Team 16

No. 18-1234

IN THE
SUPREME COURT OF THE UNITED STATES

VALENTINA MARIA VEGA,

Petitioner,

v.

JONATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fourteenth Circuit

BRIEF FOR PETITIONER

Team 16

Counsel for Petitioner

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?

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STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2018. *Jones and Regents of the Univ. of Arivada v. Vega*, No. 18-1757, slip op. at 1 (14th Cir. Nov. 1, 2018). Petitioner timely filed a petition for writ of certiorari, which this Court granted. R. at 54. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Valentina Maria Vega ("Vega") filed a complaint in the United States District Court for the District of Arivada, seeking a declaration that Jonathan Jones and the Regents of the University of Arivada (collectively, the "University") violated Ms. Vega's right to freedom of speech under the First Amendment to the United States Constitution, as incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment. R. at 1. Ms. Vega and the University filed cross motions for summary judgment on December 15, 2017. R. at 1. The District Court granted Ms. Vega's motion for summary judgment and denied the University's motion for summary judgment on January 17, 2018. R. at 17–18. The District Court concluded that the University's actions violated the First Amendment and held that the underlying policy at issue in the case, the University of Arivada Campus Free Speech Policy, was unconstitutional both on its face and as applied to Ms. Vega. R. at 17.

The University timely submitted an appeal to the United States Court of Appeals for the Fourteenth Circuit, seeking that the Fourteenth Circuit reverse and remand the case back to the District Court with instructions to enter summary judgment in favor of the University. R. at 42–43. The Fourteenth Circuit heard oral arguments on this matter on June 20, 2018. R. at 42. On November 1, 2018, the Fourteenth Circuit remanded the case back to the District Court with

instructions to enter summary judgment in favor of the University. R. at 43, 53. Ms. Vega timely filed a petition for writ of certiorari to the Fourteenth Circuit, which this Court granted. R. at 54.

STATEMENT OF THE FACTS

I. The Campus Free Speech Policy

The Arivada State Legislature adopted the Free Speech in Education Act of 2017 (the "Act") on June 1, 2017, which required state colleges and universities to implement policies designed to protect freedom of expression on campus. R. at 19. The legislature passed the Act in response to what it saw as a nation-wide trend of students "shouting down invited speakers," and tasked public institutions of higher learning with protecting the free speech rights of all persons lawfully present on campus. R. at 19. To fulfill its obligations under the Act, the University promulgated the Campus Free Speech Policy (the "Policy") on August 1, 2017. The substantive portion of the Policy mandated a free expression standard, under which any "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." R. at 23.

University Campus Security enforces the terms of the Policy, by issuing citations to students believed to be in violation of the Policy. R. at 23. Citations are then transmitted to the University's Dean of Students for review and investigation to determine whether the student materially and substantially infringed upon the rights of others to engage in or listen to expressive activity. R. at 23. The policy establishes a three-strike disciplinary procedure for violations, all of which "shall be placed on the student's record." R. at 23. The first citation entitles a student to an informal disciplinary hearing before the Dean of Students, who then issues the student a "warning." R. at 23. Second and third citations result in a formal disciplinary hearing before the School Hearing Board (the "Board"), where they are given procedural due process, including right

to counsel, right to confront witnesses, etc. R. at 23. If the Board concludes the student violated the policy, the student is given a semester-long suspension (second strike) or expulsion (third strike). R. at 23. Each academic year, students are required, as a pre-condition of attending classes, to sign a Policy Statement agreeing to the terms of the Campus Free Speech Policy. R. at 20.

II. Valentina Maria Vega's First Protest

Ms. Vega is a citizen of Arivada, a first generation Hondaraguan-American, and a student at the University, who plans to attend law school after graduation. R. at 37. On August 27, 2017, she signed the Policy Statement and began her sophomore year at the University. R. at 20, 37. Ms. Vega is also the President of the University's chapter of Keep Families Together ("KFT"), a national student organization that advocates for immigrant rights both on- and off-campus. R. at 37. KFT members, including Ms. Vega, have previously engaged in peaceful protests and rallies, which they believe are essential to promoting awareness of immigration issues. R. at 37.

On August 31, 2017, representatives of Students for Defensible Borders ("SDB") hosted an anti-immigration rally in an indoor auditorium on the University campus. R. at 37. Several KFT members, including Ms. Vega, attended the rally to protest the event and present a pro-immigrant perspective to attendees. R. at 37. When the SDB event began, Ms. Vega and other KFT members stood on their chairs and chanted pro-immigration slogans intending to "shout down the speaker." R. at 37. Shortly thereafter, Campus Security Officer Michael Thomas ("Officer Thomas") responded to a call from a member of SDB who reported that KFT students were disrupting the event. R. at 34. Upon arriving, Officer Thomas determined that the protests violated the Campus Free Speech Policy and issued citations to Ms. Vega and other KFT members. R. at 34. Pursuant to the policy's disciplinary procedure, Dean of Students Louise Winters ("Dean Winters") investigated the citations and provided each student with an informal disciplinary hearing. R. at

41. Dean Winters then concluded that Ms. Vega and other KFT members violated the Policy and issued them warnings. R. at 41.

III. Valentina Maria Vega's Second Protest

A few weeks later, another student organization, American Students for America ("ASFA"), invited Samuel Payne Drake ("Drake") to deliver a speech at an on-campus amphitheater about immigration in America. R. at 28. Mr. Drake is the Executive Director of Stop Immigration Now ("SIN"), a lobbying group that advocates anti-immigration and anti-immigrant policies. R. at 24. The amphitheater is located at the north center of the University's quadrangle green space (the "Quad") in the middle of campus. R. at 21. The Quad is used by students to study, talk, play and listen to music, and play sports like flag football and frisbee. R. at 21. There is a paved walkway about ten feet behind the benches, however after the last row there is no distinction between the amphitheater and the Quad. R. at 21. The University allows students to reserve the amphitheater for exclusive use for a short period of time. R. at 21. ASFA student president Theodore Hollingsworth Putnam ("Putnam") completed a reservation application for the amphitheater, which the University granted. R. at 28.

Upon hearing about the ASFA's event, Ms. Vega informed KFT members Ari Haddad ("Haddad") and Teresa Smith ("Smith"), of her plan to protest the speech. R. at 27. Mr. Haddad and Ms. Smith both received warnings with Ms. Vega for their participation in KFT's previous protest at the SDB rally. R. at 27, 31. Unsure of what conduct was prohibited by the Campus Free Speech Policy, Mr. Haddad and Ms. Smith chose not to protest the ASFA event out of fear of receiving a "second strike." R. at 27, 31. Ms. Vega also feared receiving further punishment, but she believed that she could nonetheless tailor her conduct to adhere to the Policy. R. at 38.

On September 5, 2017, approximately 35 people gathered in the Amphitheater for ASFA's anti-immigration event which featured a speech by Mr. Drake. R. at 21. Other events took place in the Quad simultaneously, including an intramural football game attended by a crowd of spectators, students playing music from guitars and portable speakers, and others talking, studying, eating lunch, and walking along the Quad to the south and west of the amphitheater. R. at 21. Mr. Drake delivered his speech on the amphitheater platform, which included several anti-immigrant and anti-immigration remarks. R. at 24. As part of her protest, Ms. Vega dressed in a Statue of Liberty costume and stood on the Quad's walkway located about 10 feet behind the last row of amphitheater benches. R. at 38. At the beginning of the event, she began to chant pro-immigration slogans. R. at 38. Aware that she could not attempt to shout down speakers during the event, Ms. Vega chose to stand on the public walkway which is "frequented by many other students and members of the University community," in attempts to make KFT's perspective known to the public. R. at 38.

After a few minutes, a member of ASFA notified campus security to report Ms. Vega's conduct as violating the Campus Free Speech Policy. R. at 28. Officer Thomas arrived at the amphitheater a few minutes later pursuant to that report. R. at 35. Officer Thomas noticed Ms. Vega on the periphery of the amphitheater marching and chanting and recognized her from the SDB rally. R. at 36. Despite the fact that Mr. Drake was able to speak and continued to do so, and that numerous other student events contributed to the overall noise level in the Quad, Officer Thomas nevertheless concluded that Ms. Vega was violating the terms of the Policy, and thereafter delivered a second citation to Ms. Vega. R. at 35–36.

On September 12, 2017, a formal disciplinary hearing was initiated to determine whether Ms. Vega had violated the Policy. R. at 41. The Hearing Board upheld the citation, finding Ms.

Vega in violation of the Policy, and pursuant to the Policy, suspended her for the remainder of the semester. R. at 39, 41. On October 1, 2017, following an unsuccessful attempt to appeal, Ms. Vega filed the present action against the University alleging a violation of her First Amendment right to freedom of speech and seeking a reversal of her suspension and removal of the suspension from her University student record.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision that the University's actions against Ms. Vega did not violate her rights under the First Amendment. This Court should hold that the University's Policy is unconstitutionally vague and substantially overbroad, and even if it is not, that the Policy was unconstitutional as applied to Ms. Vega. Accordingly, this Court should reverse and remand this case back to the District Court in favor of Ms. Vega.

The First Amendment protects the rights of speech and expression from restrictions imposed by the government. College and university students, as full citizens of the United States, thereby deserve the same level of protections on campus as they would receive as members of the general public. While colleges and universities must be allowed to effectuate their mission of educating a new generation of adults, in so doing they must not put in place restrictions that would offend the Constitution. By putting in place vague and substantially overbroad regulations directed at fostering a particular "code" of speech, colleges and universities chill expression and endanger the very rights such policies were designed to protect.

Under both the doctrines of vagueness and substantial overbreadth, the language of the University's Policy violates the First Amendment on its face. The Policy is vague because it fails to give proper notice to students of what conduct is and is not tolerated, it opens the door to arbitrary and capricious enforcement, and results in a decline in speech and expression on campus.

The Policy is also substantially overbroad because it sweeps within it even the most important considerations in First Amendment jurisprudence, including political speech and association.

Ms. Vega's protest is a protected expression under the First Amendment. Even if the Policy is constitutional on its face, it is unconstitutional as it was applied to Ms. Vega. The test established by *Tinker* to determine the constitutionality of student speech regulations does not apply to the colleges and universities, as the test was developed according to unique conditions that exist in elementary and secondary schools that are not relevant in university settings. Ms. Vega's solo protest of Mr. Drake's speech does not rise to the level of a substantial disturbance due to of the significant background noise in the Quad and her location outside of the venue. Nor did she interfere in an academic setting in the Quad. Ms. Vega's expression does not fall into a constitutionally unprotected speech category, and her speech is therefore protected under the First Amendment.

ARGUMENT

I. College and University Students Require Heightened Protections under the First Amendment on a Categorical Basis.

In 1971, a constitutional majority of the United States ratified the 26th Amendment, which provided citizens of the United States "who are eighteen years of age or older" the unabridged right to vote. *See* U.S. Const. amend. XXVI. Less than one year later, the United States Supreme Court issued its first opinion directly addressing college students' First Amendment rights after the ratification of the 26th Amendment. *See Healy v. James*, 408 U.S. 169 (1972). In *Healy*, the Supreme Court flatly rejected the argument that "First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180. Instead, the college classroom, as well as its "surrounding environs" was *peculiarly* central to the First

Amendment's "marketplace of ideas," and therefore deserved greater protections. *Id.* at 180–81 (citing *Keyishian v. Bd. Of Regents*, 385 U.S. 589, 603 (1967)). By stating that the First Amendment should apply with equal force on college campuses as in the general public, this Court must address Petitioner's arguments in light of that guiding principle.

In his concurrence to *Healy*, Justice Douglas noted the Court's understanding that colleges and universities did not stand *in loco parentis* to its students. *See Healy*, 408 U.S. at 196 (Douglas, J., concurring). Addressing this distinction in 26th Amendment terms, Justice Douglas provided that students themselves are "adults *who are members* of the college or university community," and not simply students that happen to be adults. *Id.* at 197 (emphasis added). Because the First Amendment "authorize[s] advocacy, group activities, and espousal of change," college and university students must be entitled to "credentials in their search for truth." *Id.* Primarily concerned with friction between students and teachers, Justice Douglas found these "credentials" to require breathing room, so that intergenerational splits would not preclude the creation of an "integrated, adult society." *Id.* Notably, *Healy* was decided in 1972, a time where mass protests and severe unrest overtook the nation's universities. Yet, it was at exactly this point in American history where the Court illustrated a firm commitment to providing enhanced First Amendment rights to college students, virtually all of whom being over the age of eighteen. Indeed, as Justice Douglas provided, "Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion." *Id.*

A year after *Healy*, the Supreme Court reaffirmed the principle that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *See Papish v. Bd. Of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973). In *Papish*, the Court held that a

university could not restrict student speech and expression in order to fix standards of decency considered "appropriate" by the administration. *Id.* ("We think *Healy* makes it clear that the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

More recently, the Supreme Court routinely endorses the principle that the college and university campus remains one of the "vital centers of the Nation's intellectual life," which thrives on "free speech and creative inquiry." *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995). Accordingly, the Court has always applied strict scrutiny in determining whether a college or university's policies impermissibly restrict student speech and expression. Consequently, in each case, the Court held that the college or university action failed to meet that burden. *See, e.g.*, *Bd. Of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235–36 (2000); *Rosenberger*, 515 U.S. at 845; *Widmar v. Vincent*, 454 U.S. 263, 277 (1981); *Papish*, 410 U.S. at 671; *Healy*, 408 U.S. at 194. This unanimous approach to protecting First Amendment rights on college campuses demonstrates that students are adult citizens first, and college students second. University policies are therefore inherently suspect when they pose the threat of chilling speech and expression, a danger which "is especially real in the University setting." *Rosenberger*, 515 U.S. at 835–36 (citing *Healy*, 408 U.S. at 180–81). Scholarship, if it is to flourish, stagnates in "an atmosphere of suspicion and distrust." *Keyishian*, 385 U.S. at 603.

These principles do not prevent a college or university from imposing reasonable regulations compatible with their mission to educate students. *Widmar*, 454 U.S. at 267 n.5. However, that ability must be read in conjunction with the notion that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian*,

385 U.S. at 603 (internal citation and quotations omitted). The 26th Amendment granted 18-year-olds the unabridged right to vote, and with that, the rights of full citizenship. The Court must therefore balance university policies against students' rights as full citizens, and in so doing, it must vigilantly protect their First Amendment rights to speak, express, and learn from one another, without unnecessary and arbitrary government intervention.

II. The University Policy is Both Vague and Substantially Overbroad and Is Therefore Facially Unconstitutional under the First Amendment.

The college and university are "traditional sphere[s] of free expression so fundamental to the functioning of our society" that a state's ability to control speech within its campuses are "restricted by the vagueness and overbreadth doctrines of the First Amendment." *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (citing *Keyishian*, 385 U.S. at 603, 605–06). Central to these protections is the belief that some policies are inherently evil in their potential application. *See Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion"). Some laws therefore "readily lend[] [themselves] to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," which "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Id.* at 97–98. Where government regulation restricts First Amendment rights, there are indeed "special reasons for observing the rule that it is the statute […] which prescribes the limits of permissible conduct and warns against transgression." *Id.* at 98.

The Campus Free Speech Policy is unconstitutional on its face because the actual language of the Policy has, does, and will continue to chill speech and expression at the University. Instead of providing clear direction, the Policy itself, limited to only one sentence, provides, "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." R. at 23. This restriction on speech is unduly vague because it fails to include the requisite terms that are necessary to "enable those within their reach to correctly apply them," which leaves the line between what is lawful and unlawful up to conjecture. *See Connally v. General Const. Co.*, 269 U.S. 385, 391, 393 (1926). The Policy is also facially overbroad, because a "substantial number of its applications are unconstitutional, [as is] judged in relation to the [its] plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 473 (2010). As provided further below, the Court should find that the Policy is unconstitutional on its face because it is both vague and substantially overbroad.

A. The Policy is Impermissibly Vague Under the First Amendment.

In our constitutional system, it is a basic principle of due process that a law, regulation, or policy is "void for vagueness if its prohibitions are clearly not defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In establishing whether such actions are unconstitutional on vagueness grounds, the Supreme Court generally provides three separate and distinct rationales for invalidating impermissible regulations. *Id.* First, vague laws do not provide fair warning; instead, laws must give individuals of "ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Id.* Second, vague laws fail to provide "explicit standards for those who apply them." *Id.* at 108–09. When laws delegate basic policy matters, e.g. defining terms on an ad hoc and subjective basis, the result is "arbitrary and discriminatory" application. *Id.* Third, and perhaps most crucial in the First Amendment context, vague laws tend to inhibit the exercise of the very freedom that the statute in question was ostensibly designed to protect. *Id.* at 109 ("Uncertain meanings inevitably lead citizens to steer far

wider of the unlawful zone […] than if the boundaries of the forbidden areas were clearly marked.") (citing *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)) (internal quotations omitted).

The Supreme Court's decision in *Grayned* provides the proper analysis in determining whether a government policy is impermissibly vague under the First Amendment. In *Grayned*, the Court rejected a facial vagueness challenge to a local ordinance, which prohibited certain expressive activities in close proximity to public elementary and secondary schools. *Id.* at 107–08 (the ordinance at issue forbade "deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities."). The Court found that the ordinance was not vague because it: (1) restricted activity at fixed times (i.e. when school was in session) and in fixed places (i.e. adjacent to the school); (2) prohibited only actual or imminent interference with the peace or good order of the school; and (3) could be enforced easily based on the impact on normal school activities. *Id.* at 110–12 (internal quotations omitted). Given the "particular context" of the ordinance, the Court held that it provided fair notice by requiring that (1) "the noise or diversion be actually incompatible with normal school activity;" (2) "there be a demonstrated causality between the disruption that occurs and the noise or diversion;" and (3) "the acts be willfully done." *Id.* at 113–14 (internal quotations omitted).

The Policy at issue in this case does not meet the standards imposed by the Court in *Grayned*, but instead fails to provide fair warning to the public, contains no clear and concise terms relating to its enforcement, and impinges on the same First Amendment rights the Policy was designed to protect. As a threshold matter, it bears repeating that under existing Supreme Court precedent, First Amendment protections should not apply with less force on college campuses than in the community at large. *Healy*, 408 U.S. at 180. Under that guiding principle, the Policy fails to provide fair warning to those that fall under its reach, i.e. University of Arivada students. In this

case, there is no dispute that several students could not reasonably determine what type of speech was permitted by the Policy. *See, e.g.*, R. at 27, 31, 39. Similarly, as the District Court provided, the Policy (1) "does not define the meaning of 'materially or substantially infringe[] upon the rights of others[];" (2) "fails to describe just what conduct it prohibits;" and (3) "offers no illustrations to guide students, campus security officers, deans, or other administrators in determining what students may and may not do." R. at 8. Unlike *Grayned*, the Policy provides no fixed term or location, but more importantly, it includes no language regarding whether the given expressive conduct must be disruptive to school *activities*, thus making the determination of what conduct should or should not be restricted impossible.

Because the Policy fails to "provide clear notice of what it prohibits," it has and does give rise to "arbitrary and overzealous enforcement." R. at 8. Most important to this inquiry is the fact that Ms. Vega did not stop Mr. Drake from speaking, nor did she prevent his audience from listening to his speech. R. at 36. When Officer Thomas arrived at the scene, he was reporting to "a specific call about a specific disturbance." R. at 35. Because he was responding to a specific call, he did not consider addressing other sources of noise distraction. R. at 35; *see also* R. at 17 ("Other events were taking place on the Quad at the same time Mr. Drake was making his speech" including an intramural football game with students cheering, as well as students playing or listening to music from guitars or speakers). Effectively, the enforcement scheme at the center of the Policy allows for a heckler's veto of sorts; by making a call to security personnel, the ASFA President was able to enforce his own will. *See Hill v. Colorado*, 530 U.S. 703, 734 (2000) (regulations which allow a single, private actor to unilaterally silence a speaker through government action are unconstitutional under the First Amendment); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965). Without enhanced specificity in the Policy's prohibited conduct, University of

Arivada students' First Amendment rights are subject to the approval of both fellow students and their own administration. The Policy is therefore facially unconstitutional, because it places an impermissible restraint on free speech and expression.

B. The Policy is Substantially Overbroad Under the First Amendment.

Even if the Court were to construe the Policy as a "clear and precise enactment," it should nevertheless find that it is overbroad because it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned*, 408 U.S. at 114. An overbroad law, in essence, deters privileged and protected activity, e.g. free speech and expression, and the Court should strike down the Policy because it is "apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984). Where there is a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression," the subject statute, regulation, or policy is facially unconstitutional. *Vincent*, 466 U.S. at 799 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

In determining whether a government policy is substantially overbroad, the Court must weigh the likelihood that the policy's very existence will inhibit free expression. *Id.* at 799. However, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id.* at 800. Instead, there must be a "realistic danger" that the policy itself will "significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* at 801; *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). In the First Amendment context, the doctrine of overbreadth is generally afforded a broader application. *Broadrick*, 413 U.S. at 612. Because the

Policy in this case specifically addresses expressive conduct, the concern for a "chilling" effect on speech should strengthen the application of the overbreadth doctrine. *Id.*

The Third Circuit offers a persuasive analysis and standard for First Amendment rights in the University setting by balancing an enhanced view of college students' First Amendment rights with a college or university's ability to reasonably effectuate its mission of young adults, and the Court should apply this standard when evaluating the University of Arivada's Policy. As provided above, college and university students clearly deserve enhanced speech protections compared to those of elementary and secondary education. *See supra* Part I. Under Third Circuit precedent, there are therefore two circumstances in which student speech may be regulated: (1) when student speech may reasonably be mistaken for the university's speech, in which the school has a heightened ability to regulate; and (2) when student speech is either "sever[e] or pervasive[]." *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213–14 (3d Cir. 2001); *DeJohn v. Temple University*, 537 F.3d 301, 317 (3d Cir. 2008).

In *DeJohn*, the Third Circuit held that for student speech to be "severe and pervasive," it must "objectively and subjectively create[] a hostile environment or substantially interfere[] with an individual's work." *DeJohn*, 537 F.3d at 317–18. The framework developed in the Third Circuit thus strikes the proper balance, while still reflecting the constitutional principle that speech itself, and especially political speech, should take priority. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (holding that speech may only be prohibited if it is "directed to inciting or producing imminent lawless action and likely to incite or produce such action."). By setting these terms, the Court in *Brandenburg* sought to prevent the risk of erroneously punishing legitimate activity in efforts to distinguish passionate advocacy from incitement. The Third Circuit foresaw a similar risk in allowing colleges and universities to suppress legitimate moral and political speech, without

a showing of severity, pervasiveness, or that which substantially interferes with other students' school work. *DeJohn*, 537 F.3d at 320.

In this case, Ms. Vega was undoubtedly engaged in political speech and expression when she protested Mr. Drake's speech. R. at 38. The record shows that Ms. Vega wore a Statue of Liberty costume and chanted pro-immigration slogans, all for the direct purpose of "providing the opposing view" and "showing support for immigrants and their families." R. at 38. Even more clearly shown is the lack of any evidence that Ms. Vega's conduct was severe, pervasive, or that it substantially interfered with other students' work. For example, Mr. Drake was not prevented from giving his remarks while on campus. R. at 36. While Ms. Vega's remarks may have technically been "distracting," the only individual not directly involved in organizing Mr. Drake's speech provided that the noise did not arise to the level of substantial interference. R. at 32 ("All of the noises combined made it difficult to hear Mr. Drake speak," and "[e]ven though the student stopped chanting during Mr. Drake's speech, there was still a lot of noise from the football game and the other students gathered on the quad."). While Mr. Putnam provided that he found the student's chants "extremely distracting" the political motivation behind notifying campus security (which itself resulted in the Policy being enforced against Ms. Vega) is especially troubling. R. at 28–29. Notably, there is no evidence whatsoever that Ms. Vega's actions impacted any students' school work particularly.

This case demonstrates the dangers inherent in a policy that allows students to utilize government agents (in this case, campus security) to silence speech that is not itself materially disruptive to other students' education. *See Hill v. Colorado,* 530 U.S. at 734. By arming other students with the power to use the force of the state to restrict other students' views, the Policy itself goes too far. And by failing to provide those tasked with enforcing the Policy with guidelines

on what is and is not permitted, the University fails to demonstrate that such a policy can be used in a manner that does not impermissibly violate the First Amendment.

Even if the University were to construe the Policy as restricting only severe or pervasive activities, as the Fourteenth Circuit provided (*see* R. at 51), the penalty placed on Ms. Vega "is itself evidence of the danger in putting faith in government representations of prosecutorial restraint." *Stevens*, 559 U.S. at 480. The University suspended Ms. Vega from school for an entire semester, and she now faces a genuine risk of expulsion if she were to ever invoke her First Amendment rights in a similar manner in the future. R. at 39. As was true in *Stevens*, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 460. The University violated, and continues to violate the First Amendment by enforcing this Policy, and the Court should find that the Policy is facially unconstitutional on overbreadth grounds.

III. The University Policy is Unconstitutional As Applied to Ms. Vega Because Her Protest was Protected Expression Under the First Amendment.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The First Amendment therefore applies to students in public schools, and school officials must show a constitutionally basis for limiting student speech by regulation. *Id.* at 511. In *Tinker*, this Court established a test for determining the constitutionality of regulations that has become the cornerstone of student speech jurisprudence in the elementary and secondary education systems. In *Tinker*, a group of elementary and secondary students were prohibited by their school district from wearing black armbands in protest of the Vietnam War. *Id.* at 504. This Court overturned the restriction, concluding that the students' expression were protected under the First Amendment.

Id. at 508–09. In so holding, the Court promulgated a new standard for applying First Amendment protections in elementary and secondary education: schools may regulate speech only if it causes a substantial disruption to academic activities. *Id.* at 508–09.

Under *Tinker*, school officials may only restrict student speech if it would substantially disrupt school operations or interfere with the educational rights of others. *Id.* at 509. Subsequently, this Court has recognized exceptions to the *Tinker* test, holding that in some specific circumstances, a showing of a "substantial disruption" is not necessary. *See, e.g.*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that a high school may prohibit students from using lewd, vulgar, or profane language on campus); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that a high school may impose reasonable restrictions on school-sponsored expressive activities if they are reasonably related to legitimate academic concerns). These student speech cases (*Tinker*, *Fraser*, and *Hazelwood*) gave public schools officials the power to regulate student speech due to the peculiar needs and characteristics of elementary and secondary schools and their role in our democratic society.

Ms. Vega's protest of Mr. Drake's speech was determined by the school to be in violation of the University's Campus Free Speech Policy. Even if this Court concludes that the Policy itself was facially constitutional, it was still unconstitutionally applied to Ms. Vega and her actions. Ms. Vega's speech is not subject to *Tinker*, and even if it were, it cannot reasonably be found to have substantially disrupted University activities. Accordingly, Ms. Vega's protest constitutes protected political expression under the First Amendment.

A. The *Tinker* Test Should Not Apply to Colleges and Universities.

The *Tinker* test (and its progeny) arose out of primary and secondary education settings and is an inappropriate standard for college and university environments. As provided above, this Court has consistently affirmed the principle that college students require similar or enhanced protections under the First Amendment as are enjoyed by other adults in the general public. *See Healy*, 408 U.S. at 197 (Douglas, J., concurring) ("Students […] are adults who are members of the college or university community"). While certain speech that would normally not be prohibited for adults may nonetheless be prohibited to elementary and high school students (*see Fraser*, 478 U.S. at 682), that same limitation is unnecessary at the college or university level.

This Court has consistently refrained from applying the *Tinker* standard to universities. *Hazelwood*, 484 U.S. at 273 n.7 (expressly reserving the decision of whether to apply the *Tinker* degree of deference to the college and university level). In response, the Third Circuit provides a persuasive analysis of *Tinker*'s inappropriate applicability to colleges and universities, based upon the reasoning of school speech case law. *See McCauley v. University of the Virgin Islands*, 618 F.3d 232, 247 (3d Cir. 2010). In *McCauley*, the Third Circuit declined to fully apply *Tinker* and other school speech cases to public universities. *McCauley*, 618 F.3d at 247 (holding that "[a]ny application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.") Given that heightened scrutiny, the Third Circuit flatly rejected the application of *Fraser* to a university policy banning certain offensive language on campus. *Id.* at 248.

In making its decision, the Third Circuit distinguished *Fraser* based on the fact the Supreme Court rested its decision partly on account of the age and maturity of the listener (i.e. elementary and secondary students) as well as the school's important interest in instilling "fundamental values" in its students. *Id.* (citing *Fraser*, 478 U.S. at 685–86). Conversely, the Third

Circuit held in *McCauley* that instilling fundamental values in students was "not a priority in public universities," and that the desire to protect vulnerable students from exposure to offensive material "cannot be convincingly trumpeted out as a basis for censoring speech for university students." *Id.* at 248. Consequently, the Third Circuit concluded that the application of *Fraser* and the *Tinker* standard in the university setting was inappropriate. *Id*.

Elementary and secondary schools on one end, and colleges and universities on the other, serve different roles in our society. *Southworth*, 529 U.S. at 238 n.4 (Souter, J., concurring) ("[C]ases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools […] whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education."). Elementary and secondary schools educate the youth of the nation to prepare them for being citizens, by emphasizing "the shared values of a civilized social order" and validating appropriate civil discourse and expression. *See Fraser*, 478 U.S. at 683. These schools' serve as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment". *Hazelwood*, 484 U.S. at 27 (citing *Brown v. Bd. of Education*, 347 U.S. 483, 493 (1954)).

In contrast, college and university campuses serve as centers of our country's intellectual life. *Rosenberger*, 515 U.S. at 836. They are the ideal marketplaces of ideas that exist "against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (citing *Rosenberger*, 515 U.S. at 835–36). While restricting lewd speech may assist an elementary school in reinforcing the importance of civilized discourse, similar policies in a college setting work to diminish that indispensable exchange of ideas. *Fraser*, 478 U.S. at 683 ("[I]t is a highly appropriate function of

public school education to prohibit the use of vulgar and offensive terms in public discourse."); *DeJohn*, 537 F.3d at 315 ("Discussion by adult students in a college classroom should not be restricted."). Due to the divergent educational goals and societal roles of these two types of institutions, along with the different needs and abilities of their respective students, the *Tinker* test should not be applied in the university setting to determine the constitutionality of a speech restrictive policy.

B. Ms. Vega's Protest of Mr. Drake's Speech was Not Substantially Disruptive.

Even if this Court finds that the *Tinker* standard should apply in some measure to the University, Ms. Vega's protest does not rise to the standards set in *Tinker* and its progeny. Under *Tinker*, a school may restrict the speech of a student if it substantially disrupts or materially interferes with school activities. *Tinker*, 393 U.S. at 509. Unlike Ms. Vega's actions at the SDB rally, where she intended to and successfully did "shout down" the speaker, Ms. Vega's second protest against ASFA did not give rise to the level of substantial disruption. There, Ms. Vega was the sole individual at the protest, minimizing the likelihood of being able to effectively "disrupt." R. at 38. Importantly, she was approximately ten feet behind the amphitheater's last row of benches, on the periphery, away of the attendees. R. at 38. There was also considerable noise from the Quad itself that could be heard in the amphitheater, e.g. a football game with cheering fans, music playing from speakers and guitars, and students walking on the very walkway where Ms. Vega was speaking and protesting. R. at 21. One audience member stated that all the noises of the Quad *combined* made it hard to hear Mr. Drake's speech. R. at 32. Between the football game, cheering spectators, and music playing nearby from speakers, it is illogical that a single person's chants outside the venue could alone be considered a substantial disruption, especially given the fact that Mr. Drake continued to deliver his speech throughout her protests. R. at 36. As is clear,

even after Ms. Vega had stopped her protest, there was still an abundance of noise coming from the Quad that was similarly distracting. R. at 25, 32.

Moreover, and paramount to the Court's *Tinker* analysis, Ms. Vega's expression did not disturb or interfere with any school or school-sponsored activities. *See Healy*, 408 U.S. at 189 (limiting its holding to prohibiting expression that interrupts classes or substantially interferes with the opportunity of other students to obtain an education). Ms. Vega's protest took place at a non-school sponsored event, held in an outdoor public space, and not in a classroom or academic setting. R. at 21. Mr. Drake was invited to campus by a student organization, not the school itself, and the event itself did not require prior approval from the University. R. at 21. While there were students studying in the Quad during Ms. Vega's protest, there is nothing in the record to indicate Ms. Vega disrupted anyone from their studies or other school work. R. at 21. Although the *Tinker* test should not be applied to the University's Policy, even if it were, Ms. Vega's protest of Mr. Drake's speech did not rise to the requisite level of a substantial disruption or material interference that would permit the University to sanction her conduct.

C. Ms. Vega's Protest was Protected Speech under the First Amendment.

Ms. Vega's protest of Mr. Drake's speech constitutes protected political expression under the First Amendment, and thus deserves this Court's highest protection. As discussed above, Ms. Vega's protest does not violate the *Tinker* substantial disturbance test. Similarly, Ms. Vega's expression does not fall into any *Tinker* exception, such as in *Hazelwood* or *Frazer*. Under *Hazelwood*, elementary and secondary schools may restrict student expression in a school-sponsored forum if members of the public might reasonably perceive the student's conduct as bearing the imprimatur of the school. *Hazelwood*, 484 U.S. at 273. Under *Frazer*, elementary and secondary schools may likewise prohibit lewd, vulgar, and indecent speech. *Fraser*, 478 U.S. at

685. There is no evidence to suggest that Ms. Vega's speech was school sponsored, nor that her protest could reasonably be seen as being sanctioned by the University. Even more so, there is nothing in the record to indicate she identified herself as a University student. Lastly, Ms. Vega's chants of "disband ICE," "immigrants made this land," and "keep families together" – while provoking to Mr. Drake – did not arise to the level of lewd, vulgar, or indecent speech. In fact, this type of speech is clearly political in nature, thus deserving of enhanced protection on the college and university campus. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The First Amendment places a restraint on the government, and therefore a college or university is precluded from regulating speech absent a specific showing of a constitutionally valid reason for doing so. *Tinker*, 393 U.S. at 511. Ms. Vega's speech cannot be classified into any of the narrow categories of speech this Court has identified as outside the protection of the First Amendment. *See, e.g.*, *Brandenburg*, 395 U.S. at 447–48 (holding that intentional speech that is likely to incite imminent unlawful action is unprotected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (holding that speech which is directed at a specific person and likely to provoke a violent response is also unprotected); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (holding that expression which communicates a serious intent to commit unlawful violence to a particular individual or group is unprotected). Ms. Vega's expression did not incite unlawful action or violence. On the contrary, Mr. Drake did not stop his speech nor did he or any attendees react in anyway during or after Ms. Vega's protest. R. at 36. Furthermore, Ms. Vega's clear intention was to show her support for immigrants and convey a pro-immigration perspective, and she did not

communicate an intention to take violent action. R. at 38. Ms. Vega was lawfully present on the Quad, and she lawfully protested Mr. Drake's speech outside the amphitheater. Ms. Vega's protest was protected political expression under the First Amendment, and the University therefore violated Ms. Vega's First Amendment rights by sanctioning her conduct and subsequently suspending her.

CONCLUSION

For the foregoing reasons, Ms. Vega respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit, and remand the case to the United States District Court for the District of Arivada with instructions to enter summary judgment in favor of Petitioner, Valentina Maria Vega.

CERTIFICATE

Team 16 hereby certifies that the following statements are true:

(1) The work product contained in all copies of Team 16's brief is in fact the work product of the members of Team 16 only;

(2) Team 16 has complied fully with its school's governing honor code; and

(3) Team 16 has complied with all Rules of the Competition.

Team 16

Counsel for Petitioner

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment states the following:

> 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.

U.S. Const. amend. I.

The Fourteenth Amendment, in relevant part, states the following:

> 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.

U.S. Const. amend. XIV.

ARIVADA STATUTES INVOLVED

The Free Speech in Education Act of 2017 states the following:

> Section 1:
>
> The Legislature hereby finds and declares that episodes of shouting down invited speakers on college and university campuses are 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 State 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 POLICIES INVOLVED

The University of Arivada Campus Free Speech Policy, in relevant part, states the following:

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.