Brief on the Merits

No. 18-1234

IN THE SUPREME COURT OF THE UNITED STATES
March Term, 2019

VALENTINE MARIA VEGA,

Petitioner,

v.

JONATHAN JONES, in his official capacity as President of the University of Arivada; and **REGENTS OF THE UNIVERSITY OF ARIVADA**, and its members, not individually named, but in their capacity as members of the Board,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

---

Team 10
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

OTHER CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND REGUALTIONS

OTHER AUTHORITIES

QUESTIONS PRESENTED

I. Is the University Campus Free Speech Policy imposing disciplinary sanctions on a student who "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" unconstitutionally vague and substantially overbroad?

II. As applied to the Petitioner, does the University Campus Free Speech Policy violate the First Amendment?

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

Factual Background

On June 1, 2017 the State of Arivada enacted the "Free Speech in Education Act of 2017" (hereinafter "the Act"). Av. Gen. Stat. § 118-20. This Act was adopted in response to a "nation-wide phenomena" of college students attempting to shut down events that they disliked by repeatedly "shouting down speakers who were invited on college and university campuses." Av. Gen. Stat. § 118-20. The purpose was to ensure protection of the "free speech rights of all persons lawfully present" on any Arivada campus. Av. Gen. Stat. § 118-20. This Act mandated that within three months of its enactment all state institutions of higher education adopt school-wide policies that would "safeguard" the freedom of expression for every student and lawful visitor. Av. Gen. Stat. § 118-200. On August 1, 2017, The University of Arivada complied with the mandate by adopting its "University Campus Free Speech Policy" (hereinafter "the Policy") to fulfill its obligations under the Act. App. C. Reading and signing the Policy was a requisite to enrollment and notified students of the University's authority to impose sanctions on students whose conduct "materially and substantially infringe [] upon the rights of others to engage in or listen to expressive activity." App. C.

The Policy "includes a three-strike range of disciplinary sanctions." App. C. Under the Policy, a student's first violation results in a warning, identifying what conduct warranted the

first warning strike. App. C. Pursuant to the Policy, Campus Security (Security) has the authority to issue citations to students for violations of the Policy. App. C. When a student receives a citation from Security, it is shared with the University's Dean of Students for the initiation of an investigation to determine whether the citation was proper. App. C. This two-part process ensures that all citations are issued fairly and that a strike is warranted under the policy. If the investigation results in issuance of a first strike, the student is then entitled to an informal disciplinary hearing before the Dean of Students to question or dispute the issuance. App. C.

If a student engages for a second time, in conduct prohibited under the policy, following an investigation a second strike may be issued. R. at 23. In the interest of a system of "checks and balances," students with second or third strikes are entitled to a full formal disciplinary hearing (Hearing) before the School Hearing Board (Hearing Board). App. C. The sanction for a second strike is suspension for the remainder of the semester. Third strikes result in expulsion.

At the beginning of each academic year, the University provides students with a copy of its updated Student Handbook, listing all policies in effect as of that time. R. at 20. Accordingly, in August 2017 the University transmitted an electronic copy of its updated Handbook, including the Campus Free Speech Policy, to all students. R at 20. As a requite to enrollment, students must sign an online Policy Statement declaring that he or she has read and agrees to abide by all University policies listed. R. at 20. Any student who fails to satisfy this prerequisite will not be permitted to "return to, or continue in classes or other programs for the upcoming academic year." R. at 20. On August 27, 2017, Ms. Valentina Vega (Vega), signed the Policy Statement before beginning classes on this day. R. at 20.

As of the 2017-2018 academic year, Vega was a Sophomore at the University. She acted as the president of "Keep Families Together" (KFT), a national organization that "advocate[s]

for immigrants' rights through on-campus and community advocacy events." R. at 37. On August 31, 2017, Vega, Mr. Ari Haddad (Haddad), Ms. Teresa Smith (Smith), and seven other members of KFT, in a representative capacity of the organization, entered an event under guise in order to protest the "anti-immigration rally" hosted by "Students for Defensible Borders" (SDB). R. at 37. Vega and other KFT members "attempted to shout [the speaker] down by communicating … pro-immigrant views by chanting and protesting while standing on chairs." R. at 37. Ms. Vega admits that her intention was to "shout down" the speaker to disrupt the event. R. at 37.

This conduct was deemed a violation of the Policy, prompting Campus Security Officer Michael Thomas (Thomas) to issue citations to Vega and all KFT members at the event. Their disruption "drowned out the majority of the speaker's remarks" according to Officer Thomas and therefore it was appropriate to issue the citations. R. at 34, 38. In response, on September 2, 2017, after the completion of an investigation and disciplinary procedures that provided students with informal hearings, Dean Winters (Winters) issued a "first strike" to Vega and all KFT members in attendance at the SBD event, finding that the students had violated the Policy "by materially and substantially infringing upon the rights of others to engage in or listen to expressive activity." R. at 41.

On September 5, 2017, an invite was extended by the student organization "American Students for America" (ASFA), Mr. Samuel Payne Drake (Drake), Executive Director of "Stop Immigration Now" (SIN), came to the speak at the University about "the state of immigration in America today." R. at 28. The President of ASFA, Mr. Theodore Hollingsworth Putnam

(Putnam), completed a University Event and Space Reservation Application[1] to reserve the Emerson Amphitheater located on the University Quad for the speaking event. R. at 28. The event consisted of Mr. Drake speaking to approximately thirty-five students in the amphitheater. R. at 05. During this time period, a number of other activities were taking place on the Quad, to the east, south, and west sides of the theater. R. at 05.

Haddad and Smith did not take part in Vega's protest during Mr. Drake's speech because of their fear that their conduct would result in a second violation of the Policy and suspension. R. at 27, 31, 38. Regardless of these shared concerns, Vega proceeded solo in protest of the ASFA anti-immigration event. R. at 38. Vega's protest consisted of her "standing ten feet past the amphitheater's last row of benches and on the edge of the paved nearby walkway." R. at 38. Vega, an immigrant herself, dressed in a "Statue-of-Liberty costume," and directed her shouting at Drake and those in attendance. Her chants included, "Disband ICE"; "Immigrants made this land"; and "Keep families together." R. at 38. Students attending this this event described Vega as "significantly more distracting" than any other background noises in the Quad. R. at 28, 32, 35.

In response to Vega's distractions, Putnam called Security to report an "obnoxious and disturbing disruption," where "some crazy student … [was] distracting people trying to listen to Mr. Drake's speech." R. at 29. Thomas responded to this call by reporting to the event, where he "investigat[ed] the disruption [and]…concluded that it was appropriate to issue [Vega] a citation for materially and substantially infringing upon the rights of others to engage in and listen to the

[1] "No permit was issued for this event. While student groups are encouraged to reserve space for events, absent special circumstances not present here, the University does not require prior approval for events operated by accredited student organizations where fewer than 75 people are expected to attend." R. at 04.

expressive activity at ASFA's event." R. at 35. Thomas's Police Report read that Vega's chanting and activity was "directly targeted at the amphitheater." R. at 36. Thomas concluded the conduct resulted in violation of the Policy and issued a citation. R. at 36.

Following the reception of this report, Winters investigated the incident and "initiated proceedings…including informing Vega of her procedural rights and sending her notice of her disciplinary hearing." R. at 41. On September 12, 2017, Winters "initiated a disciplinary hearing before the School Hearing Board (Board), … to determine whether Vega had violated the Policy," whereby the Board "upheld the charge…finding that she intentionally disrupted [Mr. Drake's] speech." R. at 41. As a result, Vega was issued a second strike and was notified of her suspension for the remainder of the semester. R. at 41.

Proceedings Below

Following the issuance of Vega's second citation, on September 12, 2017, Vega was required to attend a disciplinary hearing with Winters and the Board to assess whether Vega had violated the Policy. R. at 39, 41. The hearing included: (1) written notice of Vega's charges, (2) notification of Vega's right to counsel, (3) the right to review the evidence in support of Vega's charges, (4) Vega's right to confront witnesses, (5) Vega's right to present a defense to the charges, (6) Vega's right to call witness in support of that defense, (7) a decision by an impartial arbiter, and (8) Vega's right to appeal. R. at 41. This hearing resulted in the Board upholding the charge against Vega, "finding that she intentionally disrupted" Mr. Drake's speech, thereby "materially and substantially infringing upon the right of Mr. Drake to speak and the rights of others to listen to his speech." R. at 41.

As a result of Vega's suspension and unsuccessful appeal, on October 1, 2017 Vega filed suit against Jonathan Jones, President of the University, and the University's Board of Regents

alleging that her suspension, stemming from her second violation of the Policy, violated her right to freedom of speech pursuant to the First Amendment of the United States Constitution, as incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment. (Citation). (R.01). In bringing these claims to the United States District Court for the District of Arivada, sought a declaration that the First Amendment requires the University to reverse her suspension immediately and remove any mention of the suspension and attendant disciplinary proceedings from per permanent undergraduate record. (R. 01).

In relation to this suit, Vega and the University filed cross motions for summary judgment, whereby the Court granted Vega's motion for summary judgment and denied e University's cross motion on January 17, 2018. R. at 02. On appeal to the United States Court of Appeals for the Fourteenth Circuit, the district court's decision was reversed, whereby the Court concluded that the district court erred in ruling in favor of Vega, reversing its ruling and remanding for entry of summary judgment in favor of the University. R. at 43

SUMMARY OF THE ARGUMENT

This is a case about promoting and upholding the maintenance the Free Speech Rights on campuses, in a manner that balances the freedom of speech and the freedom to receive information in a nondisruptive or invasive way under the First Amendment. The Circuit Court without error, reversed the District Court's holding, and held that the University's "Campus Free Speech Policy" (Policy) and its application to Ms. Valentina Vega (Vega) are both constitutional. Ms. Vega's one-sided conduct fundamentally clash with the need to preserve First Amendment rights in the university setting. Her disruption collided with the school's obligation in ensuring the maintenance of a "marketplace of ideas," where "…students must always remain free to

inquire…study and…evaluate," thereby "gain[ing] [a] new maturity and understanding…" *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted).

In accordance with the state's "Free Speech in Education Act of 2017" (hereinafter, "the Act"), which was intended to "ensure that free speech rights of all persons lawfully present on college and university campuses in [Arivada] are fully protected," App. B., the University has a duty to not only protect the rights of free speech for everyone lawfully present on campus, but also the "right to receive information and ideas" which is a ""corollary" of the right to speak that triggers the First Amendment interests of not only speakers, but also audiences."" David L. Hudson, Jr., *First Amendment Right to Receive Information and Ideas Justifies Citizens' Videotaping of the Police*, 10 U. ST. THOMAS J.L. & PUB. POL'Y 89, 89 (2016) (citing Jamie Kennedy, Comment, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 818 (2005)).

The University has fulfilled this duty by adopting a Policy imposing disciplinary sanctions on students who "materially and substantially infringe upon the rights of others to engage in or listen to expressive activity." App. C. This Policy was written in a manner that provides students with fair warning regarding types of prohibited activity, utilizes permissively flexible language to ensure the fair application of the policy, and promotes "the exercise of First Amendment freedoms" in its essential purpose. Furthermore, the Policy imitates the narrowly tailored language used in policies upheld by the Supreme Court, where it was held that through such language, the policies properly operated to prevent a specific "evil" permissibly controlled and mandated by State law.

The constitutionality of the policy is further present in the application of the policy to Ms. Vega given the particular facts of this case. As applied in this case, Ms. Vega was properly

subject to regulation and discipline because her conduct not only violated the disruption prohibitions mandated by the Act and supported through the Policy, but in doing so, also acted to invade the rights of other lawful speakers and students on campus to which the University of Arivada has an *equal* duty to protect. It is a balance between the discipline necessary for the learning operations of the school and the individual rights of each student and lawful visitor. The school did properly balance these two principles by refusing to give credence to Vega's expression by removing that of another's. The First Amendment's right to free speech is founded with the intent to prevent even the highest levels of speech oppression. Surely, Ms. Vega holds no right to do otherwise.

ARGUMENT

I. THE UNIVERSTY CAMPUS FREE SPEECH POLICY IMPOSING DISCIPLINARY SANCTIONS ON A STUDENT WHO "MATERIALLY AND SUBSTANTIALLY INFRINGE UPON THE RIGHTS OF OTHERS TO ENGAGE IN OR LISTEN TO EXPRESSIVE ACTIVITY" IS NOT (A) UNCONSTITUTIONALLY VAGUE NOR (B) SUBSTANTIALLY OVERBROAD BECAUSE IT USES PERMISSIVELY FELXIBLE LANGUAGE TO PROMOTE THE STATE CONTROLLED GOALS OF A LEGISLATIVE MANDATE.

The First Amendment to the United States Constitution mandates that "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I, cl. 1. The First Amendment prohibits the government from imposing laws on the people that result in the restriction of expression or speech. *Id.* The Fourteenth Amendment extends this prohibition to the states and to the state institutions of higher learning, including the University in this case. *See Healy v. James*, 408 U.S. 169, 180 (1972) (noting that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."). Ms. Valentina Vega (Vega) contends that her suspension from the University has violated her First and Fourteenth Amendment rights because the Policy on which her suspension was based is unconstitutionally vague and substantially

overbroad. R. at 07. However, this brief will show that, as the University has successfully asserted in the Court below, that Vega's contentions fail because the University's Campus Free Speech Policy (Policy) is not (A) unconstitutionally vague or (B) substantially overbroad.

A. The University Campus Free Speech Policy is not unconstitutionally vague because it (1) provides students with a "fair warning," (2) utilizes permissively flexible language, and (3) promotes "the exercise of First Amendment freedoms."

In *Grayned v. City of Rockford,* the Court provided three reasons for overly vague statutes being unconstitutional. 408 U.S. 104, 108. First, laws should indicate "fair warning," providing a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108. Second, laws must offer "explicit standards" to prevent law enforcement actors, juries, and judicial officials from executing "arbitrary and discriminatory application." *Id.* at 108-109. Third, where First Amendment freedoms are involved, a vague statute can "inhibit the exercise of [those] freedoms," leading citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 109.

In accordance with this reasoning, the Policy in this case is not vague for three reasons. First, the Policy provides a reasonable person with "fair warning" as to what activities are prohibited per Policy language. Second, the Policy utilizes permissively flexible language allowing University officials to impose sanctions using an "individualized" assessment without the concern of arbitrary or discriminatory decision-making. Third, the Policy was adopted to promote, *not inhibit,* "the exercise of First Amendment freedoms."

1. The Policy provides a reasonable person with "fair warning" as to what activities are prohibited per Policy language.

Per *Grayned,* in assessing the vagueness of a statute, courts look to whether a law indicates fair warning, providing a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." 408 U.S. at 108. The Policy in this case sanctions

only "material[] and substantial[] infringe[ment] upon the rights of others to engage in or listen to expressive activity." App. C. This language provides limitations focusing on specific categories of activity deemed "material," "substantial," and "infringing," resulting in wording that comes within the range of reasonable articulation for the ordinary person. R. at 50.

The use of flexible language does not create a vague policy. R. at 50. As the Rockford City Council did in *Grayned*, the University "has made the basic public policy choices, and has given fair warning as to what is prohibited." 408 U.S. at 114. The facts of this case reflect the provision of a "fair warning" whereby students admitted to understanding types of conduct prohibited by this Policy when Vega and other KFT members acknowledged, prior to Vega engaging in protesting Drake's speech, that such activity could potentially result in a "second strike…and suspension pursuant to the Policy." R. at 27, 31, 38.

Furthermore, in August 2017 the University transmitted an electronic copy of its updated Handbook, including the Policy, to all students, whereby all students were required to sign a Policy Statement declaring that he or she has read and agrees to abide by the University policies listed. R at 20. It is undisputed that Vega signed the Policy Statement. R. at 20. Therefore, based on the record and its, it is clear that a "person of ordinary intelligence [had] a reasonable opportunity to know what [was] prohibited, and would understand previous citations to be a "fair warning." For these reasons, the Policy is not unconstitutionally vague.

2. <u>The Policy utilizes permissively flexible language allowing University officials to impose sanctions using an "individualized" assessment without the concern of arbitrary or discriminatory decision-making.</u>

Furthermore, in accordance with *Grayned*, courts evaluate the vagueness of a statute by looking to whether it offers "explicit standards" to prevent law enforcement actors, juries, and judicial officials from executing "arbitrary and discriminatory application." 408 U.S. at 108-109.

The *Grayned* Court specified that, "we can never expect mathematical certainty from our language." *Id.* at 110. The Court in *Grayned* observed that the words used in the Rockford ordinance, were "marked by 'flexibility and reasonable breadth, rather than meticulous specificity.'" 408 U.S. at 110 (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969)).

This flexibility created a decision-making process that allowed for consideration "on an individualized basis, given the particular fact situation." *Grayned,* 408 U.S. at 119. The Court held that the ordinance was "narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and [did] not unnecessarily interfere with First Amendment rights." *Id*. Similarly, the University Policy utilizes a flexible standard allowing the University to assess each situation on "individualized basis" as needed. R. at 50.

Furthermore, this standard does not pose a risk regarding the concern of arbitrary or discriminatory application. Violators are provided the chance to participate in informal and formal hearings to dispute any charges, including: (1) written notice of charges, (2) notification of right to counsel, (3) the right to review the evidence surrounding charges, (4) the right to confront witnesses, (5) the right to present a defense to the charges, (6) the right to call witness in support of defense, (7) a decision by an impartial arbiter, and (8) the right to appeal. R. at 23, 41. These tools provide the opportunity to dispute any charges in a fair and impartial way. For these reasons, the Policy utilizes permissively flexible language allowing University officials to impose sanctions using an "individualized" assessment without the concern of arbitrary or discriminatory decision-making. For these reasons, the Policy is not unconstitutionally vague.

3. <u>The Policy attempts to protect the free speech rights of all persons legally on campus.</u>

Moreover, based on the Court's finding in *Grayned,* in assessing the vagueness of a statute, courts look to whether First Amendment freedoms are involved, and a statute "inhibit[s] the exercise of [those] freedoms," leading citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 109. However, the *Grayned* Court determined that the prohibition of First Amendment activity is permissible when such activity "involves substantial disorder or *invasion of the rights of others*."' 408 U.S. at 118 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)*) (emphasis supplied).

The University is responsible for protecting the free speech rights of all those lawfully present on its campus. R. at 49. It is established that the "First Amendment rights 'are not a license to trample upon the rights of others. They must be exercised responsibly and without depriving others of their rights, the enjoyment of which is equally precious.'" *Barker v. Hardway,* 283 F. Supp. 228, 239 (S.D. W. Va. 1968) (quoting *Baines v. City of Danville,* 337 F.2d 579, 586 (4th Cir. 1964)). The Policy was adopted to preserve those rights and achieve those objectives, whereby Vega received a citation because she invaded the free speech rights of others through creating a disruption at Drake's speech. For these reasons and the aforementioned reasons, the Policy is not unconstitutionally vague.

B. **The University Campus Free Speech Policy is not substantially overbroad because it is narrowly tailored to prevent a specific "evil" permissibly controlled by State law.**

An overbreadth challenge, typically arises when the Petitioner is someone who has partaken in conduct that is constitutionally punishable, and who as a result then challenges a statute or policy on its face, "rather on the grounds that the particular application is unconstitutional." Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes,* 2002 UTAH L. REV.

381, 385–86 (2002). A statute or policy is unconstitutionally overbroad when "it prohibits constitutionally protected conduct." *Grayned,* 408 U.S. at 114.

When a statute or policy "does not aim specifically at evils within the allowable area of State control but, on the contrary sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech," it is considered to be substantially and unconstitutionally overbroad. *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940); *see United States v. Stevens*, 559 U.S. 460, 460 (2010) (holding 18 U.S.C. § 48, criminalizing the "commercial creation, sale, or possession of certain depictions of animal cruelty" was substantially overbroad and unconstitutional); *Thornhill* 310 U.S. at 101-02 (holding that Section 3448 of Alabama's State Code of 1923 prohibiting "[a]ny person or persons, who without a just case or legal excuse therefor, go near to loiter about the premises or place of business…" unconstitutionally overbroad because "the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."). Therefore, a statute or policy will only be struck down on overbreadth grounds if it is *substantially* overbroad. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

In this case, the Policy was created to specifically comply with a State law created with the purpose of protecting "the free speech rights of all persons lawfully present on college and university campuses" within the state. Av. Gen. Stat. § 118-200. The goal of the Policy is to support a "Free Expression Standard" whereby "[e]xpressive 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." App. C. The University has

successfully asserted that this language imitates the free speech standard articulated in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

In *Tinker*, secondary public schools suspended students for wearing black armbands to school in protest of the Vietnam War. 393 U.S. at 506. The Court held that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* The Court stipulated that schools could ban or restrict student speech *only* if it "materially and substantially disrupt[ed] the work and discipline of the school." *Id.* This standard is directly implemented in the University's Policy. The Court has cited to *Tinker* in cases involving college students and some federal circuits have tied university students' rights to secondary students' rights, bundling them together. 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, 40 (2008).

The Court has established that "the university" as an institution serves as a "marketplace of ideas," where "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die*." Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). Maintaining this marketplace consists of ensuring that students are able, through protection provided by the Policy, to hear a diverse range of ideas without fearing interruption or disruption for engaging in that expression. The Court has highlighted the existence of the right to receive information, finding that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyer." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). In accordance with these

holdings, the University Policy does not prohibit students from expressing contrasting or adverse ideas but, prevents them from invading upon the free speech rights of others.

The Policy is aimed at prohibiting "episodes of shouting down invited speakers on college and university campuses are nation-wide phenomena that are becoming increasingly frequent" to allow all speakers and individuals to utilize their free speech rights. Av. Gen. Stat. § 118-200. The University adopted the Policy because "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." Av. Gen. Stat. § 118-200. Therefore, the Policy does not prohibit students from engaging in expressive activity or conduct adverse to other speakers on campus, but prohibits students from engaging in conduct *specifically* disruptive or invasive to another event, preventing others from utilizing their First Amendment rights.

Although most decisions applying *Tinker* focus on the disruption of school operations and learning environments, Circuit Courts have relied on the "invasion of" or "collision with" "the rights of others" aspect of the decision to uphold disciplinary actions. *See, e.g, Wynar v. Douglas County Sch. Dist.*, 728 F.3d 1062, 1071-72 (9th Cir. 2012) (holding that a student's threat of a school shooting targeted at particular students constituted an invasion of the rights of others); *Harper v. Porway Unified School Dist.*, 445 F.3d 116, 1177-78 (9th Cir. 2006), cert. granted, judgment vacated sub. Nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (dismissing the case as moot where the plaintiff had graduated) (finding an offensive T-shirt worn by a student to still collide with the rights of others even when the student does not "directly accost individual students with [their] remarks").

With this understanding of the Policy, by engaging in this activity, Vega was invading others' constitutional rights. Although Vega contends that her activity "was not any more

intrusive than the shouts of the students playing flag football adjacent to the amphitheater, the discourse of passerby conversing in person or on cell phones as they walked by…,or the sounds of members of the University community who were occupying nearby areas of the Quad's green space during the ASFA event," R. at 11, the record clearly indicates that Security and two students attending Drake's speech acknowledged Vega's chanting to be "significantly more distracting than other noises" being made throughout the Quad and targeted at Mr. Drake's speech for the purpose of disruption. R. at 28, 32, 35.

The University refers to the Fourteenth Circuit's view of *Tinker*, whereby the focus on behavior that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is appropriate for college and university environments because it is directed to serious interference with the institution's educational purpose of significant intrusion on others' rights. *Tinker*, 393 U.S. at 513; *see* R. at 48. Based on this standard, the Policy does not infringe upon the First Amendment right to exercise free speech, but rather creates a "balance" between the right of speakers to engage in free speech, with the right of listeners to receive information. R. at 48. Therefore, the Policy protects the right to speak and the right to listen from material or substantial infringement. As a result, the University Policy is not unconstitutionally overbroad.

II. THE CAMPUS FREE SPEECH POLICY DOES NOT OPERATE IN VIOLATION OF MS. VEGA'S FIRST AMENDMENT RIGHTS AS APPLIED TO THE PARTICULAR FACTS OF THIS CASE BECAUSE IT WAS MS. VEGA'S CREATION OF A DISTURBANCE SIGNIFICANT ENOUGH TO INVADE OR REMOVE THE FREE SPEECH RIGHTS OF OTHERS; NOT THE CONTENT OF THE INVASION.

A. **A meritless claim that the University operated under improprieties based on favoritism of particular viewpoints**

At the outset, any suggestion of impropriety in the University's application of its policy must be dispensed with for lack of merit. The Policy was adopted in compliance with a state mandate and not in anticipation of circumstances that might include a particular viewpoint that

the University wished to one day silence. As-applied challenges demand a meticulous review of the facts and must avoid inferences of unconstitutional action that the record cannot support.

Here, Thomas was present for the August disturbance and was called to respond to September's disturbance where Vega was cited for violations of the Policy for her conduct at both and subsequently issued the strikes that led to her suspension. R. at 37. Vega asserts that it was her pro-immigration views expressed in her speech that were targeted and cited. However, an inference would need to be made that Thomas purposefully sought to silence Vega's particular viewpoint on behalf of the University to support such a motivation. This inference is unsupported by record. At the first event, Vega and other cited students entered under guise with an agenda unbeknownst to Thomas. R. at 37. At the second event where Drake advocated against immigrants like Vega, it was not "Vega" who was reported but rather, an unidentified "obnoxious and disturbing…crazy student…" Vega's identity was not revealed to the dispatcher and therefore not revealed to the security Officer that dispatch requested to respond; Officer Thomas. R. at 29. Given that Drake's speech was permitted yet unapproved, unsponsored, and otherwise unendorsed by the University, no indication of favoritism or a motivation to suppress any one viewpoint on behalf of the school exists.

Speech and expressions that disruptively interfere with educational programs or that operate to invade this right in another person in the educational setting are not protected by the First Amendment and may therefore be regulated by university officials. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969*)*. The University is charged with safeguarding the freedom of expression on its campus for all members of the university's community and any other lawfully present person on its campus. The Act, Av. Gen. Stat. § 118-200, charges all university's in the state to develop and adopt policies designed to safeguard the freedom of

expression for all members of the campus community and all others lawfully present on the campus. *Id*.

The Policy is aligned with the purpose and foundation with the Act, and therefore with the First Amendment. The policy is content neutral in its application to every member of the campus. Policy enforcement is punitive not when a particular viewpoint is expressed, but rather when a constitutional viewpoint is prevented from being fully expressed or comprehended because of the conduct of another. *Id*. The fundamental freedom of speech and expression has gained traction over time because of the increased value that individuals place in having the liberty to choose what is true and what is false. This liberty can only operate when both sides of any subject are made available. Such viewpoints and expressions create a marketplace of ideas that everyone has the right to access. *See, e.g., Board of Educ. V. Pico*, 457 U.S. 853, 866 (1982). This liberty does not end where college enrollment begins. *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

The content of speech can be different in secondary-education (K-12) learning institutions than it is in post-secondary learning environment. David L. Hudson, Jr. K-12 Expression and the First Amendment, FIRE, April 14, 2017. This Court has acknowledged that many of the concepts of post-secondary education for adults will include opportunities for invited guest speakers to discuss and peacefully debate or protest various subjects including those most controversial. This Court has consistently held that this marketplace of ideas is the necessary facilitator of the First Amendments' Freedom of Speech clause. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 269-72 (1964); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) Thus, it is only in an uninhibited marketplace that the value of a viewpoint can be properly weighed. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (explaining that no

"false idea" exists in the marketplace). Even a person with the most controversial of issues is permitted to voice them and to be heard. Viewpoints coexist in the marketplace and people have the liberty to hear and accept those that are in alliance with their individual beliefs. *See Id.* The marketplace is especially useful in an environment where the principle duty of that environment is to foster education, such as on the college campus.

B. Equal Application of Free Speech and the Preservation of Educational Disciplines: A Balancing Act on the University Campus

The Regents of colleges and universities, including the University, all share a unique role in the preservation of the Freedom of Speech. They must foster and sustain an environment where learning disciplines and free speech coexist without one trampling on or removing access to the other. Ingber, Stanley, The Marketplace of Ideas: A Legitimizing Myth, Duke Law Journal (1984): 1–90. The University promulgated its Policy in accordance with its state statute to effectuate its regulatory power on its campus. The policy applies to all members of the university as well as those lawfully present on the campus.

The Act mandated full protection of the free speech rights and read in pertinent part, "…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…campuses." R. at 19. The University properly complied with the mandate in August 2017 by developing and adopting its Policy and reinforced its applicability to any person lawfully on its campus. R. at 19. It equally protects speech on its campus through regulation when the speech disrupts the learning processes at the college or university. The learning process in university settings necessarily extends well beyond the four walls of a classroom and certainly beyond the reach of a textbook. This holistic learning process is two-fold. Adult college students have the liberty to hear differing viewpoints and to

have their viewpoints be heard. This is the essence of how collegiate pedagogy differs from the more restricted K-12 educational setting.

C. **The Tinker Test Standard**

The *Tinker* standard specifically characterizes the minimum effect that speech and expression would have to have on a learning environment to bring the speech within the reach of a school's disciplinary gambit. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

1.Selecting the Framework of Analysis: Why and How Tinker Applies

Public school authorities undifferentiated by grade level, have in common the duty to safeguard its learning environment or school operation. That the *Tinker* standard has never been applied by this Court in cases of postsecondary educational institutions does not preclude the appropriateness to do so in this case. The Supreme Court has spoken through four seminal cases on student speech and each case identifies the category of speech that it governs: "(1) vulgar, lewd, obscene, and plainly offensive speech" is governed by *Fraser*, "(2) school-sponsored speech" is governed by *Hazelwood*, and "(3) speech that falls into neither of these categories" is governed by Tinker. In *Morse*, the Court dealt with a fourth, and somewhat unique, category—speech promoting illegal drug use. 551 U.S. at 403." *Wynar v. Douglas County Sch. Dist.*, 728 F.3d 1062 (quoting *Tinker; Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262, 108 S. Ct. 562, 565 (1988); *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007).

Nothing in the Constitution precludes the states, through its school boards from "insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools."" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S.

675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (quoting *Tinker*, 393 U.S., at 508). School speech cases have tended to emphasize the discipline necessary for maintaining the proper environment necessary to learn. In cases where a type of speech would be lawful outside of school based on constitutional rights of minor or adult status, this Court maintains that the decision to render such speech equally permissible in the classroom remains with the school officials. School officials are sharply recognized by this Court to be in the best position to decide if a mode or manner of speech fosters its learning environment and to decide when circumstances render the speech or its manner to be inappropriate. The deciding factor must be what is best for maximizing learning outcomes.

Consider the high school student who is eighteen years old. He has constitutional rights to certain types of speech outside of school such as those lewd or obscene but it is the nature of his particular school setting that a court will use to decide whether the speech is allowed; not simply age. If courts relied on age alone, the eighteen-year-old high school student would be exempt from any school regulations prohibiting obscene or lewd materials. This is the basis for understanding that *Tinker* must apply to colleges and universities just as it does to high schools when *Tinker* speech is at issue. It does not turn on age alone therefore that the Supreme Court has not yet granted cert where it would apply *Tinker* in a post-secondary institution bares no support for a blanket preclusion of the *Tinker* standard should it grant cert for such a case as has been done in the instant case. States, through their school authorities are permitted to make and regulate these decisions.

Accordingly, the appropriateness of applying *Tinker* to secondary and post-secondary learning environments alike was most illustrative when The Court acknowledged: “the constitutional rights of students in public school are not automatically coextensive with the rights

of adults in other settings." *Fraser*. When disruptive *Tinker* speech is the basis of the claim, whether in high school or college, the same standard applies because in these cases, what matters is the disruption of the school's general discipline or invasion on one student's rights by another. The right of one individual to invade or remove another's equal right to speech for the purpose of advancing their own is no right at all.

This Court differentiates which framework to apply based on the type of speech, not the grade level. Any school setting has the purpose to foster a learning environment at its core. Against this backdrop, any differences in the way that the two institutions preserve fundamental rights is properly delineated by age alone. The age alone should not be the determinant for whether *Tinker* applies. With this factor removed, what remains on the spectrum are two environments: a secondary education establishment and a post-secondary establishment. Both established with the intent to prepare all citizens of this Nation to be equipped to be contributing members of the democracy for which all constitutional rights stand to support. To this end, the value given the freedom of speech and the standards by which it is protected must be identical in all learning environments if actual learning is to occur.

The university setting is unique in some of the mechanisms used to foster learning. For example, the nature of a particular subject matter may be best understood by subject matter experts invited as speakers. The same holds true for more controversial topics such as the Nation's policies on immigration. Controversial topics like immigration have been long supported by advocates of a particular viewpoint rather than a traditional subject matter expert of less controversial subjects. This Court has long recognized that the marketplace of ideas is how the more controversial topics are learned. Viewpoints, however contrary to one another, both have equal sized designations and price tags on the shelves of the marketplace and every student

enjoys equal right of access to them. It follows that every student maintains their fundamental right to enter ideas into the marketplace for consideration and support of others. No one person enjoys a right to remove another's viewpoints from the marketplace in order to showcase only their own. Expression of ideas may only survive when they are placed side by side with all others, are seen and heard by all others and are then chosen by others. Here, Vega's contribution to the market place is equal in value as Drake's contribution. *Tinker* must apply here because its standard is the only one that has proven its ability to guarantee nothing less than fair competition in the educational marketplace of ideas and should turn only on purpose not mere diction.

The Policy is content neutral and only seeks to promote and protect the legitimate educational concerns and its statutory duty to preserve the freedom of speech rights for all of its members and lawful guests. Vega's conduct was rightly subjected to regulation and discipline because of its targeted collision with the right of Drake to speak and be heard as well as the right of others to hear Drake's speech. To shout down is to disrupt access to a particular viewpoint based on the content of that viewpoint is considered to be an invasion and disruption of the rights of others A disruption of this type need not be shouting the words that would support the disruptors ideas. Any student, including Vega, would receive the same discipline pursuant to the Policy had the targeted shouting down of Mr. Drake occurred yet without any particular words. Her viewpoint is not the basis for her suspension. Her targeted disruption with the effect of drowning out Drake's speech based only on the contrary viewpoints he sought to express is why Vega was disciplined under the Policy.

A disruption that invades access to particular viewpoint in a learning environment is a disruption to the necessary discipline of the schools' operation because all learning institutions operate to foster learning. In the college classroom and the surrounding environment learning

happens when an idea or viewpoint is expressed in this marketplace of ideas and it can only die by the acceptance of contrary views and only after its been given the equal opportunity to face them head on. *Healy v. James,* 408 U.S. 169 (1972) (solidifying that the marketplace of ideas is the lifeblood of the unique learning platform by which colleges operate). A viewpoint or expression succeeds only after a student enjoys their right of access to any side of the subject and then chooses the idea that best aligns with their values and ideas. This choice is the manifestation of the First Amendment's right to free speech and it is only honored in the university setting by enforcing the marketplace principle for every student. Freedom of speech is an individual liberty designed to defend against oppression from the highest levels of government. Surely no one student has any greater removal power. To hold otherwise would grant such power to Vega to not only invade the rights of inquiring minds, but to only be permitted to do so through the content of her speech but never by the volume and manner of her distraction.

"If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion…" *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 47 F.Supp. 251 (1943). The keys to the marketplace of ideas within Arivada State schools were designed to never turn in support of one accredited student organization without turning for all. In this case, it did not unfairly work in favor of ASFA's viewpoint and it must not for Vega.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court uphold the decision of the United States Court of Appeals for the Fourteenth Circuit by finding that the University's adoption, enforcement, and application of its Campus Free Speech Policy does not violate Petitioner's constitutional rights under the Free Speech Clause of the First Amendment.

INTEGRITY CERTIFICATE

- All work product contained in all copies of our brief is in fact the work product of this team member only.
- Per our law school code of integrity, we submit in good faith and pledge that we have never give nor received improper aid in our brief's completion.
- This team has complied with all Rules of the Competition.

On this day, January 31, 2019

/s/ Team 10

APPENDIX
A

First Amendment

Amendment I

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.

APPENDIX
B

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 that 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.

APPENDIX C

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 subjection to sanction.

Disciplinary Procedures

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