No. 18-17

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

REPLY TO BRIEF IN OPPOSITION

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The public sidewalks at issue here are not part of some "special enclave" immune from the First Amendment. Contrary to respondents' assertions, the petition presents an important question of First Amendment law: whether a public sidewalk loses its presumptive status as a traditional public forum merely because it borders public university properties. This Court should grant review.

1. Sidewalks are presumptively public fora

This Court has long determined that public sidewalks,[1] "without more," are presumptively[2] traditional public fora for free speech. Pet. at 15-16. In

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[1] A "public sidewalk" is a sidewalk running alongside a public street. It may well be that the physical property under the sidewalk is owned by the adjacent landowner. But for purposes of the First Amendment right to free speech, ownership of the realty beneath the sidewalk or street 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) (emphasis added).

[2] Not "invariably," as respondents, University of Alabama officials (UA) mischaracterize the question, Opp. at i, but "*presumptively*," albeit in practice "*virtually* invariably," Pet. at 15-16 (emphasis added; citing cases). Military bases offer the obvious – and thus far solitary – exception.

this case, however, the Eleventh Circuit replaced "without more" with "unless the surrounding buildings are the 'heart' of a college campus" (or the heart of some other adjacent use?). Pet. at 10. That ruling opened a circuit split, Pet. § II(B). Moreover, the standard the lower court adopted is not logical, principled, or workable, Pet. § III, and creates substantial legal uncertainty over the countless public streets and sidewalks that run, in part, through or adjacent to college campuses, Pet. § I; *see also* Amici Brief of Alliance Defending Freedom and Young America's Foundation § II(A).

The court below reached its remarkable conclusion – that a public sidewalk is not a traditional public forum, either presumptively or in this case – despite this Court's repeated admonitions to the contrary. *See* Pet. § II(A) (listing cases). As this Court has put it,

> Sidewalks, *of course,* 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.

United States v. Grace, 461 U.S. 171, 179 (1983) (emphasis added). *See also Minn. Voters Alliance v. Mansky*, No. 16-1435, slip op. at 7 (U.S. June 14, 2018) (citing "parks, streets, sidewalks, and the like" as exemplifying "a traditional public forum"). In telling contrast, when listing "[q]uintessential examples" of traditional public fora, the Eleventh Circuit mentions

"parks and streets," Pet. App. 11a – *omitting sidewalks*.

Instead of a presumption of public forum status, the Eleventh Circuit declared that the question is whether the adjacent university "intend[ed] to open its sidewalks to public discourse," Pet. App. 15a. But intent-to-open is the test for *designated* public fora like college *classrooms*, not *traditional* public fora like public *sidewalks*. *See Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 677 (1998); *see also id.* at 678 (*"*traditional public fora are open for expressive activity *regardless* of the government's intent") (emphasis added).

UA nevertheless sees nothing unusual about the lower court's ruling. UA defends the negation of the public forum sidewalks here as no big deal. But UA's brief in opposition illustrates exactly why review is necessary: the decision below enables government bodies to argue, with a straight face, that public sidewalks are *not* presumptively traditional public fora, and that instead every stretch of sidewalk is up for grabs. As UA puts it, the forum status of each and every portion of a sidewalk should be subject to differing

> results in differing factual determinations for sidewalks on different campuses [and, presumably, any other locations] depending on the specific environment of the sidewalk at issue in each case.

Opp. at i. In other words, instead of a "long-established constitutional rule," *Greer v. Spock*, 424 U.S. 828, 835

(1976), the Eleventh Circuit has adopted a slippery, arbitrary, unpredictable "analysis" that leaves both speakers and government bodies at a loss for guidance as to the forum status of any particular public sidewalk.

2. Internal walkways vs. sidewalks along public streets

This Court has consistently differentiated, for First Amendment purposes, between traditional public fora such as streets and sidewalks running alongside public streets, on one hand, and internal government walkways, on the other. *Compare Grace* (sidewalk along public street) *with United States v. Kokinda*, 497 U.S. 720 (1990) (post office walkway separated by a parking lot from the public street and public sidewalk); *Burson v. Freeman*, 504 U.S. 191, 196 & n.2 (1992) (streets and sidewalks adjacent to polling places) *with Mansky* (inside of polling place); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (public sidewalk outside school) *with Widmar v. Vincent*, 454 U.S. 263 (1981) (classrooms inside campus).

UA disregards this crucial distinction. Thus, UA chides petitioner Keister for not citing *Kokinda*[3] in his petition; that case, however, did not involve a sidewalk running alongside a public street, as here, but rather a walkway entirely separated – by a parking lot – from both the public street and the distinct public sidewalk adjacent to that street. 497 U.S. at 722. Ironically, UA

[3] UA describes the lead opinion in *Kokinda* as a "majority," Opp. at 1, but it was a plurality.

does not even cite, much less try to distinguish, *Frisby v. Schultz*, 487 U.S. 474 (1988), which emphatically held that public forum property "does not lose its status as [such] simply because it runs through a . . . neighborhood" dedicated to other purposes. *Id.* at 480. *See also id.* at 492 n.1 (Brennan, J., joined by Marshall, J., dissenting on other grounds) (describing as "rogue" the local government's argument that the property in question was anything but a public forum).

Similarly, UA relies heavily upon *Widmar*, which addressed *internal* college campus classrooms, not sidewalks running along public streets. Yet even in *Widmar*, this Court held that the location in question was a designated public forum, at least as to those persons (students) who had the right to be in that place. 454 U.S. at 267 & n.5. Here, it is undisputed that Keister, and the general public, were free to use the sidewalks at the intersection of Hackberry Lane and University Boulevard. *See* McCray Aff. ¶¶ 41-46 (CA App. 077-078) (according to UA, Keister's "offense" was not being on the sidewalk *per se*, but rather engaging in "expressive activity" on that sidewalk without a UA permit). But more importantly, there is an obvious difference between walking onto university grounds (where *Widmar* governs) and walking along a municipal street/sidewalk that happens to border campus grounds.

Petitioner Keister is not challenging UA's ability to manage the use of "its campus and facilities," *Widmar*, 454 U.S. at 267 n.5 – buildings, internal walkways, courtyards, etc. – but rather its attempt to assert a veto power over sidewalks adjacent to public streets.

With the sole exception of military bases, this Court has consistently rejected the attempt to have surrounding property uses – courts, embassies, residences, etc. – negate the public forum status of public streets and sidewalks. Pet. at 1, 17. Even the case recognizing the exception for military bases, *Greer*, acknowledged "the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks," 424 U.S. at 835.

There is no reason why universities, of all places, Pet. at 13 (noting this Court's emphasis on the importance of free speech in the educational setting), should enjoy a unique privilege among non-military entities to silence the speech of those using sidewalks running along public streets. This Court has already held that "daytime picketing and handbilling on public grounds near a school" can take place "[w]ithout interfering with normal school activities, . . . at least on a public sidewalk open to pedestrians." *Grayned*, 408 U.S. at 118-19. If the functioning of a high school does not require the suppression of peaceful picketing and handbilling on an adjacent public sidewalk, as in *Grayned*, the University of Alabama's pursuit of its educational mission likewise does not require the suppression of peaceful leafletting and exhortations[4] on

[4] Contrary to UA's representation, Opp. at 4 & n.10, petitioner Keister did not use a loudspeaker. The source UA cites for this assertion, McCray Aff. ¶¶ 43, 46 (CA App. 077-078), makes no such claim about Keister. Nor did UA take issue with any particular noise level. More importantly, UA can address any excessive noise directly, without the need to abrogate the public (continued...)

a public sidewalk adjacent to campus property.

3. The value of First Amendment rules

UA pejoratively describes as "rigidity" the presumption, reflected in this Court's cases, that a sidewalk along a public street is a traditional public forum. Opp at 2. *Cf. Frisby*, 487 U.S. at 480 (town's counsel disparaging this Court's repeated recognition of the presumptive traditional public forum status of streets as "clichés"). But clear rules are needed for First Amendment safeguards. "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecoms. Comm'n v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring). Ambiguity and unpredictability, by contrast, are the enemies of free speech. *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

UA commends the decision below for declaring that *each and every* stretch of sidewalk is subject to separate, case-by-case, block-by-block assessment, with its status as a traditional public forum (or not) wholly dependent upon a blizzard of case-specific factors. This is the antithesis of a clear rule of law. Yet at the same time, UA dismisses as "irrelevant" the various private commercial and residential uses that populate the

[4] (...continued)
forum status of public sidewalks. *Kovacs v. Cooper*, 336 U.S. 77 (1949) (prohibition of excessive noise on public streets is constitutional under the First Amendment).

property alongside the very streets which meet at the intersection in question. Opp. at 3 n.6. UA would apparently have the courts put on blinders with respect to the streets/sidewalks in question, insisting upon a micro-focus on a particular patch of sidewalk or street. But forum analysis would be cumbersome to the point of uselessness – to speakers, government entities, and courts – if it required separate analysis of each segment or block of a public street and its adjoining sidewalk. Absent some clear demarcation – a checkpoint or gate, for example, which is absent here, Pet. App. 4a – there is no reason to think the forum status of a sidewalk blinks on and off as one passes along the same street.

4. The circuit split

Keister identified in his petition several circuit court decisions that conflict with the Eleventh Circuit's decision below. Pet. § II(B). UA disputes the existence of a circuit split. But UA's effort to dispel the conflict amounts to no more than a brief summary of lower court cases and the assertion that all the cases, at the highest level of generality, invoked the same forum analysis. The fact remains that *no other lower court* (with the possible exception of dicta in an Eighth Circuit ruling, Pet. at 23 n. 22) has held that a public sidewalk is not presumptively a traditional public forum for free speech. The circuit cases conflict squarely with the decision below. *E.g., First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1129 n.11 (10th Cir. 2002) ("The Supreme

Court has made clear that once an 'archetype' of a public forum has been identified, it is not appropriate to examine whether special circumstances would support downgrading the property to a less protected forum") (citing *Frisby*).

5. The lower court's unworkable "heart of the campus" test

Keister explained in his petition that the Eleventh Circuit's "heart of the campus" rule for negating the public forum status of public sidewalks opens a subjective can of worms. UA's only response is to note that cases often turn on the facts. Granted. But while the ambient facts "may well inform the application of the relevant test [for speech restrictions in a traditional public forum], it does not lead to a different test." *Frisby*, 487 U.S. at 481. By failing to apply that test in the first place, the court below went astray.

6. Banners and logos did not make a "special enclave"

UA, like the courts below, relies heavily upon the notion that decorative features would inform a passerby that he was in "the heart of campus." There are so many problems with this argument.

First, the decorative features in question here are demonstrably *not* reliable as indicators that one is – or is not – within the arguable perimeter of campus grounds. Pet. at 5. *E.g.*, Peoples Aff. ¶¶ 28 ("UA symbols and banners are regularly seen throughout the

City," e.g., on the driveway of a city fire station), 29 ("As in many other parts of Tuscaloosa, there were UA banners hanging from the streetlamps . . . even though all the buildings . . . are private"), 31 (in "the middle of campus . . . the street signs . . . were stylized with the City of Tuscaloosa seal") (CA App. 134-135).

Second, invocation of decorative features does not supply a principled rule. How much decorative indication is one supposed to have before knowing one is in the "heart of campus" as opposed to being in a university town? How does one distinguish between banners as a sign of campus property and banners as a sign of local college loyalty? (The decorations here do not draw any such boundary. Pet. at 5.)

Third, why should these decorations even matter in the first place? Presumably the environs of a sidewalk may tell a pedestrian that he is passing through a the heart of a commercial district, the heart of downtown, the heart of a state capitol district, or the heart of a corporate conglomerate's headquarters. So what? The First Amendment does not evaporate when one passes through a particular neighborhood – even a sleepy bedroom residential district, as in *Frisby*.

To be sure, different rules apply when one wanders off the public sidewalk into the grounds of an adjacent property. *Cf. Widmar*. But aside from the special case of a military base, this Court has *never* held that the nature of the adjacent property use negates the traditional public forum status of a public sidewalk. The Eleventh Circuit, in a dramatic departure from settled First Amendment law, has nevertheless precisely so held. This Court should grant review.

CONCLUSION

Apart from *Greer*, addressing the unique exception of military bases, UA identifies *no cases* where this Court has ever held that a public sidewalk running alongside a public street was anything other than a traditional public forum. It can't do so because there are none. Contrary to the Eleventh Circuit, a public university is not akin to a military base.

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

Respectfully submitted,

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