No. 18-1234

IN THE
SUPREME COURT OF THE UNITED STATES

VALENTINA MARIA VEGA,
Petitioner

v.

JOHNATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA,
Respondent

On Writ of Certiorari to the
United States of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

TEAM 4
Counsels of Record

QUESTIONS PRESENTED

1. Whether a university Campus Free Speech Policy imposing disciplinary sanctions on a student who "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" is unconstitutionally vague and substantially overbroad?

2. Whether, as applied to Ms. Vega, the Campus Free Speech Policy violates the First Amendment?

TABLE OF CONTENTS

Questions Presented…… i

Opinions Below …….. 1

Jurisdiction……. 1

Statement ……. 1

Summary of Argument …….. 3

Argument …….. 5

1. The Policy, which imposes disciplinary sanctions on a student who "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity", is unconstitutionally vague, substantially overbroad, and a misapplication of the free speech standard articulated in *Tinker*, therefore, it violates Ms. Vega's First and Fourteenth Amendment rights, and thus, it is unconstitutional. …… 5
    a. The Policy is unconstitutionally vague because it not only violates *Grayned, Williams and Connally* by failing to sufficiently define prohibited conduct, but it also violates multiple legal policies identified in *Grayned*..…… 5
        i. The Policy fails to sufficiently define forbidden conduct because it contains subjective language, yet lacks any clarifying interpretation, its language has yet to be scrutinized by any court, and it requires that "men of common intelligence must necessarily guess at its meaning", therefore, according to *Williams, Grayned,* and *Connally,* it is unconstitutionally vague.…….. 6

ii. As a result of the Policy's vagueness, it fails to provide adequate notice of forbidden conduct, improperly delegates enforcement of the statute to Officer Thomas, and chills the free speech rights of University students, thus, it insults the important legal policies identified in *Grayned*..…… 11

b. It is likely that multiple forms of constitutionally protected, student expression will be unconstitutionally punished under the authority of the Policy, thus, it is substantially overbroad. …….. 14

c. The *Tinker* standard should not be applied to universities and even if the standard does apply to universities, the nature in which it is incorporated into the Policy removes the standard of its fundamental elements, therefore, the Policy's reliance upon *Tinker* is improper, and thus, the Policy is unconstitutionally vague and substantially broad.…….. 17

i. The *Tinker* standard is incompatible with a university setting because it is rooted in principles crafted for primary and secondary students, not university students, thus the Policy's reliance upon it is improper. …… 17

ii. The Policy applies the *Tinker* standard in a manner that removes the purpose of protecting schools from disruption, therefore, it strips it of its fundamental meaning, and thus, the University's reliance upon it is improper. ……. 19

2. The Policy, even if deemed to be constitutional on its face, as applied to Ms. Vega, is unconstitutional because it unlawfully violated Ms. Vega's right to free speech as protected by the First Amendment. …….. 21

a. The Policy is unconstitutional as applied to Ms. Vega, because the University failed to show that Ms. Vega's speech was considered to be offensive, indecent, lewd, or discriminatory. ……22

b. The Policy is unconstitutional as applied to Ms. Vega, because the University failed to show that Ms. Vega's protest materially infringed upon Mr. Drake's speech and did not infringe upon Mr. Drake's First Amendment rights. …….. 25

Conclusion……. 27

Appendix…….. 28

Brief Certificate …… 31

TABLE OF AUTHORITIES

Cases **Page(s)**

Barker v. Hardway,
283 F.Supp. 228 (1968)…… 22, 23

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986)…….. 21, 25

Blackwell v. Issaquena County Board of Education,
363 F.2d 749 (C.A. 5th Cir. 1966)……. 17

Board of Educ., Island Trees Union Free Dist. No. 26 v. Pico,
457 U.S. 853 (1982)…… 22, 23

Brown v. Bd. Of Edu.
347 U.S. 483 (1954)…… 18, 19

Burnside v. Byars,
363 F.2d 744 (1966)…… 17

Chicago v. Gregory,
39 Ill.2d 47, 233 N.E.2d 422 (1968)…… 7, 8, 10

Chicago v. Meyer,
44 Ill.2d 1, 253 N.E.2d 400 (1969)……. 7, 8, 10

Coates v. Cincinnati,
402 U.S. 611 (1971)……. 7, 9

Connally v. Gen. Constr. Co.,
269 U.S. 385 (1926)……. *passim*

Everson v. Board of Edu. of Ewing Tp.,
330 U.S. 1 (1947)……. 5

Grayned v. City of Rockford,
408 U.S. 104 (1972)……. *passim*

Harper v. Poway Unified Sch. Dist.,
445 F.3d 1166 (9th Cir. 2006)…….. 20

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1986)…….. 21, 24

Keefe v. Adams,
840 F.3d 523 (8th Cir. 2016)…….. 21

Kowalski v. Berkley Cty. Sch.,
652 F.3d 565 (4th Cir. 2011)…….. 23, 24

McCauley v. University of the Virgin Islands,
618 F.3d 232 (3d. Cir. 2010)…… 18, 19

Members of City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984)……...……14, 15, 16

New York State Club Ass'n, Inc. v. City of New York,
487 U.S. 1 (1988)…… 14, 15

New York v. Ferber,
458 U.S. 747 (1982)…… 9

S.J.W. ex rel v. Lee Summit R-7 Sch. Dist.,
696 F.3d 771 (8th Cir. 2012)…… 23, 24

Texas v. Johnson,
491 U.S. 397 (1989)…… 17

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969)…… *passim*

U.S. v. Williams,
553 U.S. 285 (2008)…… *passim*

United States v. Stevens,
559 U.S. 460 (2010)…… 14, 15

Washington State Grange v. Washington State Republican Party,
552 U.S. 442 (2008)…… 14

Wynar v. Douglas Cty. Sch. Dist.,
728 F.3d 1062 (9th Cir. 2013)…… 20

Statutes

18 U.S.C. § 48……14

28 U.S.C. § 1254(1)……1

Av. Gen. Stat. § 118-200……1

Los Angeles Municipal Code § 28.04…….. 15

N.Y.C.Admin.Code § 8–102(9)
…….. 15

U.S.C. 18 § 2252A(a)(3)(B)…….8

Other Authorities

Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 Tex. J. ON C.L. & C.R. 27
(2008)……18

Patrick Miller, *University Regulation of Student Speech: In Search of a Unified Mode of Analysis*, 116 Mich. L. Rev. 1317 (2018)……18

University of Arivada Campus Free Speech Policy…….*passim*

Constitutional Provisions

Section One of the Fourteenth Amendment to the
Constitution of the United States of America……... *passim*

The First Amendment to the Constitution of the United States of America…….. 4, 5

BRIEF FOR PETITIONER

OPINIONS BELOW

The citation to the opinion of the United States District Court for the District of Arivada is C.A. No. 18-CV-6834. The case has not yet been reported.

The citation to the opinion of the United States Court of Appeals for the Fourteenth Circuit is No. 18-1757. The case has not yet been reported.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourteenth Circuit issued its decision on November 1, 2018. Following its decision, the petitioner submitted a writ of certiorari to the Court, which it granted. Thus, the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

On June 1, 2017, the "Free Speech in Education Act of 2017" ("Act") had been passed by the state of Arivada, requiring higher education institutes ran by the state to enact policies "to safeguard the freedom of expression on campus." Record 1. The University of Arivada (University) put the Act in place under the Campus Free Speech Policy ("Policy").

Early August of 2017, the University distributed a copy of the 2017 Student Handbook , which included the Policy to all current and incoming students. Record 20. Sophomore Valentina Maria Vega ("Ms. Vega)" signed the Policy online, acknowledging she had read the Handbook. Record 20. The Policy imposes sanctions to students who "materially and substantially infringe upon the rights of others to engage in or listen to expressive activity." Record 2. Campus Security issues citations in violation of the Policy which then move through a University-implemented system. Record 2. Upon the citation being issued, the violation is forwarded to the University's Dean of Students. Record 3.The Dean begins an investigation, which includes an informal

disciplinary hearing. If the incident is found to be in violation of the policy, they are issued a strike, which results in a warning that informs the student of a Policy violation. Record 2-3. If a student commits a second violation, they are suspended for the remainder of the current semester. Record 3. A third transgression results in expulsion. Record 3.

Ms. Vega is a sophomore and a self-proclaimed advocate for immigrants. Record 3. She is the President of an organization on campus called "Keep Families Together" ("KFT") which puts on events to raise support for immigrants. Record 3. KFT had participated in peaceful events over the past few years.

On August 31, 2017, Ms. Vega and other members of KFT attended an event put on by an organization called "Students for Defensible Borders" ("SDB") to shut down the speaker, who was speaking an anti-immigrant message. Record 3. After the speaker had begun, they stood up on chairs and started chanting, drowning out the speaker's remarks. Record 4. Campus Security responded to a complaint from SDB and citations were issued to all of the participating members of KFT. R. 04. Proper protocol was followed, and they received first strikes. Record 4.

The event which led to the expulsion of Ms. Vega occurred on September 5, 2017. Record 4. The amphitheater on the University's Quad was properly reserved so that speaker Samuel Payne Drake could speak on his views of closing borders to all immigrants. Record 4. The organization that put on the event, ASFA, had exclusive use of the amphitheater from noon to 3 p.m. on that date. Record 4.

At the time of Mr. Payne's speech, the Quad was bustling with other activities. While he spoke, there were a couple dozen students playing intramural football, being cheered on by other students. Students were walking and talking along the Quad's walkways, and students were playing and listening to music. Record 4.

Mr. Drake was delivering his message, which included proclaiming that "immigrants are destroying American ideals and American families, and they are taking away the jobs hard-working Americans need and want." He also said that we should "build the wall and keep them out". Record 5.

Ms. Vega was standing on a paved walkway about ten feet behind the last row in the amphitheater. She was wearing a Statute-of-Liberty costume and was saying "Disband ICE", "Immigrants made this land"; and "Keep Families Together." R. 05. Theodore Putnam, the President of ASFA, called Campus Security and reported "some crazy student dressed in a Statute-of-Liberty costume distracting people trying to listen to Mr. Drake's speech." Record 5.

Campus Security responded and Officer Thomas's report stated that "Ms. Vega was more distracting than the random background noise because she was generally facing the amphitheater." Record 6. He said that even though the speech continued, "Ms. Vega was materially and substantially infringing upon the rights of other to engage in or listen to expressive activity." Record 6. Ms. Vega was issued a citation then was granted a hearing before the Hearing Board for violating the Policy a second time. Record 6. Ms. Vega was issued her "second strike" and suspended for the rest of the semester. Record 6. Her appeal was denied, and she filed the lawsuit at bar. Record 6.

SUMMARY OF THE ARGUMENT

On its face, the Policy is unconstitutionally vague and substantially overbroad. Furthermore, even if the Policy is deemed to be constitutional on its face, it is, nonetheless, unconstitutional as-applied to Ms. Vega.

The Policy is unconstitutionally vague for multiple reasons. First, the Policy's language forbidding student activity that "infringes upon the rights of others" lacks any clear meaning. It

not only lacks clarifying portions, such as definitions for its key terms or a non-exhaustive list of illustrative, prohibited activity, but is also has not not been construed by any court to help clarify its meaning. Additionally, the Policy violates the legal policies that demand all laws provide adequate notice of forbidden conduct, provide clear guidelines in order to avoid subjective application, and avoid causing a chilling effect on the constitutional rights of individuals.

In addition, the Policy is substantially overbroad because its language subjects some constitutionally protected speech to discipline simply because the Policy is not clear as to the conduct that is prohibits. As the Policy stands, it is likely that students playing flag football, listening to music, talking to one another, or participating in any of the activities in the Quad will eventually reach a level of noise that will be subjectively deemed as a violation of the Policy, even though all of the aforementioned activities are wholly protected by the First Amendment. The likelihood of this happening is increased by the subjective application of the Policy by Officer Thomas, the fact that a vast majority of students live on campus, and the fact that a large number of the student population spends its free time in the Quad. For these reasons the policy is substantially overbroad.

Finally, the Policy, even if not deemed unconstitutionally vague or substantially overbroad, is, nonetheless, unconstitutional as-applied to Ms. Vega because her statements were neither lewd or offensive, therefore, Ms. Vega has a constitutional right to the type of speech that she exercised on Sept. 5, 2017. Additionally, Ms. Vega did not prevent Mr. Drake from expressing his opinions at the event, however, the University did prevent Ms. Vega from expressing her's. Therefore, the Policy as applied to Ms. Vega is unconstitutional.

ARGUMENT

1. The Policy, which imposes disciplinary sanctions on a student who "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity", is unconstitutionally vague, substantially overbroad, and a misapplication of the free speech standard articulated in *Tinker*, therefore, it violates Ms. Vega's First and Fourteenth Amendment rights, and thus, it is unconstitutional.

The Policy is unconstitutional due to its vagueness, overbreadth and erroneous reliance upon *Tinker v. Des Moines Indep. Cmty. Sch. Dist*. 393 U.S. 503 (1969). As a result, it offends Ms. Vega's right to freedom of speech and right to substantive due process. The First Amendment to the Constitution of the United States ("First Amendment") prohibits the federal government from instituting laws that curtail the right to freedom of speech for its citizens. U.S. Const. amend. I. The Fourteenth Amendment, via the process of incorporation, applies the rights of the First Amendment to the states. Dist. Ct. Op. at 7 (citing Sec. I. U.S. Const. amend XIV); *See, Everson v. Board of Edu.*, 330 U.S. 1, 14-16 (1947). The Policy's restriction of Ms. Vega's speech is unconstitutionally vague, substantially overbroad, and based on a misapplication of *Tinker*, therefore, it violates Ms. Vega's First and Fourteenth Amendment rights, and thus is unconstitutional.

a. The Policy is unconstitutionally vague because it not only violates *Grayned, Williams* and *Connally* by failing to sufficiently define prohibited conduct, but it also violates multiple legal policies identified in *Grayned*.

The Policy, which regulates student free speech based on whether the student's speech "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" is unconstitutionally vague because it fails to clearly communicate the type of conduct that is forbidden, and it violates multiple First Amendment policies. Jt. Stip. App. A. ; *See, U.S. v. Williams*, 553 U.S. 285, 295-296, 306 (2008); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A legal regulation will be deemed

"impermissibly vague" if it fails to "clearly define" the conduct that it desires to forbid, which occurs "when men of common intelligence must necessarily guess at its meaning". *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A failure to properly define can arise from subjective language, lack of context, lack of a common meaning, and lack of judicial scrutiny. *U.S. v. Williams*, 553 U.S. 285, 295-296, 306 (2008)(subjective language, lack of context and lack of common meaning can lead to vagueness); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (judicial scrutiny can provide meaning to terms). Vague legal standards must be avoided because they lack proper notice, encourage haphazard enforcement, and tend to result in individuals sacrificing their right to free speech due to their inability to pinpoint the exact conduct that is forbidden by the such a vague standard. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

i. The Policy fails to sufficiently define forbidden conduct because it contains subjective language, yet lacks any clarifying interpretation, its language has yet to be to scrutinized by any court , and it requires that "men of common intelligence must necessarily guess at its meaning", therefore, according to, *Williams, Grayned* and *Connally*, it is unconstitutionally vague.

The portion of the Policy that forbids speech which "infringes upon the rights of others" is subjective, lacks limiting framework, lacks a common meaning, and a court has yet to interpret this phrase in order to determine its proper meaning, therefore, the proscriptions of the Policy are not sufficiently defined. *See*, Jt. Stip. App. A. Thus, according to a proper reading of *Williams, Grayned*, and Connally, it is "unconstitutionally vague". *Compare* Jt. Stip. App. A *with U.S. v. Williams*, 553 U.S. 285, 295-296, 306 (2008), *and Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), *and Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

In *Grayned*, the Court ruled that the language of an Illinois noise ordinance forbidding conduct that "tend[ed] to disturb the peace" was not unconstitutionally vague. 408 U.S. 104, 108

(1972) (quoting Chicago Code of Ordinances, c. 28, s 19.2(a)). The Court's analysis centered on the phrase "tend[ed] to disturb" and whether it considered said phrase to be subjective. *Id.* at 113. The Court analyzed two Supreme Court of Illinois cases that found that a Chicago ordinance containing a phrase similar to "tending to disturb the peace" could be read to imply that the disturbing conduct must also be accompanied by a sense of imminence in order for it to violate the statute. *Grayned v. City of Rockford,* 408 U.S. 104, 111-112 (quoting *Chicago v. Meyer*, 44. Ill.2d 1, 4, 253 N.E.2d 400, 402 (1969); *Chicago v. Gregory*, 39 Ill.2d 47, 233 N.E.2d 422 (1968), reversed on other grounds, 394 U.S. 111 (1969)). After considering *Meyer* and *Gregory*, the Court reasoned that it could be inferred that the Supreme Court of Illinois intended to incorporate the meaning of *Meyer* and *Gregory* into the noise ordinance because it cited to *Meyer* in its opinion, and *Meyer*, in turn, cites to *Gregory*. *Id.*

To solidify its reasoning, the Court then compared the noise ordinance before it to another ordinance that the Court previously interpreted in *Coates v. Cincinnati*, which also contained subjective language. *Id.* at 113 (citing 402 U.S. 611, 613-614 (1971)). In *Coates*, the Court found a noise ordinance forbidding groups of individuals on sidewalks from participating in "annoying" conduct to be unconstitutionally vague because enforcement of the ordinance, due to the vagueness of the term "annoying", depended on the ranging and differing interpretations of court officials, local law enforcement and reasonable citizens. *Id.* (quoting Cincinnati ordinance). Therefore, the Court reasoned that enforcement of the ordinance would ultimately rely on the varying sensitivities of the different parties involved and as a result it would, create an "unascertainable standard" for individuals to follow. *Id.*

After consideration of the *Coates* ordinance, the Court in *Grayned* determined that the phrase "tending to disturb" differed from the term "annoying" because the phrase "tending to

disturb", as used in *Grayned*, relies on court construction for its meaning, where as the *Coates* ordinance did not. 408 U.S. 104, 113 (1972) (citing 402 U.S. 611, 613-614 (1971)). Additionally, it held that the *Grayned* ordinance clarified its language by requiring intent and linking it to school disruption. *Id.* Based on its construction of informative cases and consideration of the ordinance's language, the Court found that the phrase "tending to disturb" only proscribed conduct that created an " imminent" threat to peace. *Grayned v. City of Rockford,* 408 U.S. 104, 111-112 (quoting *Chicago v. Meyer*, 44. Ill.2d 1, 4, 253 N.E.2d 400, 402 (1969); *Chicago v. Gregory*, 39 Ill.2d 47, 233 N.E.2d 422 (1968), reversed on other grounds, 394 U.S. 111 (1969)). Thus, for these reasons, the Court in *Grayned* held that the noise ordinance was not too vague. *Grayned v. City of Rockford,* 408 U.S. 104, 114 (1972).

In *U.S. v. Williams*, the Court considered the constitutionality of a United States statute that forbid the distribution and possession of child pornography based, partially, on the requirement that the defendant act "in a manner that reflects the belief" that the material is child pornography and "in a manner…that causes another to believe" that the material is child pornography. 553 U.S. 285, 295-296, 306 (quoting U.S.C. 18 § 2252A(a)(3)(B)). The Court found, in part, that the aforementioned language in the ordinance were "questions of fact" and "true-or-false determinations" and as a result, their meaning was not overly subjective. *Id.* at 306. Thus, the Court held that the statute constitutionally defined the conduct that it prohibited. *Id.*

In *Connally v. Gen. Constr. Company*, the Court considered the constitutionality of an Oklahoma law that demanded that an employer pay his or her employers a wage above or equal to "less than the current rate of per diem wages in the locality where the work is performed'". 269 U.S. 385, 393 (quoting Oklahoma statute). The Court held that the statute's phrase, "current rate of per diem wages" failed to denote a specific, required wage. Instead, it created a standard that

relied on too many variabilities, therefore, blurring its meaning. *Id.* Additionally, the Court reasoned that the statute's phrase, "locality" could be interpreted in vastly different ways depending on what one considers to be local. *Id.* Based on these findings, the Court found that statute to be unconstitutionally vague. *Id.*

The Policy is distinguishable from both the statute in *Williams* and the ordinance in *Grayned. Compare* Jt. Stip. App. A *with* 553 U.S. 285, 295-296, 306 (2008), *and* 408 U.S. 104, 108 (1972). It is, however, similar to the statute in *Coates and Connally*. *Compare* Jt. Stip. App. A *with* 402 U.S. 611, 613-614 (1971), *and* 269 U.S. 385, 391 (1926).

There are three reasons that the Policy is distinct from the constitutional statute in *Williams*. *Compare* Jt. Stip. App. A. *with* 553 U.S. 285, 295-296, 306 (quoting U.S.C. 18 § 2252A(a)(3)(B)). First, the Policy, lacks definitions for its subjective terms, such as "infringes". See, Jt. Stip. App. A. The terms used in the statute in *Williams*, however, could be connected to statutory definitions previously discussed by the Court in *New York v. Ferber*, thus, curing its vagueness. 553 U.S. 285, 295-296, 306 (2008).

Second, the Policy's language is not rooted in any "narrowing" context, unlike the statute in *Williams*, which, rooted its meaning in the context of *Ferber* and the statutory definitions analyzed in it. *U.S. v. Williams*, 553 U.S. 285, 293 (2008)(citing 458 U.S. 747, 755-756).

Third, the term "infringes", as used in the Policy, is not so commonly used that it has a commonly agreed upon meaning. *Compare* Jt. Stip. App. A. *with U.S. v. Williams*, 553 U.S. 285, 306 (2008). In *Williams*, the Court found the portion of the statute forbidding material "advertise[d], promote[d], present[ed], distribut[ed], or solicit[ed]" to be constitutional because the terms can be attributed to a commonly known, "transactional connotation". *U.S. v. Williams*,

553 U.S. 285, 293 (2008) (quoting U.S.C. 18 § 2252A(a)(3)(B)). The same cannot be said for the Policy's use of the term "infringes". *See*, Jt. Stip. App. A.

Thus, the Policy, is clearly distinct from the statute in *Williams* because its language is subjective and is not clarified by any "statutory definitions, narrowing context, or settled legal meanings". *U.S. v. Williams*, 553 U.S. 285, 306 (2008).

The Policy and the ordinance in *Grayned* are also distinct. *Compare* Jt. Stip. App. A. *with* 408 U.S. 104, 111-112. Although both laws contain subjective language, the *Grayned* ordinance, nonetheless, differs from the Policy because it received judicial interpretation, whereas, the Policy's language, such as "infringes" did not. *Id.* at 111-112 (quoting *Chicago v. Meyer*, 44. Ill.2d 1, 4, 253 N.E.2d 400, 402 (1969)); *Chicago v. Gregory*, 39 Ill.2d 47, 233 N.E.2d 422 (1968), reversed on other grounds, 394 U.S. 111 (1969)). Additionally, the Court held that the ordinance was not vague because it properly linked its interpretation to school disruption and required intent on behalf of the violator, therefore, further narrowing the phrases meaning. *Id.* at 113-114. Thus, the Policy is distinct for the *Grayned* ordinance, which the court deemed to be constitutional.

The Policy is, however, very similar to the unconstitutional statute in *Coates* and *Connally*, because the Policy contains language that ultimately creates an "unascertainable standard". *Compare* Jt. Stip. App. A. *with* 402 U.S. 611, 613-614 (1971) *and* 269 U.S. 385, 391 (1926). In *Coates*, the Court found the use of the word "annoying" to be vague because it was extremely subjective and had not be construed by any court to give it clear meaning. 402 U.S. 611, 613-614 (1971). In *Connally*, the Court held that the statute's use of the phrases "current rate of wages per diem" and "locality" were too vague because the meaning of each phrase were open to multiple interpretations. 269 U.S. 385, 391 (1926). The Policy has the same flaws as both the *Coates* and *Connally* statutes because the term "infringes", without any reference to school disruption as a

guide, becomes subject to each individuals views of what constitutes infringement. *Compare* Jt. Stip. App. A. *with* 402 U.S. 611, 613-614 (1971) *and* 269 U.S. 385, 391 (1926). Thus, it is unconstitutionally vague.

ii. As a result of the Policy's vagueness, it fails to provide adequate notice of forbidden conduct, improperly delegates enforcement of the statute to Officer Thomas, and chills the free speech rights of University students, thus, it insults the important legal policies identified in *Grayned*.

The Policy's overly vague nature "offends" the three policies that *Grayned* identifies in support of the prohibition of vague laws. *See*, 408 U.S. 104, 108-109.

First, the Policy's language fails to sufficiently notify University students of the type of speech that would constitute a violation. *See*, Jt. Stip. App. A. Two University students, Ms. Haddad and Ms. Smith, stated, respectively, that they were "unclear" and "not sure" of the type of conduct the Policy forbid. Haddad Aff. ¶ 15, Smith Aff. ¶ 11. Additionally, Ms. Vega noted that she still felt "hesitant" to attend the rally on September 7, 2017, even after planning to alter her conduct to adhere with the Policy. Vega Aff. ¶ 11,14. Ms. Vega's hesitance, indicates that Policy fails to provide clear and adequate description of forbidden conduct.

To avoid such confusion, the University could simply import an established, statutory definition, as the statute in *Williams* successfully accomplished, however, it chose not to do so. *See*, *U.S. v. Williams*, 553 U.S. 285, 293 (citing 458 U.S. 747, 755-756). Furthermore, as the district court pointed out, the University could have simply incorporated a definition section into the Policy or even incorporated a non-exhaustive list of conduct that would violate the Policy, however, it also choose not to do so. Dist. Ct. Op. at 8. Finally, the Policy could have clarified its language by requiring intent and linking it to school disruption, but it chose no to do so. *See*, *Grayned v. City of Rockford*, 408 U.S. 104, 113-114 (1972).

Second, as a result of the Policy's vagueness, Officer Thomas, on two separate occasions, made personal decisions as to whether he felt that Ms. Vega's conduct "infring[ed] upon the rights of others". Thomas Aff. ¶ 6, 10, Thomas Aff. Add. A. The first instance occurred on August 31, 2017, when he concluded that Ms. Vega and other members of KFT violated the Policy. *Id.* at ¶ 6. According to Officer Thomas, he reached this conclusion "after assessing the situation" and "determin[ing] that the students drowned out the majority of the speaker's remarks". *Id.* The second occasion occurred on September 5, 2017, when Officer Thomas concluded that Ms. Vega's chanting in the Quad, outside of the ASFA event, "disrupted" the event and violated the Policy. *Id.* at ¶ 8. According to Officer Thomas, he reached this conclusion by considering the body language of the students in the event, the noise level of Ms. Vega's voice compared to the speaker's, and the noise level and content of the sounds permeating from the Quad at the time of the event. Thomas Aff., Add. A.

From examining Mr. Thomas's description of the events, one can determine that the Policy's implementation hinges on the personal conviction of the responding officer. *See,* Thomas Aff. A. Officer Thomas admitted that on August, 31, 2017, he "asses[ed] the situation" and reached the conclusion that KFT students were "drowning out" the voice of the speaker. Thomas Aff. ¶ 6. Such a determination, however, is subject to an individuals own ability to assess noise. What "drowns out" noise for one individual may be different than what "drowns out noise" for others, especially if one has impaired hearing,. *See*, Thomas Aff. ¶ 6. The same type of subjectivity can be seen in Officer Thomas's application of the Policy on Sept. 5, 2017 where he relied upon self implemented, subjective factors to support his decision. *Id.* at ¶ 8.

For instance, another student in the event may have been capable of hearing the speaker despite Ms. Vega's chants, thus, not affecting his or her ability to hear expressive activity. Yet,

apparently, Officer Thomas's view of the facts reign supreme, despite the subjectivity. Even if Officer Thomas believed that the individuals attending the event were distracted, he, nonetheless, could have been mistaken. However, the Policy allows his view of the facts to supersede any other individual's view of the facts, simply because he is the individual that the student organization called to report the incident. *See,* Dist. Ct. Op. at 9.

Furthermore, Officer Thomas stated that he responded to a "specific call about a specific disturbance", thus, he didn't even contemplate confronting the sources of the other, equally as loud noises. Thomas Aff. ¶ 12. This showcases how the application of the Policy places the subjective authority of implementation into the hands of the one reporting the alleged violation. Dist. Ct. Op. at 9. Thus, after considering the aforementioned scenarios, it is clear that leaving implementation to University officials directly contradicts *Grayned*'s warning that doing so will likely lead to subjective application.

Third, as a result of the Policy's vagueness, the free speech rights of multiple University students were chilled. *See,* Smith Aff. ¶ 12, Haddad Aff. ¶ 14. Ms. Smith and Ms. Haddad each contend that they chose not to attend the speech with Ms. Vega on Sept 5 , 2017, because they "feared further disciplinary actions against them." *Id.* Ms. Haddad stated that he is "passionate about advocating for the rights of immigrants", yet, he didn't attend a speech directly conflicting with his views because he could not identify the specific conduct forbidden by the Policy. Haddad Aff. ¶ 14. Similarly, Ms. Smith felt that she had a First Amendment right to express her pro-immigration point of view, yet she didn't partake in an opportunity to express this view because of the Policy's vagueness. Smith Aff. ¶ 12. The fact that the Policy creates these sentiments in University students clearly violates the First Amendment because it forces one side of an argument to limit their constitutionally protected speech, solely due to the ambiguity of the Policy. If the

policy were more properly defined, it is highly unlikely that any sort of chilling effect would take place.

Based on the aforementioned considerations, it is clear that the Policy's lack of preciseness regarding forbidden activity violates established legal principles. Thus, the policy is unconstitutionally vague.

b. It is likely that multiple forms of constitutionally protected, student expression will be unconstitutionally punished under the authority of the Policy, thus, it is substantially overbroad.

In the future, it is probable that the Policy will restrict University students' First Amendment right to freedom of speech, therefore, the Policy clearly suffers from substantial overbreadth. A law is deemed to be unconstitutionally overbroad if it can be applied to a substantial amount of constitutionally protected speech. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State v. Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6(2008)); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988); *Members of City Council Los Angles v. Taxpayers for Vincent*, 466 US. 789, 800 (1984).

In *United States v. Stevens*, the Court considered a federal statute that "criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty." 559 U.S. 460, 464 (2010) (quoting 18 U.S.C. § 48). The statute made the auditory or visual recording of "hunting" or "killing" animals, amongst other conduct, a crime, if, the recording appeared in a state that forbid such conduct, despite the fact the recording may have occurred in a state that allowed such conduct. *Id.* The Court found this statute to be "substantially overbroad", partly, because certain states forbid "hunting" and "killing", while other states do not. *Id.* This prohibition would criminalize citizens that lawfully record a "killing" or "hunting" in their state, yet, somehow the recording arrives in another state where such conduct is illegal. *Id.* at 475-477. Therefore, the

Court held that the statute criminalized conduct that would be constitutionally protected for certain citizens, thus, it found the statute to be substantially overbroad. *Id.* at 482.

In *New York State Club Ass'n, Inc. v. City of New York*, the Court considered an overbreadth challenge to an amended New York statute that forbid discrimination by any public entity and otherwise "private" entities that were so frequented by the public that their nature tended to be more public than private. 487 U.S. 1, 4 (1988) (quoting N.Y.C.Admin.Code § 8–102(9) (1986)). The Court reasoned that the statute "could be constitutionally applied" to multiple entities in New York, therefore, the Court deemed the statute constitutional. *Id.* at 11-12.

In *Members of City Council Los Angles v. Taxpayers for Vincent*, the Court considered an overbreadth challenge to a Los Angeles law that forbid individuals from stationing signs on public property. 466 U.S. 789 (1984) (citing Los Angeles Municipal Code § 28.04). The Court held the appellant did not properly "demonstrate a realistic danger" that the law would violate any constitutionally protected expression, therefore, the Court found the statute to be constitutional in its breadth. *Id.* at 803.

Considering the rulings of *Stevens*, *New York State Club Ass'n, Inc.*, and *Taxpayers*, it is clear that the Policy is substantially overbroad because it could be applied to a number of constitutional activities that University students frequently participate in on campus. *See*, Jt. Stip. ¶¶ 11-12. . At the University, student associations often use the Amphitheater to host "concerts, lectures, and speakers". Jt. Stip. ¶ 12. Additionally, University students often use the Quad to "study, talk, play games, play and listen to music, and engage in sports such as flag football and Frisbee". Jt. Stip. ¶ 11. As Ms. Vega explained to the Fourteenth Circuit, due to the Policy's language, it is applicable to these forms of constitutional, student expression. Ct. App. Op. at 6.

The Fourteenth Circuit asserts that the above hypothetical, and others similar to it, are "sheer speculation" because it is "hard to imagine" how "random background noise" would violate the Policy, however, this is incorrect. Ct. App. Op. at 9, 10 (citing Jt. Stip. App. A.). In fact, the policy presents a "realistic danger" of misapplication for a combination of reasons. *See*, *Members of City Council Los Angles v. Taxpayers for Vincent*, *466* U.S. 789, 802. Officer Thomas observed that when he arrived at the amphitheater on September 5, 2017, he could hear noise from the flag football game and students talking as they passed on the sidewalk ten feet away form the amphitheater. Thomas Aff., Add. A; Jt. Stip. ¶ 15 . The fact that Officer Thomas could hear these noises shows that it is not "sheer speculation" to assume that students playing music, students talking on the nearby sidewalk, students playing sports or any other sort of student noise in the Quad could rise to the level that it could be heard in the amphitheater. *See*, Ct. App. Op. at 9. Instead, the idea is rooted in previous observations. With this being true, it is not a giant leap of logic to then assume that Officer Thomas might issue citations to noise makers in the Quad, if insisted upon by a student association member. Furthermore, if one considers, altogether, that a "majority of students at the University sleep, eat, learn and socialize on campus", that students often spend time in the Quad, and that the amphitheater in the Quad is often used for student events, then it drastically increases the chances that a constitutional expression could rise to a noise level that violates the Policy. Jt. Stip. 11, 12, 19.

In an attempt to further justify the Policy, the Fourteenth Circuit and the University argue that the Policy serves the commendable purpose of ensuring that student expression does not "infringe[] upon the rights of others to engage in or listen to expressive activity". Ct. App. Op. at 10 (citing Jt. Stip. App. A). Although such a notion is commendable, it does not permit the University to restrict an individual's right to constitutionally express his or her speech, which is

the "bedrock principle" of the First Amendment. See, *Texas v. Johnson*, 491 U.S. 397, 414. Additionally, it does not excuse the Policy's substantial overbreadth. Dist. Ct. Op. at 11. Therefore, the Fourteenth Circuit's justification is not sufficient, and thus, the Policy is still substantially overbroad.

c. The *Tinker* standard should not be applied to universities, and even if the standard does apply to universities, the nature in which it is incorporated into the Policy removes the standard of its fundamental elements, therefore, the Policy's reliance upon *Tinker* is improper, and thus, the Policy is unconstitutionally vague and substantially broad.

The University should not rely upon *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* as alleged support for the Policy's language because the free speech standard articulated in *Tinker* is intended for primary and secondary school settings, not university settings. *See*, 393 U.S. 503, 508, 513 (1969). Furthermore, even if it is applicable to a University setting, the Policy's reformulation of the standard eliminates its purpose of averting school disruption. *See*, *Id.*

i. The *Tinker* standard is incompatible with a university setting because it is rooted in principles crafted for primary and secondary students, not university students, thus, the Policy's reliance upon it is improper.

The logic in *Tinker* does not properly translate to a university environment, therefore, it is erroneous for the Policy to rely upon it in defense of its constitutionality. *See*, 393 U.S. 503, 513-514. In *Tinker*, the Court considered whether an elementary school policy that forbid its students to protest the Vietnam war by wearing armbands violated the First Amendment rights of its students. 393 U.S 502, 504-505 (1969). The Court decided that such a policy is valid if it is rooted in the need to prevent "material" and "substantial" school disruption *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)). It also briefly noted that a policy would be justified in its restrictions if it aimed to prevent "invasion of the rights of others". *Id.* at 513 (*cf. Blackwell v. Issaquena County Board of Education*, 363 F.2D 749 (C.A. 5th Cir. 1966). Following these

declarations, the Court ruled that the actions of the students protesting the Vietnam war did not create a "substantial disruption of or material interference with school activities" or any "disturbances or disorders to the school premises". Thus, it held that the school administrators unconstitutionally forbade the students to express their opinions. *Id.* at 514.

Both the University and the Fourteenth Circuit argue that the *Tinker* standard should be applied to the University setting. Ct. App. Op. at 6, 7. The United States Circuit Courts are in fact split on this question. *See,* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 Tex. J. ON C.L. & C.R. 27, 28 (2008). As the district court noted, however, there are many reasons the logic in *Tinker* does not adequately translate to the university setting. *See,* Dist. Ct. App. at 10-11. *See,* 393 U.S. 503, 513-514.

For instance, the purpose of primary and elementary schools is to "educate children", however, the purpose of collegiate schools is to educate adults. Dist. Ct. Op. at 12 (citing Patrick Miller, *University Regulation of Student Speech: In Search of a Unified Mode of Analysis*, 116 Mich. L. Rev. 1317, 1324 (2018)). When educating children, primary and secondary schools focus on indoctrinating them with the "societal values" needed to be successful. *Id.* at 13 (quoting *McCauley v. University of the Virgin Islands,* 618 F.3d 232, 242-243 (3d. Cir. 2010); citing *Brown v. Bd. Of Edu.* 347 U.S. 483, 493 (1954)). Additionally, primary and secondary schools, unlike universities, have the added legal responsibility of treating its students as if they were their parents. *Id.* at 13 (citing *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 243 (3d. Cir. 2010)). On the other hand, when educating adults, as opposed to children, universities focus on promoting "inquiry", "challenging *a priori* assumptions" and developing an environment that promotes thought, research and invention. *Id.* at 13 (quoting *McCauley v. University of the Virgin Islands*,

618 F.3d 232, 243 (3d. Cir. 2010)). For these reasons, especially the fact that universities are not required to act "in loco parentis", *Tinker*'s logic for relaxing primary and secondary students' right to free speech does not translate to universities. *Id.* at 13 (quoting *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 242-243 (3d. Cir. 2010); citing *Brown v. Bd. Of Edu.* 347 U.S. 483, 493 (1954)).

Furthermore, even if *Tinker* did apply to college environments, it would not be proper to apply it when considering Ms. Vega's speech at the ASFA event on Sept 5, 2017. Dist. Court Op. at 13-14. *Tinker* concerned relaxing student expression for the sake of eliminating disruption to the school, however, Ms. Vega's speech did not occur during class or even a "university–sponsored function". *Id.* Therefore, *Tinker*'s justification for reducing student speech in the aim of preventing disruption to the learning environment is not relevant to Ms. Vega's speech. *Id.* Thus, the University's reliance upon it to justify the language of the Policy is improper. *Id.*

ii. The Policy applies the *Tinker* standard in a manner that removes the purpose of protecting schools from disruption, therefore, it strips it of its fundamental meaning, and thus, the University's reliance upon it is improper.

The University's reliance upon *Tinker* in defense of the policy's language is inappropriate because not only does the Policy's language substitute "infringes" for "invades", but it it also removes any mention of school disruption, thus, removing it of any true qualities of the *Tinker* standard. Dist. Ct. Op. at 14-16 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508, 513 (1969); quoting Jt. Stip. App. A.).

As the district court noted, "infringes" is a much less demanding requirement than "invades" because "invades" has a more severe meaning. Dist. Ct. Op. at 14-16. Therefore, by using the term "infringes" instead of the term "invades", the Policy's reach becomes much more broad than the *Tinker* standard. *Id.* Also, the language of the Policy lacks any reference to school disruption,

therefore, it removes the guiding crux of the standard, thus, making it vague and overbroad. Dist. Ct. Op. at 14-16. The Fourteenth Circuit attempts to counter this notion by relying upon *Wynar v. Douglas Cty. Sch. Dist.* and *Harper v. Poway Unified Sch. Dist.* to support its belief that it is acceptable to regulate the free speech rights of students for "conduct that 'invades' or 'collides with" the rights of the others is". Ct. App. Op. at 8-9, fn. 7 (citing 728 F.3d 1062, 1064-65 (9th Cir. 2013); 445 F.3d 1166, 1177 (9th Cir. 2006), cert. granted, judgment vacated sub. nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007)). As the district court noted, however, both *Wynar* and *Harper* were the first cases in a half century to apply the portion of the *Tinker* standard that pertains to the "invasion of the rights of others". Furthermore, *Wynar* and *Harper* applied them in a particular manner that focused on prohibiting disruption to the educational atmosphere or educational processes of the school, thus, properly applying the *Tinker* standard. Ct. App. Op. at 8-9 (quoting 393 U.S. 503, 508, 513 (1969)). The University removed the language in the policy that focused on disruption of the school, therefore, it removed the fundamental element of the *Tinker* standard and as a result *Wynar* and *Harper* are inapplicable to the facts at hand.

All in all, by exchanging "infringes" for "invades" and removing any mention of school disruption, the Policy becomes nothing but a vague and overbroad standard that is unconstitutional. As a result, the University cannot claim that the Policy's language passes the demanding review of strict scrutiny. The University claims that its interest in protecting the free speech rights of others to receive information is a compelling interest, but as discussed above, this purpose, while praiseworthy, does not provide the University with a compelling enough reason to broadly restrict University students' rights to exercise their constitutional right to freedom of speech. Dist. Ct. Op. at16. Furthermore, the Policy's problematic language, as discussed in length above, ultimately

creates an "abstract" standard, thus, it is not narrowly tailored to the University's claimed purpose. *Id.* at 14-16. For these reasons, this Court should grant Ms. Vega's facial challenge and hold that the Policy is substantially overbroad and unconstitutionally vague.

2. The Policy, even if deemed to be constitutional on its face, as applied to Ms. Vega, is unconstitutional because it unlawfully violated Ms. Vega's right to freedom of speech protected by the First Amendment.

The Policy in question was mandated for the purpose of protecting the freedom of speech of students and guest speakers invited to the University. Jt. Stip. App. A. However, the University has failed to prove how Ms. Vega's conduct materially differentiated from the presence of other noises and distractions located throughout the Quad at the time of Mr. Drake's speech.

Public venues located within or adjacent to college campuses, such as sidewalks cannot be "declared off limits for expressive activity" by members of the public. *Grayned v. Rockford*, 408 U.S. 104, 118 (1972) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)). But in each case, expressive activity may be prohibited if it materially disrupts classwork or involves substantial disorder or invasion of the rights of others. *Id.* Institutions of learning are allowed to "[exercise] editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 273 (1986). Genuine educational concerns may relate to compliance with an association's code of ethics, and therefore does not violate a student's First Amendment Rights if their speech is deemed to be unprofessional. *Keefe v. Adams*, 840 F.3d 523, 531-33 (8th Cir. 2016). Similarly, an institution of learning acts "within its permissible authority in imposing sanctions" when responding to a student's "offensively lewd and indecent speech." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

a. The Policy is unconstitutional as applied to Ms. Vega, because the University failed to show that Ms. Vega's speech was considered to be offensive, indecent, lewd, or racially discriminatory.

The University argues that Ms. Vega's speech was one that caused disruption and materially infringed upon the rights of Mr. Drake and the listeners of the AFSA. Cir. Ct. Op. at 10. The facts of this case are distinguished from the multiple cases that the Fourteenth Circuit cited in their opinion. *See,* Cir. Ct. Op. at 10-12. The facts in *Grayned*, contend that the issue was deciding whether a university had overstepped its limitations in regard to an anti-noise ordinance, which prevented members of a student organization from peacefully protesting on the periphery of the campus via sidewalk. *Grayned v. Rockford*, 408 U.S. 104, 106 (1972).

Similarly, the case of *Barker v. Hardway*, focuses on the issue whether petitioner's conduct warranted sanctions from the university based on their peaceful, yet lewd and offensive actions. *Barker v. Hardway*, 283 F. Supp. 228, 239 (1968). The facts in *Barker* state that the university students' First Amendments Rights were not unconstitutionally restrained, due to the students' actions of preventing the defendants right of observing and enjoying the university football game. *Id.* at 232. The students' conduct in *Barker* amounted to threatening and disruptive conduct that not only consisted of threatening the defendant with phrases such as "we're going to get you," but also actions that prevented the defendants from enjoying the university game, such as holding placards in front of the defendants' faces, obstructing their view and enjoyment of the football game. *Id.*

The Court in *Board of Educ., Island Trees Union Free Dist. No. 26 v. Pico*, focused on whether the school exceeded its bounds by banning certain books that contained offensive, anti-

Semitic, lewd, and overall unsavory content from school libraries. *Board of Educ., Island Trees Union Free Dist. No. 26 v. Pico*, 457 U.S. 853, 857 (1982). The Court in *Pico* ultimately ruled in favor of the respondents stating that the students' First Amendment rights were not infringed upon by the school, since the school had the authority to "properly determine . . . that a particular book, a particular course, or even a particular area of knowledge is not educationally suitable for inclusion within the body of knowledge which the school seeks to impart." *Id.* at 920. The content of these books were seen as offensively lewd and racists and ultimately not deemed worthy of education material, some lines of the books included but are not limited to references to fellatio, anti-Semitic insults, racial insults against African Americans, and provocative interactions of penetration. *Id.* at 900-02. This is similar to the Eighth Circuits ruling in *S.J.W. ex rel v. Lee Summit R-7 Sch. Dist.*, in where the school did not infringe upon the First Amendment rights of two students who posted a racist and sexually explicit comments on a website; the website's creation was centered to focus on other students and the speech was determined to be "reasonably foreseeable" to reach the school's community. *S.J.W. ex rel v. Lee Summit R-7 Sch. Dist.* 696 F.3d 771, 773-77 (8th Cir. 2012). Similar to the case in *S.J.W. ex rel*, the Fourth Circuit held in the case of *Kowalski v. Berkley Ct. Sch.*, that a student's first amendment rights were not infringed "after [the student] created and posted a webpage, ridiculing a fellow student, based on *Tinker's* substantial and material disruption standard." *Kowalski v. Berkley Cty. Sch.*, 652 F.3d 565, 567-75 (4th Cir. 2011) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

Ms. Vega's comments of protest during Mr. Drake's speech can be differentiated and distinguished from the facts in *Grayned, Pico, Barker, S.J.W. ex rel,* and *Kowalski*. All the cases cited by the Fourteenth Circuit focus on the issues of offensive, lewd, and unsavory actions. *See,*

Ct. App. Op. at 10-12. Ms. Vega's speech was limited to protesting her beliefs in an abstract and polite manner, and her language did not constitute any vulgarity or offensive hate speech. Vega Aff. ¶ 15. Ms. Vega only provided an opposing view in a polite and non-vulgar manner to those passing by the amphitheater during the time of Mr. Drake's speech. Vega Aff. ¶ 16. Ms. Vega's speech is distinguished from the speech made in both *Kowalski* and *S.J.W. ex rel*, because in *Kowalski* and *S.J.W. ex rel*, both cases involved speech that was obviously lewd and inappropriately focused on particular students, which infringed upon the rights of the target students' freedom of speech. *See*, 652 F.3d 565, 567-75 (4th Cir. 2011); 696 F.3d 771, 773-77 (8th Cir. 2012). Ms. Vega was at the student Quad, protesting her beliefs with no explicit targeted audience. Ms. Vega contends that she wanted her voice to be heard and wanted to provide an opposing view for the comments being made by the ASFA and Mr. Drake, but never explicitly states whom her speech was directed towards.

The ASFA event involving Mr. Drake's speech is different from the case of *Hazelwood Sch. Dist.*, because the ASFA event with Mr. Drake was not a school sponsored event. *See*, 484 U.S. 260, 273 (1986). The University did not sponsor, condone, or take a stance on the event or Mr. Drake's speech. Jt. Stip. ¶ 8. Furthermore, Mr. Drake's speech was done in a public area of the campus that could be used by members of the university and the public as a whole. Jt. Stip. ¶ 11, 17. Had the University indicated in some way that they were sponsoring the event, such as "The University of Arivada and the American Students for America present: Mr. Drake," then it could be considered a school-sponsored event. There is no indication of this in the record and no acknowledgement from either the members of the ASFA or the faculty of the University that show that it was considered as such.

Similarly, the case at hand is distinguished from the Court's ruling in *Bethel Sch. Dist. No. 403*, because Ms. Vega's speech is not considered to be offensive, lewd, or indecent speech. *See*, 478 U.S. 675, 685 (1986). Ms. Vega's statements of "Disband ICE," "Keep Families Together," and "Immigrants made this country," do not qualify as explicitly offensive, lewd, or indecent language.

b. The Policy is unconstitutional as applied to Ms. Vega, because the University failed to show that Ms. Vega's protest materially infringed upon Mr. Drake's speech and did not infringe upon Mr. Drake's First Amendment rights.

Ms. Vega's protest did not materially infringe Mr. Drake's ability to display his message towards the members of the AFSA, because she did not prevent him from giving his speech. Mr. Drake admits that even though he found Ms. Vega's protest distracting, it did not stop him from speaking. Drake Aff. ¶ 10-13. Mr. Drake, along with other spectators of the ASFA event, all concede that there was other background noise entering the amphitheater from around the Quad. Most spectators agreed that they could hear the sounds of a near flag football game, and the everyday activities of students passing by. Putnam Aff. ¶ 8; Taylor Aff. ¶ 5; Drake Aff. ¶ 10. Ms. Taylor goes as far as to admit that the combined noise from all areas of the Quad made hearing Mr. Drake incredibly difficult, but this did not prevent her from continuing to listen to his words. Drake Aff. ¶ 10. Ms. Taylor even contends that after Ms. Vega was silenced by a campus officer, there was still an uproar of noise from other students who had assembled at the Quad and were not participating in the ASFA event. Taylor Aff. ¶ 7. None of these other students received citations for disrupting Mr. Drake's speech, even though multiple spectators of the speech found noise from the flag football game, and students playing frisbee and listening to music, distracting. Jt. Stip. ¶

18. Officer Thomas admitted that he only issued a citation to Ms. Vega because he was specifically responding to that instance of distraction. Thomas Aff. App. A. He admits that he acknowledged the other sources of noise and distraction but willingly did not address them. Thomas Aff. ¶ 12.

Ms. Vega's right to freedom of speech was ultimately infringed by the University and the Policy as applied to Ms. Vega is unconstitutional due to the University's treatment of Ms. Vega by issuing her the citation on September 5, 2017. Ms. Vega was located outside of the Amphitheatre, in an area that is undiscernible between any other are of the Quad. Ms. Vega's protest on September 5, 2017 greatly differs from her first protest on August 31, 2017, due to the fact that Ms. Vega was not in a position to materially interfere and "shout down" the speaker. Her first protest, where she was issued her first citation, consisted of standing on chairs in the middle of the auditorium, with the goal and mindset of preventing the speaker to enjoy his right to free speech. Vega Aff. ¶ 5. This greatly differs from the protest at the Quad, because Ms. Vega was not in the middle of the amphitheater nor was she standing on the benches that formed the seating for the speech. Ms. Vega had a right to stand on the periphery of the amphitheater and voice her opinion as any other student at the University. By standing on the periphery of the amphitheater, Ms. Vega was nothing more than a mere part of the collective noise and distractions emanating from the campus quad as a whole. The only thing in question is Ms. Vega's positioning outside the periphery of the amphitheater. Ms. Vega, like Mr. Drake and the members of the ASFA, is an American citizen and a student at the University. She has the right to be anywhere on campus protesting her view point, so long as she does not materially infringe upon the rights of others. Ms. Vega's protest was just a small part in the overall symphony that was the raucous distractions and merrymaking of the

Quad on September 5, 2017. Thus, the Policy, as applied to Ms. Vega on that day is unconstitutional.

CONCLUSION

For these reasons, the Policy on its face and as applied to Ms. Vega is unconstitutional. Thus, the Court should reverse the Fourteenth Circuit's decision and remand the case to it with instructions to enter summary judgment in favor of Ms. Vega.

APPENDIX

First Amendment to the Constitution of the United States

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.

Section One of the Fourteenth Amendment to the Constitution of the United States

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.

Av. Gen. Stat. § 118-200 – "Free Speech in Education Act of 2017"

Section 1:

The legislature hereby finds and declares that episodes of shouting down invited speakers on college and university campuses are a nation-wide phenomena that are becoming increasingly frequent. It is critical to ensure that the free speech rights of all persons lawfully present on college and university campuses in our state are fully protected.

Section 2:

The Regents of all state institutions of higher education in the Sate of Arivada shall develop and adopt policies designed to safeguard the freedom of expression on campus for all members of the campus community and all others lawfully present on college and university campuses in this state.

Section 3:

All public colleges and universities in Arivada are to promulgate a policy to protect free speech on campus within three months of the effective date of this statute.

University of Arivada Campus Free Speech Policy

Scope

This Policy applies to all University of Arivada students.

Purpose

This Policy is adopted to fulfill the University's obligations under the Arivada "Free Speech in Education Act of 2017."

Policy Statement

The Board of Regents of the University of Arivada hereby reaffirms the University's commitment to the principle of freedom of expression.

Free Expression Standard

1. Expressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity shall not be permitted on campus and shall be subject to sanction.

Disciplinary Procedures

1. This Policy includes a three strike range of disciplinary sanctions for a University of Arivada student who infringes upon free expression of others on campus.
2. Any student who violates this Policy shall be subject to a citation by University Campus Security.

3. Campus Security shall transmit citations for violation for this Policy to the University's Dean of Students for review and investigation. The Dean of Students shall determine whether a student has materially and substantially infringed upon the rights of others to engage in or listen to expressive activity on the basis of the Dean's review and investigation.
4. Any student who receives a first citation pursuant to the Policy is entitled to an informal disciplinary hearing before the Dean of Students.
5. If the Dean of Students determines that the citation is appropriate, the Dean shall issue a warning to the student to be known as a first strike.
6. The review and investigation procedures described above, in three and four, apply citations for second and third citations in violation the Policy.
7. A student who receives a second or third citation is entitled to a formal disciplinary hearing before the School Hearing Board.
8. The School Hearing Board shall determine whether the behavior constitutes a violation of the Policy and therefore merits a second or third strike.
9. A formal disciplinary hearing includes written notice of the charges, right to counsel, right to review the evidence in support of the charges, right to confront witnesses, right to present a defense, right to call witnesses, a decision by an impartial arbiter, and the right of appeal.
10. The sanction for a second strike shall be suspension of the remainder of the semester.
11. The sanction for a third strike shall be expulsion from the University.
12. Any strike issued under this Policy shall be placed on the student's record.

Notice

The University of Arivada shall provide notice of this Policy to all enrolled students.

BRIEF CERTIFICATE

1. The work product contained in all of the copies of Team 4's brief is the sole work product of Team 4 members.
2. Team 4 has fully complied with the honor code of our institution.
3. Team 4 has fully complied with the "Rules of Competition" for the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.