No. 18-1234

IN THE

SUPREME COURT OF THE UNITED STATES

March Term, 2019

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 RESPONDENT

Team 2

Counsel for Respondent

QUESTIONS PRESENTED

I. Was the Fourteenth Circuit correct when it upheld a University's Campus Free Speech Policy, which sought to protect the free speech rights of its students, against a First Amendment facial attack from a student who is unhappy about receiving disciplinary sanctions for violating the Policy when the student knowingly engaged in conduct that the Policy prohibited and when the Policy is neither vague nor overbroad?

II. Was the Fourteenth Circuit correct when it upheld a University's discipline of a student's disruptive, unruly, and distracting expression of speech when the student's conduct interfered with other students' ability to engage in and listen to expressive activity, and when the University has sweeping authority to control the conduct of its students to maintain the integrity of the learning environment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases: **Page(s)**

Federal Circuit Court of Appeals Cases:

United States Constitution:

Statutory Provisions:

Other Authority:

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2018. *Jonathan Jones and Regents of the University of Arivada v. Valentina Maria Vega*, No. 18-1757, slip op. at 12 (14th Cir. Nov. 1, 2018). Petitioner timely filed a petition for a Writ of Certiorari to this Court, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1) (Westlaw through P.L. 115-281).

STATEMENT OF THE CASE

Statement of the Facts

Adoption of the free speech policy. The state of Arivada enacted the "Free Speech in Education Act of 2017" on June 1, 2017. R. at 2. The Act required all state-wide universities to adopt policies safeguarding the freedom of expression on campuses. R. at 2. Accordingly, Respondent, Jonathan Jones, President of the University of Arivada, and the University's Board of Regents (hereinafter referred to collectively as "University") adopted the Campus Free Speech Policy ("Policy") to protect the freedom of expression as outlined in the Act. R. at 2. This Policy is at the heart of this dispute.

If a student violates the Policy, the University's Campus Security issues the student a citation. R. at 2. The University's Dean of Students ("Dean") then determines, through an investigation, the appropriateness of the citation. R. at 3. The investigation guarantees the student an informal disciplinary hearing before the Dean. R. at 3. If the citation was appropriate, the Dean issues the student a strike. R. at 3. The student receives a "first strike" for her first transgression. R. at 2.

The student receives a "second strike" if she engages in a second transgression. R. at 3. To deter future transgressions, a "second strike" results in suspension for the remainder of the

current semester. R. at 3. If the student receives a "third strike" because of a third transgression, she faces expulsion. R. at 3. The Policy guarantees the student who receives either a "second strike" or a "third strike" a full, formal disciplinary hearing before the School Hearing Board. R. at 3. The student's record will reflect any strikes issued under the Policy. R. at 3.

Vega agreed to be bound by the Policy. Ms. Valentina Maria Vega ("Vega") is a sophomore at the university studying Sociology with a minor in Pre-Law studies. She self-declares as an advocate for the rights of immigrants in the United States. R. at 3. She is the current president of "Keep Families Together" ("KFT"), a national organization that advocates for the rights of immigrants on college and nearby community campuses. R. at 3. The organization participated in numerous peaceful protests and rallies on campus prior to the Policy's adoption. R. at 3.

Prior to starting the academic year in 2017, and after the University adopted its new Policy, the University required all students to thoroughly read and agree to the University's terms. R. at 3. The University electronically transmitted a copy of the updated Student Handbook to all students, including Vega. R. at 3. Students were to read and sign the Policy to demonstrate agreement to abide by it. R. at 3. It is undisputed that Vega signed the Policy, thereby agreeing to abide by its terms. R. at 3. She broke this promise.

Vega's first transgression. On August 31, 2017—not even five days into the start of the semester—Vega, Teresa Smith, Ari Haddad, and seven other KFT members attended an anti-immigration rally hosted by Students for Defensible Borders ("SDB"). Vega and the other KFT members disguised their true intentions to disrupt the rally, waited until the rally began, when they stood on their chairs to chant their pro-immigration views and "shout down" the speaker. R. at 3, 4. Their efforts to impede this learning opportunity were successful. R. at 4.

Campus Security responded to calls from SDB that Vega and the KFT members were disrupting its event. R. at 4. Campus Security issued citations to each KFT member, and pursuant to the Policy's disciplinary protocol, each student received their first strike. R. at 4. The Dean informed each student that they had engaged in prohibited behavior by "materially and substantially infringing upon the rights of others to engage in or listen to expressive activity." R. at 4.

Vega's second transgression . . . five days later. On September 5, 2017, the University's chapter of American Students for America ("ASFA") hosted Mr. Samuel Payne Drake ("Drake"), the Executive Director of a well-known lobbying group whose members were advocates of closing the border to all immigrants. R. at 4. The president of ASFA reserved the on-campus amphitheater for the event's exclusive use. R. at 4. The amphitheater is located within the university's quad, a large green space where students can gather to sit, play sports, and socialize. R. at 4. Dormitories and other university buildings enclose the quad. R. at 4. The amphitheater houses benches arranged in a semi-circle facing a platform. R. at 5. The amphitheater rolls into the rest of the quad, with no line delineating where the amphitheater begins or ends beyond the last bench. R. at 5.

That day, approximately 35 people gathered in the amphitheater to listen to Drake as he espoused anti-immigration ideology pursuant to the goals of ASFA. R. at 5. As Drake was speaking, the quad continued to buzz with student activity. R. at 5. Some students played an intramural football game, while others watched and cheered along with it. R. at 5. Other students were eating, studying, talking, playing, or listening to music. R. at 5.

Vega stood directly facing Drake approximately ten feet behind the amphitheater's last row of benches in the quad. R. at 5, 25. Her KFT colleagues refused to participate out of fear that

they would receive a second strike and be suspended. R. at 27, 31. Vega wore a Statue-of-Liberty costume and chanted her pro-immigration perspective. R. at 5. Drake claimed that Vega was "loudly and obnoxiously" chanting, making it extremely hard for him to "speak, think, and remain focused." R. at 25. The spectators at the event were also distracted and repeatedly turned around to look at Vega during the speech. R. at 25. When Vega continued to chant, the president of ASFA called Campus Security to report that Vega was impairing Drake's audience from listening to his speech. R. at 5.

Vega was a material disruption. Campus Security Officer Michael Thomas ("Officer Thomas") responded to the call. R. at 5. Officer Thomas claimed that Vega was "loudly protesting," and that many spectators in the amphitheater were distracted by her. R. at 6. Officer Thomas reported that the spectators had "difficulty focusing on the speech" because of her incessant chanting and garish costume. R. at 6. Officer Thomas opined in his report that although he could hear noises from the many other students in the quad at the time, Vega was "more distracting than the random background noise" because of her location. R. at 6. Subsequently, Officer Thomas issued Vega a citation for violating the University's Policy. R. at 6. As soon as Officer Thomas issued the citation and Vega left, the spectators were able to focus on Drake's speech. R. at 25.

Pursuant to the Policy's disciplinary protocol, and following a hearing before the Hearing Board, the citation was deemed proper. R. at 6. As duly expected, the Dean issued Vega her second strike, resulting in her suspension from the university for the remainder of the fall semester. R. at 6.

Procedural History

On October 1, 2017, Vega brought a facial and as-applied challenge against the University to the Policy in district court. R. at 1. She baldy asserts that the University's Policy is impermissibly overbroad and unconstitutionally vague; and the University violated her First Amendment rights by disciplining her. R. at 7. She seeks a declaration to reverse her suspension and requests the removal of both the suspension and subsequent disciplinary proceedings from her academic record. R. at 1. n. 3. Vega is trying to dodge the consequences that the University's corrective action would place on her law school application. That's it; nothing more.

District of Arivada. The United States District Court for the District of Arivada entered summary judgment in favor of Vega. R. at 17. The District Court held that the University's Policy, which resounds in First Amendment ideology, facially violated the First Amendment because it was unconstitutionally vague and substantially overbroad. R. at 2. Although the Policy protects the ability to engage in and listen to expressive activity, which stands at the heart of the First Amendment, the District Court held that the Policy fails to adequately describe what conduct it prohibits. R. at 8. Additionally, the District Court held that the policy is substantially overbroad in that it applies to all sorts of on-campus speech that is otherwise protected by the First Amendment. R. at 10. Further, the District Court rejected the University's contention that its Policy is grounded in this Court's precedent because the language is virtually identical to the standard established by this Court and applied in hundreds of cases. R. at 14. The District Court accepts Vega's as-applied challenge, ruling that Vega's speech was not any more disruptive than other activities taking place around the amphitheater, and that her speech promoted a robust exchange of ideals. R. at 17.

Fourteenth Circuit. The United States Court of Appeals for the Fourteenth Circuit concluded that the District Court erred in ruling in favor of Vega on both her facial and as-applied challenges. Correctly analyzing the policy in light of this Court's precedent, the Fourteenth Circuit held that the Policy was not impermissibly vague because it was clear what the Policy as a whole prohibited. R. at 50. Additionally, the Fourteenth Circuit held that the Policy was not unconstitutionally overbroad because Vega failed to show a substantial number of instances where the Policy would be applied unconstitutionally to other students. R. at 51. In regard to Vega's as-applied challenge, the Fourteenth Circuit confirmed that the University was within its rights to impose disciplinary sanctions because the Policy unmistakably prohibited Vega's actions. R. at 53. The Fourteenth Circuit got this case right.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's ruling that the Policy is neither unconstitutionally vague nor substantially overbroad, entitling Vega to *no* relief because her antics fell outside of the Policy's permissible conduct. On its face, the Policy is not unconstitutionally vague because it is clear what conduct is prohibited. This Court should remain consistent with its prior rulings and not construe the intentional flexibility and breadth of the Policy as vagueness. The Policy applies to University students who, like Vega, had ample notice that their *second* transgression would lead to suspension. Additionally, the Policy is not substantially overbroad because it only applies to material and substantial infringements and stops short of restricting speech that does not meet this heightened standard. The first-hand accounts of several witnesses confirm that Vega's speech exceeded this standard. Furthermore, the Policy is deeply rooted in this Court's precedent that imposes reasonable regulations on student speech that is substantially disruptive. As episodes of shouting down invited speakers become more frequent on college campuses, the Policy reflects the University's need to protect free and open expression

This Court should further affirm the Fourteenth Circuit's ruling that the University properly applied its Policy to Vega and did not violate her First Amendment rights. Consistent with this Court's precedent and the well-established deference granted to school officials in maintaining order in the learning environment, a school may regulate students' speech when it materially and substantially disrupts school activities, if the school can reasonably forecast that it will do so, or if the speech encroaches on the rights of other students to listen and engage in expressive activity. Here, the evidence shows that Vega's expression materially disrupted the learning environment, permitting the University to step in and initiate disciplinary

proceedings. In the event this Court is not convinced that Vega's actions were disruptive enough to warrant discipline, the University's actions were still proper based on this Court's rulings that permit school officials to curb speech that they *reasonably* believe will lead to a substantial disruption of the learning environment even when a disruption has yet to occur. It is undisputed that Vega engaged in similar disruptive behavior, just five days prior to the incident in question, that essentially silenced a speaker at a school function. This incident gave the University reason to believe a similar disruption would take place, rendering their disciplinary sanctions against Vega appropriate.

ARGUMENT

I. Vega's Facial Challenge to the Policy Must Fail Because the Policy is Not Unconstitutionally Vague and Not Impermissibly Overbroad, and Mirrors Well-Established Permissible Regulations of Speech.

This Court should affirm the decision of the Fourteenth Circuit and hold that the Policy is neither unconstitutionally vague nor impermissibly overbroad on its face. The Policy is not vague; rather, it is specific enough to give students adequate notice as to which speech would subject them to discipline. In the same way, the Policy is not overbroad; it stops short of restricting constitutionally protected speech.

The First Amendment guarantees the freedom of speech. U.S. CONST. amend. I. Serving as its safeguard, the Fourteenth Amendment protects this fundamental personal right and liberty against state interference. U.S. CONST. amend. XIV. Laws must secure this right because "[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

While students may exercise their First Amendment rights in public schools, the exercise must conform to the "special characteristics of the school environment." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). Moreover, it is well-established that school officials have the discretion to control certain speech that occurs in schools. *Id.; Morse v. Frederick*, 551 U.S. 393, 395 (2007) (suppressing student speech where student's message was objectively harmful to the student body). Thus, it is imperative that this Court recognize that school officials have the inherent power to properly discipline students who encroach on their peers' right to engage in or listen to expressive activity. *Tinker*, 393 U.S. at 507.

A. This Court must not entertain a vagueness challenge when the University's Policy gives adequate notice and clearly outlines what conduct it prohibits.

Now that Vega has realized that her behavior put a significant blemish on her law school application, she seeks to pass the blame for her actions onto the University. Utilizing the vagueness doctrine, she asserts that it is impossible to know when and how university students can express their views without being punished under the Policy. R. at 49. Vega is mistaken. The flexible nature of the Policy negates her baseless assertion.

The Policy could only be void for vagueness for two independent reasons. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). First, the Policy would be vague if it failed to give people of "ordinary intelligence" the "reasonable opportunity" to know what conduct is prohibited. *Id.* Second, the Policy would be vague if it was "so standardless" that its enforcement would be arbitrary or discriminatory. *U.S. v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill*, 530 U.S. at 732).

What renders a statute vague is the difficulty in determining *what* is prohibited. *Id.* at 306; *see Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (ruling the school's anti-noise ordinance was not vague because it offered fair notice as to what conduct was prohibited). However, "perfect clarity" and "precise guidance" are not required. *Hill*, 530 U.S. at 740 (rejecting a vagueness challenge where the policy contained a scienter requirement that reduced the likelihood of misunderstanding what was prohibited); *see also Williams*, 553 U.S. at 306 (rejecting a vagueness challenge when a "true-or-false determination" could clarify any confusion).

In *Grayned*, this Court rejected a vagueness challenge on the grounds that the anti-noise ordinance made clear what was prohibited and did not provide for subjective or discriminatory enforcement. 408 U.S. at 112. The ordinance at issue did not specify the amount of disturbance

prohibited; instead, the ordinance banned *any* noise which "disturb[ed] or tend[ed] to disturb the peace" of a school session. *Id.* at 108. Despite the imprecision of the ordinance's language, this Court held the ordinance was intentionally flexible in nature, provided reasonable breadth, and made clear what the ordinance as a whole prohibited. *Id.* at 108, 110. Additionally, because the ordinance was drafted for the school context, the school could easily measure the disturbance by the extent to which it interrupted normal school activities. *Id.* at 112. Moreover, the ordinance provided objective standards for punishing proscribed behavior and required a "demonstrated interference with school activities" which made the ordinance easy to apply. *Id.* at 113-114.

Presently, in an attempt to evade the adverse consequences of her actions and get into law school, Vega attempts to spew blame for failing to properly obey the clear-cut Policy on the grounds that it is too vague to understand. However, under either of the two reasons articulated in *Hill*, her challenge must fail. First, it can hardly be argued that Vega is not of "ordinary intelligence." *Hill*, 530 U.S. at 705. She attends a respected higher learning institution, is currently engaged on campus as President of KFT, and even has aspirations to pursue a legal education. Nor can it be argued that Vega did not have the "reasonable opportunity" to know her conduct was prohibited. *Hill*, 530 U.S. at 705. Prior to starting the academic year in 2017, the University required all of its students to thoroughly read and agree to the Policy. R. at 3. It is undisputed that Vega read and signed the Policy, thereby agreeing to abide by all the University's policies. R. at 3. The Dean informed Vega after her first citation, which did not result in suspension, that she had violated the Policy by engaging in prohibited behavior by "materially and substantially infringing upon the rights of others to engage in or listen to expressive activity." R. at 4.

Second, the Policy is obviously not "so standardless" that its enforcement would be arbitrary. Officer Thomas enforced the Policy against Vega twice for conduct that led to substantial disruptions both times. R. at 2. Further, the Policy's standards were so clear to Vega's colleagues that they decided not to risk suspension. R. at 27, 31. Vega also admits that the enforcement of those citations would be detrimental to her law school aspirations R. at 2. Clearly, Vega's motives are in question.

In light of this Court's holding in *Grayned*, it is abundantly clear that the University's Policy is not vague. The Policy clearly prohibits any conduct that materially and substantially invades the rights of others to engage in or listen to expressive activity. Like the anti-noise ordinance in *Grayned*, the University's Policy is flexible in nature and provides for reasonable breadth. It does not specify the *endless* types of conduct that are prohibited, but it is not required to. It is sufficient that it specifies that conduct that materially or substantially infringes on the rights of others is prohibited.

Furthermore, the Policy provides a heightened standard for judging whether there has been an infringement on the rights of others to engage in or listen to expressive activity. The Policy's heightened standard is delineated by the qualifying language 'materially' and 'substantially.' This language makes it perfectly clear that only severe conduct will be subject to discipline. The Policy does not proscribe trivial and minor disruptions. Thus, Vega's assertion that the Policy is unconstitutionally vague must fail, and this Court should affirm the Fourteenth Circuit's ruling in regard to Vega's vagueness challenge.

B. The Policy is not impermissibly overbroad because it does not restrict all speech; it merely targets speech that encroaches on the First Amendment rights of other students.

As an alternative ground for facial invalidation, Vega asserts that the Policy is unconstitutional under the overbreadth doctrine. Traditionally, a person could not challenge a statute on the grounds that it could be applied unconstitutionally to others in situations not before the Court. *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999) (citing *New York v. Ferber*, 458 U.S. 747 (1982)). This Court created an exception to this traditional rule with the overbreadth doctrine because of the deterrent effect of broadly written statutes. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (holding that no facial overbreadth challenge could be entertained).

The first step in conducting an overbreadth analysis is to construe the challenged Policy to determine what it covers. *U.S. v. Williams*, 553 U.S. at 293. The second step is to determine whether the Policy, as it has been construed, prohibits a substantial amount of protected speech. *Id.*at 292. The test requires *substantial* overbreadth, a standard that falls under no exact definition, but requires a "realistic danger" that the Policy will compromise First Amendment expression. *Taxpayers for Vincent*, 466 U.S. at 800 (holding the ordinance prohibiting posting of signs was not facially overbroad because there was no realistic danger that ordinance would compromise the First Amendment rights of people not before the Court).

Even though some applications of a policy could be impermissible, this will not be enough to render it facially invalid under the overbreadth doctrine. *Id.* There must be a substantial number of scenarios where the policy cannot be applied constitutionally. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (concluding that a law prohibiting discrimination in any place of public accommodation was not substantially overbroad). This Court has recognized that the overbreadth doctrine is "strong medicine" and has accordingly only applied it as a "last resort." *Los Angeles Police Dept.*, 528 U.S. at 39; *see*

Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (noting that no facial overbreadth challenge will be sustained where a limiting construction could be placed on the challenged statute).

Presently, the first step is to construe the Policy in question. The University's Policy prohibits the material and substantial infringement on the rights of others to engage in or listen to expressive activity. *See* Appendix 1. To understand the Policy's heightened standard, this Court can simply look at the plain meaning of the Policy's language. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). Accordingly, the Third New International Dictionary defines *material* as "having real importance or great consequences." *Webster's Third New International Dictionary of the English Language: Unabridged* 1392 (Philip B. Gove ed., 1986). Moreover, it defines substantial as "significantly great." *Id.* at 2280. Vega would violate the Policy if her conduct significantly infringed on the rights of others to engage in or listen to expressive activity, and that same significant infringement had "great consequences." Notably, this Court has already held that the consequences of not being able to receive information and ideas are severe. *Bd. of Educ., Island Trees Union Free Sch. Distr. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).

Next, Vega must demonstrate that a substantial amount of protected speech would be prohibited, including speech of those who are not before this Court. This, Vega cannot do. Notably, not all speech that occurred during Drake's speech was disciplined. The University does not dispute that there were other events taking place during Drake's speech. R. at 45. Students were eating lunch, studying, talking, and playing music. R. at 45. In fact, when Officer Thomas arrived, he could hear these other events taking place, but concluded that it was Vega's speech, not speech in the background, that was prohibited by the Policy. R. at 36.

A successful overbreadth challenge requires a realistic danger that First Amendment principles of people not before this Court would be compromised. The Policy causes no such

danger. The Policy does not forbid campus speech as a whole. It only forbids speech that compromises the speech of others. If anything, the Policy protects the First Amendment rights of students whose ability to listen to or engage in expressive conduct is compromised by those, like Vega, who disagree with the speech. Consider Vega's actions at the SDB event. There, she successfully drowned out a speaker, whose views she found abhorrent. R. at 3. Even if this Court, *arguendo*, believes the Policy is overbroad, the Policy is not so broad that this Court should discard the Policy entirely as opposed to utilizing an alternative such as a limiting construction. *See Broadrick*, 413 U.S. at 613 (noting the overbreadth doctrine is only employed as a last resort). Thus, this Court should reject Vega's overbreadth argument and affirm the Fourteenth Circuit.

C. The University was within its discretion to draft a policy with regulations on speech that are similar to ones this Court has already deemed permissible in *Tinker*.

Despite Vega's vagueness and overbreadth arguments, the Policy passes constitutional muster because it is coextensive with this Court's holding in *Tinker*, 393 U.S. at 503. Both the District Court and the Fourteenth Circuit agree that *Tinker* governs the constitutionality of campus speech regulations.[1] R. at 48. Thus, the University's Policy prohibiting a material and substantial infringement of the rights of others to engage in and listen to expressive activity is

1. This Court has not squarely confronted this issue or clarified a concrete application of *Tinker* to post-secondary school because no case has been ripe for review. In any event, the Fourteenth Circuit, upon further inspection of the issue, dismissed any doubt that *Tinker* does not apply. R. at 48. The *Tinker* standard applies to all serious interferences with the educational environment or intrusions on the rights of others. R. at 48. The circuit courts have consistently applied *Tinker* to post-secondary schools. *See e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008) (noting the limitations that *Tinker* imposes on a university's ability to promulgate campus policy).

permissible, as it mirrors *Tinker's* focus on behavior that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513.

In *Tinker*, this Court balanced the students' rights of expression with the unique characteristics of elementary and secondary schools. Although students do not "shed their constitutional rights . . . at the schoolhouse gate," this Court concluded that it could restrict student expression to the extent that it constituted a material and substantial interference with school work or discipline in the educational setting. *Id.* at 506. The Constitution does not immunize conduct by the student that is disruptive to the rights of others. *Id.* at 513.

This Court regards *Tinker* as the touchstone of an unconstitutional regulation of activity within the school context. *Grayned*, 408 U.S. at 117. Although *Tinker* does promote the "robust exchange of ideas," there is no absolute constitutional right to unlimited expression, especially in a school building or a school's immediate environs. *Id.* Drawing on this Court's conclusion in *Tinker*, *Grayned* reiterated that schools *can* restrict expressive conduct that causes a material or substantial disruption. *Id.* In contrast to the act of wearing armbands in *Tinker*, which caused no disruption to the regular affairs of school, participating in a public demonstration of protest right outside of a school building was materially disruptive to classwork and invaded the rights of others. *Id.* at 118. Students within the school building were distracted by the demonstration and lined the classroom windows to watch the protest. *Id.* at 105. The demonstration resulted in uncontrolled lateness after period changes and students leaving the building to join the protest. *Id.* This Court concluded that the anti-noise ordinance in this case was thus narrowly tailored to serve the school's compelling interest in an uninterrupted classroom conducive to the most effective learning environment. *Id.* at 119. Although the ordinance interfered with some First

Amendment rights, the ordinance only punished actual disruptive conduct, which had to be assessed on an individualized basis. *Id.*

Similar to the anti-noise ordinance in *Grayned*, the University's Policy interferes with some of students' First Amendment rights. However, a distinction must be made for student expressive conduct that disrupts the learning environment and expressive conduct that does not disrupt the learning environment. This Court in *Tinker*, followed by a reiteration in *Grayned*, shepherded this analysis and concluded that there is no absolute right to unlimited expressive conduct when it interferes with the rights of others. When expressive conduct is not conducive to a learning environment and interferes with the rights of others, that expressive conduct is not permissible. The University's Policy embodies the essence of this protection. According to the Policy, conduct is only prohibited when it substantially and materially interferes with the rights of others. Therefore, because the University's Policy is consistent with this Court's long-standing precedent allowing speech restrictions of this nature, this Court should affirm the Fourteenth Circuit's entry of summary judgment in favor of the University, as Vega has not met her burden of bringing a facial challenge against the Policy.

II. The Fourteenth Circuit Correctly Held that the University's Policy Was Properly Applied and that Disciplinary Sanctions Were Warranted When Vega Substantially Infringed on the Rights of Other Students to Listen to and Engage in Expressive Activity.

This Court's landmark decision in *Tinker*, which remains the seminal case addressing school speech, established the framework for evaluating the First Amendment claims of public-school students. *Tinker*, 393 U.S. at 503. This Court prudently concluded that the First Amendment permits reasonable regulation of speech in limited circumstances. *Id.* at 513. See supra. Because of the school's educational role, this Court held that a school may regulate students' speech *only* if it materially and substantially disrupts school activities, if the school can

reasonably forecast that it will do so, or if the speech encroaches on the rights of another. *Id.* at 514.

As time went on, this Court chiseled *Tinker*'s general rule, creating additional categories of justifiably regulated student speech. To limit a student's speech, a school must first show that the prohibited speech falls into one of the prohibited categories. These categories can be summarized as: (1) speech that is reasonably viewed as promoting illegal drug use under *Morse*, 551 U.S. at 393; (2) school sponsored speech under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); and (3) vulgar, lewd, obscene, and plainly offensive speech under *Bethel School District v. Fraser*, 478 U.S. 675 (1986). Put another way, if school officials establish that a student's speech (1) materially and substantially disrupts the operation and discipline of the school, or (2) is an invasion upon the rights of other students to listen to or engage in expressive activity, the school may subject that student to disciplinary sanctions without running afoul of the First Amendment. *Tinker*, 393. U.S. at 513.

Several circuits have adopted a reasonable forecast test for *Tinker* cases. In effect, that is, if a school official *reasonably believes* disruption might result from student speech, the school may prohibit the student's expressions despite First Amendment protections. *Boucher v. Sch. Bd. of Sch. Dist. Of Greenfield*, 134 F.3d 821, 828 (1998). The common theme among this Court's rulings is that the First Amendment rights of expression must be applied in "light of the special characteristics of the school environment," balancing the individual students' rights with the rights of the school to maintain order and carry out its educational mission. *Walker-Serrano by Walker v. Leonard*, 168 F. Supp. 2d 332, 342–43 (M.D. Pa. 2001), *aff'd sub nom. Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3d Cir. 2003) (quoting *Tinker*, 393 U.S. at 506). This Court has been steadfast in applying this balance. First, this Court held that

"undifferentiated fear or apprehension of disturbance [of the school environment] is not enough" to justify punishment for student speech. *Morse*, 551 U.S. at 408 (citing *Tinker*, 393 U.S. at 508). Second, this Court held punishing student speech must extend beyond "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.*

Presently, the University does not contend that Vega's actions were school-sponsored. R. at 47. Her actions therefore fall outside the realm of *Hazelwood*. Nor were Vega's actions plainly offensive, as established in *Fraser*. Her speech clearly did not promote illegal drug use as established in *Morse*. Rather, the University argues that Vega materially and substantially interfered with the right of others to speak, listen, and receive information, a violation of the University's Policy. R. at 47. Accordingly, the Fourteenth Circuit applied the appropriate framework established in *Tinker* and correctly concluded that the University's limitation of Vega's speech and subsequent disciplinary sanctions were proper. This Court should affirm that decision.

A. The University's decision to discipline Vega was lawful under *Tinker* because her speech materially and substantially interfered with the work and discipline of the school and interfered with the rights of other students to listen to and engage in expressive activity.

The First Amendment protects student speech that does not materially disrupt the work and discipline of the school and leaves no reason for school officials to believe that a disruption will occur. *Morse*, 551 U.S. at 403. In *Tinker*, this Court concluded school officials deprived students of their First Amendment rights when the school officials punished the students for protesting the Vietnam War by wearing armbands to school. *Tinker*, 393 U.S. at 513. Moreover, this Court acknowledged that the students' act of protest was "a silent, passive expression of opinion," that did not interrupt school activities or affairs. *Id.* at 508, 514.

Here, Vega's antics materially disrupted the University's work and discipline, triggering the University's right to initiate disciplinary sanction proceedings. Vega asks this Court to ignore the fact that she substantially disrupted Drake's speech when she positioned herself behind the amphitheater's last row of benches, wore a conspicuous Statue-of-Liberty costume, and brashly chanted her immigration views. R. at 5, 6. The University, in turn, urges this Court to contrast Vega's actions with those in *Tinker*. Indeed, this is not a passive expression of Vega's immigration views; rather, this is the quintessential example of a material disruption of the learning environment.[2] Drake confirmed that Vega was so loud and obnoxious that it was making it extremely hard for him to "speak, think, and remain focused." R. at 25. Furthermore, Vega's speech materially infringed upon the rights of other students to engage in or listen to Drake's speech. This assertion is substantiated by others at the event who repeatedly turned to look at Vega, to the point where the president of ASFA had to call Campus Security. R. at 5, 25. Notably, once Campus Security issued Vega a citation for her disruption, she left, and Drake was able to finish the speech. R. at 6, 25. Accordingly, the Fourteenth Circuit aptly summarized Vega's actions as being well within the University's Policy of prohibited behavior. Therefore,

2. Vega expresses aspirations of pursuing a legal education. The present matter offers a valuable learning opportunity for her. In the legal profession, attorneys must zealously advocate for their clients' legitimate interests, while maintaining a professional attitude towards all persons involved in the legal system. *Lawrence v. Welch*, 531 F.3d 364, 373 (6th Cir. 2008) (upholding the denial of bar admission application when applicant's behavior was inconsistent with character and fitness expectations). This standard of professionalism begins with the interactions with fellow peers who do not always share in the same viewpoint. In the traditional law school classroom, students are taught to use their passion for a particular subject to strengthen their own position, while maintaining civility. Indeed, even other professions have chosen to discipline students for failing to meet the standard of conduct of the profession. *See, e.g., Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (upholding the removal of nursing student who did not adhere to the expected standard of professionalism).

this Court should affirm the Fourteenth Circuit's ruling that the Policy is constitutional as applied to Vega.

B. Even if this Court finds that Vega's speech did not substantially interfere with the rights of other students, the University's actions were still justified because it reasonably believed a potential disruption of school activities would occur.

The First Amendment does not protect student speech if school officials can reasonably predict that substantial disruption of school activities will occur. School officials need not wait until a disruption occur in order to curb the disruptive speech, especially if they can forecast circumstances that would reasonably lead to a material and substantial disruption. *Tinker*, 393 U.S. at 514. While courts have been imprecise in determining what types of activities are disruptive to school operations, school officials may justifiably prohibit speech based on disruptions arising from similar circumstances with the same actors. *See West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358 (10th Cir. 2000) (ruling school officials could forecast disruption from a confederate flag drawing amidst a series of recent racial confrontations). Essentially, this Court's precedent, coupled with lower court precedent, establishes that schools can be proactive, rather than reactive, when acting to curb speech before it amounts to an actual disruption.

Even if Vega's actions do not convince this Court that she substantially disrupted the operation of the school, the University's actions in disciplining Vega were still proper because it predicted that Vega's antics would cause a disruption. On August 31, 2017, just five days before Vega interrupted Drake's speech, Vega and nine other students were successful in "shout[ing] down" a speaker who SDB brought in to promote the anti-immigration viewpoint. R. at 26, 30, 34, 37. Vega and her accomplices had to be escorted out of the auditorium by Officer Thomas, and the University employed its disciplinary protocols. R. at 34.

Vega engaged in a series of disruptive actions that intentionally targeted speakers with anti-immigration views invited by other student organizations in attempts to drown out expression of immigration views that she found to be objectionable. This triggered the right of the University to take disciplinary action, both during Vega's actual disruption of Drake's speech and in anticipation of a potential disruption based on Vega's prior disruption just five days before at the SDB rally. Accordingly, the Fourteenth Circuit properly applied this Court's precedent and recognized the University's right to limit speech that substantially disrupts the operation of the school.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Fourteenth Circuit's holding that that the District Court erred in ruling in favor of Vega on both the facial and as-applied challenges. The Policy is neither unconstitutionally vague nor substantially overbroad. The University correctly applied the *Tinker* standard to Vega's antics. Alternatively, if this Court holds that Vega did not cause a substantial disruption, the University was still able to impose sanctions on Vega because it was permitted to reasonably forecast her sanctionable behavior.

APPENDIX 1

Effective: June 1, 2017

Free Speech in Education Act of 2017

Av. Gen. Stat. § 118-200

Section1:

The Legislature hereby finds and declares that episodes of shouting down invited speakers on college and university campuses are nationwide phenomena that are becoming increasingly frequent. It is critical to ensure that the free speech rights of all persons lawfully present on college and university campuses in our state are fully protected.

Section 2:

The Regents of all state institutions of higher education in the State of Arivada shall develop and adopt policies designed to safeguard the freedom of expression on campus for all members of the campus community and all others lawfully present on college and university campuses in this state.

Section 3:

All public colleges and universities in Arivada are to promulgate a policy to protect free speech on campus within three months of the effective date of this statute.

University of Arivada Campus Free Speech Policy
Enacted: August 1, 2017

Scope
This policy applies to all University of Arivada students.

Purpose
This Policy is adopted to fulfill the University's obligations under the Arivada "Free Speech in Education Act of 2017."

Policy Statement
The Board of Regents of the University of Arivada hereby reaffirms the University's commitment to the principle of freedom of expression.

Free Expression Standard

1. 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.

Disciplinary Procedures

1. This Policy includes a three strike range of disciplinary sanctions for a University of Arivada student who infringes upon the free expression of others on campus.
2. Any student who violates this Policy shall be subject to a citation by University Campus Security.
3. Campus Security shall transmit citations for violation of this Policy to the University's Dean of Students for review and investigation. The Dean of Students shall determine whether a student has materially and substantially infringed upon the rights of others to engage in or listen to expressive activity on the basis of the Dean's review and investigation.
4. Any student who receives a first citation pursuant to the Policy is entitled to an informal disciplinary hearing before the Dean of Students.
5. If the Dean of Students determines that the citation is appropriate, the Dean shall issue a warning to the student to be known as a first strike.
6. The review and investigation procedures described above, in three and four, apply to citations for second and third citations in violation of the Policy.
7. A student who receives a second or third citation is entitled to a formal disciplinary hearing before the School Hearing Board.
8. The School Hearing Board shall determine whether the behavior constitutes a violation of the Policy and therefore merits a second or third strike.
9. A formal disciplinary hearing includes written notice of the charges, right to counsel, right to review the evidence in support of the charges, right to confront witnesses, right to present a defense, right to call witnesses, a decision by an impartial arbiter, and the right of appeal.
10. The sanction for a second strike shall be suspension for the remainder of the semester.
11. The sanction for a third strike shall be expulsion from the University.

12. Any strike issued under this Policy shall be placed on the student's record.

Notice
The University of Arivada shall provide notice of this Policy to all enrolled students.

BRIEF CERTIFICATE

Team 2 certifies the following:

1. The work product contained in all copies of the team's brief is in fact the work product of the team members.
2. This team has complied fully with its school's governing honor code.
3. This team has complied with all Rules of the Competition.