No. 18-1234

IN THE

Supreme Court of the United States

VALENTINA MARIA VEGA,
Petitioner,

v.

JONATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA,
Respondent.

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

BRIEF FOR PETITIONER

Team 8
Counsel for Petitioner

QUESTIONS PRESENTED

I. Is a University's mandatory, punitive Free Speech Policy that restricts protected expressive conduct campus-wide unconstitutionally vague and substantially overbroad?

II. Was Ms. Vega's peaceful demonstration, that did not infringe on others' rights to hear nor participate in expressive activity, and did not interfere with the operations of the University, a material and substantial violation of the Free Speech Policy under the First Amendment?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at R.42 (No. 18-1757). The opinion of the United States District Court for the District of Arivada is reported at R.01 (No. 18-1757).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

The United States Court of Appeals for the Fourteenth Circuit's holding as to the constitutionality of the Campus Free Speech Policy both facially and as applied to Ms. Vega is a question of law reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

Statement of Facts

Valentina Vega once dreamt of going to law school to "continue [her] advocacy efforts as an immigration lawyer" to promote "respect for the rights and dignity of immigrants in the

United States." Vega Aff. ¶ 3. On September 12, 2017, Ms. Vega, then a sophomore at the University of Arivada studying sociology and pre-law, was suspended for violating the Campus Free Speech Policy (Policy) during an anti-immigration speech on September 5, 2017.[1] R.03.

Ms. Vega was the President of the University's chapter of Keep Families Together (KFT), a national immigrants' rights student organization that has been part of the University for five years. R.03; Jt. Stip. ¶ 6. Ms. Vega, the daughter of Hondaraguan-American immigrants, effectuates KFT's mission of "advocate[ing] for immigrant's (sic) rights through on-campus and community advocacy events." R.03. KFT had been an active, nonviolent group on campus through protests and rallies before the enactment of the University's Policy. R.03.

A. The Arivada Free Speech Act.

On June 1, 2017, Arivada State enacted the "Free Speech in Education Act of 2017" (Act), which required the Regents of all higher education state institutions to "promulgate a policy to protect free speech on campus within three months of the [Act's] effective date." R.02; Av. Gen. Stat. § 118-200. The Act was to "safeguard the freedom of expression on campus," and motivated by the Legislature's declaration that "episodes of shouting down invited speakers on college and university campuses are nation-wide phenomena." Av. Gen. Stat. § 118-200.

B. The University's Free Speech Policy.

On August 1, 2017, The University adopted its Campus Free Speech Policy to fulfill its "obligations under the Arivada . . . Act." Jt. Stip. App. A. The Policy imposes increasing sanctions on a student's "[e]xpressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" on campus. Jt. Stip. App. A.

[1] University President Jonathan Jones and the Regents of the University of Arivada are referred to collectively as the University or Respondent.

The University electronically distributed the Policy to all new and current students as part of the Student Handbook in August, 2017. Jt. Stip. ¶ 4. On August 27, 2017, Ms. Vega signed the online Policy Statement acknowledging that she had read and agreed to abide by the University's policies, a mandatory document students must sign before being permitted to return to or continue in classes. Jt. Stip. ¶ 3, 5.

University Campus Safety officers have the authority to issue citations upon students they deem to have violated the policy. Jt. Stip. App. A. The Dean of Students then reviews and investigates the appropriateness of the citations. R.03. The Dean determines whether a student has materially and substantially infringed upon the rights of another on the basis of the review and investigation. Jt. Stip. App. A. If the Dean determines the citation appropriate, the student receives a strike. Jt. Stip. App. A. The Policy's sanctions quickly escalate in severity: a first strike results in a warning that the student violated the Policy, a second strike results in a suspension for the remainder of that semester, and a third strike results in the student's expulsion. Jt. Stip. App. A. Strikes are placed on a student's record. Jt. Stip. App. A.

Though a student is only entitled to an informal disciplinary hearing when he or she receives a citation that may result in a first strike, a student is entitled to a formal disciplinary hearing before the School Hearing Board (Hearing Board) when they receive a citation that may result in a second or third strike. Jt. Stip. App. A. At the formal hearing, students are presented with notice, and have the rights to present a defense, to counsel, to review the evidence, to confront witnesses, to a decision by an impartial arbitrator, and to appeal. Jt. Stip. App. A.

C. The August 31, 2017 Incident.

On August 31, 2017, Ms. Vega, Teresa Smith, Ari Haddad and seven other KFT members attended a student-organization-run anti-immigration rally hosted by Students for

Defensible Borders (SDB). R.04. KFT attended the indoor rally in an effort to "make sure that other students understand the pro-immigrant perspective." R.03. Ms. Vega and other KFT members made clear their beliefs by chanting during the rally, standing on chairs, and attempting to shout down the speaker. R.04. They were able to "drown[] out" most of the speech. R.04.

Campus Safety was called to the rally by SDB's leaders. R.04. Campus Safety Officer Michael Thomas issued citations to all ten KFT members and notified the Dean of Students, Louise Winters, of the citations. R.04. After the investigation and informal review process, Dean Winters issued Ms. Vega, Ms. Smith, and Mr. Haddad all first strikes on September 2, 2017, determining that they had all violated the Policy by "materially and substantially infringing upon the rights of other to engage in or listen to expressive activity." R.04.

D. The September 5, 2017 Incident.

There is no material dispute as to the basic events of September 5, 2017. Jt. Stip. The University's chapter of American Students for America (ASFA) invited Samuel Payne Drake, the Executive Director of Stop Immigration Now (SIN), to deliver a speech at the University on September 5, 2017 from noon to three p.m. Jt. Stip. ¶ 7. SIN "advocate[s] for the closure of the United States borders to all immigrants" and "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." R.04.

Theodore Putnam, the student President of ASFA, did not obtain a permit to host the event, but did submit an "Event and Space Reservation Application" to reserve the University's Emerson Amphitheater (Amphitheater) to the University's Campus Events Office. Jt. Stip. ¶ 8. The Amphitheater is "just north of the center of the University's 'Quad,' a sizeable green space located in the middle of the University's campus." Jt. Stip. ¶ 8, 10. Students frequent the Quad

for leisure, study, sports, games, music, and discussion and it is surrounded by student housing, facilities, open seating, and multiple intersecting walkways. Jt. Stip. ¶¶ 10-11.

Student organizations can reserve the Amphitheater for small-scale events. Jt. Stip. ¶ 12. University approval is not required for an event operated by a recognized student organization where the expected attendance is fewer than 75 people. Jt. Stip. ¶ 8. The Amphitheater's front platform is surrounded by wooden benches arranged in a semi-circle. Jt. Stip. ¶ 13. There is seating for up to 100 spectators, but, "after the last row of benches, there is no distinction between the Amphitheater and the rest of the surrounding green space of the Quad," including the walkway approximately ten feet behind the last row of benches. R.05; Jt. Stip. ¶¶ 13-15.

At 1:15 p.m. on September 5, approximately 35 people gathered for Mr. Drake's speech in the amphitheater. R.05. Mr. Drake, surrounded by ASFA offers, stood on a platform and "decried" immigration and called for the immediate closure of all borders and deportation of "every last . . . illegal alien[]." R.05. Mr. Drake reiterated ASFA's rhetoric that "illegal aliens" are the main cause of violent and drug crime in the United States and take jobs from Americans and destroy American ideals. R.05. As students attempted to enjoy "fresco lunches," acoustic guitar music, and intermural football, Mr. Drake encouraged the United States to build a wall, keep illegal immigrants out, and "make America American again." R.05.

Ms. Vega protested Mr. Drake's anti-immigration speech. Vega Aff. ¶ 10. Ms. Vega had planned to attend with other members of KFT, but they – Mr. Haddad and Ms. Smith, among others – did not participate "for fear of suspension." Vega Aff. ¶ 11. Despite Ms. Vega's hesitance and fear of being issued another Policy citation, she "believed [she] was entitled to protest Mr. Duke's (sic) speech because of [her] First Amendment rights." Vega Aff. ¶ 11.

Ms. Vega, in a Statue of Liberty costume, stood at the edge of the amphitheater approximately ten feet behind its last row of seating on the "edge of the paved nearby walkway frequented by many other students." Vega Aff. ¶ 13, 15; R.05. In response to Mr. Drake's call to build a wall, Ms. Vega began chanting pro-immigration values, including to "[k]eep families together." R.05. Mr. Putnam immediately reported Ms. Vega to Campus Safety, decrying her as "obnoxious . . . crazy . . . [and] distracting." R.05.

Officer Thomas arrived at the Amphitheater at approximately 1:30 p.m. and encountered Ms. Vega's "periphery" protest. R.06. He entered the Amphitheater and determined he could still hear Mr. Drake speak – as well as noise from a nearby football game – despite any noise from Ms. Vega. R.06. Officer Thomas then determined that Ms. Vega alone was "more distracting than the [other] random background noise" in the Quad. R.06. Officer Thomas, who recognized Ms. Vega from the August 31 interaction, issued her a Policy citation. R.06.

Officer Thomas communicated the citation to Dean Winters, who conducted her own research and investigation. R.06. On September 12, 2017, Ms. Vega had a hearing before the Hearing Board and was suspended for violating the Policy. R.01.

Procedural History

On October 1, 2017, after unsuccessfully exhausting her right to appeal, Ms. Vega sued University President Jonathan Jones and the University's Board of Regents on the grounds that her suspension violated her First Amendment guaranteed freedom of speech. R.01; R.06. Ms. Vega challenged the constitutionality of the University's Policy both facially and as applied. R.01. Ms. Vega sought a declaration requiring the University to immediately reverse her suspension and strike any mention of it or any disciplinary proceedings from her academic

record, in fear that the suspension will continue to harm her reputation and eviscerate her chances of getting accepted into law school. R.02; R.02 fn. 2.

On December 15, 2017, Ms. Vega and the University filed cross motions for summary judgment. R.02. The District Court for the District of Arivada found in favor for Ms. Vega on both of the disputed legal issues. R.02. The Policy was deemed unconstitutionally vague and substantially overbroad, having a chilling effect on student speech. R.07; R.09. Furthermore, the Policy was unconstitutional as applied to Ms. Vega because her speech did not "materially and substantially infringe upon the rights of others." R.02.

President Jones and the University's Board of Regents appealed the decision. R.42. The United States Court of Appeals for the Fourteenth Circuit reversed the District Court's findings on November 1, 2018. R.43. Ms. Vega filed a petition for writ of certiorari, which this Court granted on both the facial and as applied challenges. R.54

SUMMARY OF ARGUMENT

This Court should reverse the Fourteenth Circuit and recognize that not only does the University's Free Speech Policy facially violate the First Amendment of the Constitution, but as applied to Ms. Vega, it contradicts the purpose and protections of the First Amendment.

This Court should affirm the district court and hold the Policy facially unconstitutional. First, the Policy is impermissible vague because it does not make a reasonable person aware what conduct is and is not permitted and risks arbitrary enforcement. Second, the Policy is substantially overbroad because it sweeps within its ambit otherwise constitutionally protected conduct. Finally, the Fourteenth Circuit erred in analyzing the Policy in light of the *Tinker* doctrine because *Tinker* does not apply to higher education, and, even if the Court were to apply *Tinker*, such an analysis does not cure the Policy's otherwise unconstitutionality.

This Court should affirm the district court and hold the Policy unconstitutional as applied to Ms. Vega. Even if this Court were to extend *Tinker* to university campuses, Ms. Vega's actions were not in violation of the Policy. First, her actions did not materially nor substantially interfere with the operations of the University. Second, her actions did not materially nor substantially interfere with the rights of others to engage in or listen to expressive activity as Mr. Drake's speech was able to be both given and heard.

ARGUMENT

I. THE UNIVERSITY'S FREE SPEECH POLICY IS FACIALLY UNCONSTITUIONAL BECAUSE IT IS SO IMPERMISSIBLY VAGUE AND SUBSTANTIALLY OVERBROAD AS TO RESTRICT STUDENTS' RIGHT TO FREEDOM OF EXPRESSION.

"Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This prohibition applies to state institutions of higher education, as "[u]niversities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972) (extending the First Amendment to the states and state institutions via the Fourteenth Amendment). State colleges and universities must not enact policies that restrict students' First Amendment rights to free expression. Such restrictions include the promulgation of policies that are unconstitutionally vague and substantially overbroad, for such policies infringe upon constitutionally protected areas of expression.

The University's Campus Free Speech Policy is facially unconstitutional. First, the Policy is impermissibly vague because it does not inform reasonable people what speech is and is not permissible and risks arbitrary enforcement. Second, the Policy is substantially overbroad because it prohibits constitutionally protected conduct. Accordingly, the Policy is facially unconstitutional. Finally, the University and the Fourteenth Circuit erroneously relied on this

Court's inapplicable precedent in a failed effort to justify and to cure the Policy's unconstitutional vagueness and substantial overbreadth.

A. Universities Are Limited in Restricting Student Conduct by the First Amendment's Vagueness and Overbreadth Doctrines.

Universities and institutions of higher education are so critical to the development of free expression and critical thought that their importance cannot be overstated. In recognizing their importance to the continued growth and prospering of the First Amendment, this Court restricted the government's "ability to control speech" within university settings "by the vagueness and overbreadth doctrines of the First Amendment." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

B. The University's Policy Is Impermissibly Vague Because It Does Not Make Reasonable Students Aware What Forms of Expression Are Permissible and Risks Arbitrary Enforcement.

The vagueness doctrine is motivated by due process concerns: "[i]t is a basic principle of due process 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). The *Grayned* Court noted three ways vague laws "offend . . . important values." *Id*. First, "vague laws may trap the innocent by not providing fair warning." *Id*. Second, laws without "explicit standards for those who apply them" risk arbitrary and discriminatory enforcement. *Id*. Third, if a vague law encroaches on and prohibits the exercise of the First Amendment, "it 'operates to inhibit the exercise of [those] freedoms'" in an overbroad, chilling manner. *Id*. at 109.

1. The Policy does not provide notice of what conduct is and is not permissible.

Laws must be sufficiently clear so that persons may know if they are subject to a law and how to comply with it. *Grayned*, 408 U.S. at 109; *see also Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (vague laws impermissibly force "men of common intelligence [to] necessarily guess at its meaning"); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v.*

L. Cohen Grocery Co., 255 U.S. 81 (1921). This Court should look to the language of the Policy when determining if it is sufficiently clear. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). In *Coates*, this Court held that an ordinance that criminalized three or more people gathering on a sidewalk in an "annoying" manner was facially unconstitutional on vagueness and overbreadth grounds. *Id.* The ordinance was vague because "[c]onduct that annoys some people does not annoy others." *Id*. The ordinance was "vague, not in the sense that it requires a person to conform [their] conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id*.

Here, the district court correctly recognized that the University's Policy fails a vagueness inquiry. R.08. In effect, the Policy "fails to provide notice of what it prohibits." R.08. As in *Coates*, the Policy is impermissibly vague because it subjects the right of free expression to an "unascertainable standard." 402 U.S. at 614. The Policy restricts conduct that "materially and substantially infringes" upon another's right to engage in or listen to expressive activity. Jt. Stip. App. A. The Policy does not provide examples. It does not define material nor substantial nor infringement. Rather, it immediately proceeds to describing the disciplinary procedures to a Policy violation. Jt. Stip., App. A.

Policies like the University's need clear terms so that students may fully effectuate their First Amendment rights within the parameters of a legitimate regulation. The Policy's impermissible vagueness can be seen through the actions of the students who are required to abide by its rules. Outspoken advocates like Ms. Smith and Mr. Haddad felt compelled to limit their expressive activity after receiving their first citations. Smith Aff. ¶ 2; Haddad Aff. ¶ 2. Ms. Smith was "not sure what the Policy allowed and did not allow," and "refused to attend the speech given by Mr. Drake," even though she "felt as though [she] had a right to express [her]

views" out of fear of a second strike. Smith Aff. ¶ 11-12. Mr. Haddad was similarly unclear "as to what conduct was prohibited by the University's Policy and what conduct was permitted," and "decided not to attend the planned protest, out of fear." Haddad Aff. ¶ 14-15.

Similarly, Ms. Vega was eager to exercise both her First Amendment rights in the campus Quad and to offer support to other students who may have also been offended by Mr. Drake's speech. Vega Aff. ¶ 11, 16. Even after being made slightly more aware of the purported parameters of the Policy during a disciplinary meeting, Ms. Vega was still under the impression that she could "convey [her] perspective on a public walkway" in the Quad. Vega Aff. ¶ 18. The Policy's lack of clear terms made it so that students of "common intelligence" had to guess at its meaning and fear a misunderstanding. *Connally*, 269 U.S. at 391.

2. The Policy lacks clear standards for enforcement.

The University may enact permissible regulations "with reasonable specificity toward the conduct to be prohibited," but it "cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend on whether or not a policeman" – or president of a student organization – "is annoyed." *Coates*, 402 U.S. at 614 (citing *Gregory v. Chicago*, 394 U.S. 111, 118, 124-25 (1969) (Black, J., concurring)).

The Policy lends itself to arbitrary enforcement. It does not "indicate upon whose sensitivity a violation does depend." *Coates*, 402 U.S. at 613. Officers like Officer Thomas or students like Mr. Putnam become the arbiters of appropriate expression. Officer Thomas cited Ms. Vega because Mr. Putnam reported her, a known opponent of ASFA's anti-immigration policies, despite the fact that "other sources of random background noise" were distracting from Mr. Drake's speech. Thomas Aff. ¶ 8; Putnam Aff. ¶ 8. The Policy allows students and security to pick and choose impermissible speech based on the opinions of the few, rather than protect

and foster the First Amendment needs of the many. What may be a substantial and material infringement to one student might not register as distracting to another student, but, as happened to Ms. Vega here, the allegedly offending student would be nonetheless punished.

The Policy's vague, amorphous, threatening language creates a pattern and environment of punishment, restriction, and fear. Accordingly, the Policy is impermissibly vague.

C. The University's Policy Is Substantially Overbroad Because It Targets and Restricts Constitutionally Protected Conduct.

A law is unconstitutionally overbroad when it "prohibits constitutionally protected conduct," and "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Grayned*, 408 U.S. at 114. Vague laws risk unconstitutional overbreadth when they lack clear terms and risk arbitrary enforcement in a manner that may chill free expression. *Coates*, 402 U.S. at 615; *see also Grayned*, 408 U.S. at 115 ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct.") (internal citations omitted).

An overbreadth analysis begins with interpreting the challenged policy or statute. *United States v. Williams*, 553 U.S. 285, 293 (2008). The question is whether the ordinance "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned*, 408 U.S. at 115. A law will be struck only if it is *substantially* overbroad. *Members of City Council of City of L.A v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

This Court has not yet defined what it means to be substantial, however the *Williams* Court reaffirmed the principle that the "overbreadth [must] be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." 553 U.S. at 292 (referencing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Thus, the Court should look at whether, in relation to the regulatable

conduct within the ambit of an ordinance, it sweeps within it a proportionally substantial amount of constitutionally protected conduct. *Broadrick*, 413 U.S. at 616, n.14.

As in *Coates*, the Policy here also "violates the constitutional right" of free expression through its substantial overbreadth. 402 U.S. at 615. The *Coates* Court began with an analysis of the ordinance's "annoy" language. *Id*. at 612. Though it could be argued that "the ordinance [was] broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit," the problem was that the ordinance "authorized the punishment of constitutionally protected conduct." *Id*. at 614. The city could prevent people from "engaging in countless . . . forms of antisocial conduct," but it could only do that "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited," not through "an ordinance whose violation may entirely depend on whether or not a policeman is annoyed." *Id*. (citing *Gregory*, 394 U.S. at 118, 124-25). The city could not violate the freedoms of assembly and association in an effort to regulate permissible conduct. *Coates*, 402 U.S. at 615. The problem was that the ordinance was "aimed directly at activity protected by the Constitution," and overbroad in relation to the regulatable conduct. *Id*. at 616.

1. The language of the Policy targets constitutionally protected conduct.

As did the Court in *Coates*, the Court should here begin with the language of the Policy. 402 U.S. at 614. The Policy specifically prohibits "[e]xpressive conduct," which is protected by the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (the government cannot "proscribe particular conduct *because* it has expressive elements"); Jt. Stip. App. A. Thus, as in *Coates*, the Policy is directed at a constitutionally protected area of expression. *Coates*, 402 U.S. at 616; *see generally Virginia v. Hicks*, 539 U.S. 113, 124 (2003) ("Rarely, if ever, will an

overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech.").

2. The Policy is substantially overbroad in relation to the regulatable conduct it addresses.

Though there are forms of expressive conduct that do not fall within the First Amendment's protections, the Policy makes no attempt to differentiate. *See United States v. Stevens*, 559 U.S. 460, 460 (2010) (the "First Amendment has permitted restrictions on a few historic categories of speech . . . including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct'") (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, the policy necessary sweeps within its ambit otherwise constitutionally protected conduct.

The key inquiry here is the scope of the invasion of protected First Amendment activity, and the context: "[t]he nature of a place, 'the pattern of its normal activities, dictate the kind of regulations of time, place, and manner that are reasonable.'" *Grayned*, 408 U.S. at 116 (citing Charles Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969)). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116. Further, "in assessing the reasonableness of a regulation," this Court's "cases make clear that . . . [it] must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest." *Id*. at 116-17.

The Policy is substantially overbroad in relation to the regulatable expression it restricts. The Policy purports to be in fulfillment of Arivda's Free Speech in Education Act, which was motivated by the alleged "nation-wide phenomena" of "shouting down invited speakers on college and university campuses." Av. Gen. Stat. § 118; Jt. Stip., App. A. In reality, the Policy is motivated by a desire for politeness, rather than protection of free speech. It applies the same

conduct standards to the classroom as it would appear to apply to activity between dormmates. Jt. Stip. App. A. The Policy reaches conduct that is *not* "basically incompatible with the normal activity of a particular place at a particular time," and conduct that is not at all related to "shouting down." *Grayned*, 408 U.S. at 116. As established in the Record below, not only did the Policy reach Ms. Vega's permissible protest, but it also could have reached any other student engaged in expressive conduct deemed to be a disruption. R.11.

The Policy is not at all narrowly tailored. The University attempted to silent expressive conduct broadly across the entire campus. "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180-81 (citing *Keyishian v. Bd. of Regents of the State of N.Y.*, 385 U.S. 589, 603 (1967)). The dissemination of language or ideas that are offensive "on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). Rather, the First Amendment cannot be restricted "simply because society finds the idea[s] itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. The University cannot sacrifice the First Amendment for politeness.

In attempting to create a culture of politeness, Policy clearly sweeps within its outstretched arms conduct that is otherwise protected by the First Amendment. In a misguided attempt to balance the rights of students to both speak and listen, the University's Policy, in reality, has a chilling effect on students' expressive conduct because it prohibits and discourages students' ability to participate in protected expression. As in *Coates*, the Policy "makes a crime out of what under the Constitution cannot be a crime." 402 U.S. at 616. Accordingly, the Policy is substantially overbroad, as well as unconstitutionally vague.

D. *Tinker* Does Not Apply to Institutions of Higher Education and Thus Cannot Cure the Policy's Otherwise Unconstitutional Vagueness and Substantial Overbreadth.

In the vague and overbreadth analysis, courts have looked to whether they can apply a limiting construction to the statute, which would alleviate the facial invalidity concerns.[2] *Hicks*, 539 U.S. at 118-19 (citing *Broadrick*, 413 U.S. at 615). The University argues that analyzing the Policy in light of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), and its progeny justifies the otherwise facially unconstitutional Policy. That is not the case. First, *Tinker* does not apply to institutions of higher education. Second, even if it did, *Tinker* does not make the Policy's language any less unconstitutional.

1. *Tinker* and its progeny do not and should not apply to higher education.

The Fourteenth Circuit noted that "[t]here is a significant question 'whether the First Amendment standards developed for secondary and primary schools apply to universities.'" R.48 (citing Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 28 (2008)). However, "It can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate," particularly in higher education. *Tinker*, 393 U.S. at 506. Rather, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The notion that a university student loses their First Amendment rights as soon as they step on to campus is deeply flawed.

The status of university students' First Amendment rights is muddled at best, and unconstitutionally confusing at worst. *Tinker* and its progeny can be summarized as follows:

[2] "The showing that a law punishes a 'substantial' amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep', suffices to invalidate *all* enforcement of that law, 'unless and until a limiting construction . . . so narrows as to remove the seeming threat or deterrence to constitutionally protected expression."

> Under [*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)], a school may prohibit lewd, vulgar, or profane language on school property or at school-sanctioned events. Under [*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)], a school may regulate school-sponsored speech on the basis of any legitimate pedagogical concern. Under [*Morse v. Frederick*, 551 U.S. 393 (2007)], a school may regulate speech that poses a direct threat to the safety of students. "Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."

Meggen Lindsay, Note, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students--Tatro v. University of Minnesota*, 38 WM. MITCHELL L. REV. 1470, 1477 (2012) (referencing *Tinker's* substantial disruption test; citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)). Neither *Fraser*, *Hazelwood*, nor *Morse* applied *Tinker*'s substantial disruption standard. Lindsay, *supra*, *Tinker Goes to College*, at 1477. In fact, *Tinker* is limited to primary and secondary education, and has never been applied by this Court in the context of higher education. *Id*. at 1480.

Given that the "mode of analysis set forth in *Tinker* is not absolute," there is great disparity in the way circuit courts apply *Tinker* to school speech, if at all. *Morse*, 551 U.S. at 405. The Third Circuit, for example, has "rejected the applicability of secondary school standards to the university setting." Sarabyn, *supra*, *Resolving the Federal Circuit Split*, at 49 (referencing *DeJohn v. Temple University*, 537 F.3d 301, 315 (3rd Cir. 2008)). The Second and Sixth Circuits "have afforded university students a higher level of free speech protection" than primary and secondary students. Sarabyn, *supra*, *Resolving the Federal Circuit Split*, at 48 (referencing *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001)). Finally, only a few circuits have stuck to *Tinker*'s framework in the university setting. Sarabyn, *supra*, *Resolving the Federal Circuit Split*, at 45-47 (referencing *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (*Tinker* governs on-campus student speech); *Ala.*

Student Part v. Student Gov't Ass's of the Univ. of Ala., 867 F.2d 1344 (11th Cir. 1989) (applying *Hazelwood, Tinker*, and *Fraser* to on campus student speech)).

The appropriate analysis is that like the Third Circuit's. The Third Circuit correctly recognized that institutions of higher education do not have the same *in loco parentis* justification that primary and secondary intuitions may have, and thus are not justified in proscribing speech. Sarabyn, *supra*, *Resolving the Federal Circuit Split*, at 49. This Court should similarly recognize the need to protect and encourage open and "unbridled dialogue" on university campuses. *Id*. at 28.

This Court has declined to extend *Tinker* to higher education because of the philosophical differences between primary schools and higher education. Primary students are taught collective principles of society and their impressionable minds are protected from sensitive material. Universities aim to better society and encourage intellectual growth. Lindsay, *supra*, *Tinker Goes to College*, at 1481-82. Unlike primary education, college administers do not stand in for students' parents. *See generally Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

This Court has emphasized an "unbridled dialogue as an essential component of the academic endeavor, stands [. . .] in sharp contrast to the functions the Court has assigned to primary and secondary schools, which are to keep students safe and cultivate their moral and civic character." Sarabyn, *supra*, *Resolving the Federal Circuit Split*, at 28. Extending *Tinker* and its progeny to college campuses risks restricting those "unbridled dialogue[s]." *Id*. First, consider the effect this Policy had on Ms. Vega. All attendees of the September 5, 2017 event were adults and experienced nothing more than discomfort as a result of her actions. R.24; R.25; R.28; R.32. Ms. Vega, on the other hand, now faces expulsion and challenges baring her admission to law school. R.39. The restriction of unbridled dialogue had direct and severe

consequences. Second, consider, Mary Beth Tinker, who was 13 when she wore an anti-Vietnam arm band to school. *About the Tinker Tour*, Tinker Tour USA, https://tinkertourusa.org/about/tinkertour/ (last visited Jan. 29, 2019). Ms. Tinker now embarks on the "Tinker Tour," wherein she travels to universities and "promote[s] youth voices [and] free speech." *Id*.; *see also Living History With Mary Beth Tinker*, Newseum, http://www.newseum.org/2015/06/18/first-amendment-class-mary-beth-tinker/ (last visited Jan. 29, 2019). If *Tinker* and its progeny go to college, then Ms. Tinker may not be able to continue speaking at colleges, if that college had a similar policy that restricted expressive conduct the administration disagrees with. Ms. Vega, and Ms. Tinker, ironically, exemplify why *Tinker*'s permissive restrictions cannot and should not extend to universities.

2. Even if this Court were to analyze the Policy in light of *Tinker* and its progeny, the Policy is nonetheless unconstitutional.

Even if this Court construes the Policy in the eyes of *Tinker*, the Policy remains facially unconstitutional. First, the terms of the Policy remain impermissibly vague. Second, the Policy still reaches protected conduct because it is not limited to classroom or school sponsored speech.

The court and the University below relied on *Grayned*'s *Tinker* analysis. *See Grayned*, 408 U.S. at 117. There, the Court "considered the question of how to accommodate First Amendment rights with the 'special characteristics of the school environment.'" *Id*. (citing *Tinker*, 393 U.S. at 506). The Court upheld an ordinance prohibited expressive activity that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Grayed*, 408 U.S. at 118 (citing *Tinker*, 393 U.S. at 513). The ordinance went "no further than *Tinker* says a municipality may go to prevent interference with its schools." *Grayned*, 408 U.S. at 119 (holding the ordinance was narrowly tailored to serve a compelling interest in "having an undisrupted school session conducive to the students' learning").

This reasoning, however, does not apply to the case before the Court. The University argues that the Policy's language is "virtually identical to the standard established in *Tinker*," and thus constitutional. R.14. The University errs in two ways. First, the Policy's language does not mirror the *Tinker* language and, second, the Policy still reaches protected conduct.

The "*Tinker* standard specifically address[ed] situations in which the 'forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,'' or results in the 'invasion of the rights of others." R.14 (citing *Tinker*, 393 U.S. at 509, 513). The Policy here is not just directed at conduct that would interfere with the operation of a school. It is directed at *all* expressive conduct. Jt. Stip. App. A. Further, the Policy refers to the *infringement* – not invasion – of the rights of others. Jt. Stip. App. A.

Unlike *Grayned*, the Policy goes much "further than *Tinker* says" a school may go "to prevent interference with" the school and is not narrowly tailored. 408 U.S. at 119. The Policy's language need not be the exact same as *Tinker*'s. What must remain, however, is *Tinker*'s permissible impact. However, the Policy "essentially guts the *Tinker* standard by removing its operational foundation and relaxing the notion of invading or colliding with the rights of others." R.14. It goes beyond preventing interference with the operation of a school, and it confuses infringement with invasion, when an invasion implies a complete and utter eclipse. The court below mischaracterized the Policy as "flexible." R.50. It is overbroad, and its impacts are beyond the hypothetical- they are real. Ms. Vega faces expulsion, Ms. Smith and Mr. Haddad cannot act out of fear. Such a broad chill is untenable.

Finally, the University argues that the context of a school can cure the vagueness concerns. *See Grayned*, 408 U.S. at 112 (context can give "fair notice to those to whom [an ordinance] is directed"). However, given that the conduct regulates all conduct at the University,

the notice concerns remain. The particular context of a school offers no more guidance to a reasonable person what conduct is permissible, given the broad sweep of the statute. Thus the Policy, even in light of *Tinker*, infringes on protected conduct and is unconstitutional.

II. MS. VEGA DID NOT DISRPUPT EDUCATIONAL, ADMINISTRATIVE OPERATIONS, NOR THE ABILITY OF OTHERS TO ENGAGE IN EXPRESSIVE ACTIVITY AND THEREFORE DID NOT VIOLATE THE POLICY.

Although the constitutionality of the Policy pertains only to the precedent it would set, this Court's decision should not negatively affect Ms. Vega as she was not in violation of the University code. If *Tinker* is to apply to college-student speech, then Ms. Vega's suspension cannot be sustained as she did not materially and substantially infringe upon Mr. Drake's ability to engage nor his audience's ability to listen to expressive activity. The University asserts that Ms. Vega "intentionally disrupted the speech" and therefore materially and substantially infringed up on the rights of others. R.41. To find that a disruption is equivalent to a material and substantial infringement is contradictory to the very framework of *Tinker* and its progeny.

A. Ms. Vega's Legal Protest Did Not Substantially Disrupt School Operations so to Contradict the Rationale of *Tinker*.

Tinker and its progeny's framework reveals that a school may prohibit lewd, vulgar, or profane language on school property, as well as regulate school-sponsored speech. Therefore, "[s]peech falling outside these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214. Prohibition is permissible only if the conduct interferes "with schoolwork" or "in the operation of the school." *Tinker*, 393 U.S. at 511; *Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir. 1966) (overturning a disciplinary action against students who wore "freedom buttons" because it did not appear to hamper the school in carrying out its regular schedule of activities); *see Zanders v. La. State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968)

(upholding the expulsion of student demonstrators who took possession, physically and by force, of a college administration building and paralyze operation of the college for 2 days).

Ms. Vega did not disrupt schoolwork nor the operation of the school. The ASFA event was held in the amphitheater in the quad, a place for students to "study, talk, play games, play and listen to music, and engage in sports such as flag football and frisbee." R.21. Students that did not attend the speech spent the time engaged in extracurricular activities such as an intramural football game, playing or listening to music, and eating lunch. R.21. The location served not as an academic nor administrative setting, but as a common area for students to spend their time outside of class socializing with each other. The school was able to carry out its regular schedule of activities and students were not barred from engaging in their extracurricular activities as planned. R. 22; R.25. Ms. Vega's protests did not materially nor substantially interfere with the rights of students to learn nor the school's administrative operations.

B. Ms. Vega's Legal Protest Did Not Interfere with the Rights of Others to Engage in or Listen to Expressive Activity as the Speech was Able to be Given and Heard.

Despite the lacking of a clear definition, substantial disruption must amount to something more than an "irritant or an embarrassment." Lindsay, *supra*, *Tinker Goes to College*, at 1504. For instance, an outdoor demonstration with no activity of a violent nature but that involves noise and is directed to annoy an official or speaker has been held not sufficient enough to find that a student interfered with the rights of others. *Barker v. Hardway*, 283 F. Supp. 228 (S.D.W. Va. 1968), cert. denied 394 US 905 (1969).

In *Barker*, two student demonstrations had different outcomes based on whether they were violent in nature. *Barker*, 283 F. Supp. at 230. The first demonstration occurred during the college homecoming game half time. *Id.* at 232. About two hundred students began their

demonstration on the field but subsequently moved to different sections of the bleachers, including the section where University President Hardway and his guests sat. *Barker*, 283 F. Supp. at 232. The students obscured the spectators' view of the game and became more "harassing and menacing" so that attendees felt compelled to leave for their safety. *Id.* The demonstrations even proceeded to follow President Hardway to his vehicle to prevent him from leaving where the protest turned violent and left police officers verbally and physically abused. *Id.*

The second demonstration consisted of students singing outside President Hardway's home. *Id.* at 233. The demonstration consisted of 300 students, occurred on the president's lawn located on the college campus, and began at approximatively 12:30 a.m. *Id.* The songs and chants denounced the president. *Id*. The students deemed to lead both demonstrations received suspensions, which they challenged as violations of the First Amendment. *Id.* at 234. The first demonstration was found to be a permissible restriction; the second was not. *Id.* at 235-236. The stadium protest "far exceeded the bounds of a peaceful demonstration" and was "detrimental to the student body and institution's well-being." *Id.* at 235. The court emphasized that there was no violent or "nonpeaceful activity" at the sing-in, and although it was designed to further harass and annoy the president in violation of the school's code, it was permissible under the First Amendment. *Id.* at 239.

The distinction between the *Barker* demonstrations is applicable to Ms. Vega's two demonstrations. The first occurred in August 2017, where Ms. Vega and other student members of KFT attended an anti-immigration rally with the intentions to "shout down" the speaker by standing on chairs in the middle of the audience. R.26. The students' conduct could be considered, at best, a violation of the Policy, as the purpose was to prevent episodes of shouting

down invited speakers. R.19. Additionally, as in *Barker*, there may be a "nonpeaceful" element found because the demonstration was rowdy, indoors, and took place in close proximity to rally attendees. R.26.

By contrast, Ms. Vega's demonstration at the ASFA event is analogous to the second demonstration in *Barker*. Although she may have harassed or annoyed attendees of Mr. Drake's speech, there was no violent or "nonpeaceful activity." R.38. She purposefully remained at least ten feet away from the last row of benches in the amphitheater. R.38. However distracting her speech may have been, it did not substantially interfere with Mr. Drake's ability to give the speech nor the attendee's ability to hear it. R.25. The Campus Security Officer that cited Ms. Vega even stated in his police report that he "could hear both Mr. Drake and Ms. Vega." R.36. Ms. Vega's demonstration was permissible under the First Amendment. Any sanction she faces in an attempt to restrict her expressive conduct is a violation of her constitutional rights.

In order to "justify prohibition of a particular expression of opinion, [the University] must be able to show that its action[s] [were] caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 at 509. The Fourteenth Circuit errs in finding that annoying or distracting behavior can be construed to reach the high bar of a material and substantial disruption. Ms. Vega's actions neither disrupted academic nor administrative operations. The speech was able to be given and heard. Accordingly, this Court should reverse the Fourteenth Circuit and find that the Policy, as applied to Ms. Vega's actions, violates the First Amendment.

CONCLUSION

This Court should reverse the decision of the Fourteenth Circuit and hold that the University's Campus Free Speech Policy is facially unconstitutional because it is so vague and

substantially overbroad as to make a reasonable person unaware what speech is permissible and to restrict otherwise constitutionally protected conduct. Additionally, the trial court correctly found that as applied to Ms. Vega, her suspension in accordance with the Policy violated her First Amendment rights as she did not materially nor substantially interfere with the rights of others or the school's operations.

In light of the foregoing, Petitioner respectfully requests that this Court REVERSE the Fourteenth Circuit Court of Appeals and hold the University's Campus Free Speech Policy as unconstitutional, both facially and as applied to Ms. Vega.

Dated: January 31, 2019

Respectfully submitted,

Team 8
Counsel for Petitioner

APPENDIX

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Constitutional Provisions:

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

Statutory Provisions:

The Arivada Free Speech in Education Act of 2017 provides:

Effective: June 1, 2017

Free Speech in Education Act of 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 members of the campus community and all others lawfully present on college and university campuses in this state.

Section 3:

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

The University of Arivada Campus Free Speech Policy provides:

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. The Policy includes a three strike range of disciplinary sanctions for a University of Arivada student who infringes upon the free expression of others on campus.
2. Any student who violates this Policy shall be subject to a citation by University Campus Security.
3. Campus Security shall transmit citations for violation of this Policy to the University's Dean of Students for review and investigation. The Dean of Students shall determine whether a student has materially and substantially infringed upon the rights of others to engage in or listen to expressive activity on the basis of the Dean's review and investigation.
4. Any student who receives a first citation pursuant to the Policy is entitled to an informal disciplinary hearing before the Dean of Students.
5. If the Dean of Students determines that the citation is appropriate, the Dean shall issue a warning to the student to be known as a first strike.
6. The review and investigation procedures described above, in three and four, apply to citations for second and third citations in violation of the Policy.
7. A student who receives a second or third citation is entitled to a formal disciplinary hearing before the School Hearing Board.
8. The School Hearing Board shall determine whether the behavior constitutes a violation of the Policy and therefore merits a second or third strike.

The University of Arivada Campus Free Speech Policy, cont.:

9. A formal disciplinary hearing includes written notice of the charges, right to counsel, right to review the evidence in support of the charges, right to confront witnesses, right to present a defense, right to call witnesses, a decision by an impartial arbiter, and the right of appeal.
10. The sanction for a second strike shall be suspension for the remainder of the semester.
11. The sanction for a third strike shall be expulsion from the University.
12. Any strike issued under this Policy shall be placed on the student's record.

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

Brief Certification

i. All work product contained in all copies of the Brief is the work product of the Team members.

ii. The Team has complied fully with their school's governing Honor Code.

iii. The Team has complied fully with all Rules of the Competition.

/s/
Team 8