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, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

Rules

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the Freedom of Speech necessary to participate in our democratic republic. The Center has participated as amicus or counsel for a party in a number of First Amendment cases before this Court including: *303 Creative LLC v. Elenis*, No. 21-476; *Janus v. American Federation of State, County, and Mun. Employees*, 138 S.Ct. 2448 (2018); *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018); and *McCullen v. Coakley*, 573 U.S. 464 (2014), to name a few.

SUMMARY OF ARGUMENT

This Court has noted on numerous occasions that "public ways" and "sidewalks" have a historic role as places for public discussion and debate. *McCullen*, 573 U.S. at 476. These places are recognized as set aside for the purpose of discussing public questions between citizens.

This case concerns a public street that runs through a public university. There is nothing to indicate that the public may not pass on this street and indeed it is open to both vehicular and pedestrian traffic. Nonetheless, the court below ruled that at least

---

[1] All parties received timely notice of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

the portion of the street that runs through the boundaries of the university (the street itself remains a public thoroughfare) has been withdrawn from its status as a public forum, merely because of the fact that public university buildings border on the public street.

Review should be granted to determine whether a public university that borders both sides of a public street may constitutionally cancel the public forum character of the public sidewalk, allowing the university to control who may speak on the public sidewalk.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Protect Traditional Public Fora as Places where Citizens Can Share Ideas, Even on Controversial Topics.

The University wants to be able to pick the speakers that will use the public sidewalks on the street that runs through the University. But, as noted below, this public sidewalk attached to the public street is a traditional public forum. It does not lose that character simply because of the nature of the buildings bordering that sidewalk.

The University cannot pick and choose the speakers in a traditional public forum even if its purpose is to avoid conversations on uncomfortable or controversial topics. There is no such exception to the free speech guaranty. The First Amendment preserves the natural right to share one's opinions with others in an attempt to sway them to your point of view. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them.") Without this right,

officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The founding generation rejected the idea that government officials should have such power. They clearly recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 (reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) at 431).

Thomas Paine argued that "thinking, speaking, forming and giving opinions" are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet *Common Sense* urged his fellow

citizens to take direct action against the Crown. John P. Kaminski, CITIZEN PAINE (Madison House 2002) at 7.

Such speech was not protected under British rule. Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops to inspire them as they prepared to attack Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the framers set out to draft their first state constitutions even in the midst of the war. These constitution writers were careful to set out express protections for speech.

The impulse to protect the right of the people to share their opinions with each other was nearly universal in the colonies. In 1776, North Carolina and Virginia both issued Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS (William S Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of liberty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions they too included protections

for what Madison called "property in [our] opinions and the free communication of them." James Madison, *On Property*, *supra*.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The revolution against the Crown was not the only topic of controversy that generated pamphlets in this period. The Pennsylvania Abolition Society was formed in 1775. Edward Needles, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848) at 14. Abolitionists during this period engaged in legal actions, published books against slavery, circulated petitions, and distributed pamphlets. *See id*. at 17-18. The focus of their efforts was to convince their fellow citizens of the inherent evils of slavery – a position that was highly controversial in many parts of the colonies.

The arguments offered by the abolitionist were designed to capture the attention of their fellow citizens. In the words of William Garrison, in his anti-slavery newspaper, "The Liberator", "I do not wish to think, or speak, or write, with moderation … I am in earnest – I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." *The Liberator*, vol. 1, issue 1, January 1, 1831 (image

available at http://fair-use.org/the-liberator/1831/01/01/the-liberator-01-01.pdf).

Notwithstanding the controversial nature of speech activity in the latter half of the 18th Century, the founders were steadfast in their commitment to protect speech rights. The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 2 at 149-50 (John P. Kaminski, et al. eds. 2009); *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 128 (John P. Kaminski, et al. eds. 2009); *Letter of Thomas Jefferson to James Madison*, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 at 250-51 (John P. Kaminski, et al. eds. 2009); *Candidus II*, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 498 (John P. Kaminski, et al. eds. 2009); *Agrippa XII*, Massachusetts Gazette, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 at 722 (John P. Kaminski, et al. eds. 2009).

A number of state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 at 1553 (John P. Kaminski, et al. eds. 2009). North Carolina proposed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION at 18 (Philip B. Kurland & Ralph Lerner eds., 1987). New York's convention proposed amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention,* reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania (John P. Kaminski, *et al*. eds. 2009).

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF RIGHTS (Helen Veit, *et al*. eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68.

Congress quickly tested this limit on their power with the enactment of the Sedition Act. The question for the new country was whether the free speech and

press guarantees only protected against prior restraint, as was the case in England, or whether they guaranteed the type of liberty envisioned by Madison and others who argued for a freedom to share ideas with fellow citizens.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February, 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794)." *New York Times v. Sullivan*, 376 U.S. 254, 275 (1964).

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id*. at 274. The particular evil in the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled [sic] against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id*.

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted under it and fines were reimbursed by an

act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have that the people intended the First Amendment's speech and press clauses to be much broader than a simple bar on prior restraints. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

The First Amendment prohibits government from attempting to silence citizens, especially on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They nonetheless insisted on including a prohibition on "abridging freedom of speech" in their new Constitution.

To ensure that citizens could share their ideas on matters of public controversy, this Court has limited government regulation of speech taking place in a "traditional public forum." In this case, respondent is claiming authority to regulate speech activities on

public sidewalks simply because those sidewalks run through a public university. To be clear, the sidewalks abut a public road that starts before the boundaries of the university and extends beyond those boundaries. This Court should grant review to determine whether a public sidewalk that runs through the boundaries of a public university loses its character as a public forum.

II. Public Sidewalks Have Been Set Aside as Traditional Public Fora.

This Court has long recognized that the public sidewalks were held open for speech activity subject only to regulation to ensure that traffic was not impeded. *Schneider v. State of New Jersey*, 308 U.S. 147, 160 (1939). Prior to *Schneider*, the Court ruled that cities could not require a permit to distribute literature on the city streets. *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). These rulings were joined by the decision in *Hague v. CIO*, 307 U.S. 496 (1939), where a fractured Court held that the Free Speech guaranty protected speech activities in public parks and city streets. In his lead plurality opinion Justice Roberts noted: "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." *Id*. at 515 (opinion of Roberts, J.). This Court has repeatedly cited this observation of Justice Roberts as a truism of American constitution law. *See*, *e.g.*, *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802 (1985); *Frisby v. Schultz*, 487 U.S. 474,

481 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Even when the sidewalk or street fronted a "sensitive area," this Court has upheld speech activities on the public areas traditionally open to speech. Thus, while excessive noise in front of schools could be prohibited, peaceful picketing could not. *Compare Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) *with Mosley*, 408 U.S. at 100. Similarly, a city might prohibit picketing on the sidewalk in front of a single house but, as a general matter, the sidewalks of even residential neighborhoods are part of the traditional public forum open to free speech activities. *Frisby v. Schultz*, 487 U.S. at 482-84.

Sidewalks in front of foreign embassies are not off limits to free speech activity. *Boos v. Berry*, 485 U.S. 312, 329 (1988). Even the sidewalk in front of this Court is open to picketers and speakers. *United States v. Grace*, 461 U.S. at 176-80. As this Court noted in *Grace*, public sidewalks are part of the public forum and attempts to withdraw them from that forum are "presumptively impermissible." *Id*. at 180.

Even the most sensitive areas do not qualify as No Free Speech Zones. In *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), this Court struck down a tort judgment against Westboro Baptist Church for its display of particularly offensive signs on a public street outside of a funeral for a fallen soldier. *Id*. at 1217. This Court has clearly noted that the government may not exclude a speaker from a public forum, as the university seeks to do here, unless the "exclusion is necessary to serve a compelling interest." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

Hill v. Colorado, 530 U.S. 703 (2000), stands as an outlier on the issue of speech in a traditional public forum. As noted above, this Court has consistently held that public sidewalks are open to speech activities that do not obstruct traffic. But in *Hill*, this Court ruled that a law prohibiting approaching a person near an abortion clinic "'for the purpose of ... engaging in oral protest, education, or counseling'" was a content neutral regulation. *Hill*, 530 U.S. at 720-21. The Court stated that the Colorado law did not prohibit a "particular viewpoint." *Id*. at 723. But the Court ignored the clear intent of the law to prohibit anti-abortion messages even though the statute used language like "education" and "counseling" that plainly aimed at one, and only one, point of view. Indeed, later in the opinion the Court explicitly recognized that the state had targeted particular messages.

The Court noted the state's concession that the law was designed to ensure that women entering an abortion clinic would be free from "unwanted encounters" with people opposed to abortion. *Id*. at 729. Whatever the continuing validity of this analysis, it cannot be said that voting-age adults attending a public university are an especially vulnerable population, in need of protection from "unwanted encounters" with individuals voicing controversial or even uncomfortable ideas. There is no basis for concluding that the university should protect students from ideas.

III. Recent History Demonstrates Why Public Universities Cannot Be Granted the Power to Control Speech in a Traditional Public Forum.

In its ideal form, the university stands as a model of free inquiry and academic freedom. It is meant to

be a space "conducive to speculation, experiment and creation." *Sweezy v. New Hapshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment). The university is supposed to be a place where "leaders [are] trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Apparently, these goals are not shared by the University of Alabama.

In this case, the university seeks to control who may speak on a public sidewalk outside of university classrooms. To be clear, this is not a case where the speaker blocked the sidewalk or disrupted the classroom. Those concerns could be satisfied with an appropriate time, place, and manner regulation. Instead, the university seeks to control who may speak at all. They seek to shield their students from unwanted ideas. Unfortunately, the University of Alabama is not unique in promoting orthodoxy rather than free inquiry.

This Court has reviewed cases where the university has sought to silence speakers in the past. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court struck down denial of funding to a student newspaper that had a Christian editorial viewpoint. *Id.*, at 837. And in *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021), the Court reviewed a case where a student was prohibited from speaking about his religion even in a so-called free speech zone because it might disturb the comfort of other students. *Id*. at 796-97.

It may not be coincidental that *Rosenberger*, *Uzuebunam*, and this case all concern attempts by universities to shut down religious speech on campus. These cases seem to show that for some reason universities want to shield their students from hearing about religious ideas. But it is not just religious ideas that have been disfavored on campus. A whole range of discourse seems to have been prohibited.

In Ohio, Oberlin College has been ordered to pay millions of dollars in damages for falsely accusing Gibson Bakery of racially profiling students.[2] Earlier this year, students at Yale Law School shouted down and attempted to disrupt a presentation by an attorney from the Alliance Defending Freedom (a frequent advocate before this Court).[3] The dean of the school labeled the protest "rude," but noted that it did not violate the school's free speech policy.[4] The lack of respect for freedom of speech and free inquiry has led several federal judges to announce that they will not hire Yale Law graduates as clerks.[5] As Judge Branch

---

[2] Bakery Suing Oberlin College Wins 33 million in damages, The Hill (https://thehill.com/blogs/blog-briefing-room/news/448464-bakery-suing-oberlin-college-wins-33-million-in-damages/ (last visited November 17, 2022)).

[3] Majority of Yale Law Students Condemn Conservative Speaker Escalating Controversy, Washington Examiner (https://www.washingtonexaminer.com/policy/education/majority-of-yale-law-students-condemn-conservative-speaker-escalating-controversy
(last visited November 17, 2022)).

[4] Law School Dean Breaks Silence on Major Protest, Yale Daily News (https://yaledailynews.com/blog/2022/03/28/law-school-dean-breaks-silence-on-major-protest%ef%bf%bc/ (last visited November 17, 2011)).

[5] Federal Judges Join Boycott Hiring Yale Law Clerks Over Plague Cancel Culture, Foxnews.com

of the Eleventh Circuit explained, "I am gravely concerned that the stifling of debate not only is antithetical to this country's founding principles, but also stunts intellectual growth."[6] Judge Ho of the Fifth noted that Yale "not only tolerates the cancelation of views – it actively practices it."[7]

Whatever the ideal of academic freedom and the spirit of free inquiry at the university may be, it is not reality at many universities today. There is no basis for allowing a university to impose its own idea of who should be allowed to speak in a traditional public forum.

(https://www.foxnews.com/politics/federal-judges-join-boycott-hiring-yale-law-clerks-over-plague-cancel-culture (last visited November 17, 2022)).

[6] *Id.*

[7] *Id.*

CONCLUSION

Public streets and sidewalks have "immemorially been held in trust for the use of the public" for the free exchange of ideas. *Hague*, 307 U.S. at 515 (Opinion of Roberts, J.). The Court should grant review to protect public sidewalks as a traditional public forum – a place reserved for free exchange of ideas – even if that sidewalk happens to run through a university.

November 2022 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae