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 *Amicus Curiae* of the FOUNDATION FOR MORAL LAW in Support of Petitioner


John A. Eidsmoe
*Counsel of Record*
Roy S. Moore
Talmadge Butts
Katrinnah Harding
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

John J. Park, Jr.
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

November 18, 2022

Counsel for *Amicus Curiae*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

Page

Cases

**Constitutions**



**Statutes**



**Other Authorities**

## INTEREST OF *AMICUS CURIAE* [1]

*Amicus Curiae* Foundation for Moral Law ("the Foundation"), is an Alabama public-interest organization dedicated to the strict interpretation of the Constitution according to the intent of its Framers. The Foundation has an interest in this case because the Framers intended speech, particularly religious speech, to have preeminent importance, as enshrined in the First Amendment.

The Foundation's founder and president emeritus is a graduate of The University of Alabama School of Law, and its lead staff attorney is a graduate of The University of Alabama Honors College. The Foundation is concerned about free speech violations at The University of Alabama and recently came to the defense of a student organization when the University tried to impose thousands of dollars in security charges because the organization had invited a controversial speaker to the campus and opponents were threatening violence.

---

[1] Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Foundation Senior Counsel John Eidsmoe, Professor of Constitutional Law for the Oak Brook College of Law and Government Policy and the primary author of this brief, was present at a 2019 hearing in the Alabama Legislature in which a legislator stated, "I think all people that are invited on our colleges' campuses don't need to be there," there are some perspectives "that we just don't need to hear," and that "freedom of speech ain't freedom." To guard against such censorship of freedom of expression, the Foundation has prepared this brief for the Court's consideration.

## SUMMARY OF ARGUMENT

When Rodney Keister attempted to engage in religious speech on a public sidewalk that ran along public streets but bordered University of Alabama buildings, University officials told him he could not do so without providing ten-day notice and securing joint participation from a university-affiliated group.

However, The University of Alabama never had the authority to regulate or restrict speech on the sidewalk that is a traditional public forum owned by the City of Tuscaloosa. And the sidewalk's ordinary status as a traditional public forum could not be altered by a general campus atmosphere creating a "university enclave," like the Respondents contend.

Additionally, the University's policy on expression was void for vagueness because it failed to define what "events" it purported to regulate.

The policy also violated the State of Alabama's Campus Free Speech Act by attempting to treat the sidewalk as a limited public forum.

The University of Alabama unconstitutionally restricted Petitioner's religious expression on a public sidewalk, and the Eleventh Circuit's decision to affirm below has created a new category of university speech forums that are virtually exempt from the First Amendment.

## ARGUMENT

All across the country, students and faculty are concerned that public universities, once citadels of freedom of expression, have become institutions for indoctrination and repression. This case presents a clear opportunity for this Court to delineate and protect the rights of students and professors to freedom of expression and free exercise of religion on public university campuses. We urge this Court to grant certiorari for the following reasons.

### I. The sidewalk is a traditional public forum.

Petitioners have argued, and the lower courts have correctly recognized, that streets and sidewalks are generally traditional public fora.[2]

---

[2] The district court correctly recognized that there are four basic types of forum: traditional public forum, designated public forum, limited forum, and closed forum. No party or court in this proceeding contends that the sidewalk in question is a designated public forum or a closed forum, so the Foundation will not analyze these types of forum further.

The District Court stated on 27a, "[p]ublic sidewalks have long been considered a 'prototypical example' of a traditional public forum. . . . Indeed, 'without more,' public places such as sidewalks are considered to be traditional public forums."

However, the district court contended, and the circuit court agreed, that the University had made the sidewalk a limited forum by surrounding it with university buildings, hanging University of Alabama banners along the street, and a general campus atmosphere. Thus, even though the street and sidewalk were publicly owned rather than being owned by the University, a person walking or driving on that street or sidewalk would sense that he had entered a "university enclave." It is also true, however, that many nonstudents use the street or sidewalk to walk or drive to businesses on the periphery of the campus or beyond.

In fact, this is the only basis the district and circuit courts have used to establish that this intersection is a limited forum: that it is a university enclave. The Foundation is astonished that the Respondents would claim that their status as an academic institution gives them the authority to limit free speech. Public universities have always been thought to be enclaves of academic freedom, not academic repression. As the Supreme Court said in *Tinker v. Des Moines Independent Community School District*, 383 U.S. 503, 506 (1969), neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Further, "[t]he vigilant protection of constitutional freedoms is

nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Freedom of speech is therefore a highly protected right, especially in an academic setting. Furthermore, *Shelton* involved teachers in public elementary and secondary schools and *Tinker* involved a public high school. Academic freedom and free speech considerations are normally given greater protections at state universities than at public elementary and secondary schools because the students are older and presumably better able to distinguish between fact and opinion. *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). Indeed, this Court has warned in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), that if state-supported institutions of higher education stifle student speech and prevent the open exchange of ideas on campus, "our civilization will stagnate and die." This Court has also called public universities "peculiarly the marketplace of ideas," *Healy v. James*, 408 U.S. 169,180 (1972), and said further that there is "no room for the view that First Amendment protections should apply with less force on college campuses than in the community at large."[3] And yet, The University of Alabama argues that it should be allowed to restrict freedom of expression on public sidewalks in ways that the

[3] This does not mean an entire campus must be a traditional public forum. Certainly, the University can restrict certain classrooms to speech relevant to the course being taught, and certainly administrative offices can have a limited purpose. But the sidewalks of a university, even more than other sidewalks, are places where freewheeling expression of all sorts of ideas can and does occur regularly.

City could not restrict them in downtown Tuscaloosa. This Court held in *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014), that sidewalks and other public ways "occupy a special position in terms of First Amendment protection because of their historic roles as sites for discussion and debate."

The University of Alabama has a policy of defending academic freedom. The *Faculty Handbook*, Chapter 3-I "Academic Freedom," states, "[t]he academic freedom of the faculty is indispensable to the University in fulfilling its obligations to students, the community, and the State."[4] The Faculty Senate passed a resolution on December 16th, 2021, stating in part that "Freedom of Speech and Expression under the First Amendment is foundational to academic freedom which is a 'transcendental value' entitled to protection by the First Amendment (*See Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967))."[5]

A public sidewalk is a traditional public forum. The fact that the public sidewalk in question is located partially within a public university can only increase its status as a traditional public forum and

---

[4] University of Alabama, *Faculty Handbook*, Ch. 3-I, p. 48 (Oct. 13, 2020), https://secure2.compliancebridge.com/uat/public/getdocUA.php?file=54.

[5] Faculty Senate of The University of Alabama, *Resolution in Defense of Academic Freedom* (Dec. 16, 2021), https://facultysenate.ua.edu/resolution-in-defense-of-academic-freedom-announcement/.

the right of free speech that must be protected thereon.

## II. The University lacks authority to impose limited forum restrictions on this street and sidewalk.

The street and sidewalk in question are owned by the City of Tuscaloosa, not by The University of Alabama.[6] The University claims a right to regulate the use of this property based upon a Municipal Right-of-Way Permit to The University of Alabama conveyed by the City of Tuscaloosa on May 11, 2017. However, the Permit Clause expressly states the following:

> The City retains full title and ownership to all aspects and portions of the right-of-way for which the City has ownership. . . . The City reserves its full police and municipal powers in regard to said right-of-way and the improvements thereon, including but not limited to the right to the use and enjoyment of the right-of-way to the fullest possible extent, including the right, collaboratively with Grantee, to exercise traffic control, pedestrian access, and parking regulations. . . . It is understood by and between the City and the Grantee that this is an on-exclusive permit and the City reserves the right to

[6] As Petitioners establish in their Petition, any claim by the University that the City conveyed the street to the University is without foundation and refuted by the wording of the deed to the property.

> convey permits to public utilities. This permit is a mere license and as such confers no property or legal interest.
>
> The Permit:
>
> [H]ereby grants permission to Grantee to use the City's right-of-way for the following purposes: Install and maintain irrigation, landscaping, wearing surface, medians, sidewalks, chains and bollards, signage, street lighting, storm water inlets, electric service lines, gas piping, thermal energy piping, fiber optic conduits, and other miscellaneous utilities and infrastructure within the right-of-way.

This clearly does not include any authority whatsoever to regulate or restrict speech, assembly, or other rights guaranteed by the First Amendment to the United States Constitution.

And yet, the University claims the right to restrict people from preaching, speaking, or engaging in other activities on this property. Clearly, the City would never have given such authority to the University, as many of those who use the street and sidewalk are city residents (and even city employees) who use it for non-academic purposes.

Because the University's authority over the street and sidewalk are thus limited, the University has no authority to apply its Faculty and Grounds Use Policy to this street and sidewalk.

## III. The Facility and Grounds Use Policy is void for vagueness.

The Due Process Clause of the Fourteenth Amendment requires that laws and policies that restrict liberty must be clear and precise so that people will know with reasonable certainty what types of conduct are permitted and what are prohibited. Laws, regulations, and policies that are overbroad can unnecessarily prohibit conduct like speech or worship that is protected by the Constitution and can result in selective enforcement that prohibits activities that officials disapprove while allowing similar activities they approve.

A criminal statute "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser v. Utah*, 333 U.S. 95, 97 (1948). The statute must define the offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The void for vagueness doctrine also applies to noncriminal matters such as civil removal cases, "in view of the grave nature of deportation." *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951). It is applied with heightened strictness in cases involving First Amendment activity. *Winters v. New York*, 333 U.S. 507, 501-10 (1948); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

The University's Facility and Grounds Use Policy is overbroad. The Policy has been cited and quoted repeatedly in the Petition and in the District and Circuit Court opinions. The Foundation will simply note that the term "event" and its derivatives is found in the Policy at least 25 times and instructions are given as to who can apply for permission to hold an "event," how to apply for permission, who can grant permission, time limits under various circumstances for granting permission, and other matters.

But nowhere does the policy define what an "event" is.

It is hard to imagine how Petitioner Keister's activities could be considered an "event." He simply arrived at the location and preached with a loudspeaker and passed out tracts. This was not pre-planned, except that he had determined to come to the University. No one met him there. No crowd assembled. No one was disturbed or delayed in walking to or from classes or other business or activities. No one, from what we can determine, was offended or complained.

Nevertheless, two campus police officers approached him and told him that his preaching was prohibited unless he had prior approval for his "event." They told him he could go to another corner and "on that corner, you're good." But, after moving to the location the officers recommended, campus police again approached him and told him his activities violated the Policy in that location as well.

Apparently, these officers assumed that Petitioner's spontaneous preaching was an "event." But if this is an event, then anything could be considered an event:

* Two students walk on the sidewalk talking about religion.

* A student and nonstudent stand on the sidewalk; one starts talking about politics but the other doesn't want to discuss the subject.

* Two students argue heatedly about an upcoming election, and a crowd of ten gathers to observe and perhaps to participate. How many have to be present to constitute an "event"? Would it be different if two students were walking down the sidewalk arguing about whether the Tide football team should be ranked ahead of Ohio State, even though Ohio State is unbeaten?

* A student walks to class carrying a "boombox" playing Christian music. At what decibel level does this become an "event"?

* Does the fact that the Petitioner was speaking through a loudspeaker make his speaking an "event"? The Policy is vague about this question. Section I(2) speaks of "Applications for permission to use amplification equipment for Events," but that section would not apply unless the Petitioner's speech was an "event." So far as the Foundation can determine, the officers never advised Petitioner that his use of the loudspeaker was illegal or that his use of the loudspeaker made his speech an

"event," nor was he given the option of turning off the loudspeaker and speaking without it.

* Does blocking traffic or impeding pedestrians make speaking an event? The Policy doesn't say so and, so far as the Foundation can determine, there is no allegation that Petitioner was blocking traffic or impeding pedestrians; nor can the Foundation find any allegation that Petitioner was harassing anyone or that anyone complained about his activities.

* Does the distribution of literature make Petitioner's activity an event? The Policy doesn't say so and, in any event, Ala. Code § 16-68-3(a)(3) expressly protects the right of students to "spontaneously and contemporaneously assemble, speak, and distribute literature." Although Petitioner is not a student, this would include the right of students to listen to him and receive literature from him.[7]

Vagueness can lead to arbitrary enforcement. One officer might consider any of the above activities to be "events," while another officer might

---

[7] The Circuit Court cited *United States v. Kokinda*, 473 U.S. 720 (1990), in which this Court upheld a Post Office restriction on a table set up by solicitors for the pro-LaRouche National Democratic Policy Committee on a sidewalk outside the Post Office. But the Court noted that the solicitors were disrupting postal business, the Post Office had received 40-50 complaints in the first several hours, and "soliciting funds is inherently more disruptive than distributing literature."

not think they are events within the meaning of the Policy.

And vagueness can cause the officers' enforcement to be discriminatory. An officer might, intentionally or unintentionally, decide that a group of students (or nonstudents) talking favorably about abortion is an "event" while, on another occasion, he might decide that a similar group of students expressing the opposite view of abortion is not an event. Students speaking in favor of Christianity might be viewed one way, while students speaking against Christianity might viewed differently. Students having a scholarly discussion about religion might be considered acceptable, while students praying or singing hymns might be considered an "event."

This also leads to content and viewpoint discrimination. Would the officers have stopped Petitioner if he had sought to engage passersby in discussions about politics, economics, philosophy, or literature? This is content discrimination, but it can also be viewpoint discrimination, because there is a religious viewpoint to many, if not most, subjects. Students might discuss abortion from a medical, moral, or religious viewpoint. The Foundation has seen no evidence that anyone other than Petitioner has been stopped by officers and prevented from speaking on the public sidewalk by the University.

For all of these reasons, this Policy is vague, intrudes upon protected First Amendment activity, and leads to arbitrary and discriminatory

enforcement. It does not give people reasonable notice of what is permitted and what is prohibited. Students might decline to talk about certain matters, for fear that they will be targeted by the campus police. In this way, the Policy has a chilling effect on free speech and is void for vagueness.

Furthermore, the Policy is a classic example of prior restraint. As this Court said in *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), "[a]ny system of prior restraints . . . bear[s] a heavy presumption against its constitutional validity." And in *Watchtower Bible & Tract Society of N.Y. Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002), this Court recognized that "in the context of everyday public discourse," it is "offensive" that a speaker must "first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."

But that is precisely what the University Policy does. It requires those who would like to exercise their free speech rights to first notify the University of their intent to speak and request use of a facility to do so in a signed, written application directed to the proper authorities. According to Section D-3, the student organization may request the use of facilities "for specific purposes." Because the Policy lists many permissible purposes, we assume the applicant must tell the University in advance (normally 10 days in advance) what his purposes are. Again, this is a classic example of prior restraint.

And the effect is to chill freedom of expression. The very fact that Petitioner in this case chose to leave the campus rather than risk being arrested is evidence that his freedom of expression was chilled. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably creates irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

## IV. Free speech on The University of Alabama campus is protected by Alabama state law.

In 2019, the Alabama Legislature passed and the Governor signed HB 498, titled the "Campus Free Speech Act," in response to concerns that Alabama universities were repressing conservative speakers and creating "free speech zones." Subsections (3) and (4) of the Act (now Ala. Code § 16-68-3(a)(3)-(4)) provide:

> (3) That students, administrators, faculty, and staff are free to take positions on public controversies and to engage in protected expressive activity in outdoor areas of the campus, and to spontaneously and contemporaneously assemble, speak, and distribute literature.
>
> (4) That the outdoor areas of a campus of a public institution of high education shall be deemed to be a forum for members of the campus community, and the institution shall not create free speech zones or other designated outdoor areas of campus in order

> to limit or prohibit protected expressive activities.

It appears that this Act makes all outside areas of The University of Alabama, including the sidewalk in question, a traditional public forum. By making the sidewalk the equivalent of a limited forum, the Policy violates Alabama law and is therefore invalid. By restricting speech (other than pre-approved speech) in certain outdoor parts of the campus, the University has in effect made the other areas "free speech zones" in violation of Alabama law. By requiring prior application and permission which is to be granted within ten (or sometimes fewer) days, the Policy violates the provision of this Act that protects the right to "spontaneously and contemporaneously assemble, speak, and distribute literature."

Subsection (b) provides:

> The policy developed pursuant to this section shall supersede and nullify any prior provisions in the policies of the institution that restrict speech on campus and are, therefore, inconsistent with this policy. The institution shall remove or revise any of these provisions in its policies to ensure compatibility with this policy.

This Section removes all doubt that the University Policy, to the extent that it contradicts this Act, is invalid, unenforceable, and must be removed or revised.

## CONCLUSION

The God-given right of freedom of expression is a check on arbitrary government power, whether exercised by a king, governor, mayor, or university.

This case provides a clear opportunity for this Court to clear up confusion on the doctrine of public forum, to correct a mistaken ruling that unilaterally creates a new category of university forums that are virtually exempt from the restrictions of the First Amendment, and that enable university ideologues to silence potential opponents.

The Foundation urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

John A. Eidsmoe
*Counsel of Record*
Roy S. Moore
Talmadge Butts
Katrinnah Harding
FOUNDATION FOR
MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

John J. Park, Jr.
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

Counsel for *Amicus Curiae*

November 18, 2022