No. 18–1234

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2019

VALENTINA MARIA VEGA,
Petitioner,
v.

JONATHON 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 THE PETITIONER

Team No. 9
Counsel for Valentina Maria Vega, Petitioner

QUESTIONS PRESENTED

I. Whether, on its face, the Campus Free Speech Policy is unconstitutionally vague and substantially overbroad.

II. Whether, in suspending Ms. Vega under its Campus Free Speech Policy, the University violated Ms. Vega's First Amendment rights.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

OTHER CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2018. (R. at 42.) Thereafter, Petitioner timely filed a petition for writ of certiorari, which this Court granted. (*Id.* at 54.) This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Disposition Below

This lawsuit concerns the University of Arivada's ("University") Campus Free Speech Policy ("Policy"), which violates the First and Fourteenth Amendments. On its face, the policy is overly vague and substantially overbroad, and as applied, the policy prevented Petitioner Valentina Maria Vega from expressing her constitutionally protected views.

On October 1, 2017, Vega brought this action under 42 U.S.C. § 1983 against Respondents Jonathon Jones, President of the University of Arivada, and the University's Board of Regents. (*Id.* at 1.) Thereafter, the parties submitted cross motions for summary judgment, and the court heard oral argument. (*Id.* at 2.) On January 17, 2018, the district court granted Vega's motion and denied the University's cross motion, holding that the University's Policy is unconstitutionally vague, substantially overbroad, and unconstitutional as applied to Vega. (*Id.*) Specifically, the court found that Vega's speech "did not 'materially and substantially infringe upon the rights of others.'" (*Id.*) As a result, the court mandated that the University reverse Vega's suspension and reinstate her as a student in good standing. (*Id.*) On appeal, the circuit court reversed the district court's ruling and remanded the case for entry of summary judgment in favor of the University. (*Id.* at 43.) Vega timely filed a petition for writ of certiorari, and this Court granted same. (*Id.* at 54.)

II. Statement of the Facts

A. The University's Unconstitutional Policy

On June 1, 2017, the State of Arivada enacted the Free Speech in Education Act of 2017, Av. Gen. Stat. § 118-200, which requires all public colleges and universities to enact a policy designed to protect free speech on campus. (*Id.* at 19.) Purportedly in accordance with this Act, the University enacted the Policy at issue, which prohibits "expressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." (*Id.* at 23.) The Policy fails to define any of these terms, fails to provide examples of prohibited conduct, and fails to specify a standard for those enforcing the Policy. (*See id.*)

Under the Policy, the University's Dean of Students is the sole administrator to evaluate first-time citations ("first strikes") issued by Campus Security. (*Id.*) Students issued second- and third-time citations ("second strikes" and "third strikes") receive a disciplinary hearing before the School Hearing Board. (*Id.*) Ultimately, the Policy concentrates the authority in Campus Security to define and enforce its boundaries. (*Id.* at 2.) A second strike results in suspension for the remainder of the semester, and a third strike results in expulsion. (*Id.* at 23.)

B. Salient Facts Giving Rise to Vega's Suspension

Valentina Maria Vega is a sophomore student at the University's School of Arts and Sciences, where she is studying Sociology and Pre-Law Studies. (*Id.* at 37.) As a first generation Hondaraguan-American, Vega is proud of her heritage and committed to "promoting respect for the rights and dignity of immigrants in the United States." (*Id.*) She is a leader in the campus community: Vega is the president of Keep Families Together ("KFT"), a national student organization that shares Vega's conviction. (*Id.*) In her capacity as President, Vega organizes and participates in peaceful protests and rallies throughout the campus to further KFT's mission. (*Id.*)

KFT—and Vega, herself— believes that these protests and events are essential to "promot[e] awareness for immigration issues." (*Id.*)

On August 31, 2017, Students for Defensible Borders ("SDB") hosted a rally to spread anti-immigration rhetoric. (*Id.* at 3.) Because such beliefs are antithetical to KFT's mission, Vega and nine other members of KFT, including Ari Haddad and Teresa Smith, attended the rally, hoping to explain that "immigration is a good thing." (*Id.* at 3–4.) In response to their protests, Campus Security Officer Michael Thomas issued citations to all ten KFT members, resulting in first strikes issued by Louise Winters, the Dean of Students. (*Id.* at 4.)

Less than a week later, American Students for America ("ASFA") hosted Samuel Payne Drake, Executive Director of Stop Immigration Now, to speak at an event on campus. (*Id.* at 24.) Drake's goal was to promulgate the idea that "the evils of immigration" are "destroying our American ideals, safety, and freedom." (*Id.*) Again, these ideas were antithetical to those of Vega and KFT. (*See id.* at 38.) And again, Vega sought to voice her position. (*Id.*) This time, however, Vega was not joined by her peers—because they feared the penalties they might face under the University's ambiguous policy. (*Id.*)

Unlike the first incident, which was hosted in an indoor auditorium, ASFA's event took place in an outdoor amphitheater located in the University's "Quad"—an expansive green space at the heart of the University. (*Id.* at 4.) The Quad is a central component of campus life. (*See id.*) It is surrounded by dormitories and student facilities, and is cross-hatched with sidewalks and walkways. (*Id.*) Students frequently gather to study, listen to music, play games, socialize, and play sports like flag football and frisbee within the Quad. (*Id.*)

In addition to benches and casual seating, the Quad contains the amphitheater where ASFA's event occurred. (*Id.*) The amphitheater is comprised of wooden benches arranged in a

semi-circle around a central platform. (*Id.* at 5.) It has a maximum seating capacity of 100 people, though only thirty-five students attended ASFA's event. (*Id.*) Importantly, there is no clear line of demarcation between the amphitheater and the rest of the Quad. (*Id.*) In fact, there is a walkway located just ten feet behind the last row of benches. (*Id.*) Because there is no enclosure, activities and noises taking place elsewhere in the Quad are easily heard within the amphitheater. (*Id.*)

Drake's speech was scheduled at approximately 1:15 p.m. on September 5, 2017. (*Id.*) At that time, the Quad was buzzing with student activity. (*Id.*) Several dozen students played in an intramural football game, while many others cheered from the sidelines. (*Id.*) Students walked through the Quad to class. (*Id.*) Some gathered to eat lunch and talk with friends. (*Id.*) Others played their guitars or listened to music on portable speakers. (*Id.*) Vega joined in the bustle. (*See id.*) She stood on a paved walkway behind the amphitheater, wearing a Statute-of-Liberty costume, and declared her opposition. (*Id.*) But she was soon silenced, when Putnam called Campus Security to report "an obnoxious and disturbing disruption," and Thomas—the same officer from the first incident—arrived on the scene. (*Id.*)

Thomas briefly observed the situation, during which time he entered the amphitheater and noted that he could hear several voices, shouts, and cheers from the nearby football game. (*Id.* at 36.) Thomas also noted that Drake's speech was audible over all this noise. (*Id.*) Nevertheless, Thomas issued a citation only to Vega. (*Id.*) He did not even "consider addressing other sources of noise distraction because [he] was responding to a specific call"—a call made by the event's host, who admitted that he could hear the flag football game and Drake's speech, but who found Vega's protests "obnoxious" and "crazy." (*Id.* at 28–29, 35.)

Vega was the only student directly protesting ASFA's event. (*See id.* at 17.) And she was the only recipient of a citation, despite the abundant sources of noise. (*See id.*) Vega was subsequently suspended from the University. (*Id.* at 6.)

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because the University's Policy fails constitutional muster both on its face and as applied to Vega. From its very text, the Policy fails to give any guidance—let alone explicitly define—the conduct it prohibits. Because of its ambiguous boundaries, students have no reasonable opportunity to gauge what is allowed or prohibited by the Policy. Instead, students are left at the mercy of Campus Security, who likewise lack guidance in their enforcement of the Policy.

Unfortunately, the Policy's vague contours are exacerbated by its substantial overbreadth. The only sure thing is that the Policy proscribes "expressive conduct": conduct that is protected at the heart of the First Amendment. The Policy does not merely regulate a *substantial amount* of protected conduct in relation to its legitimate sweep: it *only* regulates constitutionally protected conduct. Given its facial infirmities, this Court need not go any further to find that this Policy violates the First and Fourteenth Amendments. However, the Policy's unconstitutionality does not stop here.

As applied, the Policy violates Vega's First Amendment rights to express her closely held beliefs in the manner in which she chooses: in this instance, in the form of a protest. In suspending Vega and disregarding the other sources of noise in the Quad, the University not only confirmed its inconsistent enforcement of the Policy; even more egregiously, the University penalized Vega for the *content* of her speech. Such application of the Policy resulted in a gross violation of Vega's First Amendment rights.

ARGUMENT

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This prohibition extends to the states under the Due Process Clause of the Fourteenth Amendment and likewise applies to public universities. *Healy v. James*, 408 U.S. 169, 180 (1972). At their core, universities foster a "marketplace of ideas," and First Amendment protections apply with equal force within university walls as they do in the community at large. *See id.* Here, the University's Policy completely undermines this purpose.

On its face, the University's Policy is inconsistent with the First and Fourteenth Amendments because it is overly vague and substantially overbroad. And as applied to this case, the Policy violates Vega's First Amendment right to free speech.

I. THE UNIVERSITY'S POLICY IS FACIALLY UNCONSTITUTIONAL BECAUSE IT IS OVERLY VAGUE AND SUBSTANTIALLY OVERBROAD.

The Supreme Court has defined the university as a sphere of First Amendment freedoms indispensable to the functioning of our society. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). It follows, then, that the state's "ability to control speech within that sphere . . . is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Id.* (citing *Keyishian v. Bd. of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605–06 (1967). Here, the University's Policy fails to define any of its ambiguous terms and lacks explicit standards to guide its application. Because of its indefinite boundaries, it works to prohibit a substantial amount of conduct at the heart of the First Amendment. Its application to Vega is a prime example of its overbreadth.

A. The policy is impermissibly vague because it fails to delineate the conduct it prohibits, and it promotes arbitrary and discriminatory enforcement.

Due process demands clarity in the law: regulations that are impermissibly vague must be struck down. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To survive a vagueness challenge, a law must satisfy two independent requirements. *Id.* First, the law must

clearly define its restrictions to give individuals of common intelligence a reasonable opportunity to ascertain its scope. *Id.* Second, the law's application cannot promote—or even authorize—arbitrary and discriminatory enforcement. *Id.* Essentially, when First Amendment freedoms are at stake, "rigorous adherence to those requirements [are] necessary to ensure that ambiguity does not chill protected speech." *Id.* at 253–54. On its face, the University's Policy fails both components of this test.

1. The Policy is unconstitutionally vague because it fails to clearly define any of its terms or illustrate the conduct it prohibits.

To evaluate whether a law is void for vagueness, the court must first attempt to extrapolate its meaning. *Grayned v. Rockford*, 408 U.S. 104, 110 (1972). While mathematical certainty is not required, it is essential that a regulation provide a clear measure of the scope of conduct it forbids. *Id.* at 110–11. Here, because the University's Policy falls under state authority, and federal courts lack jurisdiction to narrow state legislation, this Court is constrained to the text of the Policy in order to determine its meaning. *Id.*

As a general principal, statutes are unconstitutionally vague when the specified standard of conduct is subjective or "no standard of conduct is specified at all." *See City of Chicago v. Morales*, 527 U.S. 41, 47, 60 (1999) (citing *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). Vague regulations are problematic because they contain ambiguous words that render it impossible to determine what conduct is prohibited. *Id.* at 59–60. For example, in *Morales*, this Court struck down a city ordinance that prohibited gang members from "loitering." *Id.* at 47 n.2. While the law did provide a definition for the term "loiter," this Court took issue with the fact that the definition contained the words "apparent purpose." *Id.* These words, the Court found, established a subjective rather than objective basis to evaluate conduct. *Id.; see also Coates*, 402 U.S. at 611, 614 (invalidating an ordinance that proscribed conduct "annoying" to others on any sidewalk because

there was no standard of conduct specified at all). Essentially, a standard that is so subjective is no standard at all. *See id*.

When a regulation is susceptible to multiple interpretations, it must fail on its face. *See Baggett v. Bullitt*, 377 U.S. 360, 378 (1964) (invalidating a statute that required state employees to take an oath without a clear scope because of the potential for infinite interpretations). Because individuals are free to "steer between lawful and unlawful conduct," the Constitution requires that laws articulate the conduct they proscribe with reasonable precision. *Grayned*, 408 U.S. at 108. In *Grayned*, this Court upheld an Illinois anti-noise ordinance that was limited in time, place, and manner.[1] *Id.* at 109, 111. The decision turned on the ordinance's requirement of an *actual* interference with school activities: this condition was sufficient to illustrate the scope of the regulation and therefore comport with due process requirements. *Id.* at 113–14.

Here, the University's Policy provides only one sentence that takes up merely two lines of space on a single page. (R. at 23.) It gives no definitions. (*Id.*) It provides no examples. (*Id.*) Its word choice is not reasonably tailored to provide any indication of its boundaries. As properly noted by the district court, the Policy resembles more of a code of politeness than a lawful regulatory scheme. (*Id.* at 9.) Identical to *Baggett*, the University's Policy is open to an infinite number of interpretations. *See Baggett*, 377 U.S. at 378. For example, what constitutes a "material and substantial" infringement? What do the "rights of others" entail? Are the "rights" in reference to legal cognizable rights? Or do they reference something more subjective, like the "rights" to which an individual feels entitled? The questions are endless. And therein lies the problem.

[1] The anti-noise ordinance stated that "[n]o person, while on public or private grounds adjacent to any building in which a school or class thereof is in session shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . ." *Id.* at 107–08.

Similar to the laws in *Coates* and *Morales*, the Policy walks a fine line of regulating conduct based on the subjective perception of others, providing no standard at all. *See Coates*, 402 U.S. at 611; *see also Morales*, 527 U.S. at 60. Must someone completely exterminate another's rights, or is a mere impairment sufficient to violate the Policy? How *much* infringement is required to find a violation? While in *Grayned*, this Court relied on the specified time, place, and manner restrictions that provided limits on the law's scope, the Policy here fails to denote *any* time, place, or manner elements whatsoever. *See Grayned*, 408 U.S. at 108. Instead, the Policy casts a wide net over the entire campus, restricting expressive conduct at the hands of Campus Security.

Perhaps most concerning is that the uncertainty arising from this Policy has the obvious effect of chilling student speech—in an environment where students ought to be encouraged to engage in thoughtful discourse and debate. *See Healy*, 408 U.S. at 180–81. Smith and Haddad provide a prime example of this. Both students were afraid to join Vega's protests of ASFA's event because they were unable to discern what the Policy prohibited. (R. at 26, 30.) Both students were deprived an opportunity—one guaranteed to them by the Bill of Rights—because their University's Policy is so substantially vague.

2. The policy is unconstitutionally vague because it encourages arbitrary and discriminatory enforcement.

Although the Policy is unconstitutionally vague for its failure to provide reasonable notice to students, the Policy fails on yet another level: its vagueness allows for indiscriminate enforcement. Regulations that lack clear standards for administration often result in arbitrary and discriminatory enforcement, the evils of which are so egregious that such regulations require immediate invalidation. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). In fact, arbitrary enforcement is the principle conduct that the vagueness doctrine seeks to guard against. *See id.*

For example, in *Kolender*, this Court struck down a statute that required "persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer." *Id.* at 353. This Court held that the enforcement of that law was left completely to the province of state officials, who subjectively determined which types of identification were sufficient. *Id.* Such decisions depended on "moment-to-moment judgment[s]," furnishing officers with unrestrained power to enforce the statute at their discretion. *Id.* (citing *Smith v. Goguen*, 415 U.S. 566, 575 (1974). The possibility of such indiscriminate enforcement was unconstitutional. *Id.*

Here, the University's ambiguous Policy provides the same type of unworkable standard. *See id.* Campus Security is required to issue citations to those who "materially and substantially infring[e] on the rights of others," without having any guidance as to what constitutes another's "rights," or how much infringement constitutes "material and substantial." Like the officers in *Kolender*, Campus Security here must make "moment-to-moment" decisions issuing violations at their own volition. *See id.* The Policy not only authorizes, but completely promotes arbitrary and discriminatory enforcement. It delegates sweeping authority to Campus Security and fails to provide *any*—let alone adequate—guidelines to direct its enforcement. The University's Policy fails both requirements of due process and, accordingly, it must be struck down.

B. The Policy is substantially overbroad because it encompasses constitutionally protected conduct that is significant in relation to its plainly legitimate sweep.

Because the First Amendment needs "breathing space," laws attempting to restrict First Amendment rights must be narrowly designed. *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973). To this end, the overbreadth doctrine exists as a safeguard against laws with overreaching effects that implicate First Amendment freedoms. *Id.* at 612. "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." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). So when, as here, a law's overbreadth is both real and substantial in relation to its plainly legitimate sweep, the Court must strike it down. *See Broadrick*, 413 U.S. at 614.

1. The Policy prohibits constitutionally protected conduct.

In determining whether a law is overbroad, courts shall not rewrite the law to comport with the First Amendment. *United States v. Stevens*, 559 U.S. 460, 481 (2008) (citing *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997)). Instead, a regulation that, on its face applies to constitutionally protected conduct, must be struck down as a matter of law. *Bd. of Airport Comm'rs City of Los Angeles. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). In *Jews for Jesus*, this Court—without hesitation—struck down an expansive airport resolution that proscribed all First Amendment conduct near its terminals. *Id.* at 574–75. Frankly, statutes with such expansive breadth cannot be saved by any limiting construction. *Id.* at 575–76. They must be invalidated for their strain on constitutionally protected conduct. *Id.*

In *Stevens*, for example, this Court struck down a statute that banned depictions of animal cruelty, including depictions of animals being "maimed, mutilated, tortured, wounded, or killed" in any jurisdiction where such conduct was illegal. *Stevens*, 559 U.S. at 473, 475. Crucially, this Court rejected the government's argument that the statute was written with language from previous precedent. *Id.* at 479. Instead, this Court held that the "bewildering maze" of laws from over fifty-six jurisdictions, and the varying definitions of animal "cruelty," widened the scope of the statute's breadth to encompass protected conduct under the First Amendment—and it was therefore invalid. *Id.* at 476, 482.

Here, understanding the construction of the University's Policy is no small task given the Policy's impermissibly broad scope. To be clear, the Policy prohibits: (1) expressive conduct, (2) that materially and substantially, (3) infringes upon the rights of others, (4) to engage in or listen

to expressive activity. "Expressive conduct" is not difficult to delineate as it directly relates to freedoms of expression protected under the First Amendment. The Policy—from its very text—clearly applies only to protected expression under the First Amendment. Just like in *Jews for Jesus*, this compels immediate invalidation for its categorical ban.

The terms "materially" and "substantially," however, are more problematic. Although the University argues that its language is taken directly from *Tinker*, it implicitly applies this standard to conduct beyond that covered in *Tinker*. *See Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969). *Tinker*, for example, addresses only school-related activities, and *Tinker's* progenies likewise discuss the standard in the context of school-sponsored events at elementary and secondary schools. *Id; cf. Bethel School Dist. No. 3 v. Fraser*, 478 U.S. at 678. Here, on the other hand, the University applies its policies everywhere on campus, at events not sanctioned or endorsed by the school, and at events unrelated to students' studies or education. As a result, though its language mirrors the *Tinker* standard, the Policy encompasses a far broader scope of activities. *See* 393 U.S. 503. In fact, the Policy is so broad that it includes conduct protected under the First Amendment.

The context of a place determines the time, place, and manner restrictions considered reasonable to withstand an overbreadth challenge. *Grayned*, 408 U.S. at 116. In *Grayned*, for example, the anti-noise ordinance discussed above was reviewed for overbreadth in addition to vagueness. *Id.* at 108. In upholding the ordinance, this Court held that the law went no further than *Tinker* permits. *Id.* This Court explained that, while the ordinance did prohibit some noisy demonstrations ordinarily protected by the First Amendment, it only prohibited such conduct at certain times and only within school limits. *Id.* at 120. In other words, the ordinance was not

overbroad because it still gave ample opportunity to engage in protected conduct either at a different time or elsewhere. *Id.*

Here, the University's Policy is not even slightly narrowed to represent consideration for First Amendment protections. Instead, it clutches in its grasp all expressive conduct that may be disruptive to another's expression. Contrary to the ordinance in *Grayned*, the Policy fails to limit the scope of its restrictions to any time, any place, or in any manner. Its broad contours encompass any and all types of expression at any time of the day. *See id.* Unfortunately for the students, this is a college campus, with hundreds—maybe even thousands—of students living, working, eating, and socializing on campus grounds. The place where these students spend the most time is the same place where this Court has recognized the significance of the free exchange of ideas. *Healy*, 408 U.S. at 180. Yet here, it is the place where these expressions are most restricted. The Policy is in no way tailored to protect these concerns. In fact, unlike the ordinance in *Grayned*, the University's Policy extends much further than permissible under the First Amendment. *See* 408 U.S. at 116.

2. <u>The Policy is substantially overbroad because the amount of protected conduct it prohibits is greatly outweighs its plainly legitimate sweep.</u>

The overbreadth doctrine requires more than just mere speculation that some applications of a statute may be unconstitutional. *United States v. Williams*, 553 U.S. 285, 288, 303 (2008) (rejecting an overbreadth challenge of a federal statute that barred the pandering or solicitation of child pornography because such conduct is not protected by the First Amendment). But policies that prohibit protected expressions necessarily fail if they are "susceptible of application to speech . . . protected by the First and Fourteenth Amendments." *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). For instance, in *Gooding*, this Court emphasized that states are powerless to regulate speech that is not within "narrowly limited classes of speech." *Id.* at 521–22 (quoting *Chaplinsky*

v. New Hampshire, 315 U.S. 568, 571 (1942)). The *Gooding* Court struck down a state statute that forbid the use of "opprobrious words or abusive language, tending to cause a breach of the peace." *Id.* at 519. Although the state argued that the ordinance only applied to "fighting words," a class of speech *not* protected by the First Amendment, this Court was unconvinced. *Id.* at 524. Instead, the Court held that the statute was overbroad because it was not limited to unprotected speech; it encompassed classes of speech beyond that unprotected category. *Id.*

Here, like the law in *Gooding*—and unlike the law in *Williams*—the University's Policy regulates sensitive freedoms at the core of the First Amendment. *See Gooding*, 405 U.S. at 520; *see Williams*, 553 U.S. at 288. In fact, the University's Policy reaches even further than the law in *Gooding* because it exclusively targets "expressive conduct," almost all of which is constitutionally protected. *See* 405 U.S. at 520. Thus, it is not that this Policy simply encompasses substantial protected conduct in addition to its legitimate sweep. Rather, the Policy has no legitimate sweep. Its entire breadth regulates protected conduct. Thus, in addition to the Policy's failure to comport with due process, the Policy is void for its substantial overbreadth, which abridges critical rights protected by the First Amendment.

C. The Policy uses language from *Tinker*—taken out of context—which does not clarify the conduct it proscribes nor the boundaries of its application.

The University argues that *Tinker* applies to the college setting, allowing the University more leeway to regulate speech, and further, that because its Policy takes some language from *Tinker*, the Policy cannot be facially unconstitutional. *See Tinker*, 393 U.S. at 513 (explaining that conduct which "materially and substantially disrupts classwork or involves *invasion* of the rights of others" is not immunized by the First Amendment). However, the district court correctly recognized that both of these arguments are misplaced. (R. at 13.) First, a university setting exists precisely to provide students with the type of free-flowing discourse that ought to be limited in

primary and secondary schools to maintain order. *McCauley*, 232 F.3d at 243. And second, even if *Tinker* does extend to college campuses, the Policy here is nevertheless more overreaching than the standard in *Tinker*.

1. Tinker does not extend to university campuses, so university students are protected by the full breadth of First Amendment law.

The pedagogical mission of universities differs drastically from that of lower educational institutions. *McCauley*, 232 F.3d at 243. Secondary and elementary schools are committed to teaching societal and cultural values, imparting civic discourse and maturity, preparing students for professional training, and helping children adjust to their environment. *Id.* On the other side of the spectrum are universities and colleges. *Healy*, 408 U.S. at 180. There, institutions act as a "marketplace of ideas." *Id.* In *Healy*, this Court reminded us 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." *Id.* at 180, 92; *cf. Tinker*, 393 U.S. at 511–13 (explaining the need for balance between First Amendment protections and safeguarding the authority of state officials to control conduct within secondary and elementary schools). More importantly, this Court has *never* extended the standard applied in *Tinker* to First Amendment challenges at the university level. *See, e.g. Tinker*, 393 U.S. at 511–13; *Healy*, 408 U.S. at 180; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). In fact, our future is contingent upon "leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian*, 385 U.S. at 603 (citation omitted). On the other hand, administrators in elementary and secondary institutions are responsible for acting *in loco parentis*. *McCauley*, 618 F.3d at 243 (citing *DeJohn v. Temple Univ.*,

537 F.3d 301, 315 (3d Cir. 2008). And clearly, the interactions between professors and students at the university level, which resembles a "collaborative learning environment," differ drastically from the interactions between teachers and younger students in grade school. *Id.* at 244. Furthermore, the majority of college adults live on college campuses and remain subject to university policies at every moment of the day, whereas adolescents are usually free from their school's restrictions at the end of the school day. *Id.* at 247. These vast differences beg the conclusion that the standard from *Tinker* is not applicable at the university level.

2. Though similar in language, the University Policy and the *Tinker* standard differ drastically in breadth.

The University's attempt to use a few words similar to the standard articulated in *Tinker* does not relieve the Policy of its constitutional infirmities. Even if the *Tinker* standard did apply at the university level, the Policy still fails constitutional muster because it extends beyond what is encompassed by the *Tinker* standard, and it is overly vague and substantially overbroad. To start, the University uses simply a patchwork of terms from dicta throughout *Tinker*—taken out of context—to create a Policy that encompasses conduct like Vega's that is protected under the First Amendment.

The district court here correctly recognized that the University's Policy is a looser standard—more vague and more difficult to ascertain—than the standard articulated in *Tinker*. (R. 14.) For example, the Policy prohibits expressive conduct that *infringes* upon the rights of others. Yet the standard from *Tinker* prohibits conduct that *invades* the rights of others, not merely *infringes* upon those rights. *See* 393 U.S. at 511–13. The Policy provides no guidance as to whether "infringe" is broader or narrower than the *Tinker* language. In fact, the Policy itself does not even reference *Tinker*, so readers are forced to wonder whether this Court's application of the *Tinker* standard is instructive in how the University will apply its own vague Policy.

Furthermore, the Policy is broader than the standard in *Tinker* because the Policy excludes the first clause of the *Tinker* standard, which concerns conduct that "materially disrupts classwork or involves substantial disorder," and which, taken in context, limits the scope of *Tinker*. *See id.* Crucially, not only does the Policy's ignorance of this clause demonstrate that it is not the same standard, but it also makes the Policy further reaching than *Tinker* because it extends beyond school and educational activities. The additional conduct encompassed by the Policy renders the Policy substantially overbroad because, as discussed above, it includes conduct protected by the First Amendment.

In sum, even the *Tinker* Court emphasized that the First Amendment creates risks of disruption. *Tinker*, 393 U.S. at 508–09 (citing *Terminiello v. Chicago*, 337 U.S. 1, 69 (1949)). But "our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength." *Id.* The Policy here fails to recognize this. It is overly vague and substantially overbroad, with language that prohibits speech traditionally protected under the First Amendment. The consequence of such a Policy is that it chills speech in a setting that ought to, primarily, encourage free discourse: the University. Because of its facial infirmities resulting in violations of the First and Fourteenth Amendments, the Policy must be struck down.

II. AS APPLIED TO VEGA, THE POLICY VIOLATES THE FIRST AMENDMENT BECAUSE IT RESULTED IN HER SUSPENSION FOR ENGAGING IN PROTECTED EXPRESSION.

"The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971). The First Amendment protects national discourse and growth, and it is central to the American culture. *Tinker*, 393 U.S. at 508–09. But critical to First Amendment dialogue is the fact that people rarely complain about speech with which they agree. *See Cohen*, 403 U.S. at 24–26. So the debate over

how and when a State may interfere with these expansive, fundamental rights arises almost exclusively in the context of controversial speech—speech from minority groups and of minority viewpoints. *See id.* It is thus critical that, if this Court is to draw a line infringing on any individual's First Amendment rights, it do so with painstaking caution and care, keeping in mind the diversity and "marketplace of ideas" promoted by our First Amendment. *See Healy*, 408 U.S. at 180. Exceptions to constitutional protections are not to be frivolously granted. *See id.* ("We are mindful of the . . . significant interest in the widest latitude of free expression and debate consonant with the maintenance of order"). Here, Vega engaged in conduct protected by the First Amendment, she did not substantially and materially interfere with the rights of others, and she was penalized for the *content* of her speech. The University's application of its Policy is a gross violation of Vega's constitutional rights.

A. Vega's actions were expressive conduct that falls within the purview of the First Amendment.

The First Amendment protects more than simply "pure speech"—it additionally safeguards expressive conduct: actions that are intended by the speaker to communicate a particular message and likely to be understood by the audience as communicating that message. *Spence v. Washington*, 418 U.S. 405, 410 (1974) (holding that the display of an American flag upside down, with tape forming a peace symbol, constituted protected speech, despite the fact that there were no spoken or written words to communicate the message); *see also United States v. O'Brien*, 391 U.S. 367, 370 (1968) (holding that the burning of the Selective Service Registration for the draft, on the steps of a Courthouse in front of a crowd, was expressive conduct protected by the First Amendment).

Here, Vega's actions fall within the purview of First Amendment protections. *See Tinker*, 393 U.S. at 508. Her chants are pure speech, unmistakably protected. *Id.* But crucially, beyond just

her statements, Vega's actions—her Statue of Liberty costume and the time, place, and manner in which she announced her views—are expressive conduct, equally protected. *See Spence*, 418 U.S at 408; *O'Brien*, 391 U.S. at 367. Like the protesters in *Spence* and *O'Brien*, Vega's intent in protesting ASFA's event was clear: she stated that she wanted "to provid[e] support to those passing through the community who might also find such an event offensive," and that she wore a Statue-of-Liberty costume "to make a stronger impact." (R. at 38); *see id.* Also like the protestors in *Spence* and *O'Brien*, Vega's message was understood by the audience. (*Id.* at 32) ("Her views clearly differed from Mr. Drake's opinions"); *see also id*. In fact, the context surrounding Vega's protest enriched—and was crucial to—her message. *See Spence*, 418 U.S. at 410 ("the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol" citing *Tinker*, 393 U.S. at 505–14). Thus, the entirety of Vega's actions during the event fall within First Amendment protections as expressive conduct and speech.

Instead of recognizing this, the Fourteenth Circuit erroneously submits that Vega could express her views at an alternate time or place, stating that Vega "surely could have reserved the Amphitheater or some other campus venue for another day." (R. at 52.) But this suggestion severely misses the point and threatens the very foundation of free speech. It implies, contrary to this Court's holdings dating back decades, that context does not matter. *See, e.g, Tinker*, 393 U.S. at 505–14; *Spence* 418 U.S at 408; *O'Brien*, 391 U.S. at 367. It implies that Vega could be silenced for the duration of any event to which she wishes to express opposing views. It negates the idea of a protest.

Of course, we recognize the long established right to place restrictions on the time, place, and manner of certain forms of speech. *See Healy*, 308 U.S. at 192. But such restrictions require a demanding balancing test to justify the resulting encroachment on freedom of speech. *Id.* This

court has never suggested that, for the duration of time that one viewpoint is conveyed, opposing viewpoints may be legally suppressed; in fact, under the First Amendment, all viewpoints are protected absent exceptional circumstances. *See, e.g., Grayned*, 408 U.S. 104, 118 (1972); *Cohen*, 403 U.S. at 24; *Cameron v. Johnson*, 390 U.S. 611, 616 (1968); *Roth v. United States*, 354 U.S. 476 (1957). Here, Vega's conduct does not fall within any such exceptional circumstances. *See id.*

Vega's actions did not disrupt classroom activity in nearby buildings, like the protesters in *Grayned* who allured schoolchildren from their classrooms to join a demonstration outside. *See* 408 U.S. at 118. Vega's voice was not so loud that it drowned out classroom discussion. *See id.* Vega did not prevent ingress and egress from any place, like the protestors in *Cameron. See* 390 U.S. at 616. Her speech was not obscene. *See Cohen*, 403 U.S. at 20 ("such expression must be, in some significant way, erotic," *citing Roth*, 354 U.S. at 476). Vega did not espouse "fighting words." *Chaplinsky*, 315 U.S. at 573. Put simply, Vega did not engage in any exception to First Amendment protected activity. She wished to peacefully provide an opposing viewpoint and provide support to colleagues during ASFA's event. (R. at 38–39). The district court here was correct to find that such expression was shielded by the First Amendment, and the Fourteenth Circuit erred in concluding otherwise.

B. Vega's suspension is unconstitutional because her actions did not violate the school Policy, and the University suspended her for the *content* of her speech while disregarding the abundance of unrelated noise from other students.

Because Vega's speech is protected, her suspension from the University—a state actor—violates the Constitution. *See Tinker*, 393 U.S. at 508. But the University's actions are even more egregious: not only was Vega penalized for engaging in protected activity, she did not violate the school Policy—she did not "materially and substantially infringe upon" the rights of Drake to speak or the rights of other students to listen—*and* she was penalized for the content of her speech.

Given the University's flagrant disregard for the constraints of the First Amendment in enforcing this Policy, Vega's suspension must be reversed.

1. Vega did not materially and substantially interfere with others' rights because students do not have an absolute right to listen and because they could nevertheless hear Drake's speech over the noise.

While the University Policy fails to define the standard for a "substantial and material" infringement on the rights of others, this Court has used a similar standard to evaluate disruptions in schools from students' exercise of their free speech rights. This Court has found, for example, that wearing black armbands in protest of the Vietnam war was not a "substantial and material" disruption, despite that a "teacher of mathematics had his lesson period periodically 'wrecked'" due to disputes with the students, and that the armbands instigated comments, warnings by other students, and distractions. *Tinker*, 393 U.S. at 517–18 (Black, J., dissenting). On the other hand, this Court found a substantial and material disruption from a student's speech during a middle school assembly. *Fraser*, 478 U.S. at 678. There, the student used "an elaborate, graphic, and explicit sexual metaphor," which resulted in students "hoot[ing] and yell[ing]," making graphic sexual gestures, and feeling "bewildered and embarrassed." *Id.* This Court's holdings in those cases must be taken in context: in each case in which the Court referenced the "substantial and material" disruption standard, it did so narrowly, referring to the disruption *of schoolwork or school events. See e.g., Tinker,* 393 U.S. at 508; *Fraser*, 478 U.S. at 678; *Hazelwood*, 484 U.S. at 273.

Here, unlike in *Tinker*, *Fraser*, and *Hazelwood*, the University's Policy applies to events unrelated to schoolwork and not sponsored by the University. Nevertheless, assuming (absent University definitions) that the standard is the same, Vega's conduct did not substantially or materially infringe on the rights of other students. *See id.* Unlike in *Fraser*, where the comments were inescapable because students were required to attend the assembly, students here were not

required to stay and listen to Vega's remarks. *See* 478 U.S. at 678. Notably, this Court has never found an absolute right to listen rooted in the First Amendment—so students or speakers offended by Vega's comments could simply leave. *See also Cohen*, 403 U.S. at 21 (holding, in the case of printed words, that offended onlookers "could effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

Moreover, Vega was not so loud that students could not hear Drake's speech over her protest. (R. at 36) ("I entered the amphitheater to determine whether the protests were inhibiting spectators' ability to listen to the speech and determined I could hear both Mr. Drake and Ms. Vega"). In fact, Vega's actions were even less disruptive than the students' actions in *Tinker*—actions authorized by this Court as not material infringements. At worst, Vega's statements were a mere distraction to a total of thirty-five students in attendance at ASFA's event; such conduct is far less disruptive than "wrecking" an academic class or prompting threats from schoolchildren. *See Tinker*, 393 U.S. at 517–18 (Black, J., dissenting).

Ultimately, given this Court's interpretation of the standard, Vega's actions do not rise to the level of "material and substantial" infringement of other students' rights. As such, Vega did not even violate the University Policy at issue, and her suspension must be overturned.

2. The University punished Vega for the *content* of her speech.

"When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.." *Startzell v. City of Phila., Penn.*, 533 F.3d 183, 193 (3d Cir. 2008) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Here, while the Policy appears content-neutral on its face, the University has applied it so inconsistently as to render it a content-based regulation. *See Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015) ("Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered

content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech.'"). Importantly, the University's intent in enforcing the Policy here is irrelevant to the analysis; it does not matter whether the University intended to discriminate based on the content of the speech, or whether the content-based enforcement was "innocuous" or incidental. *Id.* Regulating speech based on its content—regardless of intent—is "never permitted." *Police Dep't of City of Chicago v. Mosely*, 408 U.S. 92, 99 (1972).

Crucially, the individual who set in motion Vega's suspension was Theodore Hollingsworth Putnam: the current President of ASFA, who organized the event at which Drake came to speak, and who, at his core, opposes Vega's opinions. (R. at 28–29.) To be clear, it is not his difference in beliefs that raises concern, but rather his desire to silence Vega's opinions—and the University's enabling him to do so. (*Id.*) In evaluating only the students who are *reported* in violation of the Policy—which is exactly what happened in this case—the University, in effect, penalizes only students who express controversial viewpoints as determined by their peers. More specifically in this case, the University penalized Vega not just for making noise, but for expressing pro-immigration views—because those views were offensive to her peers and because they reported her for same.

This becomes exceedingly apparent when the Court considers that dozens of other students were making noise during and near ASFA's event, that all of this noise was likewise audible within the amphitheater, and that Campus Security did not even consider addressing it. (*Id.* at 17.) The Fourteenth Circuit unsuccessfully attempts to explain away this inconsistency, noting that "Mr. Drake, Mr. Putnam, and audience member Meghan Taylor all state that Ms. Vega's antics and chants were significantly more distracting than the background noise." (*Id.* at 52.) What the Fourteenth Circuit does not reference, however, is that Taylor stated that the flag football game,

the students playing frisbee, shouting, and playing music, and Vega's protests, "*combined*, made it difficult to hear Mr. Drake speak." (*Id.* at 32.) The Fourteenth Circuit additionally fails to mention that both Drake and Putnam heard noises from the football game and other students in the Quad, but they found Vega, exclusively, "obnoxious": likely because her protests directly conflicted with their closely held opinions. (*Id.* at 25, 28–29.) In other words, Drake and Putnam disapproved of the content of Vega's message, and they complained to the University because of it. It was the University's fatal mistake to give credence to their complaints. *See Tinker*, 393 U.S. 503, 508–509 ("Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.").

Ultimately, there is insufficient evidence to show that Vega's protest was significantly more disruptive than the other activities taking place on the Quad. That is, unless one considers the content of her speech: that she was directly and deliberately disputing Drake's speech. (R. at 17.) "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). To this end, the University's inconsistent application of the Policy to Vega's case is not only dangerous, but unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the lower court and find that the University's Policy violates the First and Fourteenth Amendments of the U.S. Constitution.

CERTIFICATION

This team certifies that (i) the work product contained in all copies of this brief is in fact the work product of the team members; (ii) this team has complied fully with its school's governing honor code; and (iii) this team has complied with all Rules of the Competition.