No. 17-11347

IN THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RODNEY KEISTER, Plaintiff-Appellant, vs. STUART BELL, et al., Defendants-Appellees.	)	On appeal from the United States District Court for the Northern District of Alabama District Court No. 7:17-cv-00131-RDP

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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Keister v. Bell

Eleventh Circuit No. 17-11347

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that, in addition to the parties and entities identified in the Certificates of Interested Persons which the parties have submitted, the following may have an interest in the outcome of the proceedings:

1. American Center for Law and Justice, Inc. (ACLJ), a public interest law firm which is a nonstock corporation. The ACLJ has no parent corporation, subsidiaries, or conglomerates and neither owns nor is owned by any affiliates. No publicly held company owns 10% or more of its stock.
2. Roth, Stuart J.
3. Sekulow, Jay Alan

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/s/Jay Alan Sekulow
Jay Alan Sekulow

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STATEMENT OF ISSUES

1. Whether public streets and sidewalks remain traditional public fora when the property adjacent to those streets and sidewalks consists of public university grounds?

INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before the U.S. Supreme Court, federal courts of appeals (including this Court), and other courts, as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017), addressing a variety of issues of constitutional law, including the Free Speech Clause of the First Amendment.

This brief is being submitted with a motion for leave. No counsel for any party authored this brief in whole or in part. No person or entity aside from the amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A panel of this Court has rendered a ruling that will fundamentally destabilize First Amendment law. The panel held that public streets and sidewalks, when they pass through the "heart of the campus" of a public university, cease to be traditional public forum property. The panel's holding is deeply inconsistent with settled First Amendment law as expressed in Supreme Court precedent. Moreover, the panel's decision makes the public forum status of public streets and sidewalks an open question, subject to case-by-case resolution by reference to uncertain, unpredictable, subjective judgments about the adjacent properties. This Court should grant rehearing en banc to plug this breach in the dyke of First Amendment safeguards.

ARGUMENT

One of the clearest aspects of the public forum doctrine under the First Amendment is the rule that public streets and sidewalks, as such, are quintessential public forum property. Yet a panel of this Court ruled that the public streets and sidewalks running through the "heart" of the campus of a public university are somehow *not* traditional public fora. The panel understandably sought to recognize a university's ability to police its own facilities and grounds. But by letting that concern override the settled public forum status of public

streets and sidewalks, and by offering in place of that settled principle an elusive and subjective, ultimately "eye-of-the-beholder" test, the panel went seriously astray. This ruling is badly out of step with governing precedent and supplies a recipe for uncertainty, confusion, and endless litigation over what had previously been a settled point of constitutional law. This Court should grant *en banc* review and reverse the panel's embrace of this badly mistaken position.

I. PUBLIC STREETS AND SIDEWALKS ARE, WITHOUT MORE, TRADITIONAL PUBLIC FORA.

The simplest reason to reject the panel's holding, that public streets and sidewalks are not presumptively traditional public fora for speech, is that governing Supreme Court precedent is clearly to the contrary: "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983). Hence, "all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).[1] Even legal ownership of the underlying property is constitutionally irrelevant: "wherever the title of streets and

[1]As the usage in *Grace* and *Frisby* illustrates, the Supreme Court is not consistent in using either "forums" or "fora" as the plural of "forum." Amicus employs "fora," tracking the Latin source (as in "datum, data" and "bacterium, bacteria").

parks may rest, they have immemorially been held in trust for the use of the public." *Id* at 480-81 (citation and editing marks omitted).[2]

The panel therefore erred right off the bat by treating the forum status of the streets and sidewalks as an open question. As the Supreme Court explained, "[s]idewalks, 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." *Grace*, 461 U.S. at 179 (emphasis added). "No particularized inquiry into the precise nature of a specific street is necessary," *Frisby*, 487 U.S. at 481. Indeed, "we have repeatedly referred to public streets as the archetype of a traditional public forum," *id*. at 480.

The panel went astray when it treated the streets and sidewalks, not as streets and sidewalks that happened to run through a college campus (as the panel acknowledged, both "University Boulevard and Hackberry Lane are public Tuscaloosa streets which extend beyond the [University of Alabama] campus

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[2]Indeed, it would be illogical to make free speech rights turn upon such an incidental question of state law as whether title to the land under the public easement belonged to the municipality or to the adjacent landowner. To be sure, store owners would consider it a boon if their title to the dirt under the sidewalk in front of their shops enabled them to shoo away unwelcome leafletters or picketers. But such a rule would spell a quick death to free speech on sidewalks across the nation.

perimeter," panel op. at 5), but as campus property that happened to provide a cut-through route for vehicles and pedestrians. Such an analysis mistakenly rests on a "surroundings" test, but the Supreme Court has repeatedly rejected the notion that the nature of the property adjacent to the streets and sidewalks can somehow negate the public forum status of those public ways. In *Frisby*, the Court explained that "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." 487 U.S. at 480. Likewise in *Grace*, the Court held that the fact that a sidewalk was adjacent to, and technically part of the grounds of, the Supreme Court itself in no way derogated from the public forum status of those sidewalks. As the *Grace* Court explained,

> 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.

461 U.S. at 180.

Certainly a different rule may apply to streets and sidewalks inside a military base, *Greer v. Spock*, 424 U.S. 828 (1976), and to walkways separated (say, by a parking lot) from the public streets and sidewalks, *United States v. Kokinda*, 497

U.S. 720 (1990). But the clear, settled principle from the Supreme Court's cases is that, absent such unusual circumstances (a "special type of enclave," as the *Grace* Court phrased it, 461 U.S. at 180), public streets and sidewalks are presumptively traditional public fora for free speech. "[O]ne 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." *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

II. THE "SURROUNDINGS" AND "HEART OF THE CAMPUS" TESTS ARE UNWORKABLE.

The panel in this case found decisive the fact that the streets and sidewalks in question were "surrounded" by University of Alabama buildings and located at "the heart of campus."[3] Panel op. at 16 & n.7. As noted above, use of these considerations to negate the public forum status of public streets and sidewalks is incompatible with Supreme Court precedent. Moreover, such factors yield a

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[3]The panel also believed this case to be analogous to *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011). But that case addressed a very different question, namely, the forum status of *internal* campus grounds – "sidewalks, [a] Pedestrian Mall, and [a] Rotunda . . . all contained inside of the GSU campus, . . . entrance[] [to which is] identified with large blue signs and brick pillars," *id*. at 1234. The distinction between sidewalks along public streets and walkways that are internal to a government facility should be clear – it is precisely the distinction that led the Supreme Court to opposite results in *Grace* (sidewalk along public street) and *Kokinda* (walkway internal to USPS grounds).

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. Most obviously, this test would call into question the status of streets which run through urban universities (MIT, NYU, University of Michigan, UT-Austin, Yale, etc.). But this "surroundings" test would also create uncertainty about the public forum status of a host of other public streets or sidewalks. What if the sidewalks run through a section of town surrounded by an arts complex? By the corporate headquarters of some large company? By a group of automobile sales lots? By a large tract of farmland? The "surroundings" test contains no obvious limiting principle. Which adjacent owners will qualify for this test? How extensive must the "surrounding" collection of property be?

The "heart of the campus" test presents even more uncertainty. What counts as the "heart" of a campus – or a commercial district, a government complex, an arts community, an agricultural space – will depend upon the subjective or esthetic perceptions of judges, no two of which are likely to come to identical conclusions. It is hard to imagine a more slippery, less predictable test. Yet

attorneys and lower court judges are supposed to follow such a standard?

In short, the panel not only erred by departing from the settled status of public streets and sidewalks as traditional public fora, but in replacing that settle rule with an unworkable, subjective, sidewalk-by-sidewalk test.

CONCLUSION

This Court should grant rehearing en banc.

Respectfully submitted this 20th day of February, 2018.

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Dated: Feb. 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, I filed the foregoing with the Clerk of Court by using the CM/ECF system, which will electronically serve all counsel of record:

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