No. _____

In The
Supreme Court of the United States

RODNEY KEISTER, *Petitioner*,
v.

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

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

NATHAN W. KELLUM
CENTER FOR RELIGIOUS EXPRESSION
[redacted]

JASON TINGLE
JAUREGUI & LINDSEY, LLC
[redacted]

Counsel for Petitioner

QUESTIONS PRESENTED

Except in the unique setting of a military installation, this Court has never held that a public sidewalk running alongside a public street was anything but a traditional public forum. Here, the Eleventh Circuit reached a contrary result. The questions presented are:

1. Does the presence of adjacent college campus buildings negate the First Amendment public forum status of a sidewalk running along a public street?

2. Did the Eleventh Circuit err by holding that a virtual ban on leafletting and street preaching on a public sidewalk is not likely to violate the First Amendment right to free speech?

PARTIES

The petitioner is listed on the cover.

The respondents, defendants/appellees below, are Stuart Bell, sued in his official capacity as President of the University of Alabama; John Hooks, sued in his official capacity as Chief of Police for the University of Alabama Police Department; and Mitch Odom, sued in both his individual capacity and his official capacity as Police Lieutenant for the University of Alabama Police Department.

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INTRODUCTION

The court below held that a sidewalk, adjacent to a public street and connected seamlessly to the vehicular and pedestrian transportation grid of a city, was nevertheless *not* a traditional public forum for free speech purposes. Why? Because college buildings occupy property adjacent to the sidewalk in question. The court below reached this conclusion despite classic precedents from this Court holding that public streets and sidewalks are "traditional public fora" regardless of who owns the underlying property (*Hague*) and regardless of whether the property adjacent to the street or sidewalk contains such sensitive facilities as a high school (*Grayned*), a courthouse (*Grace*), an embassy (*Boos*), a sleepy residential neighborhood (*Frisby*), an abortion facility (*McCullen*), or a church conducting a funeral (*Snyder*),[1] with the only exception being the special enclave of a military base (*Greer*), and even then not always (*Flower*).[2]

There are at least three main reasons to grant the present petition. First, this case presents a recurring question of great First Amendment importance. Second, the decision below conflicts dramatically with the way other federal circuits – and this Court – have

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[1] *Hague v. CIO*, 307 U.S. 496, 515 (1939); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *United States v. Grace*, 461 U.S. 171 (1983); *Boos v. Barry*, 485 U.S. 312 (1988); *Frisby v. Schultz*, 487 U.S. 474 (1988); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Snyder v. Phelps*, 562 U.S. 443 (2000).

[2] *Greer v. Spock*, 424 U.S. 828 (1976); *Flower v. United States*, 407 U.S. 197 (1972).

resolved the public forum issue. And third, the rule the Eleventh Circuit adopted – that there is no public forum if the street and sidewalk run through "the heart of campus" and are "surrounded" by campus buildings – is unworkable, unprincipled, and likely to spawn endless litigation.

DECISIONS BELOW

All decisions in this case are styled *Keister v. Bell*. The district court decision denying a preliminary injunction is reported at 240 F. Supp. 3d 1232 (N.D. Ala. 2017). Pet. App. B. The opinion of the U.S. Court of Appeals for the Eleventh Circuit affirming the district court is reported at 879 F.3d 1282 (11th Cir. 2018). Pet. App. A. The Eleventh Circuit's order denying rehearing is unreported. Pet. App. C.

JURISDICTION

The Eleventh Circuit issued its panel decision on Jan. 23, 2018 and denied a timely petition for rehearing/rehearing en banc on Apr. 3, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS

The text of the First and Fourteenth Amendments appears in Appendix D. Pertinent excerpts of the University of Alabama Policy for the Use of University Space, Facilities and Grounds appear in Appendix E.

STATEMENT OF THE CASE

1. Jurisdiction in District Court

The complaint invoked 42 U.S.C. § 1983; the district court had jurisdiction under 28 U.S.C. §§ 1331, 1343.

2. Facts Material to the Questions Presented

Petitioner Rodney Keister, a traveling street evangelist, wishes to be able to speak and/or hand out literature on the sidewalks at the intersection of University Boulevard and Hackberry Lane in Tuscaloosa. The University of Alabama (UA) told him he could not do so, leading to this lawsuit.

a. The physical setting

UA is a state-funded public university located in the city of Tuscaloosa, Alabama. The campus straddles various public streets. *See* Ex. A to Aff. of Donna McCray (map of campus) (CA App. 081).[3] For example, University Boulevard is a city-owned, public street that begins outside of the UA campus, runs east/west through portions of the UA campus, and continues beyond that campus. Likewise Hackberry Lane is a city-owned, public street that begins south of and outside of UA grounds and then runs north through the UA campus virtually to its northern border. (The UA campus is bordered on the north by a river.)

Sidewalks run alongside both University Boulevard

[3] "CA App." refers to the Appendix in the Court of Appeals.

and Hackberry Lane. The adjacent buildings are a mix of university facilities and private businesses. *See* Aff. of Bryan Peoples (CA App. 129-211) (including photos); Aff. of Douglas Behm, Director of University Lands (CA App. 241-44). In particular, passing westward along *University Boulevard* from its intersection with McFarland Boulevard,[4] on the first block is DCH Regional Medical Center. At the next intersection, with Paul Bryant Drive, is the BBVA Compass finance company. Businesses along the stretch between Paul Bryant Drive and 2d Avenue include a Rite Aid pharmacy, Warren Tire & Auto, a Chevron gas station, medical offices, a U.S. Marine Corps Officer Selection Station, Alabama Credit Union, and Newk's and Arby's restaurants. The stretch from 2d Avenue to Hackberry Lane features a PNC bank (at 4th Avenue), with churches nearby, and a park, with Canterbury Chapel (an Episcopal church) set back from the park (at Hackberry Lane). Several blocks further west along University Boulevard begins "The Strip," a collection of retail establishments including Steamers on the Strip, The Houndstooth, CVS pharmacy, Publix Super Market, Buffalo Phil's pub, Mooyah's Burgers, GNC, Rounder's, and The Pita Pit. Beyond The Strip, to the west, only private commercial or government businesses appear along University Boulevard. Meanwhile, various UA facilities, including the UA stadium, are also situated along University Boulevard from The Strip to McFarland Boulevard.

As for *Hackberry Lane,* proceeding north from its

[4] *See* Aff. of Douglas Behm, Dir. of Univ. Lands at 2, ¶18 (CA App. 242) (identifying McFarland as eastern limit of UA campus).

intersection with Hargrove Road to the intersection with University Boulevard, adjacent to the street are residences, apartments, a public park, and a variety of commercial businesses including Global Tax Services, Mitchem Abernathy Accountants, Eddie's Wallpaper Shop, dry cleaners, gas stations, a General Sew and Vac, restaurants, a baking company, a strip mall, a shopping center, Regions Bank, and finally Canterbury Chapel and the park to its north of the chapel. Again, mixed with these private uses (beginning north of the railroad tracks just north of Meador Drive) are a host of UA facilities including sporting complexes, an auditorium, and a dining hall.

Notably, UA banners, symbols on street signs, and markings on the street itself appear inconsistently at a host of locations both in the vicinity of campus buildings and in the vicinity of private businesses, Peoples Aff. ¶¶ 4-5, 8-9, 11, 13, 20, 22, 24-26, 28-29, 31 (CA App. 129-35), indeed throughout the city of Tuscaloosa, *id.* ¶ 28 (CA App. 134). The placement of landscaping fencing (where it exists) in relation to the sidewalks is likewise inconsistent. Sometimes bollards are curbside, between the sidewalks and the street; other times the street and sidewalks are on one side of the bollards, with the campus buildings on the other. *See* Verified Cplt. Ex. B (CA App. 031); McCray Aff. Exs. D-I (CA App. 097-108). Moreover, there are also bollards/fencing in front of private businesses or apartments as well as campus facilities. *E.g.,* Peoples Aff. Exs. Z, AA, BB (PNC Bank), WW (apartments), BBB (park), MMM (shops on The Strip), NNN (same), SSS (same) (CA App. 151-53, 176, 181, 193-94, 199).

b. Keister's speech and UA's response

Keister is a traveling Christian evangelist who typically uses public sidewalks to reach out to his intended audience. He uses verbal speech, distribution of literature, and display of banners to communicate to passersby. Pet. App. 2a. Keister lives in Pennsylvania but travels to various destinations for his religious outreach. Among his annual destinations is Tuscaloosa, Alabama.

It is undisputed that on Mar. 10, 2016, Keister and a companion initially took to the sidewalk on 6th Avenue within the UA campus. (Whether that sidewalk is a traditional public forum is not at issue here.) Keister held a banner and handed out literature while his companion engaged in street preaching. UA police officers and a UA grounds official[5] approached Keister and told him he "could not continue his expressive activity" at that location without a UA permit. McCray Aff. ¶ 45 (CA App. 078). (Such permits are only available to those who are either affiliated with UA or sponsored by a UA affiliated entity. Pet. App. 5a.) One of the officers indicated that the street preachers could relocate to University Boulevard. Keister and his companion then moved to a sidewalk at the intersection of University Boulevard and Hackberry Lane, where they resumed their evangelism. UA police again approached and said that the police had been mistaken, that the sidewalks along University Boulevard were also UA property, and that

[5] Donna McCray, Senior Director of Facilities Operation and Ground Use Permits, McCray Aff. at 1 (CA App. 075).

Keister could not engage in any expression without a permit. *See also* McCray Aff. ¶ 46 (CA App. 078) ("prohibited from expressive activity there without a GUP [Grounds Use Permit]"). Keister and his companion, fearing arrest, then left the area.

Keister wishes to return to the sidewalks at the intersection of University and Hackberry to evangelize by word of mouth and by literature distribution, but he refrains from doing so because of the threat of arrest.

Through counsel, Keister asserted a right to speak on the sidewalks in question. In response, UA counsel asserted that the sidewalks at that intersection were not traditional public fora for free speech purposes.

3. Course of proceedings

a. District Court

Keister filed suit in the U.S. District Court for the Northern District of Alabama on Jan. 25, 2017, and promptly moved for a preliminary injunction barring the UA defendants from enforcing the UA use policy against his peaceful speech and literature distribution on a public sidewalk at the intersection of University Boulevard and Hackberry Lane. The UA defendants opposed the motion and filed an answer to the verified complaint. Both sides filed affidavits, and the district court held a hearing on the motion for a preliminary injunction on Feb. 28, 2017. On Mar. 6, 2017, the district court entered an order and opinion denying a preliminary injunction. Pet. App. B. The district court acknowledged that the sidewalks in question "border

otherwise public streets which are a part of the city of Tuscaloosa's greater urban grid," Pet. App. 31a (CA App. 255), and that "UA's campus is not fenced off, gated, or otherwise self-contained, and while it is its own separate property, some of the city's transportation grid runs through the campus," Pet. App. 21a n.3 (CA App. 247). Nevertheless, declaring that the sidewalks "lie in the heart of UA's campus" and "do not border the perimeter of the University's property," Pet. App. 31a,[6] the district court held that the sidewalks were a "limited public forum,"[7] not a "traditional public forum," because "aspects of the intersection [are] embellished by UA markings" and "the intersection itself is surrounded by UA's campus and buildings." Pet. App. 33a (CA App. 256). The court analogized the present case to a prior Eleventh Circuit decision addressing the *internal* campus walkways at Georgia Southern University, *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011),[8] and concluded that, as in *Bloedorn*, the campus – including sidewalks along public streets – "functions as a sort of special enclave"

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[6] Given the undisputed fact that the sidewalks border a public thoroughfare *not* owned by UA, the court must have meant by "perimeter" the outermost point at which a UA facility was located. (The Eleventh Circuit employed the same usage. Pet. App. 4a, 16a n.7.) By that standard, much non-UA property, including various private commercial establishments and public streets, lie within the "perimeter" of the UA campus.

[7] On the term "limited public forum," *see infra* p. 18 n.19.

[8] As the district court noted, *Bloedorn* addressed walkways "inside of GSU's campus," the "entrances" to which "were identified with large blue signs and brick pillars." Pet App. 31a.

instead of a traditional public forum, Pet. App. 33a-34a (CA App. 256-57).

"Because the intersection sidewalk is a limited public forum," the district court reasoned, the UA restrictions need only be "reasonable and viewpoint neutral," Pet. App. 34a (CA App. 257). With those premises in place, the court concluded that Keister was not likely to prevail on the merits of his First Amendment challenge.[9] The court accordingly denied the requested preliminary injunction.

Keister appealed.

b. Eleventh Circuit

The Eleventh Circuit agreed that "the district court properly found the intersection is a limited public forum," Pet. App. 2a, and affirmed. The court of appeals acknowledged that "University Boulevard and Hackberry Lane are public Tuscaloosa streets which extend beyond the UA campus perimeter" and that "UA's campus is not fenced off, gated, or otherwise self-contained to prevent public access." Pet. App. 4a. The court nevertheless ruled that the sidewalks in question

[9] It is by no means clear that the First Amendment would permit a government veto on literature distribution, much less conversational outreach, on an open-air sidewalk adjacent to a public street, even under the more relaxed "reasonableness" standard. *See Lee v. ISKCON*, 505 U.S. 830 (1992) (overturning, under First Amendment, ban on literature distribution in a nonpublic forum airport terminal). By contrast, it is well settled that veto authority over literature distribution in a traditional public forum is unconstitutional. *Schneider v. State*, 308 U.S. 147 (1939); *United States v. Grace*, 461 U.S. 171 (1983).

were only a limited public forum, relying upon its *Bloedorn* precedent, Pet. App. 14a-15a. The court declared that the intersection did not consist of "'mere' public Tuscaloosa streets," *id.* at 16a; rather, "the intersection, as evident from the UA map, is in the heart of campus," *id.* (footnote omitted).[10] The court specifically reserved the question whether the analysis would be different "if the intersection were instead at the perimeter of the university's campus." *Id.* at 16a n.7. The court found dispositive the fact that the intersection

> 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.

Id. at 16a. Such physical characteristics, the court opined, "suggest to the intended speaker that he has entered a special enclave." *Id.* The court did not explain how its reliance upon fencing and UA signage could be reconciled with the largely haphazard relation of such items to the actual UA campus. *See supra* p. 5.

The court concluded that Keister was not entitled to a preliminary injunction and affirmed the district court.

Keister petitioned for rehearing en banc, which the Eleventh Circuit denied. Pet. App. C.

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[10] The court ruled that, as a matter of historical and constitutional fact, the intersection in question is "within the heart of UA's campus," Pet. App. 9a n.3.

REASONS FOR GRANTING THE WRIT

This Court should grant review. The First Amendment question whether sidewalks along public streets are traditional public fora for speech is a consistently recurring question, both in general and in the specific context of streets running through or alongside college campuses. Hence, this case presents a recurring question of great First Amendment importance, as resolution of the forum question is often dispositive of free speech claims.

Review is especially needed here because the constitutional rule the Eleventh Circuit adopted – refusing to grant sidewalks along public streets presumptive public forum status, disregarding the seamless connection to other city streets and sidewalks, and instead relying upon the identity of the adjacent property – departs dramatically from the way other federal circuits – and this Court – have addressed the public forum issue.

Moreover, the constitutional rule the lower court adopted – that there is no public forum if the street and sidewalk run through "the heart of campus" – is incoherent, unworkable, and will generate uncertainty and an increase of litigation, thereby chilling free speech and forcing courts to resolve endless nice questions about the surroundings of sidewalks.

I. THE QUESTION IS RECURRING AND IMPORTANT.

The campuses of many colleges and universities

across the nation, both public and private, straddle public streets.[11] While some college grounds are largely self-contained (like Catholic University of America, in Washington, DC,[12] or Princeton University[13]), other college campuses are riddled with cross streets (like the University of Pennsylvania,[14] Yale University,[15] and the University of Michigan[16]).

The decision of the Eleventh Circuit in this case calls into question the traditional public forum status of every sidewalk that runs through or alongside a college campus. This is not an issue of merely theoretical significance. Cases already abound addressing the rights of speakers in open areas on *internal* campus grounds.[17] The decision in this case expands that class

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[11] The present case involves a public university. But nothing in the Eleventh Circuit's analysis suggests the outcome would be any different were the case to involve the public forum status of a street adjacent to a private college. Indeed, the absence of a state actor would, if anything, presumably increase the willingness of the Eleventh Circuit to hold that the sidewalks were not a traditional public forum.

[12] https://www.catholic.edu/res/docs/cuamap.pdf.

[13] http://m.princeton.edu/map/campus.

[14] https://www.facilities.upenn.edu/maps.

[15] https://map.yale.edu/15/41.31124/-72.9266?.

[16] gallatin.physics.lsa.umich.edu/~keithr/lscaa/ccamp.html.

[17] *See, e.g., Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011); *Sonnier v. Crain*, 613 F.3d 436 (5th Cir. 2010); *Davis v. Stratton*, 360 Fed. Appx. 182 (2d Cir. 2010); *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Gilles v. Garland*, 281 Fed. Appx. 501 (6th Cir. 2008); *Hershey v.*

(continued...)

of litigation to speakers on *public* streets and their accompanying sidewalks.

Moreover, there is a profound irony in the lower court's ruling that confers special immunity from unwelcome speech in the context of a *university*. As this Court has forcefully stated,

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citations omitted). *Accord Healy v. James*, 408 U.S. 169, 180 (1972).

But the constitutional problems stemming from the decision below are not confined to the vicinity of institutions of higher learning. Nothing in the analysis which the Eleventh Circuit adopted turns on the fact that the adjoining facilities are devoted to *higher education*. Presumably the same arguments could be made about sidewalks running past an arts center, a corporate complex, an industrial or commercial district, or farming tracts. In all of these contexts, authorities

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[17] (...continued)
Goldstein, 938 F. Supp. 2d 491 (S.D.N.Y. 2013); *Masel v. Mansavage*, 526 F. Supp. 2d 902 (W.D. Wis. 2007); *Bourgault v. Yudof*, 316 F. Supp. 2d 411 (N.D. Tex. 2004); *Guengerich v. Baron*, No. 2:10-cv-01045-JHN-PLAx, 2011 U.S. Dist. LEXIS 162989 (C.D. Cal. May 5, 2011).

wishing to shut down speech they deem unwelcome can be expected to invoke the decision below, or its reasoning, to negate the traditional public forum status of sidewalks running beside such properties.

With the sole exception of military bases, this Court has consistently rejected the notion that surrounding uses negate the traditional public forum status of streets and sidewalks. *Infra* § II. The lower court's rejection of that virtually axiomatic norm of free speech law has profound doctrinal and practical significance.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE APPROACH TAKEN BY THIS COURT AND OTHER FEDERAL CIRCUITS.

The decision of the court below departs dramatically from the settled jurisprudence of this Court as well as the other circuits implementing that jurisprudence.

A. Conflict with Supreme Court cases

For the better part of a century, this Court has repeatedly affirmed that

> one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.

Jamison v. Texas, 318 U.S. 413, 416 (1943).[18] The fact that ownership of the realty beneath the sidewalk or street may technically belong to an adjacent property owner is irrelevant:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague v. CIO, 307 U.S. 496, 515 (1939).

The term this Court uses for such places is "traditional public forum." The quintessential examples of traditional public fora are "streets, sidewalks, and parks," which "are considered, without more, to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983). Indeed, the public forum nature of such property "follow[s] automatically" from its identification as a public street, sidewalk, or park. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). *See also id.* ("our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché'"). Hence, this Court has insistently adhered to the now well-established rule that streets and sidewalks are presumptively, indeed virtually

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[18] Of course, "reasonable time, place, and manner regulations . . . are permitted." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); "[s]ubject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment," *id.* at 116.

invariably, traditional public fora. *E.g.*, *Grace*, 461 U.S. at 177 ("without more"); *Frisby*, 487 U.S. at 480 ("automatically"); *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) ("prototypical"); *Snyder v. Phelps*, 562 U.S. 443, 456 (2000) ("archetype"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("at one end of the spectrum"); *see also USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) (government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums"). As this Court recently explained,

> It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).

Accordingly, the traditional public forum status of sidewalks and streets remains a constitutional norm regardless of the presence of sensitive facilities right next to those sidewalks and streets. *See Grayned* (high school); *Grace* (U.S. Supreme Court); *Boos v. Barry,* 485 U.S. 312 (1988) (embassy); *Frisby* (residential neighborhood); *McCullen* (abortion facility); *Snyder* (church conducting a funeral). The solitary exception to this rule is a military base. *Greer v. Spock*, 424 U.S. 828 (1976), which this Court described as "a special type of enclave," *Grace*, 461 U.S. at 180.

This constitutional norm has important consequences: When government restricts speech in a public forum, a much more demanding standard of constitutional review applies than when the speech takes place in a nonpublic forum. *Perry*, 460 U.S. at 45. Specifically,

> In . . . public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Id. By contrast, restrictions on speech in a nonpublic forum need only be reasonable and viewpoint neutral.

Id. at 46.[19]

B. Conflict with other circuits' decisions

Aside from the decision below, the federal circuit courts have faithfully embraced and applied this Court's teaching that sidewalks and streets are presumptively traditional public fora, even in cases with significantly less favorable facts than those presented here.

The starkest conflict with the decision below appears with the Sixth Circuit case of *McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012). That case, like this one, involved a street evangelist using the sidewalks along city streets that ran through and around college campus property – in that case, Tennessee Technological University (TTU), *id.* at 723. The Sixth Circuit embraced the presumption that sidewalks are public fora, holding that "[t]he burden is on TTU to show that the sidewalk is overwhelmingly specialized to negate its traditional

[19] The Eleventh Circuit, like the district court, held that the sidewalks here were a "limited public forum," but applied the same reasonable/viewpoint-neutral standard that governs nonpublic fora. Pet. App. 12a. For clarity, Petitioner avoids the term "limited public forum" in this petition because that term has been used to mean different things in different cases. *Compare Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802-04 (1985) (using "limited public forum" as synonymous with "designated public forum"); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (equating "limited public forum" with "generally open forum" subject to the standard governing public fora), *with Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (equating "limited public forum" with nonpublic forum subject to reasonable/viewpoint-neutral standard).

forum status." *Id.* at 732. The Sixth Circuit concluded that because the sidewalks in question "blend into the urban grid and are physically indistinguishable from public sidewalks, they constitute traditional public fora." *Id.* at 733.[20] The Eleventh Circuit in this case reached the opposite result.[21]

The decision below likewise conflicts with the Fifth Circuit's decision in *Brister v. Faulkner*, 214 F.3d 675 (5th Cir. 2000). *Brister* involved leafletting outside a university event center, on a paved area that connected the public sidewalk with the event center. *Id.* at 678. Even though the paved area was not itself part of the public sidewalk, the Fifth Circuit held that the paved area was a traditional public forum because it was seamlessly connected to the public sidewalk. *Id.* at 682.

> If individuals are left to guess whether they have crossed some invisible line between a public and non-public forum, and if that line divides two worlds

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[20] The *McGlone* court referred to the sidewalks as "perimeter sidewalks." *Id.* By this term the court apparently meant that the sidewalks ran along the perimeter of the streets or blocks at issue. The streets in question, particularly North Peachtree Avenue and North Dixie Avenue, *id.* at 723, clearly run through the midst of the TTU campus, *see* https://www.universitymaps.com/tennessee-technological-university/ (campus map).

[21] Cementing the conflict, the Sixth Circuit has also held that even an internal sidewalk encircling a sports arena was a public forum because it "blends into the urban grid, borders the road, and looks just like any public sidewalk, . . . [and] also is a public thoroughfare." *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 452 (6th Cir. 2004).

> – one in which they are free to engage in free speech, and another in which they can be held criminally liable for that speech – then there can be no doubt that some will be less likely to pursue their constitutional rights, even in the world where their speech would be protected.

Id. at 682-83. *A fortiori*, the sidewalks adjacent to the public streets in this case would, in the Fifth Circuit, be recognized as public fora.

The D.C. Circuit, while not addressing the specific context of an adjacent college campus, has likewise embraced this Court's teachings on public forum analysis. In *Henderson v. Lujan*, 964 F.2d 1179 (D.C. Cir. 1992), also a street evangelist case, the court addressed the status of a sidewalk that was officially part of the Vietnam War Memorial and which was adjacent to a public street, *id.* at 1180. The court expressly recognized that the burden is on the government to explain why a particular sidewalk should not be regarded as a public forum: the "sidewalks' apparent similarity to ones of the classic variety at a minimum put the burden on the government to show that the use was overwhelmingly specialized." *Id.* at 1182. The court explained that "tradition operates at a very high level of generality, establishing a working presumption that sidewalks, streets and parks are normally to be considered public forums." *Id.* Moreover, consistent with this Court's cases, the *Henderson* court stated that "[t]he mere fact that a sidewalk abuts property dedicated to purposes other than free speech is not enough to strip it of public

forum status." *Id.*

Again, in *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002), involving a solitary demonstrator holding a sign or distributing leaflets on the grounds of the U.S. Capitol, the D.C. Circuit reaffirmed that the burden was on the government to negate the public forum status of the pertinent sidewalk: "to convince us the sidewalk is not a public forum, the Government must establish that the sidewalk differs from the remainder of the public Grounds in ways that make it uniquely 'nonpublic.'" *Id.* at 42. The sidewalk in that case did not even border any public streets, *id.* at 44, yet the D.C. Circuit ruled that it was a traditional public forum because it was "continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of the city's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors," *id.* (editing marks and citation omitted). As the court explained,

> Even assuming, as did the district court, that the sidewalk "is used primarily by people coming to and from the Capitol building," . . . we do not think that use sufficiently "specialized" to warrant distinguishing the sidewalk from the remainder of the Grounds for purposes of the public forum analysis. If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers – which the Government apparently concedes, as it has not closed the sidewalk to such activities – then we assume they are also capable of circumnavigating the occasional

protester.

Id. at 43. The Eleventh Circuit, by contrast, discounted the fact that the intersection is "open as a public thoroughfare," Pet. App. 16a, instead emphasizing the "educational mission" of UA, *id.* at 15a, and equating sidewalks running along public streets to sidewalks running through a military base or to walkways and driveways internal to a college campus, *id.* at 16a-17a.

Other circuits, consistent with the Fifth, Sixth, and D.C. Circuits, have ruled that there is no "special neighbors" exception to the traditional public forum status of sidewalks and streets. *E.g., Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993) ("special ambience" and "particular functions" of Olvera Street do not negate street's status as a traditional public forum); *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1102-03 (9th Cir. 2003) (canopy-covered, decoratively paved portion of Fremont Street providing a pedestrian walkway through a unique "commercial and entertainment complex," *id.* at 1094-95, remains a traditional public forum); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1117, 1120-31 (10th Cir. 2002) (pedestrian easement across LDS religious complex, which easement "forms part of the downtown pedestrian transportation grid, and . . . is open to the public," *id.* at 1128, remains a traditional public forum); *United States v. Marcavage*, 609 F.3d 264, 269, 276-78 (3d Cir. 2010) (sidewalks surrounding Independence National Historical Park are, despite distinctive paving and chain-linked bollards,

traditional public fora). *See also Venetian Casino Resort, LLC. v. Local Joint Exec. Bd.*, 257 F.3d 937 (9th Cir. 2001) (sidewalk on private casino property subject to easement for public passage and seamlessly connected to other sidewalks is a traditional public forum). *Cf. Bowman v. White*, 444 F.3d 967, 977-79 (8th Cir. 2006) (specified open areas on college campus grounds held to be designated public fora, while sidewalks at the borders of campus are likely traditional public fora).[22]

The Eleventh Circuit, by creating a heretofore unknown exception to the traditional public forum status of sidewalks, has created a circuit conflict.

III. THE ELEVENTH CIRCUIT'S TEST IS INCOHERENT AND UNWORKABLE.

This Court's repeated insistence that streets and sidewalks are, without more, traditional public fora, provides a valuable level of certainty to free speech litigation. While the nature of adjoining property "may

[22] In *dicta*, the *Bowman* court seemed to distinguish between "public streets and sidewalks which surround the campus but are not on the campus," *id.* at 977, and "streets, sidewalks, and other open areas that might otherwise be traditional public fora . . . [but] fall within the boundaries of the University's vast campus, *id.* at 978. As a practical matter, this may not make a difference, as *Bowman* held that even the open areas *within* campus grounds at issue there were designated public fora; presumably a city street or sidewalk would receive at least that designation, triggering the same standard as that which governs traditional public fora. And even if *Bowman* were read to align with the lower court decision here, that would simply underscore the circuit conflict and the need for Supreme Court review.

well inform the application of the relevant test, . . . it does not lead to a different test." *Frisby*, 487 U.S. at 481. The Eleventh Circuit's approach, by contrast, replaces that doctrinal certainty with subjective, unprincipled uncertainty.

The court of appeals found decisive the fact that the streets and sidewalks were "surrounded" by UA buildings and located at "the heart of campus." Pet. App. 16a & n.7. As noted, using such factors to negate the public forum status of public streets and sidewalks is incompatible with the precedents of this Court and of the other circuits. More pertinent here, such an approach yields a horribly unworkable and subjective test that will invite litigation and result in considerable uncertainty in the law.

Consider the "surroundings" test. This test looks at the immediate neighborhood through which a street runs, and presumably would apply regardless of the public or private nature of the adjoining lots. Why should it matter that the street runs past university facilities? Such a consideration has no bearing on the history and value, to free speech, of public forum property. As noted *supra* § I, the lower court's invocation of a "surroundings" test would call into question the forum status of streets which run through urban universities. But what principled limitation dictates that only an adjacent *university* negates the public forum status of the sidewalk? What about an arts complex? The corporate headquarters of some large company? A group of automobile sales lots? A large tract of farmland? The "surroundings" test gives no clue as to which adjacent owners will be privileged

to cancel out the free speech rights of speakers on neighboring sidewalks. Nor does the test identify what counts as "surrounding" in the first place. Here, for example, one corner of the intersection contains an Episcopal chapel, and private businesses were a short distance away, yet the Eleventh Circuit said the intersection was "surrounded" by university facilities.

The Eleventh Circuit's "heart of the campus" test presents even more uncertainty. What counts as the "heart" of a campus – or a commercial district, a corporate or government complex, an arts community, an agricultural space, etc. – as opposed to "peripheral" parts? The answer will depend upon the subjective or esthetic – and hence disparate and unpredictable – perceptions of judges. It is hard to imagine a slipperier test. Yet attorneys and lower court judges are supposed to follow such a standard? And again, why should it matter, for free speech purposes, whether one is in the "heart" of a neighborhood (*cf. Frisby*), a federal complex (*cf. Grace*), Embassy Row (*cf. Boos*), or some other locale? Fixation on the nearby lots misses the point:

> Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.

Grace, 461 U.S. at 180.

In short, the Eleventh Circuit not only erred by departing from the settled status of public streets and sidewalks as traditional public fora, but in replacing that settled rule with an unworkable, subjective, sidewalk-by-sidewalk, neighborhood by neighborhood test. This Court should grant review.

CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

NATHAN W. KELLUM
CENTER FOR RELIGIOUS EXPRESSION
[redacted]

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
WALTER M. WEBER
JORDAN A. SEKULOW
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JASON TINGLE
JAUREGUI & LINDSEY, LLC
[redacted]

Counsel for Petitioner

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