No. 22-388

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

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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 multifactor balancing test?

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. For nearly 50 years, SLF has advocated, both in and out of the courtroom, to protect our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech and religion. *See*, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

This case concerns SLF because it has an abiding interest in the preservation of the college campus as the traditional "marketplace of ideas." Too often, colleges and universities suppress diversity of thought and the free exchange of ideas. Through its 1A Project, SLF educates college students and administrators about the First Amendment, and it defends the right to engage in open inquiry on our nation's college campuses.

[1] Rule 37 statement: The parties were notified that Amicus intended to file this brief more than 10 days before its filing and consented to its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

It is a time-honored rite of passage to take advantage of the "marketplace of ideas" on a college campus. College students are in the unique position of being surrounded by true diversity: diversity of thought, religion, culture, and experience. For many, this is the first—and perhaps only—time they will hear ideas that differ from their own. Not only does the college experience shape the leaders of tomorrow, but many students become voters for the first time during their college years. Colleges thus have a duty to encourage lively discussion on current events to develop a well-informed student body and citizenry.

But the University of Alabama has abdicated its duty. Rather than operate as a marketplace, it stands as an ivory tower, unilaterally deciding who students may engage with on its public walkways. That includes denying Petitioner, a member of the public, the right to engage with students and other members of the public on a city-owned sidewalk that runs along campus.

The Eleventh Circuit Court of Appeals determined that the sidewalk is a limited public forum. App. 3a. It reached this conclusion by considering whether the University intended to open or close the sidewalk to the public. App. 26a. The Eleventh Circuit's opinion deepens confusion about the public forum doctrine among lower courts that must be resolved. If the Eleventh Circuit's decision is allowed to stand, colleges will be free to restrict *any* speech on campus by simply declaring a location a limited public forum. Such a

broad reading does not fit the First Amendment or this Court's jurisprudence, and for these reasons, this Court should grant certiorari.

ARGUMENT

I. Clarity about the public forum doctrine is needed among lower courts.

"Wherever the title of streets and parks may rest, 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." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). Yet when a member of the public tried to speak on a city-owned sidewalk in Alabama, that right was not afforded to him. The Eleventh Circuit held that because the sidewalk was surrounded by University of Alabama buildings, it "was clearly inside a special enclave—the University's campus." App. 22a. Thus, the University could deny the speaker access to the sidewalk and, by extension, access to a student audience.

But this Court has expressly held that "state colleges and universities are *not* enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972) (emphasis added). In reaching the opposite conclusion, the Eleventh Circuit applied a forum analysis that deepens confusion among lower courts about the public forum doctrine in recent years.

Even this Court's jurisprudence has not been consistent. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, a teachers union claimed that a school violated the First Amendment when it denied the union access to its mailing system but granted access to a different union. 460 U.S. 37, 39-41 (1983). This Court explained that public property generally falls within one of three categories: (1) "places which by long tradition or by government fiat have been devoted to assembly and debate" (the traditional public forum); (2) "property which the State has opened for use by the public as a place for expressive activity" (the designated public forum); and (3) "[p]ublic property which is not by tradition or designation a forum for public communication" but which the government has reserved "for its intended purposes" (the nonpublic forum). *Id*. at 45-46.

The Court held that content-based restrictions in the first two categories must be narrowly tailored to serve a compelling interest. *Id*. But when the government sets aside property for specific uses in a nonpublic forum, it may impose content-based restrictions so long as they are viewpoint-neutral. *Id*. at 46.

The union argued that the school district created a "limited public forum" because although it excluded the public at large from accessing the mail system, it granted access to several private, outside groups that were similar to the union. *Id*. at 47-48. According to the union, once the school opened the forum to certain outside groups, the traditional public forum standard applied to those groups. *Id*. at 48. In this way, the union

seemed to treat "limited public forum" as a synonym for "designated public forum." *See id*. at 47-48.

The Court specifically rejected the union's assertion that the school district created a "limited public forum" through its mail system. *Id*. at 46-48. It reasoned that the system was not "held open to the general public" and that speakers must receive permission before using the system. "This type of selective access does not transform government property into a public forum." *Id*. at 47. It concluded that the mail system was a nonpublic forum, and it held that the system was viewpoint-neutral and reasonable. *Id*. at 49-54. But in doing so, the Court never explained whether "limited" was just another word for "designated," as the union seemed to suggest, or whether it was a different kind of forum entirely.

Ten years later, the Court revisited the forum doctrine in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). There, it considered whether a school could open its property for speech on social, recreational, and civic matters while refusing religious groups access to the property. *Id.* at 386-87. The district and appellate courts each called the school facilities a "limited public forum." *Id*. at 389-90. They determined that a municipality may deny speakers access to a limited public forum so long as the regulation is reasonable and viewpoint-neutral—the standard the Court applied to the *nonpublic* forum in *Perry*. *Id*. Because the school closed its facilities to all religious groups and did not distinguish between

religions, the lower courts held that the restriction was viewpoint-neutral. *Id.*

Unanimously reversing the lower courts, this Court held that restricting access to religious groups constituted viewpoint discrimination because it allowed groups to present non-religious views about family values but did not allow religious groups to share their views on family values. *Id.* at 393-94. The Court held that it was unnecessary to conduct a forum analysis because the regulation would not survive any scrutiny. *Id.* at 392. Even so, it clarified that "[w]ith respect to public property that is not a *designated* public forum open for indiscriminate public use for communicative purposes, we have said that '[c]ontrol over access to a *nonpublic* forum can be based on subject matter and speaker identity[.]'" *Id.* at 392-93 (quoting *Cornelius v. NAACP Legal Def. and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)) (emphasis added).

The Court seemed to use this opportunity to affirm that a designated public forum is like a traditional public forum. The Court also appeared to return to its original language for the third kind of forum by calling it a nonpublic forum. But once again, it left the limited public forum untouched. Whereas the Court in *Perry* seemed to merge the designated and limited public forum categories, it did not intervene when the lower courts in *Lamb's Chapel* reversed course and merged the limited and nonpublic forum categories.

Just a few years later, the Court conducted the forum analysis in *Good News Club v. Milford Central*

School, 533 U.S. 98 (2001). As in *Lamb's Chapel*, a school denied a religious group access to its facilities. *Id.* at 103-04. The Court determined that the free speech inquiry turned on the type of forum, and that "[i]f the forum is a *traditional* or *open* public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a *limited* public forum." *Id.* at 106 (emphasis added).

The parties in *Good News Club* agreed for purposes of litigation that the school created a limited public forum, so the Court assumed for its analysis that it was a limited public forum. *Id*. It struck down the speech restriction as viewpoint discriminatory. *Id*. at 107.

Although the issues presented in *Good News Club* were nearly identical to *Lamb's Chapel*, and although the Court applied the same standard to determine whether the restrictions in each case discriminated against viewpoint, it failed to use consistent terminology for the different forum categories. Rather than use the terms traditional, designated, and nonpublic, like it did in *Lamb's Chapel*, the Court described traditional, "open," and limited public forums in *Good News Club*. The Court appeared to merge the limited and nonpublic forum categories, just as the lower courts did in *Lamb's Chapel*.

Further complicating matters, Justice Souter used the terms "limited" and "designated" interchangeably in his dissent when comparing the forum in *Lamb's Chapel* to the forum in *Good News Club*. *Compare id*.

at 134 ("[The Court in *Lamb's Chapel*] held that the government may not discriminate on the basis of viewpoint in operating a *limited* public forum.") (emphasis added) *with id*. at 135 ("This case, like *Lamb's Chapel*, properly raises no issue about the reasonableness of Milford's criteria for restricting the scope of its *designated* public forum.") (emphasis added).

Following *Good News Club*, lower courts grappled with the public forum doctrine and how to apply it. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) ("Though the Supreme Court now clearly distinguishes designated public forums subject to strict scrutiny from limited public forums that are not, the line separating the two categories remains undefined."); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649 (9th Cir. 2008) ("The limited public forum framework has been the source of much confusion and the precise contours of the term have not always been clear.") (internal quotation marks and citation omitted); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 566-67 (7th Cir. 2001) (noting confusion between use of "limited public forum" and "designated public forum" and concluding that it was unnecessary to reconcile because the restriction at issue was viewpoint-based under any framework).

More recently, and perhaps to clarify emerging confusion, this Court explained in *Minnesota Voters Alliance v. Mansky* that "our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums." 138 S. Ct. 1876, 1885 (2018). It held that in both

traditional and designated public forums, content-based restrictions must satisfy strict scrutiny. *Id*. But in nonpublic forums, "the government has much more flexibility to craft rules limiting speech." *Id*. (citing *Perry Educ. Ass'n*, 460 U.S. at 805).

Thus, the Court seemed to abandon the limited public forum, or at least merge it with the nonpublic forum.[2] Yet confusion persists among lower courts. *See White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 196 n.13 (4th Cir. 2022) ("For simplicity here, we have identified three forums. But there is considerable confusion over whether there are three or four types of free-speech forums. Courts have provided conflicting guidance on whether 'limited public forum' is (1) a synonym for or subtype of 'designated public forum'; (2) a synonym for 'nonpublic forum'; or (3) a completely separate fourth category."); *Price v. Garland*, 45 F.4th 1059, 1067-68 (D.C. Cir. 2022) (categorizing traditional, designated, and nonpublic forums, and calling the limited public forum a "hybrid case . . . in which the Government has create[d] a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects," and concluding that restrictions in a limited public forum must be viewpoint-neutral and reasonable) (internal quotation marks and citation omitted); *Garnier v. O'Connor-Ratcliff*, 41

[2] Chief Justice Roberts, who wrote the *Mansky* opinion, appeared to confirm that the two forums are identical the following year in a dissenting opinion. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2316 (2019) (Roberts, C.J., dissenting) ("In several cases, the Court has treated such initiatives as a limited public (or nonpublic) forum.").

F.4th 1158, 1178 (9th Cir. 2022) ("A limited public forum, by contrast, is a sub-category of a designated public forum that refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.") (internal quotation marks and citation omitted); *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 897 (6th Cir. 2021) (holding that the government may *not* impose content-based restrictions in a "limited public forum," thereby equating a limited public forum with a traditional or designated public forum).

The effects of this confusion are particularly felt on college campuses. For example, in *Bowman v. White*, a public speaker challenged university permitting requirements in outdoor areas of campus, including a campus mall, fountain, and common area. 444 F.3d 967, 977 (8th Cir. 2006). The Eighth Circuit Court of Appeals examined each facility and determined that they were designated public forums. *Id*. at 979. But it did not stop there. The court then conducted a test to determine whether each designated forum was "limited or unlimited in its character." *Id*. Because the university did not appear to restrict the type of speech or type of speaker in each location, it held that the outdoor areas were "unlimited designated public fora." *Id*. Although the Eighth Circuit heard this case before *Mansky*, it continues to follow this test. *See Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 878 (8th Cir. 2020) (relying on *Bowman* to conclude that free expression areas on campus were "unlimited designated public forums"). In this way, the Eighth

Circuit appears to recognize that a college campus can be divided into traditional public forums; unlimited designated public forums; limited designated public forums; and nonpublic forums.

And in *Bloedorn v. Grube*, an Eleventh Circuit case which the courts relied on below, a member of the public challenged a university's requirement that he receive permission before engaging in speech in outdoor areas of campus. 631 F.3d 1218, 1225-28 (11th Cir. 2011). The court held that there are three public forum categories: traditional, designated, and limited.[3] *Id*. at 1231. When weighing the competing interests, the court acknowledged that "state-funded universities . . . are government property, 'not enclaves immune from the sweep of the First Amendment.'" *Id*. (quoting *Healy*, 408 U.S. at 180). But then the court pivoted, holding that even though outdoor areas on campus have every appearance of being public forums, universities may close them because "the university campus *is* an enclave created for the pursuit of higher learning by its admitted and registered students and by its faculty." *Id*. at 1233-34 (emphasis added).

The court in *Bloedorn* reached its conclusion by relying in part on *Justice for All v. Faulkner*, a Fifth Circuit public forum case. 410 F.3d 760, 766 (5th Cir. 2005). There, a university argued that its entire campus was a limited public forum; otherwise, it would become a public park where anyone could engage in

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[3] The Eleventh Circuit has since expanded it to four categories. *See* App. 17a-18a.

speech with few restrictions. *Id*. The Fifth Circuit held, "The Supreme Court's forum analysis jurisprudence does not require us to choose between the polar extremes of treating an entire university campus as a forum designated for all types of speech by all speakers, or, alternatively, as a limited forum where any reasonable restriction on speech must be upheld." *Id*.

Here, the Eleventh Circuit adopted the latter extreme when it held that a sidewalk owned by the city, located in a heavily trafficked area, and lying at the intersection of two public streets that stretch past campus is a limited public forum simply because the University of Alabama intended it to be. *Compare* Pet. at 4-7 *with* App. 23a-26a.

II. This Court should grant certiorari to protect students' freedom to engage in speech and access ideas.

While it may be prudent not to open every dorm room, classroom, and dining hall to members of the public, it would be just as unwise—and contrary to the First Amendment—to insulate an entire campus from external speakers.

"[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy*, 408 U.S. at 180. College is meant to be the marketplace of ideas, where students engage in open discourse to challenge their own beliefs and the beliefs of others. Having opportunities to converse with members of the public is critical for students engaging in

the pursuit of truth, whether it be with evangelists standing on street corners, political activists pamphleting on campus quads, or scholars debating in lecture halls.

But by labeling the University of Alabama's campus a "special enclave," the Eleventh Circuit suggests that a public university may wall itself off entirely. If a publicly accessible sidewalk—which physically invites pedestrians into the marketplace of ideas—is not a traditional or designated public forum,[4] then it seems *nothing* on campus could be.

If, as the Eleventh Circuit held, the government's intent were the deciding factor for every campus speech restriction, it would "short-circuit all subsequent scrutiny." Pet. at 15. Naturally, any time the government restricts speech, it *intends* to do so. Allowing government intent to control the public forum analysis poses serious threats to students' freedom of speech. Under that reasoning, colleges would merely need to show an intent to limit speech in any location on campus. Such intent would automatically transform a space into a limited (or nonpublic) forum, where a restriction need only be viewpoint-neutral and reasonable.

Not only would this mean that students could not access the ideas of the preacher or the politician who

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[4] For purposes of this section, Amicus assumes that traditional and designated public forums are subject to strict scrutiny, and that limited public forums are synonymous with nonpublic forums.

come to campus spontaneously, but it would also mean that colleges could restrict students' access to *invited* speakers. For example, a university may declare (or otherwise show through "intent") that an auditorium is a limited public forum, even though they are historically considered public forums. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975). The college would have full authority to impose content-based restrictions on speech activities in the auditorium. That means it could ban political speech, offensive speech, religious speech, and speech on issues like abortion, immigration, gun control, and transgenderism because each of those restrictions are viewpoint-neutral. It could also ban pamphleting, posting signs, tabling, and even debating.[5] This rules out a wide swath of speech activities that the college experience normally provides.

Viewpoint neutrality cannot be the sole touchstone for speech restrictions on college campuses. Self-censorship among college students is at an all-time high. In a recent survey of nearly 20,000 college students, a shocking 60% revealed that they have refrained from speaking for fear of how others would respond. Press Release, Foundation for Individual Rights in Education, *Largest Ever Free Speech Survey of College Students*

[5] Although these restrictions may more accurately be called manner restrictions, colleges need only show that restrictions on the time, place, and manner of speech are reasonable in the traditional or designated public forum; they need not make this showing in a limited or nonpublic forum. *See Mansky*, 138 S. Ct. at 1885.

Ranks Top Campuses for Expression (Sept. 29, 2020).[6] It is crucial to maintain protections for speech that demand both viewpoint *and* content neutrality.

Censorship on college campuses is only exacerbated by inconsistencies among lower courts over the public forum analysis. If courts do not even know how many forums there are, they cannot be expected to apply the same standards each time. And the more standards and forums that are introduced, the less speech will be protected in the end. This will come at a great cost to students.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this amicus curiae brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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[6] www.thefire.org/largest-ever-free-speech-survey-of-college-students-ranks-top-campuses-for-expression/.