Case No. 18-1234

IN THE
Supreme Court of the United States

VALENTINA MARIA VEGA,

Plaintiff-Petitioner,

v.

JONATHAN JONES AND REGENTS OF THE UNIVERSITY OF ARIVADA,

Defendant-Respondent.

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

BRIEF OF RESPONDENT
University of Arivada

Team Number 22
January 31, 2019

Attorney for Jonathan Jones and Regents of the University of Arivada

QUESTIONS PRESENTED

(1) Whether a university Campus Free Speech Policy imposing disciplinary sanctions on a student who "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity" is constitutional?

(2) Whether, as applied to Ms. Vega, the Campus Free Speech Policy violates the First Amendment?

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INTRODUCTION

A school's mission is education. But education cannot flourish in the absence of the thoughtful, respectful, and civil exchange of ideas. Accordingly, universities must hold the power to enact reasonable on-campus regulations guaranteeing community members and guests their abilities to speak and to listen.

Here, a university seeks to protect these guarantees by implementing a statutorily mandated Campus Free Speech Policy. This Policy uses common sense language to bar conduct that drowns out the expression of competing perspectives. Its viewpoint- and content-neutral strictures ensure that it can be used only as shield for—not sword against—protected expression.

In asking this Court to strike down the University's Policy and its reasonable application, the Petitioner implores the Court to condone an overly broad reading of the First Amendment that immunizes disruptive and invasive conduct from the scrutiny of educators. This premise controverts First Amendment jurisprudence and defies common sense. This Court should rule to affirm a University's right to institute free speech policies to protect the rights of students and guests of the community from "shout downs" on school property.

STATEMENT OF THE CASE

On June 1, 2017 the state of Arivada passed the "Free Speech in Education Act of 2017" in response to instances of speakers being "shouted down" on university campuses. (J.A. 15). This law requires state universities to adopt policies "to safeguard the freedom of expression on campus." (J.A. 15). University of Arivada ("University") adopted a Free Speech Policy ("Policy") pursuant to this Act. (J.A. 23). The Policy prohibits any student from engaging in "[e]xpressive conduct that materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." (J.A. 23). All University students must receive, read,

and agree to the Policy as a condition of enrollment. (J.A. 20). The Policy employs a "three strike range of disciplinary sanctions." (J.A. 23). Students that violate the policy for the first time "shall be subject to a citation by University Campus Security." (J.A. 23). The Dean of Students then makes an objective determination of whether a student has violated the Policy and may issue a warning if found in violation. (J.A. 23). If the student again engages in conduct that implicates the Policy, the student "is entitled to a formal disciplinary hearing before the School Hearing Board," which includes written notice of the charges, right to counsel, and other procedural rights to present evidence and cross-examine witnesses. (J.A. 23). If the student is issued a second strike, she "shall be suspen[ded] for the remainder of the semester." (J.A. 23). Finally, a student who violates the Policy for a third time is issued a third strike and "shall be [expelled] from the University" if found in violation of the Policy following a hearing before the Board. (J.A. 23).

Petitioner Valentina Vega ("Vega") was a rising University sophomore when the Policy was enacted. (J.A. 37). She is a member of the "[University's] student chapter of 'Keep Families Together' (KFT), a national student organization" that "advocate[s] for immigrants' rights through on-campus . . . events." (J.A. 37). After the University enacted the Policy, Vega and nine other members of KFT "attended and protested an anti-immigration rally hosted by another student organization, 'Students for Defensible Borders' (SDB), in an indoor auditorium on campus." (J.A. 37). The KFT members stood on their chairs in the auditorium and "shouted down" the event speaker. (J.A. 37, 30). Officer Michael Thomas of the University's Campus Security Department issued them citations for violation of the Policy. (J.A. 38). Subsequently, the Dean of Students issued Vega and the other KFT members their first strikes. (J.A. 38).

Less than a week later, American Students for America ("ASFA"), "invited Mr. Samuel Payne Drake, Executive Director of Stop Immigration Now ('SIN') to deliver a speech" at the University's outdoor Amphitheater. (J.A. 21). The Amphitheater is "situated just north of the center of the University's 'Quad.'" (J.A. 21). A walkway is positioned "[r]oughly ten feet from the last row of benches." (J.A. 21). Otherwise, there is "no distinction between the Amphitheater and the . . . surrounding green space of the Quad." (J.A. 21). Though the University did not issue a permit for ASFA's event, ASFA President "Theodore Putnam submitted an 'Event and Space Reservation Application' to the University to reserve the Amphitheater." (J.A. 21).

Vega decided to protest the speech and attempted to recruit other KFT members to join. (J.A. 27). The other KFT members were "not sure what the Policy allowed" after receiving their first strike, (J.A. 31), so they "decided not to attend the planned protest, out of fear that if [they] received a second strike, [they] would be suspended," (J.A. 27, 31). Vega protested the speech alone. (J.A. 38). Vega arrived at the Amphitheater dressed in a Statue of Liberty costume. (J.A. 38). She stood just behind the Amphitheater seats[,] and loudly shouted slogans adverse [to the speaker]." (J.A. 28). This shouting made it "extremely hard for [Drake] to speak, think, and remain focused." (J.A. 25). It was also "extremely districting" to listeners. (J.A. 28). Though other distant noises from the Quad combined to make it "difficult to hear Mr. Drake speak," (J.A. 32), these noises were "nowhere as distracting as Vega's protests were." (J.A. 28, 32).

As a result of the disturbance, Putnam "reported to Campus Security that a student was disrupting ASFA's event in the [Amphitheater] by attempting to shout down ASFA's speaker." (J.A. 35). Officer Michael Thomas was dispatched, and he "noticed a protester standing on the periphery of the amphitheater, shouting at the spectators, the hosts, and the speaker. [He] recognized the protester as Ms. Vega, one of the students [he] has previously issued a citation."

(J.A. 35). He also observed that the spectators "appeared to have difficulty focusing on the speech due to the disruption." (J.A. 36). After his investigation, Thomas issued Vega a citation under the Policy. (J.A. 35). He "did not consider addressing other sources of noise distraction because [he] was responding to a specific call about a specific disturbance." (J.A. 35). Once Vega was removed by Campus Security, Drake "was able to formulate [his] thoughts without the disrupting chanting in the background." (J.A. 25).

Following her second citation, Vega was suspended from the University for violating the Policy. (J.A. 39). She unsuccessfully appealed the University's decision, and timely filed suit against the University in the United States District Court for the District of Arivada for violation of her First Amendment right to freedom of speech. (J.A. 39). The district court granted summary judgment in favor of Vega on the basis that the Policy was facially unconstitutional and as applied to Vega. (J.A. 17). On appeal, the United States Court of Appeals for the Fourteenth Circuit reversed, finding that the University had authority to restrict student speech in order to protect the educational environment and also that the Policy was not unconstitutionally applied to Vega. (J.A. 42). This Court then granted certiorari. (J.A. 54).

SUMMARY OF THE ARGUMENT

I. The University of Arivada's Policy is facially constitutional.

Public universities and colleges have the authority to restrict student speech that either materially and substantially disrupts the school environment or infringes on other students' rights pursuant to *Tinker v. Des Moines Independent School District*. Differences between primary school students and college students are inapposite when taken in light of the special characteristics of the school environment and its marketplace of ideas. Because *Tinker* duly

applies, the University's Policy here is not unconstitutional. The Policy only forbids substantial and material disruption, not mere incidental disruption.

Even if *Tinker* does not apply to universities, the Policy is still valid because it is not unconstitutionally vague or overbroad. Given both the clear language and purpose of the Policy, it clearly excludes incidental disruption of expressive activities. The benefits of restricting speech that Ms. Vega voluntarily adhered to would be swallowed by the harms of allowing every student to infringe on the speech rights of other students. The marketplace of ideas would collapse should the Policy be found facially invalid.

II. As applied to Ms. Vega, the Policy is not unconstitutional.

Ms. Vega's speech caused a material and substantial disruption to school activities. Drake's speech in the amphitheater was a school activity because it was put on by a student organization on school property. Ms. Vega's unusually boisterous and disturbing conduct materially disrupted the speech by undermining its educational value and purpose.

Ms. Vega's speech also invaded the rights of the event's participants to speak and to listen. As a necessary corollary of the right to speech, the right to listen is equally protected by the First Amendment. Because the event participants in the amphitheater could not communicate due to Ms. Vega's targeted chanting, their rights were infringed.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment in this matter on November 1, 2018. *Regents of the Univ. of Arivada v. Vega*, No. 18-1757, slip op. at 12 (14th Cir. Nov. 1, 2018). Petitioner filed a timely petition for writ of certiorari, which this Court granted. This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1).

ARGUMENT

I. THE UNIVERSITY'S POLICY IS FACIALLY CONSTITUTIONAL.

Petitioner brings a First Amendment facial challenge to the University's Policy, which bars conduct that "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." (J.A. 50). Policies that sanction conduct that substantially interferes with the educational environment or the rights of students are not facially unconstitutional. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Regulations of student speech that fall outside of *Tinker*'s reach can also be upheld if they are neither unconstitutionally vague nor overbroad. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Here, the University's Policy is an appropriate use of power to protect the educational environment as well as the rights of other students under *Tinker*. And even if *Tinker* did not control, the Policy is neither vague nor overbroad, so it should be upheld.

A. The Policy is not facially unconstitutional because public universities have the authority to restrict student speech pursuant to *Tinker*.

In *Tinker*, the Supreme Court held that schools, under the First Amendment, may reasonably regulate student expression and speech when it "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students." *See* 393 U.S. at 509. Statutes or regulations falling within the scope of *Tinker* are not facially unconstitutional on the basis of vagueness or overbreadth because those statutes do not infringe the First Amendment. *See id*. at 512; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Though the Supreme Court has yet to explicitly apply the powers granted in *Tinker* to university and college officials, the regulatory authority of *Tinker* should apply to public universities in addition to primary schools.

1. An application of Tinker to universities fulfills Tinker's core purpose of preserving the educational environment and maintaining students' rights.

Courts treat universities—like any other educational institution—with heightened deference under the First Amendment. While students certainly do not "shed their constitutional

rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393. U.S. at 506, this Court has long recognized a "reluctance to trench on the prerogatives of state and local educational institutions," as "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Regents of Uni. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (internal citations omitted). Consequently, with colleges, as well as any educational institution, the First Amendment rights of students must be examined in light of the special characteristics of the school environment rather than the standards imposed in other public forums. *See Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

Universities have an interest in restricting student speech in some meaningful capacity due to the educational purpose of universities. In the context of restricting student speech, a university's purpose is fundamentally different than other public forums because the "university's mission is education, and decisions of [this Court] have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 662 (2010) (internal citations omitted). In *Tinker*, this Court held that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). As such, college campuses embody a "marketplace of ideas" where thoughtful debate of different viewpoints provides the educational experience to students. *Healy v. James*, 408 U.S. 169, 180 (1972). Universities must therefore govern the methods to participate in that discussion in order to more effectively achieve the educational mission, which may be hampered

by students' unrestricted and ultimately disruptive speech. *See Morse v. Frederick*, 551 U.S. 2618, 2631 n.2 (2007) (Thomas, J., concurring) (explaining that the first public schools in the United States—including universities—prohibited students from engaging in unadulterated free speech); *see also Healy*, 408 U.S. at 192. Without the University stepping in to protect all students' rights, university campuses would devolve into nothing more than "a barren marketplace of ideas the only that [has] only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). The educational mission of universities depends on balanced, civilized dialogue, which can only be achieved by the qualified restriction of students' speech rights. This is the essential lynchpin and overall purpose of the *Tinker* analysis.

On this basis, this Court has previously used *Tinker* as the standard for analyzing speech restriction in a college setting. In *Healy*, this Court applied *Tinker*'s substantial disruption framework in analyzing a college student's First Amendment right to establish a "Students for Democratic Society" chapter as an organization recognized at the University. 408 U.S. at 169. This Court reasoned that "[w]hile a college has a legitimate interest in preventing disruption on the campus, which [. . .] may justify [. . .] restraint," university officials nonetheless have to provide an "evidential basis to support the conclusion that [the student organization] posed a substantial threat of material disruption" that would "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id*. at 190. Had university officials proffered a sufficient reason to believe that the students in question would disrupt classwork or infringe on other students' rights, the university would have been entirely justified in restricting student speech, notwithstanding the fact that the speech was that of college students. *Id.* Accordingly, this Court's precedent permits universities to restrict

organizations that would otherwise infringe on the educational mission of the university or the rights of other students.

Moreover, differences between the restrictive authority afforded to primary school officials and the authority afforded to university officials is not dispositive here. *Tinker* involved the ability of high school administrators to limit speech, but did not address the ability of university officials to restrict university student speech. 393 U.S. at 512. Given the age and maturity of college students as opposed to primary school students, the authority to restrict college students' free speech rights may indeed be more limited than in the primary school context. *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232, 873 (3d Cir. 2010) (holding that the exact manner that *Tinker* applies to colleges is "difficult to explain" and declining to refute *Tinker*'s applicability to universities). However, as in any educational environment, the need to restrict student speech to protect the educational environment remains the same, regardless of the age of the student. The pedagogical goals may differ between primary education and college—primary education, for example, seeks to instill good civic values through *loco parentis* and colleges do not—but as in all cases involving schools and First Amendment rights, the analysis turns on the school's primary responsibility of providing education to and protecting the rights of its students. *See Healy*, 408 U.S. at 180; *see also Ala. Student Party v. Student Gov't Ass'n of the Univ.*, 867 F.2d 1344, 1346 (11th Cir. 1989) (holding that there must be special deference to school environments like "universit[ies], whose primary purpose is education" and consequently "constitutional protections must be analyzed with due regard to that educational purpose, an approach that has been consistently adopted by the courts."); *Williams v. Eaton*, 468 F.2d 1079, 1083 (10th Cir. 1972) (holding that universities have the authority to restrict student speech to protect against disruption of school work). Indeed, the need for speech restriction rests not

simply on the ages of the student, but rather on the principle that government officials, acting through public university administrators, have a significant state interest in protecting the educational experiences of students in those areas due to the "special characteristics of the school environment," which are present at every level of education. *Bowman v. White*, 444 F.3d 967, 978 (8th Cir. 2006); *see also Hammond v. S.C. State Coll.*, 272 F. Supp. 947, 949 (D.S.C. 1967) (holding that universities "have a vested interest in a peaceful campus, an academic climate of order and culture [and] [t]he power of the [university] president to oversee [and] to rule"). Thus, the need to protect students' educational experience, and the subsequent power to restrict student speech to protect education, does not diminish simply because the students are enrolled in college.

2. Because universities have authority to regulate student speech under Tinker, the Policy here is not facially unconstitutional.

This Policy directly tracks the language of the *Tinker* standard by mandating that a substantial and material disruption in another's rights will not be tolerated. The Policy reflects the necessary goal of protecting the educational environment as well as students' individual rights to engage in and listen to expressive conduct. In recognizing a growing problem of students shouting down speakers and drowning out the expressive conduct of other students, the University acted in response to legislative command to ensure that free speech is protected for all—not simply the loudest person. The Policy's purpose is not to suppress disagreeable student speech for its content, but rather to ensure that all students have the ability to enjoy free speech uninterrupted by other students. In this way, the Policy sets boundaries for the marketplace of ideas, making it more conducive to lively discussion of all viewpoints. Indeed, the Policy is actually expanding students' right to speech rather than restricting it. To maintain a cohesive

dialogue which is respectful of students' rights, the University is permitted under *Tinker* to restrict speech to achieve the goal of permitting speech for all.

B. Even if *Tinker* is not the proper standard to analyze college student speech, the Policy is still constitutionally valid.

If a statute or regulation does not fall within the scope of the *Tinker* standard, it must not otherwise violate a person's First Amendment rights. To be facially valid under the constitution, a statute must not be unconstitutionally vague or unconstitutionally overbroad. The Policy here is neither vague nor overbroad.

1. The University's policy is not unconstitutionally vague.

Statutes and regulations that do not clearly define what conduct is prohibited are void under the First Amendment as unconstitutionally vague. *Grayned*, 408 U.S. at 108. To be constitutionally valid and sufficiently defined, the statute must allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* The void-for-vagueness doctrine ensures that individuals are not punished for behavior that they could not have known was prohibited or illegal. *Id.* Moreover, vague laws are unconstitutional because such laws can be enforced arbitrarily and discriminatorily through ad hoc, subjective decisions by government officials, and consequently have a chilling effect on a reasonable person from engaging in speech. S*ee id.* at 108–09; *see also O'Brien v. Welty*, 818 F.3d 920, 930 (9th Cir. 2016).

Furthermore, this Court has recognized the value in permitting flexible language in statutes involving educational environmental as well as university codes of conduct due to the unique nature of the school environment. Regulations that involve language that is "marked by flexibility and reasonable breadth, rather than meticulous specificity" are not necessarily vague when those statutes or regulations police behavior that could be disruptive of school activities. *See Grayned*, 408 U.S. at 110. In holding that a city ordinance banning excessive noise next to

schools as not unconstitutionally vague, the Supreme Court explained in *Grayned*, "[w]e do not have here a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this 'particular context,' the ordinance gives 'fair notice to those to whom (it) is directed.'" *Id.* at 112 (internal citations omitted). While the ordinance in *Grayned* involved speech next to a primary school, the principle is still applicable to universities because the educational mission is still present on a college campus.

Additionally, Universities are given authority to enforce conduct requirements against students. Codes of conduct imposed by universities on students do not have to satisfy the same rigorous demand of absolute clarity required for criminal statutes because "student discipline is not analogous to criminal prosecution." *Norton v. Discipline Comm. of East Tenn. State Univ.*, 419 F.2d 195, 200 (6th Cir. 1969); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Sill v. Pa. State Uni.*, 462 F.2d 463, 467 (3d Cir. 1972); *Soglin v. Kauffman*, 418 F.2d 163, 168 (7th Cir. 1969). Reasonable lack of clarity in such codes of conduct permit universities the flexibility to analyze situations on a case by case basis to ensure students act within required limits of conduct. *See Norton*, 419 F.2d at 200. Therefore, flexible language in codes of conduct does not immediately render those codes vague. *Id.* Even still, universities may make subjective determinations regarding how to carry out university policy. *See Corp. of Haverford Coll. v. Reeher*, 329 F. Supp. 1196, 1221 (E.D. Penn. 1971) (Ditter, J., dissenting).

The Policy here sufficiently describes what conduct is prohibited and is thus not unconstitutionally vague. Tracking the language of the *Tinker* standard, the Policy prohibits speech that "materially and substantially infringes upon the rights of others to engage in or listen to expressive activity." (J.A. 23). The Policy is does not reach to student conduct that merely

disrupts other students' rights; rather, the Policy is limited to student speech that *substantially* invades other students' rights. The use of the words "substantially and materially" suggest that the policy only impacts student speech that is specifically directed towards the free expression of other students with the purpose of interrupting or silencing the expression, not merely incidental intrusion on that expression.

Moreover, prohibited actions under the Policy are clear considering the Policy's legislative instruction. This Policy was enacted after the legislature of the state of Arivada passed the Free Speech Act of 2017. (J.A. 19). This Act was concerned with "episodes of shouting down invited speakers on college and university campuses." *Id.* This law provides a clear example of unacceptable behavior that intentionally disrupts others' right to engage in particular speech. The example provided in the Act clearly does not reach to minor infringements on the rights of others. In considering what the legislature intended to prohibit, the Policy clearly forbids behavior which purposefully disrupts others.

It is inconsequential that two students testified that they were chilled from engaging in speech because they believed the Policy was vague. (J.A. 26, 30). The void-for-vagueness doctrine will only invalidate statutes as vague when it fails to provide "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," meaning that the statue will not be vague if the statute is objectively clear to any reasonable person. *Johnson v. U.S.*, 135 S.Ct. 2551, 2567 (2015). Subjective interpretations of a few will not make the statute vague. *Id*. Here, these students' hesitation to protest or engage in speech is inconsequential in the vagueness analysis. As previously discussed, the Policy delineates between intentional disruptive speech and disruptive speech that is not intentional and is therefore provides clear instruction for reasonable interpretation. The Policy, though chilling the speech of two particular students, does

not otherwise discourage other students from engaging in protected speech. The anecdotal testimony of only two students is simply not substantial disruption of speech warranting invalidation in light of the text and purpose of Policy.

2. The University's policy is not unconstitutionally overbroad.

Perfectly clear and specific statutes may nonetheless violate the First Amendment if the statute is overbroad. Overbreadth, a related principle to unconstitutional vagueness, occurs when a statute imposes valid restrictions on unprotected speech but additionally prohibits substantially too much protected speech of the litigant as well as that of others not before the court. *United States v. Williams*, 553 U.S. 285, 292 (2008); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (explaining that in a First Amendment context, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). Such a statute may address specific kinds of proscribed behavior, "but sweeps within its ambit other activities that, in ordinary circumstances, constitute an exercise of freedom of speech or of the press" resulting in "continuous and pervasive restraint of all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 89 (1940).

However, there are significant harms from overzealous application of the overbreadth doctrine—mainly, when invalidation of the law prevents undue restriction of unprotected speech or conduct. *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003). To render a law unconstitutional and to ensure that the harms do not swallow the social benefit of speech restriction, the overbreadth must be "not only real but substantial in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Consequently, invalidation of a statute on overbreadth

grounds is a "'strong medicine' that is not to be 'casually employed'" and it will not be applied when the statute prohibits protected speech in merely limited circumstances rather than substantial amounts of speech. *Williams*, 553 U.S. at 292 (quoting *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999)).

In the university context, school officials may impose different rules and regulations on students, even if the rules have the incidental effect of restricting some protected speech. As discussed previously, universities may impose rules as necessary to protect the "traditional academic atmosphere" *Healy*, 408 U.S. at 197 n.24. A college student voluntarily attends post-secondary education and consequently "assumes obligations of performance and behavior reasonably imposed by the institution of choice relevant to its lawful missions, processes and functions." *Stacy v. Williams*, 306 F. Supp. 963, 969 n.7 (N.D. Miss. 1969). Thus, students voluntarily bind themselves to the standards imposed by universities, even if those policies cover a broad range of conduct. *Id.*

As discussed above, the Policy only implicates behavior that is intentionally designed to disrupt other speech. This prevents the overbroad application of the Policy to vague examples of students playing football or speaking to a friend while walking to class, which would otherwise be protected speech. These examples do not present a realistic danger that the Policy will compromise the First Amendment rights of students at the University. Therefore, the Policy is easily limited to conduct that is intentionally directed at infringing the rights of other students.

Moreover, the language and purpose of the Policy prevent it from being arbitrarily applied to particular students or non-disruptive kinds of conduct. The Policy is not premised on the subjective feelings of students and whether those students believe that their right to engage in or listen to expressive conduct is infringed. Instead, the Policy relies on objective determinations

by both the responding campus officer and the Dean of Students that students have inhibited the ability of other students to engage in free expression. (J.A. 23). After receiving a complaint, the officer observes the disruptive conduct and makes a determination that the student's speeches impedes on the listening rights of other students. (J.A. 23). Then, the Dean of Students holds an objective hearing to determine if the student's disruption was material and substantial. (J.A. 23). For the second or third strike, the student is entitled to an objective hearing as well. (J.A. 23).

The harm of rendering the Policy overbroad would swallow the benefit of letting the Policy stand. Speech restriction in this context is socially useful. Each student can express herself freely without substantial disruption, which ultimately ensures that all can be heard. Without this Policy, students would have no recourse for their own speech rights from being infringed. The Policy may incidentally restrict some speech, but Ms. Vega and every other student voluntarily agreed to subject themselves to this Policy, even though there was a chance it could cover some kind of free expression. The students signed the Policy form before enrolling in class, which implies that these students were willing to conduct themselves in such a way that permits the University to function. (J.A. 3). Without the Policy, the University would be incapable of fairly balancing students' rights, which could lead to the decimation of the marketplace of ideas.

II. THE UNIVERSITY'S FREE SPEECH POLICY IS CONSTITUTIONAL AS APPLIED TO PETITIONER.

"The 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." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). This is especially so in schools, which "have a duty to prevent disturbances." *See Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013); *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007).

Tinker recognizes two specific subclasses of student speech that are within the purview of school restriction: (1) speech that "causes substantial disruption of or material interference with school activities" and (2) speech that collides or "[invades] the rights of others." *Tinker,* 393 U.S. at 513. These subclasses, which receive diminished First Amendment protections, implicate the "special characteristics of the school environment." *Id.* at 506.

For the reasons set forth below, because Vega's speech falls squarely within both *Tinker* subclasses, the University's decision to suspend her for the remainder of the semester was valid under the First Amendment.

A. Vega's speech caused a "substantial disruption of or material interference with school activities."

To evaluate whether the University's application of the Policy to Vega's conduct comports with *Tinker*'s conception of constitutional regulation under its first "subclass" of student speech, we look to (1) whether the AFSA event constituted a "school activity," and (2) whether Vega's "targeted chanting" at the event rose to the level of a "substantial disruption or material interference." *Tinker*, 393 U.S. at 514. Here, both conditions are met.

1. The AFSA event was a "school activity" under Tinker.

Tinker approves of a school's regulation of "disturbances and disorders *on the school premises*." *Tinker*, 393 U.S. at 514 (emphasis added). However, despite its seemingly spatial limitation, application of *Tinker* suggests that a broader range of educationally valuable activities may be constitutionally regulated. In *Lowery v. Euverard*, the Sixth Circuit applied the "substantial disruption and material interference" standard to high school athletics—many of which occur off school premises and under the supervision of unpaid volunteers. 497 F.3d at 593; *accord Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 769 (8th Cir. 2001). Similarly, the Eighth Circuit recently held that, under *Tinker*, "speech reflecting non-compliance with [the

Nurses Association Code of Ethics]" would "materially disrupt [a Nursing] Program's legitimate pedagogical concerns"—a concept unmoored to spatial dimensions. *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016) (internal citations omitted). In short, *Tinker*'s "substantial disruption and material interference" rule sweeps far beyond a school's intramural environment in its contemplation of "school activities." *See Doninger v. Niehoff*, 642 F.3d 334, 347 (2d Cir. 2011) ("[T]erritoriality is not necessarily a useful concept in determining the limit of [a school's] authority.").

The validity of a school's regulation under *Tinker* also does not turn on the school's "sponsorship" of the underlying "school activity." This Court's decision in *Hazelwood Sch. Dist. v. Kuhlmeier* made this explicitly clear by distinguishing "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" from *Tinker*'s broader regulatory framework. 484 U.S. 260, 271 (1988). *Hazelwood* also recognizes that *Tinker* deals with speech that "*happens* to occur." *Id.* (emphasis added). Even if this Court were to require a school to "sponsor" an activity before regulating student speech connected to it under *Tinker*, First Amendment caselaw suggests that a school "sponsors" any approved activity that takes place on school-monitored and -maintained facilities. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (finding no "excessive entanglement" under *Lemon v. Kurtzman*, 403 U.S. 602 (1971) because "no expenditures for maintenance of the [religious symbol] [were] necessary").

Here, there is no dispute that Vega's targeted chanting occurred on school property at a speech designed to contribute to the on-campus discussion about immigration. (J.A. 21). Though the AFSA event was put on by a student organization, (J.A. 21), and was not issued a permit by the University, (J.A. 21), neither is necessary under *Tinker*. As the circuit courts have held,

Tinker's "school activities" requirement contemplates unfunded events that occur outside the classroom. And even if this Court did intend to read a "sponsorship" requirement into the "substantial disruption and material interference" rule, the University's maintenance and upkeep of its own property—property the school authorized AFSA to use for its event, (J.A. 21)—would qualify. Accordingly, *Tinker*'s "substantial disruption or material interference" rule applies to the AFSA event in the Amphitheater.

2. Vega's targeted chanting at the AFSA event was a "substantial disruption or material interference."

The *Tinker* Court recognized that a school's "urgent wish to avoid . . . controversy" is not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Tinker*, 393 U.S. at 508. Beyond this, however, it offered limited express guidance on what constitutes a "substantial disruption or material interference" (hereafter "substantial disruption"). *See generally id.*

Tinker imported its standard directly from a factually analogous Fifth Circuit case, *Burnside v. Byars*, which likewise offered little elaboration. *See* 363 F.2d 744, 749 (5th Cir. 1966) (finding "mild curiosity" rather than "substantial disruption"). However, the Fifth Circuit panel that decided *Burnside* also decided *Blackwell v. Issaquena Cty Bd. of Educ.*, which defines "substantial disruption" as "an unusual degree of commotion, boisterous conduct . . . an undermining of authority, and a lack of order, discipline and decorum." 363 F.2d 749, 754 (5th Cir. 1966).

Against the backdrop, "federal courts . . . treat the *Tinker* [substantial disruption] rule as a flexible one dependent upon the totality of relevant facts in each case." *Karp v. Becken*, 477 F.2d 171, 174 (9th Cir. 1973) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972)). This treatment includes inquiry into whether school officials draw "reasonable inferences from

concrete facts," *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1206 (10th Cir. 2002), including historical information and past incidents arising out of similar speech, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001); *see also West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000) (holding that school officials constitutionally regulated a student's display of the Confederate Flag based on a history of racial tension in the district).

Most authorities liberally interpret "substantial disruption" to encompass a broad swath of conduct that frustrates the goals or operation of school-related activities and responsibilities. In *Doniger v. Niehoff*, the Second Circuit held that a student's offensive, inaccurate online postings about a school event that "posed a substantial risk that [school officials] would be diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion" rightly qualified as a "substantial disruption." 527 F.3d 41, 52 (2d Cir. 2008). Likewise, in *Lowery v. Euverard*, the Sixth Circuit found that a student athlete's efforts to circulate a petition among team members stating "I hate Coach . . . and I don't want to play for him" threatened substantial disruption to team unity. 497 F.3d 584, 593 (6th Cir. 2007); *accord Miller v. Cooper*, 116 F. Supp. 3d 919, 929 (W.D. Wis. 2015) (inappropriate remarks that prompt student musicians to quit a University orchestra constitute a "material and substantial disruption" under *Tinker*). Courts typically defer to the reasoned judgment of school officials in making their determinations. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) ("Tinker does not require school officials to wait until disruption actually occurs before they may act."). The few district courts that have set a high bar for "substantial disruption" have addressed off-campus, primary school speech that purportedly undermines disciplinary authority. S*ee Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448, 456 (W.D. Pa. 2001) (finding no

substantial disruption to administrators' ability to discipline students where a student sent an email to other students from his home computer containing offensive remarks about a faculty member). Finally, courts typically do not analyze "substantial disruption" based on a student speaker's specific location or speaking volume. *See Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011) (holding that a student's defamatory MySpace post aimed at a fellow classmate created an "actual or nascent substantial disorder and disruption in the school"). Nor have they focused on the ability of others to respond to student speech in making a "substantial disruption" finding. *See generally J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc) (assuming, without deciding, that *Tinker*'s substantial disruption test applies to online speech harassing a school administrator even if the school administrator could easily respond).

Here, Vega's conduct at the AFSA event represents a "substantial disruption." Her "loudly shouted slogans," (J.A. 28), that were "significantly more distracting than the other noises," (J.A. 32), certainly satisfy the Fifth Circuit's plain language description of "an unusual degree of commotion, boisterous conduct . . . an undermining of authority, and a lack of order, discipline and decorum." Further, the University's awareness of past incidents of Vega's similar speech—her "shouting down" of the SDB event speaker in the University's indoor auditorium on August 31, (J.A. 30)—buttresses the reasonable determination that Vega's conduct was likely to persist or worsen without intervention, thereby frustrating the University's core educational aim of engendering the exchange of his diverse viewpoints. *See Doniger*, 527 F.3d at 52; *Lowery*, 497 F.3d at 593. It does not matter that Vega was not technically within the Amphitheater, (J.A. 28), or that there were other background noises emanating from the "Quad," (J.A. 32).

Considering the totality of relevant facts, *Karp*, 477 F.2d at 174, the University was clearly within its discretion to classify Vega's conduct as a "substantial disruption."[1]

B. Vega's conduct "invaded the rights" of others.

Even if Vega's conduct did not represent a substantial disruption of school activities, it was still constitutionally proscribed by the University under *Tinker.* Beyond its "substantial and material disruption" language, *Tinker* held that schools may regulate on-campus speech that "collides" or "[invades] the rights of others." *Tinker,* 393 U.S. at 513. Because Vega's speech "invaded" the recognized rights of the AFSA event participants, the University's regulation was permissible.

1. Under Tinker, the "rights of others" include the First Amendment right to speak and to listen.

Though *Tinker* is virtually silent the scope of the "rights of others" it contemplates, *id.*, scholars assert that it refers to either (1) institutional rights ("the school's rights to maintain order") or (2) private rights (the rights of individual students to be free from the emotionally and psychologically detrimental conduct of others). *See* Kellam Conover, *Protecting the Children: When Can Schools Restrict Harmful Student Speech?,* 26 STAN. L. & POL'Y REV. 349, 350–60 (2015). In either case, *Tinker*'s "rights of others," would necessarily encompass the individual

[1] The district court also implies that the University regulated Vega's speech based on her viewpoint. (J.A. 11–12) ("To single out Ms. Vega for infringing upon the right of Mr. Drake to be heard and the right of his audience to listen in these circumstances smacks of arbitrary enforcement"); (J.A. 17) ("[T]here were multiple distractions, but only one speaker was sanctioned"). As an initial matter, the record fully belies this assertion: (1) Officer Thomas had a professional duty to enforce the Campus Free Speech Policy, (J.A. 34); (2) Campus Security's enforcement of the Policy is compulsory, (J.A. 23) ("*shall* be subject to sanctions") (emphasis added); (3) Thomas attested that he "did not consider addressing other sources of noise distraction because [he] was responding to a specific call about a specific disturbance," (J.A. 35); and (4) even if Thomas was not responding to a specific call, he reasonably and permissibly factored his personal knowledge of "historical information and past incidents" of Vega's similar speech under *Saxe*, 240 F.3d 200, 212. Further, even assuming *arguendo* that the University's regulation of Vega's speech was based on viewpoint, the University did not run afoul of the First Amendment. *See Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 442 (5th Cir. 2001) (observing that *Tinker* permits a school to regulate student speech associated with specific viewpoints as long as the school can demonstrate that "the expression would substantially interfere with the work of the school or impinge upon the rights of other students"); *see also West*, 206 F.3d 1358 (upholding a school's ban on student displays of the confederate flag).

right to peacefully exchange viewpoints on school premises without invasive, persistent interruption. *See id.* An alternative reading would work an absurd result, protecting the student's infringement of another's First Amendment rights, but not First Amendment rights themselves. *See generally id.* As this Court has "held that in a variety of contexts[,] the Constitution protects the right to receive information and ideas. This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (internal citations omitted). As *Pico* explained, "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of [their] own rights of speech, press, and political freedom." *Pico*, 457 U.S. 853, 867 (1982) (citing 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)). This Court's rulings ensure that "students too are beneficiaries of this principle." *Id.* (citing *Tinker*, 393 U.S. at 511).

Here, both the speaker—Drake—and his listeners—the AFSA members and other intellectually curious onlookers like Meghan Taylor, (J.A. 32)—sought to exercise their First Amendment rights to speak and to listen, respectively. At a minimum, this on-campus exercise fell within the protections of *Tinker*.

2. Vega's conduct invaded others' rights to speak and to listen.

The scope of *Tinker*'s "interference with the rights of others" language is textually ambiguous. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001). By its own terms, *Tinker* describes "the rights of other students to be secure and to be let alone"—guidance that extends, in plain language, beyond libel, slander, and intentional infliction of emotional distress. *See Tinker*, 393 U.S. at 508. Accordingly, courts have found that *Tinker*'s "invasion" or "collision" language permits schools to regulate student expression that denigrates others on the basis of race, religion, or sexual orientation. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166,

1178 (9th Cir. 2006) (holding that "verbal assaults on the basis of a core identifying characteristic" trigger *Tinker*'s rights of others prong"), *vacated sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007). While the "civil exchange of opinions or debate" falls short of "denigration," *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 614 (6th Cir. 2008), *Tinker*'s "invasion of the rights of others" rule does not permit school regulation of student political speech imposed involuntarily on others in a school environment. *Cf. Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 785-91 (E.D. Mich. 2003) (holding, under *Tinker*, a school cannot sanction a student that tries to arrange an *optional* political debate about race and a panel for a *non-mandatory* diversity day) (emphasis added).

Here, Vega forced her "targeted chanting" on speakers and listeners at the AFSA event. (J.A. 21, 32). She foisted a choice on its participants: undertake or witness an adverse exchange in which Drake could not easily "speak, think, and remain focused," (J.A. 25), or leave. While Vega's pro-immigration protests did not rise to the level of an intentional tort, they certainly invaded the rights of others to learn, listen, and communicate. (J.A. 25, 28, 32). Thus, her political speech was properly sanctioned by the University under its Policy.

CONCLUSION

A half century ago, this Court rightfully pronounced that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 at 506. Here, the Policy—a set of common-sense parameters designed to protect the First Amendment rights of University students—reaffirms the school's commitment to fostering the exchange of diverse viewpoints to improve the educational process. Without it, the University lacks the tools to engender the "marketplace of ideas." Therefore, the University respectfully requests that the decision of the appellate court be affirmed.

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the under-signed counsel, certify that (i) this brief is entirely the work product of competition team members, (ii) the team has complied fully with its school's governing honor code; and (iii) the team has complied with all Rules of the Competition.

s/ TEAM 22

Dated: January 31, 2019

APPENDIX A: STATUTES AND 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.

28 U.S.C. § 1254(1)
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.