**No. 06-1617**

**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**

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI


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Robust debate is no where more important than on a public university campus. Universities originated as breeding grounds for discussing new ideas. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995). In our constitutional tradition, these places of higher learning occupy a "special niche" because of their association with free speech and free thought. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). This Court has often noted the protection afforded speech on college campuses because of "the important and substantial purposes of the University, which seeks to facilitate a wide range of speech." *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000).

Therefore, free speech is not just compatible with university goals, it is vital to university purpose. Indeed, "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (citation omitted). A time-honored notion, "free speech and creative inquiry" are essential to university campuses because these areas are "vital centers for the Nation's intellectual life." *Rosenberger*, 515 U.S at 836. And thus, the "college classroom *with its surrounding environs* is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (emphasis added).

To preserve the important function of speech on public property, including spots on public university campuses, courts test any restriction on expression according to a doctrine known as forum analysis. Under forum analysis, the level of scrutiny used to evaluate speech regulations turns on whether the forum is classified as public or nonpublic.

Consequently, the methodology employed to determine the status of the forum is critical.

Streets, sidewalks, parks, pedestrian malls, and other open public ways are easy enough. They have historically been considered "the 'quintessential' public forums for speech." *Hill v. Colorado*, 530 U.S. 703, 715 (2000). It is not as clear, though, whether all streets, sidewalks, parks, pedestrian malls, and other public ways qualify as public fora, especially when found on property of government proprietor. This Court addressed the forum status of such areas nearly two decades ago in *United States v. Kokinda*, 497 U.S. 720 (1990). But as the last word, *Kokinda* provides little guidance because it was a plurality decision. *See Initiative and Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299, 1313 (D.C.Cir.2005) ("As the district court noted and the Postal Service agrees, the split nature of the decision in *Kokinda* provides no definitive guidance on the forum status of postal sidewalks.") (citation and quotation omitted); Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 20 (1997) (opines that plurality in *Kokinda* lends uncertainty as to how far forum analysis can be pursued).

Given the uncertainty, a split has arisen among the circuit courts, which is exemplified with this petition. In *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007), Court of Appeals for the Seventh Circuit emphasized government intent and virtually ignored the forum's objective characteristics in judging the speech restriction. *Id.* at 469-74. As a result, *Gilles* court treated public university property like private property and allowed university officials to enjoy the same discretion as private land owners to squelch speech. *Id.* at 472-73. If this methodology were applied universally, government proprietors would be able to discriminate against

disfavored speech on public property---regardless of its objective characteristics---just like private citizens can readily preclude disliked speech on their own private property.

The result makes little sense, as it eviscerates the very idea behind forum analysis (the preservation of public space for free speech) and supplies officials with uninhibited power to proscribe speech. This outcome is notably absurd within the confines of a public university, the place that is supposed to be the marketplace for ideas.

But *Gilles* only represents one side of the story. Other circuits contradict *Gilles* and look to objective characteristics over government intent in forum analysis. *E.g. ACLU of Nevada v. City of Las Vegas*, 333 F. 3d 1092, 1099 (9th Cir. 2003) (downtown pedestrian mall); *Lederman v. United States*, 291 F. 3d 36, 41-44 (D.C. Cir. 2002) (sidewalk facing Capitol building). This "objective" methodology adheres to the goal of forum analysis because it preserves some public property for speech and limits the control of government officials over speech. For this reason, the present circuit split over methodology cuts to the heart of forum analysis. No doubt, confusion over methodology will continue to cause inconsistent and even contradictory results about speech on public property. And, to be sure, if other circuits decide to use the same methodology as Seventh Circuit, free speech will have little to no security on any property owned by the government.

Respondents try to sidestep this conflict in an unavailing and disingenuous manner; they mischaracterize the facts and

ruling of *Gilles*.[1] Respondents' perverse version of *Gilles* aside, there exists a circuit split over forum analysis and unbridled discretion. And because of the differing approaches to this matter, university officials and speakers are left in a quandary, unsure of how to regulate or speak. The only way to resolve the dilemma is for this Court to step in and supply needed guidance on forum analysis, particularly, in regards to public universities and other public areas where government acts as a proprietor.

## I. Seventh Circuit Did Not Apply Forum Analysis But Treated Public Property Like Private Property

In *Gilles*, Seventh Circuit refused to conduct forum analysis, and thereby, discarded precedents of this Court. *See e.g. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (specifying need for forum analysis). At no time did *Gilles* ever classify the relevant forum as traditional, designated, or nonpublic forum. And this error was not just one of semantics. Seventh Circuit declined to analyze any of the factors used by other circuits to determine forum status. *Compare Gilles*, 477 F.3d at 470 (denying relevance of property's compatibility with speech) *with ACLU of Nevada*, 333 F.3d at 1099 and *First Unitarian Church v. Salt Lake City*, 308 F.3d 1114, 1125 (10th Cir. 2002) (analyzing characterizing factors about property such as property's physical characteristics and compatibility with speech). Rather than analyze the actual forum, *Gilles* court relied on economic principles totally foreign to forum analysis. 477 F.3d at 470 (hesitant to impose "extravagant

[1] Far beyond zealous advocacy, Respondents endeavor to rewrite the *Gilles* opinion so as to avoid the conflict. The argument is pursued as though this Court will not actually read the *Gilles* opinion, but just blindly accept Respondents' description of it.

burdens on public universities that private universities do not bear" since "public and private universities compete with each other.").

Yet, according to Respondents, *Gilles* court did conduct forum analysis. For proof, Respondents do not reference anything in the *Gilles* opinion itself, but list factors used by the Ninth Circuit to determine forum status in *ACLU of Nevada*. (Respondents' brief, p. 7, citing 333 F.3d at 1100-01). It is telling that Respondents omit how the factors used in *ACLU of Nevada* were applied in *Gilles*. As a reading of the opinion reveals, *Gilles* court never used, applied, or even suggested the use of the factors employed in *ACLU of Nevada*.

In fact, the only time the *Gilles* court speaks to forum analysis is to criticize the doctrine. *Gilles* court comments on "[t]he difficulty with using the 'forum' template to resolve this case" and "doubt[s] the utility of multiplying categories in this fashion, thus adding epicycles to an already complex scheme and turning the search for sensible results into a classification game." 477 F.3d at 473-74. Seventh Circuit surmises that assessing the forum would result in an "unnecessary flourish." *Id.* at. 474. On Respondents' reading, the appellate court speaks out of both sides of its mouth, conducting forum analysis yet simultaneously lambasting the doctrine. This strained interpretation cannot be reconciled with the opinion.

Absent restraints from forum analysis, Seventh Circuit equates public property to private property. Citing two state cases about private property, the court presumes an implicit "norm" that bans any use of a freely accessible publicly-owned area, except as a short-cut. 477 F.3d at 472. This implicit "norm" is supposed to cure the unmistakable

vagueness found in the written solicitation policy enforced by Vincennes University ("VU"). But Seventh Circuit does not elaborate as to how this unwritten norm is consistent with the requirement that "the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).

In defense of this reasoning, Respondents argue that "countless" private property rules apply to public property. (Respondents' brief, p. 16). While "countless" seems to be a bit of a stretch, perhaps, some private property rules do apply to public property. But this is not the point. The issue is whether expression protected by the First Amendment that takes place on government property resembling public park and sidewalk can be treated as if it was uttered in someone's living room.

*Gilles's* analogy of public property to private property is inept because the forum analysis mandated by this Court presupposes fundamental rights on public property that do not carry over to private property.[2] Though Seventh Circuit may consider free speech rights to be "extravagant burdens" for public university officials to bear in comparison to their private counter-parts, 477 F.3d at 473-74, this Court has consistently limited governmental encroachment on free expression on public property.

And it is this basic premise of *Gilles* —public property is

[2] For example, even in a nonpublic forum, the government cannot retain unbridled discretion and cannot discriminate on the basis of viewpoint. In contrast, a private owner of property has every right to preclude any expression, for any reason, on his or her land.

just like private property---that is so dangerous. *See* Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217, 250 (1997) (noting dangers of analogizing public property to private property). If rules for private property apply equally to public property, then no city street, park or sidewalk would be safe for free expression. Thankfully, this Court treats public property remarkably different than private property, and so repudiates the core logic of *Gilles*.

## II. Contrary to this Court and Other Circuits, Seventh Circuit Determines that University Property Can Never Be Public Fora

Respondents also attempt to avoid the conflict between the circuits on forum analysis by focusing on a particular phrase found in *Widmar v. Vincent*, 454 U.S. 263 (1981). According to Respondents, this Court in *Widmar*, via footnote 5, clarified once and for all that all university property is nonpublic fora and that university property can never be public fora. (Respondents' brief, pp. 8-10 citing 454 U.S. at 269 n. 5).

But this singular footnote cannot bear the interpretive weight Respondents wish to give it. At most, this Court, in *Widmar*, denied that a university 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." 454 U.S. at 269 n. 5 (emphasis supplied). Respondents would have this Court forget the references to "all" in *Widmar*, and construe it so as to declare every parcel of university property as being nonpublic fora. However, precise wording from the opinion cannot be ignored. And that actual language does not label an entire campus as one type of forum. *See Bowman v. White*, 444 F.

3d 967, 987 (8th Cir. 2006) (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").

Consistent with this Court's holding in *Widmar*, several circuits refuse to classify an entire university campus as one type of forum. *E.g. Bowman*, 444 F.3d at 976-77; *Justice for All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005). As these cases recognize, this Court has never ruled or implied that all university property must be nonpublic fora. Rather, a variety of fora exists on a public university campus, including traditional and designated public fora.

Notwithstanding, Respondents proclaim that all areas on public university campus are nonpublic fora *per se*. (Respondents' brief pp. 11-12). In so urging, they ignore or misconstrue the methodology used in the cases. In addition to misreading *Widmar*, Respondents say that there is no real conflict between *Bowman* and *Gilles*. This is an untenable assertion, considering the *Gilles* decision explicitly expresses doubt about "the soundness of the decision [in *Bowman*]." 477 F.3d at 471. And importantly, *Bowman* and *Gilles* used substantially different criteria to reach their respective results. While *Gilles* relied exclusively on government intent (as espoused in litigation), *id*. at 470, *Bowman* assessed a variety of objective factors, including property's traditional use and its objective use and purpose. 444 F.3d at 978.

Respondents also mischaracterize the language in *Bowman*. Quoting *Bowman*, Respondents argue "open areas 'that might otherwise be traditional public fora' <u>are not</u> when they are within the boundaries of a university's campus." (Respondents' brief, p. 12) (underlining supplied). In reality, the *Bowman* court ruled "open areas that might otherwise be

traditional public fora may be treated differently when they fall within the boundaries of the University's vast campus." *Bowman*, 444 F.3d at 978 (underlining supplied). A very different meaning than that portrayed by Respondents. This remark in *Bowman* underscores the Eighth Circuit position that university property is not nonpublic *per se* and refers to the inquiry of whether expression is compatible with the subject property. Upon consideration of accurate language of these opinions, Respondents are unable to negate the conflict between *Bowman* and *Gilles*. And this conflict just highlights the general confusion among the circuits as a whole over forum methodology.

## III. Unbridled Discretion is Unconstitutional Irrespective of How the Forum is Depicted

Within the framework of forum analysis, courts also disagree on how much discretion to give to officials in regulating speech on nonpublic fora. While some circuits strictly ban unbridled discretion, other circuits allow for broad discretion, in nonpublic fora. *Compare Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002) and *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004) *with Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006).

To minimize the import of this conflict, Respondents first argue that *Montgomery County* is compatible with *Griffin* and *Ridley* because *Montgomery County* cites *Griffin* and *Ridley*. (Respondents' brief, p. 19.) Of course, citing one proposition from a case does not eliminate expressed disagreement with the reasoning or result of that case. *Montgomery County* comes to a different result and applies the unbridled discretion doctrine much more stringently than

*Griffin* or *Ridley*. Thus, the conflict cannot be (legitimately) denied.

Second, Respondents argue that the unbridled discretion doctrine is irrelevant due to their curious assertion that the solicitation policy was not used to ban Gilles' speech. With this, as with other matters, Respondents take undue liberty with the record. As a matter of undisputed fact, VU considered Gilles' speech to be solicitation and silenced Gilles pursuant to its solicitation policy. App. 106a. The Seventh Circuit acknowledged the application of the policy to Gilles and ruled accordingly. 477 F.3d at 472 ("The application of the university's solicitation policy to Brother Jim [Gilles] brings him to the verge of victory.") Hence, the solicitation policy is quite pertinent and ought to be scrutinized for unbridled discretion. *Gilles* court correctly noted that this policy "is hopelessly vague and thus a supple weapon for excluding…those outsiders whose message the university disapproves of." *Id*. But the refusal to strike down this policy--despite the patent invalidity--is in direct conflict with how other courts, including this Court, deal with unbridled discretion.

## CONCLUSION

Gilles requests this Court grant this Petition.

Respectfully submitted,

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