IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____
OCTOBER TERM, 2019

VALENTINA MARIA VEGA
Petitioner,

V.

JONATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA
Respondents.

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

BRIEF FOR RESPONDENTS

Team 3
Counsel for Respondents

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1. 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?
2. Whether, as applied to Ms. Vega, the Campus Free Speech Policy violates the First Amendment?

STATEMENT OF JURISDICTION

The United States District Court for the District of Arivada entered final judgment in this case on January 17, 2018. *Vega v. University of Arivada*, No. 18-CV-6834, slip op. at 9 (D. Arivada Jan. 17, 2018) [*Vega I*]. On November 1, 2018, the United States Court of Appeals for the Fourteenth Circuit reversed the district court's order granting summary judgment in favor of Ms. Vega and remanded for entry of summary judgment in favor of Jonathan Jones and the Regents of the University of Arivada. *University of Arivada v. Vega*, No. 18-1757, slip op. at 9 (14th Cir. 2018) [*Vega II*]. A Petition for Writ of Certiorari was timely filed and granted. R. at 54. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

This case centers on whether a university policy violates a student's right to freedom of speech pursuant to the First Amendment. Petitioner Valentina Maria Vega ("Ms. Vega") is a sophomore student at the University of Arivada, one of the most prominent institutions of higher learning in the nation. Aff. of Vega ¶ 2; R. at 1; 37. Respondents are University President Jonathan Jones and the Regents of the University of Arivada (hereinafter collectively referred to

as “the University”). R. at 43. Across the nation, episodes of “shout downs” on university campuses have become increasingly frequent. R. at 47. Shout downs occur when a student or group of students substantially disrupt an event by shouting over the speaker (usually a speaker with an opposing viewpoint from theirs) with the goal of preventing those who want to hear from the speaker from doing so. In response this problem, the State of Arivada enacted the “Free Speech in Education Act of 2017” (“the Act”) which requires all state universities to adopt school-wide policies that safeguard the freedom of expression on campus. Av. Gen. Stat. § 118-200. The Act seeks to ensure that free speech rights of all people lawfully present on college campuses are fully protected. R. at 47.

On August 1, 2017, the University adopted the Campus Free Speech Policy (“the policy”) in accordance with the Act. The Free Expression standard of the policy states as follows: “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.” Jt. Stip. App. A. The policy sets forth disciplinary sanctions applicable to students who infringe upon the free expression of others on campus. Jt. Stip. App. A. The University gives Campus Security enforcement authority over the policy by allowing them to issue citations to students found in violation of the policy. Jt. Stip. App. A. When a student receives a citation, the University initiates an investigation to determine whether the citation was appropriate. Jt. Stip. App. A. The student is then entitled to an informal disciplinary hearing before the Dean of Students. Jt. Stip. App. A. If a student is found to be in violation of the policy at the conclusion of the informal hearing, they receive a “first strike” warning from the Dean of Students. Jt. Stip. App. A. If the student subsequently engages in prohibited behavior on a second occasion, the student receives a “second strike” and is entitled to a formal disciplinary hearing before the

School Hearing Board. Jt. Stip. App. A. The sanction for a second strike is suspension for the remainder of the current semester. Jt. Stip. App. A. At the beginning of the school year, the University issued a Student Handbook containing the policy and sent an electronic copy of the handbook to all students, including Ms. Vega. Jt. Stip. ¶ 3. On August 27, 2017, Ms. Vega signed a statement acknowledging she received and read the policy. Jt. Stip. ¶ 3.

On August 31, 2017, Ms. Vega and members of the Keep Families Together ("KFT") organization attended an anti-immigration rally hosted by another student organization on campus. R. at 05. At the rally, Ms. Vega and the KFT members stood on chairs in the middle of the audience and proceeded to shout down the speaker during his speech. Vega Aff. ¶ 5. Because of their disruptive behavior, the University's campus security was called to assess the scene. Thomas Aff. ¶ 6. Campus Security Officer Michael Thomas responded to the call and issued citations to the KFT members who attended the event, including Ms. Vega. Thomas Aff. ¶ 6. After meeting with the Dean of Students, Ms. Vega was issued her first strike for violating the policy by "materially and substantially infring[ing] upon the rights of others to engage in or listen to expressive activity." Winters Aff. ¶ 8.

On September 5, 2017, speaker Samuel Drake ("Mr. Drake") was invited to speak at the University on behalf of the University's chapter of American Students for America (ASFA). Jt. Stip. App. A. ¶ 7. Theodore Putnam ("Mr. Putnam"), President of ASFA, requested and applied to reserve the University's Emerson Amphitheater ("Amphitheater") for the event. Putnam Aff. ¶ 5. The University granted Mr. Putnam's request to reserve the space and gave ASFA the exclusive right to use the Amphitheater on September 5, 2017. Jt. Stip. ¶ 9. The Amphitheater is located on the University's Quad ("the Quad"), a large green space where students often gather

to play sports, socialize, and study located in the center of the University's campus. Jt. Stip. ¶¶ 10-11.

During Mr. Drake's speech, Ms. Vega stood behind the Amphitheater's last row of benches and began loudly chanting phrases and marching around the periphery of the Amphitheater in a Statute-of-Liberty costume. Vega Aff. ¶ 15. This caused a distraction to a number of members in the audience, including Mr. Putnam. Putnam Aff. ¶ 9. Mr. Putnam called campus security to inform them of a "disturbing disruption" occurring at the event. Putnam Aff. ¶ 9. Campus Officer Thomas responded to the scene and noted that there were other activities occurring on the Quad that day, but that Ms. Vega was "more distracting than random background noise because she was generally facing the amphitheater." Thomas Aff. Add. A. Based on Mr. Thomas's observations, he concluded that Ms. Vega was "materially and substantially infringing upon the rights of others to engage in or listen to expressive activity." *Id.* Mr. Thomas then issued Ms. Vega her second citation pursuant to the University's policy. *Id.*

Five days after Ms. Vega received her first strike warning, Dean Winters again initiated investigative proceedings in accordance with the University's protocols and notified Ms. Vega that she would receive a formal hearing before the Hearing Board for violating the policy for a second time. Winters Aff. ¶¶ 11-12. The Hearing Board concluded that Ms. Vega violated the University's policy by "materially and substantially infringing upon the right of Mr. Drake to speak and the rights of others to listen to his speech." Winters Aff. ¶ 14. Consequently, the University suspended Ms. Vega for the remainder of the semester for violating the policy for a second time. R. at 42.

B. Procedural History

Ms. Vega filed suit against the University challenging her suspension on October 1, 2017, in the United States District Court for the District of Arivada. R. at 1. Ms. Vega claims the University policy violated her right to freedom of speech pursuant to the First Amendment. *Id.* She argues that the policy is unconstitutionally vague and substantially overbroad on its face and unconstitutional as applied to her. *See Vega I.* The district court concluded the policy was impermissibly vague and overbroad because of its "extraordinarily broad language" and because the policy "easily could be applied to all sorts of on-campus speech in an unlimited number of contexts." R. at 12. The district court also concluded the policy was unconstitutional as applied to Ms. Vega because it "inhibited, rather than promoted, a robust exchange of ideas." R. at 17. The district court therefore granted Ms. Vega's Motion for Summary Judgment. R. at 17. On November 1, 2018, the United States Court of Appeals for the Fourteenth Circuit concluded that the district court erred in ruling in favor of Ms. Vega on both the facial and as-applied challenges. R. at 43. The Fourteenth Circuit reversed the district court's ruling and remanded for entry of summary judgment in favor of the University. *Id.* Ms. Vega then filed a Petition for Writ of Certiorari to this Court. R. at 54.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit and find that the University Policy is not void for vagueness or overbreadth, nor is it unconstitutional as applied to Ms. Vega.

The record affirmatively demonstrates that the University Policy is not void for vagueness or overbreadth. The Fourteenth Circuit analogized to this Court's holding in *Grayned* when it determined that the policy puts reasonable persons on notice of what is prohibited. Like

the statute at issue in *Grayned*, the prohibited conduct can be easily measured by its visible impact on the rights of others to engage in or listen to expressive conduct. Additionally, the record provides ample support for the conclusion that the policy is not overbroad. The district court found that the policy differentiates based on the content of the expressive conduct, therefore it never reached the standard of review question. However, the policy passes constitutional muster under the applicable standard of review.

The record in this matter also supports the Fourteenth Circuit's decision granting summary judgment in favor of the University. The University's Hearing Board found that Ms. Vega violated the policy by materially and substantially infringing upon the rights of others on two different occasions. The first infringement occurred when she attempted and other KFT members attempted to shout down an anti-immigration rally, and the second infringement was when she intentionally disrupted the ASFA event by loudly chanting and marching around the amphitheater's periphery. Additionally, the affidavits from multiple witnesses stated that Ms. Vega's conduct was significantly more distracting than the other activities going on in the Quad that day because of her targeted disruption towards Mr. Drake's speech. As a result, the University's decision to subject Ms. Vega to discipline was justified. For the foregoing reasons, this Court should affirm the Fourteenth Circuit's decision.

ARGUMENT

This Court reviews questions of law *de novo*. *See Highmark, Inc. v. Allcare Health Mgt. System, Inc.*, 572 U.S. 559, 564 (2014); *Cherry v. Auburn Gear, Inc*, 441 F.3d 476, 481 (7th Cir. 2006). *De novo* review permits a reviewing court to make an independent determination on the matter at issue by reappraising the evidence in the record. *See Highmark, Inc.*, 572 U.S. at 564. Summary judgment is a question of law, therefore the review of a district court's grant of

summary judgment is proper under this standard. *See id.* Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). All inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

I. The University policy is facially valid, because it is neither impermissibly vague or overbroad, and it is an appropriate vehicle to balance the First Amendment rights of all persons lawfully present on university grounds.

"Congress shall make no law…abridging the freedom of speech." U.S. CONST. amend. I. This prohibition extends to states via the Fourteenth Amendment's Due Process Clause, and in turn, to state institutions of higher learning such as the University. *See Healy v. James*, 408 U.S. 169, 180 (1972). First Amendment challenges are subjected to a vagueness and overbreadth inquiry. *See United States v. Williams*, 553 U.S. 285, 304 (2008). If a statute is vague or overbroad, it will be deemed unconstitutional on its face. *See id.*

A. The Fourteenth Circuit correctly found that the University policy is not void for vagueness, because like in *Grayned v. City of Rockford*, the prohibited conduct can be easily measured by its visible impacts on the rights of others.

A basic principle of due process is that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Prohibitions are not clearly defined when men of common intelligence must necessarily guess at its meaning. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Vague laws are impermissible for three reasons: (1) they trap the innocent by not providing a fair warning; (2) they lead to arbitrary and discriminatory enforcement by delegating basic policy matters to policemen, judges and juries for resolution on a subjective basis; and (3) they inhibit the exercise

of sensitive First Amendment freedoms because citizens may steer wider of the unlawful zone than if the boundaries were not clearly defined. *Grayned*, 408 U.S. at 108.

Grayned involved a challenge to a city anti-noise ordinance which prohibited a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good will of the school session. 408 U.S. at 109-10. The Supreme Court upheld the ordinance, noting that the words of the ordinance were marked by flexibility and reasonable breadth, rather than meticulous specificity. *Id.* at 110. Although the ordinance did not specify an exact mathematical formula, the Court found it "apparent from statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted." *Id.* at 112. It found that the statute was clearly written for the school environment, where the prohibited conduct can be measured by its visible impacts on normal school activities. *Id.*

Here, the Fourteenth Circuit correctly found that University Policy is likewise marked by flexibility and reasonable breadth, rather than meticulous specificity. *University of Arivada v. Valentina Vega*, No. 18-1757, slip op. at 9 (14th Cir. 2018) [*Vega II*]. It cited the *Grayned* court's holding that expressive activity can be prohibited if it "involves substantial disorder or *invasion of the rights of others*." *Id.* at 8 (citing *Grayned*, 408 U.S. at 118). The district court stated that the policy appears to encompass *any* type of material and substantial infringement on the rights of others, and cited to the other sources of noise distraction that were present while Mr. Drake was speaking. *Vega v. University of Arivada*, No. 18-CV-6834, slip op. at 9 (D. Arivada Jan. 17, 2018) [*Vega I*]. It noted Officer Thomas's statement that he did not consider addressing these other potential noise issues, because he was responding to a call about a specific complaint. *Id.* The district court interpreted this to mean that it was the ASFA President who determined

how the policy was enforced. *Id.* This led it to conclude that the policy led to arbitrary and discriminatory enforcement and the delegation of power on a subjective basis. *Id.*

However, the district court erroneously failed to comment on the fundamentally different nature of these distractions compared to the conduct prohibited by the university's policy. As both parties stipulated, students frequently gather in the surrounding Quad to study, play games, listen to music and play sports. R. at 21. The fact that the ASFA President called Campus Security in this case does not indicate the policy's lending itself to arbitrary enforcement – rather it indicates the opposite. R. at 34. Unlike the background noise of persons surrounding the amphitheater, the type of conduct prohibited by the policy is more likely to be difficult to ignore. It only prohibits expressive conduct that materially and substantially infringes on the rights of others. *Id.* at 23. Although there is necessarily some degree of discretion that must be involved in determining whether the policy has been violated, a reasonable person generally knows when they are materially infringing on one's ability to listen. The conduct prohibited by the policy refers to intentional or loud and disruptive conduct, as this is generally required to materially and substantially infringe on the rights of others. Because what is "material[] and substantial[] infringe[ment]" is going to differ based on the circumstances, the policy appropriately lends itself to flexibility, rather than meticulous specificity. As in *Grayned*, the prohibited conduct is easily measured by its visible impact in each situation. Therefore, the policy at issue provides clear warning to a person of common intelligence what conduct is prohibited and what is not.

B. The District Court erroneously found the University Policy impermissibly overbroad.

An enactment is impermissibly overbroad when "a substantial number of its applications are unconstitutional," *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)), and when it

"prohibits constitutionally protected conduct." *Grayned*, 408 U.S. at 114. The fact that a regulation could conceivably apply to constitutionally protected speech in limited circumstances is not enough to deem it impermissibly overbroad. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Courts will thus strike down a regulation on overbreadth grounds only when it is *substantially* overbroad. *Id.* "Substantial overbreadth" cannot be reduced to a mathematical formula. *Id.*

The Fourteenth Circuit acknowledged that the University has a duty to protect the free speech rights of persons lawfully present on its campus. *Vega II*, at 8. This objective was deemed so fundamental that the State of Arivada passed the Free Speech in Education Act, mandating that Universities implement policies designed to safeguard freedom of expression on campus. Av. Gen. Stat. § 118-200. However, as the court recognized, First Amendment rights are not a license to trample upon the rights of others – they must be exercised responsibly. *Vega II*, at 8 (quoting *Barker v. Hardway*, 283 F. Supp. 228, 239 (S.D. W.Va. 1968)).

i. The District Court failed to distinguish between regulations affecting the manner of expression and restrictions on expressing a particular viewpoint.

A content-neutral speech restriction is not significantly overbroad and may regulate the manner of expression, provided it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The district court held that the policy restricts speech that is constitutionally protected under the First Amendment, however it failed to conduct any analysis of the rights of the persons whom the policy seeks to protect. *Vega I*, at 9. The court acknowledged that the goal of protecting free speech rights does not justify suppression of one speaker's expression at the expense of another's, which demonstrates that it recognized that no

person's rights should be placed above that of another's. *Id.* at 11. It then placed reliance on the content of the speech that is prohibited by the policy, noting that offensive and disruptive speech is no less valuable than polite and orderly expression. *Id.* In doing so, the district court made the erroneous assumption that the policy was meant to prohibit certain views from being expressed. It failed to consider that the policy was enacted to protect the invited speakers who have repeatedly been shouted down by members of the university community. Av. Gen. Stat. § 118-200. Yet, the policy does not differentiate between persons based on whether their speech is "offensive and disruptive" – it applies to everyone who wishes to disrupt speakers, not just those who wish to disrupt speakers with specific views. *See id.* The policy was enacted to promote the free speech rights of all, including those with viewpoints that are not necessarily accepted by society. The district court's reliance on the content of the speech is therefore misguided.

This content-neutral policy is akin to a statutory restriction on the *manner* of expression, rather than a restriction on expressing a particular viewpoint. Thus, it should pass the overbreadth inquiry provided it is narrowly tailored to serve an important government interest and leaves open alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Because the district court mischaracterized the scope of the University's Policy, it failed to reach the standard of review question asked for content-neutral regulations. Yet there is ample evidence in the record to support the conclusion that the policy is narrowly tailored to serve an important governmental interest and leaves open alternative channels of communication. When it passed the Free Speech in Education Act of 2017, the Legislature of Arivada expressly declared freedom of expression on campus to be an important governmental interest worthy of protection. *See* Av. Gen. Stat. § 118-200. Moreover, the Act was a direct response to increasingly frequent episodes of shouting down invited speakers on college

campuses. *See id.* Thus if the policy does not safeguard the rights of persons to listen to invited speakers, it cannot serve this important government interest. It is difficult to conceive of a policy that more efficiently safeguards the rights of all persons lawfully present on campuses than one which sanctions for only material and substantial infringements on the rights of others to engage in or listen to expressive activity.

It is reasonable to assume that within the university setting there is likely to be some background noise at various locations on campus. The parties stipulated that the amphitheater, located north of the University's Quad, is frequently reserved by student organizations for events including lectures and speakers. R. at 21. This indicates that the parties were aware that the amphitheater's location means there are likely to be students gathered, walking or relaxing in the surrounding area at any given time. Even so, the district court found that the policy is impermissibly broad given its "broad language and the reality that the policy could be applied . . . in an unlimited number of contexts." *Id.* at 11. However, the district court then conceded that the speaker observed Ms. Vega's chants to be more disruptive than the other surrounding speech, which was indisputably constitutionally protected conduct. *Id.* This ignores the primary objective of the policy – to protect the free speech rights of *all* persons lawfully present on campus. As the Dean of Students testified, the policy allows a formal hearing with adequate procedural rights upon the issuance of a second citation. R. at 41. Students are entitled to present evidence and witnesses before being suspended for violating the policy, leading to sanctions only where it is fairly determined that others' free speech rights were "materially and substantially infringe[d]" upon. The policy is thus narrowly tailored to serve this important governmental interest, and contrary to the district court's assertion, does not apply to the casual speech of students nearby.

The record also provides sufficient evidence that the policy leaves open alternative channels of communication. As the district court recognized, student organizations often reserve the outdoor amphitheater for small-scale events, including lectures and speakers. *Id.* at 5. There is no reason that the Keep Families Together organization, or any other organization, could not reserve the amphitheater to host its own invited speaker on another day. If an organization's primary concern is to ensure that the University community has access to all perspectives on any given issue, there are several peaceful and non-disruptive manners to achieve this task. Any person in the university can reserve the amphitheater for an event, hand out flyers or engage in peaceful protest not designed to disrupt others' ability to engage in or listen to expressive activity. The policy thus leaves alternative channels of communication, supporting the conclusion that it is not impermissibly broad.

ii. The District Court erroneously omitted a forum-based analysis based on the university's status as a designated public forum.

Additionally, the University Policy would pass a forum-based analysis, which courts often apply when assessing free speech restrictions on government property. Regulation of speech on government property that has traditionally been available for public expression – such as streets and parks – is subject to the highest scrutiny. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). These regulations survive only if they are narrowly drawn to achieve a compelling state interest. *Krishna*, 505 U.S. at 678. The second category of public property is a designated public forum that the State has opened for expressive activity by all or part of a public. *Id.* These are likewise subject to the highest level of scrutiny. *Id.* The final category is all remaining public property, and limitations on expressive activity on this last category are subject to a much less exacting standard of review. *Id.* at 678-79.

The Fourteenth Circuit noted that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978). In doing so, it correctly analyzed the policy in light of the unique purpose that the university setting serves. See R. at 46 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)). This demonstrates its recognition that the State has opened up the university for expressive activity by members of the public, which would make it a designated public forum. The University policy passes muster under this analysis because the record provides ample evidence to support the conclusion that it is narrowly drawn to achieve a compelling interest.

The Fourteenth Circuit recognized that the right to offer and receive information is a necessary corollary of free speech. *Vega I*, at 11, (citing *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 867 (1982)), and that the University policy is an appropriate vehicle to protect the free speech rights of all persons lawfully present on the university campus. See R. at 51. It relied on the fact that the University adopted the policy in response to a legislative mandate, which was passed out of concern for the free speech rights of persons visiting universities throughout the state and nation. *Id.* at 51. The University was thus obligated to find a way to balance the free speech rights of all persons lawfully present on its campus.

Although the district court equated background noise with the kind of purposeful conduct that is prohibited by the policy, it recognized that people must be free to hear speech in addition to offer it. *Id.* In doing so, the court failed to admit that there is a qualitative difference between the type of conduct prohibited by the policy and random background noise or casual

conversation. However, the Fourteenth Circuit correctly pointed out that the policy prohibits only "material[] and substantial[] infringe[ment]," thus it is unlikely to apply to the speech of passerbys, flag football players, or students listening to music or calling out to one another. *Vega II*, at 9. These examples do not involve expressive conduct – any incidental disruption is not an attempt to force speech upon others or restrict anyone from listening to speech. The policy's language leads to sanctions only where conduct actually is disruptive. It is thus not likely to significantly compromise the First Amendment rights of persons who do not intend their actions to cause significant disruption, supporting the conclusion that it is narrowly tailored to achieve an indisputably compelling state interest.

II. The Fourteenth Circuit correctly held that the policy, as applied to Ms. Vega, does not violate the First Amendment because her targeted conduct significantly and materially interfered with those attending the ASFA event.

In contrast to a facial constitutional challenge, an as-applied challenge requires a court to evaluate the circumstances in which a statute has been applied and to consider whether that particular application of the statue deprived the individual of a protected right. *McCullen v. Coakley,* 134 S. Ct. 2518, 2534 (2014). A plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been, or is sufficiently likely to be, unconstitutionally applied to him. *Id.* Specifically, when someone challenges a law as viewpoint discriminatory, but it is not clear from the face of the law which speakers will be allowed to speak, one must show that they were prevented from speaking while someone espousing another viewpoint was permitted to do so. *Id.* Here, the district court found that even if the policy could survive a facial challenge, it is unconstitutional as applied to Ms. Vega because she did not "materially and substantially infringe upon the right of Mr. Drake to speak or the rights of others to listen to him." R. at 17. However, the Fourteenth Circuit correctly determined that the

University was justified in subjecting Ms. Vega to discipline because she violated the policy on two different occasions by materially and substantially infringing upon the rights of others. R. at 53.

A. Ms. Vega was subject to discipline under the policy because of her targeted disruptive conduct at the event and not because of the viewpoint she expressed.

While the Supreme Court has yet to reconcile the First Amendment interests of campus speakers with the interests of protestors, they have noted the potential conflict between the competing viewpoints of two different groups. "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox v. State of Louisiana,* 379 U.S. 536, 554 (1965).

Additionally, the Third Circuit was faced with the similar issue of competing viewpoints in *Startzell v. City of Pennsylvania.* There, a Christian affiliated organization known as Repent America believed homosexuality was a sin and sought to end OutFest, an event that celebrated "National Coming Out Day." *Startzell v. City of Pennsylvania*, 533 F.3d 183 (3d Cir. 2009). Members of Repent America showed up to the event with large signs and bullhorns and began to convey their message near the stage by singing loudly and displaying their large signs. *Id.* at 191. When an officer asked the group to move away from the main stage, Repent America refused to do so and were later arrested for disorderly conduct. *Id.* The Third Circuit stated that "the right of free speech does not encompass the right to cause disruption, and this is particularly true when those claiming protection of the First Amendment cause actual disruption of an event covered by a permit." *Id.* at 189.

Here, the University had an interest in maintaining order and ensuring that an organization that reserves a venue can use the venue for the purpose of which it was obtained. *See Cox*, 379 U.S. at 554; *see also Startzell* 533 F.3d at 189. ASFA went through the proper channels of reserving the Amphitheater for their event and the University gave ASFA the right to exclusive use of the Amphitheater on that day. R. at 4. Even if the University did not sponsor or approve the event, the University maintained an interest in ensuring that events occurring on school campus run in an orderly fashion. *Cox*, 379 U.S. at 554 (1965). Unlike those students engaging in other non-expressive activities taking place on the Quad that day, it was readily apparent from Ms. Vega's loud chanting and prominent costume that she intended to divert attention away from Mr. Drake's speech and towards herself. Vega Aff. ¶¶ 13-15; R. at 05. Additionally, by standing in close proximity and chanting directly at the stage, her voice echoed through the forum. R. at 52. Her conduct was so distracting that campus police had to be summoned as a response. Thomas Aff. ¶ 8.

The district court concluded the policy was unconstitutional as applied to Ms. Vega because there were multiple distractions occurring on the Quad that day, yet Ms. Vega was the only person sanctioned. R. at 17. However, nothing in the record indicates that the noise or actions from students participating in other activities on the Quad attempted to intentionally disrupt or divert attention from the ASFA event. R. at 22. In fact, three witnesses, including Mr. Drake, Mr. Putnam, and audience member Meghan Taylor, all stated that Ms. Vega's chants were significantly *more* distracting than the noise coming from other activities occurring on the Quad that day. Drake Aff. ¶11; Putnam Aff. ¶8; Taylor Aff. ¶5; R. at 52. Therefore, the Fourteenth Circuit correctly concluded that Ms. Vega attempted to monopolize the forum by creating a cacophony of sound causing an *actual* disruption to Mr. Drake's speech. R. at 52; *see*

Startzell, 533 F.3d at 189 (noting that the right to speech does not encompass the right to cause disruption).

Further, Ms. Vega was not disciplined for expressing an unpopular viewpoint or engaging in protected speech. She was disciplined because of the *manner* in which she did it. Ms. Vega claims she attempted to "tailor her behavior. . .to adher[e] to the policy" and "did not attempt to shout down the speaker," but chanting and marching around in a distracting costume is arguably no different than standing on a chair and shouting down a speaker. Vega Aff. ¶ 16. As the Seventh Circuit noted: "Shouting down another speaker is the antithesis of speech. The First Amendment does not protect loud noises that prevent others from speaking or hearing." *Carson v. Block,* 790 F.2d 562, 565 (1986) (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)). This type of conduct – if this Court allows it to continue without any repercussions – will have dire consequences in the long run and may potentially thwart the University's goal of encouraging free and open discussion. Moreover, Ms. Vega was not inhibited from expressing her viewpoints because there were other opportunities for her to communicate her message. For example, she could have handed out pamphlets during the event or exposed the flaws in Mr. Drake's arguments through questions and discussion after the speech and not by coercing him into silence. Thus, the policy was not unconstitutional as applied to Ms. Vega because unlike the other activities occurring on the Quad that day, her conduct caused a substantial and targeted disruption of the event.

B. Ms. Vega was subject to discipline under the policy because she substantially infringed upon the rights of others.

Schools may regulate speech when such speech substantially disrupts or interferes with the rights of others. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). In order for school officials to justify prohibition of particular expression of opinion, the school

must show that its action was caused by something more than the desire to avoid the unpleasantness that accompanies an unpopular viewpoint. *Id.* at 738.

The University Policy, which Ms. Vega agreed to adhere to at the start of the semester, restricts "expressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." Jt. Stip. App. A. Ms. Vega's conduct infringed upon the rights of others because by chanting loudly into the amphitheater and intentionally trying to distract people who wanted to listen to the speech. Thomas Aff. Add A; R. at 5-6. As the Fourteenth Circuit correctly concluded, it does not matter that Ms. Vega never physically entered the amphitheater during the speech. R. at 52. The sound of her voice traveled through the amphitheater and was loud enough to distract the speaker and audience who came to listen. *Id. Tinker,* 393 U.S. at 513 (holding that expressive activity may be prohibited if it involves a substantial invasion of the rights of others).

Even if Ms. Vega claims that she did not attempt to shout down the speaker, but rather "make her perspective known to the community," the way in which she chose to do so created a substantial interference with the rights of those who came to listen to the event. Vega Aff. ¶ 14. This is not the case where Ms. Vega was trying to engage in a discussion. Instead, Ms. Vega deliberately chose to make her perspective known by chanting *over* Mr. Drake for almost ten minutes, causing disruption to both the speaker and the listeners who wanted to hear from him. Vega Aff. ¶¶ 15-17. If Ms. Vega wanted to challenge Mr. Drake's view and make her opinions known, she had every right to do so by attending the event and engaging in discussion after the speech. However, her actions were such that no one – not even those who wanted to listen to Mr. Drake's speech – would be able to substantively learn and listen to the discussion without a

distraction. R. at 5-6. Therefore, the University's decision to give Ms. Vega a second strike was justified because she substantially infringed upon the rights of those attending the speech.

III. The University has a substantial interest in encouraging free and open discussions on campus and ensuring these discussions are conducted in a civil manner.

One of the central purposes of the First Amendment is to encourage and facilitate free and open discussion in society. Having a space that encourages open debates and discussions, particularly on controversial topics, creates a learning environment where theories and ideas can be tested. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

The Arivada Legislature acknowledged that frequent "shout downs" on university campuses run afoul to the First Amendment and sought to implement a solution to this problem. R. at 19. The Act serves to prevent student protestors from attempting to disrupt speech by shouting over speakers instead of allowing speakers to express their views and later have a debate about them. *Id.* It also requires colleges to do something to protect speakers and students who wish to engage in controversial discussions in a civil manner. *Id.* The University's adoption of the "material and substantial interference" policy here was a reasonable response to this issue. In the absence of such restrictions, protestors will be able to silence any person who does not fully agree with their own views without any repercussions. Allowing protestors to stifle these discussions merely because they do not agree with what is being said disrupts and discourages the free flow of ideas and discussion and creates a barrier to open debate, particularly in an academic setting. *Kovacs*, 336 U.S. at 88 (1949). Universities must play a key role in ensuring that these types of discussions are not stifled by unruly protestors.

As the district court noted, the University is one of the nation's leading public institutions of higher learning. R. at 1. Thus, the University has a significant interest in teaching students the values of free speech and ensuring they have the opportunity to engage in thoughtful debate over arguments they may not necessarily agree with. By giving protestors like Ms. Vega the power to veto disfavored speech by disrupting events, the University in effect teaches students that drowning out those expressing differing opinions is an acceptable response to speech they find disagreeable or offensive. Without a policy in place that limits material and substantial disruptions that impede upon the rights of others, there would be no disincentive to engage in such conduct. Accordingly, the University's policy serves to ensure that all students may be able to exercise their right to engage in and listen to expressive activity without infringing on the rights of others.

CONCLUSION

The policy is not unconstitutional on its face because it is neither impermissibly vague nor overbroad. Additionally, it is not unconstitutional as-applied to Ms. Vega because her conduct materially and substantially interfered with the rights of Mr. Drake as well as those attending the ASFA event. Furthermore, the University has a substantial interest in encouraging free and open discussions on campus, and in ensuring that these discussions are conducted appropriately. Therefore, this Court should affirm the Fourteenth Circuit's decision and find that the University Policy is not unconstitutionally vague or overbroad, nor is it unconstitutional as applied to Ms. Vega.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the work product contained this brief is in fact the work product of the team members only. The undersigned counsel also certifies that the work product contained in this brief fully complies with the rules of the Seigenthaler-Sutherland Moot Court Competition and the rules of their school's governing honor code.

/s/ Team 3
TEAM 3