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* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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QUESTION 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.*

*This brief takes no position on the cert-worthiness of Question Presented 2.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's campuses. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038 (2021); Brief of FIRE as *Amicus Curiae* in Support of Appellant, *Speech First, Inc.* v. *Cartwright*, 32 F.4th 1110 (11th Cir. 2022).

FIRE has a direct interest in this case because this Court's jurisprudence on campus speech impacts the individuals FIRE represents. FIRE has seen firsthand the eagerness of university administrators to ban speech they disfavor from students and non-students alike. FIRE files this brief in support of Petitioner to

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief, in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. Counsel for all parties have received timely notice of the intent to file and have consented in writing to the filing of this brief.

demonstrate the disturbing prevalence of these abuses and to argue that this Court should grant certiorari on Question Presented 1 to reaffirm longstanding precedent governing public universities' obligations under the First Amendment.

SUMMARY OF ARGUMENT

It is a dark hour for freedom of expression at the American university. Students, faculty, and members of the public all face school-sanctioned censorship at levels that recall the Red Scare. College administrators threaten students for handing out pocket copies of the Constitution, school staff rip down anti-communist posters, and states try to ban professors from teaching about Jackie Robinson. *Shaw* v. *Burke*, No. 2:17-cv-02386, 2018 WL 459661, at *3 (C.D. Cal. Jan. 17, 2018); *Flores* v. *Bennett*, No. 1:22-cv-01003, 2022 WL 9459604, at *2 (E.D. Cal. Oct. 14, 2022); *Pernell* v. *Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22-cv-304, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022). When FIRE was founded in 1999 to combat campus censorship, its co-founder Harvey Silverglate thought the issue would be quickly addressed and that FIRE would only need to exist for ten years or so before the problem was resolved. The reverse has been true: As public university bureaucracies have mushroomed, university administrators have increasingly silenced students and non-students alike with no regard for the First Amendment.

That problem is on full display here. A public university's administrators claim the right to regulate First Amendment expression on a public city sidewalk, merely because a campus building happens

to be on the same block. This policy was used to restrict Mr. Keister's ability to share his message with students and passersby. Sadly, this is far from an isolated incident, and Mr. Keister is far from alone. Indeed, FIRE's work over more than two decades demonstrates that students and faculty are just as, if not more, likely to be hit with arbitrary and unlawful speech restrictions as non-students like Mr. Keister. That is particularly true when speech is inconvenient, unpopular, or critical of the school.

Two of this Court's steadfast First Amendment holdings bear on this case: First, 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). And second, on public sidewalks, streets, and parks, "the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n* v. *Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). These longstanding precedents should have been enough to resolve this case: A public sidewalk on a public university campus is open to First Amendment expression.

Yet the federal courts of appeal are divided on how to address public university regulation of speech in public spaces. Several circuits, including the Sixth Circuit, have properly held that these abuses violate the First Amendment and must stop. But the Fourth and now the Eleventh Circuits have split with them and allow university administrators to over-regulate sidewalk speech with impunity.

Today, many administrators treat their campuses as fiefdoms, their students as peons, and non-students like Mr. Keister as invading ants. But state university

officials don't rule by fiat. They govern public spaces subject to the rule of law, including the First Amendment. This Court should grant certiorari to resolve the circuit split below and protect the right of students and non-students to freely express themselves in public spaces.

ARGUMENT

I. Public Universities Regularly Wield Forum Restrictions to Suppress Student and Non-Student Speech Alike.

Mr. Keister is yet another victim of public university speech diktats. But public university administrators do not merely apply unlawful speech restrictions to non-students like itinerant preachers or Proud Boys. They apply them with equal fervor to students themselves. Speech zone policies have been cited to ban students from handing out constitutions on Constitution Day, to prevent them from distributing anti-capitalism flyers (when pro-capitalism materials were permitted), and to bar them from polling students on marijuana legalization—all on campus open spaces or sidewalks far from building entrances. Permitting regimes continue to wreak havoc on the rights of students and non-students like Mr. Keister to this day.

A. The First Amendment Applies to Public Colleges and Universities.

By now, it should be uncontroversial to say that the First Amendment applies at public colleges and universities. This Court noted as much in *Sweezy* v.

New Hampshire, 354 U.S. 234, 249–50 (1957), when it held that the Bill of Rights protected a state university professor's "right to lecture" on socialist topics. Discussing the importance of free expression in higher education, the Court further remarked:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250. This Court confirmed the First Amendment's application to state-employed professors in *Keyishian* v. *Board of Regents, State University of New York*, 385 U.S. 589 (1967). There, the Court struck down New York regulations requiring all state-employed faculty to sign a certificate stating they were not Communists. *Id.* at 592. In doing so, it noted that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603.

The First Amendment's protections were first extended to public university students in *Healy* v. *James*, 408 U.S. 169 (1972). There, this Court held that Central Connecticut State College violated students' First Amendment rights when it refused official club recognition to a left-wing student group. *Id.* at 180–81. The decision made clear that "state

colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id.* at 180.

The Court doubled down on that principle in *Widmar* v. *Vincent* when it held that a state university could not deny its generally available facilities to a registered student group just because that group wanted to "use the facilities for religious worship and religious discussion." 454 U.S. 263, 265 (1981). It noted that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267–68. The Court further remarked that by 1981, its "cases le[ft] no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Id.* at 268–69.

This Court has consistently protected the "expansive freedoms of speech and thought associated with the university environment," *Grutter* v. *Bollinger*, 539 U.S. 306, 329 (2003). And for decades, lower courts have adhered to this well-established precedent, making clear time and again that the First Amendment applies in full on public college campuses. *See, e.g.*, *Speech First, Inc.* v. *Fenves*, 979 F.3d 319, 338–39 (5th Cir. 2020) (collecting a "consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague"). Nevertheless, public universities and their administrators continue to brazenly assert an unfounded authority to restrict First Amendment rights on campus, just as Respondents do here.

B. Public University Administrators Routinely Ignore the First Amendment on Campus, Including in Traditionally Public Areas.

Despite the First Amendment's long-established application on public campuses, FIRE's work demonstrates that when left unchecked, state college and university administrators frequently ignore their First Amendment obligations in order to suppress speech critical of their schools or supportive of policies they disagree with.[2] In virtually every case, these administrators rely on vague, overbroad, or unevenly applied policies to restrict free speech.

For example, in a string of cases litigated by FIRE on behalf of student chapters of Young Americans for Liberty, public college administrators around the country threatened students or ordered them to disperse for expressing their First Amendment freedoms of speech and assembly, as well as their freedom to petition. In *Brown* v. *Jones County Junior College*, 463 F. Supp. 3d 742 (S.D. Miss. 2020), the Dean of Students called campus police on two students for rolling a "free speech ball" (a beach ball

[2] That is not to say that *private* college and university administrators do not also frequently restrict speech on campus. Indeed, as FIRE's research shows, private schools are often *more* callous towards student speech, in violation of their contractual promises of freedom of expression. See FIRE, *Spotlight on Speech Codes 2022*, at https://www.thefire.org/research-learn/spotlight-speech-codes-2022 [https://perma.cc/3KLG-XNUA] ("Of the 107 private colleges and universities reviewed, 44 received a red light rating (41.1%). 54 received a yellow light rating (50.5%), four received a green light rating (3.7%), and five earned a Warning rating (4.7%).").

with words written in sharpie) around the campus lawn without getting advance permission from the Vice President of Student Affairs. *Id.* at 748–49. Several months later, when student Michael Brown held a sign in the campus plaza "inviting students to share their thoughts on whether marijuana should be legalized," campus police demanded identification, "ordered him to leave campus" when he refused, "and threatened to arrest him for trespass if he returned" to his own college campus. *Id.* at 749. The Chief of Police told Brown that "he was not allowed to engage in expressive activity on campus without administrative approval." *Id.* at 750.

Los Angeles Pierce College student and YAL member Kevin Shaw was threatened with removal from campus for distributing Spanish-language copies of the Constitution outside the school's designated "Free Speech Area" without a permit—even though those requirements were unpublished and made known to Shaw only after a school administrator harassed him. *Shaw* v. *Burke*, No. 2:17-cv-02386, 2018 WL 459661, at *2–3 (C.D. Cal. Jan. 17, 2018). The "Free Speech Area" in question occupied "approximately 0.007% of the main area of campus," or roughly the ratio of an iPhone to a tennis court. *Id.* at *2.

In similar cases coordinated or litigated by FIRE, campus administrators cited free speech restriction policies to ban YAL students from seeking petition signatures to condemn spying by the NSA, Complaint, *Sinapi-Riddle* v. *Citrus Cmty. Coll. Dist.*, 2:14-cv-05104, 2014 WL 11394671 (C.D. Cal. Jul. 1, 2014), Complaint, *Burch* v. *Univ. of Hawaii Sys.*, No. 1:14-cv-00200, 2014 WL 1647534 (D. Haw. Apr. 24, 2014),

from asking support for a right-to-work amendment, Order Granting in Part Plaintiffs' Motion for a Preliminary Injunction, *Univ. of Cincinnati Chapter of Young Americans for Liberty* v. *Williams*, No. 1:12-CV-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012); and from displaying unflattering posters of George W. Bush, Barack Obama, and Che Guevara, Complaint, *Jergins* v. *Williams*, No. 2:15-cv-00144 (D. Utah Mar. 4, 2015).

But administrative overreach is not limited to just conservative and libertarian students. In *Salazar* v. *Joliet Junior College*, FIRE represented student Ivette Salazar, who was detained by uniformed campus police officers and held in an interrogation room for distributing flyers that said "Shut Down Capitalism" without permission—directly adjacent to a conservative organization handing out "Socialism Sucks" flyers without incident. Amended Complaint, No. 1:18-cv-00217 (N.D. Ill. Mar. 13, 2018). Similarly, in *Tomas* v. *Coley*, a student at California State Polytechnic University—Pomona was harassed by campus police for handing out animal-rights flyers without advance permission and outside the school's tiny designated "free speech zone." Complaint, No. 2:15-cv-02355 (C.D. Cal. Mar. 31, 2015).

Thankfully, all the above cases ended in either court victories for the silenced students or favorable settlements. However, they demonstrate university administrators' willingness to harass students—including through the use of campus police—simply for expressing their views on open, outdoor areas of campus without express administrative approval.

Many public colleges and universities continue to maintain and enforce similar policies against students and non-students alike. At Western Illinois University, for example, students advocating for the legalization of marijuana in an open area of campus were stopped within minutes by campus law enforcement—literal speech police—because they were "outside of the free speech zone." Robby Soave, *Cops Prevent Students From Advertising Fake 'Pot' Brownies Outside Free Speech Zone*, Reason (Sept. 9, 2019), https://reason.com/2019/09/09/western-illinois-university-pot-brownies-free-speech-zone [https://perma.cc/PVJ2-TTN9].

And at the University of California—Riverside, "all persons," whether school-affiliated or not, are prohibited from exercising their First Amendment rights on the school's vast acres of public green space, including the "Tower Mall" thoroughfare that dominates much of the nearly 1,200-acre campus. See FIRE Speech Code Index, *University of California – Riverside Policy 700-70: Speech and Advocacy*, https://www.thefire.org/colleges/university-california-riverside/policy-700-70-speech-and-advocacy [https://perma.cc/SS9D-RDNL]; University of California – Riverside, *About UC Riverside*, https://www.ucr.edu/about-ucr [https://perma.cc/L5ZS-7G58]; University of California – Riverside, *Campus Map*, https://campusmap.ucr.edu [https://perma.cc/7W6S-T74D].

In sum, unconstitutional speech restrictions abound at public colleges and universities, and the threat of enforcement is real. Though this Court has repeatedly held similar content- and viewpoint-based speech restrictions to violate the First Amendment,

university administrators clearly have not gotten the message.

II. This Court Should Grant Certiorari to Clarify That Public Universities Can't Silence Speech in Public Spaces.

The lower courts disagree on what makes a space "public," and who gets to decide. That disagreement has led to chilled speech for untold numbers of students and non-students, including Mr. Keister. This Court should set the record straight that public universities can't simply wave a magic wand and declare that a public space suddenly *isn't* public anymore just because it happens to be next to a campus building.

A. Public Sidewalks Are Public Spaces.

Few places are more enshrined in American jurisprudence as places of public debate than the public sidewalk. As this Court noted in *McCullen* v. *Coakley*

> It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. . . . There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,"

> *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

573 U.S. 464, 476 (2014). Consequently, public sidewalks afford special legal protection for free speech. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n* v. *Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983).

A public sidewalk on a public street does not lose those protections simply by being in front of a university building, particularly when that university's campus is in an urban setting that is highly integrated with non-campus streets and buildings. The Sixth Circuit recognized this in *McGlone* v. *Bell*, 681 F.3d 718 (6th Cir. 2012). There, Tennessee Technological University (TTU) required non-students to give 14 business days' notice before speaking anywhere on campus, including in campus green spaces and on campus sidewalks. *Id.* at 722. On facts strikingly similar to this case, TTU officials used this policy to bar an itinerant preacher from distributing religious material and discussing a Christian message with students, despite the urban campus "blend[ing] in with the City of Cookeville," and despite many campus sidewalks being "indistinguishable from City of Cookeville sidewalks." *Id.* at 723.

The Sixth Circuit held that TTU's sidewalks were just as public—and thus, just as subject to the

protections of the First Amendment—as the ordinary city sidewalks. *Id.* at 732–33. In doing so, the court put the burden on *TTU* "to show that the sidewalk [wa]s overwhelmingly specialized to negate its traditional forum status." *Id.* at 732 (citing *Henderson* v. *Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992)). Because TTU's sidewalks "blend[ed] into the urban grid and [we]re physically indistinguishable from public sidewalks," the court held that they were in fact public sidewalks for First Amendment purposes. *Id.* at 733; see also *Roberts* v. *Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) ("[T]o the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not.").

The Sixth Circuit's approach has the virtue of common sense. If it looks like a public sidewalk and functions like a public sidewalk, any member of the public or of the student body would understandably expect to be able to *use* it like a public sidewalk, including for expressive activity. At least the Fifth and Eighth Circuits have adopted a similar approach. *Brister* v. *Faulkner*, 214 F.3d 675 (5th Cir. 2000); *Bowman* v. *White*, 444 F.3d 967 (8th Cir. 2006).

B. This Court Should Grant Certiorari to Resolve the Circuit Split on University Sidewalk Speech.

In deciding that University of Alabama sidewalks aren't public, the Eleventh Circuit deepened an existing circuit split on the issue. Several years ago, the Fourth Circuit created this split with the Fifth,

Sixth, and Eighth Circuits in *ACLU* v. *Mote*, 423 F.3d 438 (4th Cir. 2005). There, despite the University of Maryland's campus being "generally open to any member of the public," and the University allowing "members of the public to engage in any lawful activity in these open areas *except* public speaking and handbilling," the Fourth Circuit held that no part of the campus was a traditional public forum. *Id.* at 443 (emphasis added). That meant that the many public sidewalks on the massive University of Maryland campus, as well as the large swathes of open green space meant to mimic the National Mall, are all cut off to non-student public speaking, leafletting, and petitioning without either a university sponsor or pre-approval from a university administrator. This runs counter to this Court's recognition that "[t]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy*, 408 U.S. at 180 (citation omitted).

Yes, *Mote* involved non-student speech—but it makes no sense for a publicly accessible sidewalk or green space to be open to all members of the public for all purposes *except* expression protected by the First Amendment. Because this was the case at the University of Maryland, it naturally follows that the campus would function as a public forum for the general public as well as its students and faculty.

In this case, the Eleventh Circuit doubles down on this bad reasoning. It notes that the public sidewalk in question is owned by the city government, abuts "private businesses and non-University property," and is "indistinguishable from the City sidewalks adjoining it." *Keister* v. *Bell*, 29 F.4th 1239, 1254 (11th Cir. 2022). Yet the Court holds that the same public

sidewalk can still not be entitled to the traditional First Amendment protections because it happens to be "just a block from the Quad" and "lie[] immediately in front of" a single university building. *Id.* Despite this extraordinary holding, the opinion does not cite a single case where a city-owned sidewalk on a public thoroughfare was held to *not* be a traditional public forum.

Neither the results nor the reasoning employed in *Mote* and *Keister* can be squared with the Sixth Circuit's holding in *McGlone*. More importantly, they cannot be squared with this Court's repeated longstanding holdings that public sidewalks are open for public debate. This Court should grant certiorari to resolve this conflict and reinstate the right of students and non-students alike to exercise their First Amendment rights on public university sidewalks.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari on the first Question Presented.

November 23, 2022 Respectfully Submitted,

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