

No. A10-1440

STATE OF MINNESOTA  
IN SUPREME COURT

Amanda Tatro,

Appellant,

vs.

University of Minnesota,

Respondent.

**BRIEF OF MINNESOTA STATE COLLEGES AND UNIVERSITIES BY AND  
THROUGH ITS CHANCELLOR,  
STEVEN J. ROSENSTONE, AS AMICUS CURIAE**

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## STATEMENT OF THE LEGAL ISSUES

1. May colleges and universities utilize their academic judgment and impose restrictions on student conduct outside the classroom while educating students on the professional norms and academic standards associated with certain courses and programs, and may the colleges and universities impose academic consequences on students who fail to demonstrate the ability to follow the appropriate norms and standards?

The Court of Appeals held in the affirmative.

Most apposite authority:

*Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978)

## STATEMENT OF INTEREST<sup>1</sup>

Consisting of 31 institutions of higher learning, Minnesota State Colleges and Universities (“MnSCU” or “System”), Minn. Stat. § 136F.10 (2011), is the single-largest provider of post-secondary education in the State of Minnesota. MnSCU annually serves about 250,000 students in credit-based courses through its seven universities and 24 community and technical colleges.<sup>2</sup>

MnSCU recognizes that its students enjoy not only “the basic constitutional rights enjoyed by all citizens,” but also “specific rights related to academic freedom and their status as students.” MnSCU Board Policy 3.1, Part 1. *See* <http://www.mnscu.edu/board/policy/301.html>. At the same time, MnSCU requires its students to “learn [ ] the content of any course of study for which they are enrolled.” *Id.*, Part 2.

Among the extensive array of programs and courses offered by MnSCU colleges and universities are a number that require students to abide by certain restrictions on their conduct outside the classroom. As part of the educational experience, the colleges and universities demand that students restrict their behavior in such diverse fields as law enforcement, teacher education, nursing and other health-related disciplines, among

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<sup>1</sup> No portion of this brief was prepared by counsel for a party and neither MnSCU nor its Chancellor received any monetary contributions for this brief. *See* Minn. R. App. P. 129.03 (requiring certification of authorship and contributors).

<sup>2</sup> The state colleges and universities that make up the MnSCU System are listed at <http://www.mnscu.edu/board/policy/1a11.html>.

others. The restrictions are imposed for a number of legitimate, pedagogical reasons, including to comply with legal requirements, such as the Minnesota Government Data Practices Act (“MGDPA”), Minn. Stat. § 13.01 *et. seq.*, and the Family Education Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g; to educate students on the professional norms associated with the respective disciplines; and to meet the expectations of those with whom students will interact, such as patients in the nursing and health fields and elementary and secondary students in the area of teacher education.

MnSCU institutions provide their students with notice that they may be subject to academic or disciplinary consequences for their actions under two separate processes. First, each MnSCU college and university publishes a code of conduct applicable to its students; these codes of conduct address a variety of prohibited behaviors, such as assaulting a classmate or engaging in underage drinking on campus. The colleges and universities normally address complaints that these policies have been violated through informal or formal code of conduct proceedings, and the codes of conduct and related processes are considered part of the student’s overall educational experience.

Second, as an institution of higher learning, each college and university requires its students to demonstrate their proficiency in whatever academic disciplines the students pursue. In some courses, this merely involves passing one or more exams during a semester. However, when students enroll in programs such as nursing and teacher education, demonstrating one’s academic proficiency frequently extends beyond the classroom. Rather, students must abide by specific limitations on their conduct in order

to demonstrate an understanding and mastery of the applicable discipline and the professional norms for the fields to which they aspire. These limitations may include prohibiting the disclosure of information students will gain access to solely through, and as a result of, their participation in the particular course or program, or abiding by the professional requirements of the associated field.

The failure of students to meet legitimate, pedagogical requirements is generally viewed as an academic matter. MnSCU gives its students notice that they may be subject to academic consequences if they fail to adhere to the standards associated with the course or program.

Failure by students to abide by legitimate, pedagogical restrictions on their conduct can have serious consequences. For example, disclosing very private and confidential information about patients receiving medical treatment, elementary students' performance in school, or information concerning an ongoing law enforcement investigation, adversely impacts the entity's ability to fulfill its duties and garner public trust. It also undermines the particular MnSCU institution's ability to utilize that entity as a means of educating students and serving the public far into the future. Therefore, MnSCU must retain the ability to impose academic consequences on students who fail to abide by the legitimate, pedagogical restrictions on their behavior.

MnSCU colleges and universities have a strong public interest in retaining their ability to properly educate their students concerning the laws, standards and professional norms associated with certain fields of study. In some cases, this includes restrictions on

conduct outside of the classroom. Moreover, colleges and universities must be able to impose academic consequences on students who fail to demonstrate proficiency in their chosen fields of study, including the standards of conduct needed for legitimate, pedagogical reasons.

## **STATEMENT OF FACTS**

MnSCU refers the Court to the facts set forth in the University of Minnesota's ("the University") brief.

## ARGUMENT

### I. TATRO DOES NOT CHALLENGE THAT THE UNIVERSITY HAD LEGITIMATE, PEDAGOGICAL REASONS FOR RESTRICTING HER CONDUCT AS PART OF HER PROGRAMS AND LAB.

This case ultimately concerns the ability of colleges and universities to educate students on the academic standards and professional norms associated with certain courses and programs and impose academic consequences on students who fail to demonstrate the required proficiency in these areas. As discussed in MnSCU's Statement of Interest, in order to educate its students to become nurses, teachers, law enforcement officials, among other professions, MnSCU colleges and universities must be able to instruct students in a way that enables students to demonstrate that they understand, and are capable of adhering to, applicable law and professional norms and standards. In doing so, students may be required to adhere to limitations on conduct, including speech. The purpose of imposing academic consequences on students who fail to demonstrate their proficiency is not to *punish* students but rather hold them accountable to the standards society expects of those entering certain professions. *Cf. Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969), *cert. denied* 398 U.S. 965 (1970) ("They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms.").

**A. The Education Of Post-Secondary Students Frequently Extends Beyond The Classroom.**

Courts exercise restraint when considering intervention in the affairs of educational institutions. *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 91 (1978). This is especially true when the matter concerns academic discipline. *Id.*; *Zellman ex. rel. M.Z. v. Independent Sch. Dist. No. 2758*, 594 N.W. 2d 216, 220 (Minn. Ct. App. 1999), *rev. denied* (Minn. July 28, 1999). “Academic judgments are afforded great discretion,” *Chronopolous v. Univ. of Minnesota*, 520 N.W.2d 437, 441 (Minn. Ct. App. 1994), *rev. denied* (Minn. Oct. 27, 1994), so a court reviewing the merits of an academic decision looks only to see if the decision was arbitrary or capricious. *Board of Curators*, 435 U.S. at 91-92.

Academic matters often extend beyond the classroom in the arena of higher education. *See, e.g., Ku v. State of Tennessee*, 322 F.3d 431, 436 (6th Cir. 2003) (“[T]here can be no doubt that in the context of medical school, academic evaluations are not limited to consideration of low grades or other objective criteria.”); *Davis v. Mann*, 721 F.Supp. 796, 799 (S.D. Miss. 1988) (various deficiencies by dental students in residency program led to academic dismissal); *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 53 (Alaska 1999) (“recognize[ing] that school teachers must possess the ability to interact effectively with their students and colleagues, and . . . such a skill may form an academic requirement necessary for satisfactory completion of a teaching program”); *Lucas v. Hahn*, 648 A.2d 839, 842 (Vermont 1994) (“plaintiff’s ability to adhere to ethical standards and to cooperate with superiors in the school setting were

valid academic matters, because they rank as important measures of an individual's ability to perform as a teacher"); *Tori v. Univ. of Minnesota*, 2006 WL 3772316, at \*5-8 (Minn. Ct. App., Dec. 26, 2006) (deferring to University's academic judgment about basic requirements for residency program and allowing the University to consider unprofessional behavior when dismissing the student).

Students frequently encounter protected or private data, for example, as student teachers, law enforcement interns, or in nursing and other health care clinical experiences. It is self-evident that students working outside the classroom but as part of their program, in areas involving data protected by law, may be expected by the college or university to abide by the applicable legal requirements or face discipline or sanctions in the program if they do not. As illustrated below, the college or university also must be able to require the student to adhere to professional standards that are endemic to the particular discipline.

A college or university must be able to prohibit a student teacher from writing disparaging comments about the pupils in the assigned student teaching experience, whether or not such comments violate a pupil's statutory privacy protections. Online postings by a student teacher commenting on how stupid the pupils are or making disparaging remarks about a particular ethnic or racial group undeniably would negatively affect the student teacher's ability successfully to complete the student teacher assignment. Further, neither parents nor other teachers or school administrators would tolerate such a student teacher being involved with their school children. Therefore, the

university must be able to administer appropriate academic consequences upon the student teacher for the sake of the learning experiences of the student teacher, as well as to protect the pupils of the student teacher and preserve future student teaching opportunities for other students.

Similarly, a nursing student assigned to a hospital clinical arrangement as part of the nursing program will have access to the most sensitive and personal information regarding patients. There should be no question that the student can be required by the college nursing program to adhere to legal standards for maintaining data privacy and medical privilege. But the college must also be able to impose additional professional standards as well for behavior outside the classroom as part of its pedagogy. For example, if the nursing student were to make online entries -- outside the classroom -- disparaging vulnerable patients, or expressing a desire to speed up the deaths of the hospital's most feeble patients, such speech would gravely undermine not only that student's ability effectively to serve patients, but also that of the hospital, other nursing students, and the college nursing faculty, and create a frightening, destructive environment for patients and their families. If a college were unable to impose academic consequences on students who failed to adhere to the program's standards so that hospitals and other clinical settings could expect the standards to be met, hospitals and clinical settings would discontinue hosting the college's clinical programs.

**B. Tatro Understood She Needed To Meet The Legitimate, Pedagogical Expectations Associated With Her Program And Courses.**

Courts have taken differing approaches in evaluating speech issues in secondary and post-secondary environments. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding discipline on high school students who wore black armbands to protest Vietnam War was unconstitutional where there was no showing that the conduct “materially disrupt[ed] classwork or involved[d] substantial disorder or invasion of the rights of others”); *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 247 (3rd Cir. 2010) (“At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.”); *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002), *cert. denied* 538 U.S. 908 (2003) (Graber, J.) (concluding “*Hazelwood* articulates the standard for reviewing a university’s assessment of a student’s academic work”); *id.* at 963-64 (Reinhardt, J., concurring and dissenting) (stating there “are a number of possible standards,” including “an intermediate level of scrutiny” that could protect student speech while “respect[ing] a University’s need to further its legitimate pedagogical purposes”); *Thomas v. Board of Educ., Granville Central Sch. Dist.*, 607 F.2d 1043, 1052 & n.17 (2d Cir. 1979), *cert. denied sub. nom. Granville Central Sch. Dist. v. Thomas*, 444 U.S. 1081 (1980) (favoring a line, at least for high schools, where school officials retain “substantial autonomy” to control

student speech “within the metes and bounds of the school itself,” but “the student is free to speak his mind when the school day ends,” while simultaneously stating “[w]e can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale”); *id.* at 1058, n.13 (Newman, J., concurring in the result) (noting that *Tinker* may not provide “the only standard for determining whether school discipline may be imposed upon students for off-campus publication” because “[s]chool officials ought to be accorded some latitude to regulate student activity that affects matter of legitimate concern to the school community, and territoriality is not necessarily a useful concept in determining the limit of their authority”).

But MnSCU does not believe the choice of a speech standard<sup>3</sup> need be reached in this case because Tatro does not contend that the University’s rules for its mortuary science and anatomy bequest programs and anatomy lab class are not legitimate or reasonable in light of the programs and courses in which she enrolled. Indeed, just as public policy reasons support restrictions on speech by lawyers, for example, by prohibiting them from disclosing confidentiality client information or requiring them to adhere to rules of court decorum, despite their general First Amendment rights, so, too, here, there were valid reasons to require Tatro to adhere to program requirements and

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<sup>3</sup> Just as the “true threat” standard and considerations, *see United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996), would not be the correct one to use where a university student refused to remain silent when appropriate during a campus lecture or where a law clerk posted truthful information concerning ongoing Court cases on Facebook, neither can that be the standard to be applied in this case, where any “restriction” exists to teach professional norms and educational standards, not to suppress speech.

refrain from cavalierly discussing cadaver dissection or blogging about the anatomy lab, and for treating the bodies donated for scientific and educational purposes with respect and dignity.

The Court need not undertake the task of determining whether Tatro's postings would have been protected by the First Amendment had she been an ordinary university student or had she not been given notice of the specific program and lab requirements. Just as there are valid reasons for contending the free speech rights (and accompanying analysis) of college and university students differs from their high school and elementary school counterparts - including that most have reached the age of majority and elected to attend non-compulsory schooling - there are equally valid reasons to conclude college and university students are more capable of understanding and abiding by the academic standards and professional norms associated with their chosen field of study. By enrolling in the mortuary science and anatomy bequest programs and anatomy lab, Tatro understood she needed to meet the legitimate, pedagogical expectations of those programs and courses.

**II. THE UNIVERSITY COULD IMPOSE ACADEMIC CONSEQUENCES ON TATRO AFTER SHE FAILED TO DEMONSTRATE PROFICIENCY IN HER PROGRAMS AND COURSES BY NOT ABIDING BY LEGITIMATE, PEDAGOGICAL RESTRICTIONS ON HER CONDUCT.**

Because Tatro does not contend the University's rules did not have a legitimate, pedagogical purpose or were not reasonably related to her programs and courses, the Court's analysis should focus on whether Tatro violated the University's rules and whether the academic discipline should be upheld. As such, this Court may follow its

general practice and resolve this matter on this basis without reaching the constitutional issues urged by Tatro. *State v. Bourke*, 718 N.W. 2d 922, 926 (Minn. 2006) (stating the Court will “avoid a constitutional ruling if there is another basis on which a case can be decided”); *In re Senty-Haugen*, 583 N.W. 2d 266, 269 n.3 (Minn. 1998) (“It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise.”).

Prior to commencing her studies in the mortuary science and anatomy bequest programs and anatomy lab class, the University provided Tatro with notice of the expectations for the class and programs. She attended an orientation, reviewed policies, and acknowledged that she had been advised of the legitimate, pedagogical restrictions on her conduct.

The University provided Tatro with notice of its academic expectation that she would limit her language concerning the donated body “outside the laboratory” to a “respectful and discrete nature.” Thus, Tatro was advised that her off-campus behavior could be subject to academic consequences. The extent of her subsequent Facebook postings outside the lab about her cadaver can hardly be called “discrete” when they were available to hundreds of online viewers consisting of not just her “friends” but all friends of her friends. Moreover, Tatro was not being respectful to the body of the person or that person’s loved ones when she posted that she needed “room” because she had “lots of aggression to be taken out with a trocar.” Her after-the-fact defenses that her postings were made in jest and that no one stopped donating bodies to the University because of

her acts do not constitute valid excuses for her actions nor relieve her of her obligations to abide by program requirements. *Cf. Snepp v. U.S.*, 444 U.S. 507, 513 (1980) (refusing to allow former CIA agent to “rel[y] on his own judgment about what information is detrimental [because] he may reveal information that the CIA - with its broader understanding of what may expose classified information and confidential sources - could have identified as harmful”).

Tatro’s postings likewise violate the anti-blogging provision she agreed to follow. See <http://www.merriam-webster.com/dictionary/blog> (defining “blog” as “a web site that contains an online personal journal with reflections [and] comments”). Tatro’s reliance on cases that invalidated penal statutes as overbroad or vague is misplaced in this instance where the University was not acting as a regulator, but as an educator.<sup>4</sup> To the extent the overbreadth doctrine has any application, it is used “sparingly and only as a last resort,”

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<sup>4</sup> Even if the University acted in a “regulator” capacity, the analysis would not rise to the level of criminal law or procedure. As Justice Blackman stated when he was a member of the Eighth Circuit:

We do not hold that any college regulation, however loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity . . . That school regulations are not to be measured by the standards which prevail for the criminal law and for criminal law procedure; and that the courts should interfere *only where there is a clear case of constitutional infringement.*

*Esteban*, 415 F.2d at 1089-90 (emphasis added).

*Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), when “the degree of overbreadth is substantial and the statute is not subject to a limiting construction.” *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). Even assuming *arguendo* the doctrine has any relevance, it cannot aid Tatro where the University did not seek to prevent her from blogging entirely or even about the University or the mortuary science program generally. It only sought to limit her and her classmates from blogging - and allowing potentially the entire world, including the relatives of the body donated for her educational use - “about the anatomy lab or the cadaver dissection.” This was a legitimate, pedagogical restriction, and Tatro could suffer academic consequences for violating the rule. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (An individual “who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.”).

Tatro also failed to treat her donated body - once a son or daughter, perhaps also a father or mother, a spouse or sibling - with respect and dignity, as required pursuant to the anatomy bequest program. Regardless of whether the Court views her postings as a joke or a threat, they can in no way be deemed as treating the donated body with respect and dignity. Tatro, therefore, could be subjected to academic consequences.

The University did not deny Tatro her constitutional rights, but rather, required her to meet the academic standards and professional norms associated with her discipline. It

justifiably subjected Tatro to academic consequences, notably failing the lab course and being required to demonstrate the ethics and professionalism required of those trusted with working with the donated bodies of loved ones, when she failed to demonstrate her proficiency regarding the anatomy bequest and mortuary science programs and anatomy lab class. The University's decision is subject to substantial deference. *Board of Curators*, 435 U.S. at 91-92. The University did not act arbitrarily or capriciously when it disciplined Tatro academically and imposed sanctions designed to determine whether Tatro was capable of understanding and following the academic standards and professional norms associated with the mortuary science and anatomy bequest programs and anatomy laboratory rules.

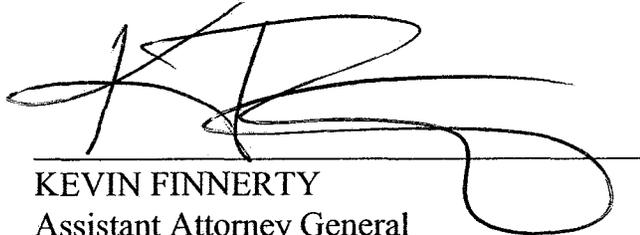
## CONCLUSION

As part of a unique, educational opportunity at the University, Tatro was required to demonstrate she was proficient in the professional norms and academic standards associated with her programs and class. When she failed to demonstrate the ability to abide by legitimate, pedagogical restrictions on her conduct, she suffered academic consequences. Therefore, *amicus curiae* MnSCU respectfully requests the Court affirm the Court of Appeals decision on this basis.

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Respectfully submitted,

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