No.

In The

Supreme Court of the United States

JAMES G. GILLES,

Petitioner,

vs.

BRYAN K. BLANCHARD, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

BENJAMIN W. BULL
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, AZ 85260
(480) 444-0020

NATHAN W. KELLUM
Counsel of Record
ALLIANCE DEFENSE FUND
P.O. Box 11159
Memphis, TN 38111
(901) 323-6672

Attorneys for the Petitioner James G. Gilles

QUESTIONS PRESENTED

For the purpose of sharing his religious beliefs, Petitioner James G. Gilles visited Vincennes University and initiated a discussion in an open and accessible part of the campus resembling a sidewalk and public park. This effort was soon thwarted by the university officials, however, who barred the expression as "solicitation." In consideration of this matter, Seventh Circuit acknowledges that the subject Solicitation Policy is vague and supplies unbridled discretion to university officials, but, in analogizing the sidewalk and park-like area on campus to private property, upholds the restriction nevertheless.

The following questions are presented:

1. Is an open area on a public university campus that resembles a sidewalk and public park and is compatible with speech, considered public fora or private property for speech purposes?

2. Is it ever appropriate to give officials unbridled discretion to regulate speech on public property, even in a nonpublic forum?

PARTIES TO THE PROCEEDING

Petitioner James G. Gilles brought suit and was a Plaintiff-Appellant before Seventh Circuit. The following are respondents and were Defendants-Appellees before Seventh Circuit: Bryan K. Blanchard, in his official capacity of President of Vincennes University, and John Livers, individually and in his official capacity of Dean of Students for Vincennes University.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. Rule 29.6, Petitioner James G. Gilles states that he is not a subsidiary or an affiliate of a publicly owned corporation.

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JURISDICTION

The United States Court of Appeals for Seventh Circuit entered its judgment in this case on February 14, 2007. The Court of Appeals denied petitioner's petition for rehearing and rehearing *en banc* on March 12, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

Vincennes University ("VU") is a public state university located in Vincennes, Indiana. VU's campus is open to the public at large. App. 29a. There are no fences preventing access and no security entrances where identification is required. App. 28a. Streets, sidewalks, and open areas are located throughout the campus for public use. App. 106a; 109a-115a; 50a-51a. In the center of the campus is an area known as the "library lawn area." App. 106a. This area consists of a main sidewalk, abutting grassy knolls, with connecting sidewalks that run through the campus and into the community of Vincennes. App. 106a, 109a-113a.

Outside groups and individuals have traditionally come onto VU's campus for expressive purposes. App. 62a. One such outside group, a religious group known as the Gideons, visits VU annually and passes out Bibles in open areas on campus. App. 61a-64a, 69a-70a. Historically, the Gideons have enjoyed free reign on the VU campus for their expressive activity, including uninhibited access to the library lawn area. App. 69a-70a. Another group, John and Ellen Duncan ("Duncans"), came to VU in August of 1998 to speak on the campus. App. 117a. At that time, the Duncans went to the open area of the library lawn and

engaged in religious discourse for over four hours. App. 117a, 119a. The Duncans attracted a large number of students (about 70) who gathered to hear the Duncans preach. App. 117a-19a. And the Duncans' expressive activity did not go unnoticed by VU. Two police officers came to the library lawn and observed the Duncans' expression, but no VU official ever attempted to restrict the Duncans' speech. App. 118a.

James G. Gilles ("Gilles") is a professing Christian who travels to public universities throughout the country and imparts a religious message to college students. App. 105a. He typically speaks on topics of faith and encourages dialogue about his faith and other moral issues of the day. App. 105a-06a. Gilles does not attempt to solicit. App. 107a. He makes no effort to sell any services or products, nor does he seek to gain anything for himself or any organization. *Id.* He does not encourage anyone to join any organization. *Id.* Nor does he try to entice anyone to action. *Id.* Gilles conveys his message because of a firm religious conviction to "share the gospel," or, in other words, to communicate the good news about Jesus Christ. *Id.* He does not wish for anyone to act, but to believe. *Id.* To achieve his goals, Gilles engages in public speaking, individual conversations with students, and leafleting. App. 108a.

In 2001, Gilles visited the campus of VU and spoke without interruption in the library lawn area. App. 106a. The following year, on August 29, 2002, Gilles came back to VU and attempted to speak in the same library lawn area, as he did in 2001. *Id*. But, on this visit, Harold Hensley, Chief of Police at VU, prohibited Gilles from speaking, and advised Gilles to fill out a solicitation request with Dean of Students John Livers ("Livers"). *Id*. Livers is the VU official responsible for reviewing and approving solicitation requests. App. 28a, 38a, 43a, 126a.

Livers instructed Gilles that he must register his speech in accordance with VU's "solicitation" policy. App. 106a. Livers enforced VU's "solicitation" policy against Gilles, concluding that Gilles' speech was "solicitation" because he thought Gilles would entice someone to action, even though Livers did not know what Gilles was going to say that day. App. 55a, 106a, 122a, 128a. VU's "sales and/or solicitation" policy reads in part as follows:

> Vincennes University also requires prior approval for all solicitations on campus by any person or organization. Again, the Dean of Students will approve the date and time of the solicitation. He will also notify the appropriate University personnel regarding the campus location for the solicitor. The designated area on campus for solicitation is the brick walkway directly in front of the Beckes Student Union. Solicitation is the act of seeking to obtain by persuasion; to entice a person to action; or the recruiting of possible sales.

App. 128a, 137a.

Because Livers declared Gilles's speech to be "solicitation," Gilles was forced to speak on the brick walkway in front of Beckes Student Union rather than the library lawn area. App. 48a, 56a, 106a, 122a. The designated brick walkway is adjacent to a public street at a three-way intersection with another street. App. 46a, 106a-107a, 114a, 115a. This location is not suited for the type of expressive activity envisioned by Gilles. App. 106a-07a. There are very few students in the vicinity and the vehicular traffic makes the background noise very loud and difficult to talk over. *Id*. Gilles attempted to speak on the "brick

walkway" but found the effort futile. App. 106a. Gilles left the area and has not returned to VU or attempted to speak on VU's campus for fear of arrest. App. 107a.

The VU Policy defines "solicitation" as "the act of seeking to obtain by persuasion; to entice a person to action; or the recruiting of possible sales." App. 128a, 137a. VU officials interpret this phrase to mean speech that persuades someone to do something or speech that persuades someone to give something. App. 45a-46a.

In application, Gilles is forced to speak at the "brick walkway" whether his speech actually falls within the policy's definition of "solicitation" or not. App. 43a, 54a, 56a. But other speakers, whose speech falls within the policy's definition of "solicitation," need not speak on the "brick walkway." App. 30a-35a, 50a-51a, 60a-61a, 78a-80a.

VU permitted the Indiana National Guard to recruit in front of Morris Hall in April of 2004. App. 80a. VU further granted the Women of Essence a chance to sell candy anywhere on campus – including the lawn of the library – in April of 2004. App. 82a-83a. VU allowed Black Male Initiative to hand out flyers for homecoming anywhere on campus, including the library lawn area, in November of 2003. App. 87a-88a. And VU permitted Sarah Nicholas and Jena Grosser, for the Kernan and Davis for Indiana Campaign, to register and encourage students to vote outside the library in September of 2004. App. 90a-91a.

During 2003, VU hosted numerous events and expressive activities. App. 72a-80a, 129a, 137a-39a. These events attempt to entice persons to action, but VU did not require any of the outside individuals or entities to fill out a solicitation request or speak in the brick walkway. App. 79a. Under the present system, an individual can come onto the

VU campus and engage in solicitation without having to fill out a solicitation request, as long as it is approved by Livers.

B. Proceedings Below

To vindicate his right to speak, Gilles filed his Verified Complaint for Declaratory and Injunctive Relief and Damages on April 16, 2004, along with a Motion for Preliminary Injunction. The district court denied Gilles' Motion for Preliminary Injunction by Order dated July 29, 2004. After discovery, the parties filed cross-motions for summary judgment on July 18, 2005. On January 16, 2006, the district court entered an Order and Judgment denying Gilles' Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment, dismissing all claims brought by Gilles. App. 14a-21a. Following this decision, Gilles filed his Notice of Appeal to Seventh Circuit Court of Appeals on February 1, 2006.

On February 14, 2007, Seventh Circuit issued its opinion affirming the district court's order of summary judgment in favor of Defendants and against Gilles. App. 1a-13a. Then, on February 28, 2007, petitioner filed a Petition for Rehearing and a Petition for Rehearing En Banc. On March 12, 2007, both petitions were denied. App 22a.

REASONS FOR GRANTING THE WRIT

As this Court has frequently noted, free speech plays a vitally important role in the university setting and deserves the utmost protection. *See, e.g., Grutter v. Bollinger,* 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Healy v. James*, 408 U.S.

169, 180 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment"); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"). But the Seventh Circuit's dim view of forum analysis threatens this important role; as does its refusal to acknowledge the dangers of unbridled discretion in this context. Undermining the First Amendment on the public university campus, the *Gilles v. Blanchard* ruling contradicts decisions of other circuits and this Court. Thus, grant of this Writ of Certiorari is justified. This Court's involvement is needed to resolve the conflict and to preserve space for "creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AMONG CIRCUIT COURTS OVER THE APPLICATION OF FORUM ANALYSIS TO OPEN AREAS ON PUBLIC UNIVERSITY CAMPUSES

For assessing the propriety of speech regulations on public property, this Court uses a methodology known as "forum analysis." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46, 49 n. 9 (1983). Pursuant to which, the property or "forum" is first classified into one of three categories: traditional public fora, designated public fora, or nonpublic fora. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Then, in judging the restriction, the standard of scrutiny attached to the forum classification is applied. *Id*. at 677-78.

In this matter, Seventh Circuit upholds a restriction on expression taking place on a sidewalk and park-like venue on

a public university campus. *Gilles*, 477 F.3d at 468-69. Streets, sidewalks, and parks have long been considered "prototypical" examples of public fora. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997). No "particularized inquiry" is required for such areas since they are considered "quintessential" fora for expression. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). *See generally* Steven G. Gey, *Reopening the Public Forum from Sidewalks to Cyberspace,* 58 OHIO ST. L.J. 1535, 1538-39 (1998) ("[E]very culture must have venues in which citizens can confront each other's ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized….") As this Court observed early on in formulating forum analysis, "*[w]herever* 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 supplied). Consequently, "streets, sidewalks and parks are considered, *without more,* to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis supplied).[1]

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[1] This begs a preeminent question in this case: What is meant by "more?" Despite this Court not expressly commenting on the topic, the indication is that the "more" to be shown is incompatibility with expression. Since streets, sidewalks, and parks necessarily share the objective characteristics of openness and accessibility, they are traditional public fora unless it can be demonstrated that expression interferes with their intended use. In isolated situations, streets and sidewalks can be found to be incompatible with speech, and thus nonpublic fora, such as those located on military installations. *See Greer v. Spock*, 424 U.S. 828, 838 (1976) ("[I]t is…the business of a military installation like Fort Dix to train soldiers, not to provide a public forum"). In the normal course of things, this cannot be shown, as streets, sidewalks, parks and similar venues are naturally compatible with expression. *See Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2nd Cir. 1991) (judging area to be public fora,

Forum status of sidewalks and parks situated on a public university has never been specifically addressed by this Court. This Court did consider an analogous situation, that being, the government's authority as a proprietor to regulate speech on a sidewalk, in *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality). Regrettably, that case did not produce a majority opinion[2] and has engendered some confusion over how to apply forum analysis to areas that appear to be traditional public fora. *See* Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217, 250 (1997) ("From the *Kokinda* twist to the public forum doctrine, a conundrum arises with respect to judicial values

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distinguished *Greer* on basis that expressive activity did not threaten same type of governmental function as that implicated on military base).

Seventh Circuit, however, believes compatibility with expression is of no import. In refusing to strike down the speech restriction imposed on Gilles and anyone else depicted as a "solicitor" on the sidewalk and park-like areas at VU, the appellate court offers that VU "wouldn't have to prove that allowing them in would disrupt its educational mission." *Gilles*, 477 F.3d at 470.

[2] In a fractured decision, a plurality, consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, and White, held that the way leading to the entrance of a post office is a nonpublic forum and a law precluding volunteers from soliciting contributions and distributing political information to be a reasonable regulation. *Kokinda*, 497 U.S. at 730, 737. Contrariwise, Justices Brennan, Marshall, Stevens, and Blackmun understood the sidewalk to be a traditional public forum and the law not narrowly tailored to serve a significant governmental interest. *Id.* at 740, 755 (Brennan, J. dissenting). In a decisive concurrence, Justice Kennedy indicated that he thought the path to be a traditional public forum, but went on to uphold the law as a valid time, place and manner restriction. *Id.* at 737-39 (Kennedy, J. concurring). *See First Unitarian Church v. Salt Lake City*, 308 F.3d 1114, 1125 n. 6 (10th Cir. 2002) ("We cite Justice Kennedy's concurrence [in *Kokinda*] as controlling Supreme Court precedent because his concurrence provided the fifth vote on the narrowest grounds").

of clarity and predictability"). With only mixed signals from *Kokinda* to guide them, some circuit courts have taken liberty to construct their own rules for forum status of areas resembling sidewalks and parks. Not surprisingly, then, circuit courts disagree on how to analyze such areas on public universities and whether such property is public or nonpublic fora. *Compare Bowman v. White*, 444 F.3d 967, 977-78 (8th Cir. 2006); *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992) with *American Civil Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005).

With the *Gilles* decision, Seventh Circuit has now lent its unique voice to the debate, advancing the position that all public university property is to be viewed as private university property.[3] In adopting this approach, and refusing to analyze the objective characteristics of the property at issue, Seventh Circuit stands in need of correction.

A. Seventh Circuit's Refusal to Evaluate Objective Characteristics of Property Conflicts with Other Circuit Courts and Decisions of this Court

There is widespread confusion and conflict among circuit courts over how to apply forum analysis where governmental entity functions as a proprietor and this is perhaps most evident in the context of university property. Ninth, Tenth and D.C. circuits look to the objective characteristics of property in making the assessment and presume that property looking and acting like parks, sidewalks, and streets classify

[3] In its own novel way, Seventh Circuit infuses economics in the constitutional analysis and essentially proposes that First Amendment be dictated by market forces. The appellate court draws the unlikely inference that the Constitution does not fully apply to public university property "[s]ince public and private universities compete with each other…." *Gilles*, 477 F.3d at 470.

as public fora. Adhering to this objective analysis, Fifth and Eighth circuits consider sidewalks and open, park-like areas on public universities to be public fora. On the other hand, Fourth Circuit ignores objective characteristics of open areas on university grounds and brand such property as nonpublic fora as a matter of course. Similar to Fourth Circuit, Seventh Circuit in *Gilles* rejects the objective approach, and this aversion to objective factors cements a clear circuit split in want of resolution.

1. Seventh and Fourth circuits gloss over objective characteristics

For Seventh and Fourth circuits, the objective characteristics of property play little to no role in forum analysis. Instead, these circuits rely on the intent of the government to determine forum status. This is exemplified in *Gilles*, where Seventh Circuit gives university officials the same power to regulate speech in areas compatible with speech as in areas incompatible with speech. The property's physical or otherwise objective characteristics are irrelevant to Seventh Circuit:

> No matter how wonderfully suited the library lawn is to religious and other advocacy, Vincennes University could if it wanted bar access to the lawn to any outsider who wanted to use it for any purpose, just as it could bar outsiders from its classrooms, libraries, dining halls, and dormitories.

Gilles, 477 F.3d at 470. Even though an open lawn is remarkably different than a library or a classroom, the *Gilles*

court treats all areas on campus the same.[4] The sole fact that VU asserts that all campus property is nonpublic fora is sufficient for Seventh Circuit.[5] Government intent is but one factor in forum analysis. *Cornelius*, 473 U.S. at 803. Government intent is not the sole or even most significant factor. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."). Hence, Seventh Circuit erred in elevating VU's legal argument and allowing it to override VU's actual actions, policies, and the nature of

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[4] By refusing to consider the particular access sought by the speaker, Seventh Circuit broke further with the precedent of this Court and sister circuits. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) ("in defining the forum, we have focused on the access sought by the speaker"). Gilles attempts to speak on the sidewalk and park-like lawn area, not a quiet library, classroom, or, for that matter, anywhere else on the campus. Governmentally-owned land that contains different types of property - like a public university campus - cannot be treated as a singular type of forum. *Bowman*, 444 F.3d at 976-77; *Justice for All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005); *Dallas Ass'n. of Cmty. Organizations for Reform Now v. Dallas Cty. Hosp. Dist.*, 670 F.2d 629, 631 (5th Cir. 1982). *See also* Rodney Smolla, *Academic Freedom, Hate Speech and the Idea of a University*, 53 LAW & CONTEMP. PROBS. 195, 218 (1990) ("The soundest view is to treat campus not as one unified forum, but as subdivided into multiple forums to which different free speech standards apply").

[5] Ironically, in way of support, Seventh Circuit quotes *Widmar v. Vincent*, 454 U.S. 263, 269 n. 5 (1981), noting the absence of any requirement "that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings." *Gilles*, 477 F.3d at 470. Of course, Gilles does not seek access to "all" of VU's facilities, just a select and small portion of the open grounds on campus. In *Widmar*, by implication with the word "all," this Court seemingly recognizes Gilles' right to have access to at least some public university property. *See Bowman*, 444 F.3d at 987 (Bye, J. concurring) ("The Court [in *Widmar*] in no way suggests, and perhaps with its use of the term 'all' implies the contrary, all streets, sidewalks and parks on a public university are non-traditional public fora").

the forum.

In its forum analysis, to the extent any was undertaken, the *Gilles* court passes over objective characteristics like the traditional use of the property, the objective use and purposes of the space, and the property's physical characteristics and location. Expressly rejecting the reasoning of the Eighth Circuit, and siding with the Fourth Circuit, the *Gilles* court declares campus sidewalk and park-like area to be nonpublic fora just because VU said so. *Gilles*, 477 F.3d at 470-71. Thus, Seventh Circuit and Fourth Circuit approach forum status of university property in similar fashion. They allow governmental intentions - even those intentions first espoused in litigation - to trump objective characteristics of the property at issue. This refusal to give due weight to objective characteristics of public property runs afoul of analysis employed by other circuit courts.

2. Fifth, Eighth, Ninth, Tenth, and D.C. circuits emphasize objective characteristics

In contrast to Seventh and Fourth Circuits, other circuits tend to analyze the objective characteristics of property when conducting forum analysis. *E.g. ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (analyzed objective nature of publicly-owned downtown pedestrian mall); *First Unitarian Church*, 308 F.3d at 1125-26 (evaluated physical characteristics of pedestrian throughway on church property)*; Lederman v. United States*, 291 F.3d 36, 41-44 (D.C. Cir. 2002) (considered objective factors of sidewalk in front of Capitol building). Areas functioning like sidewalks, streets and parks are presumed to be public fora because their physical characteristics allow for speech with minimal disruption of government interests. *See*

International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 699-700 (1992) (Kennedy, J. concurring in judgment) (urged study of "objective, physical characteristics" for determining forum status).

Such principles were employed in *First Unitarian Church, supra,* where Tenth Circuit deemed church property to be a traditional public forum because the property possessed the objective characteristics of a sidewalk and pedestrian mall. 308 F.3d at 1125. Tenth Circuit discerned physical characteristics to be more important than governmental intentions. *Id*. at 1124-25. As a result, the appellate court held the property to be public fora despite the express governmental intent to the contrary. *Id*. at 1125. For judging forum status, the following factors where adopted from Justice Kennedy's concurrence in *Lee*:

> If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether the expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.

Id. quoting *Lee*, 505 U.S. at 698-99 (Kennedy, J. concurring in judgment).

The significance of objective characteristics has also been recognized in the university environment. In *Bowman v. White*, *supra*, Eighth Circuit labeled sidewalks and open, park-like areas on a university campus as designated public fora. 444 F.3d at 978-80. In reaching this conclusion, Eighth Circuit analyzed the traditional use of the property, the objective use and purposes of the space, the government intent and policy with respect to the property, and the property's physical characteristics and location. *Id*. A sister appellate court has likewise relied on such characteristics to find public fora on university campus. *See Supple*, *supra*, 969 F.2d at 117 (finding certain outdoor areas of university to be designated public forum). Other jurists rely also on these objective characteristics as the basis to find certain university property to be traditional public fora. *See Bowman*, 444 F.3d at 988 (Bye, J. concurring) ("If we are to protect any space as a traditional public forum for expressive purposes, a public university street, sidewalk or park must be such a space"); *Alabama Student Party v. Student Gov't Ass'n*, 867 F.2d 1344, 1354 n.6 (11th Cir. 1989) (Tjoflat, J., dissenting) ("A campus of a major state university is a microcosm of the community….[S]treets, sidewalks and park-like areas…are best described as traditional public fora…."); *Spartacus Youth League v. Bd. of Trustees.*, 502 F. Supp. 789, 799 (N.D. Ill. 1980) ("This Court believes that Circle Center and campus walkways are 'public forums'"); *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 338 (W.D. Va. 1987) (noting similarities between open campus lawn and traditional public forum like municipal park, examined regulation on campus lawn as attempt to regulate speech in public place).[6]

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[6] Precedents emanating from this Court strongly suggest that some university property can be considered traditional public fora. A consistent reading of this Court's pertinent decisions on forum analysis, *Hague, Perry, Cornelius, Grace, Frisby, Kokinda, Lee, Schenck* and *Forbes*, points to a traditional public forum being defined as parcel of

The conflict between Eighth Circuit (*Bowman*) and Seventh Circuit (*Gilles*) is particularly striking. The *Bowman* court examines a host of objective factors to assess forum status, but none of these factors are considered by the *Gilles* court. In the *Bowman* decision, the appellate court downplays the role of government intent in forum analysis; in contrast, the *Gilles* court relies exclusively on an espoused governmental intention. And consequently, while the *Bowman* court finds sidewalk and park-like area on university property to be public fora, the *Gilles* court finds similarly situated university property to be nonpublic fora. Doubting the "soundness" of the *Bowman* ruling, the Seventh Circuit deliberately takes a divergent path. *Gilles*, 477 F.3d at 471.

As bore out in these two appellate decisions, as well as others, clarity is needed to resolve this ever-present conflict over methodology. Amidst this confusion and sparring over classification, the right to free speech on public university campuses hangs in the balance.

B. Seventh Circuit's Decision to Jettison Forum Analysis and Apply Private Property Rules to Public University Property Conflicts With Decisions of this Court

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government property that allows for open access and is compatible with expression. *See supra* note 1. Accordingly, university property that meets this definition, like the open lawn area and sidewalk at VU, constitutes traditional public fora. *See generally* Nathan W. Kellum, *If It Looks Like a Duck...Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L. Q. 1 (2005) (highlights Supreme Court and appellate court rulings that support recognition of streets, sidewalks and park-like areas on public university campus as traditional public fora).

Per directive of this Court, forum analysis is the proper means for judging speech restrictions on government property:

> [T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.

Cornelius, 473 U.S. at 800. In the face of this precedent, the *Gilles* court refuses to "pitch [its] analysis on the distinction that Supreme Court has drawn between 'traditional public forums,' 'designated public forums,' and 'nonpublic forums.'" *Gilles*, 477 F.3d at 473. According to Seventh Circuit, forum analysis amounts to nothing more than a "complex scheme" that has turned "the search for sensible results into a classification game." *Id*. at 474. But while Seventh Circuit is certainly free to criticize the doctrine, they are not at liberty to cast it aside. Forum analysis is not a tool of leisure.

In lieu of applying forum analysis, Seventh Circuit rests its decision on private property rules. Rejecting the claims of Gilles, Seventh Circuit reasons that school officials should be able to control all university property, just like

private property owners control their own property. *Gilles*, 477 F.3d at 472-73.[7]

Still, the *Gilles* court had to confront the actual policy used by VU to regulate Gilles' speech. Under that policy, "solicitors" are required to register with VU prior to speaking on campus. There is no other written policy regulating speech at VU, and thus, VU must necessarily label Gilles' speech as "solicitation" to regulate it. And, as the *Gilles* court recognizes, VU's policy cannot bear such interpretation, at least, not without it being unconstitutionally vague. *Id*. at 471-72. But rather than invalidate the policy, the *Gilles* court invokes an unwritten "norm" derived from private property law.

This "norm" supposedly allows strangers to visit VU but prohibits obtrusive use of the property. *Id.* at 472. Equipped with this new-found norm, VU officials are now enabled to ban Gilles from campus, similar to how a private property owner could ban Gilles from private property:

> This [rule against "unobtrusive" land use] has long been a norm, and not just a practice: strangers to the university community are not to use the library lawn for purposes other than those unobtrusive, implicitly authorized uses of land (generally as a shortcut or other pathway) that distinguish a licensee from a trespasser. *E.g.*, *Sammons v. American*

[7] This Court has said: "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderly v. State of Florida*, 385 U.S. 39, 47 (1966). In accordance with this principle, the State university can appropriately exclude expression in certain areas on campus, but, as this Court makes plain, only in those places where expression would disrupt the "use to which the property is lawfully dedicated." *See supra* n. 1.

> *Automobile Association*, 912 P.2d 1103, 1105 (Wyo. 1996); *Lakeview Associates, Ltd. v. Maes*, 907 P.2d 580, 581-82 (Colo. 1995).

Id.

Seventh Circuit defers to this so-called "norm" despite the utter lack of any factual evidence supporting its existence.[8] In lieu of evidence, the *Gilles* court relies on some common law notion of a "norm" emanating from the two cited state cases dealing with private property. Aside from this reliance being misplaced, it bears emphasis that Gilles seeks to speak on public property. Though some government property may appear to be like private property in many respects, the rules for private property cannot be applied to public property, irrespective of characteristics, location and use. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 563 (1972) (rejecting similarity between publicly and privately owned streets for First Amendment purposes). This assumption that a public university is just like "any other landowner" belies commonly understood notions of the forum doctrine, as well as this Court's appreciation of "the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*,

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[8] VU did not even contend that a "norm" like this exists. As Seventh Circuit acknowledges, VU regulates Gilles under its Solicitation Policy, not under some abstract "norm." *Gilles*, 477 F.3d at 472 ("The policy as interpreted by the defendants to cover preaching the Gospel is hopelessly vague.…") This fact is highly significant because a defendant's interpretation of its own policy should be the authoritative interpretation in considering a facial challenge. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."). Notwithstanding, Seventh Circuit disregards VU's express indications and interpretation regarding its own policy.

515 U.S. at 835.

Indeed, Seventh Circuit's use of private property law reeks of similar logic once advanced by Justice Holmes, who said: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Commonwealth v. Davis*, 162 Mass. 510, 511 (Mass. 1895). Needless to state, this logic has long been rejected by this Court, and for good reason. *E.g. Niemotko v. Maryland*, 340 U.S. 268, 279 (1951); *Saia v. New York*, 334 U.S. 558, 561 n. 2 (1948); *Hague*, 307 U.S. at 514-16. Undeterred, Seventh Circuit resurrects this erroneous reasoning, and, in doing so, strikes at the very core of forum analysis: the need to reserve some public property for robust dialogue.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AMONG CIRCUIT COURTS OVER THE APPLICATION OF THE UNBRIDLED DISCRETION DOCTRINE IN NONPUBLIC FORA

The First Amendment forbids laws that give public officials unbounded discretion to regulate speech. *Forsyth County*, 505 U.S. at 133. A law is unconstitutionally vague if it (1) fails to give fair warning as to the prohibited conduct or (2) allows for arbitrary and discriminatory enforcement in the absence of adequate standards. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). This test is especially stringent in consideration of free speech because vague language and undue discretion allows officials to discriminate against certain viewpoints. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 763-64 (1988); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). To avoid such

discrimination, this Court requires regulations on speech to contain narrow, objective, and definite standards to guide the decision-maker. *Forsyth County*, 505 U.S. at 130; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). A regulation that grants unbridled discretion in controlling protected expression is unconstitutional *per se*. *Lakewood*, 486 U.S. at 757.

This Court has yet to consider application of this unbridled discretion doctrine in a nonpublic forum. Given the silence, circuits have derived two conflicting interpretations: Federal, First, and the Seventh circuits do not apply the unbridled discretion doctrine in nonpublic fora, while Fourth, Eighth, Tenth, and Eleventh do. This latter position is supported by the decisions of this Court. The unbridled discretion doctrine is utilized to prevent self-censorship and viewpoint discrimination. And this rationale applies in all fora, including nonpublic fora. Therefore, this Court should grant review to resolve the conflict among the circuit courts and to provide guidance to government officials and speakers acting in areas depicted as nonpublic fora.

A. Seventh Circuit Decision Conflicts With Other Circuits over Application of Unbridled Discretion Doctrine in Nonpublic Fora

A clear circuit split has arisen over the unbridled discretion doctrine and its application within nonpublic fora.

1. Federal, First, and Seventh circuits permit unbridled discretion in nonpublic fora

Three circuit courts, Federal and First, and now, Seventh in *Gilles*, refuse to invalidate policies granting unbridled

discretion in nonpublic fora.[9] In the *Gilles* case, Seventh Circuit explicitly recognizes the existence of unfettered discretion with the challenged policy. And, in the words of the *Gilles* court, the vague policy and its application to Gilles "brings him to the verge of victory." *Gilles*, 477 F.3d at 472. Yet, the appellate court still upholds the policy because Gilles had not proven - to the court's satisfaction - that other parties had accessed the forum at issue:

> The policy as interpreted by the defendants to cover preaching the Gospel is hopelessly vague and thus a supple weapon for excluding from the university lawn those outsiders whose message the university disapproves of. But [Gilles] falls just short of prevailing because he has failed to show that any uninvited outsider has ever been permitted to use the lawn for any purpose.

Id.[10]

On this logic, the doctrine of unfettered discretion is essentially nullified. By demanding proof of a pattern of discrimination before a vague policy can be struck down as unconstitutional, the appellate court overlooks that vagueness and unbridled discretion automatically invalidate a policy regulating speech. This, of course, is due to the very

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[9] As shown, Seventh Circuit's error in *Gilles* was not that it classified sidewalk and open lawn area on campus as nonpublic fora, as much as it failed to apply any forum analysis at all. Nevertheless, by default, Seventh Circuit scrutinizes the restriction as though the property constitutes nonpublic fora.

[10] As an aside, Seventh Circuit is mistaken in saying Gilles failed to show that any uninvited outsider used the property. The record shows that "outside" individuals and groups have historically been permitted to use the property for expressive purposes. App. 60a-63a, 68a-69a, 117a-19a.

prospect of viewpoint discrimination. *Lakewood*, 486 U.S. at 755-57. Once the government opens a nonpublic forum via written policy, that policy is not permitted to be vague, even if no actual speaker has ever accessed the forum. *Id.*

Federal Circuit committed similar error in *Griffin v. Secretary of Veterans Affairs*. 288 F.3d 1309 (Fed. Cir. 2002). There, in *Griffin*, a veteran facially challenged a regulation that forbade "the display of any placards, banners, or foreign flags on [public] property unless approved by the head of the facility or designee." *Id*. at 1315. The *Griffin* court admitted that the policy set "no explicit limit on the discretion of [government] officials to permit exceptions, and the government has given us little or no reason why this grant of discretion differs from those that have been struck down as unconstitutional in the past." *Id*. at 1323. Notwithstanding, Federal Circuit still upheld the policy just because it applied to speech in a nonpublic forum. *Id*. *Accord Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004) (relying on *Griffin* to reject vagueness challenge in nonpublic forum).

In all these cases, Federal, First, and Seventh circuits confront a regulation that is admittedly vague and engenders unbridled discretion. In lieu of invalidating these policies on their face, however, these courts demand further proof of viewpoint discrimination. In this respect, these circuits contradict decisions of other circuit courts.

2. Fourth, Eighth, Tenth and Eleventh circuits prohibit unbridled discretion in nonpublic fora

In contrast with Federal, First, and Seventh circuits, sister circuits stringently apply the unbridled discretion doctrine in nonpublic fora. Such stringent application was on display

when Fourth Circuit invalidated a policy regulating literature distribution at public elementary schools. *Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006). That policy permitted school officials to exercise broad discretion over flyer distribution. *Id*. at 380.

Fourth Circuit declined to classify the public school as a particular forum because the unbridled discretion invalidated the policy irrespective of whether the forum classified as public or nonpublic:

> [T]he dangers posed by unbridled discretion--particularly the ability to hide unconstitutional viewpoint discrimination--are just as present in other forums. Thus, there is broad agreement that, even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment.

Id. at 386.

For this reason, Fourth Circuit did not demand any proof regarding actual access to the forum or the presence of past viewpoint discrimination. The mere possibility of viewpoint discrimination (a possibility created by unbridled discretion) was deemed ample to invalidate the policy. *Id.* at 388.

The *Montgomery County* decision is no aberration. Fourth Circuit reaffirmed the same rationale in *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five* and again announced that the unbridled discretion doctrine applies in nonpublic fora. 470 F.3d 1062, 1068-69 (4th Cir. 2006). Indeed, Fourth, Eighth, Tenth, and Eleventh circuits all agree that the unbridled discretion doctrine should apply

in nonpublic fora and that the mere presence of unbridled discretion is enough to make a policy unconstitutional. *E.g. Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310-11 (11th Cir. 2003) (sale of newspapers at airport); *Lewis v. Wilson*, 253 F.3d 1077, 1079-80 (8th Cir. 2001) (vanity license plates); *Summum v. Callaghan*, 130 F.3d 906, 919-20 (10th Cir. 1997) (monolith on courthouse lawn). The *Gilles* decision - demanding a pattern of abuse - runs squarely against this consensus, creating an obvious circuit split over the application of the unbridled discretion doctrine, particularly, within nonpublic fora.

B. Seventh Circuit Decision Conflicts with Decisions of this Court over Application of Unbridled Discretion Doctrine in Nonpublic Fora

Though this Court has never applied the unbridled discretion doctrine in nonpublic fora, this Court has articulated the rationale for doing so. In *Lakewood v. Plain Dealer Publ'g. Co.*, *supra*, this Court explained that unbridled discretion is problematic for two distinct reasons. 486 U.S. at 757. First, unbridled discretion forces parties to censor their own speech to avoid punishment, and second, it allows officials to hide viewpoint discrimination behind vague guidelines. *Id*. These rationales entail three conclusions: 1) a regulation allowing unbridled discretion should be facially invalidated 2) the unbridled discretion doctrine applies in nonpublic fora and 3) courts should not assume the good faith of officials to apply a vague policy.

In *Gilles*, Seventh Circuit disregards this Court's sound basis for the unbridled discretion doctrine. As a result, the *Gilles* court failed to facially invalidate a vague law, failed to apply the unbridled discretion doctrine in a nonpublic forum,

and failed to question the good faith of government officials applying a vague law. On all these counts, Seventh Circuit causes a conflict with this Court.

1. Policy that allows unbridled discretion should be facially invalidated

When officials possess unbridled discretion to control access to a forum, speakers will often censor their own expression in order to pander to officials' opinion and gain access to that forum. Therefore, a government official can effectively chill speech by simply retaining unbridled discretion, even if that official never actually uses that discretion to silence speakers. To counteract this chill effect, this Court invalidates vague laws on their face. A plaintiff need not prove that the law has been enforced inconsistently or that the law has been enforced at all: "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757.

This conclusion stands in contrast with Seventh Circuit decision in *Gilles* because Seventh Circuit forces Gilles to prove a pattern of abuse before invalidating the policy. But as *Lakewood* makes clear, vagueness and unbridled discretion are enough to facially invalidate a law.

In fact, unbridled discretion is problematic precisely because it chills speech and permits viewpoint discrimination in the future. The constitutionality of a policy depends "not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything… preventing him from doing so." *Forsyth County*, 505 U.S. at 133 n. 10.

2. Unbridled discretion doctrine applies in nonpublic fora

Unbridled discretion empowers officials to pick and choose which viewpoints to allow. With unbridled discretion, government officials can restrict speech for any reason and can hide viewpoint discrimination behind the veil of vague language. *Lakewood*, 486 U.S. at 758.

This connection between unbridled discretion and viewpoint discrimination is important because viewpoint discrimination is forbidden in all forums, even nonpublic forums. *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46. If unbridled discretion is forbidden because it permits viewpoint discretion, then it necessarily follows that unbridled discretion should be forbidden in nonpublic forums. This reasoning is also supported by the connection between vagueness and unbridled discretion; vague language often gives government officials the discretion to suppress certain viewpoints. *See e.g. Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) ("the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident."). As a result, vague laws that grant unbridled discretion can violate the First Amendment as well as the due process clause of the Fourteenth Amendment. *Lakewood*, 486 U.S. at 769-72. This link between vagueness and unbridled discretion is critical because this Court also denounces vague laws in nonpublic fora. *Jews for Jesus*, 482 U.S. at 576. When read together, this Court's decisions regarding vagueness, viewpoint discrimination, and unbridled discretion extend the unbridled discretion doctrine to nonpublic fora.

3. Officials should not be trusted to apply unwritten, vague policies

At its core, the unbridled discretion doctrine demands the existence of written policies or well-established practices to limit government discretion to regulate speech. A court cannot rely on the supposed good faith of a government official to apply a vague, unwritten policy.

Other than VU's Solicitation Policy, there is no other written policy regulating speech on the campus. To regulate Gilles, VU promulgated and enforced its Solicitation Policy. In light of the vagueness attached to it, the appellate court, in turn, relies on this unwritten "norm" as a supplement to VU's written policy, so as to remedy the vagueness problem.

This is, in essence, the same defense proffered by the municipal defendants in *Lakewood*. When their policy was challenged as vague, the *Lakewood* defendants argued that unwritten terms and procedures supplemented and limited the breadth of their written policy. This Court quickly disposed of that argument:

> The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-

> established practice. This Court will not write nonbinding limits into a silent state statute.

Lakewood, 486 U.S. at 770 (citations omitted). *See also Anderson Sch. Dist. Five*, 470 F.3d at 1074 (noting that First Amendment rights could not "be made to depend solely upon the good faith of state officials"). The *Gilles* court does exactly what the *Lakewood* defendants attempted to do: justify a vague written policy by incorporating unwritten terms and by assuming good faith on the part of officials to comply with those unwritten rules.

There is no reason to take such a leap of faith here. If anything, the importance of First Amendment freedoms requires courts to assume the opposite. Unwritten rules cannot remedy vaguely written laws, government officials cannot be assumed to act in good faith when regulating speech, and courts cannot re-write written policies to comply with the First Amendment. In all these respects, the *Gilles* court strayed from this Court's precedent.

CONCLUSION

For the forgoing reasons, this Court should grant this Petition and reverse the judgment of Seventh Circuit Court of Appeals.

Respectfully submitted,

BENJAMIN W. BULL
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, AZ 85260
(480) 444-0020

NATHAN W. KELLUM
Counsel of Record
ALLIANCE DEFENSE FUND
P.O. Box 11159
Memphis, TN 38111
(901) 323-6672

Attorneys for the Petitioner James G. Gilles