
IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 2004

ANDREW FITZGERALD UNIVERSITY,

Petitioner

v.

BRENDAN WILLIAM PINCENTES,

Respondent

On Writ of Certiorari
To the United States Court of Appeals
For the Moot Circuit

BRIEF FOR THE PETITIONER

Applicant ID: V

QUESTIONS PRESENTED

- I. Under the First Amendment of the Constitution of the United States of America, can a public university prohibit groups of protestors in a "Commons" area when the university has created a free speech zone for the protestors immediately across the street and has traditionally limited access to the Commons area during school-sponsored events?

- II. Under the First Amendment of the Constitution of the United States of America, can a public university require protestors to sign a non-violence agreement to obtain access to a free speech zone when the university has experienced numerous violent protests in the past and has sustained substantial damage resulting from the protests?

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JURISDICTION STATEMENT

A Formal Statement of Jurisdiction has been omitted in accordance with the rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following appeal concerns the First Amendment of the United States Constitution, which is set forth in the Appendix. The following federal statute is also relevant and appears in pertinent part in the Appendix as well: 28 U.S.C. § 1254(1) (2004).

STATEMENT OF THE CASE

Statement of the Facts

Andrew Fitzgerald University (the "University" or "AFU") is a public university that has experienced numerous violent demonstrations in its Commons area ("Commons"). (J.A. at 4). For example, as students and invited guests gathered on the Commons during commencement exercises in 2003, thousands of uninvited demonstrators amassed on the same grounds to protest the guest speaker. (J.A. at 3-4). Violence soon erupted as protestors encouraged the crowd to physically assault the speaker. (J.A. at 4). University and student property was destroyed, students were injured, and the crowd "inhibited

emergency vehicles from reaching the Commons, thereby preventing the injured students from receiving medical attention.” (J.A. at 21). Fifty protestors were arrested for disorderly conduct as a result of the melee, thirty of whom were AFU students. (J.A. at 4).

Despite AFU’s practice of hiring security services and limiting access to the Commons during University-sponsored events, similar disruptions at previous commencement exercises also resulted in student injuries, damaged property, and dozens of arrests. (J.A. at 3-4). To date, these protests have caused \$2.3 million in damages to University and student property. (J.A. at 4).

In reaction to this violence and to prevent future disruptions, the University adopted a regulation that required future demonstrations to be held within a “free speech zone” located just across the street from the Commons. (J.A. at 4-5). Students wishing to use the free speech zone may do so only after signing a non-violence agreement stating that they will not engage in acts of violence or destroy University property. (J.A. at 5, 30). Access to the free speech zone may be denied based on evidence of misbehavior in a student’s University record. (J.A. at 30).

Procedural Background

Respondent Brendan William Pincenotes ("Respondent") filed the instant action against Petitioner AFU, claiming that the free speech zone regulation and non-violence agreement violate his First Amendment rights to free speech. (J.A. at 6). After both parties moved for summary judgment, the District Court for the Western District of Moot found that both of the Respondent's arguments were without merit and granted summary judgment in favor of the University. (J.A. at 2).

On appeal, the Moot Circuit Court of Appeals reversed the District Court's opinion and granted summary judgment for the Respondent. (J.A. at 28). Because this case concerns First Amendment issues, this Court should grant no deference to the Moot Circuit's decision and review the case de novo.

SUMMARY OF THE ARGUMENT

This Court should reverse the finding of the Moot Circuit Court of Appeals that the restriction on the Commons area violates the First Amendment. This Court should also reverse the Moot Circuit's holding that the non-violence agreement is an unconstitutional prior restraint.

When analyzing First Amendment rights, a forum analysis must be applied to determine the appropriate level of scrutiny. Restrictions in nonpublic forums are merely subject to a

reasonableness standard, while traditional and designated public forums are subject a more rigorous level of scrutiny. Although the Commons may bear some resemblance to a park and other traditional public forums, this Court has stated that the mere physical characteristics of the property cannot dictate the forum analysis. Instead, the proper focus should be on the government's policy or practice with respect to the area. The Commons is not generally open to outsiders and has been opened to speakers and student activities by invitation only. This selective access does not evidence a purposeful designation for public use, and therefore, does not create a public forum.

As a nonpublic public forum, or at best, a "limited public forum," the University's restriction on speech within the Commons must only be viewpoint neutral and reasonable in light of the purposes served by the forum. The restriction, however, is written in such a speech-friendly manner that it also satisfies a strict scrutiny review. The University certainly has a compelling interest in protecting its students from violence and its property from destruction. In light of the previous disruptions in the Commons, the restriction is reasonable regarding the time, place and manner of speech and provides the Respondent with ample alternatives for communication.

Although the Petitioner's non-violence agreement may be a form of prior restraint, the regulation does not present a danger of censorship. The regulation is only directed towards violent acts beyond the scope of the First Amendment and does not take into account the content of a student's intended expression. Nor does the regulation automatically foreclose alternative channels of communication. The only real risk of censorship derives from the Petitioner's ability to deny access based on prior evidence of misbehavior. In other prior restraint cases, this Court has found that the consideration of past rule violations does not afford the decision-maker with unbridled discretion. This Court has also recognized that public school officials are granted a broad range of authority to anticipate and prevent disruptive incidents. Thus, both of these established principles reveal that the University's consideration of documented misbehavior does not leave open unacceptable questions of access to official discretion.

For all of these reasons, the Petitioner respectfully requests that this Court reverse the Moot Circuit's finding that the creation of the free speech zone and non-violence agreement violate the First Amendment.

ARGUMENT

I. THE RESTRICTRICTION ON THE COMMONS DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE THE COMMONS IS A NONPUBLIC FORUM AND THE CREATION OF THE FREE SPEECH ZONE IS REASONABLE IN LIGHT OF THE PURPOSES SERVED BY THE COMMONS.

The First Amendment of the United States Constitution prohibits the government from making any law "abridging the freedom of speech." U.S. Const. amend. I. Despite this apparently broad sweeping language, this Court has never "suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Grayned v. City of Rockford*, 408 U.S. 104, 117-118 (1972). Instead, First Amendment rights must be "applied in light of the special characteristics of the school environment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Additionally, for all government property this Court "has adopted a forum analysis as a means of determining when the [g]overnment's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Def. and Educ. Fund Inc.*, 473 U.S. 788, 800 (1985). Government-owned property has historically been categorized as one of three types of forums: the traditional public forum, the designated

public forum, and the nonpublic forum. *Id.* at 802. The standard of scrutiny this Court applies to a restriction on expression depends on the type of the forum. *See id.* at 800.

A. The Commons is a nonpublic public forum because it differs in significant respects from traditional public forums and AFU has limited public expression therein to select groups.

Traditional public forums have been described as a places which "by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). Public streets, sidewalks, and parks are appropriate examples of traditional public forums. *Cornelius*, 473 U.S. at 802. The government may not prohibit all communicative activity within a public forum, and any content-based restrictions must be narrowly tailored to serve a compelling governmental interest. *Perry*, 460 U.S. at 45. Content-neutral restrictions regarding the time, place, and manner of expression must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Id.*

A designated public forum is created when the government "intentionally opens a nontraditional public forum for public discourse." *Cornelius*, 473 U.S. at 802. A designated forum is

not created by mere "inaction or by permitting limited discourse." *Id.* Because the government takes action to create this type of forum, it has no obligation to "indefinitely retain the open character of the facility." *Perry*, 460 U.S. at 45. Also, once a forum has been opened to the public at large for assembly and speech, any speech restrictions are reviewed under the same standards that apply to traditional public forums. *Id.* at 46.

Government property "which is not by tradition or designated a forum for public accommodation" is considered a nonpublic forum. *Id.* As a private owner, the government has the authority to determine the use of property under its control. *Cornelius*, 473 U.S. at 800. Reasonable regulations on speech may be imposed to reserve the forum for its intended purposes so long as the government does not discriminate on the basis of the speaker's view. *Perry*, 460 U.S. at 46.

More recently, this Court has also described a subset of the designated public forum, the limited public forum, which applies to nonpublic forums open for public expression only "for certain groups or for the discussion of certain topics." *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106 (2001) (citations omitted). Because the government has chosen not to open the forum to the public at large, any restrictions on speech must only be viewpoint neutral and "reasonable in light

of the purpose served by the forum." *Id.* at 106-107 (quoting *Cornelius*, 473 U.S. at 806).

In summary, limited and nonpublic forums are reviewed under a more deferential reasonableness standard, whereas traditional and designated public forums are subject to higher levels of scrutiny. See *Good News Club*, 533 U.S. at 106-107.

1. The Commons is a nonpublic forum because its purpose is to provide a place for student recreation and relaxation rather than open debate, and the physical characteristics of the property are not determinative of the forum analysis.

Although the Commons may resemble a traditional park in a physical sense, this Court has declared that "[t]he mere physical characteristics of the property cannot dictate the forum analysis." *United States v. Kokinda*, 497 U.S. 720, 727 (1990). As stated earlier, the proper focus is on whether the property has been devoted to public debate. *Perry*, 460 U.S. at 45. Additionally, this Court reviews the government's policy and practice to ascertain whether it intended to designate a public forum. *Cornelius*, 473 U.S. at 802.

For example, in *Kokinda*, a political group was prohibited from setting up a table on a post office sidewalk. 495 U.S. at 723. Although government-owned sidewalks are often referred to as quintessential public forums, this Court acknowledged that the "purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 728-729. The post office sidewalk was held not to

constitute a public forum because it was constructed "to provide for the passage of individuals engaged in postal business." *Id.* at 727.

Likewise, in *Greer v. Spock*, this Court held that a military base was a nonpublic forum even though it permitted free civilian access to certain unrestricted areas. 424 U.S. 828, 836-837 (1976). The entrance to the base was not guarded or blocked by any barrier, and civilians without any prior authorization were regular visitors to unrestricted areas. *Id.* at 851 (Brennan, J., dissenting). However, because the government's purpose was to train soldiers rather than to provide a public forum, the mere presence of sidewalks, streets, and other open areas did not require a finding that the base was a public forum. *Id.* at 837-838.

Thus, this Court's forum analysis depends more heavily on the government's intended purpose rather than the physical characteristics of a property.

In the case at hand, the University has provided its students with the Commons as a place for recreation and relaxation. (J.A. at 3). The presence of sidewalks and other areas that resemble quintessential public forums is not determinative of the forum analysis. See *Kokinda*, 495 at 727. Just as the purpose of the base in *Greer* was to train soldiers, the purpose of the University is to provide an atmosphere

conducive to education. See *Greer*, 424 U.S. at 837. Because this purpose is substantially disrupted by protests and demonstrations, the University violates no First Amendment rights by limiting such activities to the free speech zone in the Commons area.

Additionally, this Court must keep in mind that the Commons is the front lawn for a student dormitory. See (J.A. at 31). For these students, the dormitory is their home--where they live, sleep, study, and go about their day-to-day activities. The Petitioner has not discovered any case law stating that a student dormitory and its immediate surroundings constitute a traditional public forum. To suggest that AFU would permit such a forum, with its potential for noise, violence, and general unrest, to be placed outside the home of its students is nonsensical. Therefore, the intent of the University clearly reveals that the Commons constitutes a nonpublic forum.

2. The University revealed its intent to limit expression in the Commons by retaining control over the area during prior commencements and other events.

Despite the military base in *Greer* having some of the physical characteristics of a public forum, the fact that other civilian speakers and entertainers had been invited to appear on the base did not convert the property into a public forum as well. 424 U.S. at 838 n.10. This principle was later clarified by this Court in *Perry*, where a school district granted a

particular union exclusive access to its mail system. 460 U.S. at 39. In other words, the school opened a nontraditional forum (its mail system) to a certain speaker. When a rival union claimed that it could not be denied access because the forum had been opened up, this Court held that such "selective access does not transform government property into a public forum." *Id.* at 47.

One of the facts relied upon by the rival union in *Perry* was that the mail system had also been opened to "non-school connected groups," such as the Cub Scouts and the YMCA. *Id.* at 47. This Court noted that even if a "limited public forum" had been created, "the constitutional right of access would in any event extend only to other entities of similar character." *Id.* at 48. As noted above, access may be limited to "particular groups or particular topics" in a limited public forum. *Good News Club*, 533 U.S. at 106.

Like the mail system in *Perry*, the Commons is not generally open to outsiders. (J.A. at 2); see *Perry*, 460 U.S. at 46. The area is merely used by students as they travel between classes and to their dormitories. (J.A. at 2). As stated in *Cornelius*, "[t]he government does not create a public forum by inaction or by permitting limited discourse." 473 U.S. at 802.

When the University actually does use the Commons to host an event, such as commencement, the area is closed off for a

week beforehand. (J.A. at 3). During such events, a private security company is hired and access is limited only to graduating students, along with their friends and family who have received tickets for admission. *Id.* at 9. Such selective access, according to this Court, does not "evidence a purposeful designation for public use,[and therefore,] does not create a public forum." *Cornelius* 473 U.S. at 805. The speakers chosen for the events merely reflect the University's desire to limit expression to particular groups or particular topics. See *Good News Club*, 533 U.S. at 106. Thus, at most the Commons may be labeled a limited public forum, which is subject to the same standard of scrutiny (reasonableness) as a nonpublic forum.

3. The creation of the "free speech zone" is a reasonable restriction in light of the purposes served by the Commons and is not an attempt to suppress expression of the speaker's view.

On numerous occasions this Court has affirmed "the continuing validity of . . . a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. 263, 277 (1981). Although "there must exist specific facts upon which the likelihood of disruption can be forecasted," these facts may include "past experience in the school, current events influencing student activities and behavior, and instances of

actual or threatened disruption relating to the . . . expression in question." *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 754 (8th Cir. 1987).

The record indicates that AFU has experienced serious incidents of violence during its last four commencement exercises, incurring millions of dollars of damages to university facilities and countless injuries to students. (J.A. at 3-4). These past experiences reveal that University officials had a legitimate fear of violence from future demonstrations in the Commons, not simply an "undifferentiated fear or apprehension of a disturbance." *Tinker*, 393 U.S. at 508; see *Bystrom*, 822 F.2d at 747. Thus, limiting future demonstrations to the free speech zone is clearly a reasonable restriction in light of the University's educational mission and its intent to reserve the Commons for special university-sponsored events. Because all students who wish to stage demonstrations are limited to the free speech zone, the restriction does not discriminate on the basis of viewpoint, and therefore, does not violate the First Amendment.

B. Even if the Commons is considered a public forum, the free speech zone is a valid time, place, and manner restriction on student expression.

A content-neutral regulation on the time, place, and manner of expression is valid in all types of forums as long as it is narrowly tailored to serve a significant government interest and

leaves open ample alternative channels of communication. *Perry*, 460 U.S. at 45. This level of scrutiny is slightly less than the "strict scrutiny" of content-based restrictions, which require a "compelling" interest instead of a "significant" one. See *id.* For the purposes of the case at hand, the distinction is immaterial because this Court has clearly stated that school officials have a "compelling interest in having an uninterrupted school session conducive to the students' learning." *Grayned*, 408 U.S. at 119. Thus, proper focus should be on how narrowly the free speech zone serves this interest, and whether the restriction on speech is being used to suppress disfavored views.

Without question, the history of violent demonstrations at AFU mandates that protestors be spatially separate from ceremonies in the Commons. The free speech zone was formulated as part of the University's best efforts to prevent further harm to its property and students. (J.A. at 4-5). The restriction is both viewpoint-neutral and content-neutral because it applies to all groups of demonstrators, regardless of their purpose or intended message. (J.A. at 5); see also *Horton v. City of Houston*, 179 F.3d 188, 193 (5th Cir. 1999) ("government regulations that apply evenhandedly to all speakers weigh in favor of finding content-neutrality"). Students are still free to attend the events on the Commons, even if they oppose a

particular speaker's views. Thus, the regulation is narrowly tailored because it is not substantially broader than necessary to achieve the school's interest in protecting its campus and students from harm. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Additionally, the University provides protestors with a stage, a microphone, and a large area of ground near the Commons. (J.A. at 5). The free speech zone is approximately four times larger than the stage used for commencement exercises, and thus provides protestors with sufficient space with which to conduct a robust protest without endangering the University grounds, students, or the students' guests. See (J.A. at 31). Although the Respondent claims that the regulation unreasonably prevents protestors from being heard by their intended audience, the free speech zone is located just across the street, roughly 100 yards from the Commons and 500 yards from the commencement stage. Because the location places the Respondent well within sight and sound of his intended audience, the free speech zone clearly provides a sufficient alternative channel for communication. See *Perry*, 460 U.S. at 45.

For all of these reasons, this Court should uphold the creation of the free speech zone even if the Commons is classified as a traditional public forum.

II. THE NON-VIOLENCE AGREEMENT DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS A CONTENT-NEUTRAL REGULATION THAT IS NARROWLY DRAWN TO SERVE SIGNIFICANT GOVERNMENTAL INTERESTS, AND UNIVERSITY OFFICIALS DO NOT HAVE UNBRIDLED DISCRETION IN APPROVING USE OF THE FREE SPEECH ZONE.

As mentioned earlier, the Petitioner now requires students to sign a non-violence agreement and seek approval before using the free-speech zone. (J.A. at 5). This type of regulation is typically classified as a "prior restraint" because it gives schools officials the power to deny the use of a forum in advance of actual expression. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Although such regulations may present a danger of censorship, this Court has expressly acknowledged that prior restraints are not unconstitutional per se. *Id.* at 558. Permit requirements, licensing schemes, and other similar prior restraints have been upheld by the Court under appropriate circumstances. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316, 318 (2002) (upholding a park district ordinance that required a permit to conduct certain activities).

Thus, in order to withstand a First Amendment challenge a prior restraint must meet certain constitutional requirements. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). First, a prior restraint must not be based on the content of the message conveyed. Second, a prior restraint must meet the same requirements as other time, place, and manner

restrictions on speech. In other words, a prior restraint must be narrowly tailored to serve significant governmental interests and must leave open ample alternatives for communication. And third, a prior restraint must not delegate overly broad discretion to a public official. *Id.* All of these requirements are designed to prevent the "abridgment of our precious First Amendment freedoms." *Southeastern Promotions*, 420 U.S. at 553.

A. The non-violence agreement is a content-neutral regulation because it only suppresses expression that is not protected by the First Amendment and applies equally to all students.

The Respondent asserts, and the Moot Circuit Court of Appeals held, that the non-violence agreement is a content-based limitation on free speech because only the views of those individuals who seek to protest Dr. Smith's message are preemptively silenced. (J.A. at 13, 24). As discussed below, however, the Moot Circuit did not appropriately consider the type of expression being regulated and the neutral purposes served by the non-violence agreement.

1. The non-violence agreement is directed towards violent expression that falls outside the scope of the First Amendment.

One of the well-established principles of Constitutional law is that "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942). There are certain well-

defined classes of speech that may be prevented and punished without raising any constitutional problems. *Id.* at 571-572. In particular, the government is permitted "to forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Thus, this Court has drawn a "critical line" between advocacy, which is entitled to full First Amendment protection, and action, which is not. *Healy v. James*, 408 U.S. 169, 192 (1972).

Before determining which side of the line the Petitioner's non-violence agreement falls upon, this Court must take into further consideration the fact that the regulation occurs in the context of a school environment. *See Tinker*, 393 U.S. at 506. For example, in *Healy*, a state college denied a student organization's application for official campus recognition because school officials believed that the organization's prospective campus activities were likely to cause a disruptive influence. 408 U.S. at 188. Although the denial constituted a prior restraint on the organization's freedom of association, this Court acknowledged that the power of a school "to prohibit 'lawless action' is not limited to acts of a criminal nature." *Id.* at 189. According to this Court, a college administration has the authority to require a student group to "affirm in

advance its willingness to adhere to reasonable campus law.”
Id. at 193.

The Petitioner’s non-violence agreement clearly falls within the type of permissible regulation announced in *Healy*. Although the Moot Circuit claims that the agreement acts as a censor against violent expression, (J.A. at 24), a closer look at the regulation reveals that it does not cross the “critical line” between advocacy and action. See *Healy*, 408 U.S. at 192. Students desiring to use the free speech zone are merely required to “agree not to engage in any form of *violent activity* against another individual, or to commit a *violent act* against University property.” (J.A. at 30) (emphasis added). Because this waiver is directed towards activities that are not protected by “reasonable campus law,” the regulation does not directly suppress the type of expression protected by the First Amendment. See *Healy*, 408 U.S. at 193. The effect of the waiver on protected expression, if any, is merely incidental to the regulation’s permissible goals.

2. The purposes served by the non-violence agreement are not related to the content of protected expression because the regulation applies to all students who seek to demonstrate with two or more other individuals, regardless of the message intended to be conveyed.

Although the Petitioner’s regulation creates the opportunity for some protestors to be denied access to the free speech zone, a “regulation that serves purposes unrelated to the

content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. In other words, a content-neutral regulation is simply one that can be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

For example, in *Ward*, a municipal ordinance required all musicians to use a sound system and sound technician provided by the city when performing in a particular park's amphitheater. 491 U.S. at 784. This Court upheld the ordinance because the city's principle justifications for desiring to control sound levels had nothing to do with the content of the regulated speech. *Id.* at 792. Instead, the justifications stemmed from the city's desire to retain the sedate character of the park and avoid undue intrusion into its surrounding areas. *Id.* The ordinance continued to permit expressive activity in the amphitheater and had no effect on the quantity or content of expression beyond regulating the extent of amplification. *Id.* at 802.

The Petitioner's non-violence agreement is similar to the ordinance in *Ward* in the sense that it can also be justified without reference to the content of the regulated expression. As correctly stated by the District Court for the Western District of Moot, "the [a]greement at issue helps maintain

campus security by preventing protestors from committing acts of violence against people or campus property." (J.A. at 12). Nowhere in the agreement does it state that the University may consider the content or message of a particular student's expression beyond the regulation of these constitutionally permissible goals. See (J.A. at 30). Nor does the regulation only apply to those seeking to protest Dr. Smith's commencement speech. Instead, the non-violence agreement is a university-wide regulation that applies on *all* occasions to *all* groups of three or more students seeking to use the free speech zone. (J.A. at 5). Thus, the Moot Circuit Court of Appeals clearly erred when it found that AFU is looking to suppress particular views protected by the First Amendment. (J.A. at 25).

B. The Petitioner's non-violence agreement is narrowly tailored because it is not substantially broader than necessary to achieve a substantial governmental interest.

The Petitioner's substantial interest in maintaining order on campus is well-documented and discussed at length above. See *Healy*, 408 U.S. at 184 ("a college has a legitimate interest in preventing disruption on the campus"). Although the Moot Circuit Court of Appeals held that the Petitioner's non-violence agreement was not narrowly tailored to this legitimate interest, the Court erroneously applied a "least-restrictive-alternative" analysis and did not properly consider the alternative channels for communication.

1. The history of violent protests at AFU indicates that the Petitioner's substantial interest in maintaining order would be served less effectively without the non-violence agreement.

In analyzing the narrowness of the non-violence agreement, the Moot Circuit stated that the regulation "is of little insurance against the actual commission of violence" and proceeded to list other "less intrusive means" that would further the Petitioner's interests. (J.A. at 26). While a regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests," this Court has expressly declared that "a least-restrictive analysis is wholly out of place." *Ward*, 491 U.S. at 799, 800 n.6. Instead, a regulation is narrowly tailored so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Consider the municipal noise ordinance upheld in *Ward*. The appellate court in that case struck down the regulation because it believed there were several alternative methods of achieving the desired end that would have been less restrictive of First Amendment freedoms. 491 U.S. at 797. Upon reversing, this Court noted that the validity of a regulation of expression "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for

promoting significant government interests or the degree to which those interests should be promoted." *Id.* at 800 (citations omitted). Because the hypothesized methods reflected "nothing more than a disagreement with the city" on the extent of sound control, the appellate court "erred in failing to defer to the city's reasonable determination" that its overall interests would be served more effectively with the sound regulation than without it. *Id.* at 800-801.

Like the appellate court in *Ward*, the Moot Circuit should have deferred to the Petitioner's determination that the non-violence agreement was necessary "to prevent the repetition of an uprising." (J.A. at 4). The determination was reasonable because it was made by AFU's Health and Safety Advisory Committee, whose functions include, *inter alia*, "anticipating and providing preventative solutions to campus safety hazards." (J.A. at 4 n.3). More importantly, AFU has previously experienced numerous violent demonstrations that led to dozens of arrests and resulted in substantial damages to University and student property. (J.A. at 4). By requiring students to sign the non-violence agreement before using the free speech zone, the University at the very least puts the students on notice that their violent actions will not be tolerated. Furthermore, the regulation in question provides the University with an opportunity to prevent violent acts by denying access to the

free speech zone (the issue concerning the amount of discretion afforded to AFU is addressed later in this document). Such a regulation surely cannot be said to serve the University's legitimate interest in maintaining safety less effectively than no regulation at all. See *Ward*, 491 U.S. at 801.

Whether the non-violence agreement is less effective than means proffered by the Moot Circuit Court of Appeals is irrelevant. As in *Ward*, the hypothesized alternative methods reflect nothing more than a disagreement with the Petitioner over the most appropriate method for promoting its legitimate interests. The key to satisfying the narrow tailoring requirement in the case at hand is that the non-violence agreement is only directed towards non-protected activities and is only applied a content-neutral manner. Thus, the regulation does not burden substantially more speech than is necessary because it focuses on the "source of the evil" the government seeks to eliminate "without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 800 n.7.

2. The non-violence agreement leaves open ample alternatives for communication because it continues to permit lawful, expressive activity in the free speech zone.

In striking down the non-violence agreement as an unconstitutional prior restraint, the Moot Circuit relied upon two obscenity cases to establish the principle that "where a law

sets out primarily to prevent an individual's future speech as a result of past conduct, the law operates as a censor and violates the First Amendment protections against prior restraint of speech." (J.A. at 25). Although the two cases may provide some support for this proposition, both can be easily distinguished from the situation at hand because they completely failed to "leave open ample alternative channels for communication." *Clark*, 468 U.S. at 293.

For example, in *City of Paducah v. Investment Entertainment, Inc.*, an obscenity ordinance authorized a city to revoke the business license of a defendant that sold or publicly exhibited obscene materials. 791 F.2d 463, 470 (6th Cir. 1986). The Sixth Circuit found the ordinance to be an unconstitutional prior restraint because revoking a license prevented the offending business from engaging in the future distribution of protected, non-obscene materials anywhere in the city. In other words, the regulation went "beyond merely deterring or punishing individuals who deal in obscene materials" by closing all alternative channels for the communication of protected expression. *Id.*

Similarly, in *Universal Amusement Co. v. Vance*, a Texas statute authorized state judges to enjoin the future exhibition of films by a business that had shown obscene films in the past. 587 F.2d 159, 169 (5th Cir. 1978), *aff'd* 445 U.S. 308 (1980).

Because such a broad injunction would close all the channels of communication for some materials not yet determined to be obscene, the statute was held to be unconstitutional. *Id.*

The Petitioner's non-violence agreement, on the other hand, does not automatically foreclose alternative channels of communication for protected expression. Under the text of the agreement, students remain free to convey any message they choose as long as they do so in a lawful, non-violent manner. (J.A. at 30). Unlike an injunction or the revocation of a license, the agreement does not impose a "blanket ban" on all future access to the free speech zone. *Universal*, 587 F.2d at 169. The denial of access on each occasion must instead be the result of a determination based upon evidence of misbehavior in a student's records. (J.A. at 30). As discussed below, such a consideration does not fall outside the scope of permissible discretion afforded to university officials to prevent substantial disorder on campus.

C. The non-violence agreement protects against unbridled discretion by providing reasonable standards to guide the University's discretion in denying access to the free speech zone.

A content-neutral regulation that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750,

757 (1988). In order to pass constitutional muster, such a regulation must reduce the number of opportunities for the suppression of protected speech by providing "narrowly drawn, reasonable, and definite standards for the officials to follow." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). An examination of prior restraints that have been upheld by this Court and others reveals that the Petitioner's non-violence agreement satisfies this burden.

Consider this Court's decision in *Thomas v. Chicago Park Dist.*, which involved a municipal ordinance that required individuals to obtain a permit from the park district before conducting any event involving 50 or more people, or before engaging in any activity emitting amplified sound. 534 U.S. at 318. Because the park district could only deny a permit for one of the reasons set forth in the ordinance, this Court held that the regulation contained adequate standards to guide the district's decision. *Id.* at 323-324. Under the ordinance's approved standards, a permit could be denied "when the applicant has damaged the park district's property on prior occasions," or "when the applicant has violated the terms of a prior permit." *Id.* at 324.

Similar standards were approved by the Sixth Circuit in *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503 (6th Cir. 2001). In *Polaris*, a noise ordinance

authorized a city to enjoin repeated violations of the ordinance's decibel limits. *Id.* at 506. The plaintiff claimed that the provision acted as an unlawful prior restraint because it allowed the suppression of lawful speech (i.e., future concerts) solely on the basis of past noise violations. *Id.* at 506-507. However, the Court disagreed and held that the ordinance did "not leave open important questions of enforcement to official discretion." *Id.* at 509.

In summary, the fact that an official may consider past violations of regulations does not provide him or her with unbridled discretion. Although the Petitioner's non-violence agreement does not define the exact type of misbehavior that may be considered, it does state that any decision must be supported by evidence in a student's record. (J.A. at 30). Such documented evidence is only likely to be a rule violation. Additionally, public school officials are granted a broad range of authority to anticipate and prevent disruptive incidents. *See New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("maintaining security and order in the schools requires a certain degree of flexibility"). Therefore, the Moot Circuit Court of Appeals clearly erred when it determined that the non-violence agreement allows the University to censor speech in a manner that violates the First Amendment.

CONCLUSION

This Court should reverse the finding of the Moot Circuit Court of Appeals that the free speech zone violates the First Amendment. The Commons is a nonpublic forum and the creation of the free speech zone is reasonable in light of the University's mission to provide an educational atmosphere free of violence. In addition, this Court should reverse the Moot Circuit's holding that the non-violence agreement is an unconstitutional prior restraint. The agreement is a content-neutral, university-wide regulation that does not leave open unacceptable questions regarding access to the free speech zone.

APPENDIX

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."

STATUTORY PROVISIONS:

28 U.S.C. § 1254 (2004)

"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."