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

BRIEF IN OPPOSITION

SYBIL NEWTON
Counsel of Record
JAY M. EZELLE
COLE R. GRESHAM
MICHAEL R. LASSERRE
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
(205) 868-6000
snewton@starneslaw.com

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioner Rodney Keister was using "loud oration to try to engage passersby on their way to class" on a sidewalk directly in front of Russell Hall, a classroom building located in the "heart of campus" of the University of Alabama ("UA" or the "University"). The Eleventh Circuit "easily conclude[d]" there was sufficient indicia to put Keister on notice that he had "entered some special type of enclave" and, thus, the campus sidewalk was not a traditional public forum.

Given these factual determinations made by the District Court and affirmed by the Eleventh Circuit, the questions presented here are:

1. Was it error for the Eleventh Circuit to consider the intent of the University as part of its analysis of the forum status of the sidewalk at issue?

2. If consideration of intent was error, then did Keister invite such error by arguing in his principal brief to the Eleventh Circuit that, "Indeed, the intentions of the owner is key to determining the purpose of the forum"?

3. Was the Eleventh Circuit in error when it applied the Court's well-established forum analysis set forth and consistently applied by this Court including *Greer v. Spock*, 424 U.S. 828 (1976), *Widmar v. Vincent*, 454 U.S. 263 (1981), *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), *United States v. Grace*, 461 U.S. 171 (1983), *United States v.*

QUESTIONS PRESENTED – Continued

Kokinda, 497 U.S. 720 (1990), and *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), simply because the application of that test renders different results for sidewalks in different locations on different campuses with different environments?

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INTRODUCTION

The Court need look no further than Keister's first Question Presented to see there are no "compelling reasons" to review the Eleventh Circuit's opinion. Keister claims "the Eleventh Circuit erred in relying on the government's (or its delegee's) intent to regulate speech,"[1] but that is exactly what he asked the Eleventh Circuit to do when he argued in his brief to the Eleventh Circuit: "Indeed, the intentions of the owner is key to determining the purpose of the forum."[2] Keister cannot now argue the Eleventh Circuit erred when it merely addressed Keister's own legal argument.[3]

Putting aside the fact that Keister invited the very alleged error of which he now complains, Keister's purported circuit splits are illusory. Further, Keister's argument that intent was the "controlling" factor in the Eleventh Circuit's analysis is simply wrong. Nowhere in the Eleventh Circuit's two-sentence discussion of the University's intent does it even hint that this factor was decisive. Properly viewed, it is clear the Eleventh Circuit applied the same test as the Ninth, Tenth, and D.C. Circuits. As the D.C. Circuit noted—in a case cited by Keister—traditional public fora are those

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[1] Petition for Writ of Certiorari at i.

[2] Keister's Appellant's Brief before the Eleventh Circuit at 33.

[3] *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing the writ as improvidently granted because "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested").

areas that "have traditionally been open to the public, **and their intended use is consistent with public expression**."[4] The different outcomes in the cases Keister cites are simply the result of different factual records, not the application of different legal tests.

Keister's argument that there is a split in how the circuits treat sidewalks on college campuses is equally unavailing. The claimed split is based on nothing more than the fact that some circuit courts concluded sidewalks on other campuses were traditional public fora while others concluded sidewalks on different campuses are not. These differences are to be expected as forum analysis depends on the specific environment of each location; again, differing conclusions are the results of the diversity of the sidewalks and campuses, not a disagreement over the proper test. A review of the cases cited by Keister as evidence of a split demonstrates this very point: the cases do not use different tests, but rather apply the same test to different facts. In fact, the Eleventh Circuit's opinion in this case specifically distinguished these cases based on the differing facts of this particular sidewalk.

With these erroneous positions clarified, Keister's arguments are revealed to be nothing more than a factual dispute over whether this particular sidewalk on UA's campus is a special enclave. Keister's arguments are built on a faulty premise: that all sidewalks are traditional public fora. As this Court found in *United*

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[4] *Lederman v. U.S.*, 291 F.3d 36, 41 (D.C. Cir. 2002) (emphasis added).

States v. Kokinda, however, "*Grace* instructs that the dissent is simply incorrect in asserting that every public sidewalk is a public forum. As we recognized in *Grace*, the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum."[5]

As Keister has not requested this Court to overrule the forum analysis used in *Greer v. Spock*,[6] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,[7] *United States v. Grace*,[8] *United States v. Kokinda*,[9] and numerous other cases—nor would there be any basis for doing so—there is no reason for this Court to hear this Petition because the District Court and the Eleventh Circuit properly applied the very analysis utilized in those cases to the specific location at issue in this case. Accordingly, the Petition for Certiorari should be denied.

STATEMENT OF THE CASE

UA has a Grounds Use Policy ("GUP") that governs access to its campus while upholding the "primacy" of UA's "teaching and research mission," including to "facilitate responsible stewardship of institutional resources and to protect the safety of persons and the

[5] 497 U.S. 720, 729 (1990) (internal citation omitted).

[6] 424 U.S. 828 (1976).

[7] 460 U.S. 37 (1983).

[8] 461 U.S. 171 (1983).

[9] 497 U.S. 720 (1990).

security of property."[10] The GUP allows those who are unaffiliated with UA to speak publicly on campus if they are sponsored by or affiliated with a UA department or registered student organization.[11]

Keister is a traveling evangelist unaffiliated with UA.[12] On March 10, 2016, Keister and his companion started preaching on the sidewalk along Sixth Avenue in "the middle of campus," without a sponsor or a permit.[13] Keister set up a large banner and passed out literature while his companion preached using a megaphone.[14] After being told they could not set up there without a permit, Keister and his companion moved to the sidewalk on the northeast corner of University Boulevard and Hackberry Lane (the "Sidewalk").[15] Keister again set up his banner on the Sidewalk directly in front of Russell Hall—home to the University's history department.[16] He then began "using loud oration to try to engage passersby on their way to class."[17] Keister continued to preach on the Sidewalk until bad weather forced him to leave.[18] It was only

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[10] *Keister v. Bell*, 29 F.4th 1239, 1248 (11th Cir. 2022).

[11] *Id.*

[12] *Id.* at 1245.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 1254.

[17] *Id.* at 1259.

[18] *Id.* at 1245.

after Keister left the Sidewalk that he was told he could not preach on the Sidewalk without a permit.[19]

Even though he left the Sidewalk on his own volition, Keister subsequently filed suit alleging the University's GUP violated his First Amendment rights because, he alleged, the Sidewalk is a traditional public forum. The District Court and the Eleventh Circuit, however, have twice rejected Keister's claims. Both courts found the Sidewalk "was clearly inside a special enclave—the University's campus."[20]

The courts based these findings on the fact that the Sidewalk "is on campus,"[21] and "surrounded by clearly identified University buildings."[22] Further, the courts found that plenty of indicia would put a person on notice that they were on campus including: landscaping fences lining the Sidewalk, street signs bearing UA's script "A" logo, and UA signs hanging from the streetlamps.[23] In fact, "Keister conceded . . . that he believed Russell Hall and the grounds in front of Russell Hall were part of the University[.]"[24] As recognized by both lower courts, there are also numerous UA facilities and landmarks visible from the intersection.[25] For instance, the university Quad is one block from, and in

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[19] *Id.* at 1245-46.

[20] *Id.* at 1254.

[21] *Id.* at 1254.

[22] *Id.* at 1247.

[23] *Id.* at 1247.

[24] *Id.* at 1254.

[25] *Id.* at 1247.

clear sight of, the intersection.[26] Gallalee Hall and a UA parking lot restricted to UA faculty and staff occupy the northwest corner.[27] The southwestern corner includes Farrah Hall and its adjacent UA-restricted parking lot.[28]

The centrality of the location and the overwhelming amount of indicia surrounding this area of UA's campus led the Eleventh Circuit to confirm its finding that the Sidewalk is in the "heart" of UA's campus.[29] The court further found that "no evidence shows that the Sidewalk has ever been treated as anything other than part of a college campus."[30] The University also has "control over the Sidewalk."[31] The map below, with the intersection circled, demonstrates the Sidewalk's central location on campus.[32]

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[26] *Id.*

[27] *Id.* at 1247, 1254.

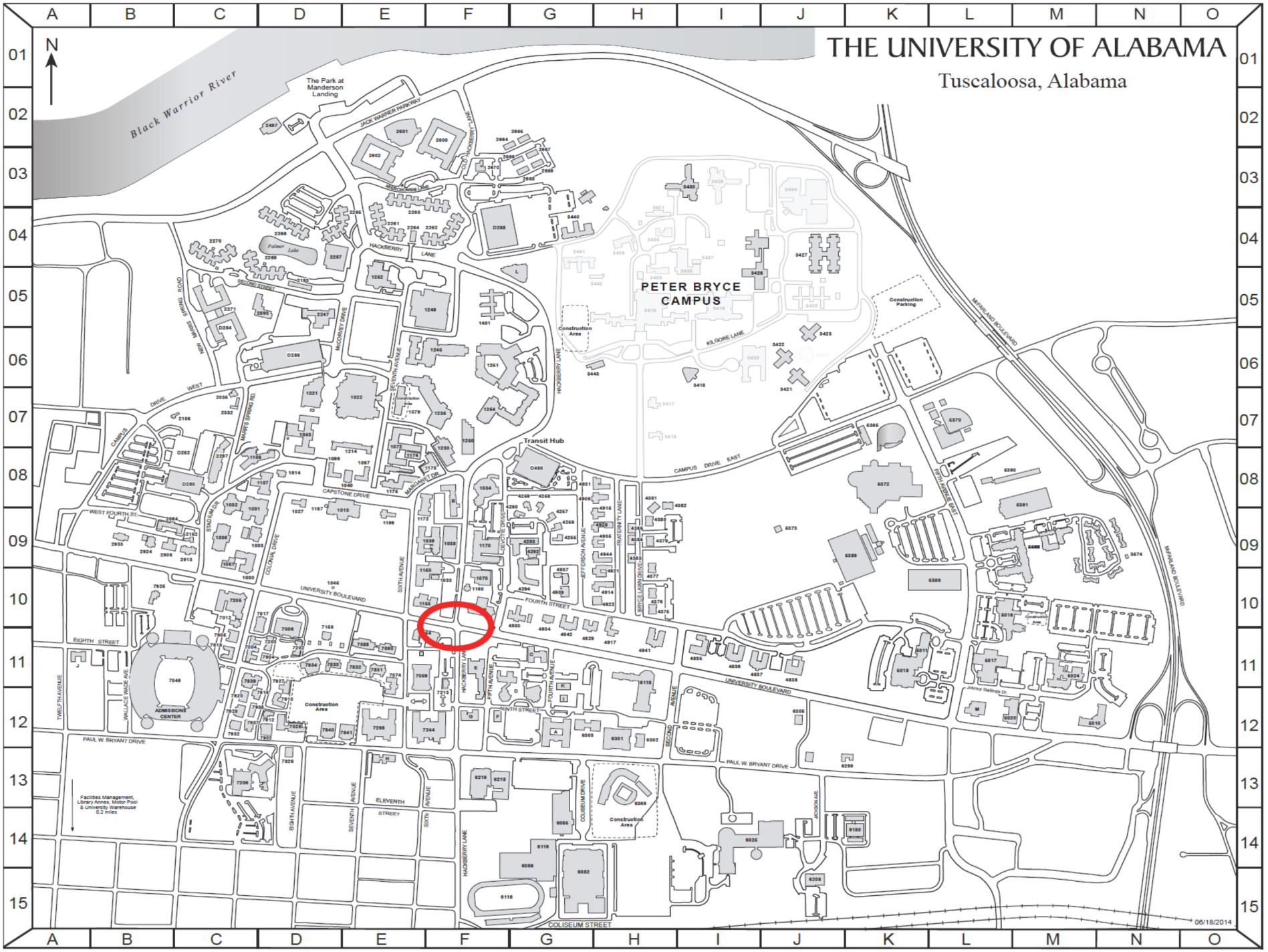
[28] *Id.* at 1247.

[29] *Id.* at 1247, 1253-54.

[30] *Id.* at 1254.

[31] *Id.* at 1255. While Keister argues (without citation) that the "University could not restrict public pedestrian or vehicular access to the intersection," his statement is inconsistent with the record. The record clearly demonstrates that the University has the authority (and does) shut down University Avenue for events on campus. While it notifies the City of its intent, the record shows the notification is simply a courtesy. Appellant's Appendix Volume II at Appx. 334.

[32] Footnote 2 of the Petition for Writ of Certiorari purports to provide an overview of the intersection at issue. The footnote, however, misleadingly refers to businesses located over a mile from the Sidewalk. The footnote also fails to include numerous University buildings and indicia that surround the Sidewalk. As set forth above, and as found by the district and circuit courts, the Sidewalk is "on campus" and "surrounded" by University buildings.


THE UNIVERSITY OF ALABAMA
Tuscaloosa, Alabama
N
Black Warrior River
The Park at Manderson Landing
JACK WARNER PARKWAY
HACKBERRY LANE
PETER BRYCE CAMPUS
Construction Area
Construction Parking
KILGORE LANE
MEARLAND BOULEVARD
Transit Hub
CAMPUS DRIVE EAST
CAMPUS DRIVE WEST
CAPSTONE DRIVE
UNIVERSITY BOULEVARD
FOURTH STREET
EIGHTH STREET
PAUL W. BRYANT DRIVE
ADMISSIONS CENTER
Facilities Management, Library Annex, Motor Pool & University Warehouse 0.2 miles
COLISEUM STREET
06/18/2014

REASONS FOR DENYING THE PETITION

I. KEISTER INVITED ANY ALLEGED ERROR.

Keister argues the Eleventh Circuit's analysis is flawed because it "relied upon the government's and its delegee's intention to limit speech as a decisive factor in its analysis."[33] In making this argument, however, Keister conveniently ignores that the Eleventh Circuit's two sentence discussion of government intent was directly addressing his own "legal arguments."[34] It was Keister—not the Eleventh Circuit—who argued in his principal brief that "the intentions of the owner **is key** to determining the purpose of the forum."[35] Keister cannot now complain the Eleventh Circuit erred by directly addressing the very argument he raised. In a virtually identical situation, this Court dismissed a writ as improvidently granted, after briefing and oral argument, because it found "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested."[36] Likewise, here, this Court should deny Keister's Petition, and reject his attempt to claim the very test he invited is error.

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[33] Petition for Writ of Certiorari at i.

[34] *Keister*, 29 F.4th at 1254-55.

[35] Keister's Appellant's Brief before the Eleventh Circuit at 33 (emphasis added).

[36] *Kibbe*, 480 U.S. at 259.

II. THERE IS NO CIRCUIT SPLIT REGARDING THE USE OF GOVERNMENT INTENT.

Keister complains "[t]he decision below conflicts with circuit decisions rejecting government intent to limit speech as a factor that can undermine the status of a traditional public forum."[37] As an initial matter, this argument mischaracterizes the role government intent played in the Eleventh Circuit's analysis. Keister claims intent was "the controlling factor,"[38] despite the fact that the Eleventh Circuit spends only two sentences discussing the University's intent in its five-page forum analysis.[39] And, nowhere does the Eleventh Circuit indicate intent was the controlling factor.

Moreover, the Eleventh Circuit did not use the University's intent to change a traditional public forum to a limited public forum. Rather, the Eleventh Circuit first determined that the Sidewalk was "in the 'heart' of campus and was surrounded by University buildings, and 'numerous, permanent, visual indications that the sidewalks are on [University] property including landscaping fences and [University] signage.'"[40] "In other words, [the Court] determined, the Sidewalk here . . . was clearly inside a special enclave—the University's campus."[41] It was only after

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[37] Petition for Writ of Certiorari at 12.

[38] Petition for Writ of Certiorari at 11.

[39] *Keister*, 29 F.4th at 1251-56.

[40] *Id.* at 1254.

[41] *Id.*

determining the Sidewalk was "on campus,"[42] and "inside a special enclave,"[43] that the Eleventh Circuit addressed "the University's intent."[44]

Properly characterized, the Eleventh Circuit's forum analysis is wholly consistent with the other circuits. Keister claims the "D.C. Circuit . . . has relied upon history and tradition, rather than government intent, to determine the contours of constitutionally protected speech." Keister's arguments and selective quotations, however, mischaracterize the test applied by the D.C. Circuit. In *Lederman v. U.S.*—a case relied on by Keister—the D.C. Circuit defines a traditional public forum as those areas that "have traditionally been open to the public, **and their intended use is consistent with public expression**."[45] Again in *Henderson v. Lujan*, the D.C. Circuit stated:

> Common sense and the cases make clear that when government has dedicated property to a use inconsistent with conventional public assembly and debate—as the Court has said of sidewalks within a military base—then the inconsistency precludes classification as a public forum.[46]

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 1255.

[45] 291 F.3d 36, 41 (D.C. Cir. 2002) (emphasis added).

[46] 964 F.2d 1179, 1182 (D.C. Cir. 1992) (internal citations omitted).

Determining the use to which the government has "dedicated property" certainly requires a court to examine the government's intent.

Far from a circuit split, the only difference between this case and *Henderson* and *Lederman* are the courts' factual findings. The D.C. Circuit's findings in *Henderson* and *Lederman* turn on the fact that the sidewalks at issue were "physically indistinguishable from ordinary sidewalks used for the full gamut of urban walking."[47] Whereas, here, the Eleventh Circuit found the "objective indicia" indicated the Sidewalk where Keister sought to speak "was clearly inside a special enclave."[48]

Similarly, the Eleventh Circuit's approach is consistent with the Tenth Circuit's test. In *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, the Tenth Circuit stated that "for property that has traditionally been open to the public, objective characteristics are more important and can override express government intent to limit speech."[49] Here, the Eleventh Circuit found the Sidewalk's "objective characteristics" indicated the Sidewalk was not a traditional public forum. Stated differently, consistent with the Tenth Circuit, the Eleventh Circuit found the "objective characteristics" did not warrant overriding the University's intent. Logically, in such a case, the court

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[47] *Id.* at 1182.

[48] *Keister*, 29 F.4th at 1253-54.

[49] *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1125 (10th Cir. 2002).

must then look to how the government intended to use the property before it can properly determine forum type.

Finally, the cases Keister relies on to assert a purported split with the Ninth and Tenth Circuits are inapposite as they all relate to the government's attempt to convert what was indisputably a public forum into a limited or non-public forum.[50] It has long been the case that "'the destruction of public forum status . . . is at least presumptively impermissible.'"[51] Here, however, "no evidence shows that the Sidewalk has ever been used as anything other than part of a college campus."[52] And, it is well-settled that a "university differs in significant respects from public forums[.]"[53] Again, the purported split does not exist. The differences Keister points to are nothing more than courts analyzing different factual records.

III. THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH OTHER CIRCUITS' DECISIONS REGARDING CAMPUS SIDEWALKS.

Keister's assertion that the Eleventh Circuit's decision conflicts with other circuits' decisions regarding

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[50] *First Unitarian Church of Salt Lake City*, 308 F.3d 114; *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003).

[51] *ACLU of Nev.*, 333 F.3d at 1105 (quoting *U.S. v. Grace*, 461 U.S. 171, 180 (1983)).

[52] *Keister*, 29 F.4th at 1254.

[53] *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

sidewalks abutting a campus ignores key factual differences. First, Keister's argument that the Eighth Circuit reached a different result applying the same test as the Eleventh Circuit to the same facts is simply wrong. In *Bowman v. White*, the Eighth Circuit "found the public streets and sidewalks which surround the campus **but are not on the campus** likely constitute traditional public fora."[54] On the other hand, the Eighth Circuit clarified that streets and sidewalks "may be treated differently when they fall within the boundaries of the University's vast campus."[55] While Keister may disagree with the Eleventh Circuit's conclusion in this case, it specifically found the sidewalk at issue was not only "on campus," but "was in the 'heart' of campus."[56] Accordingly, the Eleventh Circuit applied the same test and reached the same result as the Eighth Circuit.[57]

Likewise, Keister's reliance on *McGlone v. Bell*[58] and *Brister v. Faulkner*[59] is "misplaced."[60] The Eleventh

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[54] *Bowman v. White*, 444 F.3d 967, 977 (8th Cir. 2006) (emphasis added).

[55] *Id.* at 978.

[56] *Keister*, 29 F.4th at 1254.

[57] While the Eighth Circuit ultimately found the on-campus sidewalks to be designated public fora, the Eighth Circuit's determination is based on the fact that the university's policy "indicate[d] that the University itself designated the areas in question as locations for free expression." *Bowman*, 444 F.3d at 979. UA's GUP, however, contains no such designation.

[58] 681 F.3d 718 (6th Cir. 2012).

[59] 214 F.3d 625 (5th Cir. 2000).

[60] *Keister*, 29 F.4th at 1255.

Circuit specifically distinguished those cases explaining:

> In those cases, the sidewalks at issue were clearly municipal sidewalks that abutted campus. *McGlone*, for example, described them as "perimeter sidewalks" outside of campus. And *Brister* emphasized that "no indication or physical demarcation" told an individual that the sidewalks were part of the University of Texas campus and not just city sidewalks. Here, though, the Sidewalk is just as unambiguously within campus.[61]

There is no evidentiary or legal support to dispute the Eleventh Circuit's conclusion on this point.

Moreover, it should be noted that the university in *McGlone* did not "dispute Plaintiff's characterization of the perimeter sidewalks as traditional public fora."[62] Similarly, in *Brister*, the Fifth Circuit cautioned that its decision was "based on the very specific facts set forth here—i.e., a unique piece of university property that is, for all constitutional purposes, indistinguishable from the Austin city sidewalk."[63] Whereas, here the University presented substantial evidence supporting both the District Court's and the Eleventh Circuit's finding that the Sidewalk "was clearly within a special enclave."[64] Again, Keister's purported circuit split is

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[61] *Id.* (internal citations omitted).

[62] *McGlone*, 681 F.3d at 732.

[63] *Brister*, 214 F.3d at 683.

[64] *Keister*, 29 F.4th at 1254.

illusory. The cases upon which he relies represent nothing more than different facts that, understandably, resulted in different outcomes.

IV. AT BASE, KEISTER'S PETITION SEEKS TO RELITIGATE THE ELEVENTH CIRCUIT'S FACTUAL FINDINGS.

Contrary to Keister's claims, the Eleventh Circuit did not apply an amorphous, multi-factor balancing test. Instead, the Eleventh Circuit applied this Court's well-established forum analysis as set forth and consistently applied in decades of this Court's jurisprudence including: *Greer v. Spock*,[65] *Widmar v. Vincent*,[66] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,[67] *United States v. Grace*,[68] *United States v. Kokinda*,[69] and *Minnesota Voters Alliance v. Mansky*.[70] Ignoring this Court's forum analysis jurisprudence, Keister's argument is, in essence, that every publicly owned sidewalk is a *per se* traditional public forum. In *Kokinda*, however, this Court explicitly rejected this very argument stating: "*Grace* instructs that the dissent is simply incorrect in asserting that every public sidewalk is a public forum. As we recognized in *Grace*, the location and purpose of a publicly owned sidewalk is

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[65] 424 U.S. 828 (1976).

[66] 454 U.S. 263 (1981).

[67] 460 U.S. 37 (1983).

[68] 461 U.S. 171 (1983).

[69] 497 U.S. 720 (1990).

[70] 138 S. Ct. 1876 (2018).

critical to determining whether such a sidewalk constitutes a public forum."[71]

Here, the Eleventh Circuit, as instructed by *Grace* and *Kokinda*, examined the location and purpose of the Sidewalk and reached the factual conclusion that the Sidewalk "was clearly inside a special enclave—the University's campus."[72] Again, the Eleventh Circuit's conclusion is consistent with this Court's admonition that "[a] university differs in significant respects from public forums[.]"[73] In fact, "this Court ha[s] never denied a university's authority to impose reasonable regulations . . . upon the use of its campus and facilities."[74] Notably, Keister has not asked this Court to revisit its decisions in *Grace*, *Kokinda*, or *Widmar*. Accordingly, Keister's "asserted error consists of [nothing more than] erroneous factual findings."[75]

V. EVEN IF KEISTER WERE RIGHT, WHICH HE IS NOT, THIS CASE WOULD STILL BE A POOR VEHICLE FOR ANSWERING THE QUESTIONS HE HAS PRESENTED.

As set forth above, there is no "compelling reason" to grant Keister's Petition. The Eleventh Circuit applied the same standard as the Ninth, Tenth, and D.C. Circuits, which, according to Keister, applied the same

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[71] 497 U.S. 720, 729 (1990) (internal citation omitted).

[72] *Keister*, 29 F.4th at 1254.

[73] *Widmar*, 454 U.S. at 268 n.5.

[74] *Id.*

[75] SUP. CT. R. 10.

"history and tradition"[76] test which he now advocates. Putting that aside, however, even if the Court had some basis to answer the questions Keister presents in his favor, that would not resolve this case. The courts below all assumed, but did not decide, that the City owned the Sidewalk. The University, however, submitted substantial evidence disputing city ownership. Additionally, while Keister claims the City reserved the "use and enjoyment of the right-of-way for pedestrian access," he cites to nothing in the record supporting his claim. In fact, nothing in the document upon which Keister apparently relies so much as references the Sidewalk at issue.[77] Without City ownership or a pedestrian easement, the claimed foundation of Keister's argument fails. In other words, a decision in favor of Keister still leaves substantial factual questions unanswered and the likelihood that the Sidewalk will still be found to be a limited public forum. As a result, even were this Court inclined to revisit its prior First Amendment jurisprudence, this case is not the appropriate vehicle.

CONCLUSION

When the window dressing is pulled aside, Keister's Petition amounts to nothing more than a factual dispute over the application of this Court's long-standing forum analysis test. Such a review is unwarranted and

[76] Petition for Writ of Certiorari at 12.

[77] Appellant's Appendix Volume I at Appx. 194.

discouraged by Sup. Ct. R. 10. The Petition should be denied.

Respectfully submitted,

SYBIL NEWTON
Counsel of Record
JAY M. EZELLE
COLE R. GRESHAM
MICHAEL R. LASSERRE
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
(205) 868-6000
snewton@starneslaw.com

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