No. 18-1234

IN THE SUPREME COURT OF THE UNITED STATES

Valentina Maria Vega,

Petitioner,

vs.

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 PETITIONER

Team 13
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. Whether the University's Free Speech Policy on its face is unconstitutionally vague and substantially overbroad when the Policy fails to provide clear notice of what it prohibits, punishes students for expressing views contrary to those of other speakers, and chills student's free speech?
2. Whether the University's Free Speech Policy was improperly and unconstitutionally applied to Ms. Vega where the expression did not meet the requisite threshold of punishable interference and where the standard applied to justify the punishment was inappropriate?

STATEMENT OF THE CASE

Ms. Valentina Maria Vega is a first-generation Hondaraguan-American citizen and a sophomore at the University of Arivada, where she is majoring in Sociology and minoring in Pre-Law, and is President of the student organization "Keep Families Together" (KFT) R. at 3. She is a self-declared advocate for "promoting respect for the rights and dignity of immigrants in the United States." and has engaged in a number of peaceful protests and rallies on campus. *Id*. Ms. Vega is very passionate about making sure other students understand the pro-immigrant perspective. *Id*.

On August 1, 2017, the University of Arivada (hereinafter "the University") adopted the University of Arivada Campus Free Speech Policy (hereinafter "the Policy") pursuant to the state of Arivada's enactment of the "Free Speech in Education Act of 2017"). R. at 2. The Policy states that "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. Stipp. App. A. The Policy's disciplinary procedure includes three strikes, with escalating sanctions after each offense. R. at 2. The University requires all students to sign an online document (hereinafter "Policy Statement") declaring the student has read and agreed to the University's policies. R. at 3. While Ms. Vega and her fellow KFT members did sign the Policy Statement, they state they could not reasonably determine what expression the Policy permits and what expression is prohibited. R. at 8.

On August 31, 2017, Ms. Vega and several other members of KFT participated in a protest at the University's indoor auditorium, where "Students for Defensible Borders" (SFB) was hosting an anti-immigration rally. R. at 3. At this event, Vega and her peers stood on their chairs during the rally's speaker's speech and proceeded to "shout down" the speaker. *Id.* campus security was called and Officer Thomas arrived, issuing the students citations for

violating the school's Policy. R. at 4. Proper proceedings were held in accordance with the Policy's guidelines and the students were given warnings and their "first strike". R. at 4.

On September 5, 2017, Mr. Samuel Drake with "Stop Immigration Now" (SIN), a strong advocate for the closure of U.S. borders to all immigrants, was invited by the University's chapter of "American Students for America" (ASFA). R. at 1, 3. The speech took place in the amphitheater on the University's "Quad", which is surrounded by open areas where students gather to study, play football and frisbee, listen to music, or simply gather and talk. R. at 4. There is no clear line as to where the amphitheater ends and the rest of the Quad. R. at 5. Numerous other activities were happening on the Quad during Mr. Drake's speech, including music from guitars and cell phones with portable speakers, as well as a football game with students cheering. R. at 5. Mr. Drake strongly decried immigration and made comments such as, "immigrants are destroying American ideals and American families, they are taking away jobs Americans need and want," and that "this is America we speak English… build the wall and keep them out." *Id*.

During the speech, Ms. Vega began her pro-immigration chants in a statue of liberty costume, standing ten feet beyond the amphitheater last row of benches. *Id*. She was immediately reported to campus security by the president of ASFA, Mr. Putnam. Officer Thomas with campus security arrived and observed he could hear both Mr. Drake's speech and Ms. Vega's chants at the same time, as well as the various random background noise. R. at 6. HE determined that Ms. Vega's chants were "more distracting" than the other sources of background noise, but that Mr. Drake still continued to speak. R. at 6. Ms. Vega was issued a citation pursuant to the University's Free Speech Policy by campus security. R. at 6.

Following the issuance of the citation, the University provided Ms. Vega with a hearing before the Hearing Board, who found that she materially and substantially infringed upon the right of Mr. Drake to speak and of others to listen. R. at 6. Ms. Vega was then issued a "second

strike" and suspended for the remainder of the semester. *Id*. After unsuccessfully exhausted all avenues at the University, Ms. Vega filed this suit. *Id*. The parties submitted cross-motions for summary judgment and on December 15, 2017, Ms. Vega's motion was granted and the University's cross motion was denied. R. at 2.

In the District Court for the District of Arivada, Ms. Vega argued that her suspension from the University violated her First and Fourteenth Amendment rights, because the Policy is on its face unconstitutionally vague and substantially overbroad. R. at 7. The District Court ruled in Ms. Vega's favor, holding that the University's Policy unconstitutionally infringed on Ms. Vega's First Amendment right both on its face and as applied on the basis of three separate issues. R. at 17. First, the District Court held the Policy to be unconstitutionally vague because it lacked specificity in defines key terms, creating significant risk of arbitrary enforcement and chills free speech. R. at 9. Second, the District Court ruled that as written, the Policy was impermissibly overbroad because it could easily be applied to all sorts of on-campus speech in an unlimited number of contexts. R. at 12. Third, the District Court held the Policy applies to all campus expressive activity, not limited to school operations, not narrow in scope, therefore, the Policy is unconstitutionally overbroad. R. at 16.

Jonathan Jones and Regents of the University of Arivada (hereinafter "the University") submitted a timely appeal to the United States of Appeals for the Fourteenth Circuit. R. at 43. On November 1, 2018, the Fourteenth Circuit held that the University's Policy was neither unconstitutionally vague, impermissibly overbroad on its face, nor unconstitutional as applied to Ms. Vega because her actions were within the parameters of the Policy's prohibited conduct. R. at 53. The Fourteenth Circuit thus reversed the District Court's decision and remanded for entry of summary judgment in favor of the University. *Id*. Ms. Vega timely filed a petition for writ of certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit and find in favor of Ms. Vega, on the facial challenge to the Policy as well as the as-applied challenge to the Policy. In deciding whether the University's Policy violates Ms. Vega's First and Fourteenth Amendment, this Court should adopt the analysis of the District Court of Arivada.

First, this Court should find that the University's Policy is unconstitutionally vague and substantially overbroad. In doing so, this Court should adopt the *Grayned* analysis established by the Supreme Court to determine vagueness and overbreadth. The University's Policy is vague because the Policy does not provide fair warning or explicit standards, and prevents the exercise of freedom of speech. In deciding whether the Policy violates the First Amendment because of its overbreadth, this Court should adopt the *Grayned* analysis in conjunction with *Taxpayers for Vincent* analysis, created by this Court because the Policy effectively prohibits constitutionally protected conduct.

In application, this Court should find that the University's policy was improperly and unconstitutionally applied to the circumstances surrounding Ms. Vega's conduct. Ms. Vega's protest did not satisfy the threshold of disruption required by the Policy to warrant her suspension. Further, the citing officer showed bias towards Ms. Vega through his arbitrary and discriminatory enforcement of the policy when there were a multitude of sources causing noise, yet his previous knowledge of Ms. Vega impacted his judgment. Finally, although the University argues the *Tinker* justifies their means of enforcement as an educational institution, *Tinker* is not appropriate because of forum and age discrepancies with Ms. Vega's situation and historical applications of *Tinker*. For these reasons, Petitioner requests this court vacate the decision of the Fourteenth Circuit and reinstate the District Court's decision in favor of Ms. Vega.

ARGUMENT

I. The University's Policy violates Ms. Vega's freedom of speech protected under the First Amendment, because the Policy is unconstitutionally vague and substantially overbroad.

The Free Speech Clause of the First Amendment states, "Congress shall make no law… abridging the freedom of speech…" U.S. Const. Amend. I. The Fourteenth Amendment extends this prohibition to the states, and in turn, to state institutions of higher learning, including the University. *Healy v. James*, 408 U.S. 169, 180 (1972). To determine whether the University's Free Speech Policy ("The Policy") violates the First Amendment, this Court should adhere to the inquiry into the vagueness and overbreadth doctrines of the First Amendment established in *Grayned v. City of Rockford*, and utilized by the District Court of Arivada. Policies are considered vague if fair warning is not provided as to what conduct is or is not permitted, if there are no explicit standards provided to prevent arbitrary and discriminatory enforcement, and/or if the exercise of freedom of speech protected under the First Amendment is prevented. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The overbreadth doctrine applies when a law or regulation "prohibits constitutionally protected conduct." *Grayned*, 408 U.S. at 114. Furthermore, a statute or regulation is substantially overbroad when it prohibits constitutionally protected conduct. *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Ms. Vega contends that her suspension from the University violates her First and Fourteenth Amendment rights because the University's Policy, for which her suspension is based, is unconstitutionally vague and substantially overbroad. Ms. Vega along with two other students contend that the University's Policy is vague, because the students could not reasonably know what conduct is or is not prohibited under the Policy. R. at 8. Ms. Vega also contends that, by the language of the University's Policy, the Policy is unconstitutionally overbroad as it

overlaps with protected speech within the First Amendment. Nonetheless, this Court should reverse the determination by the United States Court of Appeals for the Fourteenth Circuit and find that the University's Policy is unconstitutionally vague and overbroad.

A. The University's Campus Free Speech Policy violates Ms. Vega's First Amendment right to freedom of speech because the Policy is vague.

Statutes violate the first essential element of due process of law when a statute either forbids or requires an act in terms so vague "that men of common intelligence must necessarily guess its meaning and differ as to its application." *Connally v. Gen Const. Co.*, 269 U.S. 385, 391 (1926). "The doctrine of vagueness, . . . refers to the ability of the courts to strike down statutes that fail to 'provide fair warning [.]'" (quoting BLACK'S LAW DICTIONARY 1548 (7th ed. 1999)). In *Grayned*, this Court stated three ways in which a law that is vague can be held unconstitutional. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). First, fair warning must be provided so that a person on ordinary intelligence can act accordingly, because he or she is given a reasonable opportunity and knows what is prohibited. *Id.* at 108-09. Second, for those who apply laws, must provide explicit standards so arbitrary and discriminatory enforcement is prevented. *Id.* Third, a vague statute that "abut[s] upon sensitive areas of basic First Amendment freedoms, it "operates to inhibit the exercise of [those] freedoms." *Id.*

1. The University's Policy is vague, because the Policy does not provide fair warning as to what conduct is or is not permitted.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id*. at 108. This Court in *Grayned* stated, "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly". *Id*. Without providing fair warning, vague laws trap the innocent. *Id*. "No one may be required at peril of life, liberty or property to speculate as to

the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

In *Grayned*, this Court reviewed a challenge of vagueness and overbreadth to a city ordinance that stated:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . . Code of Ordinances, c. 28, § 19.2 (a), *Grayned*, 408 U.S. at 107-08.

In *Grayned* this Court held it was clear what the city ordinance as a whole prohibited, when looking at the words of the ordinance they are marked by "flexibility and reasonable breadth, rather than meticulous specificity". *Id*. at 110. This Court stated that the city of Rockford's ordinance forbids deliberate noisy activity, "for the protection of Schools", when school is in session and at a fixed place. *Id*. at 110-11. While the statute does not specify the quantum of disturbance, the purpose is whether normal school activity is about to be disturbed or has been. *Id*. at 112.

In furtherance, this Court in *Baggett v. Bullitt* reviewed a challenge of vagueness to two oaths that the state of Washington required state employees to take. *Baggett v. Bullitt*, 377 U.S. 360, 361 (1964). However, this Court held the 1955 oath was unconstitutionally vague, because there was an undefined variety of "guiltless knowing behavior". *Id* at 368. This Court also held the 1931 oath was vague. *Id* at 371. The Supreme Court stated, "[t]he range of activities which are or might be deemed inconsistent with the required promise is very wide indeed." *Id* at 371.

Here, the Policy violates Ms. Vega's First Amendment right to freedom of speech because the Policy is vague. Unlike *Grayned* it is unclear, when looking at the policy as a whole, as to what conduct is or is not allowed at the University. The University's Policy's Free Expression Standard states: "[e]xpressive conduct that materially and substantially infringes

upon the rights of other to engage in or listen to expressive activity shall not be permitted on campus and shall be subject to sanction." Jt. Stip. App. A. Ms. Vega contends that it is impossible for students to know when and how they can and cannot express their views on the subject of immigration or any other topic without violating the policy. R. at 49.

Similar to *Baggett*, there is a wide variety of expressive conduct that is not defined by the Policy. The District Court reviewed the Policy and found, that in its entirety does not define the meaning of "materially and substantially infringe… upon the rights of others". R. at 8. For instance, Ari Haddad stated that after receiving her first strike she was unclear as to what conduct was prohibited or permitted by the Policy. Haddad Aff. ¶15. Another student, Teresa Smith also states that she too was not sure what the Policy allowed or did not allow after receiving her first strike. Smith Aff. ¶11. The University's Policy fails to provide fair warning to students as to what conduct is or is not permitted on campus.

2. The University's Policy is vague, because the Policy does not provide explicit standards so arbitrary and discriminatory enforcement is prohibited.

This Court in *City of Chicago* stated, " . . . even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999). The United States District Court for the Western District of Missouri stated that the standards of conduct set for by an educational institution must be relevant to a lawful mission of the institution. *Esteban v. Cent. Mo. State Coll.*, 290 F. Supp. 622, 629 (W.D. Mo. 1968). The Court further mentioned that an institution must evaluate every case with its own particular facts to make a determination. *Id*. at 629.

In *City of Chicago*, Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place". *City of Chi.*, 527 U.S. at 45-6. However, this Court acknowledged that the Chicago ordinance's broad sweep lacked any such guidelines in the ordinance to govern law enforcement officers. *Id*. at 60. This Court stated "[i]n our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." *Id*. at 64.

Furthermore, in *Esteban*, the 8th Circuit Court of Appeals reviewed regulations in place Central Missouri State College on the challenge of vagueness and overbreadth. *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1087 (8th Cir. 1969). The regulations set forth by Central Missouri State College stated that disciplinary actions would be taken against students who did not follow the regulations. *Esteban*, 415 F.2d at 1082. However, the court stated "[i]t is not a lawful mission, process or function of an educational institution to prohibit the exercise of a right guaranteed by the Constitution or by a law of the United States to a member of the academic community." *Esteban*, 290 F. Supp. at 629.

Here, the Policy does not provide explicit standards to ensure arbitrary and discriminatory enforcement is prohibited. Similar to *City of Chicago*, the University's policy's broad sweep does not provide explicit guidelines for those who enforce the policy. The District Court stated that the Policy fails to provide illustrations to guide students, deans, campus security officers or other administrators when determining what students may or may not do, because the Policy does not describe what conduct it prohibits. R. at 8. Even though Mr. Thomas has the duty to enforce the Policy, the Policy's language does not provide campus security with distinct boundaries. Thomas Aff. ¶ 4. Under the disciplinary procedures listed under the University's

Policy, campus security transmits citations for violations of the policy to the Dean of Students. Jt. Stip. App. A. There are no explicit standards for campus security.

Like *Esteban*, the Policy takes disciplinary actions against students. Jt. Stip. App. A. However the University's Policy differs from *Esteban,* because the Policy lacks explicit standards for those who enforce it. For first strike offenses to the Policy, the Dean of Students determines whether a student has materially or substantially infringed upon the rights of others to engage in or listen to expressive activity. Jt. Stip. App. A. If a student receives a second or third strike, a School Hearing Board determines whether the behavior constitutes a violation of the Policy. Jt. Stip. App. A. Since the policy fails to provide explicit standards, it has created a situation that can easily cause overzealous and arbitrary enforcement. R. at 8.

3. The University's Policy is vague, because the Policy prevents the exercise of freedom of speech protected under the First Amendment.

The expression of ideas through printed or spoken words and also symbolic speech, nonverbal "activity . . . sufficiently imbued with elements of communication", are protected under the First Amendment. *Roulette v. City of Seattle,* 97 F.3d 300, 303 (9th Cir. 1996) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). When a statute operates to restrict the exercise of individual freedoms protected by the United States Constitution, unconstitutional vagueness is further aggravated. *Cramp v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 368 U.S. 278, 287 (1961). This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech . . ." *Smith v. Ca.*, 361 U.S. 147, 151 (1959). When a statute clearly implicates freedom of speech, facial vagueness challenges are appropriate. *Cal. Teachers Ass'n v. State Bd. of Educ*., 271 F.3d 1141, 1149 (9th Cir. 2011).

In *Roulette*, the plaintiffs argued that the Seattle ordinance that prohibited people from lying or sitting in public sidewalks in certain commercial areas at a designated time, on its face

violated the First Amendment. *Roulette*, 97 F.3d at 303. In *Roulette*, the Court stated, a facial freedom of speech attack must fail unless, at a minimum, the challenged statute "is directed narrowly and specifically at expression or conduct commonly associated with expression." *Roulette v. City of Seattle,* 97 F.3d 300, 303 (9th Cir. 1996) (quoting *Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750, (1988)). The Court found that sitting or lying on the sidewalk was not commonly associated with expression, therefore, the facial attack on the ordinance was rejected. Furthermore, in *California Teachers* the Court of appeals reviewed Proposition 227, which required all California public schools to teach children in English. *Cal. Teachers Ass'n*, 271 F.3d at 1145. The Court stated, "when First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly, requiring statutes to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles." *Id*. at 1150.

Here, the Policy is vague, because it prevents the exercise of Freedom of Speech protected under the First Amendment. Unlike *Roulette*, Ms. Vega's conduct is commonly associated with expression. Ms. Vega wore a Statue-of-Liberty costume to the protest. Vega Aff. ¶ 15. Ms. Vega also chanted pro-immigration slogans. Vega Aff. ¶ 16. Different from *California Teachers*, the Policy chills Ms. Vegas Speech, which receives First Amendment protection. Ms. Vega contends that she felt it was her rights guaranteed to her by the First Amendment to protest Mr. Drake's speech. Vega Aff. ¶11. Ari Haddad states that she believes that the first strike she received was inappropriate because he was exercising her First Amendment rights. Haddad Aff. . ¶ 12. Ari Haddad decided not to attend Mr. Drake's protest, out of fear of receiving a second strike. *Id*. at ¶ 14. Also, Ms. Smith states that she did not attend the speech by Mr. Drake, even though she felt that she had a right to express her ideas. Smith Aff. ¶ 12. The actions of these students shows the vagueness of the Policy and effectively chills their free speech because of

fear of punishment. This furthers the contention that the Policy chills free speech, therefore making the Policy vague.

B. The University's Policy violates Ms. Vega's First Amendment right to freedom of speech because the Policy is substantially overbroad.

The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chi*., 527 U.S. at 52. Thus, where otherwise valid regulation "sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional." *Dandridge v. Williams*, 397 U.S. 471, 848 (1970).

1. The University's Policy is substantially overbroad because the Policy chills free speech.

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. *U.S. v. Stevens*, 559 U.S. 460, 485 (2010). Accordingly, an overbreadth claimant bears the burden of demonstrating, "from the text of the law and from actual fact," that substantial overbreadth exists. *Va.* v. *Hicks*, 539 U.S. 113, 122 (2003).

In *Doe*, a school's policy on discrimination was overbroad both on its face and as applied because it stifled protected speech, both within and outside classroom discussion. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (1989). The Court stated the university never articulated any principled way to distinguish sanctionable speech from protected speech. *Doe*, 721 F. Supp at 867. Students were necessarily forced to guess whether a comment about a controversial issue would later be found to be sanctionable. *Id*. Furthermore, in *Grayned*, the school's anti-noise ordinance was enforceable only when there was imminent danger of disturbance to the peace and good order of a school. *Grayned*, 408 U.S. at 112. The court emphasized that the critical

"measure is whether normal school activity has been or is about to be disrupted. *Id*. at 112-13. Further, the ordinance gave fair warning and defined boundaries sufficiently distinct for citizens, policemen, juries, and appellate judges. *Id*. at. 114.

Similar to *Doe*, the language of the Policy alone gives no inherent guidance on what kind of conduct would constitute a "material and substantial infringement upon the rights of others to engage or listen." The Policy fails to provide clear notice of what it prohibits. R. at 8. Unlike *Grayned*, the University's Policy has no boundaries. The University's Policy has an outright ban on "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. Smith and Mr. Haddad, both students at the University, state that they were unable to reasonably determine what speech the University's Policy permitted and what speech the Policy prohibited. R. at 8. The conduct the Policy is allowing and it is prohibiting remains undefined and contingent upon another person's reaction to speech. This stifles free expression and Ms. Vega's attempt to disseminate her contributions to the campus chills, rather than protects free speech. R. at 11.

The case at hand is also distinguishable from *Grayned* because Ms. Vega's conduct, including the pro-immigration chants and the wearing of a statue of liberty costume, was conducted on the school's Quad, where other students were playing games, yelling, talking, etc. Jt. Stip. ¶17. It is worth mentioning that the District Court of Arivada professed had more members of "KFT" joined Ms. Vega in protesting the other student organizations' event, they might have created a disruption that "materially and substantially infringed upon the rights of Mr. Drake and his audience to engage in or listen to expressive activity." R. at 11. However, this is not the case before this Court. Therefore, this Court should reverse the decision of the Court of Appeals for the Fourteenth Circuit's and find that because the Policy is overly broad the Policy chills free speech.

2. The University's Policy is substantially overbroad because it prohibits constitutionally protected conduct.

Even if this Court found that the University's Policy is not substantially overbroad, a clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct. *Grayned*, 408 U.S. at 115. A statute may withstand an overbreadth attack "only if as authoritatively construed… it is not susceptible of application to speech… that is protected by the First and Fourteenth Amendment." *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972). If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected, then the ordinance is overly broad and, thus, unconstitutional. *Grayned*, 408 U.S. at 124. The only expressive activities not protected by the First Amendment involve fighting words, obscenity, certain types of libel, and pornographic material featuring minors. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

For instance, in *Brown v. La.*, it was held that the Louisiana statute was unconstitutional, for it was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. *Brown v. La.*, 383 U.S. 131, 141 (1966). The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." *Id*. at 131. Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. *Id*. at 132. That same speech should be perfectly appropriate in the park. *Id*. Further, the Court in assessing whether the statute was overbroad, the crucial question was whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. *Id*. at 133. In *Bair v. Shippensburg Univ.*, students feared that discussion of their "political, social, and/or religious views" were sanctionable, making them "reluctant to advance certain controversial theories or ideas regarding any number of political or social issues." *Bair v. Shippensburg Univ*., 280 F. Supp. 2d 357, 372-

73 (M.D. Pa. 2003) (holding that plaintiffs had met the "irreparable harm" element by demonstrating the speech codes' chilling effect on campus speech).

Similar to *Brown*, Ms. Vega's manner of expression is compatible with the normal activity of the particular place at the particular time. The amphitheater is situated just north of the center of the University's Quad, where students gather to study, talk, listen to music, and engage in sports. Jt. Stip ¶ 11. Ms. Vega surely thought she could convey her perspective on a public walkway in the University's campus Quad. Vega Aff. ¶ 18. Even though the student stopped chanting during Mr. Drake's speech, there was still a lot of noise from the football game and other students gathered on the quad who were not listening to the speech. Taylor Aff. ¶ 7. Further, the campus security officer could hear other voices from students passing by the amphitheater, as well as shouts and cheers from the nearby football game. R. at 6. However, the campus security officer did not stop the football game or tell the fans to quiet down. R. at 8. Similar to *Bair*, the University's Policy forces students to tailor their behavior to ensure they are adhering to the Policy. Vega Aff. ¶ 14. Ms. Vega wore a Statue-of-Liberty costume Vega Aff. ¶ 15. and chanted pro-immigration slogans providing the opposing view Vega Aff. ¶ 16. There is no evidence in the record that Ms. Vega's expressive conduct was no more intrusive on Mr. Drake's speech than the other normal activity being conducted in the Quad. Her words were reportedly distracting to Mr. Drake and his audience, yet there is no indication that Ms. Vega stopped Mr. Drake from speaking or prevented his audient from listening to him. R. at 8-9. This Court has never specified that students lose their First Amendment rights once their voices reach a certain decibel.

Justice White reiterated this Court's longstanding position that hurt feelings alone are not sufficient grounds for removing First Amendment protection from speech." *R.A.V*, 505 U.S. at 414. ("[Such generalized reactions are not sufficient to strip expression of its constitutional

protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.")

Similar to *R.A.V.,* Ms. Vega expressed views that were undoubtedly offensive to Mr. Drake and to those who came to hear his talk. R. at 11. However, Ms. Vega's expressive conduct does not fall into the four categories that are not protected under the First Amendment: fighting words, obscenity, certain types of libel, and pornographic material featuring minors.

Finally, it need be reiterated that the University's Policy does not define what expressive conduct it prohibits, thus putting a blanket prohibition on all expressive conduct that student's showcase on any parts of campus. Further, Ms. Vega did not prevent or stop Mr. Drake from speaking; he was able to carry out his intended speech. This kind of expressive conduct and speech conducted by Ms. Vega did not materially or substantially infringe upon the rights of Mr. Drake, the speaker, nor the rights of his audience. Thus, the University's policy is substantially overbroad and prohibits expressive conduct protected under the First amendment. This Court should reverse the ruling of the Court of Appeals for the Fourteenth Circuit, because the University's Policy prohibits constitutionally protected conduct.

II. Ms. Vega's right to free speech was violated through an improper application of the University's Free Speech Policy.

Even if this Court does find the University's Policy protecting free speech is constitutional on its face, the process by which the Policy was applied by the University to Ms. Vega was nonetheless unconstitutional. The University's policy disallows expressive conduct that "materially and substantially infringes upon the rights of others…". Because Mr. Drake's speech was not interrupted and was still able to be heard by the attendants of the event, it is clear that Vega's protest did not rise to the level of substantial and material infringement of others' rights. It is further made apparent that Officer Thomas showed bias towards Vega during her second protest, causing arbitrary and discriminatory enforcement of the Policy. Finally, the

University argues that *Tinker* supports their decision to suspend Ms. Vega because of her "disruption", but the *Tinker* standard is an inappropriate standard to be applied in this scenario because of the environment in which the protest took place and the age of students who were affected by the protest. Under this analysis, the Policy was unconstitutionally applied to Vega and judgment against her by the Fourteenth Circuit should not be upheld.

A. Ms. Vega's alleged interference did not meet the requisite threshold of interference under the Policy to justify her suspension.

It is clear that the language of the University's Policy was meant to partially mirror the language of the "substantial disruption" test in *Tinker v. Des Moines Indep. Cmty. Sch. Dist. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). That test states that if a student "materially disrupts class work or involves substantial disorder or invasion of the rights of others, [that conduct is] not immunized by the constitutional guarantee of freedom of speech." *Id* at 513. *Tinker* discussed that in order for it to be appropriate for school officials to step in and regulate expression, "it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id* at 509. It finds that so long as a student is not engaging in conduct that "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school", a school should not be given authority to prohibit such contact. *Id*.

Bearing in mind that college students of today are leaders of tomorrow, the court in *Keyishian v. Bd. of Regents* states that our country's future "depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth", and equates college to a "marketplace of ideas", meaning that view from varying perspectives are crucial in developing one's own voice. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). This court goes on to quote *United States v. AP,* stating that in order to have meaningful expression, it must come from "a multitude of tongues, [rather] than through any kind of authoritative selection".

United States v. AP, 52 F.Supp. 362, 372 (S.D.N.Y. 1943). This court in *Texas v. Johnson* furthers these ideals by noting that, "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive of disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989).

Here, it is obvious that Ms. Vega's views and Mr. Drake's views were in complete opposition. But, protecting free speech of one should come at the price of suppressing another. Officer Thomas states that he could still hear Mr. Drake's speech during Vega's protest. Thomas Aff. Add. A. Drake never indicates from his statement that he ever had to stop or disrupt his speech at any time because of Ms. Vega's protest or any other background noise, only that he had troubling focusing. Drake Aff. ¶ 10. He mentions that students directed some of their attention to her, and some attention to him, but never that any students left because they could not hear or could no longer participate. Drake Aff. ¶ 12. He only mentions that he was "less distracted" once Vega was gone. Drake Aff. ¶ 13. The Constitution has never been interpreted to protect your right to not be distracted. Likewise, the Policy should not be interpreted to do so either. Officer Thomas states that because Mr. Putnam called about a "specific disturbance" – Ms. Vega – that was the only source he focused his efforts on. In this scenario, Mr. Putnam was effectively able to dictate how the policy was enforced. If the noise was not enough to even cause the speaker to pause, nor make any students leave or act out, could it really be that substantial or material? It is important that all speakers and listeners, especially those on a college campus, be able to participate in the "marketplace of ideas" and sift through the noise on their own, adopting the views and opinions they choose. They have the right to hear from others and to make informed decisions. They also have the right to disagree with their peers and make that opinion known. This requires hearing both sides of the narrative about any given topic. It

should not matter that Mr. Drake and Ms. Vega were in disagreement. It should not matter that Ms. Vega's protest was directed at Mr. Drake's message. So long as both opinions can be heard, neither are infringing upon the other. The District Court was proper in determining that the Policy was unconstitutionally applied to Ms. Vega for failure to meet the requirements warranting her punishment.

B. Officer Thomas was unfairly bias towards Ms. Vega in his application of the Policy during the protest.

This court in *Healy* acknowledges, "while a college has a legitimate interest in preventing disruption on the campus… a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." *Healy* at 184. Through Officer Thomas' position at the University, he is tasked with making determinations regarding the free speech Policy and enforcing it appropriately. Thomas Aff. ¶ 3, 4. He therefore must understand the difference between a "distraction" and an "infringement". In *Papish v. Bd. Of Curators of Univ. of Missouri*, the court said, "for better or worse, the marketplace of ideas is often a rough and tumble place, but offensive language and disruptive speech is no less valuable than polite and orderly speech." *Papish v. Bd. of Curators of Univ. of* Missouri, 410 U.S. 667, 670 (1973). The purpose of the Arivada statute and the subsequent University Policy was to "safeguard the freedom of expression" and prevent episodes of "shouting down invited speakers". Av. Gen. Stat. § 118-200. If a student did not surpass that threshold of infringement, he/she should not be cited.

Here, Officer Thomas has missed the mark. He was also the citing officer for Ms. Vega's first offense where she was punished for standing up during an event and "shouting down" the speaker. This conduct is clearly impermissible under the University's policy, notwithstanding the question of its constitutionality as a whole. However, the second protest involving Ms. Vega was much different. The record indicates that her conduct during the protest in question was scaled

back in many ways. She was alone, which in itself lessens the effect a protest would have because it would be a much lower volume. She also stood 10 feet away from the back of the amphitheater where the speech was being given, which again decreases the potential "disruption" and effect. It is clear that Ms. Vega was still uncertain as to what the Policy did and did not allow, she had taken steps to change the way she chose to protest in an effort to be more respectful and compliant with the policy. However, it appears that none of her efforts made any difference as Officer Thomas disregarded these changes in action during his analysis of the situation. Thomas states that when he saw Ms. Vega at Mr. Drake's speech, he remembered her as one of the students he had cited previously under the University's Policy. Thomas Aff. ¶ 9. This clearly clouded his judgment. The facts of his own statement show that Vega was not "materially and substantially" disrupting Mr. Drake's speech, but merely voicing her opinions at the same time in a permissible, even if slightly "distracting" way. And yet, because he knew who Vega was and what she stood for, he decided to cite her anyways because she was the reason for the call. He easily could have cited any of the "noise making" events occurring at that time, but he chose her. Each instance of alleged misconduct should be analyzed individually, and not influenced by any previous knowledge of the accused. Here it was not. Had a different officer responded to the call, the citation would likely have not been issued. This is unconstitutional discriminatory and arbitrary enforcement of the school's Policy due to Officer Thomas' bias, and should not be upheld.

C. *Tinker* is an inappropriate standard to be applied under these circumstances.

In *Tinker*, students were wrongfully suspended from a K-12 public school for wearing arm bands that protested the Vietnam War. 393 U.S. 503 (1969). What came from that case was the "*Tinker* standard" as it is commonly called, which gives school officials relatively broad authority to regulate speech in public schools and discipline students for their expression if it

creates a "substantial disruption" in academic settings. *Id* at 513. However, outside of this form of "substantial disruption test" students are still "People" in text of the First Amendment and are afforded the right to freedom of expression. *Id* at 511. *Tinker* has been interpreted to apply to K-12 public schools in their key learning environments. The University argues that because they are an educational institution, their Policy prohibiting material and substantial infringement is acceptable because it is supported by *Tinker* in the "appropriate discipline in the operation of the school". *Tinker* at 509. However, outside of those settings, courts have yet to give school officials authority to regulate and discipline students' free speech that did not substantially interfere with the "educational process". The University failed to show just cause for applying *Tinker* to a group of adults on a college campus while attending a student-led event. *Tinker* is a wholly inappropriate standard for these conditions and therefore should not be applied.

1. *Tinker* is inapplicable because the environment where the protest took place was recreational and social in nature, not academic.

This court in *Tinker* emphasizes that free speech protection does not remain within the classroom of a school. "When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects…" so long as his expression does impede the maintenance of order within the school. 393 U.S. 503, 512-513. *Healy* again reminds us that it is important to avoid "disruptive interference with the educational process". 408 U.S. 169, 170 (1972). Outside of an interference with a student's ability to learn however, is not within the authority of a school to regulate.

There is no question that the *Tinker* standard has long been the authority for regulating speech and expression in classrooms across the Nation since the decision was made. However, unlike *Tinker* and the cases that have followed in its footsteps, we are dealing with a social event put on by a student organization rather than an academic setting or a school sanctioned event. This speech wasn't happening in a classroom, but a common social area. The record does not

reflect the presence of any school authority, staff, faculty, administration, etc. *Tinker* has never been applied in this setting to date, and it should not be applied today either. Ms. Vega's protest did not frustrate any student's ability to learn their curriculum or the educational process. Most will acknowledge that college that students are learning no matter where they are, from the moment they wake up until the moment they go to sleep, but there should be boundaries as to how much of that learning process a University can control, and what parts are left to the "People". To apply *Tinker* to Ms. Vega's situation would be a manipulation of the law and give power to school officials that is certainly too far out of their constitutional reach.

2. ***Tinker*** **is inapplicable because those impacted by the expressive conduct were adults and should be afforded the right to broader free expression.**

This Court in *Healy* tells us that colleges and university students are entitled to the "widest latitude of free expression". 408 U.S. 169, 171. In *Bethel Sch. Dist. No. 403 v. Fraser*, this court found that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings". *Bethel Sch. Dist. No. 403 v. Fraser*, 403 U.S. 675, 683 (1986). In this context, this court was discussing public schools providing elementary and secondary educations. Because students in those settings are still "children" under the age of 18 and not yet adults, they may require additional guidance. There is also acknowledgement for a need for order within public schools. *Healy* at 180. But, as this court in *Healy* continues, it reminds us that this need for order does not mean that First Amendment protection will "apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James,* 408 U.S. 168*,* 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). This court, and other courts across the nation have consistently held that parties do not have to agree in order to speak or be heard.

> "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But the Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker* at 508-509.

As college students complete their degrees, grow further into adulthood, and develop their own opinions, they need to be given the freedom to hear what has been shielded from them in their elementary and secondary educations. *Tinker* applies, and has only ever been applied to, K-12 public institutions. It has never been applied in this type of First Amendment situation involving adults in a university, where the structure is much different. We are not dealing with children - these are young adults capable of filtering through information from the **"**marketplace of ideas" and forming their own educated opinions. They do not require such restrictions on speech and deserve the right to choose what they want to adopt or ignore. To apply Tinker in this situation would be wholly improper.

CONCLUSION

For the foregoing reasons, Ms. Vega respectfully requests this Court to reverse the decision of the Court of Appeals for the Fourteenth Circuit and find that the University's Policy is unconstitutional both on its face and as applied to Ms. Vega's First Amendment rights guaranteed by the Constitution.

Dated: January 31, 2019

Respectfully Submitted,

Team 13

ATTORNEYS FOR PETITIONER

BRIEF CERTIFICATE

i. Team 13's work product contained in all copies of our team's brief is in fact the work product of the team members;

ii. Team 13 team has complied fully with our school's governing honor code, and

iii. Team 13 acknowledges that our team has complied with all Rules of the Competition.