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

## PETITIONER'S REPLY BRIEF


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## INTRODUCTION

There is no genuine dispute that the relevant intersection is owned by the City, open to public pedestrian and vehicular traffic, and is part of the City's integrated transportation grid, connecting businesses, religious institutions, other private property, and university facilities on and adjacent to its streets. Despite Respondents' efforts at obfuscation, that intersection is in every sense the type of traditional public forum recognized by this Court's precedents, and nothing about its function or use is incompatible with free speech. That should have been the end of the matter. Instead, as Respondents also do not dispute, the Eleventh Circuit applied a multifactor balancing test and relied on evidence that "the University d[id] not *intend* to open the Sidewalk" to expressive activity to conclude that the Sidewalk was *not* a traditional public forum, thereby upholding Respondents' speech restrictions. App.26a-27a (emphasis added).

Even assuming the propriety of a balancing test, the Eleventh Circuit's circular reliance on the University's intent to suppress speech was an improper fulcrum for converting the most quintessential of traditional public fora into a limited forum allowing suppression. Contrary to Respondents, that court's reliance on government intent to suppress speech conflicts with the decisions of other circuits and this Court, was not remotely "invited," and was wrong. And Respondents' arguments only highlight the need for this Court to review and reject the lower courts' use of multifactor balancing tests that are not rooted in the

Constitution's text, history, and tradition and, in circuits like the Eleventh, make any case's outcome unprincipled and unpredictable.

## ARGUMENT

### I. The First Question Is Worthy of Review and Was Not Waived Below.

Notwithstanding Respondents' focus on non-existent or irrelevant cosmetic differences among various cases, the circuits are deeply split over whether government intent to restrict or suppress speech can convert a traditional public forum into a limited forum amenable to such restrictions. By every relevant and objective criterion, the City-owned Sidewalk here was not remotely part of a restricted University "enclave," but was instead specifically reserved and open to the public for pedestrian and vehicular use. Had this dispute arose in the Ninth, Tenth, or D.C. Circuits, the University's intent to suppress speech would have been irrelevant and the outcome would have been different.

1. Respondents first accuse Petitioner of "invit[ing]" the "error of which he now complains." BIO 1. But the single stray sentence to which they refer, C.A.Appellant's Br. 33, does nothing of the sort.

Throughout Petitioner's brief below, he repeatedly urged that the City-owned Sidewalk was "[i]nherently" a traditional public forum "as a matter of law." *Id.* at 25, 29, 32. Indeed, he expressly rejected the need for further inquiry:

> City streets and sidewalks do not require any "particularized inquiry" to determine their forum status. *Frisby* v. *Schultz*, 487 U.S. 474,

> 481 (1988). They are intrinsically traditional public fora. *Id.* For this reason, city sidewalks, and rights-of-way are labelled traditional public fora automatically, without courts delving into their purpose, function, or appearance. * * * This Court should view the intersection sidewalks at University Blvd. and Hackberry Lane the same. City ownership and right-of-way obviate the need to look any further; these sidewalks are traditional public fora.

*Id*. at 32 (citations omitted). Given this analysis, any claim that Petitioner "invited" the court to consider anything beyond public ownership and control of the street when determining its *traditional*-public-forum status would be frivolous.

But Respondents make precisely such a suggestion by focusing on the next paragraph in Petitioner's brief, in which he criticized the district court's "*limited* public fora" analysis for looking at the *University's* intent, rather than that of the Sidewalk's true owner, the City. *Id*. at 32-33. In that context, Petitioner observed that "the intentions of the owner are key to determining the purpose" of such a limited public forum and noted the relevance of the intent of the "owner" when considering "internal campus property[]," *id.* at 33 (citing *Bloedorn* v. *Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011).[1] But he promptly

[1] That Petitioner was also merely citing existing Eleventh Circuit precedent is an independent reason why there is no invited error. This Court has emphasized that parties need not press futile arguments. *MedImmune, Inc.* v. *Genentech, Inc.*, 549

distinguished "these sidewalks as city property" and rejected the district court's "improper particularized inquiry" as a basis for "characterizing the sidewalks as limited public fora." *Id.*; see also *id.* at 33-34 ("[W]hen a sidewalk is a municipal right-of-way, the appearance, and function of its surroundings cannot work to downgrade it from a traditional public forum[.]").

Respondents thus take the relevant quotation entirely out of context and ignore Petitioner's repeated, emphatic rejections of any particularized inquiry beyond looking to the City-owned nature of the street and sidewalks. Respondents' suggestion of invited error is absurd.

2. As for whether the Eleventh Circuit's analysis relied on government intent, Respondents again miss the mark. For example, in denying (at 9) that the decision below turned on the University's intent to restrict speech, Respondents simply ignore the repeated passages to the contrary. Intent was the second of three express factors, with the other two factors being either irrelevant or supporting Petitioner. App.17a. For the first factor, the court merely observed that "state-funded universities are generally not considered traditional public fora," App.20a, ignoring its prior assumption, required on summary judgment, that the Sidewalk was owned by the City and was open for public use. The next factor was the University's intent to restrict expressive

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U.S. 118, 125 (2007); see also *Cherry* v. *Dometic Corp.*, 986 F.3d 1296, 1301 (11th Cir. 2021) ("A fallback position does not invite error.").

activity, as to which it cited its decision in *Bloedorn* for the proposition that the "physical characteristics" of land resembling traditional public forums, were of "lesser significance" than government intent. *Id.* at 21a; see also App.22a (The "University did not intend to open the sidewalks for non-student use[.]"); App.26a ("[T]he University does not intend to open the Sidewalk up to unchecked expressive activity[.]"). Given that intent outweighed the obvious street and sidewalk-like qualities of the *actual* municipal street and sidewalk here, it is risible to suggest that the University's intent did not drive the outcome below.

3. As for the circuit split, Respondents do not dispute that the Second and Eighth Circuits likewise rely on government intent in their forum analysis. Pet. 18–19. Instead, they suggest that the Ninth, Tenth, and D.C. Circuits likewise *agree* that government intent to restrict speech can convert a traditional public forum into a limited public forum. BIO 9-12. That suggestion is also baseless.

For example, the Tenth Circuit recognizes that "traditional public fora are open for expressive activity *regardless of the government intent*." *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002) (emphasis in original) (quoting *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678 (1998)); *id.* ("We first reject the contention that the City's express intention not to create a public forum controls our analysis.").

The Ninth Circuit similarly rejected a claim that "'subjective intent' is a key factor in traditional public forum analysis." *ACLU of Nev.* v. *City of Las Vegas*, 333 F.3d 1092, 1104 (9th Cir. 2003). And it identified

the precise error that Respondents commit here (at 9-12): they "conflate[] the factors necessary for the creation of a designated public forum with those for a traditional public forum." *ACLU of Nev.*, 333 F.3d at 1104; accord *id.* at 1104 n.11 (Cases cited "for the proposition that government intent is said to be the touchstone of forum analysis relate to designated public forums, not traditional public forums.") (cleaned up).[2]

Indeed, Respondents (at 11) make that mistake in analyzing relevant D.C. Circuit precedent, which they wrongly assert turns on the court's "factual findings" rather than the court's refusal to rely on government intent. But in *Henderson* v. *Lujan*, the D.C. Circuit *rejected* the government's attempt to "establish the nonforum character of the sidewalks by reference to the intent of the National Park Service and its consistent practice of forbidding expressive conduct on the walkways." 964 F.2d 1179, 1182 (D.C. Cir. 1992) (cleaned up).

The D.C. Circuit—like the Ninth Circuit—deems intent relevant only when considering *designated* public forum status. Both courts hold instead that relying on government intent outside of circumstances where the "government has dedicated property to a

[2] The Ninth Circuit also recognized that analyses of traditional public forums employ "a jumble of overlapping factors" that cause them to "frequently deem[] a factor dispositive or ignor[e] it without reasoned explanation." *Id.* at 1109–1100; accord *id.* at 1100 ("[F]our different federal courts, confronted with three substantially similar programs, approached the public forum doctrine in five different ways * * * and reached three different decisions regarding the type of forum at issue.") (citation omitted).

use inconsistent with conventional public assembly and debate"—what Respondents seek to do here—would "misconceive[] the role of government intent and practice." *Id.* at 1182; accord *Lederman* v. *United States*, 291 F.3d 36, 42 (D.C. Cir. 2002) ("Congress *** may not by its own ipse dixit destroy the 'public forum' status of streets" which "have historically been public forums.") (citation omitted).

The Ninth, Tenth, and D.C. Circuits reject governments' claims that their intent to limit speech is relevant to the traditional-public-forum analysis. But such intent is now a key factor in the Second, Eighth, and Eleventh Circuits. This Court should grant certiorari to resolve that divide.

4. The Circuits are also divided over the status of sidewalks located next to university buildings. Indeed, Respondents concede (at 2) "that some circuit courts concluded sidewalks on other campuses were traditional public fora while others concluded sidewalks on different campuses are not." But Respondents assert (at 15) that these contrary decisions stem from "nothing more than different facts." Not so.

For example, in *Brister* v. *Faulkner*, 214 F.3d 675, 677, 683 (5th Cir. 2000), the Fifth Circuit held that a "unique piece of university property" that was "indistinguishable from [an] Austin city sidewalk" was a traditional public forum. Any factual distinctions between *Brister* and this case only strengthen the split—given that the property there belonged to the University of Texas, was surrounded by other UT facilities, and was merely adjacent to city streets. Here, although the Sidewalk belongs to the City and

is subject to a public right of way, the Eleventh Circuit came to a contrary conclusion about the Sidewalk's status.[3]

The Sixth Circuit's decision in *McGlone* v. *Bell*, 681 F.3d 718 (6th Cir. 2012), likewise conflicts with the decision below. There, as here, "[v]arious city streets [ran] around and through the [University] campus," and the plaintiff tried to preach on a sidewalk adjacent to such a street. *Id.* at 723. The court held that, because "the perimeter sidewalks at [the university] blend into the urban grid and are physically indistinguishable from public sidewalks, they *constitute traditional public fora*." *Id.* at 733 (emphasis added).

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[3] Contrary to Respondents' attempt to relitigate facts that must be taken in the light most favorable to Petitioner, the Sidewalk and intersection in question are not "on campus." BIO 5. The court's passing "on campus" conclusion addressed the Sidewalk's *proximity* to university grounds, "just a block from the Quad * * * immediately in front of Russell Hall," App.23a-24a, but it ultimately accepted that the city owned the Sidewalk, App.26a; see also C.A.Appellant's Br. 18-21 (discussing and showing maps reflecting City ownership). Nor is the Sidewalk in the "'heart' of campus," BIO 13, as the previous panel asserted without benefit of factual development. The panel below analyzed the Sidewalk as *City* property. App.23a-24a, 26a. Rather, the University owns property adjacent to the City-owned public intersection and sidewalks (as do different private churches), as is common in decentralized and distributed urban universities. George Washington University in D.C. or NYU in New York have distributed buildings surrounding many city streets, yet those public streets are not limited forums merely because they run "through" dispersed and non-contiguous educational institutions.

Respondents (at 14) argue that the Sidewalk is not a "perimeter" sidewalk. But Respondents ignore that the sidewalk in *McGlone* was a "private" sidewalk owned by the university, not the city, was thus on campus, and yet was *still* held to be a public forum. 681 F.3d at 725-26, 732-33. Any factual differences between *McGlone* and this case once again only strengthen the split. That the Sidewalk here had a few UA signs on lampposts and other decorative, but not restrictive, indicia of the University's proximity, BIO 5, likewise does not distinguish this case from *McGlone*, which similarly involved a "few signs." *McGlone*, 681 F.3d at 723.

Finally, Respondents (at 13) misunderstand the significance of *Bowman* v. *White*, 444 F.3d 967 (8th Cir. 2006), which shows the confusion regarding campus-adjacent streets. As the Petition notes (at 19), the Eighth Circuit in *Bowman* suggested that its First Amendment analysis could depend on whether sidewalks are located at the border of a campus. But that reconfirms the malleability of the "intent" standard.

Because the courts of appeals disagree not only on the relevance to traditional-public-forum categorization of government intent to suppress speech, but also on its specific use in the context of sidewalks abutting university property, this Court should grant certiorari to resolve those conflicts.

## II. Respondents' Arguments Confirm that the Second Question Independently Warrants Review.

While doing their best to muddle the factors at issue in cases under the first question presented, Respondents ignore the second question presented, which asks whether text, history, and tradition—rather than multifactor balancing tests—should drive the traditional-public-forum analysis. But if the existing balancing test is as malleable or unpredictable as Respondents suggest, that only highlights the need for this Court to clarify the proper way to apply the Constitution.

1. Respondents do not dispute that the multifactor balancing test applied here, unmoored from the Constitution's history and tradition, suffers from the same fundamental flaws of means-end balancing tests this Court has recently rejected elsewhere. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022).[4] The proper approach is to rely on the text of the relevant provision (in this case, the First Amendment), guided by history and tradition. *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022). Taking that approach would be entirely consistent with this Court's First Amendment precedent. See Pet. 28-30.

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[4] Indeed, Respondents' suggestion that the test properly treated university-adjacent public streets as part of a protected "enclave" where constitutional rights can be restricted has implications well beyond the First Amendment. See, e.g., *Bruen*, 142 S. Ct. at 2133-2134 (discussing limits on declaring city streets Second Amendment-free zones).

Moreover, a decision instructing courts to focus on history and tradition would guarantee that the archetypical examples of traditional public forums—"streets, sidewalks, and parks," *United States* v. *Grace*, 461 U.S. 171, 177 (1983)—retain that protection irrespective of the government's intent to limit expressive activities therein. As the decision below demonstrates, not even quintessential forums are safe from government overreach when a multifactor balancing test, unmoored from the text or history of the First Amendment, applies.

2. Finally, although Respondents invoke *United States* v. *Kokinda*, 497 U.S. 720 (1990) (plurality), for the proposition that not "every public sidewalk is a public forum" (BIO 3), there was no majority opinion in that case. Indeed, Justice Kennedy, who concurred in the judgment, declined to "make a precise determination whether this sidewalk and others like it are public or nonpublic forums." *Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring in judgment). Such a divided outcome itself argues for a more definitive test.

Petitioner does not claim that every sidewalk is always and forever a traditional public forum. History or incompatible use may dictate otherwise. But the City-owned Sidewalk here is a traditional public forum, which the Eleventh Circuit would have recognized had it relied on history and tradition rather than a balancing test that conflicts with that in several other circuits.

**III. This Case Is an Excellent Vehicle.**

Notwithstanding Respondents' suggestion (at 15), this case is an excellent vehicle for answering both questions presented and is not fact-bound. Under Petitioner's suggested approaches, the cosmetic facts to which Respondents point are *irrelevant* to a proper traditional-public-forum analysis. Here, those facts served only as circumstantial evidence of the University's intent to limit speech. But even *direct* evidence of intent should not matter where a publicly owned street is open to pedestrian and vehicular traffic. The Sidewalk here is a traditional public forum regardless how many signs or banners or proclamations of censorship the University erects.

As for whether there may be *factual* issues on remand, BIO 17, that is irrelevant to the *legal* issue here. If the University implausibly wants to dispute ownership of the Sidewalk, contrary to the assumption underlying the decision below, it "should be determined on remand" under a proper legal standard. See *Boechler, P.C.* v. *Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1501 (2022).

In any event, Respondents overstate the dispute over ownership. The agreement between the City and the University provides that "[t]he City retains full title and ownership to all aspects and portions of the right-of-way for which the city has ownership *** including, but not limited to the right of use and enjoyment of the [street and sidewalk] right-of-way to the fullest possible extent, including the right, collaboratively with Grantee, to exercise traffic control, pedestrian access, and parking regulations." CA.App.194.

## CONCLUSION

The circuits are split over whether government intent to restrict speech is relevant to the traditional-public-forum analysis. This case gives the Court an ideal opportunity both to resolve that split and to provide the lower courts with much-needed guidance on the role text, history, and tradition should play in that analysis. The Petition should be granted.

Respectfully submitted,

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