No. 18-1234

Supreme Court of the United States

VALENTINA MARIA VEGA, PETITIONER

v.

JONATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

Team 17

QUESTIONS PRESENTED

I. Whether the University's 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" is unconstitutionally vague and substantially overbroad even though it provides sufficient notice and does not substantially infringe on speech?

II. Whether the Campus Free Speech Policy violates the First Amendment as applied, where the Petitioner infringed another's right to engage in expressive activity, where there is no evidence the University prejudicially enforced its policy against Petitioner, and where the Policy survives intermediate scrutiny?

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OPINIONS BELOW

The opinion of the court of appeals is unreported, but available at Jones v. Vega, No. 18-757 (14th Cir. Nov. 1, 2018). The opinion of the district court is unreported, but available at Vega v. Jones, No. 18-CV-6834 (D. Av. Jan. 17, 2018).

JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgement on this matter on November 1, 2018. Jones v. Vega, No. 18-757 (14th Cir. Nov. 1, 2018). Petitioner timely filed a petition for a writ of certiorari which this court granted. R. at 54. This court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution are reproduced at Resp. App. A. Arivada General Statute Section 118-200 is reproduced at Resp. App. B.

PROCEEDINGS BELOW

Petitioner brought this suit in the United States District Court for the District of Arivada, challenging the constitutionality of Respondent's Campus Free Speech Policy. R. at 6. Petitioner claimed the Policy is facially unconstitutional because it is both vague and overbroad. R. at 2. Petitioner also asserted the Policy is unconstitutional as applied to her. Id. Both parties submitted motions for summary judgment. R. at 6-7. Upon review of these motions and hearing oral arguments, the district court concluded the Campus Free Speech Policy was unconstitutional both on its face and as applied. The court granted summary judgment in favor of Petitioner.

Respondent appealed. The United States Court of Appeals for the Fourteenth Circuit reviewed the district court's grant of summary judgment *de novo* and considered the parties' motions for summary judgment. R. 46. Following a thorough analysis, the court held the Policy is "neither unconstitutionally vague nor impermissibly overbroad on its face." R. 53. Further, the court declared the policy was not unconstitutional as applied to Petitioner. Id. The court of appeals reversed the district court's entry of summary judgment in favor of Petitioner and accordingly remanded for entry of summary judgment in favor of Respondent. Id.

STATEMENT OF THE FACTS

On June 1, 2017, the State of Arivada passed the Free Speech in Education Act of 2017, mandating that all public colleges and universities enact a policy to "safeguard the freedom of expression on campus." R. at 2. The state legislature declared that nationwide incidents of students shouting down on-campus speaker were becoming increasingly frequent. R. at 19.

In response to the Free Speech in Education Act, the University of Arivada ("University"), promulgated the "Campus Free Speech Policy" ("Policy"). R. at 23. The Policy reaffirms the University's commitment to free expression and provides the University can sanction students for "materially and substantially infring[ing] upon the rights of others to engage in or listen to expressive activity." Id. It operates as a "three strike" system. Id. Campus Security is tasked with recording citations, but all citations are forwarded to the Dean of Students for review. Id. The "first strike" is a warning, and the student is entitled to an informal disciplinary hearing before the Dean of Students. Id. After a second or third strike, a student is entitled to a formal disciplinary hearing with the School Hearing Board ("Board"). Id. The Board determines whether an alleged violation amounts to a sanction. A second strike will result in suspension for the academic semester, while a third strike results in expulsion. Id.

Petitioner Valentina Maria Vega ("Petitioner") is a student at the University and President of the school's branch of Keep Families Together ("KFT"), a national organization. R. at 3. On August 31, 2017, Petitioner and nine members of KFT attended a student-organized anti-immigration rally, intending to "shout down" its speaker. R. at 3-4. Once the program began, KFT members stood on chairs in the middle of the auditorium where the rally took place, shouting pro-immigration chants. R. at 4. They succeeded in shouting down the speaker. Id. The students were issued citations and, subsequently, "first strike" warnings pursuant to the Policy's

disciplinary procedures. Id.

On September 5, 2017, Samuel Payne Drake ("Mr. Drake"), Executive Director of "Stop Immigration Now" ("SIN") gave a speech at the University's amphitheater at the invitation of the University's chapter of American Students for America ("ASFA"). R. at 1, 4. The amphitheater is located just north of center of the University's "Quad." R. at 4. The Quad is a large green space cross-hatched with sidewalks and walkways and surrounded by dormitories. Id. The amphitheater is surrounded by open areas where students gather to study or play sports. Id.

Student organizations often reserve the amphitheater for small-scale, on-campus events. R. at 5. The amphitheater consists of wooden benches arranged in a semi-circle, facing a platform. Id. There is no clear line of demarcation between the Quad and the amphitheater, which connects with the surrounding green areas after its last semi-circle of benches. Id. There is also a main walkway roughly ten feet from the last row of benches. Id.

At approximately 1:15 p.m. on September 5, Mr. Drake began his speech from the amphitheater's platform, in front of roughly thirty-five people. Id. During his speech, students played intramural football, listened to music from portable speakers, and talked to each other on the Quad. Id. Concurrently, while Mr. Drake spoke, Petitioner shouted "disband ICE," "immigrants made this land," and "keep families together" from the edge of the paved walkway near the amphitheater. Id. Mr. Drake specifically found Petitioner's chanting distracting, such that it interfered with his ability to "formulate [his] thoughts." R. at 25. Student attendees also reported the chants were considerably distracting. R. at 28 (the "flag football game . . . was nowhere as distracting as Ms. Vega's protests"); R. at 32 (Petitioner's "chanting was significantly more distracting than the other noises.").

Campus Security Officer Michael Thomas ("Officer Thomas") responded to the

disturbance. R. at 5. Officer Thomas observed the speech's spectators "appeared to have difficulty focusing on the speech due to the disruption" and that Petitioner was "more distracting than the random background noise because she was facing the theater." R. at 6. Concluding Petitioner was "materially and substantially infringing upon the rights of others to engage in or listen to expressive activity," Officer Thomas issued Petitioner a citation. Id. Upon review of the citation and following a hearing, in accordance with the Policy, Dean Louise Winters subsequently issued Petitioner a "second strike" and suspended her from the University for the remainder of the semester. Id.

SUMMARY OF THE ARGUMENT

The University of Arivada enacted the Campus Free Speech Policy ("Policy") in 2017. R. at 2. The Policy intends to promote freedom of expression on campus and provides for sanctions if students "materially and substantially infringe upon the rights of others to engage in or listen to expressive activity." R. at 23. After being sanctioned, Petitioner brought this action against Respondent, claiming the Policy was unconstitutional, both facially and as applied to her. R. at 6. However, the Policy is not unconstitutional on its face, as it is neither vague nor overbroad. Further, the Policy is constitutional as applied to Petitioner.

The Supreme Court has recognized the role public universities play in educating members of society, calling the university campus a "marketplace of ideas." Healy v. James, 408 U.S. 169, 180 (1972) (citations omitted). In protecting this robust forum of free expression, administrators have taken necessary steps to prevent students from encroaching on other students' rights. The Supreme Court noted that schools can enact policies to both prevent disruption of the learning environment and discourage students from invading others' rights. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). The University thus enacted a policy with this language in mind.

Not only is the University's Policy justified, but it is also formulated such that it is not unconstitutionally vague. Vague policies trap students without warning, are in danger of being applied arbitrarily and subjectively, and operate to inhibit a substantial amount of protected speech. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). However, the Policy is not vague, as it uses clear language, operates on a strike system with many layers of administrative review, and does not inhibit large amounts of speech.

Further, the Policy is not unconstitutionally overbroad. A law is overbroad if a substantial

number of its applications are unconstitutional. United States v. Stevens, 559 U.S. 460, 472 (2010) (finding a statute prohibiting depictions of animal cruelty created "a criminal prohibition of alarming breadth"). A law must also prohibit constitutionally-protected conduct to be overbroad. Grayned, 408 U.S. at 114. The University's Policy, however, does not create a prohibition of "alarming breadth" and is narrowed to specific conduct. The Policy does not prohibit constitutionally-protected conduct.

Though Petitioner also raises a First Amendment challenge to the Policy as applied to her, the University's application is not unconstitutional. Based on a fact-intensive analysis of the record, it is clear Petitioner materially and substantially infringed upon Mr. Drake's right to engage in expressive activity and other students' rights to listen to his speech. Further, in considering other as-applied tests, such as that put forth in McCullen v. Coakley, there is no evidence the University engaged in a of a pattern of selective enforcement against Petitioner's viewpoint. 134 S. Ct. 2518, 2534 n.4 (2014) (a person claiming an as-applied First Amendment violation must show "he was prevented from speaking while someone espousing another viewpoint was permitted to do so"). Finally, in keeping with the intermediate scrutiny analysis common to First Amendment challenges of content-neutral laws, the Policy advances a substantial University interest, does not unnecessarily burden other speech, and leaves open ample alternative channels of communication. Therefore, Respondent asks this Court to affirm the judgment of the court of appeals.

ARGUMENT

This Court should uphold the decision of the court of appeals to remand for summary judgment in favor of the University. Petitioner has challenged the University's Policy on its face, claiming it is unconstitutionally vague and substantially overbroad. R. at 2. Petitioner has also contended the Policy has violated her First Amendment rights as applied to her. Id. The district court entered summary judgment in favor of the Petitioner, yet the court of appeals correctly reversed the decision, recognizing "[t]here can be no freedom of expression on campus without the freedom to listen." R. at 47. The University's Policy is constitutional both facially and as applied. Respondent respectfully asks this Court to uphold the decision of the court of appeals.

I. THE CAMPUS FREE SPEECH POLICY IS NEITHER UNCONSTITUTIONALLY VAGUE NOR SUBSTANTIALLY OVERBROAD.

As the Supreme Court noted in United States v. Stevens, to succeed in a facial attack on a law or regulation, a party must establish that no set of circumstances exists under which the law or regulation would be valid or that the regulation lacks any "plainly legitimate sweep." 559 U.S. 460, 473 (2010). A party is permitted to raise concerns about the vagueness and overbreadth of a statute, and "if the law is found deficient in one of these respects, . . . [t]he statute, in effect, is stricken down on its face." Gooding v. Wilson, 405 U.S. 518, 521 (1972).

The University's Policy meets the standards of constitutionality set forth in precedent involving facial challenges for vagueness and overbreadth. To successfully assert a regulation is too vague, and thus unconstitutional, the law must "trap the innocent without fair warning" and must raise concerns of arbitrary and discriminatory application. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). If the regulation inhibits the exercise of First Amendment freedoms, it is unconstitutionally vague. Id. at 109. The regulation must also chill a *substantial* amount of speech. Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1152 (9th Cir.

2001) (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 60 (1976)).

Furthermore, to successfully assert a regulation is too overbroad and thus unconstitutional, a court must find there is "'a likelihood that the regulation's very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court.'" Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984)). To establish this, a substantial number of applications of the regulation must be unconstitutional. Stevens, 559 U.S. at 473. This Policy, however, is not marred by such concerns, and is therefore constitutional on its face.

A. Courts have recognized that public university campuses are robust forums of free expression, and that school administrators can protect against infringement upon the rights of others.

In considering whether the University is empowered to enact the Policy, this Court should consider the role of a public university in promoting the marketplace of ideas unique to college campuses. This Court should also hold that the foundational case Tinker v. Des Moines Indep. Cmty. Sch. Dist. applies in this context, given that the University should be empowered to enact regulations to protect the rights of other students. 393 U.S. 503, 513 (1969).

1. A public university must uphold the marketplace of ideas.

American universities have historically served as places where ideas are formed and debated—a type of "marketplace of ideas." Healy v. James, 408 U.S. 169, 180 (1972) (citations omitted). The Supreme Court has recognized this, noting "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 263 (1957). By exposing students to unfamiliar, and even controversial, views, universities can shape an informed society.

Though the college classroom has been called a marketplace of ideas, exchanges often happen outside the confines of schoolroom walls. Indeed, in Healy the Supreme Court noted the

"surrounding environs" of a college campus also serve as a marketplace of ideas. 408 U.S. at 180. Fundamental to this exchange of ideas, in addition to the traditional right to speak, is the right to hear. Kleindienst v. Mandel, 408 U.S. 753, 771 (1972). See also Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Thomas v. Collins, 323 U.S. 516, 534 (1945) ("[T]here was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say . . . ."). As Justice Marshall noted in his dissenting opinion in Kleindienst, "The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin." 408 U.S. at 775. In the university context, courts have highlighted the importance of such a "right to hear." Radford, 315 F. Supp. at 896 ("This is not surprising when one considers what value the right to free speech would have if the right to hear such speech could be foreclosed.").

Whereas American universities have traditionally served as a marketplace of ideas, some scholars and commentators have argued that public universities are failing to operate in accord with the First Amendment.[1] Indeed, they have noted a rise in incidents involving the so-called "heckler's veto," in which schools uninvite speakers or cancel events out of concern about students' reactions to controversial viewpoints. See generally, R. George Wright, The Heckler's Veto Today, 68 Case W. Res. L. Rev. 159, 161 (2017). A heckler's veto also allows one audience member who objects to a speaker's words to silence the speaker. See generally Jones v. Bd. of Regents of Univ. of Ariz., 436 F.2d 618, 621 (9th Cir. 1970) (noting officials should have focused on the infringement of student's constitutional right "by those bent on stifling, even by violence, the peaceful expression of ideas or views with which they disagreed").

[1] The lower courts noted the Policy is loosely based on research put forth in a publication by the Goldwater Institute. R. at 2, 43.

In her contention the Policy violates students' First Amendment rights, Petitioner overlooks the University's traditional role in protecting the right to listen, a fundamental right impacted by the heckler's veto. "Speech is often provocative and challenging." Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). Yet college campuses have traditionally served as robust forums of free expression, exposing students to opposing beliefs and challenging ideas. While some students may find certain speech repulsive, heckling speakers to silence them ultimately infringes on the First Amendment rights of other students to receive and hear controversial viewpoints. This Court should thus consider the role of the exchange of ideas on college campuses when weighing the constitutionality of the Policy.

2. A public university can take steps to protect against speech that invades upon the rights of others.

While institutes of higher education are obligated to protect students' First Amendment rights, courts have also recognized the need for schools to protect against speech or expressive conduct that invades upon the rights of others. Indeed, in the landmark case Tinker, the Supreme Court noted that conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513. In Tinker, the Supreme Court upheld the rights of a high school and junior high student to silently protest the Vietnam War by wearing black armbands during the school day. Id. The Court noted that this act neither materially disrupted the classroom nor invaded upon the rights of others. Id. Courts have since applied this analysis to secondary schools. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986) (holding the school district acted within authority in imposing sanctions on a student for his offensively lewd and indecent speech); Morse v. Frederick, 551 U.S. 393, 397 (2007) (holding schools may take steps to protect students from speech that can reasonably be regarded as encouraging illegal drug use).

The district court in this case asserted Tinker and its progeny should not apply to colleges and universities. However, this is misguided. Some courts have noted that college administrators are granted "less leeway" in regulating student speech than their colleagues in high schools and middle schools, yet this does not preclude colleges from looking to Tinker when formulating regulations. DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008). Indeed, many cases drawing this distinction still ultimately recognize the standards set forth by Tinker. R. at 12. See DeJohn, 537 F.3d at 316 (noting, in a case involving a university, that "[u]nder the Supreme Court's rule in Tinker, a school must show that speech will cause actual, material disruption before prohibiting it"); Jones v. Bd. of Regents of Univ. of Ariz., 436 F.2d at 621 (applying Tinker to a state university's prohibition on handbills on campus); Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667, 670 (1973) (citing Healy and Tinker as demonstrating "universities are not enclaves immune from the sweep of the First Amendment."). While it may be true that courts will be more forgiving of a secondary school's efforts to protect the learning environment and the children they teach, universities are not precluded from also relying on Tinker. Based on the aforementioned cases, it is clear Tinker sets an important baseline for all institutes of education to follow.

Furthermore, the district court's second attack on the University's reliance on Tinker mistakenly claims Tinker "does not offer any justification" for regulating speech, other than speech that disrupts the classroom. R. at 13-14. As courts have noted, under Tinker, speech that would otherwise be protected "is subject to Tinker's general rule: it may be regulated only if it would substantially disrupt school operations *or interfere with the rights of others*. Saxe, 240 F.3d at 214 (emphasis added). Surely the protection of students' rights to receive information falls under the latter half of the Tinker standard. See Harper v. Poway Unified Sch. Dist., 445

F.3d 1166, 1178 (9th Cir. 2006) (citations omitted) (noting a high school student's anti-gay T-shirt collided with the rights of other students). Additionally, the focus on students' rights necessitates that the Policy reach conduct outside of the classroom, given that the marketplace of ideas on a college campus encompasses "surrounding environs." Healy, 408 U.S. at 180. The University justifiably implemented the Policy to protect the rights of other students, acceptable under Tinker. This is the compelling reason the district court seems to overlook.

Finally, when the district court does address the need to protect the rights of students, it wrongly accuses the University of overstepping the bounds imposed by Tinker. The district court claims the language "invades" or "collides with" in Tinker is more specific than the language "infringes upon" in the Policy. However, it is clear the University largely drew upon Tinker and its progeny in developing the Policy, to the point where the wording is almost identical. Indeed, both "infringe" and "invade" are understood to be synonyms of each other.[2] If anything, the use of "infringe" in the Policy is actually stronger, implying that a right is being broken,[3] whereas "invade" and "collide" simply imply a clash. Further, the Policy uses the phrases "materially," also found in the standard in Tinker. It is clear, then, the Policy does not "gut" the standard set forth in Tinker, but actually accurately encapsulates it.

B. The Campus Free Speech Policy was not unconstitutionally vague.

In keeping with Supreme Court precedent regarding facial challenges to regulations, this Court should adopt the understanding of "vagueness" put forth by Grayned. 408 U.S. at 105. Per Grayned, a statute or regulation is unconstitutionally vague if it "traps the innocent by not

[2] *Compare Infringe,* THESAURUS.COM, http:// thesaurus.com/browse/infringe (last visited Jan. 30, 2019), *with Invade,* THESAURUS.COM, http://thesaurus.com/browse/invade (last visited Jan. 30, 2019).
[3] *Infringe,* THE FREE MERRIAM–WEBSTER DICTIONARY, http:// www.merriam-webster.com/dictionary/infringe (last visited Jan. 30, 2019).

providing fair warning"; if it delegates basic policy matters for resolution on an ad hoc and subjective basis; and if it operates to inhibit the exercise of basic First Amendment freedoms. 408 U.S. at 108–09. Courts must also consider whether the regulation chills a *substantial* amount of speech. Cal. Teachers Ass'n, 271 F.3d at 152 (citing Young, 427 U.S. at 60). Applying this analysis, this Court should hold that the Policy is not unconstitutionally vague on its face.

1. The Policy provides ample notice and does not "trap" non-offenders.

Courts insist that "[L]aws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . ." Grayned, 408 U.S. at 108. Further, even though "we can never expect mathematical certainty from our language," Id. at 110, "Vague laws may trap the innocent by not providing fair warning." Id. Given the Policy provides ample notice and fair warning through clear language, it cannot be held to be unconstitutionally vague.

In Grayned, the Supreme Court held that a statute prohibiting "willfully" making or assisting in making "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class" was constitutional. 408 U.S. at 104. The Court held that unlike a general breach of peace ordinance, the language provided sufficient notice, and prohibited disturbances were "easily measured by their impact on the normal activities of the school." Id. at 112. The Court compared the case to an earlier decision that concluded that the use of the words "obstruct" and "unreasonably interfere" in an anti-picketing ordinance provided necessary notice to potential offenders. Cameron v. Johnson, 390 U.S. 611, 616 (1968). The Court noted the terms there "plainly require[d] no 'guess(ing) at (their) meaning,'" and the statute "clearly and precisely delineate[d] its reach in words of common understanding." Id. at 616. These cases serve as important models for how precise statutory language needs to be. See Cal. Teachers Ass'n, 271 F.3d at 1153 (noting a California law's requirement that public school teachers present the "curriculum" "overwhelmingly" in English gives "at least as much notice"

as that in Grayned); Hill v. Colorado, 530 U.S. 703, 714 (2000) (rejecting vagueness challenge to law that criminalized approaching another person without the person's "consent" to engage in "oral protest, education, or counseling" within an area close to a health care facility).

Like the regulations at issue in Grayned and Cameron, the Policy is not vague. The Policy announces a "Free Expression Standard": "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." R. at 23. Statutes need not be mathematically precise, but should at least meet the standards set forth in Grayned. Here, the language in the Policy is arguably even more specific than the language upheld as constitutional in Grayned. The Policy targets those who "materially" and "substantially" interfere with the rights of others—common terms that do not require guessing as to their meaning. These terms are even more common in the educational context. In Bell v. Itawamba Cnty. Sch. Bd., the Fifth Circuit referred to the Supreme Court's "'materially and substantially interfer(ing)'" standard as "the lodestar for evaluating the scope of students' on-campus First Amendment rights." 799 F.3d 379, 422 (5th Cir. 2015). If previous courts could accept the use of terms such as "willfully" and "disturbing" at issue Grayned and "overwhelmingly," as seen in Cameron, surely the specific language used here would not "trap" students. Students thus have ample notice, and this Court should hold that the Campus Free Speech Policy is not unconstitutionally vague.

2. The Policy is not in danger of being applied arbitrarily and discriminatorily by lower-level officials.

Per the Supreme Court's opinion in Grayned, "laws must provide explicit standards for those who apply them." 408 U.S. at 108. Regulations that are vague delegate basic policy matters to lower-level officials "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 109. In Grayned, the Supreme Court

noted that the law at issue was not unconstitutionally vague because it did not allow for punishment "for the expression of an unpopular point of view." Id. at 113. Further, the law did not contain a "broad invitation to subjective or discriminatory enforcement." Id. Indeed, in Coates v. City of Cincinnati, a law prohibiting "conduct . . . annoying to persons passing by" was held to be unconstitutionally vague, given that the enforcement of the ordinance relied entirely on the interpretation of the very subjective idea of "annoyance." 402 U.S. 611, 612 (1971).

Vague laws are problematic because they provide "absolute discretion" to police officers or similar officials. City of Chicago v. Morales, 527 U.S. 41, 61 (1999). Yet the proper enforcement of laws does require the exercise of at least some degree of police judgment. Hill, 530 U.S. at 733 (quoting Grayned, 408 U.S. at 114). Here, the Policy is not in danger of being applied arbitrarily and discriminatorily by lower-level officials and requires the acceptable amount of judgment. Just as the noise ordinance in Grayned required a "demonstrated interference with school activities," the Policy requires that conduct that substantially infringe on the rights of others to express themselves or listen. 408 U.S. at 114. Unlike the ordinance in Coates, which relied on the very subjective and fluid understanding of "annoyance," the terms used in the Policy are not marred by subjectivity. While what constitutes an "annoyance" could vary from officer to officer, the Policy offers a much more uniform standard to follow.

Furthermore, the Policy as a whole involves disciplinary procedures that revolve around a "three-strike" rule, thus limiting the dangers of "absolute discretion" by low-level officers. While it is true Campus Security exercises at least some degree of judgment—notably acceptable under Grayned and Hill—a security officer's decision to issue a citation is reviewed by upper-level administrators. Offenders are then entitled to a formal disciplinary hearing with a review by the Board. R. at 23. Rather than allowing the Policy to be arbitrarily applied on the spot by officials,

as was the case in Morales, various administrators ultimately review whether a student has violated the Policy *before* the student faces sanctions. Id. As such, the dangers of subjective and discriminatory applications are not present here—and the Policy is not unconstitutionally vague.

3. The Policy operates to protect, not inhibit, the exercise of first amendment freedoms.

In considering whether a law or regulation is unconstitutionally vague, a court will also consider whether the law or regulation "abuts upon sensitive areas of basic First Amendment freedoms," and if so, whether it operates to inhibit the exercise of those freedoms. As the Court noted in Grayned, "Uncertain meanings inevitably lead 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 question is more accurately stated as whether a "substantial" amount of legitimate speech will be chilled by the law. Cal. Teachers Ass'n, 271 F.3d at 1152 (quoting Young, 427 U.S. at 96). So long as a substantial amount of speech will not be chilled, and the laws are "readily subject to a narrowing construction by the state courts," a court cannot hold the regulation is unconstitutionally vague. Young, 427 U.S. at 61 (holding that a limited amount of uncertainty in a Detroit zoning ordinance for adult theatres could be narrowed by state courts).

Here, while the Policy may touch on some speech, it is targeted toward students' conduct and does not, in operation, inhibit a substantial amount of legitimate speech. Conduct that materially and substantially infringes on the First Amendment rights of others is barred. Therefore, while the district court puts forth a "parade of horribles" about what other activities may be caught up by the Policy, it is clear this is faulty speculation. Not only would many alleged applications fail to be expressive and implicate First Amendment freedoms, but like the ordinance in Young, any uncertainty in the Policy is readily subject to a narrowing construction. Surely the University's adjudicative body would not broadly apply the Policy so as to sweep up

usual campus activities. Neither will it impact substantial amounts of protected speech, given students are simply proscribed from imposing on the rights of others. The Policy is thus not unconstitutionally vague.

C. The Campus Free Speech Policy is not unconstitutionally overbroad.

For a court to find that a law or regulation is unconstitutionally overbroad, the court must consider whether a substantial number of the applications of the law are unconstitutional, as well as whether the law prohibits constitutionally-protected conduct. Here, the Policy is not plagued by these concerns. This Court should hold the Policy is not unconstitutionally overbroad.

1. The Policy will not substantially inhibit the constitutionally protected speech of third parties.

If a substantial number of the applications of a law or regulation are unconstitutional, "a law may be invalidated as overbroad." Stevens, 559 U.S. at 473. Even if these concerns are present, under the Supreme Court's decision in Vincent, Courts will only strike down speech regulations if the regulation is substantially broader than necessary. 466 U.S. at 808. In the context of the First Amendment, courts have noted that overbroad laws may inhibit the constitutionally-protected speech of third parties. Id. at 798.

Per Vincent, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." 466 U.S. at 801. There, a candidate's supporters failed to demonstrate a realistic danger that an ordinance banning signs would impinge on the First Amendment rights of third parties. Id. at 802. The Court highlighted that many of the signs posted were done in such a way so as to create traffic and safety problems, and that there were "ample alternative modes of communication" that individuals could find adequate. Id. at 812. However, in Stevens, the Supreme Court held that a statute prohibiting depictions of animal

cruelty created "a criminal prohibition of alarming breadth" 559 U.S. at 474. Courts grappling with First Amendment challenges to college policies have applied a similar analysis. See DeJohn, 537 F.3d at 301 (striking down Temple's sexual harassment policy because it reached too much speech); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 362 (M.D. Pa. 2003) (finding portions of the university's speech code unconstitutionally overbroad).

Like the regulation at issue in Vincent, Petitioner fails to demonstrate the ordinance will significantly compromise recognized First Amendment protections of others not before the Court. Though the record reflects some students were concerned about the reach of the policy to their own conduct, the most the Policy does is offer students an opportunity to reconsider plans to infringe on the rights of others before they do so. Students are not prevented from engaging in expressive activity on campus in other ways. Additionally, the policy does not go so far as to be so substantially overbroad like the statutes in Stevens, DeJohn, or Bair. Here, the policy does not criminalize specific protected speech, outlaw general notions of "harassment," or direct students to communicate in non-offensive ways. While those regulations were unconstitutionally overbroad, the same concerns are not present with the Policy. Therefore, this Court should hold the Policy is not unconstitutionally overbroad.

II. THE CAMPUS FREE SPEECH POLICY, AS APPLIED TO PETITIONER, DOES NOT VIOLATE THE FIRST AMENDMENT.

> [T]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

Cox v. La., 379 U.S. 536, 554 (1965). In preserving Mr. Drake's liberty to express himself and his listener's interest in hearing him, the University sought public order. In applying its Policy to Petitioner in pursuit of such order, the University did not violate her First Amendment Rights.

Courts have used several approaches in addressing as-applied First Amendment challenges. One standard, used by the courts below, applies a fact-intensive analysis in determining whether the prohibited speaker violated the policy at issue. Courts also invalidate policies that tend to favor one viewpoint when applied. In one last approach, courts apply intermediate scrutiny to the contested policy. For the foregoing reasons, Petitioner's actions failed to trigger First Amendment protection under each of these three approaches.

A. Petitioner materially and substantially infringed upon Mr. Drake's right to engage in expressive activity.

The courts below applied a fact-intensive analysis in determining whether Petitioner was unfairly found to have breached the Policy, in violation of her First Amendment rights. Vega v. Jones, No. 18-CV-6834 (D. Av. Jan. 17, 2018) (finding Petitioner's First Amendment rights violated where she did not "materially and substantially infringe[] upon the right of Mr. Drake to speak or the rights of his listeners to hear him"); Jones v. Vega, No. 18-757 (14th Cir. Nov. 1, 2018) (finding Plaintiff's First Amendment rights not violated where her "actions were well within the parameters of the Policy's prohibition").

Courts have used a similar fact-based analysis in resolving as-applied challenges. See, e.g., Martin v. City of Okla. City, 180 F. Supp. 3d 978, 997 (W.D. Okla. 2016) (as-applied challenge failed where the plaintiff violated the city's municipal code); see also Galbreath v. City of Okla. City, 568 F. App'x. 534, 539 (10th Cir. 2014) (in an as-applied challenge, "we must tether our analysis to the factual context in which the ordinance was applied.").

Here, Petitioner's First Amendment as-applied challenge fails, for her expressive conduct materially and substantially infringed upon the rights of Mr. Samuel Payne Drake to engage in expressive activity and university students' rights to listen to Mr. Drake's expressive activity.

1. Petitioner materially and substantially infringed upon Mr. Drake's right to engage in expressive activity.

Petitioner materially and substantially infringed upon Mr. Drake's right to engage in expressive activity by interfering with his ability to articulate his speech. Petitioner created such a substantial distraction that Mr. Drake could not adequately organize his thoughts until Petitioner was removed. R. at 25 (Petitioner "was loudly and obnoxiously chanting slogans in my direction, making it extremely hard for me to speak, think, and remain focused"). Significantly, Petitioner's expressive activity was uniquely distracting to Mr. Drake: "[a]lthough I could hear distant noises from a flag football game and students meandering through the Quad, the student's targeted chants were especially distracting to me as the speaker of the event." Id. Petitioner's conduct alone distracted Mr. Drake, who was only able to complete his speech after Petitioner was removed from the vicinity of the amphitheater. Id. ("Once Campus Security came and the protester left, I was able to continue with my speech. I was much less distracted as a result and was able to formulate my thoughts without the disrupting chanting in the background.").

It also appears Petitioner intended to interfere with Mr. Drake's right to express himself. Although Petitioner maintains she "did not attempt to shout down the speaker," she indicated she began chanting "[t]o balance out" Mr. Drake's words. R. at 38. Petitioner may have intended to provide an opposing viewpoint for the greater Quad community, but she nevertheless also made her opinion known to Mr. Drake and his audience. R. at 38. Even if Petitioner did not shout down Mr. Drake, she still materially and substantially impacted his ability to deliver his speech.

2. Petitioner materially and substantially infringed upon the attendees' rights to listen to listen to Mr. Drake's expressive activity.

Petitioner materially and substantially infringed upon attendees' rights to listen to expressive activity by distracting them from listening to Mr. Drake's speech. By several accounts, Petitioner's actions drew attendees' attention away from him. Mr. Drake "noticed the spectators . . . were frequently turning around to look at the protester and were not focused on

[my] speech." R. at 25. Theodore Putnam ("Mr. Putnam"), president of the University's chapter of American Students for America ("ASFA"), which invited Mr. Drake to speak, stated he "found the student's chants extremely distracting." R. at 28 ("Although I could hear other sources of random background noise, such as a flag football game, this was nowhere as distracting as Ms. Vega's protests . . . ."). In his report to campus security, Mr. Putnam also described Petitioner as creating an "obnoxious and disturbing disruption." Megan Taylor, a student who simply attended Mr. Drake's speech "to see what was going on," noted that although other students on the Quad generated noise, Petitioner's "chanting was *significantly* more distracting than the other noises." R. at 32 (emphasis added).

Before citing Petitioner "for materially and substantially infringing upon the rights of others to engage in and listen to the expressive activity," Campus Security Officer Michael Thomas ("Officer Thomas") observed Petitioner "shouting at the spectators, the hosts, and the speaker." R. at 35. In his report, Officer Thomas noted Petitioner directed her slogans at the amphitheater and that students "appeared to have difficulty focusing on the speech due to the disruption." R. at 36. Upon entering the amphitheater to judge Petitioner's distraction for himself, Officer Thomas could hear both Mr. Drake's and Petitioner's voices and concluded Petitioner "was materially and substantially infringing upon the rights of others to engage in or listen to expressive activity." R. at 36. Observing the September incident through the experiences of Mr. Drake, student listeners, and Officer Thomas, it is evident Petitioner's protest materially and substantially infringed the listeners' rights to engage in Mr. Drake's speech.

B. There is no evidence the University prejudicially enforced its Policy against Petitioner's viewpoint.

Petitioner cites no evidence the University engaged in a of a pattern of selective enforcement against her viewpoint. Under McCullen v. Coakley, a person claiming an as-applied

First Amendment violation must show "he was prevented from speaking while someone espousing another viewpoint was permitted to do so." 134 S. Ct. 2518, 2534 n.4 (2014) ("[A] plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him . . . ."). Courts also looks for a *pattern* of discrimination. Menotti v. City of Seattle, 409 F.3d 1113, 1145 (9th Cir. 2005) ("Should a pattern of abuse result from an official's exercise of discretion, the proper remedy is . . . to seek remedy through as-applied challenges.").

Although the University twice cited students sharing Petitioner's viewpoint, two citations does not make a pattern. United States v. Johnson, 122 F. Supp. 3d 272, 353 (M.D.N.C. 2015) ("two or three alleged instances" was "insufficient to establish a pattern or practice"); Cooper v. Fed. Res. Bank, 467 U.S. 867, 879 (1984) (finding "two or three instances of discrimination" insufficient to establish a pattern of discrimination). Petitioner has offered no additional evidence suggesting the University selectively enforced its Policy. Petitioner's challenge thus fails under the second approach to as-applied First Amendment challenges.

C. The University's Policy should be upheld under intermediate scrutiny.

The University's Policy satisfies intermediate scrutiny analysis: the Policy is narrowly tailored to a substantial government interest and leaves open substantial alternate channels for communication. Thus, Petitioner's claim fails under the third approach to as-applied challenges.

1. The University's Policy is content-neutral.

When determining whether a policy is content-neutral, "The principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984) (regulation of expressive activity is content neutral provided it can be "*justified* without reference to the content of the regulated

speech") (alteration in original)); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

The University's purpose in enacting the Policy is unrelated to Petitioner's viewpoint. The University adopted its Policy to comply with Arivada's Free Speech in Education Act of 2017 ("Act"). R. at 23. The Act's stated purpose is to address increasingly frequent "episodes of shouting down invited speakers on college and university campuses nationwide." Av. Gen. Stat. § 119-200 (2017) ("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."). In the "Policy Statement," the University reaffirmed its "commitment to the principle of freedom of expression." R. at 23. Neither the University Policy's Purpose, Policy Statement, nor its Free Expression Standard explicitly or impliedly disfavors Petitioner's viewpoint. Further, the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Hill v. Colo., 530 U.S. at 719 (1999) (citations omitted). This Court should thus find the Policy is content-neutral.

2. The University's Policy survives intermediate scrutiny analysis.

The First Amendment subjects content-neutral regulations to intermediate scrutiny. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017). "A statute satisfies intermediate scrutiny where it: (1) advances a 'substantial' governmental interest; (2) does not "burden substantially more speech than is necessary" (i.e., the statute must be narrowly tailored); and (3) leaves open 'ample alternative channels for communication.'" Free Speech Coalition, Inc. v. AG of the United States, 677 F.3d 519, 535 (3d Cir. 2012) (citing Ward, 491 U.S. at 791, 798-800). Regulations also "need not be the least restrictive or least intrusive" means of serving the government's substantial interest. Ward, 491 U.S. at 798. The Policy is narrowly tailored and leaves open substantial alternate channels for communication.

The Policy clearly advances the University's substantial government interest in

preserving freedom of expression on campus. The University preserves freedom of expression by protecting *both* its speakers' right to engage in expressive activity and listeners' right to listen to such expression. The Policy also ensures infringing conduct meets a high bar: only conduct that "materially and substantially infringes upon the rights of others" is subject to sanction. R. at 23.

In protecting potentially violative speech, the University ensures its Policy is also narrowly tailored. A substantial number of the Policy's applications are not unconstitutional, and the policy does not prohibit constitutionally-protected conduct. See supra Section I.C. As noted above, the Policy's "material[] and substantial[]" requirement is a common narrowing condition imposed in school policies that have survived a First Amendment challenge. In adhering to a court-approved standard, the Policy is narrowly tailored to protecting expressive activity.

The Policy also leaves open ample alternative channels for students such as Petitioner to express their views to an audience. Petitioner, as president of the University's student chapter of Keep Families Together "KFT"), was able to reserve the Amphitheater for both small-scale discussions and larger gatherings. R. at 21, 37. Petitioner could also conceivably use additional University space for her advocacy. Petitioner had a number of alternate venues for "providing the opposing view" and "making [KFT's] perspective known to the community." R. at 38.

The University's Policy did not violate the First Amendment as applied to Petitioner. Petitioner materially and substantially infringed upon Mr. Drake's right to engage in expressive activity; Petitioner cannot show the University consistently favored one viewpoint over another; and the University's Policy survives intermediate scrutiny. Accordingly, the court of appeals was correct in rejecting Petitioner's as-applied challenge. The court's entry of summary judgment in favor of the University should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

Jonathan Jones and Regents of the University of Arivada

By their attorneys,

/s/

Team 17

APPENDIX A: CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. 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.

U.S. CONST. amend. XIV, § 1.
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B: STATUTORY PROVISIONS

Av. Gen. Stat. § 119-200 (2017).
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.

BRIEF CERTIFICATE

Team 17 affirms the following:

1. The work product contained in all copies of Team 17's brief is the work product of Team 17's members.

2. Team 17 has complied fully with its school's governing honor code; and

3. Team 17 has complied with all the Rules of the Competition.

Sincerely,
Team 17