**No. 18-1234**

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**IN THE**

# Supreme Court of the United States

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VALENTINA MARIA VEGA,

*Petitioner*,

v.

JONATHAN JONES AND
REGENTS OF THE UNIVERSITY OF ARIVADA,

*Respondent*.

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

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## BRIEF FOR PETITIONER

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Team No. 6

## QUESTIONS PRESENTED

(1) Whether the Fourteenth Circuit erred in holding a public university's Campus Free Speech Policy that prohibits students from "materially and substantially infringing upon the rights of others to engage in or listen to expressive activity" is not unconstitutionally overbroad and vague.

(2) Whether the Fourteenth Circuit erred in holding that, as applied to Ms. Vega, such policy was not a discriminatory and unconstitutional violation of her First Amendment rights.

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## OPINIONS BELOW

The opinion of the Court of Appeals is not published in the Federal Reporter but is available at Docket No. 18-1757 (R. 42). The opinion of the District Court is available at Docket No. 18-CV-6834. (R. 01).

## JURISDICTION

The court of appeals entered its judgment on November 1, 2018. (R. 42). The Court thereafter granted certiorari with respect to this case No. 18-1234. (R. 54). This Court has jurisdiction under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App*., infra*, 1a.

## STATEMENT OF THE CASE

Petitioner Valentina M. Vega ("Vega") is a student at the University of Arivada ("the University") where she is President of the University's branch of Keep Families Together ("KFT"), a national student organization that advocates for immigrants' rights through on-campus advocacy events. (R.37). On August 31, 2017, Vega, along with fellow KFT members Ari Haddad ("Haddad") and Teresa Smith ("Smith"), attended an anti-immigration rally hosted by Students for Defensible Borders ("SDB") in an indoor auditorium on campus. *Id.* During the rally, Vega, Haddad, Smith, and several other KFT members attempted to 'shout down' the speaker by shouting their pro-immigration views in an effort to explain how immigration is positive for America. *Id.* As a result, Campus Security Officer Michael Thomas ("Officer Thomas") issued Vega and each protesting KFT member citations for violating the University's Campus Free Speech Policy (the "Policy"). (R. 38).

Enacted in response to state legislature attempting to address "episodes of shouting down" on college campuses, the Policy prohibits "[e]xpressive conduct that materially or substantially infringes upon the rights of others to engage in or listen to expressive activity" on campus. (R. 19, 23). As a result of their citations under the Policy, Vega, Haddad, and Smith all received "first strikes," and risked suspension if they violated the Policy a second time. (R. 23, 27-38).

On September 5, 2017, Samuel Drake ("Drake"), a director of Stop Immigration Now ("SIN"), was scheduled to speak during an event hosted by the student group American Students for America ("ASFA") and their current president Theodore Putnam ("Putnam"). (R. 24, 28). SIN is a lobbying group that aims to spread awareness of what it calls "the evils of immigration." (R.24). Drake's speech took place at the University's Amphitheater, located on the campus "Quad." (R. 21). The Quad is a green open area at the center of campus, cross-hatched with sidewalks and walkways used by students throughout the school day to go to and from nearby dormitories and other student facilities. *Id.* The Amphitheater sits near the center of the Quad and is surrounded by said walkways and grassy areas where students regularly gather to talk, study, play and listen to music, and play intramural sports like football and frisbee. *Id.*

Although the Amphitheater can seat just 100 people and is typically reserved for small-scale events, students must receive University approval to host *any* event attended by seventy-five or more people. *Id.* Since Putnam expected far less than seventy-five people to attend Drake's speech, reserving the Amphitheater was accomplished by submitting only an "Event and Space Reservation Application" to the University. *Id.*

When Drake began his speech at 1:05 p.m., the Quad's usual bustle was underway, as its sidewalks near the Amphitheater were replete with lunchtime foot traffic, while additional students gathered nearby to eat, talk, play guitars, and cheer on an intramural football game. (R. 21, 22). From the Amphitheater, Drake projected his anti-immigration rhetoric into the Quad, asserting that

the U.S. "must deport every last one of those illegal aliens" and accusing immigrants of "most of the violent crime, drug wars, and other problems plaguing our nation." (R. 24). A few minutes into Drake's speech, Vega appeared from the lunchtime bustle, dressed in a Statue of Liberty costume. (R. 25). From outside the Amphitheater benches, Vega, alone, began chanting slogans in inform listeners of a pro-immigration viewpoint, including "Immigrants made this land" and "Keep families together." (R. 38). Notably, Haddad and Smith did not join Vega, since they were unclear as to what conduct was permitted under the policy, feared a second strike and the risk of suspension. (R. 27, 31).

As Drake continued speaking over Vega and the rest of the noise emanating from the Quad, Putnam called Officer Thomas and complained of Vega's conduct. (R. 29). Upon arriving at the Amphitheater, Officer Thomas investigated the scene, and reported that he heard the shouts and cheers from the football game, along with other voices of the student crowds passing by. (R. 36). Ultimately, Officer Thomas decided that Vega was materially and substantially infringing upon the rights of others to engage in or listen to expressive activity. *Id.* As a result Officer Thomas issued Vega a second citation, warranting a suspension from the University. *Id.* After going through the University's standard disciplinary protocols, Dean Louise Winters issued Vega her "second strike" and suspended her from the University for the remainder of the semester. (R. 41).

Vega filed suit in the United States District Court for the District of Arivada, naming the University President Jonathan Jones and the Regents of the University as defendants. (R. 1). Each party filed for summary judgment and Vega claimed that the University's Campus Free Speech Policy, both on its face and as applied to her individually, violated her guaranteed right to freedom of speech under First and Fourteenth Amendments of the United States Constitution. (R. 43).

The district court entered summary judgement for Vega and held that the Policy was unconstitutionally facially vague and overbroad. (R. 12). The court additionally held that the

standard set forth in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), for evaluating the constitutionality of campus speech regulations does not apply in the context of institutions of higher education. (R. 12-14). The district court concluded that even if the Policy were constitutional on its face, the record does not support a finding that Vega's conduct "materially and substantially infring[ed] upon the right[]" of Drake to speak or the rights of others to listen to him. (R. 17).

On appeal, the Fourteenth Circuit reversed the district court's entry of summary and held that the Policy passed Vega's facial challenge for vagueness and overbreadth. (R. 43). The appellate court held that the Policy should be analyzed "in light of *Tinker*," and in under this approach, avoids unconstitutional vagueness because its terms are reasonably articulable. (R. 50). In addition, the court held that the Policy was not unconstitutionally overbroad because it fails to prohibit a substantial amount of constitutionally protected speech. (R. 51). Finally, the Fourteenth Circuit concluded that the Policy was constitutional as applied to Vega because her conduct fell within the reasonably parameters of the Policy. (R. 53). Vega filed a petition for a writ of certiorari in the United States Supreme Court, which was granted. (R. 54).

## SUMMARY OF THE ARGUMENT

The court of appeals incorrectly held that the University's Campus Free Speech Policy passed constitutional muster under a facial challenge for vagueness and overbreadth. Its first error came in its decision to review the Policy with deference to the secondary school standard set forth in *Tinker*. Since *Tinker*, the U.S. Supreme Court has never applied its holding, nor its progeny, to uphold a restriction of university students' free speech. *Tinker*'s standard does not apply in the context of public universities because the missions and learning environments inherent to universities require that its students enjoy the same First Amendment protections as all other adults in our Nation's society. Accordingly, as a content-based restriction on an adult's freedom of

speech, the Policy must be reviewed under strict scrutiny, which it fails because the freedom of speech outweighs any interest the University has in restricting a certain students' expression. Further, as explained below, the Policy's facial overbreadth and vagueness demonstrate that it is totally untailored to prohibiting on campus 'shout downs.'

First, the Policy fails Vega's constitutional challenge on its face because it is impermissibly overbroad. Absent any limiting terms, the Policy's prohibitions reach a substantial amount of constitutionally protected speech by outlawing any expression that may unintentionally trespass upon the subjective whims of another. The Policy's overbreadth is further demonstrated by its chilling effect on students' right to engage in other constitutionally protected activity.

Second, on its face, the Policy is unconstitutionally vague. Courts have repeatedly used a particularly stringent vagueness analysis when reviewing laws that restrict First Amendment freedoms in the context of public universities. Under such analysis, the Policy is impermissibly vague because it fails to adequately notify students of what sort of campus expression it prohibits. Although the Policy may have been written with 'shout downs' in mind, its text is ambiguous as to whether it applies also to the substance of speech in other campus settings. Additionally, the Policy is impermissibly vague because its ambiguous terms will lead to arbitrary and discriminatory enforcement by campus officials tasked with implementing it.

Should this court uphold Vega's facial challenge of the Policy, it is still unconstitutional as it was applied to her. The record reflects that the decision to enforce the Policy against Vega was driven by discriminatory animus rather than objective enforcement. Although multiple activities were creating noise that caused distractions to Drake's speech, the only conduct that was cited under the Policy was the conduct whose substance was opposed to that of Drake's speech: Vega's protest.

Accordingly, this court should reverse the decision of the Fourteenth Circuit.

## ARGUMENT

### I. University of Arivada's Campus Free Speech Policy is Facially Unconstitutional for Overbreadth and Vagueness.

#### A. The Fourteenth Circuit Erred in Analyzing the Policy in Light of *Tinker v. Des Moines Independent School District* because the *Tinker* Standard Does Not Apply to Public Universities.

The lower court's review of the Policy "in light of *Tinker*" is in error because the *Tinker* standard does not confer authority upon university administrators to restrict First Amendment rights on college campuses. Accordingly, this Court must review Ms. Vega's challenge that the Policy is vague and overbroad in light of First Amendment principles as they pertain to adults who attend our Nation's universities.

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This Court has routinely held that "state colleges and universities are not enclaves immune from the sweep of the First Amendment . . . [since] '[i]t can hardly be argued that either students or teachers shed their constitutional rights at the schoolhouse gate." *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)). In *Tinker*, the Court held that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511. The Court clarified the '*Tinker* standard,' however, and explained that secondary schools *could* restrict student speech *only* if the conduct "materially and substantially disrupt[ed] the work and discipline of the school." *Id.* at 513. In *Tinker*, the Court concluded that high school students' black armbands in protest of the war in Vietnam would not cause a "material disruption" to the classroom environment. *Id.* at 514.

However, this Court has never applied the *Tinker* standard in a case involving the free speech rights of students on a University campus. *See* Meggen Lindsay, Tinker *Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students* – Tatro v.

University of Minnesota, 38 Wm. Mitchell L. Rev. 1470, 1480 (2012). Rather, this Court has gone as far as to state that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) ("[In] cases 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 counterpart in college education").

In light of the distinct differences between the missions and purposes of secondary schools and public universities, it is imperative that the restrictive *Tinker* standard remain applicable only to secondary schools. Universities serve a far different purpose than secondary schools, whose purpose is to "inculcate a 'child [with] cultural values, [to] prepar[e] him or her for later professional training, and [to] help[] him to adjust normally to his environment.'" *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 243 (3d Cir. 2010) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). In stark contrast, universities uniquely seek to encourage "students to launch new inquiries into our understanding of the world" by creating a "university atmosphere of speculation, experiment, and creation." *McCauley*, 618 F.3d at 243. This atmosphere is vital to allowing university campuses to continue on as, what this Court has called, a "marketplace of ideas" aimed at the discovery of truth. *Keyishian v. Bd. of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603 (1967). On the campuses of public universities, "free speech is of critical importance because it is the lifeblood of academic freedom." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). Permitting university officials to encroach upon college students' right to free speech by modelling policies after *Tinker* risks "chilling . . . individual thought and expression" – a danger that "is especially real in the University setting, where the State acts against a background and tradition of

thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

Further, the differences between the learning environments and student bodies of secondary schools and universities make it additionally inappropriate to justify a university's speech restriction under *Tinker*. Unlike university administrators, secondary school administrators "have the unique responsibility to act *in loco parentis*." *McCauley*, 618 F.3d at 243 (quoting *DeJohn*, 537 F.3d at 315). Indeed, their parental roles are required because oftentimes secondary school students do not have the maturity to deal with upsetting, yet constitutionally-protected speech. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (recognizing that elementary and high school administrators "must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics"). Thus, their parent-like roles appropriately grant them "a good deal of latitude in determining which policies will best serve educational and disciplinary goals." *McCauley*, 618 F.3d at 244. In contrast, it is indisputable that "[c]ollege students today are no longer minors; they are now regarded as adults in almost every phase of community life." *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979). Therefore, university students are understood to be more mature and "less impressionable than younger students," negating any justification college administrators give for restricting First Amendment rights that are protected in every other aspect of their adult lives. *Widmar v. Vincent*, 454 U.S. 263, 274 n.1 (1981).

### B. The University's Free Speech Policy is Facially Unconstitutional Because its Overbreadth Prohibits and Chills Constitutionally Protected Speech.

The University's Free Speech Policy fails a facial challenge because it is an unconstitutional restriction on the First Amendment freedom of speech. Additionally, the Policy is impermissibly overbroad, as it prohibits and chills a substantial amount of otherwise constitutionally protected free speech.

1. As a Content-Based Restriction on Free Speech, The Policy Demands Review Under Strict Scrutiny.

The Policy is a content-based restriction of speech. As such, the Policy must pass a "strict scrutiny" analysis, which it fails because the University's interest in preventing "shouting down" incidents is not sufficiently compelling. To determine what level of scrutiny applies to a given law, a court must determine "whether the State's regulation is related to the suppression of expression." *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Promulgated regulations are content-based and subject to strict scrutiny when the government's interest underlying the law are primarily concerned with the content of expression. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) ("[I]f the government interest is related to the content of expression, . . . then the regulation . . . must be justified under a more demanding standard") (citing *Texas v. Johnson*, 397 U.S. at 403). *See B&B Coastal Enterprises, Inc. v. Demers*, 276 F. Supp. 2d 155, 162-63 (D. Me. 2003) ("A regulation is content-based *when the content conveyed determined whether the speech is subject to restriction*.") (emphasis added).

In *City of Erie*, this Court analyzed the constitutionality of a city's public indecency ordinance, which prohibited individuals from knowingly appearing in public in a "state of nudity." 529 U.S. at 284. Ultimately, the Court determined that the ordinance was content-neutral because it "regulates conduct alone" since "[i]t does not target nudity that contains an erotic message; rather it bans *all* public nudity, regardless of whether that nudity is accompanied by expressive activity." *Id.* at 290 (emphasis added).

Unlike the city ordinance in *City of Erie*, the University's Policy is primarily concerned with the *content* of expression, making it a content-based regulation which must be subject to strict scrutiny. The Policy prohibits *only* the expressive conduct that "materially and substantially infringes upon the rights of others to engage in . . . expressive activity." Critically, the Policy was enacted as required by the State of Arivada Free Speech Education Act of 2017, which was

specifically passed to address "episodes of shouting down invited speakers on college and university campuses." Av. Gen. Stat. § 118-200 (2017). Accordingly, the Policy has the purpose of suppressing the expressional act of "shouting down" campus speakers. *Id.* Further, such expression is regulated based on content, since only 'shout downs' that "infringe[] upon the rights of others to engage in or listen to expressive activity" is prohibited by the Arivada's Free Speech Policy. (R. 23). Because the Policy requires campus officers to analyze the *substance* of a 'shout down' to determine whether it has materially and substantially infringed upon the rights of others, the Policy is necessarily content-based and subject to strict scrutiny.

As a content-based restriction on the First Amendment-guaranteed freedom of speech, the Policy must survive a strict scrutiny analysis. Content-based "restrictions on speech are 'presumed invalid,' and the Government bears the burden of showing its constitutionality." *United States v. Stevens*, 533 F.3d 218, 232 (3d Cir. 2008), *aff'd*, 559 U.S. 460 (2010) (citing *Ashcroft v. A.C.L.U.*, 452 U.S. 656, 660 (2004). Strict scrutiny presents an extremely demanding standard, which this Court has rarely found to be satisfied. Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 Notre Dame L. Rev. 1347, 1365 n. 63 (2006) ("[A] majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons."). To survive a strict scrutiny analysis, the Policy must be necessary to promote a compelling state interest and narrowly drawn to achieve that end. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (citations omitted).

In context of the First Amendment, a "compelling" government interest must trump an individual's right to free speech in order to survive strict scrutiny. *See Stevens*, 533 F.3d at 226. This Court rarely finds such a "compelling interest" for content-based restrictions on speech, and when it does, they relate solely to the well-being of human beings. *Id. See also United States v. Stevens*, 559 U.S. 460, 461 (2010) ("[T]he First Amendment has permitted restrictions upon the

content of speech in a few limited areas . . . including obscenity, . . . defamation, . . . fraud, . . . incitement, . . . and speech integral to criminal conduct") (citations omitted).

There is no compelling interest sufficient to justify suffocating the First Amendment rights of university students and visitors who wish only to express their political views. In *Carey v. Brown*, the state of Illinois passed an anti-picketing statute with an expressed interest in limiting disruptions caused by picketing in residential areas, but observed an exemption for labor dispute picketing. 447 U.S. 455, 460-62 (1980). The Court invalidated the statute and explained that the interest in furthering one subset of speech (labor dispute picketing) at the expense of other First Amendment rights is not a compelling interest. *Id.* at 467.

The Policy's restrictions are dependent upon one student's subjective reaction to expressive conduct which may be entirely constitutional. Restricting the freedom of speech on the basis of a student's reaction is wholly unconstitutional. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 369 (M.D. Pa. 2003) ("[R]egulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in public high school settings and in university settings."). Similar to *Carey*, the University's interest in enacting the Policy in order to protect the free speech rights of one student at the expense of free expression of others cannot be upheld and is therefore not a compelling interest. Accordingly, since the Policy is content-based and lacks a compelling interest, it is facially unconstitutional.

2. The Policy is Facially Overbroad Because it Prohibits a Substantial Amount of Constitutionally Protected Speech.

The University's Policy fails a facial challenge for overbreadth because its terms prohibit and chill a substantial amount of constitutionally protected speech. A statute is facially unconstitutional on overbreadth grounds if it presents "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). When a law or

policy restricts First Amendment rights, said law may be "invalidated as overbroad if 'a *substantial* number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 449 n.6 (2008)) (emphasis added).

The "first step" in an analyzing a challenged law for unconstitutional overbreadth is to "construe . . . what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). To understand what a law covers, courts begin by analyzing the text of the law. *See id*; *Stevens*, U.S. 559 U.S. at 474. When the text of a law allows for "a *substantial* number of instances . . . in which the [regulation] cannot be applied constitutionally," the law is unconstitutionally overbroad. *Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir. 2013). However, a law's inclusion of a scienter or intent requirement "narrow[s] an otherwise overbroad statute." *Osborne v. Ohio*, 495 U.S. 103, 147 (1990) (citing *New York v. Ferber*, 458 U.S. 747, 765 (1982)).

In *Stevens*, this Court analyzed a federal statute that aimed to outlaw violent animal "crush videos" by criminalizing the commercial creation, sale, or possession of depictions of animal cruelty, noting "[t]he statute does not address underlying acts harmful to animals, but only portrayals of such conduct." *Stevens*, 559 U.S. at 464. The Court held that the law was substantially overbroad because the "text of the ban . . . applies to 'any . . . depiction' in which 'a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Id.* at 464. Becuase since this ban would "extend[] to *any* magazine or video depicting lawful hunting," the Court concluded that such substantial overbreadth was unconstitutional. *Id.* at 476.

In *Williams*, however, this Court upheld a law which criminalized any person who "knowingly . . . advertises, distributes, or solicits" child pornography because it was *not* substantially overbroad. 553 U.S. 285, 288 (2008). In its reasoning, the Court explained, in part,

that the law passed overbreadth muster because it contained a scienter requirement that sufficiently limited the types of prohibited transactions. *Id.* at 294.

Arivada's Free Speech Policy prohibits "expressive conduct" that "materially and substantially infringes" upon the ability of others to listen to or engage in expressive conduct. (R. 23). Unlike the child pornography statute in *Williams*, the text of the Policy includes neither a scienter nor intent requirement. Accordingly, Arivada students subject to the Policy need not actually *know or intend* that their conduct "materially and substantially infring[es] upon the rights of others to engage in or listen to expressive activity" in order to violate the Policy. As a result, one student's seemingly innocent "expressive conduct" may violate the policy if another student's genuinely, yet ridiculously, feels that their "right[] . . . to engage in or listen to expressive activity" has been materially and substantially infringed upon.

In the context of a public university campus, the lack of a scienter requirement stresses how alarmingly overbroad the Policy is. In the event that students gather to listen to a campus speaker, the text of the Policy allows its enforcement against any student who can hear the speech, so long as they feel their rights are materially and substantially infringed upon. The speaker need not actually know that his or her constitutionally protected voice or message has materially and substantially infringed upon the rights of another student; all that matters is the student's subjective reaction to the speaker's conduct. As a result, the number of instances in which the Policy cannot be applied constitutionally is beyond substantial – it is limitless.

3. The Policy's Overbreadth Chills Constitutionally Protected Speech of Persons Not Before the Court.

A law is impermissibly overbroad if it is so sweeping in nature that it is "incapable of limitation" and therefore "has the potential to repeatedly chill the exercise of expressive activity by many individuals." *New York v. Ferber*, 458 U.S. 747, 772 (1982). As a result, "the extent of deterrence of protected speech can be expected to decrease with the declining reach of the

regulation." *Id.* In *Virginia v. Hicks*, this Court explained that overbroad laws chill free speech because "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." 539 U.S. 113, 119 (2003) (internal citations omitted). *See also Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) ("A statute is unconstitutional on its face on overbreadth grounds if there is a 'realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court") (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

The 'chilling' of the 'marketplace of ideas' inherent with a public university cannot be equitably squared with the bedrock principles of the First Amendment. *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967) ("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.") (internal citations omitted). In *Dambrot*, Central Michigan University enacted a policy that prohibited behavior intended to be "intimidating, hostile, or offensive" to others through use of demeaning language, racial slurs, or derogatory symbols. 55 F.3d at 1182. The Sixth Circuit held that the university's policy was unconstitutionally overbroad and explained that "[i]t is clear from the text of the law that language[,] . . . intentional or unintentional, regardless of political value, can be prohibited" by the policy. *Id.* at 1183. Further, the court determined that "there is nothing to ensure the University will not violate First Amendment rights *even if that is not their intention*." *Id.* at 1183 (emphasis added). The court concluded that the "broad scope of the policy's language presents a 'realistic danger' the University could compromise afforded by the First Amendment" to all of the university's students. *Id.*

In *Hicks*, this Court explained that the 'chilling' effect of an overbroad law may be overcome only if the law "reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" 539 U.S. 113, 119 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Undoubtedly, however, political speech is neither constitutionally unprotected, nor so harmful that it serves as a legitimate state interest for Universities' policies that attempt to censor it. *See Citizens United v. Fed Election Comm'n*, 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it . . ."); *Tinker*, 393 U.S. at 513 ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.")

Since the Policy may be enforced upon students who engage in constitutionally protected speech, it leads students to refrain from protected speech altogether, chilling what allows universities to be the 'marketplace of ideas.' Absent any restrictive or qualifying term in the Policy, the Policy allows campus officers to enforce the Policy on a subjective basis, since the mere message of one student's speech may "materially and substantially infringe upon" the rights of another student to listen and engage in expressive conduct. Like the university speech policy in *Dambrot*, the Policy permits speech to be prohibited on a subjective basis, chilling First Amendment expression by students and visitors across campus. The chilling effect caused by the Policy's overbreadth is evident through Vega's fellow KFT colleagues: Ari Haddad, who abstained from the September 5, 2017 speech "out of fear that if I received a second strike, I would be suspended," (R. 27); and Teresa Smith, who also refrained from the September speech because she too was "fearful that she would receive a second strike, and risk suspension . . . ." (R. 31).

The two students' freedom to voice their political views was chilled because they innocently understood the Policy to be broadly enforceable against such political views if they

"materially and substantially infringed" upon another's subjective rights to engage in or listen to other expressive activity. Specifically, both Haddad and Smith understood their 'first strikes' under the Policy to have resulted from their conduct at the August 31, 2017 speaker, which Haddad and Smith only attended to inform "the other side of the [immigration] argument" of their own views "because the views of [SDB] were insensitive and disrespectful." (R.30). Absent any indication that Officer Thomas' citations issued to Haddad and Smith at the August speech were for anything other than merely voicing an opposing view, the Policy suggests that it may be enforced upon such views if they "materially and substantially infringe" upon another student's rights. Such overbreadth operates only to chill speech, as students will fear repercussions from the Policy and choose, like Haddad and Smith, to not speak at all.

### C. The University's Free Speech Policy is Facially Unconstitutional Because it Fails the Stringent Vagueness Analysis Applied to Free Speech Restrictions upon Public University Campuses.

A law that "satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). It is a long-standing principle of due process that "an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In *Grayned*, this Court warned of the substantial harms caused by unconstitutionally vague laws: First, they "may trap the innocent by not providing fair warning." *Id.* Second, "a vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. Finally, a vague law chills free speech by causing individuals to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked." *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

The University's Campus Free Speech Policy threatens each of the dangers discussed in *Grayned*. Under the appropriate strict vagueness analysis, the Policy is impermissibly vague because it fails to reasonably warn students of what conduct is prohibited, and thus chills the exercise of their guaranteed First Amendment rights. Further, the Policy is unconstitutionally vague because it leads to arbitrary and discriminatory enforcement by campus officials tasked with enforcing it.

1. Vagueness Analyses are Stricter When Reviewing Laws that Restrict First Amendment Rights, Especially Upon College Campuses.

The *Grayned* standards for evaluating a law's vagueness "should not . . . be mechanically applied," because the "degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Indeed, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 499. And when government chooses to enact a law that abuts freedoms guaranteed by the First Amendment, the "government may regulate . . . *only* with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) (emphasis added); *see also Gen. Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273, 286 (2d Cir. 1997) ("[S]tatutes that implicated constitutionally protected rights . . . are subject to 'more stringent' vagueness analysis."). Accordingly, a court's "general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *see also Hoffmann Estates*, 455 U.S. 489, 499 (1982) ("If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply"); *Button*, at 432 ("[S]tandards of permissible statutory vagueness are strict in the area of free expression . . . *Precision* of regulation must be the touchstone of an area so closely touching our most precious freedoms") (emphasis added).

Perhaps nowhere is a stringent test for vagueness more important than on our Nation's college campuses. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). This is especially so, given that "[o]ur Nation is deeply committed to safeguarding academic freedom," making "[t]hat freedom . . . a special concern of the First Amendment." *Keyishian*, at 603.

2. The Policy Fails to Delineate What Conduct is Impermissible, Ultimately Chilling Freedoms Guaranteed by the First Amendment.

A law or policy is impermissibly vague when it fails to provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. 104, 108 (1972). Failure to notify individuals of prohibited behavior threatens man's freedom to "steer between lawful and unlawful conduct," effectively trapping those who act under the reasonable belief that their conduct was innocent of the law's violation. *Id.* When determining whether a law is impermissibly vague, a court is "relegated, . . . to the words of the ordinance itself." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Determining what a law permits, "of course, is a delicate task, for it is not within [a court's] power to construe and narrow state laws." *Grayned*, 408 U.S. at 108. Although courts have recognized "that otherwise imprecise terms may avoid vagueness when used in combination with terms that provide sufficient clarity," *Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005), a court is "not required to insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). To survive a challenge for vagueness then, a law must not be "lacking 'terms susceptible of objective measurement.'" *Keyishian*, 385 U.S. 589, 604 (1967) (citing *Cramp v. Board of Public Instruction*, 368 US. 278, 286 (1961)).

In *Keyishian*, a public state university passed anti-communist policies aimed at "prevent[ing] the appointment or retention of 'subversive' persons" within the school system. 385

U.S. at 592. Among the policies at issue, two policies required the removal of any employee "for 'treasonable or seditious' utterances or acts," and prohibited employment of anyone who "'by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine' of forceful overthrow of government." *Id.* at 604. Left undefined, the words "treasonable" and "seditious," the Court explained, were "dangerously uncertain" because "the possible scope of [such] utterances or acts has virtually no limit." *Id.* at 599. Additionally, the latter policy suffered from a similar "defect of vagueness" because such "language may reasonably be construed to cover mere expression of belief." *Id.* at 601. Accordingly, the Court concluded that the policies had "the quality of extraordinary ambiguity" such that "[m]en of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 604 (citing *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964)).

Only when a policy clearly identifies a "particular context" in which it applies, does the policy survive a challenge for vagueness. In *Grayned*, this Court upheld an anti-noise ordinance because it understood the ordinance's prohibitions to apply *only* when there was an immediate threat that the peace and good order of a school would be disturbed. 408 U.S. 104, 112 (1972). Central to the Court's reasoning was that the "statute [was] written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school." *Id.* Therefore, the Court concluded that "[g]iven this 'particular context,' the ordinance" adequately notified how the it was to be enforced, giving "fair notice to those to whom (it) is directed." *Id.*

The University's Free Speech Policy fails to adequately notify students of what conduct is impermissible. Despite prohibiting students from "materially or substantially infringing upon the rights of others to engage in or listen to expressive activity," the Policy's terms entirely fail to include or even indicate a particular context in which the Policy applies. Unlike *Grayned*, where

the noise ordinance was written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school, the University's Policy contains no terms that indicate a specifically applicable context. In fact, the Policy's only term that even remotely indicates an objective measurement is 'campus,' which, given the multitude of environments that can be found in a single college campus, hardly clarifies where and how a student's conduct may infringe upon another's rights. (R. 23). Rather, like the university policy in *Keyshian*, the Policy's scope is virtually limitless because its enforceent depends on the undoubtedly subjective standard of whether conduct "materially and substantially" infringes. How is a student to know if the mere *content* of his mild-mannered words spoken in the classroom 'materially and substantially' infringe upon a classmate's ability and right to listen in class? The Policy's failure to delineate boundaries leaves this question unanswered, and for that reason leaves students to necessarily guess at the Policy's meaning and differ as to its application.

Further, and just like overbroad laws, when a vague law or policy "'abut[s] upon sensitive areas of basic First Amendment freedoms,' it operates to inhibit the exercise of [those] freedoms." *Grayned* 408 U.S. at 109. Uncertainty as to what the law prohibits "inevitably lead[s] citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button*, 371 U.S. at 433. And on college campuses, where the 'marketplace of ideas' is so strongly intertwined with the freedom of speech, "the danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded" by precise words that adequately mark what conduct is and is not proscribed. *Keyishian*, 385 U.S. at 604.

The Policy's failure to delineate boundaries of accepted and prohibited speech will undoubtedly have a chilling effect on students' speech, as students will simply refrain from engaging in 'expressive conduct' if it risks prosecution by the University under its ambiguous

speech policy. Indeed, the mere chance that a student's point of view, expressed through conduct that might "materially and substantially infringe upon" another student's ability to listen, will encourage no expression at all – since there is no possible way for the student to foresee if his or her conduct will infringe upon the subjective abilities of another. In fact, the decisions by Smith and Haddad to not engage in the September 5, 2017 protest with. Vega, each out of fear that they would receive a second strike, exposes exactly how vague laws chill protected speech.

3. The Campus Speech Policy Leads to Arbitrary and Discriminatory Enforcement.

In order to avoid "arbitrary and discriminatory enforcement" by law-enforcing government officials, "laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. When a law is vague, it subjects constitutionally protected rights to an "unascertainable standard," *Coates*, 402 U.S. 611, 614 (1971), and it "threatens to transfer legislative power to police[,] . . . leaving them the job of shaping a vague statute's contours through their enforcement decisions." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1228 (2018). Indeed, when enforcing a law requires a government officer to "evaluate a myriad of factors," there exists a substantial threat that the officer will enforce the law on an *ad hoc* and subjective basis. *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998).

In *Menlo Park*, a city's "emergency ordinance" attempted to outlaw the plaintiff's weekly abortion protest, which consisted of picketing on a public sidewalk and attaching "as many as fourteen signs on [his] nearby parked car." *Id.* at 634. The ordinance banned the posting of signs on public property, but clarified several exemptions, including "[s]igns on vehicles of any kind, provided [that] the vehicle is not parked in order to . . . demonstrate . . . or attract the attention of the public." *Id.* n. 3. The Ninth Circuit held that the ordinance exemption "runs afoul of the First Amendment" because it "falls squarely into that class of statutes that 'impermissibly delegates basic policy matters to police[] . . . for resolution on an *ad hoc* and subjective basis, with the

attendant dangers of arbitrary and discriminatory application.'" *Id.* at 639 (quoting *Grayned*, 408 U.S. at 108-09) (emphasis in original). Noting that the "target of the ban appears to be the driver's subjective intent," the court found that "to enforce the ordinance, a Menlo Park law enforcement officer must decipher the driver's subjective intent" from a "myriad of factors," including:

> the driver's choice of a prominent or obscure parking space; the amount of vehicular and pedestrian traffic around the chosen parking space; the presence of any other vehicles, trees, shrubs, or buildings that block the views of passersby; the size, color, design, and shape of the signs; and the placement of the signs on the car.

*Id.* at 638. Thus, the "range of factors to consider" when enforcing the ban necessarily created a "danger that a police officer might resort to enforcing the ordinance only against cars with signs whose messages the officer or the public dislikes." *Id.* at 639. Even reading the ordinance with "flexibility and reasonable breadth," the Ninth Circuit concluded that that the ordinance is "so imprecise that discriminatory enforcement is a real possibility." *Id.*

The Policy presents a real danger of arbitrary and discriminatory enforcement because it fails to provide sufficient guidance officers tasked with enforcing it. The Policy's failure to define what conduct "materially and subjectively infringes upon the rights of others to engage in or listen to expressive activity" leaves it solely up to the enforcing campus officer to determine if one student's expressive conduct "materially and substantially" infringes upon the rights of another student – a judgment call that is necessarily subjective. Just like *Menlo Park*, where the officers were required to "evaluate a myriad of factors" in order to enforce the ban on signs on vehicles parked in order to "demonstrate . . . or attract the attention of the public," campus officers, too, must evaluate a range of factors to determine if one student's conduct "materially and substantially infringes" on the rights of another student. In a campus setting, where students frequently gather in public to play sports and games, play and listen to music, speak with friends, etc., a called-upon campus officer would necessarily be required to consider factors like volume of the complained of

conduct, the nature of the conduct itself, and the effect of surrounding activities in his or her determination as to whether or not the Policy has been violated.

Perhaps most importantly, however, a campus officer tasked with enforcing the Policy may be required to decide whether the *substance* of one student's expression, "materially and substantially infringes upon" another complaining student's right to engage in or listen to expressive activity. Absent any indication that the mere substance of a student's message is not covered by the Policy, enforcing the Policy would require a campus officer to decide if a student's good faith complaint of another student's *message* shows an 'infringement' upon the student's rights. This could undoubtedly lead officers to 'resort to enforcing the ordinance only against' messages he personally disagrees with, which is exactly the sort of arbitrary and discriminatory enforcement *Grayned* warns of.

## II. The University's Speech Policy is Unconstitutional as Applied to Ms. Vega.

If this Court finds that the Policy survives Vega's facial challenge, it is still unconstitutional as applied to Vega because she did not "materially and substantially infringe[] upon the right" of Mr. Drake to speak or others to listen to him.

Vega's conduct caused no material and substantial interference of any academic environment because Putnam's ASFA event had little, if any, association with the University. Nothing in the record indicates that Putnam either sought approval from the University for the ASFA event or disclosed to the University that Drake would be making his anti-immigration speech during the event. Thus, Drake's unsponsored speech had minimal association with the University, and was wholly unrelated to the "operation of the school" or any classroom activity. *Tinker*, 393 U.S. 503, 509 (1969). Further, Putnam's decision to host Drake's speech on the Quad – perhaps the most open and public forum on campus – instead of the indoor auditorium, where SDB had their August rally, further distances Drake's speech from any involvement with the

University. Rather, Drake's small anti-immigration rally was more analogous to a sidewalk preacher, projecting his rhetoric on the many passersby.

At the time Drake noticed Vega appear on the Quad sidewalk, Vega's voice was inarguably one of many noises already encroaching into the Amphitheater. In fact, Putnam, Drake, and Taylor all admit that from the Amphitheater, they could hear students playing football and frisbee, others cheering and shouting during the games, and music being played through speakers. (R. 25, 28, 32). Interestingly, although Drake and Putnam insisted that Vega's conduct distracted students from listening to Drake's speech, Taylor further admitted that she could not even hear Officer Thomas' nearby conversation with Vega as he cited her under the Policy. (R. 25, 28, 32). If nothing else, this suggests that other noises drowned out Vega and Officer Thomas' as they spoke just ten feet from the partially-filled Amphitheater. Further, Officer Thomas, too, acknowledged other sources of noisy disruptions to Drake's speech when he explicitly chose to "not consider addressing other sources of noise distraction." (R. 35).

Although Vega voiced views that were unquestionably antithetical to Drake's speech, she neither physically entered the reserved Amphitheater, nor alone created all the noise that reached the ears of people attending Drake's speech. It is difficult, then, to understand what lead Officer Thomas to enforce the Policy *only* upon Vega. Officer Thomas' report indicates that Drake continued to speak as Vega protested, certainly leaving no party's "right to engage in . . . expressive activity" to have been "materially and substantially" infringed upon. (R.23). And other than Putnam's subjective belief that Vega was "obnoxious" and Officer Thomas' conjecture that others "ha[d] difficulty focusing" on Drake's speech, Officer Thomas' police report is absent any objective indications that Vega's behavior "*materially* and *substantially*" infringed upon anyone's right to listen to Drake's speech. (R. 36). What Officer Thomas' report *does* disclose, however, is that he recognized Vega from when he had previously issued her a citation of violating the Policy.

(R. 36). This unquestionably subjected Vega to the danger that Officer Thomas would enforce the Policy on the Quad in the exact same manner that he previously enforced it at SFB's rally in the indoor auditorium – each time at Vega's expense.

In such a public and open setting, the conduct required to *materially and substantially* infringe upon another's right to listen to expressive activity *must* be extensively disruptive and more than just a disagreeable idea. Yet, perhaps the most telling difference between Vega's conduct and all the other distractions to Drake's speech was that *only* Vega's conduct was politically opposed to Drake's. Disagreement the another's idea is "the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society." *Tinker*, 513 U.S. at 509. Although Drake and Putnam may have been frustrated with Vega's opposing viewpoints, Vega's citation for her pro-immigration viewpoint under the Policy is discriminately unconstitutional and particularly so as Drake asserted that immigrants "destroy[] American ideals and American families" in his speech. (R. 24).

Inarguably, of *all* of the noises that may have disrupted Drake's speech, the *only* one that lead to a sanction under the Policy was the noise from conduct that was politically opposite to the person who made the complaint. Accordingly, nothing indicates that Vega "materially and substantially infring[ed] upon" Drake's speech or the rights of others to listen, and the Policy was unconstitutional as applied to Vega.

## CONCLUSION

For the foregoing reasons, the judgements of the Fourteenth Circuit should be reversed.

Respectfully submitted,

*Counsel for Petitioner*

# APPENDIX

## Constitutional Provisions

### U.S. Const. amend. I.

> 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.

## Statutory Provisions

### 28 U.S.C. § 1254 – Courts of appeals; certiorari; certified questions

> Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

### Av. Gen. Stat. § 118-200

> Section 1:
>
> The Legislature hearby finds and declares that episodes of shouting down invited speakers on college and university campuses area nation-wide phenomena that are becoming increasingly frequent. It is critical to esure 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.

BRIEF CERTIFICATE

i. The work product contained in all copies the above brief (Team No. 6) is in fact the work product of team members.

ii. The team has complied fully its law school's governing honor code.

iii. The team has complied with all Rules of the Competition.