No. 18-1234

IN THE

SUPREME COURT OF THE UNITED STATES

VALENTINA MARIA VEGA

Petitioner,

-against-

JONATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

TEAM 19

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Is the University of Arivada's Free Speech Policy imposing disciplinary sanctions on a student who "materially and substantially infringes on the rights of others to engage in or listen to expressive activity" unconstitutionally vague and substantially overbroad?

2. Does the University of Arivada's Campus Free Speech Policy, as applied to Petitioner Valentina Maria Vega, violate her First Amendment right to free speech?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF FACTS

The Petitioner, Ms. Valentina Maria Vega, is a sophomore at the University of Arivada ("the University"). (Vega Aff. ¶ 1, 2.) In addition to her academic work, she is the president of the University's chapter of the national student organization Keep Families Together ("KFT"), which promotes and defends immigrant rights. (Vega Aff. ¶ 4.) A first-generation Honduraguan-American, Ms. Vega hopes to one day attend law school to advocate for immigrants' rights. (Vega Aff. ¶¶ 1, 3.)

On August 1, 2017, the University—a public educational institution—promulgated its Campus Free Speech Policy ("Policy") in accordance with the legislative mandate that all post-secondary schools in Arivada develop and adopt policies to safeguard the freedom of expression for all members of campus communities. See Av. Gen. Stat. § 18-200 (2017). The Policy states: "Expressive conduct that materially and substantially infringes on the rights of others to engage in or listen to expressive activity shall not be permitted on campus and shall be subject to sanction." The Policy further provides that a first strike under the policy shall result in a warning on the student's record, a second strike shall result in suspension, and a third strike shall result in expulsion from the University. The University had electronically transmitted the Policy to its students as part of the 2017 Student Handbook, and Ms. Vega signed the Policy Statement online, as was required to begin classes, before returning to campus on August 27, 2017. (Jt. Stip. ¶¶ 3-5.)

On August 31, 2017, Ms. Vega and nine other members of KFT attended an anti-immigration rally hosted by a student organization called Students for Defensible Boarders ("SDB"), hiding their intention to protest the event when the speaker began his presentation. (Vega Aff. ¶ 5.) When the rally began, Ms. Vega and the others stood up on their chairs and began to "shout down" the speaker by chanting that immigrants are the heart of America, a viewpoint in

opposition to the speaker's view. (Vega Aff. ¶ 6.) Invoking the Policy, Ms. Vega and the nine other KFT members were issued citations by Campus Security Officer Michael Thomas. (Vega Aff. ¶ 8.) After an informal disciplinary hearing, Dean of Students Louise Winters issued all ten KFT students "strikes," as required by the Policy. (Winters Aff. ¶¶ 8-9.)

Immigration was the topic of another student event just six days later, when the student group American Students for America ("ASFA") hosted a talk by Samuel Payne Drake, the Executive Director of Stop Immigration Now, a group that publicly describes illegal immigrants as the "primary cause of violent crime" in America and advocates for the closing of American borders to all immigrants. (Drake Aff. ¶¶ 3-4.) ASFA chose to hold their event at the University's amphitheater, which is located outdoors on the campus Quad. (Putnam Aff. ¶ 5.) The Quad is a "sizeable green space" at the center of campus enclosed by University dormitories. (Jt. Stip. ¶ 10.) There are trees, benches, and walkways throughout the space. During the ASFA event, Ms. Vega stood on a sidewalk approximately ten feet away from the last row of amphitheater seats and chanted slogans such as "immigrants made this land" and "keep families together," while wearing a Statue of Liberty costume. (Vega Aff. ¶ 16.) She intended to present the opposite viewpoint of ASFA's speaker. (Vega Aff. ¶ 16.) Ms. Vega participated in this expression alone because, although her fellow KFT members wanted to join the protest, they were deterred from speaking because they were unsure if doing so was consistent with the Policy and did not want to risk suspension from the University. (Haddad Aff. ¶ 14.)

Within a few minutes, ASFA president Theodore Putnam reported to Campus Security that someone was "loudly shouting slogans adverse to Mr. Drake's speech." (Putnam Aff. ¶ 7.) Within ten minutes, the same officer who responded to the SDB event—Officer Michael Thomas—responded to the complaint. (Putnam Aff. ¶ 7.) After "investigating the situation," Officer Thomas

concluded that it would be appropriate to issue Ms. Vega a citation despite the fact that she was not speaking within the parameters of the amphitheater. (Thomas Aff. ¶ 10.)

Ms. Vega's conduct did not prevent Mr. Drake from continuing his speech. (Drake Aff. ¶ 10.) It is undisputed by all who were present at or near the amphitheater at that time that there were several other noisy activities simultaneously occurring on the Quad around the venue, including a flag football game, that also caused noise during Mr. Drake's speech. (Taylor Aff. ¶ 5.) None of the other individuals responsible for the noises heard during the event were cited under the Policy. (Thomas Aff. ¶ 12.)

As a result of Ms. Vega's conduct and subsequent citation, she was given a procedural hearing where the citation issued by Officer Thomas was upheld as valid. (Winters Aff. ¶ 14.) This finding resulted in the suspension of Ms. Vega for the rest of the semester. (Winters Aff. ¶ 14.)

STATEMENT OF THE CASE

Ms. Vega filed suit against the University and filed a motion for summary judgment alleging that the Policy is unconstitutionally vague and substantially overbroad and that her suspension violates her right to free speech under the First Amendment. She seeks reinstatement as a student and the expungement of the disciplinary action from her record. The University cross filed for summary judgment, asserting that its Campus Free Speech Policy is constitutional and was properly applied to Ms. Vega. The United States District Court for the District of Arivada held the Policy both facially unconstitutional and unconstitutional as applied to Ms. Vega. (R. at 17.) The United States Circuit Court for the Fourteenth Circuit reversed, finding the Policy constitutionally sound both facially and as applied to Ms. Vega. (R. at 53.)

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the movant shows there is no genuine dispute as to any material fact and the movant

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (a). Faced with cross-motions, courts must "decide 'whether either of the parties deserves judgment as a matter of law on the facts that are not disputed.'" Fid. Co-op Bank v. Nova Cas. Co., 726 F.3d 31, 36 (1st Cir. 2013) (quoting Barnes v. Fleet Nat'l Bank, N.A., 370 F.3d 164, 170 (1st Cir. 2004)). The reviewing court must view the facts in the light most favorable to the appellants. Mathirampuzha v. Potter, 548 F.3d 70, 72-73 (2d Cir. 2008).

SUMMARY OF THE ARGUMENT

A law is vague when its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). All vague laws are unconstitutional because they fail to provide the public with fair warning as to the activities that are prohibited, invite subjective, arbitrary, and discriminatory enforcement, and inhibit free expression by those who want to avoid breaking the law but are unsure what the law forbids. Id. at 108-09.

The Policy lacks any objective standards of enforcement. It is not limited in time or location and has no connection to school activities. As demonstrated by the facts of Ms. Vega's suspension, there is no objective basis for determining which conduct is prohibited and which is permissible. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 46 (1991) (O'Connor, J., dissenting) ("The State offers no principled basis for distinguishing those . . . who should be liable . . . from those who should not be liable."). As such, students have no warning as to what conduct is prohibited until they receive a strike and its associated punishment. See City of Chicago v. Morales, 527 U.S. 41, 58-59 (1999) ("Because an officer may issue an order *only after prohibited conduct has already occurred*, it cannot provide . . . advance notice. . . .") (emphasis added). And even after receiving a strike, students still lack clarity as to what is forbidden. Ms. Vega tried—and failed—to modify her behavior to comply with the Policy, while many other students decided

not to risk the repercussions of a second strike and refrained from participating in expressive activities. The policy therefore has a chilling effect on speech.

In addition to being vague, the policy is also overbroad because it prohibits constitutionally protected conduct. Grayned, 408 U.S. at 114. Because constitutionally protected conduct is prohibited, an overbroad policy is likely to inhibit the exercise of free expression by those who obey the law. Bair v. Shippensburg University, 280 F. Supp.2d 357, 367 (M.D. Pa. 2003). The Policy also covers substantially more speech than could be prohibited under Tinker's substantial disruption test. It is thus overbroad on its face because there are a substantial number of instances in which the Policy could not be applied constitutionally. Saxe v. State College Area School Dist., 240 F.3d 200, 215 (3d. Cir. 2001).

Even if the Court were to find the Policy constitutional on its face, it was unconstitutionally applied to Ms. Vega. Because the Tinker standard does not apply to college campuses, university students should be afforded full First Amendment rights just like all other adults. But even under Tinker, Ms. Vega did not "materially and substantially interfere with the requirements of appropriate discipline" or "invade the rights" of the event's speaker or audience members. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969).

To apply Tinker to college campuses would disavow the pedagogical purpose of universities in the "marketplace of ideas" and undermine its history as a locus of political protest and civic engagement. Healy v. James, 408 U.S. 169, 180 (1972). Additionally, the University's enforcement of its Tinker-derived Policy on September 5, 2017 enabled it to suppress speech in a non-content neutral way, as the Policy was effectively used to silence views in opposition to the ones being presented at the ASFA event. Speech may only be restricted if the enforcement action is viewpoint neutral. See Hotel Emps. & Rest. Emps. Union Local 100 v. City of N.Y. Dep't of Parks and Rec., 311 F.3d 534, 553 (2d Cir. 2002).

Even under Tinker, Ms. Vega's conduct was permissible. She did not materially or substantially disrupt the event because the speaker continued to speak and the audience was able to hear. (Thomas Aff., Add. A.; Drake Aff. ¶ 10.) There was no threat of danger posed by Ms. Vega's conduct and no threat of disruption to school functioning from her standing on the public Quad in the middle of the day where many other students congregated, walked, and spoke. She also did not invade the rights of the individuals at the ASFA event because she did not physically or psychologically attack them. See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), opinion vacated on procedural grounds, 549 U.S. 1262 (2007) (recognizing the right of public school students to be "let alone," especially when it comes to verbal assaults on the basis of "core identifying characteristics.").

ARGUMENT

It is well established that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 438 (1963). Due to the unique requirements of schools to educate students and ensure proper discipline, courts have recognized a narrow exception to this rule in public elementary and secondary schools, when conduct would "materially or substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker, 393 U.S. at 509. Universities must comport with the First Amendment. Healy, 408 U.S. at 180. Any regulation limiting speech—even of students—must be clearly defined, provide reasonable warning, and be narrowly tailored to avoid capturing constitutionally protected conduct. Id.; Grayned, 408 U.S. at 108-09 & 120; Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966); Saxe, 240 F.3d at 217.

I. THE UNIVESITY'S POLICY IS UNCONSTITUTIONALLY VAGUE BECAUSE IT LACKS OBJECTIVE STANDARDS OF ENFORCEMENT AND FAILS TO PROVIDE REASONABLE WARNING.

A law is vague when its prohibitions are not clearly defined. Grayned, 408 U.S. at 108. Vague laws are void on their face for three reasons. Id. First, vague laws do not provide fair warning of the act or acts that are being prohibited. Id.; see also Morales, 527 U.S. at 56 ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . .") (quoting Giaccio, 382 U.S. at 402-03). Second, without explicit standards of enforcement, laws will be enforced subjectively—by police officers, prosecutors, judges, juries, or, as in this case, school administrators—leading to potentially arbitrary or discriminatory enforcement. Grayned, 408 U.S. at 108-09; see also Morales, 527 U.S. at 52 (holding that a law is impermissibly vague when "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."). Finally, in the First Amendment context, vague laws have a chilling effect because such laws inhibit the exercise of free speech by citizens who wish to steer clear of breaking the law but are unsure of what actions would constitute prohibited conduct. Grayned, 408 U.S. at 109.

Even if this Court finds that Ms. Vega's free speech rights were not violated, the Court must still hold that the Policy is void on its face if it finds that the policy is unconstitutionally vague. See Gooding v. Wilson, 405 U.S. 518, 520 (1972) ("It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute."); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.") (internal citation omitted). Even if Ms. Vega's conduct could have been constitutionally restricted in this particular case, the Policy must still be struck down because "persons whose expression is constitutionally

protected may well refrain from exercising their rights for fear of . . . sanctions provided by a statute susceptible of application to protected expression." Gooding, 405 U.S. at 521.

A. The Policy Contains No Objective Standards of Enforcement, as it is Unlimited in Time, Situation, and Location.

All laws must have an understandable meaning with legal standards that courts can enforce. Giaccio, 382 U.S. at 403. Laws that are vague or lack objective standards for enforcement violate the Due Process Clause. Id. at 402-03. Without any legally fixed standards, a law cannot provide advanced notice of the conduct that is prohibited. See Morales, 527 U.S. at 58-59. In the First Amendment context, Tinker requires that any restriction on First Amendment rights in public schools be narrowly tailored to achieve the goal of limiting disruption and promoting an educational environment that is conducive to learning. Tinker, 393 U.S. at 509; Saxe, 240 F.3d at 217. Thus, rules that prohibit certain expressive conduct in schools must be limited to times when classes are in session. Grayned, 408 U.S. at 120.

Because "the rights of others to engage in or listen to expressive activity" is undefined in the Policy or elsewhere, students are unaware of what specific activities are prohibited and are left to "guess at its meaning." See Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) (noting that due process is violated when a statue is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ."). In Grayned, the Court held that an ordinance prohibiting "willfully making a noise or disversion (*sic*) that disturbs or tends to disturb the peace or good order of the school session" was not impermissibly vague because the context made clear what the ordinance prohibited, thus giving it objective standards of enforcement. Id. at 110-12. Specifically, the Grayned Court reasoned that the ordinance at issue prohibited the willful disruption of normal school activities, while classes are in session, and at a fixed location. Id. In contrast, the Policy at the University lacks such specificity. The University's

policy prohibits "expressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity on campus. . . ." (R. at 23.)

Rather than enforcement being limited to expressive conduct that impacts *school activities*, during normal school hours and in academic buildings, Grayned, 408 U.S. at 110-12, the Policy is enforceable at all times, every day of the year, on the entire campus—which includes dormitories, cafeterias, restaurants, coffee shops, sports fields, parks, streets, and sidewalks—against expressive conduct that impacts anyone's right to engage in or listen to any type of expression. Unlike the ordinance upheld in Grayned, the University's policy lacks any objective standards of enforcement because it is not limited in time or location and has no connection to school activities. Would Ms. Vega have violated the policy by silently protesting in costume outside the amphitheater? Might her costume and signs still have been distracting enough to rise to a substantial and material infringement on one's right to speak or listen? If students had responded to Ms. Vega's protest with a counter-protest, would the counter-protest have violated *Ms. Vega's rights* to engage in expressive activity? What if students passing near the amphitheater were listening to loud music or speaking in raised voices and the sound briefly interrupted the speech?

The lack of guidance in the Policy regarding which forms of expressive conduct are permitted and which are not gives campus security and University administrators complete discretion over what conduct will be punished without any objective basis for their determination. Giaccio, 382 U.S. at 402-03 ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it . . . leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."). Since the Policy lacks any objective standards for enforcement, "[t]he State offers no principled basis for distinguishing those . . . who should be liable . . . from those who should not be liable." Haslip, 499 U.S. at 46 (O'Connor, J., dissenting).

Due to its vagueness, the University's policy is analogous to a traffic ordinance that permits a person to stand on a public sidewalk "only at the whim of any police officer of that city." See Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965) (finding the construction of an ordinance to be unconstitutionally vague because it "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat."). Following Shuttlesworth, this Court struck down a Chicago anti-loitering ordinance that required a police officer who observed a person or persons whom he reasonably believed to be affiliated with a criminal street gang to disperse; failure to obey such an order constituted a criminal violation and resulted in arrest. Morales, 527 U.S. at 46-47. The ordinance was unconstitutionally vague because it allowed police officers to arbitrarily decide which people they would order to disperse. Id. at 58-59. Furthermore, the law did not provide reasonable warning because "an officer may issue an order *only after prohibited conduct has already occurred*." Id. (emphasis added). The University's Policy fails under Morales and Shuttlesworth and in fact presents an even greater risk of penalties for individuals who could not have known their conduct was prohibited. Rather than being issued a warning to disperse prior to the issuance of a penalty, the Policy requires immediate disciplinary sanctions for each violation, which could take the form of a strike on a student's record, suspension, or even expulsion from the University.

The Policy is unconstitutionally vague on its face because it has no objective standards for enforcement, fails to provide fair warning of the prohibited conduct, and is not limited to conduct relating to school activities. Giaccio, 382 U.S. at 402-03; Morales, 527 U.S. at 58-59; Tinker, 393 U.S. at 509; Grayned, 408 U.S. at 120; Saxe, 240 F.3d at 217.

B. The Policy is Subject to Arbitrary and Discriminatory Enforcement, Which Results in a Chilling of Speech on Campus.

Laws that do not limit discretion in their enforcement are unconstitutional because they have the potential to be enforced in an arbitrary or discriminatory manner. See Morales, 527 U.S.

at 64. In the First Amendment context, this discretion can be used to prohibit certain speakers from expressing their views or punish speakers for the views that they choose to express. Even the possibility that such an outcome will result is inconsistent with the First Amendment and with our values as a nation. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or *fear of subsequent punishment*." Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) (emphasis added).

The chilling of speech at a public university is not only unconstitutional, but will also impair students' academic achievement. "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us. . . . 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." Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) (alteration in original) (internal quotations omitted); see also Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry. . . ."). This Policy will stamp out the multitude of tongues and exchanges of ideas in the guise of protecting free speech rights. Rather than safeguarding the right of all Americans to speak freely, this Policy will result in protecting the voices of some at the expense of others.

The University's vague Policy contains a "broad invitation to subjective or discriminatory enforcement." Grayned, 408 U.S. at 113. As the facts of this case make clear, at any time on the University's campus, multiple parties will be exercising their individual and collective free speech rights. At any time, one or more people may believe that their rights are being infringed upon.

However, it is ultimately the *ad hoc* determination of a Campus Security officer that will dictate which speech takes priority and which student or students will be silenced.

The *ad hoc* enforcement of this Policy has already chilled student speech. Several students decided not to protest—despite their right and desire to do so—out of fear of suspension from inadvertently violating the Policy. (Haddad Aff. ¶¶ 14-15; Smith Aff. ¶¶ 11-12). Likewise, Ms. Vega was "hesitant and fearful" of exercising her First Amendment rights. (Vega Aff. ¶ 11.) Ultimately, Ms. Vega tailored her behavior in a manner that she believed would comply with the Policy. (Vega Aff. ¶ 14.) In contrast to the protest on August 31, 2017, in which Ms. Vega and others attempted to "shout down" a speaker from within the auditorium, on September 5, 2017, Ms. Vega chanted and protested on a sidewalk in the University's Quad ten feet away from the amphitheater. (Vega Aff. ¶ 14.) Ms. Vega reasonably believed that by not engaging directly with the speaker nor protesting within the event space, she was expressing herself and her views in full compliance with the Policy. (Vega Aff. ¶ 14.)

In this case, Ms. Vega could just as easily have complained that her free speech rights were being violated by noisy passersby or by the spectators of the nearby football game. (Thomas Aff., Add. A.) The Policy at issue invites arbitrary and potentially discriminatory enforcement based on the views of the speaker because the Policy lacks any specificity or objective basis for enforcement. Consequently, there is a chilling effect on free expression on campus.

II. THE POLICY IS SUBSTANTIALLY OVERBROAD BECAUSE IT PROHIBITS CONSTITUTIONALLY PROTECTED CONDUCT.

Even when a law is clear and precise, it may be void for overbreadth if it prohibits constitutionally protected conduct. Grayned, 408 U.S. at 114. Subject only to *reasonable* regulation, "peaceful demonstrations in public places are protected by the First Amendment." Id. at 116. Such regulations must be narrowly tailored, and when considering which regulations may be reasonable, legislatures and courts must consider the nature of the place to be regulated as well

as its normal pattern of activities. Id.; Button, 371 U.S. at 433. To succeed in challenging a law for overbreadth, a party must demonstrate that in a substantial number of instances the law could not be applied constitutionally. New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1998). The crucial question for a facial challenge on overbreadth grounds "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned, 408 U.S. at 116.

Overbroad restrictions of expression chill constitutionally protected speech. Bair, 280 F. Supp.2d at 367. The purpose of First Amendment overbreadth doctrine is "to allow the Court to invalidate statutes because their language demonstrates their potential for sweeping improper applications posing a significant likelihood of deterring important First Amendment speech. . . ." Gooding, 405 U.S. at 530-31 (Burger, C.J., dissenting); see also United States v. Stevens, 559 U.S. 460, 461 (2010) ("In the First Amendment context, a 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.") (internal quotations omitted). For this reason, the Court must look to all potential applications of the Policy, rather than the application of the policy in a single instance. See Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) ("[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."); Bair, 280 F. Supp.2d at 367 ("[A] facial challenge . . . on overbreadth grounds will only succeed upon a finding that there is a likelihood that the [Policy's] very existence will inhibit free expression by inhibiting the speech of third parties who are not before the Court.").

The Policy, which prohibits conduct that "infringes on the rights of others," is analogous to a school district's anti-harassment policy struck down as facially overbroad by the Third Circuit.

In that case, the school-wide policy banned "any unwelcome verbal . . . conduct which offends . . . an individual." Saxe, 240 F.3d at 215 (Alito, J.) (alterations in original). Then-Circuit Judge Alito explained that the policy was overbroad because it did "not contain any geographical or contextual limitations," and thus could be applied "in a school sponsored assembly, in the classroom, in the hall between classes, or in a playground or athletic facility. . . ." Id. The policy in Saxe was likely to "sweep[] in private student speech that merely happens to occur on the school premises." Id. (internal quotation omitted). This is also true of the University's Policy, which on its face applies to every part of campus. See Button, 371 U.S. at 433 ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

The Policy is also "incompatible with the normal activit[ies]" of a university campus. Grayned, 408 U.S. at 116. For instance, the Policy could be used to discipline students who cheer for the home team at a sporting event, thereby infringing on the rights of the visiting team to engage in and listen to their own cheering or to prohibit protests in the Quad outside a dorm if such protests were found to be distracting to students engaging in casual conversation inside. These scenarios demonstrate that students could be punished under the Policy for engaging in constitutionally protected speech. And absent a "particularized reason as to why [the school] anticipates substantial disruption from the broad swath of student speech prohibited under the Policy," Saxe, 240 F.3d at 217, it is substantially overbroad on its face.

III. THE UNIVERSITY'S POLICY IS UNCONSTITUTIONAL AS APPLIED TO MS. VEGA BECAUSE TINKER DOES NOT EXTEND TO COLLEGE CAMPUSES AND EVEN IF IT DID, MS. VEGA'S CONDUCT DID NOT VIOLATE TINKER'S STANDARD.

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech." Virginia v. Black, 538 U.S. 343, 358 (2003). Beyond speech itself, the First Amendment also protects expressive conduct. See, e.g., Texas v. Johnson, 491 U.S. 397, 406 (1989) (concluding that the burning of an American flag during the Republican National

Convention was protected expressive conduct for First Amendment purposes). Despite recognition that the First Amendment contains "sweeping protections," there are certain areas of speech that have been interpreted to be outside the scope of the First Amendment. Bible Believers v. Wayne Cty., 805 F.3d 228, 243 (6th Cir. 2015). This includes "fighting words" or speech that "incites an immediate breach of the peace" and other speech that has "such slight social value" that any benefit derived from it is outweighed by the competing interests of order and morality. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

A. Applying Tinker to the College Campus Would Undermine its Pedagogical Purposes and Ignore the History of the Campus Environment as a Locus for Political Engagement.

After this Court's ruling in Tinker, there has been significant jurisprudential allowance for regulation of speech in primary and secondary schools in order to prevent disruptions in the academic setting. Tinker, 393 U.S. 504; Hazelwood v. Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988) (holding that a high school principle acted within the bounds of the First Amendment by excising two pages from the school's student newspaper because the publication was a facet of the school's curriculum); Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 682 (1986) ("It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.").

However, while Tinker has been invoked as a relevant standard in adjudicating disputes about free speech in elementary and high schools, this Court has never formally applied the case to a University. See, e.g., Hazelwood, 484 U.S. at 273 n. 7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university levels."). This Court has never applied Tinker to a university speech restriction in the 50 years since it issued its opinion. There is also a significant vein of circuit court

precedent that has refused to apply Tinker to universities. See, e.g., Student Gov't Ass'n v. Bd. of Tr. of Univ. of Mass., 868 F.2d 473, 480 n. 6 (1st Cir. 1989) (stating that Hazelwood, which applied Tinker to the suppression of a high school newspaper on the grounds that it was school-sanctioned speech, did not apply to college newspapers); DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008) (holding that because universities could not justify an *in loco parentis* role, classroom discussion by adult students could not be restricted); Christian Legal Soc'y v. Walker, 453 F.3d 853, 861 (7th Cir. 2006) ("[S]ubsidized student organizations at public universities are engaged in private speech . . . it would be a leap . . . to suggest that student organizations are mouthpieces for the university."). It follows that the Tinker standard is inapposite to college speech.

University students are afforded the full rights of citizenship to engage in the "marketplace of ideas." Healy, 408 U.S. at 180. The Healy court noted that there is "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. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Healy, 408 U.S. at 180 (internal quotations omitted).

This strict protection of First Amendment rights on college and university campuses is attributed to the distinct pedagogical goals of institutions of higher learning as compared to the goals of primary and secondary schools: "While both seek to impart knowledge, [the university] encourages inquiry and challenging *a priori* assumptions whereas [elementary and high schools] prioritize[] the inculcation of societal values." McCauley v. Univ. of the Virgin Islands, 618 F.3d 232, 243 (3d Cir. 2010). Indeed, free speech is the "lifeblood of academic freedom" which requires near unfettered access to free speech, or else narrowly tailored exceptions. DeJohn, 537 F.3d at 314.

Part of the freedoms afforded to college students to express their ideas comes from the robust history of peaceful protest and political debate that occurred during the Civil Rights Movement and the Vietnam War. In fact, Tinker itself involved a group of high schoolers who decided to wear armbands to protest the Vietnam War. Tinker, 393 U.S. at 504. Tension between students and school administrators over campus protest in the 1960s meant that many disputes of student suspension were brought to court, which directly parallels the political undertones of this suit. Traditionally, students who did not promote violence or impede the running of the university were protected by the First Amendment, and in cases where they had been suspended, they had their status as full-time students reinstated.

For example, when a student was suspended for hosting a "sing in" of three hundred students past midnight on the college president's front lawn, the court, while noting it was a violation of the rules of the school, stated that there was a strong chance the student's conduct was protected by the First Amendment. Barker v. Hardway, 283 F. Supp. 228, 233 (S.D. W. Va. 1968). The court gave the student, who had been suspended, the "benefit of the doubt" and exonerated his conduct as a matter of fact. Id. at 233. In the same era, a group of students at a majority-African American college in Louisiana gathered to protest, among other things, the administration's improvement of the school's athletic programs at the expense of the academic program. Zanders v. Louisiana Bd. Of Educ., 281 F. Supp. 747, 750 (W.D. La. 1968). During the protest, students blocked entrances to administrative buildings, amounting "not only to a total disruption of classes scheduled to be held in that building but, indeed, of the entire college." Id. at 764. However, for several of the students who had been expelled, there was no evidence that they had physically obstructed the entrances or participated in the obstruction of the buildings, and for them, the court stated that they did not "play a role impeding the operation of the college and

could not have been expelled" as a matter of fact. Id. at 769. Thus, the court reinstated them as students. Id.

Here, Ms. Vega was chanting slogans at 1:15 in the afternoon. The noise she made was in conjunction with others participating in expressive activities on the Quad. While she was standing on one of the Quad's walkways, she was not physically blocking others' paths. Ms. Vega's conduct does not constitute a "total disruption" of classes or of the University's functioning and should therefore not have been sanctioned.

B. The Application of the University's Tinker Policy Enabled a Content-Driven Speech Restriction.

The university campus—especially the Quad—is the epicenter of the marketplace of ideas envisioned in Healy. Though the issue is not formally raised in the current matter, (R. at 08.), outdoor common areas within the bounds of a state university's campus have traditionally been held to be public fora for the purposes of affording unfettered free speech rights to those who wish to speak there. Bowman v. White, 444 F.3d 967, 979 (8th Cir. 2006). Unless one can show that "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end," speech may not be hampered in these spaces. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 34, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496 (1939)). Even if the University were to argue that the Quad constituted the most restricted space—a nonpublic forum—speech may only be curtailed in those places as long as the restrictive action is "viewpoint neutral and reasonable in relation to the forum's purpose." Hotel Emps., 311 F.3d at 553.

Ms. Vega's conduct took place on the campus Quad, which is an "open space in the middle of campus that is very accessible to students." (Putnam Aff. ¶ 6.) To restrict a single student from engaging in speech in this location at 1:15 on a Friday afternoon would be plainly unconstitutional. There were many other expressive activities going on at the time of Mr. Drake's speech, including students playing music, shouting, playing frisbee, and playing flag football. (Taylor Aff. ¶ 5.)

Singling out Ms. Vega's conduct among the other noises and expressions occurring at the same time indicates that Campus Security was called because of the content of Ms. Vega's speech rather than because she was engaging in expressive activities near the amphitheater. Mr. Putnam disagreed with the content of Ms. Vega's speech and therefore found it more disruptive than the other expressions occurring on the Quad at the same time. (Putnam Aff. ¶ 7-8.) The subsequent citation of Ms. Vega by Officer Thomas in response to Mr. Putnam's complaints therefore constitutes a content-driven use of the Policy. Ms. Vega was singled out not because her words were interfering with Mr. Drake's speech but because Mr. Putnam did not like the content of her expression. While Ms. Vega's conduct may have been "obnoxious" to the students gathered at ASFA's event, it was not justly prohibited solely because it expressed a viewpoint at direct odds with that of Mr. Drake. (Putnam Aff. ¶ 9) (describing Ms. Vega's conduct as an "obnoxious and disturbing disruption."). The time Ms. Vega chose to engage in her expression may have come across as rude to those gathered for Mr. Drake's speech but she is under no obligation to curtail her First Amendment rights in order to conform to "conventions of decency." See Papish v. Board of Curators of the University of Missouri, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of 'conventions of decency.'").

Ms. Vega's conduct was protected by the First Amendment because of the location of its issuance—a sidewalk in a public quad—and because it did not fall into any traditional exceptions to free speech protections. The action taken by the University is unconstitutional because it constitutes a non-content-neutral speech restriction. To apply Tinker to college speech would disavow a storied history of post-secondary students engaging in political expression—a tried-and-true method of contributing to the proverbial "marketplace of ideas." More speech, not less, is the

way to create a robust society that promotes the free flow of ideas and this Court should not enable the University's policy to thwart this important facet of American tradition.

C. Even if this Court Finds that Tinker Extends to College Campuses, Ms. Vega Did Not Violate its Standard Because She Did Not Materially and Substantially Interfere with the Requirements of Appropriate Discipline and She Did Not Invade the Rights of Others.

If the Court finds that Tinker does extend to universities and chooses to apply it here, Ms. Vega's conduct still could not be restricted. Schools applying Tinker cannot restrict student speech absent a finding that engaging in the sanctioned conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school". Tinker, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). In the absence of any interference with school operations or the endangerment of members of the school community, regulation of expressive conduct is impermissible. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001). Because her conduct did not interfere with the discipline and running of the school, and because she did not invade the rights of the speaker or the students at the ASFA event, Tinker is not met and Ms. Vega's constitutional rights were violated when she was issued a citation and subsequently suspended.

In applying Tinker's material disruption standard, a court must look to whether the record shows facts which could reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. DeFabio v. East Hampton Union Free Sch. Dist., 623 F.3d 71, 78 (2d Cir. 2010). In recognizing that the Tinker students' First Amendment rights were violated, the Court in Tinker noted that there was "no indication that the work of the school or of any class was disrupted." Tinker, 393 U.S. at 508. Similarly, Ms. Vega's conduct did not disrupt any class or the functioning of the school. The ASFA event was an extracurricular activity located in the open-air amphitheater of the University's Quad—a space that is host to myriad social and extracurricular activities. Not only were school operations and class activities not implicated

in any way, but Mr. Drake's speech was able to continue without interruption even while Ms. Vega chanted on the sidewalk.

Courts have allowed schools to "overstep their bounds and violate the Constitution," where officials forecast situations of disruption. LaVine, 257 F.3d at 988. The majority of these forecasts, unsurprisingly, fall into situations where there might be violence and administrative disorder. See id. at 987 (holding that a high school did not violate the First Amendment by taking action against a student who wrote a poem about coming to school and shooting 28 students); Doninger v. Niehoff, 527 F.3d 41, 50-51 (2d Cir. 2008) (holding that an incendiary post referring to high school administrators as "douchebags" and encouraging students to complain, created a positive inference of substantial disruption to school order). But see Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973) (holding unconstitutional under Papish the sanction of a university student who used a four-letter expletive to refer to a college administrator in an open letter published in the newspaper).

Recently, when evaluating a case of a high school basketball player choosing to kneel during the National Anthem, a California court determined that Tinker's material disruption standard was not met even though several students from the opposing team approached the player, made racial slurs, and threw water on several of the players. V.A. v. San Pasqual Valley Unified Sch. Dist., No. 17-cv-02471-BAS-AGS, 2017 WL 6541447, at *6 (S.D. Cal., Dec. 21, 2017). In the case at hand, there was no commotion or physical confrontation between Ms. Vega and other students. Indeed, the only interaction she had was when Campus Security was called to disband her peaceful demonstration. Additionally, there were no safety concerns cited by the University or stated anywhere in the record. The only alleged disruption was that some students thought her chants were "distracting." (Taylor Aff. ¶ 5).

The material disruption standard envisioned in Tinker comes into clearer focus when Ms. Vega's conduct on the day in question is differentiated from the "shout down" activity in which she engaged on August 31. (Thomas Aff., Add. A.) At the August 31 event, Ms. Vega, along with nine other students, was found to have "drowned out the majority of the speaker's comments." (Thomas Aff. ¶ 6.) "Shouting down" more often than not leads to a material disruption because, in the presence of such shouting, the event is not able to continue without the removal of the shouter. When adjudicating a case where a couple "shouted down" an auction of their personal belongings that were seized by the Farmers Home Administration (FmHA), the Seventh Circuit analyzed the shouts as "noise" and not speech. Carson v. Block, 790 F.2d 562, 566 (7th Cir. 1986) (Easterbrook, J.). In Carson, the couple was successful in halting the auction, thereby preventing the FmHA from selling their personal items. Id.

In the September 5 incident, the slogans used by Ms. Vega were words, and therefore, speech falling under the purview of the First Amendment. Additionally, despite Mr. Drake noting that it was "extremely hard for [him] to speak, think, and remain focused," he proceeded as normal and uninterrupted for the remainder of his speech. (Drake Aff. ¶ 10.) A student, Meghan Taylor, who attended the ASFA event noted that "all of the noises combined made it difficult to hear Mr. Drake speak." (Taylor Aff. ¶ 5.) However, because there is no indication that Mr. Drake stopped speaking or the 35 students in attendance were prevented from hearing his speech, there was no material disruption of the event. Any disruption that Ms. Vega may have caused occurred in conjunction with the myriad other noises occurring on the Quad that day.

In addition to Tinker's material disruption standard, speech that "colli[des] with the rights of other students to be secure and to be let alone" can also be prohibited. Tinker, 393 U.S. at 508. While many courts have struggled to distill the true meaning of this phrase, it is commonly held to ensure that students are "secure . . . not only . . . from physical assaults but from psychological

attacks that cause young people to question their self-worth and their rightful place in society." Harper v. Poway Unified School Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), opinion vacated on procedural grounds, 549 U.S. 1262 (2007). While there is a constitutionally protected right to receive information, Pacific Gas and Elec. Co. v. Public Utilities Com'n of California, 475 U.S. 1, 8 (1986), the First Amendment does not provide for silent surroundings in which to hear.

First, the impropriety of applying such a protective measure against "psychological attacks that cause young people to question their self-worth" in a college setting is evident because of the university's aforementioned place as a free-flowing marketplace of ideas where unpopular opinions must be engaged with, or at least tolerated.

Additionally, if the Court were to apply this standard, it would apply as much to the expression of Mr. Drake as it does to the expression of Ms. Vega. It could just as easily be argued that Ms. Vega, a first generation Hondaraguan-American, should have the right to be protected from the messages promoted at the ASFA event such as "the United States must deport every last one of those illegal aliens because illegal aliens are the cause of most violent crime, drug wars, and other problems plaguing our nation." (Drake Aff. ¶ 8.) These inflammatory remarks could undoubtedly make Ms. Vega question her "rightful place" in America. However, in choosing to present the alternative view to Mr. Drake's philosophies, Ms. Vega is doing precisely what an informed and educated citizen should do—contributing to the marketplace of ideas. It would be ironic indeed if the standard of being left alone, designed to protect "members of minority groups that have historically been oppressed" was used against Ms. Vega as she advocated for the marginalized population of illegal immigrants in this country. Harper, 445 F.3d at 1178. After all, the right to freedom of speech and expression includes the right to "attempt to persuade others to change their views," and this right "may not be curtailed simply because the speaker's message

may be offensive to his audience." Bible Believers v. Wayne Cty., 805 F.3d 228, 243 (6th Cir. 2015) (quoting Hill v. Colorado, 530 U.S. 703, 716 (2000)).

The First Amendment's freedoms need "breathing space" to flourish, and therefore, government may regulate in the area only with narrow specificity. Button, 371 U.S. at 433. Because of this, Tinker cannot be applied to the historic bastion of political expression that is the college campus. It was the Tinker Court that said: "If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students." Tinker, 393 U.S. at 513. Even if Tinker did apply, Ms. Vega's conduct did not constitute a material disruption of the ASFA event and she did not invade the rights of others. Therefore, the University's policy is unconstitutional as applied to Ms. Vega.

CONCLUSION

The Court should declare the Policy unconstitutionally vague, impermissibly overbroad on its face, and unconstitutional as applied to Ms. Vega. Accordingly, the Court should reverse the opinion of the United States Court of Appeals for the Fourteenth Circuit and affirm the order of the United States District Court for the District of Arivada, entering summary judgement in favor of Ms. Vega, declaring that the University violated Ms. Vega's First Amendment right to free speech, reinstating Ms. Vega as a student in good standing, and expunging her disciplinary record.

Respectfully submitted,

/s/

Team 19
Counsel for Petitioner
Dated: January 31, 2019

CERTIFICATE

We hereby certify that:

1. The work product contained in this brief is our work only;
2. In preparing this brief, we have complied fully with our law school's honor code;
3. In preparing this brief, we have complied fully with the Rules of the Competition.

/s/

Competitor 19
Dated: January 31, 2019