No. 18-1234

IN THE SUPREME COURT OF THE UNITED STATES

VALENTINA MARIA VEGA,

Petitioner,

v.

JONATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA,

Respondents.

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

BRIEF FOR RESPONDENTS

Team 23
Counsel for Respondents

QUESTIONS PRESENTED

I. Whether the Campus Free Speech Policy is consistent with the First Amendment and is neither unconstitutionally vague nor impermissibly overbroad when the Policy sets forth what is prohibited, includes pertinent terms within common understanding, and only applies to material and substantial infringement?

II. Whether the University, in respecting the First Amendment, may constitutionally limited Plaintiff's expressive conduct, where she purposefully prevented the speaker, the host, and the spectators at an organized expressive activity from freely exchanging ideas?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Circuit Court Cases

Constitutional Provisions

OPINIONS BELOW

The January 17, 2018 decision of the United States District Court for the District of Arivada granting Plaintiff Valentina Vega's motion for summary judgment is unreported and can be found in the Record, R. at 1-18. The November 1, 2018 decision of the United States Court of Appeals for the Fourteenth Circuit reversing and remanding the district court's decision is unreported and can be found in the Record, R. at 42-53.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2018. *Jones v. Vega*, No. 18-1757, slip op. at 1 (14th Cir. Nov. 1, 2017). Petitioner timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the First Amendment of the United States Constitution, which states "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This case also involves the University of Arivada Campus Free Speech Policy found in Appendix A of the Record, R. at 23, and the State of Arivada Free Speech in Education Act of 2017, Av. Gen. Stat § 118-200 (2017), also found in the Record, R. at 19.

STATEMENT OF THE CASE

Statement of Facts

On June 1, 2017, the State of Arivada passed the Free Speech in Education Act of 2017. R. at 19. The Act requires "all state institutions of higher education" to "develop and adopt policies designed to safeguard the freedom of expression on campus for all members of the campus community and all others lawfully present on college and university campuses." *Id.* The

Legislature's intent in passing the Act was to address the nation-wide phenomena of "shouting down invited speakers on college and university campuses." *Id.*

On August 1, 2017, the University adopted the Campus Free Speech Policy to fulfill its obligation under the Act. R. at 02. The Policy affirms the University's commitment to the freedom of expression on campus and states, "expressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity shall not be permitted on campus and shall be subject to sanction." R. at 23. The Policy also provides for the "imposition of escalating sanctions" for violations of the Policy. R. at 02. The Policy further includes a "three strike range of disciplinary sanctions" for students who violate the Policy. R. at 23. While a citation may be issued to a student by University Campus Security, the University's Dean of Students ultimately makes the final decision of whether to issue a first strike to a student and the School Hearing Board ultimately makes the final decision of whether to issue a second or third strike to a student. *Id.* Moreover, a student who receives a first citation is entitled to an informal disciplinary hearing before the Dean of Students and a student who receives a second or third citation is entitled to a formal disciplinary hearing before the School Hearing Board. *Id.*

At the start of each academic year, the University sends an updated version of its Student Handbook to all of its students. R. at 03. Before returning to or continuing in their classes, students must sign an electronic "Policy Statement" signifying that they received, reviewed, and understood the updated Student Handbook. *Id.* Through signing the "Policy Statement," students signify that they agree to adhere to the policies included in the Student Handbook. *Id.* In early August 2017, prior to the start of the academic year, the University "transmitted a copy of the 2017 Student Handbook containing the policies for the upcoming academic year, including the

Campus Free Speech Policy" to all of its students. R. at 20. Plaintiff Valentina Maria Vega signed the "Policy Statement" acknowledging that she received, reviewed, and agreed to adhere to the policies included in the updated 2017 Student Handbook. *Id.*

On August 31, 2017, Plaintiff and nine other members of the "Keep Families Together" ("KFT") student organization attended an anti-immigration rally hosted by the "Students for Defensible Borders" ("SDB") student organization. R. at 03. Plaintiff and the KFT members attended the anti-immigration rally "to shout down the speaker at SDB's anti-immigration rally." *Id.* Plaintiff and the KFT members were successful "in drowning out most of the speakers remarks" by standing on chairs and chanting. R. at 04. Ultimately, Plaintiff and the KFT members were sanctioned under the Policy and issued "first strikes" for this incident. *Id.* During the disciplinary process, the Dean of Students "informed the students that they had violated the Policy 'by materially and substantially infringing upon the rights of others to engage in or listen to expressive activity.'" *Id.*

On September 5, 2017, Samuel Payne Drake, the Executive Director of "a lobbying group whose members advocate for the closure of United States borders to all immigrants" was invited to the University's campus to deliver a speech for the University's chapter of "American Students for America" (ASFA). *Id.* ASFA reserved the Amphitheater as the venue for the event. The Amphitheater is located north of the center of the Quad on campus. R. at 21. The Quad is "a sizeable green space located in the middle of the University's campus." *Id.* The Quad is surrounded by "dormitories and a variety of other student facilities with sidewalks and walkways crossing it from east to west and north to south." *Id.* Student life at the University is robust because a majority of students "sleep, eat, learn, and socialize on campus." R. at 22. The Quad is

at the heart of student life and the "go-to" spot for students to "gather . . . study, talk, play games, play and listen to music, and engage in sports." *Id.*

Prior to the ASFA event, Plaintiff expressed her desire to attend the event and engage in similar conduct as the SDB anti-immigration rally with other KFT members. R. at 27, 31. However, KFT members refused to join her. Shortly after the event began, Plaintiff showed up in a Statute-of-Liberty costume and began to loudly march and chant slogans directly targeted at the Amphitheater. R. at 36. Plaintiff's targeted chanting was so loud that it made it "extremely hard for [Mr. Drake] to speak, think, and remain focused" during his speech. R. at 25. Mr. Drake also noticed that students in the audience "were frequently turning around to look at the protestor and were not focused on the speech." *Id.* While there was a variety of background noise coming from the Quad, those attending the event agreed with Mr. Drake that Plaintiff's chanting was significantly more distracting. R. at 28, 32, 36. As a result, Plaintiff was issued a second citation. R. at 36.

On September 12, 2017, a formal hearing was held by the Dean of Students and the Student Hearing Board to determine if Plaintiff had once again violated the Policy. R. at 06. Ultimately, the Student Hearing Board "upheld the charge against [Plaintiff] finding that she . . . materially and substantially infring[ed] upon the right of Mr. Drake to speak and the rights of others to listen to his speech." *Id.* Because this was her second strike, Plaintiff was suspended from the University for the remainder of the semester. *Id.*

Procedural History

Plaintiff unsuccessfully exhausted her right to appeal the decision within the University. *Id.* Plaintiff subsequently filed suit against Jonathan Jones, President of the University, and the University's Board of Regents on October 1, 2017 in the United States District Court for the

District of Arivada. R. at 01. On December 15, 2017, Plaintiff and the University filed cross motions for summary judgment. R. at 02. On January 17, 2018, the district court granted Plaintiff's motion, finding that the University's Policy is unconstitutionally vague and substantially overbroad and unconstitutional as applied to Plaintiff. R. at 02.

On November 1, 2018, the circuit court reversed the district court's ruling and remanded the case for entry of summary judgment in favor of the University, R. at 43, finding that the Policy is neither unconstitutionally vague or impermissibly overbroad on its face, nor unconstitutional as applied to Plaintiff, R. at 53. Subsequently, this Court granted Plaintiff's Petition for a Writ of Certiorari. R. at 54.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly concluded that the Campus Free Speech Policy is neither unconstitutional on its face, nor unconstitutional as applied to Plaintiff. First, the Policy is neither unconstitutionally vague nor impermissibly overbroad. The Policy is not void for vagueness because it provides fair notice of what conduct is prohibited, the pertinent terms are rooted in common understanding and decades of judicial decisions, and it provides an objective standard to determine violations. Moreover, the Policy is not substantially overbroad because it only prohibits students from engaging in conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity on campus and is not broader than necessary to achieve the University's goal of safeguarding the freedom of expression on campus.

Second, the University constitutionally applied the Campus Free Speech Policy in its decision to suspend Plaintiff for her disruptive conduct. While students are protected by the First Amendment, colleges and universities need not tolerate expressive conduct that materially and substantially infringes upon the rights of others and is inconsistent with the legitimate interests of

higher education institutions. As such, the University need not tolerate Plaintiff's disruptive conduct. Plaintiff's conduct caused a material and substantial disruption because Plaintiff targeted her chanting at an invited speaker at a campus event, distracting both the speaker and members of the audience. By doing so, Plaintiff disrupted the free exchange of ideas on campus. Thus, the University does not offend the First Amendment and is within constitutional boundaries in sanctioning Plaintiff.

ARGUMENT

Standard of Review

The issue regarding whether the University's Campus Free Speech Policy is void for vagueness and overbroad was decided in favor of Plaintiff pursuant to a motion for summary judgment. R. at 17. The issue regarding whether the Policy as applied to Plaintiff's conduct violated the First Amendment was also decided pursuant to a motion for summary judgment. *Id.* This Court reviews the grant of a motion for summary judgment *de novo*. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). Under *de novo* review, no deference is given to the decision of the lower court. *United States v. Ornelas*, 517 U.S. 630, 639 (1996).

I. THE UNIVERSITY'S CAMPUS FREE SPEECH POLICY IS NEITHER UNCONSTITUTIONALLY VAGUE NOR IMPERMISSIBLY OVERBROAD BECAUSE THE POLICY IS CLEAR AS TO WHAT IT PROHIBITS AND DOES NOT ENCOMPASS A SUBSTANTIAL AMOUNT OF PROTECTED SPEECH.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. However, in the educational setting, speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech." *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Accordingly, universities have the

"inherent power to promulgate rules and regulations." *Healy v. James*, 408 U.S. 169, 192 (1972). These regulations will be upheld unless they are void for vagueness or substantially overbroad. "An enactment is void for vagueness if its prohibitions are not clear[]." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Id.* at 114.

The University's Campus Free Speech Policy is neither unconstitutionally vague nor impermissibly overbroad. The Policy is not void for vagueness because it provides fair notice of what is prohibited, the pertinent terms are within the common understanding, and violations of the Policy are evaluated under an objective standard. Moreover, the Policy does not encompass a substantial amount of protected speech and is not broader than necessary to achieve the University's goal of safeguarding the freedom of expression on campus. Therefore, this Court should uphold the decision of the Fourteenth Circuit Court of Appeals, ruling that the Campus Free Speech Policy is neither unconstitutionally vague nor impermissibly overbroad on its face.

A. The Campus Free Speech Policy Is Not Void For Vagueness Because It Provides Fair Notice Of What Is Prohibited And Sets Forth Standards for Non-Arbitrary Enforcement.

The vagueness doctrine is designed to "ensure fair notice . . . [and] to provide standards for enforcement by [officials]." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007). To meet these goals, a policy must (1) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and (2) "provide explicit standards for those who apply [the policy]," to prevent arbitrary and discriminatory enforcement. *Grayned*, 408 U.S. at 108. However, "perfect clarity and precise guidance" in the policy is not required. *Ward v. Rock Against Racism*, 491 U.S. 781,

794 (1989). Further, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

A policy is not void for vagueness when it is clear what the policy as a whole prohibits. *See Grayned*, 408 U.S. at 110. In *Grayned*, the defendant was arrested for violating an antinoise ordinance by demonstrating in front of a high school. *Id.* at 105. The antinoise ordinance prohibited "noise or diversion which disturbs or tends to disturb the . . . school session." *Id.* at 108. Although the words of the ordinance lacked "meticulous specificity," the ordinance was not void for vagueness because it was clear what the ordinance as a whole prohibited. *Id.* at 110. This Court reasoned that the vagueness of individual words in the ordinance was dispelled by the ordinance's announced purpose of protecting the normal activities of the school. *Id.* at 112.

Moreover, a policy is not void for vagueness if the pertinent terms of the policy are "widely used and well understood." *Cameron v. Johnson*, 390 U.S. 611, 616 (1968). In *Cameron*, the pertinent terms of the anti-picketing statute, "obstruct" and "unreasonably interfere," required no guessing at their meaning. *Id.* This Court held that the anti-picketing statute was not void for vagueness because it "clearly and precisely delineate[d] its reach in words of common understanding." *Id.* Similarly, in *Osinger*, the stalking statute was not void for vagueness because the pertinent terms of the statute, "harass" and "substantial emotional distress," were not "esoteric or complicated terms devoid of common understanding." *United States v. Osinger*, 753 F.3d 939, 945 (9th Cir. 2014). Likewise, in *Shrader*, the stalking statute was not void for vagueness because the pertinent terms of the statute, "harass" and "intimidate," could be "adequately defined 'by reference to judicial decisions, common law, dictionaries, and the words themselves because they possess a common and generally accepted meaning.'" *United*

States v. Shrader, 675 F.3d 300, 310-11 (4th Cir. 2012) (quoting *United States v. Bowker*, 372 F.3d 365, 382 (6th Cir. 2004)).

Conversely, a policy is void for vagueness when no standard of conduct is specified, thereby leaving enforcement to entirely subjective and unascertainable determinations. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In *Coates*, this Court held that an ordinance which prohibited "conduct . . . annoying to persons passing by" was unconstitutionally vague. *Id.* at 612. Although the term "annoying" is widely used and within common understanding, this Court found that the statute's standard in applying the ordinance was too subjective. *Id.* at 613-14. The ordinance created an unascertainable standard in which enforcement was entirely dependent upon whether the responding officer found the conduct annoying. *Id.* at 614.

The Campus Free Speech Policy is not void for vagueness because it provides fair notice of what is prohibited through the context in which it is written and its announced purpose. In *Grayned*, the ordinance punished conduct that "disrupts or is about to disrupt school activities." 408 U.S. at 119. In that case, the words of the ordinance were "marked by 'flexibility . . . rather than meticulous specificity,'" *id.* at 110 (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969)), but the ordinance as a whole was clear as to what it prohibits because of the context in which it was written, *id.* at 110, 112. The ordinance was "written specifically for the school context," *id.*, forbidding activity "at fixed times – when school is in session – and at a sufficiently fixed place – 'adjacent' to the school," *id.* at 111. Given this particular context, the ordinance provided "fair notice to those whom it is directed." *Id.* at 112. Here, the Policy prohibits "material[] and substantial[] infringe[ment] upon the rights of others to engage in or listen to expressive activity . . . on campus." R. at 23. The context in which the

Policy is written is clear through the words "on campus" and through the Policy's purpose of fulfilling its obligation under the Free Speech in Education Act of 2017. R. at 23. The Free Speech in Education Act of 2017 is "designed to safeguard the freedom of expression on campus" and address the increasingly frequent incidents of "shouting down invited speakers . . . on campuses." R. at 19. A reasonable person, having read the Policy and the Act that it references, would understand when his or her conduct infringes upon the rights of others to engage in or listen to expressive activity. Because the Policy provides fair notice of what is prohibited through the context in which it is written and its announced purpose, the Policy is not void for vagueness.

Moreover, the Campus Free Speech Policy is not void for vagueness because the pertinent terms of the Policy are within common understanding, and thus provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Plaintiff argues that the Policy is vague because it does not define any of its pertinent terms. However, a lack of explicit definitions is not determinative of vagueness. *See Shrader*, 675 F.3d at 310. Rather, "when a statute fails to provide an explicit definition, [courts] may resort to ordinary meaning and common sense." *Id. See also Cameron*, 390 U.S. at 616 (finding the term "unreasonably" is well understood, especially when juxtaposed with "obstruct" and "interfere"); *see also Osinger*, 753 F.3d at 945 (finding the terms "harass" and "substantial emotional distress" are "not esoteric or complicated terms devoid of common understanding"). Courts may also reference "'judicial decisions, common law, [and] dictionaries'" to define terms within a policy. *Shrader*, 675 F.3d at 311 (quoting *United States v. Bowker*, 372 F.3d 365, 382 (6th Cir. 2004)). Here, the pertinent terms of the Policy are "material," "substantial," and "infringe." These terms can be adequately defined through their common understanding and through reference to judicial decisions. The

wording of the Policy is nearly identical to the substantial disruption standard established in *Tinker* and applied in hundreds of cases since then. *See Tinker*, 393 U.S. at 507. Because the pertinent terms of the Policy can be adequately defined, the Policy is not void for vagueness.

Additionally, the Campus Free Speech Policy is not void for vagueness because it provides an objective standard of enforcement. In *Coates*, the enforcement of the ordinance was dependent upon the "completely subjective standard of 'annoyance.'" 402 U.S. at 614. "Annoyance" is an unascertainable and subjective standard because "[c]onduct that annoys some people does not annoy others." *Id.* This creates the potential for arbitrary and discriminatory enforcement. The ordinance in *Coates* is distinguishable from the Campus Free Speech Policy because the Policy sets forth an ascertainable and objective standard of "material" and "substantial." R. at 23. The Policy also provides for uniformity in enforcement through its detailed disciplinary procedures. R. at 23. Because the Policy provides an objective standard of enforcement, the Policy is not void for vagueness.

Finally, the Campus Free Speech Policy is not void for vagueness because it clearly prohibits Plaintiff's conduct. Plaintiff acknowledged that she received, reviewed, and understood the Policy when she signed the Policy Statement prior to beginning classes for the year. R. at 03. Despite having fair notice of what is prohibited, Plaintiff engaged in conduct proscribed by the Policy. Plaintiff "materially and substantially infringe[d] upon the rights of others to engage in [and] listen to expressive activity," R. at 23, when Plaintiff "march[ed] and chant[ed] slogans directly targeted at the amphitheater" during an ASFA event, R. at 36, making it difficult for Mr. Drake to speak, R. at 25, and causing students to turn around inhibiting their ability to listen to the speech, R. at 36. Plaintiff was not punished for protesting against Mr. Drake's views, she was punished for "materially and substantially infringing upon the right of Mr. Drake to speak and

the rights of others to listen to his speech." R. at 41. Because Plaintiff's conduct was clearly prohibited, she cannot challenge the Policy for vagueness. *See Village of Hoffman Estates*, 455 U.S. at 495.

In sum, this Court should find that the Campus Free Speech Policy is not void for vagueness because it provides fair notice of what is prohibited, the pertinent terms can be adequately defined, and violations of the Policy are enforced under an objective standard.

B. The Campus Free Speech Policy Is Not Overbroad Because It Does Not Encompass A Substantial Amount of Protected Speech And Is Not Broader Than Necessary To Achieve The University's Goal Of Safeguarding The Freedom Of Expression On Campus.

A law is impermissibly overbroad if "a substantial number of its applications are unconstitutional." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republication Party*, 552 U.S. 442, 449, n. 6 (2008)). However, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). A law is also impermissibly overbroad if it reaches a substantial amount of constitutionally protected [speech]." *Village of Hoffman Estates*, 455 U.S. at 494. In other words, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Moreover, an overbreadth challenge fails if a "limiting construction has been or could be placed on the challenge[d] statute." *Id.* at 613.

A policy is not overbroad unless it "prohibits constitutionally protected conduct." *Grayned*, 408 U.S. at 115. In *Grayned*, the ordinance was not overbroad because it punished only conduct that disrupted or was about to disrupt normal school activities. *Id.* at 119. In doing so,

the ordinance did not impose any "restriction on expressive activity before or after the school session." *Id.*

Nonetheless, a state may restrict speech when it is necessary "to advance a significant and legitimate state interest." *Vincent*, 466 U.S. at 804 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)). This is true even if there is an incidental restriction on First Amendment rights, so long as the incidental restriction "is no greater than is necessary to further the legitimate state interest. *Id*. at 805.

The Campus Free Speech Policy does not encompass a substantial amount of protected speech because it only prohibits students from "materially and substantially infring[ing] upon the rights of others to engage in or listen to expressive activity . . . on campus." R. at 23. The Policy does not prohibit students from expressing themselves. It merely creates a safeguard for the freedom of expression on campus. KFT members have previously "engaged in various peaceful protests and rallies on campus," R. at 20, without being sanctioned. This is because peaceful protests do not rise to the level of "material[] and substantial[] infringe[ment]." R. at 23. The only time KFT members were subject to sanctions for protesting was when they attempted "to shout down [a] speaker at [an] anti-immigration rally." R. at 03. Their intention in doing so was to "disrupt the anti-immigration rally," R. at 04, clearly violating the Policy. Because the Policy does not encompass a substantial amount of protected speech, the Policy is not impermissibly overbroad.

Furthermore, while Plaintiff might be able to point to some hypothetical situations where protected speech will be infringed, such speculation is not enough to strike down a policy as facially overbroad. *See Vincent,* 466 U.S. at 800. Plaintiff argues that the Policy is impermissibly overbroad because it can be applied to the speech of casual passersby, flag football players, and

students in dormitory rooms. These hypothetical situations significantly differ from chants directly targeted at an invited speaker during an event on campus. The background noise in the Quad created by casual passersby, flag football players, and students in dormitory rooms does not rise to level of "material[] and substantial[] infringe[ment]." R. at 23. In order to succeed in her facial challenge of the Policy, Plaintiff must show a "realistic danger that the [Policy] itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Vincent*, 466 U.S. at 801. Because Plaintiff is unable to show that a substantial number of instances exist in which the Policy cannot be applied constitutionally, the Policy is not impermissibly overbroad.

Finally, the Campus Free Speech Policy is not impermissibly overbroad because it is necessary to advance the State of Arivada's Free Speech in Education Act of 2017. The purpose of the Act and the Policy is to protect both the rights of the speaker and the rights of the listener to be free from "material[] and substantial[] infringe[ment]. R. at 23. By attempting to shout down Mr. Drake during the ASFA event, Plaintiff was not simply exercising her right to engage in expressive activity, she was materially and substantially infringing upon Mr. Drake's right to engage in expressive activity and the students' right to listen to expressive activity. R. at 41. Because the incidental effect that the Policy might have in inhibiting Plaintiff's First Amendment rights is minor in relation to the compelling State interest in safeguarding the freedom of expression on campus, the Policy is not impermissibly overbroad.

In sum, this Court should find that the Campus Free Speech Policy is not substantially overbroad because it does not encompass a substantial amount of protected speech and is not broader than necessary to achieve the University's goal of safeguarding the freedom of expression on campus.

II. THE UNIVERSITY CONSTITUTIONALLY SUSPENDED PLAINTIFF UNDER THE CAMPUS FREE SPEECH POLICY BECAUSE HER CONDUCT MATERIALLY AND SUBSTANTIALLY INFRINGED UPON THE RIGHTS OF OTHERS AND WAS INCONSISTENT WITH THE LEGITIMATE INTERESTS OF HIGHER EDUCATIONAL INSTITUTIONS.

The First Amendment provides the right to freedom of speech. U.S. Const. amend. I. Student speech gives rise to a conflict between the freedom of expression and the authority of a university to protect the free exchange of ideas. "It is clear that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506. However, a student's First Amendment rights are limited and a "school need not tolerate student speech" that rests within the constitutional boundaries of a school's ability to create an encouraging learning environment, "even though the government could not censor similar speech outside the school." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). This Court has viewed colleges and universities to occupy a "special niche" in our democratic system, *Grutter v. Bollinger,* 539 U.S. 306, 329 (2003), and, therefore, retain a level of academic freedom to standardize conduct of those within its community, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). While public schools are considered the "marketplace of ideas," *Healy,* 408 U.S. at 180, "scholarship cannot flourish in an atmosphere of suspicion and distrust," *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957). To prevent an atmosphere, a public school is justified in restricting expressive conduct that materially and substantially infringes upon the rights of others, *Tinker*, 393 U.S. at 513, and is "wholly inconsistent with the 'fundamental values' of public-school education," *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266–67 (1988). Universities thus have "the inherent power to promulgate rules and regulations" and to "expect students to adhere to generally accepted standards of conduct." *Healy,* 408 U.S. at 192.

The University's Campus Free Speech Policy, as applied to Plaintiff, does not violate the First Amendment because the Policy embodies the freedom of expression and seeks to enrich the University's "marketplace of ideas" by only limiting expressive conduct that "materially and substantially" infringes upon the rights of others. Therefore, this Court should uphold the decision of the Fourteenth Circuit Court of Appeals for two reasons: (1) the University constitutionally differentiated between permissible and impermissible expressive conduct in appropriately concluding Plaintiff's conduct was impermissible; and (2) Plaintiff's conduct was wholly inconsistent with the legitimate interests of the University.

A. The University Retains The Authority To Limit Expressive Conduct That Materially And Substantially Infringes Upon The Rights Of Others.

Embedded in the First Amendment is the right to engage in expressive conduct. *Spence v. Washington*, 418 U.S. 405, 409 (1974). However, the right to freedom of expression is not absolute and may be restricted by regulating entities. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Morse v. Fredrick*, 551 U.S. 393, 403 (2007). The same is true in a school context; students do not possess an absolute right to freedom of expression and may be restricted if there is a "specific showing of constitutionally valid reasons to regulate speech." *Tinker*, 393 U.S. at 511. One constitutionally valid reason is if a student's expressive conduct constitutes a "material and substantial interference with schoolwork," *id.*, or invades "the rights of others," *id.* at 513.

The first articulation of this principle is found in *Tinker*, where students were suspended from school for wearing black armbands in opposition of the Vietnam War. 393 U.S. at 504. This Court held that the school's restriction of expressive conduct was unconstitutional because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others." *Id.* at 514. Moreover, school officials could not reasonably conclude that the

display of the armbands would cause a disruption. *Id.* A student simply wearing an armband in school neither materially disrupted classwork nor created a substantial disorder or invasion of the rights of others. *Id*. at 513. This Court reasoned that wearing an armband is a "silent" and "passive" exercise of freedom of expression. *Id*. at 514. This Court in *Tinker* illuminated a distinction between permissible and impermissible restrictions of expressive conduct. Students may engage in expressive conduct, but when their expressive conduct, "whether it stems from time, place, or type of behavior," *id*. at 513, materially and substantially disrupts the learning environment or invades the rights of others, a school need not tolerate such conduct, *id*. at 509.

Subsequently in *Healy*, this Court again drew a line between permissible and impermissible restrictions of expressive conduct based on a material and substantial infringement to the rights of others. 408 U.S. at 189. In *Healy*, a university denied recognition to a student organization. 408 U.S. at 174. Even though the specific challenge regarded the freedom of association, this Court recognized the consequences of nonrecognition translated to prohibiting the students from engaging in organized expressive conduct on campus. *Id*. at 184. This Court provided several justifications for restricting expressive conduct as guidance for an appropriate determination. *Id.* at 185. One such justification was if there was sufficient evidence to suggest the organization's activities would be a "disruptive influence" on campus. *Id*. at 188. The focus of this justification was if the activities would demonstrate "mere advocacy" or advocacy directed at eliciting or producing a disruption on campus. *Id*. at 189. The university had defined this distinction for itself in a "Student Bill of Rights" and stated impermissible expressive conduct is that which "deprive[s] others of the opportunity to speak or be heard . . . or . . . interfere[s] with the rights of others." *Id*. This Court held the university's Student Bill of Rights represented "reasonable regulations with respect to the time, the place, and the manner in which

student groups conduct their speech-related activities." *Id.* at 192-93. The "line between permissible speech and impermissible conduct tracks the constitutional requirement" and may be used to justify denying recognition and restricting expressive conduct. *Id.* at 189.

Here, the University enacted a "reasonable regulation with respect to the time, the place, and the manner" in which students may conduct their speech-related activities and constitutionally drew the line between permissible and impermissible expressive conduct. The Campus Free Speech Policy states that impermissible expressive conduct is that which "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." R. at 23. The language of the Policy mirrors that of *Tinker*, 393 U.S. at 509, and limits impermissible conduct to the same degree as the university in *Healy*, 408 U.S. at 189. The relevance of the language mirroring that of student speech jurisprudence is that the Policy only reiterated a distinction of expressive conduct in the same way the University, as a public educational institution, was already judicially qualified to do so. The Policy only reemphasized the University's inherent authority to do so and identified the sanctions.

When applied to Plaintiff, the University found her in violation of the Policy along those constitutional boundaries and the record suggests that such determination was reasonably found. The University determined that Plaintiff materially and substantially infringed upon the right of Mr. Drake to speak and the right of spectators to listen to his speech. R. at 41. Unlike in *Tinker*, Plaintiff's conduct was not a silent, passive expression of her viewpoint. Instead, Plaintiff directed her conduct at others engaged in expressive activity at ASFA's event and "shout[ed] at the spectators, the hosts, and the speaker." R. at 35. Even though there were other activities on the Quad occurring simultaneously with ASFA's event and Plaintiff's demonstration, two students in attendance reported her conduct was significantly more distracting than the other

activities making it difficult to listen to Mr. Drake. R. at 28, 32. The spectators generally had "difficulty focusing" and "kept turning around" to look at Plaintiff as she conducted her demonstration. R. at 36, 25. This was confirmed by Campus Security. R. at 36. Upon arriving at the event, the Campus Security Officer placed himself with those engaged in the expressive activity to determine if Plaintiff was indeed causing a disturbance to ASFA's event. *Id*. While he could hear the background noise, Mr. Drake, and Plaintiff, he reported that Plaintiff was far "more distracting than the random background noise because she was generally facing the amphitheater." *Id*. Most notably, Mr. Drake, who stood further from Plaintiff than the Officer, reported that Plaintiff's conduct made it "extremely hard for [him] to speak, think, and remain focused." R. at 25. Clearly, Plaintiff's conduct caused a material and substantial disruption to those at the ASFA event, infringed Mr. Drake's ability to exercise his constitutional right to speak, and the spectators' right to listen.

Moreover, the University stated that it believed that Plaintiff "intentionally disrupted the speech" of Mr. Drake. R. at 41. And for good reason: it is difficult not to notice the significant parallels between her first and second violations of the Policy, and these parallels suggest her intent was not simply mere advocacy, but "advocacy" meant to create a disruption at each respective event. The events were five days apart and on a similar subject, which Plaintiff stated she was passionately against. R. at 38. At both events, she stood where the events took place, she directed her conduct towards the speakers, and she shouted while the speakers were delivering their speeches. R. at 37, 38. The intent of her demonstration was the same: force her viewpoint to be heard by talking over and at the same time as the invited speaker. It would be illogical to conclude that exhibiting the same type of behavior at two events would create a different result. As a sophomore in college, the short period between when Plaintiff received her first strike and

when ASFA held their event paired with the volume she projected towards the event suggests that Plaintiff should have known she was, impermissibly, flirting with the boundaries of the Policy at the ASFA event.

The only difference in Plaintiff's conduct between events was her proximity to the expressive activity. She assumed that since she did not stand exactly in the Amphitheater, but ten-feet behind the last bench, she would be respecting the Policy's guidelines and avoiding a second strike. R. at 38. However, to draw a distinction based on the proximity between expressive activity and contested conduct would be inconsistent with this Court's precedent. *Tinker* and *Healy* did not draw a distinction based on proximity, but instead drew distinctions based on the disruption the contested conduct caused to the overall learning atmosphere and the ability of others to exercise their rights. *Tinker*, 393 U.S. at 509; *Healy*, 408 U.S. at 189. The University was correct to believe that simply because Plaintiff was not specifically in the Amphitheater her conduct did still have a material and substantial impact on the rights of those engaged at the ASFA event.

Finally, the University's application of the Policy to Plaintiff's conduct shows that the purpose of the Policy is to regulate the time, place and manner of freedom of expression, and nothing more. The issued strikes after both events were not simply because she had an adverse opinion to the speaker, nor because the University did not want her perspective to be heard. Rather, Plaintiff was issued strikes because she calculated and chose to express her viewpoint during the exact same time and in the exact same place as Mr. Drake, ASFA, and spectators had reserved for their expressive activity. The line between permissible and impermissible expressive conduct drawn by the University was if Plaintiff chooses to engage in expressive conduct, she may not do so by stealing the show from another and preventing others from appreciating a

viewpoint that is in opposition to hers. Plaintiff was free to engage in expressive conduct at any time and at any place on campus, so long as she was respecting the rights of other also exercising their right to freedom of expression.

In sum, the University did not offend the First Amendment because it had "constitutionally valid reasons" to suspend Plaintiff because she preferred to materially and substantially disrupt the ASFA event.

B. Plaintiff's Conduct Was Inconsistent With The Legitimate Interests Of The University Because She Prevented The Free Exchange Of Ideas.

"A school need not tolerate student speech that is inconsistent with its basic educational mission," *Fraser*, 478 U.S. at 685, "even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266–67. Universities can exercise control over student speech without the First Amendment "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Conflicts between a student's speech and a school's legitimate interests must be considered "in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. It goes without question that all public schools have the general mission to uphold the "fundamental values of 'habits and manners of civility' essential to a democratic society," and "take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students." *Fraser*, 478 U.S. at 681. "Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences." *Id.*

Tolerance of student speech is not required when that speech is inconsistent with a school's statutory obligation to uphold a specific legitimate interest. *Morse*, 551 U.S. at 410. In *Morse*, a student was suspended from school for displaying a banner with the message "BONG HiTS 4 JESUS" at a school-approved event. *Id.* at 397. This Court upheld the suspension

because advocating for drug use directly contradicted the interests of the school in "stopping student drug abuse." *Id*. at 409. The "special characteristic of the school" was its statutory obligation to minor students. *Id*. This Court noted that "Congress [had] declared that part of a school's job is educating students about the dangers of illegal drug use." *Id*. at 408. If the school had allowed the student to display the banner, it would be implicitly be encouraging an activity directly against their constitutional obligation to "educat[e] students about the dangers of illegal drug use." *Id*.

Likewise, a school need not tolerate student speech when the manner in which the speech is expressed is inconsistent with a school's legitimate interests. *Hazelwood*, 484 U.S. at 276. In *Hazelwood*, student staff members of a school newspaper contended that the principal violated their First Amendment rights by deleting two pages of the newspaper. *Id*. at 262. The "special characteristic" in this context was the curriculum and requirements of the journalism program. One controversial article discussed student pregnancy at the school. *Id*. at 263. The principal concluded that the article was inappropriate because "the pregnant students still might be identifiable from the text" and was inconsistent with the school's journalism program standards. *Id*. This Court upheld the principal's decision because the manner in which the students wrote the article reasonably reflected the students' failure to consistently follow the school's legitimate interest to demonstrate an ethical "treatment of controversial issues and personal attacks." *Id*. at 276. Including an abundance of identifiable information in the article considering the small number of pregnant students at the school demonstrated a manner of expressive conduct that was an inconsistent with fundamental values of the school's journalism program. *Id*.

In the case at bar, Plaintiff's conduct is "wholly inconsistent" with the legitimate interests of the University because her expressive conduct was carried out in a manner that the University

is statutorily required to restrict. The purpose of the Policy is to "fulfill the University's obligation under the Arivada "Free Speech in Education Act of 2017." R. at 23. Section 2 of the Free Speech in Education Act of 2017 ("the Act") requires "all state institutions of higher education" to "adopt policies designed to safeguard the freedom of expression on campus." R. at 19. Thus, like in *Morse,* the University was statutorily obligated to create a policy geared towards protecting expressive conduct. The Act, furthermore, specifies the manner or conduct that the state legislature believes threatens the freedom of expression on campuses. *Id.* Section 1 of the Act states, "that episodes of shouting down invited speakers" on campuses are "nation-wide phenomenon that are becoming increasingly frequent," and these episodes are what threaten the freedom of expression. *Id.* Therefore, the manner in which a student violates the Policy is by "shouting down invited speakers."

The legitimate interest enumerated in the Policy and the Act correspondences with that in student speech jurisprudence such as educating the "habits and manners of civility to democratic society" and taking into account "the sensibilities of fellow students." *Fraser,* 478 U.S. at 681. In looking to the Policy and the Act as a whole, the value the University is safeguarding is the "marketplace of ideas" by encouraging the free *exchange* of ideas, where everyone has an opportunity to speak, appreciate, and absorb all viewpoints; instead of the "shouting down" of ideas, where neither viewpoint can be appreciated or one viewpoint oppresses the other. Expressing ideas through this kind of conduct could potentially lead to violent reactions; the state legislature found and declared that this likelihood is "becoming increasingly frequent." R. at 19. The increased frequency could very reasonably be in response to the current polarized political environment, including tensions surrounding immigration policy. The present case surely illustrates the passion behind these deeply held viewpoints and the obvious friction between

them. A similar political climate existed during the Vietnam War, and college campuses were a pinnacle location for passionate advocacy turning to "widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson." *Healy*, 408 U.S. at 171. The University does not contend that the conflict of passionate advocacy in the present case was forecasting potentially criminally punishable conduct. However, the University still has a statutory obligation to encourage an exchange of ideas and allowing those who have reserved the opportunity to speak to exercise that right.

Following this obligation and legitimate interest, the University correctly applied the Policy to Plaintiff because her advocacy was conducted in a manner preventing an exchange of ideas at the ASFA event. ASFA had reserved and the University had approved the Amphitheater for their expressive activity to create an opportunity for the campus community to hear and appreciate their viewpoint. R. at 21. While it was not required to reserve the Amphitheater, ASFA took the step to ensure their opportunity by applying through the appropriate University avenues. *Id*. Moreover, ASFA took the step to provide an influential perspective by inviting a speaker that heads a large, well-known lobby organization advocating for the same cause. R. at 24. As stated previously, Plaintiff's conduct materially and substantially infringed upon the rights of those engaging in the opportunity to express and appreciate ASFA's viewpoint. Like in *Hazelwood*, where a principal determined that the manner in which the students wrote the article was a person attack inconsistent with journalism program's mission, the manner in which Plaintiff expressed her viewpoint was inconsistent with the University's interest to protect the free exchange of ideas.

Plaintiff contended that before the Policy was enacted, she was able to conduct the same demonstration and not face repercussion from the University. R. at 37. This may be true, but the

change in practice was due to the University's statutory obligation to address the "increasingly frequent" episodes of shouting down invited speakers. Plaintiff is still free to conduct those demonstrations on campus as she wishes; the only new limitation being she cannot do so at the expense of another's First Amendment Constitutional Rights. The passionate and polarizing viewpoints represented in this case enlighten that now more than ever, the University of Arivada and all of higher education has a responsibility to stimulate open dialogue between aisles instead of simply tolerate it.

In sum, the University had a legitimate interest in restricting Plaintiff's conduct.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court AFFIRM the decision of the Fourteenth Circuit Court of Appeals.

Dated: January 31, 2019

Respectfully submitted,

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Team 23

Counsel for Respondents

BRIEF CERTIFICATE

Team 23 hereby certifies that: (1) the work product contained in all copies of the team's brief are the work product of the members of the team only; (2) the team has complied fully with its law school honor code; and (3) the team has complied with all the Rules of the Competition.

Dated: January 31, 2019 /s/ Team 23