

App. No. ____

In the Supreme Court of the United States

RODNEY KEISTER,

Applicant-Appellant,

v.

STUART BELL, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE
UNIVERSITY OF ALABAMA, ET AL.,

Respondent-Appellee.

SECOND APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Clarence Thomas, as Circuit Justice for the United States
Court of Appeals for the Eleventh Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, Applicant Rodney Keister respectfully requests a 30-day extension of time, to and including October 24, 2022, to file a petition for a writ of certiorari seeking review of the Eleventh Circuit's opinion in *Keister v. Bell*, 29 F.4th 1239 (11th Cir. 2022). See App. A. The Eleventh Circuit denied a timely request for *en banc* rehearing on May 26, 2022, App. B, and you granted (in part) a timely application for an extension to file a petition for certiorari, making the new due date September 24, 2022. *Keister v. Bell*, No. 22A112. Applicant is filing this second request at least 10 days before the current due date. S. Ct. R. 13.5.

As described in the prior application, this case is about a public university that violated the First Amendment by impinging a citizen's fundamental right to hand out literature and express his views on a city sidewalk bordering the university campus. The Eleventh Circuit's decision applied a multifactor balancing test using considerations contrary to this Court's and other circuits' precedent and well beyond considerations of text as informed by history and tradition that is a more appropriate way of evaluating First Amendment claims per this Court's more recent constitutional jurisprudence. Addressing the proper means of categorization of traditional public versus limited public fora is an important question on which courts are in conflict and thus the forthcoming petition has a strong prospect of being granted by this Court. A further extension is thus appropriate to allow new Supreme Court counsel to prepare a thorough petition addressing these issues and to accommodate counsel's additional case demands and pre-existing travel plans that have made it difficult as yet to devote the desired amount of time to this matter.

Background

The relevant facts are set out more fully in the first Application for an extension of time. Appl. 2-3, *Keister v. Bell*, No. 22A112. For ease, Applicant briefly restates the relevant facts here.

1. Applicant travels around sharing his Christian faith on city sidewalks. On March 10, 2016, he attempted to speak and evangelize on a sidewalk that is part of two public streets, but that borders certain buildings of the University of Alabama. *Keister v. Bell*, 29 F.4th 1239, 1246-1247 (11th Cir. 2022). A police officer initially told

Applicant he could proselytize there, but officials subsequently told Applicant the university's grounds-use policy applied to those city sidewalks and that Applicant would need to secure a permit and university approval to speak there. *Id.* at 1245-1246.

3. After unsuccessfully litigating a request for a preliminary injunction all the way to this Court, Applicant made his fuller case on remand. *Keister v. Bell*, 139 S. Ct. 208, 209 (2018) (denying certiorari).

4. Despite evidence refuting the district court's initial conclusion that the sidewalks were in the heart of campus, the lower court granted the university's motion for summary judgment and classified the sidewalks as limited public fora instead of traditional public fora. The Eleventh Circuit affirmed and denied rehearing *en banc*. In the process, it applied a multi-factor test that, among other things, addressed the university's intent with respect to the sidewalk. *Keister*, 29 F.4th at 1255.

Reasons for Granting an Extension of Time to File a Petition for a Writ of Certiorari

This second Application for an extension of 30 days to file a Petition should be granted for several reasons:

1. As the initial application made clear, the forthcoming Petition has a reasonable likelihood of being granted. The decision that the Petition will ask this Court to review flies in the face of this Court's free speech precedents and exacerbates a circuit split about the proper analysis for determining traditional public fora status. The Petition will ask whether a multi-factor test should be applied when determining

if a particular space is a traditional public forum or whether courts should look at history and tradition like the Court does when addressing other constitutional rights. *E.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

Had the Eleventh Circuit applied a history-and-tradition review, it would not have reached the extraordinary conclusion that a city sidewalk—the epitome of a traditional public forum—is a limited public forum. *See United States v. Grace*, 461 U.S. 171, 179 (1983) (“Sidewalks . . . are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property[.]”).

The Eleventh Circuit’s factor test erred in elevating government intent above history and tradition and, in the process, it clashed with approaches used by this Court and other circuits. *See, e.g.*, *Ark. Educ. Television Com’n v. Forbes*, 523 U.S. 666, 677 (1998); *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100-01 (9th Cir. 2003); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124-25 (10th Cir. 2002); *Warren v. Fairfax County*, 196 F.3d 186, 189-90 (4th Cir. 1999). The split among the circuits is clearest with respect to the Fifth and Sixth Circuits, both of which have found analogous sidewalks bordering university property to be traditional public fora. *Brister v. Faulkner*, 214 F.3d 675, 681 (5th Cir. 2000); *McGlone v. Bell*, 681 F.3d 718, 732-33 (6th Cir. 2012). The

Petition will ask this Court to resolve that conflict. S. Ct. R. 10.

2. An extension of time is also warranted to allow adequate time to prepare a Petition to this Court. Mr. Jaffe has numerous other professional obligations to meet. For example, he is currently working on a complaint in Delaware that raises Second Amendment questions. He is also briefing multiple motions for preliminary injunctions in Delaware, California, and New Jersey in cases raising both First and Second Amendment issues. In addition, he is preparing a petition for rehearing *en banc* in *Guedes v. ATF*, No. 21-5045 (D.C. Cir.), which was previously before this Court on petition for writ of certiorari and which will certainly be before this Court again. Furthermore, Mr. Jaffe is currently out of the country from September 2-19 and will have limited access to the internet and other work facilities during the latter half of that period.

The associate tasked with the initial draft of the Petition also faces several deadlines in the weeks leading up to the current deadline. Over the next month, he will be working to meet several discovery deadlines in *In re Georgia Senate Bill 202*, No. 1:2021-mi-55555 (N.D. Ga.). This will include preparing for, travelling to, and taking multiple depositions. In addition, he faces deadlines for briefs in several other courts.

3. No apparent prejudice would arise from the extension for submitting a petition. Having prevailed below, respondents suffer no disability from an extension.

Conclusion

For the foregoing reasons, Applicant requests an extension of time to file a Petition for a Writ of Certiorari to and including October 24, 2022.

Respectfully submitted,

s/Erik S. Jaffe

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September 8, 2022

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Appendix A

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-12152

RODNEY KEISTER,

Plaintiff-Appellant,

versus

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,

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Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-00131-RDP

Before WILSON, ROSENBAUM, and ED CARNES, Circuit Judges.

ROSENBAUM, Circuit Judge:

Sidewalks have long been a part of Americana.¹ Cultural anthropologist Margaret Mead remarked that “[a]ny town that doesn’t have sidewalks doesn’t love its children.” And Shel Silverstein named an entire book after his famous poem “Where the

¹ In fact, sidewalks go back much further. Ancient Rome is a case in point. William Smith & Charles Anthon, *A School Dictionary of Greek and Roman Antiquities* 355 (Harper & Bros., 1851) <https://archive.org/details/aschooldictiona00smitgoog/page/n2/mode/2up> (last visited Mar. 17, 2022). Even today, visitors to Pompeii can see remnants of sidewalks from that era. See, e.g., @pompeii_sites (Official Twitter Account of Archaeological Park of Pompeii), tweet posted Mar. 10, 2021 https://twitter.com/pompeii_sites/status/1369657737592926208 (showing a photograph and explaining, “The sidewalks, just like the pedestrian crossings, were elevated . . . and they were useful for not walking on the road . . .”).

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Sidewalk Ends.”² The significance of sidewalks was not lost on traveling evangelical preacher Plaintiff-Appellant Rodney Keister, either. This case stems from Keister’s efforts to use a sidewalk at Defendant-Appellee University of Alabama to spread the good word.

Not long after Keister set up shop on that University sidewalk, he learned that University policy required him to have a permit to engage in public speech there. That did not suit Keister. So he brought a 42 U.S.C. § 1983 action against University officials, alleging that the University’s policy violated his First and Fourteenth Amendment rights.

Among other relief, Keister sought to preliminarily enjoin the University from enforcing its policy. The district court denied his motion. That precipitated Keister’s first trip to our Court. On appeal, we affirmed the district court. We concluded, among other things, that Keister had not shown a substantial likelihood of success on the merits of his case. More specifically, we agreed with the district court that the sidewalk in question is a limited public forum, so the University’s permitting requirement needed to be only reasonable and viewpoint-neutral. *Keister v. Bell*, 879 F.3d 1282 (11th Cir. 2018).

² Shel Silverstein, “Where the Sidewalk Ends,” *Where the Sidewalk Ends* (1974).

On remand, Keister amended his complaint. After discovery, the parties filed cross-motions for summary judgment. Once again, the district court concluded that the sidewalk at the intersection is a limited public forum and upheld the University's permit policy as reasonable.

Now, on his second trip to this Court, Keister asserts that the evidence uncovered in discovery shows that the City of Tuscaloosa owns the sidewalk at issue. Consequently, he reasons, the sidewalk is a traditional public forum, and the University's permitting requirement is unconstitutional.

After careful consideration and with the benefit of oral argument—and even assuming that the City of Tuscaloosa owns the sidewalk at issue—we disagree with Keister that any facts material to our analysis have changed. So we once again conclude that the sidewalk is a limited public forum. And this time, we also review the permitting requirement. Because we find it is reasonable, we affirm the judgment of the district court.

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I.

A. **Factual Background**³

As a Christian evangelist, Keister believes his mission is to share his faith and beliefs with others in public spaces. Typically, he presents his message on public sidewalks and thoroughfares by passing out religious literature, preaching, and engaging passersby in one-on-one conversation. He likes speaking with college students, so he often visits college campuses to spread his message.

On March 10, 2016, Keister and a companion went to Tuscaloosa, Alabama, to disseminate their message to the students at the University of Alabama—a state-funded public University. Keister and his friend started preaching on a sidewalk next to Sixth Avenue, in the middle of campus. They were located between two school buildings, Smith and Lloyd Halls, and across from the Quad—a grassy area at the center of campus. Keister set up a banner and passed out literature, while his companion preached through a megaphone.

Soon after Keister and his friend began, campus police and a University representative approached. They informed Keister that the University’s Policy for the Use of University Space, Facilities and Grounds (“Policy”) required him to obtain a permit before

³ We are reviewing an order granting summary judgment, so we present the evidence in the light most favorable to Keister, against whom the district court granted summary judgment. *See Rodriguez v. City of Doral*, 863 F.3d 1343, 1349 (11th Cir. 2017).

participating in expressive conduct on University grounds. According to Keister, the University representative told him that campus “is open to the public, and Keister was allowed to be there, but he could not engage in his [preferred form] of expression on [University] campus without first obtaining a permit.”

After further discussion with the campus police and a University representative, Keister and his companion decided to move to the sidewalk at the northeast corner of University Boulevard and Hackberry Lane (the “Sidewalk” or “Intersection”). He chose that corner because, he says, one of the campus police officers told him, “On that corner, you’re good.” Keister also thought that the Sidewalk was public and not part of the University’s campus.

So Keister and his companion moved to the front of Russell Hall, a University building, to continue preaching. Later that day, the weather started to turn, and they decided to leave.

That’s when one of the officers who had stopped them earlier approached them again. The officer said he and the other University employees were mistaken earlier when they told Keister he could preach at the Intersection. In fact, the officer explained, Keister could not preach in front of Russell Hall without a permit. Keister claims that when he questioned the officer about the policy, the officer confirmed that Keister could not return without a permit and that, if he did, he would be arrested for trespass.

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Keister wishes to go back to that spot to share his message with University students. He has not returned, though, because he worries he will be arrested.

B. Relevant Procedural History and Evidence

1. Complaint and Preliminary Injunction

On January 25, 2017, Keister filed a complaint under 42 U.S.C. §§ 1983 and 1988 against Stuart Bell, the President of the University of Alabama; John Hooks, the Chief of Police for the University Police Department; and Mitch Odom, the University police lieutenant who stopped Keister on March 10, 2016. Keister sued all defendants in their official capacity. For this reason and for convenience, we refer to the three defendants collectively as the “University.”

Keister alleged that the University’s Policy violates the First Amendment’s Free Speech Clause and the Fourteenth Amendment’s Due Process Clause. The next day, he filed a motion for preliminary injunction seeking to prevent the University from enforcing its Grounds Use Policy. In his motion, Keister argued that the University should be enjoined from enforcing its Policy because the Intersection is a traditional public forum, and the policy fails appropriate scrutiny.

Following briefing and a hearing, the district court issued a written opinion denying Keister’s injunction motion. The district court determined that the Intersection is a limited public forum, and it found that the Policy satisfied the requisite level of scrutiny.

Keister filed an interlocutory appeal. In a published opinion, we affirmed. *Keister*, 879 F.3d at 1291. We held that the Intersection is a limited public forum. *Id.* But because Keister did not raise the issue on appeal, we did not consider whether the University's Policy would survive the level of scrutiny applied to limited public forums. *Id.* at 1288 n.4. Keister filed a petition seeking rehearing en banc and a petition for a writ of certiorari with the Supreme Court. Both petitions were denied.

Back in the district court, Keister filed an amended complaint, again alleging First Amendment and Fourteenth Amendment Due Process claims. He asserted that the Intersection did not actually fall within campus bounds, but rather, was only near campus. After the University unsuccessfully moved to dismiss, the parties engaged in discovery, which produced more information on the property at issue and the University's Policy.

2. Evidence Gleaned from Discovery

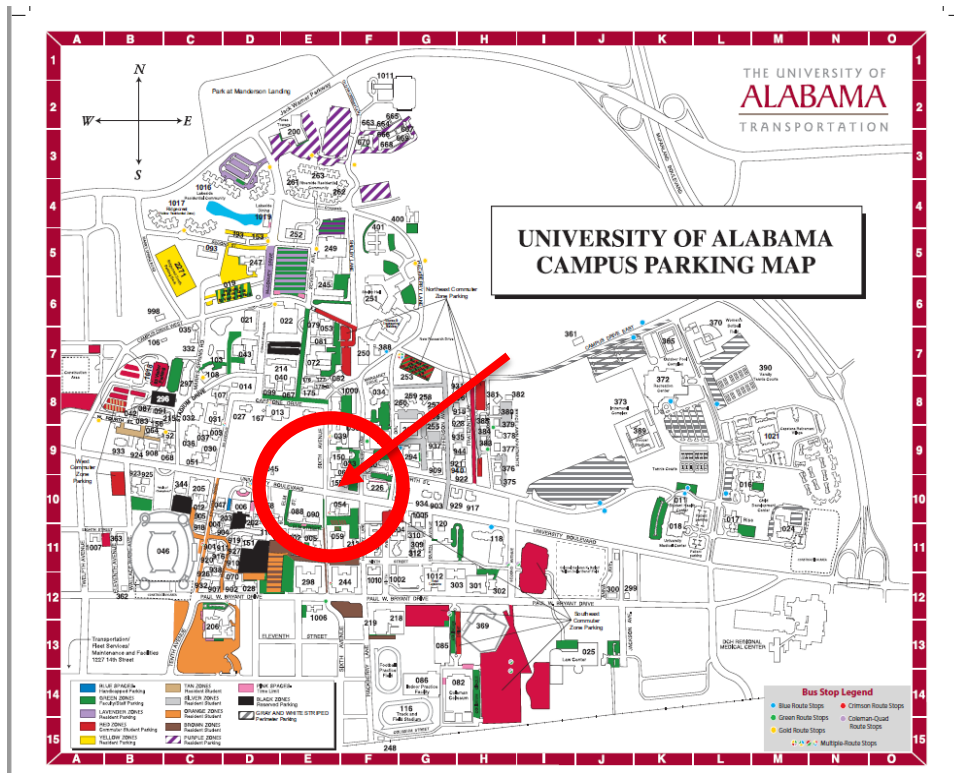
a. *The Intersection*

For orientation purposes, we begin with a map of the University of Alabama. Circled in red is the Intersection (where University Boulevard and Hackberry Lane meet).

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University Boulevard and Hackberry Lane are Tuscaloosa city streets that, as the map reflects, run through the University’s campus. Sidewalks open to the public line both streets. The Intersection is just one block east of the University Quad. It’s surrounded by clearly identified University buildings: Farrah Hall on the southwest corner of the Intersection, Gallalee Hall on the northwest corner, Russell Hall on the northeast corner, and a public park on the southeast corner. Keister, as we have mentioned, was preaching in front of Russell Hall, to which the red arrow on the map points.

Objective signs literally indicate the Intersection is on campus: the street signs at the Intersection are embossed with the script “A” logo, and University banners adorn the streetlamps. Landscaping fences, which run throughout campus, also sit on each corner of the Intersection. Roughly two blocks to the east, on University Boulevard, some private businesses are interspersed among University buildings. But all the property immediately around the Intersection is University property.

The parties dispute who owns the Sidewalk at issue: the City of Tuscaloosa or the University.⁴ Because we are reviewing an order granting the University’s motion for summary judgment, we assume for purposes of our analysis Keister’s contention—that the City owns the Sidewalk.

Nevertheless, Keister and the University agree that the University maintains it. The University is responsible for clearing the sidewalks, and its police respond to incidents there.

⁴ Keister originally alleged that the Intersection was within the University’s bounds, *Keister*, 879 F.3d at 1290 n.5, but in his amended complaint, he asserted that the Intersection is near campus but not a part of it. The evidence reflects that in 1921, the University conveyed the property on the northeast corner of the Intersection to the City of Tuscaloosa to build a hospital. Then, in 1944, the City of Tuscaloosa granted an easement to Tuscaloosa County on the land that includes the Sidewalk for making a public street or highway. Two years later, in 1946, the City transferred the land it received in 1921 back to the University “except that portion of the above-described parcel which was conveyed by said CITY OF TUSCALOOSA and others to Tuscaloosa County for the purpose of widening the highway.”

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b. The Policy

The University's Grounds Use Policy governs when, where, and how a person not affiliated with the University may engage in public speaking on campus. It applies to any activities or events that occur on campus grounds, including on campus sidewalks, other than "casual recreational or social activities."

According to the University's Senior Director of Facilities Operation and Grounds Use Permits, the Policy is "intended to facilitate responsible stewardship of institutional resources and to protect the safety of persons." It is also meant to "preserv[e] the primacy of the university's teaching and research mission."

When Keister attempted to speak publicly on campus,⁵ the Policy required individuals who are not affiliated with the University to (1) be sponsored by a University academic department or student organization (the "University Affiliate" requirement), and (2) apply for and obtain a Grounds Use Permit ("Permit"). Under the Policy, applications for a Permit "should" be submitted ten working days before the public-speaking engagement occurs. The Policy set forth this aspirational waiting period to "facilitate the review by all the different University departments that have responsibility for the various aspects of an Event (e.g., tents, food service, UAPD, electrical service, etc.)." But the Policy did not require that

⁵ As we further explain later, *see infra* at 13, the Policy in effect during Keister's attempts to speak on campus has since been superseded.

an application be submitted ten days in advance. Nor did it make the failure to do so a basis for denial. Rather, the Policy explained that “[i]f an Event does not involve factors that require multiple University department approvals, approval may be given in as few as three (3) days, if the [Permit] form is filled out completely and accurately.”

And the University’s practice showed that was the case. Usually, an applicant had to wait much less time than ten days to receive a response. In 2018, for example, Permit applications were approved in an average of 4.4 days. Some months, the average was even lower. Take March 2018, for instance. That month, the University averaged only 2.9 days to approve an application. (Keister visited the University in March 2016).

The University could also approve “spontaneous” events and “counter-events” in as little as twenty-four hours. Spontaneous events concern issues that have become public knowledge within two days of the event. And counter-events are those held in response to an event for which a Permit has been issued. Keister is not claiming that his preaching and leafletting qualified as a spontaneous or counter-event.

Outside speakers who obtain a Permit and sponsorship can also seek permission to use amplification equipment. But speakers must submit these applications ten working days before use. Similarly, Permit holders may distribute printed materials (including leaflets) in conjunction with an event.

Although the University receives a fair number of Permit applications, it approves almost all of them. Nevertheless, the University may deny an application under certain, content-neutral conditions. For example, the University may deny an application if the “proposed location [for the event] is unavailable . . . because of events previously planned for that location.” It may also deny an application if the event would unreasonably obstruct pedestrian or vehicular traffic or unreasonably interfere with regular academic and student activities. Applicants may challenge the denial of their applications.

In July 2020, after Keister filed a notice of appeal for this case, the University instituted a new Grounds Use Policy (“New Policy”). The New Policy still requires outside speakers to obtain a sponsorship and a permit before hosting an expressive event on campus. And it still has an exception for “casual recreational or social activities.” But the New Policy does slightly change the advance notice provision and sponsorship requirement. Under the New Policy, outside speakers “are strongly encouraged” to apply for a permit at least ten business days before an event, and “at a minimum” they must apply “no less than five” business days before the event. The New Policy also requires University Affiliates who reserve campus space to “actively participate in any activity associated with that reservation.”

3. Summary Judgment and Appeal

Now, we return to the procedural history. After the parties completed discovery, they filed cross-motions for summary

judgment. The district court granted the University's motion and denied Keister's. In reaching these resolutions, the district court concluded that the Sidewalk is a limited public forum because it is "within the University's campus, is not intended as an area for the public's expressive conduct, and contains markings sufficiently identifying it as an enclave." Then, applying the requisite level of scrutiny, the district court held that the University's Grounds Use Policy and its related requirements were reasonable and viewpoint neutral.

Keister timely appealed. In response, the University moved to dismiss the appeal as moot based on the University's adoption of the New Policy that took effect after Keister filed his notice of appeal. For the reasons we explain below, we conclude this appeal is not moot and address the merits.

II.

We review *de novo* a district court's grant of summary judgment. *Rodriguez v. City of Doral*, 863 F.3d 1343, 1349 (11th Cir. 2017). In our review, we draw all inferences and review all evidence in the light most favorable to the non-moving party. *Id.*

III.

Before launching into our analysis, we take a moment to explain the organization of our discussion. Article III of the Constitution limits our jurisdiction to "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. As relevant here, that means the plaintiff must have standing (a personal stake in the matter, *see TransUnion*

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LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021)), and the case must not be moot (it must present a live, ongoing controversy that the court may redress, *see Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1255 (11th Cir. 2017) (en banc), *abrogated on other grounds by Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021))—issues we address in more detail later.

The University argues that Keister may lack standing and that this case is moot. Because these arguments concern our jurisdiction to entertain the case in the first place, we would normally consider each of them, in order, before addressing the merits. But here, the University contends that Keister does not enjoy standing only if we conclude, in our analysis of his First Amendment claim, that the Sidewalk is a limited public forum—a concept we explain more later. So understanding the University's position on Keister's standing requires knowledge of First Amendment forum analysis. For that reason, we do not consider the University's standing argument until after we identify the type of forum the sidewalk represents.

Nevertheless, and at the risk of ruining the ending, we reveal now that we conclude Keister enjoys standing. As a result, we must also address the University's mootness argument. A finding of mootness based on the University's theory that we cannot redress Keister's claims now that the University has replaced the Policy at issue would obviate the need for us to consider the merits here. So we start our analysis by examining the University's mootness argument.

A. This case is not moot

Article III requires a “[c]ase[]” or “[c]ontrovers[y]” to exist at all times during the litigation. *Alvarez v. Smith*, 558 U.S. 87, 90–91 (2009). Our jurisdiction ceases if a case becomes moot while it pends before us. *See Flanigan’s*, 868 F.3d at 1255. A case can become moot, in turn, if an event occurs that ends “any actual controversy about the plaintiff[’s] particular legal rights,” *Alvarez*, 558 U.S. at 91, and makes redressability by the court an impossibility.

Despite this general rule, a party cannot necessarily moot a case for injunctive relief by simply voluntarily agreeing to stop the allegedly illegal conduct. *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1282–83 (11th Cir. 2004). This voluntary-cessation exception to mootness seeks to prevent defendants from returning to their old ways while nonetheless skirting judicial review. *Id.* at 1283. But the doctrine of voluntary cessation does not apply when there is “no reasonable expectation that the voluntarily ceased activity will, in fact, actually recur after the termination of the suit.” *Id.* That is so because when offending conduct ends or a law is repealed, it is not able to further injure a party in a way that an injunction is capable of redressing. *Checker Cab Operations, Inc. v. Miami-Dade Cnty.*, 899 F.3d 908, 915 (2018).

Government defendants receive the benefit of the doubt in voluntary-cessation cases: When they voluntarily stop the challenged conduct, a rebuttable presumption arises that they will not reengage in it. *Troiano*, 382 F.3d at 1283. For instance, when a government fully repeals a challenged law, a case challenging that

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law is almost surely moot. *Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1331 n.9 (11th Cir. 2004). And even when a challenged law is not fully repealed, we have held that so long as the law or policy has been “unambiguously terminated,” any challenge to it is moot, unless a plaintiff identifies a “reasonable basis to believe that the policy will be reinstated if the suit is terminated.” *Troiano*, 382 F.3d at 1285.

Yet the government cannot always moot a case by simply changing the challenged policy or law. If a new policy leaves the challenged aspects of the old policy “substantially undisturbed,” the case avoids mootness. *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). A change in policy will moot a case only if it “fundamentally alter[s]” the original policy so “as to render the original controversy a mere abstraction.” *Id.*

Here, we need not consider whether the University’s replacement of the Policy that was in place when Keister filed his suit “fundamentally altered” the original Policy.⁶ Even if it did, Keister’s challenge is not moot. After all, he seeks, among other relief, nominal damages for the University’s past alleged violation of his First Amendment rights. Ceasing an offending policy going

⁶ We also do not consider whether the New Policy violates the First Amendment. Because the New Policy was not enacted until after this matter was already pending on appeal, the parties did not have the opportunity in the district court to conduct discovery concerning it, and the district court did not have a chance to address it. Under these circumstances, any challenge to the New Policy is better fully developed and first considered in the district court.

forward does not redress an injury that occurred in the past. *Checker Cab Operations, Inc.*, 899 F.3d at 916. And the Supreme Court recently held in *Uzuegbunam* that, in circumstances materially indistinguishable from those here, a request for nominal damages saves a matter from becoming moot as unredressable when the plaintiff bases his claim on a completed violation of a legal right. 141 S. Ct. 792, 801–02 (2021). Because the University’s adoption of the New Policy does not render the case moot, we next consider the merits of Keister’s claim.

B. The Sidewalk at the Intersection of University Boulevard and Hackberry Lane is a limited public forum

The Free Speech Clause of the First Amendment forbids the government’s enactment of laws “prohibiting the free exercise” of speech. U.S. Const. amend. I. As state-funded entities, universities like the University of Alabama are subject to the First Amendment. *Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011). Nevertheless, the First Amendment does not guarantee a private speaker’s right to speak publicly on all government property. *Id.* at 1230. Rather, the government, similar to a private-property owner, enjoys the power to maintain its property for a lawfully prescribed use. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

To determine when private speakers can use government property for public expression, we apply a “forum analysis.” *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015). The type of forum to which a government rule or

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policy pertains determines the level of scrutiny we apply to that rule or policy. *See Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017). Assessing the type of forum a particular piece of government property may be requires us to consider “the traditional uses made of the property, the government’s intent and policy concerning the usage, and the presence of any special characteristics.” *Bloedorn*, 631 F.3d at 1233.

The Supreme Court has identified four categories of government fora: the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum.⁷ *Barrett*, 872 F.3d at 1224. This case presents the question of whether the Sidewalk at the Intersection is a traditional public forum or limited public forum.

A “traditional public forum” is government property that has “immemorially been held in trust for the use of the public[.]” *Walker*, 576 U.S. at 215 (cleaned up). It is government property that has “time out of mind . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public

⁷ We discuss only the traditional public forum and the limited public forum below. But for reference, a designated public forum is “government property that has not traditionally been regarded as a public forum [but] is intentionally opened up for that purpose.” *Barrett*, 872 F.3d at 1224. And a nonpublic forum is property for which the government “act[s] as a proprietor, managing its internal operations.” *Id.* at 1225. The term “nonpublic forum” was once synonymous with “limited public forum,” but the Supreme Court has since clarified that that the terms “limited public forum” and “nonpublic forum” delineate two distinct types of fora. *Id.*

questions.” *Id.* Think fully public parks and streets, for example. Traditional-public-forum status does not reach further than its “historic confines.” *Ark. Educ. Tele. Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

When we evaluate a government regulation on speech in a traditional public forum, we apply strict scrutiny. *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983). That means a government entity may subject speech in a traditional public forum to a time, place, and manner restriction only if its policy is “content neutral, narrowly tailored to achieve a significant government interest, and leaves open ample alternative channels of communication.” *Bloedorn*, 631 F.3d at 1231 (cleaned up).

The term “limited public forum,” on the other hand, describes government property where only particular subjects may be discussed or that only certain groups may use. *Id.* In other words, a limited public forum is not “open to the public at large for discussion of any and all topics.” *Barrett*, 872 F.3d at 1224. The government may exclude a speaker from a limited public forum “if he is not a member of the class of speakers for whose especial benefit the forum was created.” *Bloedorn*, 631 F.3d at 1231 (quoting *Cornelius*, 473 U.S. at 806). When the forum is a limited public one, regulations on speech must be only reasonable and viewpoint neutral. *Id.* We assess reasonableness by looking to the purpose of the forum and “all the surrounding circumstances.” *Id.* at 1232 (quoting *Cornelius*, 473 U.S. at 809).

The Supreme Court has recognized that universities differ from other public fora in important ways. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). Among other distinctions, universities have a particular mission to educate. *Id.* So when it comes to their campus and facilities, universities generally may issue reasonable regulations that are consistent with that mission. *Id.* For this reason, university public-speaking venues often qualify as limited public fora.

Despite this general rule, a college campus “will surely contain a wide variety of fora on its grounds.” *Bloedorn*, 631 F.3d at 1232. To determine the type of forum at issue, we must first identify the precise piece of campus the speaker wishes to access. Our cases instruct that the “scope of the relevant forum is defined by ‘the access sought by the speaker.’” *Id.* (quoting *Cornelius*, 473 U.S. at 801). Because Keister seeks to speak on only the Sidewalk at the Intersection, that is the relevant forum for our purposes.

The first time this case made an appearance in this Court, on review from the denial of the preliminary injunction, we concluded that the Sidewalk was a limited public forum. *Keister*, 879 F.3d at 1290. We reached this conclusion after applying *Bloedorn*, which we explained governs us in determining the type of forum a particular part of a university campus is. *Id.* For the reader’s convenience and to lay the groundwork for explaining why the evidence garnered in discovery does not change our conclusion that the Sidewalk is a limited public forum, we again discuss *Bloedorn* and its application here.

Bloedorn, an evangelical preacher like Keister, sought to preach on Georgia Southern University’s (“GSU”) campus. 631 F.3d at 1225. He started speaking on a sidewalk (“Pedestrian Mall”) near the rotunda and student union. *Id.* After he’d begun, a university official told him that he could not speak on campus without a permit. *Id.* at 1226–27. Bloedorn eventually filed suit, arguing that the policy violated the First Amendment. *Id.* at 1227. Ultimately, we held that GSU’s Pedestrian Mall and its rotunda were a limited public forum because state-funded universities are generally not considered traditional public fora, and GSU “expressed no intention to open these areas to the general public for expressive conduct.” *Id.* at 1232. We concluded that it was of “lesser significance that the GSU sidewalks and Pedestrian Mall physically resemble municipal sidewalks and public parks” because “[t]he physical characteristics of the property alone cannot dictate forum analysis.” *Id.* at 1233.

In arriving at this conclusion, we noted that the Supreme Court had found sidewalks not to constitute traditional public fora in similar circumstances. We pointed out that in *Greer v. Spock*, 424 U.S. 828, 835–38 (1983), the Supreme Court concluded that the presence of sidewalks and streets within a military base did not transform the base into a traditional public forum. *Bloedorn*, 631 F.3d at 1233. And we observed that in *United States v. Kokinda*, 497 U.S. 720, 727–28 (1990) (plurality opinion), the Supreme Court held that a sidewalk running between a parking lot and a post office was not a traditional public forum—even though it looked exactly

like adjacent municipal sidewalks. *Bloedorn*, 631 F.3d at 1233. The Court reached this conclusion, we remarked, because the sidewalk there was not constructed to support expressive activity. *Id.* Rather, the government built that sidewalk only to allow postal customers to navigate between the parking lot and the post office's front door. *Kokinda*, 497 U.S. at 727.

By contrast, we distinguished GSU's sidewalks from the sidewalks at issue in *United States v. Grace*, 461 U.S. 171 (1983). In *Grace*, the Supreme Court addressed whether the sidewalks in front of its own building were a traditional public forum. The Court concluded they were. *Id.* at 180. It explained that the sidewalks were "indistinguishable from any other sidewalks in Washington, D.C.," and contained "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds they have entered some special type of enclave." *Id.* at 179–80.

We found the opposite to be true of the sidewalks in *Bloedorn*: there, the sidewalks and Pedestrian Mall were "contained inside of the GSU campus," which had entrances "identified with large blue signs and brick pillars," buildings with "large blue signs," and parking lots with "signs restricting their use to GSU community members." 631 F.3d at 1234.

Perhaps not surprisingly, when we applied *Bloedorn* the first time Keister's case reached us, we arrived at the same conclusion about the University of Alabama Sidewalk as *Bloedorn* did for the GSU sidewalk at issue there. *Keister*, 879 F.3d at 1290–91. We

noted that, in both cases, the University did not intend to open the sidewalks for non-student use. *Id.* at 1290. In both cases, too, we identified objective indicia showing that the sidewalks were on campus, and they were distinguishable from other municipal streets, unlike the sidewalks in *Grace*. *Id.* at 1291. We pointed out, for example, in the University’s case, 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.” *Id.* at 1291. In other words, we determined, the Sidewalk here, like GSU’s at issue in *Bloedorn*, was clearly inside a special enclave—the University’s campus. *Id.*

Now, after discovery, Keister argues that new facts require the conclusion that the Sidewalk is a traditional public forum. He claims that new evidence reveals that the Sidewalk is not in the “heart” of campus, after all, but rather is a simple municipal sidewalk that the City of Tuscaloosa owns. In Keister’s view, city ownership renders the Sidewalk a traditional public forum as a matter of law. Keister also insists that the appearance and function of the Sidewalk confirm that it is a traditional public forum. We are not persuaded.

We begin with Keister’s claim that new facts alter the analysis. In Keister’s view, the Sidewalk is not a part of campus. Keister contends that campus cannot be viewed as a single, uninterrupted entity because private businesses and non-University property appear next to and among University property, so it is impossible to

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locate the “heart” of campus. He also argues that the Sidewalk is not inside a “special enclave” because unlike with the sidewalks in *Bloedorn*, no signs, pillars, or other markers near the Sidewalk indicate to someone that they have entered campus. Instead, Keister contends the Sidewalk is indistinguishable from the City sidewalks adjoining it. In insisting that the Sidewalk is not a part of campus, Keister relies on *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012), and *Brister v. Faulkner*, 214 F.3d 675, 681–83 (5th Cir. 2000), where the courts found the sidewalks there to be traditional public fora.

We disagree that the expanded record warrants the conclusion that the Sidewalk here is a traditional public forum. For starters, we easily conclude that the Sidewalk where Keister wants to speak is on campus. It’s just a block from the Quad—the center of campus. And it lies immediately in front of Russell Hall—home to the University’s history department. Even Keister conceded during his deposition that he believed Russell Hall and the grounds in front of Russell Hall were part of the University and were maintained by it. The buildings across the street from the Sidewalk are also University buildings. On the northeast corner of the Intersection, a parking lot is explicitly limited to University-affiliated individuals. Streetlamps by the Sidewalk boast University banners, and the street signs are inscribed with the University’s script “A” logo. A chain-linked fence that often surrounds the University’s campus also borders the Sidewalk around the Intersection.

On top of that, the University controls and maintains the Sidewalk. It shovels snow there, and its police department is

responsible for responding to incidents on that spot. And though we assume the City owns the Sidewalk, the evidence shows that it unambiguously granted the University permission to maintain and repair the sidewalks (including the Sidewalk) on University Boulevard. Indeed, no evidence shows that the Sidewalk has ever been treated as anything other than part of a college campus. In short, Keister’s fact-based arguments provide no basis for altering the forum analysis from our first opinion.

Nor do his legal arguments. Regardless of where the sidewalk may end,⁸ whether a sidewalk is owned by a city has never been the beginning and end of the forum analysis. Perhaps for this reason, Keister cites no case that stands for the proposition that sidewalks are traditional public fora *because* the government owns them. In fact, in Keister’s first appeal, we dismissed another flavor of this *per se* argument: that “because the intersection is open as a public thoroughfare, it is *per se* a traditional public forum.” *Keister*, 879 F.3d at 1291.

Keister’s claim that municipal ownership is dispositive also makes little sense in the forum-analysis context, given that the government owns all property we evaluate under that framework. *Walker*, 576 U.S. at 215 (explaining that forum analysis is used “to evaluate government restrictions on purely private speech that occurs on government property”). If government ownership were the deciding factor, then we would not need to perform forum

⁸ See Silverstein, *supra*, note 2.

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analysis to differentiate among different types of government property. And in any case, even if the Sidewalk were owned by the University (instead of the municipality), the University is still a public entity. So if Keister were correct, his rule would require the conclusion that the Sidewalk is a public forum even without considering whether the City owned the Sidewalk. But as we have explained, Keister is mistaken: the mere fact that the government may own the property does not determine the type of forum the property presents.

Keister's argument that the particular government owner drives the outcome of the forum analysis fails for similar reasons. To be sure, as Keister submits, the Supreme Court has held that public sidewalks that are operated by a "government proprietor" like a military base, *Greer*, 424 U.S. at 836–40, or a post office, *Kokinda*, 497 U.S. at 730, are limited public fora. And it has acknowledged in *Kokinda* that "governmental actions are subject to a lower level of First Amendment scrutiny" when the government is acting as a "proprietor, to manage its internal operations." 497 U.S. at 725 (cleaned up).

But again, the Supreme Court has not created a *per se* rule that sidewalks are traditional public fora simply because they are owned by a municipality (as opposed to a different government owner). Instead, and as we have emphasized, forum analysis requires us to consider the location, purpose, and traditional use of a piece of government property—whoever the governmental owner may be. *Bloedorn*, 631 F.3d at 1233.

Here, though we accept for purposes of this appeal that the City owns it, the Sidewalk—with its location immediately in front of and across from two University buildings—functions as a part of the University. And as we have noted, the University maintains the Sidewalk and is responsible for its upkeep. Even Keister acknowledges that the University could enforce its Policy on the Sidewalk. Given the University’s control over the Sidewalk, it’s the *University’s* intent that matters with respect to that property. And there’s no question that the University does not intend to open the Sidewalk up to unchecked expressive activity by the public at large.

Finally, Keister’s reliance on the out-of-circuit cases *McGlone* and *Brister* is misplaced. 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. *McGlone*, 681 F.3d at 732–33. 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. *Brister*, 214 F.3d at 681–83. Here, though, the Sidewalk is just as unambiguously within campus. That a sprinkling of private businesses sit a few blocks east of the Intersection does not change this. Anyone approaching the Intersection from any direction encounters numerous school buildings and signage plainly signaling that they are within a college campus, and not just on a city street.

In sum, we conclude that the Sidewalk on the northeast corner of the Intersection is a limited public forum.

C. Keister has standing to challenge the University's Policy

The University makes its argument that Keister lacks standing contingent on our conclusion that the Sidewalk is a limited public forum. So now that we have determined that the Sidewalk is, in fact, a limited public forum, we interrupt our merits analysis to consider Keister's standing.

Our Constitution separates legislative, executive, and judicial powers among our three corresponding branches of government, so that no one branch has too much power. Under the separation-of-powers scheme and as we have noted, the Constitution authorizes the courts to hear only “[c]ases and [c]ontroversies.” U.S. Const., Art. III. Standing doctrine helps to identify which matters fall within those bounds. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). To enjoy standing, a litigant must show all the following: (1) he “suffered an injury in fact that is concrete, particularized, and actual or imminent;” (2) the defendant “likely caused” his injury; and (3) judicial relief would likely redress his injury. *TransUnion*, 141 S. Ct. at 2203.

The gist of the University's position is that, on this record, Keister's injury cannot be redressed by a favorable ruling. More specifically, the University asserts that the determination that the Sidewalk is a limited public forum means that Keister would necessarily have to obtain a permit at some point to publicly speak

there.⁹ But Keister testified he would never apply for a permit before speaking on campus, no matter how easy the process. Because Keister refuses to seek a permit, the University reasons, he would never be able to take advantage of any favorable decision here based on a finding that the Sidewalk is a limited public forum, so his claim is not redressable. We disagree.

As an initial matter (and as we have pointed out), Keister seeks nominal damages to redress the injury he claims to have suffered to his First Amendment rights when University employees instructed him to stop preaching on University property. That checks the redressability box to establish standing, since “for the purpose of Article III standing, nominal damages provide the necessary redress for a complete violation of a legal right.” *Uzuegbunam*, 141 S. Ct. at 802. To put a finer point on it, if we conclude that the University’s Policy was unreasonable for First Amendment purposes, then Keister suffered a constitutional injury when the University enforced the Policy against him on March 10, 2016. As a result, he could obtain nominal damages, even if he never seeks a permit.

Not only that, but Keister also had standing to seek declaratory and injunctive relief. After all, we assess standing “as of the time the complaint is filed.” *Focus on the Family v. Pinellas Sun-coast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) (citation

⁹ If the Sidewalk were a traditional public forum, it could be subjected to only content-neutral time, place, and manner restrictions.

and quotation marks omitted). And when Keister filed his complaint and right up until the University superseded the old Policy with the New Policy well into this litigation, we could have enjoined the University from enforcing its Policy if we concluded that the Policy was unreasonable or not viewpoint neutral. That is the exact relief Keister sought in his amended complaint. While the University argues that Keister would have had to be “willing to accept a permit at some point in the future,” that was not necessarily the case before the University revised the old Policy. Had we enjoined the Policy, that itself was the redress Keister sought.

In short, Keister has standing to challenge the University’s Policy.

D. The University’s Policy is constitutional

With that resolved, we return to our merits analysis. When we last left off, we had determined that the Sidewalk is a limited public forum. For that reason, the University can exclude speakers who seek “to address a topic not encompassed within the purpose of the forum” or who are “not a member of the class of speakers for whose especial benefit the forum was created.” *Cornelius*, 473 U.S. at 806.

But the University’s power to limit expression is not boundless. Rather, restrictions on speech in a limited public forum still must be viewpoint neutral and reasonable. *Bloedorn*, 631 F.3d at 1235. The reasonableness standard is not demanding; a restriction on expression is reasonable even if it is not “the most reasonable or

the only reasonable limitation” on expression. *Cornelius*, 473 U.S. at 808. At a minimum, a restriction must simply be “reasonable in light of the purpose which the forum at issue serves.” *Bloedorn*, 631 F.3d at 1235.

Keister challenges three aspects of the University’s Policy. First, he asserts that the Policy banned leafletting, which the Supreme Court has held is not a reasonable restriction on speech in a limited public forum. Second, he contends that the Policy’s exception for “casual recreational or social activities” was vague and would lead to arbitrary censorship by University officials. And third, he takes issue with the ten-working-day advance-notice requirement as unreasonable.

1. Leafletting

We begin with leafletting. As it turns out, the University’s Policy, in fact, allowed outside speakers to distribute leaflets if they had a Permit. A Permit, though, required a University-affiliated sponsor. Keister claims that requirement imposed an effective ban on leafletting because he could not obtain a sponsor. For its part, the University responds that requiring a Permit and sponsor for leafletting was not tantamount to a “ban,” but rather a reasonable time, place, and manner restriction.

We conclude the Policy provisions on leafletting were reasonable. Courts have upheld regulations in limited public fora that require speakers to obtain permission before distributing leaflets. In *Greer*, for example, the military prohibited the distribution of

leaflets and other literature in Fort Dix without prior approval from the commanding general. 424 U.S. at 831. The Supreme Court upheld the regulation because the commanding general could deny a request for leafletting only if he believed that it would be a danger to the “loyalty, discipline or morale” of the military, and he could not do so “simply because he [did] not like [the leaflet’s] contents, or because it [was] . . . even unfairly critical of government policies or officials.” *Id.* at 840 (cleaned up). Though the Court recognized the possibility that a commander could, in the future, apply this requirement “irrationally, invidiously, or arbitrarily,” it observed that “none of the respondents in the . . . case even submitted any material for review.” *Id.*

The University used a similar permission scheme for leafletting in this case. Outside speakers who wished to distribute leaflets on campus were required to seek permission from the University by obtaining a sponsor and applying for a Permit. The University would then approve a properly submitted request for a Permit unless certain neutral and objective conditions were present. For example, the University could deny an application if the proposed location were unavailable at the time requested or if the event would interfere with regular academic and student activities.

Keister contends that the Policy’s sponsor requirement in this case is more like the problematic policy in *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 672 (1992), where the Court struck down a ban by the Port Authority on leafletting at New York City airports. We think not.

As Justice O'Connor explained in her concurrence in *Lee*, the Port Authority's policy laid down an absolute ban on leafletting. *Id.* at 691 (O'Connor, J., concurring in judgment). But here, the University's Policy allows leafletting—it just requires a permit. The University has more than 38,000 students and nearly 7,000 staff members for a permit-seeker to choose from to serve as an affiliate—roughly 45,000 chances to obtain a permissible sponsor. And as in *Greer*, the Policy does not allow the University to deny a permit simply because it disagrees with the content of the speaker's speech. In sum, the Policy operates similarly to the permission scheme in *Greer*.¹⁰ And it is likewise constitutional.

2. “Casual Recreational or Social Activities” Exception

Keister also asserts that the Policy's permit exception for “casual recreational or social activities” is unconstitutionally vague and violates due process. As Keister sees it, the University's answer that the terms “casual recreational or social activities” are “basic, [and] well-understood” is an “I know it when I see it approach” that gives University officials too much power to decide what falls

¹⁰ Keister also cites to a nonbinding decision, *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004), to support his argument that requiring a permit for leafletting is tantamount to a ban on leafletting. But *Parks* involved a restriction on leafletting in a public forum, so it was subject to strict scrutiny. The permitting scheme here applies to a *limited* public forum and therefore need be only reasonable. In a limited public forum, the government may exclude speakers who are “not a member of the class of speakers for whose especial benefit the forum was created.” *Cornelius*, 473 U.S. at 806.

within those categories and therefore invites officials to burden disfavored speech by classifying it as not recreational or casual. This argument fares no better than Keister’s leafletting contention.

Under due-process principles, a law or regulation is “void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Unconstitutionally vague laws fail to provide “fair warning” of what the law requires, and they encourage “arbitrary and discriminatory enforcement” by giving government officials the sole ability to interpret the scope of the law. *Id.* at 108–09. The First Amendment context amplifies these concerns because an unconstitutionally vague law can chill expressive conduct by causing citizens to “steer far wider of the unlawful zone” to avoid the law’s unclear boundaries. *Id.* at 109. To prevent these problems, due process “insist[s] that laws give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Id.* at 108. Yet despite this concern, we do not “expect mathematical certainty from our language.” *Id.* at 110.

The phrase “casual recreational and social activities” is not unconstitutionally vague. A person of ordinary intelligence understands what these terms mean. Indeed, the Policy’s exception for “casual recreational and social activities” is no vaguer than the Trenton, New Jersey, ordinance in *Kovacs v. Cooper*, 336 U.S. 77 (1949), which prohibited “loud and raucous noises.” And the Supreme Court upheld that ordinance. As the Court explained, though the words “loud and raucous” “are abstract words, they

have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.” *Id.* at 79. So too with “casual recreation and social activities.”

Not only that, but we do not read the phrase “casual recreational and social activities” in isolation. Rather we consider it within the context of the Policy as a whole. *See, e.g., Pine v. City of West Palm Beach*, 762 F.3d 1262, 1265 n.2, 1275 (11th Cir. 2014) (concluding that a sound ordinance that prohibited “unnecessary noise or amplified sound” was not unconstitutionally vague because, viewed within the context of the ordinance as a whole, it was clear that the phrase “prohibit[ed] only shouting and loud, raucous, or unreasonably disturbing amplified noise near health care facilities or institutions for the sick”). And the Policy’s “announced purpose,” *Grayned*, 408 U.S. at 112—furthering the University’s education mission, responsibly allocating its scarce resources, and protecting the safety and security of the University’s property and students—further informs the meaning of the phrase.

With these considerations in mind, we have no difficulty concluding that Keister’s actions do not fall within the “casual recreational and social activities” exception. Keister and his companion set up a display with signs, preached with an amplifier for a time, distributed literature, and used short and loud bursts of oration to draw attention. These actions do not fall within a common-sense understanding of “casual recreational and social activities.” In fact, some of these actions—leafletting and using signs—are expressly covered by the Policy and therefore explicitly do not

constitute “casual recreational or social activities.” And it’s obvious that preaching with an amplifier and speaking loudly for the purpose of drawing attention, by definition, can interfere with the University’s educational mission by disrupting ongoing classes and school activities.

As for one-on-one conversations or prayer, as the district court noted, “[d]iscussing sports or religion while strolling through campus with a friend” does not require a permit. But Keister was not just having a conversation with a friend or quietly praying; he was using loud oration to try to engage passersby on their way to class.

Nor do we agree with Keister that *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), requires the conclusion that the “casual recreational and social activities” exception is impermissibly vague. There, Los Angeles International Airport (the “Airport”) adopted a resolution that banned all First Amendment activity. *Id.* at 574–75. The Airport tried to save the ban by arguing that “airport related” expression was excepted. *Id.* at 576. The Supreme Court rejected the Airport’s argument. *Id.* It reasoned that “[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be ‘airport related,’ but is still protected speech even in a nonpublic forum.” *Id.* And while the Court concluded that “[t]he line between airport-related speech and nonairport-related speech is, at best, murky[,]” the Airport could not have described what it believed qualified as “airport-related” speech more vaguely: “an

individual who reads a newspaper or converses with a neighbor at [the Airport] is engaged in permitted ‘airport-related’ activity because reading or conversing permits the traveling public to ‘pass the time.’” *Id.*

The Supreme Court’s holding has little application here for three reasons. First, unlike the Airport’s resolution, the University’s Policy does not ban all First Amendment activity; rather, it requires permitting of public-speaking events. Second, unlike with the phrase “casual recreational and social activities,” which has a commonly understood meaning, the phrase “airport-related” enjoys no such common understanding, and to the extent that it carries a common meaning, that meaning is clearly overly narrow to encompass permissible speech in an airport. Third, to the extent the Airport attempted to define the term “airport-related” speech, it did so in the litigation and uniquely for purposes of the Airport resolution only. So the term “airport-related” had no common meaning. And even then, the Airport’s definition—First Amendment activity that allows the traveling public to “pass the time”—was broad enough to include virtually anything, so it could not provide appropriate notice to those who wished to engage in First Amendment activity at the Airport.

But the phrase “casual recreational and social activities” requires no special definition because its meaning is sufficiently clear, especially in the context of the Policy and its purpose. A person with “ordinary intelligence” knows what kind of activities qualify as “casual recreational and social activities” and what do not. And

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that is even more the case when a person considers what activities can interfere with the school setting and what will not. It is also not practical to expect a university to draft a policy of this type to identify by explicit description each and every activity that exists that requires a permit.

In a nutshell, the Policy's exception for "casual recreational and social activities" is not unconstitutionally vague, and Keister's actions clearly did not qualify for this exception.

3. Advance-Notice Requirement

Finally, Keister challenges the University's advance-notice requirement. The University's Policy stated that "applicants for use of the Grounds should request permission for such use ten (10) working days prior to the Event."

Keister complains that this notice period is unreasonably long. He notes that it is much longer than the advance-notice requirements upheld in *Bloedorn* and other cases, and he asserts that the University does not have a particular reason for having such a lengthy notice period. Though Keister acknowledges that under the Policy, applications for a permit could be approved in as few as three days, he concludes that's irrelevant. According to Keister, the University is free to bar any application that is not submitted ten working days in advance because it can deny any application not "properly made."

The University responds that submitting applications ten working days in advance is "best practice" but not required. It

points out that the Policy expressly provides that Keister's application could have been approved in as few as three days because it related to a smaller event. The University also points out that Keister could have planned his trip in advance, since he does that with churches. Finally, the University argues that it had good reasons for the notice period: it needs time to make sure that a space is available and that it will not interfere with University operations, like ongoing classes in Russell Hall.

As we suggested at the preliminary-injunction stage, a ten-working-day advance notice period is likely excessive. *Keister*, 879 F.3d at 1288 n.4 (“[T]his Court does have some concerns about whether UA’s 10 working day advance notice requirement would be reasonable for events that do not require multiple department approvals[.]”). Ten working days is also much longer than the advance notice periods upheld in other cases. *See Bloedorn*, 631 F.3d at 1240 (upholding a 48-hour notice requirement); *see also Bowman v. White*, 444 F.3d 967, 982 (8th Cir. 2006) (upholding a three-day notice requirement).

But the Policy did not *require* an application to be submitted ten working days before an event. Rather, it instructed that an application “should” be submitted ten days ahead of time—and even then only to “facilitate the review by all the different University departments that have responsibility for the various aspects of an Event (e.g., tents, food service, UAPD, electrical service, etc.).” In fact, this record contains no indication that the University ever construed the Policy to require a ten-day lead time.

On the contrary, under the express terms of the Policy, Keister could have submitted his application as few as three working days in advance and still obtained a permit. His simple event—standing on a sidewalk and speaking to passersby—did not involve multiple University departments. Nor did it require tents, food service, the University’s police department, or electrical service—the kinds of things for which the Policy’s advisory ten-day window was designed. Of course, Keister never actually applied for a Permit, but there’s no basis to think the University would have taken more than three days to approve one if he had.

The cases that Keister relies on do not affect our analysis. The advance-notice provisions in both *Bloedorn* and *Bowman* applied to designated public forums, so they had to satisfy strict scrutiny. *Bloedorn*, 631 F.3d at 1240 (assessing whether the notice period was “narrowly tailored”); *Bowman*, 444 F.3d at 982 (concluding that the advance notice period was sufficiently “narrowly tailored”). But here, the University applied its advance-notice provision to a limited public forum, so the provision had to be only reasonable. Other courts have upheld a seven-day notice requirement in a limited public forum. *Sonnier v. Crain*, 613 F.3d 436, 445 (5th Cir. 2010), *opinion withdrawn in part on reh’g*, 634 F.3d 778 (5th Cir. 2011). So certainly three days—the amount of time that would have been required to process a Permit in Keister’s situation—is not excessive.

And that is particularly so, given the University’s reasons for requiring that waiting period. The University receives thousands

of speaking requests each year. For each speaker, the University must ensure that the space the speaker seeks is available and that the speaker will not interfere with classes or other University operations. Plus, as other courts have recognized, universities are “less able than a city or other entity . . . to deal with significant disruption on short notice.” *Bowman*, 444 F.3d at 982.

The University’s Policy must be reasonable, not perfect. Here, the Policy satisfies that requirement. It phrases the ten-day advance-notice period in terms of “should,” not “must,” and the record contains no evidence that the University has rejected an application simply because it was not submitted ten days before the event. The University’s reasons for the advance-notice requirement are also reasonable, and the Sidewalk is a limited public forum. Besides this, the Policy permits the fast-tracking of a Permit if an event relates to a current issue or responds to another event. Under these circumstances, we do not think the University’s three-day notice requirement is unconstitutional.

IV.

For the reasons we have explained, we affirm the district court’s entry of summary judgment. The University’s motion to dismiss this appeal as moot is DENIED.

AFFIRMED.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12152-CC

RODNEY KEISTER,

Plaintiff - Appellant,

versus

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,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ROSENBAUM, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

Appendix C

**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 WESTERN DIVISION**

RODNEY KEISTER,

Plaintiff,

v.

STUART BELL, et al.,

Defendants.

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Case No.: 7:17-cv-00131-RDP

MEMORANDUM OPINION

This case is before the court on the parties’ cross Motions for Summary Judgment. (Docs. # 59, 60). The motions are fully briefed. After careful consideration, and for the reasons explained below, the court finds that Defendants’ Motion for Summary Judgment (Doc. # 59) is due to be granted, and Plaintiff’s Motion for Summary Judgment (Doc. # 60) is due to denied.

I. Background¹

The facts of this case have been briefed (repeatedly) by the parties. This court (*see* Docs. # 22, 49), and the Eleventh Circuit, *Keister v. Bell*, 879 F.3d 1282, (11th Cir. 2018), *cert. denied*, 139 S. Ct. 208 (2018), have addressed requests for interim relief. Although the material facts that form the basis of Plaintiff’s Complaint have not substantially changed, the parties, after conducting extensive discovery, have presented their fact submissions and legal arguments. Thus, the court once again dives in and reviews the undisputed Rule 56 facts.

¹ The facts set out in this opinion are gleaned from the parties’ submissions and the court’s own examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of the nonmoving party. *See Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002). These are the “facts” for summary judgment purposes only. They may not be the actual facts that could be established through live testimony at trial. *See Cox v. Adm’r U.S. Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1400 (11th Cir. 1994).

Plaintiff Rodney Keister (“Keister”) is a traveling Christian missionary, who is personally dedicated to glorifying God through the public sharing of the gospel in public areas throughout the nation. (*Id.* at ¶¶ 12-13). His basic message is that whoever trusts in Jesus Christ will be saved from their sins. (*Id.* at ¶ 25). As part of his ministry, he presents the merits of Christianity by preaching, handing out religious literature (“gospel tracts”), and engaging people in one-on-one conversations and prayer. (*Id.* at ¶¶ 17-19). Keister has a sincere desire to reach out to college-aged students, and he regularly visits college and university campuses. (*Id.*). He typically conveys his message on public sidewalks. (*Id.* at ¶ 15). He generally does not draw large crowds, nor does he intend to do so. (*Id.* at ¶¶ 21, 22). He does not hinder pedestrian traffic, solicit or ask for money, harass passersby, or litter. (*Id.* at ¶¶ 22, 23). Keister is sometimes accompanied in his sidewalk evangelism by one or two friends. (Doc. # 39 at ¶¶ 24).

On March 10, 2016, Keister arrived at the University of Alabama (“University” or “UA”). (*Id.* at ¶ 29). The University is a state-funded public university located in Tuscaloosa, Alabama. (*Id.*). Around 4:00 p.m., Keister and a companion began speaking with passersby and distributing literature on the University’s campus. (*Id.* at ¶¶ 45, 54). Keister’s companion briefly used a megaphone while speaking, but Keister did not. (Doc. # 59-4 at 20-21). The duo were located on a sidewalk on UA’s campus next to 6th Avenue, near the corner of Smith Hall and Lloyd Hall. (Doc. # 39 at ¶ 52). Shortly after Keister and his companion began their sidewalk evangelism, they were approached by the campus police and a University representative, who informed them that they could not continue their activities because University policy required a grounds use permit before engaging in such expressive conduct. (*Id.* at ¶¶ 55-57). The University representative confirmed that the “campus is open to the public, and Keister was allowed to be there, but he could not engage in his preferred forms of expression on the University’s campus without first obtaining

a [grounds use] permit.” (*Id.* at ¶ 60).

Because Keister and his companion did not have a grounds use permit, they moved to the sidewalk at the intersection of University Boulevard and Hackberry Lane (the “intersection”). (*Id.* at ¶¶ 60-65). Keister testified that he picked this spot for two reasons. First, he believed it was a public city sidewalk, as opposed to UA property (where he would be required to apply for and receive a grounds use permit). (*Id.*). Second, Keister contends that while speaking with a campus police officer on 6th Avenue, Keister specifically proposed that he move locations and preach on the sidewalks at the University Boulevard and Hackberry Lane intersection. (*Id.*). In response, the campus police officer stated, “[o]n that corner, you’re good.” (*Id.* at ¶ 68).

Shortly after arriving at the intersection of University Boulevard and Hackberry Lane, Keister was again approached by UA campus police, who informed him that the intersection (and its contiguous sidewalk) were indeed part of UA’s campus, and UA’s grounds use policy applied at that location as well. (*Id.* at ¶ 73). Fearing arrest for criminal trespass, Keister left UA’s campus and has not returned.² (*Id.* at ¶¶ 74). Keister testified that he “fervently desires” to return to the public sidewalks next to public streets flowing through UA’s campus. (*Id.* at ¶¶ 77, 86). Specifically, Keister wishes to return to the sidewalks situated at the corner of University Boulevard and Hackberry Lane and share his message with UA students and others affiliated with the University. (*Id.*).

On January 25, 2017, Keister filed his complaint in this court alleging violations of 42 U.S.C. §§ 1983 and 1988, and asserting that UA’s grounds use policy violates the First

² Keister’s Amended Complaint states that “[he] along with [his companion], packed up and walked back to their vehicle because it was getting late in the day.” (Doc. # 39 at ¶ 72). In his deposition, Keister stated that he and his companion left the corner because the weather “turned” and it started raining. (Doc. # 59-4 at 32-33). Although the reason Keister and his companion began packing up is contested, it is undisputed that the duo were approached by a campus police officer and threatened with arrest for trespass, departed, and have not returned

Amendment's free speech clause and the Fourteenth Amendment's due process clause. (Doc. # 1). The next day Keister filed a Motion for Preliminary Injunction. (Docs. # 6, 7). In his Motion, Keister argued the University's ground use policy violates the First Amendment, and that the University should be enjoined from enforcing its ground use policy because the intersection of University Boulevard and Hackberry Lane is a traditional public forum and the policy cannot withstand scrutiny. (*Id.*). This court set an expedited briefing schedule and held a preliminary injunction hearing. (Docs. # 8, 16). After the hearing, this court issued a written opinion and denied Keister's Motion. (Docs. # 22, 23). In its Memorandum Opinion, the court determined that the intersection was a limited public forum, and the grounds use policy satisfied the requisite level of scrutiny. (Doc. # 22).

Keister appealed the ruling. (Doc. # 26). The Eleventh Circuit affirmed, holding that this court properly determined the intersection at issue is a limited public forum within UA's campus. *Keister*, 879 F.3d at 1291. Keister filed a petition seeking rehearing *en banc*, but his request was denied. Keister then petitioned the Supreme Court for a writ of certiorari. That petition was also denied.

After the Supreme Court denied certiorari, the parties continued litigating in this court. Keister filed an amended complaint, again alleging violations of both the First Amendment and the Due Process Clause. (Doc. # 39). In response, Defendants filed a Motion to Dismiss Keister's Amended Complaint (Doc. # 41), which the court denied. (Docs. # 49, 50). On October 10, 2019, the parties filed cross Motions for Summary Judgment. (Docs. # 59, 60). Those have been fully briefed and are now ripe for decision.

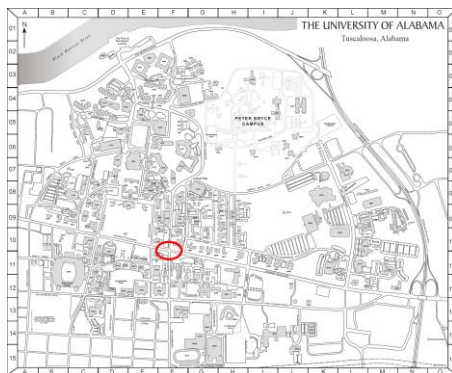
A. The Intersection and Sidewalk

University Boulevard and Hackberry Lane are city streets that run through and beyond the

perimeter of UA’s campus. (Doc. # 39 at ¶¶ 34-36). Sidewalks abound both University Boulevard and Hackberry Lane. (*Id.* at ¶ 37). At the preliminary injunction stage, the district court found that the sidewalks were located in the “heart” of UA’s campus. (Doc. # 22 at 3). In its opinion affirming this court’s denial of Keister’s Motion for Preliminary Injunction, the Eleventh Circuit stated:

Because Mr. Keister pled in his Complaint that the intersection is within UA campus’s bounds, we need not resolve the parties’ disputes as to who maintains and owns the sidewalks at issue. What is clear is that the intersection is within UA’s campus and UA treats it as such, as the district court found. And that is all that matters for our purposes today. *See Bloedorn*, 631 F.3d at 1233 (11th Cir. 2011) (“Publicly owned or operated property does not become a public forum simply because members of the public are permitted to come and go at will. Instead, we look to the traditional uses made of the property, the government’s intent and policy concerning the usage, and the presence of any special characteristics.”) (internal quotations and citations omitted)).

Keister, 879 F.3d at 1290 n.5. On remand, Keister amended his complaint and now claims that the intersection at the intersection of University Boulevard and Hackberry Lane is *near* UA’s campus, but not on it, inside it, or a part of it. (Doc. # 39 at ¶¶ 28-44). The below map shows the circled location of the intersection in reference to the outer limits of UA’s campus:



(Doc. # 59-2 at ¶ 34, Exh. A). Further, Keister claims that newly presented evidence shows that the corner sidewalks are city property, not UA property. (Doc. # 60-8 at 4). Defendants, of course, dispute that the city owns the sidewalks. (Doc. # 63 at 15-16).³ Although the parties dispute

³ Although ownership of the sidewalks at issue is disputed, the dispute is not material. *See infra* pp. 11-12.

whether the city or the University owns the sidewalks at the intersection, it is undisputed that they are maintained by the University. (Doc. # 22 at 3 n.4; Doc. # 60-7; Doc. # 63 at 15-16)

The University is not fenced-off, gated, or otherwise self-contained. (Doc. # 39 at ¶¶ 30, 31). The intersection at issue is surrounded by UA buildings and is approximately one block from UA's famous Quad. (Doc. # 59-2 at ¶ 34). Visible from the intersection are numerous UA facilities and landmarks. (*Id.* at ¶ 35). Russell Hall, where Keister was preaching, sits at the northeast corner of the intersection. (*Id.*). Gallalee Hall and a UA Parking lot (with a sign restricting its use to UA faculty and staff) occupy its northwest corner. (*Id.*). The southwest corner includes Farrah Hall, and its adjacent UA-only parking lot. (*Id.* at ¶ 36). A park sits at the intersection's southeast corner. (*Id.* at ¶ 34, Exh. D-Q). About a block away from the intersection on Hackberry Lane, there are a smattering of private businesses (namely, a PNC Bank and an Arby's) mixed in among the UA buildings. (Doc. # 59-4 at ¶¶ 14-19). There are streetlamps at the intersection, and University signs hang from the streetlamps. Doc. # 59-2 at ¶ 39). The street signs at the intersection display the script "A" logo of the university. (*Id.* at ¶ 37). Landscaping fences, which run throughout UA's campus, are on each corner of the intersection. (*Id.* at ¶ 38).

B. UA's Grounds Use Policy

UA's grounds use policy is intended to "preserve[] the primacy of the university's teaching and research mission" and "facilitate the responsible stewardship of institutional resources and to protect the safety of persons and the security of property." (Doc. # 59-2 at 9). The policy governs how, when, and where those who are unaffiliated with the University may speak publicly on campus. (*Id.*). Sidewalks are specifically included in the definition of "grounds" by the University. (*Id.* at 10).

To obtain approval to speak publicly at the University, an unaffiliated person must: (1) be sponsored by or affiliated with a University academic or administrative department or registered student organization; and (2) complete a grounds use permit (sometimes referred to as a “GUP”). (*Id.* at 9-10). The policy states that applicants for a GUP “should request permission for such use ten (10) working days prior to the [e]vent.”⁴ (*Id.* at 12). According to the University, the notice requirement is necessary “to facilitate the review by all the different University department that have responsibility for the various aspects of an [e]vent (*i.e.*, tents, food service, UAPD, electrical services, etc.)[.]” (*Id.*). The Policy provides that, “[i]f an [e]vent does not involve factors that require multiple University department approvals, approval may be given in as few as three (3) days, if the GUP form is filled out completely and accurately.”⁵ (*Id.*).

The University will approve a GUP application unless there is reason to believe that one or more of the following are present:

- a) The applicant, if a student or a recognized student organization, is under a disciplinary penalty withdrawing or restricting privileges made available to the student or a recognized student organization[], such as use of a facility.
- b) The proposed location is unavailable at the time requested because of events previously planned for that location.
- c) The proposed date or time is unreasonable given the nature of the Event and the impact it would have on University resources.
- d) The Event would unreasonably obstruct pedestrian or vehicular traffic.

⁴ The University does make an exception to the ten-day advance notice policy for “counter-events” and “spontaneous events.” (Doc. # 59-2 at 12). A counter-event is defined by the policy as one that is “occasioned in response to an Event for which a GUP has been issued[.]” (*Id.*). A spontaneous event is defined as one that is “occasioned by news or issues coming into public knowledge within the proceeding two (2) calendar days[.]” (*Id.*). For both of these events, “an expedited request for a GUP may be made by a University affiliate” and “the University will attempt to accommodate and provide access to the University Affiliate within twenty-four (24) hours, to an area of the Grounds which is available and which does not interfere with regular academic programs or scheduled events and programs.” (*Id.*). Keister’s desired expression does not constitute a “counter-event” or a “spontaneous event.” Thus, Keister does not qualify for an expedited request for a grounds use permit.

⁵ The average approval time for a grounds use permit is 4.4 days. (Doc. # 59-7).

e) The Event would prevent, obstruct, or unreasonably interfere with the regular academic, administrative, or student activities of, or other approved activities at, the University.

f) The Event would constitute an immediate and actual danger to University students, faculty, or staff, or to the peace or security of the University that available law enforcement officials could not control with reasonable effort.

g) The University Affiliate on whose behalf the application is made has on prior occasions:

1) Damaged University property and has not paid in full for such damage, or

2) Failed to provide the designated University official with notice of cancellation of a proposed activity or Event at least two (2) University working days prior to a scheduled activity or Event.

(*Id.* at 13). If a GUP application is denied, there is an appeal process. (*Id.* at 14-15). Keister has not availed himself of the grounds use policy or the appeals process, nor does he plan to do so. (Doc. # 59-4 at 46).

II. Standard of Review

Under Federal Rule of Civil Procedure 56, summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323. Once the moving party has met its burden, Rule 56 requires the non-moving party to go beyond the pleadings and -- by pointing to affidavits, or depositions, answers to interrogatories, and/or admissions on file -- designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

The substantive law will identify which facts are material and which are irrelevant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *See Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1314 (11th Cir. 2007); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See id.* at 249.

When faced with a “properly supported motion for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations.” *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997). As *Anderson* teaches, under Rule 56(c) a plaintiff may not simply rest on her allegations made in the complaint; instead, as the party bearing the burden of proof at trial, she must come forward with at least some evidence to support each element essential to her case at trial. *See Anderson*, 477 U.S. at 252. “[A] party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.’” *Id.* at 248 (citations omitted).

Summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp.*, 477 U.S. at 322. “Summary judgment may be granted if the non-moving party’s evidence is merely colorable or is not significantly probative.” *Sawyer v. Sw. Airlines Co.*, 243 F. Supp. 2d 1257, 1262 (D. Kan. 2003) (citing *Anderson*, 477 U.S. at 250-51).

“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249. “Essentially, the inquiry is ‘whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Sawyer*, 243 F. Supp. 2d at 1262 (quoting *Anderson*, 477 U.S. at 251-52); *see also LaRoche v. Denny’s, Inc.*, 62 F. Supp. 2d 1366, 1381 (S.D. Fla. 1999) (“The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment.”).

III. Analysis

The court has carefully reviewed the Rule 56 record and analyzed the parties’ claims under the appropriate legal frameworks. The court has determined that the cross motions for summary judgment and Rule 56 record present three issues key issues for the court’s consideration: (1) does Keister have standing to assert his claims?; (2) if so, has Keister presented evidence sufficient to show that the intersection of University Boulevard and Hackberry Lane is, in fact, a traditional public forum?; and (3) is the University’s grounds use policy unconstitutional? The court addresses each issue, in turn.

A. Keister Has Standing to Pursue His Claims

At the outset, the court is required to examine whether Keister has Article III standing to bring his claims. *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1253 (11th Cir. 2009) (citing *Elend v. Basham*, 741 F.3d 1199, 1204 (11th Cir. 2006)). Defendants argue that Keister lacks standing to bring a claim for actual damages because he has not suffered an actual injury. (Doc. # 59 at 12-14). Further, Defendants claim that Keister lacks standing to challenge the reasonableness and view-point neutrality of the University’s grounds use policy because Keister’s

proposed remedy would not redress any such alleged harm. (*Id.* at 14-17). The court disagrees.

As a threshold matter, Article III standing has three elements:

(1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Fla. Family, 561 F.3d at 1253 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1991)) (internal citations and quotation marks omitted). The burden is on Keister, as the party seeking to invoke this court’s jurisdiction, to produce facts sufficient to support Article III standing. *Id.* (citing *Pittman v. Cole*, 267 F.3d 1269, 1282 (11th Cir. 2001)).

Defendants’ primary argument is that Keister left the intersection at issue due to the weather, not for fear of arrest. Specifically, Defendants argue that Keister did not encounter the University police officer until after he packed up and left the intersection, due to the weather. (Doc. # 59 at 18). And when Keister did encounter the officer, he was “only told that he would be trespass[ing] if he returned.” (*Id.*) (emphasis omitted). According to Defendants “[g]iven that the undisputed evidence demonstrates that [] Keister never suffered any ‘past injury,’ he lacks standing to bring his claim for actual/nominal damages.” (*Id.*). Defendants are incorrect. Although the parties dispute the reason Keister and his friend packed up their materials, it is undisputed that they encountered the officer before they left the intersection and were threatened with arrest if they returned without a permit. (Doc. # 59-4 at 42).

Keister suffered an injury-in-fact related to his ability to speak at the intersection of University Boulevard and Hackberry Lane that is both concrete and imminent. When considering a similar standing argument in the analogous case of *Bloedorn v. Grube*, the Eleventh Circuit

observed that “[i]n determining whether an injury is imminent, the law ‘requires only that the anticipated injury occur within some fixed period of time in the future. Immediacy, in this context, means reasonably fixed and specific in time and not too far off.’” 631 F.3d 1218, 1228 (11th Cir. 2011) (citing *Am. Civil Liberties Union of Fla., Inc. v. Miami–Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1193-94 (11th Cir. 2009)) (internal quotation marks, alterations, and citation omitted); *see also Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001) (“[T]he injury requirement is most loosely applied—particularly in terms of how directly the injury must result from the challenged governmental action—where First Amendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced.”) (internal quotation marks omitted). “Moreover, a plaintiff need not expose himself to enforcement of a law to challenge it in the First Amendment context; instead, ‘an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences.’” *Bloedorn*, 631 F.3d at 1228 (citing *Pittman*, 267 F.3d at 1283). But, to establish standing, “the plaintiff must show that he has an unambiguous intention at a reasonably foreseeable time to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute or rule, *and* that there is a credible threat of prosecution.” *Id.* (emphasis added).

Here, Keister is an outside, unsponsored speaker who attempted to speak at multiple University locations, but was turned away from the campus because he refused to comply with the University’s grounds use policy. He was told that if he returned to campus and attempted to share his message without a grounds use permit, he would be arrested for trespassing. Keister has repeatedly stated that he fervently wishes to return and share his message with UA students, but he has not been able to do so for fear of arrest. The Rule 56 record leads this court to believe that

University police officers would arrest Keister if he returned to campus to speak at the intersection of University Boulevard and Hackberry Lane (or, anywhere on campus) without a grounds use permit. This is enough to establish an injury in fact that is actual, concrete, and particularized. *See Bloedorn*, 631 F.3d at 1228

Second, there is a “causal connection” between Keister’s injuries and the University’s grounds use policy. Keister has stated multiple times that *but for* the policy, he would return to UA and share his message with the college-aged students and others. The only hurdle to Keister returning to UA is the grounds use policy. That is, the Rule 56 evidence clearly permits the inference that nothing else is keeping Keister away. (*Id.*).

Finally, the court has little doubt that each of Keister’s complained of injuries could be addressed by a favorable decision in this case. *Id.* (citing *Fla. Family*, 561 F.3d at 1253). In sum, the court easily concludes that Keister has standing to pursue his claims.

B. Forum Analysis

As an initial matter, the court reminds the parties that under “law-of-the-case doctrine” *Kesiter*, as a published Eleventh Circuit decision, is binding on its court. *See Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1288 (11th Cir. 2000) (“Under the law of the case doctrine, both the district court and the appellate court are generally bound by a prior appellate decision of the same case.”). This means the Eleventh Circuit’s conclusion that the intersection of University Boulevard and Hackberry Lane is a limited public forum, *Keister*, 879 F.3d at 1289-91, is at least presumptively binding on this court (subject, of course, to it becoming clear the Rule 56 facts are different from those in the record at the time the circuit reviewed this court’s Rule 65 denial).

As the court noted in its opinion denying Defendants’ 12(b)(6) Motion:

If discovery shows that the relevant facts on which the Eleventh Circuit’s decision was based were, in fact, not the real facts, then Plaintiff will of course be free to

argue that the intersection is not a limited public forum. Even under the law-of-the-case doctrine, a prior judicial decision is not binding if, since the prior decision “new and substantially different evidence is produced.” *This That And The Other Gift And Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1283 (11th Cir. 2006) (internal quotation marks omitted). Thus, while the facts on which the Eleventh Circuit’s decision was based do not appear to be subject to reasonable dispute, that does not prohibit Plaintiff from trying to show otherwise.

(Doc. # 49 at 5). Keister has tried mightily to discover and present new evidence showing the intersection at issue is a traditional public forum. (Doc. # 60-8 at 14-15). Defendants presented additional evidence refuting that claim. (Docs. # 63, 63-1, 63-2). In light of this, the court’s next step is to conduct a forum analysis and consider all of the Rule 56 record evidence. (Doc # 49-5); *This That And The Other Gift*, 439 F.3d at 1283.

i. The Intersection at University Boulevard and Hackberry Lane is a Limited Public Forum

The court begins its analysis by reciting the unremarkable principle that the First Amendment does not guarantee access to property just because it is owned by the government. *Bloedorn*, 631 F.3d at 1230 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985)). Rather, the courts perform a “forum analysis” to evaluate restrictions on private speech and expression that occur on government property. *Keister*, 879 F.3d at 1288. The Supreme Court has recognized four different categories of government fora: (1) the traditional public forum; (2) the designated public forum; (3) the limited public forum; and (4) the non-public forum. *Id.* (citing *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1223 (11th Cir. 2017)) The parties agree there are only two fora at issue here: (1) the traditional public forum, and (2) the limited public forum. *Keister*, 879 F.3d at 1288.

A traditional public forum is property that “ha[s] immemorially been held in trust for the use of the public[.]” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). The Supreme Court has

restricted traditional public forum status to its “historic confines.” *Walker*, 872 F.3d at 1223 (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998)). These “historic confines” include public areas such as public streets and parks that, since “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry*, 460 U.S. at 45. “[A] time, place, and manner restriction can be placed on a traditional public forum *only* if it is content neutral, narrowly tailored to achieve a significant government interest, and “leave[s] open ample alternative channels of communication.” *Bloedorn*, 631 F.3d at 1231 (citing *Perry*, 460 U.S. at 45) (emphasis in original).

By comparison, a limited public forum “is established when governmental entities open their property but limit its use to ‘certain groups or dedicate[] [it] solely to the discussion of certain subjects.’” *Bloedorn*, 631 F.3d at 1231. If a space is classified as a limited public forum, the government may exclude a speaker “if he is not a member of the class of speakers for whose especial benefit the forum was created.” *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49). “Indeed, implicit in the idea that a government forum has not been opened widely and intentionally to the general public is the government’s right to draw distinctions in access based on a speaker’s identity.” *Bloedorn*, 631 F.3d at 1235 (citing *Perry*, 460 U.S. at 49). Restrictions in a limited public forum only need to be “reasonable and viewpoint neutral.” *Id.* at 1231.

The Eleventh Circuit has made it clear that “[t]he physical characteristics of the property alone cannot dictate forum analysis.” *Bloedorn*, 631 F.3d at 1233. “Instead, we look to the traditional uses made of the property, the government’s intent and policy concerning the usage, and the presence of any special characteristics.” *Id.* “[T]he scope of the relevant forum is defined by ‘the access sought by the speaker.’” *Id.* at 1232 (quoting *Cornelius*, 473 U.S. at 801). Just as at the preliminary injunction stage, Keister solely seeks to speak at the intersection. As such, that is

the scope of our forum assessment today. *Keister*, 879 F.3d at 1289.

Keister contends that the intersection’s sidewalks are a tradition public forum. Specifically, he argues: (1) the Rule 56 record confirms that those sidewalks are city-owned, and thus, traditional public fora as a matter of law; and (2) the objective function and appearance of the sidewalks confirm traditional public forum status. (Doc. # 60-8 at 18).

In support of his first argument, Keister states that although he initially believed the City held an easement on the sidewalk, that is not so. According to Keister, “this court and the appellate court, based on the record at the time of the motion for preliminary injunction, deduced that these sidewalks are limited public fora on the belief that they sat on university property internal to—indeed in the ‘heart of—UA.’” (Doc. # 60-8 at 16). But, Keister now maintains the sidewalks are property wholly owned and controlled by the City of Tuscaloosa, and are on the periphery of the campus, not in the “heart” of it.⁶ (*Id.*). As such, Keister maintains the Eleventh Circuit’s “erroneous presumptions” no longer hold true and the pathways “must” be deemed traditional public fora. (*Id.*). The issue of city ownership, Keister argues, “settle[s] the matter.”⁷ (*Id.* at 19, n.1).

In opposition, Defendants disagree with Keister’s assertions about ownership of the sidewalks. Alternatively, they maintain that even if it could be shown that the City of Tuscaloosa

⁶ The undisputed Rule 56 evidence is to the contrary. It is clear the intersection is located in the heart of campus. *See supra*, p. 4, Campus Map; *see also Keister*, 879 F.3d at 1291.

⁷ To bolster his arguments, Keister has attached the following exhibits to his brief:

- Photographs of the intersection of University Boulevard and Hackberry lane.
- Multiple maps depicting the demarcation of the University and the City of Tuscaloosa.
- Multiple photographs featuring the University, and other landmarks.
- Municipal right-of-way use license agreement between the City of Tuscaloosa and the University.

(Docs. # 60-1 to 60-8).

owns the sidewalks, ownership is not dispositive in a forum analysis, and the objective function and appearance of the sidewalks indicate they still constitute a limited public forum. (Doc. # 63 at 12).

The Eleventh Circuit has previously provided controlling guidance on how to determine the type of forum on a public college campus. For example, on the prior appeal in this case, the Eleventh Circuit noted that in the factually similar case of *Bloedorn*:

The plaintiff wished to preach on Georgia Southern University’s (“GSU”) campus and, when denied, filed suit asserting that GSU’s speech policy violated the First Amendment. This Court held that GSU’s sidewalks, pedestrian mall, and rotunda were limited public fora because (1) a state-funded university is not *per se* a traditional public forum; and (2) there was no evidence GSU intended to open those areas for public expressive conduct. By limiting who may use its facilities to a discrete group of people—the GSU community—we concluded “[t]his is precisely the definition of a limited public forum.”

We also held that it is of lesser significance that the GSU sidewalks and Pedestrian Mall physically resemble municipal sidewalks and public parks. The physical characteristics of the property alone cannot dictate forum analysis. Noting that although GSU’s campus possessed many features similar to public parks—such as sidewalks, pedestrian malls, and streets—we held its essential function was quite different: education. Thus, because GSU did not intend to open its sidewalks to public discourse, it was a limited public forum.

Keister, 879 F.3d at 1290 (11th Cir. 2018) (internal citations omitted). Importantly, in coming to its conclusion in *Bloedorn*, the Eleventh Circuit stated “the purpose of a university is strikingly different from that of a public park. Its essential function is not to provide a forum for general public expression and assembly; rather, the university campus is an *enclave* created for the pursuit of higher learning[.]” *Bloedorn*, 631 F.3d at 1332-34 (emphasis added).

Keister’s main argument is that the intersection sidewalks are owned by the City of Tuscaloosa, and not the University. Keister likens this case to other cases in which courts have held that city-owned sidewalks are traditional public fora. (Doc. # 60-8 at 20-21) (citing *Int’l*

Caucus of Labor Comm. v. City of Montgomery, 111 F.3d 1548, 1550 (11th Cir. 1997) (recognizing “city sidewalks” as traditional public fora); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *McCullen v. Coakley*, 573 U.S. 464, 474-75 (2014); *Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005)). But Keister’s “new” argument is merely a re-packaged version of his prior arguments. In his Motion for Preliminary Injunction, Keister argued that because the intersection is open as a public thoroughfare, it is a *per se* public forum. (Doc. # 6-12 at 10). This argument has already been addressed by this court and was squarely rejected by the Eleventh Circuit. *Keister*, 879 F.3d at 1291.

Further, the court need not decide whether the documents submitted by Keister (namely, the Municipal Land Permit) prove that the intersection sidewalks are owned by the City of Tuscaloosa. Even if the City of Tuscaloosa does own the sidewalks at issue, that does not change in any way the court’s analysis. Regardless, the sidewalks are owned by a government and (as Keister has acknowledged in previous briefing) “forum depiction does not turn on ownership.” (Doc. # 10 at 12) (internal citations omitted); see *Greer v. Spock*, 434 U.S. 828 (1976) (noting that the government permitting citizens to access its land via sidewalks and streets does not automatically convert a nonpublic forum to a public one); *Bloedorn*, 631 F.3d at 1233 (“Publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.”) (quoting *Grace*, 461 U.S. at 177). Because city ownership does not, as Keister maintains, “settle[] the matter,” the court proceeds to conduct a forum analysis by examining the physical characteristics and visual surroundings of the intersection sidewalks to determine if they constitute an “enclave” distinguishable from the city streets and sidewalks outside of the campus’ reach. See *Bloedorn*, 631 F.3d at 1233-34

Here, the objective characteristics and traditional uses of the sidewalks confirm the intersection's status as a limited public forum. As the Eleventh Circuit previously found:

[T]here are objective indications that University Boulevard and Hackberry Lane are within UA's campus as opposed to "mere" public Tuscaloosa streets at that intersection. Unlike in *Grace*, where the Supreme Court held that its perimeter sidewalks were traditional public fora because they were not distinguishable from the Washington, D.C. public sidewalks, here the intersection, as evident from the UA map, is in the heart of campus. It is surrounded by UA buildings, and there are numerous permanent, visual indications that the sidewalks are on UA property including landscaping fences and UA signage. While physical characteristics are not dispositive for forum analysis, they independently support a limited public forum in this case as they suggest to the intended speaker that he has entered a special enclave.

Keister, 879 F.3d at 1290-91 (internal citations and quotations omitted). None of these facts have changed nor are they genuinely disputed. Specifically, on this Rule 56 record, the following physical characteristics support a finding that the intersection sidewalks are limited public forum: street signs bear the script "A" logo of the University; the intersection is embellished by University markings; the intersection is surrounded by prominent university buildings and marked faculty only parking lots; the landscaping fences that run through campus are on each corner of the intersection.

The undisputed Rule 56 record evidence support this conclusion. *Id.* at 1335 (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981) ("[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (internal quotation marks omitted)). The Eleventh Circuit's decision in *Bloedorn* confirms this court's determination that the intersection sidewalks are a limited public forum. Just as in *Bloedorn*, the University's essential function is not to provide a forum for public expression. 631 F.3d at 1334. Rather, the campus functions as an enclave "created for the pursuit of higher learning by its admitted and registered students and by its faculty."

Further reinforcing this determination, “virtually every recent case involving a First Amendment speech challenge to a university policy regulation, or action has been analyzed under the ‘limited public forum’ framework.” *Young America’s Foundation v. Kaler*, 370 F. Supp. 3d 967 (D. Minn. 2019) (concluding that the University of Minnesota’s large-scale events policy created a limited public forum); see e.g., *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679-84 (2010 (“[T]his case fits comfortably within the limited-public-forum category, for [the Christian Legal Society], in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition.”)); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-30 (1995) (concluding the limited public forum framework appropriate for analyzing payments from the University of Virginia to its Student Activities Fund (“SAF”) to outside contractors for the printing costs of a variety of publications issued by student groups); *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017) (affirming on re-hearing the district court’s conclusion that Iowa State University created a limited public forum for First Amendment purposes); *Bloedorn*, 631 F.3d at 1232-33 (affirming that district court’s conclusion that the sidewalks, pedestrian mall, and rotunda at Georgia State University falls into the category of a limited public forum); *Young Am.’s Found. v. Napolitano*, No. 17-CV-02255-MMC, 2018 WL 1947766, at *3 (N.D. Cal. Apr. 25, 2018) (concluding the forum at issue at the University of California, Berkeley was a limited-public forum); *Kushner v. Buhta*, No. 16-CV-2646 (SRN/SER), 2018 WL 1866033, at *10 (D. Minn. Apr. 18, 2018), *aff’d*, 771 F. App’x 714 (8th Cir. 2019) (affirming the district court’s conclusion that the parties’ stipulation that a lecture hall at the University of Minnesota Law School was a limited public forum was appropriate); *Bus. Leaders in Christ v. Univ. of Iowa*, No. 317CV00080SMRSBJ, 2018 WL

4701879, at *7 (S.D. Iowa Jan. 23, 2018) (concluding that “[a] [U]niversity [of Iowa] program that grants student organizations official registration or recognition amounts to a limited public forum.”); *Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1233 (S.D. Ala. 2016) (concluding that the perimeter of campus at the University of South Alabama is “at best a limited public forum.”).

Because the undisputed Rule 56 record evidence shows that the intersection is within the University’s campus, is not intended as an area for the public’s expressive conduct, and contains markings sufficiently identifying it as an enclave, the intersection sidewalks are a limited public forum.

C. The University’s Permitting Restrictions are Constitutional

Having determined that the intersection is a limited public forum, the court turns to Keister’s challenges to the University’s grounds use policy. Keister maintains that the grounds use policy: (1) is unconstitutionally vague; (2) is content based; (3) vests University officials with unbridled discretion for licensing speech; (4) is not narrowly tailored;⁸ (5) does not leave open ample alternatives for speech; and (5) that a ten working day advance notice requirement is unconstitutional.

In analyzing the constitutionality of the grounds use policy, the court is cognizant of the Supreme Court’s guidance on this topic:

Our inquiry is shaped by the educational context in which it arises: First Amendment rights, we have observed, must be analyzed in light of the special characteristics of the school environment. This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and

⁸ Because the court has concluded that the intersection sidewalks are a limited public forum, the University’s policy is not required to be “narrowly tailored.” *Bloedorn*, 631 F.3d at 1231 (Restrictions in a limited public forum only need to be “reasonable and viewpoint neutral.”). Thus, the court need not address this argument. Having said that, the court notes that while considering a similar policy in *Bloedorn*, the Eleventh Circuit found that the restrictions imposed were in fact narrowly tailored. 631 F.3d at 1228-1242.

we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review.

Christian Legal Soc’y, 561 U.S. at 685-86 (internal citations, alterations, and quotation marks omitted). Because the intersection sidewalks are a limited public forum “any time, place, and manner restrictions made on expressive activity need only be viewpoint neutral and reasonable; and the restriction need not ‘be the most reasonable or the only reasonable limitation.’” *Bloedorn*, 631 F.3d at 1235 (quoting *Cornelius*, 473 U.S. at 808). “The regulation is constitutional so long as it is ‘reasonable in light of the purpose which the forum at issue serves.’” *Id.* (quoting *Perry Educ. Ass’n*, 460 U.S. at 49).

i. The Ground Use Policy is Not Unconstitutionally Vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

According to the Supreme Court, vague laws offend several important values:

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (internal quotations omitted).

Keister maintains that the University’s grounds use policy exception for “casual recreational or social activities” is vague, enables censorship, and is unconstitutional in any fora.

(Doc. # 60-8 at 25). Keister argues that the phrase is unconstitutionally vague because the policy “does not define th[ese] terms and neither are they self-explanatory” and “sans definition, [this] vague language empowers UA officials to divide for themselves what is ‘casual’ (with no standards to go on) and shut down for lack of permit.” (Doc. # 60-8 at 25-26). According to Keister, “[t]his gives UA officials opportunity to censor controversial topics or disagreeable viewpoints by simply concluding the speech is not ‘casual,’ while leaving others who lack a permit but have more favorable viewpoints alone.” (*Id.* at 26).

When viewing the totality of the grounds use policy, the phrase “casual recreational or social activities” is not unconstitutionally vague. In full, the grounds use policy states “[o]ther than uses for casual recreational or social activities, reservations must be made for the use of buildings and grounds under the control of the University, including University sidewalks (an ‘Event’).” (Doc. # 59-2 at 10). Although, the language of the policy is not precise, “we can never expect mathematical certainty from our language.” *Grayned*, 408 U.S. at 110. Where, as here, the language of the grounds use policy is “marked by ‘flexibility and reasonable breadth, rather than meticulous specificity,’” it is clear what the ordinance as a whole prohibits.⁹ *Id.* (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Blackmun, J.), *cert. denied*, 398 U.S. 965 (1970)). Specifically, the policy makes it clear that individuals (affiliated or not) who wish to engage in a casual picnic on University grounds need not obtain a permit. But, non-affiliated individuals who wish to speak in “short bursts to draw attention,” with voice amplification systems, or desire to share their “message” by approaching students and faculty on University grounds (including sidewalks) to hand out literature, must obtain a permit.

⁹ As the Supreme Court has noted, “[i]t will always be true that the fertile legal ‘imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.’” *Grayned*, 408 U.S. at 110 n.15 (quoting *American Commc’ns Ass’n v. Douds*, 339 U.S. 382, 412 (1950)).

The Rule 56 record evidence shows that the grounds use policy furthers the University's purpose of preserving the primacy of its teaching and research missions, as well as facilitating the responsible stewardship of University resources. (Doc. # 59-2 at 9). Requiring the University to list all activities that qualify as "casual recreational or social activities" would be tedious, unnecessary, and largely unhelpful. The University's current policy gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and does not impermissibly delegate basic policy matters to University officials for resolution on an *ad hoc* and subjective basis. *See Grayned*, 408 U.S. at 108-09. Thus, the court concludes that the grounds use policy is not unconstitutionally vague.

ii. The Grounds Use Policy is Content Neutral and Does Not Vest University Officials with Unbridled Discretion for Licensing Speech.

To begin, Keister simply has not established that the grounds use policy discriminates based on content.¹⁰ Nor has he established that the permitting scheme affords University officials unbridled discretion for licensing speech (*i.e.*, assigning the location, date time, and length of the grounds use permits). Facially, the grounds use policy is content neutral. It does not discriminate based on the speaker or the message the speaker wishes to convey. All non-affiliated outside

¹⁰ Keister also maintains that the exception to the grounds use policy for casual recreational or social activities" is content based. (Doc. # 60-8 at 25). Keister states that if he "and another individual discuss sports as they traverse the sidewalks, their expression is likely deemed exempt as 'recreational' speech, but if the conversation turns to the merits of Keister's religious beliefs, then it is no longer 'casual recreational or social,' but an 'event' requiring a permit." (*Id.* at 25-26). Thus, Keister maintains, the permit scheme is "unavoidably and impermissibly content-based." (*Id.* at 26). Keister is grasping at straws with this argument.

Discussing sports or religion while strolling through campus with a friend is not prohibited by the grounds use policy. In fact, this type of activity exemplifies a "casual recreational or social event." Prohibiting non-affiliated individuals from using University grounds without a permit is in line with the purpose and mission of the University. The space and facilities on University grounds are primarily intended for the teaching, research, and service components of the University's mission. And, the grounds use policy is intended to "facilitate the responsible stewardship of institutional resources." Activities outside the teaching, research, and service components of the University "must not interfere with the academic climate of the University." Speaking in "short bursts to draw attention," handing out literature, or using voice amplification, certainly has the potential to detract from the academic climate of the University.

speakers (regardless of the message they wish to promote) must follow the grounds use policy and obtain a permit if they wish to speak on University grounds.

Keister also maintains the grounds use policy sponsorship requirement vests unbridled discretion with University officials to license speech. (Doc. # 60-8 at 26). According to Keister, “[m]andating the need for a sponsor, UA supplies no criteria on whether sponsorship should be granted, leaving it entirely to the whims of each UA entity to decide whether to sponsor the speech or not.”¹¹ (Doc. # 60-8 at 26). The Rule 56 evidence does not support that argument. Rather, it shows that a grounds use permit is only denied for one of the seven enumerated reasons in the policy handbook. (Doc. # 59-2 at 14).

Moreover, Keister’s arguments are foreclosed for the reasons noted in the court’s initial opinion denying Keister’s Motion for a Preliminary Injunction and the Rule 56 evidence. To reiterate, this court stated:

[Keister] maintained at oral argument that the sponsorship requirement embedded in UA’s speech policy may ultimately lead to speakers being denied access to UA’s campus based on their viewpoint. Speakers are only entitled access to the campus under UA’s Policy if they are sponsored by a student group. Because there is a potential that student groups may deny him (or any other speaker) sponsorship based on his viewpoint, [Keister] contends that UA’s Policy itself is not viewpoint-neutral. The court disagrees and finds guidance from *Bloedorn* on this issue. There, regarding GSU’s sidewalks, the court noted “[t]he University has limited these areas only for use by a discrete group of people – the GSU community; its students, faculty, and employees; and their sponsored guests.” *Bloedorn*, 631 F.3d at 1232. Having found that *Bloedorn* was not “a member of the class of speakers for whose especial benefit the forum was created,” the court reasoned that “he may be constitutionally restricted from undertaking expressive conduct on the University’s sidewalks,” and that such restriction (based on his lack of sponsorship) was not viewpoint-based. *Id.* at 1235. The court finds the same to be true here. UA’s Policy applies equally to all sponsored speakers (who are allowed to speak so long as they meet the criteria outlined in the policy) and to all non-sponsored speakers (who are not allowed to speak, regardless of viewpoint). The key is that UA is not making any decisions based on a speaker’s viewpoint. *See Gilles v. Miller*, 501 F.

¹¹ For example, the University notes that Milo Yiannopoulos was allowed to speak on campus, despite counter-protests of several student organizations, because he was sponsored by the University of Alabama College Republicans (a registered student organization). (Doc. # 59-2 at ¶ 47).

Supp. 2d 939, 948 (W.D. Ky. 2007) (finding that a university's sponsorship policy did not result in viewpoint discrimination where the university did not bar the plaintiff from obtaining a sponsorship from a student organization and did not forbid student groups with views similar to the plaintiff's).

(Doc. # 22 at 14-15, n.12) (emphasis in original). Keister has not presented any Rule 56 record evidence showing (or even suggesting) that the University is the actual decision maker. Rather, the undisputed evidence in the Rule 56 record shows that the University will go above and beyond to assist non-affiliated speakers and groups connect with student organizations in order to meet the sponsorship requirement.¹²

iii. The Grounds Use Policy Leaves Open Ample Alternatives for Expression

Keister next argues that “UA’s policy prevents him from speaking in any manner on city-owned sidewalks near campus, depriving him of his intended audience.” (Doc. # 60-8 at 29). Keister cites *Amnesty International, USA v. Battle*, 559 F.3d 1170, 1183-84 (11th Cir. 2009) for the proposition that restrictions that prevent speakers from reaching their audience fail to leave ample alternatives. However, in *Amnesty International*, a group of protestors were wholly excluded from a rally and prevented from communicating their message to anyone via any form of expression (including leafletting and protesting outside the rally). 559 F.3d at 1183-84. The Eleventh Circuit likened the complete exclusion of protestors to giving the group “a permit to hold a meeting in an auditorium and then barr[ing] the doors and windows such that no audience could enter and no sound could escape the building.” *Id.* The court concluded that “[s]uch action clearly fails to leave open ample alternative channels for communication.” *Id.* (internal quotation marks

¹² For example, when the unaffiliated religious organization “the Gideons” wanted to share their messages on campus, they completed the grounds use permit process and worked with Donna McCrary, Senior Director of Facilities and Operation and Ground Use Permits, to obtain a sponsor. (Doc. # 59-2 at 3, ¶¶ 28, 29). The Gideons have worked with the University to obtain grounds use permits for the past several years. (Doc. # 59-2 at 3, ¶¶ 28, 29). In fact, in 2016 alone, the Gideons were granted twelve approved ground use permits. (*Id.*).

omitted).

Unlike in *Amnesty International*, the University's grounds use policy leaves open ample alternatives for communication. Plainly, Keister does not like the alternatives. But, he is not barred from speaking on campus; he merely has refused to apply for a grounds use permit because he contends he is "authorized by God to speak whenever [God] tells [him] to and when [God] tells [him] to." (Doc. # 59-4 at 46). In fact, Keister has not been excluded from the campus at all. The University has worked with other outside organizations, including the Gideons, to obtain student organization sponsorship and a grounds use permit. Keister is also able to speak with students outside University grounds, within the city limits of Tuscaloosa. In *Bloedorn*, the Eleventh Circuit held that a similar policy left open ample alternative channels for communication when plaintiff could "avoid the limitations imposed by the permitting scheme simply by speaking to students as they enter and exit the campus from GSU's several well-marked entrance and exit points" and "conceivably obtain sponsorship from one of the countless GSU-affiliated organizations to speak on campus." 631 F.3d at 1242. Although Keister may not like the alternative channels for communication, they do exist.

iv. The Advance Notice Requirement is Constitutional

Finally, Keister argues that regardless of forum classification, a 10-working-day advance notice requirement is unconstitutional. When reviewing this court's denial of preliminary injunction, the Eleventh Circuit noted "this Court does have some concerns about whether UA's 10 working day advance notice requirement would be reasonable for events that do not require multiple department approvals[.]" *Keister*, 879 F.3d at 1288 n.4. But -- and this point may have escaped the attention of the panel on interim review -- the grounds use policy does not *require* a ten-day notice for smaller events. Rather, the grounds use policy states, in relevant part,

To facilitate the review by all the different University department that have responsibility for the various aspects of an Event (e.g., tents food service, UAPD, electrical service, etc.), applicants for use of the Grounds *should* request permission for such use ten (10) working days prior to the Event.

If an Event does not involve factors that require multiple University department approvals, approval may be given in as few as *three days*.

(Doc. # 59-4 at 12) (emphasis added).¹³ So, for smaller events, like Keister sharing his message, approval may be given in as little as three days.¹⁴ Although the University does retain discretion to take longer than three days with the use of the permissive “may,” the court does not presume to second guess the University’s internal approval process. *Christian Legal Soc’y*, 561 U.S. at 685-86 (“Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review.”) (internal citations, alterations, and quotation marks omitted).

Obviously, the requirement for some notice serves a legitimate purpose, particularly on a college or university campus. “Universities are less equipped than other public forums to respond to disruptions on short notice, and implementing a relatively short ‘wait period’ for the University to review a grounds use permit form is certainly reasonable.” (Doc. # 22 at 13-14) (citing *Sonnier v. Crain*, 613 F.3d 436, 445 (5th Cir. 2010), *opinion withdrawn in part on reh’g*, 634 F.3d 778 (5th Cir. 2011) (holding that a public university’s speech policy was narrowly tailored when it employed a seven-day notice requirement).¹⁵ And, to be clear, in the instance of a limited public

¹³ The University also provides an expedited permit approval process for “counter-events” or spontaneous events. (Doc. # 59-4 at 12). Under the expedited review process, the University will attempt to provide a permit “within twenty-four (24) hours, to an area of the Grounds which is available and which does not interfere with regular academic programs or schedule[d] events and programs.” (*Id.*).

¹⁴ The average approval time for a grounds use permit is 4.4 days. (Doc. # 59-7).


¹⁵ The Fifth Circuit withdrew its *Sonnier* opinion, in part. 634 F.3d 778. But, the portion of the opinion cited by this court was not contained in the part that was withdrawn..

forum, reasonableness is all that is required.

IV. Conclusion

The court appreciates Plaintiff's commitment to sharing the gospel and his efforts to do so. However, his claims in this case are without merit. For the reasons discussed above, the court concludes that Plaintiff's Motion for Summary Judgment (Doc. # 60) is due to be denied, and Defendants' Motion for Summary Judgment (Doc. # 59) is due to be granted. An order consistent with this memorandum opinion will be entered contemporaneously.

DONE and ORDERED this May 19, 2020.



R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE