No. 22-388

In The
Supreme Court of the United States

RODNEY KEISTER,

Petitioner,

v

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

Respondents.

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

BRIEF OF AMICUS CURIAE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether the Eleventh Circuit erred in relying on regulate speech in determining that public sidewalk adjacent to government building are not traditional public forum, in conflict with decision by this Court and numerous circuit .*

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*This brief take no position on the certiorari question presented 2.

TABLE OF AUTHORITIES

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Tomas v. *Coley*, No. 2:15-cv-02355 (C.D. Cal.

INTEREST OF AMICUS CURIAE [1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places special

demonrate he dirbing prealence of hee abe and o argen hat hi Cor hold grant certorari on Qeton Preened 1 o reaffirm longanding precedentgoerning obligaton uder he FirtAmendment

SUMMARY OF ARGUMENT

Iti a dark hou for freedom of epreion athe

to be on the ame block. Thi policy wa ued to
retrict abilityto hare hi meage with
tdent and paerby . Sadly, thi i far from an
iolated incident, and Mr. Keiter i far from alone.
Indeed,
demontrate that tdentand facultyare jut a, if
notmore, likelyto be hitwith arbitrary and unlawu
peech retricton a non -tdentlike Mr. Keiter.
Thati particularlytrue when peech i inconvenient,
unpopular, or critical of the chool.

Two Firt Amendment
holding
and univerite are not enclave immune from the
Healy v. *James*, 408
U.S. 169, 180 (1972). And econd, on public idewalk,

Perry
Educ. Ass'n v. *Perry Loc. Educators' Ass'n*, 460 U.S.
37, 45 (1983). Thee longtanding precedent hould
have been enough to reolve thi cae: A public
idewalk on a public univerity campu i open to
FirtAmendmentexpreion.

Yetthe federal courtof appeal are divided on how
to addre public univerityregulaton of peech in
public pace. Several circuit, including the Sixth
Circuit, have properlyheld thatthee abue violate
the FirtAmendmentand mtop. Bthe Fourth
and nowthe Eleventh Circuithave plitwith them
and allowuniverityadminitrator to over -regulate
idewalk peech with impunity.

Today,many admini trator treattheir campue
a fiefdom, their tdenta peon, and non -tdent
like Mr. Keiter a invading ant. Bthe univerity

pace
bject to he rle of law, incldng he Firt
Amendment. T hi Cort hold grant certorari to
reolve he circitplit below and protect he right of
tdent and non-tdent to freely epre
hemelve in pblic pace.

ARGUMENT

I. Public Universities Regularly Wield Forum Restrictions to Suppress Student and Non-Student Speech Alike.

Mr. Keiter i yet anoher victm of pblic
niverity peech dikat. Bt pblic niverity
adminitrator do not merely apply nlawf peech
retrictn to non-tdent like itnerant preacher
or Prod Boy. They apply hem in eqal ferv or to
tdent hemelve. Speech zne policie hav been
cited to ban tdent from handing otcontt
on Contton Day to prevent hem from
dirtibtng ant-capitalim flyr (hen pro-
capitalim matrial are permi ted), and to bar hem
from polling tdent on marijana legaliaton all
on campu open pace or idewalk far from bilding
entrance. Permitng regime contne to wreak
hav on he right of tdent and non-tdent like
Mr. Keiter to hi day.

A. The First Amendment Applies to Public Colleges and Universities.

By now it hold be ncontrovrial to ay hat
he Firt Amendment applie at pblic college and
niverite. Thi Cort noted a mch in

B. Public University Administrators Routinely Ignore the First Amendment on Campus, Including in Traditionally Public Areas.

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k

demontrate thatwhen leftunchecked, tate college and univerityadminitrator frequentyignore their Firt Amendment obligaton in order to uppre peech critcal of their chool or upporte of policie theydiagree with.[2] In irtallyeer ycae, thee adminitrator relyon vague, overbroad, or uneevnly applied policie to retrict free peech.

For example, in a tring of cae litgated by FIRE on behalf of tdentchapter of Young American for Liberty pblic college adminitrator aro und the coutry threatened tdent or ordered them to dipere for expreing their Firt Amendment freedom of peech and aembly a well a their freedom to pettion. In *Brown v. Jones County Junior College*, 463 F. Supp. 3d 742 (S.D. Mi. 2020), the Dean of Stdent called campu police on tw (a beach ball

[2] That i not to ay that *private* college and univerity adminitrator do not alo frequentyretrictpeech on campu Indeed, a , priate chool are o ften *more* callouard tdentpeech, in violaton of their contractal promie of freedom of expreion. See FIRE, *Spotlight on Speech Codes 2022*, at hp://wefire.org/reearch -learn/potlight -peech -code -2022 [hp://perma.cc/3KLG -XNUA] Of the 107 priate college and univerite reiewed, 44 receivd a red light ratng (41.1%). 54 receivd a yllowlight ratng (50.5%), four receivd a green lightratng (3.7%), and fiv earned a Warning ratng (4.7%).

with words written in harpie) around the campus law without getting advance permiion from the Vice Preident of Student Affair. *Id.* at 748–49.

from aking pupo rt for a right-to -wo rk amendment; Order Grantng in Part Plaintff Moton for a Preliminary Injunctn, *Univ. of Cincinnati Chapter of Young Americans for Liberty* v. *Williams*, No. 1:12-CV-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012); and from diplaying unflatering poter of George W. Bh, Barack Obama, and Che Gevara, Complaint, *Jergins* v. *Williams*, No. 2:15-cv-00144 (D. Utah Mar. 4, 2015).

Bt administrative overreach i notlimited to jt conervative and libertarian tdent. In *Salazar* v. *Joliet Junior College*, FIRE represented tdent Ive Salazar , hwo wa detained by uniformed campu police officer and held in an interrogaton

directly adjacent to

ident Amended Complaint, No. 1:18-cv-00217 (N.D. Ill. Mar. 13, 2018). Similarly, in *Tomas* v. *Coley*, a tdent at California State Polytechnic University Pomona wa harased by campu police for handing out animal -right flyer

Complaint, No. 2:15-cv-02355 (C.D. Cal. Mar. 31, 2015).

Thankfully all the above cae ended in either courtvictorie for the ilenced tdent or favorable etlement However, theydemontrate univerity

incldingthrough the e of campu police imply for expreing their iewon open, outdoor area of campu without expre administrative approval.

Many public college and universities continue to maintain and enforce similar policies against student and non-student alike. At Western Illinois University, for example, student advocating for the legalization of marijuana in an open area of campus were stopped within minutes by campus law enforcement—literal speech police—because they were outside of the free speech zone. *Cops Prevent Students From Advertising Fake 'Pot' Brownies Outside Free Speech Zone*, Reason (Sept. 9, 2019), http://reason.com/2019/09/09/western-illinois-university-pot-brownie-free-speech-zone [http://perma.cc/PVJ2-TTN9].

And at the University of California Riverside, [redacted]-affiliated or not, are prohibited from exercising their First Amendment

niversity administrators clearly have not gone even the meage.

II. This Court Should Grant Certiorari to Silence Speech in Public Spaces.

The lower courts disagree on what makes a pace

ha led to chilled peech for untold number of tudent and non-tudent, including Mr. Keiter. Thi Court hould et the record traight that public niv declare that a public pace uddenly *isn't* public anymore jut becaue it happen to be next to a campu building.

A. Public Sidewalks Are Public Spaces.

Few place are more enhrined in American juriprudence a place of public debate than the public idewalk. A thi Court noted in *McCullen v. Coakley*

> It i no accident that public treet and idewalk have developed a special role for the exchange of idea. Even today, they remain one of the few place where a peaker can be confident that he i not imply preaching to the choir. . . . There, a litener often encounter peech he might otherwie oppoe. In light of the FirtAmend ment an uninhibited marketplace of idea in

protection of the First Amendment as the ordinary city sidewalk. *Id.* at 732–33. In doing so, the court put the burden on *TTU*

> [was] overwhelmingly specialized to negate it

Id. at 732 (citing *Henderson* v *Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992)).

> grid and [were] physically indistinguishable from

public sidewalk for First Amendment purposes. *Id.* at 733; see also *Roberts* v *Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) ("to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University student, irrespective of whether the University has so designated them or not").

This approach has the virtue of common sense. If it looks like a public sidewalk and functions like a public sidewalk, any member of the public or of the student body would understandably expect to be able to *use* it like a public sidewalk, including for expressive activity. At least the Fifth and Eighth Circuits have adopted a similar approach. *Brister* v *Faulkner*, 214 F.3d 675 (5th Cir. 2000); *Bowman* v *White*, 444 F.3d 967 (8th Cir. 2006).

B. This Court Should Grant Certiorari to Resolve the Circuit Split on University Sidewalk Speech.

In deciding that University of Alabama sidewalk

> existing circuit split on the issue. Several years ago, the Fourth Circuit created this split with the Fifth,

Sixth, and Eighth Circuits in *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005). There, despite the University of

idewalk can still not be entitled to the traditional First Amendment protection because it happen to

CONCLUSION

For the foregoing reason, this Court should grant certiorari on the first Question Presented.

November 23, 2022

Respectfully Submitted,

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