Team 1
Counsel for Petitioner

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,
Respondent

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

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

I. Whether a university Campus Free Speech Policy imposing disciplinary sanctions on a student who "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" is unconstitutionally vague and substantially overbroad?

II. Whether, as applied to Vega, the Campus Free Speech Policy violates the First Amendment when it restricted her speech on the walkway of the outdoor Quad?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Arivada appears in the record. R. at 1-18. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record. R. at 42-53. Both opinions are unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered a final judgment on November 1, 2018. R. at 42. Petitioner filed a timely petition for a writ of certiorari, which was granted by the Court. R. at 54. This Court has jurisdiction under 28 U.S.C. § 1254 (2012).

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision is set forth in Appendix A: U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioner Valentina Maria Vega ("Vega"), a resident of the State of Arivada ("Arivada"), a first-generation Honduraguan-American sophomore studying sociology and pre-law at the University of Arivada ("the University"), was found to violate her school's "Campus Free Speech Policy" (hereafter "the Policy") on September 12, 2017. R. at 3, 6, 23, 37. Vega is the President of "Keep Families Together" ("KFT"), a national student organization with a long-standing presence on campus and a mission to advocate for immigrants' rights through on-campus and community advocacy events, including peaceful protests and rallies. R. at 3, 37. Vega has a passion for "promoting respect for the rights and dignity of immigrants," such as her family. R. at 37. She aspires to attend law school in order to advocate for immigrants and their rights. R. at 37.

The Policy, enacted on August 1, 2017, prohibits "[e]xpressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." R. at 23. The Policy was implemented pursuant to the State of Arivada's "Free Speech in

Education Act of 2017" ("the Act") which requires that state institutions of higher education "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." R. at 19.

Vega was required to sign the updated Policy prior to the beginning of the academic year, on August 27, 2017. R. at 20, 44. The consequences for violating the Policy include a three-strike disciplinary framework. R. at 43. University Campus Security issues a citation to any student in violation of the Policy, and the Dean of Students then determines whether the student is in violation of the Policy. R. at 23. After having an opportunity for a hearing before the Dean, the student will be issued a first-strike warning. R. at 23. The second or third citation results in a "formal disciplinary hearing before the School Hearing Board," after which the student may be suspended for the second violation and expelled for the third. R. at 23. Vega contends that "the suspension and attendant disciplinary proceedings" remain on "her permanent undergraduate record." R. at 1.

On September 2, 2017, Vega and seven members of KFT were issued their first strike warnings for an incident that occurred on August 31, 2017. R. at 3-4. They attended the rally of another student organization in a campus indoor auditorium "to make sure that other students understand the pro-immigrant perspective." R. at 3, 38. While at the rally, the KFT members stood on their chairs in the middle of the auditorium and chanted their pro-immigration views "in an attempt to shout down the speaker at the event." R. at 3-4, 37.

On September 12, 2017, Vega was issued a second strike and suspended for the remainder of the semester because of an incident that occurred on September 5, 2017 on the University's Quad. R. at 4, 6. The local chapter of "American Students for America" (hereafter "ASFA") hosted a speech by Samuel Payne Drake (hereafter "Drake") advocating the closure of

United States borders to all immigrants. R. at 4-5, 21. The speech occurred in a small open venue, Emerson Amphitheater, located just near the center of the Quad, and distinguished from the rest of the Quad only by a semi-circular arrangement of wooden benches. R. at 4, 21. During Drake's early-afternoon speech, attended by thirty-five people, the amphitheater was surrounded by students cheering and playing an intramural football game, "playing or listening to music from guitars or speakers," and "generally talking, studying, and eating lunch." R. at 4, 5, 21.

Vega, dressed as the Statue-of-Liberty, went to the Quad and, in an "attempt to tailor [her] behavior" to comply with the Policy, stood on the paved walkway approximately ten feet from the last row of amphitheater seats. R. 5, 21, 38. Vega provided an opposing view to Drake's speech for less than ten minutes and protested alone because other KFT members feared violating the Policy a second time. R. 5, 27, 31, 38. The President of ASFA, Theodore Hollingsworth Putnam (hereafter "Putnam"), immediately upon hearing Vega's chanting, called Campus Security claiming Vega was "crazy" and "distracting." R. at 5. Campus Security Officer Michael Thomas, who previously issued a citation to Vega during the August 31, 2017 incident, arrived at the Quad and recognized Vega as the protester. R. at 34-36. Thomas ignored the "other sources of noise distraction" and focused on Vega's protest. R. at 35-36. Both Drake and Thomas noted that they could hear other students speaking and cheering from the surroundings. R. at 6. Though Thomas "could hear both Mr. Drake and Ms.Vega," he judged Vega more distracting because he "observed spectators in the amphitheater turning around to look at Ms. Vega." R. at 36. Throughout Thomas's entire observation, Drake continued to speak. Id. The Dean investigated the incident and the Hearing Board "upheld the charge against Ms. Vega based on its finding that she intentionally disrupted the speech of Mr. Drake" at the ASFA event. R. at 6.

SUMMARY OF THE ARGUMENT

Valentina Maria Vega respectfully requests this honorable Court reverse the decision of the Fourteenth Circuit. First, the University of Arivada's Campus Free Speech Policy is a facially unconstitutional violation of Vega's First Amendment free speech right. Second, the Policy as applied to Vega also unconstitutionally violated her First Amendment rights.

The Policy should not receive *Tinker* deference and therefore is unconstitutionally overbroad and vague. While this Court created the *Tinker* substantial disruption test to apply in the primary and secondary school context, it has never extended its application to the public university context. The *in loco parentis* role of elementary and secondary educators which underpins the justification of deferring to school officials' regulations of student speech does not extend to the college campus because of the vital developmental and social differences between higher education and K-12 education. The disparate outcomes of this Court's post-*Tinker* primary and secondary school cases and its college cases indicates this Court's opportunity, but conscious disregard of *Tinker* in the college context. The Policy is overbroad because the language of the policy does not limit its application and thus the subjective opinion of the listener is necessary to determine what speech "materially and substantially infringes" on the rights of others. The subjective standard places a substantial amount of protected speech within the realm of prohibited conduct under the Policy. The Policy is also unconstitutionally vague because it does not clearly define prohibited conduct in terms that an ordinary person could understand, encouraging arbitrary and discriminatory enforcement.

As applied to Vega, the Policy is unconstitutional because the manner and location of her speech has been consistently protected under the First Amendment. This Court has protected "loud" speech such as singing, clapping, cheering, and stomping so long as the speech did not include "indecent language" or profanity and did not "incite violence." Thus, the manner of

Vega's speech, chanting pro-immigration slogans, is protected under this Court's precedent. Further, this Court has repeatedly held that public sidewalks and walkways are protected areas where individuals can exercise their First Amendment rights. Vega stood along the exterior of the amphitheater, on a walkway on the outdoor Quad; therefore, her speech was protected under the First Amendment and she did not infringe on the rights of others.

ARGUMENT

I. THE UNIVERSITY OF ARIVADA'S CAMPUS FREE SPEECH POLICY SHOULD NOT BE AFFORDED *TINKER* DEFERENCE AND IS FACIALLY INVALID BECAUSE IT CONTAINS VAGUE LANGUAGE AS TO WHAT CONDUCT IS PROHIBITED AND OVERBROADLY PROHIBITS CONSTITUTIONALLY PROTECTED EXPRESSIVE CONDUCT.

An enactment is successfully invalidated on its face when the challenger proves that "no set of circumstances exist under which [the enactment] would be valid." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). A challenge to a statute on the grounds of overbreadth or vagueness is a facial challenge. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982). In the high school context, this Court has held that "First Amendment rights . . . are available to . . . students" unless the student's speech "materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school" or "collid[es] with the rights of others." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

A. *Tinker* does not govern Vega's case since she is a college student, not a high school student, and thus she is afforded the same First Amendment speech protections as adults in other contexts.

In the context of a learning environment, "First Amendment rights . . . are available to teachers and students." *See Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech . . . at the schoolhouse gate"). While this Court has made clear that students maintain their First Amendment rights during

school hours, this Court has also acknowledged that the important objective of public education is the "'inculcation of fundamental values necessary to the maintenance of a democratic political system.'" *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). Yet, the "freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundary of socially appropriate behavior." *Id.* This Court has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 507. However, in *Healy v. James*, this Court also explained that the "precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." 408 U.S. 169, 180 (1972).

1. *In loco parentis* and *Tinker*

In *Tinker*, this Court held that the First Amendment applied to students in public schools and that administrators would have to demonstrate constitutionally valid reasons for any specific regulation of speech in a school. 393 U.S. at 511. The Des Moines public schools suspended students who violated a school policy against wearing arm bands in school. *Id.* at 504. This Court noted that the students were not participating in actual or potential disruptive action, but instead participated in a "silent, passive expression of opinion." *Id.* at 508. This Court concluded the restriction violated the students' First Amendment free speech rights. *Id.*

However, this Court further explained that when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . if he does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at

512-13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th 1966)). This Court elaborated and explained that conduct by a student which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not "immunized by . . . freedom of speech." *Id.* at 513. This Court explained that the First Amendment "permit[s] reasonable regulation of speech connected activities in *carefully restricted circumstances*." *Id.* at 513 (emphasis added).

Courts' deference to the rules and disciplinary decisions of elementary and high school officials stems from *in loco parentis*.[1] This Court has recognized that during the school day, an elementary or high school teacher or administrator acts *in loco parentis*. *See Veronia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). The "substantial disruption" test espoused in *Tinker* is in part predicated on the idea of *in loco parentis*. *See generally Tinker,* 393 U.S. at 503; *see also Bethel*, 478 U.S. at 684 (explaining that "limitations on the otherwise absolute interest of the speaker" in circumstances where the speech is vulgar, lewd, or sexually explicit and when the audience includes children is justified by the concern of "parents, and school authorities acting *in loco parentis*, to protect children").

In loco parentis is a legitimate reason for courts to defer to primary and secondary school educators in limiting certain speech of students; however, because college students are adults, *Tinker* deference is inappropriate for public university administrators' speech regulations.

2. Post-*Tinker* disparate outcomes of high school and college cases

Crucial differences between the learning goals and environments of high schools and colleges justify a distinction between applying *Tinker*'s substantial disruption test to high school students versus college students. Three years after *Tinker*, this Court in *Healy v. James* referenced *Tinker*, but declined the opportunity to apply *Tinker* to the university context. 408

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[1] In loco parentis, Latin for "in the place of a parent," is defined as, "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." Black's Law Dictionary 858 (9th ed. 2009).

U.S. at 180 (quoting *Tinker*, 393 U.S. at 506) ("First Amendment rights must always be applied 'in light of the special characteristics of the [school] environment'"); *see also* Meggen Lindsay, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*, 38 W.M.L.R. 1470, 1480-81 (2012).

Further, the Third Circuit has held that public colleges and universities have "significantly less leeway in regulating student speech than public elementary or high schools." *DeJohn v. Temple University*, 537 F.3d 301, 316 (3d Cir. 2008); *see also McCauley v. University of Virgin Islands*, 618 F.3d 232 (3d Cir. 2010). It has also identified differences among the two stages of education: (1) the different "pedagogical goals of each institution," (2) "the *in loco parentis* role of public elementary and high school administrators," (3) the discipline needs of public elementary and high schools, (4) student maturity, and (5) the fact that many university students live on campus and are continually subject to university rules. *McCauley*, 618 F.3d at 242-43.

In addition to the broader developmental differences between elementary and secondary education and undergraduate education, post-*Tinker* cases indicate the distinctive deference given to high schools versus colleges in regulating student speech. *See* Lindsay, *supra*, at 1483 ("The Supreme Court has never upheld a student-speech restriction at the university level . . . what is crucial is the level of deference the Court repeatedly has afforded to the protection of college-level speech").

Despite similar situations, this Court has decided opposite outcomes for high school and college cases which supports not applying *Tinker* to college free speech regulations. In *Hazelwood School District v. Kuhlmeier*, this Court held that high school officials may impose reasonable restrictions on school sponsored publications. 484 U.S. 260, 272-73 (1988). High School officials deleted two pages of an issue of the school newspaper that described students'

experience with pregnancy and divorce. *Id.* at 265-66. In reaching its holding, this Court reasoned that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in *school-sponsored* expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (emphasis added). This Court deferred to the school officials' judgment that the material may be inappropriate for younger students and decided that the officials did not "deviate in practice from their policy that production of [the newspaper] was to be part of the educational curriculum and a regular classroom activity." *Id.* at 268.

Conversely, in *Papish v. Board of Curators*, this Court held that a political cartoon depicting policemen raping the statue of liberty, and a newspaper article entitled "M—f— Acquitted," was not unconstitutionally obscene or unprotected speech. 410 U.S. 667, 667 (1973). The cartoon and article were published in a newspaper sold on the state university campus for more than four years. *Id.* at 667. This Court explained that while "time, place, or manner regulation of speech" and its dissemination can be permitted if reasonable, the facts showed that "petitioner was expelled because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution." *See id.* at 669 (quoting *Healy*, 408 U.S. at (". . . the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'").

Both Supreme Court cases were decided after *Tinker*, and both cases dealt with school officials regulating school newspapers. *See generally Papish*, 410 U.S. at 667; *Kuhlmeier,* 484 U.S. at 260. Yet, this Court protected the speech of the graduate student in *Papish* but not the high school students in *Kuhlmeier*. *See Papish*, 410 U.S. at 667; *Kuhlmeier,* 484 U.S. at 260. While in both *Kuhlmeier* and *Papish* this Court focused on the substance of the speech and concluded it was either permissible or impermissible for the school officials to limit that speech,

the disparate outcomes still indicate this Court's reluctance to apply *Tinker* and its reasoning to the college context. *See Papish*, 410 U.S. at 669; *Kuhlmeier,* 484 U.S. at 273.

This Court has also recognized that *Tinker* is not absolute in the context of high school speech cases. *See Morse v. Frederick*, 551 U.S. 393 (2007). In *Fraser*, this Court held that high school officials are permitted to regulate "lewd," "vulgar," and "indecent" speech at school and that suspending a student after he gave a speech including sexual innuendos at a high school assembly did not violate his First Amendment free speech rights. 478 U.S. at 685. Twenty years later, this Court in *Morse v. Frederick* expressed confusion about whether *Fraser* employed the *Tinker* analysis. *See Morse*, 551 U.S. at 404 ("the mode of analysis employed in *Fraser* is not entirely clear"). However, this Court in *Morse* discerned two principles from *Fraser*. *Id.* One, that *Fraser*'s holding "demonstrates that 'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'" *See id.* (quoting *Fraser*, 478 U.S. at 682). And two, that the "mode of analysis set forth in *Tinker* is not absolute." *See id.* ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*"). This Court also acknowledged that *Kuhlmeier* was not analyzed under *Tinker*. *Id.* at 406. Thus, given that this Court post-*Tinker* has not consistently applied *Tinker* to even high school cases, this Court should not apply *Tinker* to Vega's college situation.

B. The University of Arivada Campus Free Speech Policy's ill-defined prohibition on expressive conduct that "materially and substantially infringes" is overbroad because freedom of speech is conditioned on the subjective opinion of the listener, which allows for the prohibition of a substantial amount of protected speech.

Enactments that "restrict or burden the exercise of *First Amendment* rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413

U.S. 601, 611 (1973); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (explaining that a broadly-written enactment can have "a deterrent effect" on speech). This Court's First Amendment overbreadth doctrine alters the traditional rules of standing because a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612; *see Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (noting that an overbroad ordinance "sweeps within its prohibitions what may not be punished under the *First* and *Fourteenth Amendments*"). This Court will only invalidate an enactment "as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). In an overbreadth analysis, this Court must first "construe the challenged statute; [because] it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Second, this Court considers "whether the statute, as . . . construed . . . criminalizes a substantial amount of protected expressive activity." *Id.* at 297. Substantial overbreadth does not have "an exact definition," but rather this Court focuses on whether the enactment inhibits "the speech of third parties who are not before the Court." *Taxpayers for Vincent*, 466 U.S. at 800. The fact that some conceivable impermissible application exists is insufficient to find an enactment unconstitutionally overbroad. *Id.*

1. The Policy's provisions, construed based on plain meaning, are overbroad

This Court must construe the challenged enactment in order to understand the reach of the enactment. *Stevens*, 559 U.S. at 474. The enactment's text is itself the starting point of this Court's analysis. *Id.* In this case, the Policy prohibits "[e]xpressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." R.

at 23. Based on the plain reading of the text, the Policy clearly prohibits a wide range of constitutionally-protected expressive conduct. The question for this Court is whether the prohibited conduct is substantial enough to render the Policy facially unconstitutional. *See Stevens*, 559 U.S. at 473. The word "infringe" connotes an impermissibly broad scope that is insufficiently limited by either the phrase "materially and substantially" or by the Policy's incorporated reference to the Act's purpose. *See* R. at 19, 23.

A reasonable person could interpret the Policy language to include expressive conduct that is explicitly protected under the First Amendment. Indeed, the very expressive conduct occurring on the Quad concurrent with Drake's speech could reasonably be interpreted to be a violation of the Policy. That conduct included watching and listening to an intramural football game, cheering the game, "playing or listening to music from guitars or speakers, talking, studying, and eating lunch." R. at 21. Testimony from those present at Drake's speech indicated that there was "a lot of noise from the football game" and other activities on the Quad. *See* R. at 32. Undoubtedly, a reasonable person could read the Policy to include football game noise, cheering, or loud music to be an infringement on the rights of those listening to a speaker. The language of the Policy applies even further than that. The rights of the students on the Quad to hear the guitar player could be infringed upon by a loud intramural football cheer. Likewise, the ability of the football crowd to hear an announcement from the field could be infringed upon by the music emanating from the guitar or speaker.

The purpose of the Policy is "to fulfill the University's obligations under the . . . Act," and the Act required the University to promulgate the Policy because "[i]t is critical to ensure that the free speech rights of all persons lawfully present on college and university campuses in [Arivada] are fully protected." R. at 19, 23. The legislative directive in Section 2 likewise requires the University to develop the policy to "safeguard the freedom of expression on campus

for all members of the campus community and all others lawfully present." R. at 19 (emphasis added). While the Act does reference incidents of "shouting down invited speakers," this reference is not incorporated into Section 2, which commands the University to adopt a policy and defines what the policy should accomplish. *See* R. at 19. The lack of limiting language in the Policy, and the failure of the legislature to limit its directive to shouting down speakers or impeding invited guests from offering a viewpoint, renders the Policy substantially overbroad and without any redeeming statutory limitation.

2. The Policy prohibits constitutionally-protected conduct based on a listener's reaction

The lack of clearly defined and limited prohibitions in the text of the Policy combined with the plain meaning of "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" requires the subjective assessment of the listener for application. This Court has long-held that the "'public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' or simply because bystanders object . . . ." *Bacheller v. Maryland*, 397 U.S. 564, 567 (1970) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

The Policy hinges upon the listener's determination that expressive conduct is interfering with his or her rights to listen to or engage in expressive activity. The issuance of the citation in the present case is affirmative proof of this. While Officer Thomas issued Vega a citation outside the amphitheater, it was only issued after one listener (Putnam) called campus security to complain specifically about Vega's speech. *See* R. at 28-29; 34-35. Putnam made a determination that Vega, but not the flag football game or other noise in the Quad, was "extremely distracting." *See* R. at 28. *Cf.* R. at 32 (Speech attendee Taylor noted that even when Vega stopped "there was still a lot of noise from the football game and the other students gathered on the quad."). Putnam's subjective report that Vega was distracting and creating an

"obnoxious and disturbing disruption" precipitated Officer Thomas issuing the citation. *See* R. at 28-29; 34-35. Putnam, the president of the organization against which Vega was protesting, reported a disturbance and Officer Thomas arrived, singled out Vega, and determined she "was more distracting than the random background noise." *See* R. at 28-29, 34-36. The Officer, armed with Putnam's complaint and assessment, equated "more distracting than the [rest]" with "materially and substantially infringing upon the rights of others." *See* R. at 36. While Putnam did not issue the citation himself, he was responsible for Officer Thomas appearing on-site and assessing the level of distraction coming from Vega. *See* R. at 36. Likewise, the listener-infringed standard in the Policy creates the probability that a listener could direct the enforcement of the policy to include a substantial amount of constitutionally-protected speech or conduct. *See* R. at 23. This implication goes far beyond the incident in this case and implicates the free speech rights of University students in many constitutionally-protected contexts.

C. The University Policy is unconstitutionally vague because its prohibitions are not clearly defined so an ordinary person can understand what conduct is prohibited and the Policy language encourages arbitrary and discriminatory enforcement.

A state university policy is void-for-vagueness in violation of the 14th Amendment Due Process Clause when (1) the prohibitions of the enactment are not clearly defined so that ordinary people may know what conduct is prohibited; and (2) the enactment encourages arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Grayned*, 408 U.S. at 108-09. When a university policy provides no explicit standard of conduct it allows for arbitrary and discriminatory enforcement and application. *Grayned*, 408 U.S. at 108-09. When First Amendment freedom of speech and expression is implicated, the "standards of permissible statutory vagueness are strict" and allow the government to "regulate . . . only with narrow specificity." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)). "The general test of vagueness applies with

particular force in review of laws dealing with speech." *Hynes v. Mayor & Council*, 425 U.S. 610, 620 (1976).

1. Prohibitions Not Clearly Defined

While the Constitution does not require prohibitions to be outlined with "meticulous specificity," *Grayned*, 408 U.S. at 108-09 (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077,1088 (8th Cir. 1969)), it does require prohibitions to be defined "in terms that an ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *Broadrick*, 413 U.S. at 608 (quoting *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973)). To determine whether an enactment is unconstitutionally vague this Court must first determine the meaning of the prohibitory words. *Grayned*, 408 U.S. at 109-10. This Court first looks to the plain meaning of the words in the enactment. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). When interpreting the plain meaning of the prohibitory words, this Court may consider "the statute's announced purpose" to divine whether there has been fair notice of the prohibited quantum of conduct. *Grayned*, 408 U.S. at 112.

In *Keyishian*, a state law that required public university faculty to sign pledges certifying that they were not members of the Communist Party was found to be unconstitutionally vague. 385 U.S. at 604. This Court found that the state law required removal for "'treasonable or seditious' utterances or acts," but the statute did not define what treasonable or seditious meant. *Id.* at 597-98. The opaque wording in the statute was not clarified by the cross-references, but rather "aggravated by . . . manifold cross-references to interrelated enactments and rules." *Id.* at 604. This Court reasoned that the statute would "cast a pall of orthodoxy over the classroom" with its threats to academic freedom. *Id.* at 603. Academic freedom and freedom of expression

are fundamental personal liberties that are necessary to keep the classroom a "marketplace of ideas" that trains future national leaders. *Id.* at 602-03.

Similarly, in *Baggett v. Bullit*, this Court found unconstitutionally vague a Washington state statute that required public employees, including faculty at the University of Washington, to swear an oath of allegiance. 377 U.S. 360, 361, 367-68 (1964). The oath required employees to swear that he or she would "promote respect for the flag and institutions of the United States of America and of the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." *Id.* at 361-62. This Court held that the oath was vague because it did not provide an "ascertainable standard of conduct." *Id.* at 372. This Court reasoned that the words "respect for the flag and institutions" of the oath could include a wide range of protected First Amendment conduct including: religious-based refusal to salute the flag, "criticism of the design or color scheme of the state flag," criticism of the state judicial system, criticism of the Supreme Court. *Id.* at 371. Additionally, this Court found that language promising the promotion of "undivided allegiance to the government of the United States" could be interpreted to prohibit "voicing far-reaching criticism of any old or new [government] policy" or to prohibit joining "any interest group dedicated to opposing any current public policy or law of the Federal Government." *Id.* at 371-72.

Conversely, in *Grayned*, this Court concluded that the language of a city anitnoise ordinance was not unconstitutionally vague. 408 U.S. at 106. The Ordinance prohibited "willfully mak[ing] or assist[ing] in the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of a school session or class when the person making the noise was "on public or private grounds adjacent to any building in which a school or any class thereof is in session." *Id.* at 107-08. This Court conceded that the words of the ordinance itself were not designed with "meticulous specificity" and the "prohibited quantum of disturbance [was] not

specified in the ordinance;" however, the ordinance's preamble announced its purpose and thus limited the application of the ordinance to "the school context" in a way that gave fair notice to the public. *Id.* at 110, 112. The words of the ordinance itself provided a fixed time and place for when activity is prohibited but was imprecise as to what "tends to disturb" meant. *Id.* at 111.

The University of Arivada Campus Free Speech Policy is unconstitutionally vague because neither the text of the policy itself nor the Free Speech in Education Act of 2017 provides notice to a person of ordinary sensibilities what conduct is prohibited. *See* R. at 19, 23. Like the state law in *Keyishian*, the Policy does not clearly define the meaning of the "Free Expression Standard" nor does it contain a standalone purpose but references the Act. *See* 385 U.S. at 604; R. at 23. The ordinary person could not be expected to comprehend the opacity of phrases like "materially and substantially infringes" with any specificity. *See* R. at 27 (Ari Haddad affirming that she was "unclear what conduct was prohibited by the University's Policy). Additionally, the context of the Policy can be found only by cross-reference to the Act since the stated purpose of the Policy is to "fulfill the University's obligations under the Arivada 'Free Speech in Education Act of 2017." *See* R. at 23. One might argue that this cross-reference removes vagueness from the Policy; however, using this Court's logic in *Keyishian*, cross-references to other Acts creates additional questions about the true meaning of the Policy. *See* 385 U.S. at 604.

Additionally, like the professor in *Baggett* who was forced to promise to promote allegiance to the United States, a student at the University cannot ascertain a standard of conduct that dictates what she can say that will not infringe upon the rights of others. *See* 377 U.S. at 372; R. at 23. The Policy provides no guidance as to what might be considered an infringement. *See* R. at 23. Like the *Baggett* oath, the Policy could be interpreted to prohibit speech that the listener does not like or is too loud. *See* 377 U.S. at 361-62; R. at 23. Conversely, the opaque words of

the Policy, unlike those in *Grayned*, cannot be saved from vagueness by the context provided in the Policy or the Act. *See* 408 U.S. at 110, 112; R. at 19, 23. The fact that the legislature singled out shouting down campus speakers does not limit the Policy to only that instance in the same way the *Grayned* antinoise ordinance was limited to a school context. *See* 408 U.S. at 110, 112; R. at 19, 23. Unlike the *Grayned* ordinance which outlined fixed limits on the application of the ordinance in the text of the prohibitions itself, the Policy does not provide any limiting language in the text itself. *See* 408 U.S. at 110-12; R. at 19, 23.

2. Permits Arbitrary and Discriminatory Enforcement

A state university policy is unconstitutionally vague when it fails to provide "minimal guidelines to govern law enforcement," which "encourage[s] arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-58. The void-for-vagueness doctrine focuses on notice to the citizenry of prohibitions; however, "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

In *Coates*, the loitering ordinance had only the subjective standard of "annoyance," which vested in the enforcement officer complete discretion. *See Grayned*, 408 U.S. at 113. Similarly, the Policy vests in the enforcement officer the power to interpret what conduct infringes upon the rights of others. *See* R. at 23. In the instant case, Officer Thomas relied on the report of the ASFA president to target his enforcement of the Policy. *See* R. at 35. The report directed the Officer to Vega's conduct and identified it as an attempt to "shout down ASFA's speaker." *See* R. at 35. The enforcement officer in this case used his discretion to determine that Vega's conduct, not the football game or the music playing, was an infringement of the rights of the listeners inside the amphitheater. *See* R. at 36. However, in another instance the language of the

Policy would allow the same officer to determine that the football cheers are an impediment to a campus speaker.

Additionally, this Court in *Coates* held that a loitering ordinance was unconstitutionally vague. 402 U.S. at 614. The ordinance made "it a criminal offense for 'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." *Id.* at 611. This Court focused on the word "annoying" and held that this word articulated "no standard of conduct . . . at all." *Id.* at 614. This Court reasoned that the ordinance was "broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit;" however, it was also broad enough to encompass conduct that is constitutionally protected – the right of free assembly. *Id.* at 614-15. This court noted that annoyance is a subjective standard that does not clearly define to the citizen what conduct is permissible. *See id.* at 614.

II. ARIVADA UNIVERSITY'S CAMPUS FREE SPEECH POLICY WAS UNCONSTITUTIONAL AS APPLIED TO VEGA WHEN SHE CHANTED HER PRO-IMMIGRATION SLOGANS DURING DRAKE'S SPEECH BECAUSE HER SPEECH IS PROTECTED BY THE FIRST AMENDMENT AND SHE DID NOT "MATERIALLY AND SUBSTANTIALLY INFRINGE[] UPON THE RIGHTS OF OTHERS TO ENGAGE IN OR LISTEN TO EXPRESSIVE ACTIVITY."

Arivada University's Campus Free Speech Policy is unconstitutional on its face, but it is also unconstitutional as applied. This Court has expressed a preference for as-applied constitutional challenges. *See Wash. State Grange*, 552 U.S. at 450-451 ("Facial challenges are disfavored [because]…they raise the risk of premature interpretation of statutes on the basis of factually barebones records"); *see also Ayotte v. Planned Parenthood*, 546 U.S. 320, 328 (2006) ("[W]hen confronting a constitutional flaw in a statute, we try to limit the situation to the problem").

Under the First Amendment, a policy is constitutional as applied if its application to the petitioner is viewpoint neutral and "reasonable in light of the purpose which the forum at issue

serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). Courts define an as-applied challenge as one "under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995). Speech is protected under the First Amendment unless "regulations of time, place and manner of expression are content-neutral, are narrowly tailored to serve a government interest, and leave open ample alternative channels for communication." *Perry Educ. Ass'n*, 460 U.S. at 45. There is a First Amendment right to "'receive information and ideas.'" *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

A. The manner by which Vega expressed her pro-immigration viewpoint on the university Quad is protected under the First Amendment because her speech did not contain profanity, incite violence, or unduly infringe upon the rights of others.

Courts consider the manner and nature of the speech such as yelling, cheering, or clapping, in addition to whether the speech included profanity or encouraged violence as factors in determining whether or not the speech is protected under the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443 (2011); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

This Court has long held that clapping, cheering, and "loudly" singing is protected speech under the First Amendment. *See Snyder*, 562 U.S. at 443; *Cox*, 379 U.S. at 536; *Edwards*, 372 U.S. at 229. In *Snyder v. Phelps*, this Court held that the First Amendment protected the speech of Westboro Baptist Church members ("WBC") as they displayed signs with phrases such as "Thank God for Dead Soldiers," sang hymns, and recited bible verses across the street from a soldier's funeral. 562 U.S. at 448-49. This Court determined that WBC's speech was of "public concern," as opposed to private, which was imperative since speech on "matters of public concern . . . is at the heart of the First Amendment's protection." *Id.* at 451-52. This Court

explained that "speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the community." *Id.* at 453. The picketers did not "use profanity, and there was no violence associated with the picketing." *Id.* at 449. This Court concluded that even though the picketers' views may have been hurtful, the speech was conducted "peacefully on matters of public concern at a public place" which permitted its First Amendment protection. *Id.* at 456.

Similarly, in *Edwards v. South Carolina* and *Cox v. Louisiana*, this Court upheld the speech of demonstrators who loudly sang, clapped, and cheered. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963). In *Edwards*, high school and college students protested discrimination at the South Carolina State House grounds, which is open to the general public. 372 U.S. at 230. The students walked through the grounds carrying signs while about 200-300 onlookers observed the protests. *Id.* Instead of dispersing upon the police officers' request, the students "loudly sang the Star Spangled Banner and other songs" while stamping their feet. *Id.* at 233. This Court held that by arresting the students, South Carolina infringed upon their constitutionally protected right to free speech reasoning that there was "no violence or threat of violence on their part, or on the part of any member of the crowd." *Id.* at 235-36. This Court emphasized that "a function of free speech under our system of government is to invite dispute . . . [t]hat is why freedom of speech is protected against censorship and punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.* at 237.

Likewise, in *Cox*, this Court held that the expressive conduct of singing, cheering, and clapping, exhibited by appellant Reverend Cox and 1,500-2,000 college students, on a public sidewalk in front of a courthouse was constitutionally protected. 379 U.S. at 539-40. Reverend Cox, an advisor to the racial desegregation movement, was convicted of "disturbing the peace"

and "courthouse picketing." *Id.* at 539. A witness testified that the conduct was "loud but not disorderly," which in part led this Court to conclude that there was no "boisterous or violent conduct or indecent language on the part of the students," and thus, the speech was protected by the First Amendment. *Id.* at 548; *But see Feiner v. New York*, 340 U.S. 315, 317, 320-21 (1951) (holding that speech was not protected when the speaker encouraged black audience members to "rise up in arms and fight for equal rights" against white members because the community's interest in maintaining peace outweighed the speech which sought to "incite violence").

Conversely, in *Ward v. Rock Against Racism*, this Court upheld a city guideline regulating the volume of amplified music and requiring performers to use sound-amplification equipment and a sound technician provided by the city at an outdoor amphitheater in Central Park. 491 U.S. 781, 784, 800 (1989). The city received numerous complaints from local residents regarding the performers' loud concerts, and this Court determined the city's "substantial interest in limiting sound volume" was narrowly tailored.[2] *Id.* at 800.

The manner of Vega's speech on the Quad is protected under the First Amendment and she did not "infringe[] upon the rights of others" because this Court has protected "loud" noise, her words and actions did not incite violence or include profanity, and she acted with the First Amendment protected purpose of sharing ideas of "public concern" and "inviting dispute." Though Drake described Vega's chanting of slogans as "loud[] and obnoxious[]," this Court has held that similar speech is protected by the First Amendment. *See Cox*, 379 U.S. at 536; *Edwards*, 372 U.S. at 229; R. at 25. The volume of Vega's chants, while potentially "distracting," did not rise to the level of noise protected in *Cox* and *Edwards* where numerous, and in the case of *Cox*, thousands of students sang, clapped, and cheered. *See Cox*, 379 U.S. 536, 539; *Edwards*, 372 U.S. 229; R. at 28. Further, Taylor said that "[a]ll of the noises combined

[2] Petitioner does not contest the content neutrality of Arivada University's policy; thus, Petitioner does not conduct a narrowly tailored analysis. *See, e.g., Ward*, 491 U.S. at 798-99.

made it difficult to hear Drake speak," and "[e]ven though the student stopped chanting . . . there was still a lot of noise from the football game and other students gathered on the quad." R. at 32. This indicates that even if Vega's chanting was the most prominent noise, it was not the only source of noise on the outdoor Quad that afternoon. R. at 32. And unlike the performer in *Ward*, Vega was not infringing on the rights of local residents. *Ward*, 491 U.S. at 784.

Additionally, Vega's chanting did not contain profanity, nor did it incite violence. The speech protected by the First Amendment in *Snyder* and *Cox* did not contain "profanity" or "indecent speech," and this Court noted that fact specifically. *See Snyder*, 562 U.S. at 449; *Cox*, 379 U.S. at 548. Similarly, Vega simply made opposing statements to the viewpoint Drake was expressing in his speech; she did not try to pit two sides against each other or incite a riot. R. at 38. *But see Feiner*, 340 U.S. at 321. Like the petitioners in *Cox* and *Edwards*, Vega's speech may have been "loud," but according to Taylor, "even though the student stopped chanting . . . there was still a lot of noise from the football game and the other students gathered on the quad." R. at 38. *See generally Cox*, 379 U.S. at 536; *Edwards*, 372 U.S. at 229.

Vega's speech epitomized the "function of free speech" which "invite[s] dispute." *See Edwards*, 372 U.S. at 237. Speech that invites dispute is protected against "punishment" unless the speech is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id*. Drake and ASFA members' mere annoyance was not enough to restrict Vega's First Amendment right to free speech under the circumstances. R. at 25, 28. Matters of public concern are integral to First Amendment protection, and similarly to the *Snyder* Court's characterization of the speech as political concern to the community and thus, public concern, Vega's speech regarding immigration is also a matter of political and social concern to the community. *Snyder*, 562 U.S. at 453; R. at 37-39. Like the petitioners in *Edwards* and *Cox*, who were protesting discrimination, a controversial topic in the

1960s, Vega was protesting Drake's views on immigration, a controversial topic today. *See Cox*, 379 U.S. 536; *Edwards*, 372 U.S. 229; R. at 38.

B. Vega's location in the middle of the outdoor Quad, outside of the amphitheater is protected under the First Amendment and thus did not unduly infringe upon the rights of others.

This Court has emphasized the importance of permitting individuals to exercise their free speech rights in public places when determining whether or not the speech is constitutionally protected.[3] In *Snyder*, this Court held that the WBC picketers' speech protesting a soldier's funeral on public land was constitutionally protected by the First Amendment. 562 U.S. at 448-49. The picketers neither entered church property nor went to the cemetery but they picketed on a plot of public land which was approximately 1,000 feet from the funeral's location. *Id.* at 449. This Court concluded that the picketing was conducted "at a public place adjacent to a public street" and that such space "occupies a special position in terms of First Amendment protection." *Id.* at 456. This Court further emphasized the historical and vital role public streets and sidewalks have played for "public assembly and debate." *See id.* ("public streets [are] the archetype of a traditional public forum"). Similarly, in *Cox*, this Court protected speech which occurred on a public sidewalk outside of a court house. 379 U.S. at 538-39.

Conversely, in *Hill v. Colorado*, this Court upheld a restriction which prohibited protestors from approaching "unwilling listeners" within 100 feet of medical centers performing abortions. 530 U.S. 703, 707 (2000). The protestors engaged in "sidewalk counseling" on public sidewalks which necessitated "escorts for persons entering and leaving the clinics" in order to protect them from "aggressive counselors who sometimes used strong and abusive language in face-to-face encounters." *Id.* at 710. This Court balanced the interests of the "unwilling audience" and the protestor's free speech right and concluded that the right to free speech

[3] Petitioner doed not engage in a forum analysis since the issue was not raised in the courts below. *See* R. at 8.

"includes the right to attempt to persuade others to change their views," but that protection does not extend to "offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Id.* at 715-16; *see also Startzell v. City of Philadelphia*, 533 F.3d 183, 198-99 (3d Cir. 2008) (upholding a time, place, and manner, restriction where the police asked a group to move to another location of a public event because they were using amplifiers and bullhorns to drown out platform speakers).

Vega's relative proximity to the students attending Drake's speech did not infringe on their rights to listen to Drake. Like the picketers in *Snyder*, Vega stood on the walkway of an outdoor area. *See Snyder*, 562 U.S. at 448-49; R. at 38. Also, similar to the picketers in *Snyder* who did not enter the funeral or cemetery, Vega did not enter the amphitheater which held the event she was protesting. *See Snyder*, 562 U.S. at 448-49; R. at 38. Unlike her first offense under the Policy where Vega and others stood in the middle of an indoor auditorium and yelled their beliefs, Vega peacefully chanted along the exterior of the amphitheater on a walkway outside. R. at 37-38. This Court protected the speech of 1,500 protestors in *Cox* who were "loud" on a sidewalk outside of a courthouse; surely one person's chanting, such as Vega's, would also be protected and would not be considered to infringe on the "rights of others to engage in or listen to expressive activity." *See Cox*, 379 U.S. at 539-40. Vega stood on a constitutionally protected area, a public walkway, outdoors, and remained outside of the amphitheater; thus, the policy unconstitutionally restricted her First Amendment right to free speech.

CONCLUSION

Petitioner respectfully requests this honorable Court reverse the judgment of the Fourteenth Circuit Court of Appeals and reinstate the decision of the district court.

Respectfully Submitted,

s/o Team 1

Attorneys for Petitioner

CERTIFICATE OF SERVICE

We, the attorneys for Petitioner, certify that on January 31, 2019, have served upon the Respondent a complete and accurate copy of this Brief for Petitioner by placing a copy in the United States Mail, sufficient postage affixed and properly addressed.

Date: January 31, 2019

s/o Team 1
Attorneys for Petitioner

BRIEF CERTIFICATE

Team 1 certifies that the work product contained in all copies of Team 1's brief is in fact the work product of the members of Team 1 only; and that Team 1 has complied fully with its law school's governing honor code; and that Team 1 has complied with all Rules of the Competition.

s/o Team 1
Attorneys for Petitioner

APPENDIX A: Constitutional Provision

First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.