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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before this Court, as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021), addressing a variety of issues of constitutional law, including the Free Speech Clause of the First Amendment. The ACLJ regards this case as a crucial battle over the integrity of the presumptive public forum status of sidewalks adjacent to public streets.

INTRODUCTION

The court below reached the startling conclusion that a sidewalk, adjacent to a public street and connected seamlessly to the vehicular and pedestrian transportation grid of a city, was *not* a traditional public forum for free speech purposes. Why? Because various college buildings occupy property adjacent to

[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party authored this brief in whole or in part. No person or entity aside from amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. ACLJ attorneys represented petitioner Keister as co-counsel at some earlier stages of this case, including on his petition for certiorari regarding the denial of preliminary injunctive relief. *Keister v. Bell*, 139 S. Ct. 208 (2018).

the sidewalk in question. The court below reached this remarkable conclusion despite classic precedents from this Court holding that public streets and sidewalks are "traditional public fora" *regardless* of who owns the underlying property (*Hague*) and *regardless* of whether the property adjacent to the street or sidewalk contains such sensitive facilities as a high school (*Grayned*), a courthouse (*Grace*), an embassy (*Boos*), a sleepy residential neighborhood (*Frisby*), an abortion facility (*McCullen*), or a church conducting a funeral (*Snyder*),[2] with the only exception being the special enclave of a military base (*Greer*), and even then not always (*Flower*).[3]

The decision below conflicts dramatically with the way this Court – and other federal circuits, as the Petition explains – have resolved the public forum issue. Worse, the rule the Eleventh Circuit adopted – that there is no public forum if the street and sidewalk are "surrounded" by campus buildings – is unworkable, unprincipled, and likely to spawn endless litigation.

SUMMARY OF ARGUMENT

The Eleventh Circuit's ruling in this case fundamentally destabilizes First Amendment law. The

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[2] *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); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Snyder v. Phelps*, 562 U.S. 443 (2000).

[3] *Greer v. Spock*, 424 U.S. 828 (1976); *Flower v. United States*, 407 U.S. 197 (1972).

court below held that public streets and sidewalks, when they run adjacent to a public university, cease to be traditional public forum property. This holding is deeply inconsistent with settled First Amendment law as expressed in Supreme Court precedent. Moreover, the decision below makes the public forum status of public streets and sidewalks an open question, subject to case-by-case resolution by reference to uncertain, unpredictable, subjective judgments. This Court should grant review to plug this breach in the dyke of First Amendment safeguards.

ARGUMENT

One of the clearest aspects of the public forum doctrine under the First Amendment is the rule that public streets and sidewalks, as such, are presumptively quintessential public forum property. Yet the court below ruled that the public streets and sidewalks running past the campus of a public university are somehow not traditional public fora. By overriding the settled public forum status of public streets and sidewalks, and by offering in place of that settled principle an elusive and subjective, ultimately "eye-of-the-beholder" test, the Eleventh Circuit went seriously astray. This ruling is badly out of step with governing precedent and supplies a recipe for uncertainty, confusion, and endless litigation over what had previously been a settled point of constitutional law. This Court should grant review and reverse the Eleventh Circuit's embrace of this badly mistaken position.

I. PUBLIC STREETS AND SIDEWALKS ARE, WITHOUT MORE, TRADITIONAL PUBLIC FORA.

The lower court held that public streets and sidewalks are not presumptively traditional public fora for speech. The simplest reason to reject that ruling is that governing Supreme Court precedent stands clearly to the contrary: "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, *without more*, to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added). Hence, "all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Even legal ownership of the underlying property is constitutionally irrelevant: "wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Id.* at 480-81 (citation and editing marks omitted).

The court below therefore erred right off the bat by treating the forum status of the relevant sidewalks as an open question. As this Court has explained,

> [s]idewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.

Grace, 461 U.S. at 179 (emphasis added). "No particularized inquiry into the precise nature of a specific street is necessary," *Frisby*, 487 U.S. at 481. Indeed, "we have repeatedly referred to public streets as the archetype of a traditional public forum," *id.* at 480.

The Eleventh Circuit went astray when it failed to treat the streets and sidewalks as streets and sidewalks that happened to run through a college campus. As the court below acknowledged, "University Boulevard and Hackberry Lane are Tuscaloosa city streets that . . . run through the University's campus. Sidewalks open to the public line both streets." Pet. App. 8a. Instead, the lower court treated the pertinent streets and sidewalks as campus property that happened to provide a cut-through route for vehicles and pedestrians. Such an analysis mistakenly rests on a "surroundings" test – judging the street or sidewalk by its neighbors. But this Court has repeatedly rejected the notion that the nature of the property adjacent to the streets and sidewalks can somehow negate the public forum status of those public ways.

In *Frisby*, this Court explained that "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." 487 U.S. at 480. Likewise in *Grace*, the Court held that the fact that a sidewalk was adjacent to, and technically part of the grounds of, the Supreme Court itself in no way derogated from the public forum status of those sidewalks. As the *Grace* Court explained,

> Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.

461 U.S. at 180.

Certainly a different rule may apply to streets and sidewalks inside a military base, *Greer v. Spock*, 424 U.S. 828 (1976), and to walkways separated in distance (say, by a parking lot) from the public streets and sidewalks, *United States v. Kokinda*, 497 U.S. 720 (1990). But the clear, settled principle from Supreme Court cases is that, absent such unusual circumstances (a "special type of enclave," as the *Grace* Court phrased it, 461 U.S. at 180), public streets and sidewalks are presumptively traditional public fora for free speech.[4]

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[4] There is plainly no "special enclave" here. As Keister pointed out, "no signs, pillars, or other markers near the Sidewalk indicate to someone that they have entered campus," Pet. App. 23a. Moreover, the banners and decorative fencing that the lower court referenced, Pet. App. 24a, are not even close to being reliable indicators of some recognizable border between the campus and the city. Quite the contrary. UA banners, symbols on street signs, and markings on the street itself appear inconsistently at a host of locations both in the vicinity of campus buildings and in the vicinity of private businesses, Peoples Aff. ¶¶

(continued...)

It is undisputed here that the public is free to come and go on the sidewalks at issue. It follows that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

Cases already abound addressing the rights of speakers in open areas on *internal* campus grounds.[5] The decision in this case expands that class of litigation to speakers on *public* streets and their accompanying sidewalks. That is a recipe for doctrinal confusion and endless litigation.

II. THE LOWER COURT'S "SURROUNDINGS" TEST IS UNWORKABLE.

The Eleventh Circuit concluded that the streets

[4] (...continued)
4-5, 8-9, 11, 13, 20, 22, 24-26, 28-29, 31 (CA App. 204-10), indeed throughout the city of Tuscaloosa, *id.* ¶ 28 (CA App. 209). The placement of landscaping fencing (where it exists) in relation to the sidewalks is likewise inconsistent. Sometimes bollards are curbside, between the sidewalks and the street; other times the street and sidewalks are on one side of the bollards, with the campus buildings on the other. *See* McCray Aff. Exs. D-I (CA App. 73-84). Moreover, there are also bollards/fencing in front of private businesses or apartments as well as campus facilities. *E.g.*, Peoples Aff. Exs. 24, 25, 26 (PNC Bank), 47 (apartments) (CA App. 225-27, 248).

[5] *See, e.g., Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011); *Sonnier v. Crain*, 613 F.3d 436 (5th Cir. 2010); *Davis v. Stratton*, 360 Fed. Appx. 182 (2d Cir. 2010); *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Gilles v. Garland*, 281 Fed. Appx. 501 (6th Cir. 2008).

and sidewalks in question were "on campus" because the immediate vicinity contained numerous University of Alabama buildings. Pet. App. 23a-24a. (In a prior appeal, the court had declared the sidewalk to be "in the heart of campus." Pet. App. 22a.) As noted above, the invocation of neighboring uses to negate the public forum status of public streets and sidewalks is incompatible with Supreme Court precedent. Moreover, such factors yield a horribly unworkable and subjective test that will invite litigation and result in considerable uncertainty in the law.

Consider the "surroundings" test. This test looks at the immediate neighborhood through which a street runs, and presumably would apply regardless of the public or private nature of the adjoining lots. Most obviously, this test would call into question the status of streets which run through urban universities (MIT, NYU, University of Michigan, UT-Austin, Yale, etc.).[6] But this "surroundings" test would also create uncertainty about the public forum status of a host of other public streets or sidewalks. What if the streets and sidewalks run through a section of town surrounded by an arts complex? By the corporate headquarters of some large company? By a group of automobile sales lots? By a large tract of farmland? The "surroundings" test contains no obvious limiting principle. Which adjacent owners will qualify for this

[6] A different analysis would apply, of course, to walkways that are truly "internal" either to (a) a self-contained campus like Princeton or the Catholic University of America in Washington, DC, or (b) the self-enclosed portions of a university that is elsewhere transected by public streets.

test? How extensive must the "surrounding" collection of property be?

The "heart of the campus" test which the Eleventh Circuit adopted in Keister's previous appeal (and did not disavow the second time around) presents even more uncertainty. What counts as the "heart" of a campus – or a commercial district, a government complex, an arts community, an agricultural space – will depend upon the subjective or esthetic (or geometrical?) perceptions of judges, no two of which are likely to come to identical conclusions. It is hard to imagine a slipperier, less predictable test. Yet attorneys and lower court judges are supposed to follow such a standard?

And again, why should it matter, for free speech purposes, whether one is in the "heart" of a neighborhood (*cf. Frisby*), a federal complex (*cf. Grace*), Embassy Row (*cf. Boos*), or some other locale? Fixation on the nearby lots misses the point. To reiterate:

> Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.

Grace, 461 U.S. at 180.

In short, the Eleventh Circuit not only erred by departing from the settled status of public streets and sidewalks as traditional public fora, but in replacing that settled rule with an unworkable, subjective, sidewalk-by-sidewalk, neighborhood-by-neighborhood test. This Court should grant review.

CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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