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 YOUNG AMERICA'S FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Young America's Foundation ("YAF") is a national non-profit organization that ensures young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. Young Americans for Freedom is YAF's chapter affiliate on high school and college campuses across the country.

YAF works with young people on more than 2,000 campuses, including the University of Alabama. The YAF chapter at the University of Alabama recently hosted a speech by podcast host Matt Walsh for his "What is a Woman" tour to an audience of over 500. The chapter's success for events like this depends on its ability to convey its message, and the chapter often uses sidewalks around campus to talk to people and distribute literature. Indeed, when school venues are unavailable, public areas such as sidewalks are the chapter's only avenue for spreading its message.

Time and again, YAF has seen public universities suppress speech in traditional public fora, both explicitly and under cover of supposedly viewpoint-neutral regulations. These actions injure the rights of non-students, but work even greater harm to students. YAF has a substantial interest in this case in ensuring the existence of a robust space on, and adjacent to, college campuses for the exercise of free speech (including YAF's oftentimes disfavored conservative speech).

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[1]No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Rule 37.2, and all parties consented to its filing.

SUMMARY OF THE ARGUMENT

Is a public sidewalk located along a public street a traditional public forum? For more than 100 years, this Court has answered that question with a resounding "Yes." The Court's cases have consistently classified public sidewalks as traditional public fora, regardless of location or surroundings. In fact, public sidewalks are quintessential traditional public fora, along with streets and parks.

Ignoring this Court's precedent, the Eleventh Circuit held that a public sidewalk abutting a public street running through the City of Tuscaloosa and alongside part of the University of Alabama's campus is not a traditional public forum. Instead, the court held that the sidewalk was a limited public forum because (i) a number of University buildings are located nearby; (ii) the University provides maintenance for a portion of the sidewalks, (iii) some of the street signs and signs hanging from lampposts bear the University logo; and (iv) the University applies its speech policy to the sidewalk in the same way as other University grounds (i.e. the University does not "intend" the public sidewalk to be a traditional public forum). In essence, the Eleventh Circuit replaced the bright line, objective test enunciated by this Court in favor of a subjective balancing analysis.

If the Eleventh Circuit's test is allowed to stand, it will inevitably lead to public sidewalks throughout the country being removed from their historical status as traditional public fora based solely on the intent of a government actor. Such a test would wreak havoc on free speech rights by removing huge swathes of sidewalks from public use. This effect will be heightened in university towns like Tuscaloosa, where the university is the largest employer, and local governments are likely to take a "Whatever the University Wants" approach.

The Eleventh Circuit's subjective test also makes it more difficult for conservative organizations like YAF to express their message in the face of resistance from university officials keen to control the information or messages presented around campus. Public sidewalks along public streets near university buildings are often the last bastion for YAF to deliver its conservative messages when hostile university officials prohibit YAF from registering as a student group that can host speakers on campus, or when officials deny YAF's request to host a particular event.

The Court should grant the petition and reinstate the objective, bright line test that public sidewalks along public streets are traditional public fora. Certiorari is warranted.

ARGUMENT

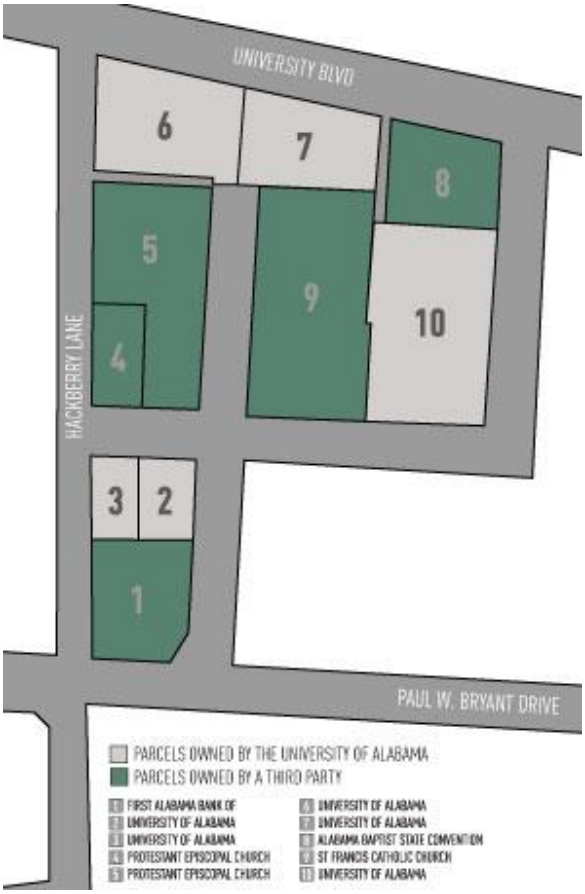
I. This Court has never deviated from the foundational rule that public sidewalks along city streets are traditional public fora.

Mr. Keister wants to preach and distribute literature on a sidewalk located at University Boulevard and Hackberry Lane—two "Tuscaloosa city streets." *Keister* v. *Bell*, 29 F.4th 1239, 1247 (11th Cir. 2022). Here is an aerial view of that intersection:

On three sides of the intersection are University buildings, while on the southeastern corner is a "public park." *Ibid.*

The sidewalks which line these two city streets are "open to the public." *Keister*, 29 F.4th at 1247. The University is not fenced-off, gated, or otherwise self-contained. Pet.50a. To the contrary, private businesses and churches are proximate to the intersection, some within just hundreds of feet. For

instance, the block located at the southeastern corner of the intersection (with the public park) is primarily owned by non-University, private church organizations:[2]



A few hundred feet further down Hackberry is a privately owned Regions Bank branch.

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[2]Information from Tuscaloosa County Geographic Information System - https://www.alabamagis.com/Tuscaloosa/ (visited on November 4, 2022).

This Court has held time and again that public sidewalks along city streets are traditional public fora. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 456 (2011) ("We have repeatedly referred to public streets as the archetype of a traditional public forum, noting that time out of mind public streets and sidewalks have been used for public assembly and debate.") (cleaned up). Indeed, the Court has explained that "[i]t is no accident that public streets and sidewalks have developed as venues for the exchange of ideas." *McCullen* v. *Coakley*, 573 U.S. 464, 476 (2014). Even today, public sidewalks "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *Ibid.* Unlike books, television, or websites, "on public streets and sidewalks[,]a listener often encounters speech he might otherwise tune out." *Ibid.*

The long list of the Court's consistent precedents recognizing that public sidewalks are traditional public fora include:

(i) *McCullen*, in which the Court noted that public sidewalks are traditional public fora "because of their historic role as sites for discussion and debate." 573 U.S. at 476;

(ii) *Schenck* v. *Pro-Choice Network of W. N.Y.*, holding that "speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum" 519 U.S. 357, 377 (1997);

(iii) *United States* v. *Kokinda*, observing that "municipal sidewalk[s] that run[ ] parallel to the road" are traditional public fora. 497 U.S. 720, 727–28 (1990) (plurality opinion);

(iv) *Frisby* v. *Schultz*, explaining that historical "decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that … they have immemorially been held in trust for the use of the public." 487 U.S. 474, 480–81 (1988) (quotation omitted);

(v) *Boos* v. *Barry*, declaring that public sidewalks are "traditional public fora that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." 485 U.S. 312, 318 (1988) (quotation omitted); and

(vi) *United States* v. *Grace*, which held that "[s]idewalks" are "traditionally … open to the public for expressive activities" and judged them "generally without further inquiry, to be public forum property." 461 U.S. 171, 179 (1983); accord *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972).

These decisions reflect a long-established history and tradition that public sidewalks along public streets are public fora, available for speaking, demonstrating, literature distribution, and advocacy. Their holdings do not indicate that a multi-factor analysis or balancing test is appropriate; rather, they establish a bright line. Is this a public sidewalk? If the answer is yes, then a traditional public forum exists. Full stop.

II. The Eleventh Circuit's holding conflicts directly with this Court's precedents in *Frisby, Marsh* and *Grace*.

The fact that the sidewalk in this case is a *public* sidewalk along *city* streets should have been the end of the Eleventh Circuit's forum inquiry. Indeed, it would have been had the Eleventh Circuit simply applied this Court's opinion in *Frisby*. There, the town whose picketing ordinance was challenged argued that calling a street or sidewalk "public" amounted to "clichés," and the title did not determine the applicable forum. 487 U.S. at 480. Rather, the town argued that a particularized analysis of the forum's nature was needed in each case, and its municipal streets were nonpublic fora because of their "physical narrowness" and "residential character."

The Court rejected that argument. Once a street or sidewalk has been identified as "public," "*[n]o* particularized inquiry into [its] precise nature … is necessary" to conclude that it is a traditional public forum. 487 U.S. at 481 (emphasis added). To the contrary, "a determination of the nature of the forum would follow automatically from this identification" as a public street or sidewalk. *Id.* at 480.[3]

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[3]The only time the Court made an exception to this rule related to an active military base:

> A necessary concomitant of the basic function of a military installation has been the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command. The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is

That is not to say that the narrowness or residential nature of the streets was entirely irrelevant; it was just not relevant to determining what type of forum was involved. *Id.* at 481 ("The residential character of those streets may well inform the application of the relevant test, but *it does not lead to a different test*.") (emphasis added).

The Eleventh Circuit should have applied *Frisby* and concluded that the sidewalk here was likewise a traditional public forum. Instead, it ignored *Frisby* and did the very thing that *Frisby* condemned: conduct a "particularized inquiry" regarding the public sidewalk in question. That inquiry led the Eleventh Circuit to hold that the sidewalk was only a limited public forum because:

(a) the University did not *intend* for the sidewalk (which it did not own) to be open to all speech;

(b) the University kept the sidewalks clear from snow and its police responded to incidents there;

(c) the sidewalk was located near some University buildings; and

(d) some of the nearby street lamps and street signs bore the University's logo.

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thus historically and constitutionally false. [*Greer* v. *Spock*, 424 U.S. 828, 838 (1976) (internal citations omitted).]

But see *Flower* v. *United States*, 407 U.S. 197, 198 (1972) (per curiam) (holding that street running through military base was fully open for First Amendment leafletting when military commander "chose not to exclude the public from the street").

The Eleventh Circuit's analysis violated this Court's precedents at every turn. First, regarding *intent,* the intent of a party who simply provides maintenance service for a public sidewalk along a public street cannot possibly dictate the type of forum that public sidewalk becomes. To the contrary, what is relevant is that the sidewalk is public and has historically been fully open to free speech. The intent of the sidewalk maintainer is irrelevant.

Indeed, there is a longstanding history of requiring private citizens to pave or maintain the public sidewalk near their property. *E.g., Callender* v. *Marsh*, 1 Pick. 418, 436 (Mass. 1823) (noting obligation of private citizens to "make and keep in repair the sidewalks."); *Paxson* v. *Sweet*, 13 N.J.L. 196, 197, 1832 WL 2307 (N.J. 1832) (requiring property owners fronting on a public street to "fix curb stones and make a brick foot way in front of his lot"); see also Nadav Shoked, *Property Law's Search for a Public*, 97 Wash. U.L. Rev. 1517, 1562–63 (2020) (noting the English tradition in the 1700s "where each owner was responsible for the paving and maintenance of the portion of the street fronting his property.") Yet this paving or maintenance role does not give private citizens the right to exclude speech from the sidewalk or make it any less a traditional public forum.

That legal principle was made explicit in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), a case where this Court assigned public forum status to a sidewalk that was *privately* owned yet bore indicia of a public use. In *Marsh*, a Jehovah's Witness attempted to distribute religious literature on a sidewalk adjacent to a street. But the sidewalk, the street, and indeed the entire town were owned by a private company.

And the company made it clear that it did not intend to open the sidewalk to public speech by posting a sign that said: "This is Private Property, and Without Written Permission, No Street … Solicitation of Any Kind Will Be Permitted." *Id.* at 503.

The Jehovah's Witness was arrested for violating the company's rule. She challenged her arrest and argued that the First Amendment protected her activity of handing out literature on the sidewalk, regardless of the intent of the company that both owned and controlled the sidewalk and adjoining street.

This Court emphatically agreed. "Whether a corporation or a municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 507. Because the corporation was permitted to "use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block," then the "managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees." *Id.* at 507–08.

Since a municipal government could not make "the right to distribute [religious literature on a sidewalk] dependent on a … permit to be issued by an official who could deny it at will," neither could a non-government entity which owned or controlled the public sidewalks, even if that entity had an "express franchise" or "mere acquiescence" from the government. *Id.* at 504, 507.

In the same way, the University's intent and "control" of the sidewalk here does not make that sidewalk a limited public forum. Indeed, this case is easier because the University is public—not private like the company town in *Marsh*—and even more so because the University *does not own the sidewalk*.

Second, the fact that there are several University buildings near the public intersection is irrelevant, as *United States* v. *Grace*, 461 U.S. 171 (1983), makes clear. In *Grace*, a federal statute prohibited the display of signs and leafletting in the United States Supreme Court building and on its grounds. Critically, the statute defined the "grounds" of the Supreme Court to extend to "the curb of each of the four streets enclosing the block on which the building is located," thereby including the public sidewalks running along those streets. 461 U.S. at 179. This Court held the statute unconstitutional as applied to those sidewalks because public sidewalks along public streets "may be considered, *generally without further inquiry,* to be public forum property." *Ibid.* (emphasis added). Such a public sidewalk does not lose its status as a traditional public forum "for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.* at 180.

Grace's holding applies here. The fact that there are several University buildings in close proximity to the intersection does not transform the traditional-public-forum nature of public sidewalks. To the contrary, this Court has held that public sidewalks between a public street on one side and an educational building on the other side remain fully protected for expressive activity provided that activity does not materially disrupt classwork or

involve substantial disorder or invasion of rights of others. *Grayned*, 408 U.S. at 118 (considering public sidewalks about 100 feet from a high school building).

The Eleventh Circuit tried to sidestep *Frisby*, *Marsh*, and *Grace* by applying this Court's rules for interior sidewalks in government enclaves, such as on "military base[s]" and between a post office's "parking lot and … front door." *Keister*, 29 F.4th at 1253 (discussing *Greer* v. *Spock*, 424 U.S. 828 (1976), and *Kokinda*). But the shoe doesn't fit. Even if public university buildings constitute an enclave, the sidewalks here run along public streets that go beyond the University's property and lie—at worst—at the *perimeter* of the University's enclave and—at best—*outside* that enclave altogether. *Id.* at 1245. That was what both a University police officer and Mr. Keister understood. *Ibid.* Sidewalks along Tuscaloosa public streets (or any public university's hometown) aren't comparable to sidewalks inside Fort Knox.

III. The Eleventh Circuit's particularized analysis test opens a Pandora's box in free speech cases.

If this Court does not grant certiorari and reverse the Eleventh Circuit's particularized, multifactor test for public sidewalks, the consequences will be extreme. First, such a test would deprive citizens in the Eleventh Circuit of knowing where they can freely express their views and require lower courts to apply a host of factors relevant to a specific sidewalk. Citizens' fundamental right to speak to their neighbors should not depend on minutiae such as (1) what government officials intend, (2) which government or private buildings are nearby, and (3) who handles the snow removal.

Second, a multi-factored analysis test would result in litigants spending years in court conducting expensive discovery to uncover details regarding the sidewalk in question. Mr. Keister tried to speak on a Tuscaloosa city sidewalk in 2016. Over six years and two trips to the Eleventh Circuit later, he still is not able to preach or pass out literature peacefully there. A bright line, objective test eliminates the need for years of litigation and allows courts to quickly resolve matters based on a straightforward inquiry. Citizens like Mr. Keister should not be forced to litigate for years against a university behemoth funded by virtually unlimited tax dollars simply to earn the right to speak on a public sidewalk running along a public street.

Third, the Eleventh Circuit's multifactor analysis is of limited utility. After over five years of litigation, the only conclusion that court reached is "that the Sidewalk on the northeast corner of the Intersection is a limited public forum." *Keister*, 29 F.4th at 1256. No one knows how far that ruling extends. Fifteen feet from the intersection? The full block? Nor does anyone know whom that ruling covers. Students? Members of the Episcopal Church or Baptist State Convention that own land abutting the sidewalk? In short, the Eleventh Circuit's ruling creates more questions than answers. And those questions are likely to quell more protected speech, affecting not just visitors like Mr. Keister but students and others who live, work, or worship near university campuses every day.

Finally, courts could extend the same speech-censoring power to private universities. Consider New York University (NYU) whose buildings are interspersed throughout Manhattan. NYU Campus

Map, https://bit.ly/3A7E7a2. If the NYPD allow NYU to provide security services around those buildings and adjacent sidewalks, and NYU clears the snow there, a court could apply the Eleventh Circuit's reasoning and conclude that Manhattan public sidewalks are not traditional public fora. Such a holding would be disastrous for students who lack a First Amendment right to speak on a private university campus and must rely on nearby traditional public fora like public sidewalks.

This Court's bright line, objective rule that public sidewalks along public streets are traditional public fora avoids these problems. That rule is straightforward and grounded in our nations' history and tradition. By departing from that rule, the Eleventh Circuit opened Pandora's box. Only this Court can shut the lid, and it should do so.

CONCLUSION

For the foregoing reasons, and those explained by Petitioner, the petition should be granted.

Respectfully submitted,

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