

NO. A10-1440

State of Minnesota
In Supreme Court

AMANDA TATRO,

Appellant,

vs.

UNIVERSITY OF MINNESOTA,

Respondent.

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA**

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OF MINNESOTA

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STATEMENT OF *AMICUS CURIAE*¹

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Minnesota (ACLU-MN) is one of its statewide affiliates with more than 8,500 members statewide. Since its founding in 1952, the ACLU-MN has engaged in constitutional litigation, both directly and as *amicus curiae*, in a wide variety of cases. Among the rights that the ACLU-MN has litigated to protect is the right to free speech guaranteed by the First Amendment to the United States Constitution and Article I, section 3, of the Minnesota Constitution.

The ACLU-MN believes that the Court of Appeals committed reversible error when it applied *Tinker* and progeny in the context of speech restrictions imposed upon a college student. Moreover, even assuming *arguendo* that *Tinker* and progeny were properly applied in this context, any sanction based on Appellant's speech was unconstitutional because her speech did not cause, and was not reasonably likely to cause, a material and substantial disruption of school activities.

¹ Counsel certifies that this brief was authored in whole by listed counsel for *amicus curiae* ACLU-MN. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the ACLU-MN, which was granted leave to participate as *amicus* by this Court's Order dated September 28, 2011.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The ACLU-MN concurs with, adopts and incorporates the Appellant's Statement of the Case and Statement of Facts set forth in the Appellant's Brief and Addendum.

ARGUMENT

I. **TINKER AND PROGENY DO NOT APPLY TO COLLEGE STUDENTS BECAUSE OF THE CRITICAL DIFFERENCES BETWEEN SECONDARY AND POST-SECONDARY SCHOOLS' PEDAGOGICAL GOALS, DISCIPLINARY NEEDS, *IN LOCO PARENTIS* ROLES, AND STUDENT MATURITY.**

The First Amendment rights of college students, unlike those of elementary and secondary school students, are co-extensive with the speech rights of other adults. The Court of Appeals got it wrong when, rather than using the strict scrutiny analysis that applies to content-based restrictions of adult speech, *see, e.g., Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011), it analyzed Tatro's speech under the *Tinker* line of cases – a line that allows secondary schools to apply restrictions to their students' speech that would be unconstitutional if applied to the speech of adults.

A. **The U.S. Supreme Court's Cases Establish that the Different Pedagogical Goals of Secondary and Post-Secondary Schools Justify Speech Restrictions at the Secondary Level that Are Unconstitutional at the College Level.**

In the years since the U.S. Supreme Court decided *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the seminal secondary school student speech case, it has never applied either *Tinker* or its progeny, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School District v.*

Kuhlmeier, 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393 (2007), to approve *restrictions* on post-secondary school students' speech, as the Court of Appeals did in this case. While the U.S. Supreme Court has occasionally invoked *Tinker* in cases that concern the speech of college students, it has done so to explain that even high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, not to justify *curtailing* the speech rights of *college* students. See, e.g., *Papish v. Univ. of Missouri Curators*, 410 U.S. 667, 671 n.6 (1973) (per curiam) (applying *Tinker* to prohibit a university from expelling a student for selling a lewd underground newspaper); *Healy v. James*, 408 U.S. 169, 174 (1972) (applying *Tinker* to prohibit a university from refusing to recognize a student group because of the group's political speech).

While the U.S. Supreme Court has not yet explicitly held that *Tinker* and progeny do not apply at the post-secondary school level, see *Hazelwood*, 484 U.S. at 273 n.7 (reserving the question of whether the deferential review given secondary schools' restrictions of student speech "is appropriate with respect to school-sponsored expressive activities at the college and university level"), Court members have recognized that the Court's "cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education," *Bd. of Regents v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) (citations omitted). Indeed, the Court's pre- and post-*Tinker* cases make clear that the missions and student body characteristics of post-secondary

educational institutions, which differ so significantly from those of primary and secondary schools, require that college students enjoy the full panoply of First Amendment freedoms to which all adults are entitled, not the restricted version that *Tinker* and progeny grant high school students.

As the U.S. Supreme Court explained in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the university classroom – even more than other places in which adults exercise their constitutional speech rights – “is peculiarly the ‘marketplace of ideas.’ The 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.’” *Id.* at 603 (citation omitted).

“The essentiality of freedom in the community of American universities is almost self-evident. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”

Id. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

Indeed, the Court has stressed, first, that the balance to be struck between student speech rights and schools’ disciplinary needs “must always be [struck] ‘in light of the special characteristics of the . . . environment’ in the particular case,” *Healy*, 408 U.S. at 180 (quoting *Tinker*, 393 U.S. at 506), and, second, that colleges and universities do not share the “special characteristics” of the primary and secondary school environments that justify certain student speech restrictions in those lower schools. Thus, the Court held in *Healy v. James* that, in marked contrast to the Court’s longstanding recognition of “the need for affirming the comprehensive authority of . . . [secondary] school officials,

consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools,” the “precedents of [the] 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.” *Id.* (citations omitted). That is, while First Amendment protections do, in some cases, apply with “less force” on *primary and secondary school* campuses than in the “community at large,” the First Amendment rights of *college* students are co-extensive with those of other adults.

As the U.S. Supreme Court has recognized repeatedly, then, colleges and universities are, uniquely, sites where adults are encouraged to express and to hear a myriad of viewpoints, no matter how controversial, and to engage in deep inquiry, even if that means making intellectual missteps. Unbridled, uncensored, unrestricted dialogue is an essential piece of the academic endeavor. College students are encouraged to break the mold, to question unceasingly, to challenge authority.

Elementary, middle and high schools are, in contrast, the institutions that pour the mold that college students are later urged to shatter so that they can discover new truths about themselves, their fields of study, and the world at large. Primary and secondary schools aim to inculcate their students with collective values and mores, forming their charges into young people who will grow up to be productive members of society. In some cases, the process requires shielding students from the kinds of offensive and controversial material that they are free – and encouraged – to explore once they graduate from high school:

Surely it is a highly appropriate function of public [secondary] school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the “fundamental values necessary to the maintenance of a democratic political system” disfavor the use of terms of debate highly offensive or highly threatening to others. . . . The inculcation of these values is truly the “work of the schools.”

The process of educating our youth for citizenship in public [secondary] schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers – and indeed the older students – demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct

Fraser, 478 U.S. at 683 (citations omitted).

In the view of the U.S. Supreme Court, then, the elementary and secondary high school educational system in this country is a mandatory one whose mission is to indoctrinate children with shared societal values, to teach them modes of civil discourse, and to protect their impressionable minds from sensitive material. The college and university system, on the other hand, is a purely voluntary one, whose goal is to foster the intellectual growth that allows adult students to develop into free-thinking, independent leaders of society. Elementary and secondary schools aim to teach children how to follow the rules; colleges and universities aim to allow adults to question and even break the old rules, make new rules, and become true leaders. These critical differences explain why secondary school officials may permissibly restrict student speech that undermines their discipline-instilling, value-inculcating role in ways that are inappropriate and

unconstitutional as applied to adult speech, including the speech of college and university students.

Several lower courts have recognized that the above-described differences in the pedagogical goals of colleges and universities, on the one hand, and primary and secondary schools, on the others, mean that “[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools.” *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 247 (3d Cir. 2010). As the Second Circuit held in *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007):

Courts have long recognized that student media outlets at public universities, and the student journalists who produce those outlets, are entitled to strong First Amendment protection. . . . These decisions appear to be rooted in the Supreme Court’s repeated admonitions that colleges play a critical role in exposing students to the “marketplace of ideas” and, as a result, First Amendment protections must be applied with particular vigilance in that context.

Id. at 121 & n.11; *see also Student Gov’t Ass’n v. Bd. of Trustees of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (*Hazelwood*’s approval of speech restrictions on high school newspapers “is not applicable to college newspapers”).

As the Third Circuit affirmed, “the pedagogical missions of public universities and public elementary and high schools are undeniably different. While both seek to impart knowledge, the former encourages inquiry and challenging *a priori* assumptions whereas the latter prioritizes the inculcation of societal values.” *McCauley*, 618 F.3d at 243 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

It is abundantly clear, then, that the U.S. Supreme Court permitted the secondary school student speech restrictions upheld in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*

because the speech at issue in each case threatened to undermine the discipline-instilling, value-inculcating educational mission of public high schools. Such restrictions are unconstitutional as applied to college and university students, who attend institutions whose educational mission is, in many ways, precisely the opposite of primary and secondary schools’: Post-secondary institutions seek, as they should, to encourage students to question the very mores they were taught to accept at face value in elementary and high school. It is for that reason that “speech . . . which *cannot be* prohibited to adult[college students] *may be* prohibited to public elementary and high school students.” *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008) (original emphasis) (citing *Fraser*, 478 U.S. at 682).

B. Differences in the *In Loco Parentis* Role that Secondary School Officials Play, Differences in Their Disciplinary Needs, and Differences in the Maturity Levels of Their Students Permit Secondary School Student Speech Restrictions that Are Impermissible in Colleges.

While the different, and indeed in many ways diametrically opposed, educational missions of secondary and post-secondary schools mean that the speech restrictions approved in the secondary school context in *Tinker*, *Fraser*, *Hazelwood*, and *Morse* are unconstitutional at the college and university level, several other differences between elementary, middle and high schools, on the one hand, and colleges and universities, on the other, bolster the conclusion that the speech restrictions at issue in this case cannot be justified by the decisions in *Tinker* and progeny.

First, “‘public elementary and high school administrators,’ unlike their counterparts at public universities, ‘have the unique responsibility to act *in loco*

parentis.” *McCauley*, 618 F.3d at 243 (quoting *DeJohn*, 537 F.3d at 315); *see also Fraser*, 478 U.S. at 684 (noting “the obvious concern . . . of . . . school authorities acting *in loco parentis*” to “protect children . . . from exposure” to offensive language).

Because secondary school officials must act in the stead of their students’ parents, they, like parents, are granted “a good deal of latitude in determining which policies will best serve educational and disciplinary goals.” *McCauley*, 618 F.3d at 244. However, any notion that public colleges may similarly “exercise strict control over their students via an *in loco parentis* relationship has decayed to the point of irrelevance.” *Id.* at 245.

College students today are no longer minors; they are now regarded as adults in almost every phase of community life. . . . There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. . . . But today students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will.

Bradshaw v. Rawlings, 612 F.2d 135, 138-40 (3d Cir. 1979). “Modern-day public universities are intended to function as marketplaces of ideas, where students interact with each other and with their professors in a collaborative learning environment [and] ‘often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.’” *McCauley*, 618 F.3d at 244 (quoting *Healy*, 408 U.S. at 197 (Douglas, J., concurring)). Thus, the *in loco parentis* relationship that primary and secondary schools share with their charges, and that justifies restrictions on speech that undermines the value systems with which those schools aim to indoctrinate their students, cannot similarly justify such restrictions at the college level.

Second, elementary and high schools, unlike colleges and universities, have a variety of special disciplinary needs that allow “the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.” *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). For example, secondary school students may be subjected to compulsory attendance rules, and within the school, teachers and administrators may mandate the ways in which students are allowed to spend their time.

In contrast, and

[u]nlike the strictly controlled, smaller environments of public elementary and high schools, where a student’s course schedule, class times, lunch time, and curriculum are determined by school administrators, public universities operate in a manner that gives students great latitude: for example, university students routinely (and unwisely) skip class; they are often entrusted to responsibly use laptops in the classroom; they bring snacks and drinks into class; and they choose their own classes. In short, public university students are given opportunities to acquit themselves as adults. Those same opportunities are not afforded to public elementary and high school students.

McCauley, 618 F.3d at 246 (footnote omitted). The speech restrictions allowed at the secondary level may be justified by the special disciplinary needs of elementary and high schools; indeed, the discipline may have an educational component, as students are taught the importance of conforming to societal expectations and following societal rules. Such discipline has no such educational component at the college level, where adult students are expected to discover the value of questioning societal expectations and rules.

Finally, as the U.S. Supreme Court has stressed repeatedly, the differing maturity levels of the student bodies in secondary and post-secondary schools allow elementary and high school officials – but not college or university officials – to limit speech that

might be offensive or upsetting to children. The *Hazelwood* Court recognized that elementary and high school administrators “must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics” *Hazelwood*, 484 U.S. at 272; *see also Fraser*, 478 U.S. at 683 (“[t]he [lewd and offensive] speech [at issue] could well be seriously damaging to its less mature audience”). While maturity levels certainly evolve over time, so that there is not necessarily a bright line between the maturity of a 17-year-old high school senior and an 18-year-old college freshman, the bottom line is that most students in high schools are minors, while most students in college are adults, with all the rights conferred on those who have attained sufficient majority and maturity to exercise them, including the rights to vote, to marry without parental permission, and to enter into legally-binding contracts. Because “[u]niversity students are . . . young adults [and] are less impressionable than younger students,” *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981), college officials cannot assert that they share the need of secondary school administrators to protect impressionable young minds from offensive speech.

In sum, the decisions of the U.S. Supreme Court, as well as the decisions of the lower courts that have thoroughly considered whether to apply *Tinker* and progeny at the college and university level,² establish that elementary and high schools’ unique

² Most of the courts that have applied *Tinker* and progeny in a university setting to restrict, rather than protect, student speech rights have done so with no explanation, simply assuming without question that those cases apply at both the secondary and post-secondary school levels. *E.g.*, *Alabama Student Party v. Student Gov’t Ass’n of Univ. of Alabama*, 867 F.2d 1344 (11th Cir. 1989); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). Those few courts that proffered some justification for applying the cases at

pedagogical goals, disciplinary needs, *in loco parentis* relationships to their students, and student maturity levels justify the speech restrictions approved in those Supreme Court cases. Such restrictions are unconstitutional as applied to college and university students, given the value-questioning rather than value-inculcating pedagogical mission of post-secondary schools; the non-parental, peer-to-peer relationships that college professors and administrators enjoy with their students; and the adult status and maturity levels of those students.

II. EVEN ASSUMING *ARGUENDO* THAT *TINKER* AND PROGENY ALLOW COLLEGE STUDENT SPEECH RESTRICTIONS, TATRO'S SPEECH DID NOT CAUSE A MATERIAL AND SUBSTANTIAL DISRUPTION OF SCHOOL ACTIVITIES, NOR COULD UNIVERSITY OFFICIALS REASONABLY PREDICT THAT IT WOULD.

While the discussion above establishes that *Tinker* and progeny are not appropriately applied to justify restricting the speech of college and university students, if this Court *were* to find that they *do* apply to post-secondary school student speech, it must also find that Tatro's speech did not materially and substantially disrupt the university's classes or the work of its students or faculty, nor could school officials reasonably forecast that it would. Thus, pursuant to *Tinker* and progeny, the University

the college level found conclusorily, and without significant analysis, that the admitted differences in the maturity levels of secondary school and college students, and in the pedagogical goals of secondary schools and colleges, were simply not relevant. *E.g.*, *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (acknowledging that in many cases, though not the case at hand, the differing maturity levels of high school and college students could justify different speech control standards); *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (dismissing the differing pedagogical goals and custodial natures of secondary schools and colleges with the comment that all schools have an educational mission to teach students "democratic virtues").

could not discipline Tatro for her Facebook postings without violating the First Amendment.³

As *Tinker* dictates, “[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able 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” or “an urgent wish to avoid the controversy which might result from the expression.” *Tinker*, 393 U.S. at 509-10.

[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk

Id. at 508. To justify restricting student speech, the school must establish that the speech in fact “materially disrupt[ed] classwork or involve[d] substantial disorder,” or that school officials could reasonably “forecast substantial disruption or material interference with school activities.” *Id.* at 513-14. Where, like Tatro’s, a student’s speech “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. . . . , caused discussion outside of the classrooms, but no interference with work

³ *Amicus* ACLU-MN agrees with Tatro and *amicus* SPLC that, even assuming *arguendo* that *Tinker* and progeny apply to restrict college student speech, they do *not* apply to off-campus speech, especially online speech that, like Tatro’s, did not occur during any school event, was not school sponsored, was published off-campus, was not aimed directly at a campus audience, did not threaten violent on-campus acts, and caused no substantial disruption on campus.

and no disorder,” the “Constitution does not permit officials of the State to deny [her] form of expression.” *Id.* at 514.

The Court of Appeals misunderstood and misapplied *Tinker* when it determined that because some faculty members and students expressed concern about Tatro’s Facebook postings, prompting the school to launch a police investigation that did not result in any charges being filed, and because some potential donors to the mortuary science program also expressed concern (Appellant’s Addendum 62A-63A), Tatro’s speech had materially and substantially disrupted school activities.

As the U.S. Supreme Court has held repeatedly, the mere fact that students, faculty, and community members were offended or upset by speech cannot justify its restriction. *See, e.g., Morse*, 551 U.S. at 409 (refusing to adopt a “broad[] rule” that student speech “is proscribable because it is plainly ‘offensive’ as that term is used in *Fraser*” and determining that “*Fraser* should not be read to encompass any speech that could fit under some definition of ‘offensive’” because “much political and religious speech might be perceived as offensive to some”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”). The offended reactions of students, faculty and potential donors – even the possibility that some donors might decide against donating to the program – do *not* demonstrate that Tatro’s speech

materially and substantially disrupted school activities. Rather, they simply establish the school's "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" and its "urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S. at 509-10.

Contrary to the opinion of the Court of Appeals, the vast majority of the lower courts to apply *Tinker*'s "material and substantial disruption" requirement have held that the objections of others, no matter how vociferously expressed, simply do not constitute the type of disruption of school activities sufficient to merit restricting or punishing student speech. As the court held in *Clark v. Dallas Independent School District*, 806 F. Supp. 116, 120 (N.D. Tex. 1992), "if school officials were permitted to prohibit expression to which other students objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression."

In recent cases factually similar to this one, the courts have held that even when students, faculty and community members (e.g., parents and benefactors) discussed and complained about the offensive speech at issue – and even when those discussions and complaints took place inside school classrooms, while class was in session – the audience reaction did not and could not constitute the substantial disruption of or interference with school activities that *Tinker* requires. For example, in *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc), a student created an internet "profile" for her principal on MySpace, a social networking website. The profile mocked the principal and included vulgar language and sexually explicit content. The student intended the profile as a joke to be shared with her friends, but it was accessible to the general public.

After viewing the profile, the principal called the police, and the student who created the profile was summoned to the police station, though no charges were pressed. *Id.* at 920-922. The school claimed that the speech caused a *Tinker*-type “disruption” both because it prompted “rumblings” in the school about the profile, including multiple students discussing it during various classes, and because staffers had to cancel appointments and rearrange their schedules to deal with the response. *Id.* at 922-23.

The court found, to the contrary, that the speech itself caused no actual substantial disruption of or interference with school activities, nor a reasonable forecast thereof. *Id.* at 929. Rather, it was not the speech but the school’s response to the parody, including the summoning of police, that “exacerbated rather than contained the disruption in the school.” *Id.* at 931.⁴

Here, too, Tatro’s speech itself caused no actual substantial disruption of or interference with school activities, nor a reasonable forecast thereof. Rather, the University’s over-reaction to the speech, including its summoning of the police, both triggered and exacerbated any disruption.

Similarly, in *T.V. v. Smith-Green Community School Corp.*, 2011 U.S. Dist. LEXIS 88403 (N.D. Ind. Aug. 10, 2011), the court found no actual or reasonably-forecast material and substantial disruption of school activities when students on a high school

⁴ In fact, in *Tinker* itself, the speech at issue – armbands protesting the Vietnam War – prompted threats and warnings from, and teasing by, other students, as well as an in-class disturbance that involved a prolonged argument between a teacher and a student who was wearing one of the armbands. *Tinker*, 393 U.S. at 517 (Black, J., dissenting). The *Tinker* majority did not believe that such hallway and classroom disturbances constituted a material and substantial disruption of school activities. *Id.* at 514.

volleyball team posted sexually-suggestive photos of themselves online, on their Facebook and MySpace accounts, prompting complaints from parents that the photos were causing disruption among team members, some who approved of the photos and others who disapproved. *Id.* at *3-*6. Though the school principal decided that the photos “had the potential for causing disruption of school activities,” *id.* at *8, the court determined, to the contrary, that the photos had caused and could cause “no interference with work and no disorder,” *id.* at *38 (quoting *Tinker*, 393 U.S. at 514).

As the *T.V.* court declared, complaints from community members and discord within the school itself “can’t be what the Supreme Court had in mind when it enunciated the ‘substantial disruption’ standard in *Tinker*. To find otherwise would be to read the word ‘substantial’ out of ‘substantial disruption.’” *Id.* at *38-*39.

The court came to the same conclusion in *J.C. v. Beverly Hills Unified School District*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010). The *J.C.* court found neither an actual disruption of school activities nor a reasonably foreseeable risk of such disruption where a high school student posted a derogatory, defamatory, and sexually suggestive YouTube video about a classmate, even though the classmate and angry parents complained to the school, several students who saw the video discussed it during school, and students involved in making the video missed class to discuss it with school officials. *Id.* at 1097-1120. Indeed, the court cautioned that other courts had likewise suggested that discipline may be especially “inappropriate” where “the school’s response itself, as opposed to the underlying student speech, is the cause of substantial disruption.” *Id.* at 1114.

The court in *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446 (W.D. Pa. 2001), also determined that the offended and hurt reactions of school officials cannot constitute either an actual disruption of school activities or a reasonably foreseeable risk of such disruption. The *Killion* court decided that when a high school student created a vulgar, derogatory “Top Ten” list about the school’s athletic director and emailed it to other students, he caused no substantial disruption of school activities since “[t]here [was] no evidence that teachers were incapable of teaching or controlling their classes because of the” list. *Id.* at 448-56. While the athletic director found the list “upsetting” and “had a hard time doing his job,” and other school officials found the student’s writing “rude, abusive and demeaning,” one to the point that she “was almost in tears,” the court determined that those “events [did] not rise to the level of substantial disruption, and [did] not support an expectation of disruption defense,” since “disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.” *Id.* at 455-56.

Those courts that have found that student speech – particularly off-campus, online student speech – *did* cause a *Tinker*-type material and substantial disruption of school activities, or at least allowed school officials reasonably to forecast such a disruption, have done so when the speech at issue threatened imminent violence against specific individuals on campus. For example, in *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001), the court upheld, under *Tinker*, the expulsion of a high school student who had given a teacher a poem he had written, describing himself walking through his school halls with a gun and shooting and killing 28 of his fellow students before

committing suicide. *Id.* at 983-84. Because the student had previously confided in school officials that he was considering suicide, because he was involved in a domestic dispute at home, because he had been reported for stalking a fellow student, and because he had been disciplined for fighting in school, *id.* at 984-85, school officials could reasonably view the poem “as a portent of future violence,” and thus could “reasonably . . . forecast substantial disruption of or material interference with school activities – specifically, that [the student] was intending to inflict injury upon himself or others.” *Id.* at 990; *see also Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35-39 (2d Cir. 2007) (where a 9th grader shared with friends, over the internet, a drawing that clearly suggested that a specific, named teacher at their school be shot and killed, “there [could] be no doubt that the [drawing], once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment”).

Even in cases in which student speech threatened violence, however, courts have found no material and substantial disruption of school activities where no imminent threat of violence was directed at a specific, identifiable individual or individuals on campus. For example, in *Murakowski v. University of Delaware*, 575 F. Supp. 2d 571 (D. Del. 2008), though the court (incorrectly) applied the *Tinker* test to the speech of a college student who had created a website on the university’s server, the court nonetheless determined that his speech could not be sanctioned, despite the fact that in his website postings, he said explicitly that he

intend[ed] to rape, kidnap and murder, requesting a sword to accomplish his wishes. In one article, he obtains strength and confidence to intimidate or menace and become like “OJ Simpson” and kill through his black gloves. . . . [The student] clearly implie[d] an interest in raping and/or murdering women.

Id. at 590. In response to the student’s postings, “a fellow female student, who lived in [the writer’s] residence hall, . . . manifested both verbally and by her appearance abject terror of [him] and fear for her safety to the point that she had to change her academic schedule. She also sought counseling.” *Id.* at 591. Additionally, a community member – a relative of a female student – complained to university police, who reviewed the website and discussed with senior administrators the writer’s potential for violence. *Id.* A parent of another student also expressed concern. *Id.*

Despite the student’s threatening language and the concerned, offended and frightened reactions of students, administrators, and community members, the court found that “[a]lthough complete chaos is not required, something more than distraction or discomfiture created by the speech is needed.” *Id.* There was no such evidence, said the court, which therefore could not agree with the school that the student’s writings “caused a material disruption or were likely to do so”:

[N]o instructors or administrators were adversely impacted to the point that they were unable to work through the end of the academic year. No substitute instructors were needed as a result of the reaction to the postings that could have or would have adversely impacted the educational environment. . . . No negative atmosphere permeated the campus because of [the student’s] writings. The University has presented no evidence which reasonably led it to forecast material interference with campus education and activities.

Id. at 592.

To constitute the material and substantial disruption of school activities that *Tinker* requires, student speech must do more than offend, upset, embarrass or discomfit school officials, faculty, fellow students and community members. Tatro's speech may have offended many, but it disrupted nothing. Students continued to attend classes; teachers continued to teach; schoolwork and school activities proceeded normally. Tatro threatened no imminent violence against any specifically-identifiable individual on campus. To the extent that there was any disruption of the mortuary science program, it was caused not by Tatro's speech, but by the school's overblown response to her speech, including its summoning of the police, which likely "exacerbated rather than contained the disruption in the school." *J.S.*, 650 F.3d at 931.

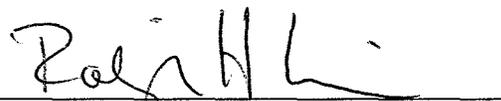
In sum, this case is precisely the type of case that the *Tinker* Court determined could not justify disciplinary action against student speech: The University's sanction of Tatro was prompted not by any material and substantial disruption of school activities caused by her speech, nor by a reasonable prediction that such disruption would result from her speech, but by the school's "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" and its "urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S. at 509-10. The punishment that it imposed on Tatro thus violated her First Amendment speech rights.

CONCLUSION

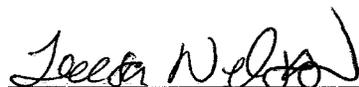
Because *Tinker* and progeny allow speech restrictions in elementary, middle and high schools that are unconstitutional in colleges and universities, given the different pedagogical goals, disciplinary needs, *in loco parentis* roles, and student maturity levels of secondary and post-secondary schools, the Court of Appeals erred when it upheld the Respondent's discipline of Appellant Tatro. Even assuming *arguendo* that *Tinker* and progeny do apply to post-secondary students, Tatro's speech did not cause a material and substantial disruption of school activities and was not reasonably likely to cause such a disruption. Therefore, *amicus curiae* ACLU-MN respectfully urges this Court to reverse the decision of the Court of Appeals.

Dated: November 7, 2011

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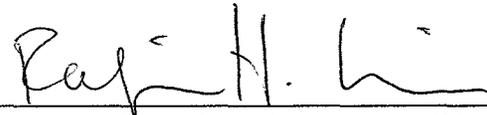
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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 6,123 words. This brief was prepared using Microsoft Word 2007.

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