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 SUPREME COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 7
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a university Campus Free Speech Policy implementing 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?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2018. The Petitioner's timely petition for a writ of certiorari was granted by this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Ms. Valentina Maria Vega, brought this 42 U.S.C. § 1983 action against Respondent, Jonathan Jones and Regents of the University of Arivada (collectively, "the University"), after the University suspended Ms. Vega after concluding that she had violated the University's Campus Free Speech Policy (Policy) for a second time by materially and substantially infringing on the rights of others to engage in or listen to expressive activity. *Vega v. Jones*, No. 18-CV-6834, slip op. at 1 (D. Eagleton Jan. 17, 2018). The parties filed cross-motions for summary judgment on December 15, 2017 and on Jan. 17, 2017, the district court granted Ms. Vega's motion. *Id.* At 2.

The University submitted a timely appeal to the United States Court of Appeals for the Fourteenth Circuit seeking reversal of the district court's grant of summary judgment. *Jones v. Vega*, No 18-1757, slip op. at 1. On November 1, 2018 the Fourteenth Circuit held that the University of Arivada Policy is neither unconstitutionally vague or impermissibly overbroad on its face, nor unconstitutional as applied to Ms. Vega. *Id.* at 12. Vega timely filed a petition for writ of certiorari, which this Court granted.

STATEMENT OF THE FACTS

I. VEGA'S BACKGROUND

Ms. Vega is a sophomore at the University of Arivada's School of Arts and Sciences, studying Sociology with a minor in Pre-Law studies. Vega aff. ¶ 2. She is a proud first-generation Hondaraguan-American citizen who "believe[s] in promoting respect for the rights and dignity of

immigrants in the United States," and hopes to enroll in law school upon graduation in order to continue her advocacy efforts. *Id.* at ¶ 1, 3. She is the current President of the University of Arivada's student chapter of "Keep Families Together" (KFT), a national student organization whose mission is to advocate for immigrants' rights through on-campus and community advocacy events. *Id.* at ¶ 4. KFT has had a chapter at the University of Arivada (University) for five years. Jt. Stip. ¶ 6. During that time, KFT members have engaged in various peaceful protests and rallies on campus. Id. Ms. Vega believes those events to be essential in promoting awareness for immigration issues. Vega aff. ¶ 4.

II. FREE SPEECH IN EDUCATION ACT AND THE UNIVERSITY POLICY

On June 1, 2017, the state of Arivada enacted the "Free Speech in Education Act of 2017" (Act). Av. Gen Stat § 118-200. The Act requires "all state institutions of higher education" to "develop and adopt policies designed to safeguard the freedom of expression on campus." *Id.* This legislation was enacted in response to "episodes of shouting down invited speakers on college and university campuses" in order to "ensure that the free speech rights of all persons" are protected. *Id.* On August 1, 2017, the University enacted the Campus Free Speech Policy (Policy) to "fulfil the University's obligations under the [Act]." Jt. Stip. App. A. The Policy provides for sanctions on students who "materially and substantially infringe[] upon the rights of others to engage or listen to expressive activity." *Id.*

The Policy provides procedures to discipline students based on a series of three strikes. *Id.* Campus Security can issue citations to any students who they find to be in violation of this policy. *Id.* Citations are then sent to the Dean of Students for review and investigation. *Id.* A student who is found to have violated the policy initially receives a "first strike," which is placed on a student's record, but carries no other sanctions and effectively serves as a warning. *Id.* A student who is accused of violating the policy a second or third time is additionally entitled to "a formal

disciplinary hearing before the School Hearing Board." *Id.* A second strike results in suspension, and a third strike results in expulsion from the University. *Id.*

III. VEGA'S FIRST STRIKE

On August 31, 2017, ten members of KFT, including Ms. Valentina Vega, Ms. Teresa Smith, and Mr. Ari Hadid, attended an anti-immigration rally at an indoor auditorium on campus. Vega Aff. ¶ 5. The event was hosted by another student organization, "Students for Defensible Borders" (SDB). Id.; Haddad Aff. ¶ 4; Smith Aff. ¶ 4. The ten members of KFT attended the rally to counter the speaker's anti-immigration views and "explain that immigration is a good thing and that immigrants are the heart of America." Vega Aff. ¶ 6 Once the speaker began, the members of KFT stood on their chairs, in the middle of the audience, and began chanting pro-immigrant slogans in an admitted attempt to "shout down the speaker." Vega Aff. ¶ 5; Haddad Aff. ¶ 7; Smith Aff. ¶ 5.

SDB called campus security to complain about the disruption by the KFT members. Thomas Aff. ¶ 5. Campus Security Officer Michael Thomas issued citations to all ten students for violating the Policy after determining that "the students drowned out the majority of the speaker's remarks." *Id.* at ¶ 6. Dean of Students Louise Winters was informed of the citations and subsequently "investigate[ed] the complaint and provid[ed] each student with an informal disciplinary hearing. Winters Aff. ¶ 7. Dean Winters then "informed the ten students that they had violated the Policy by materially and substantially infringing upon the rights of others to engage in or listen to expressive activity." *Id.* at ¶ 8. All ten students were issued first strikes on September 2, 2017. *Id.* at ¶ 9.

IV. DRAKE'S SPEECH ON THE QUAD AND THE AFTERMATH

On September 5, 2017, The University's chapter of American Students for America (ASFA) invited Mr. Samuel Payne Drake to campus to deliver a speech. Jt. Stip. ¶ 7. Drake is the

Executive Director of Stop Immigration Now (SIN), a large lobbying group that "advocates for the closing of United States borders to all immigrants." Drake Aff. ¶ 2, 3. "SIN takes the position that illegal immigration is the primary cause of violent crime, drug smuggling, and human trafficking, and that illegal immigrants deprive lawful Americans of jobs and other benefits." Drake Aff. ¶4. Theodore Putnam, the President of ASFA, was granted an "Event and Space Reservation" by the University's Campus Events Office for use of the Emerson Ampitheater (Ampitheater) on September 5, 2017, from noon to 3 p.m." Putnam Aff. ¶ 5; Jt. Stip. ¶ 9. While the reservation gave ASFA the "exclusive right" to use the Ampitheater, no permit was issued for the event, and University approval was not required to reserve the space. Jt. Stip. ¶ 8, 9.

The Amphitheater is located near the center of the University's "Quad," a large green space in the middle of the campus. Jt. Stip. ¶ 10. The Quad is frequently used by students to "study, talk, play games, play and listen to music, and engage in sports." Jt. Stip. ¶ 11. The Quad's Ampitheater, which seats a maximum of 100 people, is commonly used for small-scale concerts, lectures and speakers. Jt. Stip. ¶ 12, 13. Wooden benches are arranged in a semi-circle surround the front platform of the Ampitheater, but "there is no distinction between the Ampitheater and the rest of the surrounding space of the Quad." Jt. Stip. ¶ 13, 14. One of the walkways that cross the Quad is roughly ten feet from the last row of benches. Jt. Stip. ¶ 10, 15.

A group of about thirty-five people gathered at the Ampitheater for ASFA's event on September 5, 2017. Jt. Stip. ¶ 16. At that same time, elsewhere on the Quad, there were various other activities taking place. Jt. Stip. ¶ 17. Students were cheering for an intramural football game, as others were playing guitars, listening to music through speakers, and talking as they walked along the pathways around the Ampitheater. Jt. Stip. ¶ 17. As Mr. Drake spoke, asserting that "illegal aliens are the cause of most of the violent crime, drug wars, and other problems plaguing

our nation," and that "these people are destroying American ideals and American families," Ms. Vega stood alone at the periphery of the amphitheater, about ten feet past the last row of benches on the edge of the paved walkway. Drake Aff. ¶ 8; Vega Aff. ¶ 12, 13.

Ms. Vega was protesting alone because the other members of KFT, who had already been issued a first strike, would not even attend for fear of suspension, unsure of what the policy would and would not allow. Vega Aff. ¶ 11; Smith Aff. ¶11, 12. But Ms. Vega did show up to the Quad, believing she was "entitled to protest Mr. Duke's speech because of [her] First Amendment rights guaranteed to [her] by the United states Constitution." Vega Aff. ¶ 11. "In an attempt to tailor [her] behavior to ensure that [she] was adhering to the University policy, [Ms. Vega] stood outside the event this time and did not attempt to shout down the speaker, but rather make [her] perspective known to the community." Vega Aff. ¶ 14. Ms. Vega was wearing a Statue-of-Liberty costume in order to make a stronger impact, and chanting pro-immigrant slogans in order to provide an opposing view and support others who might also find the event offensive. Vega Aff. ¶ 16.

As a result of Ms. Vega's protest, Mr. Putnam, the event's organizer, called campus security. Putnam Aff. ¶ 9. Officer Thomas arrived on scene a few minutes later and saw Ms. Vega "standing on the periphery of the Ampitheater." Thomas Aff. ¶ 9. Even though he "could hear both Mr. Drake and Ms. Vega . . . as well as shouts and cheers from the nearby football game," Officer Thomas concluded that Ms. Vega was "materially and substantially infringing upon the rights of others to engage or listen to expressive activity," and issued a second citation to Ms. Vega. Thomas Aff. Add A. Officer Thomas did not, however, attempt to stop the football game, the cheering students, or any of the other sources of noise on the Quad. Jt. Stip. ¶ 18.

After an investigation by Dean Winters, and a subsequent disciplinary hearing before the School Hearing Board, the charges against Ms. Vega were upheld, and she was suspended for the

rest of the semester. Winters Aff. ¶ 11–15. After an unsuccessful appeal, Ms. Vega filed suit alleging the University's violation of her First Amendment right to freedom of speech. Vega Aff. ¶ 22.

SUMMARY OF THE ARGUMENT

This Court should overturn the decision of the United States Court of Appeals for the Fourteenth Circuit and find that the University of Arivada's Campus Free Speech Policy is unconstitutionally vague and impermissibly overbroad such that it is incompatible with the First and Fourteenth Amendments of the Constitution. Vague policy and statutes are a threat to otherwise law abiding citizens because they do not give sufficient warning of what they prohibit. This is dangerous because it creates uncertainty among those trying to adhere, and does not give sufficient warning to those in violation. As a result, those uncertain of what is not permissible steer far wider than the unlawful zone. This uncertainty has a stark chilling effect on First Amendment expressions. Additionally, vague policies are inherently at risk for arbitrary and discriminatory enforcement. Leaving their interpretation to the whims of their enforcers leads to prejudicial discrepancies in the way vague policies are enforced. Such discrepancies cannot stand in the face of the Fourteenth Amendment's due process protections.

When the University enacted its Campus Free Speech Policy, it failed to give its students appropriate notice and guidance for compliance. In doing so, it put students at risk of jeopardizing their college careers, even while trying to comply. Moreover, the lack of guidance also caused lopsided and discriminatory enforcement. As such, the policy is unconstitutionally vague, and should be struck.

In addition to being vague, the Policy is substantially overbroad. Overbroad policies and statutes are a threat to constitutionally protected freedom of expression for reasons similar to vague policies. When a policy is overbroad, in addition to prohibiting its intended unfavorable conduct,

it reaches into the realm of protected activity. Because overbroad policies sweep within their prohibitions acts which may not be punished under the First and Fourteenth Amendments, they should also be void. In order to avoid the issue of overbreadth, properly written policies should include some form of limitations, generally time and manner limitations, which carve out exceptions allowing for protected expression.

The University's policy, in punishing "expressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" swept within its scope not only the unfavorable acts it hoped to eliminate, but a broad range of constitutionally protected speech as well. In addition, it failed to accommodate protected expression by limiting its scope. The Policy as written applies to any expressive conduct anywhere on campus. Because it sweeps into its prohibitions constitutionally protected speech, and does not carve any limitations, the University's policy is substantially overbroad and should be voided in entirety.

While it is well established that students on school grounds have a constitutional right to freedom of expression, these rights in elementary and secondary school settings may be curtailed under special circumstances. The rulings by this Court that lead to such curtailments do not apply in this instance. Although it has never been settled whether the same approach is appropriate for post high-school education, by examining the justification of previous limitations it is clear it would be inappropriate to expand them to a university setting. Such exceptions generally stem from the State's invocation of *parens patriea.* Because the State has an interest in the education and well-being of its minors, it can assume a parent-like role in modifying certain freedoms. Since the students on a college campus are predominantly of the age of majority, this selectively carved out exception should not apply.

Even if the University's policy is not struck down for being unconstitutionally vague and substantially overbroad on its face, it was applied in a way that violated Ms. Vega's constitutional rights. There are three recognized conditions for which a school may lawfully restrain its students First Amendment rights. First, a school may step in when a student's expression substantially and materially interferes with the learning environment. Second, it is appropriate to meet out punishment when a student's expression is substantially lewd or obscene. Third, in school sponsored speech, such as a school play or student newspaper, a school has the right to direct the message it is sponsoring. Ms. Vega's solitary protest on a public sidewalk does not fit any of these exceptions, and still she was punished for her expression. The school's actions towards Ms. Vega, therefore, are in violation of her constitutional rights.

Finally, the risk that vague policies may lead to arbitrary and discriminatory enforcement was realized here. Vague policies are subject to the interpretation of their enforcers. As such, they run the risk of being arbitrarily and discriminatorily enforced based purely on the whims of police and security. When security was called on Ms. Vega, the officer readily admitted that, of the potential violators, she was the only one addressed. His justification for arbitrarily singling her out was simply that she was the only person he received a complaint about. Putting a policy with the potential for suspending or expelling students into the hands of any other student who might call security is a blatant violation of Ms. Vega's right to due process. For these reasons, regardless of the facial unconstitutional nature of the University's policy, the University's actions towards Ms. Vega were a violation of her constitutional rights.

ARGUMENT

I. THE UNIVERSITY POLICY IS BOTH UNCONSTITUTIONALLY VAGUE AND SUBSTANTIALLY OVERBROAD

The Campus Free Speech Policy adopted by the University of Arivada is unconstitutionally vague and substantially overbroad and therefore cannot be enforced. A canonical value to American political discourse, the First Amendment guarantees the rights of individuals to engage in expressive conduct. When laws, ordinances or policies are passed, even those intended to bolster the First Amendment, which are so vague as to not give notice to those who might be in violation, they interfere unconstitutionally with these rights. Similarly, when such rules are written to bar not only the intended targeted conduct, but also conduct which is protected under the First Amendment, they are substantially overbroad and should therefore be struck.

Since the policy enacted by the University is unclear as to what conduct is prohibited, it will have a cooling effect on students' exercise of their First Amendment rights and be subject to arbitrary and discriminatory enforcement. Additionally, it is so broad that it proscribes not only the undesirable acts against which it was written, but constitutionally protected First Amendment expression as well. For these reasons, it should be struck as an unconstitutionally vague and substantially overbroad policy. Finally, it is inappropriate to interpret *Tinker* in such a way to expand its standard of material disruption outside of a strict learning environment, especially when applied to a university setting.

A. The Policy as written is impermissibly vague

When policies and statutes are impermissibly vague, they ought not to stand. Vague policies are a threat to constitutional rights for several reasons. First, they do not give sufficient warning of what is prohibited for those who would adhere to them to know when they are in violation. Second, because of the confusion, vague policies tend to have a cooling effect on people's ability to engage in constitutionally protected conduct. Finally, because it is often unclear what conduct violates vague policies, they are at a high level of risk for arbitrary or discriminatory

enforcement. Because of the dangers associated with such policies, especially where they abut areas of First Amendment freedoms, such unconstitutionally vague policies and statutes cannot stand.

1. The University's policy is unconstitutionally vague because it does not give fair warning to those who may be in violation

The University's policy is unconstitutionally vague because it does not give students fair warning of what constitutes a violation. This Court has continually held 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). Clearly defined laws ensure that a "man is free to steer between lawful and unlawful conduct," *Id.* at 107, and concrete rules allow an ordinary person to know what is prohibited and act to accordingly. In contrast, vague laws tend to "trap the innocent" by not giving warning of what conduct they prohibit. *Id.* at 108. While an ordinance does not have to describe "the prohibited quantum of disturbances" when a rule infringes on an individual's right to free expression, *Id.* at 112, it does need to "delineate its reach in words of common understanding." *Id.*

While the statute in question in *Grayned* dealt with vague terms like 'noises' and 'diversions,' this Court recognized thee factors which are not present here that clarify what expressive conduct might materially and substantially infringe on the rights of others. *Id.* at 113, 14. There, the ordinance in question prohibited noise or diversion on school ground but specified such a disturbance must be "actually incompatible with school activity." *Id.* at 113. Additionally, there must be a causal connection between an actual disruption and the noise or diversion. *Id.* Finally, the acts must be willfully done. *Id.* at 114. In contrast, the University's policy lacks any qualifying descriptions to determine when conduct constitutes a material and substantial interference that without such factors, fails to alert students of the type of conduct targeted by the rule.

Additionally, this Court in its *Grayned* decision determined the ordinance in question met the minimum requirements for temporal and spacial limitations that would alert protestors when and where their actions could be subject to punishment. Without time limitations like those in *Grayned*—within one hour before school is in session and one-half hour after the school has been concluded—and spacial limitations—within 150 feet of any primary or secondary school building—even those wishing to adhere to the letter of the school's policy may find themselves unknowingly in violation. For instance, a student who walks into a common room while singing and in doing so makes it hard for another student to hear the television they were watching may unwittingly be in violation. Singing is without a doubt expressive conduct, the action is taking place on school grounds, and their song is substantially interfering with another student's ability to listen to the expressive content of his or her television program. As such any student with a song stuck in her head, may suddenly find herself at risk of expulsion.

A similar anti-picketing statute was upheld by this Court in *Cameron v. Johnson* which barred "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouse." *Cameron v. Johnson*, 390 U.S. 611, 616 (1968). There, this court determined that because it was easily discernible how one might obstruct or interfere specifically with the ingress and egress of a courthouse, the policy was not vague. Here however, the concept of interference is not so clear. While it is easy to delineate the specific way in which a picketer might interfere with a person's ability to enter and exit a courthouse, specifically by blocking the entrance, interfering with one's ability to engage in or listen to expressive activity is not so clear cut. Unlike the ordinance in *Grayned* and the statute in *Cameron,* the University's policy does not give any limitations which allow for a clear interpretation of the rule.

The student of average intelligence, after reading and agreeing to the University's policy, is not expected to then research the reasoning behind it and find out the legislative intent of the new Arivada law. Hence this court in *Coates* explained that it is "the ordinance on its face that sets the standard of conduct and warns against transgressions." *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971). By relying solely on the plain language of the rule it is impossible for students to know with any degree of reasonable certainty what acts are allowed and which may find them unwittingly facing suspension or expulsion. Due to the lack of such boundaries, the policy is insufficiently distinct for the average student to decipher. Similarly, it will be exposed to the subjective interpretation of security officers, the dean, the board of regents and appellate judges, and anyone else called upon to determine a violation. It is for the foregoing reasons that the University's policy is unconstitutionally vague.

2. When vague polices abut areas of First Amendment freedoms, they inhibit the exercise of those freedoms

Vague policies like that imposed by the University that abut the areas of First Amendment freedoms tend to inhibit the exercise of those freedoms. When a person is uncertain of the meaning of a rule and cannot determine what actions are or are not permissible, it leads them to "steer far wider of the unlawful zone than if the boundaries of the forbidden were clearly marked." *Grayned*, 408 U.S. at 109. When people are unsure of how a rule impacts their right to freedom of expression, they tend to exercise more than reasonable caution to steer clear of the unlawful zone. Because of this, vague policies that abut areas of First Amendment freedoms have a cooling effect on individual expression.

The threat of such a cooling is especially palpable in the context of a university. In delivering the majority opinion for *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, Justice Fortas explained that the protection of First Amendment freedoms is nowhere more important than in

"the community of American Schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969). He described this 'marketplace of ideas' as crucial to the nation's future which "trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues." *Id.* at 512. Here however, ten students who already have at least one strike are now left uncertain as to what actions, some of which may be protected by the First Amendment, could result in suspension or expulsion. Future leaders majoring in Philosophy, Political Science, and Sociology, and students looking for a career in legal studies, may not participate again in peaceful protest or rallies for fear it could end their academic careers.

Two of the students, Ari Hidad and Teresa Smith believed that they had a constitutionally protected right to join Ms. Vega but did not for fear of suspension. KFT, like many student run organizations, is an avenue for political expression for many students. The record shows that for years it has engaged in peaceful protests and rallies on campus, both cornerstones of a healthy democratic system. Such rallies and organizations will not be able to flourish if students choose not to celebrate their rights for fear of violating an unclear policy, especially one with such heavy consequences. One of the dangers of vague policies is their chilling effect on freedom of expression. Therefore, the University's policy, which abuts students' freedom of expression, should be struck as unconstitutionally vague.

3. Unconstitutionally vague policies, like the one enacted by the University, are open to arbitrary and discriminatory enforcement

When the University enacted its policy, it impermissibly delegated the policy determination to campus security, which opens it to arbitrary and discriminatory enforcement. Whereas precise statutes ensure a specific conduct is proscribed, *Edwards v. South Carolina*, 372 U.S. 229 (1963), vague rules delegate interpretation to their enforcers on "an ad hoc and subjective basis" which leads to arbitrary and discriminatory application. *Grayned*, 408 U.S. at 109

(emphasis omitted). In *Coates* this court struck down a law as being unconstitutionally vague which made it an 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 . . . ." *Coates v. Cincinnati*, 390 U.S. 611, 616, 611 (1971) (quoting Cincinnati, Oh. Ordinance § 901-L6 (1956)). In this case, the city of Cincinnati tried to make the argument that "annoying" was not a subjective standard. Initially, the trial court supported this claim, stating that the standard was not dependent on each complainants' sensitivity, but they did not offer any explanation as to whose sensitivity the violation depended. *Id.* at 613. Without this clarity, regardless of the legislature's intended objective standard, this Court relied on the plain words of the ordinance itself. *Id.* at 614. Since the policy placed restrictions on the right to assemble on an unascertainable standard, subject to the interpretation of law enforcement it was determined to be unconstitutionally vague. *Id.*

Similarly, without clear guidance on what actions constitute a substantial and material interference, the enforcement of the rule is subject to the whims of the security officers called upon to enforce it. During Mr. Drake's speech there were numerous distractions which could have substantially impeded on people's ability to listen to its expressive content. Students sitting closer to the ongoing football game may have been substantially distracted by the hullaballoo of the game and the attending cheers. After recognizing Ms. Vega from a previous incident, Officer Thomas made the determination that, not only was she the source of the most distracting noise on the quad, she was the only distraction rising to the level of material and substantial. In fact, he did not even "consider addressing other sources of noise distraction" because he was responding to "a specific call about a specific disturbance." Thomas Aff. at ¶ 12.

Here, the determination for material and substantial is not just subject to the ad hoc determination of a security guard, but the policy is only enforced against specific students upon

whom security is called. By leaving the determination of a violation in the hands of security guards, or the whims of people who might call security for an actual violation or because someone in the quad is "annoying to persons passing by," it opens the policy to arbitrary and discriminatory enforcements. Such vague policies abutting individual First Amendment rights are a threat to those rights they are intended to protect due to the high risk of arbitrary and discriminating enforcement.

B. In addition to being impermissibly vague, the University's policy is substantially overbroad.

Because it proscribes expressive activity protected under the Constitution as well as the disruptive conduct it targets, the University's policy is substantially overbroad. Under the overbreadth doctrine, regulations which reach beyond their intended conduct, to the extent they also regulate constitutionally protected activity, are void where a limiting interpretation is not available. *Virginia v. Hicks*, 539 U.S. 113, 118–119 (2003); *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988); *Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3d Cir. 2006) (holding that overbroad statutes may only be upheld if there is a readily available limiting interpretation that would make it constitutional, but the courts will not rewrite a regulation to conform it to constitutional requirements). Here, the University's policy sweeps protected conduct within its prohibitions. There is no readily available limiting language that would mollify the overbreadth, and it is not the type of narrowly tailored provision with limited time and place restrictions upheld by this court. As such, the entire rule should be void for substantial overbreadth.

1. The University's policy sweeps within its prohibitions acts that may not be punished under the First and Fourteenth Amendments.

In addition to its intended goal of deterring students from shouting down guest speakers, the University's policy also prohibits a substantial amount of activity which may not be punished under the First and Fourteenth Amendments. Overbroad policies, like vague ones, tend to deter privileged activity. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). When a law overreaches to the extent that it substantially prohibits protected activity which constitutionally cannot be punished, it should be rendered void for overbreadth. Because voiding for overbreadth is such "strong medicine" in that it renders an entire statute or policy moot, it can only be applied when a substantial amount of the conduct it pertains to is prohibited. *New York v. Ferber*, 458 U.S. 747, 769 (1982). Since some expressive conduct moves beyond pure speech into conduct that "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive control over harmful, constitutionally unprotected conduct," it is necessary to limit the overbreadth doctrine to protected expression, and also to only enforce those policies which are narrow in scope in how they achieve a limited government interest. *Id.* at 770.

Whereas in *Ferber*, the conduct proscribed was the distribution of lewd videos involving minors, here the acts barred by the University's policy will generally fall closer to the realm of pure speech. Because the policy prohibits "any expressive conduct" that might materially interfere with another individual's ability to listen to expressive activity, the breadth of what falls within its scope is quite substantial. In this instance, not only does the policy punish students whose single picketing protest might distract from a speech, but it also encompasses a wide variety of other protected activity. If a guest speaker is making it difficult for a passer-by to hear the other end of a phone conversation, this may constitute a material and substantial roadblock for the pedestrian. Students in a spirited informal debate may be in violation if one begins to speak too vehemently

over the other. Because the only limitation the policy puts on itself is the governing of "expressive conduct," there is seemingly no end to the scope of to the protected conduct it could punish, given the right set of circumstances.

2. The University's policy is not the type of time place and manner restriction which may be permitted.

The University makes no attempts to narrow the scope of its policy in a way that it could be construed as constitutional. Generally, policies that limit individuals' freedom of expression must conform with minimum time place and manner restrictions because such restrictions of expressive activity can only be made for "weighty reasons." *Grayned*, 408 U.S. at 116. In *Grayned*, this Court upheld an ordinance which limited picketing rights on school grounds. This is despite the limitation placed on free speech restraints on school campuses. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students, and may only be limited when a showing of substantial and material disruption to teaching or school activities).

Under the Fourteenth Amendment, in order for a state imposed statute, ordinance, or policy that impedes on a fundamental right to be constitutional, it must be narrowly tailored to address a compelling state interest. In *Grayned*, the Rockford's antinoise ordinance severely limited the ability of students, teachers, and community members to picket on campus and yet it was still upheld. It read:

> A person commits disorderly conduct when he knowingly : . . . (i) pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided that the subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . .

Grayned, 408 U.S. at 107 (quoting Rockford, Ill. Code of Ordinances ch. 28, § 18.1(i)). Here, the city of Rockford applied specific time and place restrictions, which not only clearly described when protesting was not allowed, but also gave notice when similar protesting would be permissible. This rule is narrowly tailored; rather than a carte blanche ban on all of a specific type of protected conduct, it limited the restriction to a narrow portion of the day. Just like *Tinker*, here the prohibited conduct is limited to the type of expressive activity that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 118 (quoting *Tinker, 393 U.S* at 513).

In contrast, the University made no attempt to tailor its policy. While it mentions the interest of affirming its commitment to the principle of freedom of expression, the actual rule is by no means narrowly tailored to this end. Instead, left without any time, manner, and place limitation, it serves the opposite of its stated intent. By extending into protected conduct it serves the opposite interest and cools the rights of the University's students to engage in their own individual expression. Additionally, the policy on its face is not readily susceptible to limiting interpretation and as such cannot be rewritten in a narrower scope. *Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3d Cir. 2006). Because the policy oversteps into prohibiting protected conduct, and does not do so in a way that is narrowly tailored to address a compelling state interest, it should be void for substantial overbreadth.

C. Expanding the Tinker intermediate scrutiny standard to college campuses would be an overreach, contrary to the original intent of its ruling.

This court has an opportunity to clarify its *Tinker* decision by appropriately limiting its standard of review to elementary and secondary school settings. The principal concept established in *Tinker* is that neither students nor teachers should be expected to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty.*

Sch. Dist., 393 U.S. 503, 506 (1969). While establishing students' right to freedom of expression, this Court also established a lower level of scrutiny for schools to regulate speech. As a result of tension that arises where freedom of expression collides with "the rules of the school authorities," *Id.* at 507, it was determined that school authorities could restrict student expression, but only if the expression created a material or substantial disruption of the learning environment. *Id.* at 511. Citing the Fifth circuits decision in *Burnside v. Byars*, this Court determined that if the school cannot show that engaging in the forbidden conduct would materially and substantially interfere with "the requirement of appropriate discipline in the operation of a school" than such a prohibition cannot be sustained. *Id.* at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

The standard for a material and substantial interference on school grounds is a less strict level of scrutiny than is typically applied to First Amendment issues. This Court in *Cohen v. California* outlined four factors to determine if a statute lawfully interfered with an individual's freedom of expression outside of a school environment. First, the rule prohibiting such expression must put the actor on sufficient notice to know what constitutes a violation. *Cohen v. California*, 403 U.S. 15, 19 (1971). As discussed previously no such notice is present here. Secondly, State actors may prohibit certain obscene expression. *Id.* Here, the Court uses a narrow view of what constitutes obscenity, limiting it to expressions that are "in some significant way erotic." *Id.* at 20. Next, this Court upholds restrictions on so-called fighting words, statements which are "personally abusive epithets which . . . are . . . inherently likely to provoke violent reaction." *Id.* Finally, when expressive acts constitute a "distasteful mode of expression," the State may step in and prohibit the intrusion of such expressions into "the privacy of the home," however, they cannot be banned from public dialogue. *Id.* at 21.

The Cohen standard suggests an appropriately strict scrutiny on restrictions of expression that one would assume would overturn the "material disruption" standard in *Tinker*. *Tinker's* lower standard of scrutiny stems from the State's ability to invoke *parens patriae*, a notion stemming from this Court's decision in *Prince v. Massachusetts*. There, this Court determined that in order to "guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor[,] and in many other ways." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In other words, because the state has a parent-like interest in the wellbeing of its children, it is acceptable at times to limit the constitutional rights of minors.

The notion that the State can similarly invoke such a parental role on a college campus by extending the looser standard of scrutiny is a dangerous precedent, and one which goes against the spirit of the very expressions *Tinker* and *Cohen* defended. Both cases, which took place during the United States' conflict in Vietnam, involved individuals protesting the conflict, and specifically the draft. By extending *Tinker's* lower scrutiny to college campuses, this Court would be at once stating that college students, generally between 18 and 22, who have reached the age of majority, need protection to the point where they cannot fully realize their constitutional rights, but those same individuals when called upon by their country are of a sufficient age to be compelled to go to war.

Because the students on college campuses have generally reached the age of majority, unlike those in elementary and secondary schools, it is unreasonable to afford them less than the full protections guaranteed to adults under the Constitution. As such, the appropriate standard to apply in a college or university setting is the *Cohen* standard. The University's policy, as stated previously, does not put students on sufficient notice to know what actions are prohibited. There

is no mention in the policy of attempting to preclude erotic public expressions on campus. Nor did the policy attempt to deter students from expressing fighting words or imposing unpleasant views into the private surroundings of others. For the foregoing reasons, the University's policy does not meet the strict scrutiny standard required for the type of prohibition of expression it seeks.

II. THE CAMPUS FREE SPEECH POLICY AS APPLIED TO MS. VEGA IS UNCONSTITUTIONAL

A. Even if the policy were not facially unconstitutional, Ms. Vega's actions were not the type the school may regulate.

Even if this Court extends *Tinker* into a collegiate setting and upholds the University's policy, Ms. Vega's actions do not fall under any of the categories of speech recognized by this Court as appropriate to limit. Because her conduct was not the type schools may prohibit, even if the University's Policy is not facially void, the Policy is unconstitutional as applied to her. Since the *Tinker* decision, this Court has gone on to define other circumstances under which schools may regulate student speech. These cases fall into two major categories. The first are cases which deal with a school's ability to regulate the speech of students in school sanctioned or school sponsored media, these are governed by *Kuhlmeier*. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The other category involves regulation of lewd, vulgar, or obscene expression; these cases are governed by *Fraser*. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *see Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001) (taking a three-category approach to determining different types of instances where a school may restrict freedom of speech and what levels of scrutiny apply to each).

Tinker proscribes conduct which is specifically disruptive to the learning environment. When Ms. Vega was sanctioned for her expressive activity, she was in a public space on campus, and nothing in evidence suggests her protest had any impact on nearby classrooms. While her conduct may have seemed disruptive to those around her, expanding the material and disruptive

standard given by *Tinker* from the school setting and applying it to any material distractions anywhere on campus is an overstep, and a misapplication of *Tinker's* constitutional framework. Dealing with a similar school picketing issue in the majority opinion in *Grayned*, Justice Marshall explicitly said, "it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians." *Grayned v. City of Rockford*, 408 U.S. 104, 120 (1972). Here, this Court describes the exact act undertaken by Ms. Vega, and claims it would be 'highly unusual' to find such an act in any way disruptive to the school. *Id.* At 119. Ms. Vega's actions, even if disruptive, did not interfere with the learning environment cultivated by the school, and as such do not fall under the scope of *Tinker*.

None of the slogans chanted by Ms. Vega fall into the category of lewd vulgar or obscene speech that may be regulated on school campuses. Generally, a school may curtail the speech of its students when such speech is offensively lewd. In *Bethel School Dist. No. 403 v. Fraser*, this court upheld sanctions against a student whose student body campaign speech in front of an auditorium of six-hundred students contained gestures and innuendo which were "lewd . . . and offensive to the modesty and decency of" those in attendance. *Fraser*, 478 U.S. at 678, 79. In this instance, the Court recognized the school's interest in protecting its students, many of whom were under the age of fourteen and "on the threshold of awareness of human sexuality" from speech that could be "seriously damaging to its less mature audience." *Id* at 683. Not only did Ms. Vega's demonstration lack completely in any similar lewd or untoward expression, her target audience, college students who are generally legal adults, do not need the same protection from potentially provocative speech. As such, Ms. Vega's actions do not fall into the second recognized category for schools to limit the expression of students.

Finally, because Ms. Vega's protest was not part of a school sanctioned event or school sponsored media, it does not fall under the final category of speech which may be permissibly regulated by the school. Educators are entitled to exercise control over speech when that speech is school sanctioned, especially when it pertains to works sanctioned and produced by the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). This greater leeway is to help schools assure that students learn the lessons the school intends to teach, and that readers and listeners are not exposed to content of an inappropriate level of maturity for a school setting. *Id* at 271. In *Kuhlmeier*, the school paper decided to cut a story that a student had written describing other high school students' experiences with pregnancy and another article discussing the impact of divorce on students. *Id* at 260.

There, the articles in question were written for a school-sponsored paper, and struck from a school-sponsored paper. The rights afforded to schools by this Court in *Kuhlmeier* are limited in their application to school-sponsored and sanctioned expression. Here, Ms. Vega was not protesting on behalf of the school. Nor was the speech she was attending a school-sanctioned event. The subject matter of her chanting dealt no more with an inappropriate level of content than the speech she is said to have interfered with. Ms. Vega therefore has been reprimanded for her protected expression, when her expression does not meet the criteria for any of this Court's exceptions. As such, even if the policy were not facially unconstitutional, it is unconstitutional as applied to Ms. Vega.

B. The arbitrary enforcement of the policy against Ms. Vega was a violation of her right to due process.

The University's selective enforcement of its policy constitutes arbitrary enforcement in violation of Ms. Vega's right to due process. The Fourteenth Amendment protects citizens from arbitrary or discriminatory punishment by state actors in its due process clause. U.S. Const. amend.

XIV. Without this protection, constitutional statutes and policies might violate a person's right to procedural due process when arbitrarily enforced. When rules are not sufficiently clear as to allow individuals to know when they are unwittingly in violation, they give the responsibility of interpretation to those enforcing them. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). As mentioned previously, such an ad hoc and subjective approach inherently leads to discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). When Officer Thomas received the complaint from Mr. Putnam, his unsubstantiated determination that "students appeared to have difficulty focusing on the speech" was all that was needed to determine Ms. Vega's violation. Thomas Aff. Add. A. Not only does this put students at a heightened risk of being in violation when they are expressing themselves near speeches that are by themselves difficult to focus on, it shows how little procedure is actually in place to make a determination which could ultimately expel a student. Officer Thomas admitted that Ms. Vega was not the only distraction, that he could hear other voices from students passing by the amphitheater, as well as "shouts and cheers from the nearby football game." Thomas Aff. Add. A. While any number of other noises permeating the quad may have risen to the level of a material and substantial distraction, it was Officer Thomas' subjective analysis that Ms. Vega was the most distracting.

The plain letter of the policy reads "[e]xpressive conduct that materially and substantial 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." Appendix C, University of Arivada Campus Free Speech Policy. The Policy does not say that when there are multiple infringers only the one deemed by security to be most distracting will be subject to sanction. Here, the letter of the rule covers all other material distractions as much as it covers Ms. Vega. A fair enforcement, one that would not violate due process, would enforce the same policy uniformly to all material and

substantial interferences. Moreover, according to Officer Thomas' testimony, the reason he chose to enforce the policy singularly against Ms. Vega was because he was "responding to a specific call about a specific disturbance." Thomas Aff. Add. A. Not only is this the type of policy at high risk of arbitrary and discriminatory enforcement, here, we see the subjective person in charge of its interpretation ceding control to any complainant. In *Coates* this Court rejected a statute making it unlawful for persons to conduct themselves in a manner "annoying to persons passing by" because it relinquished the authority to determine who violated the statute to the whims and sensitivities of anyone passing by. *Coates v. Cincinnati*, 402 U.S. 611, 611 (1971) (quoting Cincinnati, Oh. Ordinance § 901-L6 (1956)). Here, the University has adopted an enforcement scheme that could expel students, which surrenders the authority of interpretation to the sensitivities of anyone who personally feels disrupted. Such an arbitrary scheme with such heavy sanctions at stake cannot stand in the face of due process. Therefore, Ms. Vega's constitutional right to due process was violated through the arbitrary and discriminatory enforcement of the University's policy.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit and remand the case to the United States District Court for the District of Arivada with instructions to enter summary judgment in favor of Petitioner, Valentina Maria Vega.

APPENDIX

U.S. Constitution
First Amendment

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. Constitution
Fourteenth Amendment

Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4:

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Free Speech in Education Act of 2017
Effective: June 1, 2017
Av. Gen. Stat. § 118-200

Section 1:

The Legislature hereby finds and declares that episodes of shouting down invited speakers on college and university campuses are nation-wide 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 member 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 sanction 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.

CERTIFICATE OF COMPLIANCE

Pursuant to the rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, we hereby certify that i) this brief, in all its copies, is the work product of the members of Team 7; ii) this brief has complied fully with the governing honor code of Team 7's law school; iii) team 7 has complied with all rules of the competition.

Respectfully submitted,

/s/ Team 7