Brief on the Merits

No. 18-1234

IN THE SUPREME COURT OF THE UNITED STATES

March Term, 2019

VALENTINA MARIA VEGA,
Petitioner,

-against-

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

On Appeal from the Order of the
United States Court of Appeals for the Fourteenth Circuit
(Hon. Skillrud, Coughlin, and Marinelli)

Brief for Respondent
Jonathan Jones and Regents of The University of Arivada

Team 15
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether the University's Policy is unconstitutionally vague because it is flexible and directed at a compelling interest and whether the Policy is unconstitutionally overbroad by restricting speech due to a few hypothetical scenarios in which the Policy could be impermissibly applied.

II. Whether Petitioner's disruptive conduct on a college campus where she dressed up in Statue-of-Liberty costume and loudly chanted counter speech infringed upon Mr. Drake's right to freely speak as well as his listeners ability to freely listen to him speak.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit rendered its decision on November 1, 2018. *Jones and Regents of the University of Arivada v. Vega*, No. 18-1757 (14th Cir. Nov. 1, 2018). A Petition for Writ of Certiorari was filed and granted. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On June 1, 2017, the state of Arivada passed the Free Speech in Education Act. AV. GEN. STAT. § 118-200. This act required all public institutions of higher education to adopt a policy to protect the freedom of expression of all persons legally on college campuses. (R. at 19). The University of Arivada (the "University") complied by enacting the University's Campus Free Speech Policy on August 1, 2017 ("Policy"). (R. at 23). The Policy reads as follows: "Expressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity shall not be permitted on campus and shall be subject to sanction." (University of Arivada Campus Free Speech Policy). Students who violate the Policy are disciplined under a three-strike system. (R. at 23). After the first incident, the student receives a warning. (R. at 23). After the second and third citation, the student is entitled to a formal disciplinary hearing in front of the school board. (R. at 23). If the school board finds that the student's actions violate the Policy, the second disciplinary action is suspension from the University for the remainder of the semester. (R. at 23). The third and final disciplinary action is expulsion from the University, which shall be placed on the student's record. (R. at 23). The Policy was created to reaffirm the University's commitment to the First Amendment and to protect all students' right to freedom of expression on campus. (R. at 23). At the beginning of the school year,

all students are required to read the Policy and sign a document declaring that they have read, understood and agree to the Policy. (R. at 3).

Prior to the adoption of the Policy, Valentina Vega ("Petitioner"), a student at the University, engaged in multiple protests with a national student organization, Keep Families Together ("KFT"). (R. 3). KFT is an organization that advocates for immigrants' rights on campus through various events and demonstrations. (R. at 3). Petitioner's first strike under the University's Campus Free Speech Policy resulted from an incident that occurred on August 31, 2017, where she and several other members of KFT attended an anti-immigration rally on campus. (R. at 3). It is uncontested that Petitioner and the KFT members "sought to shout down the speaker at [this] anti-immigration rally." (R. at 3). Petitioner stood on a chair in the middle of the audience and loudly chanted distracting counterspeech. (R. at 4). The Dean issued the first strike to Petitioner and her fellow KFT members, including Ari Haddad and Teresa Smith, on September 2, 2017. (R. at 4, 27, 30).

On September 5, 2017, Samuel Payne Drake ("Mr. Drake") was invited to the school by a student organization called American Students for America ("ASFA"), to deliver a speech expressing his anti-immigration views. (R. at 4). In anticipation of this event, Theodore Putnam ("Mr. Putnam"), the President of ASFA, reserved the on-campus amphitheater, giving ASFA the exclusive right to use the amphitheater during the event. (R. at 4). The outdoor amphitheater is located on the University's Quad ("Quad"), an open space surrounded by dormitories and other student facilities, with benches and multiple areas for seating. (R. at 4). There is no distinct boundary between the amphitheater and the Quad. (R. at 5). Additionally, several walkways and sidewalks pass through the Quad and are used by students daily to gather, study, play sports, talk, and listen to music. (R. at 4).

Only three days after the University issued Petitioner her first strike, she targeted Mr. Drake's speech. (R. at 5). Petitioner stood a mere ten feet behind the last row of benches, dressed in a Statue-of-Liberty of costume, and began yelling her disruptive chants in Mr. Drake's direction as he was speaking. (R. at 5). Petitioner loudly shouted, "Disband ICE"; "Immigrants made this land"; and "Keep families together." (R. at 5). Ari Haddad and Teresa Smith, students at the University and other KFT members, refused to protest at Mr. Drake's speech at the request of Petitioner because they had previously been cited for similar conduct at a separate incident. (R. at 27, 30).

Upon hearing Petitioner's chants, Mr. Putnam contacted campus security and reported a loud disruption occurring at the event. (R. at 5). When Officer Michael Thomas ("Officer Thomas") arrived, he observed Petitioner in her costume, loudly chanting phrases "directly targeted at the amphitheater" and visibly distracting people who were trying to listen to Mr. Drake's speech. (R. at 36). He also observed people in the audience "turning around to look at Petitioner" and found that they had "difficulty focusing on the speech" because of her. (R. at 36). Officer Thomas also heard students who were passing the amphitheater and heard shouts and cheers from a nearby football game. (R. at 36). Similarly, although other students could be seen talking, listening to music, and studying, Officer Thomas concluded that "Petitioner was more distracting than the random background noise because she was generally facing the amphitheater." (R. at 5, 6). Additionally, Meghan Taylor, a spectator at the event, further agreed that Petitioner's chanting "was significantly more distracting than the other noises." (R. at. 32). Although Mr. Drake's speech was not successfully cut short, Officer Thomas believed that Petitioner was substantially and materially infringing upon Mr. Drake's right to speak and the spectators' rights to listen, and therefore issued a citation to Petitioner pursuant to the Policy (R. at 6).

In accordance with the Policy, Petitioner attended a hearing with the Hearing Board on September 12, 2017. (R. at 6). The Hearing Board found that Petitioner intentionally disrupted Mr. Drake's speech, and therefore "materially and substantially infring[ed] upon the right of Mr. Drake to speak and the rights of others to listen to his speech." (R. at 6). The Hearing Board's decision resulted in Petitioner's suspension from the University for the remainder of the semester. (R. at 6). After exhausting her right to appeal the University's decision, she filed suit against the University of Arivada in the United States District Court for the District of Arivada. (R. 1, 39).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit and find that the University of Arivada's Campus Free Speech Policy is consistent with the Free Speech Clause of the First Amendment. In *Tinker v. Des Moines Independent School Dist*., the Court laid out a standard allowing discipline for disruptive behaviors in public high schools. 393 U.S. 503, 514 (1969). Although the case does not expressly apply to college campuses, the Court should apply a modified version of the *Tinker* standard to the case at issue. The University has a keen interest in protecting its students from substantial intrusion on their Constitutional rights in an effort to expose young adults to many different ideas as they begin their journey to becoming productive and open-minded members of society. *See Tinker*, 393 U.S. at 511. Under this *Tinker* standard, the Policy is neither unconstitutionally vague nor is it overbroad.

The Policy is not unconstitutionally vague because it is reasonably flexible, narrowly directed at an important interest of the University—to protect the marketplace of ideas for all students—and gave the students ample notice of what the University expected of them. Additionally, the Policy only punishes conduct that directly infringes on the rights of members on school grounds. Moreover, students were given fair warning as to which acts would violate the Policy through the three-strike system. This makes it easy for students to determine and predict what would prevent others from engaging in or listening to others. It is proper for the University administration to prohibit activities that interfere with other students' engaging in their free speech rights in an effort to safeguard academic freedom for young adults.

The Policy is not unconstitutionally overbroad because it does not significantly compromise the rights of the students on campus and it allows for the speaker to be heard within

the marketplace. Further, simply the fact that there are hypothetical situations in which the University could impermissibly apply the Policy does not amount to sufficient proof to reasonably conclude that the Policy is overbroad. Students are free to express themselves at any point during the day as long as their actions do not actively conflict with the free speech of other people on campus. Students can hand out posters or walk around silently in costumes during the speech of others. The Policy simply requests that students not shout down or yell targeted chants at others while they are trying to express themselves as well. Given the role Universities have in providing an environment in which young adults can learn and be exposed to new ideas through open and expressive dialogue, the marketplace of ideas is particularly important on a college campus and the University is constantly attempting to maintain this message as it goes forward in applying the Policy.

Furthermore, the Policy was not unconstitutional as applied to Petitioner because the First Amendment does not give a student the right to engage in conduct detrimental to the school's well-being or to deprive other students of an atmosphere in which they can be exposed to new opinions and ideas as they pursue their education. Petitioner prevented the orderly expression and reception of a guest speaker's ideas when she stood on a chair wearing a flashy costume and chanted loudly with the intention of causing a disruption. Rather than fostering discussion, Petitioner interrupted and interfered with the event and consequently with the rights of others. The University properly applied the school Policy to the Petitioner because her improper and disruptive conduct was on school grounds and her targeted attack was connected to the school environment.

ARGUMENT

I. THE UNIVERSITY'S POLICY IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE IT WAS APPROPRIATELY FLEXIBLE, NARROWLY TAILORED, AND GAVE NOTICE TO STUDENTS, AND THE POLICY IS NOT OVERBROAD BECAUSE A FEW HYPOTHETICAL, IMPERMISSIBLE APPLICATIONS CANNOT BE USED TO SHOW SIGNIFICANT VIOLATION OF ONE'S FIRST AMENDMENT RIGHTS.

This Court should affirm the Court of Appeals' holding that the University's Policy is neither unconstitutionally vague nor overbroad. Supreme Court precedent has determined that universities are traditional spheres of free expression that is so fundamental to the proper functioning of our society that a university's ability to restrict such speech is restricted by the vagueness and overbreadth doctrines of the First Amendment. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). Universities, in particular, have a keen interest in protecting the marketplace of ideas for all members because an open intellectual dialogue on a university campus is vital in the development of young adults in their journey to become educated and productive members of society. *See Healy v. James*, 408 U.S. 169, 180–81 ("the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools…the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom") (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). This Court should hold that its precedent allowing officials to discipline high school students who partake in disruptive behavior should be applied in a modified form to include students on a university's campus who significantly intrude on the rights of others. *See Tinker*, 393 U.S at 513. The Court's main concern in *Tinker* was protecting students against significant intrusion on their rights, and although it did

not include universities in its analysis, a university's main purpose is to foster an education through open dialogue and allow all students to be heard. *Id*.

The District Court did not apply the *Tinker* standard to the case at issue and attempted to create a strict line between *Tinker*'s language of an "invasion" of the rights of others and the Policy's language of an "infringement" upon the rights of others. (R. at 14). Although the court stated that an invasion of rights would be much more serious than an infringement on rights, both an *invasion* and an *infringement* are predictable to those abiding by the ordinance or policy. Under both analyses, Petitioner actively attempted to garner attention for herself and to distract others from Mr. Drake's speech. Such behavior both invades and infringes on Mr. Drake's rights and the rights of those attempting to hear him. Further, simply because one or two students did not fully comprehend the Policy and what it required does not mean that it is unconstitutionally vague.

Therefore, under this form of a *Tinker* analysis, the University's Policy is not unconstitutionally vague because it is reasonably flexible, directed at an incredibly important interest of the University, and students had ample notice of what the University expected under the Policy. Moreover, the Policy is not unconstitutionally overbroad because Petitioner did not provide legitimate examples of a substantial number of impermissible applications of the Policy that would violate the Constitution. Accordingly, this Court should affirm the Court of Appeals ruling and find that the Policy is not unconstitutionally vague nor is it overbroad.

A. The Policy is not unconstitutionally vague because it was appropriately flexible, narrowly tailored, and gave notice to students.

Vague laws offend several important values provided to citizens through the First Amendment. When a law is vague, a person of ordinary intelligence may be trapped by the language without fair warning and "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); *see also FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 240 (2012) ("...regulated parties should know what is required of them so they may act accordingly . . . precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way"). However, when an ordinance is reasonable, flexible, and clearly denotes its main prohibitions, it is not considered unconstitutionally vague. *Grayned*, 408 U.S. at 110.

In *Grayned*, this Court found an anti-noise ordinance that prohibited excessive noise on or around a school during class session constitutional because it "punishe[d] only conduct which disrupts or is about to disrupt school activities" and had "'flexibility and reasonable breadth, rather than meticulous specificity.'" *Id*. (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969)). The Court found the anti-noise ordinance constitutional because the city wrote it specifically for a school context and it gave "fair notice to those whom [it] is directed" and "fair warning as to what [is] prohibited." *Id*. at 113, 114. The ordinance contained a flexible standard to be individually applied to include certain types of disturbances that would harm others' speech. *Id*. at 113. Therefore, when an ordinance is not vague, expressive activity can be prohibited if it "involves substantial disorder or invasion of the rights of others." *Id*. at 118.

Like the anti-noise ordinance in *Grayned*, the Policy here punishes only the conduct that directly infringed on the rights of those on school grounds. Further, like the city in *Grayned*, the University cannot be expected to list every single potential violation of the Policy that could take place on campus and therefore must be allowed to leave room for reasonable flexibility. By quelling targeted shouting from Petitioner, the University prohibited expressive activity that created substantial disorder from normal school activity, such as attending an educational and informational session, and therefore invaded the rights of the students attempting to listen to Mr.

Drake's speech. Additionally, the students were given fair warning as to what was prohibited, especially considering that before returning to campus, the students signed the Policy and the three-strike system that the Policy enacts to give students more than one opportunity before officially being suspended. (R. at 3). Petitioner herself received a warning just a few days prior to the issue in question because she partook in a very similar display and the University cited her for such actions. (R. at 4). Further, Petitioner's friends even claimed they did not participate because they had been cited previously and knew they would be cited again and ultimately suspended if they attended another rally with Petitioner. (R. at 27, 31).

Like the ordinance in *Grayned*, the Policy in this case is reasonably flexible and therefore need not have meticulous specificity. The Policy reasonably allows for the quelling of speech or conduct that "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." (R. at 23). Due to the early notice of the new Policy given by the University, it is easy for students to determine what prevents people from engaging in conversation or listening to others and it is easily predictable what would violate the Policy. Targeted shouting with the intent to distract specifically from another person's speech would fall within the flexible standard of the Policy; in fact, Petitioner had already violated the Policy for similar conduct a week prior. (R. at 4). Surely, then, Petitioner would have known that standing a mere 10 feet from the back of the amphitheater, wearing a Statue-of-Liberty costume and loudly yelling phrases that intentionally contradicted the speech of Mr. Drake would violate the Policy. (R. at 5). One could easily predict that such an act would be distracting for the speaker and the listeners and therefore violate a policy designed to prevent just that.

This Court has held in a variety of contexts that "the Constitution protects the right to receive information and ideas." *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982). Using the rationale

in *Tinker*, protecting the rights of students on a university campus is perhaps even more important than protecting the rights of children to speak in high school because allowing young mature adults to experience all forms of educational speech is crucial for growth. Further, it is perfectly proper for a college administration to prohibit activities by students or groups of students that violate reasonable campus rules, or substantially interfere with the opportunity of other students to obtain an education. *Healy*, 408 U.S. at 192. Without power to keep order on campus, university officials have no power to maintain education for their students. *Barker v. Hardway*, 283 F. Supp. 228, 235 (S.D. W.Va. 1968).

The University has a right to discipline those who violate reasonable and flexible rules because it has a compelling interest to keep the marketplace of ideas open and clear for all members to participate, regardless of the message. *Stacy v. Williams*, 306 F. Supp. 963, 977 (N.D. Miss. 1969) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)) ("[t]hat the speaker may hold views disliked by the campus community is not a permissible basis for the denial of the students' right to hear him"). Petitioner's rights under the First Amendment do not mean that she can trample on the rights of another simply because she did not like Mr. Drake's message. Universities play an important role in facilitating the expression and reception of speech on its campuses, and it is a compelling interest for the University to be able to protect the right to speak and the right to receive information. This case is about letting young minds develop freely. Such development is an incredibly compelling interest to universities where a main goal is to educate its students as to all sides of a conversation. Based on the importance of this concept, the University needs flexibility. This statute is worded to afford just that.

B. The Policy is not unconstitutionally overbroad because hypothetical applications in which it could be applied does not significantly endanger one's First Amendment rights.

For a law to be facially challenged on overbreadth grounds there must be a realistic danger that the law in question will *significantly* compromise recognized First Amendment protections of parties not before the Court. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). A law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional," judged in relation to the statute's plainly legitimate language. *United States v. Stevens*, 559 U.S. 460, 473 (2012). However, simply because it is conceivable that a university could impermissibly apply its policies to constitutionally protected speech, does not make it unconstitutional. *Id*. Therefore, a statute must be substantially overbroad to be considered unconstitutional. *Id*.

In *New York State Club Ass'n, Inc. v. City of New York*, this Court held that the appellant had not identified any club whose constitutional rights were legitimately threatened by the city's Human Rights Law, let alone a substantial number of clubs, and therefore found the law constitutional. 487 U.S. 1, 14 (1988). Additionally, the Court concluded that the law was not overbroad and whatever questions of overbreadth existed should be "cured through case-by-case analysis of the fact situations to which its sanctions, assuredly, may not be applied." *Id*.

In *Stevens*, the Court held that a Government statute criminalizing the sale, possession or creation of animal cruelty videos was substantially overbroad because it diminished "the market for other depictions, such as hunting magazines and videos" and the exceptions clause was not broad enough to include such activity. *Stevens*, 559 U.S. at 482. Therefore, even though the Government was concerned with a legitimate growing problem, animal cruelty videos, the statute encompassed far too much unproblematic speech. *Id.*

The Policy is not substantially overbroad because it does not significantly compromise the rights of Petitioner or her classmates and it allows the initial speaker to be heard within the

marketplace. Petitioner did not have a right to shout and attempt to overpower Mr. Drake's speech by significantly distracting audience members simply because she did not like what he had to say. *See Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969) ("That the speaker may hold views disliked by the campus community is not a permissible basis for the denial of the students' right to hear him").

Simply because other actions and noise also occurred at the time of Mr. Drake's speech does not mean that Petitioner's actions did not violate the Policy nor that the Policy is overbroad. *See Vincent*, 466 U.S. (holding that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge). Although Petitioner contends that the Policy is overbroad because other students who were making noise during the speech did not get cited, this Policy solely focuses on disruptive behavior, in which the other students were not engaging.

Like in *New York State Club Ass'n Inc.*, although it could be possible to impermissibly apply the Policy, say, for example, to people chatting as they walk by the amphitheater, this is not enough to render the Policy overbroad. Further, it is hard to believe that playing football or walking by with casual exchanges would "materially and substantially infringe" on Mr. Drake's right to speak. Specifically, Meghan Taylor, a spectator, noted that "[Petitioner's] chanting was significantly more distracting than [the surrounding] noises." (R. at 32). Therefore, the possibility of impermissible application is not enough to demonstrate the substantial number of applications required to find overbreadth. Further, other casual campus exchanges would not have materially and substantially infringed on Mr. Drake's rights per the Policy, by contrast, Petitioner's actions were significantly more distracting. The phrase "material and substantial infringement" in the

Policy limits the instances of impermissible application and reserves constitutional application for acts like Petitioner's. (R. at 23).

Unlike the statute in *Stevens*, the Policy does not significantly compromise Petitioner's rights by being overbroad because she can don a Statue-of-Liberty costume at any other point during the day and have her thoughts be heard. Petitioner could have even protested during Mr. Drake's speech, had she done so in a manner that would not have distracted the audience, like handing out fliers or putting up signs. The Policy simply requests that students do not materially infringe on others' rights to speak or receive ideas by targeting a speech and actively shouting down another speaker.

The right to receive information and ideas is included in First Amendment liberties and therefore policies may be enacted to ensure that these rights are protected. *American Civil Liberties Union of Virginia, Inc. v. Radford College*, 315 F. Supp. 893 (1970). Further, the idea of shouting down speakers on a university campus has become a nationwide phenomenon and a commonly used intimidation tactic to quell the speech of unpopular groups on campus. *See* Stanley Kurtz, *Year of the Shout-Down: A War of Words on College Campuses*, CBS NEWS (Jan. 21, 2018), https://www.cbsnews.com/news/a-war-of-words-on-college-campuses/). Therefore, the University should have the opportunity to create a flexible policy that allows all voices to be heard before the shout-down tactic becomes even more prevalent on its campus.

II. THE UNIVERSITY POLICY WAS CONSTITUTIONAL AS APPLIED TO PETITIONER WHERE PETITIONER MATERIALLY AND SUBSTANTIALLY INFRINGED ON MR. DRAKE'S RIGHT TO FREELY SPEAK, AND OTHERS' RIGHTS TO FREELY LISTEN, THROUGH THE USE OF TARGETED CHANTS AND A FLASHY COSTUME THAT CAUSED A DISRUPTION ON A COLLEGE CAMPUS.

The First Amendment guarantees freedoms concerning expression and assembly.

Petitioner threatened those freedoms when she targeted Mr. Drake's speech on a college campus in an attempt to silence his educated ideas and opinions, and when she inhibited the peaceful gathering amongst college students who came to listen to Mr. Drake express those views. This Court held that a student does not shed their First Amendment rights at the door of a schoolhouse; however, a Fourth Circuit District Court has noted that the First Amendment does not give a student the right to engage in conduct detrimental to the school's well-being or to deprive other students of an atmosphere in which they can be exposed to new opinions and ideas as they pursue their education. *Tinker*, 393 U.S. at 506; *Barker v. Hardway*, 283 F. Supp. 228, 238 (S.D. W.Va. 1968). The First Amendment does not give individuals the right to trample on the rights of others. *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964). These rights must be exercised responsibly so they do not deprive other individuals of the enjoyment of their rights. *Id*.

In *Tinker*, school principals suspended students for wearing black armbands to school in violation of a school policy. *Tinker*, 393 U.S. at 504. The Court held that the students did not interrupt or interfere with school activities and did not interfere with the rights of other students because they demonstrated silently and unaccompanied by disorder or disturbance. *Id*. at 508, 512. Therefore, the students' conduct did not materially and substantially interfere with other students' rights, but instead, fostered discussion outside of the classrooms and avoided any interference with work. *Id*. at 509, 513. The Court further reasoned that a student's right to express his or her opinion does not exist solely in the classroom, but also in other open areas of the campus so long as they are during authorized school hours and do not materially and substantially interfere with the rights of others. *Id*. at 512-13. Conduct by a student, in or out of class, that for any reason materially disrupts classwork, involves substantial disorder, or invades the rights of others is not protected by the constitutional guarantee of freedom of speech. *Id*. at 513.

In *Barker*, students protested discriminatory practices at a college by marching on the school's football field during halftime. *Barker*, 283 F.Supp. at 232. The court held that although the students were allowed to protest by marching, chanting, and singing during halftime, their behavior became punishable once their disorderly conduct deprived spectators of their ability to freely watch the game. *Id.* at 239. The court reasoned that school officials have an inherent general power to maintain order within a school and the ability to punish those students who are detrimental to the institutions well-being. *Id.* at 235. Furthermore, the court reasoned that there are rules that are recognized as necessary to maintain the orderly function of a college and to provide a suitable climate to students to pursue their studies. *Id.*

In *Kowalski v. Berkeley Cty. Sch.*, a student was rightfully suspended from school for creating a website that targeted a fellow student, even though it was off school grounds and did not occur during a school-related activity. 652 F.3d 565, 574 (4th Cir. 2011). The court held that the student's behavior could be punished because it interfered with the work and discipline of the school and caused a disruption in the environment. *Id*. at 572. The court reasoned that the targeted attack was sufficiently connected to the school environment, which gave the school the authority to discipline the student. *Id*. at 567. Moreover, school officials have the authority to regulate speech in an effort to further educational objectives. *Id*. at 571. The court further held that the student was on notice that she could be punished for improper behavior because she read the school handbook which contained an anti-bullying policy. *Id*. at 570.

When Petitioner began loudly chanting ten feet away from the last row of the Amphitheater in a Statue-of-Liberty costume, she prevented the orderly expression of Mr. Drake's ideas and opinions. (R. at 52). Officer Thomas, who was actually there to observe Petitioner's actions, claimed that spectators were turning around to look at Petitioner and appeared to have difficulty

focusing on Mr. Drake's speech due to her significant disruption. (R. at 45). In addition to Officer Thomas' observations, Meghan Taylor, a spectator at the event, agreed that Petitioner's chanting was significantly distracting. (R. at 32). In *Tinker*, the Court found that the protestors did not materially and substantially interfere with other students' rights because they demonstrated silently and unaccompanied by disorder or disturbance. *Tinker*, 393 U.S. at 508, 512. Unlike the student's silent protest in *Tinker* which did not amount to a substantial distraction, Petitioner wore a flashy costume and chanted loudly with the intention of causing a disruption. (R. at 5). Instead of silently sharing her message in an attempt to foster discussion, Petitioner interrupted and interfered with the event, thereby interfering with the rights of other students because her behavior was accompanied by disorder and disturbance. *Id*. at 508.

While the First Amendment is guaranteed to all individuals, the University has a legitimate interest and statutory duty to protect the free and full exchange of ideas on its campus in order to ensure that all students and guests have the ability to unreservedly communicate. A primary goal of universities is to expose students to different ideas and opinions. Here, Petitioner prevented the free and full exchange of ideas on the University's campus when she attempted to silence Mr. Drake by chanting loudly over him while simultaneously wearing a Statue-of-Liberty costume to create an even grander distraction. (R. at 5). Like the college officials in *Barker* who rightfully prevented disruptive speech at a football game, the University officials in this case appropriately intervened and prohibited Petitioner from depriving guests lawfully at the Quad from listening to Mr. Drake's speech. Here, it was more even reasonable for the University to quell Petitioner's disorderly behavior because Mr. Drake's speech was for educational and political purposes, which is part of the overall college education experience.

It is generally understood that events held in an open college spaces will have a significant

amount of distractions. Although there were multiple sources of noise that could have been distracting to Mr. Drake and his listeners during his speech, Petitioner was comparatively more distracting to the effect that she was "materially and substantially infring[ing] upon the rights of" other spectators to listen to Mr. Drake's speech. (R. at 23). When Officer Thomas entered the amphitheater with the intention of determining whether Petitioner's protest was inhibiting the spectators' ability to listen to Mr. Drake's speech, he concluded that Petitioner was more distracting than the random background noise because she was facing the amphitheater. (R. at 45). As the Court of Appeals for the Fourteenth Circuit mentioned, "targeted chanting directed at a speaker and his audience is qualitatively different in character and capacity for disruption than random noise coming from a variety of directions." (R. at 52). Unlike the background noise coming from students playing music or playing sports, Petitioner purposely and persistently caused a disruption in close proximity to Mr. Drake and was specifically aiming her chants at him and his spectators. (R. at 52).

While Petitioner claims that she was trying to educate other students at the University about the opposing views on immigration at Mr. Drake's speech, she could have chosen to express those views at a different time or place. Instead, she deliberately chose to scream over Mr. Drake, which made it difficult, and perhaps even impossible, for his listeners to focus on the material. By contrast, in *Tinker*, the students chose an appropriate time and location to relay their message, choosing not to disrupt other students and consequently fostering discussion outside of the classroom. *Tinker*, 393 U.S. at 509, 513. While it would have been acceptable to make her ideas known to the student body at an appropriate time and place, Petitioner chose to try to eliminate the expression of Mr. Drake's ideas by attempting to drown him out while he spoke. Furthermore, in *Tinker*, the protests fostered speech political in nature and the students' actions contributed to the

overall learning experience, whereas Petitioner stifled speech of political nature, ensuring that only her side of the issue could be heard.

Although Petitioner stood a mere ten feet behind the amphitheater, refraining from physically entering the open space is immaterial because the projection of Petitioner's voice into the area resulted in the same disruptive outcome. In *Kowalski*, a student was rightfully suspended for improper conduct that did not occur on school grounds, but rather in the confines of her own home. *Kowalski*, 652 F.3d at 574. In *Tinker*, the court held that a student's rights do not exist solely in the classroom, but rather, they also exist in other open areas of the campus so long as they are during authorized school hours and do not materially and substantially interfere with the rights of others. *Tinker*, 393 U.S. at 512–13. Here, we have improper and disruptive conduct that actually occurred on school grounds. Petitioner's argument that her actions did not take place during a school-related activity are irrelevant because her targeted attack was sufficiently connected to the school environment, which gave the school the authority to discipline her. *Kowalski.*, 652 F.3d at 567. Mr. Drake's speech was closely related to school activity, even though it was not sponsored by the University, because it is a part of the all-inclusive educational experience and therefore under the ambit of what the University can regulate.

When Petitioner received her first strike, the University notified her that her conduct of standing on a chair and loudly chanting distracting counterspeech violated the Policy. (R. at 4). It is uncontested that when Petitioner received her first warning, she and other KFT members "sought to shout down the speaker at . . . [the] anti-immigration rally." (R. at 3). In her affidavit, Petitioner further admitted that she intended to disrupt the event by shouting the speaker down. (R. at 37). It is reasonable to believe that when Petitioner engaged in the same behavior at Mr. Drake's event, she was once again determined to drown him out, simply because she disagreed with the content

of his speech. After receiving their first warning from the school, other members of KFT avoided protesting during Mr. Drake's speech because they knew this exact conduct was prohibited since they were cited for similar measures taken the week prior to this incident. (R. at 27, 33). Even though Petitioner understood that this behavior was prohibited, she once again carried herself in the same manner at Mr. Drake's speech. *See Kowalski*, 652 F.3d at 575 (noting that the student was already on notice that she could be punished for improper behavior because she read the school handbook which contained the policy in question). In addition to being warned about her prior behavior, Petitioner signed the Policy online, thereby acknowledging that she received, read and understood it. (R. at 3).

Shouting down speakers on university campuses has become a nationwide phenomenon. *See* Stanley Kurtz, *Year of the Shout-Down: A War of Words on College Campuses*, CBS NEWS (Jan. 21, 2018), https://www.nationalreview.com/corner/year-shout-down-worse-you-think-campus-free-speech/. As campus climates continue to become more hostile, some universities have had to avoid highly controversial topics out of fear of students shouting down their political adversaries. *Id*. In many cases, protestors attend lectures with the premeditated intention of causing a disruption in the hopes of shutting down the speech in its entirety. Through the use of berating chants and counter-chants, protestors have the ability to successfully prohibit guest speakers from uttering complete sentences. *Id*. Thus, "shout-downs set boundaries for permitted speech and the effect spreads locally, nationally, and persistently if the shout-down goes unpunished." *Id*. For these reasons, universities must have the authority to remove and discipline disruptive speakers to not only restore order, but also to deter future shout-downs. It is important to protect free and full exchange in the marketplace of ideas, especially on university campuses. In particular, universities have a keen interest in safeguarding the communication of educational ideas that are controversial

and highly debated because such topics have the ability to allow students to be exposed to all viewpoints before forming their own intellectual opinions. The boundaries of this exchange cannot be prescribed by student protestors engaged in counterspeech. Therefore, the application of the Policy as applied to Petitioner was not unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should affirm the United States Court of Appeal's decision in holding that the policy was neither unconstitutionally vague nor impermissibly overbroad on its face, nor unconstitutional as applied to Petitioner.

Appendix A

Amendment I to the United States Constitution:

> 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.

Amendment XIV to the United States Constitution:

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

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 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.

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 subject 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 citations in violation of the Policy.
7. A student who receives a second or third citation is entitled to a formal disciplinary hearing before the School Hearing Board.
8. The School Hearing Board shall determine whether the behavior constitutes a violation of the Policy and therefore merits a second or third strike.
9. A formal disciplinary hearing includes written notice of the charges, right to counsel, right to review the evidence in support of the charges, right to confront witnesses, right to present a defense, right to call witnesses, a decision made by an impartial arbiter, and the right of appeal.
10. The sanction for a second strike shall be expulsion from the University.

11. The sanction for a third strike shall be expulsion from the University.
12. Any strike issued under this Policy shall be place on the student's record.

Notice

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

COMPETITION CERTIFICATE

Team 15 affirms the following:

1. All copies of the brief are the work product of the members of the team only;
2. The team has complied fully with its law school honor code; and
3. The team has complied with all the Rules of the Competition.

Sincerely,

Team 15