Injunction and the Rule 56 evidence. To reiterate, this court stated:

> [Keister] maintained at oral argument that the sponsorship requirement embedded in UA's speech policy may ultimately lead to speakers being denied access to UA's campus based on their viewpoint. Speakers are only entitled access to the campus under UA's Policy if they are sponsored by a student group. Because there is a potential that student groups may deny him (or any other speaker) sponsorship based on his viewpoint, [Keister] contends that UA's Policy itself is not viewpoint-neutral. The court disagrees and finds guidance from *Bloedorn* on this issue. There, regarding GSU's sidewalks, the court noted "[t]he University has limited these areas only for use by a discrete group of people – the GSU community; its students, faculty, and employees; and their sponsored guests." *Bloedorn*, 631 F.3d at 1232. Having found that Bloedorn was not "a member of the class of speakers for whose especial benefit the forum was created," the court reasoned that "he may be constitutionally restricted from undertaking expressive conduct on the University's sidewalks," and that such restriction (based on his lack of sponsorship) was not viewpoint-based. *Id.* at 1235. The court finds the same to be true here. UA's Policy

> applies equally to all sponsored speakers (who are allowed to speak so long as they meet the criteria outlined in the policy) and to all non-sponsored speakers (who are not allowed to speak, regardless of viewpoint). The key is that UA is not making any decisions based on a speaker's viewpoint. *See Gilles v. Miller*, 501 F. Supp. 2d 939, 948 (W.D. Ky. 2007) (finding that a university's sponsorship policy did not result in viewpoint discrimination where the university did not bar the plaintiff from obtaining a sponsorship from a student organization and did not forbid student groups with views similar to the plaintiff's).

(Doc. # 22 at 14-15, n.12) (emphasis in original). Keister has not presented any Rule 56 record evidence showing (or even suggesting) that the University is the actual decision maker. Rather, the undisputed evidence in the Rule 56 record shows that the University will go above and beyond to assist non-affiliated speakers and groups connect with student organizations in order to meet the sponsorship requirement.[12]

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[12] For example, when the unaffiliated religious organization "the Gideons" wanted to share their messages on campus, they completed the grounds use permit process and worked with Donna McCrary, Senior Director of Facilities and Operation and Ground Use Permits, to obtain a sponsor. (Doc. # 59-2 at 3, ¶¶ 28, 29). The Gideons have worked with the University to obtain grounds use permits for the past several years. (Doc. # 59-2 at 3, ¶¶ 28, 29). In fact, in 2016 alone, the Gideons were granted twelve approved ground use permits. (*Id.*).

iii. The Grounds Use Policy Leaves Open Ample Alternatives for Expression

Keister next argues that "UA's policy prevents him from speaking in any manner on city-owned sidewalks near campus, depriving him of his intended audience." (Doc. # 60-8 at 29). Keister cites *Amnesty International, USA v. Battle*, 559 F.3d 1170, 1183-84 (11th Cir. 2009) for the proposition that restrictions that prevent speakers from reaching their audience fail to leave ample alternatives. However, in *Amnesty International*, a group of protestors were wholly excluded from a rally and prevented from communicating their message to anyone via any form of expression (including leafletting and protesting outside the rally). 559 F.3d at 1183-84. The Eleventh Circuit likened the complete exclusion of protestors to giving the group "a permit to hold a meeting in an auditorium and then barr[ing] the doors and windows such that no audience could enter and no sound could escape the building." *Id.* The court concluded that "[s]uch action clearly fails to leave open ample alternative channels for communication." *Id.* (internal quotation marks omitted).

Unlike in *Amnesty International*, the University's grounds use policy leaves open ample alternatives for communication. Plainly, Keister does not like the alternatives. But, he is not barred from speaking on campus; he merely has refused to apply for a grounds use permit because he contends he is "authorized by God to speak whenever [God] tells [him] to and when [God] tells [him] to." (Doc. # 59-4 at 46). In fact, Keister has not been excluded from the campus at all. The

University has worked with other outside organizations, including the Gideons, to obtain student organization sponsorship and a grounds use permit. Keister is also able to speak with students outside University grounds, within the city limits of Tuscaloosa. In *Bloedorn,* the Eleventh Circuit held that a similar policy left open ample alternative channels for communication when plaintiff could "avoid the limitations imposed by the permitting scheme simply by speaking to students as they enter and exit the campus from GSU's several well-marked entrance and exit points" and "conceivably obtain sponsorship from one of the countless GSU-affiliated organizations to speak on campus." 631 F.3d at 1242. Although Keister may not like the alternative channels for communication, they do exist.

iv. The Advance Notice Requirement is Constitutional

Finally, Keister argues that regardless of forum classification, a 10-working-day advance notice requirement is unconstitutional. When reviewing this court's denial of preliminary injunction, the Eleventh Circuit noted "this Court does have some concerns about whether UA's 10 working day advance notice requirement would be reasonable for events that do not require multiple department approvals[.]" *Keister*, 879 F.3d at 1288 n.4. But -- and this point may have escaped the attention of the panel on interim review -- the grounds use policy does not *require* a ten-day notice for smaller events. Rather, the grounds use policy states, in relevant part,

> To facilitate the review by all the different University department that have responsibility

> for the various aspects of an Event (e.g., tents food service, UAPD, electrical service, etc.), applicants for use of the Grounds *should* request permission for such use ten (10) working days prior to the Event.
>
> If an Event does not involve factors that require multiple University department approvals, approval may be given in as few as *three days*.

(Doc. # 59-4 at 12) (emphasis added).[13] So, for smaller events, like Keister sharing his message, approval may be given in as little as three days.[14] Although the University does retain discretion to take longer than three days with the use of the permissive "may," the court does not presume to second guess the University's internal approval process. *Christian Legal Soc'y*, 561 U.S. at 685-86 ("Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review.") (internal citations, alterations, and quotation marks omitted).

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[13] The University also provides an expedited permit approval process for "counter-events" or spontaneous events. (Doc. # 59-4 at 12). Under the expedited review process, the University will attempt to provide a permit "within twenty-four (24) hours, to an area of the Grounds which is available and which does not interfere with regular academic programs or schedule[d] events and programs." (*Id.*).

[14] The average approval time for a grounds use permit is 4.4 days. (Doc. # 59-7).

Obviously, the requirement for some notice serves a legitimate purpose, particularly on a college or university campus. "Universities are less equipped than other public forums to respond to disruptions on short notice, and implementing a relatively short 'wait period' for the University to review a grounds use permit form is certainly reasonable." (Doc. # 22 at 13-14) (citing *Sonnier* v. *Crain*, 613 F.3d 436, 445 (5th Cir. 2010), *opinion withdrawn in part on reh'g*, 634 F.3d 778 (5th Cir. 2011) (holding that a public university's speech policy was narrowly tailored when it employed a seven-day notice requirement).[15] And, to be clear, in the instance of a limited public forum, reasonableness is all that is required.

IV. Conclusion

The court appreciates Plaintiff's commitment to sharing the gospel and his efforts to do so. However, his claims in this case are without merit. For the reasons discussed above, the court concludes that Plaintiff's Motion for Summary Judgment (Doc. # 60) is due to be denied, and Defendants' Motion for Summary Judgment (Doc. # 59) is due to be granted. An order consistent with this memorandum opinion will be entered contemporaneously.

DONE and **ORDERED** this May 19, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

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[15] The Fifth Circuit withdrew its *Sonnier* opinion, in part. 634 F.3d 778. But, the portion of the opinion cited by this court was not contained in the part that was withdrawn.