NO. A10-1440

State of Minnesota

In Supreme Court

AMANDA TATRO,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA,

Respondent.

JOINT BRIEF OF *AMICI CURIAE* STUDENT PRESS LAW CENTER and FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, INC.

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I. INTRODUCTION AND SUMMARY[1]

This case, while ostensibly about the postings of one college student on a social networking website, raises significant questions about how much control colleges and schools may assert over what is said about them. If affirmed by this Court, the legal standard adopted by the court below assures that student journalists, editorial commentators, citizen activists and whistleblowers will face retaliation without recourse for speech addressing matters of public concern. Whatever this Court may think about Amanda Tatro's sense of humor, unleashing colleges and schools to punish their students' speech—no matter when and where it is uttered—because of a belief that the speech may damage the school's image in the eyes of its supporters sweeps far beyond any legitimate conception of school authority.

The decision below marks a radical departure in First Amendment jurisprudence—one that should not be made without careful consideration of all of the unintended consequences. The notion that registering for a course offered by a public college divests a citizen of the full benefit of the First Amendment for every hour of her waking life, so that there is never a time when she is safe from government retaliation, should alarm us and give us pause. The court below evinced insufficient consideration of the perils of a rule that all forms of off-campus speech—not only postings on social networking sites, but letters to newspapers, speeches at town-hall meetings and interviews with television news stations—are subject to content-based governmental control. It is one thing to lower

[1] Counsel for *Amici* hereby certifies, pursuant to Rule 129.03, that no one on behalf of any party participated in the authorship of this brief, and that no party other than *Amici* made a monetary contribution to the preparation or submission of the brief.

the bar for speech that a student disseminates within the confines of an elementary or secondary school. It is quite another to say that a government agency may impose a rule against "disruptive" speech by adults in their off-campus lives without having to surmount the gauntlet of strictest scrutiny that the First Amendment demands when the government regulates speech based on content or viewpoint.

Amici fully agree with, and adopt, the constitutional arguments made by counsel for Appellant Tatro in her brief. *Amici* write separately to emphasize two primary and fundamental errors in the Court of Appeals' opinion below that make reversal essential if speakers are to enjoy the "breathing space"[2] that the First Amendment assures them.

First, the Court of Appeals erred in applying without modification the "substantial disruption" standard coined in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)—an analysis created for the unique "captive audience" setting of a high school. *Tinker* is manifestly the wrong standard for off-campus speech that is directed to a wider public audience and that must, unlike on-campus speech, be affirmatively sought out by the listener.

Second, the Court of Appeals erred in holding that the reaction of University of Minnesota financial supporters who learned of Tatro's Facebook comments through the news media may be regarded, for purposes of a *Tinker* analysis, as a "substantial disruption" of university functions that is attributable to Tatro. Some of the most important and effective reporting done by student journalists can cause university donors

[2] *See NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

to reconsider their financial support of an institution. To hold that damaging the image of a college in the eyes of its donors is "substantially disruptive" activity that removes speech from the protection of the First Amendment is to sign the death warrant for any type of investigative journalism or whistle-blowing activity.

II. *TINKER* STRIKES THE WRONG BALANCE WHEN SPEECH TAKES PLACE OUTSIDE SCHOOL PREMISES AND FUNCTIONS

At the outset, *Amici* fully agree with Appellant's counsel that the *Tinker* standard—uniquely and deliberated fashioned for the context of grade and high schools—is inapplicable in the adult world of a college campus at which attendance is non-compulsory. It is increasingly commonplace for college campuses to be populated by students in their 30s, 40s and beyond, as jobless adults seek retraining and military veterans resume their education after completing overseas combat deployment. To tell adults attending college—people old enough to marry, sign contracts, purchase firearms, and risk their lives to defend their country—that they are not old enough to be trusted with the full benefit of the Constitution because they need to be taught civility is both unacceptably patronizing and contrary to long-settled precedent.[3]

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[3] *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (citation omitted); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to

Tinker—which is as much a *withdrawal* of First Amendment rights as it is a *recognition* of First Amendment rights—struck its balance based on the "special characteristics of the school environment." *Tinker*, 303 U.S. at 506. These are, principally: (1) that K-12 schools are populated by impressionable minors, and (2) that the audience members for student speech are not free to leave because attendance is compulsory. These factors simply have no application on the campus of a college. Indeed, the "characteristics" of a college are no more "unique" than those of any other government property on which adults transact business—*except* that a college campus is "uniquely" a forum for the open exchange of ideas through uninhibited speech.[4] "[D]iscussion of controversial ideas on a college campus is essential to the background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition in the university setting. Vigorous debate on controversial topics is consistent with the Supreme Court's description of our college and university campuses as vital centers for the Nation's intellectual life." *Brown v. Li*, 308 F.3d 939, 961 (9th Cir. 2002) (citing *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 835 (1995) (internal quotes omitted)).

The Court need not, however, even reach the broad issue of *Tinker*'s general applicability to the college setting, because an unmodified *Tinker* standard plainly is unsuited to speech *outside* the confines of the campus.

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inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

[4] Indeed, the Supreme Court of the United States has described the public college campus as "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

First, speech within the walls of a school building necessarily targets a school audience and only a school audience. A high school student who wears a Confederate flag T-shirt to school[5] forces everyone else in the school to look at the symbol all day long. Affronted students may not switch seats, leave the building, or otherwise avoid exposure to the message, which is thrust upon them without their volition. This is not true of off-campus speech, which may simply be ignored by those who do not wish to hear or see it.

A student who speaks on a blog, website or social networking page is speaking to a larger public audience—many or even all of whom may be members of the general public, entirely unconnected with the school community. Allowing schools to police the content of this speech means that every word written by a student off campus must be appropriate for school. It means that the school gets to decide what content is suitable for a student to share with her family, personal friends, co-workers, and members of the general public. The interests simply must balance differently when a student is speaking to an audience comprised largely of people unconnected with the school. A school may not be permitted to enforce content-based restrictions on what a student says to third parties—third parties that may include family members, public officials, and the news media—on the grounds that some unknown segment of the listening audience may be comprised of students.

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[5] Similar facts involving students wearing Confederate flag apparel were at issue in *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008) and *Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010).

Tinker's reduced level of First Amendment protection for on-campus K-12 student speech is justified in part by the fact that a student who has speech unwittingly thrust upon him in the confines of the school predictably may act upon that speech while at school. Returning to the Confederate flag T-shirt example, a student who finds the shirt's message incendiary may well be provoked to take a swing at the wearer in the heat of the moment. But if the speaker instead wishes to display that same Confederate emblem on a personal Facebook page, he must be permitted to do so—even if classmates, seeing that image on Facebook over the weekend, decide to attack the student when he comes to school on Monday. In that scenario, the only proper and permissible response is to punish the attackers who commit the disruption by bringing the dispute onto the campus.

Importantly, it bears emphasis that nothing in the *Tinker* standard requires that the "disruption" occasioned by the student's speech be wrongful or ill-motivated in other to be punishable. The *Tinker* standard recognizes that on-campus student speech may be, to borrow from Justice Stevens, "the right thing in the wrong place." *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978). To illustrate, a well-meaning student who insists on walking the halls of school wearing a sandwich board that says, "The building is full of asbestos—get out immediately!" might permissibly be ordered under *Tinker* to remove the sign, even if its message is entirely truthful and is motivated by an altruistic concern for student safety, because the message risks provoking a panic. But if the student wishes to march outside of the Board of Education building after school wearing the very same sign—even if its effect undoubtedly will be to incite parents to pull their children out of

school and to otherwise "disrupt" routine operations—the student absolutely must be able to do so with certainty that he is within the protection of the First Amendment. Under the rule coined by the Court of Appeals below, the student cannot have that confidence. If not reversed by this Court, the result inevitably will chill the dissemination of information and opinions much more substantive than jokes on a Facebook page.

It further bears emphasis that *Tinker* does not require a school to actually wait to see whether a disruption materializes; rather, speech may be penalized in the reasonable anticipation of a disruption, even if none comes to pass. Thus, if the ruling below stands, a university will be able to prohibit any student from complaining publicly if the university concludes that donors *might have* reacted negatively to the criticism, even if none ever does. One need not speculate whether schools, empowered with open-ended authority over students' off-campus expression, will abuse that authority for the purpose of suppressing discussion of controversial ideas or legitimate criticism of school policies. Recent history is replete with such instances. To highlight only a few:

- At Valdosta State University, student Haydon Barnes was summarily expelled without process because the university's president took personal affront to Barnes' campaign of flyers and website posts drumming up public opposition to a parking garage that was the president's pet project.[6]
- At Catawba Valley Community College, student Marc Bechtol was suspended for two semesters and banned from campus for comments on Facebook criticizing the school's affinity agreement with a debit-card issuer and what he believed to be the intrusive practice of re-selling students'

[6] *See Barnes v. Zaccari*, __ F.Supp.3d __, No. 1:08-CV-0077-CAP (N.D. Ga. Sept. 3, 2010) (Order granting in part and denying in part college president's summary judgment motion in student's civil-rights suit arising out of expulsion).

personal information to other marketers.[7] (The decision was reversed after a national media outcry.)[8]

- At Wesley Chapel High School in Tampa, an 18-year-old senior was ejected from the Honor Society on the grounds of "disloyalty" to his school, because he started a Facebook discussion group where students could vent their frustration about the school's failure to achieve adequate progress under federal "No Child Left Behind" standards.[9]

While the majority of school and college administrators may be trustworthy people who will not abuse their authority, the First Amendment exists to protect citizens against the minority who—as in any field of endeavor—may be incompetent, corrupt or ill-motivated. As the U.S. Supreme Court made clear in *United States v. Stevens*, 130 S. Ct. 1577 (2010), an unconstitutionally broad grant of authority cannot be salvaged by the enforcer's assurance that the authority will be used judiciously. *See id.* at 1591 ("We would not uphold an unconstitutional statute merely because the government promised to use it responsibly."). No matter how well-intentioned the University (or any university)

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[7] Richard Gould, *Facebook post gets Catawba Valley Community College student in trouble*, HICKORY DAILY RECORD, Oct. 15, 2011.

[8] *See* Bob Sullivan, *Student banned after debit card/student ID card complaint is reinstated*, RED TAPE CHRONICLES, Oct. 14, 2011, *available at* http://redtape.msnbc.msn.com/news/2011/10/14/8324390-student-banned-after-debit-cardstudent-id-card-complaint-is-reinstated (last visited November 3, 2011); *Facebook rant results in student's suspension*, NBC UNIVERSAL, Oct. 16, 2011, *available at* http://www.nbc-2.com/story/15706095/2011/10/16/facebook-rant-results-in-students-suspension (last visited November 3, 2011); Glenn Reynolds, *Censorship in the Ivory Tower: Colleges and Universities are Killing Free Speech*, INSTAPUNDIT, Oct. 14, 2011, *available at* http://pjmedia.com/instapundit/129705/ (last visited November 3, 2011); *Student suspended over Facebook post*, UPI INTERNATIONAL, Oct. 14, 2011, *available at* http://www.upi.com/Odd_News/2011/10/14/Student-suspended-over-Facebook-post/UPI-31411318579200/ (last visited November 3, 2011); Adam Kissel, *Marc Bechtol, Catawba Valley Community College Student, Banned After Complaining About Branded Debit Cards*, HUFFINGTON POST, Oct. 13, 2011, *available at* http://www.huffingtonpost.com/2011/10/13/marc-bechtol-cawtaba-vall_n_1008999.html?1318519887 (last visited November 3, 2011).

[9] The Associated Press, *Tampa student: Facebook page led to ouster from honor society,* ORLANDO SENTINEL, Feb. 4, 2010, at B9.

may appear, a license to punish off-campus expression will unavoidably become a vehicle for some schools and colleges to pursue illegitimate ends.

It is no answer to say that a school's authority over off-campus speech may be limited to speech that foreseeably will be viewed on school grounds. In the year 2011, *any* off-campus speech can foreseeably be expected to reach campus via the Internet. A T-shirt worn to an off-campus party will appear in a photograph on a friend's social networking page. A speech to a Board of Regents meeting will be archived for public viewing on the Regents' website. A letter to the local newspaper will be republished on the newspaper's website. There is no such thing, in 2011, as "off-campus speech accessible online." There is only "off-campus speech."

Similarly, it is no answer to say that a school's authority over off-campus speech may be limited to speech that "targets" the school or school personnel. A complaint to the Board of Regents that a college administrator is a sexual harasser or an anti-Semite is speech "targeting" the school—and indeed, is uttered with the intent of causing an effect on campus. Yet that speech must necessarily be entitled to the full benefit of the First Amendment if campuses are going to remain bastions of learning, development and progress.

The U.S. Supreme Court has never held that schools may punish off-campus speech under the same legal standard as that applicable to on-campus speech and, to the contrary, has strongly indicated that the converse is true. In *Morse v. Frederick*, 551 U.S. 393 (2007) the Court analyzed its prior student-speech jurisprudence to determine the proper legal framework to apply to speech at a school-supervised outing taking place

adjacent to school grounds. In so doing, the Court distinguished the case of *Bethel Area Sch. Dist. v. Fraser*, 478 U.S. 675 (1987) by observing that, even though the Court found high school student Matthew Fraser's sex-themed speech punishable in the context of a mandatory on-campus assembly, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 2626. In other words, the Court has drawn a sharp distinction between on-campus and off-campus speech, making clear that expression properly subject to regulation on campus nevertheless retains protection if delivered outside of school. Because the U.S. Supreme Court has recognized that different legal standards necessarily apply to off-campus versus on-campus speech, it was error for the Court of Appeals to apply an on-campus speech analysis to off-campus speech such as that on Amanda Tatro's Facebook page.[10]

To be clear, recognizing that off-campus student speech is entitled to the same level of protection as any other citizen's off-campus speech in no way undermines schools' ability to operate in an orderly manner. Speech that is truly unlawful—for instance, "true threats"[11]—is beyond the protection of the First Amendment, and a student

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[10] Unlike the premises of a school, a student's blog or social networking page is not any kind of government property at all. While a school might be given additional latitude to govern speech where the speaker seeks to use government property as a vehicle for communication, no such case is presented here. There is no evidence that anyone who complained about Tatro's speech—whether classmate, instructor or donor—read the Facebook post on school grounds during school time, or that Tatro did anything to encourage such. While online speech has the potential to be read on school grounds during school time, so do magazines, newspapers and books. The University's argument boils down to a contention that speech *about* the school is to be equated with speech *inside of* the school. While this would be a convenient rule for colleges and schools, since it would do away with embarrassing whistleblowing and investigative journalism, there is no constitutional support for it.

[11] The U.S. Supreme Court has held that "true threats"—"those statements where the speaker means to communicate a serious expression of an intent to commit an act of

punished for truly threatening her professor would have no tenable First Amendment claim. Speech that is not unlawful but is instead merely worrisome—for instance, speech that indicates that a student may be a danger to herself or others—may properly be handled with professional assessment, and, if necessary, counseling. If students behave disruptively on campus because of something they read off campus, the obvious (and constitutionally appropriate) response is to punish the disruptive actors.

As the United States Court of Appeals for the Seventh Circuit has noted, "The school's proper response is to educate the audience rather than squelch the speaker." *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1999 (7th Cir. 1993). Speech that is neither truly threatening nor otherwise unprotected should be countered with more speech, not with reprisal. There is ample authority for schools to police campus safety without divesting students of the ability to speak about matters of concern in their lives frankly and without fear.

III. EVEN IF *TINKER* PROVIDES THE CORRECT FRAMEWORK, THE LOWER COURT'S APPLICATION OF *TINKER* WAS FLAWED

Even assuming *arguendo* that the *Tinker* standard does apply to off-campus speech at the post-secondary level, the Court of Appeals erred nonetheless in its application of the standard. The lower court determined that:

> Tatro's posts presented substantial concerns about the integrity of the anatomy-bequest program. Tatro's posts eventually reached families of anatomy-bequest-program donors and funeral directors, causing them to contact the university, expressing dismay and concern about Tatro's conduct and to question the professionalism of the program in general—a

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unlawful violence to a particular individual or group of individuals"—are outside the boundaries of First Amendment protection. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

> program that relies heavily on the faith and confidence of donors and their families to provide necessary laboratory experiences for medical and mortuary-science students. Indeed, the rules requiring respect and professionalism in the sensitive area of mortuary science appear designed to ensure ongoing trust in this relationship . . . .

Tatro v. Univ. of Minn., 800 N.W.2d 811, 822 (Minn. Ct. App. 2011). In effect, the court concluded that Tatro's speech inflicted reputational harm on the school and is thus unprotected as materially and substantially disruptive. This application of *Tinker* suffers from at least two fatal defects.

First, as a theoretical matter, it is not appropriate to countenance reputational harm to the school as a *Tinker* disruption. Even if student speech inflames potential donors, allowing schools to punish speech on the basis of reputational harm invites impermissible viewpoint discrimination. Four decades of case law since *Tinker* manifestly show that the negative reaction of benefactors or the possibility thereof cannot constitute a material and substantial disruption under *Tinker*. *See* § III.B, *infra*, and cases cited therein.

If causing university supporters to contact the university to express dismay is a "substantial disruption" that removes speech from the ambit of the First Amendment, then investigative reporting about school matters is out of business in the state of Minnesota. Student investigators frequently expose mismanagement and corruption at their institutions.[12] Reporting on corruption and mismanagement *should* cause supporters

[12] To give just one example, the University of Georgia's student newspaper, *The Red and Black*, won multiple national investigative reporting awards for exposing weaknesses in the school's system of policing sexual harassment, which—according to the paper's findings—allowed known harassers to remain on the job for as long as two decades. *See* Kristen Coulter, *Documents: Professor sexually harasses students for 20 years*, THE RED

to contact the university "expressing dismay and concern." That is the appropriate reaction to effective student reporting, not grounds for that reporting to lose First Amendment protection.

In 1988, *The Minnesota Daily*, the student newspaper at the University of Minnesota, was instrumental in bringing to light questionable spending by the University's then-president, Kenneth Keller, which ultimately led to the president's resignation.[13] That series of events undoubtedly was more "disruptive" to the University's operations than a few irate phone calls from mortuary donors. Yet such speech must necessarily be shielded against censorship by the First Amendment if institutions are to be held accountable to their public duty. Therefore, negative donor reaction cannot be categorized for purposes of a *Tinker* analysis as a "substantial disruption."

Second, the Court remarked on, but failed to recognize the importance of, a crucial aspect of this case: the fact that Tatro's posts only "eventually reached families" of donors and directors. *Tatro*, 800 N.W.2d at 822 (emphasis added). *Tinker* requires that disruption result *directly and proximately* from the speech itself, not from indirect third-party accounts of that speech. The First Amendment does not allow students to be punished for the results of what amounts to a game of whisper-down-the-lane. As far as the record shows, there is no evidence as to which third-party accounts reached donor ears, when they did, or how reliably and completely those accounts may have relayed

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AND BLACK, Jan. 20, 2008, *available at* http://redandblack.com/2008/01/30/documents-professor-sexually-harasses-students-for-20-years/ (last viewed Nov. 1, 2011).

[13] Rogers Worthington, *U. of Minnesota Head Resigns*, CHICAGO TRIBUNE, Mar. 15, 1988, *available at* http://articles.chicagotribune.com/1988-03-15/news/8802290811_1_resigns-regents-accountable (last viewed Nov. 1, 2011).

Tatro's words and the context in which she said them. Ultimately, the fact that Tatro was not the speaker should be dispositive; she should not be punished for any resulting disruption.

A. *TINKER'S* "SUBSTANTIAL DISRUPTION" REQUIRES INTERFERENCE WITH CLASSWORK, SCHOOL DISCIPLINE OR THE INSTRUCTIONAL PROCESS

In demarcating the boundaries of constitutionally protected student speech, *Tinker* did more than just adopt a standard of "material and substantial disruption." *Tinker* also supplied a direct object, informing us what must be substantially disrupted, or what must be materially interfered with, before a school may constitutionally punish a student. Schools must demonstrate that "students' activities would materially and substantially disrupt the *work and discipline of the school.*" *Tinker*, 393 U.S. at 513-14 (emphasis added). Disrupting public opinion, but not classwork, is not enough.

Recent cases have supported this reading of *Tinker*. Three years ago, the Seventh Circuit defined substantially disruptive speech, with specific recognition of *Morse*[14] and *Fraser,*[15] as that speech which "will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school." *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 674 (7th Cir. 2008) (Posner, J.). Tatro's sarcastic literary endeavors on Facebook do not qualify. That an erosion in public support might, several layers of causation removed, ultimately have an impact on the school's educational programming is simply too attenuated—and this exception, if allowed, would invite too much abuse.

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[14] *Morse*, 551 U.S. 393.
[15] *Fraser*, 478 U.S. 675.

Just as the University here argues that alienating donors impairs the school's educational offerings, a school could argue that editorially advocating for the defeat of a school bond issue or a school millage increase could impair the quality of educational offerings, thus making that editorial commentary punishable on the same basis.

Routinely courts facing speech more churlish and ominous than that at issue here have followed *Tinker* and cabined "disruptions" to acts that directly interrupt the educational process. *See, e.g., Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 591 (D. Del. 2008) ("Educational institutions may prohibit and punish the student for speech if they establish that the student speech materially disrupts the educational process or activities, creates substantial disorder, invades the rights of others or is reasonably foreseen to do so."); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 785 (E.D. Mich. 2002) (school must show interference with the "educational process" if attempting to regulate speech); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (no substantial disruption where there was "no evidence that teachers were incapable of teaching or controlling their classes").

B. TARNISHING THE REPUTATION OF AN INSTITUTION DOES NOT AMOUNT TO A SUBSTANTIAL DISRUPTION

Attempting to ground a substantial disruption in the unwelcome reaction of constituents, or the fear of such a reaction, is by no means a novel argument. It dates back to *Tinker* itself, where although the Supreme Court found that the action of the school was based "upon an urgent wish to avoid the controversy which might result from the expression," 393 U.S. at 510 (1969), it held that the First Amendment requires a school to

show that "its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 504.

Soon after *Tinker*, the Court further crystallized this principle in *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (per curiam). *Papish* involved attempted discipline of a college student for distributing a newspaper issue that included a headline containing a profanity and a raunchy political cartoon. The Eighth Circuit had held that even if the paper was not obscene, the student could be disciplined pursuant to a university regulation barring "indecent speech or conduct," an obligation that the student had willingly assumed. *Papish v. Bd. of Curators of the Univ. of Mo.*, 464 F.2d 136, 138 (8th Cir. 1972). The Supreme Court strongly disagreed, holding that "the mere dissemination of ideas—no matter how offensive to good taste —on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish*, 410 U.S. at 670.

The University of Minnesota now repeats the University of Missouri's mistake in offering political backlash as a justification for truncating First Amendment liberties. But, in fact, it not just a repetition of another's school mistake: the University of Minnesota itself has also previously advanced this same unavailing justification. In *Stanley v. McGrath*, 719 F.2d 279 (8th Cir. 1983), a University of Minnesota student newspaper brought suit against the university after the school instituted a new system of budgetary funding in retaliation for an earlier "humor issue" of the paper that featured incendiary religious satire, including a "blasphemous interview with Jesus on the Cross that would

offend anyone of good taste." *Id.* at 280. The issue generated vehement criticism and school administrators received numerous letters from outraged members of the community. *Id.* Nonetheless, the court concluded that despite the political maelstrom, the resulting retaliatory action violated the students' First Amendment rights. *Id.* at 284.

Courts across the nation have rejected the University's position on this point. *See, e.g., Leeb v. Delong*, 198 Cal. App. 3d. 47, 61 n.11 (Cal. Ct. App. 1988) ("[W]e reject the principal's decision to censor the article in question based in part on the belief it would tarnish the reputation of the school and the district. The mere reputations of government entities may never be defended by censorship in a society governed by the governed."); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it"); *see also Morse*, 551 U.S. at 409 (refusing to adopt a rule that would allow prohibition of "any speech that could fit under some definition of offensive").

Allowing reputational harm or bad publicity to justify censorship would necessarily invite, and legitimize, viewpoint discrimination. *See Kincaid v. Gibson*, 236 F.3d 342, 356 (6th Cir. 2001) ("in a traditional, limited, or nonpublic forum, state officials may not expunge even 'garbage' if it represents a speaker's viewpoint."). Relying on harm to a school's reputation to justify censorship allows the school to pass the buck and externalize the decision to censor. It allows the school to claim that the originator of the censorship is actually the third-party complainant. But when the

government gives effect to an outside third party's disagreement with speech, the government censors just as if the complaint came from the government itself. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (recouping costs incurred due to listeners' reaction to unwelcome speech not permitted by the First Amendment); *see also Amidon v. Student Ass'n of State Univ. of New York*, 508 F.3d 94, 101–02 (2d Cir. 2007) ("Viewpoint discrimination [against the minority position] arises because the vote reflects an aggregation of [the majority's will].").

Amanda Tatro is not the University of Minnesota, and her speech is not the government's speech. Students are not "agents" of their schools; Amanda Tatro was neither salaried to study mortuary science, nor was she an authorized University spokesperson, nor would a reasonable person believe her views to be those of the University. The mere fact that certain outside third parties blame the college for the speech of its students does not make the college responsible for, or supervisory over, that speech.

C. A SPEAKER CANNOT BE HELD RESPONSIBLE FOR THE EFFECTS OF THIRD-HAND ACCOUNTS OF HER SPEECH

The lower court erred by making unsupported assumptions regarding the manner in which the Facebook posts reached the eyes and ears of donors. The court held that Tatro's Facebook posts "eventually reached" the ears of donors' families and funeral directors. *Tatro*, 800 N.W.2d at 822.

No evidence in the record indicates that Tatro had among her Facebook "friends" the families of cadaver donors. (Were that the case, the posts would not have "eventually

reached" the donor families; the posts would have reached them instantly.) Because the mortuary program's supporters were not reacting to first-hand exposure to Tatro's speech, then they must necessarily have learned about it second-, third- or fourth-hand. But the characterizations that these supporters were reading are not in evidence, and these accounts are the speech of others (journalists, commentators, family or friends passing along their versions of the story). Tatro did not utter their words, and she cannot be held responsible for their "spin" on what she said.

For example, one can easily imagine a person who read a news account of Tatro's Facebook posts giving an oversimplified version to a friend. The account could have gone something like this: "One of those mortuary students at the University is in trouble because she went on the Internet and threatened to stab some people." This type of inexact and oversimplified description is emblematic of how news gets garbled in repetition. One can readily understand how, armed with nothing more than that oversimplified understanding, a donor might well call the University in alarm over the character of its students. But those words are not Tatro's words, and speakers cannot be held accountable for how strangers characterize their language.

As the record shows, Tatro's Facebook postings were not reported by the news media until she publicly complained about being banned from campus and investigated by police. The news accounts to which the donors were allegedly reacting (or, potentially, to third-hand descriptions of those news accounts) were not merely photocopies of Tatro's Facebook posts; rather, they were descriptions of Tatro's displeasure with the disciplinary process. It is therefore impossible to know from this record how many of

these supporters' complaints were provoked by the Facebook postings themselves and how many by what Tatro said to the media about her pending punishment. If some or all of Tatro's punishment is based on how donors reacted *to her interviews with the news media*, then it is the speech in those interviews that should have been analyzed under the First Amendment. Regardless of the level of First Amendment dignity that the Court affords to the Facebook postings themselves, complaining about the unfairness of a school disciplinary process must assuredly be afforded full First Amendment protection.

To affirm the Court of Appeals' "disruptiveness" finding on the grounds of donor reaction would produce the untenable result that speech becomes more punishable because it is newsworthy. Speech that provokes a high level of public discussion would become punishable simply because the more widely that speech is discussed, the more it is exaggerated and mischaracterized. The perverse outcome is obvious: The better that student journalists do their job, and the wider the audience they engage, the more likely their speech is to become punishably "disruptive," if people who hear garbled or incomplete third-hand versions of the speech complain about it.

IV. CONCLUSION

The deficit of civic engagement by America's young people has been repeatedly and authoritatively identified as an urgent national concern, most recently by Justice O'Connor's Campaign for the Civic Mission of Schools and its report. "Guardian of Democracy."[16] There is no surer way to suppress students' civic involvement than to tell

[16] The Campaign for the Civic Mission of Schools, "Guardian of Democracy: The Civic Mission of Schools," Sept. 15, 2011, *available at*

them that talking about their schools off campus—even if attempting to engage public support on matters of public concern—will be punishable if the school, in its deferentially reviewed discretion, decides that the speech has the potential to provoke a "disruptive" level of on-campus discussion.

The University and its *amici* supporters undoubtedly will claim, as schools always do, that divesting them of disciplinary authority over lawful off-campus expression will leave them "helpless" or "powerless" to maintain orderly operations. This is nonsense, and the Court should reject it out of hand. It is only when the government unleashes its *punitive* authority that the First Amendment is implicated. Short of imposing disciplinary consequences, a school may investigate, may make referrals to appropriate civil or criminal authorities, may offer counseling, may (if the student is a minor) call in parents for a conference, and—above all—may educate. There is no reason to believe that the interests of the University of Minnesota in maintaining orderly operations would not have been fully satisfied in this case had all of these non-punitive measures been employed.

Whatever the Court decides as to the non-First Amendment claims in this case, it is imperative for the safety of student whistleblowers, journalists and activists that this Court forcefully repudiate at least that much of the Court of Appeals' decision holding that college students' off-campus speech receives no more First Amendment protection than a high school student's on-campus speech, and that a punishable level of "disruption" occurs when a college's supporters are provoked into threatening to

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http://civicmissionofschools.org/site/documents/ViewGuardianofDemocracy/view (last viewed Nov. 1, 2011).

withdraw their support. Accordingly, the ruling below should be REVERSED and the case remanded for application of a more speech-protective legal standard.

Respectfully submitted,

Dated: November 4, 2011

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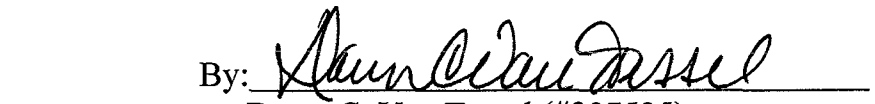
By: 

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